

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2009 CA 82
v.	:	T.C. NO. 2009 CR 0133
CRAIG SAUNDERS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

**OPINION**

Rendered on the 28<sup>th</sup> day of January, 2011.

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FROELICH, J.

{¶ 1} Craig Saunders appeals from a judgment of the Greene County Court of Common Pleas, which found him guilty on his guilty pleas of two counts of theft, sentenced him to an aggregate prison term of eighteen months, and ordered him to pay restitution. For the following reasons, the judgment of the trial court will be affirmed.

{¶ 2} Saunders is an attorney who, in the past, worked as a prosecutor for the City of Xenia. On March 11, 2009, Saunders was indicted on two counts of theft, which related to stealing money from two estates while he served as attorney for the estates.

{¶ 3} The indictment did not include facts regarding the amount of money or the circumstances of either offense. Count I contained a specification that the value of the property taken was greater than \$5,000; theft of over \$5,000 is a fourth degree felony. R.C. 2913.02(B)(2). Count II contained two specifications: that the victim of the offense was an elderly person and that the value of the property taken was greater than \$500. If the State had established both specifications, Count II would have been a fourth degree felony. R.C. 2913.02(B)(3). However, the State's recitation of facts did not include the age of the victim. Without that specification, theft of over \$500 was a fifth degree felony.

{¶ 4} At the plea hearing on September 21, 2009, the State alleged, and Saunders pled guilty to, the following offenses: The basis for Count I was that Saunders received \$79,937.70 from a decedent's daughter in 2005 to pay estate disbursements, including estate tax, but kept \$40,806.11 for himself, in violation of R.C. 2913.02(A)(2). Saunders' failure to pay the estate taxes resulted in late fees totaling \$5,000.64. The basis for Count II was that Saunders received \$7,508.95 from the executor of an estate to pay the estate tax, when in fact only \$5,109.46 was owed, and kept the difference, in violation of R.C. 2913.02(A)(2).

{¶ 5} The trial court found Saunders guilty and ordered a presentence investigation; on December 14, 2009, it conducted a sentencing hearing. The court sentenced Saunders to eighteen months on Count I and to twelve months on Count II, to be served concurrently. These sentences were the maximum allowable sentences

for fourth and fifth degree felonies, respectively. The court also ordered Saunders to pay \$48,206.11 in restitution.

{¶ 6} Saunders appeals from his convictions, raising one assignment of error.

II

{¶ 7} Saunders' assignment of error states:

{¶ 8} "THE TRIAL COURT ERRED IN THE IMPOSITION OF SENTENCE."

{¶ 9} Saunders contends that the trial court "did not review and/or consider all of the relevant factors as required by the Ohio Revised Code and by case law in the State of Ohio" and that, if it had done so, it would not have imposed the maximum sentences for his offenses. Saunders points out that he was a law school graduate with no prior criminal record, that he "demonstrated a genuine sense of remorse," that his likelihood of recidivism was low, that he had no substance abuse problem, and that he "had suffered the loss of his license and faced public scrutiny for his offenses."

{¶ 10} The trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum, consecutive, or more than minimum sentences. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶31. Nevertheless, in exercising its discretion, the trial court must consider the statutory policies that apply to every felony offense, including those set out in R.C. 2929.11 and 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at ¶37. See, also, *State v. Barker*, 183 Ohio App.3d 414, 2009-Ohio-3511, ¶36-38; *State v. Arnold*, Clark App. No. 2008 CA 25, 2009-Ohio-3510, ¶8.

{¶ 11} Under R.C. 2929.11(A), "[t]he overriding purposes of felony sentencing

are to protect the public from future crime by the offender and others and to punish the offender.” R.C. 2929.12(A) provides that a court that imposes a sentence for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11. R.C. 2929.12(B) and (C) enumerate factors to be considered in weighing the seriousness of the conduct, and R.C. 2929.12(D) and (E) enumerate factors to be considered in weighing the likelihood of the offender’s recidivism. The court also may consider any other factors that are relevant to achieving the purposes and principles of sentencing, such as charges that did not result in a conviction, including charges that were dismissed by the State pursuant to a plea agreement. *State v. Wiles* (1991), 59 Ohio St.3d 71, 78; *State v. Williams* (June 14, 2002), Montgomery App. No. 19026, 2002-Ohio-2908.

{¶ 12} “When reviewing felony sentences, an appellate court must first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence, including R.C. 2929.11 and 2929.12, in order to find whether the sentence is contrary to law.” *State v. Moore*, Clark App. No. 2010 CA 55, 2010-Ohio-6226, ¶7, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶4. If the sentence is not clearly and convincingly contrary to law, the trial court’s decision in imposing the term of imprisonment must be reviewed under an abuse-of-discretion standard. *Id.* The abuse of discretion standard is an “appellate court’s standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence.” *State v. Watkins*, 186 Ohio App.3d 619, 2010-Ohio-740, ¶41, citing *State v. Boles*, 187 Ohio App.3d 345, 2010-Ohio-278, ¶18.

{¶ 13} Saunders’ conviction for theft in an amount over \$5,000 was a fourth

degree felony pursuant to R.C. 2913.02(B)(2). The statutory range of a prison term for a fourth degree felony is six to eighteen months. R.C. 2929.14(A)(4). His theft of over \$500, with no reference to an elderly victim, was a fifth degree felony pursuant to R.C. 2913.02(B)(2). The statutory range of a prison term for a fifth degree felony is six to twelve months. R.C. 2929.14(A)(5). Saunders was subject to a restitution order under R.C. 2929.18(A)(1).

{¶ 14} At the sentencing hearing, the trial court stated that it had fully considered the information contained in the presentence investigation report, the information presented at the hearing, and the record. It stated that it had also considered the factors pertaining to the seriousness of the offense and to recidivism and found that prison was consistent with the purposes and principles of sentencing set forth under R.C. 2929.11. These considerations were reiterated in the judgment entry, and the trial court imposed a sentence within the statutory range. The sentence was not contrary to law.

{¶ 15} Having concluded that Saunders' sentence was not contrary to law, we must consider whether the trial court abused its discretion in imposing the sentence that it did. *Watkins* at ¶41. "[I]n the felony sentencing context, '[a]n abuse of discretion can be found if the sentencing court unreasonably or arbitrarily weighs the factors in R.C. 2929.11 and 2929.12.'" *State v. Jordan*, Columbiana App. No. 09 CO 31, 2010-Ohio-3456, ¶12 (internal citation omitted). In determining an appropriate sentence, the trial court "is not confined to the evidence that strictly relates to the conviction offense because the court is no longer concerned, like it was during trial, with the narrow issue of guilt." *State v. Bowser*, 186 Ohio App.3d 162, 2010-Ohio-951, ¶14,

citing *Williams v. New York* (1949), 337 U.S. 241, 246-47, 69 S.Ct. 1079, 93 L.Ed. 1337.

{¶ 16} R.C. 2929.12(B) provides that the court shall consider all of the following that apply to the offender, the offense, or the victim, and any other relevant factors indicating that the offender's conduct is more serious than conduct normally constituting the offense.

{¶ 17} (1) The physical and mental injuries suffered by the victim of the offense due to the conduct of the offender were exacerbated because of the physical and mental condition or age of the victim;

{¶ 18} (2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense;

{¶ 19} (3) The offender held a public office or position of trust in the community, and the offense related to that office or position;

{¶ 20} (4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice;

{¶ 21} (5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others;

{¶ 22} (6) The offender's relationship with the victim facilitated the offense;

{¶ 23} (7) The offender committed the offense for hire or as part of an organized criminal activity;

{¶ 24} (8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion;

{¶ 25} (9) If the offense is a violation of R.C. 2919.25 or a violation of section 2903.11, 2903.12 or 2903.13 of the Revised Code, involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or a person in loco parentis of one or more of those children.

{¶ 26} R.C. 2929.12(C) lists certain factors indicating that an offender's conduct is less serious than conduct normally constituting the offense. These factors include strong provocation, failure to cause physical harm to any person or property, and "substantial grounds to mitigate the offender's conduct although the grounds are not enough to constitute a defense."

{¶ 27} R.C. 2929.12(D) lists recidivism factors tending to show (in the legislature's estimation) that an offender is likely to commit future crimes. These factors include the offender's failure to respond favorably to other sanctions previously imposed through criminal proceedings, a pattern of substance abuse related to the offense and the offender's refusal to acknowledge the connection or seek treatment, and the lack of remorse.

{¶ 28} R.C. 2929.12(E) lists factors indicating that the offender is not likely to commit future crimes: the absence of prior criminal offenses, a significant period of "law-abiding life" prior to the offense, genuine remorse, and the occurrence of the offense under circumstances that are not likely to recur.

{¶ 29} In addition to statutory factors, the court may consider the contents of a presentence investigation report, facts supporting a charge of which the defendant was

ultimately acquitted, allegations of crimes for which the defendant was never prosecuted, and facts supporting a charge that was dismissed in a plea agreement. *Bowser* at ¶15-16; *State v. Miller*, Clark App. No. 09-CA-28, 2010-Ohio-2138, ¶47, fn.2.

{¶ 30} The court was presented with a presentence investigation report, which recounted Saunders' educational and work experience, including his employment with a management recruiter (where he is paid commission) at the time of sentencing. The report stated that Saunders had the "physical ability" to pay financial sanctions, but did not have "the income to satisfy the amount required." The report also discussed Saunders' father's effort to get a federal grant for his farm, which could be used to help pay restitution, but it was not clear that the money would be received. The report stated that Saunders was diagnosed with depression (for which he had been prescribed medication), but was otherwise in good physical health.

{¶ 31} The presentence report also expressed the view that Saunders "has shown disregard for prior judgments<sup>1</sup> being placed upon him to pay restitution" and "has done little to show great remorse to the victims for the offense." Based on these observations about Saunders' attitude toward the offenses, and restitution in particular, the probation officer conditioned its sentencing recommendation on whether Saunders had paid restitution (presumably in the probate case). The presentence report recommended that, if restitution had been paid, Saunders be sentenced to three days in

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<sup>1</sup>The record does not reflect any "prior judgments" related to restitution in this case, but the PSI references "Judge Hagler, Greene County Probate Court" in this regard. The State also alleged at the sentencing hearing that there had been "discussions" and "promises" to pay restitution in this case, but no payments had been made up to that time.

jail and to community control sanctions for five years, with conditions placed on his community control related to mental and behavioral health treatment, and that he be ordered to pay full restitution. The presentence report recommended that, if restitution had not been paid, Saunders be sentenced to eighteen and twelve months of incarceration on the theft offenses, respectively, to be served consecutively.

{¶ 32} At the sentencing hearing, the State asked the court to consider numerous factors, including “unindicted matters” and a “pattern of behavior” in Saunders’ law practice of “not necessarily criminal activity but receiving money for legal work that ultimately wasn’t done.” The prosecutor also asked the court to consider that there were multiple offenses alleged in this complaint, even though Saunders was technically a “first offender.” The prosecutor pointed out that the amount of money involved in Count I greatly exceeded the amount required to charge that offense as a fourth degree felony (\$5,000) and that, in the nine months since his indictment, Saunders had not paid any restitution to the victims, despite many promises to do so. The record does not indicate whether any restitution had been paid in the probate case.

{¶ 33} Several factors set forth in R.C. 2929.12(B), related to the seriousness of the offense, also applied. Although the trial court did not specifically cite these factors, the court could have reasonably found that: 1) the victims of the offenses suffered serious economic harm as a result of the offenses, inasmuch as the amount stolen exceeded \$42,000 (R.C. 2919.12(B)(2)); 2) Saunders held a position of trust in the community and the offenses related to that position (R.C. 2919.12(B)(3)); 3) Saunders’ professional reputation or occupation was used to facilitate the offenses (R.C. 2919.12(A)(5)); and 4) Saunders’ relationship with the victims facilitated the offense.

R.C. 2919.12(A)(6).

{¶ 34} The nature of an attorney-client relationship heightens the seriousness of any theft by an attorney from his or her client. See *Moraine v. Lewis*, 151 Ohio App.3d 526, 2003-Ohio- 460, ¶27 (“Attorneys occupy a special and favored position of trust and confidence vis-à-vis their clients.”). “A fiduciary relationship is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.” *In re Termination of Employment of Pratt* (1974), 40 Ohio St.2d 107, 115. “The relation between attorney and client is a fiduciary relationship of the very highest character, and bonds the attorney to most conscientious fidelity – uberrima fides.” *Cox v. Delmas* (1893), 99 Cal. 104, 123, 33 P. 836. Black’s Law Dictionary defines “uberrima fides” as “The most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight.” Black’s Law Dictionary (6 Ed.Rev.1990) 1520.

{¶ 35} Although Saunders’ offenses were not directly related to his former position as a city prosecutor, in that capacity, he had previously been “obliged \*\*\* to prevent the offense or bring others committing it to justice;” the trial court could have reasonably concluded that Saunders’ previous position increased the seriousness of these offenses. Further, as discussed at the plea hearing, “there were discussions about one potential other charge may be filed (sic) and the State is going to waive filing of that charge;” the court may have considered these non-charged activities. Thus, numerous factors supported the imposition of the sentences in this case.

{¶ 36} Saunders cites the dissent in *State v. Sims*, Greene App. No. 08CA71,

2009-Ohio-5751, in support of his argument that the trial court did not adequately consider the statutory factors in imposing his sentence, particularly the factors showing that his offense was less serious than conduct typically constituting the offense and that his risk of recidivism was low. However, the basis for the concern expressed in the *Sims* dissent is not present in Saunders' case. In *Sims*, the dissent pointed out that none of the more serious factors of R.C. 2929.12(B) was present, while one of the "less serious" factors of R.C. 2929.12(C) was present. Further, with respect to recidivism, one of the "more likely" factors was present, whereas two of the "recidivism not likely" factors were present. Yet the court imposed the maximum sentences, without discussion of the statutory factors. The dissent expressed concern that the scope of the uncharged offenses in that case – which were alleged to have accounted for exponentially more theft around the country than that proven in the Ohio case – "abrogate[d] the sentencing considerations mandated by the legislature." The dissent concluded that, under the circumstances presented, the trial court had abused its discretion by "marginalizing" the statutory factors in imposing sentence.

{¶ 37} In Saunders' case, there is no indication that the trial court "marginalized" the statutory factors, although it did not discuss them specifically. Several factors weighed in favor of finding a serious form of the offense, particularly his position of trust with respect to the victims. Saunders made no argument that any of the "less serious" factors applied. Saunders claimed to be remorseful (and we have no reason to doubt this) and to be working diligently toward restitution, but not even a token payment had been made, and Saunders seemed to be relying on his parents to make any payments. Even assuming that Saunders' risk of recidivism was low, the trial court could have

reasonably concluded that the seriousness of Saunders' offense outweighed the low risk of recidivism.

{¶ 38} With the facts presented in this case, we cannot conclude that the trial court abused its discretion in imposing maximum, concurrent sentences for the theft offenses.

{¶ 39} The assignment of error is overruled.

III

{¶ 40} The judgment of the trial court will be affirmed. We return the case to the trial court for execution of sentence by entry or any other means that the trial court deems appropriate.

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GRADY, P.J. and BROGAN, J., concurs.

Copies mailed to:

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Hon. Sumner E. Walters, Visiting Judge

Hon. J. Timothy Campbell/Hon. Michael Buckwalter