[Cite as *State v. Cottrill*, 2020-Ohio-7033.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. 20CA3704
vs.	:	
WILLIS COTTRILL,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Lori J. Rankin, Chillicothe, Ohio for appellant.[1]

Jeffrey C. Marks, Ross County Prosecuting Attorney, and Pamela Wells, Assistant Prosecuting Attorney, Chillicothe, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-23-20
ABELE, J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court judgment of conviction and sentence. Willis Cottrill, defendant below and appellant herein, asserts that the trial court erred in imposing sentence.

{¶ 2} Appellant assigns one error for review:

> "THE TRIAL COURT ABUSED ITS DISCRETION IN VIOLATION OF THE DEFENDANT-APPELLANT'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT

[1] Different counsel represented appellant during the trial court proceedings.

ARBITRARILY REVERSED ITSELF FROM IMPOSING COMMUNITY CONTROL TO A MAXIMUM, CONSECUTIVE PRISON SENTENCE."

{¶ 3} In October 2019, a Ross County Grand Jury returned an indictment that charged appellant with one count of aggravated possession of drugs in violation of R.C. 2925.11, and one count of theft in violation of R.C. 2913.02, both fifth-degree felonies. On December 23, 2019, appellant pleaded guilty to both counts. On February 3, 2020, the trial court sentenced appellant to serve a twelve-month prison term on each count, consecutive to each other, along with three years discretionary post-release control.

{¶ 4} With a score of 32 on the Ohio Risk Assessment System, which indicates a high likelihood of re-arrest and recidivism, appellant's presentence investigation (PSI) also revealed that he: (1) has three or more felony convictions, (2) has been incarcerated multiple times, (3) has used illegal drugs, (4) is in contact with or actively seeks out criminal peers, (5) is a gang member (although he is not active), (6) has significant criminal attitudes, and (7) has no concern for others. The PSI further stated that, at the time of the interview, appellant was on supervision with the Adult Parole Authority and his parole officer noted that appellant "was released on [post-release control] on 12-09-18 for the offense of breaking and entering. He has been a violator at large twice sanctioned three times and has pending charges. He failed to report as directed, and left Freedom Hall without permission. At the time of the interview he (appellant) said that he had a charge of Grand Theft pending in Pickaway County."

{¶ 5} At the sentencing hearing, counsel advised the trial court about a negotiated plea and asked the court to adopt the terms of the plea agreement, which involved drug treatment and community control. The trial court stated, "I'm going to be honest, Mr. Cottrill; can you tell me

anything good you've done for society? * * * As I read through this, this county has been worse off from the fact that you exist." Appellant replied, "I already know this, but I could care less what the county thinks about me, but, I'm here to do better for myself." The trial court replied:

> You just told me you don't care about the county. I get that. I do care about this county and what I see when I look at you is someone that's going to go out and steal his neighbor's stuff, he's going to steal everything he can from everyone he can get his little paws on, he's going to use drugs until the day that he dies. I see nothing good from you and the best thing I can do is protect this community, but I'm going to give you a chance to prove me wrong and to be honest, I don't think there's any chance you will. I think I get my twenty-four months out of you after I leave you in jail and after you do your CBCF. I think what we end up doing is just warehousing you. But that's okay. So, here's going to be your chance, I'm going to honor your negotiations in this -."

{¶ 6} Appellant interrupted and stated, "Can I say one more thing, your honor?" The court replied, "You're not going to say another word. You had your chance." Appellant responded, "I was trying to say something but you just keep interrupting me." The court replied, "Okay. Go ahead and roll the dice here, my friend." Appellant then stated:

> You said something about I don't care about the community. It wasn't that I didn't care about the community, I don't care about the people about what they think about me. You know what I mean? I'm my own person. I can change myself. I don't care what somebody else thinks about me. You know, everybody.

{¶ 7} The trial court replied, "You clearly don't - you're a thief. You don't care that people think that you're a thief." Appellant responded, "Yeah, I dug that hole when I was younger. I've lived with that all my life. I don't need somebody to downgrade me. You know what I mean? Especially from the higher up."

{¶ 8} The court then stated:

> Very well. The court's considered the P.S.I, the record, the statements of defendant and counsel. I'm making my decision primarily based on the overriding principals

> [sic] and purposes of felony sentencing. I've considered all the relevant seriousness and recidivism factors. I find the offender is not amenable to community control and that prison term is consistent with the purpose and principle of felony sentence.
>
> I'm going to impose upon the defendant twelve months on each case. I'm going to run each of those counts consecutive to each other. I specifically find in this case that the harm is -first of all I find that consecutive sentences are necessary to protect the public, punish the offender, they're not disproportionate and I find that the offender's criminal history shows that consecutive terms are needed to protect the public.

{¶ 9} The trial court's February 6, 2020 sentencing entry states (1) appellant has a previous conviction or guilty plea to an offense of violence, (2) consecutive service is necessary to protect the public from future crime and punish the appellant, (3) consecutive sentences are not disproportionate to the seriousness of appellant's conduct and the danger he poses to the public, and (4) consecutive sentences are necessary to protect the public from future crime. This appeal followed.

{¶ 10} In his sole assignment of error, appellant asserts that the trial court abused its discretion and violated his Fifth and Fourteenth Amendment rights when it "arbitrarily reversed itself from imposing community control to a maximum, consecutive prison sentence."

{¶ 11} R.C. 2953.08 provides for appeals based on felony sentencing guidelines. Pursuant to R.C. 2953.08(G)(2), an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either "that the record does not support the sentencing court's findings," under the specified statutory provisions, or "the sentence is otherwise contrary to law." *State v. Mitchell*, 4th Dist. Meigs No. 13CA13, 2015-Ohio-1132, ¶ 11; *State v. Brewer*, 2014-Ohio-1903, 11 N.E.3d 317, ¶ 37 (4th Dist.). "[C]lear 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." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. Thus, 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. *State v. Walker*, 4th Dist. Gallia No. 19CA1, 2020-Ohio-617, ¶ 19.

{¶ 12} Appellant argues that the imposition of maximum, consecutive prison sentences violates his due process rights. In particular, he contends that the parties' plea agreement included the state's recommendation for community control, but after appellant attempted to explain that the trial court had misunderstood his comment, the court sentenced him to serve maximum, consecutive sentences. Appellant thus contends that the court's decision is "not based an [sic] exercise of reason, but on passion, on a whim of the court after Mr. Cottrill 'rolled the dice' and tried to explain himself." Appellant claims that he did not act disrespectfully or contemptuously when he attempted to explain himself. Further, he argues that he did not make false claims of innocence or excuses, nor say anything that should have resulted in the court finding him not amenable to community control.

{¶ 13} Appellee points out that, although the state recommended community control, the trial court asked appellant during the plea colloquy whether he understood that a court is not bound to accept any sentence recommendation, to which he responded that he did. Further, appellee argues that when the court allowed appellant to present mitigation, he declined and showed no remorse. Instead, appellant interrupted the court and stated, "I don't care about the people about what they think about me. You know what I mean? I'm my own person. I can change myself. I don't care

what somebody else thinks about me."

A. Consecutive Sentences

{¶ 14} R.C. 2929.14(C)(4) sets forth a three-step analysis for consecutive sentences. *State v. Williams,* 4th Dist. Adams No. 19CA1090, 2019-Ohio-4873. R.C. 2929.41(A) establishes a statutory presumption in favor of concurrent sentences. "In order to impose consecutive terms of imprisonment, a trial court must make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but the court has no obligation to state reasons to support its findings." *State v. Blair*, 4th Dist. Athens No. 18CA24, 2019-Ohio-2768, at ¶ 52, citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. "Under the tripartite procedure set forth in R.C. 2929.14(C)(4), prior to imposing consecutive sentences a trial court must find that: (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender; (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and (3) that one of three circumstances specified in the statute applies." *See State v.* Baker, 4th Dist. Athens No. 13CA18, 2014-Ohio-1967, ¶ 35-36. The three circumstances are:

> (a) The offender committed one or more of 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.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) 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(C)(4)(a)-(c).

{¶ 15} A trial court must make these findings at the sentencing hearing and incorporate its findings in its sentencing entry. *Bonnell*, *supra,* at the syllabus. "Although it is not necessary for a trial court to use talismanic words in each step of its analysis to comply with R.C. 2929.14(C)(4), it must be clear from the record that the trial court actually made the required findings." *Blair*, *supra,* at ¶ 53, citing *State v. Baker*, *supra,* at ¶ 37, citing *State v. Clay*, 4th Dist. Lawrence No. 11CA23, 2013-Ohio-4649, ¶ 64. This court has also held that a trial court is under no obligation to make specific findings under the various factors outlined in these statutes. *See State v. Kulchar*, 4th Dist. Athens No. 10CA6, 2015-Ohio-3703, ¶ 47; *State v. Watson*, 4th Dist. Meigs No. 18CA20 & 18CA21, 2019-Ohio-4385, ¶ 17.

{¶ 16} Additionally, in *Walker*, *supra,* at ¶ 21, this court observed:

> Recently, in *State v. Gwynne*, Slip Opinion No. 2019-Ohio-4761, the Supreme Court of Ohio, in a plurality opinion, spoke to the imposition of consecutive sentences. Three justices indicated that courts should not review consecutive sentences based on the principles and purposes of felony sentencing pursuant to R.C. 2929.11 and 2929.12 because paragraph 23 of *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, applies to a challenge to the length of a non-maximum sentence for a single count, not a challenge to consecutive sentences. According to the *Gwynne* plurality, the Ohio General Assembly intended R.C. 2953.08(G) to be the exclusive means of appellate review of consecutive sentences."

{¶ 17} In the case sub judice, after our review we reject appellant's contention that the consecutive sentences are contrary to law and unsupported by the record. Here, the trial court made the R.C. 2929.14(C)(4) required findings, both on the record and in the sentencing entry, in order to impose consecutive sentences for appellant's convictions. Moreover, a trial court is not bound to follow a prosecutor's recommended sentence, *see, State ex rel. Duran v. Kelsey*, 106 Ohio St.3d 58,

2005-Ohio-3674, 831 N.E.2d 430, ¶ 6. In the case at bar, the trial court informed appellant at the plea hearing that it is not bound by the parties' agreement. Further, appellee points out that appellant's pre-sentence investigation (PSI) shows that appellant: (1) has numerous convictions for theft-related offenses from 2001 through the present, (2) served multiple prison sentences, and (3) had an active felony warrant in another county at the time of his plea.

{¶ 18} After our review and based on the above facts, we cannot conclude by clear and convincing evidence that the record does not support the imposition of consecutive sentences for appellant's convictions. Appellant's multiple prior convictions exhibit a disregard for the impact his crimes have on victims and the community in general. Accordingly, we agree with the trial court's rationale that the appellant's sentences are necessary to protect the public, to punish the offender, and no single prison term will adequately reflect the seriousness of the offender's conduct.

B. Maximum Sentences

{¶ 19} Appellant also contends that his maximum sentences violated his due process rights, and argues that the trial court should have, instead, sentenced him to serve community control.

{¶ 20} R.C. 2929.13(B)(1)(a) includes a presumption for community control if an offender is convicted of, or pleads guilty to, a felony of the fourth or fifth degree that is not an offense of violence. *State v. Campbell,* 4th Dist. Ross No. 19CA3683, 2020-Ohio-3146, ¶ 15, citing *State v. Grimmette*, 4th Dist. Scioto No. 18CA3830, 2019-Ohio-3576, ¶ 11, citing *State v. Napier*, 12th Dist. Clermont No. CA 2016-04-022, 2017-Ohio-246, ¶ 44, *State v. Lilly*, 12th Dist. Clermont Nos. CA 2017-06-029, 2018-Ohio-1014, ¶ 15. "The presumption of a community control sanction, however, is subject to the exceptions listed in R.C. 2929.13(B)(1)(b)." *Grimmette, supra,* at ¶ 11, citing *State v. Barnes*, 11th Dist. Trumbull No. 2012-T-0049, 2013-Ohio-1298, ¶ 16. R.C. 2929.13(B)(1)

provides:

> (b) The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense *if any of the following apply*:
>
> * * *
>
> (ix) The offender at the time of the offense was serving, or the *offender previously had served, a prison term*.
>
> (Emphasis added).

{¶ 21} In the case sub judice, as noted above, the trial court considered appellant's PSI, which revealed that appellant had served multiple terms of imprisonment. Thus, appellant did not benefit from a presumption of community control.

{¶ 22} A trial court's imposition of a maximum prison term for a felony conviction is not contrary to law if the sentence is within the statutory range for the offense and if the court considers both the R.C. 2929.11 purposes and principles of felony sentencing and the R.C. 2929.12 seriousness and recidivism factors. *State v. Mathias*, 5th Dist. Fairfield No. 19CA52, 2020-Ohio-4224, ¶ 9, citing *State v. Taylor*, 5th Dist. Richland No. 17CA29, 2017-Ohio-8996, ¶ 16, citing R.C. 2929.12 and *State v. Keith*, 8th Dist. Cuyahoga Nos. 103413 and 103414, 2016-Ohio-5234, ¶ 10, 16.

{¶ 23} R.C. 2929.11 requires the overriding purposes of felony sentencing shall guide a court that sentences a felony offender. The overriding purposes of felony sentencing are to protect the public from future crime and punish the offender using the minimum sanctions to accomplish 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." R.C. 2929.11.

{¶ 24} R.C. 2929.12 sets forth a non-exhaustive list of factors that a trial court must consider when it determines the offense's seriousness and the likelihood that the offender will commit future offenses. *State v. Sawyer*, 4th Dist. Meigs No. 16CA2, 2017-Ohio-1433, ¶ 17; *State v. Lister*, 4th Dist. Pickaway No. 13CA15, 2014-Ohio-1405, ¶ 15. Although a trial court is required to consider the R.C. 2929.12 factors, "the court is not required to 'use specific language to make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors (of R.C. 2929.12)'" *Sawyer* at ¶ 19, citing *State v. Latimer*, 11th Dist. Portage No. 2011-P-0089, 2012-Ohio-3745, ¶ 18, quoting *State v. Webb*, 11th Dist. Lake No. 2003-L-078, 2004-Ohio-4198, ¶ 10, quoting *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000).

{¶ 25} "[A] maximum sentence is not contrary to law when it is within the statutory range and the trial court considered the statutory principles and purposes of sentencing as well as the statutory seriousness and recidivism factors." *Sawyer* at ¶ 20, quoting *State v. Talley*, 2016-Ohio-8010, 74 N.E.3d 868, ¶ 15 (2d Dist.). In the case sub judice, the trial court's sentence fell within the statutory range. Further, in the sentencing entry the trial court stated that it considered the R.C. 2929.11 principles and purposes of sentencing and the R.C. 2929.12 seriousness and recidivism factors.

{¶ 26} After our review, we conclude that the trial court properly considered the purposes and principles of sentencing (R.C. 2929.11) and the factors that a court must consider to determine an appropriate sentence (R.C. 2929.12). Here, the trial court recognized appellant's lengthy criminal history. Moreover, the record reflects that, even at sentencing, appellant indicated that he remains unconcerned about his reputation as a thief. *See, e.g., State v. Rahab*, 150 Ohio St.3d 152,

2017-Ohio-1401, 80 N.E.3d 431, ¶ 28 ("[g]enuine remorse is one factor to be considered by the trial court when it makes its sentencing decision"). While appellant may disagree with the weight a trial judge may give to these factors, appellant's sentence is within the applicable statutory range, and we find no basis to conclude that the maximum sentence is contrary to law. Consequently, we conclude that the record supports the trial court's findings and considerations in sentencing appellant to serve maximum, consecutive sentences.

{¶ 27} Accordingly, based upon the foregoing reasons, we overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross 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 the 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 that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Wilkin, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, 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.