[Cite as *State v. Lynn*, 2021-Ohio-4590.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

MICHAEL ANTHONY LYNN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 21 BE 0009

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 20 CR 231

BEFORE:
David A. D'Apolito, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. J. Kevin Flanagan, Belmont County Prosecutor, and *Atty. Daniel P. Fry*, Assistant Prosecuting Attorney, 52160 National Road, St. Clairsville, Ohio, 43950, for Plaintiff-Appellee and

Atty. Grace L. Hoffman, Lancione, Lloyd & Hoffman, 151 West Main Street, St. Clairsville, Ohio 43950, for Defendant-Appellant.

Dated: December 9, 2021

D'Apolito, J.

{¶1} Appellant Michael Anthony Lynn appeals his twenty-four month sentence, which was imposed by the Belmont County Court of Common Pleas following the entry of his guilty plea to one count of attempted pandering sexually oriented matters involving a minor, in violation of R.C. 2923.02(A) and 2907.322(A)(1)(C), a felony of the third degree. Appellant also asserts that he was coerced into entering his guilty plea and misinformed that his conviction would not result in a prison sentence. For the following reasons, Appellant's conviction and sentence are affirmed.

{¶2} On September 3, 2020, Appellant was indicted for one count of pandering sexually oriented material involving a minor, in violation of R.C. 2907.322(A)(1) and 2907.322(C), a felony of the second degree (count one), and three counts of use of minor in nudity-oriented material or performance, in violation of R.C, 2907.323(A)(3) and 2907.323(B), felonies of the fifth degree (counts two through four). The charges are the result of a sexual relationship between Appellant, who was in his mid-thirties when he was indicted, and a then 17-year-old girl, during which they filmed various sex acts and exchanged nude photographs via the internet.

{¶3} On January 22, 2021, Appellant entered a plea of guilty to count one, which was amended pursuant to his plea agreement to attempted pandering sexually oriented matters involving a minor. The remaining three fifth-degree felonies were dismissed as a part of the plea agreement. On February 8, 2021, the trial court imposed the twenty-four month sentence. This timely appeal followed.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT-APPELLANT, MICHAEL A. LYNN, TO TWENTY-FOUR (24) MONTHS IN THE PENITENTIARY.

{¶4} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily." *State v. Engle*, 74 Ohio St.3d 525, 527, 1996–

Ohio–179, 660 N.E.2d 450. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct.1709 (1969). "Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." *Kercheval v. United States*, 274 U.S. 220, 223, 47 S.Ct. 582 (1927).

{¶5} At the plea hearing, the trial court explained the effect of Appellant's plea to the amended charge in count one as follows:

> What you are charged with right now is four charges, okay. The first is called pandering sexually oriented matter involving a minor. It's a second degree felony. The maximum penalty is – and you're subject to indefinite sentencing, a minimum of 8 years and a maximum of 12 years. For the other three charges, the mandatory is 12 months each. So again, as of right now, before we go any further, you could be looking at between 11 and 12 years in the penitentiary. Do you understand that?

(Plea Hrg., p. 3-4.) Appellant responded, "Yes."

{¶6} The trial court continued:

> Now, with this agreement, the charge in Count I is going to become attempted pandering. It is a third-degree felony. So it lowers it one level, and that causes two things to happen. No. 1, no more indefinite sentencing. So instead of 8 to 12 years, the worst that can happen, the maximum sentence is three years, or 36 months, in the penitentiary. Do you understand?

(Plea Hrg., p. 4.) Appellant responded, "Yes, sir."

{¶7} The trial court added:

> And the other three charges are going to be merged and dismissed. So, again, those potential three years in prison will be gone. So, again, if we go through this, what you have to understand is what you're looking at is a maximum of 36 months in the penitentiary, a $10,000 fine, you would be classified as what's called a Tier II sex offender, meaning, biannual, every half year, every 180 days in-person registration with the sheriff in the county where you reside.

(*Id.*)

{¶8} Further, during the plea colloquy, the trial court inquired, "Has anyone promised you anything, threatened you, coerced you in any way to make you do any of this, other than of your own free will?" Appellant responded, "No, sir." (Plea Hrg., p. 9.) Next, the trial court reiterated:

> [S]ince we don't have an agreed sentence, I'm not bound by what the attorneys say at the sentencing hearing. In other words, I don't have to agree with them. I can impose any sentence clear up to the maximum 36 months in the penitentiary, a $10,000 fine with the Tier II sex offender registration. Do you understand all of that?"

(Plea Hrg., p. 9-10.) Appellant responded, "Yes, sir."

{¶9} Based on the foregoing excerpt from the plea hearing, Appellant was fully informed regarding the effect of his plea and he entered his plea voluntarily. To the extent that Appellant's allegations of misstatements regarding his potential sentence and coercion are predicated upon evidence outside of the record, they cannot be addressed in his direct appeal, but, instead, must be raised in a collateral proceeding.

{¶10} Next, when reviewing a felony sentence, an appellate court must uphold the sentence unless the evidence clearly and convincingly does not support the trial court's findings under the applicable sentencing statutes or the sentence is otherwise contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1.

{¶11} R.C. 2953.08(G) states in pertinent part:

> (2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
>
> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

R.C. 2953.08(G)(2)(a)-(b).

{¶12} The trial court made the following findings prior to imposing the twenty-four-month sentence:

> The factors, then, that indicate to the Court more serious conduct, more likelihood of recidivism, first of all prior record. As an adult he had a felony conviction for attempt of unlawful sexual conduct with a minor as a fourth degree felony. That was in this Court, back in 2011. He completed his community control sentence. He has misdemeanor convictions for theft and possession of drug paraphernalia. From the – and I'm taking this information from what I have read in these reports. His conduct resulted in the victim causing harm to herself. This harm that she sustained is exacerbated by her age. He has not been rehabilitated, as he at age 36 had an improper relationship with a 17-year-old, who he blames for essentially causing this all to occur, or initiating the conduct in the vehicle on that one occasion. There has been no showing of remorse. The factors

> that indicate less serious conduct and less likelihood of recidivism are absent.

(Sentencing Hrg. Tr., p. 5.)

{¶13} The trial court continued:

> Court is going to find, based on the record, that more than minimum sentence is necessary, appropriate and reasonable. A short sentence or community control sentence with a combination of sanctions will not adequately punish you and protect the public, would demean the seriousness of what the Court considers your conduct.
>
> Factors decreasing seriousness are greatly outweighed by those increasing seriousness. There is more likelihood of recidivism if you receive a very short community control sentence.

(Sentencing Hrg. Tr., p. 5.)

{¶14} R.C. 2929.14(3)(b) reads, in its entirety, "For a felony of the third degree that is not an offense for which division (A)(3)(a) of this section applies, the prison term shall be a definite term of nine, twelve, eighteen, twenty-four, thirty, or thirty-six months." R.C. 2907.322 is not specifically enumerated in subsection (a) of R.C. 2929.14(3)(a). Accordingly, Appellant's sentence is within the range of sentences that may be imposed for his crime.

{¶15} Further, the trial court did not make any findings under R.C. 2929.13(B) or (D), R.C. 2929.14(B)(2)(e) or (C)(4), or R.C. 2929.20(I). The trial court predicated its sentence exclusively on the factors set forth in R.C. 2929.12. In *State v. Jones*, 2020-Ohio-6729, 169 N.E.3d 649, the Ohio Supreme Court clarified dicta regarding felony sentencing in *Marcum*, holding that "[n]othing in R.C. 2953.08(G)(2) permits an appellate court to independently weigh the evidence in the record and substitute its judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and 2929.12." *Id.* at ¶ 42. Having reviewed the facts in the record, we find that

they clearly and convincingly support the trial court's findings under the applicable sentencing statutes

{¶16} In summary, we find that Appellant's plea was knowingly and voluntarily entered, and that his sentence is lawful and clearly and convincingly supported by the record. Accordingly, Appellant's conviction and sentence are affirmed.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.