

[Cite as *State v. Cooper*, 2010-Ohio-1983.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93308

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SCOTT COOPER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516924

BEFORE: Gallagher, A.J., Jones, J., and Cooney, J.

RELEASED: May 6, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, Scott Cooper, appeals from the judgment and sentence of the Cuyahoga County Court of Common Pleas. For the reasons stated herein, we affirm.

{¶ 2} On November 13, 2008, Cooper was indicted on four counts of pandering sexually-oriented matter involving a minor (R.C. 2907.322(A)(2) and (A)(1)) and one count of possessing criminal tools, to wit: computer and/or equipment (R.C. 2907.322(A)(1)). Each count contained a forfeiture specification.

{¶ 3} On January 28, 2009, Cooper entered a plea of guilty to all counts of the indictment. The court conducted a sentencing hearing on February 24, 2009.

{¶ 4} At the sentencing hearing, the prosecutor explained that Cooper was indicted as a result of Operation Safety Net. Operation Safety Net “was an investigation by the Ohio Internet Crimes Against Children Task Force, wherein defendants were using file sharing software * * * [to] access through Limewire * * * child pornography[.]” After the files were downloaded, they would be placed “into a file-sharing folder where those files then become available for sharing or distribution to anyone around the world who was looking for free child pornography.”

{¶ 5} The prosecutor stated that Operation Safety Net led to a search warrant being executed at Cooper's home. A preview forensic examination was done on his computer, and two separate movie files of child pornography were found. Cooper waived his *Miranda* rights and provided an oral statement to investigators.

{¶ 6} The prosecutor summarized Cooper's statement to police. Cooper admitted visiting the website "jailbait.com" and using Limewire. He admitted entering search terms and receiving videos of young children, five to ten years old, being physically and sexually abused by adults. He also stated he would "act out" by viewing the child pornography on the Internet and then masturbating. The prosecutor expressed the state's belief that pandering child pornography is not a victimless crime. The prosecutor further reviewed Cooper's criminal history.

{¶ 7} In mitigation, Cooper's ex-wife made a statement on his behalf. She confirmed that she separated from Cooper because she caught him spying on her two teenage daughters through a peephole in the attic around the year 2000. She has since forgiven Cooper and has reconciled with him. She indicated that he has been working hard to get help.

{¶ 8} Defense counsel argued the presentence investigation report supported factors against recidivism. He indicated that Cooper cooperated with investigators, was actively involved in AA, and was obtaining

counseling. Cooper expressed remorse for his behavior and claimed he had not acted out or looked at child pornography since his computer was seized.

{¶ 9} The trial court commented on the seriousness of the offense and considered Cooper's considerable remorse. The court sentenced Cooper to an aggregate sentence of 16 years in prison. Cooper filed a delayed appeal with leave of court.

{¶ 10} Cooper raises eight assignments of error for our review. His first assignment of error provides as follows: "I. Defendant was denied due process of law when he was convicted of offenses which failed to allege any culpable mental state."

{¶ 11} This court has consistently recognized that by entering a plea of guilty to the offenses, a defendant waives any alleged errors in the indictment, including the failure to allege a culpable mental state. *State v. Griffin*, Cuyahoga App. No. 92728, 2010-Ohio-437; *State v. Hawkins*, Cuyahoga App. No. 91930, 2009-Ohio-4368; *State v. Gaston*, Cuyahoga App. No. 92242, 2009-Ohio-3080. Notwithstanding waiver, there was no error in the indictment because the knowledge requirement applies to the first part of the statute and strict liability applies for the acts that are prohibited. *State v. Turner*, Montgomery App. No. 22777, 2008-Ohio-6836. Accordingly, Cooper's first assignment of error is overruled.

{¶ 12} Cooper's second assignment of error provides as follows: "II. Defendant was denied due process of law when the court failed to inform the defendant of the effect of a guilty plea."

{¶ 13} "A defendant who has entered a guilty plea without asserting actual innocence is presumed to understand that he has completely admitted his guilt. In such circumstances, a court's failure to inform the defendant of the effect of his guilty plea as required by Crim.R. 11 is presumed not to be prejudicial." *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 5, syllabus. Here, the record reflects that Cooper understood the rights he would waive by pleading guilty, he never claimed actual innocence, and he indicated his understanding of the maximum sentences that could be imposed. Accordingly, the record sufficiently demonstrates that Cooper understood that by entering a guilty plea, he admitted to committing the charged offenses. Cooper's second assignment of error is overruled.

{¶ 14} Cooper's third assignment of error provides as follows: "III. Defendant was denied due process of law when the court sentenced defendant upon claims of other offenses occurring on other dates."

