

[Cite as *State v. Spahr*, 2009-Ohio-4609.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 21, 2008 CA 22
v.	:	T.C. NO. 07 CR 501 07 CR 523
ANTHONY SPAHR	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 4th day of September, 2009.

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FROELICH, J.

{¶ 1} Defendant-appellant Anthony Spahr appeals from his conviction and sentence on two counts of Attempted Gross Sexual Imposition. Spahr argues that the trial court erred in denying his motion to suppress his confession and in sentencing him to maximum, consecutive sentences. For the following reasons, we will affirm the judgment of the trial court.

I

{¶ 2} On October 3, 2007, Milton-Union High School personnel received an anonymous call informing them that an employee had engaged in sexual misconduct with a student, V.W. The principal, Dr. Powderly, and his assistant principal, Scott Bloom, talked to V.W. and to Spahr, the assistant band director. Spahr gave a written statement in which he admitted that V.W. had been at his apartment on several occasions, but he denied any sexual misconduct. Powderly contacted the School Resource Officer, Miami County Sheriff's Deputy Adams.

{¶ 3} Deputy Adams interviewed V.W. in the presence of two school guidance counselors. She denied any sexual relationship with Spahr and provided a written statement. The next morning, V.W. approached Deputy Adams and asked to speak with him. They discussed the discrepancies between her statement and Spahr's. After she learned that Spahr had admitted that she was at his apartment, she conceded that it was true. When V.W. learned that Deputy Adams had seen her in the area of Spahr's apartment a couple of days earlier, she became very agitated and asked to speak with her parents, who were due to arrive at any time. V.W.'s parents were concerned that there was too much contact between their daughter and Spahr, pointing to frequent phone calls between the two.

{¶ 4} V.W. asked Deputy Adams if she could speak with him alone; her parents agreed. V.W. said that she had spoken with Spahr the night before, and he told her to "make things right," but she did not know what he meant, and she did not want to get him into trouble. V.W. told Deputy Adams that if Spahr told him what

happened, she would provide details. She insisted, without elaboration, that anything that happened was consensual.

{¶ 5} Assistant Principal Bloom contacted Spahr and asked him to come to the school to discuss the allegations further. Spahr agreed, but indicated that he needed a ride, and he accepted Bloom's offer to pick him up. The interview took place in a conference room; present were Bloom, Deputy Adams, Principal Powderly, and Spahr. Deputy Adams advised Spahr that his cooperation was entirely voluntary and that he was free to leave at any time. Deputy Adams explained the allegations and encouraged Spahr to tell the truth. Deputy Adams cautioned Spahr that he was potentially facing anything from a misdemeanor to a felony, which could mean registering as a sex offender for the rest of his life. Spahr acknowledged that there were discrepancies between his statement and what V.W. had told the police. He admitted to having consensual sex with V.W., and he wrote a confession. Deputy Adams spoke with V.W., who confirmed the details of the sexual encounters between her and Spahr.

{¶ 6} Deputy Adams was also assigned as a School Resource Officer at Newton High School. During his investigation of similar allegations regarding Spahr and a student at that school, he learned that Spahr had also had sexual contact with S.S. Some portion of the investigation on the day of Spahr's confession addressed the allegations involving S.S.

{¶ 7} In November and December, 2007, Spahr was indicted on two counts of Sexual Battery (Case No. 07CR-501 in relation to S.S. and Case No. 07CR-523 in relation to V.W.). He filed a motion to suppress his confession. A hearing was held

on the motion, but before the trial court ruled on the motion, a plea agreement was reached in April, 2008, whereby Spahr pled no contest to two counts of Unlawful Sexual Conduct with a Minor. The State agreed that if he were not sentenced to community control, it would recommend concurrent sentences and would otherwise remain silent at sentencing.

{¶ 8} A few days later, Spahr moved to withdraw his plea, alleging that Deputy Adams had himself come under investigation for crimes similar to those to which Spahr had admitted. The trial court granted the motion. Spahr moved to reopen his motion to suppress and for further testimony on that motion. The trial court denied his motion to reopen the hearing and soon after overruled Spahr's motion to suppress.

