[Cite as *State v. Hawks*, 2010-Ohio-4345.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93582

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CODEY HAWKS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-520270

BEFORE: Sweeney, J., McMonagle, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: September 16, 2010

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Codey Hawks ("defendant"), appeals from the 28-year sentence the trial court imposed following his guilty plea to, and convictions for, four counts of rape, one count of gross sexual imposition, and two counts of importuning. For the reasons that follow, we affirm.

{¶ 2} Defendant was charged in a 16-count indictment with multiple sex offenses alleged to have occurred between him and a victim, who was under 13 years of age. The indictment alleges all of the rape and gross sexual imposition offenses occurred during a four-day time period between January 22, 2009 through January 26, 2009, and that the importuning offenses occurred between January 1, 2009 through January 15, 2009.

{¶ 3} According to the record, defendant met the victim while playing video games on the internet via Xbox Live. Defendant had various conversations with the victim through the gaming system, which included sexual discussions. The defendant, who lived in Michigan, traveled to Ohio to stay with the victim's family.[1] The defendant arrived in Cleveland on or about January 19, 2009, but the two had been in contact throughout the previous year.

{¶ 4} On January 26, 2009, defendant made a written statement at the Parma Police Department, wherein he described various acts he had engaged in with the 12-year-old victim beginning around January 23, 2009 through January 26, 2009. Defendant also described how the relationship developed and things he had discussed with the defendant prior to arriving in Cleveland.

{¶ 5} During the proceedings, defendant had also been referred to the Court Psychiatric Clinic for purposes of evaluating his sanity and also competency to stand trial. Defendant was found both sane and competent, but was diagnosed with various disorders.

{¶ 6} Defendant pled guilty as set forth above and the matter was referred for a presentence investigation report. The State submitted a sentencing memorandum with defendant's written confession in support. Therein, the State enumerated conduct by the defendant that would support distinct acts for each

[1]The victim's parents were told, and believed, that defendant left Michigan to get away from his parents' alleged drug abuse and to join the National Guard. On the belief that they were helping defendant's efforts to better himself, they allowed him to stay in their home.

count to which the defendant had pled guilty, which was corroborated by defendant's statement.

{¶ 7} The trial court conducted a full sentencing hearing. Before announcing the sentence, the court stated, "my duty is to protect the public and to punish you, the offender. And when I look at the seriousness of this offense, I do find it a serious — one of the most serious * * * forms of the offense." The court noted the defendant's use of the internet to facilitate the crime between himself (a 19- year old) and a 12-year-old child. The court also found that defendant had used the internet to manipulate the child and his family into feeling sorry for him and as a means to achieve access into their home. The court indicated that the victim had suffered psychological harm as a result of the offenses. The court also took into consideration defendant's cooperation with police and his acknowledgment of guilt.

{¶ 8} The defendant received a 28-year prison sentence as follows: six years on each rape conviction, two years for the gross sexual imposition conviction, and one year on each importuning conviction, every sentence was imposed consecutively.

{¶ 9} Defendant sets forth three assignments of error that will be addressed together and out of order where appropriate for ease of discussion.

{¶ 10} "I. Appellant's consecutive sentences are contrary to law and violative of due process because the trial court failed to make and articulate the findings and reasons necessary to justify it.

{¶ 11} "III. Appellant's sentence is contrary to law and violative of due process because the trial court failed to consider whether the sentence was consistent with the sentences imposed for similar crimes committed by similar offenders and because a [28-year sentence] for a first time offender is inconsistent with such sentences."

{¶ 12} In his first sentencing challenge, defendant maintains that the trial court erred by imposing consecutive sentences without making findings in accordance with R.C. 2929.14(E)(4). Defendant recognizes, however, that Ohio courts have not been required to make these statutory findings, since they were severed from the legislation by virtue of the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Nonetheless, defendant urges us to disregard *Foster* based upon the United States Supreme Court's decision in *Oregon v. Ice* (2009), _____ U.S. , 129 S.Ct. 711, 172 L.Ed.2d 517. There is abundant precedent in this district that we will continue to follow *Foster* when reviewing felony sentencing issues until the Ohio Supreme Court orders otherwise. E.g., *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379, at ¶29. While we recognize that defendant may continue to raise this issue as a means of preserving the issue for further review, the first assignment of error is overruled.

{¶ 13} Defendant maintains that his sentence is contrary to law because he believes the trial court did not consider the guiding principles of Ohio's sentencing law contained in R.C. 2929.11(B). It is his position that his 28-year prison

sentence is not reasonable, proportional, or consistent with those imposed on other similar offenders and, therefore, contrary to the law set forth in R.C. 2929.11.

{¶ 14} The two-fold analysis for reviewing sentences is: first to determine whether the trial court complied with all applicable rules and statutes when imposing the sentence such that the sentence it imposed is not "clearly and convincingly contrary to law"; if so, we proceed to examine if the trial court's sentence constitutes an abuse of its discretion. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶4.

{¶ 15} Because defendant did not challenge the proportionality of his sentence or the consistency of it as compared to other similar offenders in the court below, he has waived this issue. *State v. Lycans*, Cuyahoga App. No. 93480, 2010-Ohio-2780, ¶5-12. But, it is otherwise without merit in any case.

{¶ 16} Defendant's sentence falls within the statutory range for his convictions. Defendant did not suggest any particular sentence to the trial court and there is no evidence in the record from which we could engage in proportionality and consistency analysis. The sentencing journal entry indicates that the trial court considered "all required factors of the law" and found that the sentence was consistent with "the purpose of R.C. 2929.11." Accordingly, the sentence is not contrary to law.

