[Cite as *State v. D.H.*, 2019-Ohio-1017.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 18AP-608
v.	:	(C.P.C. No. 15CR-2912)
D.H.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 21, 2019

On brief: *Ron O'Brien,* Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

On brief: *The Law Office of Thomas F. Hayes, LLC*, and *Thomas F. Hayes*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

BEATTY BLUNT, J.

{¶ 1} Defendant-appellant, D.H., appeals from a judgment of the Franklin County Court of Common Pleas resentencing him pursuant to a remand order from this court. For the reasons that follow, we affirm the trial court's judgment.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On June 15, 2015, appellant was indicted on three counts of rape, in violation of R.C. 2907.02(A)(1)(b), all felonies in the first degree. Under Count 1 of the indictment, the State alleged that from April 8, 2006 to April 7, 2007, appellant engaged in sexual conduct, to wit: digital vaginal penetration with S.M. who was less than 13 years of age. Count 2 of the indictment alleged that from April 8, 2006 to April 7, 2012, appellant engaged in sexual conduct, to wit: vaginal intercourse with S.M. Count 3 of the indictment

alleged that, from April 8, 2006 to April 7, 2009, appellant engaged in sexual conduct, to wit: cunnilingus with S.M. Appellant is S.M.'s biological father.

A. Trial and Sentencing

{¶ 3} A jury trial on the charges commenced on May 2, 2016.

{¶ 4} At the trial, S.M. testified that her "dad molested [her]," as both his "penis and his mouth" touched her "vagina." (Tr. Vol. II at 69.) S.M. explained that "[appellant] had [S.M.] come in their bedroom and had [her] lay on the bed, put a pillow over [her] face." (Tr. Vol. II at 70.) S.M. stated that appellant pulled her pants down, and then she "felt his penis rubbing up against [her] vagina." (Tr. Vol. II at 73.) The prosecutor asked S.M if appellant's penis was rubbing "[b]etween the lips of your vagina?" S.M. responded "[y]es." (Tr. Vol. II at 74.) S.M. stated that, after appellant had rubbed his penis against her vagina, "[h]e smacked [her] leg and told [her she] could get up and told [her] that he loved [her] and he would never hurt [her]." (Tr. Vol. II at 75.)

{¶ 5} S.M. stated appellant touched her vagina with his penis in this manner, "[p]robably almost every time [she] went over" to appellant's home. (Tr. Vol. II at 70.) S.M. noted that sometimes she was "laying on [her] back, and he sometimes had [her] lay on [her] stomach, but [she] always had a pillow or something over [her] face." (Tr. Vol. II at 72.)

{¶ 6} When S.M. was "about 9," appellant touched her vagina with his mouth. (Tr. Vol. II at 81.) S.M. explained appellant had her "come in the room like he usually did and had [her] take [her] pants off and told [her] to sit on his face." (Tr. Vol. II at 82.) S.M. did not understand what appellant meant so she "kind of just stood there and he kind of pulled [her] over towards him." (Tr. Vol. II at 84.) S.M. "got on the bed and sat on" appellant, his face "was under [her] vagina," and he "started licking" her "vagina." (Tr. Vol. II at 84-85.)

{¶ 7} S.M. testified that appellant also "touched [her] with his fingers." (Tr. Vol. II at 110.) S.M. explained that once at appellant's home, she was "sleeping on the couch, and [she] woke up to [appellant's] hands down [her] pants." (Tr. Vol. II at 166.)

{¶ 8} A forensic interviewer also testified that S.M. informed her that "her father had abused her," and that it "started when she was 8 and it ended when she was 11." (Tr. Vol. II at 212-13.) Appellant had been incarcerated during S.M.'s early childhood, and he returned to prison on unrelated charges when S.M. was eleven. S.M. told the interviewer

that appellant "digitally penetrated her when she was 8, * * * that he had rubbed his penis against her vagina when she was 8, and that he had performed oral sex on her when she was 9 or 10 years old." (Tr. Vol. II at 213.)

