[Cite as *State v. Scott*, 2023-Ohio-2640.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ZACKARY D. SCOTT,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 CO 0034

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 21 CR 469

BEFORE:
David A. D'Apolito, Cheryl L. Waite, Mark A. Hanni, Judges.

JUDGMENT:
Affirmed.

Atty. Vito J. Abruzzino, Columbiana County Prosecutor, and *Atty. Shelley M. Pratt*, Assistant Prosecuting Attorney, 135 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee

Atty. Kerry M. O'Brien, 159 South Main Street, Suite 423, Akron, Ohio 44308, for Defendant-Appellant.

Dated: July 28, 2023

D'APOLITO, P.J.

{¶1} Appellant, Zackary D. Scott, appeals from the August 1, 2022 judgment of the Columbiana County Court of Common Pleas sentencing him to an indefinite term of ten years (minimum) to 15 years (maximum) in prison on two counts of rape (concurrent), felonies of the first degree, and classifying him as a Tier III Sex Offender following a guilty plea.[1] On appeal, Appellant asserts the trial court erred in imposing an excessive sentence. Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

{¶2} On October 13, 2021, Appellant was indicted by the Columbiana County Grand Jury on two counts of rape, felonies of the first degree in violation of R.C. 2907.02(A)(1)(b).[2] Appellant retained counsel, pled not guilty at his arraignment, and waived his right to a speedy trial.

{¶3} Appellant subsequently entered into plea negotiations with Appellee, the State of Ohio. On April 22, 2022, a written plea agreement was filed and a change of plea hearing was held. The State moved to amend both rape counts to lesser-included offenses of rape and recommended a ten-year term of incarceration. (4/22/2022 Plea Agreement); (4/22/2022 Plea Hearing Tr., p. 3). The trial court discussed the minimum and maximum sentences and Appellant acknowledged he understood he could face up to 16-and-one-half years on each charge. (4/22/2022 Plea Hearing Tr., p. 10-11). Appellant also acknowledged he understood he would be classified as a Tier III Sex Offender and would be subject up to five years of mandatory post-release control. (4/22/2022 Plea Agreement); (4/22/2022 Plea Hearing Tr., p. 11-12).

{¶4} Appellant withdrew his former not guilty plea and entered a guilty plea to two amended counts of rape, felonies of the first degree in violation of R.C. 2907.02(A)(2). The trial court accepted Appellant's guilty plea after finding it was made in a knowing,

[1] Am. Sub. S.B. No. 201, 2018 Ohio Laws 157, known as the "Reagan Tokes Law," significantly altered the sentencing structure for many of Ohio's most serious felonies by implementing an indefinite sentencing system for those non-life felonies of the first and second degree, committed on or after March 22, 2019.

[2] The charges stem from allegations that Appellant, who was 18 years old at the time of the offenses, engaged in sexual conduct with a 12-year-old girl, ("the victim"), d.o.b. 9/1/2008, on two occasions in August 2021.

intelligent, and voluntary manner pursuant to Crim.R. 11. The court ordered a PSI and deferred sentencing.

{¶5} On July 25, 2022, Appellant filed a sentencing memorandum with an attached psychological evaluation from Akron Family Institute, revealing: Appellant was born to a drug addicted mother; was born with cerebral palsy; had a low IQ (up to 89); had a lower than 18 functioning age; and was diagnosed with autism spectrum disorder. (7/25/2022 Defendant's Sentencing Memorandum).

{¶6} A sentencing hearing was held on July 29, 2022. After considering the record, the oral statements, the victim impact statement, the PSI, the purposes and principles of sentencing under R.C. 2929.11, and the seriousness and recidivism factors under R.C. 2929.12, the trial court sentenced Appellant to an indefinite term of ten years (minimum) to 15 years (maximum) in prison on two counts of rape, felonies of the first degree in violation of R.C. 2907.02(A)(2). (8/1/2022 Sentencing Entry). The court ordered both counts be served concurrently, classified Appellant a Tier III Sex Offender, and notified him that post-release control is mandatory for a period of five years. (*Id.*)

{¶7} Appellant filed a timely appeal and raises one assignment of error.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY SENTENCING HIM TO 10 TO 15 YEARS IN PRISON WITHOUT ADEQUATELY CONSIDERING HIS COGNITIVE AND INTELLECTUAL DIAGNOSES AND THE SENTENCE WAS THEREFORE EXCESSIVE.

{¶8} This court utilizes R.C. 2953.08(G) as the standard of review in all felony sentencing appeals. *State v. Michaels*, 7th Dist. Mahoning No. 17 MA 0122, 2019-Ohio-497, ¶ 2, citing *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1.

