

STATE OF OHIO, COLUMBIANA COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 09 CO 4
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
JAMES HEVERLY,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 07CR140.

JUDGMENT: Affirmed.

APPEARANCES:  
For Plaintiff-Appellee:

Attorney Robert Herron  
Prosecuting Attorney  
Attorney Timothy McNicol  
Assistant Prosecuting Attorney  
105 South Market Street  
Lisbon, Ohio 44432

For Defendant-Appellant:

Attorney Douglas King  
91 West Taggart Street  
P.O. Box 85  
East Palestine, Ohio 44413

JUDGES:  
Hon. Joseph J. Vukovich  
Hon. Gene Donofrio  
Hon. Mary DeGenaro

Dated: March 15, 2010

VUKOVICH, P.J.

¶{1} Defendant-appellant James Heverly appeals from his conviction and sentence in the Columbiana County Common Pleas Court of rape, a violation of R.C. 2907.02(A)(1)(b), a first degree felony. Heverly raises three sentencing issues in this appeal. First, he contends that the sentence was not proportional to his conduct. Second, he contends that the sentence does not serve the overriding purposes and principles of sentencing. Lastly, he contends that the sentence is overly burdensome to the state. In addition to the sentencing issues, Heverly, *pro se*, argues that trial counsel was ineffective. For the reasons expressed below, the judgment of the trial court is hereby affirmed.

#### STATEMENT OF CASE

¶{2} On April 26, 2007, Heverly was indicted for rape of a child under thirteen years of age, a violation of R.C. 2907.02(A)(1)(b), a first degree felony. The charge also contained an age specification that at the time of the offense the victim was less than ten years of age. That specification carried a potential life sentence.

¶{3} Heverly was arraigned and pled not guilty to the charge. 05/29/07 J.E. After discovery and waiving his right to a speedy trial, Heverly and the state reached a plea agreement whereby the age specification would be dismissed and the state would recommend a six year sentence. According to the agreement, Heverly pled guilty to rape, a violation of R.C. 2907.02(A)(1)(b), a first degree felony. After a plea colloquy, the trial court accepted the guilty plea, ordered a presentence investigation (PSI), and set the matter for sentencing. 10/16/07 J.E. New counsel was retained by Heverly and he moved to continue the sentencing twice, which was granted each time. Heverly then filed a motion to withdraw his guilty plea; the state opposed that motion. At the hearing on the motion to withdraw the guilty plea, Heverly withdrew his motion and consented to the case proceeding directly to sentencing. 03/26/08 Sentencing Tr. 3-4.

¶{4} At sentencing, the state recommended a six year prison term. 03/26/08 Sentencing Tr. 5. Heverly asked the court to consider a five year sentence versus the

six year sentence recommended by the state, and in the alternative, he asked the court to, at the least, accept the state's recommendation. 03/26/08 Sentencing Tr. 5. After designating Heverly a Tier III Sex Offender and informing him of his duties to register, the trial court followed the state's recommendation and sentenced him to a six year prison term. 03/26/08 Sentencing Tr. 8.

¶{5} Heverly filed a delayed appeal, which this court allowed. 03/09/09 J.E.

#### PROPOSED ASSIGNMENT OF ERROR

¶{6} "DEFENDANT/APPELLANT WAS DENIED SUBSTANTIVE DUE PROCESS DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL."

¶{7} Heverly asserted to appellate counsel that at the trial level he was denied effective assistance of counsel and, thus, wished to raise this argument to the appellate court. In the brief, appellate counsel indicated that he reviewed this argument for the appeal, but believes it lacks merit. Thus, appellate counsel submits this assignment of error under the authority of *Anders v. California* (1967), 386 U.S. 738.

¶{8} On September 3, 2009, this court issued a judgment entry granting Heverly fourteen days to supplement the proposed assignment of error. Heverly filed a supplemental brief on October 6, 2009. Both counsel and Heverly's briefs on the issue of ineffectiveness will be reviewed; we will independently review whether trial counsel was ineffective and address Heverly's *pro se* arguments.

