

OHIO COURT OF APPEALS, THIRD APPELLATE DISTRICT, CRAWFORD  
COUNTY

State v. Tupps

2023 Ohio 2097 (Ohio Ct. App. 2023) · No. 3-22-48 · Decided June 26, 2023

SUMMARY

The Ohio Third District Court of Appeals reviewed Jason Tupps's convictions and sentence for rape and domestic violence. The court upheld the venue ruling and adoptive-admission jury instruction, but held that the trial court failed to provide all required notifications for an indefinite prison sentence under R.C. 2929.19(B)(2)(c). The judgment was affirmed in part, reversed as to sentencing, and remanded for resentencing.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Ohio Court of Appeals, Third Appellate District, Crawford County                                                                                                                                                                                                                                                                                                                                                                                                       |
| WRITING FOR THE COURT | Miller, P.J.; Willamowski, J.; Waldick, J.                                                                                                                                                                                                                                                                                                                                                                                                                             |
| JURISDICTION          | Ohio                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| DECIDED               | June 26, 2023                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| DOCKET                | 3-22-48                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| DISPOSITION           | reversed_and_remanded                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| PROCEDURAL POSTURE    | Defendant appealed his convictions and sentence from the Crawford County Court of Common Pleas. The appellate court affirmed the rulings concerning venue and the adoptive-admission jury instruction, but reversed the sentence as contrary to law and remanded for resentencing.                                                                                                                                                                                     |
| STANDARD OF REVIEW    | Venue was reviewed for plain error because the issue was not raised below. Jury instructions generally are reviewed for abuse of discretion, but the unobjected-to instruction and repetition were reviewed for plain error. Felony sentences were reviewed under R.C. 2953.08(G) (2), requiring reversal when clear and convincing evidence shows that the record does not support the relevant statutory findings or that the sentence is otherwise contrary to law. |
| PRECEDENTIAL VALUE    | published                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| PARTIES               | Jason Tupps v. State of Ohio                                                                                                                                                                                                                                                                                                                                                                                                                                           |

## TOPICS

criminal procedure evidence sentencing appellate procedure due process

## PRACTICE AREAS

criminal law criminal procedure evidence felony sentencing appellate procedure

## QUESTIONS PRESENTED

1. Whether the State presented sufficient evidence to establish Crawford County as the venue for the rape charge, despite the absence of an objection at trial.
2. Whether the trial court committed plain error by giving an adoptive-admission jury instruction under Evid.R. 801(D)(2)(b) and by repeating one neutral line of that instruction.
3. Whether Tupps's indefinite felony sentence was contrary to law because the trial court failed to provide all notifications required by R.C. 2929.19(B)(2)(c) at the sentencing hearing.

## HOLDINGS

1. The State presented substantial credible evidence from which the jury could find beyond a reasonable doubt that the rape occurred in the marital bedroom in Crawford County. The trial court therefore did not commit plain error by accepting the guilty verdict.
2. The trial court did not commit plain error by instructing the jury on adoptive admissions under Evid.R. 801(D)(2)(b), because the instruction was legally correct, applicable to the evidence, and appropriately informed the jury that the inference was permissive. Tupps also failed to show prejudice from the court's repetition of the instruction's final line.
3. A trial court imposing a non-life felony indefinite prison term must provide all notifications specified in R.C. 2929.19(B)(2)(c)(i)-(v) at the sentencing hearing. Because the trial court failed to provide all required notifications, Tupps's sentence was contrary to law and had to be reversed and remanded for resentencing.

## KEY QUOTATIONS

*“Venue is not a material element of any crime but, unless waived, is a fact that must be proven at trial beyond a reasonable doubt.” (¶ 10)*

*“The trier of fact is permitted, but not obligated, to infer that the defendant acquiesced to the truth of the third party’s statement.” (¶ 25)*

*“By indicating that the sentencing court ‘shall do all of the following’ and ‘notify the offender of all of the following,’ the legislature clearly placed a mandatory duty upon the trial court rather than granting it discretion.” (¶ 37)*

## FACTUAL BACKGROUND

Jason Tupps and L.T. were married and lived together in Crestline, Crawford County, Ohio. L.T. recorded arguments and conversations, including an overnight recording that captured what she described as Tupps forcibly penetrating her with his fingers. The State also relied on a recording in which L.T. accused Tupps of forcibly digitally penetrating her and Tupps remained silent for several seconds before changing the subject. The trial court sentenced Tupps to an indefinite term of five to seven and one-half years after the jury convicted him of rape and acquitted him of domestic violence.

## PROCEDURAL HISTORY

A Crawford County grand jury indicted Tupps for rape and domestic violence. A jury found him guilty of rape and not guilty of domestic violence, and the trial court imposed an indefinite prison term of five to seven and one-half years. Tupps appealed, challenging venue, the adoptive-admission instruction, sentencing advisements, and the constitutionality of provisions of the Reagan Tokes Law. The appellate court overruled the first two assignments, sustained the sentencing assignment, and declined to reach the constitutional assignments because resentencing was required.

## DISPOSITION

reversed\_and\_remanded

## REMAND INSTRUCTIONS

Reverse the judgment as to the sentence and remand for resentencing consistent with the opinion, including full compliance with R.C. 2929.19(B)(2)(c). The convictions and other portions of the judgment are affirmed.

## CASES CITED

- State v. Williams, 53 Ohio App.3d 1, 5 (10th Dist. 1988)
- State v. Barr, 158 Ohio App.3d 86, 2004-Ohio-3900, ¶ 14 (7th Dist.)
- Toledo v. Taberner, 61 Ohio App.3d 791, 793 (6th Dist. 1989)
- State v. McVety, 3d Dist. Logan No. 8-16-19, 2017-Ohio-2796, ¶¶ 10-11
- State v. Jackson, 3d Dist. Seneca No. 13-14-30, 2015-Ohio-1694, ¶¶ 7-8
- State v. Shine-Johnson, 10th Dist. Franklin No. 17AP-194, 2018-Ohio-3347, ¶ 25
- State v. Adams, 144 Ohio St.3d 429, 2015-Ohio-3954, ¶ 240
- State v. White, 142 Ohio St.3d 277, 2015-Ohio-492, ¶¶ 52-53
- State v. Orians, 179 Ohio App.3d 701, 2008-Ohio-6185, ¶ 10 (3d Dist.)
- State v. Kean, 10th Dist. Franklin No. 17AP-427, 2019-Ohio-1171, ¶ 65
- State v. Bertuzzi, 3d Dist. Marion No. 9-13-12, 2014-Ohio-5093, ¶ 94
- State v. Gibson, 2d Dist. Greene No. 09-CA-05, 2010-Ohio-1121, ¶ 15
- State v. Comstock, 11th Dist. Ashtabula No. 96-A-0058, 1997 WL 531304, at \*5 (Aug. 29, 1997)
- United States v. Hampton, 843 F. Supp. 2d 571, 578-579 (E.D. Pa. 2012)
- Zeller v. State, 123 Ohio St. 519, 523 (1931)

- State v. Barnes, 94 Ohio St.3d 21, 27 (2002)
- State v. Sutton, 3d Dist. Seneca No. 13-21-11, 2022-Ohio-2452, ¶ 50
- State v. Long, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus
- State v. Jalowiec, 91 Ohio St.3d 220, 231 (2001)
- State v. Price, 60 Ohio St.2d 136 (1979), paragraph four of the syllabus
- State v. Marcum, 146 Ohio St.3d 516, 2016-Ohio-1002, ¶¶ 1, 22
- Cross v. Ledford, 161 Ohio St. 469 (1954), paragraph three of the syllabus
- State v. Greene, 1st Dist. Hamilton No. C-220160, 2022-Ohio-4536, ¶¶ 6, 9-11
- State v. Hodgkin, 12th Dist. Warren No. CA2020-08-048, 2021-Ohio-1353, ¶¶ 24-25
- State v. Bentley, 4th Dist. Adams No. 21CA1147, 2022-Ohio-1914, ¶¶ 9-11, 15
- State v. Wolfe, 5th Dist. Licking No. 2020CA00021, 2020-Ohio-5501, ¶¶ 36-39