[Cite as *State v. Massena*, 2016-Ohio-7157.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2016-A-0006**
- vs -	:	
MICHAEL MASSENA,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2014 CR 000393.

Judgment: Affirmed.

Nicholas A. Iarocci, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Robert N. Farinacci, 65 North Lake Street, Madison, OH 44057 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Michael Massena, appeals from the December 22, 2015 judgment of the Ashtabula County Court of Common Pleas, sentencing him to six years in prison for unlawful sexual conduct with a minor and labeling him a Tier III sex offender following a guilty plea. At issue on appeal is whether appellant's sentence is contrary to law. Finding no error, we affirm.

{¶2} Appellant was indicted by the Ashtabula County Grand Jury on one count of unlawful sexual conduct with a minor, a felony of the second degree, in violation of R.C. 2907.04(A), Case No. 2014-CR-393. Appellant was later indicted on four additional counts of unlawful sexual conduct with a minor, Case No. 2015-CR-241. Both cases were subsequently consolidated. Appellant was represented by counsel, pleaded not guilty, and waived his right to a speedy trial.

{¶3} Appellant subsequently withdrew his former not guilty plea and entered an oral and written plea of guilty to one count of unlawful sexual conduct with a minor, a felony of the second degree, in violation of R.C. 2907.04(A). The trial court accepted his guilty plea, dismissed the remaining four counts, and ordered a pre-sentence investigation report.[1]

{¶4} Thereafter, the court sentenced appellant to six years in prison, labeled him a Tier III sex offender, and notified him regarding post-release control. Appellant timely appealed and asserts the following assignment of error:

{¶5} "The trial court committed prejudicial error and abused its discretion by imposing a sentence upon the defendant that was unreasonable, arbitrary, unconscionable and contrary to the guidance and dictates of R.C. 2929.11."

1. The PSI reveals that in 2013, appellant pleaded guilty to unlawful sexual conduct with a minor, Case No. 2012-CR-330. The thirteen-year-old victim in that case and the victim in this case is the same. Appellant got the victim pregnant. He was sent to jail for a short sentence. Following his release, appellant got the victim pregnant again. Also, in addition to the instant offense, the PSI details appellant's criminal record, which includes the following offenses: burglary and theft (dismissed); criminal mischief (guilty); domestic violence (guilty); criminal mischief and falsification (guilty); habitually disobedient (guilty); habitually disobedient (dismissed); aggravated menacing (guilty); possession of marijuana (guilty); telephone harassment (guilty); telephone harassment (dismissed); resisting arrest and disorderly conduct (guilty); and unlawful sexual conduct with a minor (guilty). Due to appellant's continued criminal behavior, his probation officer recommended that he serve a term of incarceration for an amount of time to be determined by the trial court.

{¶6} In his sole assignment of error, appellant mainly argues that the trial court erred in imposing a six-year sentence.[2]

{¶7} "R.C. 2953.08(G) and the clear and convincing standard should be applied to determine whether a felony sentence is contrary to law." *State v. Bryant*, 11th Dist. Trumbull No. 2015-T-0100, 2016-Ohio-4928, ¶54, citing *State v. Ernest*, 11th Dist. Lake No. 2014-L-108, 2015-Ohio-2983, ¶60. *See also State v. Marcum*, Slip Opinion Nos. 2014-1825 and 2014-2122, 2016-Ohio-1002, ¶1 ("an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law.")[3]

{¶8} In reviewing a felony sentence, R.C. 2953.08(G) provides:

{¶9} "(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.

{¶10} "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

2. In addition to appellant's main sentencing argument, he makes other side-allegations including, inter alia, irregularities in the proceedings and that the second indictment was a form of retaliation on the part of the state. However, there are no facts in the record to support those assertions.

3. We note that appellant cites in his brief to an outdated standard of review for felony sentences, i.e., he cites to the abuse of discretion standard and the two-part test enunciated in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. In agreeing, inter alia, with this court's decision in *State v. Mullins*, 11th Dist. Portage No. 2012-P-0144, 2013-Ohio-4301 (Cynthia Westcott Rice, P.J., concurred in judgment only with Concurring Opinion; and Thomas R. Wright, J., concurred in judgment only), the Ohio Supreme Court struck down *Kalish* and the abuse of discretion standard in sentencing-term challenges. *Marcum, supra,* at ¶1,10, 23.

may take any action authorized by this division if it clearly and convincingly finds either of the following:

{¶11} "(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;

{¶12} "(b) That the sentence is otherwise contrary to law."

{¶13} 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.

{¶14} Appellant takes issue with R.C. 2929.11, which states in part:

{¶15} "(A) 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. To achieve those purposes, the sentencing court shall 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.

{¶16} "(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, 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."

{¶17} "'Thus, the legislature has given us the tools as well as a mandate to address the issues of keeping dangerous criminals off the street, while balancing Ohio's financial deficits and an already overcrowded prison system.' *Ernest, supra, at ¶67*. 'However, courts have determined that "while resource and burdens to the government may be a relevant sentencing criterion, the statute 'does not require trial courts to elevate resource conservation above the seriousness and recidivism factors.'" (Citation omitted.)' *State v. Arkenburg*, 11th Dist. Lake No. 2013-L-087, 2014-Ohio-1361, ¶10, quoting *State v. Anderson*, 11th Dist. Geauga No. 2011-G-3044, 2012-Ohio-4203, ¶36. '"Only if the record affirmatively shows that the trial court failed to consider the principles and purposes of sentencing will a sentence be reversed on this basis, unless the sentence is strikingly inconsistent with relevant considerations."' *State v. Demeo*, 11th Dist. Ashtabula No. 2013-A-0067, 2014-Ohio-2012, ¶29, quoting *State v. Parsons*, 7th Dist. Belmont No. 12 BE 11, 2013-Ohio-1281, ¶12." *Bryant, supra,* at ¶62.

{¶18} Appellant's sentence of six years in prison for a second-degree felony is within the statutory range. *See* R.C. 2929.14(A)(2) ("[f]or a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.")

{¶19} At the sentencing hearing, the trial court gave careful and substantial deliberation to the relevant statutory considerations. Specifically, the following took place in open court:

{¶20} "THE COURT: So Mr. Massena is currently 27 years old, right?

{¶21} "THE DEFENDANT: Correct, Your Honor.

{¶22} "THE COURT: When you were 11 years old, you were originally charged with a Burglary, but that was eventually dismissed, correct?

{¶23} "THE DEFENDANT: Correct.

{¶24} "THE COURT: So you were first introduced to the criminal court system at age 11.

{¶25} "THE DEFENDANT: Correct.

{¶26} "THE COURT: You've had five additional charges filed against you as a juvenile for Domestic Violence, Criminal Mischief, Habitually Disobedient. Does that sound correct?

{¶27} "THE DEFENDANT: Correct, Your Honor.

{¶28} "THE COURT: When you became an adult - - actually about six weeks after becoming an adult, you committed your first criminal offense by threatening someone, right?

{¶29} "THE DEFENDANT: Correct, Your Honor.

{¶30} "THE COURT: And you've had other charges since then.

{¶31} "THE DEFENDANT: Correct, Your Honor.

{¶32} "THE COURT: In 2011 you had Unlawful Sexual Conduct with a Minor in the Common Pleas Court, correct?

{¶33} "THE DEFENDANT: Correct, Your Honor.

{¶34} "THE COURT: And then they hoped that you would follow their instructions and leave underage girls alone. And after being told to leave underage girls alone, you turned and around (sic) got the girl pregnant.

{¶35} "THE DEFENDANT: Correct, Your Honor.

{¶36} "THE COURT: So based upon that record, and under the definitions provided by law, recidivism is likely.

{¶37} "The mother of this girl knew what was going on and allowed it to continue?

{¶38} "THE DEFENDANT: Correct, Your Honor.

{¶39} "THE COURT: And I put her in jail, because this was so wrong. If an adult participated in this, they needed to be incarcerated. You understand that?

{¶40} "THE DEFENDANT: Correct, Your Honor.

{¶41} "THE COURT: You got this underage girl pregnant on two separate occasions.

{¶42} "THE DEFENDANT: Correct, Your Honor.

{¶43} "THE COURT: You didn't learn your lesson the first time? Right?

{¶44} "THE DEFENDANT: Yes. Correct, Your Honor.

{¶45} "THE COURT: And you've been in and out of the court system since you were 11.

{¶46} "THE DEFENDANT: Correct, Your Honor.

{¶47} "THE COURT: So you have 16 years experience being in and out of court and in and out of jail.

{¶48} "THE DEFENDANT: Correct, Your Honor." (Sentencing Transcript 10-12)

{¶49} After the trial judge allowed appellant and his attorney to make additional statements, in which they asked for a light sentence due to the fact that appellant had a job and paid child support, the judge indicated:

{¶50} "THE COURT: You're asking the Court to set the bar low. No one should have to be told to get a job. They should know they should get a job. No one should have to be told to support their children. They should know to support their children. And no one should have to be told not to have sex with underage people, because they should know that that is prohibited conduct and it is not tolerable. He pretty much got a pass the first time. He's not getting a pass the second time." (Sentencing Transcript 17)

{¶51} After the trial court discussed the requirements involving the Tier III sex offender classification, the judge stated:

{¶52} "THE COURT: Okay. The Court finds that there is no good and sufficient reason why the sentence should not now be pronounced.

{¶53} "As I said, I have looked at the Presentence Investigation Report. I've looked at the defense attorney's Sentencing Brief, and I've looked at the defendant's prior criminal record, which I've discussed.

{¶54} "The Court's considered the purposes and principles of the sentencing statutes. The overriding purpose is to punish offenders and to protect the public from future crimes.

{¶55} "I've looked at the recidivism factors. This defendant has committed the same offense with the same victim twice that we know of, so recidivism is likely.

{¶56} "The Court's looked at the seriousness factors. The defendant got this victim pregnant twice. Therefore, the Court finds that the more serious factors do override the less serious factors.

{¶57} "There is no recommendation for community control.

{¶58} "The Court finds that a term of community control would demean the seriousness of the offense and would not adequately protect the public from future crimes.

{¶59} "The Court has received a recommendation from the County Prosecutor's Office, which is about a polar opposite of the recommendation made by the defendant's attorney. I find that the State's recommendation appears reasonable.

{¶60} "So it will be the judgment and sentence of this Court that this defendant be sentenced to a term of six years in prison." (Sentencing Transcript 24-25)

{¶61} Before concluding the sentencing hearing, the trial court discussed post-release control, appellant and his attorney signed the form, and appellant was advised of his right to appeal.

{¶62} Thereafter, the trial court stated the following in its sentencing entry:

{¶63} "[D]efendant * * * was afforded all rights pursuant to Criminal Rule 32. The Court has considered the record, oral statements, any victim impact statement and pre-sentence investigation report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12

{¶64} "The Court finds that defendant entered a plea of guilty to and has been convicted of the offense as charged under Count One of the Indictment, to wit: Unlawful Sexual Conduct with a Minor, in violation of R.C. 2907.04(A), a felony of the second degree.

{¶65} "The Court further finds the defendant is not amenable to community control and that prison is consistent with the purposes of R.C. 2929.11."

{¶66} The trial court also notified appellant that post-release control is mandatory for five years, as well as the consequences for violating conditions of post-release control imposed by the Parole Board under R.C. 2967.28.

{¶67} Thus, the record reflects the trial court gave due deliberation to the relevant statutory considerations. 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. The court sentenced appellant within the statutory range under R.C. 2929.14(B). Further, the record reveals the court properly advised appellant regarding post-release control. Therefore, the trial court complied with all applicable rules and statutes and, as a result, appellant's sentence is not clearly and convincingly contrary to law.

{¶68} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Ashtabula County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, P.J.,

THOMAS R. WRIGHT, J.,

concur.