

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	Case No. 2015-0956
	:	
<i>Plaintiff - Appellant</i>	:	C.A. No. 2014 CA 42
	:	
-vs-	:	
	:	
ADAM J. OVERHOLSER	:	On Appeal from the Clark County
	:	Court of Appeals, Second Appellate District
<i>Defendant Appellee</i>	:	

APPELLEE'S MEMORANDUM IN RESPONSE TO JURISDICTION

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THIS CASE IS NOT OF GREAT PUBLIC OR GENERAL INTEREST.

In reversing the 20 year sentence imposed upon Adam Overholser for sexually abusing a 12 year old boy where Overholser had not caused any physical harm to his victim nor any serious or unusual mental harm, had no prior record of any kind and where Overholser expressed profound remorse for his actions, the Second District held: “[f]urther, without detracting from the criminality of Overholser’s conduct, and without diminishing the psychological harm to BD, 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 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.” *State v. Overholser*, 2015-Ohio-1980 at ¶32. Now, the state argues to this court that the court of appeals improperly “substituted its judgment” for that of the trial court. In reality, the court of appeals carefully analyzed the record in the case, devoting some 12 pages of the 23 page majority opinion to doing so, and clearly and convincingly (and correctly) concluded that the record did not support the findings the trial court made to support the imposition of consecutive sentences.

In its Memorandum in Support of Jurisdiction, the state advances three reasons as to why this case constitutes a case of great public or general interest.

The first is the “... so long as the trial court makes the appropriate statutory findings, the consecutive nature of its sentencing should [stand] and a court of appeals should not substitute its conclusions for that of the trial court.” The problem is that the state’s argument ignores this court’s decision in *State v. Bonnel*, 148 Ohio St. 3d 209, 2014-Ohio-3177, 16 N.E. 3d 659. In *Bonnel*, this court directed appellate courts “to review the record, including the findings underlying the sentence” and to modify or vacate the sentence “if it clearly and convincingly finds . . . that the

record does not support the sentencing court's findings under division . . . (C)(4) of §2929.14 of the Revised Code." *Bonnel, supra.* at ¶28. The state, apparently, sees no role for appellate courts in the appellate review of consecutive sentences.

Next, the state argues that "[t]his court should accept this case and remedy this statutory violation and further expound [sic] the holding of *State v. Bonnel* . . . by holding that where the trial court makes the necessary findings to impose consecutive sentences and the record supports such findings, the appellate courts are prohibited from substituting their judgment from that of the trial court." (Memorandum in Support of Jurisdiction at pg. 2.) In the first place, it appears that the state is using the terms "conclusions" and "judgment" interchangeably in their argument. In any event, the state does not say who, in its opinion, should determine whether the record supports the findings used to justify consecutive sentences. Is it the trial court itself? Or the state? Fortunately, both the General Assembly and this court have charged appellate courts with conducting a review of the record to see if consecutive sentences are warranted. R.C. §2953.08 (G)(2)(a) directs the appellate court "to review the record, including the findings underlying the sentence" and to modify or vacate the sentence "if it clearly and convincingly finds . . . that the record does not support the sentencing court's findings under division . . . (C)(4) of §2929.14 . . . of the Revised Code." *Bonnel, supra.* at ¶28.

Finally, the state argues that this court should take this case as an opportunity to overrule *State v. Kalish*, 120 Ohio St. 2d 23, 2008-Ohio-4912, 896 N.E. 2d 124 and its holding that courts of appeal review consecutive sentences for an abuse of discretion. This court has accepted for review the case of *State v. Marcum*, Case No. 2014-2122, where that issue has been squarely presented. This case is not the proper vehicle to resolve such a question because, even if this court overrules *Kalish*, it would not change the outcome in this case. In *Overholser*, at ¶33, the court of

appeals concluded: “[f]or the foregoing reasons, we conclude that the record does not support the trial court’s consecutive sentence findings. . . . Overholser’s second assignment of error is sustained, and his consecutive sentence is reversed. On this record, we would also find that the court find that the trial court abused its discretion in sentencing in sentencing Overholser.” The court of appeals did *not* reverse for an abuse of discretion. Indeed the court did not rule on Overholser’s assignment of error alleging an abuse of discretion. *Id.* at ¶34.

Finally, sentencing always is fact specific. The facts of this case are very unusual and unlikely to be repeated. Therefore this is not a case involving a common fact-pattern or a question of great public interest.