{¶9} 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).

{¶10} Although trial courts have full discretion to impose any term of imprisonment within the statutory range, they must consider the sentencing purposes in R.C. 2929.11 and the guidelines contained in R.C. 2929.12.

{¶11} R.C. 2929.11(A) provides that the overriding purposes of felony sentencing are (1) "to protect the public from future crime by the offender and others"; and (2) "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." Further, the sentence imposed shall be "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. 2929.11(B).

{¶12} R.C. 2929.12 provides a nonexhaustive list of sentencing factors the trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses. The court that imposes a felony sentence "has discretion to determine the most effective way to comply with the purposes and principles of sentencing." R.C. 2929.12(A). The factors a trial court may consider include the "more serious" factors, such as "[t]he physical or mental injury suffered by the victim

of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim" and "[t]he victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense." R.C. 2929.12(B)(1) and (2). The court may also consider the "less serious" factors, any recidivism factors, and any mitigating factors listed in R.C. 2929.12(C)-(F).

> R.C. 2929.11 does not require the trial court to make any specific findings as to the purposes and principles of sentencing. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31. Similarly, R.C. 2929.12 does not require the trial court to "use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors." *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000).

State v. Shaw, 7th Dist. Belmont No. 15 BE 0065, 2017-Ohio-1259, ¶ 36.

{¶13} "'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.)." *State v. Burkhart*, 7th Dist. Belmont No. 18 BE 0020, 2019-Ohio-2711, ¶ 16.

{¶14} In *State v. Jones*, 163 Ohio St.3d 242, 2020-Ohio-6729, the Supreme Court of Ohio has indicated that the language in *Marcum* is dicta. *Id.* at ¶ 27 ("The statements in *Marcum* at ¶ 23 suggesting that it would be 'fully consistent' with R.C. 2953.08(G) for an appellate court to modify or vacate a sentence when the record does not support the sentence under R.C. 2929.11 or 2929.12 were made only in passing and were not essential to this court's legal holding.") In *Jones,* the Court held that "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." *Id.* at ¶ 39. The Court explained that "an appellate court's determination that the record does not support a sentence does not equate to a determination that the sentence is 'otherwise contrary to law' as that term is used in R.C. 2953.08(G)(2)(b)." *Id.* at ¶ 32. Thus, under *Jones*, an appellate court errs if it relies on

the dicta in *Marcum* and modifies or vacates a sentence "based on the lack of support in the record for the trial court's findings under R.C. 2929.11 and 2929.12." *Id.* at ¶ 29; *see also State v. Dorsey*, 2nd Dist. Montgomery No. 28747, 2021-Ohio-76, ¶ 17.

{¶15} Pursuant to *Jones*, when reviewing felony sentences that are imposed solely after considering the factors in R.C. 2929.11 and R.C. 2929.12, appellate courts shall no longer analyze whether those sentences are unsupported by the record. Rather, we simply must determine whether those sentences are contrary to law. *See Dorsey, supra,* at ¶ 18.

> A sentence is considered to be contrary to law if it falls outside of the statutory range for the particular degree of offense; if the trial court failed to properly consider the purposes and principles of felony sentencing as enumerated in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12; or if the trial court orders consecutive sentences and does not make the necessary consecutive sentence finding.

Burkhart, *supra,* at ¶ 12.

{¶16} In this case, Appellant alleges the trial court's decision to impose an indefinite prison sentence of ten years (minimum) to 15 years (maximum) is excessive, fails to comply with Ohio sentencing statutes, and is clearly and convincingly contrary to law. (1/17/2023 Appellant's Brief, p. 10). Appellant stresses the State and the trial court were largely dismissive of his functional age, low IQ, and autism spectrum disorder. (*Id.* at p. 11, 14). Further complicating his understanding, Appellant stresses the 12-year-old victim invited him into her home on both occasions. (*Id.* at p. 11). Appellant believes a three-year prison sentence better aligns with his intellectual and cognitive deficits. (*Id.* at p. 15-16).

{¶17} The State argues the trial court gave due deliberation to the relevant statutory considerations, R.C. 2929.11 and 2929.12, and contends Appellant's sentence is not contrary to law. (2/3/2023 Appellee's Brief, p. 2-6).

{¶18} Contrary to Appellant's assertions, the record reveals the trial court took into account his lower than 18 functioning age, low IQ (up to 89), and autism spectrum disorder. *See* (7/25/2022 Defendant's Sentencing Memorandum); (7/29/2022

Sentencing Hearing Tr.); *see also State v. Cunningham*, 5th Dist. Stark No. 2015CA0224, 2016-Ohio-3050 (affirming a competency finding in which the appellant, who had autism and a low IQ of 53, was sentenced to prison for sexual battery and gross sexual imposition involving a victim less than 13 years old).

{¶19} Appellant's sentence is not contrary to law. As stated, the trial court sentenced Appellant to an indefinite term of ten years (minimum) to 15 years (maximum) on two counts of rape (concurrent), felonies of the first degree in violation of R.C. 2907.02(A)(2), and classified him as a Tier III Sex Offender. The court gave due deliberation to the relevant statutory considerations. Appellant entered a guilty plea which the court accepted after finding it was made pursuant to Crim.R. 11.

{¶20} At the sentencing hearing, the trial court heard from the prosecutor on behalf of the State, defense counsel on behalf of Appellant, Appellant's biological and adoptive mothers, Appellant's adoptive father, Appellant's sister, and Appellant.

{¶21} The prosecutor revealed that Appellant was charged with rape for engaging in oral sex with the 12-year-old victim on two separate occasions. (7/29/2022 Sentencing Hearing Tr., p. 3). Appellant was discovered at the victim's home by her father and his girlfriend. (*Id.*) When initially interviewed by police, Appellant denied having sex or oral sex with the victim. (*Id.*) Appellant later admitted to engaging in oral sex with the victim. (*Id.* at p. 4). The prosecutor believed Appellant understood the wrongfulness of his conduct because he attempted to leave the victim's home before being discovered by her father and his girlfriend. (*Id.*) During his presentence investigation, Appellant stated he thought the victim was 16 years old. (*Id.* at p. 5). During his interviews, Appellant stated he initially believed the victim was 14. (*Id.*) Appellant later admitted he knew the victim was 12. (*Id.*) The prosecutor pointed to Appellant's criminal history which showed he was charged with unlawful sexual conduct with a minor in another unrelated case, thereby demonstrating he has a propensity for engaging in sexual conduct with victims who are not of legal age. (*Id.* at p. 7).

{¶22} Defense counsel stressed that Appellant is autistic and has taken responsibility for his actions. (*Id.* at p. 8). Defense counsel indicated "that teenagers seem to think that oral sex is not a rape or a sex offense as we know it" and that Appellant "really didn't understand what he was getting himself into." (*Id.* at p. 9). Defense counsel

claimed Appellant "did not know that [the victim] was twelve at the time of the two incidents[.]" (*Id.* at p. 10).

{¶23} Nancy Scott, Appellant's adoptive mother, assessed Appellant's age to be "between ten and twelve mentally." (*Id.* at p. 12). Taking that into account, the trial court asked Nancy if Appellant had a driver's license and his own vehicle to which she replied in the affirmative. (*Id.*) Nancy said Appellant is a "good driver" and is not a "troublemaker." (*Id.*) The court interjected, "But these are adult responsibilities that you are standing up here before me saying that he is of the mental capacity of a ten to twelve year old." (*Id.* at p. 13). Nancy believed "in a lot of ways he is still a little boy." (*Id.*) Nancy tried to explain that Appellant is "not vicious and violent" and was "afraid of him going to a prison." (*Id.* at p. 14-15).

{¶24} Stephanie Scott, Appellant's biological mother, stated Appellant is "very immature" and has "a twelve-year-old boy's mentality." (*Id.* at p. 17). Stephanie agreed Appellant broke the law but does not believe he should go to prison. (*Id.* at p. 18).

{¶25} Dan Scott, Appellant's adoptive father, emphasized Appellant had never been in a fight before and did not learn to walk until he was two-and-one-half years old. (*Id.* at p. 19).

{¶26} Skylar Scott, Appellant's older sister, revealed she has always been "fiercely protective" of Appellant because he was made fun of by his classmates. (*Id.*) Skylar said Appellant is neither violent nor mean. (*Id.* at p. 19-20). Skylar requested the court be lenient on Appellant and not send him "somewhere horrible." (*Id.* at p. 20).

{¶27} Appellant said he made a "very terrible decision" and he was "really sorry." (*Id.* at p. 20). Appellant stated he was not a "bad person" and wished he "could take it [all] back." (*Id.* at p. 21-22).

{¶28} The trial court judge concluded by stating the following:

> The Court must take into consideration seriousness and recidivism factors both in 2929.11 and 2929.12. The seriousness factors are obviously - - we have a twelve year old here; okay? Sex offenses - - and as I was stating to your mother, the reason that the legislature writes these statutes in the way they are, there is an age of innocence, an age of immaturity, a class of people that need protected because they don't have the ability to protect

> themselves. So when the legislature writes these statutes, they write them to protect a specific age.

(*Id.* at p. 22).

{¶29} The trial court indicated its concern that Appellant had been charged with unlawful sexual conduct with a minor in Stow Municipal Court in July 2021 for the exact same conduct as the present case. (*Id.* at p. 23). The victim in that matter was 14 years old. (*Id.*) The court stated that offense occurred before the conduct in the present case and that Appellant was out on bond and under court supervision when the conduct in the present case took place. (*Id.* at p. 23-24). Appellant committed the instant offenses in secrecy and late at night, after traveling well over an hour to see the victim. (*Id.* at p. 24).

{¶30} The trial court considered Appellant's autism diagnosis and the factors associated with that diagnosis. (*Id.* at p. 25). However, the court was troubled by the proximity of Appellant's prior criminal case and the fact that the conduct was identical to this case and committed while he was out on bond. (*Id.*) Appellant knew his conduct was criminal as he had already been charged with the same conduct in the prior case. (*Id.*) The court acknowledged Appellant took responsibility for his actions, but he was also caught. (*Id.* at p. 25-26). The court considered that force was not used and that the victim may have been a willing participant. (*Id.* at p. 28). However, the court explained that 12 year olds are protected by the law and victims should not be blamed. (*Id.* at p. 27-28).

{¶31} In discussing the seriousness and recidivism factors, the trial court stated:

> So on the seriousness factors, you know, the victim, the age of the victim is a factor. That is on the more serious end. We did not receive any response back from the victim's family or the victim themselves. I can't say whether she has engaged in any sort of counseling for any injury or anything that had been done. But, again, those factors, you know, are on the more serious end. I guess the argument would be on the less serious is that the victim induced or facilitated the offense. Twelve years old. She did invite you there. I don't think there is any discrepancy in that. So those factors are pretty much a wash. You got a factor on each one, on the more serious and the less serious.

> Recidivism. Recidivism is exactly what we are talking about here today. Whether an individual commits or acts in the same way that they previously have, knowing there are consequences for that action. You were on bond in a sex offense case when this occurred. Recidivism factors are high.

(*Id.* at p. 28-29).

{¶32} Also, in its August 1, 2022 judgment, the trial court stated:

> The Defendant has been afforded all rights pursuant to Criminal Rule 32. The Court has considered the record, the oral statements of the Defendant, the victim impact statement, if any, and the pre-sentence investigation prepared in this case, as well as the principles and purposes of sentencing provided for under ORC Section 2929.11, including the seriousness and recidivism factors found in ORC Section 2929.12.

(8/1/2022 Sentencing Entry, p. 1).

{¶33} The record in this case reflects no reversible sentencing error. The trial court gave due deliberation to the relevant statutory considerations and properly advised Appellant regarding post-release control. The court considered the purposes and principles of felony sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12.

{¶34} In addition, the trial court imposed an indefinite ten year (minimum) to 15 year (maximum) sentence on two counts of rape and ran both counts concurrently following a guilty plea. Appellant's sentence is within the statutory range for the first degree felony offenses. R.C. 2929.14(A)(1)(a) ("For a felony of the first degree committed on or after the effective date of this amendment [April 12, 2021], the prison term shall be an indefinite prison term with a stated minimum term selected by the court of three, four, five, six, seven, eight, nine, ten, or eleven years and a maximum term that is determined pursuant to section 2929.144 of the Revised Code"); R.C. 2929.144(B)(3) ("If the offender is being sentenced for more than one felony, if one or more of the felonies is a qualifying felony of the first or second degree, and if the court orders that all of the prison terms imposed are to run concurrently, the maximum term shall be equal to the longest of the

minimum terms imposed on the offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree for which the sentence is being imposed plus fifty per cent of the longest minimum term for the most serious qualifying felony being sentenced.") Also, the record reveals the court properly advised Appellant regarding post-release control.

{¶35} Accordingly, because the trial court considered the purposes and principles of felony sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12, and because Appellant's indefinite prison sentence of ten years (minimum) to 15 years (maximum) is within the authorized statutory range for first-degree felonies, his sentence is not contrary to law. *See* R.C. 2953.08(G).

CONCLUSION

{¶36} For the foregoing reasons, Appellant's sole assignment of error is not well-taken. The August 1, 2022 judgment of the Columbiana County Court of Common Pleas sentencing Appellant to an indefinite term of ten years (minimum) to 15 years (maximum) in prison on two counts of rape (concurrent) and classifying him as a Tier III Sex Offender following a guilty plea is affirmed.

Waite, J., concurs.

Hanni, 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 Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

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.