[Cite as *State v. McMullen*, 2015-Ohio-1631.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. JOHN A. MCMULLEN Appellant	C.A. No. 26850 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR-2012-03-0699

DECISION AND JOURNAL ENTRY

Dated: April 29, 2015

HENSAL, Presiding Judge.

{¶1} John McMullen appeals from his conviction in the Summit County Court of Common Pleas. For the reasons set forth below, we reverse.

I.

{¶2} Mr. McMullen was indicted on three counts of rape of a child under the age of 13. After his trial began but before the victim testified, Mr. McMullen pleaded guilty to the charges in the indictment pursuant to an agreement with the State that it would recommend "life in prison with eligibility [for parole] after 25 years and a Tier III registration for life, five-year mandatory post-release control." The trial court accepted Mr. McMullen's guilty plea and sentenced him to life imprisonment with the possibility of parole after 25 years.

{¶3} Mr. McMullen has appealed, raising two assignments of error for our review. Both the State and Mr. McMullen agree that the case should be reversed and remanded to the trial court.

II.

ASSIGNMENT OF ERROR

> A SENTENCE IS CONTRARY TO LAW WHEN IT IS NOT AUTHORIZED BY STATUTE. JOHN A. MCMULLEN WAS SENTENCED TO LIFE IMPRISONMENT WITH THE POSSIBILITY OF PAROLE AFTER SERVING TWENTY-FIVE YEARS. THAT SENTENCE REQUIRES A CONVICTION OF A SEXUALLY VIOLENT PREDATOR SPECIFICATION. MR. MCMULLEN WAS NOT CONVICTED OF A SEXUALLY VIOLENT PREDATOR SPECIFICATION. THEREFORE, HIS SENTENCE IS CONSEQUENTLY CONTRARY TO LAW.

{¶4} Mr. McMullen argues in his first assignment of error that the trial court lacked authority to sentence him to a term of life imprisonment with parole eligibility after 25 years because he had not pleaded guilty or been convicted of being a sexually violent predator.

{¶5} Mr. McMullen pleaded guilty to three counts of violating Revised Code Section 2907.02(A)(1)(b) by engaging in sexual conduct with a minor who was six years old. *See id.* ("No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when * * * [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person."). Section 2907.02(B) sets forth the sentencing protocol for offenders found guilty under Section 2907.02(A):

> Except as otherwise provided in this division, notwithstanding sections 2929.11 to 2929.14 of the Revised Code, an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code. * * * [I]f the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code, the court may impose upon the offender a term of life without parole.

Section 2971.03(A)(3)(d)(i) provides that, if an offender is found guilty of, or pleads guilty to, a sexually violent predator specification and violating Section 2907.02(A)(1)(b), the trial court

"shall impose an indefinite prison term consisting of a minimum term of twenty-five years and a maximum term of life imprisonment." However,

> if division (A) of this section does not apply regarding the person, and if the court does not impose a sentence of life without parole when authorized pursuant to division (B) of section 2907.02 of the Revised Code, the court shall impose upon the person an indefinite prison term consisting of one of the following:
>
> * * *
>
> (b) If the victim was less than ten years of age, a minimum term of fifteen years and a maximum of life imprisonment.

R.C. 2971.03(B)(1).

{¶6} Mr. McMullen pleaded guilty to the three counts of violating Section 2907.02(A)(1)(b) by engaging in sexual conduct with a minor under the age of ten. Thus, the trial court could impose a prison term of life in prison without the possibility of parole or an indefinite term of 15 years to life. *See* R.C. 2907.02(B); R.C. 2971.03(B)(1)(b). *See also State v. Tschudy*, 9th Dist. Summit No. 24053, 2008-Ohio-4073, ¶ 6. However, instead of imposing either sentence, the trial court sentenced Mr. McMullen to 25 years to life imprisonment, which was not authorized by either statute. Because the court did not impose a sentence authorized by the sentencing statutes, Mr. McMullen is correct that his sentence is contrary to law and must be reversed. *See, e.g., State v. Harris*, 132 Ohio St.3d 318, 2012-Ohio-1908, ¶ 7 (noting that the Supreme Court has consistently held that a sentencing court may only impose sentences authorized by statute).

{¶7} Accordingly, Mr. McMullen's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

> JOHN A. MCMULLEN WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN TRIAL COUNSEL FAILED TO REQUEST A WAIVER OF COURT COSTS AT SENTENCING.

{¶8} In Mr. McMullen's second assignment of error, he argues that he received ineffective assistance of counsel when his counsel did not move for the court to waive the imposition of court costs. Given our resolution of Mr. McMullen's first assignment of error, this assignment of error is moot as Mr. McMullen must be resentenced on remand. *See* App.R. 12(A)(1)(c).

III.

{¶9} Mr. McMullen's first assignment of error is sustained, and his second assignment of error is moot. The judgment of the Summit County Court of Common Pleas is reversed in part, and the matter is remanded for further proceedings consistent with this opinion.

Judgment reversed in part,
and cause remanded

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

JENNIFER HENSAL
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR.

APPEARANCES:

KATHERINE R. ROSS-KINZIE, Assistant State Public Defender, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RACHEL M. RICHARDSON, Assistant Prosecuting Attorney, for Appellee.