{¶ 15} Cooper argues that when sentencing him, the trial court improperly considered the uncharged acts pertaining to "peeping" on his ex-wife's daughters. This court has previously held that a defendant's uncharged yet undisputed conduct may be considered in sentencing without

resulting in error when it is not the sole basis for the sentence. *State v. Gray*, Cuyahoga App. No. 91806, 2009-Ohio-4200; *State v. Hawthorne*, Cuyahoga App. No. 89932, 2008-Ohio-2049; *State v. Edwards*, Cuyahoga App. No. 89181, 2007-Ohio-6068.

{¶ 16} A review of the sentencing transcript indicates that the uncharged conduct was not the sole basis for the sentence in this case. The trial court considered the facts in the case, stressed the seriousness of the offense, reviewed the presentence investigation report, and considered recidivism factors along with Cooper's considerable remorse. Accordingly, we conclude that the trial court did not improperly consider evidence of Cooper's uncharged conduct when sentencing him. Cooper's third assignment of error is overruled.

{¶ 17} Cooper's fourth assignment of error provides as follows: "IV. Defendant was denied due process of law when the court sentenced defendant to consecutive sentences amounting to sixteen (16) years."

{¶ 18} We review felony sentences by applying the two-prong approach set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. First, we must ensure that the trial court adhered to all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. *Id.* at 25. Second, if

the first prong is satisfied, we review the trial court's decision under an abuse-of-discretion standard. *Id.* at 26.

{¶ 19} In this case, the trial court imposed an aggregate sentence of 16 years, when Cooper faced a total maximum consecutive sentence of 36 years. The sentence was within the permissible statutory range. Also, the court properly applied postrelease control. Accordingly, Cooper's sentence is not clearly and convincingly contrary to law.

{¶ 20} Next, we consider whether the trial court abused its discretion. Under current Ohio law, a trial court "now has the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently." *State v. Elmore*, 122 Ohio St.3d 472, 480, 2009-Ohio-3478, 912 N.E.2d 582; *State v. Bates*, 118 Ohio St.3d 174, 178, 2008-Ohio-1983, 887 N.E.2d 328. Although trial courts have full discretion to impose a prison sentence within the statutory range and are not required to make findings or give reasons for imposing the maximum or consecutive sentences, the trial court must still consider the purposes of the felony sentencing statute set forth in R.C. 2929.11 and 2929.12, which provide factors to consider relating to the seriousness of the offense and recidivism of the offender. See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470; *State v. Mathis*, 109 Ohio St.3d 54, 62, 2006-Ohio-855, 846 N.E.2d 1.

{¶ 21} Here, the trial court discussed the seriousness of the underlying offense, finding it to be “an absolutely heinous offense.” The court reviewed the presentence investigation report; heard arguments from counsel, including a review of Cooper’s criminal history and mitigating factors; heard from Cooper and his ex-wife, who spoke on his behalf; and considered Cooper’s remorse. Reviewing the record, we find that the trial court considered the statutory factors and did not abuse its discretion. Cooper’s fourth assignment of error is overruled.

{¶ 22} Cooper’s fifth assignment of error provides as follows: “V. Defendant was denied due process of law when he was sentenced to an unreasonable sentence which, in effect, constituted cruel and unusual punishment.”

{¶ 23} Under this assignment of error, Cooper essentially argues that his sentence was disproportionate to sentences imposed for similar crimes committed by similar offenders.

{¶ 24} This court has concluded that in order to support a contention that a sentence is disproportionate to sentences imposed upon other offenders, the defendant must raise this issue before the trial court and present some evidence, however minimal, in order to provide a starting point for analysis and to preserve the issue for appeal. *State v. Lang*, Cuyahoga App. No. 92099, 2010-Ohio-433; *Edwards*, *supra*. Because Cooper did not

raise the issue of proportionality in the trial court, he has not preserved the issue for appeal.

{¶ 25} We further recognize that “[i]t is well-settled that ‘a proper and circumspect application of the sentencing guidelines acts to ensure proportionality and consistency under R.C. 2929.11(B).’ *State v. Marker*, Portage App. No. 2006-P-0014, 2007-Ohio-3379. Therefore, when a trial court considers and applies the necessary statutory provisions, a sentence must be deemed, as a matter of law, consistent and proportionate to those imposed from similar crimes. *Id.*” *State v. Brooks*, Cuyahoga App. Nos. 93347 and 93613, 2010-Ohio-1063. Accordingly, Cooper’s fifth assignment of error is overruled.

{¶ 26} Cooper’s sixth assignment of error provides as follows: “VI. Defendant was denied due process of law when the court imposed a consecutive sentence without findings.”

{¶ 27} Cooper argues that statutory findings for imposing consecutive sentences are required by implication of the United States Supreme Court’s decision in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517. The Ohio Supreme Court acknowledged this decision in *Elmore*,¹²² Ohio St.3d at 480, but declined “to address fully all ramifications of *Oregon v. Ice*, since neither party sought the opportunity to brief this issue before oral argument.” The court followed its *Foster* decision, and reiterated that trial

courts “are no longer required to make findings or give their reasons for maximum, consecutive, or more than the minimum sentences.” *Elmore*, supra at 482, quoting *Foster*, 109 Ohio St.3d 1. Until the Ohio Supreme Court states otherwise, this court continues to follow *Foster*. *State v. Pinkney*, Cuyahoga App. No. 91861, 2010-Ohio-237; *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564. Accordingly, Cooper’s sixth assignment of error is overruled.

{¶ 28} Cooper’s seventh assignment of error provides as follows: “VII. Defendant was denied due process of law and subjected to multiple unconstitutional punishments when the court did not merge various offenses.”

{¶ 29} As an initial matter, we reject the state’s argument that Cooper waived this issue by entering a guilty plea. The Ohio Supreme Court recently held that “A defendant’s plea to multiple counts does not affect the court’s duty to merge those allied counts at sentencing. This duty is mandatory, not discretionary. Therefore, * * * when a sentence is imposed on multiple counts that are allied offenses of similar import in violation of R.C. 2941.25(A), R.C. 2953.08(D) does not bar appellate review of that sentence.” *State v. Underwood*, 124 Ohio St.3d 365, 370-371, 2010-Ohio-1, 922 N.E.2d 923.

{¶ 30} Thus, we proceed to consider Cooper’s argument that the trial court should have merged Counts 3 and 4 for sentencing. Counts 3 and 4 of the indictment both charged Cooper with pandering sexually-oriented matter involving a minor, in violation of R.C. 2907.322(A)(1), with both offenses allegedly occurring on August 26, 2008.

{¶ 31} R.C. 2941.25(A) provides that where the same conduct by a defendant can be construed to constitute two or more allied offenses of similar import, the defendant may be convicted of only one of the offenses. But R.C. 2941.25(B) provides that where the conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the defendant may be convicted of all the offenses.

{¶ 32} R.C. 2907.322(A)(1) provides: “No person, with knowledge of the character of the material or performance involved, shall do any of the following: (1) Create, record, photograph, film, develop, reproduce, or publish any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality.”

{¶ 33} There is no dispute that allied offenses of similar import are involved because Counts 3 and 4 were both for a violation of R.C. 2907.322(A)(1). We turn our analysis to whether the offenses were committed separately or with a separate animus.

{¶ 34} The basis for Counts 3 and 4 was two separate movie files found on Cooper's computer. This court has previously held that "multiple convictions are allowed for each individual image because a separate animus exists every time a separate image or file is downloaded and saved." *State v. Hendricks*, Cuyahoga App. No. 92213, 2009-Ohio-5556.

{¶ 35} Cooper's reliance on *United States v. Hector* (C.A.9, 2009), 577 F.3d 1099, is misplaced as *Hector* did not involve convictions resulting from multiple files. Because Cooper had downloaded and saved two separate files, he could be sentenced for both charges. His seventh assignment of error is overruled.

{¶ 36} Cooper's eighth assignment of error provides as follows: "VIII. Defendant was denied effective assistance of counsel."

{¶ 37} In order to substantiate a claim of ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *State v. Trimble*, 122 Ohio St.3d 297, 310, 2009-Ohio-2961, 911 N.E.2d 242, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland*, 104 S.Ct. at 2065. In Ohio, there is a presumption that a properly licensed attorney is

competent. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905.

{¶ 38} Cooper sets forth several claims under this assignment of error. First, Cooper argues that defense counsel should have sought a merger of counts. As Cooper has failed to establish that a merger was warranted, we find no merit to this argument.

{¶ 39} Second, Cooper argues that defense counsel should have filed a motion to suppress evidence. He states that defense counsel should have challenged the search warrant, the seizure of evidence, and his warrantless arrest. It is well settled that the entry of a guilty plea waives “any complaint as to claims of constitutional violations not related to the entry of the guilty plea.” *State v. Ketterer*, 111 Ohio St.3d 70, 82, 2006-Ohio-5283, 855 N.E.2d 48.

{¶ 40} Third, Cooper argues that defense counsel failed to make a determination as to whether the images were real or virtual. Fourth, Cooper argues that no attempt was made to consider a plea bargain and to plead to something less than all of the charges. Because Cooper entered a guilty plea, he is precluded from claiming ineffective counsel, except to the extent that the defects complained of caused the plea to be less than knowing and voluntary. *State v. Barnett* (1991), 73 Ohio App.3d 244, 249, 596 N.E.2d 1101. Cooper

has not demonstrated that his plea was less than knowingly, voluntarily, and intelligently entered.

{¶ 41} Fifth, Cooper argues that defense counsel requested judicial release when he was ineligible for judicial release. As no prejudice has been shown, Cooper has failed to establish a claim for ineffective assistance of counsel.

{¶ 42} Accordingly, Cooper has not shown ineffective assistance of counsel, requiring reversal of his conviction. We overrule the eighth assignment of error.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

LARRY A. JONES, J., and
COLLEEN CONWAY COONEY, J., CONCUR