

STATE OF OHIO

Plaintiff-Appellee

V.

MICHAEL J. CEMINO

Defendant-Appellant

ON APPEAL FROM THE 2nd DISTRICT  
COURT OF APPEALS, MONTGOMERY  
COUNTY, OHIO

C.A. CASE NO. 24442

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Memorandum in Support of Jurisdiction

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This is an appeal of a felony conviction from the 2nd District Court of Appeals, Montgomery County, Ohio

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Michael J. Cemino A645398

Lebanon Correctional Institution

P.O. Box 56

Lebanon, Ohio 45036

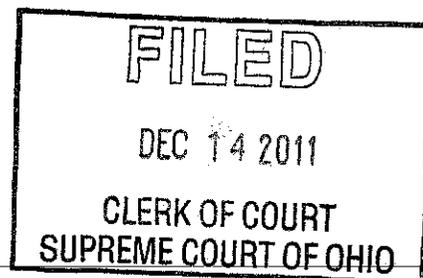
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Johnna M. Shia, Atty. Reg. No. 0067685

Assistant Prosecuting Attorney

301 W. Third Street, 5th Floor

Dayton, Ohio 45422



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## EXPLANANTION FOR REQUEST OF APPEAL

Defendant-Appellant, Cemino, states that his right to a fair and impartial review of his appeal by the 2nd District Court of Appeals was compromised due to an incorrect assessment of the indictment against him.

Additionally, Defendant-Appellant, Cemino, states that the trial court showed bias and abuse of discretion in sentencing him and failed to limit it's decision to facts in evidence by relying on unsupported statements from the victim.

## STATEMENT OF THE CASE

On August 6, 2010, appellant Michael J. Cemino was charged by indictment with one count of felonious assault(serious harm), one count of kidnapping(terrorize/physical harm), one count of kidnapping(sexual activity) and one count of rape(by force or threat of force). On December 1, 2010 Cemino entered a guilty plea to felonious assault as charged in the indictment. In exchange for his plea, the State dismissed the two counts of kidnapping and the one count of rape. On December 30, 2010 the trial court sentenced Cemino to six years in prison. Cemino appealed the sentence on the basis of facts not in evidence and judicial bias.

## STATEMENT OF THE FACTS

The opinion from the Second District Court of Appeals affirming the trial court's decision states that "Michael Cemino was indicted for felonious assault, kidnapping, and rape of his wife and one count of kidnapping a child under the age of thirteen".

At sentencing, the State acknowledged on the record that "the records from that night do not show any lasting or permanent injuries". The trial court acknowledged on open record that it had reviewed the medical records and stated "whether you believe them or not, I believe she has vision loss. I believe that she has hearing loss based on the type of beating that I read about."

During the sentencing hearing Cemino's case was called and then postponed because the trial court had not read the victim impact statement or letters from family and friends in support of Cemino.

The felonious assault charge is a second degree felony under ORC 2903.11(A)(1) with a possible prison term of from two to eight years.

## ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The Second District Court of Appeals erred in reviewing the case.

The opinion from the Second District Court of Appeals affirming the trial court's decision states that "Michael Cemino was indicted for felonious assault, kidnapping, and rape of his wife and one count of kidnapping a child under the age of thirteen".

The Second District Court of Appeals erred in its opinion by stating "one count of kidnapping a child under the age of thirteen". The indictment clearly states "Felonious Assault(serious harm), Kidnapping(terrorize/physical harm), Kidnapping(sexual activity), and Rape(by force or threat of force).

While this may only be a clerical error, the mention of a child under the age of thirteen could unduly influence the opinion of the Appellate Court as to the seriousness of the crime.

Proposition of Law No. 2: The trial court awarded sentence based upon facts not in evidence.

During sentencing, when asked as to why the court did not impose the minimum sentence the trial court responded "Whether you believe them or not, I believe that she has vision loss. I believe that she has hearing loss based upon the type of beating that I read about."

The medical records submitted as evidence show bruising of the right jaw, a laceration to the inside of the upper lip, no injury to the pelvis or vaginal area. Additional injuries noted included abrasion of the neck, abrasion to the left shoulder blade and hip, abrasion and laceration to left forearm.

While not demeaning the seriousness of these injuries, none of them are sufficient to cause vision or hearing loss as claimed by the victim. Additionally, the claim that the victim had "cuts to her mouth, cuts to the back of her throat where the Defendant shoved his fist--or hand down there" is unsupported by the medical records. The action of shoving a fist down someone's throat is likely to cause abrasions or lacerations to that person's hand. Cemino was never processed and there is no evidence to support this claim, indeed the arrest report states "no visible injury".

Proposition of Law No. 3: The trial court was unprepared to render an informed and unbiased decision.

