

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
HARDIN COUNTY**

STATE OF OHIO

CASE NUMBER 6-05-05

PLAINTIFF-APPELLEE

v.

OPINION

CHRISTOPHER KALB

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed in part and reversed in part and cause remanded.

DATE OF JUDGMENT ENTRY: November 7, 2005

ATTORNEYS:

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BRYANT, J.

{¶1} The defendant-appellant, Christopher Kalb (“Kalb”), appeals from the judgment of the Hardin County Common Pleas Court sentencing him to two consecutive two year terms in prison; an aggregate sentence of four years.

{¶2} On July 16, 2004, the Hardin County Grand Jury indicted Kalb on the following charges: two counts of sexual battery, violations of R.C. 2907.03(A)(5), felonies of the third degree; sexual imposition, a violation of R.C. 2907.06(A)(4), a misdemeanor of the third degree; gross sexual imposition, a violation of R.C. 2907.05(A)(4), a felony of the third degree; and possession of criminal tools, a violation of R.C. 2923.24(A), a felony of the fifth degree. The indictment resulted from incidents that occurred between January 2001 and January 2004. At the time of the offenses, Kalb was married to Rhonda Kalb (“Rhonda”) and lived with her and her children from previous relationships: B.M, C.M., and A.C. Kalb formed a close relationship with his step-daughter, B.M., who eventually confided to Kalb that she had formed close relationships with Rhonda’s previous boyfriends and had been sexually assaulted by at least one of them. When B.M. was between the ages of fifteen and sixteen years old, Kalb began to fondle and digitally penetrate her.

{¶3} At a change of plea hearing held on February 22, 2005, Kalb entered guilty pleas on two counts of sexual battery as charged in the indictment, and the

State of Ohio (“State”) dismissed the remaining charges. A sentencing hearing was held on April 11, 2005, and the trial court sentenced Kalb to a two year sentence on each charge for an aggregate sentence of four years in prison. Kalb appeals the trial court’s sentence and asserts the following assignments of error:

The court erred in sentencing Mr. Kalb [to] more than the shortest prison term.

The sentencing court erred in increasing the penalty against the defendant due to the defendant’s position which facilitated the offense.

The sentencing court erred in making the prison terms consecutive to each other as the judge failed to support his findings with reasons as required by R.C. 2929.19(b)(2)(d)(e).

{¶4} In his first assignment of error, Kalb argues that the trial court failed to make the findings required by R.C. 2929.14(B) when it imposed a sentence greater than the shortest prison term. R.C. 2929.14(B) states in pertinent part:

if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

- (1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.**
- (2) The court finds on the record that the shortest prison term will demean the seriousness of the offender’s conduct or will not adequately protect the public from future crime by the offender or others.**

{¶5} A violation of R.C. 2907.03(A)(5) is a third degree felony, which carries a sentence of either one, two, three, four, or five years in prison. R.C. 2907.03(B); 2929.14(A)(3). In this case, the trial court was required to sentence Kalb to a one year prison sentence on each count unless it made the findings required by R.C. 2929.14(B). Because Kalb was not serving a prison term at the time of the offense and because he has never previously served a prison term, R.C. 2929.14(B)(1) is inapplicable. Applying R.C. 2929.14(B)(2), our review of the record indicates that the trial court failed to make the appropriate findings. At the sentencing hearing, the trial court stated in pertinent part:

because the harm to the victim was so bad and you used your position of trust as a step-father and took advantage of this victim who confided in you because of her victimization is the reason that the Court finds that this matter was a very serious offense. It is the most harmful to this particular young lady, it is something that she probably never will recover from. . . . The Court does find that this is the worst form of the offense in this particular case because of the position of trust, and therefore in order to punish you, the Court feels that its two year sentence is justified in this particular case.

Hearing Tr., Jun. 7, 2005, 16-17. The trial court's finding that Kalb committed the worst form of the offense is required only upon sentencing an offender to the maximum sentence. See R.C. 2929.14(C). Likewise, the trial court's finding that a two year sentence was necessary to punish Kalb is consistent with the principles and purposes of felony sentencing. See R.C. 2929.11(A). However, neither of the trial court's findings comply with the requirements of R.C. 2929.14(B)(2).

Accordingly, the first assignment of error is sustained. Having sustained the first assignment of error, the second assignment of error is moot.

{¶6} In his third assignment of error, Kalb contends that the trial court made its findings on the record, but failed to support its findings with reasons.

R.C. 2929.14(E)(4) states in relevant part:

[i]f multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

- (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.**
- (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.**
- (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.**

{¶7} The requirements of R.C. 2929.14(E)(4) are threefold. First, the trial court must find that a consecutive sentence is necessary to protect the public from

future harm or to punish the offender. Second, the trial court must find that a consecutive sentence is not disproportionate to the seriousness of the conduct and the danger posed to the public. Third, the trial court must find at least one of the three findings in R.C. 2929.14(E)(4)(a)-(c). The trial court is required to make these findings and state its reasons therefore on the record at the sentencing hearing. *State v. Comer*, 99 Ohio St. 3d 463, 2003-Ohio-4165, 793 N.E.2d 473, at ¶¶ 20-21.

{¶8} Our review of the record indicates that the trial court complied with R.C. 2929.14(E)(4). The court stated in pertinent part:

[t]he Court [finds] in this particular case it is necessary to punish you Mr. Kalb. Second finding is that the proposed sentences are not disproportionate. Both as to the seriousness of the conduct which the Court has already found is quite serious, and while the Court does not believe that you pose a danger immediately to the public, certainly the public has to be protected from you because the old adage that you have tasted the poisonous fruit Mr. Kalb. . . . You are a young man, you'll marry again. We don't know what the future holds for you Mr. Kalb, or for anyone else. Or that the use of consecutive sentences to denote the seriousness or unusual harm caused, and that is what I keep coming back to Mr. Kalb. This isn't an ordinary case of sexual battery where you find a victim who is a victim for the first time and little or no harm is done. Again, you took a victim who had been victimized, and you made her a victim again. . . . Harm so great that no single prison term can adequately reflect the seriousness of the offender's conduct. I truly believe that, Mr. Kalb, in your case.

{¶9} Hearing Tr., 17-18. The trial court specifically found that consecutive sentences are necessary to punish the offender, they are necessary to

protect the public because he committed the crimes once and may do so again, and that no single prison term could adequately reflect the seriousness of the conduct. The trial court referenced Kalb's position of trust, the injury he caused B.M., and Kalb's knowledge of the other sexual assaults on B.M. We find that the trial court properly supported its findings as to consecutive sentences. The third assignment of error is overruled.

{¶10} The sentence of the Hardin County Common Pleas Court is reversed in part and affirmed in part. This cause is remanded for further proceedings.

*Judgment affirmed in part
and reversed in part and
cause remanded.*

CUPP, P.J., concurs.

ROGERS, J., concurs separately.

{¶11} **Rogers, J., concurring separately.** I concur with the majority opinion's judgment; however, I write separately to express my frustration with the role that appellate courts in Ohio have been forced to play in sentencing following Senate Bill 2 (effective 7/1/1996). Essentially, the appellate courts' function has become to examine, with microscopic care, the language used by trial courts in sentencing to determine whether it passes statutory muster. While the ideals of the sentencing statutes enjoined upon the courts of Ohio by S. B. 2 and its progeny may have been well intentioned, the vague terms utilized have caused an explosion of appeals challenging trial court findings of "worst form of the

offense,” “demean the seriousness of the offense” and other terms, the exact meanings of which were not and cannot be defined.

{¶12} This case is a prime example of the above problem. As noted by the majority opinion, the defendant was sentenced on two counts of sexual battery, felonies of the third degree. A felony of the third degree carries a potential penalty of one, two, three, four, or five years in prison. R. C. 2929.14(A)(2). The sentencing statutes require that if the trial court desires to impose more than a minimum penalty for a felony offense, then the trial court must make one of several specific findings, one of which is a finding that the minimum term would “demean the seriousness of the offender’s conduct.” R. C. 2929.14(B)(2). Likewise, a trial court sentencing an offender for a felony “may impose the longest prison term authorized for the offense” only if the trial court makes one of several specific findings, one of which is a finding that the defendant “committed the worst [form] of the offense.” R. C. 2929.14(C).

{¶13} The trial court judge in this case specifically stated that this was the “worst form of the offense * * *.” However, because the trial court imposed more than the minimum prison term, but less than the longest prison term, it was required to find that the minimum term would “demean the seriousness of the offense.” R.C. 2929.14(B)(2). Therefore, the majority opinion has remanded this case for re-sentencing. I understand the majority’s reasoning for remanding

Kalb's sentence and respectfully join that opinion based on the law governing this Court. However, can anyone seriously argue that the minimum term would not demean the seriousness of the offense when a trial court has found the defendant's conduct to be the worst form of the offense?

{¶14} On remand, the trial court is likely to reimpose the same sentence. However, the second time around the trial court will surely choose its words more carefully and will probably use the "magic words" of the statute.

{¶15} While the goal should always be technical correctness in our compliance with the mandates of the legislature, small departures in semantics should not demand such drastic consequences. The cost to the criminal justice system is too great to allow this to continue. Because most criminal defendants are indigent, the citizens of Ohio bear the financial cost of these appeals and resentencing hearings. Furthermore, the cost is more than just monetary. There is also a cost of the credibility of the criminal justice system when a defendant is told that he/she won his/her appeal on the issue of sentencing, only to be returned to the trial court to be resentenced to exactly the same penalties with the trial court simply using different words. What a farce this must seem to those defendants and their families. What a waste of time and money it must appear to the trial courts, appellate courts, prosecutors, and especially to the county commissioners who must budget for these nonsensical proceedings.

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{¶16} It is time to ask our legislature to correct this malady.