[Cite as *State v. Millhoan*, 2011-Ohio-4741.]

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

State of Ohio

Appellee

v.

David Millhoan, Sr.

Appellant

Court of Appeals Nos. L-10-1328
L-10-1329

Trial Court Nos. CR0201002702
CR0201001265

DECISION AND JUDGMENT

Decided: September 2, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

George J. Conklin, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Defendant-appellant, David Millhoan, Sr., appeals his conviction and sentence on multiple sex-related offenses in consolidated cases. He contends that his guilty pleas were not entered knowingly and voluntarily, that the imposition of near-maximum consecutive sentences was unwarranted, and that he was denied effective

assistance of trial counsel. Finding no merit to these assertions, we affirm the judgment of the Lucas County Court of Common Pleas.

I. FACTS

{¶ 2} In February 2010, a Lucas County Grand Jury returned a nine count indictment of appellant in case No. CR0201001265. The charges generally stem from a series of sexual improprieties by appellant with two minor boys, which allegedly occurred during the period of January 1, 2009, through December 28, 2009. Specifically, the indictment charged appellant with two counts of rape in violation of R.C. 2907.02(A)(1)(b) and (B), felonies of the first degree punishable pursuant to R.C. 2907.02(B) (counts one and two); two counts of gross sexual imposition in violation of R.C. 2907.05(A)(4) and (C), felonies of the third degree (counts three and four); one count of rape in violation of R.C. 2907.02(A)(2) and (B), a felony of the first degree punishable pursuant to R.C. 2907.02(B) (count five); two counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A) and (B)(3), felonies of the third degree (counts six and seven); and two counts of gross sexual imposition in violation of R.C. 2907.05(A)(1) and (C), felonies of the fourth degree (counts eight and nine).

{¶ 3} On September 21, 2010, appellant withdrew his original pleas of not guilty to the nine charges and entered guilty pleas to counts three through nine of the indictment pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25. Appellant also entered an *Alford* plea of guilty to each of the first two counts of rape after they were modified by a

bill of information filed the day before in case No. CR0201002702 to violations of R.C. 2907.02(A)(2), rather than R.C. 2907.02(A)(1)(b) as originally charged in the indictment.

{¶ 4} Prior to accepting appellant's guilty pleas, the trial court conducted a thorough plea colloquy pursuant to Crim.R. 11(C)(2). With respect to the maximum penalties involved, the following exchange occurred:

{¶ 5} "THE COURT: As I stated, in counts one and two in case 10-2702, and in count five in case 10-1265 you are entering a plea to felonies of the first degree. Do you understand that each of those offenses carries a basic prison term of three to ten years?

{¶ 6} "THE DEFENDANT: Yes.

{¶ 7} "THE COURT: Do you understand that each of those offenses carries a possible fine of up to $20,000?

{¶ 8} "THE DEFENDANT: Yes.

{¶ 9} "THE COURT: And in counts three and four in case 10-1265 you are entering a plea to two felonies of the third degree, and in counts six and seven you are entering a plea to two felonies of the third degree. Do you understand that each of those offenses carries a basic prison term of one to five years?

{¶ 10} "THE DEFENDANT: Yes.

{¶ 11} "THE COURT: Do you understand that each of those carries a possible fine of up to $10,000?

{¶ 12} "THE DEFENDANT: Yes.

{¶ 13} "THE COURT: And in counts eight and nine you are entering a plea to two felonies of the fourth degree. Do you understand that each of those offenses carries a basic prison term of six to 18 months?

{¶ 14} "THE DEFENDANT: Yes.

{¶ 15} "THE COURT: And each of those offenses carries a possible fine of up to $5000? Do you understand that?

{¶ 16} "THE DEFENDANT: Yes.

{¶ 17} "THE COURT: So as you stand here today you're facing a total of 53 years in a state institution. Do you understand that?

{¶ 18} "THE DEFENDANT: Yes.

{¶ 19} "THE COURT: And you're facing a possible fine of up to $110,000. Do you understand that?

{¶ 20} "THE DEFEDNANT: Yes."

{¶ 21} With regard to the three rape offenses (counts one and two of the information and count five of the indictment), the trial court further informed appellant:

{¶ 22} "THE COURT: Mr. Millhoan, before the State of Ohio tells me the facts leading up to this plea, with respect to your sentence, as I stated, you are entering a plea to three felonies of the first degree. Do you understand that each of those offenses carries a mandatory sentence, so you are facing a mandatory sentence of nine to 30 years in a state institution?

