

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-P-0065
GARY A. VARGO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2010 CR 0141.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder* and *Theresa M. Scahill*, Assistant Prosecutors, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Eric R. Fink, 217 North Water Street, Kent, OH 44240 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This criminal appeal is from a final judgment of the Portage County Court of Common Pleas. Appellant, Gary A. Vargo, seeks reversal of the prison term imposed by the trial court after he had entered a guilty plea to certain charges. Appellant challenges both the length of the term and the procedure the trial court followed in making its sentencing determination.

{¶2} In March 2010, the Portage County Grand Jury returned an indictment charging appellant with one count of rape, three counts of gross sexual imposition, and

one count of tampering with evidence. The rape and gross sexual imposition charges alleged that the victim was below the age of 13 at the time of the commission of the sexual offenses. The indictment further alleged that the sexual offenses took place over a three-year period from November 2006 until November 2009.

{¶3} After the criminal action had been pending for approximately two months, the grand jury returned a supplemental indictment against appellant containing six new counts of rape, two new counts of gross sexual imposition, and a separate count of attempted rape. Like the original four sexual charges, all of the nine new counts stated that the crimes had occurred when the victim was below the age of 13. In regard to the date of these offenses, the supplemental indictment asserted that the majority of them had been committed during a distinct three-year period from November 2003 until November 2006.

{¶4} Appellant entered an initial plea of not guilty to all 14 charges in the two indictments. After the parties engaged in extensive discovery, a jury trial was scheduled to begin on July 13, 2010. However, on that date, appellant and the state negotiated a plea agreement as to all pending counts. Pursuant to the terms of this bargain, the state dismissed all seven counts of rape, the sole count of attempted rape, and the sole count of tampering with evidence. The state also amended one of the charges of gross sexual imposition to sexual battery, a third-degree felony under R.C. 2907.03. Appellant agreed to enter a guilty plea to the “sexual battery” count and the four remaining counts of gross sexual imposition, third-degree felonies under R.C. 2907.05.

{¶5} Upon accepting appellant’s guilty plea in a written judgment, the trial court referred the matter to the Adult Probation Department for an expedited pre-sentencing

investigation and report. At the subsequent sentencing hearing, the victim and certain members of her immediate family gave victim impact statements. The statements established that appellant is the step-grandfather of the victim, and that she spent a considerable amount of time at his home throughout her childhood. In addition, both the victim and her mother briefly described the nature of the acts the victim experienced.

{¶6} As part of his final argument on sentencing, appellant's counsel indicated that his client still denied that any rape had ever occurred. Counsel further emphasized that the guilty plea had been limited to the counts of gross sexual imposition and sexual battery. In response, the state noted that the plea agreement was expressly structured to enable the trial court to impose a term of five years on each of the five offenses, for a maximum aggregate sentence of 25 years. According to the state, the degree of harm to the victim and her extended family justified the imposition of the longest term possible.

{¶7} After permitting appellant to make a separate statement, the trial court stated on the record that the evidence against him had been considerable. In support of this point, the court referenced the results of certain DNA tests and the basic credibility of the victim's version of the events. The court also stated that it accepted the plea agreement solely to save the victim from testifying, and that appellant only entered the guilty plea in order to avoid a life sentence. Based upon this, the court sentenced appellant to serve the maximum prison term of five years on each offense, consecutively, for a total term of 25 years.

{¶8} During the sentencing hearing, the trial court did not refer to any statutory factors governing the imposition of maximum or consecutive prison terms. Similarly, the

trial court's final written judgment did not contain any express reference to such factors. Instead, the judgment merely restated that an aggregate term of 25 years had been imposed for the five offenses. Furthermore, the judgment adjudicated appellant a Tier III sexual offender and sentenced him to five years post release control upon completing his sentence.

{¶9} In appealing the foregoing judgment, appellant asserts the following assignments of error:

{¶10} “[1.] The trial court committed prejudicial error by failing to follow Ohio’s statutes on sentencing when the trial court sentenced a first-time felony offender to a term in prison longer than the minimum required by law without recognizing the statutory presumptions or making the requisite findings of fact.

{¶11} “[2.] The trial court committed prejudicial error by failing to follow Ohio’s statutes on sentencing when the trial court sentenced a first-time felony offender to a maximum prison term without recognizing the statutory presumptions or making the requisite findings of fact.

{¶12} “[3.] The trial court committed prejudicial error by failing to follow Ohio’s statutes on sentencing when the trial court sentenced a first-time felony offender to consecutive prison terms without recognizing the statutory presumptions or making the requisite findings of fact.

{¶13} “[4.] The trial court committed prejudicial error by abusing its discretion in sentencing a first-time felony offender to the maximum consecutive prison terms.”

{¶14} Because appellant has only advanced one argument in support of his first three assignments, they will be addressed simultaneously. Basically, appellant submits

that the decision to impose an aggregate term of 25 years must be reversed because the trial court failed to comply with certain statutory requirements under R.C. 2929.11 et seq. That is, he contends that the trial court erred in not making specific findings of fact regarding: (1) the imposition of a prison term greater than the minimum for a third-degree felony; (2) the imposition of the maximum term for each offense; and (3) the imposition of consecutive terms. While acknowledging that the “findings of fact” provisions of the statutory scheme were declared unconstitutional by the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, appellant maintains that the provisions have been “revived” in light of the United States Supreme Court’s decision in *Oregon v. Ice* (2009), 555 U.S. 160.

{¶15} Following the submission of both briefs in this appeal, the Supreme Court of Ohio was presented with an opportunity to review the argument raised by appellant. In *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, the defendant asserted that the *Ice* decision mandates that a trial court cannot impose consecutive sentences unless it makes specific findings of fact under R.C. 2929.14(E)(4). In rejecting this assertion, the *Hodge* court stated:

{¶16} “2. The United States Supreme Court’s decision in *Oregon v. Ice* (2009), 555 U.S. 160 ***, does not revive Ohio’s former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ***.

{¶17} “3. Trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made.” *Id.* at paragraphs two and three of the

syllabus.

{¶18} Although the *Hodge* opinion only discussed the effect of the *Ice* decision upon determinations pertaining to the imposition of consecutive sentences, the rationale also logically applies to the imposition of maximum or greater than the minimum terms. In light of this, it has been stated that the basic procedure for the imposition of a sentence in a felony matter is still the same as it was prior to the release of the *Ice* decision; i.e., Ohio trial courts have broad discretion in determining the length of a prison term within the delineated statutory range, and are not required to provide finding of facts in support of decisions to impose a maximum, consecutive, or greater than the minimum prison term. *State v. Cole*, 8th Dist. No. 94911, 2011-Ohio-2146, at ¶7, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶11.

{¶19} In light of the foregoing, the trial court in the underlying action had no obligation to make findings of fact or reference any statutory presumption while determining the aggregate length of appellant's prison term. Accordingly, the first three assignments of error in this appeal lack merit.

{¶20} Under his fourth assignment, appellant asserts that the imposed sentence of 25 years cannot be upheld because the record contains no indication that the trial court considered the relevant statutory factors in making its ruling on the questions of maximum and consecutive terms. It is appellant's position that, even if the trial court was not required to state specific findings of fact, it still should be obligated to show that its decision was predicated upon the appropriate factors.

{¶21} Our review of the relevant case law readily shows that, since the demise of "judicial fact-finding" in *Foster*, Ohio courts have been mandated to follow a two-

prong test in reviewing the legal propriety of a felony sentence. See, generally, *State v. Kirkpatrick*, 11th Dist. No. 2010-T-0025, 2010-Ohio-6578, at ¶16-22. Under the first prong of this test, the imposed sentence is examined to determine if it complies with all applicable rules and statutes; in performing this purely legal analysis, an appellate court can only strike down the sentence when it is clearly and convincingly contrary to law. *State v. Bever*, 11th Dist. No. 2010-L-022, 2010-Ohio-6443, at ¶40, citing *Kalish*, 2008-Ohio-4912. If the first prong is met, it must then be determined whether, even though the term was within the permissible statutory range, its imposition still resulted in an abuse of discretion by the trial court. *Kirkpatrick*, 2010-Ohio-6578, at ¶21. In the context of sentencing, this court has indicated that an abuse of discretion occurs when the trial court's judgment does not comport with reason or the record. *Bever*, 2010-Ohio-6443, at ¶40.

{¶22} In applying the foregoing test, we have also stated that R.C. 2929.11 and 2929.12 delineate specific factors which a trial court is required to consider as a general guide for imposing a sentence. *Id.* at ¶41. However, in satisfying this obligation, the trial court does not have a corresponding duty to divulge its analysis of the various factors:

{¶23} “It is well-settled that R.C. 2929.12 does not require a sentencing court to discuss the statutory criteria on the record or even to state on the record that it has considered them. *State v. Chapdelaine*, 11th Dist. No. 2009-L-166, 2010-Ohio-2683, at ¶14. In fact, the Court in *Kalish* noted that where a sentencing court does not memorialize on the record that it considered the factors, a presumption arises that the factors were properly considered. [*Kalish*, 2008-Ohio-4912], at ¶27, f.n. 4. ‘By implication, as long as there is some indication that the factors were considered, a

reviewing court is bound to uphold the sentence.’ *Chapdelaine*, supra.” Id. at ¶42.

{¶24} See, also, *State v. Tenney*, 11th Dist. No. 2009-A-0015, 2010-Ohio-6248, at ¶14, in which this court concluded that a silent record raises a presumption that the relevant statutory factors were duly considered before the sentencing determination was made.

{¶25} In the instant case, a review of the trial record confirms that the trial court never referenced any of the relevant sentencing factors during the oral hearing or in its final judgment. Nevertheless, pursuant to the foregoing precedent of this court, the lack of any reference does not mean that we must infer that the trial court failed to engage in the required analysis. Instead, the opposite is true; i.e., we must presume that the trial court considered all relevant factors under R.C. 2929.11 and 2929.12 prior to imposing the sentence.

{¶26} Moreover, in contesting the procedure followed by the trial court, appellant has not cited any statement or action of the court which would be sufficient to rebut the foregoing presumption. For example, there is nothing in the record to indicate that, due to the specific circumstances of this case, the trial court expressly chose to ignore the usual statutory criteria for the imposition of a felony sentence. As a result, the scope of our review of the trial court’s decision must be specifically limited to the two-prong test for felony sentencing, as described above.

{¶27} As part of the terms of the plea agreement, appellant entered a guilty plea to five third-degree felonies. Pursuant to R.C. 2929.14(A)(3), the statutory range for a third-degree felony is one to five years. Therefore, in sentencing appellant to a term of five years on each of the offenses, the trial court did not exceed the scope of its

authority under the Ohio sentencing statutes. To this extent, the record before this court supports the conclusion that the trial court's "sentencing" determination was not contrary to the law.

{¶28} As to the second prong of the "felony sentencing" test, we would begin our analysis by noting that, pursuant to R.C. 2929.11(A), the basic purposes of the sentencing are to protect the public from future crime and to punish the offender. Furthermore, R.C. 2929.11(B) provides that, in attempting to act in accordance with those purposes, a trial court should impose a sentence that is commensurate with the seriousness of the crime and its impact upon the victim. In turn, R.C. 2929.12(B)(6) states that, in determining if the offender's conduct is more serious than an act which typically forms the basis of the offense, the trial court can consider whether the offender's relationship with the victim helped to facilitate the offense.

{¶29} In the present matter, appellant pleaded guilty to five offenses showing a specific pattern of behavior on his part. That is, appellant admitted that he engaged in sexual contact with the victim on multiple occasions over a six-year period. The facts of the case also established that the sexual contact began when the victim was only seven years old, and that appellant's conduct was facilitated by his relationship with the victim as her step-grandfather. Finally, the statements before the trial court established that the victim suffered significant psychological harm as a result of his conduct.

{¶30} Given these facts, the trial court could readily find that appellant's course of conduct constituted more serious forms of gross sexual imposition and sexual battery than the typical forms of those offenses. In turn, in light of the highly serious nature of the five offenses, the trial court could justifiably conclude that the length of appellant's

prison term would not be commensurate with the degree of harm to the victim unless he was given the maximum sentence for all five offenses, and the five sentences were then served consecutively. Thus, the record indicates that the imposition of an aggregate term of 25 years was consistent with both reason and the trial record, and did not demonstrate any arbitrary or unconscionable attitude on the part of the trial court.

{¶31} Since appellant has failed to establish any procedural error or abuse of discretion by the trial court in imposing the prison term, his fourth assignment likewise lacks merit.

{¶32} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Portage County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.