[Cite as *State v. Johnson*, 2010-Ohio-2214.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93004

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LARRY JOHNSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515301

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

RELEASED: May 20, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Larry Johnson ("appellant"), appeals the sentence imposed by the trial court. After reviewing appellant's arguments, the facts, and the relevant case law, we affirm.

{¶ 2} On August 23, 2008, appellant entered the home of another individual and was discovered digitally penetrating an 11-year old girl with cerebral palsy. He was arrested and indicted in a five-count indictment on one count of aggravated burglary in violation of R.C. 2911.11(A)(1); one count of rape in violation of R.C. 2907.02(A)(1)(b) with a furthermore specification that he purposely compelled the victim to submit by force or threat of force; one count of rape in violation of R.C. 2907.02(A)(1)(c); one count of rape in violation of R.C. 2907.02(A)(2); and one count of kidnapping in violation of R.C. 2905.01(A)(4) with a sexual motivation specification. All counts were first-degree felonies.

{¶ 3} As a result of a plea deal, appellant pled guilty to aggravated burglary and rape in violation of R.C. 2907.02(A)(1)(b), which was amended to delete the furthermore specification delineated above. The remaining counts were dismissed.

{¶ 4} Appellant was sentenced to ten years in prison for aggravated robbery and life imprisonment with the possibility of parole after ten years

for rape. The terms of incarceration were to run consecutively to one another for an aggregate sentence of life in prison with parole eligibility after 20 years. Appellant was labeled a Tier III sex offender pursuant to the Adam Walsh Act ("AWA").[1] This appeal followed.

{¶ 5} Appellant presents three assignments of error for our review.[2] He argues that the trial court erred in imposing consecutive sentences and that the sentence imposed constitutes cruel and unusual punishment. He also argues that the trial court misapplied the elements of the Adam Walsh Act in violation of his constitutional rights.

Law and Analysis

{¶ 6} Appellant first argues that the trial court improperly sentenced him to consecutive, rather than concurrent sentences. He relies on the fact that he had no prior sex offenses on his record and the degree of the crime to argue that the sentence imposed was unreasonable. He specifically argues that "[w]hile the crime [he] pled to is reprehensible to the public and reasonable minds, the fact that [he] was given a consecutive sentence to another crime with a 'life tail' is arbitrary in nature, and contrary to the principles of fair play and substantial justice."

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[1]Ohio's version of the Adam Walsh Act can be located at R.C. Chapter 2950.

[2]Appellant's assignments of error are set forth in appendix A of this opinion.

{¶ 7} In 2006, the Ohio Supreme Court released its opinion in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, wherein it severed and excised former R.C. 2929.14(E)(4) and former R.C. 2929.41(A). *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328, ¶18. In light of this decision, Ohio courts are left with no statute that creates a presumption of concurrent sentences. Id.[3] Post-*Foster,* appellate courts are to apply a two-step analysis in determining the validity of a sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶4. "First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." Id.

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[3]The Court in *Bates* recognized that R.C. 5145.01 did set forth a presumption for concurrent sentences when the consecutive sentence provisions of R.C. 2929.14 and 2929.41 do not apply. *Bates* at ¶16, fn. 2. The Court declined to address the issue because neither Bates nor the state raised it. Id. This court has previously held, however, that R.C. 5145.01's presumption in favor of concurrent sentences is no longer applicable. *State v. Shie*, Cuyahoga App. No. 83632, 2009-Ohio-5828, ¶11. See, also, *Shie v. Smith* (Feb. 13, 2009), N.D. Ohio No. 1:08 CV 194, stating that "the *Bates* court noted that one consequence of the *Blakely* decision, which spawned the *Foster* decision, is that it 'altered Ohio's sentencing dynamics' and effectively reinstated the common-law presumption in favor of consecutive sentences. It is hard to imagine, after making these unambiguous proclamations with full knowledge of the existence of §5145.01, that the Ohio Supreme Court would now find that a statute that addresses the governance of state prisons trumps the Ohio sentencing statutes, creates a liberty interest in concurrent sentences and forms a basis for overturning, in less than three years, its decisions in *Foster* and *Bates*." (Internal citations omitted.) Id. at 5.

{¶ 8} Appellant does not argue that the trial court failed to comply with any applicable sentencing statute. The trial court indicated, both at the sentencing hearing and in its journal entry, that it considered the factors of R.C. 2929.11 and 2929.12 when sentencing appellant. Appellant simply relies on various factors to argue that the imposition of consecutive sentences in this case was unjust. He specifically argues that he has no history as a sex offender, the alleged rape involved only digital penetration, and his rape conviction already carried a "life tail." He relies on these facts to argue that the trial court acted capriciously in imposing consecutive sentences.

{¶ 9} Although the arguments presented by appellant are not compelling, we find the application of Ohio's sentencing statutes to a conviction of rape under R.C. 2907.02(A)(1)(b) ("child rape provision") to be problematic. R.C. 2907.02(B) provides that rape is ordinarily a first-degree felony. The statute then provides that "[e]xcept as otherwise provided in this division, notwithstanding sections 2929.11 to 2929.14 of the Revised Code, an offender under [the child rape provision] shall be sentenced to a prison term or a term of life imprisonment pursuant to section 2971.03 of the Revised Code." A review of R.C. 2971.03 leaves us to decide whether an offender can be sentenced under R.C. 2971.03 even though he did not plead guilty to and was not found guilty of a sexually violent predator specification.

{¶ 10} Upon first glance, R.C. 2971.03 does not appear to apply to appellant since it is entitled "Sentence for offender convicted of violent sex

offense and sexually violent predator specification; sentence for offender convicted of designated homicide, assault, or kidnapping offense and both a sexual motivation and sexually violent predator specification." The indictment did not contain a sexually violent predator specification, and this was appellant's first conviction for a sex offense.

{¶ 11} The statute's terms, however, are less clear. R.C. 2971.03(A) expressly applies to "a person who is convicted of or pleads guilty to a violent sex offense and who is also convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment[.]" R.C. 2971.03(B), however, makes no mention of a sexually violent predator specification and specifically applies to a person convicted under the child rape provision. "'The canon expressio unius est exclusio alterius tells us that the express inclusion of one thing implies the exclusion of the other.'" *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶57, quoting *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176, ¶24. Pursuant to this maxim, we find that because the application of R.C. 2971.03(A) is expressly limited to those individuals who are convicted of or plead guilty to a sexually violent predator specification, and no such limitation is set forth in R.C. 2971.03(B), such a specification is not required for the application of R.C. 2971.03(B).

{¶ 12} The statute relating to indictments and sexually violent predator specifications provides some guidance on this issue. R.C. 2941.148(A)(1) provides that R.C. Chapter 2971, the portion of the Revised Code relating to

sexually violent predators, is inapplicable unless certain circumstances are met. R.C. 2941.148(A)(1)(a) permits application of the sexually violent predator provisions if the individual "is charged with a violent sex offense, and the indictment, count in the indictment, or information charging the violent sex offense also includes a specification that the offender is a sexually violent predator * * *."

{¶ 13} Noticeably, R.C. 2941.148(A)(1)(b) pertains to individuals convicted of child rape committed on or after January 2, 2007 and makes no mention of a sexually violent predator specification. As such, R.C. 2941.148(A)(1)(b) seemingly implies that R.C. Chapter 2971 applies to someone who pleads guilty to rape in violation of the child rape provision regardless of whether they also plead guilty to a sexually violent predator specification.[4]

{¶ 14} While no cases directly address the issue at hand, *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, thoroughly analyzes R.C. Chapter 2971 and the purpose it was intended to serve. The Court in *Smith* noted that "R.C. Chapter 2971 enhances the sentence of an offender who is convicted of or pleads guilty to a sexually violent offense and who is also convicted of or pleads guilty to a sexually-violent-predator specification." Id. at

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[4]Troublesome to our analysis is the fact that appellant does not meet the definition of a sexually violent predator. R.C. 2971.01(H)(1) defines a sexually violent predator as "a person who, on or after January 1, 1997, commits a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses." The factors to be considered in determining whether an individual is likely to commit future sex offenses are contained in R.C. 2971.01(H)(2). A review of this list is unnecessary, but we note that none of the factors appear to apply to appellant.

¶8. The *Smith* Court held that it "decline[d] to interpret R.C. 2971.01(H)(1) to permit the state to subject first-time offenders of certain sexual offenses to such draconian sentence enhancements without an unambiguous mandate from the General Assembly. To do so would conflict with the criminal-sentencing guidelines." Id. at ¶29.

{¶ 15} Although the holding in *Smith* would lead one to believe that the sentence in this case was contrary to law, *Smith* was decided in 2004 — well before R.C. 2907.02(B) and 2971.03 were amended.[5] The provisions now require an individual who violates the child rape provision to face a minimum prison term of life in prison with the possibility of parole after 10 years.

{¶ 16} Appellant pled guilty to aggravated burglary and rape in violation of the child rape provision. Aggravated burglary is a first degree felony punishable by three to ten years in prison. R.C. 2929.11(B); R.C. 2929.14(A)(1). Appellant was sentenced to ten years for this count, which was to run consecutively to the ten years to life in prison for his violation of the child rape provision. Because this sentence was within the permissible statutory range, we do not find that appellant's sentence is contrary to law.

{¶ 17} Having found that appellant's conviction is not contrary to law, we must now determine whether the trial court abused its discretion in imposing

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[5]The relevant sentencing provisions became part of R.C. 2907.02(B) and 2971.03 pursuant to Am. Sub. S.B. 260, 2006 Ohio Laws 172, which became effective on July 2, 2007.

consecutive sentences. *Kalish*, supra. See, also, *State v. Clay*, Cuyahoga App. No. 89763, 2008-Ohio-1415. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 18} When imposing consecutive sentences, the trial court discussed the facts of appellant's case. For example, the victim was an 11-year-old girl who suffered from cerebral palsy and was wheelchair bound. The court also considered appellant's extensive criminal background, despite the fact that this was his first conviction for a sex offense. After reviewing the transcript in its entirety and considering the reprehensibility of appellant's conduct, we cannot find that the trial judge abused her discretion in sentencing appellant to consecutive sentences. Appellant's first assignment of error is overruled.

Cruel and Unusual Punishment

{¶ 19} Appellant next argues that the sentence imposed by the trial court constitutes cruel and unusual punishment in violation of the Ohio and United States Constitutions. "'[A] sentence does not violate the constitutional prohibition against cruel and unusual punishment if it is not so greatly disproportionate to the offense as to "shock the sense of justice of the community."'" *State v. Barnes* (2000), 136 Ohio App.3d 430, 434, 736 N.E.2d 958, quoting *State v. Chaffin* (1972), 30 Ohio St.2d 13, 17, 282 N.E.2d 46; *State v. O'Shannon* (1988), 44 Ohio App.3d 197, 542 N.E.2d 693. As an appellate court, we must give deference to the General Assembly because they have broad authority in determining the punishments for crimes. *Solem v. Helm* (1983), 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637. We must also give deference to the trial court's discretion in sentencing convicted defendants. Id. We must ultimately determine whether the punishment violates the Ohio or United States Constitutions. *Barnes* at 434.

{¶ 20} In conducting the proportionality calculus discussed in *Solem*, courts "should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem* at 292. Although each of these factors should be considered, no one factor is dispositive. Id. at 290.

{¶ 21} In *Harmelin v. Michigan* (1991), 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836, the United States Supreme Court held that this proportionality

analysis need not be conducted in every case; however, if the initial comparison of the crime and the sentence does not give rise to an inference of gross disproportionality, the sentence need not be compared to other sentences. Id. at 1005. "In light of *Harmelin*, the state of the law is that if a comparison of 'the gravity of the offense and the harshness of the penalty' under the first element of *Solem* does not give rise to an inference of gross disproportionality, then the 'comparative analysis with other sentences,' pursuant to the second and third elements of the *Solem* [analysis], 'need not be performed.'" *Barnes* at 436. See, also, *State v. Edwards* (Apr. 20, 1999), Cuyahoga App. No. 73480.

{¶ 22} Appellant argues that his sentence for his rape conviction could not pass the *Solem* test. He specifically argues that his sentence carries a "life tail" and is not "very far off" from a sentence that would be imposed in a murder case. We find this argument unpersuasive. Appellant pled guilty to rape in violation of the child rape provision, which prohibits an accused from engaging in sexual activity with an individual under the age of 13. The General Assembly set forth various factors to be considered when sentencing an individual pursuant to this statute. See, e.g., R.C. 2971.03. A review of R.C. 2971.03 makes it clear that the General Assembly considered the severity of the crime when determining the appropriate sentencing range for a conviction under the child rape provision.

{¶ 23} Appellant pled guilty after being accused of entering the home of the victim, T.R., an 11-year-old girl suffering from cerebral palsy, and digitally penetrating her while she was sleeping on the couch. Appellant claimed that he

had mistaken T.R. for her older sister, but this has no bearing on our analysis here. Rape is a serious offense that should be met by a serious punishment. This court has considered the punishment imposed for a violation of the child rape provision in light of a cruel and unusual punishment analysis. See *State v. Warren*, 168 Ohio App.3d 288, 2006-Ohio-4104, 859 N.E.2d 998.[6] This court held that, "[o]utside the death penalty context, the Eighth Amendment does not require strict proportionality between crime and sentence but forbids only extreme sentences that are grossly disproportionate to the crime. We cannot say that a sentence of life imprisonment (with possibility of parole) is grossly disproportionate to the crime of rape of a child under the age of 13." (Internal citations omitted.) Id. at ¶29.

{¶ 24} Appellant was sentenced to ten years to life in prison for violating the child rape provision. We cannot find, pursuant to the *Solem* analysis and the decision in *Warren*, that this constitutes cruel and unusual punishment. Appellant's second assignment of error is overruled.

Adam Walsh Act

{¶ 25} In his third and final assignment of error, appellant argues that the trial court violated his due process and equal protection rights when labeling him a Tier III sex offender pursuant to the AWA. Relying on the dissenting opinion in

[6] We recognize that *Warren* was decided before the amendment of R.C. 2903.02(B) and 2971.03, but the defendant received a life sentence in that case, as appellant did in this case.

Sears v. State, Clermont App. No. CA2008-07-068, 2009-Ohio-3541, appellant argues that the trial court was first required to label him a "sex offender" or a "child-victim offender" and was then required to classify him pursuant to Ohio's three-tier classification system. Appellant then argues that, as it relates to him, the AWA is not rationally related to a legitimate state interest. We find these arguments unpersuasive.

{¶ 26} *Sears* involved a constitutional challenge to the retroactive application of the AWA. Id. at ¶7. It is true, however, that the dissent in *Sears* includes the following statement: "The offender who commits a sex offense is first found to be either a 'sex offender' or a 'child-victim offender.' Then, depending solely upon the sex offense committed, the offender is classified as Tier I, Tier II, or Tier III without any additional assessment of risk." Id. at ¶29. Since this statement was mere dicta in a dissenting opinion in a non-controlling district, we do not find it dispositive in this case.

{¶ 27} Appellant also relies on R.C. 2929.19(B)(4)(a) to support his argument that the trial court was first required to label him a "sex offender" or a "child-victim offender" before imposing his tier classification under the AWA. While this statute does provide that "[t]he court shall include in the offender's sentence a statement that the offender is a tier III sex offender/child-victim offender, and the court shall comply with the requirements of Section 2950.03 of the Revised Code[,]" we are not persuaded by appellant's strict interpretation of this statute.

{¶ 28} When sentencing appellant, the trial judge informed him that he would be labeled a Tier III offender and would be subject to a registration requirement every 90 days for the remainder of his life. Although the trial judge did not use the specific language "sex offender" or "child-victim offender," we find that inconsequential to our analysis. The trial judge notified appellant that, should he ever be released from incarceration, his Tier III sex offender status would subject him to a mandatory reporting requirement. This information, in our opinion, was sufficient to put appellant on notice of his sex offender status under the AWA.

