[Cite as *State v. Wilson*, 2015-Ohio-838.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 14 MA 43
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
THOMAS WILSON	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 13 CR 1092

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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Mahoning County Prosecutor
Atty. Ralph M. Rivera
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For Defendant-Appellant:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: March 3, 2015

[Cite as *State v. Wilson*, 2015-Ohio-838.]
WAITE, J.

{¶1} Appellant Thomas Wilson appeals his five-year prison sentence on counts of gross sexual imposition and pandering obscenity involving a minor. Appellant was convicted of four separate charges pursuant to a plea agreement. One charge of gross sexual imposition was dismissed. The prosecutor agreed to recommend a five-year aggregate prison term. Appellant contends that he should not have been sentenced to any prison term and that the sentence amounts to an abuse of discretion. The record fully supports the sentence imposed, particularly in light of the fact that one charge was dismissed, the sentence imposed was consistent with the plea agreement, and because the potential maximum sentence was considerably longer. The judgment of the trial court is affirmed.

{¶2} Appellant was indicted on October 17, 2013, in the Mahoning County Court of Common Pleas on two counts of gross sexual imposition, R.C. 2907.05(A)(1)(c) (fourth degree felonies, maximum prison term 18 months); one count of gross sexual imposition, R.C. 2907.05(A)(4)(c) (third degree felony, maximum prison term 36 months); and two counts of pandering obscenity involving a minor, R.C. 2907.321(A)(1)(c) (second degree felonies, maximum prison term 8 years). The charges arose after Appellant took his daughter (age 12) and her girlfriend (age 13) to the basement of his home, blindfolded them, licked their feet and masturbated, all the while video recording the crimes on his cell phone. His daughter later found the video and reported it, leading to the indictment.

{¶3} On January 8, 2014, Appellant entered into a written Crim.R. 11 plea agreement. He agreed to plead guilty to counts 1, 2, 4 and 5 of the indictment. The

prosecutor agreed to dismiss count 3, gross sexual imposition (fourth degree felony), and to recommend a five-year prison term for all the combined charges. The court accepted the guilty plea on January 8, 2014, and the judgment entry was filed on January 10, 2014. Sentencing took place on March 19, 2014.

{¶4} At sentencing, Appellant's counsel stated that Appellant was divorced, had no felony record, suffered abuse as a child, and that he has a sexually-oriented illness described as a foot fetish. A psychological report from the Forensic Psychiatric Center of Northeast Ohio was admitted as evidence. This report recommended that Appellant receive community control sanctions with sex offender treatment. Appellant also spoke at sentencing and expressed his regret for his actions. The court noted the factors mentioned by Appellant and his counsel, but determined that a five-year prison term was appropriate based on the prosecutor's recommended sentence and the statutory sentencing factors, including the safety of the community, a need to punish the offender, the risk of recidivism, along with a presumption in favor of a prison term for two of the charges. The court also noted that the injury was worsened by the age of the victims and the psychological harm suffered, and that Appellant was in a position of trust over the victims when the crimes occurred. The court specifically discussed many of the sentencing factors listed in R.C. 2929.12 and 2929.13, and stated that the factors in R.C. 2929.13(B) weighed against the defendant. The court imposed 18 months in prison each on counts one and two (gross sexual imposition), and five years in prison each on counts four and five (pandering obscenity involving a minor), all to be served

concurrently, for an aggregate five-year prison term. The court also classified Appellant as a Tier II sexual offender. This appeal followed.

ASSIGNMENT OF ERROR

The Trial Court Erred and Abused its Discretion in Sentencing the Appellant Too Harshly.

{¶5} Appellant argues that his five-year prison term is too harsh in light of a variety of factors found in R.C. 2929.12 that purportedly render his crimes less serious than normal and because he believes he is less likely to commit future crimes. Appellant sought to be placed on community control and be given sexual offender counseling rather than be sentenced to prison. He contends that the trial court did not consider the sentencing factors in R.C. 2929.12 and that the sentence was contrary to law and constituted an abuse of discretion. The record does not support Appellant's argument.

{¶6} When reviewing a felony sentence, an appellate court first examines the sentence to ensure that the sentencing court clearly and convincingly complied with the applicable laws. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶4. An appellate court then reviews the trial court's sentencing decision for abuse of discretion. *Id.* at ¶17, 19-20. An abuse of discretion means more than an error in judgment, but rather, implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). We continue to apply the two-part *Kalish* test despite decisions from other appellate courts that *Kalish* may no longer be applicable after the sentencing

changes made in H.B. 86 in 2011. *See*, *e.g.*, *State v. Hill*, 7th Dist. No. 13 MA 1, 2014-Ohio-919, ¶20.

{¶7} R.C. 2929.12(B) states that: "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 more serious than conduct normally constituting the offense." We recognize that the court is only directed to consider the factors that apply, and is not required to consider factors that do not apply. Appellant appears to believe that the court must consider every factor listed in R.C. 2929.12, regardless of whether it applies to his case or not.

