

[Cite as *State v. Santos*, 2016-Ohio-5845.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103964

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILBERTO SANTOS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-14-590377-B and CR-14-590856-B

BEFORE: Stewart, J., Jones, A.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: September 15, 2016

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant Wilberto Santos¹ challenges his 20-year sentence for various felony offenses by arguing that the trial court wrongfully imposed maximum and consecutive sentences under R.C. 2929.14(C)(4). We affirm the decision of the trial court.

{¶2} On October 29, 2014, Santos was indicted in two separate cases. In Cuyahoga C.P. No. CR-14-590377-B (“rape case”), he was charged with two counts of rape, two counts of aggravated burglary, two counts of aggravated robbery, four counts of kidnapping, and two counts of gross sexual imposition — all counts carried one- and three-year firearm specifications, in addition to sexual motivation specifications on the kidnapping counts and a sexually violent predator specification on Count 1, rape. In Cuyahoga C.P. No. CR-14-590856-B (“drug case”), Santos was charged with drug possession and possessing criminal tools. He eventually entered guilty pleas in both cases and made a proffer against his codefendants to assist the state in the rape case.

¹ Santos is also referred to as Santos-Gonzalez in the transcript.

{¶3} The charges in the rape case arose from an incident where Santos and two others, Tabitha Harris and Kavonte Darnell Gregory, committed criminal acts against a male and female victim while invited guests in the male victim's home. According to the prosecutor's synopsis of the case from Santos's proffer, the night of the incident began with Santos, Harris, and Gregory driving to Bedford Heights to buy marijuana. Along the way, Harris telephoned her girlfriend-lover, the female victim, who was at that time staying at the male victim's apartment along with her three-year-old child. Harris asked her girlfriend if the group could come over and hang out, and the girlfriend replied that they could. On the way to the apartment, Santos and company smoked a "blunt K2," which is a type of synthetic marijuana also known as "spice." Before they reached the apartment, the group devised a plan to rob the victims when they got to the apartment.

{¶4} When the group arrived, the child was sleeping in a sleeping bag on the floor and the male victim was in his bedroom. The female victim and the three visitors drank alcohol and smoked marijuana until about 2:00 or 3:00 a.m. when she asked her guests to leave because it was getting late. At this point, Santos pulled out a gun and asked “where is the safe?” Gregory also approached the victim with balled fists and told her that he was going to punch her in the face if she did not tell them the location of the safe. When the victim explained that there was no safe in the apartment, Santos and company proceeded to ransack the apartment in search of valuables. At some point, the male victim was accosted and both victims were made to undress. The male victim was made to lie on his bed while Harris sat on top of him and the female victim was placed in the bathroom while the search of the apartment continued.

{¶5} Santos and Gregory, at gunpoint, then made the victims engage in sexual acts with each other. The male victim, who is gay, was unable to become erect and was forced to pretend to engage in intercourse. Afterwards, Santos and Gregory forced the female victim to perform oral sex on them. Before leaving the apartment, Santos and his fellow offenders took the victims’ identification cards and threatened to kill them and their family members if either should tell anyone what happened that night.

{¶6} The victims delayed going to the police but eventually reported the incident.

The indictment followed and the police obtained and executed a search warrant on Santos's home in relation to the charges in the rape case. While searching Santos's home, police found the female victim's identification card and the male victim's social security card. Additionally, the police found firearms, "spice" and marijuana, and criminal tools (digital scales, packing materials, and cell phones). The results of the search led to the indictment in the drug case.

{¶7} Santos pleaded guilty to the indictment in the drug case, and then entered guilty pleas to an amended indictment of one count of rape, one count of aggravated burglary, and one count of aggravated robbery with a three-year gun specification in the rape case. After accepting the plea, the court merged the aggravated robbery and aggravated burglary counts under R.C. 2941.25 and the state elected to proceed to sentencing on the aggravated robbery charge. The court sentenced Santos to a three-year prison term on the firearm specification to run prior to, and consecutive to, the maximum 11-year prison term on the rape charge and a six-year prison term on the aggravated robbery charge. The court then ordered the rape and aggravated robbery sentences to run consecutive to each other for an aggregate 20-year prison sentence.

{¶8} In his sole assignment of error, Santos contends that the trial court erred by ordering consecutive sentences without submitting adequate reasons in support of the R.C. 2929.14(C)(4) findings. Specifically, he argues that the court made “insufficient or inappropriate” findings on the record that do not support maximum, consecutive sentences.

{¶9} We begin by noting that it is not clear from the assigned error whether Santos is challenging both the maximum sentence on his rape conviction in addition to the order of consecutive sentences, or the order of consecutive sentences alone. Therefore, out of an abundance of caution, we will address both issues on appeal.