{¶ 23} "THE DEFENDANT: Yes."

{¶ 24} On October 13, 2010, the trial court held a combined sentencing hearing with respect to all nine counts pursuant to R.C. 2929.19. On October 19, 2010, the trial court filed separate but cross-referencing judgments in case Nos. CR0201001265 and CR0201002702 in which it sentenced appellant to a mandatory term of nine years in prison as to counts one, two, and five (rape); four years in prison as to counts three and four (gross sexual imposition) and counts six and seven (unlawful sexual conduct); and 17 months as to counts eight and nine (gross sexual imposition). The court ordered that the terms imposed for the rape and unlawful sexual conduct counts be served consecutively, and that the remaining counts be served concurrently, for an aggregate prison term of 35 years.

{¶ 25} Appellant filed separate notices of appeal as to each of the foregoing judgments. On November 15, 2010, this court ordered that the two appeals be consolidated pursuant to App.R. 3(B). It is in this consolidated appeal that appellant assigns the following errors:

{¶ 26} "FIRST ASSIGNMENT OF ERROR: The Appellant's Pleas were not entered knowingly and voluntarily because the trial court failed to inform him that his Guilty Pleas either required the court to impose consecutive sentences or could result in the imposition of consecutive sentences.

{¶ 27} "SECOND ASSIGNMENT OF ERROR: The trial court erred in imposing consecutive sentences.

{¶ 28} "THIRD ASSIGNMENT OF ERROR: The trial court erred in imposing near-maximum consecutive sentences and failing to make findings pursuant to Ohio Rev. Code § 2929.14(E)(4).

{¶ 29} "FOURTH ASSIGNMENT OF ERROR: The Appellant was denied effective assistance of counsel."

II. VOLUNTARINESS OF PLEA

{¶ 30} In support of his first assignment of error, appellant argues that the trial court never informed him that "his sentences could or would be served consecutively as to any of the Counts demanding any mandatory prison term." According to appellant, his pleas were not entered knowingly or voluntarily because "the issue of the imposition of consecutive mandatory penalties, or even discretionary consecutive penalties, such as those imposed on October 13, 2010 was never explored [by the trial court at his plea hearing]."

{¶ 31} Crim.R. 11(C)(2)(a) mandates that before accepting a plea, the trial court must address the defendant personally and determine, among other things, that "the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved * * *." Since this provision involves a nonconstitutional right, the plea may be vacated only if appellant demonstrates that he was prejudiced by the court's failure to substantially comply with the rule. See *State v. Hubbard*, 9th Dist. No. 25141, 2011-Ohio-2770, ¶ 7-8; *State v. Kamer*, 6th Dist. Nos. L-08-1114, L-08-1429, 2009-Ohio-5995, ¶ 30-31.

{¶ 32} As to appellant's assertion that the trial court failed to advise him with respect to "discretionary consecutive penalties," Rule 11 does not require the court to explain that sentences for multiple offenses may be run consecutively. In *State v. Johnson* (1988), 40 Ohio St.3d 130, syllabus, the Supreme Court of Ohio held, "Failure to inform a defendant who pleads guilty to more than one offense that the court may order him to serve any sentence imposed consecutively, rather than concurrently, is not a violation of Crim.R. 11(C)(2), and does not render the plea involuntary." See, also, *State v. Jones*, 8th Dist. No. 94408, 2011-Ohio-453, ¶ 38-40; *State v. Whiteside*, 9th Dist. No. 23891, 2008-Ohio-2309, ¶ 8-9; *State v. Clay*, 8th Dist. Nos. 89339, 89340, 89341, 2008-Ohio-314, ¶ 18; *State v. Lewis*, 8th Dist. Nos. 88627, 88628, 88629, 2007-Ohio-3640, ¶ 14.

{¶ 33} Moreover, although not required, the trial court did essentially advise appellant of the maximum consecutive penalty he could receive for all the offenses. After informing appellant of the basic prison terms for each charge, the trial court explained that "as you stand here today you're facing a total of 53 years in a state institution." Fifty-three years, of course, is the sum of the maximum terms for all nine offenses, i.e., (10 years x 3 offenses) + (5 years x 4 offenses) + (1.5 years x 2 offenses) = 53 years. While the trial court did not specifically use the term "consecutively," it did substantially convey the principle by communicating to appellant that he faced an aggregate or total prison term of 53 years. Instead of conveying information from which appellant could perform his own calculation to arrive at the cumulative total of all his

maximum sentences, the trial court performed that mathematical calculation for appellant.

