

ORIGINAL

IN THE SUPREME COURT OF OHIO

12-1229

STATE OF OHIO,
:
:
Plaintiff-Appellee,
:
vs.
:
ROBERT STEIN,
:
Defendant-Appellant.

Case No. _____
On Appeal from the Cuyahoga
County Court of Appeals
Eighth Appellate District
C.A. Case No. 97395

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ROBERT STEIN**

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EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This Court should accept this case to clarify the duties and roles of trial and appellate courts in imposing and reviewing the sentences to be imposed on defendants. This case provides an excellent record for this Court to review the unintended consequences of *State v. Foster*, 109 Ohio St.3d 1 (2006) and *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, and to refine the application of *United States v. Booker*, 543 U.S. 220 (2005) and *Gall v. United States*, 552 U.S. 38 (2007) to Ohio. This case presents the perfect opportunity to bring Ohio into harmony with the interpretation of *Booker* that prevails in federal court, and also to address the post-*Foster* tendency of Ohio trial and appellate courts to oversentence, which has led to large increases in the Ohio prison population and wide disparities amongst the sentences of similar offenders. Most importantly, this case gives this Court the opportunity to bring Ohio sentencing practices closer what the General Assembly actually intended when it enacted the sentencing reforms in Am.Sub.S.B. 2 and H.B. 86.

The decisions in *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005) dramatically changed the sentencing landscape in the United States. In light of these changes, this Court decided *State v. Foster*, 109 Ohio St.3d 1 (2006), which severed Am.Sub.S.B. 2's statutory language requiring judicial fact-finding and significantly altered appellate review of felony sentences. After *Foster*, sentencing courts were given much broader discretion to impose sentences within the felony ranges and

were no longer required to make specific statutory findings to justify the particular sentence imposed.

Am.Sub.S.B. 2 was designed as a system of guided discretion—the statutory scheme used factfinding to guide trial courts toward appropriate sentences. Moreover, courts were required to consider sentencing consistency, among other important goals. The Ohio Sentencing Commission found that S.B. 2’s guidance produced measurably greater consistency in sentencing across the state and across felony offense levels. See Diroll and Ohio Criminal Sentencing Commission, *A Decade of Sentencing Reform, A Sentencing Commission Staff Report* (March 2007) 20, <http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/Publications/sentencingReform.pdf>.

But when it severed judicial factfinding, *Foster* had the unintended effect of allowing virtually unfettered discretion in felony sentencing, and which in turn has resulted in a significant increase in the prison population. See Diroll and Ohio Criminal Sentencing Commission, *Prison Crowding: The Long View, With Suggestions – 2011 Monitoring Report* (March 2011) 14, <http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/Publications/MonitoringReport2011.pdf> (noting that “DRC estimates that the Foster decision accounts for a gain of 4,000+ inmates since the ruling, with a projected final impact of about 8,000.”) Moreover, *Foster* and its progeny have also permitted trial courts to impose wildly different sentences on similarly-situated offenders being sentenced for the same crimes—one of the very evils Am.Sub.S.B. 2 was enacted to address.

Foster used the same severance remedy applied to the Federal Sentencing Guidelines by the United States Supreme Court in *United States v. Booker*, 543 U.S. 220 (2005). The effect in the federal system has been notably different from that in Ohio, though—the Federal Sentencing Guidelines are now advisory, and sentences are reviewed on appeal for reasonableness in departing from those guidelines. *Gall v. United States*, 552 U.S. 38 (2007). It appears that this Court aspired to achieve a similar result when it decided *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, but *Kalish* has generally not prevented appellate courts from affirming any sentence within the statutory range, absent a gross abuse of discretion.¹

This Court's guidance is required to ensure that the appellate courts are performing their proper function of reviewing sentences for equivalence and equitability. And where an imposed felony sentence is substantially different from that imposed for other, similar offenses by similarly situated offenders, the trial court should justify and explain the bases for its sentencing choices, to allow appellate courts to review the sentence for reasonableness in accordance with *Gall* and *Kalish*. This Court should accept review of this case because it implicates important questions of proper appellate review and fair sentencing, which affect virtually every felony defendant.