{¶ 9} In May, 2008, a new plea agreement was reached. Two bills of information were filed, each alleging one count of Attempted Gross Sexual Imposition. The State recommended concurrent sentences, but otherwise agreed to remain silent at sentencing. Spahr waived indictment, pled no contest, and was referred for a pre-sentence investigation report (PSI). The trial court sentenced Spahr to two consecutive sentences of twelve months. Spahr appeals.

II

{¶ 10} Spahr's First Assignment of Error:

{¶ 11} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT OVERRULED THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE SINCE APPELLANT'S CONFESSION WAS OBTAINED AS A RESULT OF A CUSTODIAL

INTERROGATION WITH [SIC] BENEFIT OF *MIRANDA* WARNINGS.”

{¶ 12} In his first assignment of error, Spahr argues that the trial court should have suppressed his confession because it was given during a custodial interrogation without the benefit of Miranda warnings. When assessing a motion to suppress, the trial court is the finder of fact, judging the credibility of witnesses and the weight of evidence. *State v. Jackson*, Butler App. No. CA2002-01-013, 2002-Ohio-5138, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 20. An appellate court must rely on those findings and determine “without deference to the trial court, whether the court has applied the appropriate legal standard.” *Id.*, quoting *State v. Anderson* (1995), 100 Ohio App.3d 688, 691. When the trial court’s ruling on a motion to suppress is supported by competent, credible evidence, an appellate court may not disturb that ruling. *Id.*, citing *State v. Retherford* (1994), 93 Ohio App.3d 586. Finding that the trial court’s ruling that Spahr was not in custody when he confessed was supported by competent, credible evidence and that no Miranda warnings were necessary, we will overrule Spahr’s First Assignment of Error.

{¶ 13} Police are not required to give warnings pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, to everyone they question, even when the person being questioned is a suspect. *State v. Biros* (1997), 78 Ohio St.3d 426, 440, citations omitted. Instead, Miranda warnings are only required for custodial interrogations. *Id.* When seeking suppression of a confession, the defendant bears the burden of proving that he was subjected to a custodial interrogation. *State v. Muncy*, Montgomery App. No. 21563, 2007-Ohio-1675, ¶8, fn. 1. “The ultimate inquiry is simply whether there is a formal arrest or restraint on

freedom of movement of the degree associated with formal arrest.” *Biros*, supra, at 440. In reaching this determination, we have considered factors such as: the location of the interview and the suspect’s reason for being there; whether the defendant was a suspect; whether the defendant was handcuffed or told he was under arrest or whether his freedom to leave was restricted in any other way; whether there were threats or intimidation; whether the police verbally dominated the interrogation or tricked or coerced the confession; and the presence of neutral parties. *State v. Estep* (Nov. 26, 1997), Montgomery App. No. 16279, citations omitted.

{¶ 14} Spahr agreed to participate in the interview at the request of Bloom, not law enforcement. Upon learning that Spahr had no transportation, Bloom offered to pick him up and Spahr agreed. Spahr’s consent to come to the interview weighs heavily against a finding that he was in custody. *Biros*, supra, at 440, citations omitted.

{¶ 15} The interview took place in a large conference room at the school where Spahr worked. Although Spahr would have us believe that this was a coercive atmosphere, courts have previously rejected the argument that a school is necessarily a coercive setting for a juvenile to be questioned by police. *In re Haubeil*, Ross App. No. 01CA2631, 2002-Ohio4095, ¶16, citing *In re Bucy* Nov. 6, 1996), Wayne App. No. 96CA0019; *In re Johnson* (June 20, 1996), Morgan App. No. CA-95-13. We see less reason to reach a different conclusion when a staff member is questioned rather than a student.

