[Cite as *State v. Atwater*, 2019-Ohio-986.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107182

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSEPH ATWATER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-623180-A

BEFORE: Kilbane, A.J., Celebrezze, J., and Sheehan, J.

RELEASED AND JOURNALIZED: March 21, 2019

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MARY EILEEN KILBANE, A.J.:

{¶1} Defendant-appellant, Joseph Atwater ("Atwater"), appeals his convictions and sentence. For the reasons that follow, we affirm.

{¶2} In February 2017, Atwater was indicted on one count each of rape, kidnapping, and aggravated burglary. Each of the rape and kidnapping counts contained a sexually violent predator specification, and the kidnapping count also contained a sexual motivation specification. The indictment stems from allegations by A.W. (d.o.b. January 7, 2000) that she had been sexually assaulted by her cousin, Atwater (d.o.b. September 16, 1995).

{¶3} In December 2017, A.W. alleged other incidents of sexual assault by Atwater. As a result, the state dismissed the February 2017 indictment with prejudice and reindicted Atwater. In the reindictment, Atwater was charged with five counts of rape, four counts of

kidnapping, one count of attempted rape, and one count of aggravated burglary.[1] In March 2018, Atwater executed a jury waiver, and a bench trial ensued.

{¶4} At trial, 13 witnesses testified, including A.W. She testified that Atwater began sexually assaulting her when she was about five years old. At first, Atwater would place his hands on her private area through her clothing, but later, when she was about seven years old, Atwater began pulling down or removing her clothing, so he could insert his penis into her vagina or anus.

{¶5} A.W. detailed three instances of rape that occurred around the age of 11 or 12. A.W. testified the rapes occurred during the time she and her mother were living with Atwater and his mother. A.W. stated that in all three instances, Atwater used his body weight to restrain her and then proceeded to insert his penis into her vagina against her will.

{¶6} A.W. also testified about an incident in August 2016, which occurred when she was home alone. A.W. stated that Atwater entered her bedroom, got on top of her, proceeded to pull down her pants, and then inserted his penis into her vagina, against her will. A.W. testified that when she went to school the following day, she told one of her teachers that Atwater had raped her the night before.

{¶7} Tiffany Hairston ("Hairston"), A.W.'s assigned teacher, testified that on August 27, 2016, A.W. disclosed to her that her cousin raped her the previous night. Hairston immediately took A.W. to the principal, Latoya Price ("Price"), and informed her of the disclosure. Hairston stated that a very emotional A.W. recounted the disclosure of the sexual assault to Price, who subsequently contacted the police.

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[1]Each of the rape and kidnapping counts contained a sexually violent predator specification, and the kidnapping counts also contained a sexual motivation specification.

{¶8} Rita Lovelace ("Lovelace"), a forensic nurse at Hillcrest Hospital, testified she examined A.W. on August 27, 2016, following the reported sexual assault. Lovelace stated that A.W. indicated Atwater had raped her the previous night, that he had ejaculated in her vagina, that she was afraid to tell her mother, so she told her teacher and principal the following day. Lovelace testified that after collecting the necessary specimens, she forwarded the rape kit to law enforcement.

{¶9} Kylie Graham ("Graham"), a forensic scientist with the Bureau of Criminal Investigation, testified that she conducted the DNA testing of the samples included in the rape kit. Graham testified that Atwater's DNA matched the sample taken from A.W.'s underwear.

{¶10} During the trial, the state dismissed one count of rape involving anal penetration. The trial court denied Atwater's Crim.R. 29 motion to dismiss the remaining counts. Thereafter, the trial court found Atwater guilty of one count of rape and one count of kidnapping, and not guilty of the remaining counts. The trial court also found Atwater guilty of the sexually violent predator and the sexual motivation specifications contained in said counts.

{¶11} The trial court advised the state that the rape and the kidnapping counts were allied offenses of similar import, and the state elected that the trial court sentence Atwater on the rape count. The trial court sentenced Atwater to a term of ten years to life in prison and classified him as a Tier III sex offender.

{¶12} Atwater now appeals, assigning the following errors for our review:

Assignment of Error One

> It was error to attach to the within indictment a sexually violent predator specification and to sentence [Atwater] on a sexually violent predator specification.

Assignment of Error Two

It was error to sentence [Atwater] to life imprisonment.

Sexally Violent Predator Specification

{¶13} In the first assignment of error, Atwater contends that the indictment improperly charged him with sexually violent predator specifications when he had no prior conviction for a sexually violent offense.

{¶14} In support of his contention, Atwater relies on *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, which held that a

> conviction of a sexually violent offense cannot support the specification that the offender is a sexually violent predator as defined in R.C. 2971.01(H)(1) if the conduct leading to the conviction and the sexually violent predator specification are charged in the same indictment.

Id. at syllabus.

{¶15} However, after the *Smith* decision, the General Assembly amended or clarified the statute to its current version. R.C. 2971.01(H)(1) now defines "sexually violent predator" as "a person who, on or after January 1, 1997, commits a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses."

{¶16} Subsequently, we interpreted the General Assembly's purpose in revising R.C. 2971.01(H)(1) to allow for the inclusion of a sexually violent predator specification in the indictment even if it is the first time being charged with a sexually violent offense. *State v. Stansell*, 8th Dist. Cuyahoga No. 100604, 2014-Ohio-1633, citing *State v. Green*, 8th Dist. Cuyahoga No. 96966, 2012-Ohio-1941.

{¶17} Since the General Assembly's amendment, we have repeatedly rejected Atwater's argument and held that the sexually violent predator statute does not require a defendant to have a prior conviction for a sexually oriented offense to be found guilty of a sexually violent predator

specification. *State v. A.M.*, 8th Dist. Cuyahoga No. 106400, 2018-Ohio-4209; *State v. Mitchell*, 8th Dist. Cuyahoga No. 94287, 2010-Ohio-5775. *See also State v. Waters*, 8th Dist. Cuyahoga No.103932, 2017-Ohio-650; *State v. Taylor*, 8th Dist. Cuyahoga No. 100315, 2014-Ohio-3134.

{¶18} Given the revisions to the statute and the General Assembly's explicit purposes in enacting them, Atwater's reliance on *Smith* is misplaced. The present law allows for the inclusion of a sexually violent predator specification in the indictment of one being charged for the first time with a sexually violent offense. As a result, the inclusion of the sexually violent predator specification in the indictment was permissible.

{¶19} Accordingly, the first assignment of error is overruled.

Life Sentence

{¶20} In the second assignment of error, Atwater challenges his life sentence. Atwater argues the specification should not have been attached.

{¶21} In the first assignment of error, we rejected Atwater's contention that without a prior conviction for a sexually violent offense, the specification attached to the indictment was improper. Therefore, our analysis of this assignment of error will be limited to a review of the sentence the trial court imposed.

{¶22} In reviewing felony sentences, appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2), rather than an abuse of discretion standard. *See State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 9. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce, or modify a sentence, or it may vacate the sentence and remand for resentencing, only if it clearly and convincingly finds either (1) the record does not support certain specified findings, or (2) the sentence imposed is contrary to law.

An appellate court does not review a trial court's sentence for an abuse of discretion. *Marcum* at ¶ 10.

{¶23} R.C. 2971.03 sets forth the type of sentence a court "shall impose * * * upon a person who is convicted of * * * a violent sex offense and who also is convicted of * * * a sexually violent predator specification * * *." R.C. 2971.03(A). Rape is a violent sex offense. R.C. 2971.01(L)(1), citing R.C. 2907.02. Under R.C. 2971.03(A)(3)(d)(ii), for rapes that occurred after January 2, 2007, the trial court is required to "impose an indefinite prison term consisting of a minimum term fixed by the court that is not less than ten years, and a maximum term of life imprisonment." *Id*.

{¶24} As previously discussed, Atwater was convicted of one count of rape, along with the sexually violent predator specification. It was also established that the rape occurred after January 2, 2007. The trial court sentenced Atwater to a term of ten years to life on the rape count, the minimum term available with the specifications. Consequently, the court sentenced Atwater in accordance with R.C. 2971.03. *See* R.C. 2971.03(A)(3)(d)(ii). Because the sentence the trial court imposed was in accordance with the applicable statute, it is not contrary to law.

{¶25} Moreover, the record supports the trial court's determination that Atwater was a sexually violent predator.

{¶26} R.C. 2971.01(H)(2)(a)-(f) lists the factors that may be considered by the factfinder as evidence tending to indicate that there is a likelihood that the person will engage in the future in one or more sexually violent offenses. It provides:

> (a) The person has been convicted two or more times, in separate criminal actions, of a sexually oriented offense or a child-victim oriented offense. For purposes of this division, convictions that result from or are connected with the same act or result from offenses committed at the same time are one conviction, and a conviction set aside pursuant to law is not a conviction.
>
> (b) The person has a documented history from childhood, into the juvenile developmental years, that exhibits sexually deviant behavior.
>
> (c) Available information or evidence suggests that the person chronically commits offenses with a sexual motivation.
>
> (d) The person has committed one or more offenses in which the person has tortured or engaged in ritualistic acts with one or more victims.
>
> (e) The person has committed one or more offenses in which one or more victims were physically harmed to the degree that the particular victim's life was in jeopardy.
>
> (f) Any other relevant evidence.

R.C. 2971.01(H)(2).

{¶27} The record established that Atwater had two prior adjudications of sexual assault, that he continued to engage in sexually deviant behavior while detained in juvenile facilities, and that the instant charges arose while he was on parole. In addition, in 2010, at the age of 15, Atwater admitted to allegations of gross sexual imposition ("GSI"), was adjudicated delinquent, and was ordered to the Ohio Department of Youth Services ("ODYS").

{¶28} Further, as a juvenile, while detained at Indian River, Atwater engaged in a pattern of sexually deviant misconduct against numerous employees of the facility. The evidence established that there were approximately 17 instances of sexually deviant misconduct and that Atwater would again be adjudicated delinquent for GSI.

{¶29} Based on the numerous sexually deviant infractions against staffers while detained in ODYS facilities, committing another sexual offense while on parole, having two prior

adjudications for sexual assault, and having a high-risk score on the Mokita Assessment, we conclude there was sufficient evidence for the trial court to find that Atwater was likely to engage in the future in one or more sexually violent offenses. As a result, the trial court's verdict was supported by the record.

{¶30} Accordingly, the second assignment of error is overruled.

{¶31} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., and
MICHELLE J. SHEEHAN, J., CONCUR