[Cite as *State v. Prater*, 2019-Ohio-2745.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 18CA1069
	:	
vs.	:	
	:	DECISION AND JUDGMENT
JEANNIE PRATER,	:	ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

Matthew F. Loesch, Portsmouth, Ohio, for Appellant.

David Kelley, Adams County Prosecutor, and Kris D. Blanton, Assistant Adams County Prosecuting Attorney, West Union, Ohio, for Appellee.

Smith, P. J.

{¶1} Jeannie Prater appeals the judgment entry of the Adams County Common Pleas Court, entered July 18, 2018. Prater was convicted upon entering pleas to one count of aggravated trafficking in drugs, methamphetamine, in the vicinity of a juvenile and one count of aggravated trafficking in drugs, methamphetamine. On appeal, Prater challenges her aggregate sentence of 54 months as an abuse of the trial court's discretion.

Upon review, the record clearly demonstrates that the trial court properly considered all sentencing statutes and Prater's sentence is within the statutory range. Thus, we find no merit to Prater's argument. Accordingly, we overrule Prater's sole assignment of error and affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} On January 16, 2018, Jeannie Prater (hereinafter "Appellant") was indicted by the Adams County Grand Jury on two counts of aggravated trafficking in drugs, violations of R.C. 2925.03(A)(1), and felonies of the third degree. The allegations were as follows:

> Count One: On or about December 6 and December 8, 2017, in Adams County Ohio, Appellant did knowingly sell or offer to sell Methamphetamine, a schedule II controlled substance, in an amount less than bulk.
>
> SPECIFICATION: The Grand Jurors further find and specify that the offense was committed in the vicinity of a juvenile.
>
> Count Two: On or about between December 13 and December 15, 2017, in Adams County, Ohio, [Appellant], did knowingly sell or offer to sell Methamphetamine, a schedule II controlled substance, in an amount that equals or exceeds the bulk amount, but is less than five times the bulk amount.

{¶3} On January 19, 2018, Appellant pled not guilty to both counts and the court set a cash bond. The parties engaged in discovery. Appellant

filed a motion to reduce bond which the trial court initially denied. On May 9, 2018, however, the trial court modified the bond to a recognizance bond.

{¶4} On June 6, 2018, Appellant entered guilty pleas on both counts. The trial court ordered a pre-sentence investigation and the case was set for sentencing at a later date. At the plea hearing, the trial court asked Appellant to describe the events which occurred in both counts. As to Count One, Appellant stated:

> "I um, met the father of my daughter at Walmart parking lot. *** Um, Brent Fischer.***And prior to that he had called me and asked me to go to his friend's house and pick some Meth up for him and bring it to him, so I did and sold it to him.***My daughter was with me.*** She was eight at the time."[1]
>
> As to Count Two, Appellant explained:
>
> "Brent called me and asked me if I could get him an eight-ball um, of Meth and I got it from the same place and I took it to him. ***At his residence in Manchester…***3.8 grams.***I just sold it and left.***I made $50.00 off of it.

{¶5} The record indicates that Detective Sam Purdin met with a confidential informant who reported on both occasions that Appellant offered to sell him Methamphetamine. According to Appellant, she was "set up" by Brent Fischer. At the plea hearing, the trial court engaged in a lengthy colloquy with Appellant regarding the

[1] Appellant has two daughters. Brent Fischer is not the father of the 8-year-old Appellant brought with her to the Walmart parking lot.

circumstances underlying the indictment and the circumstances underlying a new misdemeanor Appellant had allegedly committed while awaiting disposition of the indictment.

{¶6} By July 9, 2018, the Adams County Probation Department had notified the court that Appellant had violated the terms and the conditions of her bond as related to a pill count. The trial court reverted her previously modified recognizance bond to a cash or surety bond and Appellant was placed into the custody of the Adams County Sheriff Department.

{¶7} At Appellant's sentencing on July 18th, the parties discussed the bond violation. The probation department's drug testing indicated Appellant was negative for a prescribed drug, Buprenorphine, which should have been in her system, based on the date of the refill and the number of pills missing. The trial court concluded Appellant was not using the drug in the manner prescribed.

{¶8} When Appellant was given time to address the court, she stated as follows:

> "I just, I want to say that first I want to apologize for, for this and I know I hurt a lot of people. I hurt the community, I hurt my family and feels like the last years of dark time in my life I want to move, I want to move on and do good things for the community. I want to work, I almost had, you know got to start work. It took, I was out a little over thirty days and I filled out applications as soon as you released me and it took, I went to two interviews and got hired. So, right I just feel like I needed

> more time. I want to do the right thing, I want to, I want to work and get into a good treatment center and be there for my kids. I don't want to be in there [sic] lives right now because I don't feel like I'm ready. I want to get better and, and eventually be the mom that I've always been their whole lives."

{¶9} The trial court imposed a stated prison term of thirty months on Count One and a stated prison term of twenty-four months on Count Two. The sentences were ordered to be served consecutively, for a total of fifty-four months. Appellant was given credit for time served. The trial court commented:

> "Ms. Prater uh, you and every other person that uh, trafficking Methamphetamine in this, in this county has absolutely gutted us. You have destroyed us, you have overwhelmed us. And every person you were selling drugs to uh, they were ruining the lives of their children because you can't name me one person that's a good parent that's using Methamphetamine. But you were disseminating it and now I learn that we were even providing food stamps for you so that you didn't have to work, you could just do cash flow with Methamphetamine. ***You did this in the vicinity, your little girl is sitting in the back seat while your [sic] doing a drug transaction. And then if that's not enough then uh, that doesn't phase you, you go out and get uh, more than bulk and less than five times bulk amount and make another transaction."

{¶10} This timely appeal followed. Where pertinent, additional facts are set forth below.

ASSIGNMENT OF ERROR

> "I. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO PROPERLY CONSIDER AND APPLY THE

SERIOUSNESS AND RECIDIVISM FACTORS TO THE APPELLANT AT HER SENTENCING."[2]

A. STANDARD OF REVIEW

{¶11} Appellant's assignment of error challenges her fifty-four month consecutive sentence for two counts of aggravated trafficking in drugs, one with a specification for having occurred in the vicinity of a juvenile. When reviewing felony sentences, appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Graham,* 4th Dist. Adams No. 17CA1046, 2018-Ohio-1277, at ¶ 13, citing S*tate v. Marcum,* 146 Ohio St.3d 516, 2016–Ohio–1002, 59 N.E.3d 1231, ¶ 1, 22–23. Under R.C. 2953.08(G)(2), "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." Instead, R.C. 2953.08(G)(2) specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division

[2] This is the assignment of error as set forth on Page 3 of Appellant's brief. On Page 5 of the brief, the assignment of error is set forth as follows: "APPELLANT'S SENTENCE IS CONTRARY TO LAW IN THAT THE TRIAL COURT FAILED TO PROPERLY APPLY THE FACTORS SERIOUSNESS AND RECIDIVISM MANDATED BY O.R.C. 2929.12."

(B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

{¶12} Moreover, although R.C. 2953.08(G)(2)(a) does not mention R.C. 2929.11 and 2929.12, the Supreme Court of Ohio has determined that the same standard of review applies to those statutes. G*raham, supra,* at ¶ 14; *Marcum* at ¶ 23 (although “some sentences do not require the findings that R.C. 2953.08(G)[2][a] specifically addresses[,] * * * it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court”); *State v. Butcher, 4th* Dist. Athens No. 15CA33, 2017–Ohio–1544, ¶ 84. Consequently, “an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence.” *Marcum* at ¶ 23; *Butcher* at ¶ 84; see also *State v. Jones*, 2018–Ohio–498, ––– N.E.3d –––– (8th Dist.) (court of appeals recently resolved intradistrict conflict by applying *Marcum* at ¶ 23 to hold that appellate courts can review the record to determine whether the considerations set forth in R.C. 2929.11 and 2929.12 support a sentence).

{¶13} "Once the trial court considers R.C. 2929.11 and 2929.12, the burden is on the defendant to demonstrate by clear and convincing evidence that the record does not support his sentence." *Graham, supra*, at ¶ 15, quoting, *State v. Akins–Daniels*, 8th Dist. Cuyahoga No. 103817, 2016–Ohio–7048, ¶ 9; *State v. O'Neill,* 3d Dist. Allen No. 1–09–27, 2009–Ohio–6156, ¶ 9, fn. 1 ("The defendant bears the burden to demonstrate, by clear and convincing evidence, that the sentence is not supported by the record, that the sentencing statutes' procedure was not followed, or there was not a sufficient basis for the imposition of a prison term; or that the sentence is contrary to law"); *State v. Leonhart,* 4th Dist. Washington No. 13CA38, 2014–Ohio–5601, ¶ 5 ("because [appellant] failed to establish by clear and convincing evidence either that the record does not support the trial court's findings or that the sentence is otherwise contrary to law, these assignments of error are meritless"). "Clear and convincing evidence is 'that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'" Sta*te ex rel. Husted v. Brunner,* 123 Ohio St.3d 288, 2009–Ohio–5327, 915 N.E.2d 1215, ¶ 18, quoting *Cross v.*

Ledford, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

B. LEGAL ANALYSIS

{¶14} Appellant concedes that her sentence is within the statutorily prescribed range. However, she asserts that at sentencing, it appears as though the trial court did not properly analyze the factors of R.C. 2929.12, but focused solely upon punishment aspect of felony sentencing; chastising her for receiving food stamps; and blaming her for the Methamphetamine problem destroying Adams County. Appellant concludes that the trial court's cumulative 54-month sentence is improper as a matter of law, and that the trial court abused its discretion in imposing it. Appellant requests that this court reverse her sentence and grant her whatever relief the Court deems necessary and proper.[3]

{¶15} We begin by recognizing that R.C. 2929.11 enumerates the overriding purpose of felony sentencing. "A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish

[3] As set forth above, the proper standard of review is that set forth in R.C. 2953.08(G)(2).

those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall 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.*

{¶16} R.C. 2929.12 sets forth factors to consider in determining the appropriate sentence. *Id.* The statute contains a nonexclusive list of factors that render an offender's conduct more serious than conduct normally constituting the offense and factors that render an offender's conduct less serious than conduct normally constituting the offense. R.C. 2929.12(B) and(C). Likewise, the statute sets forth a nonexclusive list of factors indicating the offender is more likely to commit future crimes and factors indicating recidivism is less likely. R.C. 2929.12(D)(E). Based upon our review of the record, we disagree with Appellant's argument that her sentence is inappropriate. For the reasons which follow, we find Appellant's sentence is not contrary to law and that it is clearly and convincingly supported by the record.

1. <u>Appellant's sentence is not contrary to law.</u>

{¶17} In this case, R.C. 2929.14(A)(3)(b) is applicable to both counts and is set forth as follows:

> "For a felony of the third degree that is not an offense for which division (A)(3)(a) of this section applies, the prison term shall be nine, twelve, eighteen, twenty-four, thirty, or thirty-six months."

{¶18} In Count One, Appellant was convicted of R.C. 2953.03(A)(1), aggravated trafficking in drugs with a specification for committing the offense in the vicinity of a juvenile. The trial court imposed a sentence of thirty months. R.C. 2925.03(C)(1)(b) provides:

> "If the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender."
>
> R.C. 2929.13C states:
>
> "Except as provided in division (D), (E), (F), or (G) of this section, in determining whether to impose a prison term as a sanction for a felony of the third degree or a felony drug offense that is a violation of a provision of Chapter 2925 of the Revised Code and that is specified as being subject to this division for purposes of sentencing, the sentencing court shall comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code and with section 2929.12 of the Revised Code."

{¶19} Appellant was sentenced to a twenty-fourth month prison sentence for her Count Two conviction for aggravated trafficking. R.C. 2925.03(C)(1)(c) provides:

> "Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated trafficking in drugs

> is a felony of the third degree, and, except as otherwise provided in this division, there is a presumption for a prison term for the offense."

{¶20} Appellant concedes that her sentence is within the statutory range. "'[A] sentence is generally not contrary to law if the trial court considered the R.C. 2929.11 purposes and principles of sentencing as well as the R.C. 2929.12 seriousness and recidivism factors, properly applied post[-]release control, and imposed a sentence within the statutory range.'" *Graham, supra,* at ¶ 16, quoting, *State v. Perry,* 4th Dist. Pike No. 16CA863, 2017–Ohio–69, ¶ 21, quoting *State v. Brewer,* 2014–Ohio–1903, 11 N.E.3d 317, ¶ 38 (4th Dist.).

{¶21} At the sentencing hearing, the trial court stated it had considered the record, the oral statements, the pre-sentence investigation report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11(A). The court also stated it had balanced the seriousness and recidivism factors under 2929.12. These considerations were also noted in the first paragraph of the Judgment Entry on Sentence. A judge is presumed to follow the law. *In re Huffman,* 135 Ohio St. 3d 1296, 2013-Ohio-1615, 987 N.E. 2d 689, at ¶ 8 (Where defendant filed an affidavit seeking to disqualify judge from presiding over new trial); *State v. Batty,* 2014-Ohio—2826, 15 N.E. 3d 347 (4th Dist.), at

¶ 12 (In appeal raising issue of judicial bias); *State v. Evans,* 4th Dist. Scioto No. 08CA3268, 2010-Ohio-2554, at ¶ 45 (In appeal involving trial court's ruling on the admissibility of evidence).

{¶22} Based on the foregoing, we find that the trial court properly considered the dictates of R.C. 2911.12 and R.C. 2929.12. Appellant's sentence is within the statutory range. Accordingly, Appellant's sentence is not clearly and convincingly contrary to law.

2. Appellant's sentence is clearly and convincingly supported by the record.

{¶23} Appellant essentially contends that none of the seriousness factors of R.C.2929.12(B) are applicable to her. We would generally agree. For example, Appellant did not cause serious physical harm to any person. Appellant did not hold an elected office or position of trust in the community which would likely influence others to commit crime. Appellant was not part of an organized criminal enterprise nor did she act based on racial prejudice or other bias.

{¶24} Appellant argues that the factors of R.C. 2929.12(D) and (E) make recidivism less likely. R.C. 2929.12(D) provides:

> "The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing; was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code; was under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of section 2967.16 or section 2929.141 of the Revised Code; was under transitional control in connection with a prior offense; or had absconded from the offender's approved community placement resulting in the offender's removal from the transitional control program under section 2967.26 of the Revised Code.

(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151 of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152 of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151 of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152 of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

R.C. 2929.12(E) provides:

"The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

{¶25} Appellant contends that the trial court's harsh comments indicate he imposed a sentence solely for the purpose of punishment and did not analyze the other factors. She emphasizes that (1) she did not commit the offense while on bail, awaiting sentencing, or while on community control or after having post-release control unfavorably terminated; (2) she does not have a history of criminal convictions or juvenile delinquency adjudications and has otherwise led a law-abiding life; (3) she only has one prior low level felony conviction which was sealed prior to the events in the instant case; (4) she has responded favorably to sanctions previously imposed, as demonstrated by her successful completion of community control imposed for a drug charge in Brown County; (5) she did not commit

the current offenses under circumstances likely to occur again in that she has twice been “set-up” by the same person with significant motivation to do so; and (6) she is genuinely remorseful for the conduct at issue. We believe the judge’s comments, while stern, may reflect (1) a genuine concern for the well-being of the women and children victims of the pervasive drug problem in southern Ohio, and (2) the daily frustrations experienced by many municipal and common pleas judges throughout our state. However, based on the following, we find that Appellant’s sentence is clearly and convincingly supported by the record.

{¶26} Concerning a trial court’s remarks at sentencing, the Supreme Court of Ohio has stated on more than one occasion,

> “Because a sentencing judge must ordinarily explain the reasons for imposing a sentence, judicial comments during sentencing, even if disapproving, critical, or heavy-handed, do not typically give rise to a cognizable basis for disqualification. See Flamm, Judicial Disqualification, Section 16.4, 450–463 (2d Ed.2007). As other courts have explained, “‘[i]t is the court's prerogative, if not its duty, to assess the defendant's character and crimes at sentencing, after * * * guilt has been decided.’” *Connecticut v. Rizzo,* 303 Conn. 71, 128–129, 31 A.3d 1094 (2011), quoting *United States v. Pearson,* 203 F.3d 1243, 1278 (10th Cir.2000), cert. denied, 530 U.S. 1268, 120 S.Ct. 2734, (2000). “Furthermore, ‘[t]o a considerable extent a sentencing judge is the embodiment of public condemnation and * * * [a]s the community's spokesperson * * * can lecture a defendant as a lesson to that defendant and as a deterrent to others.’” *Id*., quoting *United States v. Bakker,* 925 F.2d 728, 740 (4th Cir.1991).” *Huffman, supra,* at ¶ 6.

{¶27} It appears the trial court placed much emphasis on the fact that Appellant had sold drugs with her little girl sitting in the back seat. However, the trial court also appears to have relied heavily on the pre-sentence investigation report prepared in Appellant's case.[4] Reading from the report, the trial court observed Appellant scored moderate on the Ohio Risk Assessment,[5] noting as follows:

> "Family and social support scored low, moderate on the criminal history, neighborhood problems, substance abuse, criminal attitudes and behavioral problems and patterns. Scored high on lack of education, lack of employment, financial situation, and peer associations. These results indicate that she's at a moderate offense, or risk of reoffending without structured programming."

{¶28} The trial court discussed the recidivism factors, noting her history of three prior misdemeanor convictions and one prior felony trafficking in drugs.[6] The trial court also noted she had violated the terms of her recognizance bond with regards to the pill count. The trial court stated,

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[4] Although the pre-sentence report is not part of the public record, it is part of the appellate record for our review. R.C. 2953.08(F). See State v. Martin, 140 Ohio App.3d 326, 338, 2000-Ohio-1942, 747 N.E. 2d 318 (4th Dist.).

[5] The Ohio Risk Assessment System is an assessment tool which can be used at various points in the criminal justice system to gather information and aid in informed decision-making. See Ohio Department of Rehabilitation &Correction, "Ohio Risk Assessment System," https://www.drc.ohio.gov/oras. Accessed March 27, 2019.

[6] The trial court observed Appellant had a 2008 attempted assault conviction. She also had a trafficking in drugs for which she was placed on two years community control, and had her conviction sealed. The court also noted the assault conviction while in jail on the current charges.

"The court finds without any question or hesitation uh, that you're not amenable to available community control sanctions."

{¶29} There is no authority that indicates the trial court is required to give more or less weight to any particular factor. *State v. Bailey,* 4th Dist. Highland No. 11CA7, 2011-Ohio-6526, at 34. And, "[s]imply because the court did not balance the factors in the manner appellant desires does not mean that the court failed to consider them, or that clear and convincing evidence shows that the court's findings are not supported by the record. *State v. Yost,* 4th Dist. Meigs No. 17CA10, 2018-Ohio-2719, at ¶ 21, quoting *Graham, supra,* at ¶ 26, quoting *State v. Butcher,* 4th Dist. Athens No. 15CA33, 2017-Ohio-1544, at ¶ 87.

{¶30} For the foregoing reasons, we find that Appellant's sentence is also clearly and convincingly supported by the record. We find no merit to Appellant's argument that her sentence is inappropriate. Accordingly, we overrule the sole assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. & Hess, J. : Concur in Judgment & Opinion.

For the Court,

BY: ____________________________________
Jason P. Smith, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.