

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2014-06-137
 :
 - vs - : OPINION
 : 4/13/2015
 :
 DALE A. CAMPBELL, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR13-03-0500

Michael T. Gmoser, Butler County Prosecuting Attorney, Kimberly L. Kasten, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Scott Blauvelt, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

PIPER, P.J.

{¶ 1} Defendant-appellant, Dale Campbell, appeals his convictions and sentence in the Butler County Court of Common Pleas for ten counts of pandering sexually-oriented matter involving a minor.

{¶ 2} Campbell's ex-girlfriend reported to police that she had discovered large amounts of child pornography on her laptop computer that Campbell had used approximately ten hours a day while he lived with her. An image evaluation performed on the computer by

police indicated that Campbell had his own file in the computer named "Dale," and that the password was "dalecampbell08." All of the pictures and videos of child pornography were located in the "Dale" file, and no other images were located within any other location in the laptop.

{¶ 3} Campbell was charged with 20 counts of pandering sexually-oriented matter involving a minor. Campbell pled guilty to ten of the 20 counts, and stipulated at the plea hearing that the bill of particulars was an accurate statement of facts. The trial court then ordered a presentence investigation, and later sentenced Campbell on each of the ten counts to which he pled guilty. The trial court ordered the sentences for five of the counts to run consecutive to each other, but concurrent with the sentences for the other five counts. The aggregate sentence was ten years, and Campbell was classified a Tier II sexual offender. Campbell now appeals his convictions and sentence, raising the following assignments of error.

{¶ 4} Assignment of Error No. 1:

{¶ 5} THE IMPOSITION OF CONSECUTIVE SENTENCES WAS CONTRARY TO LAW.

{¶ 6} Campbell argues in his first assignment of error that the trial court erred in sentencing him to consecutive sentences without first making the requisite statutory findings.

{¶ 7} The standard of review set forth in R.C. 2953.08(G)(2) shall govern all felony sentences, and dictates that sentences that are contrary to law will be reversed. *State v. Crawford*, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶ 6. A consecutive sentence is contrary to law and must be reversed where the trial court fails to make findings required by R.C. 2929.14(C)(4). *State v. Warren*, 12th Dist. Clermont No. CA2012-12-087, 2013-Ohio-3483, ¶ 16.

{¶ 8} According to R.C. 2929.14(C)(4),

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.

{¶ 9} "In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, syllabus.

{¶ 10} The record clearly indicates that the trial court sentenced Campbell to consecutive sentences, and made the R.C. 2929.14(C)(4) findings within the sentencing entry. However, the trial court did not make any findings, nor make any mention whatsoever, of the findings required by the statute during the sentencing hearing. As such, and as conceded by the state, Campbell's consecutive sentences are contrary to law, and must be reversed.

{¶ 11} Campbell's first assignment of error is sustained, his sentence is vacated, and

we remand the issue for resentencing.

{¶ 12} Assignment of Error No. 2:

{¶ 13} THE TRIAL COURT COMMITTED PLAIN ERROR TO THE PREJUDICE OF APPELLANT IN FAILING TO CONDUCT AN ALLIED OFFENSES ANALYSIS AND IN IMPOSING MULTIPLE SENTENCES FOR ALLIED OFFENSES OF SIMILAR IMPORT.

{¶ 14} Campbell argues in his second assignment of error that his crimes were allied offenses of similar import and should have been merged at sentencing.

{¶ 15} As referenced by Campbell, he did not object to his convictions as being allied offenses of similar import. Nonetheless, the Ohio Supreme Court has held that, even absent an objection at sentencing, "imposition of multiple sentences for allied offenses of similar import is plain error." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 31. As such, we will review Campbell's sentence to determine if any of his convictions should have been merged at sentencing.

{¶ 16} Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). Plain error does not exist unless, but for the error, the outcome would have been different. *State v. Blacker*, 12th Dist. Warren No. CA2008-07-094, 2009-Ohio-5519, ¶ 39.

{¶ 17} The Ohio Supreme Court has recently clarified the test for allied offenses. *State v. Ruff*, Slip Opinion No. 2015-Ohio-995. The *Ruff* court noted that the trial court or reviewing court must "first take into account the conduct of the defendant." *Id.* at ¶ 25.

If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance - - in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation.

Id.

{¶ 18} A defendant bears the burden of proving that the offenses for which he has been convicted and sentenced constitute allied offenses of similar import pursuant to R.C. 2941.25. *State v. Luong*, 12th Dist. Butler No. CA2011-06-110, 2012-Ohio-4520, ¶ 46. A court will look to the information contained in the record to make its allied offense determination, including the indictment, bill of particulars, and the presentence investigation report. *State v. Tannreuther*, 12th Dist. Butler No. CA2013-04-062, 2014-Ohio-74, ¶ 16.

{¶ 19} Campbell was convicted of ten counts of pandering sexually-oriented matter involving a minor. Five of the counts were charged as violations of R.C. 2907.322(A)(1), while five counts were charged as violations of R.C. 2907.32(A)(5). R.C. 2907.322(A)(1) provides that, "no person, with knowledge of the character of the material or performance involved, shall do any of the following: Create, record, photograph, film, develop, reproduce, or publish any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality." R.C. 2907.322(A)(5) provides, "no person, with knowledge of the character of the material or performance involved, shall do any of the following: Knowingly solicit, receive, purchase, exchange, possess, or control any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality."

{¶ 20} In regard to merging charges of pandering sexually oriented matter involving a minor, "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. Mannarino*, 8th Dist. Cuyahoga No. 98727, 2013-Ohio-1795, ¶ 53. Although the defendant may have obtained images around the same time, each file obtained constitutes a new and distinct crime because the "mere fact that the crimes occurred in quick succession does not mean that they were not committed separately or with separate animus." *State v. Eal*, 10th Dist. Franklin No. 11AP-460, 2012-Ohio-1373, ¶ 93.

{¶ 21} After reviewing the record, we find that Campbell's convictions are not allied

offenses of similar import. Campbell argues that because he obtained the images around the same time, his crimes were committed with the same conduct and animus. The bill of particulars indicates that ten of the 20 counts were specific to images downloaded to the computer on September 18, 2012, while the other ten counts were specific to his possession, exchange, or control of the images on November 6, 2012. However, as established above, 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.

{¶ 22} Instead, the record clearly indicates that the charges were specific to different images, ten of which form the basis of his convictions, so that multiple convictions were permitted. Despite his argument to the contrary, Campbell made the conscious decision to download, possess, control, and share the distinct images, and did so with a separate conduct and animus each time he downloaded, saved, or shared the images.

{¶ 23} Campbell argues that his convictions should merge because the record does not demonstrate that the files were "distinct," or "new." Campbell further argues that it cannot be determined whether the files were "unique" or simply "duplicates." However, each image described in the bill of particulars, which was stipulated as an accurate representation of the facts, clearly indicates that the files each depict a different, and heinous, image of child pornography.

{¶ 24} As set forth in the bill of particulars, the image depicted in Count 1, was an 11-year-old girl engaged in oral sex, and its title referenced the child who "jerks and sucks a big cock." Count 3 was specific to an image that depicted an 11-year-old girl engaged in oral sex, and the title referenced the child who "sucks a big cock and gets a mouthful of spunk." The image in Count 5 depicted an 11-year-old girl engaged in anal sex, and the tile referenced the child as a "Cat Goddess." The image in Count 7 depicted three children, ages four, six, and seven, engaged in sexual intercourse, with one child performing fellatio on

her father. The title referenced that the six-year-old child would "suck dad." The image in Count 9 referenced a five-year-old engaged in sexual conduct, and the title referenced the child's age as "5Yo." The image in Count 12 depicted a one-year-old child engaged in sexual conduct, and the title referenced "Girl 1Yo Stephanie." The image in Count 14 depicted a two-year-old child who was performing oral sex on her father, and the title referenced "toddler girl {2Yo} Suck Dad [5min]." The image in Count 16 depicted a three-year-old boy who had been anally raped, and the title referenced "toddler boy – 3yo—just fu**ed—cum is dripping from a**." The image in Count 18 depicted 10 and 11-year-old boys engaged in anal intercourse with one child's father, and the title referenced "Sweden Preteen BJ + Anal F**k." The image in Count 20 depicted three children, ages nine, ten, and 11, engaged in sexual intercourse, and was titled "Katerin Enjoy Pussy F**k."

{¶ 25} Stated once more, the Ohio Supreme Court has recently held that a court cannot merge charges if the offenses are dissimilar in import such as against separate victims, the offenses were committed separately, or the offenses were committed with a separate animus. Campbell's crimes were committed against multiple child victims depicted in the different images, he committed the offenses separately by downloading, possessing, and sharing distinct images, and he committed the offenses with a separate animus, as each image was chosen for its depiction of different child-victims engaged in different types of sexual conduct.

{¶ 26} While Campbell asserts that it is improper to rely on the fact that each file contained a different title and description of what was depicted within the file, he stipulated that the bill of particulars was an accurate recitation of the facts. Campbell was given the opportunity to add to the facts or to clarify them, and did not take the opportunity to assert at any time that the files were duplicative in any manner, downloaded in one giant transfer, or contained the same exact depictions in each file.

{¶ 27} At no time was any reference made to the possibility that the images were duplicative or downloaded or shared in one mass file. In fact, the presentence investigation report indicates that the detectives who performed the image evaluation of Campbell's computer discovered that Campbell's files contained "really bad child porn *images* of infants" and that the multiple images had been "stored and *categorized*." (Emphasis added.) The detectives also found "a large amount of image and video files of minors in a state of nudity and/or engaged in sexual activity," and that most of the victims were either pre-pubescent or toddlers and infants. These descriptions clearly indicate that the files contained different images, different victims, different sexual acts, and different types of child pornography rather than files that contained the same reproduced image over and over. The fact that Campbell categorized the images also indicates that they were distinct, each having their own place among Campbell's child pornography hoard based on what the image depicted.

{¶ 28} Furthermore, during the sentencing hearing, Campbell indicated that he had been addicted to pain killers and had essentially "blacked out" for the previous three years. Campbell explained to the trial court that he "didn't even realize the extent of this until I read through my discovery when my attorney gave it to me." Campbell then admitted that he did not pay for the pornography, but rather, obtained the images "through a shareware" and then later "passed" the images to others. At no time, however, did Campbell allege that he had only downloaded pornography one time in a mass download. Nor did Campbell allege that he shared only one file or that the multiple pictures and videos found in the computer were the same image over and over again. Campbell's assertion now that his crimes should merge because there could have been one mass download and one duplicative image is incongruous with Campbell's admission during his allocution that there was an "extent" to his criminal possession of child pornography, and incongruous with the description of the imaging evaluation of the computer. Campbell's farcical contention that his crimes should

merge because the images could have been the same is patently unsupported by the record.

{¶ 29} After reviewing the record, we find that Campbell has failed to demonstrate that his convictions were allied offenses of similar import. As such, the trial court did not commit plain error in failing to merge his sentences, and Campbell's second assignment of error is overruled.

{¶ 30} Judgment affirmed in part, reversed in part, and the cause is remanded for the limited purpose of resentencing in a matter consistent with this opinion.

HENDRICKSON and M. POWELL, JJ., concur.