{¶ 16} Present at the interview were Spahr, the principal, the assistant

principal, and Deputy Adams, who was the only law enforcement officer in attendance. Spahr was not handcuffed or restrained in any way. There is no evidence that Spahr was physically or verbally intimidated or threatened or that he was tricked or coerced into confessing. The deputy advised Spahr at the outset that he was not under arrest, that his cooperation was voluntary, and that he could leave at any time. Moreover, Spahr was aware that when he was ready to leave, Bloom would either return him to work or to his home. At the end of the interview, Spahr was not placed under arrest, and he went home.

{¶ 17} When considered objectively, a reasonable person in Spahr's position would not have believed, under all of the circumstances, that he was under arrest or its functional equivalent. *State v. Petitjean* (2000), 140 Ohio App.3d 517, 523, citing *Stansbury v. California* (1994), 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293. Therefore, Miranda warnings were not necessary, and the confession was admissible. Spahr's First Assignment of Error is overruled.

III

{¶ 18} Spahr's Second Assignment of Error:

{¶ 19} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT OVERRULED THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE SINCE APPELLANT'S CONFESSION WAS INVOLUNTARY BECAUSE IT WAS ELICITED THROUGH INACCURATE STATEMENTS OF THE LAW AND PROMISES OF LENIENCY."

{¶ 20} In his second assignment of error, Spahr contends that his confession

should have been suppressed because it was involuntarily made. He maintains that Deputy Adams gave him incomplete and inaccurate information regarding the potential penalties that he faced and that the deputy coerced his confession by telling him that if he cooperated, he would receive more lenient treatment. For the following reasons, we conclude that Spahr's confession was voluntarily given.

{¶ 21} “A suspect's decision to waive his privilege against self incrimination is made voluntarily absent evidence that his will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct.” *State v. Otte*, 74 Ohio St.3d 555, 1996-Ohio-108, 562, citing *Colorado v. Connelly* (1986), 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473; *State v. Dailey* (1990), 53 Ohio St.3d 88, paragraph two of the syllabus. The burden is on the State to show by a preponderance of the evidence that a defendant's confession was voluntarily given. *State v. Melchior* (1978), 56 Ohio St.2d 15. “In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.” *State v. Edwards* (1976), 49 Ohio St.2d 31, paragraph two of the syllabus. See, also, *State v. Loza* (1994), 71 Ohio St.3d 61, 66.

{¶ 22} Contrary to Spahr's claim, there was no false promise of leniency. After Deputy Adams advised Spahr of the factual basis of the allegation, he encouraged Spahr to tell the truth. He told Spahr, “that being truthful shows cooperation which helps...when dealing with the Prosecutor or the Courts, that it's

very important to be truthful and it shows cooperation.” Admonitions to tell the truth are permissible; they are neither threats nor promises. *State v. Cooney* (1989), 46 Ohio St.3d 20; *State v. Wiles* (1991), 59 Ohio St.3d 71, cert. denied (1992), 506 U.S. 832, 113 S.Ct. 99.

{¶ 23} Deputy Adams further explained that although any charges would ultimately be up to the prosecutor, if Spahr were cooperative, he (Adams) would ensure that the prosecutor was aware of that. To the extent that this statement could be interpreted to indicate a promise of leniency, “[p]romises that a defendant’s cooperation would be considered in the disposition of the case, or that a confession would be helpful, does not invalidate an otherwise legal confession.” *Loza*, supra, at 67, citing *Edwards*, supra, at 40-41.

{¶ 24} Similarly, there was no misstatement of the law. Deputy Adams warned Spahr “that he could be facing several things. He could be facing things up to registering as a sexual offender for the rest of his life down to misdemeanors. *** Depending on the type of charges that he could be facing could be from felony down to misdemeanor, because each charge holds a different degree of punishment.” Thus, contrary to Spahr’s claim, he was warned that he could face felony charges. Deputy Adams had general information of sexual misconduct, but without more specific information, he could not assess the possible charges and could only offer a broad overview of the possibilities. This overview was consistent with the deputy’s knowledge of the facts at that time; there is no evidence of any attempt to be deceptive, let alone actual deception.

