Supreme Court of Ohio Clerk of Court - Filed June 10, 2015 - Case No. 2015-0956

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May 27, 2015

NOTICE OF THE FILING OF FINAL ENTRY

CASE NO: 14CA0042 CAPTION:
ADAM J OVERHOLSER vs. STATE OF OHIO

To: ~~**BRIAN DRISCOLL**~~ / Ryan Saunders
50 E COLUMBIA STREET
SPRINGFIELD OH 45502

Please be advised that the Final Entry has been filed in the above captioned case on: **MAY 26, 2015**.

Disposition as follows: JUDGMENT OF THE TRIAL COURT IS REVERSED AND THE MATTER IS REMANDED FOR RESENTENCING

RONALD E VINCENT, CLERK OF COURTS
COMMON PLEAS COURT AND COURT OF APPEALS

Mindy Smith
DEPUTY CLERK

RICHARD E MAYHALL

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

CLARK COUNTY
COURT OF APPEALS
MAY 26 2015
FILED
RONALD E. VINCENT, CLERK

STATE OF OHIO	
Plaintiff-Appellee	C.A. CASE NO. 2014-CA-42
v.	T.C. NO. 13CR859
ADAM OVERHOLSER	**FINAL ENTRY**
Defendant-Appellant	

. . . . . .

Pursuant to the opinion of this court rendered on the 22nd day of May, 2015, the judgment of the trial court is reversed and the matter is remanded for resentencing.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Clark County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

Mary E. Donovan
MARY E. DONOVAN, Judge

Michael T. Hall
MICHAEL T. HALL, Judge

JEFFREY M. WELBAUM, Judge

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CLARK COUNTY
COURT OF APPEALS

MAY 26 2015

FILED
RONALD E. VINCENT, CLERK

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	
Plaintiff-Appellee	C.A. CASE NO. 2014-CA-42
v.	T.C. NO. 13CR859
ADAM OVERHOLSER	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	

. . . . . .

OPINION

Rendered on the 22nd day of May, 2015.

. . . . . .

RYAN A. SAUNDERS, Atty, Reg. No. 0091678, Assistant Prosecuting Attorney, 50 E. Columbia Street, Suite 449, Springfield, Ohio 45502
Attorney for Plaintiff-Appellee

RICHARD E. MAYHALL, Atty. Reg. No. 0030017, 20 S. Limestone Street, Suite 120, Springfield, Ohio 45502
Attorney for Defendant-Appellant

. . . . . .

DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Adam Overholser, filed March 27, 2014. Following his pleas of guilty, Overholser appeals from the trial court's judgment entry of conviction sentencing him to four years each on five counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4), to be served consecutively, for an aggregate term of 20 years. The offenses are felonies of the third degree. Since

the record clearly and convincingly does not support the trial court's consecutive sentence findings, we hereby reverse the trial court's judgment and remand the matter for resentencing.

{¶ 2} Overholser was indicted on December 16, 2013, on six counts of gross sexual imposition and one count of rape. In exchange for Overholser's pleas, one count of gross sexual imposition and the rape count were dismissed. The male victim herein, B.D., was 11 years old at the time of the offenses, and Overholser was 21 years of age.

{¶ 3} Overholser initially pled not guilty on December 20, 2013, but then he entered his guilty pleas on February 20, 2014. At the plea hearing, the prosecutor stated that the offenses alleged in Counts One, Two, Three and Five involved Overholser touching the penis of the victim, and the allegation in Count Four "would be that the defendant had the victim touch his penis * * *."

{¶ 4} The Presentence Investigation Report ("PSI") is part of the record before us, attached to which is the Probable Cause Affidavit of Detective Debra Strileckyj, which provides that on December 2, 2013, "an incident of sexual abuse involving [B.D.] was reported to the Clark County Sheriff's Office." The Affidavit further provides:

> * * *
>
> On December 4, 2013, a forensic interview was conducted with the victim, B.D., who disclosed numerous incidents of mutual masturbation and oral sex, from approximately May, 2013 through September, 2013. The victim disclosed these incidents occurred at locations in Clark, Miami, and Champaign counties. On this same date a recorded phone call was conducted, during which the Defendant admitted to some sexual acts.

{¶ 5} The PSI provides as follows regarding the offenses:

> The defendant related the following concerning his involvement in the instant offense: "I began to form a relationship with the victim to be a positive influence in his life. We became close and did a lot together. I took him fishing a lot, to a hockey game, I went to his baseball games, and I took him to Kings Island a couple times. We spent a lot of time together and he began staying overnight with me. Everything was normal for a while but then something tempted me to make a poor decision and do inappropriate things with the victim. There was a time when there was inappropriate touching and other times I masturbated in front of the victim. I really can't explain why things happened other than we just had a close relationship and I felt comfortable doing things I shouldn't with him and in fron[t] of the victim. I knew as soon as it happened that it was wrong and I began to end the relationship prior to my arrest."
>
> When questioned further about the instant offenses, the defendant admitted to committing them. He further stated he didn't have an explanation for his inappropriate actions and states that he did not have any previous sexual attraction to other underage children. He further denied any other inappropriate sexual actions with any other children.

{¶ 6} The PSI provides that Overholser was "last employed as a bus driver and substitute custodian and substitute aide for the Tecumseh Local Schools from October, 2012 to December, 2013." It indicates that he also worked for Tac Industries from July-December, 2013, and that he lost both of these jobs due to his arrest. The PSI provides

that Overholser previously worked at Loretta's Country Kitchen from October, 2007 to November, 2012, and at Karen's Pizzeria from October, 2005 to October, 2007, both in Christiansburg.

{¶ 7} We note that there are 18 letters attached to the PSI in support of Overholser, including letters from members of his church and community, Overholser's mother and brother, Overholser's eighth grade language arts teacher, as well as a retired teacher from Graham High School and Overholser's Sunday school teacher. Also attached to the PSI is Overholser's transcript from Graham High School, from eighth through twelfth grade, reflecting a cumulative grade point average of 3.562 and a class rank of 30 out of 165 students. Finally, an Ohio Risk Assessment System ("ORAS") report is attached to the PSI which concludes that Overholser represents a low risk for recidivism in seven categories.

{¶ 8} At disposition, John Ranous testified that he is the pastor of Newton Missionary Church near St. Paris, having been so employed for eight and a half years. Ranous stated that Overholser "has been an active part of our church, and when I say active, he'd probably be there for forty-eight Sundays out of fifty-two Sundays a year." Ranous stated that Overholser worked with him to develop a website for the church, and that Overholser ran the projection system during Sunday services, noting that "Adam has been the young man since probably six years ago who has been entrusted with developing all of those slides, putting them onto the computer." According to Ranous, Overholser "would come on Saturday nights and install them * * *, and then if on Sunday mornings that he was gone, which was rare, he would have it arranged that somebody else would be able to do that."

{¶ 9} Ranous stated that he has met with Overholser on Tuesdays and Thursdays since he has been in jail, and that, regarding the offenses, "we talked about it in general terms as far as asking him if he knows what he does is sin as a Christian and if he's repentantive (sic) of that and his understanding of that." Ranous stated, "I've gone so far as to ask him, is it a temptation in your life and is it something that's going to be recurring pastorally as a concern for him at which point he said no. He has said that it happened and it shouldn't have happened." Ranous stated that he did not understand the nature of the offenses Overholser committed, but that Overholser "assured me it won't happen again." Ranous stated, "as far as I know, [Overholser's] been honest with me; and from what I can see he's been honest with even law enforcement and all."

{¶ 10} Ranous testified that Overholser did not seek out contact with the younger parishioners in their church, and instead he has "kind of kept himself to the computer end of our church and the technology end of it." Ranous stated that Overholser was once asked to volunteer with the children's ministry, but "it never worked out in his schedule, so he's never sought to be around the church in such a way as to compromise his integrity." Ranous stated that he believes Overholser is remorseful about his actions, and that his remorse is sincere and genuine. Ranous stated that he believes that Overholser has the ability to learn from his arrest and avoid similar conduct.

{¶ 11} Russell Steel testified that he is a Sunday school teacher at Newson Missionary Church with 37 years' experience, and that he is also a deacon in the church and a member of the church board. He stated that he has attended the church since 1972 when he became the Youth Director. Steel stated that Overholser has attended the church since he was seven or eight years old. Steel stated that he agreed with

Ranous' testimony regarding Overholser's character. Steel stated that Overholser "has never been a noncompliant or a troubled kid. * * * He was a leader at the school." Steel stated that he himself has "dealt with discipline and punishment a lot," and regarding Overholser, "we've got a young man here who is pretty compliant and doesn't require that stiff arm, and I am convinced after our time of sharing that Adam is really getting the message of the seriousness of what he's done." Steel testified, "And I believe his heart has repentantly changed, and I just hope that we don't over-discipline. I always found as a teacher that I always wanted to discipline severely enough to change behavior and break their will but not break their spirit so that they despair and give up." Steel stated that he has visited Overholser weekly in jail. Like Ranous, Steel testified that he was unfamiliar with the nature of the charges against Overholser. Steel stated that Overholser has indicated to him that he accepts responsibility for his offenses, and when asked if Overholser's remorse is genuine, Steel responded, "Without a doubt."

{¶ 12} Counsel for Overholser argued to the Court that Overholser has no criminal history, that he did well in school, and that he was his senior class president. He stated that Overholser has always been a hard worker, often holding two jobs at a time. He stated that Overholser has been completely honest about the offenses. Counsel acknowledged that Overholserr's "occupation facilitated the offense to the extent that that's how he became introduced to this young man. He drove a bus and was a bus attendant for the young man's grandmother." Counsel asserted that Overholser "has made a family here in the church members, all of whom think the world of him. They understand that he did a terrible thing." Counsel asked the court to impose a sentence that "is proportionate to the harm caused. Consistent with similar offenses. There was

just the one child in this situation. I don't mean to demean what happened, but it's not like there were a string of victims in this case* * *." According to counsel for Overholser, "Adam up until this situation has led an exemplary life."

{¶ 13} Overholser then addressed the court as follows:

> Yes, Your Honor, first I'd like to say I am sorry to every single person that has been affected by my poor choices. I consider it my highest goal in life to help others and make others happy.
>
> That is why this has been so difficult for me, not only because of the consequences of my actions but internally because I know that I have hurt somebody and let a countless number of people down.
>
> I'd like to specifically apologize to the victim and the victim's family. I developed a close relationship with all of them.
>
> They trusted me, confided in me, and counted on me and with much of my sorrow I destroyed all of this, and I can never replace it. It's impossible for me to go back and change what I have done or say anything to make them feel better. I can only pray that God will heal their hearts and that they may be able to forgive me someday. I feel regret and I'm ashamed and embarrassed for what I done.
>
> I realize you probably hear this day after day, Your Honor, but I say this with the most sincerity and honesty that this is not something that will ever happen again.
>
> I wish there was something I could do or something tangible that I could do to you to guarantee that, but what I can give you is my word.

Anybody knows that my word is valuable and means something because I always have been and I always will continue to be a man of my word.

I've been honest for my actions since the very beginning. I was honest with the victim's mother when she confronted me. I was honest with the detective in the interview with me, and I'm being honest and sincere with you now, Your Honor.

Once again, I assure you I learned from my mistakes, and this will never happen again. Although I cannot go back and change what happened, I am willing to face the consequences of my actions and seek any help and advice available to me.

I have a huge network of family, church family and friends that will stand by me in any way possible.

{¶ 14} Finally, the prosecutor then addressed the court as follows[1]:

* * *

And so far you haven't heard anything about the victim. You only heard about the defendant and how he was a good church goer and [how] he's done what was right, in their mind.

---

[1] As this Court previously noted in *State v. Adams*, 2d Dist. Clark No. 2014-CA-13, 2015-Ohio-1160, fn. 1, "The order of the presentencing statements (i.e. [Overholser] and counsel went first and the State was the last to speak to the court) is unusual. Given the history of the right of allocution and its probable evolvement from final statements before pronouncement of a death sentence, Bennett, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocution in Sentencing*, 65 Ala.L.Rev. 735 (2014), it seems reasonable that a convicted defendant should have the last word. However, [Overholser] did not object, seek to rebut anything the prosecutor said, or raise the issue on appeal. While the right to allocution itself is constitutional, *Green v. United States*, 365 U.S. 301, 81 S.CCt. 653, 5 L.Ed.2d 670 (1961), neither the Constitutional nor Crim.R. 32(A)(4) mandates a particular sequence and there does not appear to be any inherent prejudice."

But unfortunately, we now have an eleven-year-old child who is never going to be the same. His life because of these selfish actions of Adam Overholser is never going to be the same. He's going to live every single day of his life knowing what has happened to him.

He has to live every single day of his life wondering what's going to happen to him next. And I know that he wrote a letter to the Court.

I just want to read a very short portion of that letter to the court right now, and he wrote: "The choices that Adam made have changed my life and have caused problems for me that I now have to go to therapy to deal with. There are places that I avoid and triggers that cause problems for me and affect the things I do every single day. I am glad Adam is in jail right now, and I would like him to stay in prison for a very long time.

This way he will not be able to hurt anymore children, if he hasn't already. And then when I also will be an adult and be able to defend myself if I should need to. I never want to see or talk to Adam again. He has hurt me, broken my trust, hurt my family and his own family, and he should pay the price for his actions."

So this is from a now twelve-year-old victim who has to go to counseling to deal with these issues, and that's probably going to be something that's going to be ongoing in his life.

He's worried about his own family because of their relationship [to] this individual.

Again, I can't say it enough, that this young man, no matter how good

he was, no matter how involved he was in the community and the things that he did, he has taken a child and forever broken him, and we have a grandma who is devastated because she thinks it's her fault that Adam came in contact with her grandson. She blames herself personally because she was the one who didn't see it who invited Adam in and just like the other people in this courtroom - - and by that I mean it was because he was so engaging, so nice and yet now everyday she has to feel the pain of knowing what has happened to her grandson.

I have a mom who is devastated because, again, she let this individual take her son to places because she thought, again, like all the other individuals did, that this was good person and during that entire time he was grooming this young man.

He was doing stuff in order to, again, serve his own selfish needs. Again, he says he doesn't know why he did this. This wasn't a one time thing, Your Honor. This was over a period of time. These were five distinct separate acts. Yes, there was only one victim.

But at any time this defendant could have stopped and said, you know what, what I did was wrong. He continued on to the next time. For five times. And finally, he was confronted. And only then when he was confronted, did he come forward and say, "Yes, I did this," and try to seek out help.

Again, we have an individual who works at a local school district. It was brought out Tecumseh is where I went to school at. Every time you

> see on the news when you have someone in that position of trust who violates that position of trust, and I understand it was played up more that he was a Tecumseh school bus driver, but what really happened was with a family friendship. He used that family friendship to facilitate his actions, Your Honor.

The prosecutor asked the court to sentence Overholser to consecutive sentences on each count.

