IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee

v.

FRANCISCO VASQUEZ

Appellant

Supreme Court
Case No. 20-0288

On Appeal from the Summit County Court of Appeals Ninth Appellate District Court of Appeals No. 29422

STATE'S BRIEF IN OPPOSITION TO FRANCISCO VASQUEZ'S MOTION FOR LEAVE TO FILE OUT OF TIME DUE TO COVID-19

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Counsel for Appellant,
Francisco Vasquez

Now comes Appellee State of Ohio, by and through Summit County Prosecutor Sherri Bevan Walsh and her undersigned assistant, and hereby states its opposition to the Motion for Leave to File Out of Time due to COVID-19 filed by Appellant Francisco Vasquez.

On April 14, 2020, this Court granted Defendant's Motion for Delayed Appeal, and it ordered that Vasquez file his jurisdictional memorandum within 30 days. On May 15, 2020, Vasquez moved to file out of time due to the COVID-19 emergency. This Court granted that motion, without objection by the State, and extended the time for the filing of the jurisdictional memorandum to June 10, 2020. That date passed without the filing of a jurisdictional memorandum.

On June 11, 2020, the undersigned received an email from defense counsel's executive assistant. The email purports to serve a copy of Vasquez's jurisdictional memorandum on the State via an attached PDF document. The jurisdictional memorandum attached to the email includes a Certificate of Service that states the memorandum was emailed to the undersigned on June 10, 2020. However, no such email was ever sent to the undersigned on June 10, 2020. A true and accurate copy of the June 11, 2020 email is attached hereto as Exhibit "A." A true and accurate copy of the jurisdictional memorandum attached to the June 11, 2020 email is attached hereto as Exhibit "B."

The Rules of Practice generally disallow the extensions of time for the filing of documents with the Court. S.Ct.Prac.R. 3.03(B)(1). There is no authority within the Rules of Practice that would provide for a second extension of time in this matter. The Court's administrative orders relating to the COVID-19 emergency similarly do not provide for a second extension of time in this matter.

As such, this Court should deny Vasquez's Motion for Leave to File Out of Time due to COVID-19.

Respectfully submitted,

SHERRI BEVAN WALSH
Prosecuting Attorney

/s/ C. Richley Raley, Jr.
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PROOF OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document was sent via email to Justin M. Weatherly, Henderson, Mokhtari, & Weatherly Co., L.P.A., at jw@hmwlawfirm.com on this 16th day of June 2020.

/s/ C. Richley Raley, Jr.
C. RICHLEY RALEY, JR.
Assistant Prosecuting Attorney

re: Francisco Vasquez

Amanda Kerrick [ak@hmwlawfirm.com]
Sent: Thursday, June 11, 2020 1:06 PM
To: Rick Raley
Attachments: Vasquez - Appellant's Peti~1.pdf (165 KB)

Hello,

Please find attached to this email a copy of the Appellant's Petition for Jurisidiction.

If you have any questions or concerns regarding this matter please do not hesitate to contact our office at the number listed below.

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Exhibit "A"

NO. 2020-0288

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE 9th DISTRICT COURT OF APPEALS FOR SUMMIT COUNTY, OHIO
NO. CA-29422

STATE OF OHIO
Plaintiff-Appellee

-vs-

FRANSISCO VASQUEZ
Defendant-Appellant

APPELLANT'S PETITION FOR JURISDICTION

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Exhibit "B"

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STATEMENTS OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

On April 14, 2018, a twenty-one count Indictment was filed in the Summit County Court of Common Please charging Francisco Vasquez ("Appellant") with seven counts of Rape, Felonies of the First Degree, in violation of O.R.C. §§2907.02(A)(1)(B) and 2907.02(B), seven counts of Sexual Battery, Felonies of the Second Degree, in violation of O.R.C. §§2907.03(A)(5) and 2907.03(B), and seven counts of Gross Sexual Imposition, Felonies of the Third Degree, in violation of O.R.C. §§2907.05(A)(4) and 2907.05(C)(2).

On March 13, 2019, pursuant to a plea agreement, Appellant pled guilty to five amended counts of Sexual Battery, Felonies of the Third Degree, in violation of O.R.C. §2907.03(A), and the remaining sixteen counts listed in the indictment were dismissed.

On April 30, 2019, the trial court held a sentencing hearing. Appellant was sentenced to a five-year term of incarceration on each count. The trial court ordered the terms to run consecutively for an aggregate term of incarceration of twenty-five years. Additionally, Appellant was labelled as a Tier III sex offender.

On December 31, 2019 this matter was appealed to the Summit County Court of Appeals, Ninth Appellate District – *State of Ohio v. Francisco Vasquez,* Court of Appeals Case No. 29422. The Ninth District Court of Appeals affirmed the trial court's sentence.

II. STATEMENT OF FACTS

The indictment set forth allegations against Appellant spanning from October 28, 2008 to October 27, 2015. Counts one, two, three, four, five, six and seven alleged that Appellant engaged in sexual conduct with K.V., who was less than thirteen years of age. Counts seven, eight, nine, ten, eleven, twelve, thirteen, and fourteen, alleged that Appellant engaged in sexual conduct with

K.V., when Appellant was the Parent, Guardian, or In Loco Parentis of K.V. Counts fifteen, sixteen, seventeen, eighteen, nineteen, twenty, and twenty-one alleged that Appellant engaged in sexual contact with K.V. when K.V. was less than thirteen years of age.

At the time of sentencing, the State reported that the case had an impact on K.V.'s entire family. (Sent. Tr. 38, Ln. 19-22). The State ultimately asked for a term of twenty-five years due to the circumstances, the PSI, lack of remorse, and because it deemed Appellant a risk to society. (Sent. Tr. 38-39, Ln. 1-5). Several of K.V.'s family members addressed the court. K.V.'s mother indicated that K.V. suffered from PTSD, depression and anxiety. (Sent. Tr. 9, Ln. 1-3). She also blamed financial impact due to her divorce and the loss of one income on Appellant. (Sent. Tr. 10, Ln. 11-13). Sarah Batten, the girlfriend of K.V.'s brother also spoke on K.V.'s behalf. Ms. Batten shared a different side of K.V. and indicated that K.V. chose to rise above it all. (Sent. Tr. 15, Ln. 15-16). Ms. Batten described K.V. as having strength and resilience and represented that K.V. came "out on top in all areas of her life, including her academics, her extracurricular activities, her relationships with other people and so forth." (Sent. Tr. 15, Ln. 14-20). K.V. also spoke on her own behalf and shared some of the same accomplishments she achieved despite this incident. K.V. represented to the trial court that she had come so far, was a 4.0 student, was in the National Honor Society, was an ambassador of Ellet and was a section leader in the band. (Sent. Tr. 36, Ln. 6-11). She went as far to say that she had blossomed without Appellant, and that she does not "have this fear of listening for footsteps every night." (Sent. Tr. 36, Ln. 12-15).

Counsel for Appellant expressed that Appellant had been slowly reflecting on his conduct and recognized the seriousness of the allegations. (Sent. Tr. 39, Ln. 17-19). Counsel spoke to Appellant's background, his work, and his family life. (Sent. Tr. 41, Ln. 3-8). Ultimately counsel sought the ability for Appellant to grow and improve on community control, or in the alterative, a

concurrent term of incarceration due to the lifelong implications of his conduct, including life-time sex offender registration. (Sent. Tr. 41, Ln. 15-20; Sent. Tr. 42, Ln. 2-5). Appellant addressed the Court and showed remorse for his conduct. He took responsibility for his actions and indicated he wanted what was best for K.V. (Sent. Tr. 43, Ln. 7-9). He explained to the trial court that it had taken him some time for him to admit what he did, that he regretted what he had done in the past and recognized that it's not a good thing. (Sent. Tr. 43, Ln. 4-7).

The trial court claimed to give consideration to the overring principles and purposes of felony sentencing and suggested that seriousness and recidivism factors were considered. (Sent. Tr. 47-48, Ln. 12-23). The trial court ultimately sentenced Appellant to five years on each count, consecutive to one another for a total term of twenty-five years. (Sent. Tr. 48, Ln. 23-25; Sent. Tr. 49, Ln. 1-17). The trial court used the standard script to support its determination that a consecutive sentence was necessary and noted the length of time of the offense and Appellant's lack of remorse in its findings. (Sent. Tr. 50, Ln. 2-7).

LAW AND ARGUMENT

I. THE NINTH DISTRICT COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S MAXMUM CONSECUTIVE SENTENCE WITHOUT THE NECESSARY FACTORS TO DO SO.

The twenty-five-year term of incarceration imposed on Appellant is inconsistent with the underlying purposes of felony sentencing. O.R.C. §2929.11 provides that felony sentences "shall be guided by the overriding purposes of sentencing," which "are to protect the public from future crimes by the offender and to punish the offender using the minimum sanctions that the court determines accomplishes those purposes without imposing an unnecessary burden on state or local government resources." O.R.C. §2929.11(A). Here, the trial court imposed its sentence without taking into account Appellant's likelihood of committing future crimes.

To achieve the underlying purposes of felony sentencing, "the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and marking restitution to the victim of the offense, the public, or both." *Id*. Any sentence imposed "shall be reasonably calculated to achieve the two overriding purposes of felony sentencing…commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." O.R.C. §2929.11(B).

While the trial court will have the discretion in sentencing, they must still consider a multitude of factors relating to the seriousness of the conduct and the likelihood of recidivism. O.R.C §2929.12. Here, the trial court failed to take into account Appellant's likelihood of recidivism when imposing a twenty-five-year incarceration term as the record is absent of the trial court engaging in any sort of general discussion related to Appellant's lack of juvenile record, his limited criminal history as an adult, the fact that he has lived a law abiding life for a significant number of years, and that the offense was committed under circumstances not likely to recur. (Sent. Tr. 43, Ln. 12-15).

Felony sentences are to be reviewed by Appellate courts under O.R.C. §2953.08(G)(2). Under the Revised Code, a reviewing appellate court is permitted to increase, reduce, or otherwise modify a sentence, or to vacate the sentence and remand to the sentencing court for resentencing if it clearly and convincingly finds either of the following:

a) That 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;
b) That the sentence is otherwise contrary to law.

Id. We acknowledge that "[w]hen a party seeks an appeal, the appellant bears the burden of

demonstrating error by reference to the record of the proceedings below, and it is the appellant's duty to provide the reviewing court with an adequate transcript." App.R. 9 provides the procedure for making the transcript a part of the record. Thus, this Court "must presume the regularity of the trial court proceedings" in the absence of a complete and adequate record. *State v. Pringle*, 2003-Ohio-4235 (Ohio Ct. App. 3d Dist. 2003). Although prior counsel failed to provide the reviewing court with adequate records, this does not defeat the trial court's failure to take into account Appellant's likelihood of recidivism when sentencing – the absence of which warrants this Court in finding that the trial court and the Ninth District Court of Appeals erred in their decisions.

While no specific language must be used to show consideration of the statutory factors, "general discussion at the sentencing hearing regarding the seriousness of the offense and likelihood of recidivism is an indication that the trial court has considered such factors." *State v. Swartz*, 2007-Ohio-5304 (Ohio Ct. App. 6th Dist. 2007); *see also State v. Alexander*, 2012-Ohio-3349 at ¶16 (Ohio Ct. App. 1st Dist. 2012) ("[M]oreover, while the sentencing court is not required to use "talismanic words," it must be clear from the record that the trial court addressed the statutorily required findings."). Here, the trial court made no reference to the likelihood that Appellant was, or was not, likely to commit crimes in the future. *See also State v. Short*, 2013-Ohio-3780 (Ohio Ct. App. 3d Dist. 2013) (holding because there was nothing in the record to indicate that the trial court addressed the requisite statutory findings either at the sentencing hearing or in its judgment entry of conviction and sentence when it imposed consecutive sentences, the trial court's sentence was clearly and convincingly contrary to law).

Although "[a] presumption exists in favour of concurrent sentencing absent the applicable statutory exception." *State v. Polizzi*, 2019-Ohio-2505 (Ohio Ct. App. 11th Dist. 2019), here, the trial court failed to make the necessary findings to rebut the presumption for concurrent sentences.

Indeed, the trial court should not have imposed maximum or consecutive sentences. Appellant had no adjudications as a juvenile, had lived a law-abiding life for a significant number of years, committed the offense under circumstances not likely to recur, and demonstrated remorse at the time of sentencing. *See* (Sent. Tr. 43, Ln. 12-15).

Revised Code §2929.12(B) sets forth nine factors which demonstrate whether the offender's conduct is more serious than what normally constitutes the offense.

> (1) The 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) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense;
> (3) The offender held a public office or position of trust in the community, and the offense related to that office or position;
> (4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice;
> (5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others;
> (6) The offender's relationship with the victim facilitated the offense;
> (7) The offender committed the offense for hire or as a part of an organized criminal activity;
> (8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion;
> (9) If the offense is a violation of §2919.25 or a violation of §§2903.11, 2903.12 or 2903.13 involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who was not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

See O.R.C. §2929.12(B). The trial court failed to discuss any of the nine factors. Further, O.R.C. §§2929.12(D) and 2929.12(E) focus on recidivism, and the importance that a sentencing court must place on an offender's likelihood to commit future crimes. Appellant's likelihood to commit

future crimes was not taken into full account at the sentencing hearing. While the trial court referenced the purposes of felony sentencing, they did not discuss the seriousness of the offense or the likelihood of recidivism. (Sent. Tr. 49, Ln. 17-25). If they had engaged in general discussion of both, they would have concluded that Appellant's likelihood of recidivism was exceedingly low –his lack of a juvenile record, his limited criminal history as an adult, the fact he has lived a law abiding life for a significant number of years, and that the offense was committed under circumstances not likely to recur. Although the seriousness of the offense has been admitted and understood by Appellant, the trial court should have relied on O.R.C. §§2929.12(D) and (E) when imposing their sentence.

The trial court made only one comment regarding Appellant's lack of remorse, and this was made without detailing the lack thereof. (Sent. Tr. 39, Ln. 1-5). There is a difference between general discussion and accepting one statement as true. A discussion is a conversation or debate about a certain topic. Here, the trial court did not engage in a "discussion" regarding Appellant's lack of remorse. The trial court accepted what was said to be true and disregarded Appellant's own responsibility for his conduct. (Sent. Tr. 43, Ln. 12-15). Appellant's minimal likelihood of future crimes combined with the regret of his conduct far outweighed the seriousness of the crime. If the trial court would have compared the nine factors from O.R.C. §2929.12(B) with Appellant's prior record, his acceptance of responsibility and remorse for his actions, as well as the likelihood that he would recommit, the twenty-five-year incarceration term is undoubtedly against the record.

II. THE NINTH DISTRICT COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S IMPOSITION OF APPELLANT SERVING CONSECUTIVE SENTENCES

Revised Code §2929.14(C)(4) governs the imposition of consecutive sentences and provides the following:

> If multiple prison terms are imposed on an offender for convictions of multiple offense, the court may require the offender to serve the 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 O.R.C. §§2929.16, 2929.17, or 2929.18, 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 course 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 reflected 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.

O.R.C. §2929.14(C)(4). As used in the statute, the verb "finds" means that the court "must note that it engaged in the analysis" required by the statute. *State v. Edmonson*, 86 Ohio St.3d 324, 326 (1999). "The statutory language itself does not have magical powers. Instead, it is merely a vehicle to ensure that the trial court engaged in the required analysis. Even so, there must be some reference in the record that the trial court considered the statutory requirements and made the requisite findings." *State v. Warren* 2013-Ohio-3483 (Ohio Ct. App. 12th Dist. 2013). A trial court's general statements as to why the trial court believed a prison term was necessary *do* not constitute specific findings as required by the statute. *State v. Fort*, 2002-Ohio-5068 at ¶87 (Ohio Ct. App. 8th Dist. 2002). Nor does an indication in the record that a trial court may have intended to make a finding fulfil the statutory requirement when the enumerated findings do "not expressly appear in the record." *State v. Byrd*, 2004-Ohio-4369 at ¶36 (Ohio Ct. App. 2d Dist. 2004). Compliance with O.R.C. §2929.14(C)(4) requires separate and distinct findings in addition to any

findings related to the purposes and principles of sentencing with O.R.C. §2929.11 or the recidivism factors within O.R.C. §2929.12. *See Edmonson,* 86 Ohio St.3d at 326.

Here, the trial court should have relied on the Eleventh District Court of Appeals ruling in *Polizzi*. There, the court ruled that there was no support in the record that the defendant was likely to re-offend and to the contrary, found the fact that he lacked criminal history before and after the crimes, the letters of support as to his character, and the Tier III sex offender status all supported a finding that the opportunity for re-offense was low. *See Polizzi*, 2019-Ohio-2505 at ¶31. Here, the trial court indicated in its sentencing entry that consecutive sentences were necessary to "punish the offender and is not disproportionate to the seriousness of the conduct, and that the harm caused by two or more of the multiple offenses committed in this matter was so great that no single prison term for any of the offenses adequately reflects the seriousness of the offender's conduct." (Sent. Tr. 49, Ln. 14-21). However, portions of the record indicate that such punishment was severely against the evidence given, as previously stated, Appellant's lack of a juvenile record, his limited criminal history as an adult, the fact that he has lived a law abiding life for a significant number of years, and that the offense was committed under circumstances not likely to recur.

Disproportionate consecutive sentences serve no purpose for society as well as Appellant. This Court need to recognize and understand that Appellant had no adjudications as a juvenile, had a lived a law-abiding life for a significant number of years, committed the offense under circumstances not likely to recur, and demonstrated remorse at the time of sentencing. When sentencing, the trial court had at its disposal, a voluminous number of letters in support of his character. These letters combined with other previously mentioned factors in the record should have guided the court in imposing a sentence that reflected the notions of the Ohio Revised Code and the fairness of society that is rooted within the American justice system. The record does not

clearly and convincingly support the trial court's determination that a consecutive sentence was necessary due to the risk to the public based on the likelihood of future crime.

Conclusion

The trial court was permitted to impose a sentence that weighed the seriousness of the crime under O.R.C. §2929.12(B) with the Appellant's prior criminal history, character, likelihood of recidivism and remorse. When sentencing Appellant to five consecutive five-year terms the trial court failed to do so. The trial court's failure to engage in general discussion regarding Appellant's remorse for his actions, failure to take into account his limited criminal history, and failure to weigh all surrounding circumstances, contributed to a twenty-five-year term of incarceration that was against the manifest weight of the evidence. For the above cited reasons, Appellant, by and through undersigned counsel, respectfully urge this Honorable Court to reverse the decisions of the trial and appellate courts herein.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby assert that that a true and accurate copy of the foregoing was emailed to the Summit County Prosecuting Attorney's Office, C. Richley Raley, Jr., Esq., (89221), rraley@prosecutor.summitoh.net, on this 10th day of June 2020.

/s/ Justin M. Weatherly
JUSTIN M. WEATHERLY, Esq.
Counsel for Appellant Francisco Vasquez