[Cite as *State v. Brewer*, 2009-Ohio-2958.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	CASE NO. 08-BE-4
	)	
JOSEPH E. BREWER,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common Pleas of Belmont County, Ohio
Case No. 07CR171

JUDGMENT: Affirmed

APPEARANCES:

For Plaintiff-Appellee

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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: June 16, 2009

[Cite as *State v. Brewer*, 2009-Ohio-2958.]
DONOFRIO, J.

{¶1} Defendant-appellant, Joseph Brewer, appeals from a Belmont County Common Pleas Court judgment convicting him of sexual battery and the resulting sentence, following his guilty plea.

{¶2} On July 27, 2007, a bill of information was filed against appellant charging him with one count of sexual battery, a third-degree felony in violation of R.C. 2907.03(A)(5). The bill of information alleged that appellant had engaged in sexual conduct with a nine-year-old girl.

{¶3} Appellant waived indictment and entered a guilty plea to the charge. As part of appellant's plea agreement, plaintiff-appellee, the State of Ohio, agreed to stand silent at sentencing.

{¶4} The trial court held a plea hearing where it informed appellant of the rights he was waiving by pleading guilty. It then accepted his guilty plea. The court later held a sentencing hearing and a sexual predator determination hearing. The court sentenced appellant to five years in prison. It found that appellant was not a sexual predator. But it found him to be a sexually oriented offender, as was agreed to by appellant and the state.

{¶5} This court granted appellant's motion to file a delayed appeal and appointed the Ohio Public Defender's Office to represent him.

{¶6} Appellant's appointed counsel has filed a no-merit brief pursuant to *State v. Toney* (1970), 23 Ohio App.3d 203, and asked to withdraw as counsel.

{¶7} In *Toney*, this court set forth in its syllabus the procedure to be used when counsel of record determines that an indigent's appeal is frivolous:

{¶8} "3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.

{¶9} "4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, *pro se.*

{¶10} "5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments *pro se* of the indigent, and then determine whether or not the appeal is wholly frivolous.

{¶11} " * * *

{¶12} "7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed."

{¶13} This court informed appellant that his counsel had filed a *Toney* brief. Appellant subsequently filed his own brief pro se.

{¶14} Appellant now raises three assignments of error, the first of which states:

{¶15} "APPELLANT'S GUILTY PLEA WAS NOT KNOWINGLY, INTELLIGNETLY, OR VOLUNTARILY ENTERED WHERE THE TRIAL COURT AND COUNSEL DID NOT INFORMED [sic.] THE APPELLANT THAT HE WOULD BE ELIGIBLE TO FILE FOR JUDICIAL RELEASE AT SENTENCING."

{¶16} Appellant argues that the trial court failed to inform him whether he was eligible for judicial release. Therefore, he contends he did not enter his plea knowingly, intelligently, or voluntarily. Appellant goes on to argue that his counsel was ineffective for failing to inform the court whether he was eligible for judicial release. He claims that his counsel told him that he was eligible for judicial release. He contends that because of this alleged misinformation by counsel, he was deceived into pleading guilty.

{¶17} When determining the voluntariness of a plea, this court must consider all of the relevant circumstances surrounding it. *State v. Trubee,* 3d Dist. No. 9-03-65, 2005-Ohio-552, at ¶8, citing *Brady v. United States* (1970), 397 U.S. 742, 90 S.Ct. 1463. Pursuant to Crim.R. 11(C)(2), the trial court must follow a certain

procedure for accepting guilty pleas in felony cases. Before the court can accept a guilty plea to a felony charge, it must conduct a colloquy with the defendant to determine that he understands the plea he is entering and the rights he is voluntarily waiving. Crim.R. 11(C)(2). If the plea is not knowing and voluntary, it has been obtained in violation of due process and is void. *State v. Martinez,* 7th Dist. No. 03-MA-196, 2004-Ohio-6806, at ¶11, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709.

{¶18} A trial court must strictly comply with Crim.R. 11(C)(2) pertaining to the waiver of federal constitutional rights. *Martinez,* 7th Dist. No. 03-MA-196, at ¶12. These rights include the right against self-incrimination, the right to a jury trial, the right to confront one's accusers, and the right to compel witnesses to testify by compulsory process. *State v. Tucci,* 7th Dist. No. 01-CA-234, 2002-Ohio-6903, at ¶11, citing *Boykin,* supra; *State v. Ballard* (1981), 66 Ohio St.2d 473, 478, fn. 4.

{¶19} A trial court need only substantially comply with Crim.R. 11(C)(2) pertaining to non-constitutional rights such as informing the defendant of "the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence." *Martinez,* supra, at ¶12, citing Crim.R. 11(C)(2)(a)(b).

{¶20} Here appellant does not contend that the court failed to inform him of any of his constitutional rights. In fact, a review of the plea hearing reveals that the court clearly advised appellant that by pleading guilty he was waiving the right to a speedy and public jury trial, the right to confront the witnesses against him and to cross examine them, the right to compulsory service of process to compel witnesses to testify on his behalf, the right to have the state prove his guilt beyond a reasonable doubt, and the right not to be compelled to testify against himself. (Plea Tr. 7-8).

{¶21} The court further explained to appellant the maximum sentence he faced, the maximum fine he faced, and the sexual offender classifications he faced. (Plea Tr. 7). It also explained to appellant the nature of the charge he was pleading

guilty to and the elements of the offense. (Plea Tr. 7). And the court explained to appellant that upon accepting his plea, it could immediately proceed to judgment and sentencing. (Plea Tr. 9).

{¶22} As appellant asserts, the court did not discuss judicial release with him before accepting his plea. However,

{¶23} "Appellant is incorrect that a trial court must discuss judicial release as part of a plea agreement. '[T]he trial court need not inform a defendant about his eligibility for judicial release unless it is incorporated into a plea bargain.' *State v. Simmons,* 1st Dist. No. C-050817, 2006-Ohio-5760, ¶ 13, citing *State v. Mitchell,* 11th Dist. No.2004-T-0139, 2006-Ohio-618, and *State v. Cline,* 10th Dist. No. 05AP-869, 2006-Ohio-4782." *State v. Gibson*, 7th Dist. No. 07-MA-98, 2008-Ohio-4518, at ¶9.

{¶24} There is no indication on the record that judicial release was part of appellant's plea agreement. Thus, the court did not err in failing to discuss judicial release with appellant before accepting his plea.

{¶25} Appellant further contends that his counsel told him that he was eligible for judicial release when he was not and this deceived him into pleading guilty.

{¶26} Firstly, there is no evidence on the record as to what appellant's counsel told him regarding judicial release. Consequently, we have no way to review whether that information was accurate or not.

{¶27} Secondly, appellant fails to recognize that he can be eligible for judicial release at some point. Thus, his counsel did not deceive him as he alleges. The court explained this to appellant at his sentencing hearing:

{¶28} "Now, judicial release is a mechanism by which you can return to society prior to completing a prison term, but in this case it is limited because of the sentence the court imposed. It would never be available to you unless you accepted full responsibility and accountability for your actions. I will not rule it out because of what I heard today but, as I said, you won't be eligible for it for a lengthy period of time, but you need to know this. The attitude that you expressed here in the

courtroom today certainly gave me and hopefully society some hope that at some point in time, because we expect you are going to return, you will come back into society and be a contributing citizen and we won't have to fear you." (Sentencing Tr. 50).

{¶29} Thus, if appellant's counsel did indeed tell him that he could be eligible for judicial release, that was not inaccurate as appellant seems to contend.

{¶30} Accordingly, appellant's first assignment of error is without merit.

{¶31} Appellant's second assignment of error states:

{¶32} "THE TRIAL COURT DENIED APPELLANT[']S DUE PROCESS RIGHTS WHEN IT DID NOT ALLOW HIM TO PRESENT A DEFENSE IN THE SEXUAL PREDATOR PART OF THE SENTENCING."

{¶33} Appellant argues here that he was unaware that he could present evidence at his sexual offender classification hearing. And appellant seems to claim that he was given no notice of the hearing.

{¶34} The trial court found that appellant was not a sexual predator. Instead, it found that he was a sexually oriented offender.[1]

{¶35} At appellant's change of plea hearing, the court and counsel discussed whether the parties had made any agreement regarding sexual offender classification. (Plea Tr. 2-3). The prosecutor informed the court that no agreement had been reached on this subject but that the parties might reach an agreement prior to sentencing. (Plea Tr. 2). The court then informed the parties that if they did not reach an agreement on the issue before sentencing, then it would hold a hearing to determine appellant's sexual offender classification prior to sentencing. (Plea Tr. 3). Thus, the court specifically gave appellant notice of the potential hearing.

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[1] At the time of appellant's sentencing, the old version of Revised Code Chapter 2950. was in effect. Under the old version, the trial court designated appellant a sexually oriented offender. The court recognized, however, that on January 1, 2008, appellant's sexually oriented offender status would change to a tier 3 sex offender pursuant to the new version of R.C. 2950.01.