{¶8} The factors in R.C. 2929.12(B)-(E) include:

{¶9} 1. Factors indicating the crime was more serious than conduct normally constituting the offense: physical or mental injury exacerbated because of the physical or mental condition or age of the victim; the victim of the offense suffered serious physical, psychological, or economic harm; the offender held a public office or position of trust and the offense related to that office or position; the offender should have prevented the offense or brought it to justice due to his or her occupation or office; the offender's reputation, occupation, office, or profession was used to facilitate the offense; the offender's relationship with the victim facilitated the offense; the offender committed the offense for hire or as a part of an organized criminal activity; and the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

{¶10} 2. Factors indicating the crime was less serious than conduct normally constituting the offense: the victim induced or facilitated the offense; the offender acted under strong provocation; the offender did not cause or expect to cause physical harm to any person or property; and there are substantial grounds mitigating the offender's conduct.

{¶11} 3. Factors indicating the offender is likely to commit future crimes: the offender was under release from confinement before trial or sentencing, was under a community control sanction, under post-release control, or had absconded from community placement; the offender previously was adjudicated a delinquent child or has a history of criminal convictions; the offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child, or has not responded favorably to sanctions previously imposed for criminal convictions; the offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge he has demonstrated that pattern, or refuses treatment for the drug or alcohol abuse; the offender shows no genuine remorse for the offense.

{¶12} 4. Factors indicating the offender is not likely to commit future crimes: prior to committing the offense, the offender had not been adjudicated a delinquent child; prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense; prior to committing the offense, the offender had led a law-abiding life for a significant number of years; the offense was committed

under circumstances not likely to recur; the offender shows genuine remorse for the offense.

{¶13} It is also true that charges dismissed during the plea bargain process may be considered at sentencing. *State v. Cooey*, 46 Ohio St.3d 20, 35, 544 N.E.2d 895 (1989). In this case, one count of gross sexual imposition was dismissed.

{¶14} Appellant argues that the court did not consider any mitigating evidence or any of the supplemental information provided to the court at sentencing, such as the psychological report. There is nothing in the record to support this argument. Appellant believes that he should not have been sentenced to prison because he was remorseful for his actions and had no prior felony record. Further, his psychiatrist recommended community control sanctions and treatment, he did not physically harm his victims, and his actions were not motivated by race, gender, sex, or religion. While acknowledging that it was up to the trial court to weigh this evidence, including the credibility of this evidence, in light of all the sentencing factors, Appellant nevertheless concludes that the evidence does not justify a sentence that he contends is nearly the maximum prison sentence.

{¶15} Appellant is mistaken that the maximum prison term was imposed, or even any term close to the maximum. The total possible prison term was twenty and one-half years. His five-year prison term is not remotely close to the maximum possible sentence. Even taking into account only the two second degree felonies, the maximum term for each was eight years. The court imposed five, which, again, is

far from the maximum. Appellant's argument fails simply because he does not appear to understand the length of the possible prison terms in this case.

{¶16} R.C. 2929.13(D)(1) provides a presumption in favor of a prison term for first and second degree felonies. The court may override this presumption and impose community control sanctions if it finds that a community control sanction would adequately punish the offender and would protect the public from future crime, and if a community control sanction would not demean the seriousness of the offense. While this was clearly explained to Appellant at sentencing, he continues to argue that the mitigation factors in his case should have overcome the presumption.

{¶17} The trial court actually addressed most of the factors that Appellant complains were ignored in this appeal. The court stated that it balanced the seriousness and recidivism factors in R.C. 2929.12, and followed the felony sentencing guidelines in R.C. 2929.13. (3/27/14 J.E., p. 2.) The court's judgment entry states that it considered Appellant's sentencing memorandum. (3/27/14 J.E., p. 1.) The court discussed at length the psychological report. (3/19/14 Tr., pp. 10, 13-14.) The court recognized that the psychological report did not take into account all of the statutory purposes and principles of sentencing in R.C. 2929.11, namely, the need to protect the public and to punish the offender. The court noted that Appellant had a prior criminal record but no juvenile record. (3/19/14 Tr., p. 11.) The court stated that many factors regarding the seriousness of this matter were present, including the tender age of the victims, the psychological harm suffered, and Appellant's relationship to the victims. The fact that the court did not mention that

Appellant expressed remorse does not mean it was not considered. It may mean that the court did not find it credible.

{¶18} There is a presumption that the court followed the statutory guidelines absent an affirmative demonstration to the contrary, as long as there is some mention of the statutory factors. *State v. Arnett*, 88 Ohio St. 3d 208, 215, 724 N.E.2d 793 (2000); *State v. Watson* 7th Dist. No. 09 MA 62, 2011-Ohio-1178, ¶12. In this case, the record is replete with references to the sentencing guidelines.

{¶19} It appears that Appellant merely disagrees with the manner in which the trial court viewed and weighed the evidence at sentencing and with the court's analysis regarding whether a modest prison term (in comparison to the possible maximum sentence) was appropriate. There is nothing in Appellant's argument or the record that would justify a reversal of the sentence based on an abuse of discretion on the part of the trial court. The record supports that the court considered all the relevant factors at sentencing. The court considered Appellant's conduct severe enough to warrant a five-year prison term. Appellant's argument is not persuasive, and the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.