

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
JON MATHEWS	:	Case No. CT2009-0026
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. CR2009-0040

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: March 25, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Farmer, J.

{¶1} On March 4, 2009, the Muskingum County Grand Jury indicted appellant, Jon Matthews, on one count of felonious assault in violation of R.C. 2903.11. Said charge arose from an altercation between appellant and Ronald Ligget.

{¶2} On May 6, 2009, appellant pled guilty to an amended count of aggravated assault in violation of R.C. 2903.12. In exchange for this plea, the state agreed to recommend that appellant serve six months in prison. By entry filed June 15, 2009, the trial court sentenced appellant to eight months in prison rather than the six months recommended by the state.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING THE DEFENDANT TO MORE THAN THE AGREED UPON SENTENCE OF SIX MONTHS."

I

{¶5} Appellant claims the trial court erred in sentencing him to more than the six months recommended by the state. We disagree.

{¶6} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶4, the Supreme Court of Ohio set forth the following two-step approach in reviewing a sentence:

{¶7} "In applying *Foster* [*State v.*, 109 Ohio St.3d 1, 2006-Ohio-856] to the existing statutes, appellate courts must apply a two-step approach. 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. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard."

{¶8} In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217.

{¶9} By entry filed June 15, 2009, the trial court sentenced appellant to eight months in prison after pleading guilty to one count of aggravated assault, a felony of the fourth degree. Felonies of the fourth degree are punishable by "six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months." R.C. 2929.14(A)(4). Clearly the sentence was within the permissible range. Furthermore, in its June 15, 2009 entry, the trial court expressly stated that it considered the purposes and principles of sentencing under R.C. 2929.11, as well as the seriousness and recidivism factors under R.C. 2929.12. In addition, the trial court properly applied post-release control. Accordingly, the sentence is not clearly and convincingly contrary to law.

{¶10} During the May 6, 2009 plea hearing, the trial court specifically cautioned appellant that the state's recommendation was not binding on the trial court:

{¶11} "THE COURT: The State of Ohio is recommending that you receive a six-month prison sentence. Is that you (sic) understanding?"

{¶12} "MR. MATHEWS: Yes.

{¶13} "THE COURT: Have you been promised anything else or threatened in any way in order to enter your plea of guilty today?"

{¶14} "MR. MATHEWS: No, sir.

{¶15} "THE COURT: You understand the Prosecutor's recommendation isn't binding on the Court; I do not have to follow it?"

{¶16} "MR. MATHEWS: Yes." May 6, 2009 T. at 7-8.

{¶17} During the June 15, 2009 sentencing hearing, defense counsel requested that the sentence be less than the state's six month recommendation:

{¶18} "The State's recommendation is for six months. The detective, Dan Arter, agrees with the recommendation.

{¶19} "In discussing this case with my client, he would like to possibly request community control sanctions in this matter and he would like to get employed and be able to help his children out. If the Court's not inclined to accept the community control, we are agreeable with the six months and believe that's an appropriate and reasonable sentence, and we just ask that all this be taken into consideration here today, Your Honor. Thank you." June 15, 2009 T. at 4-5.

{¶20} Prior to this request, defense counsel offered the following background information:

{¶21} "Just a few things I would like to let the Court know in regard to my client prior to sentencing. He is 46 years, currently not married, does have two minor children who he has a relationship with and does have a child support obligation for those two children. He has a hearing coming up on June 24th for some contempt matters since he's been incarcerated and unable to pay." June 15, 2009 T. at 3-4.

{¶22} At the conclusion of the hearing, the trial court sentenced appellant to eight months in prison, stating the following:

{¶23} "THE COURT: Thank you. Well, the Court has received the presentence investigation and has had an opportunity to review the same.

{¶24} "The Court will note for the record that you entered a plea of guilty to a lesser included offense, that being one count of aggravated assault, a felony of the fourth degree. The Court would also note for the record that, according to the presentence investigation, you owe almost \$16,000 in back child support; so it's not just recently that you haven't been paying. Also note that you didn't even know the current address for your children.

{¶25} "As such, the Court will impose an eight-month prison sentence in this case. This Court will order that you be given credit for time served and that you pay the court costs in this matter." June 15, 2009 T. at 5-6.

{¶26} Appellant argues the trial court's statements demonstrate that it considered matters non-germane to the offense charged i.e., failure to pay child support, and therefore the trial court abused its discretion in sentencing appellant to eight months in prison rather than six. We disagree. We note the trial court's comments were directly related to defense counsel's comments on appellant being unable to pay child support since he's been incarcerated and wanting community control so he could "get employed and be able to help his children out."

{¶27} Upon review, we find the sentence was neither contrary to law nor an abuse of discretion.

{¶28} The sole assignment of error is denied.

{¶29} The judgment of the Court of Common Pleas of Muskingum County, Ohio
is hereby affirmed.

By Farmer, J.

Edwards, P.J. and

Hoffman, J. concur.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ William B. Hoffman

JUDGES

SGF/sg 0212