¹ *Kalish* was a 3-1-3 plurality opinion, and that has created some additional confusion in the appellate courts. For example, in *State v. Zaslov*, 8th Dist. No. 91736, 2009-Ohio-3734, the Cuyahoga County Court of Appeals specifically concluded that the plurality opinion was persuasive rather than binding. Similarly, the Summit County Court of Appeals has described *Kalish* as being of "questionable precedential value." *State v. Jenkins*, 9th Dist. No. 24166, 2008-Ohio-6620, ¶ 10 n.1.

STATEMENT OF THE CASE AND FACTS

In July 2010, the Ohio Internet Crimes Against Children (ICAC) Task Force began investigating a computer associated with Mr. Stein's internet protocol (IP) address. ICAC investigators connected to Stein's computer and downloaded three files that contained child pornographic content. In August 2010, law enforcement executed a search warrant at Mr. Stein's home. Investigators analyzed Mr. Stein's computer and discovered numerous child pornographic videos and photographs he had collected and saved to his hard drive.

In December 2010, Mr. Stein was indicted on 102 counts relating to child pornography. In August 2011, he pleaded guilty to one count of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(2), fifty-four counts of pandering sexually-oriented matter involving a minor in violation of R.C. 2907.322(A)(1), twenty-four counts of illegal use of a minor in nude material or performance in violation of R.C. 2907.323(A)(1), and one count of possessing criminal tools in violation of R.C. 2923.24(A).

In his sentencing memorandum, Mr. Stein submitted a collection of over 70 cases of similar offenses in Cuyahoga County, and argued that he should be sentenced in accordance with the pattern established in those other cases. Cf. R.C. 2929.11(B). But the trial court sentenced Stein to an aggregate sentence of ten years: five years for Count One, pandering sexually oriented matter involving a minor; five years on each of the fifty-four counts of pandering sexually-oriented matter involving a minor, concurrent to one another, but

consecutive to Count One; five years on each of the twenty-four counts of illegal use of a minor in nude material or performance, concurrent to one another and concurrent to all other counts; and one year for possessing criminal tools, concurrent to all other counts. The trial court also notified Stein that he would be subject to five years of mandatory post-release control upon his release from prison and that he was labeled a Tier II sex offender.

On appeal, Stein argued that the trial court erred by sentencing him to a term of ten years, because the vast majority of individuals convicted of possession of child pornography in Cuyahoga County received lesser sentences. The Eighth District reviewed a list from Stein's sentencing memorandum that described over seventy child pornography cases in Cuyahoga County. Among other information, the list outlined the number of counts each offender was charged with, the trial court judge who presided over the case, and the sentence the offender received. Nonetheless, the Eighth District affirmed the trial court's judgment. This appeal follows.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW I

If a trial court imposes a felony sentence substantially different than the sentences imposed upon defendants convicted of similar offenses, that sentence is unreasonable unless the court adequately explains its decision to allow for meaningful appellate review (*United States v. Booker*, 543 U.S. 220 (2005), *Gall v. United States*, 552 U.S. 38 (2007), *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, explained and applied.)

Ohio appellate courts review felony sentences using the two-prong test set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. 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. *Id.* at ¶ 4. If a trial court's sentence is outside the permissible statutory range, the sentence is contrary to law and cannot stand. *Id.* at ¶ 15. Sentences within the permissible statutory range are subject to review for abuse of discretion. *Id.* at ¶ 17.

Kalish followed *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, in which this Court severed the statutory provisions that required specific judicial fact-finding prior to the imposition of a non-minimum sentences. *See id.* at ¶ 11. As a result, trial courts now "have full discretion to impose a prison sentence within the statutory range . . . and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Id.* at ¶ 100.

Ohio's lower courts have, unfortunately, taken this language to mean that they are free to impose sentences without reason, and without providing any explanation that the appellate courts can use on review. After *Foster*, the record may be completely silent as to the judicial findings that appellate courts were originally meant to review. See *Kalish* at ¶ 12.