STATEMENT OF THE CASE AND OF THE FACTS

On December 16, 2013 the appellee, Adam J. Overholser, was indicted on six counts of gross sexual imposition in violation of R.C. §2907.05(A)(4) and one count of rape in violation of R.C. § 2907.02 (A)(1)(b). Overholser was held in the Clark County Jail in lieu of bond while the case was pending.

On February 20, 2014 Overholser entered guilty pleas to five counts of gross sexual imposition, felonies of the third degree. In exchange, the state dismissed the balance of the charges. The court ordered a presentence investigation.

The Presentence Investigation Report revealed at the time he committed the underlying offenses, Overholser was 21 years old and had no prior criminal record. He had been employed as a school bus driver, where he met the 11 year old victim, a student on his bus route. Between May 1, 2013 and September 1, 2013, Overholser and the victim engaged in several instances of mutual masturbation. Prior to the offenses, Overholser had engaged in a pattern of grooming the victim. When confronted by the victim’s mother, Overholser admitted his wrongdoing.

The report also indicated that Overholser had been president of his high school senior class and ranked 30th out of 165 students with a GPA of 3.56. The report also indicated that he had a solid work history and that his ORAS risk assessment for reoffending was “low”. The report included letters from 19 friends and family members. The letters noted the impact that the suicide of Overholser’s father two years prior had on him. The letters also stated that Overholser had always worked, was a good student, was active in his church and had no prior involvement with drugs or alcohol. The letters characterized him as being “gentle, caring and responsible” and that the crimes he had committed were out of character. At sentencing on March 19, 2014, Overholser presented the testimony of two clergymen who had met with him many times at the Clark County Jail where Overholser was held following his arrest. Both clergymen thought that Overholser had been honest and forthright in accepting responsibility and expressing remorse for his crimes.

The prosecutor asked the court to impose consecutive sentences but cited no facts in the record that supported such a sentence.

The trial court made the findings necessary to support the imposition of consecutive sentences. That is, the court found that, 1) consecutive sentences were necessary to protect the public from future crime and to punish the defendant, 2) that consecutive sentences were not disproportionate to the seriousness of the defendant’s conduct and to the danger he posed to the public and 3) at least two of the offenses were committed as part of a 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 reflected the seriousness of the defendant’s conduct. Although admittedly not required to do so, the trial court did not state what facts in the record supported its consecutive sentence findings.

Overholser appealed to the Second District Court of Appeals. In a decision handed down on May 22, 2015, with a majority opinion authored by Judge Donovan, the Second District held that “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.” *Overholser* at ¶1. Judge Hall concurred in judgment only and Judge Wellbaum filed a separate dissenting opinion.

ARGUMENT

RESPONSE TO APPELLANT’S PROPOSITION OF LAW

THE APPELLATE COURT DID NOT MISAPPLY THE APPELLATE STANDARD OF REVIEW, PURSUANT TO R.C. 2953.08(G)(a)(2), WHEN HOLDING CONSECUTIVE SENTENCES TOTALLING 20 YEARS WAS NOT SUPPORTED BY THE RECORD

(A.) The Second District employed the correct standard of review.

The courts of appeal are divided over the appropriate standard of review for felony sentences. A number of courts maintain that sentences are reviewed for an abuse of discretion while others, including the Second District, have held that review is limited to the “extremely deferential” standard of upholding sentences unless the appellate court “clearly and convincingly finds” that the record does not support the findings made by a trial court to justify consecutive sentences.

Because the court below explicitly stated that it found that “the record clearly and convincingly does not support the trial court’s consecutive sentences findings”, *Overholser* at ¶1, the state cannot complain about the standard of review employed by the trial court.

Because the record amply demonstrates that the trial court employed the extremely deferential standard of R.C. §2953.08(G)(a)(2), this court should decline further review of this case.

(B) The Second District did not improperly “substitute its judgment” for the judgment of the trial court.

The trial court did *not* conclude that there was *some* evidence in the record supporting the trial court’s findings but that, in the judgement of the court of appeals, consecutive sentences were not appropriate. To the contrary, the Second District, in a majority opinions spanning 24 pages, exhaustively examined the record and correctly concluded that the record clearly and convincingly did not support the trial court’s findings.

Effective September 30, 2011, R.C. §2929.14(C) required trial courts to make three distinct findings before imposing consecutive sentences. The court must find that sentences are “necessary to protect the public or punish the offender”, that consecutive sentences are not disproportionate to the seriousness of the conduct and to the danger posed to the public by the offender and, relevant to this appeal, that “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.” (Emphasis added.)

Because there was no evidence in the record that supported the trial court’s finding that consecutive sentences were not disproportionate to the danger posed to the public by Overholser, the court of appeals was correct when it clearly and convincingly found that the record did not support that finding by the trial court. It was undisputed that Overholser had no prior juvenile or criminal record, had no prior involvement with drugs and alcohol, had expressed profound remorse, had strong support from church and family, had served as president of his high school senior class, graduated with a 3.5 GPA and that the Ohio Risk Assessment System (“ORAS”) concluded that he was at low risk of recidivism. *Overholser* at ¶7.

At sentencing, the trial court never stated its reasons for concluding that the risks posed by Overholser to the public was not disproportionate to the 20 year consecutive sentence it imposed. The State of Ohio has never -- not at sentencing when it asked for consecutive sentences, not in the direct appeal when it asked for those consecutive sentences to be affirmed and not before this court where it seeks further review of the case -- aligned any facts in the record to the finding that Overholser posed a risk to the public that was not disproportionate to the 20 year consecutive sentence. The same can be said of Judge Wellbaum's dissent in the court below.

Similarly, there is no evidence in the record that the harm caused by "two or more" of the offenses was "great or unusual". The court below correctly concluded that the mental distress experienced by the victim was inherent in the offense and, therefore, not "great or unusual." Overholser at ¶32. In this respect, it is important to note that no restitution to the victim of any kind, including costs associated with counseling or psychological services, was sought or ordered.

Further, the finding under 2929.14(C)(3)(b) is dependent on the harm being caused by "two or more" of the offenses. In this case, there was no evidence that the quantum of harm caused to the victim by the first offense was increased in any way by the subsequent offenses. Therefore, there was no evidence that the harm was caused by "two or more" offenses.

Finally, the state's arguments that Overholser's sentence was not disproportionate to other sentences and that the trial court could properly consider dismissed counts in fashioning a sentence are misplaced.

First, although Overholser did assign as error the fact that his sentence was disproportionate and inconsistent, the court below did not rule on that assignment, so whether or not Overholser's sentence was disproportionate to others is not an issue in this appeal. Second, the dismissed counts of the indictment were disputed by Overholser and no evidence was

presented at the sentencing hearing on the issue. Further, the state did not argue in the court below that the sentence should be affirmed because of the dismissed counts. That issue was first raised by Judge Wellbaum in his dissent.

The state seems to be basing its argument before this court on Judge Wellbaum's dissent. At ¶39 of the opinion, Judge Wellbaum quotes Judge Hall's dissent in *State v. Adams*, 2nd Dist., Clark No. 2014-CA-13, 2015-Ohio-1116: "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 court made the necessary statutory findings. Under such circumstances, we should not substitute our conclusions for those of the trial court." It is interesting to note, of course, that Judge Hall concurred in the opinion in this case overturning Overholser's consecutive sentences. More to the point, Judge Wellbaum's dissent, respectfully, does not accurately state the law. The General Assembly imposed the duty on appellate courts to review felony sentences. While that review may well be deferential, it is not meaningless. When a court of appeals concludes that findings are not supported by the record, it is not "substituting its judgment for the trial court's" (especially in a case such as this where the trial court declines to state what facts in the record support its findings); rather, the court is performing its function as a court of review and as an error correcting court.

CONCLUSION

The record clearly and convincingly did not support consecutive sentences in this case. The court of appeals carefully analyzed the record, including the Presentence Investigation Report and the transcripts. The court addressed every fact in the record when deciding that Overholser's actions did not warrant consecutive sentences. The court reviewed the statute and found consecutive sentences, totaling 20 years were not necessary to protect the public or punish Overholser and that the harm caused by Overholser was not great or unusual. The court took the time to thoroughly consider all the facts of the case, as well as Overholser's history, and decided that the record did not support consecutive sentences. This court should not grant jurisdiction in this case simply because the court of appeals felt compelled to reverse such a disproportionate and extreme sentence. The court of appeals followed the law.

Respectfully submitted,

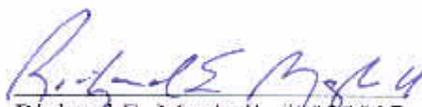


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered via U.S. Mail to Ryan Saunders, Clark County Prosecutor's office, 50 E. Columbia Street, Springfield, Ohio 45502 on this 9th day of July, 2015.

Respectfully submitted,


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