{¶36} Apparently, appellant and the state reached an agreement before sentencing regarding his sexual offender classification. The trial court acknowledged this agreement, specifically stating:

{¶37} "Court finds that the defendant has been convicted or pleaded guilty of a sexually oriented offense pursuant to Chapter 2950.01, and that after a hearing wherein *there was agreement between the State and the defendant on this issue*, and *after proper notice to all parties*, it was determined that he should be adjudicated as a sexually oriented offender for a crime that occurred after January 1, 1997; and I have considered all the factors in 2950.09, as well as evidence and argument that is to be presented by the parties and has been presented up till now, and *pursuant to agreement of the State and the defendant* I find sufficient evidence exists to support a determination of sexually oriented offender. There is not clear and convincing evidence to establish sexual predator[.]" (Emphasis added; Sentencing Tr. 7).

{¶38} Because appellant reached an agreement with the state regarding his classification, there was no need for an evidentiary hearing. The issue had already been resolved.

{¶39} Accordingly, appellant's second assignment of error is without merit.

{¶40} Appellant's third assignment of error states:

{¶41} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO A MAXIMUM TERM OF IMPRISONMENT."

{¶42} Here appellant argues that because he had no prior felony convictions, the court should not have sentenced him to a maximum prison term. He asserts that the trial court made certain factual findings in violation of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. He further contends that the court should not have allowed Sandra Crook, the victim's mother, and Tonya Wilt, a friend of the victim's family, to make statements to the court prior to imposing sentence.

{¶43} Our review of felony sentences is now a limited, two-fold approach, as outlined by the recent plurality opinion in *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. First, we 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. (O'Connor, J., plurality opinion). In examining "all applicable rules and statutes," the sentencing court must consider R.C. 2929.11 and R.C. 2929.12. Id. at ¶13-14 (O'Connor, J., plurality opinion). If the sentence is clearly and convincingly not contrary to law, the court's exercise of discretion "in selecting a sentence within the permissible statutory range is subject to review for any abuse of discretion." Id. at ¶17, (O'Connor, J., plurality opinion). Thus, we apply an abuse of discretion standard to determine whether the sentence satisfies R.C. 2929.11 and R.C. 2929.12. Id. at ¶17, (O'Connor, J., plurality opinion).

{¶44} Appellant was convicted of a third-degree felony. The possible sentences for a third-degree felony are one, two, three, four, or five years. R.C. 2929.14(A)(3). Here the trial court sentenced appellant to five years. Thus, appellant's sentence is within the range of possible sentences for a third-degree felony.

{¶45} Next, we must look at whether the trial court considered R.C. 2929.11 and R.C. 2929.12. In its judgment entry of sentence, the trial court specifically stated that it considered the purposes and principles of sentencing under R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12. The court even went on to specifically state which seriousness and recidivism factors it found applied to appellant.

{¶46} The court found the following seriousness factors applied. Injury to the victim was exacerbated by the victim's age of nine years (R.C. 2929.12(B)(1)). The victim suffered serious psychological and emotional harm and her family has suffered emotional and economic harm in providing counseling for the victim (R.C. 2929.12(B)(2)). And appellant's relationship with the victim facilitated the offense (R.C. 2929.12(B)(6)).

{¶47} The court found the following recidivism factors applied. Appellant lacks genuine remorse and fails to accept full responsibility for his act (R.C.

2929.12(D)(5)). Appellant has a history of criminal convictions (R.C. 2929.12(D)(2)). And appellant has not responded favorably to previous sanctions (R.C. 2929.12(D)(3)). The court also found that appellant's bond was revoked prior to sentencing due to a positive test for marijuana.

{¶48} The court found that the following factor indicating that appellant was less likely to commit future crimes applied. Appellant has no prior juvenile adjudications (R.C. 2929.12(E)(1)). The court also found that appellant has friends and family for whom he has performed many kind acts and who strongly support him. And it found that appellant has helped many people in his lifetime and honorably served in the United State Army for six years. Finally, the court found that by pleading guilty, appellant relieved the victim from having to testify at a trial.

{¶49} Thus, the court clearly considered the necessary statutes and factors in sentencing appellant.

{¶50} Appellant's argument lies with the fact that the court also found in its judgment entry of sentence:

{¶51} "Although specific findings pursuant to R.C. §2929.14(B) are no longer mandated for the Court to impose more than the minimum prison term authorized for the offense, or to impose consecutive sentences, in light of **State v. Foster, 109 Ohio St.3rd 1**, the Court, in its discretion to determine the most effective way to comply with the principles and purposes of sentencing contained in R.C. §2929.11, has chosen to consider the principle that *the shortest prison term will demean the seriousness of the offender's conduct and will not adequately protect the public from future crimes by this offender or others*, based upon the reckless nature of this Defendant's actions (sexual conduct between a forty-seven (47) year old man and a nine (9) year old child, under the guise of father-figure relationship and babysitter and Defendant's lack of genuine remorse, evidenced by his inconsistent statements as to what actually transpired; blaming the victim; minimizing his behavior and, finally, suggesting that the entire incident was accidental until his final sentencing hearing wherein he has begun to admit his guilt).

