[Cite as *State v. Dunkle*, 2010-Ohio-938.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

State of Ohio — Court of Appeals No. WM-08-024

Appellee — Trial Court No. 08 CR 030

v.

Coy E. Dunkle — **DECISION AND JUDGMENT**

Appellant — Decided: March 12, 2010

* * * * *

Thomas A. Thompson, Williams County Prosecuting Attorney, for appellee.

Chad D. Huber, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Williams County Court of Common Pleas which, on November 20, 2008, following a plea of guilty to 49 counts of pandering sexually oriented matter involving a minor ("pandering"), in violation of R.C. 2907.322(A)(5), each a felony of the third degree, and four counts of illegal use of a minor in nudity-oriented material or performance ("illegal use of a

minor"), in violation of R.C. 2907.323(A)(2), each a felony of the second degree, sentenced appellant, Coy E. Dunkle, to two years incarceration for each of the 49 pandering counts and three years for each count of illegal use of a minor, and ordered the sentences to run consecutively, for a total cumulative term of incarceration of 110 years. Appellant timely appealed and raises the following assignments of error:

{¶ 2} 1. "The trial court erred by sentencing appellant on all forty-nine counts of pandering sexually oriented material involving a minor, where those forty-nine counts constituted allied offenses of similar import which were not committed separately or with separate animus."

{¶ 3} 2. "The trial court erred by imposing consecutive sentences for forty-nine counts of pandering in violation of the Eighth Amendment of the United States Constitution and section nine, Article I of the Ohio Constitution."

{¶ 4} In his first assignment of error, appellant argues that the 49 counts of pandering were allied offenses, as they were not committed separately or with separate animus. We disagree.

{¶ 5} R.C. 2941.25 states:

{¶ 6} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶ 7} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or

similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 8} In determining whether crimes are allied offenses of similar import under R.C. 2941.25(A), the Ohio Supreme Court has employed a two-step analysis. First, "[c]ourts should assess, by aligning the elements of each crime in the abstract, whether the statutory elements of the crimes 'correspond to such a degree that the commission of one crime will result in the commission of the other.'" *State v. Rance*, 85 Ohio St.3d 632, 638, 1999-Ohio-291, citing *State v. Jones* (1997), 78 Ohio St.3d 12, 14. If the elements do correspond, the court must proceed to the second step, "which involves a review of the defendant's conduct to determine whether the offenses were committed separately or with a separate animus as to each." *State v. Mughni* (1987), 33 Ohio St.3d 65, 67. A defendant may be convicted of allied offenses of similar import if the defendant's conduct reveals that the crimes were committed separately or with separate animus. R.C. 2941.25, and *Jones*, 78 Ohio St.3d at 14. The defendant bears the burden of establishing that two offenses are allied and that he is entitled to the protection provided by R.C. 2941.25 against multiple punishments for a single criminal act. *Mughni*, 33 Ohio St.3d at 67, and *State v. Logan* (1979), 60 Ohio St.2d 126, 128.

{¶ 9} In exchange for dismissal of two counts of rape, in violation of R.C. 2907.02(A)(1)(b), one count of pandering and four counts of illegal use of a minor, appellant entered a plea of guilty in this case. Also in exchange for appellant's plea, the

state agreed that it would not bring additional charges against appellant, relating to any of the thousands of other pictures and videos gathered as a result of the investigation in this case. In part, appellant pled guilty to and was convicted of 49 counts of pandering in violation of R.C. 2907.322(A)(5), which states that "[n]o person, with knowledge of the character of the material or performance involved, shall do any of the following: * * * (5) Knowingly solicit, receive, purchase, exchange, possess, or control any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality; * * *."

{¶ 10} Appellant asserts on appeal that because the photographs and videos were apparently transmitted via computer technology and/or the Internet, the 49 incidences of pandering may have occurred in a single "act," thus precluding appellant from being convicted of and sentenced to 49 separate counts. We, however, find that appellant failed to raise any issue regarding allied offenses of similar import in the trial court and, therefore, has waived any error in this regard on appeal. *State v. Jones*, 6th Dist. No. L-05-1232, 2007-Ohio-563, ¶ 46, citing *State v. Comen* (1990), 50 Ohio St.3d 206, 211, and *State v. Williams* (1977), 51 Ohio St.2d 112, 116-117. Additionally, even pursuant to a plain error analysis, see Crim.R. 52(B), based on the fact that appellant entered a plea of guilty, in exchange for dismissal of more serious offenses, yet failed to raise any issue regarding allied offenses, we find that any purported error in this case was invited by appellant. See *State v. Johnson*, 6th Dist. No. OT-05-008, 2005-Ohio-5029, ¶ 35, citing *State v. LaMar*, 95 Ohio St.3d 181, 199, 2002-Ohio-2128, ¶ 102.

{¶ 11} Notwithstanding, we note that there is no indication that the 49 counts of pandering to which appellant was convicted occurred as a result of a single act, transaction, or animus. The facts presented by the state indicate that the thousands of photographs, images, and videos that appellant possessed were found on separate computers and computer discs, and were found in different areas of the home. Appellant's materials contained images of thousands of different children. Additionally, during the investigation leading to appellant's arrest, appellant offered to take video and/or photographs of his three-year-old daughter, posed in outfits sent to him by potential customers. Appellant specifically offered an undercover officer close-up video images of the minor's vaginal and anal areas, in exchange for fifty dollars. Further evidence was obtained on appellant's computer that appellant had disseminated unlawful images of his three-year-old daughter to at least 20 separate individuals. There was also evidence that appellant offered to exchange with other customers "new material" of his daughter for "new material" of other victims. Accordingly, we find that there is no indication that the 49 counts of pandering to which appellant was convicted occurred as a result of a single act or animus.

{¶ 12} Accordingly, we find that the trial court did not err in convicting and sentencing appellant to 49 separate counts of pandering sexually oriented matter, in violation of R.C. 2907.322(A)(5). Appellant's first assignment of error, therefore, is found not well-taken.

{¶ 13} Appellant argues in his second assignment of error that by sentencing him to consecutive sentences, the trial court violated his Eighth Amendment rights regarding the infliction of cruel and unusual punishment. Appellant argues that the sentence imposed was grossly disproportionate to the crimes committed, would be considered shocking to any reasonable person, and would shock the sense of justice in the community. Specifically, appellant states that he "does not contend that his individual two-year sentences themselves are necessarily grossly disproportionate," but states that "given that a substantial and limitless amount of such photos can be acquired in mere seconds and in as few as one 'act,' * * * cumulative sentences for individual pictures possessed are grossly disproportionate." Appellant further asserts that this type of crime is "often punished in a manner substantially more severe than even murder or rape due to the stacking of multiple counts for individual pictures."

{¶ 14} The Ohio Supreme Court held in *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, ¶ 21, that, when considering whether a cumulative prison term imposed for multiple offenses is cruel and unusual punishment, "for purposes of the Eighth Amendment and Section 9, Article I of the Ohio Constitution, proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively. Where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment."

{¶ 15} In this case, appellant received two years incarceration for each count of pandering and three years for each count of illegal use of a minor. As such, the individual sentences were within the statutory range of sentences available and, therefore, the aggregate prison term resulting from consecutive sentences in this case does not constitute cruel and unusual punishment.

{¶ 16} Additionally, we find that the trial court properly considered the principles and purposes of sentencing pursuant to R.C. 2929.11 and the seriousness and recidivism factors of R.C. 2929.12 when determining appellant's sentences. Specifically, the trial court found that the convictions in this case were a serious problem and issue and that the public needed protection from future crime by appellant. The trial court also considered that the physical and mental injury suffered by the victims of the offenses was exacerbated by the victims' ages, that appellant's relationship with his daughter facilitated the offenses involving her, and found that appellant was likely to recidivate because of his prior felony convictions for the same or similar offense, he was not rehabilitated despite previous treatment, and appellant showed no remorse for the offenses.

{¶ 17} Furthermore, under the circumstances in this case, we find that the sentences imposed do not shock the sense of justice in the community and would not be considered shocking to any reasonable person. For each offense of pandering, a child victim was exploited and harmed by having to pose for the video or photograph depicting the child in a sexually oriented manner. According to the state, all the children in the

material used to convict appellant were clearly prepubescent, including the victim in the video showing a child being violently raped.

{¶ 18} Based on the foregoing, we find that appellant's rights against cruel and unusual punishment, as guaranteed by the Eighth Amendment of the United States Constitution and Section 9, Article I of the Ohio Constitution, were not violated in this case. Appellant's second assignment of error, therefore, is found not well-taken.

{¶ 19} On consideration whereof, this court finds that the judgment of the Williams County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE