

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-04-031
- vs -	:	<u>OPINION</u> 4/13/2015
DANA TROY NEAL,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS  
Case No. 2013 CR 00743

D. Vincent Faris, Clermont County Prosecuting Attorney, Nicholas Horton, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103, for plaintiff-appellee

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**HENDRICKSON, J.**

{¶ 1} Defendant-appellant, Dana Troy Neal, appeals from his sentence in the Clermont County Court of Common Pleas for gross sexual imposition. For the reasons set forth below, we affirm.

{¶ 2} In December 2013, appellant was indicted on one count of gross sexual imposition in violation of R.C. 2907.05(A)(1), a felony of the fourth degree, and three counts

of gross sexual imposition in violation of R.C. 2907.05(A)(4), felonies of the third degree. Following plea negotiations and an amendment to the indictment, appellant entered a guilty plea on March 12, 2014, to three counts of gross sexual imposition in violation of R.C. 2907.05(A)(1), felonies of the fourth degree. By entering this plea, appellant admitted to having sexual contact with his underage stepdaughter, D.W., by purposefully compelling D.W. to submit to the contact by force or the threat of force. Specifically, appellant admitted to rubbing D.W.'s breasts on two occasions between 2009 and December 2011, and to placing his penis in D.W.'s hand while she was asleep on June 5, 2013.

{¶ 3} The trial court ordered a presentence investigation report and scheduled sentencing for April 14, 2014. At the sentencing hearing, the trial court determined that appellant was not amenable to community control sanctions and that prison was consistent with the purposes and principles of sentencing. Appellant was ordered to serve 18 months in prison on each count of gross sexual imposition, with the prison terms running consecutively to one another for an aggregate prison term of 54 months.

{¶ 4} Appellant timely appealed his sentence, raising two assignments of error.

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE TRIAL COURT ERRED IN FINDING PRISON TO BE CONSISTENT WITH THE PURPOSES AND PRINCIPLES OF SENTENCING.

{¶ 7} In his first assignment of error, appellant argues that a review of the factors set forth in R.C. 2929.12 does not support the trial court's finding that prison, as opposed to a community control sanction, is consistent with the purposes and principles of sentencing. Appellant contends that he should have been found amenable to community control as he has not previously served a prison term and he sought counseling for both his substance abuse issues and his sexual abuse issues.

{¶ 8} We review the imposed sentence under the standard of review set forth in R.C.

2953.08(G)(2), which governs all felony sentences. *State v. Crawford*, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶ 6. "When considering an appeal of a trial court's felony sentencing decision under R.C. 2953.08(G)(2), '[t]he 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.'" *Id.* at ¶ 7, quoting R.C. 2953.08(G)(2). However, an appellate court's review of an imposed sentence is not whether the sentencing court abused its discretion. *Id.*; *State v. Moore*, 12th Dist. Clermont No. CA2014-02-016, 2014-Ohio-5191, ¶ 6. Rather, an appellate court may take any action authorized by R.C. 2953.08(G)(2) only if the court "clearly and convincingly finds" that either (1) "the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;" or (2) "[t]hat the sentence is otherwise contrary to law." R.C. 2953.08(G)(2)(a)-(b). An appellate court will not find a sentence clearly and convincingly contrary to law where the 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 appellant within the permissible statutory range. *Moore* at ¶ 6; *State v. Setty*, 12th Dist. Clermont Nos. CA2013-06-049 and CA2013-06-050, 2014-Ohio-2340, ¶ 107.

{¶ 9} Appellant was convicted of three counts of gross sexual imposition, felonies of the fourth degree. Although appellant contends that community control sanctions should have been imposed, application of R.C. 2929.13(B) suggests otherwise.

{¶ 10} R.C. 2929.13 provides, in relevant part, the following:

(B)(1)(a) Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree *that is not an offense of violence* or that is a qualifying assault offense, *the court shall sentence* the offender

to a community control sanction of at least one year's duration if *all* of the following apply:

(i) The offender previously has not been convicted of or pleaded guilty to a felony offense.

(ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.

(iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty-five-day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.

(iv) The offender previously has not been convicted of or pleaded guilty to a misdemeanor offense of violence that the offender committed within two years prior to the offense for which sentence is being imposed.

