

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-140769
Plaintiff-Appellee,	:	TRIAL NO. B-1403705
vs.	:	<i>JUDGMENT ENTRY.</i>
MICHAEL JOHNSON,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Michael Johnson appeals the trial court's imposition of maximum, consecutive sentences of incarceration following Johnson's pleas of guilty to two counts of gross sexual imposition, in violation of R.C. 2907.05(A)(5), punishable as fourth-degree felonies. Johnson, a former high school teacher, had admitted to engaging in two acts of oral sex with his victim, a special-needs student. As part of his pleas, Johnson admitted that he knew the victim's ability to resist or consent was substantially impaired. The trial court's aggregate sentence was 36 months' imprisonment.

Johnson's victim lived with her grandmother. She had been sexually abused previously and suffered from post-traumatic stress disorder, reactive-attachment disorder,

cognitive and memory issues, impaired judgment, and communication issues. Johnson's victim had an I.Q. of 70.

Johnson had known his victim since her freshman year in high school. The victim had developed a crush on Johnson. Despite being warned by the victim's grandmother to end any emotional relationship with the victim, Johnson continued to interact with her during her school career, encouraging her affection and buying her gifts. On the last school day of her senior year, Johnson engaged in oral sex with the victim.

Johnson admitted that he had long suffered from a variety of psychological disorders. He had been diagnosed with Kallman's syndrome—a genetic condition where the sufferer fails to fully complete puberty—and was receiving testosterone treatment for the condition. Johnson alleges that, in the months before the offenses, improperly administered testosterone had caused his aggressive sexual behavior toward the victim.

In his first assignment of error, Johnson contends that the trial court erred by imposing maximum sentences on a first-time offender and by employing improper factors in fashioning those sentences. Johnson first argues that the trial court failed to give adequate consideration to the applicable "less serious" and "recidivism not likely" factors when it considered the seriousness and recidivism factors set forth in R.C. 2929.12.

R.C. 2953.08(G)(2) governs our review of felony sentences. Because sentencing findings were not required for the imposition of maximum sentences, in resolving this issue, we may modify or vacate Johnson's sentences only if we clearly and convincingly find that the sentences are contrary to law. *See* R.C. 2953.08(G)(2); *see also State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, ¶ 11 (1st Dist.); *State v. Alexander*, 1st Dist. Hamilton Nos. C-110828 and C-110829, 2012-

Ohio-3349, ¶ 24, *overruled sub silentio in part on other grounds, State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659.

We must presume that the trial court considered all relevant seriousness and recidivism factors unless the defendant affirmatively demonstrates otherwise. *See State v. Kennedy*, 2013-Ohio-4221, 998 N.E.2d 1189, ¶ 118 (1st Dist.). Here, the record demonstrates that the court did consider the relevant factors. Johnson argued that he was a first-time offender, that his “highly sexualized” victim had initiated physical contact before the oral sex acts occurred, and that he suffered from a variety of medical and psychological disabilities. The trial court reviewed Johnson’s sentencing memorandum, including the attached report of a psychotherapist who stated that Johnson’s behavior was out of character and likely the result of testosterone-induced mania. As the trial court noted, Johnson exhibited some remorse, had pleaded guilty and avoided the necessity of having his victim testify, and had admitted that he had “brought harm to another.”

But the trial court also detailed factors it had weighed in making its sentencing decision, including that Johnson had used his position of trust as the victim’s teacher to facilitate the offenses inflicted on a young woman highly compromised by emotional and intellectual deficits. The court also noted that despite his claim that the offense had resulted from improper medication, Johnson’s relationship with the victim had continued for several years despite warnings from the victim’s grandmother. Reports submitted with Johnson’s sentencing memorandum indicated that he suffered from bipolar disorder, repressed anxiety, anger issues, and depression, and that he continues to require testosterone treatment. On the record before us, we cannot say that Johnson’s sentences were

clearly and convincingly contrary to law. *See White*, 2013-Ohio-4225, 997 N.E.2d 629, at ¶ 12-14.

Johnson also argues that the trial court demonstrated an impermissible bias toward him when it stated at sentencing that Johnson had received “a break” when his offenses had not been charged as rape offenses. *See, e.g., State v. Blake*, 3d Dist. Union No. 14-03-33, 2004-Ohio-1952, ¶ 1 (holding the trial court erred by expressly indicating that it believed the defendant was guilty of dismissed rape charges, and stating that it would impose the punishment due for the dismissed charges). But here, the trial court did not state that Johnson was guilty of rape, or that he should have been charged with rape, but merely acknowledged that the two acts of oral sex with a student could have been charged in that manner. The first assignment of error is overruled.

Johnson’s second assignment of error, in which he argues that the trial court erred in imposing consecutive sentences, is without merit. The trial court stated the findings mandated by R.C. 2929.14(C)(4) for consecutive sentences during the sentencing hearing, journalized a sentencing-findings worksheet that included these findings, and incorporated its consecutive-sentencing findings into the sentencing entry as required by *State v. Bonnell*.

Under R.C. 2953.08(G)(2), we may modify or vacate the trial court’s consecutive sentences only if we clearly and convincingly find that the record does not support the sentencing findings, or that the sentences are otherwise contrary to law. *See White*, 2013-Ohio-4225, 997 N.E.2d 629, at ¶ 11.

The trial court found that consecutive sentences were necessary to protect the public and to punish the offender, and that they were not disproportionate to the seriousness of Johnson’s conduct and the danger he posed to the public. Finally, the

trial court found that the harm Johnson had caused was so great that no single prison term would reflect the seriousness of his conduct.

Johnson had used his position as the victim's teacher to facilitate sexual offenses committed on a special-needs student. Despite being warned by the victim's grandmother to end any emotional relationship with the victim, Johnson continued to interact with the victim for a period of years. Johnson admitted that he suffers from medical and psychological disorders, and that he continues to require testosterone treatment. The record of Johnson's misdeeds amply supports the trial court's R.C. 2929.14(C)(4) findings. *See* R.C. 2953.08(G)(2). The second assignment of error is overruled.

In his final assignment of error, Johnson asserts that his two convictions for gross sexual imposition by engaging in cunnilingus and by engaging in fellatio, as charged in Counts 1 and 2, were based upon the same ongoing course of conduct. Thus, he argues, the trial court denied him the protections of R.C. 2941.25, Ohio's multiple-count statute, by sentencing him for both offenses.

Contrary to Johnson's argument, this court has previously found that distinct and different kinds of sexual activity, charged under the same statutory section, constitute separate conduct resulting in separate offenses for purposes of merger under R.C. 2941.25. *See State v. Strong*, 1st Dist. Hamilton Nos. C-100484 and C-100486, 2011 Ohio 4947, ¶ 71; *see also State v. Williams*, 1st Dist. Hamilton No. C-140199, 2015-Ohio-3968, ¶ 59. The third assignment of error is overruled.

Therefore, the judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs should be taxed under App.R. 24.

OHIO FIRST DISTRICT COURT OF APPEALS

CUNNINGHAM, P.J., DEWINE and STAUTBERG, JJ.

To the clerk:

Enter upon the journal of the court on December 16, 2015

per order of the court _____.
Presiding Judge