[Cite as *State v. Herron*, 2023-Ohio-4744.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DARRELL L. HERRON II,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 MA 0011

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2020 CR 00649

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:
Affirmed.

Atty. Gina DeGenova, Mahoning County Prosecutor and *Atty. Edward A. Czopur*, Assistant Prosecutor, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Rhys B. Cartwright-Jones, 42 North Phelps Street, Youngstown, Ohio 44503-1130, for Defendant-Appellant

Dated: December 21, 2023

WAITE, J.

{¶1} Appellant Darrell L. Herron II appeals a December 29, 2022 Mahoning County Common Pleas Court judgment entry convicting him of a single count of sexual battery. In this matter involving an *Alford* guilty plea, Appellant challenges only his sentence. He argues that the trial court imposed a maximum sentence based solely on a charge dismissed through the plea agreement. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} Because there was a plea agreement in this matter, there are few factual details in the record. However, the record does show that Appellant checked into several area hotels with his daughter over a somewhat long period of time. During this period, his daughter was sixteen years old. Appellant chose hotels that had a Jacuzzi, except for one occasion where a Jacuzzi was not available. Law enforcement was able to confirm these reservations, the check-in by the pair, and the check outs.

{¶3} While at the hotels, Appellant took his daughter into the Jacuzzi with him. Then he would engage in sexual intercourse, oral sex, and digital penetration with his daughter.

{¶4} On October 22, 2020, Appellant was indicted on one count of rape, a felony of the first degree in violation of R.C. 2907.02(A)(2), (B); one count of sexual battery, a felony of the third degree in violation of R.C. 2907.03(A)(5), (B); two counts of gross sexual imposition, felonies of the fourth degree in violation of R.C. 2907.05(A)(1), (C)(1); and two counts of disseminating matter harmful to juveniles, felonies of the fifth degree in violation of R.C. 2907.31(A)(1), (F).

{¶5} On October 11, 2022, Appellant entered a guilty plea pursuant to *Alford* to a single count of sexual battery, a felony of the third degree. *See North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The state agreed to dismiss the remaining charges. At the hearing, while inquiring about the agreement, the court expressed surprise that the serious misconduct charged, containing a rape allegation involving Appellant's own daughter, and containing a total of six charged offenses, had been reduced to a mere single count of sexual battery. The state explained that it was not certain, based on the available evidence, the rape charge could be proven, as the prosecutor suggested that the young victim was wavering in her willingness to cooperate. Appellant's counsel stated that he believed he could successfully defend against the charges, however, Appellant wished to spare his daughter the trauma of a trial.

{¶6} While the parties had reached agreement about Appellant's charges, they disagreed significantly as to his sentence. The state sought the maximum sentence, five years of incarceration. Appellant's counsel asked that he serve only a community control sanction. The state contended that the form of the offense necessitated a severe sentence. Defense counsel urged that Appellant was entitled to leniency because he was sparing his daughter the distress of a trial and that a lifetime sex offender classification was sufficient punishment for Appellant's crimes.

{¶7} At the sentencing hearing, the court specifically said it grappled with imposing the sentence due to the inherent difficulties in sentencing a person who maintains their innocence pursuant to *Alford*. Ultimately the court concluded that the evidence in the record provided by the parties in order to satisfy the elements of an *Alford* plea supported the credibility of the victim. On December 29, 2022, the court imposed

the maximum sentence of five years of incarceration, with credit for one day served. The sentence carried a tier three sex offender classification. It is from this entry that Appellant timely appeals.

ASSIGNMENT OF ERROR

> The trial Court erred in issuing Herron a maximum sentence for sexual battery.

{¶8} Appellant's argument in support of his contention that the trial court erred in sentencing him to the maximum sentence in this matter is somewhat misleading. While Appellant cites to certain caselaw standing for the proposition that a court should not consider information related to a dismissed charge when sentencing a defendant, his actual argument is that a court cannot base its sentence *solely* on a dismissed charge. Appellant argues that the trial court sentenced him, not on the count to which he pleaded guilty, but to the counts that were dismissed. He contends the court's sentence is predicated on the facts of his rape charge, which is a felony of the first degree, not the facts involving a charge of sexual battery, a felony of the third degree. In support of this argument, Appellant posits that the court considered only its belief that he raped his daughter in determining his sentence, and disregarded all other pertinent information, such as his statement to the court that he was innocent of all wrongdoing but pleaded guilty to save his daughter from the harm that a full blown trial would undoubtedly cause.

{¶9} "[A]n 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." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1.

{¶10} "A sentence is considered to be clearly and convincingly contrary to law if it falls outside of the statutory range for the particular degree of offense; if the trial court failed to properly consider the purposes and principles of felony sentencing as enumerated in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12; or if the trial court orders consecutive sentences and does not make the necessary consecutive sentence findings." *State v. Pendland*, 7th Dist. Mahoning No. 19 MA 0088, 2021-Ohio-1313, ¶ 41; citing *State v. Collins*, 7th Dist. Noble No. 15 NO 0429, 2017-Ohio-1264, ¶ 9; *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 30.

{¶11} The Ohio Supreme Court has clarified the standard of review for felony sentences that was previously announced in *Marcum*. *State v. Jones*, 163 Ohio St.3d 242, 2020-Ohio-6729, 169 N.E.3d 649. The *Jones* Court did not overrule *Marcum*, but clarified dicta to reflect that "[n]othing in R.C. 2953.08(G)(2) permits an appellate court to independently weigh the evidence in the record and substitute its judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and 2929.12." *Jones, supra*, at ¶ 42.

{¶12} "A court reviewing a criminal sentence is required by R.C. 2953.08(F) to review the entire trial-court record, including any oral or written statements and presentence-investigation reports. R.C. 2953.08(F)(1) through (4)." *State v. Bryant*, 168 Ohio St.3d 250, 2022-Ohio-1878, 198 N.E.3d 68, reconsideration denied, 167 Ohio St.3d 1484, 2022-Ohio-2765, 192 N.E.3d 515.

{¶13} "Nothing about [the *Jones*] holding should be construed as prohibiting appellate review of a sentence when the claim is that the sentence was imposed based on impermissible considerations-i.e., considerations that fall outside those that are contained in R.C. 2929.11 and 2929.12." *Bryant*, at ¶22. "Accordingly, when a trial court imposes a sentence based on factors or considerations that are extraneous to those that are permitted by R.C. 2929.11 and 2929.12, that sentence is contrary to law." *Id.*

{¶14} As this Court has previously recognized, a trial court has a great deal of discretion in what it considers when determining a sentence:

> It is well established that sentencing courts may consider arrests and even prior allegations that did not result in conviction before imposing sentence. *State v. Hutton*, 53 Ohio St.3d 36, 43, 559 N.E.2d 432 (1990). A sentencing court may take into consideration the circumstances of the offense for which the defendant has been indicted, even if the negotiated plea is at odds with the indicted elements. *State v. Starkey*, 7th Dist. No. 06 MA 110, 2007-Ohio-6702, ¶ 17. In sentencing, the court can review the indictment, bill of particulars, victim's statements in court, trial testimony if a trial was held, and any presentence investigation report. See R.C. 2929.19(B)(1). * * *
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> * * * Moreover, "(c)ourts have consistently held that evidence of other crimes, including crimes that never result in criminal charges being pursued, or criminal charges that are dismissed as a result of a plea bargain, may be considered at sentencing." *Starkey* at ¶ 17.

State v. Patton, 7th Dist. Mahoning No. 19 MA 0033, 2020-Ohio-937, ¶ 7.

