[Cite as *State v. Musolff*, 2022-Ohio-2205.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- JAMES MUSOLFF, JR. Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. Craig R. Baldwin, J. Case No. CT2021-0048 O P I N I O N
CHARACTER OF PROCEEDINGS:	Appeal from the Muskingum County Court of Common Pleas, Case No. CR2021-0216
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 21, 2022

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
RONALD L. WELCH Prosecuting Attorney Muskingum County, Ohio TAYLOR P. BENNINGTON Assistant Prosecuting Attorney Muskingum County, Ohio 27 North Fifth Street P.O. Box 189 Zanesville, Ohio 43701	CHRIS BRIGDON 8138 Somerset Road Thornville, Ohio 43076

Hoffman, J.

{¶1} Defendant-appellant James R. Musolff, Jr. appeals the judgment entered by the Muskingum County Common Pleas Court convicting him of illegal use of a minor in nudity-oriented material (R.C. 2907.323(A)(3)) and two counts of pandering sexually oriented material involving a minor (R.C. 2907.321(A)(3),(5)) following his pleas of guilty, and sentencing him to an aggregate term of 10 1/2 to 14 1/2 years incarceration. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On February 4, 2021, police in Muskingum County were notified by Muskingum County Children's Services of a sexual relationship between Appellant, who was 53 years old at the time, and the sixteen-year-old female victim in this case. The victim's cell phone was collected. In the cell phone, police found two thumbnail images of a penis entering a vagina, with no faces visible in the photographs.

{¶3} The victim was interviewed at Nationwide Children's Hospital in Columbus. During the interview, the victim disclosed she had been sexually involved with Appellant. The victim stated in addition to the photographs, there were also videos on her phone of her and Appellant having sex. She told police officers she deleted many images when her parents found out about her sexual relationship with Appellant.

{¶4} Police executed search warrants of Appellant's phone, finding images of the victim's breasts, which appeared to be selfies she took and sent to Appellant. Police also found photographs of the victim's breasts which appeared to be taken by someone else, and the previously viewed video still shots of Appellant and the victim having sex, focusing graphically on their genitals.

{¶5} Appellant was indicted by the Muskingum County Grand Jury on four counts of illegal use of a minor in nudity-oriented material, felonies of the second degree, and two counts of pandering sexually oriented material involving a minor, felonies of the second degree. Pursuant to a plea agreement, Appellant entered guilty pleas to one count of illegal use of a minor in nudity-oriented material as amended by the State to a fifth degree felony; one count of pandering sexually oriented material involving a minor as a second degree felony, and one count of pandering sexually oriented material involving a minor as amended by the State to a fourth degree felony. The State dismissed the remaining charges. The trial court sentenced Appellant to twelve months incarceration for illegal use of a minor in nudity-oriented material, eight to twelve years incarceration for pandering sexually oriented material using a minor as a second degree felony, and 18 months incarceration for pandering sexually oriented material using a minor as a fourth degree felony, to be served consecutively for an aggregate term of incarceration of 10 1/2 to 14 1/2 years. It is from the August 13, 2021 judgment of conviction and sentence Appellant prosecutes his appeal, assigning as error:

I. MUSOLFF DID NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY PLEAD GUILTY, IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION SIXTEEN, ARTICLE ONE OF THE OHIO CONSTITUTION.

II. AS AMENDED BY THE REAGAN TOKES ACT, THE REVISED CODE'S SENTENCES FOR FIRST AND SECOND DEGREE

QUALIFYING FELONIES VIOLATES THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF OHIO.

III. THE TRIAL COURT UNLAWFULLY ORDERED MUSOLFF TO SERVE CONSECUTIVE SENTENCES, IN VIOLATION OF HIS RIGHTS TO DUE PROCESS, GUARANTEED BY SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

IV. MUSOLFF RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION.

I.

{¶6} In his first assignment of error, Appellant argues his guilty pleas were not knowingly, intelligently, and voluntarily entered because the trial court notified Appellant at the plea hearing he would register as a Tier II sex offender, but at sentencing ordered him to register as a Tier III sex offender.

{¶7} Guilty pleas are governed by Crim. R. 11. The notice requirements for non-constitutional rights incorporated in Rule 11 are subject to a substantial compliance analysis, which looks to the totality of the circumstances to ascertain whether the defendant subjectively understood the implications of his plea and the rights he waived. *See, e.g., State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990); *State v. Stewart*, 51 Ohio St.2d 86, 93, 364 N.E.2d 1163 (1977).. A defendant must show prejudice before

a plea will be vacated for a trial court's error involving Crim. R. 11(C) procedure when no constitutional aspects of the plea colloquy are at issue. *State v. Hendershot*, 5th Dist. Muskingum No. CT2016-0061, 2017-Ohio-8112, 98 N.E.3d 1139, ¶ 31.