This guidance from *Foster* and *Kalish* has created confusion. For example, according to the Eighth District, "in order to demonstrate inconsistency, the appellant must point to facts and circumstances within the record which demonstrate the sentencing court's failure to properly consider the relevant factors." *State v. Sutton*, 2012-Ohio-1054, ¶ 18. But an appellant cannot make such a demonstration if a trial court record is insufficient or silent as to the relevant judicial findings. Taken together, isolated passages from *Foster* and *Kalish* create a perverse incentive for trial courts to refrain from stating the reasons for their sentences. Thus, not only have the unconstitutional portions of Am.Sub.S.B. 2 been severed, as *Foster* and *Kalish* intended, but also appellate courts are almost completely evading their responsibilities to review sentences for fairness and proportionality.

Fortunately, in a case involving federal sentencing, the United States Supreme Court has offered a solution. Following *Gall v. United States*, 552 U.S. 38 (2007), this Court should rule that Ohio's courts must sufficiently justify the appropriateness of disproportionate sentences. Where a court "departs" from a demonstrated range, it must offer a compelling justification. *Id.* at 46. If a sentence is inconsistent with the guidelines, federal courts "must consider

the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of variation.” *Id.* Then, they must “adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.” *Id.* The Court stated that “failing to adequately explain the chosen sentence—including an explanation for any deviation” is unreasonable and amounts to significant error. *See Gall* at 51.

Review for abuse of discretion under *Kalish* functions as a basic, substantive review of sentence lengths and should allow for the comparison and explanation of sentencing decisions. When a sentence departs from a demonstrated sentencing range, the record should reflect the court’s reasoning on which that decision is based. But absent a statement in the record explaining why the particular sentence was imposed, there is no way to ensure that the sentence complies with the sentencing principles enacted by the General Assembly. Meaningful appellate review can only occur if trial courts are required to explain their sentencing decisions on the record.

Consistent with *Blakely*, *Booker*, and *Foster*, Ohio’s trial courts need not use exact language or make specific findings when imposing sentences. And because no specific reasoning is “essential to punishment,” requiring explanation of a sentencing decision does not run afoul of the Sixth Amendment’s jury trial guarantee. *Cunningham v. California*, 549 U.S. 270, 291 (2007). But a trial court’s general explanation of its reasoning must provide a clear record for effective appellate review. This is consistent with this Court’s jurisprudence and with *Booker*, in which the United States Supreme Court

reasoned that appellate review for reasonableness would help to avoid “excessive sentencing disparities” and “would tend to iron out sentencing differences.” *Booker*, 543 U.S. at 262-65.

The United States Court of Appeals for the Sixth Circuit has interpreted *Gall* and *Booker* to mean that a sentence may be unreasonable if it fails to provide enough reasoning to provide for meaningful appellate review. *United States v. Christman*, 607 F.3d 1110, 1121-1122 (6th Cir.2010). In *Christman*, a case involving a below-guidelines sentence, the government argued that the district failed to address several factors that were relevant to sentencing, including unwarranted disparity. The district court did not adequately address these issues; it simply implied its sentence was based on specific deterrence and potential disparity, and did not address other factors. Accordingly, the Sixth Circuit held that the sentence was substantively unreasonable for failing to provide sufficient reasoning. Similarly, this Court should conclude that under *Kalish*, a sentence within the statutory sentencing range may still be unreasonable if it markedly exceeds the sentences typically imposed in similar cases, and if the trial court fails to explain why it imposed a disproportionate sentence. *Compare United States v. Benson*, 591 F.3d 491 (6th Cir.2010).

Here, Mr. Stein’s sentence *was* substantively unreasonable even though it was within the statutory range. The sentence is not consistent with those of other, similar offenders. Recent cases in the Cuyahoga County Court of Common Pleas sufficiently demonstrate that the sentence was inconsistent with sentences imposed for similar crimes by similar offenders. Furthermore,

the sentencing court failed to provide sufficient reasoning in imposing its sentence. The trial court simply stated that it considered the purposes and principles of felony sentencing. *Stein* at ¶ 11. But mere recitation of pertinent statutory factors is not sufficient for meaningful appellate review—instead, when departing from what prior cases suggest is an appropriate sentence, the trial court must provide an explanation for that departure, to permit an appellate court to determine whether the imposed sentence is reasonable. See *Christman* at 1121.

This Proposition of Law would simply require sentencing courts to justify their chosen sentences when a substantial difference will result between sentences imposed upon defendants convicted of other, similar offenses. Trial courts should adequately explain these sentences to allow for meaningful appellate review and to promote fair sentencing. Meaningful review cannot occur unless reviewing courts know which facts in the record and what reasoning support the sentence the trial court has imposed.

PROPOSITION OF LAW II

Defendants challenging sentence lengths on grounds of inconsistency or disproportionality must make an affirmative showing to the courts regarding the sentences typically received by similarly situated offenders who have committed similar offenses.

Even after *Booker*, the federal sentencing guidelines continue to provide detailed guidance to the district courts regarding appropriate sentences for each individual convicted of criminal offenses. In turn, those guidelines also inform the work of reviewing courts, which are charged with the responsibility

of ensuring consistency in sentencing, and provide those reviewing courts with objective reference points regarding appropriate sentences.

In this state, however, the sentencing statutes include within-range sentencing guidance only in certain scenarios. By way of general example, first-time offenders and repeat offenders are often required to be sentenced differently, due their different criminal histories. But generally speaking, trial courts are offered no concrete guidance regarding sentence lengths, in the manner that federal sentencing judges are given such guidance. Thus, it quickly becomes apparent that meaningful appellate review of the consistency of sentences in Ohio cannot simply be modeled on the federal approach. Further, it is also readily apparent that Ohio's appellate courts cannot be burdened with the obligation of ascertaining what sentences are typically being imposed for given offenses, committed by defendants with given, similar backgrounds.

Thus, it is reasonable to place an affirmative burden on a defendant challenging the length of his or her sentence as being inconsistent with or disproportionate to other sentences in similar cases. More specifically, such a defendant should have the burden of establishing what sentences typically have been imposed in such similar cases. Thus, at the trial-court level, before sentencing, trial counsel would be obligated to present to the court a presumptively fair sentencing range, based on facts in the record and the sentences imposed in other similar cases. Then, on appeal, an additional burden would fall on the defendant-appellant to establish that the sentence

imposed by the trial court is outside the range for similar offenders to such an extent that it can be deemed unreasonable.

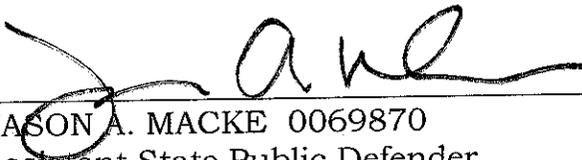
This practice is not simply rooted in policy. As this Court has repeatedly observed, the law places a duty on the sentencing court to ensure that its sentence is “reasonably calculated to achieve the two overriding purposes of felony sentencing”—punishment and deterrence. See R.C. 2929.11(A) (cited in *Foster* at ¶ 36 and *Kalish* at ¶ 15-17). And in determining whether a sentence fulfills these purposes, trial courts are required to consider the twenty-three factors in R.C. 2929.12 “to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code.” And recently, the legislature amended R.C. 2929.11 to state that the purpose of a sentence is “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.*” R.C. 2929.11(A) (emphasis added); 2011 H.B. 86 Sec. 1 (eff. Sept. 30, 2011). These statutes clearly demonstrate that the legislature intended to require both trial prosecutors and criminal defendants to take an active role and provide the trial court the proper information upon which to base a sentence. For this reason, it is completely appropriate to require the defendant (both at sentencing and on appeal) to demonstrate that the sentence requested fulfills the requirements of R.C. 2929.11 and is presumptively fair given the facts sentences imposed in similar cases.

CONCLUSION

Mr. Stein respectfully requests that this Court accept jurisdiction over his case and, through adoption of the two propositions of law above, establish meaningful sentence-length review which will improve consistency in Ohio sentencing and allow for appellate correction of outlier sentences that might not constitute gross abuses of discretion. For the reasons stated above, this Court should reverse the decision of the Eighth District and remand this case to the trial court for additional proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant Robert Stein was sent by regular U.S. mail, postage prepaid to the office of William D. Mason, Cuyahoga County Prosecutor, 9th Floor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, on this 23rd day of July, 2012.



