[Cite as *State v. South*, 2004-Ohio-3336.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2002-P-0137**
- vs -	:	
THOMAS A. SOUTH, SR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 97 CR 0137.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 466 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Patricia A. Millhoff, 3301 Easton Road, Norton, OH 44203 (For Defendant-Appellant).

JUDITH A. CHRISTLEY, J.

{¶1} This appeal is taken from a final judgment of the Portage County Court of Common Pleas. Appellant, Thomas A. South, Sr., appeals from the trial court's decision to impose the maximum sentence following his convictions for rape and attempted rape.

{¶2} In April 1997, the Portage County Grand Jury indicted appellant on twelve counts of rape and seven counts of felonious sexual penetration. The charges alleged that appellant had used force or the threat of force to engage in sexual relations with three different children under the age of thirteen.

{¶3} Appellant eventually entered into a plea bargain whereby he agreed to plead guilty to one count of rape with the force specification deleted and to two amended counts of attempted rape. This was part of a joint agreement of sentencing that included mandatory prison time, concurrent sentences, and classification as a sexual predator, but the state later decided not to go forward with having appellant labeled as a sexual predator. Counsel for the parties did not agree as to the length of the sentences. The trial court accepted appellant's guilty pleas, entered a nolle prosequi with respect to the remaining charges, and referred appellant to the probation department for a presentence investigation report.

{¶4} During the subsequent sentencing hearing, the trial court ordered appellant to serve a definite term of incarceration of ten years for the rape conviction. The trial court also sentenced appellant to eight years in prison for each count of attempted rape. All three sentences represented the maximum term allowed under the sentencing guidelines and were to be served concurrently.

{¶5} Appellant appealed, arguing that the trial court erred when sentencing him because the court failed to adhere to the statutory requirements governing the imposition of the maximum prison term for a felony conviction. Specifically, appellant maintained that the trial court did not indicate why it had decided to deviate from the

statutorily mandated minimum sentence, and that the trial court failed to follow the requirements set forth in R.C. 2929.14(C) for imposing the maximum sentence.

{¶6} After looking at the record, this court held that the judgment of the trial court should be reversed because the court did not specify either of the reasons listed in R.C. 2929.14(B) to support its deviation from the minimum sentences. In light of our conclusion that the trial court had failed to comply with R.C. 2929.14(B), we also determined that appellant's argument concerning the issue of maximum sentences was moot. Nevertheless, we instructed the trial court on remand to "comply with the dictates of both R.C. 2929.14(B) and (C) when resentencing appellant." *State v. South* (June 23, 2000), 11th Dist. No. 98-P-0050, 2000 Ohio App. LEXIS 2768.

{¶7} The trial court conducted a new sentencing hearing on October 23, 2000. At that time, the trial court again sentenced appellant to the maximum allowable prison term for all three charges. In support of its sentence, the court found that the minimum sentence would demean the seriousness of the offense and would not adequately protect the public from future crimes committed by appellant. Also, the trial court concluded that appellant had committed the worst form of the offense.

{¶8} Appellant filed another appeal, this time arguing that the trial did not make the statutorily mandated findings under R.C. 2929.14(C) when imposing the maximum sentences. We considered appellant's argument and ultimately reversed the trial court's judgment. As part of our analysis, we first noted that the trial court, on the record, had made the findings required by R.C. 2929.14(C). However, despite making the necessary findings, the trial court failed to include its reasons for imposing the maximum sentences, which is a requirement under R.C. 2929.19(B)(2)(d). Therefore,

we once again remanded the matter so that the trial court could conduct a new sentencing hearing. *State v. South* (July 12, 2002), 11th Dist. No. 2001-P-0059, 2002 Ohio App. LEXIS 3638.

{¶9} On remand, the trial court held another sentencing hearing on November 25, 2002. As before, the trial court ordered appellant to serve the maximum sentence on all three charges because, according to the court, appellant had committed the worse form of the offense.

{¶10} From this decision appellant filed a timely notice of appeal with this court. He now submits the following assignments of error for our consideration:

{¶11} "[1.] The trial court erred to the prejudice of appellant when it found that he committed the worst form of the offense and same was not spported [sic] by clear and convincing evidence.

{¶12} "[2.] The trial court erred to the prejudice of appellant when it failed to properly indicate on the record for sentencing him to the maximum penalty pursuant to 2929[.19](B)(2)(d).

{¶13} "[3.] R.C. 2929.14(C) unconstitutionally [sic] void for vagueness in its use of the terms worst forms of the offense."

{¶14} Because appellant's first two assignments of error contain related issues, for ease of discussion, we will consider them together. In appellant's first assignment of error, he argues that the trial court erred by finding that appellant committed the worst form of the offense. In his second assignment of error, he argues that the trial court erred by failing to properly indicate on the record its reasons for sentencing appellant to

the maximum sentence under R.C. 2929.19(B)(2)(d). For the reasons set forth below, appellant's first two assignments of error are not well-taken.

{¶15} Under R.C. 2953.08, our review of a felony sentence is de novo. *State v. Raphael* (Mar. 24, 2000), 11th Dist. No. 98-L-262, 2000 Ohio App. LEXIS 1200, at 4. However, this court will not disturb appellant's sentence unless we find, by clear and convincing evidence, that the record does not support the sentence or that the sentence is otherwise contrary to law. *State v. Thomas* (July 16, 1999), 11th Dist. No. 98-L-074, 1999 Ohio App. LEXIS 3334, at 10, quoting *State v. Rose* (Sept. 15, 1997), 12th Dist. No. CA96-11-106, 1997 Ohio App. LEXIS 4161, at 15. Clear and convincing evidence is that evidence which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Thomas* at 10.

{¶16} R.C. 2929.14(C) limits the discretion of a sentencing court to impose a maximum sentence only on defendants who fall into one of the four following categories: (1) those who commit the worst form of the offense; (2) those who pose the greatest likelihood of committing future crimes; (3) certain major drug offenders; and (4) certain repeat violent offenders. In *State v. Edmonson*, 86 Ohio St.3d 324, 1999-Ohio-110, the Supreme Court of Ohio addressed the statutory requirements for imposing a maximum sentence. The Court determined that when imposing a maximum sentence based on one of the four criteria found in R.C. 2929.14(C), R.C. 2929.19(B)(2)(d) "*** requires a trial court to 'make a finding that gives its reasons for selecting the sentence imposed' if the sentence is for one offense and is the maximum term allowed for that offense, and requires a trial court to set forth its 'reasons for imposing the maximum prison term.'" (Emphasis omitted.) *Edmonson* at 328, quoting R.C. 2929.19(B)(2)(d).

{¶17} In the past, this court has held that the findings mandated by R.C. 2929.14 "must appear somewhere on the record of sentence, either in the judgment or in the transcript of the sentencing hearing." *State v. Rone* (Dec. 4, 1998), 11th Dist. No. 98-A-0001, 1998 Ohio App. LEXIS 5813, at 6. See, also, *State v. Hoskins* (Mar. 16, 2001), 11th Dist. No. 2000-A-0037, 2001 Ohio App. LEXIS 1232. Recently, however, the Supreme Court held that when sentencing a defendant, the trial court must make its statutorily required findings at the sentencing hearing. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, paragraphs one and two of the syllabus.[1]

{¶18} Here, the record shows that the trial court made the required findings during the sentencing hearing:

{¶19} "THE COURT: While this Court has once before reviewed this presentence report and the background and the facts that's set forth here at this hearing and previous hearings, this Court determined that the minimum sentence would demean the seriousness of the offense and not adequately protect the public.

{¶20} "The basis for that is the basis because of the facts set forth in this case, and those facts are that this Defendant engaged in a number of offenses and he had previously been convicted of a sex offense in the past here.

{¶21} "This involved a number of children, some of which were members of his own family and some of very tender years.

1. *Comer* only addressed the trial court's duty with respect to sentencing an offender to a nonminimum sentence or consecutive sentences. However, after considering the language in R.C. 2929.14, we believe that the same rationale applies when a court imposes the maximum sentence.

{¶22} "And this method of this course of conduct continued over an extended period of time. And these children, because they're family members and so on, relied upon him and trusted him not to do those kinds of things that would be harmful to them.

{¶23} "Regardless of these victim impact statements, the Court cannot find that there is not a substantial impact on victims of that young, tender age, regardless of what their parents or guardians might say about it.

{¶24} "The Court, having reviewed that, considered all those facts, and having put 31 years on the Bench here, and comparing it with other cases that are similar, can only find that this is the most serious of the offenses that I've heard in this category.

{¶25} "And the Court, therefore, finds again that this is the worst from of the offense and continues to sentence ten years previously imposed by this court."