{¶ 15} The trial court designated Overholser a TIER II sex offender, sentenced him to five years of mandatory post-release control, and then addressed him as follows:

> As I indicated, I did receive numerous letters on behalf of the defendant and on behalf of the victim. With respect to those of you who may have written letters on behalf of the defendant, I can appreciate your position, and I can understand your desire to support your friend or family member or fellow church member.
>
> I do want to set forth here on the record some recurring themes that I saw in those letters:
>
> "Mistake, possibly a terrible misunderstanding, one unthinkable mistake; I truly do not believe that prison is the right place; a mistake, a huge misunderstanding, some bad decisions, a lack of sound judgment, a bad choice, mistakes have been made; mistakes, a mistake; a slip in character that [everyone] at some time in their life makes."
>
> And I just want to be clear that, again, while I appreciate a desire to support a friend or family member or fellow church goer, in order to put this

in proper perspective, these were not mistakes. These were criminal acts perpetrated on a child, and they were repeated multiple times.

It makes me wonder if some of these letters would be different if the letter writers were related to the victim in this offense.

These are some excerpts from letters that I have received on behalf of the victim and his family:

"We hope the defendant receives the maximum sentence. The defendant needs to be in prison for a long time. Hearing the victim say what the defendant had done to him was like a nightmare for all of us.

The victim has been robbed of his childhood. The victim has told us that he will never get over this. That he doesn't understand why this happened to him. I hope you consider giving the defendant the maximum sentence.

I strongly believe in the worse (sic) sentence possible due to the offender's actions toward a minor. The judicial system needs to make the offender accountable for his actions and show the public this will not be tolerated.

The defendant worked his way into this family. He gained everybody's trust and abused it in the most terrible way by sexually abusing an eleven-year-old child. I hope the Court will give him the maximum sentence. The victim has problems and now has to go to therapy to deal with it. He avoids places and triggers that cause problems for him. And this affects the things that he does everyday."

{¶ 16} The Court concluded as follows:

This was not just a one-time incident. These offenses were perpetrated upon an eleven-year-old child multiple times.

The Court finds, therefore, that consecutive sentence[s] are necessary to protect the public from future crime and to punish the defendant. That consecutive sentences are not disproportionate to the seriousness of the defendant's conduct and to the danger he poses to the public.

And that at least two of these multiple offenses were committed as part of a course of conduct and the harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed adequately reflects the seriousness of the defendant's conduct.

The Court is going to order that the defendant be sentenced to four years in the Ohio State Penitentiary on each offense. Those sentences will run consecutively for a total sentence of (20) twenty years in the Ohio State Penitentiary.

{¶ 17} Overholser's Judgment Entry of Conviction provides in relevant part as follows:

* * *

The Court considered the record, oral statements of counsel, the defendant's statement, numerous letters on behalf of both the defendant and the victim, and the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and then balanced the seriousness and

recidivism factors under Ohio Revised Code Section 2929.12

The Court found pursuant to Ohio Revised Code Section 2929.14(C)(4) that consecutive sentences (1) are necessary to protect the public from future crime and to punish the defendant, (2) are not disproportionate to the seriousness of the defendant's conduct and to the danger the defendant poses to the public, and (3) at least two of the multiple offenses were committed as part of a course of conduct and the harm caused by the offenses so committed was so great or unusual that no single prison term adequately reflects the seriousness of the defendant's conduct.

{¶ 18} Overholser asserts four assignments of error herein. We will consider his first and second assigned errors together. They are as follows:

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN IMPOSING CONSECUTIVE SENTENCES ON THE APPELLANT."

And,

"BECAUSE THE RECORD IN THIS CASE DOES NOT SUPPORT THE FINDINGS THE TRIAL COURT USED TO JUSTIFY THE IMPOSTION OF CONSECUTIVE SENTENCES, THE SENTENCE IS CLEARLY AND CONVINCINGLY CONTRARY TO LAW."

{¶ 19} We initially note that R.C. 2929.11(A) provides:

A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and to punish the offender using the minimum sanctions that the court

determines accomplish those purposes without imposing an unnecessary burden on the state or local government resources. * * *.

{¶ 20} Am.Sub.H.B. 86, effective September 30, 2011, "created a statutory presumption in favor of concurrent sentences and further directed courts to make statutorily enumerated findings prior to imposing consecutive sentences, but it did not require courts to give reasons in support of its findings." *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 4. As "long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Id.*, ¶ 29.

{¶ 21} R.C. 2929.14(C)(4) grants a sentencing judge the discretion to impose consecutive sentences for multiple offenses as follows:

> If multiple prison terms are imposed on an offender for conviction 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 course 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.

{¶ 22} Regarding Overholser's first assigned error, we note that in *State v. Rodeffer,* 2d Dist. Montgomery Nos. 25574, 25575, 25576, 1013-Ohio-5759, this Court held that we would no longer use an abuse-of-discretion standard in reviewing felony sentences, but would apply the standard of review set forth in R.C. 2953.08(G)(2). Since then, opinions from this Court have expressed reservations as to whether our decision in *Rodeffer* is correct. *See, e.g., State v. Garcia*, 2d Dist. Greene No. 2013-CA-51, 2014-Ohio-1538, ¶ 9, fn. 1; *State v. Johnson*, 2d Dist. Clark No. 2013-CA-85, 2014-Ohio-2308, ¶ 9, fn 1.

{¶ 23} R.C. 2953.08(G) provides as follows:

* * *

(2) The court hearing an appeal under division (A),(B), or (C) of this section shall Review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence

and remand the matter to the sentencing court for resentencing. The appellate court's standard of review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division * * * (C)(4) of section 2929.14 * * * of the Revised Code * * *.

(b) That the sentence is otherwise contrary to law.

{¶ 24} Regarding Overholser's second assigned error, we begin our analysis by noting that in *State v. Hawkins*, 2d Dist. Greene No. 2014-CA-6, 2014-Ohio-4960, this Court recently concluded that the record therein contained evidence supporting the imposition of consecutive sentences of three years each on two counts of gross sexual imposition. The record in *Hawkins* is distinguishable from the record herein and reflects the following facts:

According to the PSI, twenty-two-year-old Hawkins was found in a motel room with a twelve-year-old child. A half empty bottle of 151 proof rum was present. According to the victim, she and Hawkins had engaged in vaginal intercourse twelve times and oral sex thirteen times three days earlier. On the day she was found with Hawkins, the pair had engaged in vaginal intercourse another seven or eight times and oral sex another three or four times. The victim told police Hawkins had supplied her with rum, making her intoxicated. For his part, Hawkins admitted having sex with the victim multiple times. He stated that he believed she was fifteen years old, which he acknowledged still was below the legal age of consent. Hawkins

admitted providing the victim with alcohol. He also stated that he did not believe having sex with a fifteen-year old girl was inappropriate. * * * Among other things, the PSI included recommendations from a psychologist that if Hawkins received community control he should be prohibited from having unsupervised contact with females between the ages of ten and sixteen and should be required to undergo sex offender treatment. The PSI also noted that he accepted no responsibility for his actions.

{¶ 25} This Court determined as follows:

In our view, the facts in this case support the imposition of consecutive sentences. Although Hawkins had no prior criminal record other than a seat belt violation, he admitted engaging in numerous sex acts that constituted rape, a first-degree felony. *See* R.C. 2907.02(A)(1)(b) (defining rape to include sexual conduct with a person less than thirteen years of age, regardless of whether the offender knows the victim's age.) Even under Hawkins' version of events, he knew that the victim was under the legal age of consent. He also acknowledged providing her with alcohol and opined that having sex with a fifteen year old girl was not inappropriate.

The conduct in which Hawkins engaged and his attitude about it support a finding that consecutive sentences were necessary to protect the public from future crime and to punish him. Hawkins' actions and attitude also support a finding that consecutive sentences are not disproportionate to the seriousness of his conduct and to the danger he poses to the public.

Although Hawkins pled guilty to gross sexual imposition, he admitted engaging in rape. The trial court was entitled to consider that fact at sentencing. *State v. Clemons*, 2d Dist. Montgomery No. 26038, 2014-Ohio-4248, ¶ 8 (recognizing that a trial court at sentencing may consider a defendant's uncharged yet undisputed conduct as well as facts related to charges dismissed under a plea agreement.)

The record additionally supports a finding that Hawkins' offenses were committed as part of a course of conduct and that the harm caused was so great or unusual that no single prison term adequately would reflect the seriousness of his conduct. His course of conduct involved numerous sex acts over a multi-day period. With regard to the harm he caused, the victim's mother testified during the first sentencing hearing that her daughter was "paying dearly for her actions." * * * The victim's mother elaborated: "She's experienced a rape kit, jail time, ridicule from classmates, being called names on the street, and loss of friends."[] Although this evidence of harm is not overwhelming, it is enough to preclude a finding, by clear and convincing evidence, that the record does not support the trial court's finding under R.C. 2929.14(C)(4)(b)

{¶ 26} This Court further distinguished *State v. Nichols*, 195 Ohio App.3d 323, 2011-Ohio-4671, 959 N.E.2d 1082 (2d Dist.) ("*Nichols I*") and *State v. Nichols*, 2d Dist. Clark No. 2012 CA 38, 2013-Ohio-3285 ("*Nichols II*"), upon which Hawkins relied. Therein, the defendant "was convicted of four counts of gross sexual imposition for improperly touching four elementary-school girls. No skin-to-skin contact was involved,

as the touching occurred outside at least some clothing. The trial court imposed maximum, consecutive five-year prison terms totaling twenty years." *Hawkins,* ¶ 13. In *Nichols I*, this Court reversed, "finding that the sentence was an abuse of discretion. On remand, the trial court imposed four consecutive three-year prison terms. In *Nichols II*, this Court again reversed, finding little likelihood of recidivism, little evidence that the defendant's offenses were more serious than conduct normally constituting gross sexual imposition, and little evidence of great harm." *Id.*

{¶ 27} This Court noted that in *Nichols,* "the harm reported by the four girls involved in the defendant's improper touching included things such as anger, anxiety, crying, nervousness, insomnia, introversion, nightmares, insecurity, loss of self-esteem, and bed-wetting. *Nichols I* at ¶ 5-8." *Hawkins*, ¶ 16. One of the girls was also receiving therapy. *Nichols I* at 24. "This Court "reasoned that 'while the anger, fear, and disturbances experienced by the children are heartbreaking, there is nothing in the record to suggest that these injuries are qualitatively greater than those predictably experienced by any victim of a gross sexual imposition[.]' *Id.* at ¶ 38." *Hawkins*, *Id.* In contrast, this Court concluded that the harm experienced by the victim in *Hawkins* was so great as to warrant consecutive sentences. *Id.*, ¶ 17.

{¶ 28} The record herein reflects that the trial court made the necessary findings required by R.C. 2929.14(C) in sentencing Overholser. As this Court recently noted however, in *State v. Adams*, 2d Dist. Clark No. 2014-CA-13, 2015-Ohio-1160, ¶ 18, in which this Court determined that the record did not support the trial court's consecutive-sentence findings, while the sentencing court is not required to provide reasons to support its findings, "* * * an explanation of the rationale (both case-specific and statutory) for a

sentence can only increase the public understanding of a particular sanction and thus the perceived legitimacy of the criminal justice system. *See, e.g.*, O'Hear, *Explaining Sentences*, 36 Fla.St.U.L.Rev. 459 (2009) * * *." This Court further cautioned in *Adams* as follows:

> "Formalism" has been described as scrupulous or excessive adherence to outward form at the expense of inner reality or content. We are concerned that our sentencing jurisprudence has become a rubber stamp for rhetorical formalism. It appears that consecutive sentences will be upheld on appellate review as long as the aggregate sentence is within the arithmetic long-addition established by the statutes and the trial judge and the entry state that this calculation is necessary to protect the public from future crime or to punish the offender, (2) not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and (3) one or more of the offenses was committed while awaiting trial or sentencing. Here, the minimally-required statutory phrases were uttered, and a 22-year-old non-psychopathic addict, with only a previous juvenile suspended DYS commitment and no adult felony record, will spend the next twenty years in prison at the expense of the taxpayers, not to mention the damage to him and to the community where he will be released.

Adams, ¶ 30.

{¶ 29} Unlike in *Hawkins*, where this Court found that "Hawkins' depraved conduct and cavalier attitude reasonably suggest a risk of recidivism and a need for

serious punishment," we clearly and convincingly find a lack of support for the trial court's consecutive-sentencing findings. *Id.,* ¶ 14. As noted above, Overholser was 21 years old at the time of the offenses. He led a lawful life prior to the offenses, having not been adjudicated a delinquent child and with no adult criminal history. *See* R.C 2929.12(E)(1)-(3). Overholser completed high school, and the record reflects that he was an outstanding student and the president of his senior class. He did not provide alcohol or drugs to B.D., and he does not abuse alcohol or drugs himself. *See* R.C. 2929.12(D)(4). He has been consistently employed. Due to Overholser's TIER II sex offender designation, pursuant to R.C. 2950.06(B) and 2950.07(B), he will be required to register every 180 days for 25 years, making it unlikely that any future employment will bring him into contact with children, and we conclude that the circumstances herein are not likely to recur.

{¶ 30} The ORAS report further concluded that Overholser's risk of recidivism, in a risk range of low, low/moderate, moderate, high, and very high, is low in all seven categories, namely "Criminal History," "Education, Employment, and Financial Situation," "Family and Social Support," "Neighborhood Problems," "Substance Use," "Peer Associations," and "Criminal Attitudes and Behavioral Patterns."

{¶ 31} At sentencing, unlike Hawkins, Overholser apologized to "every single person that has been affected by my poor choices," and he acknowledged that he "hurt somebody and let a countless number of people down." He stated to the sentencing judge "with the most sincerity and honesty that this is not something that will ever happen again." He stated that he felt regret, and that he was ashamed of his conduct, and that when confronted regarding his offenses, he was honest with the victim's mother, law

enforcement and the court. Overholser stated that he "learned from my mistakes," and that he was "willing to face the consequences" of his actions. He stated that he has a large network of support in his family and community, as demonstrated by his letters of support, and that he is willing to "seek any help and advice available to me."

