[Cite as *State v. Stutes*, 2023-Ohio-4582.]

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

STATE OF OHIO,	:	
	:	Case Nos. 22CA6 & 22CA7
Plaintiff-Appellee,	:	
	:	
v.	:	DECISION AND JUDGMENT
	:	ENTRY
BRETTON STUTES,	:	
	:	**RELEASED: 12/11/2023**
Defendant-Appellant.	:	

APPEARANCES:

Christopher Pagan, Repper-Pagan Law, Middletown, Ohio, for appellant.

William L. Archer, Jr., Gallia County Assistant Special Prosecutor, Circleville, Ohio, for appellee.

Wilkin, J.

{¶1} This is an appeal from a Gallia County Court of Common Pleas judgment of conviction involving two separate cases that were consolidated for appeal. In both cases, 21CR168 and 21CR221, appellant, Bretton Stutes, was charged with several counts of violating a protection order, fifth-degree felonies due to his previous conviction of violating a protection order. The hearings for both cases were held contemporaneously, including the change of plea hearing in which Stutes pleaded guilty to three counts of violating a protection order with the state agreeing to dismiss the remaining two counts.

{¶2} The state and Stutes agreed to a jointly recommended sentence of a community-control sanction for 24 months for the three counts Stutes pleaded guilty to. The trial court rejected the recommended sentence. Instead, the trial

court for the sole count of violating a protection order in 21CR221, imposed a prison term of 11 months. For the remaining two counts of violating a protection order that Stutes also pleaded guilty to in 21CR168, the trial court imposed a community-control sanction of 48 months on each of the two counts to be served concurrently to each other. At the disposition hearing, the trial court ordered the prison term and the community-control sanctions to be served consecutively, but in the sentencing entry, the trial court ordered the sentences to be served concurrently.

{¶3} In the first assignment of error, Stutes presents several arguments. First, he asserts the trial court erred in its recidivism analysis that resulted in the rejection of a community-control sanction in 21CR221. We overrule this argument since R.C. 2953.08 does not provide a basis for an appellate court to modify or vacate a sentence based on its view that the factors in R.C. 2929.12 were not properly considered. Second, Stutes challenges the trial court's order for the 11-month prison term sentence to be served consecutively to the prison term Stutes was serving at the time in another case. Stutes challenges only the trial court's findings. We overrule this argument as well because we do not clearly and convincingly find that the record does not support the trial court's finding, and additionally, the trial court made an alternate finding under R.C. 2929.14(C)(4)(c).

{¶4} We do, however, in 21CR221 remand the matter for the trial court to issue a nunc pro tunc entry incorporating all consecutive-sentence findings announced at disposition. Also, in 21CR168, we remand the matter for

resentencing because the trial court's sentencing announcement at the disposition hearing was substantively different than the sentence imposed in the sentencing entry.

{¶5} In his second assignment of error, Stutes challenges for the first time the constitutionality of R.C. 2951.03 in which he argues his appellate counsel should be able to obtain a copy of the presentence investigative ("PSI") report. We decline to address Stutes constitutional challenge as he failed to raise it at trial, and we also overrule his argument that he is entitled to a copy of the PSI report. The statutory language is clear: immediately after sentencing neither defense nor the state are permitted to obtain/retain a copy of the PSI report, which is not a public record and must be kept sealed.

FACTS AND PROCEDURAL BACKGROUND

{¶6} In 21CR168, Stutes was charged with four counts of violating a protection order, R.C. 2919.27(A)(1). The offenses were fifth-degree felonies because Stutes was previously convicted of violating a protection order. Each offense alleged that Stutes contacted the named petitioner in the protection order. The date for each offense varied with the first occurring on May 19, 2021, the second on May 24, 2021, the third on June 16, 2021, and finally the fourth on July 19, 2021.

{¶7} In 21CR221, Stutes was charged with committing one offense of violating a protection order, a fifth-degree felony, due to his previous conviction of violating a protection order. In both felony cases, Stutes initially pleaded not guilty, but on March 28, Stutes agreed to plead guilty to Counts One and Three in

21CR168, and to the sole count in 21CR221. In exchange, the state agreed to dismiss Counts Two and Four in 21CR168 and to the following:

> No promises have been made except as part of this plea agreement stated entirely as follows: Global resolution resolving all cases and charges. Joint recommendation for 24 months of community control to commence upon release from prison. The state will ask for consecutive underlying prison terms for any violation. Defendant agrees to pay the costs in both actions.

{¶8} A joint change of plea hearing was conducted with the state placing the agreement on record:

> Mr. Stutes will change his plea and enter a guilty plea to Count 1 uh, in 21 CR 221, that would be violation of a protection order with a prior conviction. Uh, in 21 CR 168 that will be a guilty plea to Counts 1 and 3 uh, both being violations of a protection with a prior conviction. Uh, he would be placed upon, well there would be a joint recommendation and ask him to be placed on 24 months of community control. Uh, that would commence upon his release from prison. Uh, we would expect and ask uh, for consecutive underlying prison sanctions for any violation. Uh, the remaining counts in 168 would be dismissed and he would pay
> the cost of the action.

{¶9} Stutes agreed with the state's recitation of the agreement. The trial court then informed Stutes of the maximum sentences he faces, including the option to impose a prison term for each offense and ordering them to be served consecutively. The trial court also explained the possibility of placing Stutes on community control and the consequences of violating community control. As part of the plea colloquy, the trial court explained the constitutional rights Stutes waives by pleading guilty.

{¶10} Stutes stipulated to the factual basis for each element of each offense and admitted that he made contact with the victim on May 19, 2021, June 16, 2021, and September 2, 2021. Stutes then pleaded guilty to each offense.

The trial court then shifted gears and questioned Stutes regarding the plea forms to ascertain whether he reviewed the documents with his counsel, understood what he reviewed, and that it was his signature on the forms. Stutes informed the trial court that he signed the guilty plea forms and the jury waiver forms. The trial court accepted Stutes guilty plea to three counts of violating a protection order, ordered a PSI report, and scheduled sentencing for April 18.

{¶11} At the disposition hearing, the state again outlined the jointly recommended sentence of 24 months of community-control sanction to commence upon the release of Stutes from prison and that Stutes was "serving a prison term at the time of these offense[s]." The trial court granted the state's request to dismiss Counts Two and Four in 21CR168 and sentenced Stutes to the following:

> Um, I'm going to accept in part and veer off in part. Um, so first you need to know Mr. Stutes that I am finding a prison sentence is consistent with the purposes and principles of sentencing. Um, find that you're not right now amenable to a community control sanction. I'm going to order that you serve a term of 11 months in prison under case number 21 CR 221 for violating a protection order, a felony of the fifth degree. And um, I'm going to find that you are to serve that consecutively with the term that you are serving right now. I do find consecutive sentence is necessary to protect the public from future crime. They're not disproportionate to the seriousness of the conduct or to the danger the offender imposes to the public. I do find this was committed while you were in, already a serving a prison term and in prison. So basically your history of criminal conduct demonstrates consecutive sentences is necessary to protect the public from future crime. I have two days of jail to give you credit uh, because of uh, custody uh, I'm sorry, because of time you spent in jail and in custody in this case prior to sentencing.
>
> * * *
>
> Now, however, on case number 21 CR 168 I am going to uh, that happened on different dates, different cases. I'm going to find community control uh, appropriate in that case after you have served the prison term. Find it's consistent with the overriding purposes of

felony sentencing. Find that after your service of your prison term you are amenable to a community control sanction and further prison is not consistent with the purposes and principles of sentencing. Um, as part of your sentence on, your, you will be uh, under a community control sanction on each of these counts for 48 months. You'll serve that concurrently for one 48 month period.

{¶12} In 21CR168, the trial court's sentencing entry included the following:

> However, the Court finds, as set forth in Ohio Revised Code Section 2929.12(D), that the Defendant was under a residential sanction, prison, at the time of the offense. Ohio Revised Code Section 2929.12(D)(1). Further, the Defendant has a history of criminal convictions, now serving a prison term. Ohio Revised Code Section 2929.12(D)(2). Further, Defendant exhibits a pattern of drug abuse related to the offense and as a refusal to engage in treatment. Ohio Revised Code section 2929.12(D)(4).
>
> Defendant's prior prison term and that Defendant committed a new crime while incarcerated are considered for the purposes of Ohio Revised Code Section 2929.13(B).
>
> After consideration of the factors in Ohio Revised Code Section 2929.11, 2929.12 and 2929.13, the Court finds that a community control sanction is consistent with the overriding purposes of felony sentencing. Further, the Court finds that the Defendant is amenable to a community control sanction and that a prison term is not consistent with the purposes and principles of sentencing.
>
> It is therefore Ordered that the Defendant be sentenced to forty-eight (48) months of community control, ON EACH COUNT, subject to the general supervision and control of the Adult Probation Department under any terms and conditions that they deem appropriate.
>
> These terms of community control shall be served **concurrently** with each other and with the sentence imposed in Case Number 21 CR 221.
>
> * * *
>
> The Court finds that consecutive sentences are necessary to protect the public from future crime and to punish the offender. Consecutive sentences are not disproportionate to the seriousness of the offender's conduct nor are they disproportionate to the danger the offender poses to the public. Further, Defendant committed this offense while incarcerated. And, the Defendant's history of criminal conduct demonstrates the necessity of consecutive sentences to protect the public from future crime. Ohio Revised Code Section 2929.14(C). (Boldface sic.)

{¶13} In 21CR221, the trial court's sentencing entry included findings for the imposition of consecutive sentences because the prison term of 11 months was ordered to be served consecutively to the prison term Stutes was serving at the time:

> However, the Court finds, as set forth in Ohio Revised Code Section 2929.12(D), that the Defendant was incarcerated in prison at the time of the offense. Ohio Revised Code Section 2929.12(D)(1). Further, the Defendant has a history of criminal convictions, now serving a prison term. Ohio Revised Code Section 2929.12(D)(2). Further, Defendant exhibits a pattern of drug abuse related to the offense and a refusal to engage in treatment. Ohio Revised Code section 2929.12(D)(4).
>
> Defendant's prior prison term and that Defendant committed a new crime while incarcerated is considered for the purposes of Ohio Revised Code Section 2929.13(B).
>
> Further, the Court finds that the Defendant is not presently amenable to an available community control sanction.
>
> Accordingly, after consideration of all of the above, the Court finds that a prison term is consistent with the purposes and principles of sentencing set forth in the Ohio Revised Code Section 2929.11.
>
> Therefore, it is the Order and Judgment of this Court that the Defendant shall be **sentenced** to the Ohio Department of Rehabilitation and Correction for a period of eleven (11) months for "Violation of a Protection Order," a violation of Section 2919.27(B)(3)(a) of the Ohio Revised Code, a felony of the fifth degree.
>
> This sentence shall be served consecutively to the prison term Defendant is now serving.
>
> * * *
>
> The Court finds that consecutive sentences are necessary to protect the public from future crime and to punish the offender. Consecutive sentences are not disproportionate to the seriousness of the offender's conduct nor are they disproportionate to the danger the offender poses to the public. Further, these offenses were committed while Defendant was under a residential sanction – prison. Ohio Revised Code Section 2929.14(C). (Boldface sic.)

{¶14} It is from these judgments that Stutes appeal.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT'S SENTENCES WERE CONTRARY TO LAW.

II. IT IS UNLAWFUL TO DENY APPELLATE COUNSEL A COPY OF STUTES' PSI TO INVESTIGATE, RESEARCH, AND PRESENT ISSUES FOR APPEAL.

ASSIGNMENT OF ERROR I

{¶15} Stutes within the first assignment of error raises three separate arguments attacking the imposition of the 11-month prison term in 21CR221, and the trial court's order for Stutes' sentences to be served consecutively. Stutes begins by challenging the trial court's recidivism analysis per R.C. 2929.12 in which he claims the trial court erred by finding Stutes was serving a residential sanction when he offended. According to Stutes, prison is not a residential sanction, and the error in finding that the factor in R.C.2929.12(D) applied here resulted in rejecting community-control sanction as the appropriate sentence.

{¶16} Secondly, Stutes asserts the trial court erred in ordering the 11-month prison term to be served consecutively to the prison sentence he was serving at the time. Stutes does not challenge the trial court's findings that consecutive terms are necessary to protect the public and that consecutive prison terms are not disproportionate. Stutes solely challenges the trial court's factual application of R.C. 2929.14(C)(4)(a) because Stutes was in prison at the time of the offense, not in a residential sanction, which, according to Stutes, is what is referenced in the statute. Therefore, Stutes is requesting that we modify his sentence so that the 11-month prison term will be served concurrently to his 2-year prison term he was serving at the time.

{¶17} Finally, Stutes claims the trial court erred by imposing a split sentence when it ordered the community-control sanction in 21CR168 to be served consecutively to the prison term Stutes was serving at the time and consecutive to the 11-month prison term in 21CR221. In support of his argument, Stutes relies on the Supreme Court decision in *State v. Hitchcock*, 157 Ohio St.3d 215, 2019-Ohio-3246, 134 N.E.3d 164, and requests that we modify his sentences to be served concurrently.

{¶18} The state agrees that a prison sentence is not a residential sanction, but, nonetheless, it is a recidivism factor that the trial court may consider pursuant to R.C. 2929.12(D). Thus, the trial court properly considered Stutes' imprisonment at the time of the offense, and in the alternative, the trial court's misstatement was harmless error. Further, as to the consecutive-sentence factors, the state maintains that the trial court found other factors supported the imposition of consecutive sentences including Stutes' criminal history and his pattern of drug abuse.

{¶19} As to Stutes' claim that the trial court imposed a split sentence, the state disagrees and argues that there is no split sentencing here in which the trial court ordered the 11-month prison sentence to be served consecutively to the prison sentence Stutes was serving at the time in another jurisdiction based on a different indictment. Moreover, Stutes' community-control sanction imposed in 21CR168 was ordered to be served concurrently to the 11-month prison term sentence in 21CR221.

{¶20} In his reply, Stutes argues the trial court's error in analyzing the

recidivism factors was not harmless. In addition, the trial court lacked express statutory authority to impose split sentencing when it ordered the community-control sanction be served consecutively to the prison term.

Law and Analysis

1. R.C. 2929.12 – Recidivism

{¶21} We must review Stutes' sentence pursuant to the dictates of R.C. 2953.08(G). *See State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 16. "R.C. 2953.08(G)(2)(a) permits an appellate court to modify or vacate a sentence if it clearly and convincingly finds that 'the record does not support the sentencing court's findings under' certain specific statutory provisions." *State v. Jones*, 163 Ohio St.3d 242, 2020-Ohio-6729, 169 N.E.3d 649, ¶ 28.

{¶22} The only provisions listed in R.C. 2953.08(G)(2)(a), however, are R.C. 2929.13(B) and (D), R.C. 2929.14(B)(2)(E) and (C)(4), and R.C. 2929.20(I). *See Jones* at ¶ 28. As such, the Supreme Court reiterated that R.C. 2953.08(G) "does not provide a basis for an appellate court to modify or vacate a sentence based on its view that the sentence is not supported by the record under R.C. 2929.11 and 2929.12." *Jones* at ¶ 39. "Consequently, appellate courts cannot review a felony sentence when 'the appellant's sole contention is that the trial court improperly considered the factors of R.C. 2929.11 or 2929.12 when fashioning that sentence.' " *State v. Whitehead*, 4th Dist. Scioto No. 20CA3931, 2022-Ohio-479, ¶ 109, quoting *State v. Stenson*, 6th Dist. Lucas No. L-20-1074, 2021-Ohio-2256, ¶ 9, citing *Jones* at ¶ 42.

{¶23} In the case at bar, the record is clear that the trial court considered R.C. 2929.11 and R.C. 2929.12 before imposing sentence and incorporated the findings in the sentencing entry. Pursuant to the clear holding in *Jones*, we do not have a basis to modify Stutes' 11-month prison sentence in which his sole claim is that the trial court improperly considered his incarceration as a factor pursuant to R.C. 2929.12. We therefore affirm his prison sentence in 21CR221.

2. Consecutive Sentencing

{¶24} Generally, a trial court is required to make certain findings pursuant to R.C. 2929.14(C)(4) before ordering a defendant to serve multiple prison terms consecutively:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (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.

{¶25} The trial court is required to make the consecutive-sentence findings at the disposition hearing and incorporate the findings in the sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 23.