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
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	:	Eighth Appellate District
ROBERT STEIN,	:	
	:	C.A. Case No. 97395
Defendant-Appellant.	:	

APPENDIX TO

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ROBERT STEIN**

Court of Appeals of Ohio

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EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
No. 97395

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT STEIN

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DEFENDANT-APPELLANT

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74107592

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-545011

BEFORE: Boyle, P.J., S. Gallagher, J., and Kilbane, J.

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PER APP.R. 22(C)

JUN 07 2012

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BY _____ DEP.

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MARY J. BOYLE, P.J.:

{¶1} Defendant-appellant, Robert Stein, appeals his ten-year sentence.¹

He raises three assignments of error for our review:

“[1.] The defendant-appellant’s right to due process of law as guaranteed by Article I, Section 10 of the Ohio State Constitution and the Fourteenth Amendment to the United States Constitution was violated when he was sentenced to consecutive prison terms totaling ten years.

“[2.] The trial court abused its discretion when it sentenced the defendant-appellant to ten years in prison, because the sentence was grossly disproportionate to that imposed for other, similar offenders.

“[3.] The trial court abused its discretion by considering prejudicial matters outside the record when imposing a sentence.”

{¶2} Finding no merit to his arguments, we affirm.

Procedural History and Factual Background

{¶3} In December 2010, Stein was indicted on 102 counts relating to child pornography. In August 2011, he pleaded guilty to one count of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(2), 54 counts of pandering sexually-oriented matter involving a minor in violation of R.C. 2907.322(A)(1), 24 counts of illegal use of a minor in nude material or performance in violation of R.C. 2907.323(A)(1), and one count of possessing

¹Stein was sentenced before the effective date of H.B. 86.

criminal tools in violation of R.C. 2923.24(A). All counts included a forfeiture specification.

{¶4} The trial court sentenced Stein to an aggregate sentence of ten years: five years for Count 1, pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(2); five years on each of the 54 counts (Counts 2-55) of pandering sexually-oriented matter involving a minor in violation of R.C. 2907.322(A)(1), concurrent to one another, but consecutive to Count 1; five years on each of the 24 counts (Counts 56-79) of illegal use of a minor in nude material or performance in violation of R.C. 2907.323(A)(1), concurrent to one another and concurrent to all other counts; and one year for possessing criminal tools, concurrent to all other counts. The trial court further ordered Stein to forfeit two cameras, a cell phone, a computer tower, 65 hard drives, a mouse, a keyboard, and miscellaneous CDs and DVDs. The trial court also notified Stein that he would be subject to five years of mandatory postrelease control upon his release from prison and that he was labeled a Tier II sex offender.

{¶5} It is from this judgment that Stein appeals.

Standard of Review

{¶6} This court reviews felony sentences under the two-prong test set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. Under the first prong, we review whether the trial court complied with all

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applicable rules and statutes to determine if the sentence is clearly and convincingly contrary to law. *Id.* at ¶ 4. If the first prong is satisfied, then we review the trial court's decision for abuse of discretion. *Id.*

Ten-Year Prison Sentence

{¶7} In his first assignment of error, Stein contends that the trial court erred when it sentenced him to a more-than-the-minimum prison term and sentenced him to consecutive terms.² Stein acknowledges that a trial court no longer has to provide its reasons for imposing a sentence that is more than the minimum or is consecutive, but he nonetheless argues that the trial court "failed to provide sufficient reasoning in its determination." He maintains that the question in this case is not whether a ten-year sentence is excessive in a child pornography case, but whether it is excessive for him, given the fact that he "without question differentiated himself from all other[s] by engaging in a regimen of treatment that could not be surpassed." Stein asserts that for him, ten years "was not only unnecessary and excessive but actually counterproductive."

{¶8} Stein's sentence of ten years was clearly not contrary to law. As the trial court indicated, it could have sentenced Stein to over 600 years in prison. Thus, under the second prong of *Kalish*, we must determine if the trial court abused its discretion in sentencing Stein to ten years in prison.

²Stein was sentenced before the effective date of H.B. 86.

