[Cite as *State v. Collins*, 2004-Ohio-5855.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 78596

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
CHARLES COLLINS	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT
OF DECISION: November 4, 2004

CHARACTER OF PROCEEDING: Criminal appeal from
Common Pleas Court
Case No. CR-368019

JUDGMENT: VACATED AND REMANDED
FOR RESENTENCING

DATE OF JOURNALIZATION: _____

APPEARANCES:

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ANTHONY O. CALABRESE, JR., J.:

{¶ 1} In *State v. Collins*, Cuyahoga County Court of Common Pleas Case No. CR-368019, Charles Collins ("Collins") pled guilty to five counts of rape. This court affirmed his conviction in *State v. Collins* (July 5, 2001), Cuyahoga App. No. 78596. On February 20, 2004, Collins, through counsel, filed an application for reopening, which this court granted on June 1, 2004. Pursuant to that opinion, Collins now raises the following assignments of error:

{¶ 2} "I. The trial court committed reversible error by failing to make the findings required to impose consecutive sentences.

{¶ 3} "II. The trial court committed reversible error by failing to make the findings required to impose a greater-than-minimum term of imprisonment on an offender who has never before served a term of imprisonment.

{¶ 4} "III. The trial court failed to make the findings required to ensure that appellant's sentence is consistent with sentences imposed for similar crimes committed by similar offenders.

{¶ 5} "IV. The sentence imposed by the trial court deprived appellant of his right to a jury trial, guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 10, of the Constitution of the State of Ohio.

{¶ 6} "V. The sexual predator adjudication must be vacated and set aside because the trial court denied appellant due process of law and violated Ohio law by failing to comply with the

requirements of Ohio Rev. Code Section 2950.09, including, but not limited to, (i) providing the appellant with notice of the date, time and location of the hearing; (ii) conducting a full evidentiary hearing; (iii) affording appellant an opportunity to testify and present evidence on his behalf; (iv) affording appellant an opportunity to confront and cross-examine the witnesses against him; (v) affording appellant the right to counsel; and (vi) by requiring clear and convincing proof that the offender is a sexual predator. Fourteenth Amendment, Constitution of the United States; Article I, Section 16, Constitution of the State of Ohio.

{¶ 7} "VI. The trial court erred in finding that appellant was a sexual predator by clear and convincing evidence."

{¶ 8} For purposes of clarity, we will address appellant's first and second assignments of error together.

{¶ 9} According to the record of trial, the court stated the following during appellant's sentencing:

{¶ 10} "This is a most unusual case. It's an absolutely horrendous crime. It's also your first offense with the law. It's puzzling how this could be here today.

{¶ 11} "It's the judgment of this court that, in count two, you be sentenced to the Lorain Correctional Institution for a period of eight years; count three, you be sentenced to the Lorain Correctional Institute for a period of eight years, to run consecutive to count one; count four, you be sentenced to the Lorain Correctional Institute for a period of eight years, to run consecutive to counts two and three; count five, you be sentenced to the Lorain Correctional Facility for a period of eight years, to run concurrent to counts two, three and four; count six, you be sentenced to the Lorain Correctional Institute for a period of eight years, to run concurrent to counts two, three, four and five.

{¶ 12} "You will pay costs and any restitution."

{¶ 13} The Supreme Court of Ohio directs that a trial court sentencing an offender to his first imprisonment must specify on the record that one or both reasons allowed by R.C. 2929.14(B) justify

a sentence longer than the minimum. *State v. Edmonson*, 86 Ohio St.3d 324, 1999-Ohio-110.

{¶ 14} R.C. 2929.14(B) provides in part, "[i]f 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."

{¶ 15} According to 2929.14(A), the prison term for a felony of the second degree is two, three, four, five, six, seven, or eight years in prison. In this matter, appellant has never before served a prison term. However, the court failed to state any sanctioned reasons why it diverted from the minimum sentence.

{¶ 16} The next issue is whether the court erred by imposing consecutive sentences. "Pursuant to 2929.14(E)(4), the trial court may impose consecutive prison terms for convictions of multiple offenses upon the making of certain findings enumerated in the statute. Moreover, under R.C. 2929.19(B)(2)(c), if the trial court imposes consecutive sentences, it must make a finding on the record that gives its reason for imposing consecutive sentences." *State v. Cardona* (Dec. 16, 1999), Cuyahoga App. No. 75556; see, also, *State v. Albert* (1997), 124 Ohio App.3d 225; *State v. Beck* (Mar. 30, 2000), Cuyahoga App. No. 75193; *State v. Maynard* (Mar. 16, 2000), Cuyahoga App. No. 75122; *State v. Hawkins* (Aug. 19, 1999), Cuyahoga App. No. 74678; *State v. Lockhart* (Sept. 16, 1999), Cuyahoga App. No. 74113; *State v. Lesher* (July 29, 1999), Cuyahoga App. No. 74469.

{¶ 17} According to R.C. 2929.14(B)(4):

{¶ 18} "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 dis-proportionate 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:

{¶ 19} "(a) The offender committed 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.

{¶ 20} "(b) The harm caused by the multiple offenses was so great that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct.

{¶ 21} "(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

{¶ 22} As the State concedes, the record and the journal entry indicate that the trial court imposed consecutive sentences without making any of the requisite findings pursuant to R.C. 2929.14(E)(4). Accordingly, appellant's first two assignments of error are sustained, thereby rendering the remaining assignments of error as to sentencing moot.

{¶ 23} In the last two assignments of error, appellant claims that the sexual predator adjudication must be set aside because the trial court failed to comply with the requirements of R.C. 2950.09. We agree.

{¶ 24} R.C. 2950.09(B)(1) provides in part:

{¶ 25} "The judge who is to impose sentence on a person who is convicted of or pleads guilty to a sexually oriented offense shall conduct a hearing to determine whether the offender is a sexual predator *."**

{¶ 26} Although the journal entry indicates that a sexual predator hearing was held, as conceded by the State, the trial court failed to conduct a separate sexual predator hearing as required by R.C. 2950.09. Therefore, appellant's fifth and sixth assignments of error are sustained.

{¶ 27} Accordingly, appellant's sexual predator adjudication and sentence are vacated.

{¶ 28} This case is vacated and remanded to the lower court for further proceedings consistent with this opinion.

{¶ 29} It is ordered that appellant recover of appellee his costs herein taxed.

{¶ 30} It is ordered that a special mandate issue from this court to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

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ANTHONY O. CALABRESE, JR.

ANNE L. KILBANE, P.J., and

COLLEEN CONWAY COONEY, J., CONCUR.