[Cite as *State v. Singleton*, 2010-Ohio-5612.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94877

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JASON SINGLETON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-394116

BEFORE: Celebrezze, J., Gallagher, A.J., and McMonagle, J.

RELEASED AND JOURNALIZED: November 18, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Jason Singleton, appeals from his resentencing on March 10, 2010, where the trial court imposed the same sentence appellant had originally received in 2000. Relying on the Supreme Court's decision in *Oregon v. Ice*, (2009), 555 U.S. __, 129 S.Ct. 711, 172 L.Ed.2d 517, for the proposition that the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, has been overruled, appellant argues that the trial court failed to make necessary findings in order to impose consecutive sentences. Appellant also argues that the trial court sentenced him to allied offenses of similar import and that the trial court

relied on improper facts in determining his sentence. After a thorough review of the record and case law, we affirm appellant's sentence.

{¶ 2} This case has a long history that has previously been set forth by this court in *State v. Singleton*, Cuyahoga App. No. 90042, 2008-Ohio-2351 ("*Singleton I*"), and *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958 ("*Singleton II*"). In 2000, appellant pled guilty to and was convicted of rape and felonious assault. He was sentenced to consecutive terms of incarceration of ten and seven years, respectively. Appellant was not properly informed of postrelease control at sentencing. In 2006, he filed a motion to withdraw his pleas based on the argument that he had not been informed of the appropriate period of postrelease control.

{¶ 3} Appellant was resentenced on March 10, 2010 at a de novo sentencing hearing. The trial court found that his convictions were not allied offenses of similar import and should not merge. This appeal stems from this resentencing where the trial court imposed the same terms of incarceration appellant had received at the conclusion of his 2000 trial.

Law and Analysis

Allied Offenses

{¶ 4} In his first assignment of error, appellant argues that "[t]he trial court erred in sentencing appellant in contravention of R.C. 2941.25(A)."

{¶ 5} R.C. 2941.25, Ohio's attempt to guard against multiple punishments for a single criminal offense, states that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one[,]" but "[w]here the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 6} It is well established that a two-step analysis is required to determine if two offenses are allied offenses of similar import. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶14. "'In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.' (Emphasis sic.)"

Id. at ¶14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

{¶ 7} Rape, as defined in R.C. 2907.02(A)(2), prohibits one from "engag[ing] in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶ 8} Felonious assault, as defined in R.C. 2903.11(A), sets forth that "[n]o person shall knowingly do either of the following: (1) Cause serious physical harm to another or to another's unborn; (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶ 9} A comparison of the elements of each crime indicates that they are not allied offenses. Rape does not require serious physical harm or a deadly weapon or dangerous ordnance; nor does felonious assault require sexual conduct.

{¶ 10} This court, recognizing that the crime of rape may result in serious physical harm, nonetheless held that rape and felonious assault are not allied offenses. *State v. McCullen*, Cuyahoga App. No. 90214, 2008-Ohio-3081, ¶18. This is consistent with the First, Second, Third, Fourth, Fifth, and Tenth Districts. *State v. Gallagher*, Morrow App. No. CA941, 2003-Ohio-3581, ¶74. See, also, *State v. Haynes*, Richland App. No. 2009 CA 0031, 2010-Ohio-944, ¶29 (finding felonious assault and rape are not

allied offenses because "[t]he 'force' element of rape need not rise to the level of 'serious physical harm' as required for the commission of felonious assault."); *State v. Butts*, Summit App. No. 24517, 2009-Ohio-6430, ¶35 (finding "[t]he commission of a rape does not necessarily result in serious physical harm and does not necessarily involve a deadly weapon, while the commission of felonious assault does not necessarily result in sexual conduct.").

{¶ 11} Even if the offenses did align, as appellant argues, the acts here were committed with a separate animus. Appellant broke into the victim's home and hit her in the head with a blunt object or the handle of a knife while she slept. After she woke, appellant raped her. The act of hitting the victim in the head was not related to the rape; it occurred while the victim slept. Appellant then waited for the victim to regain consciousness before raping her.

{¶ 12} Appellant's first assignment of error is overruled.

Consideration of Improper Sentencing Factors

{¶ 13} Appellant next argues that the trial court heard and considered improper testimony and evidence introduced at the de novo sentencing hearing.

{¶ 14} The trial court was required to conduct a de novo sentencing hearing in accordance with R.C. 2929.19. This section states in part that

"[t]he court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony and before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded pursuant to section 2953.07 or 2953.08 of the Revised Code. At the hearing, the offender, the prosecuting attorney, the victim or the victim's representative in accordance with section 2930.14 of the Revised Code, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case. The court shall inform the offender of the verdict of the jury or finding of the court and ask the offender whether the offender has anything to say as to why sentence should not be imposed upon the offender." The sentencing court is limited in its consideration to "the record, any information presented at the hearing by any person pursuant to division (A) of this section, and, if one was prepared, the presentence investigation report made pursuant to section 2951.03 of the Revised Code or Criminal Rule 32.2, and any victim impact statement made pursuant to section 2947.051 of the Revised Code." R.C. 2929.19(B)(1).

{¶ 15} "The purpose of a victim impact statement is to apprise the court of any economic loss, physical injury, change in the victim's personal welfare or familial relationships, and any psychological or other impact experienced

by the victim as a result of the offense." *State v. Harris*, Montgomery App. No. 20841, 2005-Ohio-6835, ¶6, citing R.C. 2947.051(B).

{¶ 16} In the present case, appellant did not object to any statement made during the resentencing hearing, nor did he request a continuance to address alleged inaccuracies. Therefore, this issue will be reviewed under a plain error standard. Id. at ¶7.

{¶ 17} To constitute plain error, the error must be obvious on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16. Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100, 661 N.E.2d 1043. Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Phillips*, 74 Ohio St.3d 72, 83, 1995-Ohio-171, 656 N.E.2d 643.

{¶ 18} Appellant claims that after the victim's fiancé made several inflammatory statements, including a comment asserting that appellant's purpose was to kill the victim, he was not afforded an opportunity to respond. First, we must note that appellant was given an opportunity to respond to all the information presented by the state, the victim, and her fiancé.

Appellant indicated he had nothing to say. Also, the trial court did not reference this statement in its sentencing decision. Therefore, this aspect of appellant's argument fails.

{¶ 19} Appellant also relies on *State v. Edwards*, Cuyahoga App. No. 89181, 2007-Ohio-6068, claiming the trial court improperly relied on uncharged conduct in crafting his sentence. Appellant and the state presented appellant's prison record from 2006 to the date of trial. Appellant claimed it showed that he was rehabilitated and posed no further threat to society and that he should be released. The state presented appellant's disciplinary history and argued that appellant had not been rehabilitated. Appellant disputed a 2009 allegation that he forced another inmate to perform oral sex on him, which was contained in the report.

{¶ 20} In *Edwards,* this court found that past allegations of child sexual abuse that were barred from prosecution by the statute of limitations could serve as a consideration in sentencing so long as they were not the sole basis for the sentence. Id at ¶7.

{¶ 21} Here, as in *Edwards*, the trial court did not rely solely on the allegation in appellant's prison records. The trial court noted that "much has been made of the conduct of the defendant since being placed in the institution. And, again, this is a good thing. However, that's not all totally true, as [the state] pointed out, * * * there was an incident in the institution

of forced sexual conduct with respect to the defendant. And that is as recent as January of 2009. So that belies some of the claims of rehabilitation within the prison system." The court also noted that it "did not see an overall expression of remorse or sorrow for what [appellant has] done to [the victim] and how you've affected her life. I saw you more concerned with your own life * * *."

{¶ 22} This does not support appellant's claim that the trial court relied on improper uncharged allegations as the basis for this sentence. Appellant could have requested a continuance to dispute the allegation, but he did not do so. It was not plain error for the trial court to view this allegation as refuting appellant's claims of rehabilitation based on the prison records before the court. Therefore, appellant's second assignment of error is overruled.

Consecutive Sentences

{¶ 23} Appellant finally argues that "[t]he trial court erred in sentencing appellant to consecutive terms without making findings and providing reasons for doing so."

{¶ 24} Appellant argues that, contrary to the holding in *Foster*, the trial court was required to make findings of facts necessary to impose consecutive sentences. He asserts that the Supreme Court's decision in *Oregon v. Ice*, abrogates the holding in *Foster* and leads to the conclusion that Ohio's

sentencing statutes requiring the trial court to make findings in order to impose maximum or consecutive sentences are not constitutionally invalid.

{¶ 25} The Ohio Supreme Court has held that "trial courts have full discretion

{¶ 26} to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster* at paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus.

{¶ 27} This court has rejected similar arguments stating, "[we] will continue to follow [our] own precedent, along with the precedent set forth by the other Ohio districts [sic] courts of appeals, which have determined that, until the Ohio Supreme Court states otherwise, *Foster* remains binding." *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564, ¶25. See, also, *State v. Billi*, Cuyahoga App. No. 93190, 2010-Ohio-2345, ¶14.

{¶ 28} The sentence imposed was within statutory guidelines where the maximum sentence appellant could have received was 18 years in prison.

{¶ 29} Also, when imposing the maximum sentence for rape, the trial court noted, "this is the most serious form of the offense. It does certainly justify the maximum sentence of ten years for that offense.

{¶ 30} "The facts are just egregious. I can't even [—] in my tenure with respect to many rape cases, this is one of the worst ones I have seen. So it is certainly this Court's view that this is the worst form of the offense."

{¶ 31} The court further noted, "these counts will run consecutive to one another because the Court does find that the consecutive sentences are necessary to protect the public and do not demean the seriousness of the offenses; that the worst form of the offenses were committed; and that the criminal history as [the state] described on the record does require consecutive sentences. Also I can find that the harm caused in this case was great or unusual; and that consecutive sentences are necessary to fulfill the principles and purposes of felony sentencing, and they are not disproportionate to the seriousness of the conduct and the danger to the public." The court then reimposed appellant's 17-year sentence.

{¶ 32} Even though not required, the trial court did set forth its reasoning for imposing maximum and consecutive sentences. This sentence is within the statutory range and will not be disturbed by this court.

Conclusion

{¶ 33} The trial court did enunciate its reasons for imposing maximum and consecutive sentences, and they did not include the complained of victim impact statement or recent allegation of misconduct. These claimed errors do not amount to plain error. Appellant also failed to convince this court and

the trial court that rape and felonious assault are allied offenses given the case law holding the opposite. The sentence imposed was the same as that received in 2000. It is not contrary to law, and therefore, will not be disturbed.

Judgment affirmed.

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 appeal is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, A.J., and
CHRISTINE T. McMONAGLE, J., CONCUR