

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ARNOLD J. PERRY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0063

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2016 CR 1045

BEFORE:

Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:

Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Wesley A. Johnston, P.O. Box 6041, Youngstown, Ohio 44501, for Defendant-Appellant.

Dated: June 26, 2019

WAITE, P.J.

{¶1} Appellant Arnold J. Perry appeals his 27 year sentence entered June 12, 2018 in the Mahoning County Common Pleas Court. Appellant received this prison term following his convictions on two counts of rape and one count of sexual battery. Based on the record in this matter, Appellant's sentence is not clearly and convincingly contrary to law and the record supports the sentence. Appellant's assignment is without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} The underlying facts in the record are limited. Appellant was apparently homeless for a time and the victims' mother allowed him to stay in her home. Appellant subsequently repeatedly raped the mother's 14 year old twins and another 12 year old daughter. All three children subsequently became pregnant at approximately the same time. One of the 14 year old children's pregnancy was detected early and the pregnancy was terminated. Because the other two children's pregnancies were not detected until later in gestation, these children gave birth. The infants reside in the home with the victims and the victims' mother who acts as the primary caretaker.

{¶3} Appellant was indicted on September 15, 2016 on two charges of rape, felonies in the first degree, and two counts of unlawful sexual conduct with a minor, felonies in the third degree. On February 16, 2017, an amended superseding indictment was filed charging Appellant with two counts of rape, in violation of R.C. 2907.02(A)(2), (B), felonies in the first degree; three counts of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A), (B)(3), felonies in the third degree; one count of sexual battery, in violation of R.C. 2907.03(A)(3), (B), felonies in the third degree; and one count of rape, in violation of R.C. 2907.02(A)(1)(b), (B), felony/life.

{¶14} On November 14, 2017, Appellant pleaded guilty to two counts of rape, each a felony in the first degree; and one count of sexual battery, a third degree felony. The state dismissed the remaining charges.

{¶15} A sentencing hearing was held on February 8, 2018. Appellant was sentenced to eleven years of incarceration for count one, rape, in violation of R.C. 2907.02(A)(2), (B); a felony in the first degree; five years for count five, sexual battery, in violation of R.C. 2907.03(A)(3), (B), a felony of the third degree; and eleven years on count seven, rape, in violation of R.C. 2907.02(A)(2), (B), a felony of the first degree.

{¶16} Defendant filed a delayed notice of appeal on June 4, 2018. App.R. 5(A) allows a criminal defendant to file a motion for leave to appeal after the expiration of the 30-day period provided by App.R. 4(A). Appellant contended that he was not timely notified of his right to appeal and his right to counsel on appeal. While his sentencing entry indicates that Appellant was notified of his appellate rights under R.C. 2953.08, there is no mention of the right to counsel or of his Crim.R. 32(B) appellate rights. Thus, we concluded on July 12, 2018, that the delay in filing this appeal was reasonable.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT TO CONSECUTIVE PRISON TERMS WHEN CLEARLY AND CONVINCINGLY THE RECORD FAILED TO SUPPORT ITS FINDINGS.

{¶17} Appellant contends the trial court erred in sentencing him to consecutive sentences on his convictions.

{¶18} Pursuant to the Ohio Supreme Court's holding in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, "an appellate court may vacate or

modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court’s findings under relevant statutes or that the sentence is otherwise contrary to law.” *Id.*

{¶9} Clear and convincing evidence “is that measure or degree of proof which is more than a mere ‘preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Id.* at ¶ 22, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph one of the syllabus.

{¶10} Appellant can challenge the imposition of consecutive sentencing in two ways. First, he may contend the sentence is contrary to law because the trial court failed to make the necessary findings required pursuant to R.C. 2929.14(C)(4). See R.C. 2953.08(G)(2)(b). Otherwise, he may assert the record does not support the findings made under R.C. 2929.14(C)(4). See R.C. 2953.08(G)(2)(a); *State v. Collins*, 7th Dist. Noble No. 15 NO 0429, 2017-Ohio-1264, ¶ 6.

{¶11} Appellant’s challenge to the trial court’s imposition of consecutive sentences alleges the record does not support the consecutive sentence findings. Appellant claims that during the sentencing hearing his counsel informed the court that Appellant suffered from an illness as a child which caused a brain injury, but the trial court failed to consider Appellant’s claims. Appellant also states that he expressed remorse and accepted responsibility for his conduct, which the trial court also ignored.

{¶12} R.C. 2929.14(C)(4) sets forth the necessary findings required for the imposition of consecutive sentences:

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.

{¶13} When a trial court imposes consecutive sentences it must not only make the R.C. 2929.14(C)(4) findings at the sentencing hearing, but must also incorporate those findings into the judgment entry of sentence. *Bonnell*, 2014-Ohio-3177, at ¶ 29.

{¶14} In the instant matter, the trial court stated at the sentencing hearing:

The court finds that because of the multiple offenses -- and the court finds that they should be run consecutive, it is necessary to protect the public from any future crime, and that they are not disproportionate to the seriousness of the offense and the danger the offender poses to the public.

The court finds that these were made in a course of conduct, and that the harm that was created is so great that no single prison term would adequately reflect the seriousness of the offense.

(2/8/18 Tr., p. 14.)

{¶15} The sentencing court did not recite the language of the statute verbatim, however, the court's finding that his crimes "were made in a course of conduct" and that "the harm that was created is so great that no single prison term would adequately reflect the seriousness of the offense" satisfies the second part of R.C. 2929.14(C)(4), that Appellant posed a danger to the public. The Ohio Supreme Court has stated that "a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Bonnell*, at ¶ 29. Thus, no "magic" or "talismanic" words are required in order to validly impose consecutive sentences. *State v. Bellard*, 7th Dist. Mahoning No. 12 MA 97, 2013-Ohio-2956, ¶ 17. Reviewing the statements made by the trial court at the sentencing hearing, it is clear that the court engaged in the correct analysis and complied with the mandates of R.C. 2929.14(C)(4) and *Bonnell*.

{¶16} Again, the trial court is also required to include these findings in the judgment entry of sentence. Here, the trial court stated:

The Court Finds [sic] that consecutive sentences are warranted pursuant to 2924.14(C)(4)(a) [sic] in that:

Consecutive service is necessary to protect the public from future crime or to punish the offender and that the consecutive sentences are not disproportionate to the seriousness of the offenders [sic] conduct and to the danger the offender poses to the public, and the court finds the following:

(b) at least two 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 offenders [sic] conduct.

(Emphasis deleted.)

(6/12/18 J.E.)

{¶17} Although the citation to the statute contains a scrivener's error and is off by one digit, it is clear from the language that the trial court considered the correct statutory factors before imposing consecutive sentences. Appellant's assignment of error is without merit and is overruled.

Conclusion

{¶18} The consecutive sentences imposed in the instant matter are not clearly and convincingly contrary to law and the record supports the sentence. Accordingly, Appellant's assignment of error is without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.