[Cite as *State v. Younker*, 2015-Ohio-2066.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	C.A. CASE NO. 26414
Plaintiff-Appellee	:	
	:	T.C. NO. 2014-CR-2249/2
v.	:	
	:	(Criminal appeal from
ISSAC K. YOUNKER	:	Common Pleas Court)
	:	
Defendant-Appellant	:	

. . . . . .

O P I N I O N

Rendered on the ___29th_ day of ____May____, 2015.

. . . . . .

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. . . . . .

DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Issac Younker, filed October 8, 2014. Younker appeals from his September 18, 2014 Judgment Entry of Conviction, entered following his September 2, 2014 pleas of guilty, on a bill of

information, to three counts of gross sexual imposition, involving a child under the age of 13, in violation of R.C. 2907.05(A)(4), all felonies of the third degree. Younker received an aggregate sentence of three years. The victim is Younker's sister.

{¶ 2} We initially note that the following exchange occurred at Younker's September 2, 2014 plea hearing:

> THE COURT: * * * Would the attorneys indicate for the record any plea bargain or plea agreement in this case?
>
> MS. MADZEY: Your Honor, in exchange for the Defendant's plea of guilty as charged in the bill of information, the State would not seek additional charges from the Grand Jury. We would agree that he is subject to a mandatory prison sentence of no less than one year up to the maximum consecutive sentence of 15 years on all three counts. And there would be no agreement as to what sentence the Court will find in that range.
>
> THE COURT: Mr. Certo, do you agree with the terms of the plea agreement as indicated by the Assistant Prosecuting Attorney?
>
> MR. CERTO: That is a correct statement of the agreement, Your Honor.
>
> THE COURT: * * * Mr. Younker have you heard what the lawyers said[?]
>
> THE DEFENDANT: Yes sir.
>
> THE COURT: Is that your agreement?
>
> THE DEFENDANT: Yes sir.

{¶ 3} In the course of the plea colloquy, the court inquired of Younker as follows:

"* * * Do you understand that it's [a] mandatory sentence, you're not going to be considered for community control sanctions there will be a prison sentence?" Younker responded, "Yes sir."

{¶ 4} At sentencing on September 16, 2014, the court indicated in part as follows:

> Based on the presentence investigation report including also the victim impact statement in that report also including the sentencing memorandums by the Assistant Prosecuting attorney and by Defense Counsel (sic). In considering the letter, considering the statements today, also considering the purposes and principles of sentencing as set forth in R.C. 2929.11 and considering the seriousness and recidivism factors set forth in R.C. 2929.12 including but not limited to in this case there are on the seriousness factors there are more serious factors and less serious factors. Here some more serious factors do apply and that is that the victim of the offense was a minor and also a family member. That makes the offenses here more serious.
>
> On the recidivism factors, there are recidivism less likely factors and recidivism more likely factors. Here the recidivism less likely factors do apply. Mr. Younker is 22 and has no prior felony convictions as an adult. He has no prior misdemeanor offenses as an adult and according to the report no juvenile offenses.
>
> Now these three counts are felonies of the third degree but because they are sex offenses, the felony 3 or greater sex offense is mandatory. Generally, a felony 3 would have no presumption, it would not have a

presumption in favor of prison or a presumption in favor of a community based sanction. But these being felony 3 level sex offenses, there is a mandatory prison sentence. So the court - - and the court is also aware of case law and has considered it about generally a first time to prison than the minimum sentence or lower. (Sic).

The end sentence is appropriate but in this case the court has considered that (sic). I also looked at the case law on when there could be some deviation from a minimum. I think the fact that this is a sex offense or sex offenses, the young age of the victim and the fact that you have a family relationship, would in this case make it appropriate not to impose the minimum sentence.

The Judgment Entry of Conviction reflects that Younker received a mandatory sentence of three years on each count, to be served concurrently, "for a TOTAL SENTENCE OF 3 MANDATORY YEARS."

{¶ 5} Younker asserts four assignments of error herein. We will consider his first two assignments of error together. They are as follows:

THE TRIAL COURT ERRED IN SENTENCING MR. YOUNKER TO A MANDATORY TERM OF PRISON WITHOUT A FINDING THAT EITHER R.C. 2907.05(C)(2)(a) or (b) WAS PRESENT.

And,

A FINDING OF CORROBORATIVE EVIDENCE UNDER R.C. 2907.05(C)(2)(a) VIOLATES MR. YOUNKER'S CONSTITUTIONAL RIGHTS.

{¶ 6} R.C. 2907.05 proscribes gross sexual imposition and provides as follows:

(A) No person shall have sexual contact with another, not the spouse of the offender * * * when any of the following applies:

* * *

(4) The other person * * * is less than thirteen years of age, whether or not the offender knows the age of that person.

* * *

(C) Whoever violates this section is guilty of gross sexual imposition.

* * *

(2) Gross sexual imposition committed in violation of division (A)(4) * * * of this section is a felony of the third degree. Except as otherwise provided in this division, for gross sexual imposition committed in violation of division (A)(4) * * * of this section there is a presumption that a prison term shall be imposed for the offense. The court shall impose on an offender convicted of gross sexual imposition in violation of division (A)(4) * * * of this section a mandatory prison term equal to one of the prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree if either of the following applies:

(a) Evidence other than the testimony of the victim was admitted in the case corroborating the violation;

(b) The offender was previously convicted of or pleaded guilty to a violation of this section, rape, the former offense of felonious sexual

penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age.

{¶ 7} Younker initially asserts as follows under his first assigned error:

Mr. Younker has no prior criminal history. Thus, at issue is whether evidence was offered that corroborates his gross sexual imposition violation. [R.C.] §2907.05(C)(2)(a) is to be construed strictly against the State, and liberally in favor of the accused, as required by R.C. 2901.04(A). Here, there was no such evidence offered on the record, and there was no finding such evidence was present, so the trial court erred in issuing a mandatory prison sentence.

The sentence should be vacated and remanded to the trial court.

{¶ 8} Younker further asserts as follows under his second assigned error:

The Sixth Amendment right to trial "by an impartial jury," in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt. *U.S. v. Gaudin*, [515 U.S. 506 at 510.] Defining facts that increase a mandatory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment and preserves the jury's historic role as an intermediary between the State and criminal defendants. *Gaudin*, at 510-511. Mandatory minimum sentences increase the penalty for a crime and therefore any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. *Alleyne v. United States*, [133 S.Ct. 2151(2013)] (*finding a fact that*

increases a mandatory minimum sentence must be submitted to the jury because "the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime.").

A jury is required to determine the existence of corroborating evidence under R.C. 2907.05(C)(2)(a). There is simply no rational basis for the R.C. 2907.05(C)(2)(a) statutory classification requiring corroborating evidence to enhance the minimum sentence. This argument has been dismissed by the Tenth Ohio Appellate District *(State v. North,* [10th Dist. Franklin No. 13AP-110, 2013-Ohio-4607, ¶ 5] and *State v. Bevly*, [10th Dist. Franklin No. 12AP-471, 2013-Ohio-1352]). However, counsel is unaware that this court has tackled this issue. Further, it is argued the aforementioned Tenth District decisions are in conflict with *Alleyne.*

Mr. Younker asks this court to opine that R.C. 2907.05(C)(2)(a) is unconstitutional under *Alleyne* and vacate his plea and his sentence.

{¶ 9} The State responds that, "[b]ecause Younker admitted sexually abusing his sister, evidence other than the testimony of the victim existed to corroborate Younker's commission of gross sexual imposition." The State further asserts that, "[b]ased upon the Ohio Supreme Court's decision in *State v. Bevly* [142 Ohio St.3d 41, 2015-Ohio-475, 27 N.E.3d 516][1] ["*Bevly*"], Younker's sentence is unconstitutional. This matter should be remanded for re-sentencing."