{¶26} As the preceding passage shows, there is no question that the trial court made the findings required by R.C. 2929.14(C). Moreover, the trial court also complied with R.C. 2929.19(B)(2)(d) when it put its reasons for the imposed sentence on the record.[2]

{¶27} Accordingly, we will now consider appellant's second argument; i.e., the trial court's decision to impose the maximum sentences is not supported by clear and convincing evidence. Appellant contends that there is no evidence that he committed the worst form of the offense. In support, appellant maintains that he was amenable to treatment and that the victims did not suffer serious psychological or physical harm. Furthermore, he submits that because the victims were extended family members, he is a "passive opportunist type of sex offender," rather than a violent predator who simply

2. We also note that the trial court included similar findings in its November 26, 2002 sentencing entry.

seeks out children when the urge strikes him.

{¶28} After carefully considering the record, we conclude that the trial court's finding that appellant committed the worst form of the offenses is supported by the evidence. Appellant sexually abused multiple child-victims over the course of several months. These children, who were four and seven-years-old, respectively, at the time of the abuse, were related to appellant and were placed in his and his wife's care by their parents. Unfortunately, appellant then violated that trust when he abused them.

{¶29} Also, this is not the first time appellant has been convicted of a sexually oriented offense involving a child. Sometime in the late 1980's, appellant was convicted of gross sexual imposition with a twelve-year-old girl. Although this conviction was eventually expunged, appellant did serve five years of probation.

{¶30} Appellant attempts to mitigate his actions by emphasizing the familial relationship between him and the victims. This court, however, sees no benefit in appellant's choice of victim in this case. If anything, the fact that he chose to abuse a family member is more disturbing. Appellant, instead of providing the children with a safe and caring environment, used his relationship with them to facilitate the abuse.

{¶31} Therefore, the trial court did not err by finding that appellant committed the worst form of the offense, and the trial court properly stated on the record the statutory reasons for sentencing appellant to maximum sentences. Appellant's first two assignments of error are without merit.

{¶32} In appellant's third assignment of error, appellant argues that R.C. 2929.14(C) is void for vagueness because it does not provide a sentencing court with any guidance concerning what constitutes the worst form of the offense. He contends

that under the current statutory scheme, a reviewing court cannot determine if a particular sentence is valid because "the statutory language itself is so arbitrary as to be unconstitutional." Appellant's third assignment of error is without merit.

{¶33} Despite the fact that appellant has appealed his sentence two other times, this is the first time he has challenged the constitutionality of R.C. 2929.14(C). Ordinarily, when an appellant fails to raise an issue with the trial court, he waives the issue for appellate purposes. *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus (holding that the "[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal"); *State v. Szefcyk*, 77 Ohio St.3d 93, 1996-Ohio-337, syllabus (holding that res judicata prevents the consideration of any claim that was raised or could have been raised in an earlier appeal).

{¶34} However, given the nature of the various appeals connected with this matter, appellant did not waive this issue by first raising it in his third appeal from the trial court's judgment. Only in the trial court's second modified judgment entry did the trial court state that it found appellant to be the worst form of offender and that appellant was, therefore, sentenced to maximum sentences. Hence, despite res judicata, only in this third appeal does appellant have actual standing to challenge he constitutionality of R.C. 2929.14(C) as void for vagueness.

{¶35} The Supreme Court of Ohio, this court, and other district courts have addressed this same subject and determined that the requirement that a sentencing court find the offender committed the worst form of the offense before imposing the

maximum sentence is not unconstitutionally void for vagueness. *State v. Mushrush* (1999), 135 Ohio App.3d 99, 110; *State v. Defabio* (Dec. 21, 2001), 11th Dist. No. 2002-P-0037, 2001-Ohio-8801, 2001 Ohio App. LEXIS 5864; *State v. Gist*, 7th Dist. No. 99-CO-34, 2002-Ohio-5241, at ¶96; *State v. Shupe* (Oct. 27, 2000), 6th Dist. No. H-00-010, 2000 Ohio App. LEXIS 4980, at 2. First, "[e]xactly what the 'worst from of the offense' constitutes is not, and could not be, defined in statutory law." *Defabio* at 7. Further, "[s]entencing guidelines are not designed to inform the offender of the consequences of violating a criminal statute, but [to] guide judges in imposing a sentence." (Citations omitted.) *Defabio* at 9. In concluding that 2929.14(C) is not void for vagueness, the Supreme Court of Ohio has stated that the sentencing guidelines must be considered as a whole, and that the sentencing court should be guided by R.C. 2929.12(B) and (C) when determining the seriousness of the offense. *Mushrush* at 110. Accordingly, appellant's third assignment of error is without merit.

{¶36} Pursuant to the foregoing analysis, appellant's three assignments of error are not well-taken. The judgment of the trial court, therefore, is affirmed.

DONALD R. FORD, P.J.,

DIANE V. GRENDELL, J.,

concurs.