[Cite as *State v. Bolden*, 2022-Ohio-2271.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, : No. 110841

v. :

CURTIS BOLDEN, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED AND REMANDED
RELEASED AND JOURNALIZED: June 30, 2022

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-20-653651-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Melissa Riley, Assistant Prosecuting Attorney, *for appellee.*

Joseph V. Pagano, *for appellant.*

KATHLEEN ANN KEOUGH, P.J.:

{¶ 1} Defendant-appellant, Curtis Bolden, appeals his sentence following his guilty pleas to numerous sexually oriented offenses involving a minor child. For the reasons that follow, we affirm but remand to the trial court to issue a new

sentencing entry, nunc pro tunc, to conform with the sentence imposed during the sentencing hearing.

{¶ 2} In January 2021, Bolden was named in a 21-count indictment charging him with Count 1, gross sexual imposition, a third-degree felony violation of R.C. 2907.05(A)(4); Counts 2-5, illegal use of a minor in nudity-oriented material or performance, a violation of R.C. 2907.323(A)(1), felonies of the second degree; Counts 6-15, pandering sexually oriented matter involving a minor, in violation of R.C. 2907.322(A)(2); felonies of the second degree; Counts 16-20, pandering sexually oriented matter involving a minor, fourth-degree felony violations of R.C. 2907.322(A)(5); and Count 21, possessing criminal tools, in violation of R.C. 2923.24(A), a felony of the fifth degree. Count 21 also requested forfeiture of personal property. The charges arose after the National Center for Missing and Exploited Children ("NCMEC") receiving a cyber tip from Google identifying a user of their services engaged in activity relating to online exploitation of children. NCMEC alerted the Ohio Internet Crimes Against Children Task Force ("ICAC"), which executed a search warrant at Bolden's residence where child pornography was discovered on his Google account.

{¶ 3} In July 2021, Bolden pleaded guilty to Count 1 — gross sexual imposition; Counts 2, 3, 4, and 5 — illegal use of a minor in nudity-oriented material or performance; Counts 6, 7, 8, 9, 10, and 20 — pandering sexually oriented matter involving a minor; and Count 21 — possessing criminal tools, including the forfeiture specification. The state nolled the remaining charges.

{¶ 4} The trial court continued the matter for sentencing for the purpose of obtaining a presentence-investigation report. Bolden's counsel submitted a sentencing memorandum with supporting documentation, including a letter from Bolden's employer, two expert evaluations, and verification of Bolden's attendance of sexual addiction therapy meetings. At the sentencing hearing, the trial court heard statements from the prosecutor, the mother of one of the victims, the ICAC special investigator and case agent, Bolden's counsel, and Bolden.

{¶ 5} Without objection, the trial court sentenced Bolden pursuant S.B. 201, the Reagan Tokes Law. At the sentencing hearing, the court imposed a 30-month sentence on Count 1; three years on each of Counts 2-5; four years on each of Counts 6-10; and 11 months on each of Counts 20 and 21. The court ordered that Counts 1, 20, and 21 be served concurrently but consecutive to the concurrent sentences imposed in Counts 2-10. Accordingly, the trial court ordered Bolden to serve an aggregate minimum term of six and one-half years but up to the maximum term under the Reagan Tokes Law of eight and one-half years. The court's sentencing entry does not reflect the trial court's accurate oral pronouncement of the maximum term under the Reagan Tokes Law. (Tr. 81.)

{¶ 6} Bolden now appeals, raising three assignments of error, each challenging his sentence.

I. Sentence

{¶ 7} In his first assignment of error, Bolden contends that his sentence is contrary to law and violates his right to due process because: (1) the trial court failed

to consider mitigating factors prior to imposing the sentence; (2) the trial court failed to consider the statutory factors in R.C. 2929.11 and 2929.12; and (3) the trial court's consecutive-sentence findings under R.C. 2929.14(C)(4) are unsupported by the record. Additionally, he asserts that the trial court failed to include the maximum term under the Reagan Tokes Law in the judgment entry of conviction.

A. Mitigating Factors; R.C. 2929.11 and 2929.12

{¶ 8} We review felony sentences under the standard set forth in R.C. 2953.08(G)(2). *See State v. Smith*, 8th Dist. Cuyahoga No. 108793, 2020-Ohio-3666, ¶ 18; *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.2d 1231, ¶ 21. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce, or otherwise modify a sentence or vacate a sentence and remand for resentencing if it clearly and convincingly finds that the record does not support the sentencing court's findings as required under the law, or the sentence is otherwise contrary to law. A sentence is contrary to law if it falls outside the statutory range for the offense or if the sentencing court fails to consider the purposes and principles of sentencing set forth in R.C. 2929.11 and the sentencing factors in R.C. 2929.12. *State v. Pawlak*, 8th Dist. Cuyahoga No. 103444, 2016-Ohio-5926, ¶ 58.

{¶ 9} Bolden has not raised any argument that his sentence falls outside the statutory range for the offenses. He contends, however, that despite the presumption that the trial court considered the factors found in R.C. 2929.11 and 2929.12, the record does not support such consideration.

{¶ 10} Under R.C. 2929.11(A), the overriding purposes of felony sentencing are to (1) protect the public from future crime by the offender and others, (2) punish the offender, and (3) promote the effective rehabilitation of the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. A sentence imposed for a felony should be reasonably calculated to achieve the three overriding purposes of felony sentencing, and must be "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." R.C. 2929.11(B).

{¶ 11} R.C. 2929.12 gives the sentencing court discretion to determine the best way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11 when imposing a sentence. *State v. Switzer*, 8th Dist. Cuyahoga No. 102175, 2015-Ohio-2954, ¶ 10. In exercising this discretion, the sentencing court must consider a nonexhaustive list of factors relating to the seriousness of the offender's conduct and the likelihood of recidivism. The factors relevant to this appeal are the harm suffered by the victim, including whether the harm was exacerbated by the of age of the victim; whether the defendant shows any remorse; and "any other relevant factors." R.C. 2929.12(B)(1)-(2) and (D)(5).

{¶ 12} The court must also consider any factors "indicating that the offender's conduct is less serious than conduct normally constituting the offense." Relevant to the appeal, Bolden contends that the factors relevant to this appeal are

whether the offender did not cause or expect to cause physical harm to any person or property; and whether there are substantial grounds to mitigate his conduct, although the grounds are not a defense. R.C. 2929.12(C)(3)-(4).

{¶ 13} Finally, the court must consider any factors indicating that the offender is less likely to commit future crimes. R.C. 2929.12(E). Bolden contends that all the factors listed apply to him — has not been adjudicated a delinquent child; other than an OVI offense, he has not pleaded guilty to a criminal offense; prior to these offenses, he has led a law-abiding life; and he shows genuine remorse. He further contends that based on the opinions of his mental health experts, he is unlikely to reoffend if permitted to continue his treatment and therapies addressing his addictions. Accordingly, Bolden claims that the factor that "the offense was committed under circumstances not likely to recur" also weighs in his favor.

{¶ 14} Bolden concludes that his sentence is clearly and convincingly contrary to law because the R.C. 2929.12(C) factors, when considered and weighed, demonstrate that his sentence is both inconsistent with sentences imposed on similarly situated offenders and disproportionate to his crimes and thus, contrary to the overriding purposes and principles of sentencing.

{¶ 15} Our review of the record reveals that Bolden did not present any evidence to the trial court of sentences imposed on other offenders who pleaded guilty to multiple counts of sex offenses involving minor children. Additionally, Bolden has not directed this court to any cases demonstrating that his sentence is inconsistent with similarly situated offenders or disproportionate to his crimes.

Rather, Bolden focuses on the mitigating factors in this case, the factors found in R.C. 2929.12, and relevant case law to support his argument that a reduced sentence is warranted.

{¶ 16} In discussing the statutory factors, Bolden maintains that the only applicable "more serious" factor is the harm suffered by the victim. He also contends that most of the "less serious factors" apply and that all of the factors indicating that he is less likely to recidivate are present. Bolden further directs this court to the expert reports prepared as mitigation for sentencing opining that Bolden's undiagnosed and untreated conditions of sex addiction and drug and alcohol abuse contributed to his conduct. Accordingly, he maintains that there were substantial grounds to mitigate his conduct, although not a defense. We disagree and find that the trial court fulfilled its duties in its consideration of the relevant factors prior to imposing sentence and that Bolden's sentence is neither disproportionate to the seriousness of his crimes nor inconsistent with those imposed on similarly situated offenders.

{¶ 17} We initially note that while the quantity of factors may weigh in a defendant's favor, it is ultimately the sentencing judge who has the "discretion to determine the weight to assign a particular statutory factor." *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000).

{¶ 18} The trial court stated on the record that it considered all the sentencing factors found in R.C. Chapter 2929, and in its sentencing journal entry that it considered all the required factors of the law, and that prison is consistent

with the purpose of R.C. 2929.11. A trial court is not required to make factual findings under R.C. 2929.11 or 2929.12. *State v. Kronenberg*, 8th Dist. Cuyahoga No. 101403, 2015-Ohio-1020, ¶ 27. Indeed, consideration of the factors is presumed unless the defendant affirmatively demonstrates otherwise. *State v. Seith*, 8th Dist. Cuyahoga No. 104510, 2016-Ohio-8302, ¶ 12. This court has consistently found that a trial court's statement that it considered the required factors, without more, is sufficient to fulfill its obligations under R.C. 2929.11 and 2929.12. *Kronenberg* at ¶ 27.

{¶ 19} Additionally, the court noted that it considered all of the relevant information when imposing the sentence:

> Mr. Bolden, in imposing the following sentences, I have taken into account everything that I know about you and about this case, and that includes the following: First of all, the presentence report and the sentencing memorandum that I've already mentioned; second, the statements today by all the participants: the prosecutor, * * * your lawyer, and you; third, I'm considering the sentencing laws in Chapter 2929 of the Ohio Revised Code.

(Tr. 74.)

{¶ 20} Moreover, when discussing the evaluations conducted by the two experts who diagnosed Bolden and opined that his diagnosis and untreated addictions drove his behavior, the trial court noted:

> So Mr. Bolden's * * * compulsion to engage in this conduct was analogized to drugs and by implication alcohol. The difficulty I have with that is there is nothing wrong — well, certainly with alcohol, we know that's legal, but an argument can be made that there's nothing wrong with the use of drugs in a more or less careful and controlled setting. They are illegal, though, because abuse of them can result in injury to others, not to mention the person [themselves]. But there's

> nothing in human nature that should repel you from using alcohol or drugs. Maybe you shouldn't abuse them. That's a separate issue. But the conduct here is inexplicable. It should be, when engaged in by the ordinary person, repulsive, repugnant, repellant. And that, to me, is where the analogy fails. If there is something about Mr. Bolden's moral core that doesn't recognize that what he was doing was wrong, how is any amount of so-called rehabilitation going to help?
>
> Having said that, Mr. Bolden, I hope that you don't do this again. I mean, obviously, I think we all hope that. I think [the child's mother] said she hopes you don't do it again. For the good of all of us, not to mention yourself. But it's tough to swallow that this was a thing that Mr. Bolden didn't know was utterly depraved when he did it, and did it again and again and again when we're talking about the publication of the images, and the three-hour duration — well, I don't want to say any more. I'm sure [the child's mother] knows what I'm talking about.

(Tr. 81-82.)

{¶ 21} Based on our review of the record, Bolden seemingly downplays the seriousness of his conduct and the harm that he caused to the victims in this matter. He was discovered with 371 images of known child pornography uploaded onto his Google account. Most disturbingly, however, is that one of the files contained "unfamiliar or newly-produced" images of a two and one-half year-old child who was nude. It was discovered that Bolden took these images of the child while she was sleeping and recorded himself engaging in sexual activity with the minor child. These violations occurred when Bolden was visiting a friend who was babysitting the child. According to the record, Bolden had access to the child for three hours and engaged in this conduct while other adults were present in the household. As ICAC Investigator Megan Arena told the trial court during sentencing: "[Bolden] is not only a man who saw images and videos depicting prepubescent minor females being

sexually abused and exploited, but also took it a step further and actually victimized an innocent child himself." (Tr. 52.)

{¶ 22} The trial court noted during sentencing, "[m]ost of the cases like this that I have had before tend to involve people viewing, publishing, recirculating images that have kind of been out on the worldwide web for a long time. In this case, though, we're talking about original creations." (Tr. 53.) Accordingly, the trial court engaged in a proportionality review when determining Bolden's sentence.

{¶ 23} Based on the record before this court, we do not clearly and convincingly find that Bolden's nonmaximum individual sentences for one count of gross sexual imposition (30 months); four counts of illegal use of a minor in nudity-oriented material or performance (3 years); five second-degree felony counts of pandering sexually oriented matter involving a minor (4 years); one fourth-degree felony count of pandering sexually oriented matter involving a minor (11 months), and one count possessing criminal tools (11 months), are contrary to law.

B. Consecutive Sentences

{¶ 24} Bolden also argues that the trial court's imposition of consecutive sentences was contrary to law because the record does not support the trial court's findings pursuant to R.C. 2929.14(C)(4).

{¶ 25} "In Ohio, sentences are presumed to run concurrent to one another unless the trial court makes the required findings under R.C. 2929.14(C)(4)." *State v. Gohagan*, 8th Dist. Cuyahoga No. 107948, 2019-Ohio-4070, ¶ 28. Trial courts must therefore engage in the three-tier analysis of R.C. 2929.14(C)(4) before

imposing consecutive sentences. *Id.* First, the trial court must find that "consecutive sentences are necessary to protect the public from future crime or to punish the offender." Second, the trial court must find that "[consecutive] sentences [are] not disproportionate to the seriousness of the [offender's] conduct and to the danger the offender poses to the public." *Id.* Third, the trial court must find that at least one of the following applies:

> (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.

Id. The failure to make the above findings renders the imposition of consecutive sentences contrary to law. *Gohagan* at ¶ 29.

{¶ 26} A defendant can challenge consecutive sentences on appeal in two ways. First, the defendant can argue that consecutive sentences are contrary to law because the court failed to make the necessary findings required by R.C. 2929.14(C)(4). *See* R.C. 2953.08(G)(2)(b); *State v. Nia*, 2014-Ohio-2527, 15 N.E.3d 892, ¶ 16 (8th Dist.). Second, the defendant can argue that the record does not

support the court's findings made pursuant to R.C. 2929.14(C)(4). *See* R.C. 2953.08(G)(2)(a); *Nia* at ¶ 16.

{¶ 27} In this case, the trial court made the following consecutive-sentence findings under R.C. 2929.14(C)(4):

> First of all, consecutive sentences are ordered here because I find that consecutive service is necessary to protect the public from future crime and to punish you as well. I also find that consecutive sentences are not disproportionate to the seriousness of your conduct and to the danger that you present to the public. I further find that at least two or more of these multiple offenses were committed as part of one or more courses of conduct, and that the harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of these courses of conduct adequately reflects the seriousness of your conduct.

(Tr. 77-78.)

{¶ 28} Bolden does not dispute that the trial court made the requisite consecutive-sentence findings under R.C. 2929.14(C)(4). He contends, however, that the stated findings are not supported by any factual basis or the record. Specifically, Bolden contends that "the finding that the sentence is not disproportionate is not supported by any kind of comparison to any other similar crimes committed by any similarly situated offenders," and the court did not explain why concurrent sentences were insufficient.

{¶ 29} We initially note that Bolden's "disproportionate" argument is more akin to those made in challenging the findings made under R.C. 2929.11, not the

imposition of consecutive sentences under R.C. 2929.14.[1] In deciding whether to impose consecutive sentences, the trial court must find that consecutive sentences are not disproportionate to the seriousness of the *offender's conduct* and to the danger he poses to the public. Accordingly, the appropriate focus when reviewing consecutive sentences is on the seriousness of Bolden's conduct and the danger he poses, not those who have committed similar offenses.

{¶ 30} To support his argument that the trial court must explain its reasons for imposing consecutive sentences, Bolden relies on *State v. Metz*, 2019-Ohio-4054, 146 N.E.3d 1190, ¶ 97 (8th Dist.). To the contrary, in *Metz* we explained that a reviewing court must determine whether the record clearly and convincingly supports the consecutive sentences. *Id.* at ¶ 97, 110. A trial court "has no obligation to state reasons to support its findings," but the necessary findings "must be found in the record and [] incorporated into the sentencing entry." *State v. Bonnell* 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37.

{¶ 31} As the Ohio Supreme Court has explained, when reviewing consecutive sentences, "R.C. 2953.08(G)(2)(a) directs the appellate court 'to review the record, including the findings underlying the sentence' and to modify or vacate the sentence 'if it clearly and convincingly finds * * * [t]hat the record does not support the sentencing court's findings under'" R.C. 2929.14(C)(4). *Bonnell* at ¶ 28, quoting R.C. 2953.08(G)(2)(a). We cannot make such a finding in this case.

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[1] Under R.C. 2929.11(B), the sentence must be commensurate 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*.

{¶ 32} As discussed, Bolden's conduct not only involved viewing child pornography but also creating additional pornography to continue a cycle of abuse and harm. He perpetuated additional harm to all of his victims depicted in the 371 downloaded images of existing pornography by viewing those images. Additionally, he created new child pornography by recording himself engaging in sexual activity with a nude, sleeping, minor child. He uploaded his creations to his Google Account, potentially exposing this unsuspecting child victim to further and future harm. Accordingly, the court's consecutive-sentence findings are supported by the record.

{¶ 33} Bolden further challenges the imposition of consecutive sentences by contending that the trial court disregarded expert evaluations that opined that his diagnosis and untreated addictions drove his behaviors, and not his inability to understand the wrongfulness of his actions. Finally, he asserts that a consecutive sentence is excessive because the trial court did not give any consideration to the fact that he was a first offender, his untreated conditions, or that he was remorseful. These challenges were addressed in this court's analysis of the trial court's consideration of the factors under R.C. 2929.11 and 2929.12. Nevertheless, the record reflects that the trial court stated that it took "into account everything that I know about you and about this case, and that includes the following: First of all, the presentence report and the sentencing memorandum that I've already mentioned; second, the statements today by all the participants: the prosecutor, * * * your lawyer, and you." (Tr. 74.)

{¶ 34} Therefore, while Bolden believes that his conduct did not warrant consecutive sentences, this court finds that the trial court complied with the mandates of R.C. 2929.14(C)(4); the trial court's imposition of consecutive sentences is not contrary to law and is supported by the record.

C. Imposition of Indefinite Sentence

{¶ 35} Bolden also contends that although the trial court advised him during the sentencing hearing of the possible maximum term under the Reagan Tokes Law, the sentencing journal entry does not reflect this advisement. He further maintains that the court's sentence does not clearly set forth what the indefinite term is as required under R.C. 2929.144. Our review of the sentencing hearing transcript reveals that Bolden was properly advised but the sentence was not completely journalized.

{¶ 36} This a clerical mistake that may be corrected by the court through a nunc pro tunc entry to reflect what actually occurred in open court. *See, e.g., State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718 (nunc pro tunc proper when defendant properly advised of postrelease control at sentencing but the advisement was not included in sentencing journal entry); *Bonnell* at ¶ 30-31 (nunc pro tunc proper when trial court made the consecutive-sentencing findings but the findings were not included in the sentencing journal entry).

{¶ 37} Accordingly, we overrule Bolden's first assignment of error challenging his entire sentence but remand the matter to the trial court to issue a new sentencing journal entry, nun pro tunc, to accurately reflect what occurred

during sentencing, specifically that the trial sentenced Bolden to an aggregate minimum term of six years and six months, up to the maximum term under S.B. 201 of eight and one-half years.

II. Reagan Tokes Law

{¶ 38} In his second and third assignments of error, Bolden contends that he received ineffective assistance of counsel when counsel failed to object to the trial court imposing a sentence under the Reagan Tokes Law because the law is unconstitutional. He asserts the law is unconstitutional because it violates the separation-of-powers doctrine and his rights to a trial by jury and due process.

{¶ 39} Based on the authority established by this district's en banc holding in *State v. Delvallie*, 2022-Ohio-470, 185 N.E.3d 536 (8th Dist.), the challenges Bolden advances against the constitutional validity of the Reagan Tokes Law have been overruled. *Id.* at ¶ 17-54. Therefore, even if counsel properly objected or challenged the constitutional validity of the Reagan Tokes Law, Bolden's sentence pursuant to the Reagan Tokes Law is not a violation of his constitutional rights, and no prejudice can be demonstrated to warrant a finding that he was deprived of effective assistance of counsel. Accordingly, his second and third assignments of error are overruled.

{¶ 40} Judgment affirmed; case remanded for the trial court to issue a corrected sentencing entry, nunc pro tunc, to accurately reflect the trial court's sentence imposed regarding the application of the Reagan Tokes Law.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for it to issue a corrected sentencing entry, nunc pro tunc, and for execution of sentence.

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

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KATHLEEN ANN KEOUGH, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
MARY J. BOYLE, J., CONCUR