[Cite as *State v. Badertscher*, 2015-Ohio-927.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
PUTNAM COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 12-14-06**

v.

GARY L. BADERTSCHER, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Putnam County Common Pleas Court
Trial Court No. 2013 CR 68

Judgment Affirmed

Date of Decision: March 16, 2015

APPEARANCES:

F. Stephen Chamberlain **for Appellant**

Todd C. Schroeder **for Appellee**

SHAW, J.

{¶1} Defendant-appellant Gary Badertscher ("Badertscher") appeals the August 15, 2014, judgment entry of the Putnam County Common Pleas Court sentencing Badertscher to an aggregate prison term of 28 years after Badertscher pled guilty to three counts of Endangering Children in violation of R.C. 2919.22(B)(5), all felonies of the second degree, one count of Disseminating Matter Harmful to Juveniles in violation of R.C. 2907.31(A)(1), a felony of the fourth degree, one count of Pandering Sexually Oriented Matter Involving a Minor in violation of R.C. 2907.322(A)(5), a felony of the fourth degree, and one count of Illegal Use of a Minor in Nudity-Oriented Material or Performance in violation of R.C. 2907.323(A)(3), a felony of the fifth degree.

{¶2} The facts relevant to this appeal are as follows. On December 19, 2013, Badertscher was indicted in a 46 count indictment alleging four counts of Endangering Children in violation of R.C. 2919.22(B)(5), all felonies of the second degree (counts 1, 2, 4, and 5)[1], one count of Compulsion to Involuntary Servitude (Trafficking in Persons) in violation of R.C. 2905.32(A), a felony of the first degree (count 3), two counts of Disseminating Matter Harmful to Juveniles in violation of R.C. 2907.31(A)(1), one count being a misdemeanor of the first degree and one count being a felony of the fourth degree (counts 6 and 7,

[1] Count 2 contained a Human Trafficking Specification pursuant to R.C. 2941.1422.

respectively), six counts of Pandering Sexually Oriented Matter Involving a Minor in violation of R.C. 2907.322(A)(5), all felonies of the fourth degree (counts 8-13), and 33 counts of Illegal Use of Minor in Nudity-Oriented Material or Performance in violation of R.C. 2907.323(A)(3), all felonies of the fifth degree (counts 14-46).

{¶3} On December 30, 2013, Badertscher was arraigned and pled not guilty to the charges. (Doc. 28).

{¶4} On February 7, 2014, the State filed a Bill of Particulars clarifying the nature of the various sexually-related crimes and specifying the victims of the alleged offenses. Every count other than counts 2 and 3 involved different victims and the offenses alleged to have occurred spanned from April of 2012 to August of 2013. (Docs. 48-49).

{¶5} On February 19, 2014, Badertscher was arraigned on a second indictment that charged him with 21 counts of Illegal Use of a Minor in Nudity-Oriented Material or Performance, all felonies of the fifth degree. Badertscher pled not guilty to the new charges.[2]

{¶6} On July 3, 2014, a change-of-plea hearing was held. At the hearing, the court was notified that the parties had entered into a written negotiated plea agreement wherein Badertscher agreed to plead guilty to three counts of

[2] While we have a transcript of this arraignment, this companion case, trial court case number 14-CR-04, is not before the court (as it was ultimately dismissed) and we do not have the actual indictment.

Endangering Children in violation of R.C. 2919.22(B)(5), all felonies of the second degree (counts 1, 2, and 5 of the indictment), one count of Disseminating Matter Harmful to Juveniles in violation of R.C. 2907.31(A)(1), a felony of the fourth degree (count 7), one count of Pandering Sexually Oriented Matter Involving a Minor in violation of R.C. 2907.322(A)(5), a felony of the fourth degree (count 8), and one count of Illegal Use of a Minor in Nudity-Oriented Material or Performance in violation of R.C. 2907.323(A)(3), a felony of the fifth degree (count 14). In exchange the State agreed to remain silent at sentencing and dismiss the remaining charges against Badertscher, including all of the charges in the second indictment.[3] (Doc. 74). The written agreement was signed by all parties involved in open court.

{¶7} After being informed of the proposed plea agreement, the court conducted a full Crim.R. 11 colloquy with Badertscher. The State then provided a factual basis for the charges. With regard to count 1, the State indicated that Badertscher "engaged in online communications with a minor female between January 2013 and July 2013" wherein the minor disclosed that she was 14 and Badertscher encouraged her to send him "nudity oriented material." (July 3, 2014, Tr. at 12). With regard to count 2 the State indicated that Badertscher engaged in online communications with a female who was 15 and that Badertscher

[3] The specification to count 2 was also dismissed.

encouraged her to send him "nudity oriented material." (*Id*. at 13). With regard to count 5 the State indicated that Badertscher "engaged in communications with a minor female between April 2012 through June 2012" and that during the course of those communications Badertscher encouraged her to send him "nudity oriented material." (Tr. at 13). As to count 7, the State indicated that Badertscher engaged in communications between June 2012 and September 2012 with a female in California who identified herself as being 10½ years old and that Badertscher made "references to her about his penis and other references which he should have known [were] obscene towards [her]." (Tr. at 14). With regard to Count 8 the State indicated that in August, 2013, Badertscher had in his possession an image of a minor child engaged in sexual activity. (*Id*.) With regard to count 14 the State indicated that Badertscher had in his possession images of a female child in a state of nudity. (*Id*.)

{¶8} Following the State's indication of the factual basis for the charges, Badertscher was specifically asked by the trial court if he was admitting to those facts and Badertscher indicated that he was. The court then accepted Badertscher's pleas and found him guilty. Subsequently the court ordered a pre-sentence investigation and set the matter for sentencing at a later date.

{¶9} On August 5, 2104, a sentencing hearing was held. At the hearing, Badertscher was classified as a Tier 3 sex offender. The court and counsel then

had a discussion regarding allied offenses. Afterward, Badertscher's attorney spoke in mitigation of sentence. Ultimately the court found that Badertscher's crimes were not allied offenses and the court sentenced Badertscher to 8 years in prison on each of the three Endangering Children charges, 18 months on both the Disseminating Matter Harmful to Juveniles and the Pandering Sexual Material Involving Juveniles charges, and 12 months in prison on the Illegal use of a Minor in Nudity-Oriented Material or Performance charge. All of these prison sentences were ordered to be served consecutively to each other for an aggregate prison term of 28 years. A judgment entry memorializing this sentence was filed August 15, 2014.

{¶10} It is from this judgment that Badertscher appeals, asserting the following assignments of error for our review.

ASSIGNMENT OF ERROR 1

THE TRIAL COURT COMMITTED AN ERROR WHEN SENTENCING THE DEFENDANT TO THE MAXIMUM CONSECUTIVE SENTENCE ALLOWED BY LAW.

ASSIGNMENT OF ERROR 2

THE TRIAL COURT COMMITTED AN ERROR [BY] NOT MERGING ALLIED OFFENSES.

ASSIGNMENT OF ERROR 3

THE DEFENDANT'S TRIAL COUNSEL WAS INEFFECTIVE.

First Assignment of Error

{¶11} In his first assignment of error Badertscher argues that the trial court erred by imposing maximum consecutive sentences in this case.

Maximum Sentences

{¶12} "Trial courts have full discretion to impose any sentence within the statutory range." *State v. Noble*, 3d Dist. Logan No. 8-14-06, 2014-Ohio-5485, ¶ 913 citing *State v. Saldana*, 3d Dist. Putnam No. 12–12–09, 2013–Ohio–1122, ¶ 20. Badertscher does not argue in this case that his maximum sentences fell outside of the statutory ranges for his crimes; rather, he contends that the maximum sentences were improper.

{¶13} "A trial court's sentence will not be disturbed on appeal absent a defendant's showing by clear and convincing evidence that the sentence is unsupported by the record or otherwise contrary to law." *State v. Barrera*, 3d Dist. Putnam No. 12–12–01, 2012–Ohio–3196, ¶ 20. Clear and convincing evidence is that "which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus. An appellate court should not, however, substitute its judgment for that of the trial court because the trial court is in a better position to judge the defendant's chances of recidivism and determine

the effects of the crime on the victim. *State v. Watkins*, 3d Dist. Auglaize No. 02–08, 2004–Ohio–4809, ¶ 16.

{¶14} Revised Code Chapter 2929 governs sentencing. R.C. 2929.11 provides, in pertinent part, that the "overriding purposes of felony sentencing are to protect the public from future crime and to punish the offender." R.C. 2929.11(A). In advancing these purposes, sentencing courts are instructed to "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." *Id.* Meanwhile, R.C. 2929.11(B) states that felony sentences must be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim" and also be consistent with sentences imposed in similar cases. In accordance with these principles, the trial court must consider the factors set forth in R.C. 2929.12(B)-(E) relating to the seriousness of the offender's conduct and the likelihood of the offender's recidivism. R.C. 2929.12(A). However, the trial court is not required to make specific findings of its consideration of the factors. *Noble, supra*, citing *State v. Kincade*, 3d Dist. Wyandot No. 16–09–20, 2010–Ohio–1497, ¶ 8.

{¶15} At the sentencing hearing, the trial court stated that it had considered the record, the PSI, and the purposes and principles of sentencing.[4] (Tr. at 17).

[4] The trial court's judgment entry of sentencing stated that it had specifically considered the principles and purposes of sentencings under R.C. 2929.11 and R.C. 2929.12.

The trial court also recited several factors that it found particularly troubling in this case including the fact that the injuries were worsened by the result of the victims' ages, that all of the crimes were sexual offenses, that Badertscher had a criminal history of "inappropriate sexual * * * contacts" with minor girls since the year 2000 and that Badertscher had already previously been classified as a sex offender. (Tr. at 18). The trial court recited that Badertscher had at least 11 prior felony convictions, five of which had been sex offenses. (Tr. at 15-16). According to the court, the previous sex offenses were similar in nature to the offenses before the court in this case, "involving solicitation of young individuals * * * in efforts to directly meet * * * some very young victims[.]" (Tr. at 16).

{¶16} Badertscher claims on appeal that a less than maximum sentence would not be demeaning to the seriousness of his conduct because he had no face-to-face contact with the victims. However, the trial court clearly considered multiple factors that weighed against imposing a less than maximum sentence. Badertscher's history of criminal conduct, particularly his history of prior similar sexually-related crimes, indicated a likelihood of his recidivism. Thus we can find no error in the trial court's imposition of maximum sentences in this case.

Consecutive Sentences

{¶17} The revisions to the felony sentencing statutes under H.B. 86 now require a trial court to make specific findings on the record, as set forth in R.C.

2929.14(C)(4), when imposing consecutive sentences. *State v. Hites*, 3d Dist. Hardin No. 6–11–07, 2012–Ohio–1892, ¶ 11. Revised Code 2929.14(C)(4) now provides:

> **If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:**
>
> *** * ***
>
> **(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.**

{¶18} When imposing consecutive sentences, the Ohio Supreme Court has held that "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." *State v. Bonnell*, 140 Ohio St.3d 209, 2014–Ohio–3177, ¶ 29. Further, the court should also include its statutory findings in the sentencing entry because a court speaks through its journal. *Id.* at ¶ 29, citing *State v. Brooke*, 113 Ohio St.3d 199,

2007–Ohio–1533, ¶ 47. However, a trial court is not required to give a "talismanic incantation" of R.C. 2929.14(C)(4), nor is it required to state reasons that support its finding. *Bonnell* at ¶ 37.

{¶19} In this case, the trial court made the statutorily required findings both at the sentencing hearing and in its judgment entry. At the sentencing hearing, the trial court specifically stated,

> **consecutive prison terms are necessary to protect the public from future crime or to punish the offender, and the consecutive sentences are not disproportionate to the seriousness of the offender's conduct and the danger posed by the offender to the public. And 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 is so great or unusual that no single prison term for any of these offenses committed as part of the course of conduct, adequately reflects the seriousness of the offender's conduct.**

(Tr. at 17-18). These findings were reflected in the judgment entry. As the trial court clearly made the statutorily required findings and is not required to support those findings, we cannot find that the trial court erred in imposing consecutive sentences.[5] Therefore, Badertscher's first assignment of error is overruled.

Second Assignment of Error

{¶20} In his second assignment of error, Badertscher argues that his convictions were allied offenses of similar import. Specifically, Badertscher argues that all of his crimes against the various victims were part of one course of

[5] Nevertheless, the trial court's findings were supported by the record.

conduct. He contends that his situation is analogous to a "commercial fishing operation whereby the fisherman casts a wide net and come[s] up with many individual fish." (Appt's Br. at 13). We disagree.

{¶21} Whether offenses are allied offenses of similar import is a question of law that this Court reviews *de novo*. *State v. Stall*, 3d Dist. Crawford No. 3–10–12, 2011–Ohio–5733, ¶ 15, citing *State v. Brown*, 3d Dist. Allen No. 1–10–31, 2011–Ohio–1461, ¶ 36. Revised Code 2941.25, Ohio's multiple-count statute, states:

> **(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.**
>
> **(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.**

{¶22} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Supreme Court of Ohio modified the analysis for determining whether offenses are allied offenses of similar import under R.C. 2941.25. "In *Johnson* the Supreme Court revised the allied offenses analysis by removing the first step of the analysis, which had required trial courts to compare the elements of the charged offenses in the abstract." *State v. Helmbright*, 10th Dist. Franklin Nos.

11AP-1080, 11AP-1081, 2013-Ohio-1143, ¶ 33. Now, according to *Johnson*, a court must first determine whether it is possible to commit both offenses with the same conduct. *Johnson* at ¶ 48. "If the multiple offenses can be committed with the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008–Ohio–4569, ¶ 50 (Lanzinger, J., dissenting). If it is possible to commit the offenses with the same conduct and the defendant did, in fact, commit the multiple offenses with the same conduct, then the offenses are allied offenses of similar import and will merge. *Id.* at ¶ ¶ 49-50.

{¶23} However, "if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then according to R.C. 2941.25(B), the offenses will not merge." *Id.* at ¶ 51. "The defendant bears the burden to prove entitlement to merger." *State v. Forney*, 2d Dist. Champaign No. 2012-CA-36, 2013-Ohio-3458, ¶ 10, citing *State v. Jackson*, 2d Dist. Montgomery No. 24430, 2012–Ohio–2335, ¶ 134.

{¶24} In this case, Badertscher was convicted of three counts of Endangering Children, one count of Disseminating Matter Harmful to Juveniles, one count of Pandering Sexually Oriented Matter Involving a Minor, and one

count of Illegal Use of a Minor in Nudity-Oriented Material or Performance. Badertscher does not specify on appeal which of his offenses he claims are allied; rather, he seems to argue that they are all allied offenses as part of one course of conduct.

{¶25} Despite Badertscher's arguments, all of his crimes were committed against separate victims and they were committed at different times and thus were not part of the same course of conduct. So while Badertscher states that his situation is analogous to a fisherman simply casting his net into the water, it is more akin to a fisherman repeatedly casting his net into the water over months and years catching different fish with each casting. The dates listed in the indictment range from April of 2012 through August of 2013[6] and separate Jane Does are listed as the victims for each of the convictions.

{¶26} Moreover, the crimes in this case carry a range of acts from directly interacting with the girls to simply possessing illegal material. Thus while all the crimes may have been similar in nature as sexual offenses directed toward minor females, they were in no way allied because they were not part of the same course of conduct and they did not involve the same victims.

[6] More specifically, the Endangering Children charges occurred on or about May-July of 2013 (Count 1), July of 2013, (Count 2), April-June of 2012 (Count 5), the Disseminating Matter Harmful to Juveniles charge occurred on or about June 2012 through September 2012, the Pandering Sexually Oriented Matter Involving a Minor charge occurred on or about August 2013, and the Illegal Use of a Minor in Nudity-Oriented Material or Performance occurred in August of 2013. (Doc. 1).

{¶27} Accordingly we cannot find that the trial court erred by finding that Badertscher's offenses were not allied. Therefore, Badertscher's second assignment of error is overruled.

Third Assignment of Error

{¶28} In Badertscher's third assignment of error, he argues that his counsel was ineffective at the sentencing hearing. Specifically, he argues that his trial counsel failed "to present any substantial statement in mitigation of sentence, including, but not limited to, Defendant's continued employment * * *, [or] the fact that his crimes were all committed via the internet and not in person."

{¶29} To establish ineffective assistance of counsel, a defendant must show that "(1) counsel's performance was deficient or unreasonable under the circumstances; and (2) the deficient performance prejudiced the defense." *State v. Price,* 3d Dist. Seneca No. 13-05-03, 2006-Ohio-4192, at ¶ 6, citing *State v. Kole*, 92 Ohio St.3d 303, 306, 2001-Ohio-191, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). In proving that the defendant was prejudiced by counsel's actions, the appellant must demonstrate that "there is a reasonable probability that, but for counsel's performance, the result of the proceeding would have been different." *Id.* at ¶ 6, citing *Strickland* at 694. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that

course should be followed." *Strickland* at 697; *State v. Helton*, 3d Dist. Hardin No. 6-08-01, 2008-Ohio-1146, ¶ 17.

{¶30} On appeal, Badertscher claims that his counsel did not provide an adequate statement at the mitigation portion of his sentencing hearing; however, his counsel did make a statement in mitigation. Defense counsel referred to Badertscher being a former Marine who had been honorably discharged. Defense counsel also did specifically refer to the fact that while Badertscher possessed illegal photographs he did not distribute them to other individuals or profit off of them. Defense counsel also indicated that Badertscher was remorseful for what he had done and that Badertscher fully acknowledged his wrongdoing.

{¶31} Badertscher does not remotely establish on appeal how his counsel stating at the sentencing hearing that he had been employed consistently while being a sex offender would have caused the trial court to sentence him differently.[7] Thus there is nothing to establish that trial counsel's performance was deficient or that there was any resulting prejudice, particularly in light of the fact that the trial court was clearly concerned at sentencing with Badertscher's extensive criminal history. Therefore, Badertscher's third assignment of error is overruled.

[7] We also have nothing before us in the record to truly establish that fact.

{¶32} For the foregoing reasons Badertscher's assignments of error are overruled and the judgment of the Putnam County Common Pleas Court is affirmed.

Judgment Affirmed

PRESTON and WILLAMOWSKI, J.J., concur.

/jlr