{¶ 17} In regard to the abuse of discretion analysis, defendant submits that his 28-year sentence is "outside the mainstream for first time offenders."

Defendant believes that the trial court did not take into account mitigating factors but acknowledges that the court said it would consider his cooperation and acknowledgment of guilt. The sentence is very harsh; however, the trial court did explain the reasons for the sentence that was imposed, including the harm suffered by the child victim. The victim's parents addressed the court and described the serious and detrimental effect defendant's conduct has had on the entire family. Defendant voluntarily pled guilty to gross sexual imposition, four counts of rape, and two counts of importuning. The trial court repeatedly indicated its belief that this was one of the most serious forms of the offense. While the court did impose consecutive sentences, it did not impose the maximum sentence on any of the rape counts. The record does not demonstrate an abuse of discretion in sentencing.

{¶ 18} Assignments of Error I and III are overruled.

{¶ 19} "II. Appellant's convictions for rape and gross sexual imposition are allied offenses of similar import and the convictions must merge into a single conviction."

{¶ 20} Defendant maintains that his sentence for the gross sexual imposition and rape counts were allied offenses of similar import, which should have merged pursuant to R.C. 2941.25. The Ohio Supreme Court has held that "R.C. 2941.25(A) clearly provides that there may be only *one conviction* for allied offenses of similar import." *State v. Underwood*, 124 Ohio St.3d 365,

2010-Ohio-1, 922 N.E.2d 923, ¶26 (emphasis in original).[2] "[T]he defendant may be sentenced for only one offense * * * allied offense of similar import are to be merged at sentencing. Thus, a trial court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import. 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." Id.[3]

{¶ 21} "A defendant may not be convicted of both gross sexual imposition and rape when the counts arise out of the same conduct. *State v. Foust*, 105 Ohio St.3d 137, 162, 2004-Ohio-7006, 823 N.E.2d 836. However, where the evidence shows the acts of gross sexual imposition were separate and distinct from the acts of rape or committed with a separate animus, the defendant may be convicted of each. See Id.; *State v. Knight*, Cuyahoga App. No. 89532, 2008-Ohio-579." *State v. Scott*, Cuyahoga App. No. 91890, 2010-Ohio-3057, ¶69.

{¶ 22} Defendant's gross sexual imposition conviction is supported by evidence (including defendant's statement to police) that shows it was separate

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[2]Compare with *State v. Whitfield,* 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182*,* paragraph three of the syllabus ("Because R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing").

[3]But, see, *State v. Antenori*, 124 Ohio St.3d 1219, 2010-Ohio-576, 922 N.E.2d 965.

and distinct from the acts of rape; therefore, it would not merge for purposes of sentencing.

{¶ 23} Assignment of Error II is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 Court of Common Pleas 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.

JAMES J. SWEENEY, JUDGE

PATRICIA A. BLACKMON, J., CONCURS;
CHRISTINE T. McMONAGLE, P.J., DISSENTS
WITH SEPARATE DISSENTING OPINION

CHRISTINE T. McMONAGLE, P.J., DISSENTING:

{¶ 24} Respectfully, I dissent.

{¶ 25} Insofar as this was a plea, there is precious little in the record concerning the facts of this case. However, from what is extant in the file, we see that the 12-year-old male victim in this case and the19-year-old defendant met "online." The 19-year-old left his home in Michigan and came

to live with the 12-year-old's family. Unbeknownst to the family, the 19-year-old (now the defendant) was once a sexually abused child and suffered from PTSD. The parents of the victim allowed the two boys to stay in the same bedroom, and not surprisingly, the defendant and the victim eventually engaged in sexual activity. There was some oral sex, an attempt at anal sex, some mutual masturbation, and "french" kissing.

{¶ 26} After approximately a month had gone by, the *defendant* advised the 12-year-old's mother that he and the victim were "dating." The mother immediately took her son to the hospital, and notified the local authorities. The defendant, a high school graduate with no prior record, when contacted by the police, voluntarily provided a lengthy statement containing essentially what has been discussed here. He expressed remorse in his statement, verified that he knew the victim to be only 12 years old, and offered no excuses for his behavior. He concluded his interview with the police saying, "I know it was wrong and I hope to have a second chance. Nobody has ever shown me that they actually cared that much about me like [the victim] did. If I'm given a second chance I hope to join the National Guard to show my mom that I am not worthless and I can be something."

{¶ 27} The details of his statement adequately reflect the plea taken, and as to the issue of allied offenses of similar import, I agree with the majority. Each charge pled to is a separate crime and merger is not mandated. Nonetheless, I find this sentence draconian. Under pre-*Foster*

law (and perhaps again post-*Foster*, dependent upon the Ohio Supreme Court's decision in *State v. Hodge*, Supreme Court Case No. 2009-1997), the defendant under these facts would be presumed a mandatory *concurrent* prison sentence. (And in light of his first offender status, a minimum concurrent sentence.) While some deviation from a minimum concurrent sentence *might* be justified, I detect no additional facts that would justify this enormous consecutive sentence.

{¶ 28} I cannot help but conclude that fear, not logic, compelled this sentence: fear of the internet, fear of homosexuality, and perhaps most compelling, the fear of parents that they will "trust" their child to the wrong person.

{¶ 29} However, the sentence meted out for this young, cooperative, first-time offender (28 years in prison with no opportunity for parole or any form of early release) is in excess of one of four sentences available in a capital murder case. Under the facts of this case, I would hold this sentence to be disproportionate and an abuse of discretion.