

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

State of Ohio

Court of Appeals No. OT-14-010

Appellee

Trial Court No. 10-CR-120

v.

Gary Wayne Myers

DECISION AND JUDGMENT

Appellant

Decided: March 13, 2015

* * * * *

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

Howard C. Whitcomb, III, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Defendant-appellant, Gary Wayne Myers, appeals the March 6, 2014 judgment of the Ottawa County Court of Common Pleas sentencing him to a seventeen-month prison term following his conviction of pandering sexually-oriented material involving a minor. For the reasons that follow, we affirm the trial court's judgment.

I. Background

{¶ 2} On October 4, 2010, Myers was indicted on two counts of pandering obscenity involving a minor and two counts of pandering sexually-oriented material involving a minor. These charges followed the discovery that Myers was in possession of “copious amounts” of child pornography. Myers and the state reached an agreement pursuant to which Myers entered a plea of guilty to one count of pandering sexually-oriented material involving a minor, in violation of R.C. 2907.322(A)(5), a felony of the fourth degree. The remaining counts were dismissed. Following a Crim.R. 11(C) hearing on December 10, 2013, the court accepted Myers’ plea, finding that it had been entered knowingly, voluntarily, and intelligently. The court ordered a presentence investigation (“PSI”) report and continued the matter for sentencing.

{¶ 3} In an order dated March 6, 2014, Myers was sentenced to a prison term of 17 months with credit for the 165 days previously served, costs of the trial proceeding, and a mandatory five-year term of post-release control. He was also designated a Tier III sexual offender, child victim offender registrant. Myers appeals from that sentence and assigns the following errors for our review:

I. THE TRIAL COURT ERRED IN IMPOSING A SEVENTEEN
(17) MONTH SENTENCE UPON DEFENDANT-APPELLANT IN THAT
IT DID NOT COMPLY WITH THE REQUIREMENTS OF OHIO
REVISED CODE SECTIONS 2929.11 ET SEQ AND BY DOING SO,
VIOLATED DEFENDANT-APPELLANT’S RIGHT TO DUE PROCESS.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN
IMPOSING A SEVENTEEN (17) MONTH SENTENCE UPON
DEFENDANT-APPELLANT AS IT WAS AGAINST THE MANIFEST
WEIGHT OF THE EVIDENCE.

II. Law and Analysis

{¶ 4} In his first assignment of error, Myers argues that he was denied due process of the law because his sentence was excessive and was inconsistent with R.C. 2929.11 through 2929.14. Myers' primary assertion is that while the trial court stated that it considered the principles and purposes of sentencing under R.C. 2929.11, balanced the seriousness and recidivism factors under R.C. 2929.12, and found the factors supporting community control sanctions to be absent, the court was either incorrect in its conclusions or neglected to consider *all* of the required factors. He urges that had all factors been considered and given appropriate weight, his sentence would have been less severe.

{¶ 5} On appeal, we review felony sentences using the two-prong standard of review set forth in R.C. 2953.08. *State v. Tammerine*, 6th Dist. Lucas No. L-13-1081, 2014-Ohio-425, ¶ 11. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce, or otherwise modify a sentence or may vacate the sentence and remand the matter to the sentencing court for resentencing 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.

Notably, we do not review a felony sentence for an abuse of discretion. *Id.*

{¶ 6} Applying the first prong of R.C. 2953.08(G)(2) to this case, only R.C. 2929.13(B) is applicable. Under R.C. 2929.13(B)(1)(a) there is a presumption of community control where an offender is convicted of a fourth or fifth degree felony, however, section (B)(1)(b) of that statute provides, in relevant part:

The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense if any of the following apply:

* * *

(v) The offense is a sex offense that is a fourth or fifth degree felony violation of any provision of Chapter 2907 of the Revised Code.

{¶ 7} Here, Myers was convicted of a sex offense under Chapter 2907.233, thus it was within the court's discretion to order a period of incarceration.

{¶ 8} Turning to the second prong of R.C. 2953.08(G)(2), the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 18, held that a sentence is not clearly and convincingly contrary to law where the trial court has considered the purposes and principles of sentencing under R.C. 2929.11 and the

seriousness and recidivism factors under R.C. 2929.12, properly applied post-release control, and imposed a sentence within the statutory range.

{¶ 9} Under R.C. 2929.14(A)(4), “[f]or a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.” Myers’ seventeen-month sentence is within the statutory range.

{¶ 10} R.C. 2967.28(B)(1) mandates a five-year period of post-release control for a felony sex offense. The period of post-release control ordered by the court was, therefore, appropriate.

{¶ 11} We next turn to the principles and purposes of sentencing under R.C. 2929.11, the seriousness and recidivism factors under R.C. 2929.12, and the factors supporting imposition of community control under R.C. 2929.13. Although these statutes must be considered by the trial court in fashioning an appropriate sentence, the court is not required to articulate its reasoning pertaining to each factor. *State v. McClanahan*, 6th Dist. Ottawa, No. OT-14-024, 2014-Ohio-5597, ¶ 15. To meet the requirements of the relevant statutes, the court may simply state that it considered the factors. *Id.* Further, it is within the discretion of the sentencing judge to determine the particular weight to be given to any of the statutory factors. *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000).

{¶ 12} Here, both the sentencing judgment entry and the transcript of the sentencing hearing reflect that the trial court considered the required statutory factors in

arriving at Myers' sentence. The court stated that it had taken into account Myers' statements, the PSI, the record, and all oral statements in weighing those factors. Ultimately, the trial court found that the more likely recidivism factors did not outweigh the less likely factors, and that the more serious factors outweighed the less serious factors. Of particular significance to the court was Myers' lack of accountability for his actions and his attempt to shift the blame for his crime to others. Specifically, Myers blamed his nephew for the illicit materials contained on the hard drive of his computer.

{¶ 13} These findings suffice to indicate that the court properly considered the statutory factors. *See State v. Brimacombe*, 195 Ohio App.3d 524, 530, 2011-Ohio-5032, 960 N.E.2d 1042 ¶ 20 (6th Dist.). We find no error in the trial court's sentence, and we find Myers' first assignment of error not well-taken.

{¶ 14} In his second assignment of error, Myers argues that the sentence imposed by the trial court was an abuse of discretion because it was "against the manifest weight of the evidence." Without citing any case law in support, he urges that his sentence is inconsistent with sentences imposed by other courts for similar crimes. We find no merit to Myers' argument.

{¶ 15} First, as discussed earlier in this opinion, an appellate court does not review a felony sentence under an abuse of discretion standard. *Tammerine*, 6th Dist. Lucas No. L-13-1081, 2014-Ohio-425, at ¶ 12. *See* R.C. 2953.08(G)(2). Additionally, "consistency in sentencing does not result from a case-by-case comparison, but by the trial court's proper application of the statutory sentencing guidelines." *McClanahan*, 6th Dist. Ottawa

No. OT-14-024, 2014-Ohio-5597, at ¶ 16. As we previously determined, the trial court properly applied the relevant sentencing statutes and imposed a sentence within the statutory range. We, therefore, find Myers' second assignment of error not well-taken.

III. Conclusion

{¶ 16} We find Myers' two assignments of error not well-taken and affirm the March 6, 2014 judgment of the Ottawa County Court of Common Pleas. Myers 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

James D. Jensen, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