During the sentencing hearing the Trial Court had not received a letter from the victim and had not received letters submitted by Cemino's counsel and from Cemino. Due to this the proceeding was recessed and would be recalled later.

After some of the letters were found the Trial Court proceeded to read them between other cases. After the case was recalled the Trial Court stated "I've been trying to read some of it. I've been looking at these. I want to look at them." "All right. For purposes of the record, I have read the statement by the prosecutor. I've read the statement by the defense attorney. I've read the statement by Mr. Cemino and I've read the statement by Betty Eldridge. I've read the victim input request and finally, I've read the letter by Sheila Cemino."

Clearly the Trial Court was not prepared to render an informed decision. Reading of these letters during other court proceedings would prevent the Trial Court from devoting full attention to them. Additionally, there were other letters submitted by defense counsel that were never read.

Proposition of Law No. 4: The trial court imposed a six year prison term, while within the guidelines for felonious assault, the term is excessive given the defendants actions and lack of evidence and is contrary to ORC 2929.11, Purposes of Felony Sentencing and ORC 2929.12, Seriousness of Crime and Recidivism Factors.

ORC 2929.11(B) states "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".

1. In State v. Harding, 2011-Ohio-2823, the defendant was convicted of Felonious Assault(deadly weapon) and Felonious Assault(serious harm) and was sentenced to three years.

2. In State v. Bootes, 2011-Ohio-874, the defendant was convicted of Felonious Assault(serious harm) and was sentenced to five years community control.

3. In State v. Tribble, 2011-Ohio-3618, the defendant was convicted of Felonious Assault(deadly weapon) and was sentenced to five years community control.

4. In State v. Julian, 2011-Ohio-4014, defendant was convicted of Felonious Assault(serious harm) and was sentenced to four years in prison.

ORC 2929.12(C) states "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.

ORC 2929.12(E) states "The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

- (1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

- (2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.
- (3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.
- (4) The offense was committed under circumstances not likely to recur.
- (5) The offender shows genuine remorse for the offense.

#### CONCLUSION

For the reasons discussed above, this case involves matters of a felony conviction that was not unbiased and based on fact. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully,  
Michael J. Cemino  
Appellant

#### CERTIFICATE OF SERVICE

I, Michael J. Cemino, certify that the foregoing notice of appeal was sent by ordinary United States mail to Johnna M. Shia, Atty. Reg. No. 0067685, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422 on December 13, 2011

*Michael J. Cemino*

Michael J. Cemino



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MONTGOMERY CO. OHIO  
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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO

Plaintiff-Appellee

v.

MICHAEL J. CEMINO

Defendant-Appellant

C.A. CASE NO. 24442

T.C. NO. 10CR2336

FINAL ENTRY

Pursuant to the opinion of this court rendered on the 4<sup>th</sup> day of November, 2011,  
the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

*Mike Fain*  
MIKE FAIN, Judge

*Mary E. Donovan*  
MARY E. DONOVAN, Judge

*Jeffrey E. Froelich*  
JEFFREY E. FROELICH, Judge



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MONTGOMERY CO. OHIO  
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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 24442
v.	:	T.C. NO. 10CR2336
MICHAEL J. CEMINO	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 4<sup>th</sup> day of November, 2011.

JOHNNA M. SHIA, Atty. Reg. No. 0067685, Assistant Prosecuting Attorney, 301 W. Third Street, 5<sup>th</sup> Floor, Dayton, Ohio 45422  
Attorney for Plaintiff-Appellee

JOSE M. LOPEZ, Atty. Reg. No. 0019580, 18 East Water Street, Troy, Ohio 45373  
Attorney for Defendant-Appellant

FROELICH, J.

On August 6, 2010, Defendant-appellant Michael Cemino was indicted for felonious assault, kidnapping, and rape of his wife and one count of kidnapping a child under the age of thirteen. Cemino pled guilty to felonious assault, and the remaining counts were

dismissed. The trial court sentenced Cemino to six years in prison. Cemino appeals his sentence.

Cemino's First Assignment of Error:

"THE TRIAL COURT ERRED AND ACTED CONTRARY TO LAW IN ITS SENTENCING OF MICHAEL J. CEMINO AS IT FAILED TO PROPERLY CONSIDER THE RECORD AND ALL MITIGATING FACTORS IN R.C. 2929.11 AND 2929.12."

In his first assignment of error, Cemino argues that the trial court abused its discretion in imposing a six-year prison sentence without considering the overriding purposes of felony sentencing set forth in R.C. 2929.11 or the seriousness and recidivism factors enumerated in R.C. 2929.12. Specifically, Cemino insists that the trial court abused its discretion by relying on evidence not in the record in finding that the victim had suffered from vision and hearing loss, when "the medical records reflected the victim suffered only facial contusions and no other serious injuries."

