

[Cite as *State v. Rivera*, 2015-Ohio-1302.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101616

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CARLA RIVERA

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-583352-A

BEFORE: Laster Mays, J., Keough, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: April 2, 2015

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ANITA LASTER MAYS, J.:

{¶1} After entering a guilty plea to charges of child endangering, felonious assault, and domestic violence, defendant-appellant Carla Rivera appeals from her convictions and the sentences imposed. Rivera presents four assignments of error, claiming that (1) her guilty plea was infirm because the trial court failed to inform her that she could receive consecutive sentences for her convictions; (2) the trial court improperly sentenced her on allied offenses; (3) she was unfairly prevented at the sentencing hearing from responding to a video prepared by a victim representative; and (4) the journal entry of sentence is flawed.

{¶2} A review of the record does not support her first three assignments of error. The fourth, however, has merit. Consequently, although Rivera's convictions and sentences are affirmed, this case is remanded for the trial court to incorporate into the journal entry of sentence, nunc pro tunc, the statutory findings it made for the imposition of consecutive sentences upon Rivera.

{¶3} Rivera was indicted in this case on seven counts. Counts 1 through 5 charged her with child endangering in violation of, respectively, the separate sections of R.C. 2919.22(A) through (B)(4); each contained a furthermore clause that alleged the violation caused serious physical harm. Count 6 charged her with felonious assault in violation of R.C. 2903.11(A)(1), and Count 7 charged her with domestic violence in violation of R.C. 2919.25(A). The offenses were alleged to have occurred from February 25, 2014 to March 4, 2014 against a single victim, who was born on April 15, 2010.

{¶4} Rivera pleaded not guilty at her arraignment. After defense counsel obtained full discovery from the state, the parties notified the court that a plea agreement had been reached. In exchange for Rivera's guilty pleas to Counts 1, 2, 6, and 7, the state would dismiss the remaining counts.

{¶5} The trial court asked the parties whether "any of these counts [were] allied offenses"; the prosecutor responded only the domestic violence charge would merge with the others, while defense counsel left the matter "to the Court's interpretation." During the colloquy, the trial court informed Rivera that the penalties for Counts 2 and 6, both second-degree felonies, ranged in yearly increments from two to eight years, and the penalty for Count 1, a third-degree felony, was "punishable by a possible term of incarceration of 9, 12, 18, 24, 30 or 36 months in prison * * * ." Rivera stated that she understood.

{¶6} The trial court accepted Rivera's guilty pleas, then ordered both a presentence report and a psychological evaluation. Subsequently, the trial court sentenced her to a prison term that totaled 19 years.

{¶7} Rivera appeals from her convictions with four assignments of error, as follows:

I. The trial court erred when it did not merge allied offenses of similar import.

II. The trial court erred when it permitted the state to enter a video and a photograph at defendant-appellant's sentencing hearing, when the trial court did not give defendant-appellant the opportunity to respond.

III. The trial court erred when it accepted the plea of defendant-appellant when it was not a voluntary plea.

IV. The trial court erred in imposing consecutive sentences.

{¶8} This court will address Rivera's assignments of error in logical order. She argues in her third assignment of error that the trial court failed to comply with the dictates of Crim.R. 11(C)(2) because, during the plea colloquy, she was not informed that the court could impose the sentences consecutively. Rivera concedes that the Ohio Supreme Court declared otherwise in *State v. Johnson*, 40 Ohio St.3d 130, 532 N.E.2d 1295 (1988). In *Johnson*, the court held:

* * * [N]either the United States Constitution nor the Ohio Constitution requires that in order for a guilty plea to be voluntary a defendant must be told the maximum total of the sentences he faces, or that the sentence could be imposed consecutively. Therefore, even though the trial court here did not specifically state that such sentences could run consecutively, but did explain the maximum sentences possible, there was no deprivation of [the defendant's] constitutional rights.

{¶9} Because this court must follow the decisions of the Supreme Court, Rivera's third assignment of error is overruled.

{¶10} In her first assignment of error, Rivera claims that her convictions on Counts 2 and 6 constituted allied offenses pursuant to R.C. 2941.25(A).¹ She cites *State v.*

¹R.C. 2941.25 provides:

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the

Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 (*abrogated in part by State v. Ruff Slip Opinion No. 2015-Ohio-995*) as authority for her claim. However, the facts in this case are distinguishable.

{¶11} According to the recitation of the facts the prosecutor provided at Rivera’s sentencing hearing, the victim was Rivera’s own child and had been residing with her. The victim’s condition² came to light on March 4, 2014, when he was taken by ambulance to the emergency room for treatment for trauma he suffered as a result of a beating administered by Rivera that day, i.e., he had a perforated bowel, a lacerated spleen, and a fracture of the tenth lateral rib. During surgery to repair the damage, the victim expired, but the hospital team resuscitated him. This incident formed the basis for the charge of felonious assault against Rivera. *State v. Reed*, 192 Ohio App.3d 657, 2011-Ohio-308, 950 N.E.2d 203, ¶ 26 (8th Dist.).

{¶12} During their examination of the victim, his treating physicians also determined that he had suffered previous bodily trauma, including old “healing fractures” of his ribs and severe frostbite. Additionally, one of the police officers who had responded to Rivera’s home observed that the victim had an “open sore on the bottom of his foot, partially exposed bone matter.” This wound could have been left untreated for a

indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

²The victim on that date was nearly four years old but weighed only 27 pounds, and five of his toes required amputation as a result of his previous exposure to frostbite.

lengthy period of time. Indeed, the trial court commented that Rivera's abuse of her son "was a continuing course of conduct" and, therefore, the court certainly could conclude that Rivera's conviction for child endangering on Count 2 was a separate offense pursuant to R.C. 2941.25(A). *Id.* at ¶ 27. Rivera's first assignment of error is therefore overruled.

{¶13} Rivera argues in her second assignment of error that the trial court violated R.C. 2930.14(B) at her sentencing hearing. She contends that the trial court viewed a video that had been prepared by the victim's family that presented "new information" to which Rivera should have been allowed to respond.

{¶14} R.C. 2929.19(A) applies to felony sentencing hearings and states that:

* * * [T]he offender, the prosecuting attorney, the victim or the victim's representative in accordance with section 2930.14 of the Revised Code, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case. * * *

{¶15} The trial court's decision to permit the provision of the information will not be reversed absent an abuse of discretion. *State v. Rose*, 3d Dist. Hancock No. 05-06-32, 2007-Ohio-2863, ¶ 10. When the victim of a defendant's crime is a minor child, R.C. 2930.14(A) requires a court to allow the victim's representative to make a "statement" before the court imposes a sentence on the defendant. The court must then consider that statement, along with other requisite factors, in imposing sentence. R.C. 2930.14(B). If the statement contains new material facts, the court cannot rely on those new material facts until it takes the appropriate action, such as continuing the sentencing hearing, to afford the defendant an opportunity to respond. *Id.*

{¶16} However, where it is clear from the record that the defendant is aware of the information, and did not seek a continuance to rebut that information, then such information will not be found to constitute “new material facts” that trigger the continuance requirement. *Rose* at ¶ 14, citing *State v. Marple*, 12th Dist. Clermont No. CA2004-09-073, 2005-Ohio-6272, ¶ 38. *See also State v. Brown*, 146 Ohio App.3d 654, 660, 2001-Ohio-4266, 767 N.E.2d 1192, ¶ 21 (1st Dist.). The record of this case demonstrates that the video, if considered to be a “statement” for purposes of R.C. 2930.14(A), showed only the extent of the victim’s injuries, which was information already disclosed to Rivera during discovery. *Id.* at ¶ 23-24; *Marple* at ¶ 39. According to the prosecutor, “the family put together [the] video to show the [victim’s] injuries, from when he first arrived at the hospital, and, to where he is now.” Although Rivera objected to the video, she did not request that the trial court grant her a continuance of the sentencing hearing. *Id.* ¶ 40.

{¶17} Under these circumstances, the trial court neither abused its discretion nor erred in permitting the state to present the video without giving Rivera an opportunity to respond to it. *Rose* at ¶ 13. Rivera’s second assignment of error is overruled.

{¶18} In her fourth assignment of error, Rivera asserts that the trial court erred in failing to place the findings necessary to impose consecutive sentences into the journal entry. This assignment of error is sustained.

{¶19} A review of the transcript of the sentencing hearing demonstrates that the trial court set forth the findings required by R.C. 2929.14(C)(4), and the record supports

those findings. However, the court did not incorporate those findings into the journal entry of sentence. Because this error is clerical, Rivera's convictions and sentences are affirmed, but this case is remanded to trial court to incorporate the findings for consecutive sentences in the sentencing entry, nunc pro tunc. *State v. Taylor*, 8th Dist. Cuyahoga No. 101368, 2015-Ohio-420, ¶ 25, citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3117, 16 N.E.3d 659, ¶ 29.

{¶20} Affirmed and remanded.

It is ordered that appellee recover from appellant the 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. Case remanded to the trial court for correction of the journal entry, nunc pro tunc.

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

ANITA LASTER MAYS, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR