

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104112

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TONY L. STEPHENS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-560547-A

BEFORE: Laster Mays, J., E.A. Gallagher, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: October 27, 2016

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant, Tony L. Stephens (“Stephens”), again appeals the trial court’s imposition of consecutive sentences imposed after a negotiated plea to endangering children and two counts of gross sexual imposition. We affirm the trial court’s sentence.

{¶2} Stephens has filed two prior appeals and we cite from the second appeal in setting forth the background facts:

In 2012, the Cuyahoga County Grand Jury returned a seven count indictment charging Stephens with kidnapping in violation of R.C. 2905.01(A)(4); endangering children in violation of R.C. 2919.22(B)(5); illegal use of a minor in nudity-oriented material or performance in violation of R.C. 2907.323(A)(1); two counts of gross sexual imposition (“GSI”) in violation of R.C. 2907.05(A)(4); illegal use of a minor in nudity-oriented material or performance in violation of R.C. 2907.323(A)(3); and possessing criminal tools in violation of R.C. 2923.24(A). The charges arose from accusations that Stephens engaged in sexual conduct with an eight-year-old.

As a result of plea negotiations, Stephens pled guilty to endangering children and two counts of GSI in exchange for dismissal of the remaining charges. As part of the plea agreement, Stephens agreed that the offenses would not merge under R.C. 2941.25, the allied offenses statute.

State v. Stephens, 8th Dist. Cuyahoga No. 102429, 2015-Ohio-3590, ¶ 2-4 (“*Stephens II*”).

{¶3} In *State v. Stephens*, 8th Dist. Cuyahoga No. 99051, 2014-Ohio-2759 (“*Stephens I*”), this court reversed and remanded the case due to the trial court’s failure to make the statutory findings required by R.C. 2929.14(C)(4) for the imposition of

consecutive sentences. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659. The state conceded that the requisite findings were not made.

{¶4} Stephens was resentenced on December 3, 2014. Stephens appealed the trial court's failure to make the requisite findings for consecutive sentencing in *Stephens II*. This court again reversed and remanded to the trial court "for resentencing and for the limited purpose of considering whether consecutive sentences are appropriate and, if so, to make the statutory findings and incorporate them in the sentencing journal." *Stephens II* at ¶ 13.

{¶5} In the instant appeal, Stephens again asserts that the trial court has failed to comply with R.C. 2929.14(C)(4) and H.B. 86 requiring that the court consider for the record, the propriety of consecutive sentences as well as to make the statutory findings and incorporate same into the sentencing journal. Stephens reiterates his request that this court vacate the consecutive sentences and impose the sentences concurrently.

{¶6} R.C. 2929.14(C)(4) provides:

If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that *consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public*, and if the court also finds *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 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.*

(Emphasis added.)

{¶7} Our remand in *Stephens II* was specific, and the trial court complied with our mandate, as the emphasized language supports:

THE COURT: All right. I am going to impose the same sentence that has been rendered initially and continue through up until today, even though they've had some issues with regard to those.

So for the record, Count 2, endangering children, a felony of the second degree, six years; gross sexual imposition, Count 4, two years; gross sexual imposition, Count 5, two years. *And I do find that consecutive sentences are appropriate in this case.*

It's necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender possesses to the public. We do have two separate sorts of conduct with regard to the gross sexual imposition, Counts 4 and 5.

The child involved in this case is eight years old at the time. The court does recall the statements made by the victim's representatives, the grandmother and mother, *concerning the psychological issues to the child, so I think those factors have been satisfied.*

In addition, we do find that the *defendant's criminal history demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender and that one or more of these multiple offenses occurred as part of a course of conduct as noted by the two gross sexual*

imposition counts. And that in the court's view, a single term is not appropriate in light of the course of conduct and it doesn't adequately deal with and reflect the seriousness of the defendant's conduct.

So for all of those reasons the court believes that Section 2929.14(C)(4) has been satisfied.

(Emphasis added.) (Tr. 21-23.)

{¶8} Finally, appellant urges us to adopt the analyses of the concurring judge in *State v. Brooks*, 8th Dist. Cuyahoga No. 100455, 2014-Ohio-3906, and *State v. Davis*, 8th Dist. Cuyahoga No. 101338, 2015-Ohio-178. It was suggested in those cases that, in light of the trial court's failure to comply with R.C. 2929.14(C)(4), *Bonnell* required that the appellate court exercise its authority pursuant to R.C. 2953.08(G) to vacate the noncompliant consecutive sentences and order that they be served concurrently. The issue was clarified in *Stephens II*:

Also in support of his position, Stephens makes reference to the interpretation of paragraph 23 of *Bonnell* that the authoring judge in this case has taken on the issue. See *State v. Brooks*, 8th Dist. Cuyahoga No. 100455, 2014-Ohio-3906 (Stewart, J., concurring in part and dissenting in part), and *State v. Davis*, 8th Dist. Cuyahoga No. 101338, 2015-Ohio-178 (Stewart, J., concurring in part and dissenting in part). However, more recently in a concurring opinion in *State v. Jackson*, 8th Dist. Cuyahoga No. 101957, 2015-Ohio-3029, ¶ 15, this author noted that "R.C. 2953.08(G) gives appellate courts the ability to vacate a sentence and order that a defendant serve a concurrent term when the trial court has failed to make the statutorily required findings. But what appears, at least to me anyway, to be mandatory language in paragraph 23 of *Bonnell* is mandatory as to the trial court: not the appellate court. To read the paragraph otherwise would take away the options that the legislature clearly intended appellate courts to have when reviewing sentences under R.C. 2953.08(G). When the trial court fails to adhere to the mandate, it imposes a sentence that is contrary to law. And when confronted with this infirmity, R.C. 2953.08(G) gives the appellate court several options, including remanding for resentencing." *Id.*

Stephens, 8th Dist. Cuyahoga No. 102429, 2015-Ohio-3590, ¶ 11, fn. 1.

{¶9} Stephens's single assigned error is found to be without merit. Stephens's sentence is affirmed.

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.

ANITA LASTER MAYS, JUDGE

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