[Cite as *State v. Johnson*, 2018-Ohio-102.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105904

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARCELLUS JOHNSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-610780-A

BEFORE: Stewart, J., Kilbane, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: January 11, 2018

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant Marcellus Johnson pleaded guilty to first-degree felony counts of aggravated burglary, rape, and kidnapping. The court classified Johnson as a sexual predator under the former Megan's Law (the rape occurred in 1997). The court imposed ten-year sentences on each count, with the agreement of the parties that the offenses were not allied and did not merge. The court ordered that the sentences for aggravated burglary and rape be served concurrently, but consecutive to the kidnapping count, for a total of 20 years in prison. On appeal, Johnson argues that the court erred by classifying him a sexual predator and that the court erred as a matter of law by refusing to merge the rape and kidnapping counts despite defense counsel's agreement that they did not merge.

I. Sexual Predator Classification

{¶2} Johnson first argues that the court erred by classifying him as a sexual predator because there was no evidence that he was likely to commit a sexually oriented offense in the future.

{¶3} Johnson committed his offenses in June 1997. For offenses committed at that time, sexually oriented offenders are subject to the classification and registration requirements under Megan's Law, as codified in former R.C. 2950.01 et seq. That law creates three classifications for sexual offenders: sexually oriented offender, habitual sex offender, and sexual predator. *See* former R.C. 2950.09. A "sexual predator" is "a person who has been convicted of or pleaded guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses." Former R.C. 2950.01(E). A sexual predator determination is made by the trial judge who, after reviewing all of the testimony and considering various factors, "shall determine by clear and convincing evidence whether the offender is a sexual predator." *State v. Blake-Taylor*, 8th Dist. Cuyahoga No. 100419, 2014-Ohio-3495, ¶ 4, citing former R.C. 2950.09(B)(4). We review a sexual predator classification under the civil manifest weight of the evidence standard: if the judgment is supported by some competent, credible evidence going to all the essential elements of the case, it will not be reversed. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, syllabus.

{¶4} We have long held that Megan's Law is not a "one strike and you're out" law such that a single conviction for a sexually oriented offense is ipso facto proof that an offender is a sexual predator. *State v. Ward*, 130 Ohio App.3d 551, 561, 720 N.E.2d 603 (8th Dist.1999). Nevertheless, the particular facts of a single offense could, if egregious enough, by themselves be compelling proof that an offender is likely to commit another sexually oriented offense in the future. *State v. Eppinger*, 91 Ohio St.3d 158, 167, 2001-Ohio-247, 743 N.E.2d 881; *State v. Bibbs*, 8th Dist. Cuyahoga No. 83955, 2004-Ohio-5604, ¶ 53.

{¶5} The presentence investigation report viewed by the trial judge outlined the circumstances of the offense: Johnson broke into the victim's home while she was asleep and raped her, compelling her to submit by threatening to kill her four-year-old child who was in the bed with her.

{¶6} The court also examined Johnson's institutional prison record. One notation in Johnson's institutional report summary stated that Johnson has an "ongoing" masturbation problem. In a six-year period, there were at least 39 instances where prison personnel saw Johnson masturbating in his cell and other areas of the prison. Several notes indicate that Johnson appeared to be intentionally masturbating in a display for the prison guards. One note stated that Johnson was attending a religious service in the chapel and "pulled out his penis and was masturbating at one of the female religious volunteers." Another note stated that as Johnson was being processed for discipline relating to masturbation, he made a lewd remark to the correctional officer and pulled his pants down to expose himself to her. On one occasion, Johnson threatened his cell mate with a pen and then pulled out his penis and attempted to grab his cellmate and "jack off" on him. Johnson's prison record also showed that he gave a prison guard a "kite" stating that she aroused him and that "sometimes he acts out on it in the form of masturbation."

{¶7} Johnson also completed a Static-99 assessment, an actuarial assessment that predicts a sexual offenders likelihood of reoffending. He was given a score of "4," which placed him in the "above average" risk category. The examiner scoring the results gave Johnson a predicted sexual recidivism rate of 11.0, meaning that for offenders with the same score, 110 out of 1000 will reoffend within five years.

{¶8} Johnson maintains that despite a lengthy criminal history (56 arrests), his only conviction for a sexual offense is the rape count in the present case and that he has not been convicted of any criminal sexual offenses since committing the rape. This 20-year period, he maintains, is proof of his low likelihood of reoffending.

{¶9} In cases like this where there is a 20-year delay between the commission of a sexually oriented offense and conviction, the delay period can be persuasive on the issue of whether the offender is likely to commit a sexually oriented offense in the future. However, the trial court found that this is not such a case. Johnson completely ignores his institutional record of deviant sexual behavior, and the trial court noted as much. When interviewed for the presentence investigation report, Johnson self-reported that he did not have any prison sex charges. The manner in which Johnson conducted himself while incarcerated, seemingly as a direct, sexualized challenge to prison staff, showed a depravity that the court could consider as indicating a likelihood that Johnson would commit a sexually oriented offense in the future. *State v. Skaggs*, 8th Dist. Cuyahoga No. 83830, 2004-Ohio-4471; *State v. Cooper*, 1st Dist. Hamilton No. C-060677, 2007-Ohio-4464, ¶ 10. The court also found the circumstances of the rape offense were particularly egregious: Johnson used violence to commit the offense and committed the rape in the presence of the victim's child and threatened to kill the child. All of this was competent, credible evidence supporting the court's determination that Johnson is likely to engage in the future in one or more sexually oriented offenses.

II. Allied Offenses

{¶10} When detailing the terms of the plea bargain, the state told the court that "[a]s part of the plea agreement, defense counsel agrees that these are non-allied offenses and can be sentenced consecutively to one another or concurrently at the Court's discretion." Johnson argues that the offenses were allied offenses and as a matter of law should have merged for sentencing regardless of any agreement by the parties.

{¶11} "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." R.C. 2941.25(A). However, the state and a defendant may, as part of a plea agreement involving multiple offenses, stipulate that the offenses were committed with separate animus, thus subjecting the defendant to more than one conviction and sentence. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 29. Johnson stipulated that the offenses were committed with a separate animus, so he waived the right to appeal the allied offenses issue. *State v. Black*, 2016-Ohio-383, 58 N.E.3d 561, ¶ 16 (8th Dist.); *State v. Woods*, 1st Dist. Hamilton No. C-160851, 2017 Ohio App. LEXIS 4432, 4 (Oct. 4, 2017). Importantly, Johnson agreed that he would serve a prison term of between 10 and 20 years. With the maximum sentence on a first-degree felony being 11 years, his agreement to the terms of the plea bargain showed his understanding that at least one of the sentences could be ordered to be served consecutively if the court were to sentence him to as many as 20 years. *State v. Ramsey*, 5th Dist. Licking No. 16-CA-91, 2017-Ohio-4398, ¶ 15.

{¶12} 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.

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MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
TIM McCORMACK, J., CONCUR