{¶ 10} The State asserts that "despite not raising a constitutional challenge to the

[1] We note that on February 13, 2015, Younker filed "Supplemental Authority In Support of Appellant's Second Assignment of Error," also directing this Court's attention to the Ohio Supreme Court's decision in *Bevly*.

statute below, the rights and interests involved here warrant consideration of Younker's claim that plain error occurred and that the mandatory nature of his sentence is contrary to law." The State concedes that Younker's "sentence should be vacated and this matter should be remanded for re-sentencing – this time with the understanding that any sentence that the trial court imposes would no longer be mandatory." The State asserts that "even though waiver is clear," this Court may consider a constitutional challenge to the application of R.C. 2907.05(C)(2)(a), since "there is no indication that Younker understood that he was agreeing to imposition of a sentence that – by virtue of R.C. 2907.05(C)(2)(a) being unconstitutional – rendered the mandatory nature of his sentence contrary to law." The State asserts in a footnote that the "fact that it was improper for the trial court to impose a *mandatory* prison sentence in no way suggests that it was improper for the trial court to have imposed a prison sentence generally."

{¶ 11} The Supreme Court of Ohio's decision in *Bevly* involved a challenge to the constitutionality of R.C. 2907.05(C)(2)(a). By way of background, Bevly entered guilty pleas to two counts of gross sexual imposition in violation of R.C. 2907.05(A)(4). At the plea hearing, a detective testified that "Bevly had confessed to the offenses. The state also introduced a compact disc recording of Bevly's alleged confession. The state argued that Bevly's confession constituted corroborating evidence, and thus a mandatory prison sentence was required under R.C. 2907.05(C)(2)." *Id*., ¶ 2.

{¶ 12} The trial court "could find no rational basis for the distinction between gross-sexual-imposition cases in which there is corroborating evidence and those cases in which there is none." *Id*., ¶ 4. The trial court further "concluded that a jury was required to make a finding regarding corroboration because introduction of this evidence

enhanced the sentence from a mere possible prison term to a mandatory prison term. Bevly was sentenced to three years' imprisonment and five years of postrelease control." *Id*.

{¶ 13} The State appealed, asserting that the trial court erred in failing to impose mandatory prison sentences after the State presented corroborating evidence pursuant to R.C. 2907.05(C)(2)(a). *Bevly*, 2013-Ohio-1352, ¶ 7. The Tenth District reversed the judgment of the trial court, "holding that the General Assembly was justified in distinguishing between cases with and cases without the corroborating evidence. *Id.* at ¶ 9, 19. In addition, the court of appeals concluded that the corroboration provision of R.C. 2907.05(C)(2)(a) was a sentencing factor that need not be found by a jury. *Id*. at ¶ 15." *Bevly*, 142 Ohio St.3d 41, ¶ 5.

{¶ 14} After initially declining jurisdiction, the Ohio Supreme Court on reconsideration accepted Bevly's propositions of law. *Id*., ¶ 6. Citing *State v. Thompkins*, 75 Ohio St.3d 558, 560, 664 N.E.2d 926 (1996), the *Bevly* Court noted "that the rational-basis test provides that 'laws passed by virtue of the police power will be upheld if they bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public, and are not arbitrary, discriminatory, capricious or unreasonable.'" *Bevly*, ¶ 15. While the State asserted that "R.C. 2907.05(C)(2)(a) has a rational basis, in that it imposes more punishment on an offender when there is more evidence of guilt," the Supreme Court of Ohio determined that "once an accused has been found guilty beyond a reasonable doubt of an offense, the quantity of evidence is irrelevant to the sentence." *Id*., ¶ 16. The *Bevly* Court found that "there is no rational basis for imposing a greater punishment on offenders based only

on the state's ability to produce additional evidence to corroborate the crime," for the reasons set forth above, as well as the fact that Bevly's confession "is merely cumulative of his admission of guilt at the plea hearing and provides no additional information that proves the offense or justifies an enhanced penalty." *Id*., ¶ 18. Accordingly, the Court determined that R.C. 2907.05(C)(2)(a) "is contrary to a constitutional sentencing scheme that must apply equally to all convicted and avoid arbitrary or vengeful sentencing of selected offenders." *Id*., ¶ 19.

