[Cite as *State v. Dunlap*, 2015-Ohio-2690.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
BRANDON DUNLAP	:	Case No. CT2014-0043
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. CR2014-0209
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	June 29, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
GERALD V. ANDERSON, II 27 North Fifth Street P.O. Box 189 Zanesville, OH 43702-0189	ERIC J. ALLEN 713 South Front Street Columbus, OH 43206

Farmer, J.

{¶1} On September 5, 2014, appellant, Brandon Dunlap, pled guilty to two counts of illegal use of a minor in nudity oriented material in violation of R.C. 2907.323 and one count of pandering sexually oriented material involving a minor in violation of R.C. 2907.322. By sentencing entry filed October 29, 2014, the trial court sentenced appellant to a total aggregate term of nine years in prison, four years on each of the illegal use counts and twelve months on the pandering count, all to be served consecutively.

{¶2} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶3} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO SUCH A HIGH SENTENCE, AS APPELLANT WAS A FIRST TIME OFFENDER WHO HAD NOT PREVIOUSLY BEEN SENTENCED TO ANY JAIL TIME."

II

{¶4} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE SENTENCES AS THE COURT FAILED TO ENGAGE IN THE REQUISITE THREE PART ANALYSIS REQUIRED TO SENTENCE A DEFENDANT TO CONSECUTIVE SENTENCES BY FAILING TO FIND THAT ANY OF THE THREE FACTORS LISTED IN 2929.14(C)(4)(a)-(c) APPLIED."

I, II

{¶5} Appellant claims the trial court erred in sentencing him to such high sentences and running them consecutively. Because of the limited record to review, we will address the assignments jointly.

{¶6} In *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4, the Supreme Court of Ohio set forth the following two-step approach in reviewing a sentence:

> In applying *Foster* [*State v.,* 109 Ohio St.3d 1, 2006-Ohio-856] to the existing statutes, appellate courts must apply a two-step approach. First, they must 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. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard.

{¶7} In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217 (1983).

{¶8} This court recently reaffirmed this standard of review in a well developed analysis filed November 17, 2014 in *State v. Bailey,* 5th Dist. Ashland No. 14-COA-008, 2014-Ohio-5129, ¶ 18–24.

{¶9} In determining a sentence, R.C. 2929.11 and 2929.12 require trial courts to consider the purposes and principles of felony sentencing, as well as the factors of seriousness and recidivism. *See State v. Mathis,* 109 Ohio St .3d 54, 2006-Ohio-855.

{¶10} Appellant was indicted on nine counts, four counts of dissemination of matter harmful to juveniles in violation of R.C. 2907.31(A)(1), four counts of illegal use of a minor in nudity oriented material in violation of R.C. 2907.323(A)(1) and (3), and one count of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(5). Pursuant to a plea agreement, appellant pled guilty to two counts of illegal use in violation of R.C. 2907.323(A)(1) in the second degree and the one count of pandering in the fourth degree. The three counts involved three different minors, one eleven, one sixteen, and one seventeen.

{¶11} Appellant argues as a first time offender, he should have been given shorter sentences. We note for a felony in the second degree, "it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code." R.C. 2929.13(D)(1).

{¶12} Appellant was sentenced to four years on each second degree felony out of a possible two to eight years and twelve months on the fourth degree felony out of a possible six to eighteen months. R.C. 2929.14(A)(2) and (4). The sentences are clearly mid-range for the respective degree of felony and are authorized by law.

{¶13} Upon review, we find nothing arbitrary or unlawful as to the length of the sentences rendered.

{¶14} Appellant argues the trial court failed to engage in a proper analysis for consecutive sentences under R.C. 2929.14(C)(4)(a)-(c) which state the following:

(4) 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:

(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.

{¶15} As noted by appellant in his brief at 6, the trial court is not required to utter any "magic words." As explained by the Supreme Court of Ohio in *State v. Bonnell,* 140

Ohio St.3d 209, 2014-Ohio-3177, ¶ 29, "a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld."

{¶16} The trial court sub judice acknowledged it thoroughly reviewed a presentence investigation report, as well as a letter from the mother of one of the girls discussing the impact the incident had in their lives. T. at 7, 12. These documents are not included in the record. The eleven year old girl actually discovered the camera in a hole by the vent in the bathroom and tried to cover it with her hand while she texted her mother. T. at 11. The trial court stated it also considered the record and all statements and the principles and purposes of sentencing under R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12.

{¶17} As explained by this court in *State v. Mills,* 5th Dist. Ashland No. 03 COA 001, 2003-Ohio-5083, ¶ 13-14:

> Alternatively, we also note that we do not know the specific contents of the presentence investigation report or any of the victim impact statements as appellant did not make them a part of the record. In *State v. Untied* (Mar. 5, 1998), Muskingum App. No. CT97-0018, we addressed the issue of failure to include the presentence investigation report and stated:
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> "Appellate review contemplates that the entire record be presented. App.R. 9. When portions of the transcript necessary to resolve issues are

not part of the record, we must presume regularity in the trial court proceedings and affirm. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 400 N.E.2d 384. The presentence investigation report could have been submitted "under seal" for our review***."

{¶18} During the sentencing hearing, the trial court stated the following (October 27, 2014 T. at 13-14):

THE COURT: Mr. Dunlap, this is reprehensible, your actions.

THE DEFENDANT: What's that mean, Your Honor?

THE COURT: It means it is disgusting.

THE DEFENDANT: Yes, Your Honor.

THE COURT: An 11-year-old and a 16-year-old, and you did it with hidden cameras, right?

THE DEFENDANT: Yes, Your Honor.

THE COURT: For your own personal sexual gratification.

THE DEFENDANT: Yes, Your Honor.

THE COURT: That's what reprehensible is right there. Now you know the definition, right?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Based upon that, on Count 5, you'll be sentenced to four years in prison. On Count 8, you'll be sentenced to 12 months in

prison. On Count 9, you'll be sentenced to four years in prison, all to run consecutively, for an aggregate prison sentence of nine years.

You're ordered to pay court costs in this matter. You will be given credit for the 101 days of time served. The Court finds that consecutive sentences are necessary to protect the public and punish the offender. Consecutive sentences are not disproportionate to the seriousness of the conduct and the danger you posed to the public. There are multiple victims and multiple offenses, and based upon that, consecutive sentences are appropriate.

{¶19} Although not a long discussion, we find the trial court's analysis to be sufficient.

{¶20} Upon review, we find the trial court did not err in ordering consecutive sentences.

{¶21} Assignments of Error I and II are denied.

{¶22} The judgment of the Court of Common Pleas of Muskingum County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Baldwin, J. concur.

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