[Cite as *State v. Halama*, 2015-Ohio-2215.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MARK D. HALAMA Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P. J. Hon. John W. Wise, J. Hon. Craig R. Baldwin, J. Case No. 14 COA 019 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 14 CRI 004
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 5, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Wise, J.

{¶1}. Appellant Mark D. Halama appeals his conviction for rape and other offenses, following guilty pleas, in the Ashland County Court of Common Pleas. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.[1]

{¶2}. On January 20, 2014, officers from the Ashland Police Department responded to appellant's residence in response to a suspected suicide attempt by appellant, age forty-four. While inside the home, Officer Joshua Welch observed suspected drug paraphernalia and a collage of photographs on one wall of what appeared to be teenage females partying at that location.

{¶3}. Appellant was thereafter treated at Samaritan Hospital in Ashland. While he was there, Ashland Detective Brian Evans came to interview him. During this conversation, appellant acknowledged that he had pipes and marihuana residue in his home. Appellant further told the detective that many teenagers had partied at his home, often bringing their own alcohol and drugs, although appellant admitted that he had sometimes provided these teenagers with alcohol and marihuana.

{¶4}. Upon appellant's release from Samaritan Hospital, Evans informed him that he was under arrest. Prior to going to the Ashland County Jail, appellant agreed to accompany Evans to the house to recover the suspected drug paraphernalia and drugs. On the way there, Evans gave appellant his *Miranda* warnings.

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[1] Because this case did not proceed to a trial, the recited facts follow the outline of the State's brief, which we have confirmed via the information in the presentence investigation ("PSI"), which is also in the record before us. Appellant filed a reply brief in this case voicing strong opposition to the State's factual presentation. However, because R.C. 2953.08(F)(1) states the appellate record "shall include" any PSI report, we find appellant's reply argument is without merit in this regard.

{¶5}. While at appellant's home, Detective Evans located marihuana residue inside a jar. Evans further observed that a computer monitor had been mounted in the head board of appellant's bed. Appellant told Evans that he had numerous computers networked together in the house. Appellant agreed to allow Evans to review the contents of one of the computers; as a result, Evans found a video of a naked teenage female filmed in appellant's bathroom. Appellant admitted he had previously filmed two females performing sex acts in the bathroom, and he told the detective that he had been saving pornographic videos for over ten years.

{¶6}. Appellant proceeded to show Evans his upstairs bar room, pointing out certain illegal drugs and drug paraphernalia in that area of the house.

{¶7}. During this initial view of appellant's home, Evans decided to cease his consent search and obtain a search warrant due to the amount of potential evidence. On January 22, 2014, Evans and other Ashland police officers executed the search warrant from Ashland Municipal Court. The officers thereafter seized numerous computers, computer and video equipment, and photographs of teenage girls partying in appellant's home.

{¶8}. On January 27, 2014, Evans interviewed a female victim, S.C. During this conversation, S.C. told Evans that she met appellant when she was fifteen or sixteen years old, and that she would go to appellant's home to drink alcohol and smoke marihuana. At first appellant freely provided her with drugs and alcohol; however, appellant eventually started requiring her to “do things” in exchange for marihuana and alcohol. As this progressed, appellant began paying S.C. money or marihuana in exchange for sexual favors. S.C. estimated that she engaged in sexual relations with

appellant more than twenty times before she was eighteen years old. S.C. also stated that appellant would let her stay at the house when she skipped school. Appellant later admitted that he had provided S.C. with marihuana and alcohol before she turned eighteen, and that he had photographed S.C.'s breasts while she was a minor.

{¶9}. On January 27, 2014, Evans also interviewed another victim, H.W., about her knowledge of appellant. H.W. told Evans that she also began going to appellant's home when she was fifteen or sixteen years old. Prior to H.W. turning eighteen, appellant gave her Demerol, cocaine, marihuana, and alcohol. She also stated that appellant gave her money, cigarettes, and drugs to have sex with him.

{¶10}. During his review of appellant's computers and digital storage devices, Evans located videos of appellant engaging in sexual acts with H.W. In at least two videos, appellant is shown engaging in sex with H.W. while she is unconscious. She subsequently told Evans that she did not consent to this conduct.

{¶11}. On January 28, 2014, Evans obtained and executed a second search warrant for appellant's home. During this second search, officers found other cameras and equipment that appellant was using to record videos in his home and store on his computer. During the investigation, officers also found hidden cameras in the bathroom of appellant's home, which appeared to be set up to secretly make videos for appellant to watch.

{¶12}. In reviewing the materials obtained in the search, Evans found more images and videos depicting teenage females drinking and using drugs in appellant's home. Evans found more pictures and videos of teenage females in various stages of

undress. There were also videos showing appellant snorting cocaine and pills with teenage females.

{¶13}. Other videos found in the search include appellant obtaining oral sex from a female victim while she periodically stops to snort what appears to be cocaine, as well as appellant engaging in vaginal and anal sex and/or digital penetration with a female victim while she is asleep or unconscious. In one instance, appellant masturbates on a female victim while she is unconscious. In another instance, appellant is seen snorting cocaine off the victim's vaginal region and then masturbating on her. Detective Evans determined the victim was age seventeen in that instance. In regard to the hidden bathroom camera, Evans found numerous videos showing teenage females pulling their pants down and using the toilet.

{¶14}. On January 31, 2014, Evans further interviewed appellant about the investigation. Evans again advised appellant of his *Miranda* rights. During the interview, appellant acknowledged he began engaging in sexual activity with one of the female victims when she was about sixteen years old. Appellant further acknowledged that he had videotaped himself snorting cocaine off this same victim when she was seventeen years old. Appellant confessed to providing her with Demerol, cocaine, alcohol, marihuana, and morphine before she turned eighteen. In exchange, she sometimes allowed him to tape their sexual acts.

{¶15}. In an interview, appellant admitted that he enjoyed the "challenge" of engaging in sex acts with one of the victims while she was unconscious.

{¶16}. Appellant also admitted that he had been secretly videotaping females in his bathroom for years. He stated that the youngest depicted female was probably fifteen or sixteen years old.

{¶17}. Appellant also notified Evans that he had also engaged in sexual relations with another minor female, S.S. Appellant stated that he and S.S. had sex three or four times, but he did not record these acts.

{¶18}. On January 31, 2014, Detective Evans filed a criminal complaint initially charging appellant with one count of sexual battery, a felony of the third degree.

{¶19}. Appellant was arraigned on February 3, 2014, and counsel was appointed. On February 7, 2014, appellant waived his right to a preliminary hearing and the case was bound over to the grand jury.

{¶20}. On February 27, 2014, the Ashland County Grand Jury indicted appellant on four counts of rape, four counts of sexual battery, two counts of corrupting another with drugs, one count of voyeurism, one count of possession of LSD, two counts of aggravated possession of drugs, one count of possession of cocaine, two counts of pandering sexually-oriented material involving a minor, two counts of illegal use of a minor in nudity-oriented material or performance, two counts of compelling prostitution, and one count of possessing criminal tools. In addition to these felony counts, appellant was charged in the indictment with a misdemeanor count of possessing criminal tools and a misdemeanor count of furnishing beer or intoxicating liquor to underage persons, an unclassified misdemeanor offense. The indictment also included two forfeiture specifications.

{¶21}. On May 9, 2014, the State and appellant reached a negotiated plea agreement. Under this agreement, appellant pled guilty to one count of rape, a felony of the first degree; three counts of sexual battery, all felonies of the third degree; one count of corrupting another with drugs, a felony of the second degree; one count of voyeurism, a felony of the fifth degree; one count of pandering sexually-oriented material involving a minor, a felony of the second degree; one count of compelling prostitution, a felony of the third degree; and two forfeiture specifications contained in the indictment.

{¶22}. On July 22, 2014, the trial court sentenced appellant to nine years in prison for the rape conviction, sixty months aggregate for the sexual battery convictions, five years for corrupting another with drugs, twelve months for voyeurism, five years for pandering sexually-oriented material involving a minor, and thirty-six months for the offense of compelling prostitution.

{¶23}. The trial court ordered that all of the above prison sentences, with the exception of the term for compelling prostitution, be served consecutively to one another, thus ordering an aggregate prison term of twenty-five years.

{¶24}. On August 20, 2014, appellant filed a notice of appeal. He herein raises the following two Assignments of Error:

{¶25}. "I. THE TRIAL COURT ERRED AND VIOLATED APPELLANT'S CONSTITUTION [SIC] RIGHT TO DUE PROCESS AND AGAINST SELF-INCRIMINATION WHEN IT IMPOSED CONSECUTIVE SENTENCES SUCH THAT THE AGGREGATE SENTENCE EXCEEDED THE MAXIMUM PRISON TERM ALLOWED BY OHIO REVISED CODE 2929.14(A) FOR THE MOST SERIOUS OFFENSE OF WHICH THE APPELLANT WAS CONVICTED, ELEVEN YEARS.

{¶26}. "II. THE COURT ERRED IN ORDERING CONSECUTIVE PRISON SENTENCES AS THE IMPOSITION OF SUCH SENTENCES PLACES AN UNNECESSARY BURDEN ON STATE RESOURCES."

I.

{¶27}. In his First Assignment of Error, appellant contends the trial court erred in ordering, for all but one of the offenses at issue, consecutive prison sentences. We disagree.

{¶28}. In *State v. Kalish,* 120 Ohio St.3d 23, 896 N.E.2d 124, 2008–Ohio–4912, a plurality opinion, the Ohio Supreme Court established a two-step procedure for reviewing a felony sentence. The first step is to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶ 4. If this first step is satisfied, the second step requires the trial court's decision be reviewed under an abuse-of-discretion standard. *Id.* Recently, in *State v. Bailey,* 5th Dist. Ashland No. 14–COA–008, 2014–Ohio–5129, ¶ 18 – ¶ 19, this Court, while recognizing the approach has been rejected by some Ohio appellate districts, reaffirmed *Kalish* as its standard of review.

{¶29}. R.C. 2953.08(C)(1) states in pertinent part as follows:

> (C)(1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (C)(3) of section 2929.14 of the

> Revised Code and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.[2]

{¶30}. This Court has recognized that the right to appeal a sentence under R.C. 2953.08(C) does not mean that consecutive sentences for multiple convictions may not exceed the maximum sentence allowed for the most serious conviction. *See State v. Beverly,* Delaware App.No. 03 CAA 02011, 2003–Ohio–6777, ¶ 17 (additional citations omitted).

{¶31}. Specifically, 2011 Am.Sub.H.B. No. 86 revived the language provided in former R.C. 2929.14(E) and moved it to R.C. 2929.14(C)(4). The General Assembly has thus expressed its intent to revive the statutory fact-finding provisions pertaining to the imposition of consecutive sentences that were effective pre-*Foster. See State v. Wells,* Cuyahoga App.No. 98428, 2013–Ohio–1179, ¶ 11.

{¶32}. R.C. 2929.14(C)(4) provides, in relevant part:

{¶33}. "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

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[2] Pursuant to App.R. 5(D)(2), an assignment of error challenging consecutive sentences is to be deemed a timely motion for leave to appeal pursuant to R.C. 2953.08(C).

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:

> (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. (Emphases added).

{¶34}. Thus, in a nutshell, "R.C. 2929.14(C)(4) provides that a trial court may require the offender to serve multiple 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 one of three facts specified in subdivisions (a), (b), and (c)." *State v. Leet*, 2nd Dist. Montgomery No. 25966, 2015-Ohio-1668, ¶ 15 (internal quotations and brackets omitted).

{¶35}. The Ohio Supreme Court recently held as follows: "In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings." *State v. Bonnell,* 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.3d 659, syllabus.

{¶36}. In the case sub judice, appellant does not appear to dispute that his felony sentences are all within the statutory parameters for the various felonies. *See Kalish*, *supra*. In regard to the consecutive sentence issue, we note the trial court set forth the following written findings in its sentencing entry: "The Court finds that consecutive sentences are necessary to protect the public from future crime, and to punish the Defendant, that consecutive sentences are not disproportionate to the seriousness of the Defendant's conduct and to the danger the Defendant poses to the public. The Court additionally finds that at least two of the 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 adequately reflects the seriousness of the offender's conduct. The Court further finds that the Defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the Defendant."

{¶37}. Sentencing Entry, July 22, 2014, at 3.

{¶38}. Similar findings were stated on the record by the trial court at sentencing. *See* Sentencing Tr. at 19-20.

{¶39}. Appellant first challenges the trial court's finding of "great or unusual" harm caused by the multiple offenses (R.C. 2929.14(C)(4)(b)) by denouncing the prosecutor's contention at sentencing that one of the victims is now "hundreds of times more likely to engage in life-ruining behaviors." Sentencing Tr. at 12-13. Appellant urges that nothing in the record, such as a victim-impact statement, exists to support the prosecutor's claim in this regard. Appellant also challenges the trial court's consideration of appellant's "history of criminal conduct" (R.C. 2929.14(C)(4)(c)) via its reliance on uncharged criminal activity. We note at sentencing, the trial court acknowledged that appellant had no actual prior criminal record, but the court told appellant "you admittedly engaged in illegal activity for over ten years with countless unknown victims." Sentencing Tr. at 20.

{¶40}. Appellant presently contends that using information from the PSI in such a manner discourages open cooperation by defendants during the presentence process and effectively punishes them for past un-convicted criminal activity.

{¶41}. However, despite appellant's aforesaid protestations and his apparent remorse as conveyed at the sentencing hearing, having reviewed the record, we find the trial court adequately made the findings required by R.C. 2929.14(C)(4) in considering appellant's total sentence, and we hold the trial court's consecutive sentences in this matter are not unreasonable, arbitrary, or unconscionable, and are otherwise not contrary to law.

{¶42}. Appellant's First Assignment of Error is therefore overruled.

II.

{¶43}. In his Second Assignment of Error, appellant contends the imposition of his consecutive prison sentences creates an unnecessary burden on state resources. We disagree.

{¶44}. R.C. 2929.11(A) provides in pertinent part as follows: "A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. ***."

{¶45}. The sentencing statutes do not provide a definition or guideline for the concept of "unnecessary burden." *See State v. Ferenbaugh,* 5th Dist. Ashland No. 03COA038, 2004–Ohio–977, ¶ 7. Furthermore, Ohio law does not require trial courts to elevate resource conservation above the seriousness and recidivism factors. *State v. Shull,* 5th Dist. Ashland No. 2008–COA036, 2009–Ohio–3105, ¶ 22.

{¶46}. In light of appellant's multiple offenses, his admitted long-term degradation and sexual victimization of teenage females, and his recurrent contribution to the flow of illegal drugs and the production of pornography involving minors, we are not persuaded that his prison sentences constitute an unnecessary burden on state resources, and we otherwise find no abuse of discretion in the trial court's sentencing decision in this regard.

{¶47}. Appellant's Second Assignment of Error is therefore overruled.

{¶48}. For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Ashland County, Ohio, is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

Baldwin, J., concur.

JWW/d 0508