

[Cite as *State v. Orr*, 2015-Ohio-1738.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101582

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID ORR

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-577174-A

BEFORE: Boyle, J., E.T. Gallagher, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: May 7, 2015

ATTORNEY FOR APPELLANT

Kevin M. Cafferkey
1370 Ontario Avenue
2000 Standard Building
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Ronni Ducoff
Mary McGrath
Assistant County Prosecutors
Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶1} Defendant-appellant, David Orr, appeals his eight-year sentence for three counts of sexual battery and one count of gross sexual imposition, raising a single assignment of error:

The record does not support the R.C. 2929.14(C) findings by the sentencing court.

{¶2} Finding no merit to the appeal, we affirm but remand to the trial court to issue a nunc pro tunc entry to incorporate the findings made at the sentencing hearing into the journal entry.

Procedural History and Facts

{¶3} Orr, who was 40 years old at the time and a home healthcare aide, committed several sexual offenses against a former patient — a 62-year-old woman. According to the victim, nearly on a daily basis, between June 2, 2012 and October 20, 2012, Orr performed oral sex and had sexual intercourse with the victim without her consent while working as the victim's home healthcare aide. The victim, who suffers a host of medical problems, is confined to a wheelchair and dependent on oxygen for support. Orr was arrested for the offenses after the victim presented a washcloth that contained Orr's sperm together with the victim's DNA.

{¶4} In April 2014, pursuant to a plea agreement, Orr pleaded guilty to an amended indictment containing four counts of sexual battery (amended Counts 1, 2, 3, and 8) in violation of R.C. 2907.03(A)(2); two counts of gross sexual imposition (Counts 5 and 6) in violation of R.C. 2907.05(A)(1); and one count of abduction in violation of R.C. 2905.02(A)(1) (amended Count 7). The original counts for rape and kidnapping were dismissed.

{¶5} Following Orr's guilty plea, the trial court ordered a presentence investigation report ("PSI"), and the parties each submitted a sentencing memorandum to the court.

{¶6} In May 2014, the trial court held the sentencing hearing. Orr's counsel addressed

the court, highlighting Orr's positive work history, strong family support, and his lack of a prior record, and requested that the court take mercy on his client. Orr's sister spoke on her brother's behalf, expressing the family's love and support of Orr, who "has always been a compassionate person." Orr addressed the court, apologizing to the victim and the victim's family and acknowledging that what he did "was wrong towards the victim in this situation."

{¶7} The state, however, urged the trial court to impose maximum, consecutive sentences. The prosecutor emphasized that Orr initially denied any sexual contact with the victim when first confronted and then maintained that the relationship was consensual. The prosecutor indicated that Orr told the victim that no one would believe her if she considered reporting the acts. The prosecutor stated that, based on the victim's medical issues, "she is totally dependent on her healthcare aide to help her do everything." The prosecutor further emphasized that Orr "sees his encounters as consensual," reporting during the PSI the following: "I was there to help the victim and try to make her feel better because she was always sad and crying and I wanted her to feel better, to cheer her up. I don't feel as though I was aggressive. I was just doing my work." Relying on these statements, the prosecutor argued that Orr's total disregard for the victim, the victim's health conditions, and the abuse of his position as a home healthcare aid warranted maximum, consecutive sentences.

{¶8} After making the required findings under R.C. 2929.14(C)(4), the trial court ultimately sentenced Orr to a prison term of eight years. Specifically, following the merger of certain counts, the trial court imposed the following prison terms on the remaining counts that the state elected to proceed upon: four years on Count 2, four years on Count 3, one year on Count 5, and four years on Count 8. The trial court further ordered that the four-year sentences in Counts 2, 3, and 5 be served concurrently to each other but consecutive to Count 8, for a total of eight

years in prison. The trial court further informed Orr that five years of postrelease control was part of his sentence. The trial court additionally informed Orr of his status as a sexual offender and his accompanying duty to register.

{¶9} From this order, Orr appeals, challenging the imposition of consecutive sentences.

Standard of Review

{¶10} R.C. 2953.08(G)(2) provides that our review of felony sentences is not an abuse of discretion. An appellate court must “review the record, including the findings underlying the sentence or modification given by the sentencing court.” *Id.* If an appellate court clearly and convincingly finds either that (1) “the record does not support the sentencing court’s findings under [R.C. 2929.14(C)(4)]” or (2) “the sentence is otherwise contrary to law,” then “the appellate court may increase, reduce, or otherwise modify a sentence * * * or may vacate the sentence and remand the matter to the sentencing court for resentencing.” *Id.*

Consecutive Sentences

{¶11} In his sole assignment of error, Orr argues that although the court made all the required findings under R.C. 2929.14(C)(4) before imposing consecutive sentences, the record does not support two of the trial court’s findings. Specifically, Orr maintains that there is no evidence in the record to support the trial court’s finding that “a consecutive sentence was not disproportionate to the danger defendant poses to the public” and that “the harm caused to the victim was so great or unusual that no single prison term adequately reflects the seriousness of the offender’s conduct.” We disagree.