{¶ 32} Regarding the trial court's determination that at least two offenses were committed as part of one course of conduct, and that the harm caused by two or more of the offenses was so great or unusual that no single prison term adequately reflects the seriousness of the defendant's conduct, we note that there is no evidence that Overholser caused physical harm to B.D. or was violent. While Overholser's conduct is more egregious than the conduct in *Nichols,* since there was skin-to-skin contact between him and B.D., it does not rise to the level of harm at issue in *Hawkins* that resulted in a six-year sentence, namely "three dozen explicit sex acts," as well as "subjecting a twelve-year-old child to a rape exam, causing her to experience time in jail, and causing her to suffer ridicule and ostracization from her peers."[2] *Hawkins*, ¶ 17. While B.D., like one victim in *Nichols*, is receiving counseling, we cannot conclude that a need for counseling is so unusual under these circumstances. As we further noted in *Nichols I*, "there is nothing in the record to suggest that * * * [B.D. is] unlikely to overcome these effects in a reasonable period of time with the love and support of [his family] and the knowledge that [Overholser] has admitted his wrongdoing and been punished for it." *Id.*, ¶ 38. Further, without detracting from the criminality of Overholser's conduct, and without diminishing the psychological harm caused to B.D., we note that a sentence of 20 years in this matter may in fact demean the seriousness of other more violent crimes and the harm to other

[2] The circumstances that led to the victim serving time in jail are not clear.

victims; for example, rape is a felony of the first degree and has a maximum sentence of 11 years, and a sentence for murder is 15 years to life.

{¶ 33} For the foregoing reasons, we conclude that the record does not support the trial court's consecutive-sentence findings. Finally, we conclude that the record also does not demonstrate that consecutive service is the minimum sanction to accomplish the purposes and principles of sentencing without imposing an unnecessary burden on the State. Overholser's second assigned error is sustained, and his consecutive sentence is reversed. On this record, we would also find that the trial court abused its discretion in sentencing Overholser.

{¶ 34} Overholser's third and fourth assigned errors are as follows:

"BECAUSE THE SENTENCE IMPOSED BY THE TRIALCOURT IS DISPORPORTIONATE AND INCONSISTENT, IT IS CONTRARY TO LAW AND CONSTITUTES PLAIN ERROR."

And,

"BECAUSE THE TRIAL COURT FAILED TO REASONABLY CONSIDER THE CONCEPT OF REHABILITATION, THE DEFENDANT'S SENTENCE IS CONTRARY TO LAW."

{¶ 35} Given our conclusion that the record does not support the imposition of consecutive sentences, analysis of Overholser's remaining assignments of error is rendered moot.

. . . . . .

HALL, J., concurs in judgment only.

WELBAUM, J., dissenting.

{¶ 36} I very respectfully dissent from the judgment and opinion of the majority. Under the facts of this case, the trial court's decision to sentence Overholser, a 21-year-old with no previous criminal record, to twenty years in prison for five counts of third-degree felony gross sexual imposition is undoubtedly on the high end of the spectrum and may constitute an abuse of discretion. However, whether the trial court abused its discretion is not the appropriate standard of review. *See* R.C. 2953.08(G)(2); *State v. Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069, ¶ 29 (2d Dist.).

{¶ 37} Rather, as noted by the majority, in reviewing felony sentences we may increase, reduce, modify or vacate a sentence only if we "clearly and convincingly" find either: (1) that the record does not support certain specified findings (which include the consecutive sentence findings in R.C. 2929.14(C)(4)); or (2) that the sentence imposed is contrary to law. *Id.* Unlike the majority, I do not find that the record clearly and convincingly does not support the trial court's consecutive-sentence findings. Also, while not addressed by the majority, I do not find that the sentence imposed by the trial court is clearly and convincingly contrary to law. Therefore, I would affirm the judgment of the trial court.

{¶ 38} In reaching this decision, it should be noted that Overholser does not challenge the individual four-year prison sentences imposed for each of the five offenses of gross sexual imposition to which he pled guilty. Instead, only the trial court's consecutive-sentence determination is at issue. This squarely brings into play R.C. 2953.08(G)(2)(a) and the "extremely deferential" standard of review recognized by *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453 (8th Dist.). In *Venes,* the Eighth District

stated that:

> It is important to understand that the "clear and convincing" standard applied in R.C. 2953.08(G)(2) is not discretionary. In fact, R.C. 2953.08(G)(2) makes it clear that "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." As a practical consideration, *this means that appellate courts are prohibited from substituting their judgment for that of the trial judge.*
>
> It is also important to understand that the clear and convincing standard used by R.C. 2953.08(G)(2) is written in the negative. *It does not say that the trial judge must have clear and convincing evidence to support its findings.* Instead, it is the court of appeals that must clearly and convincingly find that the record does not support the court's findings. In other words, *the restriction is on the appellate court, not the trial judge. This is an extremely deferential standard of review.*

(Emphasis added.) *Venes* at ¶ 20-21.

{¶ 39} Multiple appellate districts, including this district, have cited and quoted *Venes* for the proposition that the standard of review is "extremely deferential." *See, e.g., Rodeffer* at ¶ 31; *State v. Lee*, 12th Dist. Butler No. CA2012-09-182, 2013-Ohio-3404, ¶ 9; *State v. Gooding*, 5th Dist. Holmes No. 13CA006, 2013-Ohio-5148, ¶ 7; *State v. Lane,* 11th Dist. Geauga No. 2013-G-3144, 2014-Ohio-2010, ¶ 123; *State v. Losey*, 4th Dist. Washington No. 14CA11, 2015-Ohio-285, ¶ 7. Most of these cases also quoted the language directly from *Venes* recognizing that a trial court does not need clear and convincing evidence to support its findings. Accordingly, as long as a trial court makes

appropriate statutory findings, the consecutive nature of its sentencing should stand unless the record overwhelming suggests otherwise. In my view, which is the same view shared by Judge Hall in the dissenting opinion he authored in *State v. Adams*, 2d Dist. Clark No. 2014-CA-13, 2015-Ohio-1160, "a record that is silent except for the offenses and dates committed, perhaps after pleas without a presentence investigation and with only minimal information concerning the offenses, is sufficient if the trial court made the necessary statutory findings. Under such circumstances, we should not substitute our conclusions for those of the trial court." *Id.* at ¶ 37.

