

[Cite as *State v. Kupay-Zimmerman*, 2009-Ohio-3596.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92043

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EDITH KUPAY-ZIMERMAN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509870

BEFORE: Blackmon, J., Cooney, A.J., and McMonagle, J.

RELEASED: July 23, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Susan L. Gragel
Robert J. Rotatori
Richard L. Stoper, Jr.
Julie A. Wagner
Rotatori, Bender, Gragel, Stoper,
and Alexander Co., L.P.A.
800 Leader Building
526 Superior Avenue, East
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Lisa Reitz Williamson
Erin Donovan
Assistant County Prosecutors
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Edith Kupay-Zimerman (“Zimerman”) appeals her sentence. She assigns the following errors for our review:

“I. The trial court erred in imposing a sentence that is contrary to law because, 1) the sentence fails to comply with the purposes set forth in the sentencing statutes, 2) is not commensurate with the offender’s conduct and its effect on the victim, and 3) is not consistent with sentences imposed for similar crimes committed by similar offenders, as required by Ohio Revised Code §2929.11.”

“II. The trial court erred in imposing a sentence that is contrary to law because the trial court’s findings regarding remorse and recidivism pursuant to Ohio Revised Code §2929.11 were not supported by the record.”

“III. The trial court abused its discretion by imposing ten (10) community control sanctions upon appellant, particularly, a period of detention of 105 days, a maximum fine, and two years of probation, in light of the fact that the victim requested that appellant be placed on probation, pay restitution, and be required to take parenting classes.”

“IV. Appellant’s plea was involuntary and should be vacated because the trial court incorrectly advised appellant of the maximum prison sentence, particularly, the consequences of imposition of a term of postrelease control.”

{¶ 2} Having reviewed the record and pertinent law, we affirm Zimerman’s sentence. The apposite facts follow.

Facts

{¶ 3} The Cuyahoga County Grand Jury indicted Zimmerman for one count of child endangerment. The facts surrounding the indictment involved Zimmerman's German shepherd biting a ten-year old boy who was sleeping over at her house. Although the wounds were severe, Zimmerman failed to seek medical attention for the boy and, in fact, told him to lie to his mother regarding how he was hurt. She had assured his mother that the dog would not be present during the sleep-over. The mother did not discover her son was bitten by the dog until 20 hours after the attack. By then, because of swelling, it was too late to suture the wounds, resulting in scarring to the boy's arm and back.

{¶ 4} Zimmerman entered a plea of guilty to an amended count of attempt to commit child endangerment. The trial court sentenced her to two years of community control; 15 days in jail, to be served on weekends, along with 90 days of electronic home monitoring. She was also ordered to take parenting classes, perform 40 hours of community service, pay restitution in the amount of \$3,121.66 to the victim, fined \$5,000, and was ordered to euthanize the dog.

Considerations under R.C. 2929.11 and 2929.12

{¶ 5} We will address Zimmerman's first three assigned errors together because they all relate to whether the sentence imposed complies with the considerations set forth under R.C. 2929.11 and 2929.12.

{¶ 6} We review sentences pursuant to a two-prong standard set forth by the Supreme Court of Ohio in a split decision in *State v. Kalish*.¹ In *Kalish*, the court held that:

“[i]n applying *Foster* 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.”

{¶ 7} Zimerman’s sentence is undisputedly within the applicable statutory guidelines and, in all respects, the court adhered to applicable statutory requirements. Hence, we consider only whether the court abused its discretion by concluding that the sentencing factors listed under R.C. 2929.11 and 2929.12 warranted the term imposed. Zimerman contends the court should have honored the victim’s request of community control and contends the imposition

¹120 Ohio St.3d 23, 2008-Ohio-4912. (We recognize that *Kalish* is merely persuasive and not necessarily controlling because it has no majority. The Supreme Court of Ohio split over whether we review sentences under an abuse of discretion standard in some instances.)

of house arrest and 15 days in jail prevent her from being able to care for her family.

{¶ 8} Although the Supreme Court's decision in *State v. Foster*² no longer requires the trial court to make findings or give reasons for imposing its sentence, R.C. 2929.11 and 2929.12 remain operative.³ However, the court is not required to make findings pursuant to R.C. 2929.11 and 2929.12; it need only consider these provisions.⁴

{¶ 9} Nothing in the court's sentence shows it to be unreasonable, arbitrary, or unconscionable. The trial court specifically mentioned at the hearing that it considered "the seriousness and recidivism factors and the purposes and principles of Senate Bill 2 or R.C. 2929.12" and found Kupay-Zimmerman's conduct "outrageous."

{¶ 10} The court was presented with evidence from the prosecutor and the victim's mother regarding the seriousness of the injuries to the child, both physically and mentally. One of the wounds was so deep it reached the victim's muscle and required surgical packing. The mother of the victim testified her son

²109 Ohio St.3d 1, 2006-Ohio-856.

³*State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855; *Kalish*, at ¶13.

⁴*State v. Nolan*, Cuyahoga App. No. 90646, 2008-Ohio-5595; *State v. Page*, Cuyahoga App. No. 90485, 2008-Ohio-4244; *State v. McSwain*, Cuyahoga App. No. 90358, 2008-Ohio-3661; *State v. Garrett*, Cuyahoga App. No. 90428, 2008-Ohio-3549.

now wets the bed, sucks his thumb, and is terrified of going outside the home because a German shepherd lives in the neighborhood.

{¶ 11} Zimerman also deceived the mother by telling her the dog, which had previously bitten her own son, would not be on the premises, when in fact, he was present. Zimerman also convinced the boy to lie to his mother regarding the injuries, causing delay in seeking treatment, further exacerbating his injuries.

{¶ 12} The trial court also noted that Zimerman's body language and the fact she could not provide an honest answer regarding how the event occurred indicated she had no remorse. On appeal, Zimerman argues that the court misinterpreted her body language. The trial court, however, is in a better position than this court to have interpreted Zimerman's body language.⁵

{¶ 13} Additionally, Zimerman contends she did not answer the trial court dishonestly; she merely did not understand the question. However, the record reveals the court's questions were uncomplicated. The court first simply asked, "How did it happen?" According to the presentence investigation report and the victim's mother, the attack occurred at 1:00 a.m.; however, Zimerman stated it happened about 9:00 a.m. or 10:00 a.m. when the boys were wrestling in her son's room. The court then asked, "Well, then what happened? How did you find

⁵*State v. Thompson* (1998), 127 Ohio App.3d 511, 529.

out about the dog?” In reply, she answered by stating she panicked and did not want to believe the dog bit the boy. She contended she did not actually believe the dog bit him until the dog warden called the next day. This is incredulous, given the evidence that indicated that the wounds were obviously dog bites. Although she contends she did not intend to harm the victim, common sense dictates that a child severely suffering from dog bites needs medical attention.

{¶ 14} Zimerman also contends that her sentence is not consistent with crimes committed by similar offenders and refers to multiple cases and their respective sentences. Zimerman, however, failed to present this argument at her sentencing hearing; therefore, she has waived this argument on appeal.⁶

{¶ 15} We conclude nothing in the record supports Zimerman’s contention that the trial court’s sentence was unreasonable, arbitrary, or unconscionable, especially since she could have received a sentence of 18 months. Accordingly, Zimerman’s first, second, and third assigned errors are overruled.

Invalid Plea

⁶*State v. Edwards*, Cuyahoga App. No. 89181, 2007-Ohio-6068; *State v. Nettles*, Cuyahoga App. No. 85637, 2005-Ohio-4990; *State v. Woods*, Cuyahoga App. No. 82789, 2004-Ohio-2700; *State v. Mercado*, Cuyahoga App. No. 84559, 2005-Ohio-3429; *State v. Breeden*, Cuyahoga App. No. 84663, 2005-Ohio-510; *State v. Austin*, Cuyahoga App. No. 84142, 2004-Ohio-5736.