{¶ 34} In regard to appellant's contention that the trial court failed to inform him "of the imposition of consecutive mandatory penalties," appellant relies on cases that hold a defendant must be advised of consecutive sentences when a statute requires the imposition of consecutive sentences. Appellant does not claim, however, that any statute requiring the imposition of consecutive sentences was actually applied in this case. Instead, appellant frames the issue as whether the trial court, before accepting the pleas, was required to advise him "of *the potential* for consecutive mandatory sentencing." (Emphasis added.) Appellant does not specify the circumstances under which such potential would be realized.

{¶ 35} It is true that appellate courts have eschewed the holding in *Johnson* when the imposition of consecutive sentences is mandated by law. Several appellate courts, including this court, have held that when consecutive sentences are mandatory as opposed to discretionary, the trial court must advise the defendant of that fact in order to achieve substantial compliance with Crim.R. 11(C)(2). See *State v. Anderson*, 8th Dist. No. 94598, 2010-Ohio-5487, ¶ 11; *State v. Norman*, 8th Dist. No. 91302, 2009-Ohio-4044, ¶ 7; *State v. Bragwell*, 7th Dist. No. 06-MA-140, 2008-Ohio-3406, ¶ 55-57; and *State v. Hayes*, 6th Dist. No. L-06-1078, 2007-Ohio-2837, ¶ 26. But these holdings apply only when the imposition of consecutive sentences is a foregone conclusion at the time the plea is entered and accepted, that is, only in cases where "a mandatory, consecutive

prison term was a *guaranteed consequence* of appellant's guilty plea." (Emphasis added.) *Norman*, supra, at ¶ 9; *Bragwell*, supra, at ¶ 57. There is nothing in the case law or the rule itself that requires the trial court to advise a defendant as to "the potential for consecutive mandatory sentencing."

{¶ 36} Besides, the trial court in this case was not acting pursuant to any statutory mandate, but was exercising its discretion, when it ordered consecutive prison terms. We fail to see how appellant could have been prejudiced when the asserted potential for mandatory consecutive sentencing never came to fruition. Cf. *State v. Flagg*, 8th Dist. Nos. 93248, 93249, 2010-Ohio-4247, ¶ 34, 38 (finding that defendant was not prejudiced by the trial court's failure to advise him of a potential fine associated with one of his guilty pleas, because the trial court did not ultimately impose a fine for that charge).

{¶ 37} Accordingly, appellant's first assignment of error is not well-taken.

III. JUDICIAL FINDINGS UNDER FORMER R.C. 2929.14(E)(4)

{¶ 38} In his second assignment of error, appellant argues against himself in a purported effort to preserve the issue for further review. He first contends that the trial court erred by imposing consecutive sentences without making findings as required by R.C. 2929.14(E)(4), but concedes that R.C. 2929.14(E)(4) was declared unconstitutional and severed from the sentencing code in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Appellant then argues that the rationale articulated by the Ohio Supreme Court in *Foster* was undercut by the decision of the United States Supreme Court in *Oregon v. Ice* (2009), 555 U.S. 160, thus reviving the statutory requirement of judicial fact-finding

before imposition of consecutive criminal sentences. Yet, he acknowledges that this argument was rejected by the Supreme Court of Ohio in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320. In that case, the Ohio Supreme Court held that the high court's decision in *Ice*, while undermining the reasoning in *Foster*, does not revive former R.C. 2929.14(E)(4) and that Ohio trial court judges need not engage in judicial fact-finding before imposing consecutive sentences unless the General Assembly enacts new legislation to that effect.

{¶ 39} Appellant goes on to argue that "the Ohio legislature has from time to time 'reenacted' Ohio Rev. Code §2929.14(E)(4) by restating the language of that section when making amendments to other subsections of Ohio Rev. Code §2929.15." He immediately recognizes, however, that "some Ohio courts have rejected these arguments." In fact, this argument was soundly rejected by the Seventh Appellate District in *State v. Hohvart*, 7th Dist. No. 10 MA 31, 2011-Ohio-3372. In that case, the court found that pursuant to *Hodge*, the General Assembly "must clearly and unequivocally reestablish those provisions that were formerly declared unconstitutional," that the "mere act of reprinting statutory sections, as part of amendments to other aspects of the felony sentencing law, does not constitute clear direction from the legislature," and that "the legislature's ministerial act of copying previously enacted legislation as part of amendments to valid statutes does not reflect a clear intent to revive a previously invalidated statute." Id. at ¶ 11.

{¶ 40} Finally, appellant maintains that *Hodge* "may yet be determined by further review by the United States Supreme Court." Nevertheless, this court is still constrained to follow the dictates of *Hodge* in the interim and, in any event, the United States Supreme Court has since denied certiorari in *Hodge v. Ohio* (June 27, 2011), United States Supreme Court case No. 10-9727.

{¶ 41} Accordingly, appellant's second assignment of error is not well-taken.

IV. PROPRIETY OF NEAR-MAXIMUM CONSECUTIVE SENTENCES

{¶ 42} In his third assignment of error, appellant generally asserts that the trial court erred in imposing near-maximum consecutive sentences. His supporting arguments are divided into three parts, each presenting a discrete and independent issue. We will consider each contention in turn.

A. Imposition of Near-Maximum Sentences

{¶ 43} First, appellant maintains that the trial court abused its discretion by imposing a near-maximum sentence with respect to the "three (3) felonies underlying this matter." While conceding that his sentences are "within the individual statutory penalties for the crimes as alleged," appellant argues that near-maximum prison terms were unwarranted because he "had no previous felony history or history of any sexual offense" and "[n]o drugs were used to impair the minor involved."

{¶ 44} In reviewing felony sentences, this court has repeatedly followed the two-step procedure outlined by the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. See *State v. Loyd*, 6th Dist. Nos. E-10-055, E-10-056, 2011-Ohio-

2964, ¶ 35; *State v. Mendoza*, 6th Dist. No. WD-10-008, 2011-Ohio-1971, ¶ 22*; State v. Donald*, 6th Dist. No. S-09-027, 2010-Ohio-2790, ¶ 6; and *State v. Turner*, 6th Dist. No. L-09-1195, 2010-Ohio-2630, ¶ 50. The first step is to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶ 4. The second step is "to review the actual term of imprisonment for an abuse of discretion." Id. at ¶ 17.

{¶ 45} In this case, the trial court complied with all applicable rules and statutes in sentencing appellant. The court imposed sentences within the permissible statutory range, properly applied postrelease control, and expressly stated that it considered the purposes and principles of sentencing under R.C. 2929.11, as well as the seriousness and recidivism factors listed in R.C. 2929.12. Thus, the sentence in this case is not clearly and convincingly contrary to law. Id. at ¶ 18.

{¶ 46} We also find that the trial court did not abuse its discretion in selecting sentences near the high end of the permissible statutory range. Instead, the trial court properly considered the purposes and principles of sentencing under R.C. 2929.11, and gave careful and deliberate consideration to the relevant statutory factors of seriousness and recidivism under R.C. 2929.12. At sentencing, the trial court noted that appellant "has no prior record of sexual offenses" and that "no drugs or alcohol was used to impair the victims." But the court expressly balanced these factors against other considerations, including that the victims were children between the ages of 10 and 13, that appellant was

between 41 and 42 years of age at the time of the offenses, that appellant engaged in a pattern of ongoing sexual activity with the children, that he committed several offenses and engaged in various sexual acts against more than one victim, that he acted from a position of trust from within a community organization, and that he threatened the children with death if they disclosed to anyone what appellant was doing to them. We cannot find under these circumstances that the trial court's decision was unreasonable, arbitrary, or unconscionable.

B. Imposition of Consecutive Sentences: Allied Offenses

{¶ 47} Appellant next contends that "the imposition of consecutive sentences was unwarranted" because "[t]he offenses of Rape as alleged in Counts I and II of the Information and the Rape and Counts of Gross Sexual Imposition in the Original Indictment are allied offenses of similar import * * *." Appellant argues that rape and gross sexual imposition arising from the same conduct are allied offenses of similar import and that "it cannot be clearly established [from the record] that [these offenses] occurred on different occasions."

{¶ 48} The state contends that appellant waived this argument by virtue of pleading guilty to separate offenses. In support, the state relies on several cases that were decided between 1976 and 2008, which hold that a defendant who enters a guilty plea to distinct offenses waives any argument that the offenses are, in reality, allied offenses of similar import. However, in *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, the Supreme Court of Ohio held that the issue of allied offenses under R.C. 2941.25 may be

appealed pursuant to R.C. 2953.08(A)(4), even if the defendant entered separate pleas to multiple offenses and received a jointly recommended sentence. The court did intimate that the issue of allied offenses may effectively be waived where the plea agreement contains a stipulation that the offenses were committed with separate animus or where the record demonstrates that the defendant was informed that he or she was agreeing to be convicted of allied offenses. Id. at ¶ 29, 32. Since there is nothing in the present record to this effect, we reject the state's contention and consider the merits of appellant's argument.

{¶ 49} "[A] defendant may not be convicted of both gross sexual imposition and rape when the counts arise out of the same conduct." *State v. Faust*, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶ 143. The corollary, of course, is that a defendant may be convicted of both offenses when the counts arise out of separate conduct. Id. at ¶ 144-145. See, also, *State v. Hawks*, 8th Dist. No. 93582, 2010-Ohio-4345, ¶ 21. In this case, the record clearly shows that the counts of rape and gross sexual imposition were based on separate conduct. In the first place, the record does include evidence that the offenses took place on separate occasions. The presentence investigation report specifically discloses that "the abuse occurred on approximately 10 to 15 occasions * * *." In any event, the rape and gross sexual imposition counts would not be merged as allied offenses of similar import in this case, even if the underlying conduct did occur during the same encounter.

{¶ 50} Counts one and two of the information (rape) and counts three and four of the indictment (gross sexual imposition) involve offenses against victim M.B., while

count five (rape) and counts eight and nine (gross sexual imposition) involve offenses against victim C.M. "Clearly, a defendant can be convicted for more than one offense if each offense involves a different victim * * *." *State v. Harvey*, 3d Dist. No. 5-10-05, 2010-Ohio-5408, ¶ 24. See, also, *State v. Young*, 2d Dist. No. 23642, 2011-Ohio-747, ¶ 39; *State v. Poole*, 8th Dist. No. 94759, 2011-Ohio-716, ¶ 14; *State v. Lowd*, 3d Dist. No. 5-09-16, 2010-Ohio-193, ¶ 6. Thus, none of the counts naming M.B. as the victim are allied offenses of similar import to any of the counts naming C.M. as the victim.

{¶ 51} With respect to each victim, the rape count or counts involve the performance of fellatio by appellant upon his victim, while the gross sexual imposition counts involve the rubbing of appellant's penis on the victim's buttocks (and, except for count three, the additional act of touching the victim's penis). These are distinct sexual acts involving different areas of the victim's body that were obviously not performed simultaneously and, therefore, constitute separate crimes for which appellant may be convicted and sentenced. See *State v. Mason*, 10th Dist. Nos. 10AP-337, 10AP-342, 2011-Ohio-3301, ¶ 47; *State v. Faust*, supra, at ¶ 144-145; *State v. Cooper*, 2d Dist. No. 23143, 2010-Ohio-5517, ¶ 24-26; *State v. Bradley*, 3d Dist. No. 15-10-03, 2010-Ohio-5422, ¶ 61-62; *State v. Harvey*, supra, at ¶ 21; *State v. Hawks*, supra, at ¶ 21-22; *State v. Bunch*, 7th Dist. No. 02 CA 196, 2005-Ohio-3309, ¶ 195-196, reversed in part on other grounds, *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109; *State v. Hay* (Dec. 19, 2000), 3d Dist. No. 14-2000-24; *State v. Alexander* (Feb. 25, 1993), 8th Dist. No. 61674.

{¶ 52} We also note that a merger of the rape and sexual imposition counts as allied offenses would have no apparent impact on the consecutive prison terms imposed by the trial court. The trial court imposed consecutive sentences for the counts of rape and unlawful sexual conduct with a minor, not for the counts of rape and gross sexual imposition.

C. Imposition of Consecutive Sentences: Judicial Findings Revisited

{¶ 53} Appellant once again asserts that the trial court erred when it sentenced him to consecutive sentences without making the required findings of fact under R.C. 2929.14(E). We cannot perceive any difference between appellant's arguments here and those advanced in support of his second assignment of error. Therefore, we reject this argument for the reasons already stated.

{¶ 54} Accordingly, appellant's third assignment of error is not well-taken.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

{¶ 55} In his fourth assignment of error, appellant asserts that his trial counsel was ineffective for failing "to timely correct or object to" the errors stated in his first three assignments of error. In light of our disposition of the foregoing assignments of error, we find that appellant's trial counsel was not prejudicially ineffective.

{¶ 56} Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 57} The judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

JUDMENT 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

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE