

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2013-11-210
	:	
- vs -	:	<u>OPINION</u>
	:	5/4/2015
	:	
VICTOR J. HORNA,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case No. CR2012-12-1989

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Victor J. Horna, #A679843, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601, defendant-appellant, pro se

**RINGLAND, J.**

{¶ 1} Defendant-appellant, Victor J. Horna, appeals from his conviction and sentence in the Butler County Court of Common Pleas for gross sexual imposition and unlawful sexual conduct with a minor.

{¶ 2} Horna was charged with one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), and one count of unlawful sexual conduct with a minor in violation of

R.C. 2907.04(A), both felonies of the third degree. Horna pled guilty to both offenses.

{¶ 3} Following a sentencing hearing, Horna was ordered to serve 48 months in prison on each count. The trial court ordered that the sentences be served consecutively.

{¶ 4} Horna now appeals his conviction and sentence, raising two assignments of error for our review.

{¶ 5} Assignment of Error No. 1:

{¶ 6} WHETHER THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO ABIDE BY THE SENTENCING GUIDELINES AS LEGISLATIVELY PROMULGATED.

{¶ 7} Within this assignment of error, Horna argues that the trial court erred in (1) failing to make the statutorily required findings before imposing consecutive sentences, and (2) failing to merge the charges as allied offenses of similar import.

### **Consecutive Sentences**

{¶ 8} The standard of review set forth in R.C. 2953.08(G)(2) shall govern all felony sentences, and dictates that sentences that are contrary to law will be reversed. *State v. Crawford*, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶ 6. A consecutive sentence is contrary to law and must be reversed where the trial court fails to make findings required by R.C. 2929.14(C)(4). *State v. Warren*, 12th Dist. Clermont No. CA2012-12-087, 2013-Ohio-3483, ¶ 16.

{¶ 9} 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).

{¶ 10} "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." *State v. Setty*, 12th Dist. Clermont Nos. CA2013-06-049 and CA2013-06-050, 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. *Bonnell* at ¶ 28; *Setty* at ¶ 113. The court's findings must thereafter be incorporated into its sentencing entry. *Bonnell* at ¶ 37.

{¶ 11} Here, the record establishes that the trial court made the findings required by R.C. 2929.14(C)(4) before ordering Horna's sentences be served consecutively. Specifically, in ordering Horna to serve consecutive sentences for gross sexual imposition and unlawful sexual conduct with a minor, the trial court made the following findings at the sentencing

hearing:

The Court will specifically find that \* \* \* consecutive sentences are necessary to protect the public and to adequately in this case, very much adequately punish [Horna] are not disproportionate.

And the Court will find in addition to that that the harm to the victim in this case was so great or unusual that a single term does not adequately reflect the seriousness of your conduct. \* \* \* Seven, eight years of this type of conduct and behavior and control and victimizing this little girl. So for those reasons, the Court will find that consecutive sentences are necessary, and appropriate.

{¶ 12} The sentencing entry incorporated those findings, specifically stating that:

The Court finds that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. The court also finds that: \* \* \* [a]t 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 was so great and unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the defendant's conduct.

{¶ 13} Thus, the trial court found that (1) consecutive sentences were necessary to protect the public, (2) consecutive sentences were not disproportionate to the seriousness of his crimes, and (3) Horna engaged in the two offenses as part of a course of conduct over a number of years and the harm was so great or unusual that a single term would not reflect the seriousness of his crimes. Accordingly, the trial court made the statutorily required findings pursuant to R.C. 2929.14(C)(4) before imposing consecutive terms.

### **Allied Offenses**

{¶ 14} While Horna failed to raise the issue of allied offenses to the trial court, we review his argument for plain error nonetheless. *State v. Chamberlain*, 12th Dist. Brown No. CA2013-04-004, 2014-Ohio-4619, ¶ 67. Under Crim.R. 52(B), plain error exists only where there is an obvious deviation from a legal rule that affected the outcome of the proceeding.

*State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). The imposition of multiple sentences for allied offenses of similar import constitutes plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 31–33.

{¶ 15} The Ohio Supreme Court has recently clarified the test for allied offenses. *State v. Ruff*, Slip Opinion No.2015-Ohio-995. The *Ruff* court noted that the trial court or reviewing court must "first take into account the conduct of the defendant." *Id.* at ¶ 25.

If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation.

*Id.*

{¶ 16} In the present case, Horna's convictions were based on conduct that occurred separately over the course of a number of years. The gross sexual imposition conviction stems from conduct that occurred between January 1, 2005 and December 31, 2006. On the other hand, the unlawful sexual conduct with a minor conviction is based upon conduct that occurred between January of 2008 and December 31, 2009. It is plainly obvious the offenses were committed on separate occasions and with a separate animus. Accordingly, Horna's convictions are not allied offenses of similar import.

{¶ 17} In light of the foregoing, having found that the trial court made the statutorily required findings before imposing consecutive sentences and the convictions are not allied offenses of similar import, Horna's first assignment of error is overruled.

{¶ 18} Assignment of Error No. 2:

{¶ 19} WHETHER APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL.

{¶ 20} To prevail on an ineffective assistance of counsel claim, an appellant must

establish (1) that his trial counsel's performance was deficient and (2) that such deficiency prejudiced the defense to the point of depriving the appellant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052 (1984); *State v. Vore*, 12th Dist. Warren Nos. CA2012-06-049 and CA2012-10-106, 2013-Ohio-1490, ¶ 14. Trial counsel's performance will not be deemed deficient unless it "fell below an objective standard of reasonableness." *Strickland* at 688. To show prejudice, the appellant must prove there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. An appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other. *State v. Madrigal*, 87 Ohio St.3d 378, 389 (2000).

{¶ 21} Horna supports his claim of ineffective assistance of counsel by stating that, "[a]s previously elucidated, [Horna's] case is riddled with the absence of statutory requirements that are rudimentary at best." Having already found that the trial court did not err in imposing consecutive sentences or finding that the charges were not allied offenses under the first assignment of error, we do not find that Horna's counsel was deficient for declining to raise those meritless arguments below.

{¶ 22} In light of the foregoing, having found that Horna failed to show that his counsel's performance was deficient, Horna's second assignment of error is overruled.

{¶ 23} Judgment affirmed.

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