

[Cite as *State v. Colon*, 2018-Ohio-280.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105571

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAVIER COLON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-610545-A

BEFORE: E.T. Gallagher, P.J., Celebrezze, J., and Jones, J.

RELEASED AND JOURNALIZED: January 25, 2018

ATTORNEY FOR APPELLANT

Allison S. Breneman
1220 West 6th St., Suite 303
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor

By: Mary Weston
Assistant County Prosecutor
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN T. GALLAGHER, P.J.:

{¶1} Javier Colon (“Colon”) appeals his 36-year prison sentence in this cold case involving rape, kidnapping, and attempted murder and assigns the following errors for our review:

I. The trial court abused its discretion by imposing a prison sentence contrary to R.C. 2929.14 and the purposes and principles of the felony sentencing guidelines.

II. The trial court erred by imposing consecutive sentences.

{¶2} Upon review of the record, we find no merit to the appeal and affirm Colon’s sentence.

I. Facts and Procedural History

{¶3} On January 25, 2017, Colon pled guilty to one count of rape in violation of R.C. 2907.02(A)(2), a first-degree felony; one count of attempted murder in violation of R.C. 2923.02 and 2903.02(A), a first-degree felony, with a three-year firearm specification; and one count of kidnapping in violation of R.C. 2905.01(A)(2), a first-degree felony. On March 7, 2017, the court sentenced Colon to 11 years in prison for the rape, 11 years in prison for the attempted murder, three years in prison for the gun specification, and 11 years in prison for the kidnapping. The court ran these sentences consecutively for an aggregate prison term of 36 years. Colon now appeals from this sentence.

II. Law and Analysis

A. Maximum Sentences

{¶4} In his first assignment of error, Colon argues that the court “failed to appropriately access [sic] the seriousness and recidivism factors necessary for the purposes and principles of the felony sentencing guidelines.”

{¶5} R.C. 2953.08(A)(1) permits Colon to appeal his maximum consecutive sentence. R.C. 2953.08(G) provides that a court hearing an appeal under R.C. 2953.08(A) “may increase, reduce, or otherwise modify a sentence” or may vacate the sentence and remand the matter to the sentencing court for resentencing if it clearly and convincingly finds either of the following:

(a) The record does not support the sentencing court’s findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant; [or]

(b) That the sentence is otherwise contrary to law.

{¶6} A sentence is contrary to law if (1) the sentence falls outside the statutory range for the particular degree of offense, or (2) the trial court failed to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12. *State v. Carabello*, 8th Dist. Cuyahoga No. 100354, 2014-Ohio-2641, ¶ 6-7.

{¶7} Courts have “full discretion” to impose a sentence within the applicable statutory range. *State v. Collier*, 8th Dist. Cuyahoga No. 95572, 2011-Ohio-2791, ¶ 15,

citing *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus. Therefore, a sentence imposed within the statutory range is “presumptively valid” if the court considered the applicable sentencing factors. *Id.*

{¶8} A trial court is no longer required to make findings or provide reasons for imposing the maximum sentence. *State v. Bement*, 8th Dist. Cuyahoga No. 99914, 2013-Ohio-5437, ¶ 14. Although the trial court must consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors listed in R.C. 2929.12, the sentencing court is not required to “state on the record that it considered the statutory criteria or discussed them.” *State v. Pickens*, 8th Dist. Cuyahoga No. 89658, 2008-Ohio-1407, ¶ 5, quoting *State v. Polick*, 101 Ohio App.3d 428, 655 N.E.2d 820 (4th Dist.1995). A trial court’s statement that it considered the required statutory factors, without more, is sufficient to fulfill its obligations under the sentencing statutes. *State v. Wright*, 8th Dist. Cuyahoga No. 95096, 2011-Ohio-733, ¶ 4.

B. Consecutive Sentences

{¶9} “[T]o impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry * * *.” *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. Pursuant to R.C. 2929.14(C)(4), the court must find consecutive sentences are “necessary to protect the public from future crime or to punish the offender”; “not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public”; and at least one of the following three factors:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction * * *, 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.

{¶10} At the plea hearing in the case at hand, the state informed Colon, defense counsel, and the court that it would be “advocating for the maximum possible sentence here, 36 years.”

{¶11} At the sentencing hearing, the prosecutor stated that on October 1, 2006, G.A. and her teenaged son, P.A., drove from Lake County to downtown Cleveland for dinner. After dinner, as they were approaching their car to leave, a man in a hooded sweatshirt forced them at gunpoint into their car. He ordered G.A. to drive, and she recalled that he had a Hispanic accent. G.A. and P.A. were not familiar with downtown Cleveland, but the man told G.A. to stop the car in an “industrial area.” He ordered P.A. into the trunk of the car and shut it. The man told G.A. to get into the passenger seat, and he drove them a short distance “under an overpass bridge” and stopped the car. While in the car, he committed various forceful sexual offenses against G.A., including digital penetration. The man then ordered G.A. out of the car and raped her vaginally and anally.

{¶12} While the man was raping G.A. outside of the car, P.A. escaped from the trunk using a hatch that opened into the backseat. P.A. tried to help his mother, but the man pistol whipped P.A. multiple times in the face, then shot P.A. in the chest. The man then ran off with the keys to the car. P.A. called the police, and he and G.A. were taken to MetroHealth Medical Center. G.A. was given a rape kit. P.A. had stitches on his head and survived the gunshot wound.

{¶13} During the investigation of these crimes, the police collected palm prints and DNA but were unable to match this evidence with anything in the known databases, such as the Integrated Automated Fingerprint Identification System (“AFIS”) and the Combined DNA Index System (“CODIS”). Furthermore, neither G.A. nor P.A. were able to identify the offender. Eventually the case went cold.

{¶14} In 2011, in an unrelated incident, Colon’s DNA was placed into the CODIS system. In 2016, the palm print from the case at hand was run through AFIS, and “there was a hit” belonging to Colon. Investigators then tested the DNA collected during the rape kit from G.A.’s pants against Colon’s DNA from CODIS. The two were also a match. Colon was swabbed for DNA again, and the results confirmed that “the chances of the DNA in this case being someone other than [Colon] is less than 1 in 1 trillion unrelated individuals.”

{¶15} The state also put Colon’s criminal history on the record. This included an armed robbery in 1995 in Massachusetts, for which he was sentenced to seven years in prison, a 2010 felony drug conviction in Cuyahoga County, 2007 and 2010 domestic violence convictions, and a 2014 driving under the influence arrest. Additionally, the

state introduced into evidence Colon's House Bill 180 sexual predator evaluation, which diagnosed Colon with polysubstance abuse disorder, antisocial personality disorder, schizoaffective disorder, and adjustment disorder with depressed mood.

{¶16} At the sentencing hearing, G.A. made the following statement:

I am angry and full of hate because he shot my son and could have killed him, that he touched me in ways I would not have let him, that he put a gun to both my son and I and threatened to shoot us if we did not do what he said.

The fearfulness and helplessness is unmeasurable when driving around not knowing what is going through his mind as to what he is going to do. We were so scared to make the wrong move and him shoot both of us. I have had many sleepless nights and nightmares. I have not gone * * * many places because I * * * always have him on my mind.

I am always looking over my shoulder and around me for suspicious people. There is not a day that goes by that this is not in my thoughts. It has negatively impacted my relationship with my husband, family, and friends.

* * *

I think it has affected my son greatly. He has become extremely introverted and has had many sleep[less] nights since this has happened. And I also see the anger in him that I have. I cannot imagine his thoughts or what he had to listen to and see me go through. It troubles me deeply that he had to experience this.

I don't believe there is any amount of time he could spend in prison that could satisfy me. There is nothing that could be done to replace what we have lost. I don't want him to ever be able to do this to anyone else. I don't want anyone else to go through this. I would love to see him get the maximum consecutive sentence without a chance for early parole.

