[Cite as *State v. Barnhart*, 2011-Ohio-5685.]

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

State of Ohio — Court of Appeals No. OT-10-032

Appellee — Trial Court No. 09-CR-098

v.

Richard A. Barnhart — **DECISION AND JUDGMENT**

Appellant — Decided: November 4, 2011

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Joseph H. Gerber, Assistant Prosecuting Attorney, for appellee.

Ron Nisch, for appellant.

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YARBROUGH, J.

{¶ 1} Appellant Richard Barnhart appeals a judgment of conviction and sentence for rape from the Ottawa County Court of Common Pleas. For the following reasons we affirm.

{¶ 2} On July 23, 2009, the Ottawa County grand jury indicted Barnhart on six counts of rape, all first-degree felonies in violation of R.C. 2907.02(A)(1)(b), and twenty-six counts of sexual battery, all third-degree felonies in violation of R.C. 2907.03(A)(5). The victim was Barnhart's step-daughter, who was twelve at the time of the offenses. On September 16, 2010, Barnhart withdrew his previous pleas of not guilty and not guilty by reason of insanity ("NGRI"), and pled guilty to one count of rape. Nolle prosequi were entered on the remaining counts of the indictment.

{¶ 3} Between his indictment and sentencing, Barnhart underwent two court-ordered psychological and psychiatric examinations at the Court Diagnostic and Treatment Center. These examinations generated two written evaluations by Dr. Charlene Cassel, the first dated September 24, 2009, and the second dated August 17, 2010. The purpose of the first evaluation, ordered pursuant to R.C. 2945.371 upon Barnhart's NGRI plea, was to assess Barnhart's mental status at the time of the offenses, including his level of intellectual function, his understanding of the criminal nature of his acts and his competence to stand trial. In this evaluation, Cassel concluded that Barnhart was not mentally retarded nor was he suffering from any severe mental disease or defect when he committed the crimes. While he appeared to be functioning "in the borderline range intellectually," she concluded "there was no condition which caused Mr. Barnhart not to know the wrongfulness of the actions for which he is charged."

{¶ 4} The second evaluation was ordered pursuant to R.C. 2951.03 for the purpose of a presentence assessment. Specifically, this evaluation was directed to assessing

Barnhart's "mental health, likely recidivism rate, possible alternative placements [to incarceration] and sexual offender classification." As with her first assessment of Barnhart, Cassel found that his intellectual functioning was "in the borderline to low average range." Three tests were also performed, but due to Barnhart's random responses on one, its results were deemed "invalid for interpretation." The remaining two tests ostensibly measured for the risk of recidivism, particularly sexual recidivism. In this evaluation Cassel concluded, in relevant part:

{¶ 5} "* * * Historically, incest has a relatively low recidivism rate. Unless Mr. Barnhart becomes involved in a similar relationship ([a] woman with pre-adolescent or adolescent children) the likelihood of him repeating his actions is relatively low. Even with this consideration, I highly recommend that Mr. Barnhart become involved in a sex offender program. He needs to take responsibility and develop skills to avoid future such behaviors. I know of no program which might be an alternative to prison."

{¶ 6} On October 11, 2010, the trial court held sentencing and sexual classification hearings during which defense counsel spoke in mitigation and Barnhart made a statement. Counsel for Barnhart urged for a sentence with a minimum prison term based on several mitigating factors: his lack of a felony record, and specifically the lack of any convictions for sex-related offenses, his borderline mental capacity, his limited education, and his cooperative behavior during the police investigation. The sentencing transcript reflects that the court referred to the principles of sentencing in R.C. 2929.11 and the seriousness and recidivism criteria of R.C. 2929.12, and then stated:

{¶ 7} "[W]e have had evaluations of the Defendant, and I understand that he has an I.Q, perhaps lower than average, but there is nothing there to indicate to me that he doesn't know right from wrong. Certainly, if that were indicated to me, that would make a significant difference. I also, in reading Dr. Cassel's [August 2010] report, she makes predictions regarding recidivism [sic]. And as to one of the tests that Dr. Cassel performed, she indicates that the chances of recidivism are 32.8 percent. 'Based on his score, there is a 32.8 percent probability that Mr. Barnhart would reoffend.' She calls that [a] low to moderate range, but when we are talking about an F-1 rape, a one-in-three chance is an incredible chance."

{¶ 8} The court thereafter imposed a mandatory 8-year prison term on the rape count and ordered Barnhart to register as a Tier III child-sex offender. A judgment entry of sentence was filed October 12, 2010.

{¶ 9} In this appeal Barnhart now assigns one error for review:

{¶ 10} "The trial court's decision as to sentencing was an abuse of discretion."

{¶ 11} Barnhart's counsel argues that the sentencing court misconstrued certain statements in the August 2010 evaluation from which it then assigned greater weight to certain "negative factors" and insufficient weight to other mitigating factors. Citing Cassel's psychological testing, counsel claims the court ignored the favorable portions of this evaluation suggesting a lower risk of recidivism. On one test, called the "Static-99 test," Barnhart scored zero. This score placed him at "an 11% risk for sexual offense recidivism within 10 years and a 12% risk for violent offenses within the next 10 years."

Yet, Cassel also stated that the "Static-99 test *does not reflect accurately* the risk of an incest offender." (Emphasis added.) The court's reference to the 32.8 percent recidivism statistic, however, came from a different test, called a "Level of Service Inventory - Revised" ("LSI-R") test . This test "measures the [program] needs of an offender whether incarcerated or on community control. It is also a predictor of recidivism." Barnhart's score of "16" on this test was "the maximum score for community control," according to Cassel. Based on that score, she concluded there was "a 32.8 % probability that Mr. Barnhart would reoffend."

{¶ 12} Asserting that the August 2010 evaluation contains ambiguous and internally conflicting statements, counsel insists that it was actually Cassel's later statement regarding incest offenders and their low-recidivism rate that was entitled to greater weight in selecting a prison term than either test. He contends that because the sentencing court placed undue reliance on the 32.8 percent statistic, while "ignoring" Cassel's other statements, an eight-year jail term based on that statistic constitutes an abuse of discretion. We find no merit in this argument.

{¶ 13} Appellate courts review assigned errors challenging the sentencing court's application of R.C. 2929.11 and 2929.12 using the method announced in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. In *Kalish*, supra, the Supreme Court established a "two-prong" process for appellate review of felony sentences, stating:

{¶ 14} "First, [appellate courts] 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." *Kalish* at ¶ 4.[1]

{¶ 15} Here counsel concedes that Barnhart's sentence "was not contrary to law." A choice of sentence from within the permissible statutory range cannot, by definition, be contrary to law. Id. at ¶ 15. Thus, *Kalish's* first prong is satisfied. Under the second prong we review the trial court's "exercise of its discretion in selecting a sentence within the permissible statutory range," using the sentencing record as the context. *Kalish* at ¶ 17. This prong employs the traditional language for assessing discretion - that is, whether in selecting a specific prison term the court's decision was "unreasonable, arbitrary or unconscionable." Id. at ¶ 20.

{¶ 16} Regarding the import of R.C. 2929.12, we recently stated:

{¶ 17} "R.C. 2929.12 is a guidance statute. It sets forth the seriousness and recidivism criteria that a trial court '*shall consider*' in fashioning a felony sentence. * * * Subsections (B) and (C) establish the factors indicating whether the offender's conduct is more serious or less serious than conduct normally constituting the offense. Subsections (D) and (E) contain the factors bearing on whether the offender is likely or not likely to

[1]Noting that *Kalish* is a plurality opinion, some appellate districts have declined to adopt its two-prong test. Instead, these districts apply only "the traditional clear and convincing/contrary to law standard." See *State v. Harris*, 8th Dist. No. 90699, 2008-Ohio-5873, ¶ 99 fn. 1; *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶ 6-9 (10th Dist.); cf. *State v. Irvin*, 4th Dist. No. 08CA3057, 2009-Ohio-3128, ¶ 6 fn.1. In reviewing felony sentences in this district, we have followed *Kalish's* two-prong test. See *State v. Turner*, 6th Dist. No. L-09-1195, 2010-Ohio-2630, ¶ 50-59 and *State v. Brimacombe*, 6th Dist. L-10-1179, 2011-Ohio-5032, ¶ 12-15.

commit future crimes. While the phrase 'shall consider' is used throughout R.C. 2929.12, the sentencing court is not obligated to give a detailed explanation of how it algebraically applied each seriousness and recidivism factor to the offender. Indeed, no specific recitation is required. * * * Merely stating that the court considered the statutory factors is enough." *State v. Brimacombe,* 6th Dist. No. L-10-1179, 2011-Ohio-5032, ¶ 11 (internal citations omitted).

{¶ 18} We have thoroughly reviewed the transcript of the sentencing hearing as well as Dr. Cassel's two evaluations. Regarding the August 2010 presentence evaluation, we find no ambiguity or conflict in the test results, nor in Cassel's statements about them. The results of the first test were deemed invalid due to Barnhart's own behavior. His score of "zero" on the second test drew the prediction of "an 11% risk for sexual offense recidivism with 10 years," but its reliability was negated by Cassel's caveat that this test "does not accurately reflect the risk of an incest offender."

{¶ 19} The LSI-R test serves a dual function: it measures the rehabilitative needs of the offender, whether imprisoned or not, and attempts to predict the rate or likelihood of his reoffending. As to the first function, Cassel stated clearly that Barnhart needed sex-offender treatment, but knew "of no [such] program which might be an alternative to incarceration." As to the second function, it was Barnhart's score of "16" that drew Cassel's conclusion of a "32.8% probability" of his reoffending.

{¶ 20} A sentencing court has broad discretion to determine the relative weight to assign the factors in R.C. 2929.12. See *State v. Arnett*, (2000) 88 Ohio St.3d 208, 215

(citing *State v. Fox* (1994), 69 Ohio St.3d 183, 193). Where psychological tests are used in attempting to determine the risk of recidivism, Ohio courts have held that even a low-risk score on a particular test is merely one factor to be considered within the totality of evidence before the court. *See, e.g., State v. Morales*, 153 Ohio App.3d 635, 2003-Ohio-4200, ¶ 13 (First District); *State v. Robertson*, 147 Ohio App.3d 94, 2002-Ohio-494, ¶ 39 (Third District); *State v. Kunsman*, 11th Dist. No. 2001-L-073, 2002-Ohio-4700, ¶ 14. Moreover, a sentencing court is not restricted solely to psychiatric findings, opinions or test results in determining the likelihood of recidivism. *Robertson*, supra, at ¶ 34. Rather, the psychiatric evidence is to be viewed in the context of all the evidence. Id. at ¶ 39; see also, *State v. Reeves*, 11th Dist. No. 2006-T-0099, 2007-Ohio-4765, ¶ 7 (Even with a zero score, "the Static-99 test is not the sole determinant" for sexual recidivism.)

{¶ 21} The sentencing transcript reflects that the court considered Barnhart's lack of a criminal record and acknowledged his low intelligence level. As the State suggests, however, even accepting that low intelligence implies a diminished mental capacity, that condition is of more significance to his competence to stand trial than it is to mitigate punishment for a crime to which he knowingly admitted guilt. More importantly, the premise of Barnhart's argument confuses the statutory mandate *to consider* any mitigating factor that might exist (such as an isolated statement by Cassel which appears favorable on the issue of recidivism) with a concomitant obligation automatically *to assign* that factor the same qualitative weight as another factor the court deemed unfavorable. Indeed, the court could reasonably assign little or no mitigating weight to any particular

statement by Cassel or the absence of criminal history as compared to its judicial sense of what a one-third risk of sexual recidivism means.[2] This is the essence of discretion in sentencing. See *Fox* at 193-94 ("The weight, if any, to be given mitigation evidence is a matter for the discretion of the sentencer.")

{¶ 22} As we have said, the sentencing court is required only to *consider* the statutory factors, not explain how it considered them or assigned them weight. See *Kalish* at ¶ 12 and 18, fn 1; *Brimacombe* at ¶ 19. Nonetheless, that the court here weighed these factors is clear. The transcript reveals the court's reference to balancing the seriousness and recidivism factors under R.C. 2929.12 and to being "guided by the overriding purposes of felony sentencing which are to protect the public and punish the offender." In imposing sentence, the court discussed those aspects of Cassel's presentence evaluation it found to be relevant. That it assigned more significance or less significance to some aspect of a psychiatric opinion or test only proves that the sentencing court

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[2]Ohio courts have identified the inherent risk of recidivism among sex offenders whose victims are younger children:

"[T]he overwhelming statistical evidence support[s] the high potential of recidivism among sex offenders whose crimes involve the exploitation of young children. The age of the victim is probative because it serves as a telling indicator of the depths of [the] offender's inability to refrain from such illegal conduct. The sexual molestation of young children, aside from its categorization as criminal conduct in every civilized society with a cognizable criminal code, is widely viewed as one of the most, if not the most, reprehensible crimes in our society. Any offender disregarding this universal legal and moral reprobation demonstrates such a lack of restraint that the risk of recidivism must be viewed as considerable. (Citations omitted.)" *State v. Maynard* (1999), 132 Ohio App.3d 820, 826, appeal disallowed, 86 Ohio St. 3d 1437, quoting *State v. Daniels* (Feb. 24, 1998), 10th Dist. No. 97APA06-830.

considered and weighed the recidivism factors based on what the record showed. Merely because a more lenient punishment arguably could be justified if those same factors were reweighed does not, by itself, demonstrate an abuse of discretion. *State v. Maynard*, supra, at 824. Nothing otherwise suggests that the court's selection of an eight year prison term for a first-degree felony rape was "unreasonable, arbitrary or unconscionable." *Kalish* at ¶ 20.

{¶ 23} Accordingly, the sole assignment of error is not well-taken.

{¶ 24} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE
CONCUR.