\* \* \*

(2) If division (B)(1) of this section does not apply, \* \* \* in determining whether to impose a prison term as a sanction for a felony of the fourth or fifth degree, the sentencing court shall comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code and section 2929.12 of the Revised Code.

(Emphasis added.) The statute therefore mandates that community control sanctions be imposed for fourth-degree felony offenses when certain requirements are met. R.C. 2929.13(B)(1)(a); *State v. Taylor*, 2d Dist. Clark No. 2013-CA-59, 2014-Ohio-2821, ¶ 7. However, where a defendant is convicted of fourth-degree felony that is an "offense of violence," the requirement to impose a community control sanction under R.C. 2929.13(B)(1)(a) does not apply. *State v. Wild*, 8th Dist. Cuyahoga No. 98057, 2012-Ohio-4724, ¶ 11. Gross sexual imposition is expressly included in the definition of "offense of violence." See R.C. 2901.01(A)(9). Consequently, the trial court was not required to impose a community control sanction under R.C. 2929.13(B)(1).

{¶ 11} Rather, it was within the trial court's discretion to impose a prison term. Pursuant to R.C. 2929.13(B)(2), before determining whether to impose a prison term, the trial court was required to consider the purposes and principles of sentencing under R.C. 2929.11 and R.C. 2929.12.

{¶ 12} The purposes of felony sentencing are to protect the public from future crime by the offender and to punish the offender. R.C. 2929.11(A). A felony sentence must be reasonably calculated to achieve the purposes set forth in R.C. 2929.11(A) "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(B). "When sentencing a defendant, a trial court is not required to consider each sentencing factor, 'but rather to exercise its discretion in determining whether the sentence satisfies the overriding purpose of Ohio's sentencing structure.'" *State v. Stamper*, 12th Dist. Butler No. CA2012-08-166, 2013-Ohio-5669, ¶ 11, quoting *State v. Oldiges*, 12th Dist. Clermont No. CA2011-10-073, 2012-Ohio-3535, ¶ 17. The factors set forth in R.C. 2929.12 are nonexclusive, and R.C. 2929.12 explicitly allows a trial court to consider any relevant factors in imposing a sentence. *Id.*; *State v. Birt*, 12th Dist. Butler No. CA2012-02-031, 2013-Ohio-1379, ¶ 64.

{¶ 13} The record reflects that the trial court considered the purposes and principles of sentencing before determining that appellant was not amenable to available community control sanctions and that community control sanctions were not appropriate in this case.

The sentencing entry specifically states that

[t]he court has considered as to each of the counts the record, any information presented pursuant to R.C. 2929.15(A), oral statements, victim impact statement, and pre-sentence report, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code Section 2929.12.

{¶ 14} In regards to the factors set forth in R.C. 2929.12, the trial court found that defendant's conduct was more serious rather than less serious than conduct normally constituting the offense of gross sexual imposition. The court further found that appellant is more likely rather than less likely to commit future crimes. In reaching these determinations, the trial court considered appellant's expressed remorse for his crimes and his statements that he had voluntarily undergone counseling for his substance abuse and sexual abuse issues. The court nonetheless found that appellant posed a risk to the public. The court discussed the fact that appellant used his relationship with the victim to facilitate the commission of the offenses. The court also considered appellant's history of engaging in similar conduct in the past. In 2001, appellant pleaded guilty to two counts of sexual imposition for rubbing the breasts of another stepdaughter and that stepdaughter's friend while the two 14-year-old girls were sleeping. Although appellant had completed sex offender counseling for his 2001 offenses, he reoffended by violating D.W. over a period of years, starting in 2009. Moreover, as a result of appellant's actions, D.W. has suffered severe psychological harm. Given appellant's criminal history, his course of conduct in committing the present offenses over a period of years, and the psychological harm caused to the victim, we find no error in the trial court's determination that a prison term, rather than community control sanctions, was consistent with the principles and purposes of sentencing.

{¶ 15} Accordingly, as the record demonstrates that the trial court considered the purposes and principles of R.C. 2929.11 as well as the factors listed in R.C. 2929.12, appropriately concluded that appellant was not amenable to a community control sanction pursuant to R.C. 2929.13(B), imposed a sentence within the permissible statutory range for a fourth-degree felony in accordance with R.C. 2929.14(A)(4), and properly applied postrelease control, we find that appellant's prison sentence is not clearly and convincingly contrary to

law.

