[Cite as *State v. Moon*, 2010-Ohio-4483.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93673

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL E. MOON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-522061

BEFORE: Blackmon, J., Kilbane, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: September 23, 2010

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Michael E. Moon appeals his sentence and assigns seven errors for our review.[1]

{¶ 2} Having reviewed the record and pertinent law, we affirm Moon's sentence in part, reverse in part, and remand for the trial court to properly order the terms of postrelease control. The apposite facts follow.

Facts

[1]See appendix.

{¶ 3} The Cuyahoga County Grand Jury indicted Moon for over a 100 counts consisting of illegal use of a minor in nudity-oriented material, pandering sexually-oriented matter involving a minor, and possession of criminal tools. Moon entered a plea to four counts of pandering, 45 counts of illegal use of a minor in nudity-oriented material, and two counts of possession of criminal tools. The offenses arose from Moon's possession of over 500 images of child pornography.

{¶ 4} The search that precipitated his arrest was based upon baggage screeners locating 50 photographs of child pornography concealed in several envelopes in Moon's checked-in luggage. Because the luggage scanner could not penetrate the envelopes, a hand search was conducted, revealing the images. Officers did not attempt to retrieve Moon's computer until several days after his arrest. By then, Moon was out on bail, and his home computer had been concealed or destroyed; it was never recovered. However, in searching the house, the officers recovered seven computer disks containing child pornography.

{¶ 5} Moon and the state both filed sentencing memoranda. After a hearing was conducted, the trial court sentenced Moon to 20 years in prison and classified him as a Tier II sex offender. Moon filed a motion to reconsider his sentence, which the trial court denied without a hearing.

Ineffective Assistance of Counsel

{¶ 6} In his first assigned error, Moon argues his counsel was ineffective for failing to request the search warrant to be unsealed before advising Moon to enter a guilty plea.

{¶ 7} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the deficient performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph one of the syllabus. To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different. Id. at paragraph two of the syllabus. Judicial scrutiny of a lawyer's performance must be highly deferential. *State v. Sallie*, 81 Ohio St.3d 673, 1998-Ohio-343, 693 N.E.2d 267.

{¶ 8} Moon argues that by not requesting to view the unsealed warrant, counsel was deprived of possibly arguing the search warrant was defective. If the search warrant was defective, then the offenses linked to the disks found at Moon's home would have been eliminated.

{¶ 9} Moon's argument is based on pure speculation because we obviously do not know what is contained in the search warrant. Speculation

is insufficient to demonstrate the required prejudice needed to succeed on a claim for ineffective assistance of counsel. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864; *State v. Imani*, 5th Dist. No. 2008 AP 06 0043, 2009-Ohio-5717; *State v. Grahek*, Cuyahoga App. No. 81443, 2003-Ohio-2650. The search warrant could have just as likely been valid. Thus, Moon is unable to overcome the "strong presumption" that defense counsel's performance constituted reasonable assistance because there is no evidence that the unsealing of the warrant would have changed the result of the proceedings. Accordingly, Moon's first assigned error is overruled.

Consideration of the Computer

{¶ 10} In his second assigned error, Moon argues the trial court erred by including in its consideration of his sentence, the fact that his computer was missing. In his sentencing memorandum to the court, Moon argued for mitigation of his sentence based on the fact he was not involved with any file-sharing networks online, and that he did not engage in chat rooms or online services providing child pornography. Thus, the missing computer became relevant because without the computer, there was no way to ascertain that Moon, in fact, did not access any of the online services.

{¶ 11} Additionally, in spite of his denial of using the internet, he admitted in his presentence investigation report that he used the internet to obtain child pornography. Thus, it was proper for the trial court to consider

the fact that the computer was missing because it prevented the court from ascertaining whether his denial of using online chat rooms or sharing the photos online, were true. Accordingly, Moon's second assigned error is overruled.

Sentence Contrary to Law

{¶ 12} We will consider Moon's third, fourth, fifth, and sixth assigned errors together because they concern Moon's argument that his sentence is contrary to law.

