[Cite as *State v. Jones*, 2015-Ohio-2314.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-09-017
	:	O P I N I O N
- vs -		6/15/2015
	:	
ANTHONY EDWARD JONES,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2013-2208

Jessica A. Little, Brown County Prosecuting Attorney, Mary McMullen, 510 East State Street, Suite 2, Georgetown, Ohio 45121, for plaintiff-appellee

Timothy J. Kelly, 108 South High Street, P.O. Box 467, Mt. Orab, Ohio 45154, for defendant-appellant

HENDRICKSON, J.

{¶ 1} Defendant-appellant, Anthony Edward Jones, appeals from his sentence in the Brown County Court of Common Pleas for two counts of rape. For the reasons set forth below, we affirm in part, reverse in part, and remand the matter to the trial court for resentencing.

{¶ 2} In August 2013, appellant was indicted on ten counts of rape in violation of R.C.

2907.02(A)(1)(b), felonies of the first degree, four counts of sexual battery in violation of R.C. 2907.03(A)(5), felonies of the third degree, and one count of pandering sexually-oriented matter involving a minor in violation of R.C. 2907.322(A)(1), a felony of the second degree. Of the ten rape counts, three counts specified that the victim, appellant's stepdaughter M.C., was under the age of ten at the time of the offenses, and the other seven counts specified the victims, M.C. and appellant's stepson, C.C., were under the age of 13 at the time of the offenses.

{¶ 3} Following plea negotiations, appellant entered a guilty plea in November 2013 to two counts of rape. By entering this plea, appellant admitted to engaging in sexual conduct with both M.C. and C.C. With respect to M.C., appellant admitted to having vaginal intercourse with M.C. when she was less than ten years old (count one). With respect to C.C., appellant admitted that he engaged in fellatio with C.C. when C.C. was less than 13 years old (count twelve). The remaining charges were dismissed.

{¶ 4} On December 31, 2013, appellant was sentenced to life without parole on count one and ten years to life on count twelve. The sentences were run consecutively to one another. The trial court did not instruct appellant about any term of postrelease control; nor did it include postrelease control in its January 2, 2014 sentencing entry.

{¶ 5} Appellant appealed, raising two assignments of error.

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT APPELLANT BY IMPOSING A SENTENCE OF LIFE WITHOUT PAROLE.

{¶ 8} In his first assignment of error, appellant contends that the trial court erred when it imposed a sentence of life without parole on count one instead of a sentence of fifteen years to life. Appellant argues that the more lenient sentence, which allows the possibility of parole, was warranted as he "[does] not have a history of being at [sic] threat to

the public at large" and, prior to his current conviction, he "was a law abiding citizen with no serious criminal history, just a 2001 DUI and a disorderly conduct."

{¶ 9} 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.

{¶ 10} With respect to count one, appellant was convicted of rape in violation of R.C. 2907.02(A)(1)(b), with the specification that M.C. was less than ten years old at the time of the offense. Pursuant to the express language of R.C. 2907.02(B),

> [e]xcept as otherwise provided in this division, notwithstanding

> [R.C. 2929.11 to R.C. 2929.14], an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or a term of life imprisonment pursuant to [R.C. 2971.03]. * * * If an offender under division (A)(1)(b) of this section previously has been convicted of or pleaded guilty to violating division (A)(1)(b) of this section or to violating an existing or former law of this state, another state, or the United States that is substantially similar to division (A)(1)(b) of this section, if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, or *if the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to [R.C. 2971.03], the court may impose upon the offender a term of life without parole*.

(Emphasis added.) If the trial court does not impose a term of life without parole, the court must sentence the offender in accordance with R.C. 2971.03, which provides:

> (B)(1) [I]f a person is convicted of or pleads guilty to a violation of [R.C. 2907.02(A)(1)(b)] * * * and if the court does not impose a sentence of life without parole when authorized pursuant to [R.C. 2907.02(B)], the court shall impose upon the person an indefinite prison term consisting of one of the following:
>
> * * *
>
> (b) If the victim was less than ten years of age, a minimum term of fifteen years and a maximum of life imprisonment.

