

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-08-002

Appellee

Trial Court No. 07 CR 106

v.

Brandon Davidson

DECISION AND JUDGMENT

Appellant

Decided: July 31, 2009

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Gwen Howe-Gebers, Assistant Prosecuting Attorney, for appellee.

Wendell R. Jones, for appellant.

* * * * *

HANDWORK, P.J.

{¶ 1} This is an appeal from the Wood County Court of Common Pleas wherein appellant, Brandon Davidson, entered a guilty plea to an amended charge of endangering children, a violation of R.C. 2903.11(A)(1) and a felony of the third degree. As part of

the plea agreement, appellee, the state of Ohio, dismissed a charge of felonious assault, a violation of R.C. 2903.11(A)(1) and a felony of the second degree.

{¶ 2} The charges against appellant arose from an incident where appellant, who was babysitting his three-month-old son while the child's mother was at work, shook the baby so violently that he suffers from daily seizures. Furthermore, the long term effects of the injury are still unknown. When the infant was taken to the hospital, he was limp and unresponsive. His eyes were "rolled back into his head." An MRI was performed. It revealed a hematoma behind one of the baby's eyes. It is undisputed that even after the child was taken to the hospital and his injury was reported to the authorities, appellant denied any culpability in causing that injury. Appellant later admitted that he "jostled" the baby while holding him but continues to deny that he shook his son hard enough to cause this serious injury.

{¶ 3} The trial judge sentenced appellant to five years in prison, the maximum term for a third degree felony. Appellant appeals his sentence and sets forth the following assignment of error:

{¶ 4} The trial court abused its discretion and sentenced appellant contrary to law."

{¶ 5} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26, a plurality of justices on the Ohio Supreme Court set forth the following two tiered test for appellate courts when reviewing felony sentences:

{¶ 6} "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 in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard."

{¶ 7} The first tier of the test requires a court to determine whether "the trial court adhered to all applicable rules and statutes in imposing the sentence." *Id.*, ¶ 14. The standard of review for this tier is whether the sentence is clearly and convincingly contrary to law, the standard provided in R.C. 2953.08(G). *Id.* An example of a sentence that would fall within this category would be one in which the trial court imposed a sentence outside the permissible range. *Id.*, ¶ 15. If the sentence is not clearly and convincingly contrary to law, an appeals court then reviews the sentence under an abuse of discretion standard. *Id.*, ¶ 18-19; *State v. Walters*, 6th Dist. No. L-08-1238, 2009-Ohio-3198, ¶ 32. Thus, the sentence imposed by a trial court cannot be overturned unless the judge's attitude in determining that sentence was unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 8} As applicable to the case before us, the maximum sentence imposed by the trial court was within the statutory limits and not clearly and convincingly contrary to law. Therefore, we are required to decide if the common pleas court's imposition of a five year maximum sentence is unreasonable, arbitrary or unconscionable.

{¶ 9} Appellant maintains that the trial court imposed the maximum sentence "with only limited supporting statements and a reliance on rationale not borne out by the evidence." The arguments in support of this proposition ask this court to engage in impermissible fact finding in order to decide whether the trial court abused its discretion in imposing a maximum sentence. See *State v. Foster*, 109 Ohio St.3d 1, paragraph one of the syllabus. Therefore, we must decline to address this argument.

{¶ 10} Appellant also asserts that the trial court performed only a cursory examination of the factors related to the purposes and principals of felony sentencing, as found in R.C. 2929.11, and recidivism and seriousness factors, as set forth in R.C. 2929.12, in sentencing him to five years in prison. In *State v. Kalish*, supra, at ¶ 17, the court expressly held that because R.C. 2929.11 and 2929.12 are not fact finding statutes, an appellate court could review a trial court's selection of a sentence under the abuse of discretion standard.

{¶ 11} R.C. 2929.11 sets forth the purposes and principles of felony sentencing while R.C. 2929.12 contains the seriousness and recidivism factors. Prior to imposing sentence in the instant cause, the trial court specifically addressed the purposes and principles of felony sentencing, stating the sentencing statute was promulgated to protect the public from future crime by appellant and to punish appellant. In doing so, the court further remarked that there was a need to incapacitate and deter appellant from committing future crimes.

{¶ 12} The judge then turned to a consideration of the pertinent R.C. 2929.12 seriousness and recidivism factors, finding that the injuries suffered by appellant's son were exacerbated due to the child's age, that the victim suffered serious physical and psychological harm as a result of the offense, and that appellant's relationship with the child facilitated the offense. The court also observed that appellant has a history of criminal convictions, including felony convictions as a juvenile. The judge then went on to find that a combination of community control sanctions would demean the seriousness of appellant's conduct and its effect on the victim. He further concluded that imposing a prison sentence was commensurate with appellant's conduct, would not place an unnecessary burden on the state of Ohio, and was necessary to protect the public from future criminal acts that could be committed by appellant. Upon a review of the foregoing, we find that the trial court's attitude in imposing a five year sentence was not unreasonable, arbitrary, or unconscionable. Accordingly, appellant's sole assignment of error is found not well-taken.

{¶ 13} The judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

State v. Davidson
C.A. No. WD-08-002

Peter M. Handwork, P.J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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