In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶13, the Ohio Supreme Court set forth a two-step procedure for reviewing felony sentences. First, "an appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G). If on appeal the trial court's sentence is, for example, outside the permissible statutory range, the sentence is clearly and convincingly contrary to law." *Id.* at ¶¶14-15. "If this first step is satisfied, the second step requires that the trial court's decision be reviewed under an abuse-of-discretion standard." *Id.* An abuse of discretion means that

the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. "[I]n the felony sentencing context, '[a]n abuse of discretion can be found if the sentencing court unreasonably or arbitrarily weighs the factors in R.C. 2929.11 and R.C. 2929.12.'" *State v. Hardin-Moore*, Montgomery App. No. 24237, 2011-Ohio-4666, ¶14, quoting *State v. Jordan*, Columbiana App. No. 09 CO 31, 2010-Ohio-3456, ¶12.

"After [*State v.*] *Foster*, [109 Ohio St.3d 1, 2006-Ohio-856,] trial courts are not required to make any findings or give reasons before imposing any sentence within the authorized statutory range, including maximum, consecutive, or more than minimum sentences, *Foster*, syllabus at ¶ 7. Courts, nevertheless, are still required to comply with the sentencing laws unaffected by *Foster*, such as R.C. 2929.11 and 2929.12 which require consideration of the purposes and principles of felony sentencing and the seriousness and recidivism factors. *State v. Mathis*, 109 Ohio St.3d 54, 846 N.E.2d 1, 2006-Ohio-855. However, a sentencing court does not have to make any specific findings to demonstrate its consideration of those general guidance statutes. *Foster* at ¶ 42; *State v. Lewis*, Greene App. No. 06 CA 119, 2007-Ohio-6607. And, where the record is silent, a presumption exists that the trial court has considered the factors. *State v. Adams* (1988), 37 Ohio St.3d 295, 297, 525 N.E.2d 1361. Further, where a criminal sentence is within statutory limits, an appellate court should accord the trial court the presumption that it considered the statutory mitigating factors. *State v. Taylor* (1992), 76 Ohio App.3d 835, 839, 603 N.E.2d 401; *State v. Crouse* (1987), 39 Ohio App.3d 18, 20, 528 N.E.2d 1283. Consequently, the appellant has an affirmative duty to show otherwise." *State v. Ramey*, Clark App. No. 2010 CA 19, 2011-Ohio-1288, ¶47.

Cemino was convicted of Felonious Assault, in violation of R.C. 2903.11(A)(1), a felony of the second degree, which carries a possible prison term of two to eight years. R.C. 2929.14(A)(2). The trial court imposed a six-year sentence, which falls within the prescribed statutory range.

The trial court afforded defense counsel and the prosecutor an opportunity to be heard, and the court allowed Cemino to make a statement before imposing sentence. Although not required to do so, the trial court offered an extensive explanation at the sentencing hearing for imposing a six-year sentence on Cemino. The court explained, "You did something ugly, nasty, despicable and disgusting to [your wife] \* \* \* And you need to think about how disgusting your behavior is." The court read from the victim's letter to the court, in which the victim expressed her mental turmoil over her husband's actions. Cemino's wife explained that she has vision and hearing loss, and scars in her throat, which the trial court believed to be true in light of the nature of the beating Cemino inflicted upon his wife. The court stated that Cemino's behavior demonstrates that he is a man who belongs in prison; he is "a man who does not know control."

The court also explained that Cemino's actions demonstrate an escalation in violence over time, stating "I find as a matter of law that his behavior escalates in violence, beginning with the abduction of a little girl who was caught before anything or -- or he was found out and he was caught before anything happened and then we escalate and go into this terrible, terrible action that occurred on that night." Cemino had misdemeanor convictions for criminal damaging and driving under the influence, and he had been released from prison on an unrelated conviction for attempted abduction just the week before the felonious assault.

Cemino contends that the trial court abused its discretion by making a factual error when the court found that the victim suffered from permanent vision and hearing loss. Cemino made no explicit objection to his sentence, although he did ask the trial court for an explanation of why it imposed a six-year sentence. We will view this as sufficient to have preserved Cemino's right to appeal his sentence.

In support of his claim that the trial court abused its discretion, Cemino insists that the medical records from the night of the assault indicate that the victim "had facial contusions and no other serious injuries." However, as the State points out, those were not the only medical records, nor were facial contusions the only evidence of injury to the victim. There were photographs not only of the facial contusions, but also of cuts to the victim's mouth and the inside of her throat, as well as cuts and bruises on her arm and other parts of her body. Additionally, the victim exhibited swelling to both sides of her head and distorted vision.

Contrary to Cemino's assertion, there was ample evidence from which the trial court could reasonably conclude that the victim had suffered from vision and hearing loss. Prior to imposing sentence, the trial court considered<sup>1</sup> the December 1, 2010 victim impact statement and the victim's November 9, 2010 letter to the court, both of which were included in the pre-sentence investigation report, and both of which indicate that the victim suffered from vision and hearing loss. A trial court may consider the contents of a pre-sentence investigation report when imposing sentence. See, e.g., *State v. Saunders*, Greene App. No. 2009 CA 82, 2011-Ohio-391, ¶29, citations omitted.

Furthermore, in imposing sentence a trial court may consider other charges filed

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<sup>1</sup>The court quoted extensively from the letter sent by the victim.

against a defendant that were dismissed as part of a plea agreement. *State v. Williams*, Montgomery App. No. 19026, 2002-Ohio-2908, citing *State v. Wiles* (1991), 59 Ohio St.3d 71, 78. In exchange for Cemino's guilty plea to the felonious assault charge, the State agreed to dismiss three additional felony charges against Cemino: two counts of kidnapping and one count of rape.

We conclude that Cemino's sentence is not contrary to law and that the trial court did not abuse its discretion in imposing a six-year sentence. Cemino's first assignment of error is overruled.

## II

Cemino's Second Assignment of Error:

"MICHAEL J. CEMINO'S SENTENCE WAS PREJUDICIALLY INFLUENCED BY JUDICIAL HOSTILITY AND/OR BIAS TO THE POINT OF VIOLATING HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND TO BE FREE OF CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO STATE CONSTITUTION."

Cemino concludes in his second assignment of error that since his sentence was not supported by the record, it must have been "based merely upon prejudice and bias" against him. "Judicial bias is defined as 'a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and facts.'" *State v. Miller*, Lucas App. No. L-08-1314, 2009-Ohio-3908, ¶20, quoting *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-

2128, ¶34. "A trial judge is 'presumed not to be biased or prejudiced, and the party alleging bias or prejudice must set forth evidence to overcome the presumption of integrity.' *Weiner v. Kwiat*, [Montgomery App.] No. 19289, 2003-Ohio-3409, ¶90, quoting *Eller v. Wendy's Internatl., Inc.* (2000), 142 Ohio App.3d 321, 340 \* \* \*." *Id.*, at ¶21. "[T]he appearance of bias or prejudice must be compelling to overcome these presumptions." *In re Disqualification of George*, 100 Ohio St.3d 1241, 2003-Ohio-5489, ¶5.

As evidence of the trial court's alleged bias, Cemino insists that "the trial court not only scolded Appellant and his counsel in open court on a number of occasions but, in addition, handed down an excessive sentence based upon medical evidence unsupported by the record." We have already concluded above that Cemino's sentence was not excessive and that the trial court's finding that Cemino's wife had suffered from vision and hearing loss was supported by the record.

Cemino points to only two specific instances of so-called scolding. When Cemino's attorney asked why his client was being given more than a minimum sentence, the court explained, "Your client doesn't deserve the minimum sentence. You - - he doesn't - - you don't need to raise your eyebrows. He's been sentenced to prison before. I know what that was about. And he would not admit to what he did and what he did was awful.

"Don't shake your head. What you did was awful and I read that last report. I read it. We lived through it. You wouldn't admit to what you did. You just got out of prison. You - - and then as soon as you get out of prison you do this awful act. He does not need the minimum sentence. And I don't have to impose that based upon the kind of injuries that this lady suffered."

The trial court's brief directives do not indicate either hostility toward Cemino or

favoritism toward the State; nor do they show that the trial court "specifically verbalize[d] personal bias or prejudice." *Miller*, supra, at ¶21, citation omitted. The admonishments may have been intended to preserve for the record what the trial court deemed to be the inappropriate actions of Cemino and his attorney. The statements do not amount to compelling evidence of bias, and they are insufficient to overcome the presumption of trial court integrity.

Additionally, Cemino states "the trial court also acknowledged on the record it had considered Appellant's prior criminal offense in determining Appellant's sentence in this matter." He implies that a trial court is not permitted to consider a defendant's criminal record when sentencing him on a new conviction. To the contrary, as the trial court explained, a defendant's criminal history is highly relevant to the issue of his likelihood for future recidivism. R.C. 2929.12(D).

In short, Cemino disagrees with the sentence that the trial court imposed. However, a party's disagreement or dissatisfaction with a trial court's ruling, without more, does not constitute bias or prejudice. *In re Disqualification of Aubry*, 117 Ohio St.3d 1245, 2006-Ohio-7231, ¶9, citation omitted.

Cemino's second assignment of error is overruled.

III

Having overruled both of Cemino's assignments of error, we affirm the judgment of the trial court.

.....  
FAIN, J. and DONOVAN, J., concur.

Copies mailed to:

Johnna M. Shia  
Jose M. Lopez  
Hon. Frances E. McGee