

[Cite as *State v. Bevly*, 2013-Ohio-1352.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-471
Damon L. Bevly,	:	(C.P.C. No. 11CR-08-4152)
Defendant-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 28, 2013

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellee.

APPEAL from the Franklin County Court of Common Pleas
McCORMAC, J.

{¶ 1} Defendant-appellee, Damon L. Bevly, was charged with four counts of gross sexual imposition in the Franklin County Court of Common Pleas. The charges were third degree felonies because they alleged violations of R.C. 2907.05(A)(4) which applies when the victim is less than 13 years old. The indictment alleged that the victim was aged 10-11 at the time of the offenses.

{¶ 2} The crime of gross sexual imposition under 13 generally carries a presumption of prison. R.C. 2907.05(C)(2). However, when "evidence other than the testimony of the victim was admitted in the case corroborating the violation" the general assembly has provided that a court "shall impose" on such offender "a mandatory prison term equal to one of the prison terms described in section 2929.14 of the Revised Code for a felony of the third degree." R.C. 2907.05(C)(2)(a).

{¶ 3} Defendant pleaded guilty to Counts 1 and 2 of the indictment as charged, both third degree felonies. He understood that the state was taking the position that mandatory sentencing was required. At the plea hearing, the state introduced the testimony of Detective Brian Sheline, who testified that defendant confessed to the offenses by admitting that he had fondled the girl's vaginal area and then touched his penis to her vaginal area on at least two occasions as well. In addition to Sheline's testimony regarding defendant's confession, the state introduced as exhibit A the compact disc recording of the confession.

{¶ 4} In the interim between the plea and sentencing hearings, defendant filed a sentencing memorandum raising two constitutional challenges to the mandatory sentencing requirement. The state filed a memorandum opposing the constitutional issues. Those lines of argument will be discussed later in this decision.

{¶ 5} The trial court issued a decision rejecting the application of the mandatory sentencing provision:

First, there is a question as to whether this is evidence "admitted" in a case as anticipated by the statute. Defense counsel did not even cross-examine the witness. Admittedly, he was given the opportunity to do so but did not. It is reasonable to assume that he saw no need as his client was going to enter a plea of guilty. Clearly, this would not have happened at a trial. Second, a serious question can be raised as to whether the testimony of Det. Sheline is evidence as anticipated in R.C. 2907.05(C)(2)(a). Rule 101(C)(3) of the Rules of Evidence specifically provides that the Rules of Evidence do not apply to miscellaneous criminal proceedings, including sentencing. This is a plausible conclusion when read in conjunction with Evid.R. 102, which provides that the purpose of the rules is to provide procedures for the "adjudication of causes."

Construing R.C. 2907.05(C)(2)(a) strictly against the State, and liberally in favor of the accused, as required by R.C. 2901.04(A), it is the opinion of this Court that the mandatory sentencing provision at issue does not apply. This makes good policy as it recognizes the importance of a defendant accepting responsibility for his actions and not putting the system and the victims through an expensive and emotional trial. To read the statute differently, the defendant ends up being more severely punished because of his cooperation.

In addition to the Court's statutory interpretation of the relevant section of the Revised Code, the Court finds the same to be unconstitutional for two reasons. First, the Court does not believe there is any rational basis for the distinction between cases where there is corroborating evidence from those where there is no corroborating evidence. Second, the Court finds that the distinction violates the Defendant's right to have the fact decided by a jury as guaranteed by the Sixth Amendment.

April 26, 2012 decision finding that the prison term is not mandatory.

{¶ 6} At the subsequent sentencing hearing, the trial court noted that there was an issue at sentencing as to whether or not the prison term in this case is mandatory. The court noted that, while the statute as represented by the state is mandatory, the court found the mandatory provision to be unconstitutional. The court imposed concurrent three-year prison sentences and specifically stated that the sentences were not mandatory.

{¶ 7} The state filed a timely appeal of right asserting the following assignment of error:

THE COMMON PLEAS COURT ERRED WHEN IT FAILED TO IMPOSE THE PRISON SENTENCES AS MANDATORY SENTENCES FOR GROSS SEXUAL IMPOSITION AGAINST A CHILD UNDER 13 WHEN THERE WAS CORROBORATING EVIDENCE OF THE VIOLATIONS.

{¶ 8} The first issue is whether the common pleas court erred when it failed to impose those sentences for gross sexual imposition against a child under 13 as mandatory sentences. Both parties agree that R.C. 2907.05(C)(2)(a) requires a mandatory sentence if the provisions of the statute are followed. Before proceeding to other aspects of this issue, we must first determine whether the general assembly may constitutionally order mandatory sentencing for the same crime, in this case, gross sexual imposition, when certain defined evidence strengthens the proof by enhancing the likelihood that the testimony of the victim is true.

{¶ 9} The Supreme Court of Ohio stated in *State v. Thompkins*, 75 Ohio St.3d 558, 560 (1996): "Pursuant to its police powers, the General Assembly has the authority to enact laws defining criminal conduct and to prescribe its punishment." In *State v. Morris*, 55 Ohio St.2d 101, 112 (1978), the court stated that "at all times it is within the

power of the General Assembly to establish crimes and penalties" which power rests with the General Assembly alone. Some statutes require corroboration in order to convict a defendant on the testimony of an accomplice alone. *See State v. Pearson*, 62 Ohio St.2d 291, 295 (1980). More applicable to the crime of gross sexual imposition, the General Assembly has required corroborating evidence beyond just the victim's testimony. *State v. Economo*, 76 Ohio St.3d 56 (1996). The foregoing provisions are corroborating enhancement that increases the burden of the prosecution generally in regard to crimes where there is a close personal relationship. However, in our opinion, enhancement by corroborating evidence may also apply to a defendant as long as the evidence is introduced in a way that is constitutional. It seems obvious that the General Assembly felt that it was better to start out with a sentence that was not required to be mandatory and to make the sentence mandatory only if there is corroborative proof beyond the alleged victim's testimony that the crime was actually committed.

{¶ 10} Appellee argues that this case is moot because even though the court held that the prison term was not mandatory, it sentenced appellee to prison. Thus, appellee argues that the state's appeal raises only an academic issue which will have no bearing whatsoever on appellee's prison sentence.

{¶ 11} The distinguishing character of a moot issue is that it involves no actual genuine live controversy, the decision of which can definitely affect existing legal relationships. *See Culver v. City of Warren*, 84 Ohio App. 373, 393 (7th Dist.1948). Based on the assertion that the judgment rendered herein will have no effect on defendant's incarceration in any way whatsoever, appellee argues that the judgment of the common pleas court should be left intact. Appellee further asserts that it is too late to change the non-mandatory statutory determination that the trial judge adopted as the sentence ordered by the trial court was mandatory in character.

{¶ 12} We disagree. If the determination was held to be mandatory per se, there would be a substantial difference in the way it would affect defendant. If the mandatory provision had been held valid by the trial court, appellee no longer could be released early. The fact that the sentence was imposed in a mandatory fashion but without a mandatory determination allows the trial court's sentence to be changed in important ways potentially favorable to defendant. The case is not moot for that reason.

{¶ 13} The state's other argument against declaring the case moot is that the trial court's judgment would be held against the state in later cases and "will bind the State in future sentencing matters, such as precluding the State from arguing that judicial release or transitional control is barred because the sentences are mandatory."

{¶ 14} The state's principle argument is that R.C. 2907.05(C)(2)(a), which provides a mandatory prison term if evidence corroborates the violation poses a sentencing factor rather than an element of the crime, and that therefore the trial judge is the one that determines its applicability in a sentencing hearing rather than the issue being submitted to a jury even if a jury had not been waived. The determination of this issue is based upon the rationale of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny. In *Apprendi*, New Jersey had enacted a hate crime statute which increased the maximum penalty that otherwise would apply for that type of crime. The New Jersey Supreme Court had affirmed, holding that it was a sentencing matter to be decided by the trial court judge. The United States Supreme Court reversed, holding that other than the fact of a prior conviction, any fact that increases the penalty for crime beyond prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. A failure to do so violated the due process clause and the hate crime statute New Jersey had enacted specifically calling the determination a sentencing factor which was abruptly dismissed as simply disagreeing with the constitutional mandate set forth in *Apprendi*. Ohio's General Assembly did not label the provision as either an element of the crime or a sentencing factor. It does refer to a term equal to one of the prison terms described in R.C. 2929.14 for a felony of the third degree. Thus, the term to which appellee was sentenced could not exceed a maximum term possible under the third degree felony provisions even without a finding of corroboration.

{¶ 15} As we pointed out before, finding that a prison term is mandatory eliminates some possible benefits that may otherwise apply during the prison term imposed including early release, something that is otherwise possible as no one in prison has a guarantee that they are going to be released early and those provisions may be changed by entities other than courts or juries. It is another form of sentencing prerogatives and it is also not unusual that those sentencing prerogatives and release prerogatives are not court determined. Consequently, we find that the statutory provision

does not increase the maximum prison sentence that could have been applied without the corroboration provision and it is therefore a sentencing factor.

{¶ 16} The trial court erred in holding that the issue of whether the victim's testimony had been corroborated was one that must be presented to a jury if the jury provision had not been waived. The trial court was required to make this determination. While it is true that the determination was presented to the court after a guilty plea but prior to the actual sentencing hearing, it should have been considered in the sentencing phase.

{¶ 17} In the case of *Southern Union Co. v. United States*, 132 S.Ct. 2344 (2012), the court noted that legislatures can enact statutes that constrain judges' discretion in sentencing. Of course that prerogative must be in accordance with valid constitutional principles, but as explained before, it was in this case. R.C. 2907.05(C)(2)(a) does constrain the judges' discretion in regard to imposing the mandatory provision. Issues may arise as to the standard of proof. Some sentencing provisions specify the standard of proof. Other provisions require the trial court to weigh numerous applicable provisions and to exercise discretion as to which ones outweigh adverse ones.

{¶ 18} The trial court also held that the evidence was not admissible because it was not admitted in the case and that it was not evidence as anticipated in R.C. 2907.05(C)(2)(a). The trial court erred in both of these holdings. The case includes all parts thereof, one of which is sentencing. Rules of evidence are not applicable to miscellaneous criminal proceedings including sentencing. However, the sentence procedure is part of the case despite the fact that defendant had pled guilty to two charges. There is no conflict with Evid.R. 102, which provides that the purpose of the rules is to provide procedures for the "adjudication of causes." Criminal cases are not fully adjudicated without a sentence having been ordered. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The disputed testimony meets that standard. It is evidence that is of great value in determining the crucial issue of whether the court "shall impose" a mandatory prison sentence. The fact that the rules of evidence do not apply in some situations in a trial such

as in sentencing does not affect the character of the evidence but only the procedure for introducing it.

{¶ 19} Appellant's assignment of error is sustained. The judgment of the Franklin County Court of Common Pleas is reversed and the case is remanded to the trial court for further proceedings consistent with this decision.

*Judgment reversed and remanded
for further proceedings.*

BRYANT and DORRIAN, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of Ohio Constitution, Article IV, Section 6(C).