

[Cite as *State v. Kinder*, 2015-Ohio-608.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101515

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JIMMY LEE KINDER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED; REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-561491

BEFORE: Kilbane, J., E.A. Gallagher, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: February 19, 2015

APPELLANT

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Jimmy Lee Kinder (“Kinder”), appeals from his sentence for sexual battery that was imposed following a hearing on remand from this court in *State v. Kinder*, 8th Dist. Cuyahoga No. 99613, 2013-Ohio-5250 (“*Kinder I*”). For the reasons set forth below, we affirm the sentence but remand the matter for the limited purpose of having the trial court address the issue of defendant’s sexual offender classification and to incorporate its consecutive-sentence findings in the sentencing journal entry.

{¶2} On June 12, 2012, Kinder was indicted on five counts of rape and five counts of kidnapping in connection with alleged assaults upon a relative who has developmental disabilities. Each of the charges contained a sexually violent predator (“SVP”) specification, and the kidnapping counts also contained a sexual motivation specification. On November 8, 2012, Kinder entered into a plea agreement. Upon recommendation of the prosecutor, the trial court amended three counts of rape, Counts 1, 3, and 5, to sexual battery and deleted the specifications in those counts. The remaining counts were nolle. In exchange for the state’s amendment of the first three rape counts to charges of sexual battery, the deletion of the SVP specifications in those counts, and the remaining counts being nolle, Kinder pled guilty to the three charges of sexual battery. On December 19, 2012, the trial court sentenced Kinder to consecutive two-year terms for each offense, for a total of six years of imprisonment. On November 27, 2013, following a delayed appeal, this court concluded that the trial court did not make all of the findings required pursuant to R.C. 2929.14(C)(4) in order to impose consecutive terms, and the court reversed and remanded for further proceedings. *See Kinder I*.

{¶3} The resentencing hearing was held on May 5, 2014. The victim’s presence was waived. Kinder’s counsel requested concurrent sentences, and the trial court heard from

Kinder's son, brother, and sister, who doubted that the attacks occurred. The trial court noted that Kinder admitted to police that he had oral sex with the victim. (Tr. 28, 45.) At that point, Kinder apologized for the attacks, expressed remorse, and explained that prescription drug use may have contributed to his actions.

{¶4} The court then stated:

Findings were made here by the judge. And also I'll find by this court that there is a relationship between the defendant and the victim that facilitated the offense. This court does find that pursuant to 2929.12(B), that renders the conduct more serious. The expression of the remorse today is something I'll also note as a factor that is to the defendant's benefit. There was a complete sentencing hearing * * *; [the judge] made findings but 2929.14(C)(4) was not referenced. It is contained within the pre-sentence report that if at some point in time there was supervision — you're going back to prison, sir, so please don't get your hopes unduly raised here — but if they had recommended supervision it would be with Group F.

What I'm going to do, having considered the factors set forth in 2929.12, 2929.13 and 2929.41, as it pertains to the presumption for concurrent terms, I do find that a prison term is appropriate. And I will make findings for consecutive terms in a moment but here's what the sentence is going to be: In Count 1 for sexual battery the sentence is 2 years. That will be — the Court does find that consecutive terms are necessary to protect the public from future crime and to punish Mr. Kinder. And the consecutive terms are not disproportionate to the seriousness of Mr. Kinder's conduct and the danger that he poses to the public.

Specifically, or including familial relations and pursuant to Subsection (C) 2929.14(C)(4), I do find that the offender's history of criminal conduct, inasmuch as these offenses span a period of months from 2010 to 2011, also purportedly for decades but at least as established through the guilty pleas for months, that that criminal conduct history demonstrates that consecutive terms are necessary to protect the public from future crime by the offender. Count 1 is 2 years consecutive to Count 3, which is 2 years, for an aggregate of 4 years.

In Count 5, the Court is imposing community-controlled sanctions with the transfer to the Wood County Community-Based Correctional Facility upon conclusion of the 4 years. If there is any violation of that supervision — and by the way, Group F supervision, sex offender supervision was recommended. Wood County has that supervision in a Community-Based Correctional Facility, but if there is a violation then that two-year term, which this court finds would appropriately run consecutive to the other 4 years, would be imposed. So in other

words it's a four-year term today followed by a Community-Based Correctional Facility component with sex offender programming. And if you violate that, you'll go to prison for 2 years. * * *

{¶5} In the journal entry issued on the same date, the trial court held:

The Court considered all required factors of the law. The Court finds that prison is consistent with the purpose of R.C. 2929.11. The court imposes a prison sentence at the Lorain Correctional Institution of 4 year(s). Count one — 2 years, count three — 2 years, counts one [and] three to run consecutive. The Court finds that consecutive prison terms are required pursuant to R.C. 2929.14 (C)(4)(B).

{¶6} Kinder, pro se, now appeals. In his brief and supplemental brief, he has set forth a total of three errors for our review.

Assignment of Error I

The sentence was disproportionate to defendant's conduct and the appellant did not pose any danger to society to warrant consecutive sentences.

Assignment of Error II

The trial court erred in finding the appellant [to be a] Tier III sex offender.

Assignment of Error III

The trial court prejudicially erred by imposing a double jeopardy violation when the trial court sanctioned appellant for community control after completing the entire four-year felony prison term and held consecutively in lieu of count five.

Sentencing Issues

{¶7} Pursuant to R.C. 2953.08(G)(2), in reviewing felony sentences, the reviewing court must determine whether it “clearly and convincingly” finds that (1) “the record does not

support the sentencing court's findings under [R.C. 2929.14(C)(4)]," or that (2) "the sentence is otherwise contrary to law." The reviewing court may then "increase, reduce, or otherwise modify a sentence * * * or may vacate the sentence and remand the matter to the sentencing court for re-sentencing." R.C. 2953.08(G)(2). See *State v. Hammond*, 8th Dist. Cuyahoga No. 100656, 2014-Ohio-4673; *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 11.

{¶8} Pursuant to R.C. 2929.14, a trial court may impose consecutive sentences if the court finds that (1) a consecutive sentence is necessary to protect the public from future crime or to punish the offender and (2) that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. In addition to these two factors, the court must find any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

Id.

{¶9} The record establishes that the trial court made all the required findings. The court found that consecutive terms were necessary to protect the public from future crime and to punish Kinder. The court found that consecutive terms were not disproportionate to the seriousness of Kinder's conduct and the danger he poses to the public. (Tr. 48-49.) The court

found, citing R.C. 2929.14(C)(4), that Kinder's history of criminal conduct extended from 2010 to 2011, and possibly longer, which demonstrates that consecutive terms are necessary to protect the public from future crime by the offender. (Tr. 49.) The court also found that there is a relationship between the defendant and victim that facilitated this offense, thereby rendering Kinder's conduct more serious. Therefore, we conclude that the trial court made all of the findings required for the imposition of consecutive sentences.

Proportionality

{¶10} In *Hammond*, 8th Dist. Cuyahoga No. 100656, 2014-Ohio-4673, at ¶ 15, this court explained proportionality as follows:

Hammond also argues that his sentence is contrary to law because the trial court failed to “engage in a consistency or proportionality discussion” or examine sentences that have been imposed on other juvenile offenders. This court, however, has repeatedly recognized that “consistency is achieved by weighing the factors enumerated in R.C. 2929.11 and 2929.12 and applying them to the facts of each particular case.” *State v. Wells*, 8th Dist. Cuyahoga No. 100365, 2014-Ohio-3032, ¶ 12, quoting *State v. Lababidi*, 8th Dist. Cuyahoga No. 100242, 2014-Ohio-2267, ¶ 16. And as discussed above, the trial court thoroughly and properly applied R.C. 2929.11 and 2929.12 in this case, thereby negating any claim that the sentence is inconsistent with similar offenders.

Moreover, Hammond did not object or argue that his sentence was disproportionate or inconsistent with other similar juvenile offenders. Failure to do so precludes further review on the issue by this court. *Wells* at ¶ 15, citing *State v. Spock*, 8th Dist. Cuyahoga No. 99950, 2014-Ohio-606, ¶ 37.

{¶11} Similarly, in this matter, the record demonstrates that the trial court thoroughly and properly applied R.C. 2929.11 and 2929.12, and therefore, it complied with its statutory sentencing duties. In addition, the trial court specifically concluded that “consecutive terms are not disproportionate to the seriousness of Mr. Kinder's conduct and to the danger that he poses to the public.” (Tr. 49.) This, coupled with Kinder's failure to object or argue that his sentence

was disproportionate or inconsistent with other similarly situated offenders precludes further review of this issue.

{¶12} We note, however, that in *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E. 3d 659, syllabus, the Ohio Supreme Court held that, in addition to making the statutory findings to impose consecutive sentences on the record, the trial court must also incorporate those findings into its sentencing entry. The *Bonnell* court stated that the trial court's failure to do so is a clerical mistake and does not render the sentence contrary to law, so the omission "may be corrected * * * through a nunc pro tunc entry to reflect what actually occurred in open court." *Id.* at ¶ 30, citing *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 15.

{¶13} Because the journal entry prepared in this matter does not set forth the court's findings in support of the consecutive sentences, the matter must be remanded for a nunc pro tunc correction of this issue in order for the journal entry to reflect the court's findings made at the sentencing hearing.

Tier III Sex Offender

{¶14} The defendant also complains that he was adjudicated to be a Tier III sexual offender. The record demonstrates that at the sentencing hearing held on December 19, 2012, the trial court concluded:

Defendant found to be a Tier III violator by nature of his plea, in open court and on the record he was advised of his duties and signed the explanation of duties as a sex offender R.C. 2950.032.

{¶15} Following the reversal of that sentence, there was no mention of the sexual offender classification at the resentencing hearing. The convictions for sexual battery, in violation of R.C. 2907.03 (A)(2), felonies of the third degree, require a Tier III classification. R.C. 2950.01(G). The matter must, therefore, be remanded for a hearing for the limited purpose

of notifying Kinder that his sexual battery convictions cause him to be classified as a Tier III offender. *See State v. Gonzales*, 8th Dist. Cuyahoga No. 96058, 2011-Ohio-4415, ¶ 25. After the reclassification hearing, the trial court shall also correct any applicable journal entries to reflect this classification. *State v. Clemmons*, 8th Dist. Cuyahoga No. 96938, 2012-Ohio-1536, ¶ 18.

Double Jeopardy

{¶16} Defendant next asserts that the court's sentence for sexual battery in Count 5 subjects him to double jeopardy.

{¶17} R.C. 2929.19(B)(4) and 2929.15(B) govern the term of a prison sentence imposed after an offender violates community control sanctions.

{¶18} R.C. 2929.19(B)(4) states in pertinent part:

(4) If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to section 2929.14 of the Revised Code.

{¶19} R.C. 2929.15(B) states:

(B)(1) If the conditions of a community control sanction are violated or if the offender violates a law or leaves the state without the permission of the court or the offender's probation officer, the sentencing court may impose upon the violator one or more of the following penalties:

(a) A longer time under the same sanction if the total time under the sanctions does not exceed the five-year limit specified in division (A) of this section;

(b) A more restrictive sanction under section 2929.16, 2929.17, or 2929.18 of the Revised Code;

(c) A prison term on the offender pursuant to section 2929.14 of the Revised Code.

(2) The prison term, if any, imposed upon a violator pursuant to this division shall be within the range of prison terms available for the offense for which the sanction that was violated was imposed and shall not exceed the prison term specified in the notice provided to the offender at the sentencing hearing pursuant to division (B)(2) of section 2929.19 of the Revised Code. The court may reduce the longer period of time that the offender is required to spend under the longer sanction, the more restrictive sanction, or a prison term imposed pursuant to this division by the time the offender successfully spent under the sanction that was initially imposed.

{¶20} In this matter, rather than sentencing Kinder to a third two-year prison term for his conviction for sexual battery in Count 5, the court provided sex-offender treatment, but ordered that in the event that Kinder violates the requirements of the sex offender program, a two-year term would be imposed for this offense. There is no double jeopardy violation. *State v. McMullen*, 6 Ohio St.3d 244, 452 N.E.2d 1292 (1983).

{¶21} In accordance with the foregoing, this assignment of error lacks merit.

{¶22} We affirm Kinder's sentence but remand the matter for the limited purpose of having the trial court address the issue of defendant's sexual offender classification and for the court to incorporate its consecutive-sentence findings in the sentencing journal entry.

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.

MARY EILEEN KILBANE, JUDGE

EILEEN A. GALLAGHER, P.J., and
PATRICIA A. BLACKMON, J., CONCUR