[Cite as *State v. Thomas*, 2015-Ohio-2195.]

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

STATE OF OHIO	C.A. No. 14CA0042-M
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DAVID H. THOMAS	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellant	CASE No. 14 CR 0059

DECISION AND JOURNAL ENTRY

Dated: June 8, 2015

WHITMORE, Judge.

{¶1} Appellant, David B. Thomas, appeals from the order of the Medina County Court of Common Pleas sentencing him to 16 years in prison. We affirm.

I

{¶2} A grand jury indicted Mr. Thomas on sixteen counts of pandering obscenity involving a minor in violation of R.C. 2907.321(A)(1),[1] felonies of the second degree, and ten counts of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(1),[2] also felonies of the second degree. Forfeiture specifications were added to all counts for electronic equipment used to commit or facilitate the offenses.

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[1] "No person, with knowledge of the character of the material or performance involved, shall do any of the following: (1) Create, reproduce, or publish any obscene material that has a minor as one of its participants or portrayed observers[.]" R.C. 2907.321(A)(1).

[2] "No person, with knowledge of the character of the material or performance involved, shall do any of the following: (1) Create, record, photograph, film, develop, reproduce, or publish any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality." R.C. 2907.322(A)(1).

{¶3} Mr. Thomas pled no contest to each of the charges and specifications. He did not admit guilt of the offenses, but did admit that he engaged in the acts alleged in the indictment. More specifically, Mr. Thomas took sexually explicit photographs of his young grandchildren, ages six and four (at the time of sentencing), and shared the images on social media by trading them for photographs of other young children.

{¶4} According to the presentence investigation ("PSI") report, Mr. Thomas informed police that he began to photograph his grandchildren in a state of nudity while babysitting them for his stepdaughter, the children's mother, after his wife died. Mr. Thomas admitted to being naked in the presence of his grandchildren on multiple occasions, having his granddaughter sit on his lap while both were naked, and touching his granddaughter's genitals. He also admitted that the grandchildren touched his genitals. Among other actions, Mr. Thomas photographed the granddaughter's vaginal and anal area, photographed his granddaughter and grandson nude from the waist down with their genitals showing, created videos of the granddaughter undressing under his instruction, and traded the photographs or files with like-minded, unknown people on the internet. The granddaughter stated that she "h[e]ld grandpa's wee-wee when he tinkles." She stated that, "when grandpa touches her 'doopie' it tickles," that he said it was pretty, and feels good, and that she should not tell anybody. When asked by the probation department in preparation for the PSI report why he committed these offenses, Mr. Thomas replied, "I honestly can't tell you. I don't know, I guess it was gratification."

{¶5} After ordering the preparation of the PSI report, the trial court held a sentencing hearing. At the sentencing hearing, the court asked Mr. Thomas if he would like to speak in order to lessen or mitigate punishment. Mr. Thomas stated:

> I'd like to tell you that I am very sorry for what I did and I'm ashamed of myself. I understand the gravity of what I did. I know that my

> stepdaughter loved me and trusted me and I violated that trust, that I did the same with my grandchildren, her children. She trusted me with them and I did what I did. . . . I have to live with myself forever. No matter what you do, I have to live with my conscience.

{¶6} The trial court found Mr. Thomas guilty on all twenty-six counts. The court sentenced Mr. Thomas to a prison term of eight years on each of the sixteen counts under R.C. 2907.321(A)(1), and eight years on each of the ten counts under R.C. 2907.322(A)(1). The trial court ordered Counts 1 and 2[3] to run consecutively, with all other terms to run concurrently, and ordered the property described in the specifications to be forfeited. The court further notified Mr. Thomas of his duties to register as a Tier II sexual offender, and of the mandatory five years of post-release control as well as the consequences for violating the conditions imposed by the Adult Parole Authority. The court gave Mr. Thomas 110 days of jail time credit, imposed costs, and ordered him to submit to a DNA sample.

{¶7} Mr. Thomas now raises one assignment of error for our review.

II

Assignment of Error Number One

> THE TRIAL COURT ERRED WHEN SENTENCING APPELLANT TO A SIXTEEN YEAR PRISON TERM WHICH IS DISPROPORTIONATE TO THE CONVICTED OFFENSE.

{¶8} In his only assignment of error, Mr. Thomas argues that his 16 year sentence is disproportionate because:

> (1) he has not served a prior prison sentence;
>
> (2) he expressed remorse for his actions at sentencing, and, even though he did not admit guilt, his no contest plea spared the victims the trauma of a trial;

[3]Counts 1 and 2 both were for pandering obscenity involving a minor under R.C. 2907.321(A)(1). None of the offenses charged were allied offenses.

