[Cite as *State v. Hall*, 2010-Ohio-4056.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-09-067

Appellee — Trial Court No. 07 CR 289

v.

Daniel Hall — **DECISION AND JUDGMENT**

Appellant — Decided: August 27, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, for appellee.

Bruce B. Stevens, for appellant.

* * * * *

HANDWORK, J.,

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas.

{¶ 2} On December 5, 2007, The Wood County Grand Jury indicted appellant, Daniel Hall, on (1) one count of importuning, that is, soliciting a child under the age of 13 to engage in sexual activity with the offender in violation of R.C. 2907.07(A); (2) one

count of gross sexual imposition, specifically, having sexual contact with a child under 13 years of age in violation of R.C. 2907.05(A)(4); and (3) ten counts of pandering sexually oriented material involving a minor in violation of R.C. 2907.322(A)(1).

{¶ 3} The first two charges arose from two separate incidents in which appellant exposed his penis to young girls. In the first instance, appellant allegedly asked the girl to touch his exposed penis. In the second incident, appellant was at the girl's home, grabbed her groin, and exposed his erect penis. The other ten charges were based upon the child pornography received and e-mailed by appellant on his computer.

{¶ 4} On June 18, 2008, appellant filed a motion for leave to file a written "Not Guilty by Reason of Insanity" plea. In its entry and order, also filed on June 18, 2008, the trial court determined that based upon a report prepared by Mark Pittner, Ph.D., of the Wood County Court Diagnostic and Treatment Center ("Diagnostic and Treatment Center"), appellant was not competent to stand trial and allowed appellant to file the requested plea.

{¶ 5} Appellee, the state of Ohio, objected and asked that a second evaluation be made by Northcoast Behaviorial Health Care ("Northcoast"). Appellee argued that this court recently compared assessments from Northcoast Behavioral Health Care and the Diagnostic and Treatment Center and found that the opinion and report of the Northcoast psychologist was "much more relevant and credible to [defendant's] current condition, because [the psychologist] had longer and closer contact with [defendant] during treatment, and her evaluation did not rely on old, unrelated evaluations." *State v. Nickell*,

6th Dist. No. WD-07-015, 2008-Ohio-1571, ¶ 7. The trial court granted this motion on June 25, 2008.

{¶ 6} Appellant was admitted to Northcoast and examined by Robert Cooley, Ph.D. Based upon his examination, Dr. Cooley found appellant competent to stand trial. Thereafter, appellant changed his plea to guilty. After holding a hearing, the court below accepted this plea.

{¶ 7} A sentencing hearing was held on October 6, 2009. The trial judge sentenced appellant to an aggregate term of 12 years in prison. He classified Hall as a Tier I sexual offender for his conviction on one count of Importuning and as a Tier II sexual offender for his convictions on one count of gross sexual imposition and one count of pandering sexually oriented matter involving a minor.

{¶ 8} Appellant appeals the trial court's judgment and alleges that the following errors occurred in the proceedings below:

{¶ 9} "I. THE TRIAL COURT ERRED IN SENTENCING DEFENDANT TO AN AGGREGATE OF TWELVE YEARS IN THE OHIO DEPARTMENT OF CORRECTIONS.

{¶ 10} "II. THE TRIAL COURT ERRED IN FAILING TO TAKE INTO CONSIDERATION THE OVERRIDING MITIGATING FACTORS WHICH IN DETERMINING AN APPROPRIATE SENTENCE GIVEN TO APPELLANT WOULD INDICATE A NEED FOR LESS PRISON TIME TO BE IMPOSED.

{¶ 11} "III. THE TRIAL COURT ERRED IN ALLOWING OFFICER SCOTT LIEBER OF THE BOWLING GREEN POLICE DEPARTMENT, WHO WAS THE INVESTIGATING OFFICER, TO SPEAK IN COURT WITHOUT BEING SWORN.

{¶ 12} "IV. THE TRIAL COURT ERRED IN ALLOWING THE WOOD COUNTY PROSECUTING ATTORNEY TO READ A PORTION OF AN ALLEGED INSTANT MESSAGE COMMUNICATION BETWEEN THE DEFENDANT AND SOMEONE OVER THE AGE OF EIGHTEEN (18) WHEREIN THE DEFENDANT AND SAID INDIVIDUAL OVER THE AGE OF EIGHTEEN ENGAGED IN A FANTASY-BASED CONVERSATION WHICH IS PROTECTED SPEECH UNDER FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION, AS AN AGGRAVATING FACTOR TO BE CONSIDERED IN SENTENCING."

{¶ 13} Before any discussion of appellant's assignments of error, we must point out that appellant's argument set out under his Assignment of Error No. II actually should be part of his Assignment of Error No. III and shall be addressed under that assignment of error. Furthermore, a reading of the argument made by appellant under his Assignment of Error No. IV reveals that it is made in support of appellant's Assignment of Error No. I. It shall therefore be considered under that assignment. Finally, appellant's argument that relates to Assignment of Error No. IV is found within the body of Assignment of Error No. III. This argument will be dealt with under Assignment of Error No. IV.

{¶ 14} Appellant's Assignments of Error Nos. I and II essentially address the same issue, in particular, whether the trial court erred in sentencing appellant to 12 years in prison without considering the applicable mitigating factors, specifically, appellant's mental retardation and cerebral palsy.

{¶ 15} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at paragraph four of the syllabus, a plurality of the court held: "In applying [*State v.*] *Foster* [109 Ohio St.3d 1], to the existing statutes, appellate courts must apply a two-step approach. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." An abuse of discretion means that a trial court's judgment is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 16} Appellant argues in the case sub judice that the trial court failed to consider mitigating circumstances in sentencing appellant. R.C. 2929.12(C) provides:

{¶ 17} "The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense: (1) The victim induced or facilitated the offense; (2) In committing the offense, the offender acted under strong provocation; (3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property; (4)

There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense." (Emphasis added.)

{¶ 18} Hall argues that both Dr. Pittner and Dr. Cooley found that appellant is mentally retarded. Dr. Pittner did determine that appellant suffers from "'mild retardation.'" Nonetheless, Dr. Cooley's report finds: "Some intellectual deficits are also suspected, but not sufficient to suggest mental retardation." Dr. Cooley also states:

{¶ 19} "In addition to learning basic concepts, Mr. Hall was able to participate in meaningful discussions regarding his charges, potential consequences, plea-bargaining, and his explanation of his behaviors relative to the allegations. His statements were simple and concrete, but he was able to communicate his desires and expectations sufficiently when encouraged to do so."

{¶ 20} Thus, both reports did not find that appellant suffered from mental retardation. As to the cerebral palsy, only the relevant portion of Dr. Pittner's report opines that appellant is incompetent to stand trial "based upon cerebral palsy and mild mental retardation."

{¶ 21} Upon its review of both reports, the trial court held: "Based upon the more expansive examination of the defendant conducted by Dr. Cooley and the staff at Northcoast Behaviorial Healthcare, the court finds Dr. Cooley's opinion that the defendant is competent to stand trial to be more credible than that of Dr. Pittner."

{¶ 22} If, as set forth above, a trial court is provided with competing expert opinions regarding a defendant's competence, the issue becomes one of credibility. *State*

v. McColgan, 10th Dist. No. 04AP-120, 2005-Ohio-580, ¶ 21. Under such circumstances, "'the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.'" Id. quoting *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The trial judge in this cause expressly found Dr. Cooley's report to be more credible. Consequently, we cannot substitute our judgment for that of the trial court's on the issue of the mitigating factors of cerebral palsy and alleged mental retardation.

{¶ 23} Hall also relies on statements that he made during the court's presentence investigation report to argue that he "is not a high functioning criminal sociopath that needs to be kept from the community and punished for his ability to plan on how he can acquire child pornographic images." This argument is premised on a statement made by appellant indicating that he did not believe that his actions were "wrongful" because he could obtain child pornography "for free" on the internet. While this statement could be interpreted as indicating that Hall lacked the mental capacity to realize that his sexual attraction to young girls was "wrong," it could also support the argument that appellant knew what he did was wrong and was lying to prevent criminal charges.

{¶ 24} Finally, appellant contends that federal courts have recently been troubled with the length of the sentences imposed for the possession of child pornography. We do not find this argument persuasive as it relates to this case. First, we are not concerned as to how the federal courts are handling sentences in which the defendant is found guilty of possession of child pornography. Our concern is whether the trial court followed the

principles and purposes of Ohio's sentencing statute. See R.C. 2929.11 and 2929.12. Our review of the sentencing hearing and judgment on sentencing reveals that the court did follow these statutes. Second, appellant pled guilty not only to the receipt of and keeping of a record of pornography involving young girls on his computer, but also pled guilty to importuning and gross sexual imposition charges that resulted from sexual activity with young girls. Third, even though the trial judge imposed a prison term of eight years for each violation of R.C. 2907.332(A)(1), he ordered these prison terms to be served concurrently to each other and to the sentences imposed for the violations of R.C. 2907.07(A) and 2907.05(A)(4). In other words, the trial court was lenient in imposing sentence upon appellant.

{¶ 25} For all of the above reasons, appellant's Assignment of Error No. I and Assignment of Error No. II are found not well-taken.

{¶ 26} In assertions related to Assignment of Error No. III, appellant contends the trial judge erred in permitting Officer Scott Klieber to speak during the sentencing hearing about the facts of this case without first being sworn, thereby violating his due process rights under the Sixth Amendment to the United States Constitution. R.C. 2929.19(A)(1) reads, in relevant part:

{¶ 27} "The court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted or pleaded guilty to a felony * * *. At the hearing, the offender, the prosecuting attorney, the victim or the victim's

representative * * *, and with the approval of the court, any other person may present information relevant to the imposition of sentence in the case."

{¶ 28} As applied here, Officer Klieber had the approval of the court to speak at appellant's sentencing hearing and, therefore, had the right to speak as to the facts of this case as they related to sentencing without being under oath. For this reason, appellant's Assignment of Error No. III is found without merit.

{¶ 29} Assignment of Error No. IV complains that the common pleas court violated appellant's right to free speech under the First Amendment to the United States Constitution by allowing the Wood County Prosecutor, Paul Dobson, to read portions of e-mail messages between appellant and a couple in California at his sentencing hearing. These messages revealed that appellant and the California couple believed that they should have children for the purpose of incestuous relationships.

{¶ 30} In *Dawson v. Delaware* (1992), 503 U.S. 159, 165, the Supreme Court of the United States held "that the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." Thus, the court concluded that the prosecution may not present evidence of defendant's beliefs at a sentencing hearing only when those beliefs have no relevance to the issue being tried. Id. at 168. Here, and as noted by the Ohio Supreme Court in *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4554, ¶ 177, appellant's e-mail messaging is relevant to his criminal

activity, that is, illegal sexual activity with children. Id. Appellant's Assignment of Error No. IV is found not well-taken.

{¶ 31} The judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE