[Cite as *State v. Ault*, 2015-Ohio-556.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio — Court of Appeals No. OT-13-037

Appellee — Trial Court No. 12CR039

v.

Alan L. Ault — **DECISION AND JUDGMENT**

Appellant — Decided: February 13, 2015

* * * * *

Mark M. Mulligan, Ottawa County Prosecuting Attorney, and
Emily M. Gerber, Assistant Prosecuting Attorney, for appellee.

Alan S. Konop, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Alan Ault, appeals his sentence from his convictions in the Ottawa County Court of Common Pleas on one count of rape, a violation of R.C. 2907.02(A)(2), one count of pandering obscenity involving a minor, a violation of R.C. 2907.321(A)(2), one count of illegal use of minor in a nudity oriented material or

performance, a violation of R.C. 2907.323(A)(1), and one count of pandering sexually oriented material involving a minor, a violation of R.C. 2907.322(A)(5). For the reasons that follow, we affirm.

{¶ 2} On August 22, 2013, appellant entered *Alford* pleas to the above charges. Appellant received maximum, consecutive sentences for one first degree felony, two second degree felonies and one fourth degree felony. His aggregate prison sentence was 28½ years. Appellant now appeals setting forth the following assignments of error:

> I. The trial court erred in sentencing appellant to serve maximum consecutive sentences, as the appellant's sentence does not serve the purpose of the sentencing statute pursuant to R.C. 2929.11, is clearly and convincingly contrary to law, and the record clearly and convincingly does not support the trial court's findings.
>
> II. The record clearly and convincingly establishes that the record does not support the trial court's finding for imposing consecutive sentences.
>
> III. The trial court committed plain error by failing to consider the issue of merger for purposes of sentencing pursuant to *State v. Johnson*.

{¶ 3} As an appellate court, we review felony sentences pursuant to R.C. 2953.08(G)(2). *State v. Goings*, 6th Dist. Lucas No. L-13-1103, 2014-Ohio-2322, ¶ 20. We may only increase, modify, or vacate and remand a judgment if we clearly and convincingly find that: (1) "the record does not support the sentencing court's findings

under division * * * (C)(4) of section 2929.14, * * *," or (2) "the sentence is otherwise contrary to law." *Id*., citing R.C. 2953.08(G)(2). "Notably, we do not review the trial court's sentence for an abuse of discretion." R.C. 2953.08(G)(2). *State v. Washington*, 6th Dist. Lucas No. L-13-1201, 2014-Ohio-2565, ¶ 6.

{¶ 4} In his first assignment of error, appellant contends that his sentence is clearly and convincingly contrary to law in that it does not serve the purposes of felony sentencing as set forth in R.C. 2929.11, which states in pertinent part:

> (A) 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. To achieve those purposes, the sentencing court shall 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.
>
> (B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the

seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

{¶ 5} Appellant initially focuses on section (A) above, arguing that the trial court erred in failing to explain how maximum sentences would not impose an unnecessary burden on state or local government resources. In support of his proposition that the trial court "must explain," the unnecessary burden issue, appellant cites to *State v. Wilson*, 2d Dist. Montgomery No. 24978, 2012-Ohio-4756.

{¶ 6} In *Wilson*, appellant entered guilty pleas to three counts of gross sexual imposition involving children. He was sentenced to 48-month sentences for two of the offenses and a sentence of 48 months for the third offense, to run consecutive to the other two 48-month sentences. On appeal, appellant argued that the court erred in failing to consider whether or not his sentence accomplished the purposes of felony sentencing without imposing an unnecessary burden on the government.

{¶ 7} The Second District Court of Appeals held that when the trial court stated, on the record, that it considered the purposes and principles of sentencing, this encompassed the "unnecessary burden on government resources." *Id*. at ¶ 10. Contrary to appellant's assertion, that case does not direct trial courts to specifically expound upon the unnecessary burden issue.

"Although resource burdens are a relevant sentencing criterion under newly enacted language in R.C. 2929.11(A), a sentencing court is not

required to elevate resource conservation above seriousness and recidivism factors. (Citations omitted.) Where the interests of public protection and punishment are well served by a prison sentence, the claim is difficult to make that the prison sentence imposes an unnecessary burden on government resources." *State v. Bowshier*, 2d Dist. Clark No. 08-CA-58, 2009-Ohio-3429, ¶ 14, citing Ohio Felony Sentencing Law, 2007 Ed. Griffin and Katz, at 966. *Wilson, supra*, at ¶ 6.

{¶ 8} In this case, the trial court, in its judgment entry, stated "[T]he court has considered * * * the principles and purposes of sentencing under Ohio Revised Code Section 2929.11." In accordance with the *Wilson* case, we find that the court properly considered the unnecessary burden issue.

{¶ 9} Next, appellant contends that the trial court erred in using an element of three of the offenses to enhance his penalty. The element that appellant refers to is the fact that the victim is a minor. Appellant cites to this particular portion of the trial judge's sentencing speech:

> Part of what I did during the course of this case was meet with the victim in this case…That is not an interview I will ever forget. We did not talk about the specifics of the case, but I did get a feel for what that child was about and how innocent she is.

{¶ 10} We find appellant's contention that the trial judge essentially made up his own penalty enhancement to be a stretch. R.C. 2929.11(B) requires the court to consider

the impact of the crime on the victim. Clearly, the judge's statements quoted above show that he accomplished that.

{¶ 11} Finally, appellant contends that appellant's sentence was contrary to law because the court imposed consecutive sentences without making the required, statutory findings pursuant to R.C. 2929.14(C)(4), which reads in pertinent part:

> 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.

{¶ 12} Appellant acknowledges that in the judgment entry, the trial court, mirroring R.C. 2929.14(C)(4)(b), found that:

> [A]t least two of the multiple offenses were committed as part of one or more course of conduct, and the harm cause by two or more of the multiple offenses were committed as part of one or more courses of conduct, and the harm cause by two or more of the multiple offenses so committed was so great and/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 offenders conduct.

Appellant, however, objects to what he terms "mere regurgitation of the statute," arguing that it does not satisfy the court's duty under R.C. 2929.14. We disagree. The Ohio Supreme Court recently held in *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus, that "[i]n 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*." (Emphasis added.)

{¶ 13} Based on the foregoing, we conclude that appellant's aggregate sentence is not clearly and convincingly contrary to law. Appellant's first assignment of error is found not well-taken.

{¶ 14} In his second assignment of error, appellant contends that consecutive prison terms were not appropriate because the trial court did not consider the proportionality between the consecutive prison terms and the level of danger appellant

posed and whether the harm caused by Ault was so great or unusual that no single prison term could reflect the seriousness of his conduct. R.C. 2929.14(C)(4).

{¶ 15} Two of the counts appellant was convicted of involved child pornography found on appellant's computer. Some of children were as young as two or three years old. The videos showed children engaging in sexual activity or being raped by adults. The other two counts involved the same, young victim. Appellant was accused of her rape and taking nude pictures of her.

{¶ 16} In sentencing appellant, the judge recognized that he received many supportive letters depicting appellant as a decent, kind, hardworking person. He went on to provide his rationale for imposing consecutive sentences:

> I am overwhelmed by the horror of these offenses, just how incredibly repugnant the whole matter is. As I have come to find out more about sex offenses, I find that that is not inconsistent with what offenders are like. They are typically well-respected in their community, kind gentle people who just have a side of them that allows them to do these horrible things. So, I guess those things are irreconcilable. The court finds that consecutive sentences are necessary to protect the public from future crime, to punish the offender, and are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public.

{¶ 17} Upon a review of the sentencing transcript, we are satisfied that the trial court conducted the proper analysis pursuant to R.C. 2929.14. Appellant's second assignment of error is found not well-taken.

{¶ 18} In his third assignment of error, appellant contends that the court committed plain error in failing to merge the offenses of pandering obscenity involving a minor and illegal use of minor in a nudity oriented material, for purposes of sentencing.

{¶ 19} An error not raised in the trial court must be plain error for an appellate court to reverse. *State v. Long*, 53 Ohio St.2d 91, 372 N.E. 2d 804 (1978); Crim.R. 52(B). In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *Long, supra*. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id*. at paragraph three of the syllabus.

{¶ 20} The Supreme Court of Ohio in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, created a three-prong test to guide a court in deciding whether to merge two allied offenses for sentencing purposes. First, in determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct. *Id*. at ¶ 48. If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import. *Id.* at ¶ 48. Secondly, if the multiple

offenses can be committed by 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." (Citations omitted). *Id.* at ¶ 49. Thirdly, 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 a separate animus for each offense, then, under R.C. 2941.25(B), the offenses will not merge. *Id*. at ¶ 51.

{¶ 21} Here, we find no plain error as the merger doctrine does not apply. The record shows that the two offenses, while similar in nature, occurred at different times and, more importantly, involved different victims. Appellant's third assignment of error is found not well-taken.

{¶ 22} The judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____

JUDGE

Thomas J. Osowik, J. _____

JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.

JUDGE