

[Cite as *State v. Hood*, 2001-Ohio-2620.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

State of Ohio, :
 :
 Plaintiff-Appellee, :
 : Case No. 00CA51
vs. :
 : DECISION AND JUDGMENT ENTRY
Richard Hood, :
 : Released November 14, 2001
 Defendant-Appellant. :

APPEARANCES

Kathleen A. McGarry, Athens, Ohio, for appellant.

Alison Cauthorn, Marietta, Ohio, for appellee.

Kline, J.:

Richard Hood appeals the Washington County Court of Common Pleas' decision classifying him as a sexual predator and sentencing him to maximum, consecutive sentences for the two offenses he committed. Hood asserts that the trial court's finding that he is a sexual predator is against the manifest weight of the evidence. Additionally, Hood asserts that the trial court did not make the requisite findings to sentence him to maximum, consecutive terms. Because we find that the record contains some competent, credible evidence supporting the trial

court's conclusion that Hood is a sexual predator, and because the record contains the requisite findings and facts supporting those findings which justify sentencing Hood to maximum, consecutive terms, we disagree. Accordingly, we affirm the judgment of the trial court.

I.

Ashley Hood was born on July 12, 1984 to Hood and his first wife. Sara Cole was born on September 18, 1984 to Laura Cole (now Laura Cole Hood) and her first husband. Both of the girls' parents' first marriages ended in divorce, leaving Ashley in Hood's custody and Sara in Laura Cole Hood's custody. In 1994, Hood and Laura Cole Hood married and established a home where they lived with Ashley, Sara and their other children.

In June 2000, the Washington County Department of Children's Services received a report from Sara's natural father concerning the possible sexual abuse of Sara and Ashley. Upon investigation, Hood admitted abusing the girls, and eventually pled guilty to one count of gross sexual imposition and one count of rape.

The gross sexual imposition count arose from an incident in 1998 when Sara felt ill and stayed home from school. Sara told investigators that on that day, despite her protests, Hood forced her hands down to her side, held her nude body on the

bed, and fondled her vaginal area while giving her a sponge bath. Within a few days of that incident, Hood typed a message on his computer at work: "The best time I've ever had - I've had was giving Sara a sponge bath. Her pussy is really soft, but she wouldn't let me eat it. It's not every day that you get to give a thirteen-year old a bath like that." In a statement to the pre-sentence investigator, Hood stated that he did not actually fondle Sara, but wrote about his desires in order to prevent himself from acting on them.

The rape count involved Hood's conduct with Ashley on at least one occasion between 1991 and 1998. Hood told investigators that Ashley took over the role of his wife after his divorce in 1991, and that she initiated sexual contact with him, which he failed to stop. Specifically, Hood stated that Ashley played with his penis and gave him "blow jobs" on fewer than ten occasions. He stated that he never ejaculated into her mouth. Ashley reported that over the years Hood had forced her head down to his groin area and ejaculated into her mouth. She was unable to recall how many times those incidents occurred.

The pre-sentence investigation report also revealed that Hood admitted to watching the girls as they bathed or showered, admitted to entering the shower with Sara and having her wash his back and buttocks, and admitted to fondling both girls'

breasts and vaginal areas while they slept. Hood explained that he engaged in such behavior at times when he was under stress due to the actions of his ex-wife and her father. Hood stated that he quit abusing the girls in 1998.

The maternal grandmother of Ashley, with whom both Ashley and Sara were residing at least part-time at the time of the report, stated that both girls are doing well but do not like to talk about the incidents.

The trial court held a hearing to determine Hood's sexual offender classification and his sentence. The court considered the pre-sentence investigation report, the statements of the attorneys for both sides, and the statements of Hood and Laura Cole Hood. Laura Cole Hood stated her belief that Hood had been converted through attending church and counseling, and that he does not represent a danger to children.

The trial court determined that Hood is a sexual predator. The court sentenced Hood to eighteen months on the gross sexual imposition conviction and to ten years on the rape conviction. The trial court ordered Hood to serve the sentences consecutively. Hood appeals, asserting the following assignments of error:

- I. THE FINDING BY THE TRIAL COURT THAT APPELLANT IS A SEXUAL PREDATOR IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO THE MAXIMUM SENTENCE.

III. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE TERMS OF IMPRISONMENT.

II.

In his first assignment of error, Hood contends that the trial court's determination classifying him as a sexual predator is against the manifest weight of the evidence. Specifically, Hood asserts that the trial court should not have labeled him a sexual predator because he has never previously been convicted of a sexual offense and because nothing in the record indicates that he is likely to engage in future sexual offenses.

In a sexual predator proceeding, R.C. 2950.09(B)(3) requires that the trial court use the "clear and convincing evidence" standard of proof. Thus, a reviewing court must examine the record to determine if the trier of fact had sufficient evidence before it to satisfy the "clear and convincing" standard of proof. *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368. The words "clear and convincing" mean:

That measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as * * * 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. (Citations omitted.)

State v. Schiebel (1990), 55 Ohio St.3d 71, 74. This court will not re-weigh the evidence, and will affirm the judgment of the trial court when the record contains some competent, credible evidence that goes to all the essential elements of the case. *Id.*; *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, quoting *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279.

The factors that the trial court must consider under R.C. 2950.09(B)(2) are as follows:

- (a) The offender's age;
- (b) The offender's prior criminal record regarding all offenses, including, but not limited to, all sexual offenses;
- (c) The age of the victim of the sexually oriented offense for which sentence is to be imposed;
- (d) Whether the sexually oriented offense for which sentence is to be imposed involved multiple victims;
- (e) Whether the offender used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;
- (f) If the offender previously has been convicted of or pleaded guilty to any criminal offense, whether the offender completed any sentence imposed for the prior offense and, if the prior offense was a sex offense or a sexually oriented offense, whether the offender participated in available programs for sexual offenders;
- (g) Any mental illness or mental disability of the offender;

(h) The nature of the offender's sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;

(i) Whether the offender, during the commission of the sexually oriented offense for which sentence is to be imposed, displayed cruelty or made one or more threats of cruelty;

(j) Any additional behavioral characteristics that contribute to the offender's conduct.

The purpose of considering the above factors is to assist the court in determining whether the offender is likely to commit sexual offenses in the future. *State v. Dunn* (June 17, 1998), Pickaway App. No. 97CA26, unreported. The trial court may designate even a first time sexual offender as a sexual predator if the enumerated factors indicate that the offender is likely to commit sexual offenses in the future. See *Dunn, supra*; *State v. Watts* (May 29, 1998), Montgomery App. No. 16738, unreported.

In this case, the record contains the pre-sentence report and the testimony of Hood and his wife at the sexual offender classification and sentencing hearing. The report contains competent, credible evidence supporting the trial court's ruling, including: (1) Hood was thirty-seven years old at the time of the gross sexual imposition and between thirty-one and thirty-seven years old at the time of the rape, old enough to

appreciate the nature of his conduct; (2) Ashley was only seven years old when Hood began to abuse her; (3) Hood victimized more than one girl; (4) Hood exhibited a pattern of abuse, in that he abused Ashley at least ten times between 1991 and 1998; (5) the nature of Hood's behavior was exploitive, in that he used the trust placed in him by virtue of his relationship to the victims as their father or step-father; (6) Hood used physical force upon both his victims; and (7) Hood displayed cruelty in threatening his victims that they would be separated from their families if they reported the abuse.

Based upon the evidence described above, we find that the record contains competent, credible evidence to support the trial court's determination that Hood is likely to engage in sexual offenses in the future. Hence, the trial court's determination that Hood is a sexual predator is not against the manifest weight of the evidence.

Accordingly, we overrule Hood's first assignment of error.

III.

In his second assignment of error, Hood asserts that the trial court erred in sentencing him to the maximum sentence without making statutory requisite findings. Likewise, in his third assignment of error, Hood asserts that the trial court

erred in ordering him to serve his sentences consecutively. In his brief to this court, Hood concedes that the trial court made the findings required by statute, but asserts that the evidence in the record does not support or justify any of those findings.

R.C. 2953.08(A)(4) provides that a defendant who is convicted of a felony may pursue an appeal on the ground that the sentence is contrary to law. The appellate court may modify the sentence upon clearly and convincingly finding that the sentence is not supported by the record, the sentence erroneously includes or excludes a prison term, or the sentence is contrary to law. R.C. 2953.08(G)(1)(a)-(d). In applying this standard of review, we do not substitute our judgment for that of the trial court. Rather, we look to the record to determine whether the sentencing court: (1) considered the statutory factors, (2) made the required findings, (3) relied on substantial evidence in the record supporting those findings, and (4) properly applied the statutory guidelines. *State v. Persons* (Apr. 26, 1999), Washington App. No. 98CA17, unreported, citing Griffin & Katz, *Ohio Felony Sentencing Law* (1999) 542-547, Section 9.16-9.20.

In sentencing a felony offender, a trial court must impose a sentence that is reasonably calculated to achieve the two overriding purposes of felony sentencing, *i.e.*, protecting the

public from future crime by the offender and others and punishing the offender. R.C. 2929.11(A). To achieve these two purposes, it is within the court's discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11. R.C. 2929.12(A).

However, the court must consider the factors set forth in R.C. 2929.12(B) and (C) relating to the seriousness of the offender's conduct, and those set forth in R.C. 2929.12(D) and (E) relating to the likelihood of the offender's recidivism. R.C. 2929.12(A).

The trial court's sentencing entry should include the trial court's findings regarding the sentencing factors as well as the facts in the record supporting those findings. See *State v. Reed* (Dec. 26, 2000), Washington App. No. 00CA01, unreported. However, in the interests of justice we may examine the entire record to determine the basis of a lower court judgment. *Id.* at fn. 1, citing *State v. Blair* (Dec. 27, 1999), Scioto App. Nos. 98CA2588 & 98CA2589, unreported, citing *State v. Patterson* (Sept. 21, 1998), Washington App. No. 97CA28, unreported. Therefore, in felony sentencing cases, while a trial court must give its reasons for its findings, they need not be specified in the sentencing entry as long as they are discernable from the record as a whole. *Id.* However, the better practice is to

articulate both the findings and reasons for the findings, when required, in the sentencing entry. *Id.*

A.

In reviewing the trial court's imposition of maximum sentences upon Hood, we note that R.C. 2929.14(C) establishes the public policy disfavoring maximum sentences except for the most deserving offenders. *State v. Edmonson* (1999), 86 Ohio St.3d 324, 328. R.C. 2929.14(C) prohibits a trial court from imposing the maximum term of imprisonment for an offense unless the trial court determines that the offender falls into one of four classifications. *State v. Riggs* (Sept. 13, 1999) Washington App. No. 98CA39, unreported, citing *State v. Holsinger* (Nov. 20, 1998), Pike App. No. 97CA605, unreported. Maximum sentences are reserved for those offenders who: (1) have committed the worst forms of the offense; (2) pose the greatest likelihood of committing future crimes; (3) certain major drug offenders; and (4) certain repeat violent offenders. R.C. 2929.14(C).

R.C. 2929.19(B)(2)(d) requires a trial court to "make a finding that gives its reasons for selecting the sentence imposed" if the sentence is for the maximum term, and requires a trial court to set forth its "reasons for imposing the maximum prison term." *Edmonson* at 328. See, also, *Riggs*; *State v.*

Lenegar (Feb. 3, 1999), Vinton App. No. 98CA521, unreported. We will uphold a maximum sentence if the court's stated findings are supported by the record. See *Riggs; Lenegar*.

In this case, the trial court found that Hood committed the worst form of the offenses and that he poses the greatest likelihood of recidivism. Hood concedes that the trial court made the findings necessary to impose the maximum sentence on each offense, but asserts that the record does not support the trial court's findings. However, our review of the record reveals support for each of these findings. As the trial court noted, Hood committed the worst form of the offenses in that he victimized his own daughter and step-daughter. The trial court also found that Hood posed the greatest likelihood of recidivism. The record supports this finding, given that Hood engaged in a pattern of inappropriate sexual activity over a seven year period, continued to insist in the pre-sentence investigation and at the sentencing hearing that Ashley initiated the sexual activity, and used threats to prevent the girls from reporting the sexual activity. We cannot clearly and convincingly find that the trial court erred in finding that Hood committed the worst form of the offense or that he poses the greatest likelihood of recidivism. Therefore, we overrule Hood's second assignment of error.

B.

In reviewing Hood's assertion that the trial court erred in imposing consecutive sentences, we note that, in general, a prison sentence imposed by an Ohio court must run concurrently with any other sentence imposed by any other court in this country. R.C. 2929.41(A). However, a court may impose consecutive sentences under R.C. 2929.14(E)(4) when:

* * * 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 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) The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course 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.

The inquiry under R.C. 2929.14(E)(4) is a "tripartite procedure." *State v. Hiles* (Nov. 6, 2000), Hocking App. No. 99CA23, unreported, citing, *State v. Haugh* (Jan. 24, 2000),

Washington App. No. 99CA28, unreported. First, the sentencing court must find that consecutive sentences are "necessary to protect the public" or to "punish the offender;" second, the court must find that the consecutive sentences are "not disproportionate" to the seriousness of the offender's conduct and the "danger" he poses; and finally, the court must find the existence of one of the enumerated circumstances in R.C.

2929.14(E)(4)(a) through (c). *Id.* The verb "finds," as used in R.C. 2929.14(E)(4), means that the court "must note that it engaged in the analysis" required by the statute. See *Edmonson*, 86 Ohio St.3d at 326; *State v. Brice* (Mar. 29, 2000), Lawrence App. No. 99CA21, unreported. Additionally, the court must comply with R.C. 2929.19(B)(2)(c), which requires that the sentencing court make a finding giving its reasons for deciding to impose consecutive sentences under R.C. 2929.14. The requirement that a court give its reasons for selecting consecutive sentences is separate and distinct from the duty to make the findings required by R.C. 2929.14(E)(4). *Brice*.

In this case, the trial court found that consecutive sentences were necessary to protect the public from future crime and to punish Hood, and that the harm Hood caused was great and unusual. Hood asserts that the record does not support the trial court's findings. In particular, Hood asserts that the

record does not support that he poses any danger to the public, because his offenses occurred only within his family. However, we find that Hood's willingness to victimize family members in such a manner only illustrates the greater danger he would pose to children in the public, with whom he does not have an emotional bond, should he gain access to them. Additionally, Hood contends that the fact that he voluntarily stopped abusing his daughter and step-daughter during the past two years shows that he does not pose a likelihood of recidivism. However, we find that Hood's pattern of abuse over a period of approximately seven years outweighs the previous two years.

The record contains evidence demonstrating that consecutive sentences are necessary to protect the public because Hood had more than one victim. Consecutive sentences are not disproportionate to the danger Hood poses because Hood's continued belief that his victims or others prompted him to engage in the illegal conduct reflects his failure to fully appreciate his personal responsibility for his past actions and the danger he may pose in the future. Finally, Hood's conduct caused his victims great and unusual harm due their relationship with him. In listing its reasons for imposing consecutive sentences, the trial court noted that the sexual conduct occurred on multiple occasions over a considerable period of

time, and that no single prison term would adequately reflect the seriousness of his conduct.

We find that the record, particularly Hood's pre-sentence report, supports the trial court's decision that Hood is likely to commit future crimes, and therefore poses a great likelihood of recidivism. Thus, we find that Hood has failed to clearly and convincingly demonstrate that the record does not support the trial court's findings. Accordingly, we overrule Hood's final assignment of error, and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. The stay as herein continued will terminate in any event at the expiration of the sixty-day period.

The stay shall terminate earlier if the appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to Rule II, Sec.2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J. & Abele, P.J.: Concur in Judgment and Opinion

For the Court

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

