[Cite as *State v. Thomas*, 2023-Ohio-4750.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
NOBLE COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

TERRY L. THOMAS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 NO 0508

Criminal Appeal from the
Court of Common Pleas of Noble County, Ohio
Case No. 222-2112

BEFORE:
Cheryl L. Waite, David A. D'Apolito, Mark A. Hanni, Judges.

JUDGMENT:
Affirmed.

Atty. Jordan C. Croucher, Noble County Prosecutor, 150 Courthouse, Caldwell, Ohio 43724, for Plaintiff-Appellee

Atty. Michael Groh, 1938 East Wheeling Avenue, Cambridge, Ohio 43725, for Defendant-Appellant

Dated: December 21, 2023

WAITE, J.

{¶1} Appellant Terry L. Thomas appeals a January 31, 2023 sentencing entry of the Noble County Court of Common Pleas following his conviction on nine charges related to possession and redistribution of child pornography. Appellant attacks only his sentence, arguing that he presented evidence to overcome the presumption of prison, and challenging the manner in which the court weighed the factors in R.C. 2929.12 and R.C. 2929.13. For the reasons provided, Appellant's arguments are without merit and the decision of the trial court is affirmed.

Factual and Procedural History

{¶2} As Appellant entered into a plea agreement in this case, the facts in this record are limited. It appears that a Facebook employee or representative alerted law enforcement after discovering private messages involving Appellant. These included images of child pornography and contained disturbing language. Apparently, Appellant had engaged in this conduct over the course of several years.

{¶3} On October 31, 2022, Appellant was indicted on seven counts of pandering sexually oriented matter involving a minor or impaired person, felonies of the second degree in violation of R.C. 2907.322(C), and nine counts of pandering sexually oriented matter involving a minor or impaired person, felonies of the fourth degree in violation of R.C. 2907.322(C).

{¶4} On December 2, 2022, Appellant entered into a plea agreement. He pleaded guilty to all seven second-degree felony counts of pandering sexually oriented matter and two of the fourth-degree felony counts. The remaining charges were apparently dismissed. On January 31, 2023, the trial court sentenced Appellant to an

aggregate prison term of fourteen to fifteen years. It is from this entry that Appellant timely appeals.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN FINDING THAT THE MORE SERIOUS FACTOR OF THE VICTIM SUFFERING SERIOUS PSYCHOLOGICAL HARM WAS PRESENT IN THE OFFENSES.

{¶5} Appellant contends this Court has held that mere possession and redistribution of child pornography does not cause physical harm to the affected child and cannot form the basis for a prison term. See *State v. Stout,* 2014-Ohio-1094, 6 N.E.3d 1263 (7th Dist.). Regardless, Appellant argues that the record is devoid of evidence that any victim in this matter suffered any specific harm.

{¶6} In response, the state distinguishes *Stout*, which involved felonies of the fourth and fifth degree, from the instant case which involved a conviction on seven felonies of the second degree. The state also notes that in *Stout*, this Court based its reversal on the trial court's erroneous finding of *physical* harm, which formed the sole basis for incarceration, whereas in the instant matter the trial court made a finding of *psychological* harm along with other relevant findings in support of a prison term. The state highlights the fact that the victims in this matter were children between the ages of two to twelve, and that their psychological harm was likely to become worse as the children age. The state also cites the disturbing messages sent by Appellant to others, including asking if anyone had had sexual intercourse with a child. Even if this Court

were inclined to agree with Appellant's arguments in this matter, the state posits that his sentence should still be affirmed due to Appellant's admitted criminal record

{¶7} This issue centers on R.C. 2929.12(B)(2), which provides:

> (B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:
>
> * * *
>
> (2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

{¶8} The state correctly concludes that Appellant is somewhat confused about the holding of *Stout.* In *Stout,* the issue was narrowly focused on whether images constituting child pornography resulted in *physical* harm to the children depicted. *Id.* at ¶ 36. The ensuing analysis made it clear that, although a long line of courts clearly found possession of such materials caused harm to a victim, the specific harm may not be physical. The *Stout* court acknowledged that physical and psychological harm are distinct from one another and explained that "[s]olely possessing and viewing child pornography does not per se cause physical harm to the victim, although it unquestionably causes the victim emotional, mental and psychological harm." *Id.* at ¶ 37. The issue in *Stout* was whether the court could impose a prison sentence for a felony of the fourth degree under

the law in effect at that time, which required a finding that the victim had suffered physical harm.

{¶9} Although *Stout* is distinguishable from the instant matter, it favors the state's position, here. As acknowledged in *Stout,* there is no question that possession and redistribution of child pornography causes the victim(s) psychological harm. Contrary to Appellant's arguments, and based on *Stout*, this harm can be presumed. ("Solely possessing and viewing child pornography does not per se cause physical harm to the victim, although it unquestionably causes the victim emotional, mental and psychological harm." *Stout* at ¶ 37.) This is particularly true when looking at the ages of the victims in this matter, which ranged from two to twelve, the scenes depicted in the images (nudity and sexual acts), and the impact these images will have on the children in the future, as they were located on what has been called the "dark web" and have been redistributed an unknown number of times.

{¶10} The trial court in the instant matter questioned the state at the sentencing hearing as to who the victims (generally) were and what type of harm they would be expected to suffer as a result of Appellant's conduct. Defense counsel attempted to counter the state's arguments by contending that, as he did not generate the materials, there is nothing in the record showing that his act of redistributing these materials caused any actual harm to the children depicted, and raised his *Stout* argument that Appellant did not physically harm the victims. The court recessed during the hearing to read the *Stout* opinion. After the court returned to the record, it explained that *Stout* supported a finding that victims in possession and redistribution cases were presumed to have

suffered psychological harm. The court also found that the young ages of the children likely worsened the harm.

{¶11} While the trial court on one occasion in the sentencing hearing inadvertently once said "physical harm," the court corrected itself and used the phrase "psychological harm," throughout the remainder of the proceedings. The court did not, at any point, find that the children depicted in Appellant's images were subject to physical harm caused by Appellant.

{¶12} Based on the above, it is appropriate pursuant to R.C. 2929.12(B)(2) to consider a victim's psychological harm in a case involving possession and redistribution of child pornography. Caselaw exists recognizing that such harm may be presumed based on the victim's age, the nature of the depictions, and the nature of redistribution by means of the internet. As such, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT HAD NOT OVERCOME THE PRESUMPTION IN FAVOR OF PRISON IN SENTENCING DEFENDANT.

{¶13} Citing old law, Appellant argues that the trial court's imposition of a prison term amounts to an abuse of discretion. Also, without recognizing recent Ohio Supreme Court caselaw, he appears to argue that the trial court erroneously weighed the factors found in R.C. 2929.12.

{¶14} The state correctly responds that an appellate court no longer reviews a felony sentence using an abuse of discretion standard due to the Ohio Supreme Court's decision in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231. In *Marcum,* the Court held that "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id.* at ¶ 1.

{¶15} "A sentence is considered to be clearly and convincingly contrary to law if it falls outside of the statutory range for the particular degree of offense; if the trial court failed to properly consider the purposes and principles of felony sentencing as enumerated in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12; or if the trial court orders consecutive sentences and does not make the necessary consecutive sentence findings." *State v. Pendland*, 7th Dist. Mahoning No. 19 MA 0088, 2021-Ohio-1313, ¶ 41; citing *State v. Collins*, 7th Dist. Noble No. 15 NO 0429, 2017-Ohio-1264, ¶ 9; *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 30.

{¶16} Regarding Appellant's arguments involving the presumption of prison in this matter, the relevant law is found in R.C. 2929.12(D)(1). That statute sets out: "[e]xcept as provided in division (E) or (F) of this section, for a felony of the first or second degree * * * it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code." The exception to this rule is found within R.C. 2929.13(D)(2):

> Notwithstanding the presumption * * * the sentencing court may impose a community control sanction or a combination of community control sanctions instead of a prison term on an offender for a felony of the first or second degree or for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable if it makes both of the following findings:
>
> (a) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.
>
> (b) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense.

{¶17} In order to overcome the presumption of prison, a trial court must make a finding under both R.C. 2929.13(D)(2)(a) and (b) that community control would

adequately punish the offender, protect the public, and not demean the seriousness of the crime. Here, the court found "that the defendant is not presently amenable to community control sanctions, a combination of community control sanctions, and that such sanctions would demean the seriousness of the offense and would not adequately protect the public from future crimes by the defendant." (Sentencing Hrg., p. 26.) Clearly, the court made findings that negate Appellant's contention that he had overcome the presumption of prison. The court focused on the length of time during which the conduct occurred and the number of times Appellant redistributed the images. (Sentencing Hrg., p. 27.) The court acknowledged that the effect of Appellant's conduct would last for many years into the future, and cause worsening psychological harm to the victims as they continued to get older, particularly considering how difficult it is to completely remove these images from the internet.

{¶18} As to the factors found in R.C. 2929.12, Appellant fails to acknowledge the limitations the Ohio Supreme Court has placed on appellate courts when reviewing felony sentences in *State v. Jones*, 163 Ohio St.3d 242, 2020-Ohio-6729, 169 N.E.3d 649. The *Jones* Court modified the standard of review for felony sentences that had been previously announced in *Marcum*. *Marcum* held "that R.C. 2953.08(G)(2)(a) compels appellate courts to modify or vacate sentences if they find by clear and convincing evidence that the record does not support any relevant findings under 'division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code.' " *Marcum, supra*, at ¶ 22. While *Jones* did not directly overrule *Marcum*, the Court clarified that "[n]othing in R.C. 2953.08(G)(2) permits an appellate court to independently weigh the evidence in the record and substitute its

judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and 2929.12." *Jones, supra*, at ¶ 42.

{¶19} The maximum sentences possible in this matter would amount to an aggregate total of fifty-nine to sixty-three years (in accord with the Reagan Tokes Act). Appellant was sentenced to an aggregate of only fourteen to fifteen years of incarceration. Thus, his sentence fell well below the maximum sentence possible. Pursuant to *Jones*, this Court cannot independently weigh the factors set out in R.C. 2929.12. It is apparent from the record in this case that the trial court did make the appropriate findings, which are supported by the record, limited as it is due to Appellant's plea. Accordingly, Appellant's second assignment of error is also overruled.

Conclusion

{¶20} Appellant appeals only his sentence in this matter, arguing that he presented evidence to overcome the presumption of prison and challenging the court's decision when weighing the R.C. 2929.12 factors. Based on this record, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

D'Apolito, P.J. concurs.

Hanni, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Noble County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.