{¶52} "The Court makes all findings based upon the sentencing factors of R.C. § §2929.11, 2929.12, 2929.13 and 2929.14, as such have been amended by **State v. Foster, 109 Ohio St.3rd 1**." (Emphasis added).

{¶53} Prior to the Ohio Supreme Court's ruling in *Foster*, 109 Ohio St.3d 1, the trial court was required to make certain factual findings on the record before imposing non-minimum and consecutive sentences. R.C. 2929.14(B) and (E)(4). However, in *Foster,* the Supreme Court held that this judicial fact-finding violated the defendant's right to a jury trial. Id. at ¶83. Therefore, the Court severed those portions of Ohio's sentencing statutes that required the trial court to engage in judicial fact-finding.

{¶54} One of the sections that *Foster* severed was R.C. 2929.14(B), which required that the court make one of two findings before imposing a more-than-minimum sentence. One of those two findings was that the shortest prison term would demean the seriousness of the offense or would not adequately protect the public from future crime by the offender or others. R.C. 2929.14(B)(2).

{¶55} This court has "specified that a sentencing court's mention of factors that were previously required by the excised statutes is not erroneous because the trial court can now consider any factors it wants in sentencing defendants." *State v. Love,* 7th Dist. No. 06-MA-130, 2007-Ohio-7210, at ¶9. Thus, the trial court here was free to consider these factors. Furthermore, the trial court did not specifically cite to the severed statutory section from which it derived the language, R.C. 2929.14(B). And importantly, the court stated that it considered the sentencing statutes "*as such have been amended by Foster*." (Emphasis added.) Thus, the trial court did not sentence appellant in violation of *Foster*.

{¶56} Appellant also argues that the court should not have considered the statements from the victim's mother and family friend in sentencing him

{¶57} But such statements are statutorily allowed. "Before imposing sentence upon, or entering an order of disposition for, a defendant or alleged juvenile offender for the commission of a crime or specified delinquent act, *the court shall*

permit the victim of the crime or specified delinquent act to make a statement." (Emphasis added.) R.C. 2930.14(A). "*The court shall consider a victim's statement* made under division (A) of this section along with other factors that the court is required to consider in imposing sentence or in determining the order of disposition." R.C. 2930.14(B).

{¶58} Additionally, R.C. 2929.19(A)(1) provides that at the sentencing hearing, the court shall permit the offender, the prosecutor, the victim or the victim's representative, and with the court's approval, any other person to present information relevant to sentencing. The court shall then consider this information before sentencing the offender. R.C. 2929.19(B)(1). The trial court has discretion to determine the number of persons with relevant information who can speak at the sentencing hearing. *State v. Condon*, 152 Ohio App.3d 629, 2003-Ohio-2335, at ¶117.

{¶59} In *State v. Agner*, 3d Dist. No. 8-01-25, 2002-Ohio-2352, the rape victim was a child under the age of 13. At the sentencing hearing, the trial court allowed a representative for the victim to speak and also allowed the victim's parents to speak. The court additionally allowed the defendant to speak and to present the statements of several character witnesses in mitigation. On appeal, the defendant argued that the court erred in allowing three people to speak on the victim's behalf. The Third District disagreed, finding: "Since the trial court gave each side the same opportunity to present evidence at the hearing, we do not find that the trial court abused its discretion in permitting the parents to testify at the sentencing hearing." Id. at ¶16.

{¶60} The victim in this case was a nine-year-old child. Thus, it is appropriate that her mother and her family friend would speak on her behalf. Furthermore, the court permitted appellant to present James and Robert Brewer, appellant's brothers, and Pamela Simmons, appellant's step-daughter, to make statements as to his character, in addition to making a statement himself in mitigation. As was the case in *Agner*, the trial court here allowed both sides an equal opportunity to present

witnesses. Furthermore, there is no law that limits the amount of people who can make statements at a sentencing hearing. Consequently, the trial court did not abuse its discretion in allowing the victim's mother and the victim's family friend to speak on her behalf at the sentencing hearing.

{¶61} Accordingly, appellant's third assignment of error is without merit.

{¶62} Appellant pleaded guilty pursuant to a Crim.R. 11 felony plea agreement and was sentenced thereafter. Therefore, he can appeal only two main issues, whether his plea was knowingly, intelligently, and voluntarily entered and his sentence. We have discussed each issue in detail in the context of appellant's assignments of error. No error exists.

{¶63} Therefore, for the reasons stated above, the trial court's judgment is hereby affirmed and counsel's motion to withdraw is granted.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.