R.C. 2971.03(B)(1)(b).

{¶ 11} Accordingly, the statutory range within which appellant could have been sentenced was either fifteen years to life with the possibility of parole, pursuant to R.C. 2971.03(B)(1)(b), or life without parole, pursuant to R.C. 2907.02(B). By electing to sentence appellant to life without the possibility of parole, the trial court sentenced appellant within the permissible statutory range.

{¶ 12} Further, in sentencing appellant to life without parole, the record reflects that the court considered the principles and purposes of sentencing as set forth in R.C. 2929.11, as well as the seriousness and recidivism factors set forth in R.C. 2929.12. With respect to the purposes of felony sentencing, the intent is 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} Here, the trial court's sentencing entry specifically states that "[t]he Court has considered the record and oral statements, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors of R.C. 2929.12. The Court has further reviewed R.C. 2907.02(B) and R.C. 2971.03(B)." The court found that appellant's conduct was more serious rather than less serious than conduct normally constituting the offense of rape. In reaching this determination, the court considered that appellant used his relationship with the victims to facilitate the commission of the rapes. He sexually abused M.C. for nearly a decade, beginning the abuse when M.C. was between the ages of six and nine. He similarly abused M.C.'s younger brother, beginning the abuse when C.C. was ten years old. He threatened both M.C. and C.C. with beatings if they ever told anyone about the abuse, stating that he'd "whip [them] until [they] bled." Although appellant expressed remorse for his actions at the sentencing hearing, the trial court was entitled to find that appellant was "very dangerous" and that he posed a risk to

the public. While appellant did not have a prior felony sex offense conviction, the record demonstrated that he sexually assaulted victims of both genders for nearly a decade, causing them significant psychological harm. Given these considerations, we find that the imposition of appellant's sentence of life without parole was consistent with the principles and purposes of sentencing.

{¶ 14} Although appellant was sentenced within the permissible statutory range and the record reflects that the court properly considered the purposes and principles of R.C. 2929.11 as well as the factors listed in R.C. 2929.12, we find that appellant's sentence is contrary to law as the trial court failed to properly apply postrelease control.

{¶ 15} R.C. 2967.28 provides, in relevant part, the following:

> (B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is an offense of violence and is not a felony sex offense shall include a requirement that the offender be subject to a period of postrelease control imposed by the parole board after the offender's release from imprisonment. * * * Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of postrelease control required by this division for an offender shall be one of the following periods:
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> (1) For a felony of the first degree or for a felony sex offense, five years.

{¶ 16} At the sentencing hearing, the trial court erroneously indicated that there was no need for it to apply postrelease control given appellant's life without parole sentence. However, the Ohio Supreme Court, interpreting R.C. 2967.28, has indicated otherwise. In *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, ¶ 14, the court stated:

> [A]pplying the rules of grammar and common usage to R.C. 2967.28(B)(1), we find that the statute's plain, unambiguous language expressly requires the inclusion of a mandatory postrelease-control term of five years for each prison sentence

> for felonies of the first degree and felony sex offenses. [The defendant] was convicted of rape in violation of R.C. 2907.02, which is both a felony of the first degree and a felony sex offense. R.C. 2907.02(B) and R.C. 2967.28(A)(3). Therefore, R.C. 2967.28(B) require[s] that a five-year term of postrelease control be included in his sentence.

{¶ 17} The Supreme Court also noted that "[b]ecause R.C. 2967.28(B)(1) is phrased in broad, sweeping language," courts "must accord it broad, sweeping application." *Id.* at ¶ 20. Therefore, "[a]lthough it could be implied from [R.C. 2967.28(F)] that postrelease control is unnecessary for indefinite or life sentences, there is no specific language in either this or other provisions that modifies the express language in R.C. 2967.28(B)(1) requiring postrelease control." *Id.* "R.C. 2967.28(B)(1) is not expressly limited to definite sentences; instead it applies broadly to '[e]ach sentence to a prison term for a felony of the first degree * * * [or] for a felony sex offense.'" *Id.*

{¶ 18} Therefore, although appellant will never be released from prison, we cannot ignore the broad language of R.C. 2967.28 or the policy set forth in *Carnail* requiring strict statutory compliance with the postrelease control statute. We are constrained to conclude that the trial court erred in failing to impose postrelease control as part of appellant's sentence for his first-degree felony rape conviction. *See Carnail; State v. Spence*, 10th Dist. Franklin No. 10AP-1183, 2011-Ohio-3655.

{¶ 19} Consequently, appellant's first assignment of error is overruled in part and sustained in part. The matter is remanded for the trial court to impose postrelease control in accordance with the procedures outlined in R.C. 2929.191. *See State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434; *State v. Schleiger*, 12th Dist. Preble No. CA2009-09-026, 2010-Ohio-4080.

{¶ 20} Assignment of Error No. 2:

{¶ 21} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT

APPELLANT BY IMPOSING CONSECUTIVE RATHER THAN CONCURRENT SENTENCES.

{¶ 22} In his second assignment of error, appellant argues that the trial court failed to comply with the requirements set forth in R.C. 2929.14(C)(4) in imposing consecutive sentences by failing to make the necessary findings at the sentencing hearing. The state concedes that the trial court "did not specifically state all the findings on the record during the sentencing hearing," but argues that "the appropriate findings were contained in the sentencing entry."

{¶ 23} 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.
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> (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).

{¶ 24} "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 at the sentencing hearing. *Id.* The court's findings must thereafter be incorporated into its sentencing entry. *Bonnell* at ¶ 37.

{¶ 25} At the sentencing hearing, the trial court stated the following before imposing consecutive sentences:

> The Court, at this point in time, has, also, reviewed 2907.02(B) as well as 2971.03. As it relates to Count 1, Rape, in violation of 2907.02(A)(1)(b), victim under 10-years of age, it will be the sentence, of this Court, that the Defendant serve life imprisonment, without eligibility for parole.
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> As to Count 12, 2907.02(A)(1)(b), with the victim being under 13-years-of-age, it will be the sentence of this Court, that he serve a period of 10 years imprisonment, to life imprisonment. The Court does not feel, and I agree with the prosecutor, that no one term of imprisonment is - - is enough to sentence you properly and to serve the "Purposes and the Principles of Sentencing." Count 1 [sic] will run consecutive to Count 12 [sic].

The record, therefore, reflects that the trial court did not make *all* of the necessary findings at the sentencing hearing before ordering that appellant's sentence for count twelve be served consecutively to his sentence for count one. While the trial court's statements at the hearing indicated the court's belief that consecutive sentences were not disproportionate to appellant's conduct or the danger that he poses to the public, the trial court was required to

make the other findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences. Contrary to the state's argument, the fact that the other necessary sentencing findings were later incorporated into the court's sentencing entry was not sufficient to properly impose consecutive sentences. As the Supreme Court indicated in *Bonnell*, a trial court must first make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing before incorporating such findings into its sentencing entry. *Bonnell*, 2014-Ohio-3177 at syllabus and ¶ 29 ("a trial court must state the required findings as part of the sentencing hearing, and by doing so it affords notice to the offender and to defense counsel").

{¶ 26} As the trial court failed to make the required findings pursuant to R.C. 2929.14(C)(4) at the sentencing hearing, we conclude that the imposition of consecutive sentences was contrary to law. Appellant's second assignment of error is sustained.

{¶ 27} We therefore vacate that portion of the trial court's judgment imposing consecutive sentences and remand this matter to the trial court for resentencing. On remand, the trial court shall consider whether consecutive sentences are appropriate under R.C. 2929.14(C)(4), and if so, shall make the required statutory findings on the record at resentencing and incorporate its findings into a sentencing entry. *See Bonnell*, 2014-Ohio-3177 at ¶ 37*; State v. Smith,* 12th Dist. Clermont No. CA2014-07-054, 2015-Ohio-1093, ¶ 16.

{¶ 28} Judgment is affirmed in part, reversed in part, and the cause remanded for resentencing and the imposition of postrelease control.

PIPER, P.J., and RINGLAND, J., concur.