

[Cite as *State v. Colon*, 2016-Ohio-3462.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103504

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JULIO E. COLON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-592449-B

BEFORE: Keough, P.J., E.T. Gallagher, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: June 16, 2016

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} Defendant-appellant, Julio E. Colon, brings this appeal challenging the trial court's imposition of consecutive sentences and court costs after his guilty plea to three counts of sexual battery. We affirm in part, reverse in part, and remand for a limited resentencing on the issue of costs.

I. Background

{¶2} In February 2015, Colon was indicted on seven counts of rape and two counts of kidnapping, all with sexually violent predator specifications. The charges arose from Colon and codefendant Philip Gordon's repeated rapes of two mentally disabled brothers over a two-year period of time. The evidence demonstrated that Colon and Gordon met the brothers at a community meal in Lakewood, befriended them, and then began grooming them for sex. Colon and Gordon's sexual abuse of the brothers was discovered when the brothers' aunt became suspicious of Colon's involvement with the brothers and asked him to stay away from them. When he would not do so, the aunt asked the Fairview Park police for assistance. The police investigated, and the brothers eventually told them about the sexual abuse by Colon and Gordon.

{¶3} Colon subsequently pleaded guilty to three counts of sexual battery in violation of R.C. 2907.03(A)(2), felonies of the third degree, and the remaining counts were nolle. The trial court sentenced him to 60 months incarceration on each count, to

be served consecutively, and to five years postrelease control. The court found him to be a Tier III sex offender and ordered that he pay court costs. This appeal followed.

II. Analysis

A. Consecutive Sentences

{¶4} In his first assignment of error, Colon asserts that the trial court committed reversible error because it did not make the statutory findings necessary to impose consecutive sentences.

{¶5} The presumption in Ohio is that sentencing is to run concurrent. *State v. Rodrigues*, 8th Dist. Cuyahoga No. 102507, 2015-Ohio-2281, ¶ 5. To overcome this presumption, the trial court must make the findings mandated by R.C. 2929.14(C)(4) when it imposes consecutive sentences. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29.

{¶6} Under R.C. 2929.14(C)(4), the trial court must find that: (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender; (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and (3) one of the following — (a) the offender committed one or more of the multiple offenses while awaiting trial or sentencing, (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 was so great or unusual that no single prison term for any of the offenses would

adequately reflect the seriousness of the offender's conduct, or (c) the offender's criminal history demonstrates consecutive sentences are necessary to protect the public.

{¶7} At sentencing, the trial court stated:

This is human trafficking. You didn't sell them, but used them in its worst form.

The locks weren't on the doors for [the victims]. The locks were on their brains, in their skills and their lack of it, communication skills. These are the people that we as humans are expected to protect, to shield from the predators of society.

* * *

This is the worst form of the offense. Mr. Colon, you are a danger to the public, although your family may not recognize it. I would say you're a danger to them as well. And a consecutive sentence will not be disproportionate to the seriousness of your conduct, at least to the multiple offenses that were committed as part of one or more courses of conduct, and the harm caused by two or more offenses so committed was so great or unusual that no single prison term adequately would reflect the seriousness of the offender's conduct.

* * *

And but for plea bargaining, rape of minor children, those with mental defects such as in this case, do indeed call for life imprisonment sentences, so it's not disproportionate.

{¶8} The trial court is not required to use the exact language of R.C. 2929.14(C) to comply with the guidelines and factors for consecutive sentencing. *State v. Mannarino*, 8th Dist. Cuyahoga No. 98727, 2013-Ohio-1795, ¶ 23. 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 sentencing should be upheld. *State v. Seals*, 8th Dist. Cuyahoga No. 101081, 2015-Ohio-517, ¶ 44. A trial

court satisfies the statutory requirement when the record reflects that the court has engaged in the required analysis and has selected the appropriate statutory criteria. *Id.*

{¶9} The record in this case demonstrates that the trial court engaged in the correct analysis and made the requisite R.C. 2929.14(C)(4) findings before imposing consecutive sentences. It found that consecutive sentences were necessary to protect the public and punish Colon because he was a danger to the public and had essentially engaged in human trafficking; consecutive sentences were not disproportionate to the seriousness of his conduct; and the multiple offenses had been committed as part of one or more courses of conduct, and consecutive sentences (essentially a life sentence for Colon, who was 70 years old at sentencing) were necessary to adequately reflect the harm caused by Colon's offenses (the rape of minors with mental defects who lacked communication skills to tell anyone what was happening to them).

{¶10} The record supports these findings. Colon and Gordon befriended the two young adult victims specifically for the purpose of grooming them for sex. The victims were mentally disabled, did not understand what was happening to them, and lacked the communication skills to tell anyone about the ongoing abuse. Colon admitted that he knew about the cognitive defects of the brothers but nevertheless continued the abuse.

{¶11} Because the court engaged in the proper analysis and made the requisite R.C. 2929.14(C) findings before imposing consecutive sentences, and the record supports those findings, the first assignment of error is overruled.

B. Constitutionality of R.C. 2907.03(A)(2)

{¶12} In his second and third assignments of error, Colon argues that R.C. 2907.03(A)(2), regarding sexual battery and to which he pleaded guilty, is unconstitutional because it violates equal protection and due process guarantees and is void for vagueness.¹

{¶13} Colon failed to challenge the statute in the trial court. In *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus, the Ohio Supreme Court held that “[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state’s orderly procedure, and therefore need not be heard for the first time on appeal.” The waiver doctrine of *Awan* has been ruled to be discretionary. *State v. Bruce*, 8th Dist. Cuyahoga No. 89641, 2008-Ohio-926, ¶ 9, citing *In re M.D.*, 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), syllabus. We decline to exercise our discretion to consider Colon’s constitutional challenge for the first time on appeal, however, and find that he has waived the issues raised by the second and third assignments of error. *State v. Smith*, 61 Ohio St.3d 284, 293, 574 N.E.2d 510 (1991). Accordingly, the second and third assignments of error are overruled.

C. Court Costs

¹ The headings for assignments of error two and three challenge the constitutionality of R.C. 2907.03(A)(2), but the argument following each of the headings quotes R.C. 2907.03(A)(3) and argues that R.C. 2907.03(A)(3) is unconstitutional. The error is not relevant to our analysis. Colon’s failure to challenge either statute in the trial court waived the issue for appeal.

{¶14} In his fourth assignment of error, Colon contends that the trial court did not properly impose court costs because it failed to warn him that if he did not pay costs, the court could require him to perform community service. The state concedes the error and we agree.

{¶15} R.C. 2947.23(A)(1)(a) provides that:

In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, * * * and render a judgment against the defendant for such costs. At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following:

(i) If the defendant fails to pay that judgment or fails to timely make payments toward that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

(ii) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.

{¶16} The Ohio Supreme Court has held that the notification under R.C. 2947.23(A)(1) is mandatory and must be given at the sentencing hearing. *State v. Huber*, 8th Dist. Cuyahoga No. 98206, 2012-Oho-6139, ¶ 32, citing *State v. Smith*, 131 Ohio St.3d 297, 2012-Ohio-781, 964 N.E.2d 423, ¶ 10.

{¶17} The record reflects that the trial court did not give Colon the requisite R.C. 2947.23(A)(1) notification when it imposed court costs. Accordingly, we sustain

Colon's fourth assignment of error and reverse and remand for a limited resentencing hearing on the issue of costs.

{¶18} Judgment affirmed in part, reversed in part, and remanded.

It is ordered that the parties share equally 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. Case remanded to the trial court.

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

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
ANITA LASTER MAYS, J., CONCUR