[Cite as *State v. Dash*, 2017-Ohio-9009.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 16 MA 0090
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
ROBERT C. DASH, JR.	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 15 CR 851
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Ralph M. Rivera Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Attorney Cynthia L. Henry P.O. Box 4332 Youngstown, Ohio 44515

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: November 30, 2017

[Cite as *State v. Dash*, 2017-Ohio-9009.]
WAITE, J.

{¶1} Appellant Robert C. Dash, Jr. appeals the sentence entered by the Mahoning County Common Pleas Court following his convictions on pandering obscenity involving a minor and pandering sexually oriented matter involving a minor. Appellant argues that the trial court erred in sentencing him to prison and imposing consecutive sentences. Based on this record, we find that the trial court did not err in sentencing Appellant. Appellant's assignment of error is without merit and the judgment of the trial court is affirmed.

Factual and Procedural Background

{¶2} On August 27, 2015, Appellant was indicted on nine criminal counts: one count of pandering obscenity involving a minor, in violation of R.C. 2907.321(A)(2), (C), a felony of the second degree; two counts of pandering sexually oriented matter involving a minor, in violation of R.C. 2907.322(A)(2), (C), a felony of the second degree; and six counts of pandering sexually oriented matter involving a minor, in violation of R.C. 2907.322(A)(5), (C), felonies of the fourth degree.

{¶3} On April 1, 2016, Appellant and the state entered into a Crim.R. 11 agreement. Due to this, the state dismissed counts four through nine of the indictment. Appellant pleaded guilty to counts one, two and three. The state agreed to recommend a nine year sentence and that Appellant be required to register as a Tier II sex offender.

{¶4} Sentencing was held on May 25, 2016. The state followed the plea agreement and recommended that Appellant receive a nine year sentence. (5/25/16 Sentencing Hrg. Tr., p. 3.) In support of this recommendation, the state argued that

there were fifteen pages of search terms where Appellant specifically typed in terms used in child pornography, including "pthc" (meaning preteen hardcore) as well as "lolita" and "13 year old brother and sister." (*Id*. at pp. 5-7.) The state also noted that one video included a close up of a little girl who is visibly crying. The videotaped victims included a six year old, a nine year old and a ten year old. The state noted that Appellant ran a computer repair business, and had a higher level of knowledge than most regarding deleting files and removing evidence of downloads utilizing a Linux operating system. (*Id*. at pp. 4, 6-8.) Appellant asked the court to impose a lesser term due to the fact that he was fifty-seven years old and suffered from some health issues. He also highlighted the fact that he had no prior criminal record. (*Id*. at pp. 10-12.)

{¶5} The trial court sentenced Appellant to three years of incarceration on each count to run consecutively, for a total prison term of nine years. (*Id*. at pp. 19-20.) Appellant timely appeals his sentence.

ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING THE APPELLANT TO PRISON AND CONSECUTIVE SENTENCES.

{¶6} The Ohio Supreme Court in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, ¶ 10, held that "appellate courts may not apply the abuse-of-discretion standard in sentencing-term challenges." Instead, "appellate courts must adhere to the plain language of R.C. 2953.08(G)(2)." *Id.* at ¶ 7. Accordingly, "an appellate court may vacate or modify a felony sentence on appeal only if it

determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id.* at ¶ 1.

{¶7} Appellant contends that the trial court erred in not adequately considering the mitigating factors set forth in R.C. 2929.12 or the factors relevant to achieving the purposes and principles of sentencing enumerated in R.C. 2929.11. Appellant relies on the fact that he has health issues and was fifty-seven years old with no prior criminal history to argue that these should have mitigated against consecutive sentences.

{¶8} As this Court has previously held, *Marcum* does not permit appellate courts to independently weigh the sentencing factors in R.C. 2929.12 on review. *State v. Davis,* 7th Dist. No. 15BE0034, 2016-Ohio-7319, ¶ 5. An analysis under *Marcum* is applied to situations in which none of the sentencing factors support a stated prison term or the record reveals the trial court relied on a factor unsupported by the record. *Id.* In the instant case the trial court was not required to specifically state the specific statutory factors in R.C. 2929.11 and R.C. 2929.12 on which the court relied.

{¶9} At the sentencing hearing, counsel for Appellant raised not only Appellant's age, his poor health, and the fact that he has no prior criminal history, counsel also stated, "[a]nd I believe but for this, this sexual appetite, it is -- I mean, he's not a, he's not a bad guy." (5/25/16 Sentencing Hrg. Tr., p. 11.) Counsel asserted that Appellant was remorseful and could be rehabilitated:

> Your Honor, I believe there is potential for him to be rehabilitated. He does -- the PSI indicates that he's not, wasn't remorseful. But he does say that he's sorry. And he does acknowledge, as the prosecutor indicated, he did acknowledge through the interview that he has this issue. So I think, you know, the first step to rehabilitation is admitting that you have this tendency. So I would disagree with the prosecutor. I believe there is a potential for rehabilitation.

(5/25/16 Sentencing Hrg. Tr., p. 11.)

{¶10} The trial court inquired whether Appellant wished to make a statement prior to sentencing. Appellant replied:

> I do want to say I'm sorry this is all being brought up before the court, especially on my path, because I know that I could have stopped it just by simply not giving out the password to my router, not giving out the password to my computer and to let people use my computer freely without any type of, anybody watching over at all.
>
> Your Honor, it was more than, I had more than 12 people that had access to my router, my wireless router for my internet. And besides that, in the neighborhood there were, there were pedophiles in the neighborhood that I was not aware of until recently. But there were.
>
> * * *

> I did say that I accidentally did download one child pornography, one thing of child pornography. Because I was just going down through the list, just click it off and just downloading anything. And when I came across it I had deleted it immediately, knowing what the outcome would be.

(5/25/16 Sentencing Hrg. Tr., pp. 13-14.)

{¶11} Contrary to assertions by Appellant's counsel, Appellant was not remorseful, nor did he acknowledge or hold himself accountable for his own actions. Appellant expressed that he was only sorry he was caught. Appellant blamed twelve nameless individuals to whom he allegedly gave his router and computer passwords and alleged there were neighborhood pedophiles responsible for his crimes. Moreover, despite evidence of Appellant's advanced knowledge of computer hardware and software, he contends he gave out his passwords to several individuals, even though he admitted he deleted the child pornography from his computer because he knew "what the outcome would be." *Id.* Finally, although in his statement Appellant asserted that he believed that he downloaded one file, he pleaded guilty to multiple counts based on the evidence.

{¶12} Despite the apparent contradiction between Appellant's view of his crime and the evidence presented by the state, Appellant does not argue that his plea was not entered voluntarily. Instead, Appellant only attacks his sentence, arguing that his mitigating factors should override all other factors.

{¶13} Based on this record, however, we cannot conclude that the trial court failed to give adequate consideration to any mitigating factors. Simply put, any mitigation was found to be outweighed by his lack of remorse. Although not required to specifically state the statutory factors of R.C. 2929.11 and R.C. 2929.12, the trial court stated:

> Upon consideration of the oral statements of the defendant, prosecutor, the presentence investigation report and all of the circumstances of this case, as well as the principles and purposes of sentencing under Revised Code 2929.11, and having considered the seriousness and recidivism factors under 2929.12 for the offenses of pandering obscenity involving a minor, a felony of the second degree, and two counts of pandering sexually oriented matter involving a minor, also felonies of the second degree, the court finds that the defendant is not amenable to community control, and that prison is the only sanction consistent with the principles and purposes of sentencing that does not place an unreasonable burden on state and local resources.
>
> The court also finds that defendant not only lacks any remorse for his crimes but also continues to profess his innocence.

(6/25/16 Sentencing Hrg. Tr., pp. 18-19.)

{¶14} As the trial court sentenced Appellant to consecutive sentences, it was required to make the R.C. 2929.14(C)(4) findings at the sentencing hearing and

incorporate those findings into the judgment entry of sentence. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 654, ¶ 29. R.C. 2929.14(C)(4) provides:

> 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:
>
> (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.
>
> (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.

> (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).

{¶15} At the sentencing hearing the court stated:

> The court finds that consecutive sentences are necessary to protect the public from future crimes and to punish the offender, and that consecutive sentences are not disproportionate to the seriousness of his conduct and to the danger he poses to the public, and at least two of the multiple offenses were committed as part of one or more courses of conduct, and that the harm caused by multiple offenses were so great that no single prison term adequately reflects the seriousness of the conduct.
>
> On Count Three defendant is sentenced to a term of three years in prison to run consecutive to Counts One and Two. The court also finds on each of those counts that the minimum sentence would not accomplish the overriding purpose of felony sentencing without imposing an unreasonable burden on state and local resources, and that consecutive sentences are necessary to protect the public from future crimes and to punish the offender, and that consecutive sentences are not disproportionate to the seriousness of the conduct and the danger the defendant poses to the public. And at least two of

> the multiple offenses were committed as part of one or more courses of conduct. And the harm caused by the multiple offenses are so great that no single prison term adequately reflects the seriousness of the conduct.

(5/25/16 Sentencing Hrg. Tr., pp. 20-21.)

{¶16} Clearly, the trial court found evidence at hearing of a course of conduct pursuant to R.C. 2929.14(C)(4)(b). The record included over fifteen pages of search material undertaken by Appellant resulting in his accessing multiple videos and images over several days. Hence, the trial court's determination that consecutive sentences were warranted is not contrary to law. Pursuant to statute, the trial court's judgment entry includes the same findings supporting Appellant's consecutive sentencing. (5/27/16 J.E., pp. 2-3.)

{¶17} Based on the above, the trial court clearly enunciated at the sentencing hearing and in the judgment entry of sentence that it considered the statutory factors enumerated in both R.C. 2929.11 and R.C. 2929.12 before imposing consecutive sentences on Appellant. Moreover, the trial court made the requisite findings regarding consecutive sentencing pursuant to R.C. 2929.12(C)(4) at both the sentencing hearing and in the judgment entry of sentence. The trial court may not have weighed alleged mitigating factors in the manner Appellant had hoped, but our review reveals no error on the part of the trial court. Therefore, we find Appellant's assignment of error to be without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, P.J., concurs.