{¶10} R.C. 2953.08(G)(2) gives appellate courts limited authority to review felony sentences. Under this statute, an appellate court can increase, reduce, or otherwise modify a sentence, or can vacate a sentence and remand to the trial court for resentencing, if 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.” *See also State v. Marcum*, Slip Opinion No. 2016-Ohio-1002. Appellate courts have no authority to review sentencing terms for an abuse of discretion. *Id.* at ¶ 10.

{¶11} Pursuant to R.C. 2953.08(A)(1), Santos is entitled to appeal as of right the maximum sentence imposed on his rape conviction. He also has the right to appeal, pursuant to R.C. 2953.08(A)(4), the imposition of consecutive sentences.

{¶12} Although Santos has a right to appeal the imposition of a maximum term of imprisonment on his rape conviction, he makes no argument that would invoke this court's authority to reduce, modify, or vacate the sentence under R.C. 2953.08(G). A trial court's imposition of any prison term, including a maximum prison term, on a single felony count is not contrary to law as long as the court sentences the offender within the statutory range for the offense, and in so doing, considers the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors set forth R.C. 2929.12. *State v. Keith*, 8th Dist. Cuyahoga Nos. 103413 and 103414, 2016-Ohio-5234, ¶ 10, 16. Although a trial court must consider the factors in R.C. 2929.11 and 2929.12, there is no requirement that the court state its reasons for imposing a maximum sentence, or for imposing a particular sentence within the statutory range. *See id.* at ¶ 16. In fact, trial court judges do not have to affirmatively state on the record at sentencing that they considered the R.C. 2929.11 and 2929.12 sentencing factors; rather, consideration of the factors is presumed unless the defendant affirmatively shows otherwise. *Id.* at ¶ 11, citing *State v. Stevens*, 1st Dist. Hamilton No. C-130278, 2013-Ohio-5218, ¶ 12. And a trial court's statement in its sentencing journal entry that it considered the required statutory factors alone is enough to fulfill its obligations under R.C. 2929.11 and 2929.12. *State v. Clayton*, 8th Dist. Cuyahoga No. 99700, 2014-Ohio-112, ¶ 9.

{¶13} In this case, the court sentenced Santos within the statutory sentencing range for a first-degree felony offense (3-11 years), *see* R.C. 2929.14(A)(1), and in so doing, stated in the sentencing entry that it considered all the required factors at law. The court's statement in its journal entry is enough to find that the court considered R.C. 2929.11 and 2929.12 factors. *See Keith* at ¶ 11. Therefore, the trial court's imposition of the 11-year prison term for Santos's rape conviction is not, on its face, contrary to law.

{¶14} To the extent that this court is authorized to review the court's decision for whether the record shows that the maximum sentence is clearly and convincingly contrary to law on the basis that the court considered an incorrect fact when deciding to impose the maximum sentence, *see Marcum*, Slip Opinion No. 2016-Ohio-1002, ¶ 23, and *State v. Ongert*, 8th District Cuyahoga No. 103208, 2016-Ohio-1543, ¶ 13 (interpreting *Marcum's* holding), we also can find no error. On this issue, Santos points to certain statements the court made prior to imposing the 11-year prison term on the rape charge. The court stated:

The eleven years [on the rape charge] is necessary, and I believe warranted, given the circumstances that [the victims] had to experience and endure. Both the humiliation component to that, and knowing their sexual preference, the conduct forced upon them becomes even more egregious to the Court's finding, having to listen to that circumstance, and to imagine the humiliation that each has felt, given that circumstance. So I think the maximum for the eleven years on the rape is warranted, followed by the conduct of the oral sex component to that.

According to Santos, the above statements establish that the trial court used an “incorrect and inappropriate” fact in its decision to impose a maximum prison term because Santos did not know the sexual preference of the two victims prior to the rape, and yet the court assumed that he did.

{¶15} Although it is clear from the above statement that the trial judge believed or assumed, at least for a portion of the sentencing, that Santos was aware of the victims’ sexual orientation prior to the commission of the offense, this assumption was quickly corrected by defense counsel. Defense counsel explained to the judge immediately after the judge issued the sentence, but while the court still had time to reconsider its order, that Santos was unaware of the victims’ sexual preference when committing the crimes and, therefore, it should not serve as a basis for the sentence imposed. The court thereafter acknowledged the incorrect statement but nevertheless explained that the victims’ sexual preference was not a significant consideration upon which Santos’s sentence was based. Rather, as the court explained, the most significant factor was the humiliation that the victims suffered when Santos forced them to engage in sex with each other, and then forcing the female victim to perform oral sex on him and Gregory. Santos acknowledges the court’s clarification on this point, but still argues that because the victims’ sexual orientation was the “only” reason the court gave for his sentence, it had to have impacted the court’s sentencing decision.

{¶16} We find no merit to this argument. First, the court explained that the victims’ sexual preference was not a significant factor in its sentencing decision. Further, Santos is incorrect that the victims’ sexual preference was the court’s only apparent consideration. The court made clear in its original statements and again in its explanation of those statements, that it was Santos’s course of action coupled with the victims’ humiliating experience that made the offense deserving of the lengthy prison term.

{¶17} In his brief, Santos further disagrees with the court’s characterization of the rape as a particularly humiliating experience for the victim, by arguing that “[r]ape is rape” and as such it “is a humiliating and horrible experience for any victim,”— thus implying that the humiliation that a victim experiences should not be a consideration in the court’s sentencing decision. However, the trial court found that Santos’s actions of terrorizing his victims at gunpoint, forcing them to engage in sexual acts with each other, and then forcing the female victim to perform oral sex on him in front of others in the room was a particularly horrible and humiliating experience. This court would be hard pressed to disagree. Whether Santos knew of the victims’ sexual orientation is irrelevant, the court’s characterization of the events as humiliating is not misplaced. Accordingly, we find no error in the trial court’s imposition of the maximum sentence on the rape charge and find that the court did not consider any inappropriate or erroneous facts when imposing the sentence.

{¶18} We now address the court's order of consecutive sentences. Before a trial court may impose consecutive sentences, the court must first make specific findings mandated by R.C. 2929.14(C)(4) and incorporate those findings in the sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. Pursuant to the statute, the court must find that consecutive sentences are: 1) necessary to protect the public from future crime or to punish the offender; and 2) are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. R.C. 2929.14(C)(4). In addition to making those findings, the court must also find one 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 postrelease 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.

{¶19} Although trial courts are required to make the necessary statutory findings when imposing consecutive sentences, the court has no duty to give reasons in support of its findings. *Bonnell* at ¶ 24. Nevertheless, an appellate court may vacate an order of consecutive sentences if it clearly and convincingly finds that the record does support consecutive service under R.C. 2929.14(C)(4). *See* R.C. 2953.08(G)(2)(a).

{¶20} Santos does not argue that the court failed to make the required findings for imposing consecutive sentences. Rather, he argues that the court failed to make an adequate record that would support consecutive sentences. Santos also believes that the court's statement regarding the victims' sexual preference was a consideration when deciding whether to impose consecutive sentences.

{¶21} There is no indication from the transcript of the sentencing that the court considered the sexual preference of the victims when making the decision to impose consecutive sentences. As explained above, the statement regarding the victims' sexual preference and the humiliation they endured, came immediately before the court imposed the 11-year sentence on the rape charge and was made in reference to the length of the sentence on that charge. The trial court gave no reasons, beyond the R.C. 2929.14(C)(4) findings, for ordering consecutive sentences, and was under no obligation to do so. *See Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659 at ¶ 24.

{¶22} Furthermore, contrary to Santos’s contention, the trial court had no duty to “provide an adequate record” that would support the order. The record in any case involving a review for consecutive sentences consists of everything from the indictment and prior criminal history of the defendant, to the prosecution’s and defense counsel’s recitation of facts at sentencing, to the trial court transcript and sentencing memorandums, as well as any presentence investigation reports. The trial court is charged with determining whether consecutive sentences are appropriate based on its review of all of the record’s components. Consecutive sentences may be appropriate if the trial court finds that the record supports the findings under R.C. 2929.14(C)(4). On the other hand, our review as an appellate court of the imposition of consecutive sentences is limited to two components: 1) reviewing whether the court made the R.C. 2929.14(C)(4) findings for imposing consecutive sentences and incorporated the findings in the journal entry, and; 2) in the event that the court made the findings, reviewing the record to see whether the record clearly and convincingly does not support the sentencing court’s findings. *See* R.C. 2958.03(G)(2); *Bonnell* at ¶ 29.

{¶23} Here the court made the findings and incorporated them into the sentencing entry. Santos has failed to argue how the record in this case clearly and convincingly does not support the trial court's findings. And our independent review leads to no better results. The record shows that in addition to having a criminal history, Santos was on probation at the time of the offense. Further, the presentence investigation report indicated that Santos had a high chance of reoffending. This, together with the events that took place on the night the crimes were perpetrated does not lead us to conclude that the record clearly and convincingly does not support consecutive sentences. Accordingly, we overrule the assigned error.

{¶24} Judgment affirmed.

It is ordered that appellee recover of 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.

MELODY J. STEWART, JUDGE

LARRY A. JONES, SR., A.J., and
EILEEN A. GALLAGHER, J., CONCUR