

Released 8/31/21

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

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| STATE OF OHIO, | : | |
| | : | |
| Plaintiff-Appellee, | : | Case No. 20CA35 |
| | : | |
| vs. | : | |
| | : | |
| DAVID M. MOORE, | : | <u>DECISION AND</u> |
| | : | <u>JUDGMENT ENTRY</u> |
| | : | |
| Defendant-Appellant. | : | |

APPEARANCES:

Steven H. Eckstein, Washington Court House, Ohio, for Appellant.

Nicole Tipton Coil, Washington County Prosecuting Attorney, and David K.H. Silwani, Assistant Washington County Prosecuting Attorney, Marietta, Ohio, for Appellee.

Smith, P.J.

{¶1} This is an appeal from a Washington County Common Pleas Court judgment entry convicting Appellant, David M. Moore, of one count of unlawful sexual conduct with a minor, a fourth-degree felony in violation of R.C. 2907.04(A) and (B)(1) and sentencing him to a maximum prison term of 18 months. On appeal, Moore contends that the trial court erred in sentencing him to the maximum sentence allowed by law. However, because we have found that the trial court considered the R.C. 2929.11 purposes and principles of sentencing as

well as the R.C. 2929.12 seriousness and recidivism factors, properly applied postrelease control, and imposed a sentence within the statutory range, Moore has not met his burden of clearly and convincingly demonstrating that the record fails to support the trial court's findings or that his sentence was contrary to law. Thus, we find no merit to his sole assignment of error. Accordingly, it is overruled and the judgment of the trial court is affirmed.

FACTS

{¶2} On November 21, 2019, David Moore was indicted on one count of unlawful sexual conduct with a minor, a third-degree felony in violation of R.C. 2907.04(A) and (B)(3). The indictment alleged Moore engaged in sexual conduct with a female juvenile over the age of 13, but less than the age of 16, and that Moore was ten or more years older than the minor. Moore pleaded not guilty to the charge and was released on a personal recognizance bond, but then he failed to appear at the final pretrial hearing on February 18, 2020. As a result, the trial court revoked his bond and issued a warrant for his arrest.

{¶3} Thereafter, Moore entered into a plea agreement with the State whereby he agreed to enter a plea of guilty to an amended count of unlawful sexual conduct with a minor, a fourth-degree felony in violation of R.C. 2907.04(A) and (B)(1). After ordering and reviewing a presentence investigation report, the trial

court ultimately sentenced Moore to a maximum sentence of 18 months in prison.¹ It is from the trial court's October 29, 2020 journal entry of sentencing that Moore now brings his timely appeal, setting forth one assignment of error for our review.

ASSIGNMENT OF ERROR

I. THE TRIAL COURT ERRED IN SENTENCING DEFENDANT- APPELLANT TO THE MAXIMUM SENTENCE ALLOWED BY LAW.

{¶4} In his sole assignment of error, Moore contends that the trial court erred in sentencing him to a maximum prison term of 18 months for a fourth-degree felony sex offense. He argues that the maximum prison sentence that was imposed was not supported by the record in this case and that it was contrary to law in light of the fact that 1) he had a minimal criminal history; 2) he pleaded guilty instead of putting the victim and her family through a long, protracted trial; 3) he was honest with law enforcement during the presentence investigation; and 4) he had an ORAS score of 18. The State contends, however, that the maximum sentence was supported by the record and was not contrary to law.