> (3) sentencing Mr. Thomas to the maximum eight years in prison on each of the twenty-six counts, and imposing consecutive eight-year sentences on two of the counts, exceeds the bounds of reason under the circumstances; and
>
> (4) a recent sentencing decision by the same judge (with little or no factual similarities to this case) imposed only a 15-year sentence, where the defendant stole a car and drove while intoxicated, which resulted in the death or serious injury of two people and corresponded with three criminal charges (to which the defendant pled guilty).

We disagree.

{¶9} In reviewing a felony sentence, this Court follows the two-step approach set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008–Ohio–4912. *E.g., State v. Shank*, 9th Dist. Medina No. 12CA0104–M, 2013–Ohio–5368, ¶ 31. First, we "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶ 26. If the sentence is not contrary to law, then we review the trial court's sentence under an abuse-of-discretion standard. *Id.* An abuse of discretion indicates that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶10} Under the first prong of *Kalish*, Mr. Thomas argues that his sentences were clearly in violation of R.C. 2929.14(B) in imposing the maximum term of imprisonment because he had not served a prior prison term. Mr. Thomas' argument appears to rely on a previous version of R.C. 2929.14(B) cited in *State v. Doan*. *See State v. Doan*¸ 8th Dist. Cuyahoga No. 82007, 2003-Ohio-3951, ¶ 26, citing R.C. 2929.14(B) (former). The version of the statute cited in *Doan* stated:

> If the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender and if the offender previously has not served a prison term, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless the court finds on the record

> that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

However, this portion of R.C. 2929.14(B) was found to be unconstitutional in *State v. Foster*, because it required the trial court to make findings in order to impose a sentence greater than the minimum in violation of *Blakely v. Washington*, 542 U.S. 296 (2004). *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 56-61, 83 (finding R.C. 2929.14(B) unconstitutional because it required judicial fact-finding before the imposition of a more-than-minimum sentence); *see State v. Trifari*, 9th Dist. Medina No. 08CA0043-M, 2009-Ohio-667, ¶ 10. Consequently, the Ohio Supreme Court severed it from the statute. *Foster*, at ¶ 97. The legislature formally removed this portion of the statute pursuant to amended House Bill 86, effective September 30, 2011.[4] 2011 Am. Sub. H.B. No. 86. Thus, Mr. Thomas cannot show that his sentences for the charged offenses, which he does not contest were within the statutory range, were clearly and convincingly contrary to law.[5]

{¶11} Nor can Mr. Thomas show an abuse of discretion by the trial court under the second prong of *Kalish* in imposing a sentence that allegedly was disproportionate to the offense. In imposing felony sentences, trial courts must consider the statutory considerations and factors

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[4] *Foster* declared unconstitutional portions of Ohio's felony sentencing statutes that required judges to make certain findings before imposing maximum, consecutive, or more-than-minimum sentences. The United States Supreme Court later made it clear, however, that it was constitutionally permissible to require judicial fact-finding as a prerequisite for the imposition of consecutive sentences. *Oregon v. Ice*, 555 U.S. 160 (2009). The Supreme Court of Ohio subsequently acknowledged that the legislature could reenact consecutive sentence finding requirements. *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, ¶ 36. The legislature responded by enacting 2011 Am. Sub. H.B. No. 86. The new legislation, effective September 30, 2011, revived the judicial fact-finding requirement for consecutive sentences, but did not revive the requirement for maximum or more-than-minimum sentences.

[5] Mr. Thomas does not contest that the trial court made the appropriate findings of fact to impose consecutive sentences. R.C. 2929.14(C)(4).

in the general guidance statutes R.C. 2929.11 and R.C. 2929.12. These two sections apply as a general judicial guideline for every sentencing. *Foster* at ¶ 36-37; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶12} R.C. 2929.12 lists general factors which must be considered by the trial court in determining the sentence to be imposed for a felony, and gives detailed criteria which do not control the court's discretion, but which must be considered for or against severity or leniency in a particular case. The trial court retains discretion to determine the most effective way to comply with the purpose and principles of sentencing as set forth in R.C. 2929.11. R.C. 2929.12(A).

{¶13} Under R.C. 2929.11(A), the overriding purposes of felony sentencing are to protect the public from future crime by the offender and others, and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve these purposes, the sentencing court is required to consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both. R.C. 2929.11(A).