{¶ 15} The Court further determined that even if the Court "were to hold that R.C. 2907.05(C)(2)(a) was constitutional, further analysis of the statute indicates that application of the statute in this case violates Bevly's right as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution." *Id*., ¶ 20. The Court noted that under "the low standard set in *State v. Economo*[2], 76 Ohio St.3d 56, 666 N.E.2d 225 (1996), anything other than the victim's testimony – including Bevly's confession, would constitute sufficient corroborating evidence." *Id*. The *Bevly* Court noted as follows:

> The Supreme Court of the United States recently provided guidance on this issue in *Alleyne v. United States*, _____ U.S. _____, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). *Alleyne* overruled the court's previous decision in *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). In both cases, the question was whether facts increasing the mandatory minimum sentence were elements of the crime that must be

[2] "In *State v. Economo*, the only evidence corroborating any element of the offense [of sexual imposition, in violation of R.C. 2907.06] was that the alleged victim promptly reported the incident to the authorities, appeared to be upset, and did not want to be alone with the alleged perpetrator of the offense. These circumstances were deemed to constitute sufficient corroboration." *State v. Rossi*, 2d Dist. Montgomery No. 22803, 2009-Ohio-1963, ¶ 38.

> submitted to the jury or sentencing factors that can be left for a judge's determination. The defendant in *Harris* was charged with carrying a firearm in the course of committing a drug-trafficking crime, which carried a mandatory minimum sentence of five years. The five-year sentence could be increased to seven years if it was found that the defendant had brandished the firearm. *Id*. at 550-551, 122 S.Ct. 2406. The court affirmed the judgment of the court of appeals that brandishing was a sentencing factor that was not required to be determined by the jury. *Id*. at 568-569, 122 S.Ct. 2406. In reaching this conclusion, the plurality opinion explained that "the jury's verdict has authorized the judge to impose the minimum with or without the finding." *Id*. at 557, 122 S.Ct. 2406.
>
> In *Alleyne*, the Supreme Court revisited the same statute and issue presented in *Harris* and changed its position. This time it concluded, "Because the finding of brandishing *increased the penalty* to which the defendant was subjected, it was an element, which had to be found by the jury beyond a reasonable doubt." (Emphasis added.) *Alleyne* at 2163. Because the judge, rather than the jury, made the brandishing finding, the court held that Alleyne's Sixth Amendment rights were violated. *Id*. at 2163-2164. * * *

Bevly, ¶ 22-23.

{¶ 16} The *Bevly* Court noted that *Alleyne* overruled *Harris.* *Id*., ¶ 24. Finally, the Court in *Bevly* determined as follows:

> Application of the principles set forth in *Alleyne* illustrates the issue

> whether R.C. 2907.05(C)(2)(a) violates Bevly's right to a jury trial. Without the existence of corroborating evidence, a conviction for third-degree gross sexual imposition under R.C. 2907.05(A)(4) subjects the offender to a maximum term of up to 60 months in prison. R.C. 2929.14(A)(3). That is not a mandatory term, although there is a presumption that prison time will be served. R.C. 2907.05(C)(2). And if the presumption is overcome, the court may impose a community-control sanction. R.C. 2929.15. But with the finding that corroborating evidence has been admitted, pursuant to R.C. 2907.05(C)(2)(a), the offender is subject to a maximum *mandatory* prison term of 60 months. The corroborating evidence aggravates the prescribed punishment. Applying *Alleyne* to this case, we conclude that the corroboration requirement in R.C. 2907.05(C)(2)(a) is an element that would have been required to be found by a jury and that application of the statute in Bevly's case violated the Sixth Amendment right to a jury trial.

Bevly, ¶ 25.

{¶ 17} We initially note that R.C. 2953.08 governs a defendant's appellate rights. R.C. 2953.08(A) provides: "In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds: * * * (4) The sentence is contrary to law."

{¶ 18} 2953.08(D)(1), however, provides: "A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by

a sentencing judge." A "sentence is 'authorized by law' and is not appealable within the meaning of R.C. 2953.08(D)(1) only if it comports with all mandatory sentencing provisions." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 4. Younker and the State jointly agreed to a mandatory term, which was imposed by the sentencing judge, and we must accordingly determine whether the mandatory sentence was authorized by law.

{¶ 19} We initially find that Younker's reliance upon *Bevly* and *Alleyne* as a basis to vacate his sentence, as well as the State's concession that, "on the authority of *Bevly*, the trial court's imposition of a mandatory prison sentence in this case was unconstitutional," are misplaced on this record. We conclude from the record before us that the trial court sentenced Younker to a mandatory term, not pursuant to R.C. 2907.05(C)(2)(a), but upon a mistaken belief that third degree felony sex offenses are subject to mandatory sentences as a matter of law. Although at the plea hearing, the parties stipulated to a mandatory term, there is nothing in the record to indicate that their agreement was based upon the existence of corroborating evidence. No corroborating evidence was introduced at the plea hearing, unlike in *Bevly*, and the trial court did not make a finding that corroborating evidence existed at sentencing or in Younker's Judgment Entry of Conviction.[3] As noted above, at the sentencing hearing, the trial court indicated in part: "But these being felony 3 level sex offenses, there is a mandatory prison sentence." R.C. 2907.05(C)(2) merely provides that "there is a presumption that a prison term shall be imposed for the offense" of third degree gross sexual imposition. Since the court improperly imposed a mandatory prison term, the mandatory nature of the

[3] It is undisputed that R.C. 2907.05(C)(2)(b) does not apply to require imposition of a mandatory term.

term is accordingly not authorized by law, and Younker's agreement to the mandatory nature of his sentence does not "insulate" the nature of his sentence from our review. *See Underwood,* ¶ 20.

{¶ 20} To the extent that Younker argues that the court erred in imposing a mandatory sentence, Younker's first assignment of error is sustained. Younker's second assignment of error is overruled, since *Alleyne* and *Bevly* do not apply herein. Based upon our determination that the trial court erred in imposing a mandatory term of imprisonment, the matter is remanded for resentencing consistent with our opinion regarding the mandatory nature of Younker's sentence.

{¶ 21} We will next consider Younker's fourth assignment of error. It is as follows:

> MR. YOUNKER'S PLEA WAS NOT INTELLIGENTLY, VOLUNTARILY OR KNOWINGLY MADE AND SHOULD BE VACATED.

{¶ 22} Younker asserts that, "because [his] sentence should not have been mandatory but Mr. Younker was told it would be, his plea was not voluntarily, intelligently or knowingly made. His plea should be vacated."

{¶ 23} The State asserts as follows regarding the nature of Younker's plea:

> When a trial court, during a plea colloquy, overstates the sentence that a defendant faces, the overstatement does not render the defendant's plea involuntary. Because the trial court erred here in overstating the sentence Younker faced by informing him that his prison sentence was mandatory, rather than discretionary, Younker was not prejudiced by the overstatement. His guilty plea, therefore, need not be vacated.

The State directs our attention to *State v. Frye*, 2d Dist. Montgomery No. 24796, 2012-Ohio-5101.

{¶ 24} As this Court has previously noted:

> * * * Crim.R. 11(C) sets forth the requisite notice to be given to a defendant at a plea hearing on a felony. To be fully informed of the effect of the plea, the court must determine that the defendant's plea was made with an "understanding of the nature of the charges and the maximum penalty involved." Crim.R. 11(C)(2)(a).
>
> In order for a plea to be given knowingly and voluntarily, the trial court must follow the mandates of Crim.R. 11(C). If a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is void. *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274.
>
> A defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, 5 O.O.3d 52, 364 N.E.2d 1163; Crim.R. 52(A). The test is whether the plea would have been otherwise made. Id. at 108, 5 O.O.3d 52, 364 N.E.2d 1163.
>
> A trial court must strictly comply with CrimR. 11 as it pertains to the waiver of federal constitutional rights. These include the right to trial by jury, the right to confrontation, and the privilege against self-incrimination. However, substantial compliance with CrimR. 11(C) is sufficient when waiving nonconstitutional rights. *State v. Nero* (1990), 56 Ohio St.3d 106,

> 108, 564 N.E.2d 474. The nonconstitutional rights that a defendant must be informed of are the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that after entering a guilty plea or no-contest plea, the court may proceed to judgment and sentence. Crim.R. 11(C)(2)(a)(b); *State v. Philpott* (Dec. 14, 2000), 8th District NO. 74392, 2000 WL 1867395, citing *McCarthy v. United States* (1969), 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418. Substantial compliance means that under the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving. *Nero*, 56 Ohio St.3d at 108, 564 N.E.2d 474.

State v. Silvers, 181 Ohio App.3d 26, 2009-Ohio-687, 907 N.E.2d 805, ¶ 8-11 (2d Dist.).

{¶ 25} In *State v. Frye*, 2012-Ohio-5101, the defendant therein asserted that his guilty plea to escape was not rendered knowingly and voluntarily, since "the trial court stated during the plea colloquy and at the sentencing hearing that it was required to order Frye's sentence for escape to be served consecutively to any other sentence he was ordered to serve," but that, pursuant to R.C. 2929.14(C)(2), "the mandate for consecutive sentencing applied only when a defendant escaped from a jail, prison, or other residential detention facility," and Frye escaped from the custody of a police officer. *Id*., ¶ 6.

{¶ 26} This Court rejected Frye's assertion regarding the trial court's error, finding that at "worst, the trial court inadvertently misled Frye into believing that he faced a longer possible prison sentence than was available." Id., ¶ 11. This Court failed "to see how a defendant is prejudiced by such a misapprehension on his part. He cannot earnestly argue that he pled guilty based on a mistaken belief that he faced an unduly long or

consecutive sentence, and that he would not have entered the plea if he had known that the possible sentence was, in fact, shorter. * * *. We see no prejudice to Frye in the entering of his plea." *Id*. In fact, Younker does not argue that he would not have entered his pleas if in fact he knew they merely carried a presumption of imprisonment.

{¶ 27} As in *Frye*, we conclude that Younker has not demonstrated prejudice such that his pleas are void based upon the trial court's determination that he was subject to a mandatory sentence, when in fact he was not. Younker's fourth assigned error is overruled.

{¶ 28} Younker's third assigned error is as follows:

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN SENTENCING MR. YOUNKER TO MORE THAN THE MINIMUM PRISON SENTENCE.

{¶ 29} Younker asserts that, in imposing more than a minimum sentence, the trial court failed to properly consider R.C. 2929.11, which governs the overriding purposes of felony sentencing, and R.C. 2929.12, which sets forth the seriousness and recidivism factors for the court to consider in imposing sentence. Since there was no agreement as to the length of the sentence to be imposed by the court, R.C. 2953.08(D)(1) does not bar review of Younker's third assigned error.

{¶ 30} Younker directs our attention in part to R.C. 2929.11(A), which provides:

> A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the *minimum* sanctions that the

> court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. (Emphasis added).

{¶ 31} Younker asserts as follows: "The factors indicate Mr. Younker's conduct was less serious and not likely to recur. Therefore, the minimum sentence would not have demeaned the seriousness of the offense. Lastly, this offense involved his sister in the confines of their home. The public, in general, was not at risk by his conduct."

{¶ 32} Finally, Younker asserts that the trial court "used the victim's age as a reason to impose a harsher sentence. * * * The victim's age was, however, an essential element of the crime and should not have been considered as a 'more serious' factor to support a higher sentence. Further, the victim's age – alone – is not listed as a 'more serious' factor under 2929.12(B)."

