

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO**

|                      |   |                             |
|----------------------|---|-----------------------------|
| STATE OF OHIO,       | : | <b>O P I N I O N</b>        |
| Plaintiff-Appellee,  | : |                             |
| - vs -               | : | <b>CASE NO. 2015-P-0061</b> |
| DAVID C. KINGSBURY,  | : |                             |
| Defendant-Appellant. | : |                             |

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2013 CR 00244.

Judgment: Affirmed.

*Victor V. Vigluicci*, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

*Gregory A. Price*, 159 South Main Street, Suite 910, Akron, OH 44308 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, David C. Kingsbury, appeals his aggregate thirty-six-year sentence on two counts of Rape and two counts of Pandering Sexually Oriented Matter Involving a Minor, following the entry of a plea in the Portage County Court of Common Pleas. The issue before this court is whether a court may impose maximum and consecutive sentences for the rape of a child where the offender was himself a

victim of sexual and physical abuse and had no felony criminal record. For the following reasons, we affirm the decision of the court below.

{¶2} On April 12, 2013, the Portage County Grand Jury indicted Kingsbury on five counts of Rape, felonies of the first degree in violation of R.C. 2907.02(A)(1)(b) and (B); ten counts of Gross Sexual Imposition, felonies of the third degree in violation of R.C. 2907.05(A)(4); one count of Pandering Sexually Oriented Matter Involving a Minor, a felony of the second degree in violation of R.C. 2907.322(A)(1) and (C); five counts of Unlawful Sexual Conduct with a Minor, felonies of the third degree in violation of R.C. 2907.04(A) and (B)(3); and fifteen counts of Illegal Use of a Minor in Nudity-Oriented Material or Performance, felonies of the second degree in violation of R.C. 2907.323(A)(1) and (3) and (B).

{¶3} On April 17, 2013, Kingsbury was arraigned and entered a plea of “not guilty” to the charges in the Indictment.

{¶4} On June 25, 2014, the Portage County Grand Jury returned a Supplemental Indictment, adding fifty counts of Pandering Sexually Oriented Matter Involving a Minor, felonies of the second degree in violation of R.C. 2907.322.

{¶5} On July 14, 2014, Kingsbury was arraigned and entered a plea of “not guilty” to the charges in the Supplemental Indictment.

{¶6} On February 12, 2015, Kingsbury entered a Written Plea of Guilty to two counts of Rape and two counts of Pandering Sexually Oriented Matter Involving a Minor. The State of Ohio entered a Nolle Prosequi to the remaining counts of the Indictment.

{¶7} On April 6, 2015, a sentencing hearing was held.

{¶8} Counsel for Kingsbury addressed the court and urged that he be punished “towards the lower end of the [sentencing] range,” given that he was the victim of the same sort of conduct: “What do you do with the victim turned perpetrator \* \* \*?”

{¶9} The victim’s parents addressed the court and urged that the maximum sentence be imposed. The victim’s mother stated that she “took [Kingsbury] in as [her] son” and “watched him as he grew,” and that they “tried to help him with everything possible [they] could.” Yet, he “repeatedly raped [her] son.”

{¶10} The victim addressed the court and stated that he allowed Kingsbury to rape him for over two-and-a-half years “because he said that \* \* \* if I would not do what he wanted, that he would do it to his own children.” The victim wanted “to protect [his] nephew and \* \* \* niece” and “keep [the] family together.” The victim urged that Kingsbury receive “a higher sentence because he was a victim of rape as well” and “knows the damage and distress that it could cause to a person.”

{¶11} The prosecutor addressed the court and noted that the victim was less than thirteen years of age when the abuse began. The prosecutor acknowledged that Kingsbury did “kind of have that moment of clarity and finally admit out loud to the world that he did do these things,” and that “may mitigate slightly what he did.” However, “the State fashioned this [plea] agreement so that [Kingsbury] could get 38 years” with “no qualms.” In addition to the harm done to the victim and his family, the prosecutor emphasized that “the volume of child pornography that he was in possession of is extensive” and indicative of “a life-long obsession.”

{¶12} Kingsbury addressed the court and denied that he ever threatened his own children. He “accept[ed] \* \* \* responsibility for the choices and decisions [he]

made.” When queried by the court, Kingsbury described his conduct as “a choice” and “a mistake.” Kingsbury apologized for his choices and the pain that he caused, and he wished he “could take it all back.”

{¶13} The trial court sentenced Kingsbury (age 32) to eleven years in prison for each count of Rape (the maximum for a felony of the first degree) and seven years in prison for each count of Pandering. All sentences were ordered to be served consecutively for an aggregate sentence of thirty-six years. The court advised Kingsbury that post release control was mandatory for a period of five years and that he would have to register as a Tier III Sex Offender.

{¶14} On April 8, 2015, the trial court issued an Order and Journal Entry memorializing Kingsbury’s sentence.

{¶15} On August 28, 2015, Kingsbury filed his Notice of Appeal.

{¶16} On October 8, 2015, Kingsbury filed a Motion for Delayed Appeal with this court, which was granted on December 22, 2015.

{¶17} On appeal, Kingsbury raises the following assignment of error:

{¶18} “[1.] The trial court’s sentence is clearly and convincingly contrary to law.”

{¶19} The overriding purposes of felony sentencing in Ohio “are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.” R.C. 2929.11(A). “A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender’s conduct

and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.” R.C. 2929.11(B).

{¶20} It is well-recognized that a sentencing court “has discretion to determine the most effective way to comply with the purposes and principles of sentencing.” R.C. 2929.12(A).

In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct, the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender’s recidivism, and the factors set forth in division (F) of this section pertaining to the offender’s service in the armed forces of the United States and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

R.C. 2929.12(A).

{¶21} The Ohio Supreme Court has described a sentencing court’s discretion as “full discretion to impose a prison sentence within the statutory range.” *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. “[T]he trial court is not obligated, in the exercise of its discretion, to give any particular weight or consideration to any sentencing factor.” *State v. Holin*, 174 Ohio App.3d 1, 2007-Ohio-6255, 880 N.E.2d 515, ¶ 34 (11th Dist.).

{¶22} “The court hearing an appeal [of a felony sentence] shall review the record, including the findings underlying the sentence or modification given by the

sentencing court.” R.C. 2953.08(G)(2). “The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing \* \* \* if it clearly and convincingly finds \* \* \* [t]hat the record does not support the sentencing court’s findings under division \* \* \* (C)(4) of section 2929.14, or \* \* \* [t]hat the sentence is otherwise contrary to law.” R.C. 2953.08(G)(2)(a) and (b).

{¶23} Kingsbury asserts that his sentence is improper, an abuse of discretion, and contrary to law “as it failed to properly weigh the seriousness and recidivism factors in determining David’s sentence.” First, Kingsbury notes the absence of a felony record. “Most importantly,” however, is the fact that, “[f]or years he was the victim of daily physical abuse while being molested by a relative.” This resulted in his “acting out sexually as a child,” including a juvenile adjudication for Gross Sexual Imposition. Appellant’s brief at 4.

{¶24} The mitigating factors cited by Kingsbury fall far short of demonstrating that the sentence imposed by the trial court is unsupported by the record or otherwise contrary to law. Factors indicating that Kingsbury’s conduct is more serious than conduct normally constituting the offense and/or a likelihood of recidivism include, but are not limited to: the young age of the victim; the significant harm caused, not only to the victim, but to the family and children whose images underlay the Pandering charges; Kingsbury’s relationship with the victim; a juvenile adjudication for Gross Sexual Imposition; and the fact that the offenses constituted a course of conduct engaged in for several years. We further note Kingsbury’s acknowledgement of his crimes as “choices” he made and the victim’s observation that he knew “how it could scar

someone and yet he chose to do it to someone that \* \* \* he allegedly cared about.” *State v. Schmiede*, 11th Dist. Lake No. 2015-L-020, 2015-Ohio-4029, ¶ 17 (despite the offender’s “troubled upbringing,” which included sexual abuse, the court “determined that these points did not make his offenses less serious”).

{¶25} The sole assignment of error is without merit.

{¶26} For the foregoing reasons, Kingsbury’s thirty-six-year aggregate sentence is affirmed. Costs to be taxed against the appellant.

TIMOTHY P. CANNON, J.,

COLLEEN MARY O’TOOLE, J.,

concur.