

[Cite as *State v. Thomas*, 2002-Ohio-1533.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 2000 CO 22
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	<u>OPINION</u>
	)	
GERALD THOMAS, Sr.,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Columbiana County, Common Pleas Court, Case No. 99 CR 89.
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JUDGMENT:	Affirmed in Part, Reversed In Part and Remanded.
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APPEARANCES:

For Plaintiff-Appellant:	Attorney Robert L. Herron Prosecuting Attorney Columbiana County Courthouse Lisbon, OH 44432
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For Defendant-Appellee:	Attorney R. Eric Kibler 32 ½ N. Park Avenue Lisbon, OH 44432
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JUDGES:

Hon. Joseph J. Vukovich

Hon. Cheryl L. Waite

Hon. Mary DeGenaro

Dated: March 22, 2002

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court and the parties' briefs. Defendant-Appellant, Gerald Thomas, Sr. (hereinafter "Thomas"), appeals the trial court's decision finding him guilty of gross sexual imposition, rape with a force specification, two other counts of rape, and disseminating matter harmful to juveniles and sentencing him to a term of life imprisonment plus twenty-six years. Thomas' counsel has filed a no merit brief and Thomas has not filed a *pro se* brief raising any assignments of error. For the following reasons, we conclude the trial court failed to make the findings required by R.C. 2929.14(E)(4) when it ordered Thomas' sentences be served consecutively. Therefore, we reverse the trial court's decision in part and remand the case for re-sentencing.

{¶2} Amanda Monigold (hereinafter "Amanda") was born to Thomas' daughter on June 10, 1984. Because of difficulties with her mother and stepfather, Amanda's grandmother, Mary Thomas, gained custody of Amanda. Amanda moved in with her grandparents in April 1996. In March 1999, Amanda's uncle suspected Thomas may have been sexually abusing Amanda. He asked Amanda about this on March 23, 1999, but Amanda denied any abuse. However, later that day she told her cousin and her grandmother that Thomas had been sexually abusing her. Her grandmother then reported this to the Department of Human Services and, on March 25, 1999, Thomas was arrested and charged with one count of rape in violation of R.C. 2907.02(A)(2).

{¶3} After an April 9, 1999 preliminary hearing, the case was bound over to the Columbiana County Grand Jury. On April 27, 1999, the grand jury indicted Thomas on five offenses: 1) one count of gross sexual imposition in violation of R.C. 2907.05(A)(4) for an offense involving Amanda in December 1996 or January 1997; 2) one count of rape with a force specification involving Amanda during the spring of 1997; 3) one count of rape involving Amanda from the summer of 1997 through February 1999; 4) one count of rape involving Amanda which occurred on March 10, 1999; and, 5) one count of disseminating matter harmful to juveniles in violation of R.C. 2907.31(A)(1) involving Amanda from the summer of 1997 through February 1999.

{¶4} Thomas hired Attorney Charles Amato to represent him and, on May 13, 1999, the court appointed Attorney Amato to be Thomas' counsel until an indigency evaluation was completed. On June 7, 1999, after discovery, Thomas waived his right to a speedy trial. That same day, the trial court granted the State's motion to increase Thomas' bond and acknowledged Thomas' waiver of speedy trial. On July 26, 1999, Thomas filed motions *in limine* dealing with the admissibility of rape shield evidence, potential hearsay evidence, possible opinion evidence, evidence not disclosed during discovery, evidence of Thomas' character, and evidence of Amanda's reputation.

{¶5} On July 28, 1999, Thomas entered into a felony plea agreement in which he agreed to plead guilty to all five counts in exchange for a recommendation of a seven year sentence. The matter was set for sentencing on October 29, 1999. On October 29, 1999, Attorney Amato filed a motion to withdraw as counsel, and Thomas moved to withdraw his guilty plea and re-enter a plea of not

guilty. On November 2, 1999, the trial court granted both motions and ordered a competency hearing. That same day, the trial court appointed Attorney Theresa Tolson to represent Thomas. On January 19, 2000, Thomas was found competent to stand trial.

{¶6} On February 10, 2000, Attorney Tolson filed a motion to withdraw as counsel, stating the communication between her and Thomas had "broken down to the point where counsel is unable to effectively represent the Defendant and prepare for trial." After a hearing, the trial court denied that motion on February 11, 2000.

On February 23, 2000, Thomas filed a motion to sever count five of the indictment, a motion *in limine* to bar admission into evidence all pornographic videos or magazines seized by the police, a motion to compel discovery, and a motion for a bill of particulars. On February 24, 2000, the trial court heard the motions. The trial court granted the motion to compel discovery, but denied the remaining motions.

{¶7} The matter proceeded to jury trial on February 28 and 29, 2000. Thomas was found guilty on all five counts and was sentenced consecutively to the maximum possible term, life plus twenty-six years. The trial court also designated Thomas to be a sexual predator. Thomas appeals from this judgment.

{¶8} Attorney Eric Kibler was appointed to represent Thomas on appeal. On December 5, 2000, Attorney Kibler filed a No Merit Brief within which he stated he had

{¶9} "diligently reviewed the record on appeal and has researched the applicable law. Counsel's efforts have convinced him that, in his professional opinion, there is no meritorious argument available to the Appellant in this appeal."

{¶10} Thomas was then given until July 19, 2001, to file a brief

raising any assignments of error.

{¶11} On July 27, 2001, Thomas informed this court he had not yet received a copy of the transcript so he could address the merits of his appeal. This court ordered that transcript be provided and granted Thomas leave until November 7, 2001, to file a brief raising any assignments of error. No such brief was filed.