{¶ 33} The State responds as follows:

> Younker was convicted of three third-degree felonies for which the allowable sentencing range was one to five years in prison on each count. R.C. 2929.14(A)(3)(a). In deciding to sentence Younker to concurrent terms of three years in prison on each count – which is two years more than the minimum allowable prison sentence and twelve years less than the maximum (i.e., five years consecutive on each count) – the trial court expressly stated that it had considered both the purposes and principles of sentencing set out in R.C. 2929.11, as well as the seriousness and recidivism factors set out in R.C. 2929.12. * * * And even though it was not required to, the court nevertheless gave a full explanation of its reason for

imposing more than the minimum sentence. * * * Consequently, because the trial court complied with all applicable sentencing statutes and because Younker's three-year prison sentence fell well-within the authorized sentencing range for a felony of the third degree, the sentence is not contrary to law and there is no legitimate basis upon which the sentence should be disturbed.

{¶ 34} As this Court recently noted:

In *State v. Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069 (2d Dist.), we held that we would no longer use an abuse-of-discretion standard in reviewing a felony sentence, but would apply the standard of review set forth in R.C. 2953.08(G)(2). Under this statute, an appellate court may increase, reduce, or modify a sentence, or it may vacate the sentence and remand for resentencing, only if it "clearly and convincingly" finds either (1) that the record does not support certain specified findings or (2) that the sentence imposed is contrary to law. *Rodeffer* stated that "[a]lthough *[State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124] no longer provides the framework for reviewing felony sentences, it does provide * * * adequate guidance for determining whether a sentence is clearly and convincingly contrary to law. * * * According to *Kalish*, a sentence is not contrary to law when the trial court imposes a sentence within the statutory range, after expressly stating that it had considered the purposes and principles of sentencing set forth in R.C. 2929.11, as well as the factors in R.C. 2929.12." (Citations omitted). *Rodeffer* at ¶ 32. "The

trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum or more than minimum sentences." *State v. King*, 2013-Ohio-2021, 992 N.E.2d 491, ¶ 45 (2d Dist.).

R.C. 2929.11 requires trial courts to be guided by the overriding principles of felony sentencing. Those purposes are "to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." R.C. 2929.11(A). The court must "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*. R.C. 2929.11(B) further provides that "[a] sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing * * *, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."

R.C. 2929.12(B) sets forth nine factors indicating an offender's conduct is more serious than conduct normally constituting the offense; R.C. 2929.12(C) sets forth four factors indicating that an offender's conduct is less serious. R.C. 2929.12(D) and (E) each list five factors that trial court are to consider regarding the offender's likelihood of committing future

crimes.

State v. McElhaney, 2d Dist. Greene No. 2014-CA-9, 2015-Ohio-349, ¶ 23 - 25.

{¶ 35} It is clear from the transcript of the sentencing hearing that the trial court considered the purposes and principles of sentencing as well as the factors set forth in R.C. 2929.12. The court indicated that the facts that Younker committed a sex offense against a minor victim who is a family member "make it appropriate not to impose the minimum sentence" of one year for each offense. Regarding Younker's assertion that the trial court improperly considered the victim's age as a factor indicating that Younker's conduct was more serious than conduct normally constituting the offense, we note that R.C. 2929.12(B) allows the court to consider, in addition to the factors set forth therein, "any other relevant factors." As the State asserts, Younker's non-minimum terms are not contrary to law, since R.C. 2929.14 provides that for a felony of the third degree that is a violation of R.C. 2907.05, the "prison term shall be twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months." Finally, on this record, we do not find that the imposition of three-year concurrent sentences for Younker's offenses constitutes an abuse of discretion. Since Younker's third assigned error lacks merit, it is overruled.

{¶ 36} Having determined above that the trial court's imposition of a mandatory sentence is not authorized by law, the mandatory provision of Younker's sentence is reversed and vacated, and the matter is remanded for resentencing consistent with this opinion. The judgment of the trial court is affirmed in all other respects.

. . . . . .

HALL, J. and WELBAUM, J., concur.

Copies mailed to:

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