{¶ 25} Spahr was twenty-nine years old and a high school graduate.

Throughout the interview, he conversed calmly, cooperatively, and intelligently. There was no formal arrest, nor was there any restraint on his movement. Spahr was not handcuffed, and there is no evidence that the door was blocked or that he ever sought to invoke his right to terminate the questioning. Deputy Adams explained to Spahr that the interview was voluntary and that he could leave at any time. In fact, Spahr went home after the interview. Deputy Adams never raised his voice or threatened Spahr, nor was Spahr denied any basic necessities such as food, water, or bathroom breaks. Furthermore, the interview was relatively brief, lasting only twenty minutes.

{¶ 26} Under the totality of the circumstances, we conclude that the trial court correctly determined that Spahr's confession was voluntarily given. Spahr's second assignment of error is overruled.

IV

{¶ 27} Spahr's Third Assignment of Error:

{¶ 28} "THE TRIAL COURT VIOLATED MR. SPAHR'S SIXTH AMENDMENT RIGHTS WHEN IT ENGAGED IN JUDICIAL FACT FINDING IN SENTENCING MR. SPAHR TO THE MAXIMUM SENTENCE PERMITTED BY STATUTE."

{¶ 29} Spahr's Fourth Assignment of Error:

{¶ 30} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING MR. SPAHR TO MAXIMUM CONSECUTIVE SENTENCES BASED SOLELY UPON HIS PERCEIVED LACK OF REMORSE."

{¶ 31} Spahr's Fifth Assignment of Error:

{¶ 32} “THE COURT RELIED UPON IMPERMISSIBLE EVIDENCE CONTAINED IN THE PRE-SENTENCE INVESTIGATION WHEN IT SENTENCED MR. SPAHR TO MAXIMUM, CONSECUTIVE SENTENCES FOR EACH COUNT.”

{¶ 33} In his third, fourth, and fifth assignments of error, Spahr challenges the sentence imposed upon him by the trial court. Spahr insists that the trial court’s finding that he was in collusion with one of the victims and that he was not remorseful amounted to judicial factfinding in violation of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, and the court should not have relied on these findings when sentencing him to maximum, consecutive sentences. Spahr also maintains that the trial court should not have considered statements in the PSI alleging that he provided alcohol to a minor and that there were prior allegations of inappropriate sexual conduct with students.

{¶ 34} Spahr did not raise any of these issues in the trial court. Before the court made its statements that Spahr and one of his victims were in collusion and that Spahr was not truly remorseful, the court gave Spahr and his attorney an opportunity to explain why the victim was suddenly recanting her allegations and Spahr was now denying the truth of allegations that he had already admitted. There were no objections either to the judge’s statements or to the court’s consideration of those factors in sentencing Spahr. To the contrary, counsel acknowledged that the victim’s last minute recantation could indicate “some type of collusion,” and that it made “the mitigating factor of remorsefulness watered down.” Similarly, about the PSI, counsel simply stated, “I’m a little bit unsure why those were mentioned in the P.S.I. report, but they were there and I would like to address those.” He then very

briefly addressed the allegations about prior incidents of providing alcohol to a minor and inappropriate sexual conduct with students. Having failed to object to any of these matters at sentencing, Spahr has waived his right to raise them for the first time on appeal. See, e.g., *State v. Bolling*, Montgomery App. No. 20225, 2005-Ohio-2509, ¶73, citing *State v. Williams* (1977), 51 Ohio St.2d 112; *State v. Awan* (1986), 22 Ohio St.2d 120. Nevertheless, we may review Spahr's sentence for plain error. *State v. Smith*, Montgomery App. Nos. 21463 & 22334, 2008-Ohio-6330, ¶41, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642.

{¶ 35} We begin with Spahr's claim that the trial court engaged in judicial factfinding by concluding that he and one of his victims were in collusion and that he was not truly remorseful for his crimes. Spahr admitted to both police and to the court that he had engaged in sexual conduct with V.W., and she told the police the same. However, by the time of the PSI, Spahr denied it. Moreover, the day before the sentencing hearing, V.W. sent a letter to the court, for the first time recanting her claims. The trial court was understandably concerned and asked Spahr for an explanation, which he was unable to provide. Spahr's counsel admitted that one possible interpretation was that Spahr and V.W. were in collusion. We also point out that the trial court was in a position to observe Spahr's voice and demeanor at sentencing and at prior court appearances. As a result of all of this information, the trial court concluded that Spahr was not remorseful for his acts.

{¶ 36} Ohio Revised Code Section " *** 2929.12, grants the sentencing judge discretion 'to determine the most effective way to comply with the purposes and principles of sentencing.' R.C. 2929.12(A) directs that in exercising that discretion,

the court shall consider, along with any other ‘relevant’ factors, the seriousness factors set forth in divisions (B) and (C) and the recidivism factors in divisions (D) and (E) of R.C. 2929.12. These statutory sections provide a nonexclusive list for the court to consider.” *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶37. Whether or not a defendant shows genuine remorse for an offense is one factor that a trial court “shall consider” pursuant to R.C. 2929.12(D)(5) & (E)(5) before imposing sentence. *State v. Jackson*, Butler App. No. CA2002-01-013, 2002-Ohio-5138, ¶34.

As these sections were not found to constitute judicial factfinding, they were not among the ones severed as unconstitutional by *Foster*. See, e.g., *State v. Watkins*, Lucas App. No. L-05-1336, 2007-Ohio-92, ¶6. Moreover, “[a] trial court may consider an offender’s statement of remorse; however, a court is not required to accept the statement as true and may comment accordingly.” *State v. Cockrell*, Fayette App. No. CA2006-05-020, 2007-Ohio-1372, ¶28, citing *State v. Strunk*, Warren App. No. CA2006-04-046, 2007-Ohio-683, ¶44. Therefore, the trial court’s belief that Spahr lacked remorse was properly considered by the court prior to sentencing.

{¶ 37} We next address Spahr’s contention that the court erred in considering “unsubstantiated allegations” of prior wrongdoings. When imposing sentence, the trial court may consider and refer at sentencing to information contained in the PSI, any statement from the defendant or his victims, or any other evidence in the record.

State v. Mathis, 109 Ohio St.3d 54, 2006-Ohio-855, ¶37. There is no statutory guidance for what information may be contained in the PSI. *State v. Hutton* (1990), 53 Ohio St.3d 36, 43. However, R.C. 2929.12(A)(1) requires that the report include

the circumstances of the crime, the defendant's prior criminal record and "such information about defendant's social history *** as may be helpful in imposing or modifying sentence ***." *Id.* The Ohio Supreme Court has "held that the concept of 'social history' is broad enough to include allegations of wrongdoing even though the wrongdoing did not result in criminal charges." *Id.*, citing *Cooey*, *supra*, at 35; see, also, *State v. Eley*, 77 Ohio St.3d 174, 1996-Ohio-323. Thus, the trial court was clearly permitted to consider the allegations of Spahr's previous wrongdoings.

{¶ 38} Finally, Spahr insists that the trial court erred in ordering maximum, consecutive sentences. However, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster*, *supra*, at paragraph 7 of the syllabus. The trial court indicated that it had "considered the purposes and principles of felony sentencing under Ohio Revised Code Section 2929.11 and the seriousness and recidivism factors under 2929.12. The court finds that the Defendant is not amenable to an available Community Control sanction." Spahr's sentence fell within the statutory guidelines, and the factors of which he complains are within the court's discretion to consider.

{¶ 39} Finding no plain error in Spahr's sentence, his third, fourth, and fifth assignments of error are overruled.

V

{¶ 40} Having overruled all five of Spahr's assignments of error, the judgment of the trial court is Affirmed.

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FAIN, J. and GRADY, J., concur.

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