[Cite as *State v. Bilicic,* 2018-Ohio-5377.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2017-A-0066**
- vs -	:	
JESSE J. BILICIC, II,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2016 CR 00626.

Judgment: Affirmed in part, reversed in part, and remanded.

Nicholas A. Iarocci, Ashtabula County Prosecutor, and *Shelley M. Pratt,* Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

James David Ingalls, 55 Public Square, 21st Floor, Cleveland, OH 44113 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Jesse J. Bilicic, II, appeals from the judgment of conviction entered by the Ashtabula Court of Common Pleas following appellant's plea entered pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). We affirm in part, reverse in part, and remand the matter for resentencing.

{¶2} Appellant was originally charged in a seven-count indictment; to wit: Count One, rape, in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree; Counts Two

and Three, sexual battery, in violation of R.C. 2907.03(A)(2), felonies of the third degree; Count Four, unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A)(B)(3), a felony of the third degree; Counts Five and Six, corrupting another with drugs, in violation of R.C. 2925.02(A)(4)(a)(C)(3), a felony of the fourth degree; and Count Seven, sexual imposition, in violation of R.C. 2907.06(A)(4), a misdemeanor of the third degree. Appellant entered a plea of not guilty to the charges.

{¶3} During discovery, defense counsel filed a motion to "Determine Defendant's Right of Access to Department of Human Services and Other Records" of appellant's accusers, who were juveniles. The state opposed the motion and, following a hearing, the court issued an order stating the requested records were not in the possession of the prosecutor's office and must be subpoenaed prior to the court conducting an in-camera review of the same. Defense counsel issued subpoenas to various schools and public agencies. The state subsequently filed motions to quash the subpoenas, which the trial court granted.

{¶4} On July 5, 2017, the state dismissed the indictment and filed a bill of information, charging appellant with two counts of endangering children, a violation of R.C. 2919.22(A)(E)(2)(c), felonies of the third degree. Appellant subsequently entered a plea, pursuant to *Alford*, *supra*. After conducting a hearing on the plea, the trial court accepted appellant's plea and found him guilty. Following a sentencing hearing, the court ordered appellant to serve 36-months imprisonment on each count, for a total of six years in prison. This appeal followed. For his first assignment of error, appellant asserts:

{¶5} "The trial court erred in finding defendant Bilicic guilty of endangering children, in violation of Ohio Revised Code 2919.22(A)(E)(2)(c), a felony of the third degree."

{¶6} Appellant argues the state failed to provide the court with a sufficient factual basis upon which the court could premise its guilty determination.

{¶7} A plea entered pursuant to *Alford* is a plea that permits a defendant to plead legal guilt, yet maintain his or her factual innocence. *State v. Anderson,* 11th Dist. Lake No. 2005-L-178, 2006-Ohio-5167, ¶8. Before accepting an *Alford* plea, "[t]he trial judge must ascertain that notwithstanding the defendant's protestations of innocence, he has made a rational calculation that it is in his best interest to accept the plea bargain offered by the prosecutor." *State v. Padgett,* 67 Ohio App.3d 332, 338, (2d Dist.1990), citing *Alford, supra,* at 38, fn. 10; *see also Anderson, supra,* at ¶8.

{¶8} Moreover, a trial court may accept an *Alford* plea when a factual basis for the guilty plea is evidenced by the record. *See Alford*, *supra*, at 37-38. Some clarification of this point is necessary. In *State v. Post*, 32 Ohio St.3d 380 (1987), the Ohio Supreme Court recognized that an *Alford* plea "should not be accepted unless there is a factual basis for the plea." *Id.* at 387. Still, the Court emphasized that the *Alford* opinion "found no constitutional bar to accepting a guilty plea in the face of an assertion of innocence provided a defendant voluntarily, knowingly[,] and understandingly consents to sentencing on a charge." *Id.* citing *Alford*, at 37-38. The Court in *Post* emphasized that, while a factual basis is preferable, Crim.R. 11 does not require a trial court to establish a factual basis before accepting a guilty plea.

{¶9} With this in mind, and because appellant does not allege his pleas were invalid because they were not entered voluntarily, knowingly, and intelligently, we shall simply consider the factual basis provided by the state:

{¶10} On record, after the plea colloquy, the prosecutor stated:

> **{¶11}** Your honor, between November 1st, 2014 and February 16, 2015, the defendant resided with both victims and their mother. He was involved romantically with the mother at that time. In that capacity he had a duty of care to these children acting in loco parentis as a custodian and failed in that duty to protect and care for these children in that repeatedly over the course of that time the defendant would give the girls marijuana, and in exchange for that marijuana as time went on, he would ask for sexual favors, primarily oral sex from both girls, and the girls would comply. The oldest girl was between the ages of 14 and 15 at the time of these events. The youngest was between 12 and 13 at the time of these events. Between the marijuana and the sexual conduct, these children have suffered severe psychological harm, which would necessitate prolonged treatment.

{¶12} Appellant asserts the state's factual basis only indicates his accusers suffered psychological harm; the crime of endangering children, however, requires a child to suffer "serious physical harm." We do not agree.

{¶13} Preliminarily, appellant cites *State v. Simon*, 11th Dist. Lake No. 98-L-134, 2000 WL 688728 (May 26, 2000) in support of his position. *Simon*, however, is fundamentally distinguishable. *Simon* involved a jury trial and the issue was whether the state breached a pretrial agreement not to present evidence of psychological harm to prove serious physical harm. This matter involves an *Alford* plea at which the state was asked to provide a factual basis and, in doing so, alleged the child victims suffered psychological harm that would require prolonged treatment. Appellant does not allege the state breached an agreement not to do so and thus *Simon* is inherently disanalogous.

{¶14} That said, R.C. 2901.01(A)(5) states that "serious physical harm to persons" means any of the following: "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment." The prosecutor's recitation of the facts demonstrates that, if the charges were to be tried, evidence would be introduced that the child victims, as a result of the alleged abuse, suffered from a mental condition so severe they would require prolonged treatment. Although appellant maintains the prosecutor failed to specifically state the children would require *psychiatric* treatment, the state is not required to prove its case beyond a reasonable doubt at a plea hearing. Moreover, we find no authority for the proposition that the state must present specific facts going to each element of a charge where a defendant enters an *Alford* plea. *See e.g., State v. Battigaglia*, 6th Dist. Ottawa Nos. OT-09-009 & OT-09-010, 2010-Ohio-802, ¶24 (rejecting the contention that prosecutor was required to present facts on each element of an offense in the context of an *Alford* plea because Crim.R. 11 contains no such requirement.) The factual basis was therefore sufficient to permit the court to accept appellant's *Alford* plea.

{¶15} Appellant's first assignment of error lacks merit.

{¶16} Appellant's second assignment of error provides:

{¶17} "The trial court committed prejudicial error when it permitted a non-victim's alleged statement to be read into the record at Defendant Bilicic's sentencing hearing."

{¶18} Under this assigned error, appellant asserts the trial court erred when it permitted a third-party, non-victim to read the statement of the child victims' mother at the sentencing hearing. We do not agree.

{¶19} In *State v. Pattinson*, 11th Dist. Trumbull No. 2010-T-0003, 2010-Ohio-5664, this court was faced with a similar argument. In rejecting the same, this court, quoting various sister districts, observed:

> **{¶20}** "The Ohio statute governing sentencing hearings provides that 'the offender, the prosecuting attorney, the victim or the victim's representative in accordance with section 2930.14 of the Revised Code, and, with the approval of the court, *any other person* may present information relevant to the imposition of sentence in the case.' [R.C. 2929.19(A).] The court therefore has discretion 'to hear statements from *anyone* with information relevant to the imposition of a sentence in the case.' "[*Battigaglia*, *supra,*] at ¶25, citing *State v. Hough,* 11th Dist. No. 2001-T-0009, 2002-Ohio-2942, at ¶15. (First emphasis added).
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> **{¶21}** "R.C. 2930.02(A) does not limit the trial court's discretion regarding the number of people who may speak at a sentencing hearing. R.C. 2929.19(A)(1) provides that the trial court has the discretion to permit any person with information relevant to the imposition of sentence to speak at the sentencing hearing." *State v. Harwell,* 149 Ohio App.3d 147, 776 N.E.2d 524, 2002-Ohio-4349, at ¶7. "[S]uch an allowance will not be reversed absent an abuse of discretion." *State v. Rose,* 3rd Dist. No. 5-06-32, 2007-Ohio-2863, at ¶10. *Pattinson*, *supra*, ¶15-16.

{¶22} Appellant asserts that because Ms. Hall is not a victim of appellant's charged crimes, her statement was read by a third party, and it was a lengthy narrative replete with unsubstantiated statements, the trial court abused its discretion in permitting the same. First of all, no objection was leveled at Ms. Farmer reading the statement or, after she began reading it, at the content of the statement. In this respect, any arguable error is forfeited. Assuming the error was not forfeited, we find no error.

{¶23} While Ms. Hall's statement included harsh, inflammatory words and allegations, it was written by the child-victims' mother. It is understandable that, given the allegations and circumstances, a parent would be angry, impassioned, and horrified by the situation in which she finds herself and her children. And it is also both

understandable and reasonable that the trial court would give the parent of two child victims a platform, at sentencing, to voice her feelings. This does not imply, however, that the trial judge, catalyzed by the outrage and vehemence of the mother's words, lost his objectivity and sentenced appellant based upon fury and passion. The mother's words, while in some cases incendiary, were the product of a clearly upset parent. The trial judge could recognize this, appreciate her statement, but still separate himself from the jarring and severe nature of its content. The record suggests the trial judge did so. The court specifically stated it considered the purposes and principles of the sentencing statutes; the recidivism factors and the seriousness/less-serious factors; as well as the presentence investigation report in selecting its sentence. We therefore hold the trial court did not abuse its discretion in permitting the statement to be read at the sentencing hearing.

{¶24} Appellant's second assignment of error lacks merit.

{¶25} Appellant's third assignment of error provides:

{¶26} "The trial court committed prejudicial error and violated Defendant's due process rights when it failed to conduct an in-camera inspection of records subpoenaed by Defendant before it denied Defendant's request for the records."

{¶27} Appellant takes issue with the trial court's decision to deny his request for certain records without conducting an in-camera inspection of the same. This action took place prior to appellant entering into his plea. An *Alford* plea is procedurally indistinguishable from a guilty plea and waives all alleged errors, including the denial of a motion to suppress, committed at trial except those errors that may have affected the entry of a defendant's plea pursuant to Crim.R. 11. *State v. Leasure,* 6th Dist. Lucas No.

L-05-1260, 2007-Ohio-100, ¶7; *see also State v. Adkins*, 2d Dist. Clark No. 2014-CA-118, 2015-Ohio-4605, ¶7. The instant alleged error occurred prior to appellant entering his *Alford* plea. Because appellant does not challenge the validity of the trial court's Crim.R. 11 colloquy, the error was therefore waived.

{¶28} Appellant's third assignment of error lacks merit.

{¶29} Appellant's fourth assignment of error provides:

{¶30} "The trial court committed reversible error when it sentenced Defendant Bilicic to maximum, consecutive sentences."

{¶31} An appellate court generally reviews felony sentences under the standard of review set forth in R.C. 2953.08(G)(2), which states:

{¶32} The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

{¶33} 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. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

{¶34} (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

{¶35} (b) That the sentence is otherwise contrary to law.

{¶36} Appellate courts "'may vacate or modify any sentence that is not clearly and convincingly contrary to law'" only when the appellate court clearly and convincingly finds that the record does not support the sentence. *State v. Wilson*, 11th Dist. Lake No. 2017-L-028, 2017-Ohio-7127, ¶18, quoting *State v. Marcum,* 146 Ohio St.3d 516, 2016-Ohio-1002, ¶23.

{¶37} The Ohio Supreme Court has held, R.C. 2929.11 and R.C. 2929.12 do not require judicial fact-finding. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶42; *State v. Macko*, 11th Dist. Lake No. 2016-L-022, 2017-Ohio-253, ¶75. "Rather, in sentencing a defendant for a felony, a court is merely required to consider the purposes and principles of sentencing in R.C. 2929.11 and the statutory * * * factors in R.C. 2929.12." *Macko*, *supra*, citing *Foster, supra.*

{¶38} Further, R.C. 2929.14(C)(4) provides, in relevant part, as follows regarding consecutive felony sentences:

> **{¶39}** 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:
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> **{¶40}** (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.
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> **{¶41}** (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.

{¶42} (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. R.C. 2929.14(C)(4).

{¶43} Appellant first asserts that consecutive sentences were erroneously ordered because the trial court failed to fully comply with R.C. 2929.14(C)(4). We agree appellant's sentence must be reversed on this basis. This conclusion renders appellant's remaining arguments relating to the recidivism and seriousness factors moot.

{¶44} Prior to imposing sentence, the trial court stated on record and in its judgment entry on sentence, that consecutive sentences were necessary to protect the public from future crimes and to punish appellant and consecutive sentences were not disproportionate to the seriousness of appellant's conduct or to the danger he poses to the public. The trial court, however, failed to make the additional findings required by R.C. 2929.14(C)(4)(a) –(c).

{¶45} "[A] trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry * * *." *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, ¶37. Further, the trial court is not required to use "talismanic" words when imposing consecutive sentences. *See e.g. State v. Graham,* 2d Dist. Montgomery No. 25934, 2014-Ohio-4250, ¶36. As stated by the Supreme Court, "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. Nevertheless, "[a] consecutive sentence is contrary to law where the trial court fails to make the consecutive sentencing findings as required by R.C. 2929.14(C)(4)." *State v. Todd,* 12th Dist. Clermont No. CA2014-05-035, 2015-Ohio-649, ¶21.

{¶46} The statute states that a trial court must not only find "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," but also that any of the three categories of scenarios set forth under R.C. 2929.14(C)(a) – (c) apply. In this matter, there is no indication the trial court made the requisite findings pursuant to subsections (a)-(c). As such, we cannot discern, from the trial court's statements on record, that it engaged in the correct statutory analysis. Accordingly, appellant's sentence is contrary to law and must be reversed and remanded for resentencing.

{¶47} Appellant's fourth assignment of error has merit.

{¶48} For the reasons discussed in this opinion, the judgment of the Ashtabula County Court of Common Pleas is affirmed in part, reversed in part, and remanded for the limited purpose of conducting a resentencing hearing.

DIANE V. GRENDELL, J., concurs,

THOMAS R. WRIGHT, P.J., concurs in judgment only.