{¶ 16} Appellant's first assignment of error is, therefore, overruled.

{¶ 17} Assignment of Error No. 2:

{¶ 18} THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE PRISON TERMS.

{¶ 19} In his second assignment of error, appellant challenges the trial court's imposition of consecutive sentences, arguing that his 54-month prison sentence was "disproportionate both to the seriousness of [his] conduct and to the danger he poses to the public." Appellant contends that because the crimes he was convicted of occurred within his home, he is not a "threat to the general public" and that consecutive prison terms were therefore excessive.

{¶ 20} Pursuant to R.C. 2929.14(C)(4), a trial court must engage in a three-step analysis and make certain findings before imposing consecutive sentences. *State v. Dillon*, 12th Dist. Madison No. CA2012-06-012, 2013-Ohio-335, ¶ 9; see also *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, syllabus. First, the trial court must find that the consecutive sentence is necessary to protect the public from future crime or to punish the offender. R.C. 2929.14(C)(4). Second, the trial court must find that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. *Id.* Third, the trial court must find that one of the following applies:

(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.

R.C. 2929.14(C)(4)(a)-(c).

{¶ 21} "A trial court satisfies the statutory requirement of making the required findings when the record reflects that the court engaged in the required analysis and selected the appropriate statutory criteria." *Setty*, 2014-Ohio-2340 at ¶ 113. In imposing consecutive sentences, the trial court is not required to provide a word-for-word recitation of the language of the statute or articulate reasons supporting its findings. *Bonnell*, 2014-Ohio-3177 at ¶ 27-29; *Setty* at ¶ 113. Nevertheless, the record must reflect that the trial court engaged in the required sentencing analysis and made the requisite findings. *Id.* The court's findings must thereafter be incorporated into its sentencing entry. *Bonnell* at ¶ 37.

{¶ 22} Here, the record reflects that the trial court made the findings required by R.C. 2929.14(C)(4) before ordering appellant's sentence be served consecutively. Specifically, the trial court made the following findings at the sentencing hearing:

THE COURT: The prison term that will be imposed is \* \* \* 54 months, which is 18 months on each of the counts served consecutively. And in imposing those prison sentences consecutively they're necessary to protect the public from future crime and to punish [appellant]. They're not disproportionate to the seriousness of his conduct and the danger he poses to the public.

When you offend against the same person three times, it doesn't mean that the harm is less the second and third times. In fact, I think the harm is great each time it is committed, and the harm caused by the multiple offenses is so great or unusual that no single prison term for any of the offenses committed as part of the course of conduct adequately reflects the seriousness of [appellant's] conduct, and his history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by him.

The trial court later memorialized these findings within its sentencing entry.

{¶ 23} From the trial court's statements at the sentencing hearing and the language utilized in the sentencing entry, it is clear that the trial court complied with the dictates of R.C. 2929.14(C)(4). See *Bonnell* at ¶ 37; *Crawford*, 2013-Ohio-3315 at ¶ 17. It is also clear that the record supports the trial court's finding that consecutive sentences are not disproportionate to the seriousness of appellant's conduct and the danger he poses to the public. Although appellant contends that he is not a "threat to the general public," appellant's conduct demonstrates otherwise. Appellant has had a history of engaging in sexual contact with minor females since 2001. Two different stepdaughters and another minor female were all victims of appellant's unwanted touching, and sex offender counseling proved to be unsuccessful in rehabilitating appellant or preventing appellant from reoffending. Based on these facts, as well as the fact that appellant's sexual abuse of D.W. extended over a period of years and involved a number of instances of sexual contact, we find sufficient evidence to support the trial court's finding that consecutive sentences are not disproportionate to the seriousness of appellant's conduct and the danger he poses to the public.

{¶ 24} We therefore conclude that the information presented at the sentencing hearing, as well as the information contained within the presentence investigation report, supports the trial court's findings under R.C. 2929.14(C)(4). Accordingly, we find that the trial court did not err in imposing consecutive sentences.

{¶ 25} Appellant's second assignment of error is, therefore, overruled.

{¶ 26} Judgment affirmed.

M. POWELL, P.J., and S. POWELL, J., concur.