

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
WYANDOT COUNTY**

**STATE OF OHIO**

**CASE NUMBER 16-05-08**

**PLAINTIFF-APPELLEE**

**v.**

**OPINION**

**DAVID EDMOND HERBERT**

**DEFENDANT-APPELLANT**

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**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.**

**JUDGMENT: Judgment affirmed.**

**DATE OF JUDGMENT ENTRY: December 27, 2005**

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**ATTORNEYS:**

**CAROL A. WRIGHT  
Attorney at Law  
Reg. #0029782  
318 Berger Alley  
Columbus, OH 43206  
For Appellant.**

**JONATHAN K. MILLER  
Assistant Prosecuting Attorney  
Reg. #0064743  
137 S. Sandusky Ave.  
Upper Sandusky, OH 43351  
For Appellee.**

**Shaw, J.**

{¶1} The defendant-appellant, David Edmond Herbert (“Herbert”), appeals the May 26, 2005 Judgment of conviction and sentence entered in the Court of Common Pleas of Wyandot County, Ohio.

{¶2} On March 10, 2005, the Prosecuting Attorney of Wyandot County filed a Bill of Information charging Herbert with six counts: Count 1: Rape, a violation of R.C. 2907.02(A)(1)(b), a felony of the first degree; Count 2: Unlawful Sexual Conduct with a Minor, a violation of R.C. 2907.04(A), a felony of the third degree; Count 3, 4, 5: Illegal use of a Minor in Nudity Oriented Material, a violation of R.C. 2907.323(A)(1), a felony of the second degree; and Count 6: Pandering Sexually Oriented Matter Involving a Minor, a violation of R.C. 2907.322(A)(5), a felony of the fourth degree.

{¶3} On March 28, 2005, Herbert waived indictment and plead guilty to each of the offenses set forth in the Bill of Information. Herbert agreed to a Stipulation of Facts stating the following:

- 1) That the Defendant in this matter, David Edmund Herbert is the maternal grandfather of victim K.A.F. as named in the Bill of Information.**
- 2) That victim K.A.F. has resided with Defendant, David Edmund Herbert, at his place of residence, 2801 County Highway 9 Sycamore, Ohio 44882 since the spring of 2003.**
- 3) The Defendant further stipulates to the introduction of certain evidence at the time of sentencing. The evidence consists of the following:**

- a. **Photograph of victim K.A.F. relating to Count One of the Bill of Information.**
- b. **Photographs of victim K.A.F. relating to Count Three of the Bill of Information. Information depicting the child victim in a state of nudity.**
- c. **Photographs of victims K.A.F. and B.L.P. relating to Count Four and Five of the Bill of Information depicting the victims in a State of Nudity.**
- d. **Photographs relating to Count Six of the Bill of Information depicting child victims engaged in sexual activity.**

The trial court then explained his rights and accepted his guilty pleas. The trial court also acknowledged that if Herbert chose to plead guilty to the charges the trial court would be required to hold a hearing to determine whether he was a sexual predator.

{¶4} On May 24, 2005, the trial court held a combined sexual predator and sentencing hearing. During the sexual predator hearing, the State presented Lieutenant Fry who testified that Herbert seemed to have no remorse. He also claimed that Herbert had thousands of child pornographic images on his computers. During the sentencing portion of the hearing, the State called Abigail Lama-Gaffney, a professional clinical counselor, to testify as to the victim's feelings and circumstances. The trial court found Herbert to be a sexual predator.

{¶5} Then, the trial court proceeded with sentencing. The trial court sentenced Herbert to the following:

**[a] basic prison term of nine years on count one; four years on count two; seven years on --- on count three --- let me make that**

**clear. Seven years on count three; seven years on count four; seven years on count five; and 17 months on count six, which shall be served in the custody of the Director of Ohio Department of Corrections and Rehabilitations.**

**\*\*\***

**The Court further orders that these sentences shall be served count one, count – of nine years; count two of four years; and count five of seven years consecutive to one another, with the sentences in count three, four and six being concurrent with one another and concurrent to the consecutive sentences imposed in count one, count two, and count five. So it'll be a total of – actual total of 20 years.**

Sent Trans. p.61-62. The trial court found that the defendant was not amenable to community control and that a prison term is consistent with the principles of sentencing as set forth in R.C. 2929.11. Specifically, the trial court found:

**Toward these findings the Court finds less than prison would not adequately punish you and would not protect the public from future crime by you or others, and would demean the seriousness of the offenses.**

**You have minimized your conduct and show no remorse for it \*\*\* before today. You have attempted to rationalize your behavior by blaming your victims. You portray your child victims as vixens you couldn't resist. You explain the rape of a 10 year old as an educational exercise and justify putting your fingers in her for alleged medical purposes.**

**\*\*\***

**Your victimization of K.A.F. went on for approximately four and a half years. You taught her it was a way of life for her to be violated, betrayed and used all for your pleasure.**

**The injury inflicted was made worst by the age of your victims. One, an impressionable young girl who after years of abuse is confused, who reports her whole family is in counseling, who has**

**fits of anger, scattered emotions and in her words, ‘weird thoughts’. A child who is afraid of you and who has lost (according to her) her mom, her friends, and her things for which she paid such a heavy price.**

Sent. Trans. p. 59-60.

{¶6} The trial court made the following specific findings under R.C. 2929.14(B) and R.C. 2929.14(E)(4):

**The Court finds a shortest prison term possible would demean the seriousness of the offense. And, would not adequately protect the public from future crime by the offender and others.**

**\*\*\***

**Consecutive terms are necessary to protect the public from future crime as defendant up until today showed little or no remorse and has justified and made excuses for his criminal acts.**

**Consecutive terms are necessary to punish the offender.**

**\*\*\***

**Consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender imposes to the public.**

**\*\*\***

**The harm caused was so great or unusual that no single prison term can adequately reflect the seriousness of the offender’s conduct.**

Sent. Trans. p.62-63.

{¶7} On June 23, 2005, the defendant-appellant filed his notice of appeal raising the following assignment of error:

**A TRIAL COURT MAY NOT SENTENCE A DEFENDANT TO NON-MINIMUM SENTENCE AND CONSECUTIVE SENTENCES BASED ON FACTS NOT FOUND BY THE JURY OR ADMITTED BY DEFENDANT. SUCH SENTENCE**

**VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §10 AND 16 OF THE OHIO CONSTITUTION.**

{¶8} Herbert alleges that the trial court violated his constitutional rights when it imposed sentences greater than the statutory minimum and consecutive sentences based on the findings not admitted by him or submitted to a jury. Herbert relies upon the holding in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, for this proposition. This Court has previously ruled that the holding in *Blakely* does not apply to Ohio's sentencing scheme. *State v. Trubee*, 3<sup>rd</sup> Dist. No. 9-03-65, 2005-Ohio-552, at ¶ 16-38.

{¶9} In sum, Herbert concedes that the trial court made all the necessary findings in the May 26, 2005 Judgment Entry and that those findings are supported by the record. Upon review of the record, we find that the trial court properly made all findings at the sentencing hearing and that those findings are supported by evidence in the record.

{¶10} Accordingly, Herbert's assignment of error is overruled and the judgment of the Court of Common Pleas of Wyandot County, Ohio is affirmed.

***Judgment affirmed.***

**ROGERS and BRYANT, JJ., concur.**

**r**