{¶17} Defense counsel spoke on Colon’s behalf about mitigating factors, stating that Colon “expressed to me his remorse for what he did. He is not a talkative person. He can’t really express himself. He does speak English and he understands English, but it’s very hard for him to express himself. * * * He is so remorseful for what happened.” Defense counsel noted that Colon has “had mental problems all his life * * *. I know he’s tried to commit suicide in the past a number of times and he’s been hospitalized for that.”

{¶18} Defense counsel told the court that Colon is “a human being who made a horrible, horrible, horrible mistake and did awful things to this woman and to her son.” Colon “barely remembers what happened. * * * He was drinking. He was on some kind of drugs. He doesn’t even remember what drugs it’s so long ago. And he did this act * * * without even thinking about it. * * * [H]e did not do this in his right mind. * * * He was not on his medicine.”

{¶19} Defense counsel noted that this was Colon’s first conviction for a sex offense and stated that “I don’t think he would ever be likely to commit a crime like this again.” Defense counsel, requesting a sentence less than the maximum consecutive, asked the court “to look at both sides of this case; the human factor of my client, and the horrible act that he did to these poor people and mete out a sentence that would be satisfactory to protect the public and the community from any future crimes that this Court may think he would commit.”

{¶20} Colon addressed the court at his sentencing hearing, and stated the following: “I want to say sorry. I don’t know — I want to say my heart — I want to say

I'm real sorry to the people. I don't know what happened. I was on drugs that day.

And I'm real, real sorry.”

{¶21} Prior to sentencing Colon, the court considered the following on the record:

You know, these cases are so difficult because the ramifications — it's like a waterfall. It just never stops. It just continues. The victimizing continues.

* * *

And the suffering that you've caused can go across communities. * * * These are the kinds of acts that put fear into people who haven't been victims before.

It impairs people's ability to relate to each other. It impairs people to live as a community.

And although you may have had mental health issues and were on * * * drugs — [p]eople have suffered from mental illness as human beings since time began. It's not an excuse to harm people.

* * *

To say that because you used drugs * * * somehow explains your behavior, if you choose to use drugs, then you're responsible for the behavior. These are not excuses. There is a line that needs to be drawn between compassion and rationality.

Now, I may understand that you have a mental health problem. And I may have compassion for you that you have that, but rational thought is that does not give you the excuse to terrorize other people. It does not mitigate what you did. You have presence of mind. You had the ability to stop your behavior. And you didn't stop your behavior.

* * *

All I can do is weigh these considerations and protect the public in punishing the offender. But I certainly can understand that the suffering that you imposed upon this woman and her son, it's never going to go away.

* * *

[T]he moment that you engaged in these acts, you altered their lives forever. And there's a price to pay. There's always a price to pay when you harm other people. And I do think that the State has made a significant case for a maximum sentence. You earned your way here, Mr. Colon.

{¶22} After imposing the 36-year prison sentence, the court made the following findings on the record:

The Court also finds that this sentence is necessary to protect the public from future crime and punish you and that these sentences are not disproportionate to the seriousness of your conduct and the danger you pose [to] the public.

The Court further finds * * * two or more of the offenses were committed in part of the same course of conduct and the harm caused by these offenses was so great or unusual that no single prison term would adequately reflect the seriousness of your conduct.

The Court also finds that your criminal history demonstrates consecutive sentences are necessary to protect the public [from] future crimes.

{¶23} Upon review, we find that Colon's sentence falls within the statutory range for the offenses of which he was convicted. Furthermore, the court considered the statutory purposes, principles, and factors of felony sentencing in R.C. 2929.11 and 2929.12. Additionally, the court complied with R.C. 2929.14(C)(4) when it ran Colon's sentences consecutively by considering the proportionality of Colon's sentence, the seriousness of the offenses, and the need to protect the public from future crime.

C. Conclusion

{¶24} The court did not err by sentencing Colon to 36 years in prison in this rape, kidnapping, and attempted murder case. Colon's sentence is not contrary to law, it is supported by evidence in the record, and the court considered the proper felony

sentencing statutes when imposing the prison term. Colon's two assignments of error are overruled.

{¶25} Sentence 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 be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

EILEEN T. GALLAGHER, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, SR., J., CONCUR