

[Cite as *State v. Martin*, 2018-Ohio-862.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 16 MA 0160
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
GEORGE T. MARTIN)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio
Case No. 2015 CR 1172

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant: Atty. Desirae DiPiero
7330 Market Street
Youngstown, Ohio 44512

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: March 1, 2018

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WAITE, J.

{¶1} Appellant George T. Martin was convicted in the Mahoning County Court of Common Pleas on five counts of rape of his niece. Appellant now appeals his prison sentence. He contends the trial court erred in considering a victim impact statement written by the victim's sister, who was not the victim in the instant matter. Appellant argues the trial court was improperly influenced by the sister's statement when it imposed his sentence: a sentence that was two years longer than the state proposed as part of Appellant's guilty plea. For the reasons that follow, Appellant's argument is without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On November 25, 2015, Appellant was indicted on nine counts of rape in violation of R.C. 2905.02(A)(2), (B), felonies in the first degree. Appellant entered into a Crim.R. 11 plea agreement with the state. Pursuant to this agreement, Appellant pleaded guilty to five counts of rape. The remaining counts were dismissed. On August 11, 2016, the trial court conducted a plea hearing and, after a colloquy with Appellant, accepted his guilty plea.

{¶3} A sentencing hearing was held on September 20, 2016. The state recommended an eight-year period of incarceration. Appellant argued for a three-year sentence. Ultimately, the trial court imposed a term of ten years on each count of rape, but ordered them to be served concurrently, for an aggregate stated prison term of ten years. This timely appeal followed.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT IMPROPERLY CONSIDERED A STATEMENT FROM THE VICTIM'S SISTER REGARDING THE ALLEGED ABUSE OF OTHER VICTIMS BY APPELLANT.

{¶4} Appellant's entire argument rests on alleged prejudice involving two issues: (1) a statement by the prosecution at sentencing that the victim had two sisters who had also reported abuse by Appellant but that the state could not bring charges on those offenses because the statute of limitations had run, and (2) a letter written by the victim's sister and presented to the trial judge prior to sentencing. This letter was not admitted into evidence and is not a part of the record before us. Appellant contends the trial court was improperly influenced by both of these, making the sentence imposed, which is two years longer than the state's recommendation, clearly and convincingly contrary to law.

{¶5} An appellate court is permitted to review a felony sentence to determine if it is contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1232, ¶ 23. Pursuant to *Marcum*, "an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence." *Id.* When determining a sentence, a trial court must consider the purposes and principles of sentencing in accordance with R.C. 2929.11, the seriousness and recidivism factors set forth in R.C. 2929.12, and the statutory ranges enumerated in R.C. 2929.14.

{¶6} Appellant takes issue with the following comments made by the assistant prosecutor at the sentencing hearing:

Two of the victim's sisters in this case also had reported abuse, however, we were unable to litigate that because the statute of limitations had run for those two women, so we are left with only the charges as they relate to [the victim].

I think that you could only imagine the atmosphere in this home where the defendant is preying upon these young girls. As one of them gets old enough and moves out of the house, he simply moves on to a younger sister. So he always has someone there at his disposal.

(9/20/16 Sentencing Hrg. Tr., p. 3.) The discovery in this case included statements from the victim and these sisters and investigatory notes relative to these from various police agencies.

{¶7} It is well established that sentencing courts may consider arrests and even prior allegations that did not result in conviction before imposing sentence. *State v. Hutton*, 53 Ohio St.3d 36, 43, 559 N.E.2d 432 (1990). A sentencing court may take into consideration the circumstances of the offense for which the defendant has been indicted, even if the negotiated plea is at odds with the indicted elements. *State v. Starkey*, 7th Dist. No. 06 MA 110, 2007-Ohio-6702, ¶ 17. In sentencing, the court can review the indictment, bill of particulars, victim's statements in court, trial testimony if a trial was held, and any presentence investigation report. See R.C.

2929.19(B)(1). Moreover, R.C. 2929.19(A) permits a victim to present evidence relevant to a defendant's sentence. It reads, in part:

At the hearing, the offender, the prosecuting attorney, the victim or the victim's representative in accordance with section 2930.14 of the Revised Code, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case.

{¶8} We note that counsel for Appellant failed to object to the assistant prosecutor's statement at sentencing, and thus has waived all but plain error. *State v. Hansen*, 7th Dist. No. 11 MA 63, 2012-Ohio-4574, ¶ 15. Moreover, "[c]ourts have consistently held that evidence of other crimes, including crimes that never result in criminal charges being pursued, or criminal charges that are dismissed as a result of a plea bargain, may be considered at sentencing." *Starkey* at ¶ 17.

{¶9} In the instant matter, the assistant prosecutor was merely recounting evidence in the record and available for the court's consideration prior to imposing sentence. At sentencing, the court noted that it had considered the victim's statement, the presentence investigation report as well as the relevant statutory factors prior to imposing sentence. Appellant fails to direct us to any part of the record that indicates the trial court relied on evidence not relevant to his sentencing contrary to R.C. 2929.12(A).

{¶10} Regarding the typed letter from the victim's sister presented by the state at the sentencing hearing, the following exchange occurred prior to sentencing:

THE COURT: Court has considered the record, the oral statements made, the victim's statement and a letter that was given to me typed out. I don't know who it's from.

[APPELLEE]: Your Honor, that is actually a statement from * * * the victim's sister.

THE COURT: Okay

[APPELLEE]: And since the victim did actually appear today, we would ask that you consider the victim's statement rather than [her sister's].

THE COURT: Then I'm not going to even admit this into evidence.

(9/20/16 Sentencing Hrg. Tr., p. 11.)

{¶11} As this letter was not admitted into evidence, its contents and the allegations contained therein are not in the record. However, this record clearly reflects that the trial court specifically disregarded the letter and did not take it into consideration prior to imposing sentence. There is no further reference to the letter or its contents. At most, it appears that the letter was to serve as a proxy if the victim was not going to make a statement, herself. The record shows that the victim was present and did make a statement at sentencing, and that the trial court did not take the letter into consideration when making its sentencing determination. The trial court did not err regarding these issues and Appellant has failed to otherwise establish the court's sentence was clearly and convincingly contrary to law.

{¶12} Based on the foregoing, Appellant's assignment of error lacks merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, P.J., concurs.