A. “Not Disproportionate to the Danger Defendant Poses to the Public”

{¶12} Orr argues that his lack of a prior criminal record and his existing support network preclude any finding that consecutive sentences are not disproportionate to the danger that he

poses to the public. Specifically, he contends that there is nothing in the record indicating that he abused his position or committed any crimes before this case; therefore, he does not pose a threat to the public. These arguments, however, lack merit.

{¶13} Orr had his support network in place at the time that he committed the offenses and yet this support network did not prevent him from committing these offenses. As for this being Orr's first felony convictions, this alone does not mandate the imposition of concurrent sentences. Notably, the trial court expressly considered on the record the mitigating factors in Orr's favor but ultimately concluded that consecutive sentences were necessary. Specifically, the trial court stated, among other things, the following:

Indicators you're more likely to reoffend under 2929.12(D), there really aren't any except what I consider unbelievable lack of insight. You told the Probation Officer, they quoted, "I was there to help [the victim] and try to make her feel better because she was always sad and crying and I wanted her to feel better, to cheer her up." As somehow having sex with you was the answer to her life problem. You say, "I didn't feel as though I was aggressive." That's another quote. Another quote, "I was just doing my work." Those statements are so incredible and wrongheaded, I don't even know where to start.

I think all of us who have had parents, aunts, uncles, children in situations where they were given care either in a hospital or nursing home or their own home and to think that any one of those people was abusing them in any way, whether it was stealing from them, whether it was being physically abusive, or whether it was in this case sexually assaulting them, it's unthinkable in our society that that should happen. And your statements don't reflect any empathy or any understanding of how wrong this is.

I'm sure you can't envision anyone in your family being sexually assaulted by a stranger who is supposed to help them, but that's what happened to this lady. And apparently she needs a lot of care and she's on her own, and you said no one would believe her about this event. But it is true. It did happen. And it didn't just happen once. It happened a period of July and August of 2012 and it happened again between another period September 1st and October 23rd. These were ongoing incidents. She deserves much, much better.

You were not a gift to her in that sense. I mean, she didn't — whether you thought she was enjoying this or whatever your thoughts were, that's completely wrong. She is a patient. She deserves to be treated with dignity,

respect and good care, and providing a sexual assault is none of those. This is intolerable. No patient should be abused in any way by a caregiver ever. You stole her dignity. And your comments are kind of arrogant. You may not have intended them that way, but that's how they sound. You sound like somehow you were gifting yourself to her. This is awful. And you have a family that's very accomplished in the community and other activities. They wouldn't tolerate this and I'm sure they're wondering how this happened. But it's not the victim's fault.

{¶14} Orr's conduct in this case coupled with his own justification for such conduct support the trial court's finding that consecutive sentences are not disproportionate to the danger that Orr poses to the public.

B. "Harm Caused to the Victim"

{¶15} Orr further argues that the record does not support the court's finding under R.C. 2929.14(C)(4)(b), namely, that "the harm caused by two or more of the multiple offenses committed was so great or unusual that no single prison term adequately reflects the seriousness of the offender's conduct." He argues that the victim's own statement in the victim impact statement reveals that the harm was not "so great or unusual" to justify consecutive sentences. Specifically, he points to the victim's desire that she did "not wish for anyone to go to prison" and that the harm constituted an abuse of trust, which alone is not "so great or unusual."

{¶16} According to the record, however, the victim refused to speak with the probation officer as part of the PSI because she is afraid of people that she does not know. There is also other evidence in the record that the victim is now afraid to answer her door. The trial court properly recognized and explained the physical and emotional harm endured by the victim, stating the following:

More significantly, she had health issues that prevented her from walking for any distance. She had to be transported through special care and special caregivers, and she was essentially unable to move much on her own, and she was on oxygen. There couldn't have been a person with many more restrictions than

she had that was still living independently. And you took advantage of her. Also the relationship; you were her caregiver among others and you sexually assaulted her, caused her serious physical harm in the sense that any man or woman or child who is sexually assaulted there is physical harm. Also a psychological harm. She doesn't want to talk to anyone, answer the phone, go to the door. She doesn't have that sense of trust anymore.

{¶17} Based on the totality of the record at the time of sentencing, we cannot say that the record does not clearly and convincingly support the trial court's findings under R.C. 2929.14(C)(4).

{¶18} Orr's sole assignment of error is overruled.

{¶19} While we affirm the trial court's sentence, we remand the case for the limited purpose of having the trial court incorporate, nunc pro tunc, its consecutive findings into the sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus and ¶ 30 (trial court is not only required to make the statutory findings mandated under R.C. 2929.14(C) to support consecutive sentences but also incorporate its findings into its sentencing entry; trial court's omission is a clerical mistake and may be corrected through a nunc pro tunc entry).

{¶20} Judgment affirmed and case 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. 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.

MARY J. BOYLE, JUDGE

EILEEN T. GALLAGHER, P.J., and
MELODY J. STEWART, J., CONCUR