{¶ 9} Appellant testified in his own defense. He denied the allegations in the indictment. Appellant told the jury that S.M. was lying. (Tr. Vol. III at 399.) He explained to the jury that he was currently incarcerated for "[a]ggravated robbery, aggravated burglary and weapons under disability," and that he had been incarcerated for these crimes since "2009." (Tr. Vol. III at 374, 385.)

{¶ 10} On May 6, 2016, the jury returned verdicts of guilty on Count 2 and Count 3 of the indictment, and a verdict of not guilty on Count 1 of the indictment.

{¶ 11} The trial court sentenced appellant to a ten-year term of imprisonment on Count 2 of the indictment, to be served concurrent to a four-year term of imprisonment on Count 3 of the indictment. The court ordered appellant to serve the sentence on the present case consecutively to the sentence appellant was serving on case No. 09CR-2015. The court further ordered appellant to be classified as a Tier III sex offender.

B. First Appeal and Resentencing

{¶ 12} Appellant appealed his convictions, assigning nine errors for our review. Seven of his assignments of error "pertain[ed] only to Count 2," and "all turn[ed] upon the legal question of what constitutes 'vaginal penetration' within the meaning of R.C. 2907.01(A)." (Sept. 30, 2016 Appellant's Brief in Case No. 16AP-501 at 6.) Appellant argued that he "should have been convicted on Count 2, if at all, of only the lesser included offense of gross sexual imposition." (Sept. 30, 2016 Appellant's Brief in Case No. 16AP-501 at 7.)

{¶ 13} On review of the record and the relevant law, this court determined that "although the evidence demonstrates appellant penetrated S.M.'s labia, the evidence fails to demonstrate appellant inserted his penis into S.M.'s vaginal opening." *State v. D.H.*, 10th Dist. No. 16AP-501, 2018-Ohio-559, ¶ 56. Due to the recent change in the law defining sexual conduct under R.C. 2907.01(A), combined with the failure of the evidence to demonstrate that appellant's act of rubbing his penis between S.M.'s labia occurred before the statute's amendment, this court found "insufficient evidence to support appellant's conviction under count two." *Id.* at ¶ 60. Nonetheless, this court determined that "S.M.'s

testimony that appellant rubbed his penis against her vagina, while insufficient to prove sexual conduct, is sufficient to prove appellant engaged in sexual contact with S.M. As such, the evidence supports a conviction of gross sexual imposition." *Id*. at ¶ 62.

{¶ 14} Following this review, this court vacated appellant's rape conviction on Count 2 of the indictment and modified it to a conviction for gross sexual imposition, a felony of the third degree, in violation of R.C. 2907.05(A)(4). *Id*. at ¶ 63, 90. Accordingly, "[t]he case [was] remanded to the trial court for resentencing on the same." *Id*. at ¶ 90.

{¶ 15} The case was remanded and the trial court held a resentencing hearing on July 13, 2018 to resentence appellant on Count 2 of the indictment.

{¶ 16} At the resentencing hearing, the State requested that the trial court impose a sentence on Count 2 of the indictment that would run consecutively to the sentence imposed previously on Count 3 of the indictment. Specifically, the State argued "there's overwhelming factors to support this Court finding that this Count 2 should be run consecutive to the four-year sentence that is Count 3, and also make a finding that, as in the first sentencing hearing, that with regards to this crime and this case as a whole, the sentence be run consecutive to the 2009 case." (July 13, 2018 Tr. at 3-4.)

{¶ 17} The trial court considered the standards outlined in R.C. 2929.11 and 2929.12 before imposing a sentence of 60 months on Count 2 of the indictment. (July 13, 2018 Tr. at 9-10.) The trial court then considered whether the new sentence on Count 2 of the indictment should run consecutively to that of Count 3 of the indictment. On this issue, the trial court stated:

> I find that consecutive sentences are not disproportionate to the seriousness of the conduct and danger posed by the defendant to the public. And I find that these two offenses are part of a course of conduct, and the harm from that course of conduct is so great and unusual that a[n] essential single prison term would not adequately reflect the seriousness of the conduct.

(July 13, 2018 Tr. at 10-11.)

{¶ 18} Based on this determination, the sentence on Count 2 of the indictment would run consecutively with the four-year mandatory sentence on Count 3 of the indictment.

{¶ 19} In its July 17, 2018 amended judgment entry, the trial court confirmed that the two sentences would run consecutively, stating:

> The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. **The Court further finds that a prison term is mandatory pursuant to R.C. 2929.13(F) as to Count Three.**
>
> **The Court further finds that consecutive sentences are necessary to protect the public from future crime, that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, that two offenses are part of a course of conduct and the harm caused is so great that a single prison sentence would not adequately reflect the seriousness of the conduct and that Defendant's criminal history demonstrates that consecutive sentences are necessary to protect the public.**

(July 17, 2018 Am. Jgmt. Entry at 2.)

II. ASSIGNMENT OF ERROR

{¶ 20} Appellant now appeals his new sentence, assigning the following assignment of error for our review:

> The Appellants [sic] sentence is contrary to law because the trial court improperly employed the "sentencing package doctrine" in violation of the Fifth and Fourteenth [Amendment] and Article I, Section 1 and 16 of the Ohio Constitution and R.C. 2953.08(A)(4).

A. Standard of Review

{¶ 21} Although appellant states several times in his brief that the trial court "abused its discretion" when it resentenced appellant, felony sentences, by statute, are not reviewed under the abuse of discretion standard. *See* R.C. 2953.08(G)(2); *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, ¶ 7-11; *State v. Petty*, 10th Dist. No. 17AP-385, 2017-Ohio-9200, ¶ 28; *State v. Rodriguez*, 10th Dist. No. 17AP-78, 2017-Ohio-9130, ¶ 32. Rather, an appellate court reviews a sentence imposed by a trial court "under the standard of review set forth in R.C. 2953.08(G)(2), which governs all felony sentences." *Petty* at ¶ 28.

{¶ 22} R.C. 2953.08(G)(2) provides:

> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13 * * *;
>
> (b) That the sentence is otherwise contrary to law.

B. Sentencing Package Doctrine

{¶ 23} Appellant argues that the trial court improperly imposed the sentencing package doctrine when it resentenced him. The "sentencing package doctrine" is a federal sentencing doctrine that requires federal courts to consider the sum of a defendant's convicted counts as a package in handing down a single overarching sentence for those counts. As such, if any one part of the sentence is vacated on appeal, the entire sentence may be vacated and the package of offenses can be remanded for resentencing. *See generally State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 4-5.

{¶ 24} In *Saxon*, the Supreme Court of Ohio expressly rejected application of the doctrine for State offenses. The court held: "the sentencing court may not employ the [sentencing package] doctrine when sentencing a defendant, and appellate courts may not utilize the doctrine when reviewing a sentence or sentences." *Id*. at ¶ 10. The court determined that the rationale for sentence packaging is not applicable in Ohio, "where there is no potential for an error in the sentence for one offense to permeate the entire multicount group of sentences[]" because "Ohio's felony-sentencing scheme is clearly designed to focus the judge's attention on one offense at a time." *Id*. at ¶ 8. Rather, judges in Ohio must assign a particular sentence to each offense separately. The court went on to direct trial courts that "[o]nly after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively." *Id*. at ¶ 9.

{¶ 25} Appellant argues that the trial court here employed the sentencing package doctrine when it resentenced him following this court's remand. To support this argument, appellant points to statements made by the State at the resentencing hearing in which the

State referred to the original aggregate sentence multiple times as the proper sentence and advocated for a consecutive sentence. To support his argument, appellant cites to several cases in which a trial court was found to have improperly employed the sentencing package doctrine. In each of those cases, though, the appellate court determined that the trial court itself made specific statements on the record that showed it was engaging in sentence packaging. *See, e.g.*, *State v. Quinones*, 8th Dist. No. 97054, 2012-Ohio-1939, ¶ 6-10 (quoting the trial court's admission that "[t]he Court is still of the mind that five years is an appropriate sentence for the crime of rape * * *. And, so, this Court is not going to reduce or enlarge his sentence, *but reinstitute the five year sentence that the Court imposed*.") (Emphasis sic.); *State v. Parker*, 193 Ohio App.3d 506, 2011-Ohio-1418, ¶ 96 (2d Dist.) (finding the "trial court's own statements at sentencing demonstrate that it was motivated by a desire to achieve a particular purpose" to impose an "overall and more lengthy sentence to cover the group of offenses."); *State v. Bradley*, 2d Dist. No. 06CA31, 2008-Ohio-720 (finding the numerous statements by the trial court indicative that it packaged the sentences, including: "[T]he sentence in the previous case was imposed in view of all the convictions. The Court has the same responsibility now to decide what sentence to impose.")

{¶ 26} There is nothing in the record here that suggests the trial court employed the sentencing package doctrine when it resentenced appellant. Statements made by the prosecutor are not imputed to the trial court and are not evidence of the court's intent when it sentenced appellant. The trial court did not make any statements that it intended to impose one overall sentence for the two counts, nor is there any evidence that it intended to impose an aggregate sentence that was the same or substantially the same as it imposed previously.

{¶ 27} Appellant argues that the court's imposition of a consecutive sentence on remand is evidence that it engaged in sentence packaging because the court imposed a concurrent sentence originally. We reject that argument. We also reject the contention that the similarity between the aggregate sentences imposed originally (ten years) and on remand (nine years) shows that the trial court acted improperly. When an appellate court modifies a criminal conviction and vacates the sentence imposed for that modified offense, "[a] remand for a new sentencing hearing generally anticipates a de novo sentencing

hearing." *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, ¶ 15, citing R.C. 2929.19(A); *State v. Emanuel*, 10th Dist. No. 15AP-734, 2016-Ohio-3187, ¶ 14. This requires that a trial court hold a sentencing hearing and engage in the analysis required under R.C Chapter 2929, even on a resentencing following remand. *See* R.C. 2929.19(A). "During a de novo resentencing, '* * * the trial court is free to impose the identical sentence that was originally imposed, or a greater or lesser sentence within its discretion * * *.' " *State v. Jackson*, 8th Dist. No. 92365, 2009-Ohio-4995, ¶ 9, quoting *State v. Cook*, 8th Dist. No. 90487, 2008-Ohio-4246, ¶ 10.

{¶ 28} Similarly, on remand, the trial court is free to make a determination that multiple sentences should run concurrently or consecutively. This court has already joined numerous other districts in recognizing that a trial court has the discretion, within the statutory framework, to impose a consecutive sentence as part of a resentencing hearing even if it imposed a concurrent sentence previously. *See State v. Busby*, 10th Dist. No. 09AP-1119, 2010-Ohio-4516, ¶ 6; *State v. O'Neill*, 6th Dist. No. WD-12-002, 2013-Ohio-50, ¶ 13-16 (explicitly rejecting the argument that a concurrent or consecutive designation becomes part of a sentence on a particular count); *State v. Mockbee*, 4th Dist. No. 14CA3601, 2014-Ohio-4493, ¶ 28, *superceded on other grounds*, 2015-Ohio-3469; *State v. Wells*, 11th Dist. No. 2013-A-0014, 2013-Ohio-5821, ¶ 33-36; *State v. Huber*, 8th Dist. No. 98206, 2012-Ohio-6139, ¶ 24, *superceded by statute on other grounds*; *State v. Mitchell*, 2d Dist. No. 21020, 2006-Ohio-1602, ¶ 11. This view comports with the analysis from *Saxon*, in which the Supreme Court of Ohio specifically recognized that "*[o]nly after* the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively." (Emphasis added.) *Saxon* at ¶ 9. For these reasons, appellant's suggestion that the concurrent sentence imposed originally somehow attached to Count 3 of the indictment also fails. (*See* Appellant's Brief at v, Issue Presented for Review.) Such an argument was specifically rejected by the Sixth District Court of Appeals in *O'Neill* at ¶ 13-16, and we specifically reject it now.

{¶ 29} To be clear, on remand for de novo resentencing, the trial court is limited by the statutory scheme, which requires that the court make certain explicit findings before imposing a consecutive sentence, and prohibitions from acting vindictively or otherwise

contrary to law. The trial court is not, however, limited by its original sentencing decision. To suggest that there is an inference that a trial court acts improperly if it varies from what it imposed originally would nullify the requirement to conduct a de novo resentencing hearing and undermine the court's responsibility to engage in a full analysis pursuant to the sentencing statutes.

{¶ 30} Plainly, there is no clear and convincing evidence here that the trial court acted contrary to law by employing the sentencing package doctrine when it resentenced appellant. On remand, the trial court was required to hold a de novo hearing to resentence appellant on Count 2 of the indictment, which included making a de novo determination about whether the sentence on Count 2 of the indictment should run concurrently or consecutively to the sentence previously imposed on Count 3 of the indictment.

C. Imposition of Consecutive Sentences

{¶ 31} Having determined that the trial court here did not improperly employ the sentencing package doctrine, the court next considers whether the trial court acted properly when it imposed consecutive sentences. Of note, appellant has not directly assigned as error the trial court's imposition of consecutive sentences separately from the argument that the trial court engaged in sentence packaging. Nonetheless, appellant does argue that "[t]he record from the June 8, 2018 and July 13, 2018 sentencing hearings does not support the court[']s imposition of consecutive punishment." (Appellant's Brief at 3.) Accordingly, to the extent this has been raised, we review whether the trial court acted in accordance with the law when it ordered appellant's sentences to be served consecutively.

{¶ 32} In *Petty*, 10th Dist. No. 17AP-385, 2017-Ohio-9200, we recognized:

> Under Ohio law, "[a] sentence is not clearly and convincingly contrary to law where trial court 'considers the principles and purposes of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly imposes postrelease control, and sentences the defendant within the permissible statutory range.' " [*State v. Kaaz*, 12th Dist. No. CA2016-05-010, 2017-Ohio-5669] ¶ 93, quoting *State v. Julious*, 12th Dist. No. CA2015-12-224, 2016-Ohio-4822, ¶ 8. A trial court's imposition of a consecutive sentence is contrary to law where the court "fails to make the consecutive sentencing findings as required by R.C. 2929.14(C)(4)." *Id.* at ¶ 94, citing *State v. Marshall*, 12th Dist. No. CA2013-05-042, 2013-Ohio-5092, ¶ 8.

Id. at ¶ 29.

{¶ 33} R.C. 2929.14(C)(4) provides:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 34} Under this standard, a trial court must make three findings before imposing consecutive sentences: " '(1) that consecutive sentences are necessary to protect the public from the future crime or to punish the offender; (2) that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and (3) that one of the subsections (a), (b), or (c) apply.' " *Petty* at ¶ 31, quoting *State v. Roush*, 10th Dist. No. 12AP-201, 2013-Ohio-3162, ¶ 76.

{¶ 35} In *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, syllabus, the Supreme Court of Ohio held: "In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings." Further, "a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern

that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Id.* at ¶ 29.

{¶ 36} On review of the record here, it is clear that the trial court conducted an appropriate analysis pursuant to R.C. 2929.14(C)(4) and made all of the required factual findings before deciding that the sentences on appellant's Counts 2 and 3 of the indictment should run consecutively.

{¶ 37} For the foregoing reasons, we overrule appellant's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRUNNER and HANDWORK, JJ., concur.

HANDWORK, J., retired, formerly of the Sixth Appellate District, Assigned to active duty under the Ohio Constitution, Article IV, Section 6(C).