{¶12} As stated above, Thomas' appointed appellate counsel has filed a no merit brief and moved to withdraw as counsel in this case. In *State v. Toney* (1970), 23 Ohio App.2d 203, 52 O.O.2d 304, 262 N.E.2d 419, this court set forth in its syllabus the procedure to be used when counsel of record determines an indigent's appeal is frivolous:

{¶13} "3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.

{¶14} "4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, *pro se*.

{¶15} "5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments *pro se* of the indigent, and then determine whether or not the appeal is wholly frivolous.

{¶16} "6. Where the Court of Appeals makes such an examination and concludes that the appeal is wholly frivolous, the motion of an indigent appellant for the appointment of new counsel for the purpose of appeal should be denied.

{¶17} "7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed." *Id.*

{¶18} After examining the record in this case, it appears as if there is one issue which could arguably support an appeal, the trial court's sentence of Thomas to the maximum term on all counts with consecutive sentences.

{¶19} When sentencing an offender, the trial court must consider several aspects of the sentencing statutes. First, the overriding purposes of felony sentencing must be followed, namely, to protect the public from future crime by the offender and others and to punish the offender. R.C. 2929.11(A). The court must consider the need for "incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both." *Id.* Further, the sentence must be commensurate with and not demeaning to the seriousness of the offender's conduct and its impact on the victim and be consistent with sentences imposed for similar crimes committed by similar offenders. R.C. 2929.11(B). Keeping these purposes in mind, if the offender has not previously served a prison term, R.C. 2929.14(B) presumes the imposition of the shortest prison term for an offense.

{¶20} The trial court may only impose a sentence beyond the minimum term when it specifically finds on the record that the shortest prison term would either demean the seriousness of the offender's conduct or would not adequately protect the public from future crime by the offender. R.C. 2929.14(B). The trial court is not required to give an explanation for its finding. Rather, the

trial court "must note that it engaged in the analysis and that it varied from the minimum for at least one of the two sanctioned reasons." *State v. Edmonson* (1999), 86 Ohio St.3d 324, 326, 715 N.E.2d 131, 134-135. In the instant case the trial court stated, "I think any sentence that is a short sentence would demean, certainly, the seriousness of these offenses that he committed against this child." Because of this finding, the trial court may properly adopt a sentence greater than the minimum.

{¶21} When sentencing an offender to the maximum allowable term, the trial court must comply with both R.C. 2929.14(C) and 2929.19(B)(2)(d). A trial court may impose a maximum prison term only when it finds on the record either the offender committed the worst form of the offense or the offender has the greatest likelihood of committing future crimes. R.C. 2929.14(C). The trial court must also give its reasons for imposing that maximum term. R.C. 2929.19(B)(2)(d). In the present case, the trial court stated, "this is one of the worst case scenarios of what I consider systematic sexual abuse * * * that I've the occasion to see." The court went on to state, "I just don't think a greater harm can be inflicted on a human being than what you've inflicted on this young lady." However, the trial court never made a specific finding that Thomas had committed either "the worst form of the offense" or that he "has the greatest likelihood of committing future crimes" in accordance with R.C. 2929.14(C).

{¶22} Because the trial court did not specifically make either of the required findings, Thomas possessed an arguably appealable issue. However, we conclude the trial court's findings complied with R.C. 2929.14(C). The trial court's statement that Thomas committed "one of the worst case scenarios of what I consider

systemic sexual abuse" is a statement that Thomas' actions were the worst form of the offenses with which he was charged. Furthermore, the trial court gave ample reasons to support its finding in accordance with R.C. 2929.19(B) (2) (d) .

{¶23} The trial court also ordered Thomas' sentences run consecutively. A trial court may only sentence an offender to consecutive sentences for felony offenses under certain circumstances pursuant to R.C. 2929.14(E) . In this case, the only subsection which would apply would be R.C. 2929.14(E) (4) which states:

{¶24} "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:

{¶25} 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.

{¶26} 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.

{¶27} The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender." R.C. 2929.14(E) (4) .

{¶28} When the trial court makes findings in accordance with R.C. 2929.14(E) (4) , it must state its reasons on the record. R.C. 2929.19(B) (2) (c) . Failure to either make the necessary findings on

the record or to sufficiently state the reasons for that finding on the record constitutes reversible error. *State v. Gary* (2001), 141 Ohio App.3d 194, 196, 750 N.E.2d 640, 642.

{¶29} At the sentencing hearing, the trial court stated:

{¶30} "I'm going to order that those sentences be served consecutively. And again, in my opinion, this defendant needs to be kept out of society for the longest possible period of time to keep him from inflicting this type of conduct upon anyone else. And the only way to do that is to keep him locked up and behind bars." Tr. p. 322.

{¶31} While this statement makes one of the findings necessary under R.C. 2929.14(E)(4), that is, consecutive sentences are necessary to protect the public from future crime, it does not address whether consecutive sentences are disproportionate to the seriousness of Thomas' conduct and to the danger he poses to the public. Furthermore, the trial court does not appear to have found any of the factors listed in R.C. 2929.14(E)(4)(a)-(c) apply to Thomas. Accordingly, the trial court committed reversible error when it sentenced Thomas to consecutive sentences.

{¶32} Thomas' appellate counsel was incorrect when he filed the no merit brief as Thomas did have issues which would arguably support an appeal. We have addressed the substance of those arguments and find the trial court erred when it sentenced Thomas to consecutive sentences without making the requisite findings pursuant to R.C. 2929.14(E)(4). Therefore, we affirm in part the trial court's decision with regard to the sentence imposed for each offense for which Thomas was convicted, and reverse in part the trial court's decision relative to consecutive sentences. Accordingly, we remand this cause back to the trial court for it to consider whether concurrent sentences are appropriate, or to make the appropriate findings pursuant to R.C. 2929.14(E) which are

necessary to impose consecutive sentences.

Vukovich, P.J., concurs.

Waite, J., concurs.