Crim. R. 11(C)(2) provides:

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶8} The sex offender classification and corresponding registration and notification requirements imposed under R.C. Chapter 2950 on a defendant convicted of a sexually oriented offense are part of the penalty for the conviction, and therefore Crim.R. 11(C)(2)(a) requires a trial court to determine the defendant understands these requirements before accepting a plea of guilty or no-contest to a sexually oriented offense. *State v. Wallace*, 10th Dist. Franklin No. 17AP-818, 2019-Ohio-1005, 132 N.E.3d 1317, ¶ 18.

{¶9} In the instant case, during the Crim. R. 11 plea colloquy, the trial court informed Appellant he would be required to register as a Tier II sex offender. However, at sentencing, the trial court informed Appellant he would be required to register as a Tier III sex offender:

> THE COURT: This form indicates you will automatically be classified as a Tier 3 offender, *just as you are already*, which means you will have a lifetime in-person verification of your address to the sheriff in the county in which you reside every 90 days.

{¶10} Sent. Tr. 13 (emphasis added).

{¶11} We find the trial court erred in advising Appellant at the plea hearing he would be required to register as a Tier II offender, when Appellant was in actuality required to register as a Tier III offender. However, we find Appellant has not demonstrated prejudice from the trial court's error. As noted in the transcript cited above, Appellant was subject to registration as a Tier III offender based on a prior offense, prior to entering his

plea in this case. Because Appellant was already subject to the registration requirements of a Tier III offender, we find the error in the plea colloquy did not render his plea in the instant case unknowing, involuntary, or unintelligent.

{¶12} The first assignment of error is overruled.

II., IV.

{¶13} In his second assignment of error, Appellant argues the trial court erred in sentencing Appellant pursuant to the Reagan Tokes Act because it is unconstitutional. In his fourth assignment of error, Appellant argues counsel was ineffective for failing to raise the constitutionality of the Reagan Tokes Act in the trial court.

{¶14} For the reasons stated in this Court's opinion in *State v. Householder*, 5th Dist. Muskingum No. CT2021-0026, 2022-Ohio-1542, we find the Reagan Tokes act is constitutional, and counsel was therefore not ineffective in failing to raise the issue in the trial court.

{¶15} Appellant's second and fourth assignments of error are overruled.

III.

{¶16} In his third assignment of error, Appellant argues the trial court erred in ordering his sentences to run consecutively.

{¶17} R.C. 2929.14(C)(4) provides:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison 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 section 2929.16, 2929.17, or 2929.18 of the Revised Code, 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.

{¶18} The trial court must make the R.C. 2929.14(C)(4) findings at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings, nor must it recite certain talismanic words or phrases in order to be considered to have complied. *State v. Smith*, 10th Dist. Franklin No. 18AP-525, 2019-Ohio-5199, ¶ 34, citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, syllabus.

{¶19} Appellant concedes the trial court made the requisite findings, but argues the record failed to demonstrate the seriousness of Appellant's offenses. He argues he demonstrated remorse, accepted responsibility for his actions, had served in the military, and had successfully completed probation for his prior offense.

{¶20} The trial court stated at the sentencing hearing:

> As part of the presentence investigation, I received the investigation regards to your prior record. That record goes back to 1997 from an incident that happened in 1996 involving the rape of a child is the title on the charge. And that was a stepdaughter to the woman who you were married to at the time. Contained within all that was a report that was provided to the Court there and here that as prepared in December of 1996 by a forensic specialist out of Virginia by a Isaac Van Patten, P-A-T-T-E-N, on evaluating you and going through what he detailed as your problems. Surprisingly, most of what he had to say in there is what you did in this case as well as that case back there….
>
> I have the letters, as I indicated. And both the other letters indicate that – there's one from one of her brothers, says my sister will suffer from these actions for the rest of her life. And that is true, given her age when this started. Not like a very, very young child, though, they may have the opportunity in her lifetime to put away what happened and move on. This is something that she will bear it the rest of their life.

> There's no excuse for it, and the fact that you were so brazen as to tell the person who did the PSI that you two will get together when you get out just indicates to me that, no matter what happens, if you get an opportunity again, you're going to take advantage of it because that's your nature, as it was described back in 1996.

{¶21} Sent. Tr. 14-16.

{¶22} We find based on the PSI report and impact letters from the victim and from her family members, as discussed by the trial court at sentencing and quoted above, support the trial court's finding consecutive sentences are necessary to protect the public and punish Appellant, consecutive sentences are not disproportionate to the seriousness of Appellant's conduct and the danger he poses to the public, the offenses were committed as part of one or more courses of conduct, and the harm caused by the offenses is so great or unusual that no single prison term on any of the offenses committed as part of the course of conduct accurately reflects the seriousness of Appellant's conduct. The third assignment of error is overruled.

{¶23} The judgment of the Muskingum County Common Pleas Court is affirmed.

By: Hoffman, J.
Gwin, P.J. and
Baldwin, J. concur