{¶14} Among the various relevant factors that the trial court must consider and balance under R.C. 2929.12 are: (1) whether physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim; (2) serious physical, psychological, or economic harm to the victim as a result of the offense; (3) whether the offender's relationship with the victim facilitated the crime; (4) whether the offender has a history of criminal convictions; and (5) whether the offender shows genuine remorse for the offense. R.C. 2929.12. It is presumed that the trial court considered these factors when a sentence falls within the statutory range (as it does

here), even if the trial court does not mention R.C. 2929.12. *State v. Estright*, 9th Dist. Summit No. 24401, 2009-Ohio-5676, ¶ 60.

{¶15} In view of the relevant R.C. 2929.12 factors, the trial court did not abuse its discretion in imposing the maximum eight-year sentence for each of Mr. Thomas' twenty-six convictions, with two of the eight-year terms to run consecutively. The court specifically noted the vulnerable age of the victims, who were four and six at the time of sentencing. The court also had before it a statement from the children's mother, who explained that the children exhibited a fearful disposition, and that Mr. Thomas' granddaughter had a continuing need for medical care due to a fear of using the bathroom and accidents. In addition, it was particularly important to the court that Mr. Thomas took advantage of his relationship with the victims to perpetrate the abuse. The court stated:

> You count on your kin watching out for you. You don't have anything else in the world if you're four and six. No matter who you are, no matter how old you are, no matter what you've done, you've got your kin, you've got those folks who love you. If you don't have those folks, what do you have? You have nothing.

The court also noted that Mr. Thomas had no prior offenses.

{¶16} Accordingly, even though Mr. Thomas had not previously served jail time, and purported to feel remorse for his actions, the trial court did not act in an arbitrary, unreasonable, or unconscionable manner in assessing the relevant factors under R.C. 2929.12 and finding that any mitigating circumstances were outweighed by: the vulnerable age of the victims; the psychological harm to the victims; and the fact that Mr. Thomas used his relationship of trust as the victims' grandfather to facilitate the abuse. There is no basis here to conclude that the trial court abused its discretion in sentencing Mr. Thomas to the maximum allowable prison term for each count. Instead, the evidence supports that the trial court fully discharged its duty to protect

the public from future crime by Mr. Thomas and to punish him in accordance with R.C. 2929.11(A).

{¶17} Mr. Thomas' claim that his sentence is disproportionate when compared to other sentences of the court is equally ineffective. He cites to the case of *State v. Ralios*, Medina C.P. No. 2013CR0348, (Jan. 21, 2014), in which the defendant received 15 years in prison. *Ralios* is entirely inapposite here, because it does not bear any factual resemblance to this case.

{¶18} A defendant who alleges his sentence is disproportionate to that of similar offenders has the burden of producing evidence to demonstrate that his sentence is directly disproportionate to sentences given to other offenders, with similar records, who committed the same offense. *State v. Jackson*, 7th Dist. Mahoning No. 12 MA 199, 2014-Ohio-777, ¶ 25, citing *State v. Wilson*, 8th Dist. Cuyahoga No. 99331, 2013-Ohio-3915, ¶ 16. Here, Mr. Thomas attempts to compare his sentence on twenty-six convictions for pandering obscenity and pandering sexually oriented material containing a minor with a sentence for aggravated vehicular homicide, aggravated vehicular assault, and receiving stolen property arising from a guilty plea to the three counts. Mr. Thomas' offenses involved numerous obscene images of his own four and six-year-old grandchildren. Mr. Ralios crashed a stolen vehicle while intoxicated, killing one person and severely injuring another. The offenses are not similar in any regard. Accordingly, Mr. Thomas has failed to offer the Court any basis to hold that his sentence is directly disproportionate to sentences given to other offenders.

{¶19} Under the circumstances present here, a trial court does not abuse its discretion by sentencing an offender to eight-year maximum prison terms for each of twenty-six convictions, and by ordering two of the prison sentences to run consecutively. Mr. Thomas' assignment of error is overruled.

III

{¶20} Mr. Thomas' sole assignment of error is overruled. The judgment of the Medina County Court of Common Please is affirmed.

Judgment affirmed.

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 Medina, 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 Appellant.

BETH WHITMORE
FOR THE COURT

HENSAL, P. J.
CARR, J.
CONCUR.

APPEARANCES:

CONRAD G. OLSON, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MATTHEW A. KERN, Assistant Prosecuting Attorney, for Appellee.