{¶ 13} When reviewing felony sentences, an appellate court must first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence, including R.C. 2929.11 (which specifies the purposes of sentencing) and R.C. 2929.12 (which provides guidance in considering factors relating to the seriousness of the offense and the recidivism of the offender), to determine whether the sentence is contrary to law. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 986 N.E.2d 124, ¶4. If the sentence is not contrary to law, we then review the trial court's decision under an abuse-of-discretion standard. Id.

{¶ 14} The trial court's sentencing entry indicates that along with considering the PSI, and the sentencing memoranda filed by the state and Moon, it "considered all required factors of the law" and, further, that it found prison to be consistent with the purpose of R.C. 2929.11. Because the

sentence is within the permissible statutory range and the court stated it had considered the applicable statutes, we find the sentence is not contrary to law. In fact, if the court chose to sentence Moon to the maximum, consecutive sentence, he would have received over 300 years in prison.

{¶ 15} We next consider whether the trial court abused it discretion in imposing the lengthy sentence. Moon contends the court abused its discretion because there was no evidence he shared the photographs with anyone or that he tried to seduce or molest a minor. Thus, he argues, because he did not physically harm anyone, his twenty-year sentence is excessive. Because the computer was destroyed, the trial court had no basis on which to determine whether his claims were true. Without the computer there was no way to determine whether he was involved in obtaining and trading child pornography or approached children online.

{¶ 16} Additionally, our review of the transcript indicates that the court throughly considered Moon's argument in favor of a lenient sentence. The trial court found that Moon's failure to be tested objectively pursuant to the ABEL Assessment factors and the Static 99 test created a situation in which it could not determine Moon's likelihood of recidivism. The court noted that although Moon took a polygraph test, the questions asked did not reflect on the likelihood of his recidivism. He was not questioned as to whether he was attracted to children or what his fantasies were.

{¶ 17} After noting the difficulties of determining Moon's risk of recidivism, the court went on to state that a 2007 case study concluded that the majority of "just pictures" offenders turn out to be undetected child molesters. The court also referred to the findings of a former FBI behavioral analyst who concluded that an "offender's pornography and erotica collection is the single best indicator of what he wants to do." The court did consider the fact that Moon was molested by neighbor boys when he was five, one of whom was also five, but concluded this was different than being molested by an adult with power and authority.

{¶ 18} In light of these factors and the substantial collection of child pornography that Moon possessed, the sentence of 20 years was commensurate with the seriousness of his crime and hence not manifestly disproportionate to the crimes committed.

{¶ 19} Moon also argues the trial court erred by denying his motion for reconsideration of his sentence in which he discussed cases of similar criminal offenders who committed similar crimes but received less prison time. A motion to reconsider a sentence is a nullity because the trial court lacks jurisdiction to reconsider its own valid final judgment. *State v. Shamaly*, Cuyahoga App. No. 88409, 2007-Ohio-3409, citing *Pitts v. Dept. of Transp.* (1981), 67 Ohio St.2d 378, 380, 423 N.E.2d 1105; *State v. Johnson*, 6th Dist. No. L-07-1338, 2008-Ohio-1298; *State v. I'uju*, 10th Dist. No. 06AP452,

2006-Ohio-6436. Thus, the trial court did not err by denying the motion and could not consider the cases cited by Moon in support of his argument his sentence was not proportionate to those of other offenders.

{¶ 20} Even if Moon preserved the issue for appeal, it does not correlate that the cases presented dictate a lesser sentence. Although Moon cited cases where lesser sentences were imposed, our perfunctory review of cases indicates that similar sentences have been imposed. In *State v. Phillips*, Cuyahoga App. No. 92560, 2009-Ohio-5564, a first time offender who committed similar offenses received 24 years in prison. In *State v. Geddes*, Cuyahoga App. No. 91042, 2008-Ohio-6489, the offender received 18 years for six counts of pandering.

{¶ 21} Moreover, the goal of felony sentencing is to achieve consistency rather than uniformity. *State v. Calvillo*, Cuyahoga App. No. 90146, 2009-Ohio-2024, ¶16. Since there is no grid in place to ensure identical sentences for various classifications of offenders, consistency is achieved by weighing the factors enumerated in R.C. 2929.11 and 2929.12. *State v. Rabel*, Cuyahoga App. No. 91280, 2009-Ohio-350, ¶15. We concluded previously that the trial court complied with R.C. 2929.11 and R.C. 2929.12 in imposing the sentence.