¶{9} The proposed assignment of error and Heverly's supplemental brief claim that trial counsel was ineffective. Since Heverly entered a guilty plea, our standard of review for reviewing any alleged errors that occurred prior to the acceptance of the plea is not the traditional two-prong *Strickland* test. Instead, we will only vacate the guilty plea if trial counsel's ineffectiveness affected the knowing and voluntary character of the plea. *State v. Doak*, 7th Dist. Nos. 03CO15 and 03CO31, 2004-Ohio-1548, ¶55, quoting *State v. Madeline* (Mar. 22, 2002), 11th Dist. No.2000-T-0156. Using that standard, we now examine trial counsel's actions prior to the guilty plea.

¶{10} Permitting a defendant to enter a guilty plea after speedy trial time had expired would amount to ineffective assistance of counsel, and thus, could affect the

knowing and voluntary nature of the plea. *State v. Davis*, 7th Dist. No. 08MA80, 2009-Ohio-4639, ¶12-13, citing *State v. Gray*, 2d Dist. No. 20980, 2007-Ohio-4549, ¶21. However, the record in this case clearly discloses that Heverly waived his right to speedy trial prior to the expiration of that time. Thus, there is no viable argument regarding speedy trial or that the waiver affected the knowing and voluntary nature of the plea.

¶{11} Furthermore, defense counsel moved to suppress evidence that the state intended to introduce at trial. 09/07/07 hearing. The court granted that request. 09/12/07 J.E. Thus, there is no potential argument that counsel failed to move to suppress evidence or that that failure affected the knowing and voluntary nature of the plea.

¶{12} Lastly as to any pre-plea errors, Heverly, *pro se*, argues that certain allegations in the medical examination report went uninvestigated as well as unquestioned by counsel. The record before this court does not contain the medical examination report. Thus, this alleged error is outside the record and, as such, is not reviewable on direct appeal. *State v. Perry* (1967), 10 Ohio St.2d 175. That said, the arguments Heverly is making pertain to the results of the medical exam and certain factual allegations contained within the report. Heverly claimed to tell his counsel that the factual allegations were incorrect. These were arguments that could have been raised at trial by offering testimony from his family that he allegedly showed that the report was factually inaccurate. Heverly knew of these alleged inaccuracies at the time of the plea. One can only speculate how his legal counsel got appellant to abandon those purported inaccuracies and adversely impacted the knowing and voluntary nature of his guilty plea. Such speculation is not a basis to find ineffectiveness of legal counsel. Therefore, this argument lacks merit.

¶{13} Having reviewed pre-plea actions of counsel, we now turn to the plea hearing. Crim.R. 11(C) provides that a trial court must make certain advisements prior to accepting a defendant's guilty plea to ensure that the plea is entered into knowingly, intelligently and voluntarily. These advisements are typically divided into constitutional rights and nonconstitutional rights.

¶{14} The constitutional rights are: 1) a jury trial; 2) confrontation of witnesses against him; 3) the compulsory process for obtaining witnesses in his favor; 4) that the state must prove the defendant's guilt beyond a reasonable doubt at trial, and 5) that the defendant cannot be compelled to testify against himself. Crim.R. 11(C)(2)(c); *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶19-21. The trial court must strictly comply with these requirements; if it fails to strictly comply, the defendant's plea is invalid. *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at ¶31; *State v. Ballard* (1981), 66 Ohio St.2d 473, 477. See, generally, *Boykin v. Alabama* (1969), 395 U.S. 238. See, also, *State v. Singh* (2000), 141 Ohio App.3d 137.

¶{15} The nonconstitutional rights are that: 1) the defendant must be informed of the nature of the charges; 2) the defendant must be informed of the maximum penalty involved, which includes an advisement on post-release control, if it is applicable; 3) the defendant must be informed, if applicable, that he is not eligible for probation or the imposition of community control sanctions, and 4) the defendant must be informed that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence. Crim.R. 11(C)(2)(a)(b); *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at ¶10-13; *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, ¶19-26 (indicating that post-release control is a nonconstitutional advisement); *State v. Aleshire*, 5th Dist. No. 2007-CA-1, 2008-Ohio-5688, ¶8 (stating that post-release control is a part of the maximum penalty).

¶{16} For the nonconstitutional rights, the trial court must substantially comply with Crim.R. 11's mandates. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at ¶15 quoting *Nero*, 56 Ohio St.3d at 108. Furthermore, a defendant who challenges his guilty plea on the basis that the advisement for the nonconstitutional rights did not substantially comply with Crim.R. 11(C)(2)(a)(b) must also show a prejudicial effect, meaning the plea would not have been otherwise entered. *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at ¶15 citing *Nero*, 56 Ohio St.3d at 108.

¶{17} The trial court's advisement on the constitutional rights strictly complied with Crim.R. 11(C)(2)(c). Heverly was informed that by pleading guilty he was waiving his right to a jury trial, to confront witnesses against him, to subpoena witnesses in his favor and to have the state prove at trial each and every element of the offense by proof beyond a reasonable doubt. 10/15/07 Plea Tr. 11-12. He was also advised that if he went to trial he could not be compelled to testify against himself. 10/15/07 Plea Tr. 11-12. Heverly indicated after the explanation of every right that he understood the right. 10/15/07 Plea Tr. 11-12.

¶{18} As to the nonconstitutional rights, Heverly was advised of the charge in the indictment, rape with an age specification, and was advised of the charge which he was pleading to, rape without the age specification. 10/15/07 Plea Tr. 9, 12-13. He was informed that a prison term was mandatory and that he was not eligible for a community control sanction. 10/15/07 Plea Tr. 10. The trial court correctly advised him of the maximum penalty involved for the indicted offense, which was a life sentence, and the maximum penalty involved for the rape offense without the age specification, ten years and a twenty-five thousand dollar fine. 10/15/07 Plea Tr. 9. See, also, R.C. 2929.14(A)(1) (stating the maximum term for a first degree felony is ten years); R.C. 2907.02(B) (stating that the maximum penalty for rape of a child under 10 years of age is a life term); R.C. 2929.18(A)(3)(a) (stating the maximum fine for a first degree felony is twenty-five thousand dollars). Heverly was also informed that part of his penalty would be five years of post-release control. 10/15/07 Plea Tr. 10; R.C. 2967.28(B)(1) (indicating that a felony sex offense is subject to a five year term of post-release control).

¶{19} Additionally, in regards to the penalty for rape, Heverly was told that at the time of sentencing the trial court would classify him and inform him of his duty to register. 10/15/07 Plea Tr. 10. This advisement was sufficient for the plea hearing and the lack of a more specific advisement did not render the plea unknowingly, unintelligently and involuntarily entered. Our sister courts have explained:

¶{20} "[T]hat a trial court need not inform a sex offender of the registration and notification requirements of R.C. Chapter 2950 before accepting a plea. We have described the registration and notification requirements as collateral consequences of

a defendant's guilty plea to a sex offense. *State v. Condrón* (March 27, 1998), Montgomery App. No. 16430 ('Because Megan's laws are not punitive, the registration and notification requirements are collateral consequences of a defendant's guilty plea.'). Therefore, a trial court is not obligated to inform a defendant about these requirements before accepting his plea, and its failure to do so does not render the plea invalid. *State v. Abrams* (Aug. 20, 1999), Montgomery App. No. 17459." *State v. Stape*, 2d Dist. No. 22585, 2009-Ohio-420, ¶19, quoting *State v. Cupp*, 2d Dist. Nos. 21176, 21348, 2006-Ohio-1808, ¶10. See, also, *In re C.A.*, 2d Dist. No. 23022, 2009-Ohio-3303, ¶56; *State v. Richey*, 10th Dist. No. 08AP-923, 2009-Ohio-2988, ¶18; *State v. Perry*, 8th Dist. No 82085, 2003-Ohio-6344, at ¶9; *State v. Paris*, 3d Dist. No. 2-2000-04, 2000-Ohio-1886; *State v. DeAngelo* (March 10, 1999), 9th Dist. No. 97CA006902.

¶{21} We adopt the above reasoning as our own. Thus, the trial court's advisement as to sexual offender classification and registration amounted to substantial compliance.

¶{22} The only possible problem with the nonconstitutional advisement was that at the October 15, 2007 plea hearing, the trial court did not inform Heverly that after accepting the plea it was permitted to proceed directly to sentencing. However, the trial court did not proceed directly to sentencing, but rather ordered a PSI and set sentencing for January 14, 2008, almost three months later. Therefore, this court cannot find prejudice. Therefore, there is no means for vacating the plea. *State v. O'Neal* (Sept. 29, 1999), 9th Dist. No. 19255.

¶{23} Thus, given the above, we conclude that the trial court substantially complied with Crim.R. 11 for the advisements on the nonconstitutional rights and strictly complied with the constitutional advisements. Consequently, there is no basis to find that the plea was not entered into knowingly, intelligently and voluntarily, and hence, no basis to find that counsel at the plea hearing was ineffective.

¶{24} Having found no merit with any argument that trial counsel was ineffective at any stage prior to the acceptance of the guilty plea, our attention now turns to the actions of counsel after the acceptance of the guilty plea.<sup>1</sup>

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<sup>1</sup>As stated earlier, Heverly retained new counsel for this stage of the proceedings.

¶{25} In determining whether counsel was ineffective after the plea was entered, we use the two-prong *Strickland* test. *State v. Maguire*, 7th Dist. No. 08MA188, 2009-Ohio-4393, ¶17-18 (explaining that when a defendant pleads guilty he waives the right to challenge the propriety of any action taken prior to the plea, unless it affects the knowing and voluntary nature of the plea. However, the guilty plea does not waive ineffective assistance of counsel claims for defects that occurred after the plea). First, Heverly must establish that counsel's performance fell below an objective standard of reasonable representation. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. Second, he must show that he was prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. at 687. To show prejudice, Heverly must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus. If this court finds that either prong fails, there is no need to analyze the remaining prong because in order for ineffective assistance of counsel to be shown, both prongs must be established by appellant. *State v. Herring*, 7th Dist. No. 06JE8, 2007-Ohio-3174, ¶43.

¶{26} After entering the guilty plea, but prior to sentencing, counsel filed a motion to withdraw the guilty plea. 03/03/08 Motion. The motion was based on the trial court's advisement regarding the sexual offender classification and registration. That motion was withdrawn prior to sentencing. 03/26/08 Sentencing Tr. 3.

¶{27} As is shown above, the motion to withdraw did not have any merit. Thus, counsel withdrawing the motion did not prejudice Heverly and, as such, did not amount to ineffective assistance of counsel.

¶{28} At sentencing, counsel argued for a lesser sentence. 03/26/08 Sentencing Tr. 5. Consequently, his actions cannot be in any way characterized as deficient in regards to the length of prison sentence Heverly received.

¶{29} Heverly argues "that the court agreed to dismiss the age specification and then placing the Defendant as a Tier III, Sexual Predator." It appears that he is arguing that he could not have been placed as a Tier III Sex Offender when the age specification was dismissed. As stated above, Heverly was charged with R.C. 2907.02(A)(1)(b) engaging in sexual conduct with a person under the age of thirteen.



He was additionally charged with the specification that the victim was under the age of ten. It was the under the age of ten specification that was dismissed; Heverly still pled guilty to R.C. 2907.02(A)(1)(b), engaging in sexual conduct with a person under the age of thirteen. R.C. 2950.01(G)(1)(a) provides that an offender who is convicted of R.C. 2907.02 is a Tier III Sex Offender/Child-Victim Offender. Thus, since Heverly pled guilty to a violation of R.C. 2907.02, the trial court was required to label him a Tier III Sex Offender. Heverly's argument to the contrary is without merit.

¶{30} In conclusion, counsel's representation of Heverly prior to the guilty plea did not affect the knowing and voluntary nature of the plea, and thereby, was not ineffective. Also, counsel's representation after the plea was entered was not ineffective. The proposed assignment of error and Heverly's supplemental assignment of error are without merit.

#### FIRST AND SECOND ASSIGNMENTS OF ERROR

¶{31} "THE DEFENDANT/APPELLANT'S SENTENCE WAS NOT PROPORTIONAL RELATIVE TO THE DEFENDANT'S CONDUCT LEADING TO THE CHARGE AND THEREFORE THE SENTENCE IS CONTRARY TO LAW."

¶{32} "DEFENDANT/APPELLANT'S SENTENCE IS CONTRARY TO LAW AS IT DOES NOT SERVE THE OVERRIDING PURPOSES AND PRINCIPLES OF SENTENCING AS EXPRESSED IN ORC 2929.11."

¶{33} The disposition of the first assignment of error encompasses analysis that disposes of the second assignment of error. Thus, they are addressed simultaneously.

¶{34} We review felony sentences using both the clearly and convincingly contrary to law and abuse of discretion standards of review. *State v. Gratz*, 7th Dist. No. 08MA101, 2009-Ohio-695, ¶8; *State v. Gray*, 7th Dist. No. 07MA156, 2008-Ohio-6591, ¶17. A sentence is clearly and convincingly contrary to law when the sentencing court does not comply with all applicable rules and statutes in imposing the sentence. *Gratz*, 7th Dist. No. 08MA101, 2009-Ohio-695, at ¶8, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶13-14. An abuse of discretion can be found if the sentencing court unreasonably or arbitrarily weighs the factors in R.C. 2929.11 and

R.C. 2929.12. *Gratz*, 7th Dist. No. 08MA101, 2009-Ohio-695, at ¶8, citing *Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶17.

¶{35} Heverly argues that although the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, determined that R.C. 2929.14(E) was unconstitutional, the trial court should still engage in a proportionality analysis that was required by that section. He contends that since there is nothing in the record to support the six year sentence, it cannot be said that the sentence is proportionate to his conduct.

¶{36} R.C. 2929.14(E) indicated that before a court could sentence an offender to consecutive sentences that the trial court was required to find that consecutive sentences were “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.” The court was also required to find that one of the three factors in R.C. 2929.14(E)(4)(a), (b), or (c) was applicable. The trial court was then required to provide reasons supporting its findings. R.C. 2929.19(B)(2)(c).

¶{37} As Heverly concedes, *Foster* determined that R.C. 2929.14(E) was unconstitutional because that section required judicial fact finding. 109 Ohio St.3d 1, 2006-Ohio-856, paragraph three of the syllabus. After severing that section from the statute, the Supreme Court then held that a sentencing court has “full discretion” to sentence an offender within the statutory range and is no longer required to make findings or give its reasons for imposing non-minimum, maximum, or consecutive sentences. *Id.* at paragraph seven of the syllabus. A sentencing court need only consider “R.C. 2929.11, which specifies the purposes of sentencing.” “R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender,” and any other statutes that are specific to the case. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶38.

¶{38} Consequently, the above clearly indicates that the trial court was not required to engage in the proportionality analysis espoused in R.C. 2929.14(E). However, even if there still was a requirement for the trial court to engage in such analysis, the R.C. 2929.14(E)(4) proportionality analysis was specific to the imposition

of consecutive sentences. Here, we are not dealing with consecutive sentences; rather, there was one discretionary sentence issued.

¶{39} As to Heverly's mention of a proportionality review, he may have intended to cite both R.C. 2929.11, which lists the purposes and principles of sentencing, and R.C. 2929.12, which requires a sentencing court to consider the seriousness and recidivism factors. In the second assignment of error, he cites to R.C. 2929.11 and argues that the sentence did not serve the purposes of felony sentencing. Considering the argument made in that assignment and the proportionality argument he makes in the first assignment of error, the trial court's consideration of both R.C. 2929.11 and R.C. 2929.12 is reviewed.

¶{40} In neither the sentencing transcript or in the sentencing judgment entry did the trial court state that it considered R.C. 2929.11 and/or R.C. 2929.12. Thus, the record before us is silent. Recently we have held that a silent record raises the rebuttable presumption that the sentencing court considered the appropriate factors. *State v. James*, 7th Dist. No. 07CO47, 2009-Ohio-4392, ¶50. The presumption can be overcome when there is an affirmative showing that the sentence is "'strikingly inconsistent' with the applicable factors." *Id.* at ¶50.

¶{41} Here, Heverly has failed to make an affirmative showing that the sentencing court failed to consider the proper factors in issuing a six year sentence. Moreover, considering the limited facts in the record, we cannot find that a six year sentence for rape (digital penetration) of a child under thirteen is inconsistent with the factors in R.C. 2929.11 or R.C. 2929.12. Although the age specification of the victim was dismissed, the trial court was permitted to consider that the victim was under the age of ten at the time of the offense. *State v. Starkey*, 7th Dist. No. 06MA110, 2007-Ohio-6702, ¶17-18 (stating dismissed charges can be considered at sentencing). That factor makes the conduct more serious. R.C. 2929.12(B)(1) (age of victim).

¶{42} Furthermore, the trial court ordered a PSI for sentencing. The PSI shows that Heverly had previously been charged with criminal conduct and had also been found guilty of some of the charges. Those convictions and offenses that did not result in convictions demonstrate that recidivism is more likely. The court was authorized to consider both the convictions and the charged offenses that did not

result in convictions when determining the appropriate sentence. *Starkey*, 7th Dist. No. 06MA110, 2007-Ohio-6702, at ¶17-18; R.C. 2929.12(D)(2).

¶{43} However, we note that prior to sentencing, Heverly did state that he was sorry. 03/26/08 Tr. 6. That is a factor indicating recidivism is less likely. R.C. 2929.12(E)(5).

¶{44} The sentencing range for commission of this first degree felony is three to ten years. R.C. 2929.14(A)(1). Thus, the six year sentence was not a maximum sentence, but rather was at the middle to lower end of the spectrum. When considering all facts, the six year sentence, at the very least, was proportionate to the conduct. Thus, the trial court did not abuse its discretion in issuing the sentence that it did. Furthermore, since the sentence was within the applicable statutory range it was not contrary to law.

¶{45} Consequently, for all the above reasons, we find that Heverly did not overcome the rebuttal presumption, the sentence is consistent with R.C. 2929.11 and R.C. 2929.12 and the sentence is not contrary to law. These assignments of error lack merit.

### THIRD ASSIGNMENT OF ERROR

¶{46} “THE TRIAL COURT’S IMPOSITION OF A SIX (6) YEAR SENTENCE IN THE PRESENT CASE IS CONTRARY TO LAW AND/OR VIOLATES THE MANDATES OF ORC 2929.13(A).”

¶{47} Heverly argues that the sentence violates R.C. 2929.13 because it is “unnecessarily burdensome to the state or local government resources.”

¶{48} R.C. 2929.13(A) does provide that a felony “sentence shall not impose an unnecessary burden on state or local government resources.” Considering this statutory language, we have previously explained:

¶{49} “Just what constitutes a “burden” on state resources is undefined by the statute, but the plain language suggests that the costs, both economic and societal, should not outweigh the benefit that the people of the state derive from an offender's incarceration. \* \* \* The court must also consider the benefit to society in assuring that an offender will not be free to reoffend. Many people sleep better at night knowing that certain offenders are incarcerated. They would no doubt consider a lengthy

incarceration worth the cost of housing those offenders.’ *State v. Vlahopoulos*, 154 Ohio App.3d 450, 2003-Ohio-5070 ¶5.” *State v. Goins*, 7th Dist. No. 06MA131, 2008-Ohio-1170, ¶35.

¶{50} Hence, considering Heverly’s prior convictions and charges, the cost of incarceration does not outweigh the benefit to society. During his incarceration, he is unable to harm society by committing sex offenses. R.C. 2929.13 has not been violated and this assignment of error lacks merit.

#### CONCLUSION

¶{51} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.

DeGenaro, J., concurs.