[Cite as *State v. Setty*, 2015-Ohio-2012.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
		CASE NO. CA2014-09-068
Plaintiff-Appellee,	:	
		O P I N I O N
	:	5/26/2015
- vs -		
	:	
JASON CHRISTOPHER SETTY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2012CR0068

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

The Farrish Law Firm, Michaela M. Stagnaro, 810 Sycamore Street, 6th Floor, Cincinnati, Ohio 45202, for defendant-appellant

S. POWELL, J.

{¶ 1} Defendant-appellant, Jason Christopher Setty, appeals from the decision of the Clermont County Court of Common Pleas resentencing him on three counts of rape upon remand from this court's decision in *State v. Setty*, 12th Dist. Clermont Nos. CA2013-06-049 and CA2013-06-050, 2014-Ohio-2340. For the reasons outlined below, we affirm.

{¶ 2} On January 25, 2012 and September 26, 2012, a Clermont County Grand Jury

indicted Setty on a number of counts including rape, attempted rape, sexual battery, disseminating matter harmful to juveniles, and felonious assault. The charges stemmed from allegations that between March and September 2011, Setty orally, anally, and vaginally raped or attempted to rape his two minor stepdaughters, Lo.R. and Li.R., as well as allegations that he engaged in sexual contact and conduct with the children, thus causing them to suffer serious physical harm. It was also alleged that Setty showed the children pornographic videos depicting sexual acts that he then later asked them to perform. At the time the alleged sexual abuse occurred, Lo.R. was ten years old and Li.R. was eight and nine years old. Following a four-day jury trial, Setty was found guilty on all charges.

{¶ 3} On May 31, 2013, the parties reconvened for purposes of sentencing. At the sentencing hearing, the trial court sentenced Setty to life in prison without the possibility of parole on counts one through three regarding the rape convictions relating to Li.R., as well as on counts four through six regarding the rape convictions relating to Lo.R. The three rape counts relating to Li.R. were then ordered concurrent to one another, with the three rape counts relating to Lo.R. ordered concurrent to one another, but consecutive to the rape sentences relating to Li.R. Setty was also sentenced to serve eight years in prison on count seven for the attempted rape of Lo.R., which was ordered to run consecutive to the sentences he received on the rape charges. Setty was further sentenced to 18 months in prison on count 14 for disseminating matter harmful to juveniles, which was ordered to run consecutive to the rape and attempted rape sentences. As it relates to counts eight through 13, the trial court determined Setty's convictions for sexual battery were allied offenses of similar import that the state elected to merge with the rape convictions. The trial court held the same as it relates to Setty's convictions for his two felonious assault convictions.

{¶ 4} Setty appealed from his convictions and sentence. As relevant here, this court reversed the trial court's decision sentencing Setty to life in prison without the possibility of

parole on counts four through six regarding the rape convictions relating to Lo.R. As this court stated:

> [A] defendant may be sentenced to life without parole under R.C. 2907.02(B) if convicted of violating R.C. 2907.02(A)(1)(b) and one of the following applies: (1) the defendant was previously convicted or pleaded guilty to raping a person under the age of 13; (2) the defendant caused serious physical harm to the victim, who was less than 13 years of age, during or immediately after the rape; or (3) the defendant raped a victim who was less than ten years of age. If none of the above apply, the defendant shall be sentenced in accordance with R.C. 2971.03 to a prison term or a term of life.
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> * * *
>
> In the indictment for Case No. 2012-CR-0068, the rape counts relating to Lo.R. do not contain a specification that Lo.R. was less than ten years old at the time of the offense, that appellant has previously been convicted or pleaded guilty to the rape of a minor under age 13, or that appellant caused serious physical harm to Lo.R. during or immediately after the rapes. Furthermore, the verdict forms finding appellant guilty of raping Lo.R. in counts four through six of Case No. 2012-CR-0068 were general verdict forms finding appellant "guilty of the offense of Rape, Section R.C. 2907.02(A)(1)(b) of the Ohio Revised Code, as to Lo.R. who was more than 10 years of age but less than thirteen years of age." Nonetheless, the trial court, at the sentencing hearing and in its sentencing entry, specifically found appellant caused serious physical harm to Lo.R. during the course of the rapes and imposed a sentence of life without parole on counts four through six.

Setty, 2014-Ohio-2340 at ¶ 117-118.

Continuing, this court stated:

> [T]he verdict forms submitted to the jury on counts four through six were general verdict forms asking the jury to determine appellant's guilt or innocence. The forms did not require the jury to determine whether appellant caused Lo.R. serious physical harm during or immediately after the commission of the rape offenses. As the jury did not specifically find appellant caused Lo.R. serious physical harm during or immediately after the commission of the rapes, appellant could not be sentenced to life without parole pursuant to R.C. 2907.02(B).
>
> We further find that the trial court's statement in its sentencing

> entry and its determination at the sentencing hearing that appellant caused Lo.R. "serious physical harm" during the course of the rapes was an improper basis to enhance the penalty on counts four through six. While the trial court unquestionably believed appellant caused Lo.R. serious physical harm during the course of the rapes, the trial court was not permitted to make this additional finding, independent from the jury, to enhance the statutory maximum penalty permitted by R.C. 2907.02(B).

Id. at ¶ 120-121.

Concluding, this court stated:

> We find this portion of appellant's sixth assignment of error to be well-taken, and therefore sustain appellant's sixth assignment of error to the extent the trial court erred in sentencing appellant to life without parole on counts four, five and six in Case No. 2012-CR-0068. We reverse the sentence on counts four, five, and six and remand the matter for resentencing. On remand, the trial court is instructed to sentence appellant on those counts in accordance with [R.C. 2971.03(B)(1)], where the maximum penalty authorized under the specific facts and circumstances of this case is life imprisonment. In all other respects the sentence imposed by the trial court is affirmed.

Id. at ¶ 123.

{¶ 5} On September 11, 2014, the trial court held a hearing for purposes of resentencing Setty on counts four through six, his three rape convictions relating to Lo.R. Following this resentencing hearing, Setty was resentenced to ten years to life on each of the three counts to be served consecutive to all other sentences originally imposed for a total of 30 years to life in prison. Setty now appeals from the trial court's resentencing decision, raising one assignment of error for review.

{¶ 6} THE TRIAL COURT ERRED AS A MATTER OF LAW IN RESENTENCING APPELLANT.

{¶ 7} In his single assignment of error, Setty initially argues the trial court erred by resentencing him upon remand to serve three consecutive terms of ten years to life in prison on counts four through six for a total of 30 years to life in prison. In support of this claim,

Setty alleges the trial court's resentencing decision violates his due process rights and was motivated by retaliation or vindictiveness given his successful appeal. We disagree.

{¶ 8} In *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969), the United States Supreme Court held that a trial court violates due process of law when, motivated by retaliation or vindictiveness for a defendant's successful appeal, the court resentences a defendant to a harsher sentence. *Id*. at 725. In this case, however, the trial court did not impose a harsher sentence upon remand. As noted above, the trial court originally sentenced Setty on counts four through six to life in prison without the possibility of parole. Upon remand, however, the trial court merely sentenced Setty to a term of ten years to life on each count to be served consecutively for a total term of 30 years to life in prison. As stated by the trial court, and with which we agree, this does not constitute a harsher sentence given the fact that "30 to life is certainly less than life without parole[.]" Therefore, because the trial court's resentencing decision complied with this court's decision in *Setty* and R.C. 2971.03(B)(1), Setty's first argument is without merit and overruled.

{¶ 9} Setty next argues the trial court erred by ordering the sentences to be served consecutively because it failed to make the necessary findings as required by R.C. 2929.14(C)(4). We again disagree.

{¶ 10} 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. Blair*, 12th Dist. Butler No. CA2014-01-023, 2015-Ohio-818, ¶ 52. First, the trial court must find a consecutive sentence is necessary to protect the public from future crime or to punish the offender. *State v. Dillon*, 12th Dist. Madison No. CA2012-06-012, 2013-Ohio-335, ¶ 9. 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. *State v. Heard*, 12th Dist. Butler Nos. CA2014-02-024, CA2014-02-025, and CA2014-05-118,

2014-Ohio-5394, ¶ 10. Third, the trial court must find that at least one of the three circumstances listed in R.C. 2929.14(C)(4)(a)-(c) applies; namely:

> (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).

{¶ 11} "'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. Childers*, 12th Dist. Warren No. CA2014-02-034, 2014-Ohio-4895, ¶ 31, quoting *Setty*, 2014-Ohio-2340 at ¶ 113. When imposing consecutive sentences, a trial court is not required to provide a word-for-word recitation of the language of the statute or articulate reasons supporting its findings. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶ 27, 29. "Nevertheless, the record must reflect that the trial court engaged in the required sentencing analysis and made the requisite findings." *State v. Moore*, 12th Dist. Clermont No. CA2014-02-016, 2014-Ohio-5191, ¶ 12. The court's findings must then be incorporated into its sentencing entry. *Id*., citing *Bonnell* at ¶ 37.

{¶ 12} In this case, the record firmly establishes that the trial court made all the necessary findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences upon remand. Specifically, as the trial court stated:

> I certainly re-reviewed the pre-sentence report, but I also sat and heard the entire trial in this matter and understand the effects that it had on these children. Nevertheless, I believe again that the consecutive structure of these three sentences which will also be served consecutively to the other sentences that are – that are imposed in this case are necessary to protect the public from future crime, and to punish the Defendant for these heinous offenses.
>
> I do not believe they're disproportionate to the seriousness of his conduct, and they were perpetrated against two minor children repeatedly for a period of months. And each child suffered serious physical harm. In particular, [Lo.R.] was diagnosed with post-traumatic syndrome. And as a result of these sexual assaults committed upon them by the Defendant, the harm caused by these three multiple offenses are so great and unusual that a single prison sentence does not adequately reflect the seriousness of the conduct imposed – committed in this particular case.

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

{¶ 13} Based on the trial court's statements at the resentencing hearing upon remand, as well as the language utilized by the trial court in its resentencing entry, it is clear the trial court complied with the dictates of R.C. 2929.14(C)(4) before again imposing consecutive sentences on Setty in this matter. Therefore, because the trial court did not err by imposing consecutive sentences here, Setty's second argument is also without merit and overruled.

{¶ 14} Finally, Setty argues the trial court erred by failing to notify him that he would be required not to ingest or be injected with a drug of abuse and submit to drug testing as provided by R.C. 2929.19(B)(2)(f), or that he would be subject to DNA testing under R.C. 2901.07(B)(1) and (2). However, similar to our holding in *State v. Moore*, 12th Dist. Clermont No. CA2014-02-016, 2014-Ohio-5191, ¶ 16-18, any error resulting from the trial court's omissions was, at worst, harmless. Pursuant to Crim.R. 52(A), this court shall disregard any "error, defect, irregularity, or variance which does not affect substantial rights[.]" Setty's final argument is therefore likewise without merit and overruled.

{¶ 15} Judgment affirmed.

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