[Cite as *State v. Bosley*, 2017-Ohio-7643.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 16 MA 0100
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
REX A. BOSLEY	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 15 CR 964

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:

Atty. Rhys B. Cartwright-Jones
42 N. Phelps Street
Youngstown, Ohio 44503-1130

JUDGES:

Hon. Cheryl L. Waite
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: September 7, 2017

[Cite as *State v. Bosley*, 2017-Ohio-7643.]
WAITE, J.

{¶1} Appellant Rex A. Bosley appeals a sentencing entry of June 21, 2016 in the Mahoning County Common Pleas Court following his convictions for pandering. Appellant argues that the trial court improperly imposed consecutive sentences and that the court erroneously failed to merge his multiple counts for sentencing purposes. For the reasons that follow, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On November 5, 2015, Appellant was indicted on ten counts of pandering obscenity involving a minor, a felony of the fourth degree in violation of R.C. 2907.321(A)(5), (C), and forty counts of pandering sexually orientated matter involving a minor, a felony of the fourth degree in violation of R.C. 2907.322(A)(5), (C).

{¶3} On April 11, 2016, Appellant and the state entered into a Crim.R. 11 agreement. As part of the agreement, the state agreed to dismiss counts sixteen through fifty relating to pandering sexually orientated matter. In return, Appellant agreed to plead guilty to the remaining fifteen counts: ten counts of pandering obscenity involving a minor and five counts of pandering involving sexually orientated matter involving a minor. The plea hearing transcript was not made a part of the appellate record.

{¶4} On June 15, 2016, the trial court held a sentencing hearing. At the hearing, the state recommended ten years of incarceration. The defense requested Appellant receive a community control sanction. The trial court sentenced Appellant

to six months of incarceration per count to run consecutively, for an aggregate total of seven and a half years of incarceration. The trial court also imposed a mandatory five-year postrelease control period. Appellant is additionally required to register as a tier two sex offender. This timely appeal followed.

ASSIGNMENT OF ERROR NO. 1

> THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES, TOTALING 7 AND 1/2 YEARS, BECAUSE THE RECORD DOES NOT CONTAIN ANY EVIDENCE OF A PATTERN OF CONDUCT UNDER R.C. 2929.14(C)(4)(b).

{¶5} Appellant argues that the act of downloading multiple child pornography files on the same date does not constitute a "course of conduct" for purposes of consecutive sentencing. He argues that a course of conduct is intended to encompass multiple instances, not multiple "objects." He also argues that downloading files of child pornography is akin to drug cases. In drug cases, he asserts, a defendant may be caught with several bags of drugs but is charged with only a single count of the degree of felony that amount of total drugs would carry.

{¶6} The state responds by citing to an Eighth District case where the Court held that multiple downloads of child pornography constituted a course of conduct. See *State v. Duhamel,* 8th Dist. No. 102346, 2015-Ohio-3145. Because Appellant possessed fifty-one videos and ninety-seven photographs that depicted child pornography, and the files contained search terms and file names that connoted child pornography, pursuant to *Duhamel* Appellant's behavior demonstrates a course of

conduct. As to Appellant's attempt to compare pornography charges and drug cases, the state explains that while a defendant in Appellant's hypothetical would be charged with one count of possession of drugs, the sentence imposed is enhanced based on the amount of drugs possessed.

{¶7} Pursuant to R.C. 2929.14(C)(4), before a trial court can impose consecutive sentences on a defendant, the court must find:

> [T]hat 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.

{¶8} A trial court judge must make the consecutive sentence findings at the sentencing hearing and must additionally incorporate the findings into the sentencing entry. *State v. Williams*, 7th Dist. No. 13 MA 125, 2015-Ohio-4100, 43 N.E.3d 797, ¶ 34, citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. The court need not state reasons to support its finding nor is it required to use any "magic" or "talismanic" words, so long as it is apparent that the court conducted the proper analysis. *Id*. citing *State v. Jones*, 7th Dist. No. 13 MA 101, 2014-Ohio-2248, ¶ 6; *State v. Verity*, 7th Dist. No. 12 MA 139, 2013-Ohio-1158, ¶ 28-29.

{¶9} The crux of this matter is whether Appellant's actions constituted a course of conduct. We recently decided a case involving a very similar matter, *State v. Lucicosky*, 7th Dist. No. 16 MA 0112, 2017-Ohio-2960, -- N.E.3d --. In *Lucicosky, supra,* the appellant was charged with multiple counts of pandering after multiple videos and images depicting child pornography were found on his computer. The appellant in *Lucicosky* also argued that child pornography cases were akin to drug cases. We rejected this argument for several reasons, chief among them that the drug possession statute is not written in the same manner as the pandering statute. *Id.* at ¶ 14.

{¶10} We also rejected the argument that multiple images and videos uploaded on the same day do not show a course of conduct on the part of a

defendant. We acknowledge that the facts in this case slightly differ from those in *Lucicosky.* In *Lucicosky,* the appellant admittedly made the videos and images available for others to download through a shared folder. Here, although the files were stored in a shared folder, there is no evidence that these files were actually shared. Regardless, *Lucicosky* applies because we held that downloading multiple files of pornography involving multiple child victims does constitute a course of conduct.

{¶11} In this case, Appellant obtained ninety-seven files of child pornography and, as evidenced by the file names, the victims consisted of at least four different children from the age of twelve to as young as the age of two. As the *Duhamel* Court stated, "[e]very video or image of child pornography on the internet constitutes a permanent record of that particular child's sexual abuse. The harm caused by these videos is exacerbated by their circulation." *Id*. at ¶ 54. Images depicting rape or abuse are far more harmful than solitary photographs of nude children. *Id.* at ¶ 55.

{¶12} We note that Appellant claimed at oral argument that he obtained these ninety-seven files by a single push of a download button. As Appellant did not attempt to raise this argument before the trial court, there is no evidence in the record to support his assertion. Regardless, even if these files were obtained by means of a mass download, it is clear that his intent was to collect multiple files. While modern technology makes it easier for a person to obtain numerous files at once, the fact remains that Appellant received ninety-seven files containing child pornography. Importantly, Appellant pleaded guilty to fifteen separate counts of pandering.

Because he pleaded guilty to several separate counts, he cannot now argue that his behavior did not give rise to those separate counts.

{¶13} Accordingly, Appellant's argument is without merit and his first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES, TOTALING 7 AND 1/2 YEARS, AS TO OFFENSES THAT MERGED AS ALLIED OFFENSES OF SIMILAR IMPORT.

{¶14} As merger of allied offenses presents a question of law, an appellate court must conduct a *de novo* review. *State v. Burns*, 7th Dist. No. 09-MA-193, 2012-Ohio-2698, ¶ 60. When determining whether offenses are subject to merger, the Ohio Supreme Court created a fact-specific analysis that looks at the defendant's conduct, the animus, and the import. *Williams, supra*, at ¶ 17, citing *State v. Ruff,* 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 26. The test contains a three-part analysis: (1) whether the offenses are dissimilar in import or significance: that is, whether each offense caused a separate and identifiable harm; (2) whether the offenses were separately committed; and, (3) whether the offenses were committed with separate animus or motivation. *Id.* If the answer to any of these questions is "yes," then the offenses do not merge. *Id.* The Court acknowledged that, due to the fact-specific nature of the test, results will vary on a case-to-case basis. *Id.*

{¶15} Both Appellant and the state essentially repeat their arguments from the first assignment of error. However, each now focus on whether the trial court properly found that the offenses were not subject to merger.

{¶16} Our Opinion in *Lucicosky* is again relevant. In *Lucicosky,* we found that arguments similar to those presented by Appellant had been rejected by our sister districts, and we adopted the reasoning of those courts:

> We find the multiple offenses of pandering sexually oriented matter involving a minor in the case do not merge. We thus join with multiple other Ohio appellate court districts which have found that "multiple convictions are allowed for each individual image because a separate animus exists every time a separate image or file is downloaded and saved." *State v. Duhamel*, 8th Dist. Cuyahoga No. 102346, 2015-Ohio-3145, ¶ 62, citing *State v. Mannarino*, 8th Dist. Cuyahoga No. 98727, 2013-Ohio-1795, ¶ 53; see also, *State v. Eal*, 10th Dist. Franklin No. 11AP-460, 2012-Ohio-1373, ¶ 93. The selection of each individual video or image is a separate decision. *Id*.
>
> "* * *
>
> Appellant's convictions are not allied offenses of similar import because he downloaded each file of child pornography with a separate animus, and each downloaded file was a crime against a separate victim or victims. *Id*.; see also, *State v. Sanchez*, 11th Dist. No. 98-A-0006, 1999 WL 270055 (Apr. 9, 1999), at 6; *State v. Yodice*, 11th Dist. Lake No.

> 2001-L-155, 2002-Ohio-7344, ¶ 25; *State v. Hendricks*, 8th Dist. Cuyahoga No. 92213, 2009-Ohio-5556, ¶ 35; *State v. Stone*, 1st Dist. Hamilton No. C-040323, 2005-Ohio-5206. *State v. Starcher*, 5th Dist. No. 2015CA00058, 2015-Ohio-5250, ¶ 35-37.

Lucicosky, supra, at ¶ 23.

{¶17} Again, we note that this case differs slightly from *Lucicosky* because there is no evidence Appellant shared these files with another person. We also note that Appellant repeats his argument that he obtained these files through a mass download rather than through multiple downloads, despite the fact that there is nothing in the record to support this claim. However, even if this were the case, Appellant pleaded guilty to fifteen charges pertaining to fifteen different files and involving at least four different child victims.

{¶18} Our determination in this matter aligns with decisions from other appellate districts. In a Twelfth District case, the appellant argued that his pandering convictions were subject to merger because he obtained the child pornography files around the same time and on the same date. *State v. Campbell,* 12th Dist. No. CA2014-06-137, 2015-Ohio-1409. The *Campbell* Court rejected this argument and held that the convictions were not subject to merger because the charges were specific to different images. Further, the Court stated: "the mere fact that the images were obtained or possessed on the same day, even in rapid succession, does not prove that the actions were done with the same conduct or animus." *Id.* at ¶ 21.

{¶19} In a Tenth District case, the appellant argued that the charges were "alleged to have occurred on the same day, at the same time, and in the same place," and so were subject to merger. *State v. Eal,* 10th Dist. No. 11AP-460, 2012-Ohio-1373, ¶ 92. The Court determined that "[a]lthough defendant may have uploaded the ten images at around the same time, each file he uploaded constitutes a new and distinct crime. '[T]he mere fact that the crimes occurred in quick succession * * * does not mean that they were not committed separately or with a separate animus.' " *Id.* at ¶ 93, citing *State v. Blanchard,* 8th Dist. No. 90935, 2009-Ohio-1357, ¶ 12, reversed on other grounds.

{¶20} Here, Appellant pleaded guilty to fifteen charges that resulted from fifteen separate violations of R.C. 2907.321(A)(5), (C) and R.C. 2907.322(A)(5), (C). Each of the images and videos associated to these fifteen charges constitute a new and distinct crime for which Appellant may be sentenced. As such, Appellant's arguments are without merit and his second assignment of error is overruled.

Conclusion

{¶21} Appellant argues that the trial court erroneously ruled that his actions constituted a course of conduct and imposed consecutive sentences. Appellant further argues that the court improperly failed to merge the counts for sentencing purposes. However, Appellant pleaded guilty to fifteen counts that stem from fifteen different images or videos and that affect multiple victims. As such, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

DeGenaro, J., concurs.

Robb, P.J., concurs.