[Cite as *State v. Graham*, 2015-Ohio-896.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case Nos. 26205
Plaintiff-Appellee	:	26206
	:	
v.	:	Trial Court Nos. 11-CR-274
	:	13-CR-2145/2
JAMES L. GRAHAM, JR.	:	
	:	(Criminal Appeal from
Defendant-Appellant	:	Common Pleas Court)
	:	

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O P I N I O N

Rendered on the 13th day of March, 2015.

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HALL, J.

{¶ 1} James Graham appeals from his convictions for aggravated robbery,

complicity to commit rape, and rape. He argues that the trial court erred by not suppressing statements that he made to police after they illegally searched the home in which they found him. Graham also argues that the court erred by imposing the maximum sentence for the complicity to commit rape and the rape offenses. Finding no error, we affirm.

I. FACTS

{¶ 2} The facts are not in dispute. On July 15, 2013, Dayton police officers Travis Eaton and his partner were dispatched to Grandview Hospital to meet a woman who had been robbed and sexually assaulted. The woman told the officers that she and another woman were walking down Main Street near East Norman Avenue when they encountered two African-American men—one heavier set; the other tall, thin, and shirtless. They called over to the women, and the women approached. When the women neared, the victim saw that the shirtless man was holding what appeared to be a shotgun wrapped in blue clothing. The man then pointed the gun at her head and said, " 'You all are going to follow us into the back alley.' " (Tr. 10). They walked down the alley behind East Norman and stopped behind the fourth or fifth house. The shirtless man told the women to undress and empty out their purses, which they did. Out of the house to the right of where they stood came a heavier-set man wearing gray boxer briefs. The shirtless man leveled his gun at the victim and said, " 'You're going to go in there and you're going to do whatever the F Dave tells you.' " (Tr. 11). After they went inside the house, "Dave" sexually assaulted the victim. Afterwards, she ran out of the house to the hospital.

{¶ 3} The victim also told Officer Eaton "that later on through her encounter that she discovered that the male that was holding the gun was named J.R. or Junior or

something." (Tr. 9-10). This man was later identified as Graham.

{¶ 4} Armed with this information, Officer Eaton and his partner drove to East Norman Avenue and turned down the back alley. After passing four or five houses, they saw items on the ground that looked like they came from a woman's purse—combs, hair bands, and the like. Officer Eaton called a backup unit, and when it arrived, the officers surrounded the house to the right of the items that they found on the ground. Eaton peered through an open window into the living room and saw sleeping a heavy-set man wearing gray boxer briefs. When another officer began knocking on the front door, Officer Eaton, through the window, ordered the man to answer the door, which he did. This exchange followed:

"We asked him his name." – "Dave." (Tr. 18).

"We asked him if anyone else was in the house." – "[Y]eah, * * * family and everybody [i]s here." (*Id*.)

"We asked him who everybody was." – " 'Junior and them.' " (*Id*.)

{¶ 5} The officers then entered the house and found "Junior" (Graham), who matched the victim's description of the shirtless man holding the gun. They arrested Graham and placed him in the back of a police cruiser. They then obtained consent from the owner of the house to search it. Officer Eaton found a pellet gun that looked like a rifle wrapped in a blue t-shirt.

{¶ 6} The police took Graham to the police station where he was twice interviewed by Detective Ross Nagy. During the second interview, Graham made incriminating statements. The content of these statements is not in the record.

{¶ 7} Graham was indicted of two counts of aggravated robbery (deadly weapon),

in violation of R.C. 2911.01(A)(1); two counts of kidnapping (sexual activity), in violation of R.C. 2905.01 (A)(4); one count of complicity to commit rape (by force or threat of force), in violation of R.C. 2923.03 (A)(2); and one count of rape (by force or threat of force), in violation of R.C. 2907.02(A)(2). Each of these offenses is a first-degree felony.

{¶ 8} Graham moved to suppress all of the evidence seized in the house and the statements that he made later at the police station. After a hearing, the trial court sustained Graham's motion as to the evidence seized in the house, concluding that, by entering the house without a warrant, the officers violated the Fourth Amendment.[1] But the court overruled the motion as to Graham's statements, concluding, based on *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990), that the exclusionary rule does not apply because probable cause existed to arrest Graham.

{¶ 9} Graham pleaded no contest to the indicted charges, and the trial court found him guilty as charged. The court sentenced Graham to 10 years in prison for each aggravated robbery offense, to 11 years for complicity to commit rape, and to 11 years for rape. (The kidnapping offenses merged into the two aggravated robbery offenses.) The court ordered Graham to serve the sentences concurrently. At the time he committed these offenses, Graham was on community control in another case. The court found that

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[1] When officers approached the house, from outside through an open window, an officer observed the suspect fitting the description of "Dave" in grey shorts. Probable cause existed for his arrest which was accomplished when "Dave" was ordered to answer the front door. When "Dave" told the officers that the suspect "Junior" was also in the house, who the victim described as the suspect with what she believed to be a shotgun, the officers were likely entitled to enter the house and perform a protective sweep which revealed the defendant. ("[I]t was a brisk sweep looking for suspects" (T. 36-7.)) James Graham Sr., the owner of the premises, then signed a consent to search form which resulted in discovery of the physical evidence. We do not reach the issues of whether the trial court's determination suppressing the physical evidence is incorrect because of either a protective sweep or consent because the state has not cross-appealed in regard to that determination.

he had been carrying a concealed weapon (loaded, ready at hand), in violation of R.C. 2923.12(A)(1), so the court revoked the community-control sanction and sentenced Graham to 17 months in prison, to be served concurrently to the 11-year sentence.

{¶ 10} Graham filed a notice of appeal in both cases.

II. ANALYSIS

{¶ 11} Graham assigns two errors to the trial court. The first alleges that the court erred by not suppressing his statements to police. And the second alleges that the court erred by imposing the maximum sentence for the complicity to commit rape and rape offenses.

A. The Motion to Suppress

{¶ 12} Graham contends that his statements should be suppressed as "fruit of the poisonous tree" because they are the product of the illegal search of the house.

{¶ 13} The issue here was addressed by the U.S. Supreme Court in *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990). In *Harris*, police found the body of a victim murdered in her apartment. Various facts gave police probable cause to believe that the defendant had killed her. Without first obtaining an arrest warrant, officers went to the defendant's apartment to arrest him. They knocked on the door, and when the defendant opened it, they showed their guns and badges. The officers entered, arrested the defendant, and took him to the police station. There the defendant signed a written inculpatory statement.

{¶ 14} The issue in *Harris* was whether the defendant's written statement "should have been suppressed because the police, by entering [the defendant's] home without a warrant and without his consent, violated *Payton v. New York*, 445 U.S. 573, 100 S.Ct.

1371, 63 L.Ed.2d 639 (1980), which held that the Fourth Amendment prohibits the police from effecting a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." *Harris* at 16. The Supreme Court concluded that the statement should not have been suppressed, holding that "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*." *Id.* at 21.

{¶ 15} The facts here are the same, mutatis mutandis, as those in *Harris*. Thus Graham's statements to police are not subject to suppression.

{¶ 16} The first assignment of error is overruled.

B. The Maximum Sentences

{¶ 17} In the second assignment of error, Graham contends that the maximum sentences imposed for complicity to commit rape and rape are contrary to law because the trial court failed to follow the procedures in R.C. 2929.11 or 2929.12. Graham asserts that when imposing the maximum sentence for an offense, the sentencing court must make a finding that the offender committed the worst form of the offense or that the offender poses the greatest likelihood of committing future crimes, citing R.C. 2929.14(C), and must state reasons that support its findings, citing R.C. 2929.19(B)(2)(d). While acknowledging that the court gave reasons for its sentence, Graham says that it "failed to discuss or list seriousness or recidivism factors [in R.C. 2929.12] as to why a lesser sentence was not appropriate as directed by R.C. 2929.11(A)." (Brief of Appellant, 17).

{¶ 18} Graham misstates current sentencing law. R.C. 2929.14(C) does not

require a court to make any findings before imposing the maximum sentence for an offense, and R.C. 2929.19(B)(2)(d) does not require the court to state reasons to support its findings. R.C. 2929.11(A) provides that a court must "*consider* the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both." (Emphasis added.). It does not require the court to explicitly state any findings about these factors.

{¶ 19} R.C. 2929.14(C) used to limit imposition of maximum sentences only for certain offenders, including those who committed the worst forms of the offense and those who posed the greatest likelihood of committing future crimes. But the Ohio Supreme Court severed this division in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, and in 2011, the General Assembly removed the division from the statute with H.B. 86. It remains true that "judicial fact-finding is not required before a prison term can be imposed within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶ 27. Still, though a trial court is no longer required to make findings, "in exercising its discretion, the court must carefully consider the statutes that apply to every felony case," which include R.C. 2929.11 and 2929.12. *Id.* at ¶ 38.

{¶ 20} The standard of review in R.C. 2953.08(G)(2) applies to felony sentences. *State v. Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069, ¶ 29 (2d Dist.). Under this standard, an appellate court may vacate a sentence if the sentence is contrary to law. R.C. 2953.08(G)(2)(b). "[A] sentence is not contrary to law when the trial court imposes a sentence within the statutory range, after expressly stating that it had considered the

purposes and principles of sentencing set forth in R.C. 2929.11, as well as the factors in R.C. 2929.12." *Rodeffer* at ¶ 32, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 18. The trial court here, before sentencing Graham, said that it had "[c]onsider[ed] the purposes and principles of sentencing set forth in Revised Code 2929.11, including avoiding unnecessary burden on state or local government resources as well as the seriousness and recidivism factors set forth in Revised Code 2929.12." (Tr. 93). Thus Graham's sentence is not contrary to law.

{¶ 21} The second assignment of error is overruled.

{¶ 22} The trial court's judgment is affirmed.

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FAIN, J., concurs.
DONOVAN, J., concurs in judgment only.

Copies mailed to:

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