[Cite as *State v. Robertson*, 2015-Ohio-595.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101318

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN ROBERTSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-577638-A

BEFORE: S. Gallagher, P.J., Blackmon, J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: February 19, 2015

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SEAN C. GALLAGHER, P.J.:

{¶1} Defendant John Robertson appeals from his conviction following a guilty plea to three counts of sexual battery and two counts of importuning. For the following reasons we affirm, although the case is remanded for the limited purpose of entering a nunc pro tunc entry to memorialize the consecutive sentence findings made during the hearing but omitted from the final entry.

{¶2} The then 63-year-old Robertson engaged in sexual intercourse with his girlfriend's 14-year-old daughter. He also sent sexually explicit texts to her. The state charged Robertson with three counts each of rape, sexual battery, and importuning. Robertson pleaded guilty to three counts of sexual battery in violation of R.C. 2907.03(A)(5), one count of importuning in violation of R.C. 2907.07(B), and one count of importuning in violation of R.C. 2907.07(D)(1). The trial court sentenced Robertson to five years of imprisonment for each sexual battery count, one year on the R.C. 2907.07(B) importuning count, and 18 months on the R.C. 2907.07(D)(1) importuning count. Two of the sexual battery counts were merged. The two remaining sexual battery counts were then ordered to be served consecutively to each other, but concurrently with the importuning charges. The aggregate sentence was ten years.

{¶3} Robertson appealed, advancing three assignments of error. In his first assignment of error, Robertson claims the trial court erred by imposing maximum consecutive sentences because he is 64 years old and the ten-year sentence is too long for a person of his age. We find no merit to his argument.

{¶4} Robertson has not challenged the imposition of consecutive sentences other than to claim, in his third assignment of error, that the trial court failed to memorialize the findings in the sentencing entry pursuant to the Ohio Supreme Court's decision in *State v. Bonnell*, 140 Ohio

St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659. The trial court made the required findings on the record, although the trial court must correct this error through a nunc pro tunc entry. *Id.* That omission is trivial and correctable through a limited remand. We have no other reason to reverse the imposition of consecutive sentences. R.C. 2953.08(G)(2). In *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, the Ohio Supreme Court held that a sentence is the sanction or combination of sanctions imposed "for each separate, individual offense." *Id.*, paragraph one of the syllabus. Robertson's ten-year term of imprisonment is predicated upon imposing his individual five-year sentences to be served consecutively, an issue to which Robertson failed to assign any error.[1]

{¶5} The only argument Robertson advanced against his sentences was that R.C. 2929.11(A)[2] requires the court to impose the minimum sanction that adequately punishes the offender without imposing an unnecessary burden on the state. Robertson argues that ten years is too much given his age, an issue that arises out of the unchallenged imposition of consecutive sentencing, but does not offer any alternative analysis upon which to review the sentence.

{¶6} In support of his claim challenging the propriety of the ten-year term of imprisonment, Robertson cites *State v. Bonness*, 8th Dist. Cuyahoga No. 96557, 2012-Ohio-474, in which this court determined that the defendant's forty-year sentence was inconsistent with similarly situated offenders. Robertson is not claiming that his sentences are inconsistent with other similarly situated offenders, and our decision in *Bonness* is simply inapplicable to the

[1]Robertson, in 1998, was convicted of two counts of gross sexual imposition involving two victims, an 8-year-old and a 15-year-old, upon which he served two years in prison and was required to register as a sex offender. He also had various other drug-related and other minor charges between 1991 and 2004.

[2]"A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing." R.C. 2929.11(A).

arguments advanced in this case. *See* App.R. 16(A)(7). Although we need not do so, after reviewing the record, we conclude the trial court considered the principles and purposes of felony sentencing and detailed Robertson's record and mitigating factors. We accordingly overrule Robertson's first assignment of error.

{¶7} Finally, in his second assignment of error, Robertson claims that his entire plea was not entered knowingly, intelligently, and voluntarily because, although correctly explaining the severity and the maximum sentence for all the charges twice during the colloquy, the trial court inadvertently stated that the importuning count, in violation of R.C. 2907.07(D)(1), was a felony of the fifth degree and subject to a maximum sentence of one year when actually taking Robertson's plea. The state charged that count as a felony of the fourth degree with a maximum sentence of 18 months in prison.

{¶8} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily." *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, 660 N.E.2d 450. The standard of review for determining whether a plea was knowing, intelligent, and voluntary within the meaning of Crim.R. 11 for nonconstitutional issues is substantial compliance. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990), citing *State v. Stewart*, 51 Ohio St.2d 86, 92-93, 364 N.E.2d 1163 (1977). "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *Id*. Furthermore, a defendant must show a prejudicial effect. *Stewart* at 93.

{¶9} In this case, although the trial court erred while taking the plea, there is no dispute that the charges and potential penalties were adequately explained to Robertson throughout the proceeding on two other occasions. Robertson conceded that the trial court accurately stated the

nature of the R.C. 2907.07(D)(1) importuning count two out of the three times the issue was discussed. He has not even argued, let alone demonstrated, that he suffered prejudice from the trial court's inadvertent misstatement. App.R. 16(A)(7). We overrule his second and final assignment of error.

{¶10} Robertson's conviction is affirmed, although we remand for the limited purpose of entering a nunc pro tunc order correcting the sentencing entry to memorialize the consecutive sentencing findings.

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.

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

SEAN C. GALLAGHER, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
EILEEN T. GALLAGHER, J., CONCUR