{¶ 40} As the majority correctly notes, the trial court in this case made all of the consecutive-sentence findings required by R.C. 2929.14(C)(4). Specifically, the trial court found that: (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender; (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and (3) 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. *See* R.C. 2929.14(C)(4)(b).

{¶ 41} Pursuant to R.C. 2953.08(G)(2), I do not clearly and convincingly find that the record fails to support the foregoing consecutive-sentence findings. The presentence investigation report states that Overholser admitted to inappropriately touching the victim and masturbating in front of him. The record further indicates that there was skin to skin contact and the abuse occurred multiple times over a five month

period. In addition, the record reveals the abuse was facilitated by a family friendship, as Overholser gained the trust of the victim's family who allowed him to take the victim on outings such as fishing trips, hockey games, Kings Island, and sleepovers at Overholser's house. The record also indicates Overholser mentored the victim and took advantage of their close relationship.

{¶ 42} Furthermore, the victim was only 11 years old at the time of the abuse. The victim stated that Overholser hurt him and that the abuse has changed his life. The record further indicates that the victim suffered psychological harm, as the victim explained he has to go to therapy and avoid certain locations and triggers that cause him problems. The victim also expressed that the abuse has affected his daily life. As the trial court aptly stated: "[N]o matter how good [Overholser] was, no matter how involved he was in the community and the things that he did, he has taken a child and forever broken him[.]" Disposition Trans. (Mar. 19, 2014), p. 22.

{¶ 43} I find it significant that Overholser's sentence was five years less than the twenty-five year statutory maximum the trial court could have imposed. Moreover, Overholser overlooks the fact that his plea agreement resulted in the dismissal of an additional third-degree felony gross sexual imposition charge, as well as a more severe first-degree felony rape charge involving an allegation of oral sex that carried a possible term of life in prison. In fashioning an appropriate sentence, the trial court was permitted to consider these dismissed charges. *State v. Clemons*, 2d Dist. Montgomery No. 26038, 2014-Ohio-4248, ¶ 8 (recognizing that a trial court at sentencing may consider a defendant's uncharged yet undisputed conduct *as well as facts related to charges dismissed under a plea agreement*).

{¶ 44} Under R.C. 2953.08(G)(2), I also do not find that Overholser's aggregate twenty-year sentence is contrary to law. "[A] sentence is not contrary to law when the trial court imposes a sentence within the statutory range, after expressly stating that it had considered the purposes and principles of sentencing set forth in R.C. 2929.11, as well as the factors in R.C. 2929.12." (Citation omitted.) *Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069 at ¶ 32. These requirements were met here. Each of Overholser's sentences were within the authorized statutory range, and the trial court considered the statutory principles and purposes of sentencing as well as the seriousness and recidivism factors.

{¶ 45} Sentencing decisions are very fact dependent. In a factually similar case, *State v. Wilson*, 3d Dist. Henry No. 7-12-25, 2013-Ohio-5195, the Third District Court of Appeals affirmed a trial court's imposition of maximum-consecutive sentences totaling 25 years for five counts of third-degree felony gross sexual imposition using the standard of review in R.C. 2953.08(G)(2). Like the present case, the offenses in *Wilson* involved a single victim that was under the age of thirteen. Wilson was indicted for one count of first-degree felony rape and five counts of gross sexual imposition. As in the present case, the single count of rape was dismissed pursuant to a plea agreement while Wilson pled guilty to the gross sexual imposition charges. Wilson committed the offenses over a nine month period and was able to commit the offenses because he had gained a position of trust with the victim's family as a babysitter. Like Overholser, Wilson was a first-time offender who, during sentencing, apologized for his actions.

{¶ 46} There are only two notable differences between *Wilson* and the present case. The first is that it was estimated Wilson abused the victim approximately 40 times,

which is greater than the number of incidents shown in this appeal. The second is that Wilson had been sexually abused as a child and argued in mitigation that he did not understand the wrongful nature of his actions due to his prior abuse. Overholser, on the other hand, stated during his presentence investigation that he was never physically or emotionally abused as a child. He also could not explain why he abused the victim, other than stating that he and the victim had a close relationship.

{¶ 47} The cases cited by the majority, namely, *Nichols I* and *Nichols II,* applied an abuse of discretion standard, which is no longer the law of this district. Therefore, in applying the appropriate standard of review in R.C. 2953.08(G)(2), I would overrule Overholser's assignments of error and affirm the judgment of the Clark County Court of Common Pleas. Accordingly, I very respectfully dissent.

. . . . . .

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