{¶ 22} Moon also contends that the trial court erred by ordering consecutive sentences without making the necessary findings to justify

consecutive sentences. He concedes that under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, such findings are not required, but relies on *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517, to argue that *Foster* was incorrectly decided and should be overturned.

{¶ 23} In *Ice*, the United States Supreme Court upheld an Oregon statute permitting judicial fact finding in the imposition of consecutive sentences, calling into question the continuing validity of *Foster*. This court has held that it will apply the holding in *Foster* unless and until directed otherwise by the Ohio Supreme Court. *State v. Woodson,* Cuyahoga App. No. 92315, 2009-Ohio-5558; *State v. Reed*, Cuyahoga App. No. 91767, 2009-Ohio-2264; *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379; and *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564.[2]

{¶ 24} Lastly, Moon contends his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment of the U.S. Constitution. The Ohio Supreme Court in *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, addressed the review of a sentence under the Eighth Amendment. In *Hairston,* the defendant appealed his sentence, arguing that the aggregate sentence constituted cruel and unusual

[2]We anticipate that the Ohio Supreme Court will consider the impact of *Ice* on *Foster* in *State v. Hodge*, Supreme Court Case No. 2009-1997, currently pending before the Ohio Supreme Court.

punishment in violation of the Eighth Amendment of the United States Constitution and Section 9, Article I of the Ohio Constitution. The *Hairston* court stated as follows:

> **"In *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 715 N.E.2d 167, we applied Justice Kennedy's Eighth Amendment analysis in his concurring opinion in *Harmelin v. Michigan* (1991), 501 U.S. 957, 997, 111 S.Ct. 2680, 115 L.Ed.2d 836. We quoted with approval his conclusion that '[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.' *Weitbrecht*, 86 Ohio St.3d at 373, 715 N.E.2d 167, quoting *Harmelin*, 501 U.S. at 1001, 111 S.Ct. 2680, 115 L.Ed.2d 836 (Kennedy, J., concurring in part and in judgment). We further emphasized that 'only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality' may a court compare the punishment under review to punishments imposed in Ohio or in other jurisdictions. Id. at 373, 86 Ohio St.3d 368, 715 N.E.2d 167, fn. 4, quoting *Harmelin*, 501 U.S. at 1005, 111 S.Ct. 2680, 115 L.Ed.2d 836 (Kennedy, J., concurring in part and in judgment).**
>
> **"With respect to the question of gross disproportionality, we reiterated in Weitbrecht that '[c]ases in which cruel and unusual punishments have been found are limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person,' and furthermore that 'the penalty must be so greatly disproportionate to the offense as to shock the sense of**

> **justice of the community.' Id. at 371, 715 N.E.2d 167, quoting *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 70, 30 O.O.2d 38, 203 N.E.2d 334, and citing *State v. Chafin* (1972), 30 Ohio St.2d 13, 59 O.O.2d 51, 282 N.E.2d 46, paragraph three of the syllabus."** *Hairston,* at ¶13-14.

{¶ 25} The court noted that Ohio's felony sentencing scheme had been designed to focus the sentencing courts on one offense at a time; therefore, the Eighth Amendment proportionality test is inapplicable to aggregate sentences. Id. at ¶16, quoting *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶8-9. The Court explained:

> **"[F]or purposes of the Eighth Amendment and Section 9, Article I of the Ohio Constitution, proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively. Where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment."** Id. at ¶20.

{¶ 26} The court went on to review the individual sentences imposed on *Hairston* and found each sentence to be within the pertinent statutory range. Id. at ¶21-23. The court cited its prior holdings that "trial courts have discretion to impose a prison sentence within the statutory range for the offense," and that "'[a]s a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment.'" Id. at ¶21, citing *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at paragraph seven of the syllabus.

{¶ 27} Here, for a second-degree felony, a trial court may sentence an offender to two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2). Thus, the individual sentences of six years for each second-degree felony offense were within the valid statutory range, and, in fact, did not constitute the maximum.

{¶ 28} Moon's sentence of six years on each count would not shock the conscience of the community. Likewise, the fact that Moon was sentenced to the maximum of 12 months for the criminal possession counts does not shock the conscience. Given Moon was found with over 500 images of child pornography, mostly of prepubescent children, the six year sentence on each of the pandering and nudity-oriented material counts, is not cruel or unusual. Accordingly, Moon's third, fourth, fifth, and sixth assigned errors are overruled.

Postrelease Control

{¶ 29} In his seventh assigned error, Moon argues that because the trial court failed to impose a specific term of postrelease control at the sentencing hearing, he is entitled to a new sentencing hearing.

{¶ 30} At the sentencing hearing, the trial court informed Moon he would receive a mandatory five years for postrelease control; the court also ordered a mandatory five years of postrelease control in the sentencing entry. However, only the counts related to the pandering and illegal use of a minor in nudity-oriented material have a five year mandatory postrelease control. As to the two counts of criminal possession, only up to three years of postrelease control applies. R.C. 2967.28.

{¶ 31} Pursuant to R.C. 2967.28(F)(4)(c):

> **"If an offender is subject to more than one period of post-release [sic] control, the period of post-release [sic] control for all of the sentences shall be the period of post-release [sic] control that expires last, as determined by the parole board or court. Periods of post-release [sic] control shall be served concurrently and shall not be imposed consecutively to each other."**

{¶ 32} Thus, even if the trial court had imposed three years for the criminal possession counts, Moon would still serve five years of postrelease control because that is the term that expires last. Nonetheless, this court and others, addressing the identical situation have concluded remand is necessary for the trial court to impose the correct postrelease control because

the duty to do so is mandatory. *State v. Holloway*, Cuyahoga App. No. 91005, 2009-Ohio-35. See also, *State v. Scott*, 6th Dist. No. E-09-048, 2010-Ohio-297. Thus, in spite of the fact that the correction of the postrelease control will not change the length of time Moon serves for postrelease control, we must remand for correction.

{¶ 33} The Ohio Supreme Court in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph two of the syllabus held that for "sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191." Here, Moon was sentenced in July 2009; he, therefore, is subject to the "sentence-correction mechanism of R.C. 2929.191." Id. at ¶27. Notably, in *Singleto*n, the court specifically recognized that R.C. 2929.191 does not afford a defendant a de novo sentencing hearing:

> **"The hearing contemplated by R.C. 2929.191(C) and the correction contemplated by R.C. 2929.191(A) and (B) pertain only to the flawed imposition of postrelease control. R.C. 2929.191 does not address the remainder of an offender's sentence. Thus, the General Assembly appears to have intended to leave undisturbed the sanctions imposed upon the offender that are unaffected**

by the court's failure to properly impose postrelease control at the original sentencing." Id. at ¶24.

{¶ 34} Accordingly, we sustain Moon's seventh assigned error and remand the case for a R.C. 2929.191 hearing as to the criminal possession counts only. The remainder of Moon's sentence is affirmed. See, *State v. Holloway*, Cuyahoga App. No. 93809, 2010-Ohio-3315; *State v. Billi*, Cuyahoga App. No. 93190, 2010-Ohio-2345; *State v. Lombardo*, Cuyahoga App. No. 93390, 2010-Ohio-2099.

Judgment is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share equally the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR

Appendix

"I. Appellant was denied effective assistance of counsel as guaranteed by Section 10, Article I, of the Ohio Constitution and the Sixth and Fourteenth Amendments of the United States Constitution when trial counsel advised appellant to enter pleas of guilty without examining the search warrant or making a motion to unseal the search warrant."

"II. The trial court erred when sentencing appellant by considering the fact that appellant's computer was now missing when there is no evidence that appellant had anything to do with that."

"III. The trial court by ordering appellant to serve a sentence which is contrary to law."

"IV. The trial court erred by ordering appellant to serve a twenty (20) year prison sentence which is contrary to law because the sentence imposed was inconsistent with the sentences imposed on similarly situated offenders and the court erred when it failed to consider similar and proportionate sentences."

"V. Appellant's twenty (20) year prison sentence violated the Eighth Amendment of the United States Constitution that prohibits cruel and unusual punishment."

"VI. 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."

"VII. Appellant is entitled to a de nova sentencing hearing as the court did not properly impose a specific term or period of postrelease control at the sentencing hearing."