{¶15} Again, while Appellant does not appear to argue that the court cannot take the more serious offenses into consideration, he contends that the court's statements at sentencing reveal the court only considered the rape charge and sentenced Appellant as though he had actually been convicted of rape. A review of the court's discussion, however, does not support Appellant's contention:

> The Court: So when I look at it in that context, and I've seen it before, I've heard it testified about, then I look at objective things that would point me in a direction as to whether it's just an allegation or whether there's more evidence to it. The statements by the victim were detailing numerous hotel visits with the defendant and the activities that occurred, primarily hot tubs, except on one occasion where there was a shower that was noted. The Austintown Police did their due diligence and pulled the records of a few different hotels and verified 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, at least 16 reservations made by [Appellant] noting that one time either a Jacuzzi-style tub was not available or something, and they had to get a room with a shower, which corroborated the statements made by the victim in this matter. Why [Appellant] would get numerous hotel rooms locally when he had residences speaks to a concealing of a behavior that he did not perhaps want others to know about or that he wanted to keep as private as he could. That's the conclusion I draw.
>
> So I do believe the victim. I know that evaluations are made by lawyers, what will a jury do? And it's almost impossible to know, even on the best

> day. I know that this plea agreement was the result of three lawyers not wanting to leave the fate of a victim who might not be validated in her pain and a defendant who might have to go to prison for a long, long, long time, and this was the resolution, and I accepted it. I did that with my eyes wide open, though, with the understanding that I would get into as much as I could to determine what I thought occurred and what I thought, therefore, the penalty should be.
>
> I think counsel actually has done a very good job of limiting the exposure of the defendant knowing me, knowing how I feel about these types of offenses. In one of the cases that involved a defendant with their daughter, I think I gave the gentleman 90 years or something like that. This is as bad as it gets to me.

(Sentencing Hrg., pp. 20-21.)

{¶16} Appellant conflates the court's consideration of the evidence into a conclusion that Appellant had committed rape, and believes the sole basis for his sentence was the court's decision that he was guilty of rape. This is not a reasonable reading of the court's statement as a whole. The court did not solely consider the rape allegations, but undertook an examination of all of the evidence before it as a whole when deciding this sentence. All of the charges stemmed from the same conduct: Appellant, who had a local residence, took his sixteen-year-old daughter to several area hotels and committed various sexual acts. As similar facts formed the basis for all of the counts charged within the indictment, the court correctly reviewed them in its determination.

{¶17} The court never concluded that the elements of rape were met, nor did it analyze or even mention these elements. The court admittedly found sentencing a defendant who entered an *Alford* plea and maintained his innocence troubling. The court discussed the difficulty in sentencing such a defendant without determining whether the allegations in the dismissed charged are merely that and whether there is some evidence showing that misconduct had occurred. We note that a court cannot accept an *Alford* plea without some showing of evidence in the record indicating the defendant's guilt.

{¶18} To the extent that the court considered some of the charges dismissed by the plea, Ohio law clearly permits a trial court to consider a plethora of prior conduct, including, but not limited to, "criminal charges being pursued, or criminal charges that are dismissed as a result of a plea bargain." *Patton* at ¶ 8.

{¶19} Importantly, the court was very clear that in sentencing Appellant it expressly considered the PSI, letters submitted for the court's consideration, and the police report attached to the PSI. The court explained that it weighed the substance of that evidence when considering the applicable sentencing factors and laws. The court stated the "[m]ore information that the court has, I think the more complete its decision is, whatever that decision is. My job is to take everything in and review it and to weigh the purposes and principles of sentencing." (Sentencing Hrg., p. 18.)

{¶20} While Appellant argues he should receive greater leniency for "sparing" his daughter a trial, the court expressed that in allowing this plea, Appellant appeared to be getting a certain amount of leniency. Appellant's initial charges contained allegations of very serious offenses that carried many years of imprisonment should Appellant have proceeded to trial and been found guilty. The court determined there was evidence to

support a finding of guilt as to the charge of sexual battery, at the very least. The court sentenced Appellant to the maximum prison sentence for that charge based on several factors, which are supported in this record, including Appellant's stated reason for entering his plea. There is no support in this record that the trial court erred in that regard. Accordingly, Appellant's sole assignment of error is without merit and is overruled.

Conclusion

{¶21} Appellant argues that the court imposed a maximum sentence based solely on a charge dismissed by means of his plea agreement. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Robb, J. concurs.

Hanni, J. concurs.

For the reasons stated in the Opinion rendered herein, Appellant's 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 to be taxed against the Appellant.

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.