{¶ 29} Appellant also challenges the constitutionality of the AWA claiming it violates the Due Process and Equal Protection Clauses of the Ohio and United States Constitutions. "Our inquiry begins with a fundamental understanding: a statute enacted in Ohio is presumed to be constitutional. That presumption applies to amended R.C. Chapter 2950 and remains unless [appellant] establishes, beyond reasonable doubt, that the statute is unconstitutional." (Internal citations omitted.) *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, ¶12.

{¶ 30} Appellant argues that the AWA infringes upon his fundamental liberty interest in living wherever he pleases. We note from the outset that appellant lacks standing to make this argument because he remains incarcerated and has never been ousted from his place of residence due to the AWA's residency restrictions. See *State v. Peak*, Cuyahoga App. No. 90255, 2008-Ohio-3448

("Peak lacks standing to challenge the constitutionality of R.C. 2950.031. * * * Peak never claimed that he resided within 1,000 feet of a school, or that he was forced to move from an area because of his proximity to a school."); *State v. Dobson*, Miami App. No. 2008 CA 43, 2010-Ohio-279, ¶15 ("Because Dobson has not alleged, much less established, that he has been deprived of his property rights, he lacks standing to challenge the residency restrictions."); *Hungerford v. State*, Lake App. No. 2008-L-073, 2009-Ohio-6997, ¶85 ("[W]e point out that appellant has failed to allege, let alone establish, he has experienced the actual deprivation of his rights by virtue of his classification. * * * Appellant does not even proclaim any intention of moving within 1,000 feet of the proscribed areas. As a result, appellant has failed to provide any evidence indicating he suffered an injury in fact or an actual deprivation of his liberty or property."); *State v. Gilfallan*, Franklin App. No. 08AP-317, 2009-Ohio-1104, ¶117 ("This issue is not ripe for review because appellant is incarcerated. * * * Appellant lacks standing to raise constitutional challenges to S.B. 10's residency restrictions, and we need not consider them.").

{¶ 31} Appellant makes a general argument that the AWA violates his fundamental rights. He points to only one specific fundamental right, the right to live where one chooses, to assert that the AWA is unconstitutional. Appellant fails to allege, much less establish, that the AWA has actually infringed upon any of his fundamental rights or that he has suffered any actual injury as a result. As

such, his argument that the AWA's residency restrictions violate his fundamental rights is not yet ripe for review. *Peak*, *Dobson*, *Hungerford*, *Gilfillan*.

{¶ 32} Even if appellant had alleged an actual injury resulting from the AWA's residency restrictions, Ohio courts have held that this restriction is constitutional. For example, the court in *Dobson* said that "even if Dobson had standing, we have previously rejected his assertion that the residency restrictions impose an unconstitutional restraint and infringe on that fundamental right." Id. at ¶15, citing *State v. King*, Miami App. No. 08-CA-02, 2008-Ohio-2594, ¶16. Appellant's third assignment of error is overruled.

Conclusion

{¶ 33} The trial judge acted within her sound discretion in imposing consecutive sentences, and appellant's sentence does not constitute cruel and unusual punishment. Since appellant has failed to establish any actual injury as a result of the AWA's residency restrictions, he lacks standing to challenge such restrictions pursuant to the Due Process and Equal Protection Clauses of the Ohio and United States Constitutions. Regardless, such residency restrictions survive constitutional muster. All of appellant's assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover of 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

CHRISTINE T. McMONAGLE, J., CONCURS;
SEAN C. GALLAGHER, A.J., CONCURS IN JUDGMENT ONLY

Appendix A

Appellant's assignments of error:

I. The trial court erred in sentencing the appellant to consecutive terms of incarceration, rather than to concurrent terms of incarceration.

II. The sentence handed down from the trial court violates the "cruel and unusual punishment" provision of the Eighth Amendment to the United States Constitution.

III. The trial court erred in applying the elements of "The Adam Walsh Act" in classifying the appellant as a Tier III sexual offender, violating his rights of due process and equal protection under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the State of Ohio Constitution.