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{¶9} Before sentencing Stein, the trial court obtained a presentence investigation report ("PSI") and a psychological report. The trial court heard testimony from Dr. Michael Aronoff, the court's chief of psychology. Dr. Aronoff testified that Stein had depressive disorder not otherwise specified and anxiety disorder. Dr. Aronoff stated that Stein "scored positively" on the ABEL assessment, meaning he "has a significant sexual interest in adolescent and adult females," which meant that he scored normal for heterosexual men. But Dr. Aronoff further stated that Stein was a "possible pedophile" because of the act of viewing child pornography occurring over a period of time and the "clinical distress that it caused him."

{¶10} The trial court further heard from defense counsel, Stein, Stein's wife, and a family friend. Defense counsel explained how Stein immediately sought help after being arrested. Stein obtained individual therapy from a counselor, who also submitted a glowing letter to the court regarding Stein's progress over the period of his treatment. Stein attended more than 170 meetings for sexual addicts and had obtained a "one-year token of sobriety." And Stein had been gainfully employed and had the support of his wife and many family and friends, as evidenced by 19 letters from friends and family, as well as Stein's wife's testimony at the sentencing hearing.

{¶11} The trial court expressly stated that it considered the purposes and principles of felony sentencing, as well as the factors listed in R.C. 2929.12. And

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although it did not have to, the trial court expressly discussed the R.C. 2929.12 factors. When considering whether Stein's conduct was more serious than conduct normally constituting the offense, the trial court found that the "physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim." Specifically, the trial court stated, "when I refer to victim, I, of course, refer to for example the three-year old child with a penis draped all over her in video number 279, the 48 minute video, and among the other victims that we saw[.]"

{¶12} The trial court found that the victims "suffered serious physical, psychological or economic harm as a result of the offense." It stated, "every time the video or photos in this matter are exchanged the child in those videos is harmed again. Nothing ever leaves the internet."

{¶13} The trial court further found that Stein "committed this offense as part of an organized criminal activity," because he downloaded and shared child pornography through an online site called LimeWire, where users share photographs and videos of child pornography. During the allied offenses portion of the sentencing hearing, a child pornography investigator explained that LimeWire is an online file sharing network, or peer-to-peer network, that allows users to share and transfer child pornography files between one another.

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{¶14} The trial court did not find any factors in Stein's favor indicating that his conduct was less serious than conduct normally constituting the offense.

{¶15} The trial court then found that according to the PSI, Stein's risk of recidivism was low, and he had not had a prior offense. Even so, after considering all of the factors, the trial court found that a sentence of community control would "absolutely demean the seriousness of this offense."

{¶16} The trial court indicated that it read all of the letters submitted to the court on Stein's behalf (19 letters, including a treatment letter from Candace Risen, who had been treating Stein since his arrest). But the trial court stated that it found the letters "spoke formulaically in glowing terms of the defendant and his family."

{¶17} At the allied offenses part of the sentencing hearing, the trial court heard evidence from child pornography investigators that they found 81 videos and 285 photos on Stein's computer hard drive. These images and videos included files that Stein had obtained after searching "PTHC," which stands for "preteen hard core." The investigators described videos and images of prepubescent girls in unimaginable sexual situations with adult males. And although many of the files had been obtained on a single day, Stein admitted that he had been addicted to pornography for many years, and had been viewing child pornography for five years.

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{¶18} Further, investigators testified that there was no evidence of any “hands on” offenses with children. But Dr. Aronoff, the court’s own witness, testified that Stein was a “possible pedophile” because of the act of viewing child pornography occurring over a period of time and the “clinical distress that it caused him.”

{¶19} Thus, in reviewing the record before us, we find that the trial court gave careful and substantial deliberation to the relevant statutory considerations in sentencing Stein.

{¶20} We note that in a recent case from this court, *State v. Mahan*, 8th Dist. No. 95696, 2011-Ohio-5154, the defendant was a first-time offender, as Stein is here. And the defendant in *Mahan* also had the support of family and friends, was gainfully employed, and had attended 100 meetings for sexual addicts. This court stated:

We acknowledge that a 16 year prison term imposed on a first-time offender who has, by all accounts, led an otherwise productive, law abiding life is a harsh sentence and is perhaps not one that we may have imposed. Nonetheless, the sentence was significantly less than what the court could have imposed based on defendant’s 95 convictions. There was ample testimony in the record of the harm that has been, and continues to be, inflicted upon the victims who are the subjects of the material being viewed in these types of cases. The images, once uploaded, continue to circulate on the internet where individuals, like defendant, view them and make them available for viewing by others. The wide range of sentences that have been apparently imposed on defendants convicted of similar offenses is the result of the discretion vested in the trial court. Defendant’s sentence was within the statutory range, lawful, and supported by the record,

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thus we cannot say it was unconscionable or otherwise an abuse of the trial court's discretion. *Id.* at ¶ 63.

{¶21} Accordingly, we find no abuse of discretion on the part of the trial court. Stein's first assignment of error is overruled.

Disproportionate Sentence

{¶22} In his second assignment of error, Stein argues that the trial court erred when it sentenced him because "the vast majority of individuals convicted of child pornography offenses in Cuyahoga County * * * have received a lesser sentence." As such, Stein contends the trial court abused its discretion in sentencing him to ten years.

{¶23} R.C. 2929.11(B) provides that: "A sentence imposed for a felony shall be * * * consistent with sentences imposed for similar crimes committed by similar offenders."

{¶24} In Stein's sentencing memorandum, he submitted a list of over 70 child pornography cases in Cuyahoga County. In the list, he included the name of the case, the case number, the number of counts each offender was charged with, the trial court judge who presided over the case, and the sentence the offender received.

{¶25} A review of the list, however, does not tell any facts about the individual case. Thus, we do not know whether the offenders in those cases were similar to Stein. As this court recently stated in *Mahan*, in upholding a 16-year sentence on an offender who pleaded no contest to 95 counts of various child

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pornography charges, “these journal entries tell us little, if anything, of the offender characteristics and provide no information beyond the convictions and terms of the sentences.” *Id.*, 2011-Ohio-5154, at ¶ 60.

{¶26} Accordingly, we overrule Stein’s second assignment of error.

Matters Outside the Record

{¶27} In his third assignment of error, Stein argues that the trial court erred when it sentenced him because it improperly considered “prejudicial matters” outside the record. Specifically, Stein complains of two statements made by the trial court at the sentencing hearing; the first is the trial court’s statements on the evils of child pornography, and the second is a statement the trial court made when discussing LimeWire being an organized crime (in its discussion of the R.C. 2929.12 factors):

You may not have offended on anyone that you claim, however, who is to say that Joe Shlabotnick from Milwaukee, Wisconsin who went into LimeWire and downloaded materials from your computer did not then go out and rape and murder a little child. We don’t know that. We will never know that. That’s why the Court is finding that you have done this as part of an organized criminal activity.

{¶28} After a thorough review of the lengthy sentencing transcript, however, we find no abuse of discretion on the part of the trial court. Its statements on the evils of child pornography cannot be disputed — even by Stein. And although there was no evidence before the trial court that Stein — or anyone who obtained child pornography files from Stein via file sharing —

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raped or murdered children, we find that those statements alone do not cancel out the many proper factors considered by the trial court in sentencing Stein.

{¶29} Accordingly, we overrule Stein's third assignment of error.

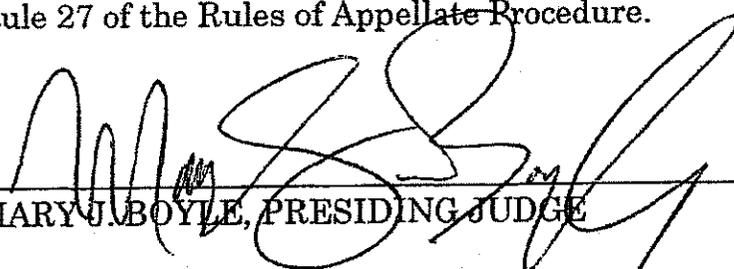
{¶30} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



MARY J. BOYLE, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
MARY EILEEN KILBANE, J., CONCUR

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