{¶ 16} In her fourth assigned error, Zimmerman argues her plea was not voluntarily and knowingly entered because the trial court at the plea hearing incorrectly advised her as to the maximum sentence.

{¶ 17} We agree the court incorrectly advised Zimmerman that if she was sentenced to prison, postrelease control was mandatory, and that if she violated postrelease control, she could be sentenced to an additional four-and-one-half years.

{¶ 18} Postrelease control is only mandatory for felonies of the first, second, and third degrees.⁷ R.C. 2967.28(B) also provides that if a prisoner violates post-release control, the “parole board may impose a prison term of up to one-half of the stated prison term originally imposed on the prisoner.” Because Zimmerman pled to a fourth degree felony with a potential maximum sentence of 18 months, the penalty for violating postrelease control would at the most be nine months. However, even though the court erred, Zimmerman’s plea is not invalid.

{¶ 19} Courts have divided Crim.R. 11 rights into constitutional and non-constitutional rights. Concerning constitutional rights, courts must strictly comply with Crim.R. 11 mandates; for nonconstitutional rights, the standard is substantial compliance.⁸ Informing the defendant of the potential maximum

⁷R.C. 2967.28(B).

⁸*State v. Stewart* (1977), 51 Ohio St.2d 86.

sentence is a nonconstitutional right; therefore, the court needed only to substantially comply in advising Zimmerman as to the maximum sentence.⁹

{¶ 20} "Substantial compliance means that under the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving. Furthermore, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show prejudicial effect. The test is whether the plea would have otherwise been made."¹⁰

{¶ 21} The Ohio Supreme Court recently held that if a trial court failed to mention a mandatory period of postrelease control -- which falls under the category of "maximum penalty involved," as it is part of defendant's sentence -- at the plea hearing, the plea must be vacated.¹¹ However, if the trial court partially complied with the rule, for example by incorrectly explaining postrelease control, an appellate court may only vacate the plea if the defendant makes a showing of prejudicial effect.¹²

⁹*State v. Nero* (1990), 56 Ohio St.3d 106.

¹⁰*Nero*, supra, at 108 (internal citations omitted.)

¹¹*State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509.

¹²*Id.* See, also, *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748.

{¶ 22} We conclude the trial court substantially complied in advising Zimmerman as to the postrelease control. Although the court's information was incorrect, the information apprised Zimmerman of the possibility of postrelease control.¹³

{¶ 23} Zimmerman has failed to show how she was prejudiced by the trial court's incorrect advisement. This was not a plea to which the sentence was agreed. Thus, the court's improper statement applied whether she pled or not. It would be absurd to argue she would not have entered the plea if she was aware her plea could result in a shorter sentence and shorter penalty for violating postrelease control.¹⁴ Moreover, she was not sentenced to prison, but received community control; therefore, she was not subject to postrelease control. Therefore, because Zimmerman has failed to show she was prejudiced by the misinformation, there is no basis on which to invalidate her plea. Accordingly, Zimmerman's fourth assigned error is overruled.

Judgment affirmed.

¹³But note this court's decision in *State v. Bostic*, Cuyahoga App. No. 84842, 2005-Ohio-2184 where the same judge in the instant case gave the same improper information as to postrelease control. We concluded the trial court's information was inadequate but concluded the issue was moot because Bostic was never subjected to postrelease control; but, we admonished the lower court for its inaccurate depiction of postrelease control. *Bostic* was decided prior to the Ohio Supreme Court's *Sarkozy* decision in which substantial compliance is now the standard.

¹⁴See, *State v. Nawash*, Cuyahoga App. No. 82911, 2003-Ohio-6040.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

COLLEEN CONWAY COONEY, A.J., and
CHRISTINE T. McMONAGLE, J., CONCUR