{¶5} More specifically, the State argues that while the 18-month prison term was the maximum sentence, it was within the permissible sentencing range and

¹ A review of the sentencing transcript indicates that Moore was apparently indicted for attempted failure to appear as a result of his failure to appear at the scheduled final pretrial hearing in this case. Although the new case was not consolidated with this underlying case, it appears from the sentencing hearing transcript that Moore was sentenced on the attempted failure to appear charge at the same time he was sentenced on the unlawful sexual conduct with a minor charge. Further, per the sentencing transcript, the trial court sentenced Moore to a 12-month prison term for attempted failure to appear, to be served concurrently to the 18-month prison term imposed in this case. However, Moore is currently only appealing from his conviction and sentence for unlawful sexual conduct with a minor.

was therefore not contrary to law. The State also argues that the trial court cited several reasons for imposing the maximum sentence and put its reasoning on the record. Those reasons included: 1) the victim's statement, which described how Moore had taken advantage of her; 2) the victim's mother's statement explaining how Moore "conditioned" the victim and exposed her to drugs; and 3) the court's review of the presentence investigation report. Thus, the State contends that Moore has failed to meet his burden of showing by clear and convincing evidence that his sentence was not proper.

Standard of Review

{¶6} A reviewing court may modify or vacate a felony sentence only "if the court clearly and convincingly finds either that 'the record does not support the sentencing court's findings' under the specified statutory provisions or 'the sentence is otherwise contrary to law.'" *State v. Taylor*, 4th Dist. Lawrence No. 15CA12, 2016-Ohio-2781, ¶ 40, quoting *State v. Marcum*, 146 Ohio St. 3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1. " 'Clear and convincing evidence is that measure or degree of proof * * * which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.' " *Marcum*, at ¶ 22, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118, paragraph three of the syllabus (1954). " 'This is a very deferential standard of review, as the question is not whether the trial court had clear and convincing

evidence to support its findings, but rather, whether we clearly and convincingly find that the record fails to support the trial court's findings.’ ” *State v. Ray*, 2d Dist. Champaign No. 2017-CA-33, 2018-Ohio-3293, ¶ 11, quoting *State v. Cochran*, 2d Dist. Clark No. 2016-CA-33, 2017-Ohio-217, ¶ 7.

{¶7} Unlike other felony sentencing statutes, such as R.C. 2929.14(C)(4), which require a trial court to make certain “findings” before imposing consecutive sentences, a trial court is required only to “carefully consider” the factors in R.C. 2929.11 and R.C. 2929.12 when imposing sentence, and is not required to make any “findings,” or state “reasons” regarding those considerations. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶ 38; *State v. Kulchar*, 4th Dist. Athens No. 10CA6, 2015-Ohio-3703, ¶ 47. Further, as this Court has recently observed, “ ‘R.C. 2953.08(G)(2)(b) * * * does not provide a basis for an appellate court to modify or vacate a sentence based on its view that the sentence is not supported by the record under R.C. 2929.11 and 2929.12.’ ” *State v. Allen*, 4th Dist. Pickaway No. 19CA31, 2021-Ohio-648, ¶ 13, quoting *State v. Jones*, 2020-Ohio-6729, — N.E.3d —, ¶ 39. “ ‘ “[A] sentence is generally not contrary to law if the trial court considered the R.C. 2929.11 purposes and principles of sentencing as well as the R.C. 2929.12 seriousness and recidivism factors, properly applied postrelease control, and imposed a sentence within the statutory range.’ ” ” *Allen, supra*, at ¶ 14, quoting *State v. Perry*, 4th Dist. Pike No. 16CA863, 2017-

Ohio-69, ¶ 21, in turn quoting *State v. Brewer*, 2014-Ohio-1903, 11 N.E.3d 317, ¶ 38 (4th Dist.).

R.C. 2929.11 and 2929.12

{¶8} “R.C. 2929.11 states that the purpose of felony sentencing ‘is to protect the public from future crime and to punish the offender using the minimum sanctions to accomplish those purposes without imposing an unnecessary burden on state or local government resources.’ ” *State v. Allen, supra*, at ¶ 15, quoting *State v. Watson*, 4th Dist. Meigs Nos. 18CA20, 2019-Ohio-4385, ¶ 12. “ “ “To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.” ’ ” *Id.*, quoting R.C. 2929.11.

{¶9} “R.C. 2929.12 provides a non-exhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses.” *Watson, supra*, at ¶ 12, citing *State v. Sawyer*, 4th Dist. Meigs No. 16CA2, 2017-Ohio-1433, ¶ 17, in turn citing *State v. Lister*, 4th Dist. Pickaway No. 13CA15, 2014-Ohio-1405, ¶ 15. Moreover, as noted in *Allen*, “ ‘[s]imply because the court did not balance the factors in the manner appellant desires does not mean that the court failed to consider them, or that clear and convincing evidence shows that the court's findings are not

supported by the record.’ ” *Allen, supra*, at ¶ 16, quoting *State v. Butcher*, 4th Dist. Athens No. 15CA33, 2017-Ohio-1544, ¶ 87.

Legal Analysis

{¶10} Here, a review of the sentencing transcript reveals that the trial court expressly stated on the record that it had considered the overriding purposes of felony sentencing, that it had weighed the seriousness and recidivism factors, and that after having considered such, it found the sentence imposed to be reasonably calculated to achieve those purposes. The court further found that the sentence was commensurate with and did not demean the seriousness of the defendant’s conduct or the impact on the victim, and that it was consistent with sentences imposed for similar crimes committed by similar defendants. Further, although it was not required to state its reasons for imposing a maximum sentence, the trial court expressly stated on the record as follows regarding the seriousness factors:

I’ve given him the maximum possible sentence, and part of the reason for that is, I’m cognizant that the facts of the case actually support an F-3. It’s a higher level F-3, where you could have been looking at five years, but due to the plea bargain, the max I can give is eighteen months. So I’m stuck with eighteen months.

{¶11} Elsewhere in the transcript the trial court also noted that the victim in the case had suffered serious psychological injuries as a result of the offense, that those injuries were a result of Moore’s conduct, and that the injuries were exacerbated because of the age of the victim and her mental condition at the time.

The trial court further found that Moore's relationship with the victim had facilitated the offense. This finding was in reference to the fact that the victim's mother's statements indicated that Moore had gained the victim's trust by telling her that he was a good friend of her deceased father, while the victim was in a fragile state after her father's death, and then abused that trust to provide the victim with drugs in order to obtain sexual favors. The victim's mother further stated during the sentencing hearing that the victim had sustained a traumatic brain injury at age two and suffered from learning disabilities as a result.

{¶12} The trial court also expressly discussed its analysis of the recidivism factors during the sentencing hearing. The trial noted that the defendant had a prior criminal history, although it was "somewhat slight." The trial court also referenced the fact that Moore had "breached bond" during the course of the case, which the court believed made him more likely to recidivate. The trial court further noted that Moore had committed criminal damaging while housed in the jail during the course of the case. The trial court also found that Moore showed no genuine remorse for the offense and that he had an ORAS score of 18, "which indicates a moderate risk of reoffending."

{¶13} Thus, the record reflects that the trial court considered the R.C. 2929.11 purposes and principles of sentencing as well as the R.C. 2929.12 seriousness and recidivism factors, properly applied postrelease control, and

imposed a sentence within the statutory range. As we explained in *State v. Allen, supra*, under the Supreme Court's decision in *Jones*, a reviewing court no longer needs to determine whether a trial court's consideration of the factors in R.C. 2929.11 and 2929.12 are supported in the record. *Allen, supra*, at ¶ 13, quoting *Jones, supra*, at ¶ 19. The court's consideration of the factors enumerated in these statutes is sufficient. Accordingly, Appellant's sentence is not contrary to law since the trial court properly considered the principals and purposes of felony sentencing in R.C. 2929.11 and the factors in R.C. 2929.12, in deciding to sentence Appellant to prison and whether to impose a maximum prison term. Accordingly, Appellant's sole assignment of error is overruled and the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hess, J. and Wilkin, J., Concur in Judgment and Opinion.

For the Court,

Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.