{¶26} "R.C. 2953.08(G)(2)(a) permits an appellate court to modify or vacate a sentence if it clearly and convincingly finds that 'the record does not support the sentencing court's findings under' certain specific statutory provisions." *State v. Jones*, 163 Ohio St.3d 242, 2020-Ohio-6729, 169 N.E.3d 649, ¶ 28. "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." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1957), paragraph three of the syllabus.

{¶27} "The plain language of R.C. 2953.08(G)(2) requires an appellate court to defer to a trial court's consecutive-sentence findings, and the trial court's findings must be upheld unless those findings are clearly and convincingly not supported by the record." *State v. Gwynne*, __ Ohio St.3d __, 2023-Ohio-3851, N.E.3d __, ¶ 5. "The clear-and-convincing standard for appellate review in R.C. 2953.08(G)(2) is written in the negative." *Id.* at ¶ 13.

{¶28} The Court in *Gwynne* continued:

> an appellate court is directed that it must have a firm belief or conviction that the record does not support the trial court's findings before it may increase, reduce, or otherwise modify consecutive sentences. The statutory language does not require that the appellate court have a firm belief or conviction that the record supports the findings. This language is plain and unambiguous and

> expresses the General Assembly's intent that appellate courts employ a deferential standard to the trial court's consecutive-sentence findings. R.C. 2953.08(G)(2) also ensures that an appellate court does not simply substitute its judgment for that of a trial court.

Id. at ¶ 15.

{¶29} In the case at bar, Stutes' 11-month prison term was ordered to be served consecutively to the prison term he was serving at the time in another case. The record is clear, and Stutes concedes, that the trial court found the necessity and proportionality findings in support of consecutive sentencing. Stutes solely argues that the record does not support the application of R.C. 2929.14(C)(4)(a) because he committed the offenses while in prison and not while under a sanction per R.C. 2929.16, R.C. 2929.17 or R.C. 2929.18. We disagree with Stutes and affirm his sentence.

{¶30} First, the PSI report indicates that Stutes "committed the current offenses while on Probation Supervision in Jackson County Municipal Court." Accordingly, we are not clearly and convincingly convinced that the record does not support the trial court's findings. *See Gwynne*, __ Ohio St.3d __ , 2023-Ohio-3851, __ N.E.3d __, ¶ 19.

{¶31} Second, the trial court made the additional finding that "your history of criminal conduct demonstrates consecutive sentences is necessary to protect the public from future harm." R.C. 2929.14(C)(4) is written in the alternative; that is, if the two factors in the body of R.C. 2929.14(C) apply and one of the factors set forth in R.C. 2929.14(C)(4)(a) or (b) or (c) apply, then the trial court may order the prison terms to be served consecutively. Stutes' criminal history is one such alternative factor. Therefore, with the trial court finding that R.C.

2929.14(C)(4)(c) applied, we overrule Stutes argument. *See State v. Mitchell*, 8th Dist. Cuyahoga No. 111297, 2022-Ohio-3818, ¶ 11 ("The trial court made the alternative finding, under R.C. 2929.14(C)(4)(b), which is well within the statutory requirements. Inasmuch as the trial court imposed the consecutive sentence under R.C. 2929.14(C)(4)(b), we need not consider whether the record also supports a finding under subdivision (C)(4)(c) of that section since only one of the alternative findings is required.")

{¶32} In conclusion, we affirm Stutes' 11-month prison sentence in 21CR221 to be served consecutively with his prison term he was serving at the time. However, we remand the matter in 21CR221 to the trial court to issue a nunc pro tunc entry to incorporate all the factors announced in disposition in support of consecutive sentencing in the sentencing entry, including Stutes' criminal history. A trial court is required to announce the consecutive sentencing factors at the disposition hearing and also incorporate them in the entry. *See Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 23.

3. Split Sentencing

{¶33} In *State v. Hitchcock*, the Supreme Court of Ohio addressed the issue whether "a trial court may impose community-control sanctions on one felony count to be served consecutively to a prison term imposed on a separate felony count." 157 Ohio St.3d 215, 2019-Ohio-3246, 134 N.E.3d 164, ¶ 1. The lead opinion emphasized that "judges have no inherent power to create sentences, and the only sentence a trial judge may impose is that provided by statute." *Id*. at ¶ 18. "[T]rial courts are given express authorization to impose a

prison term for one offense and community-control sanctions for another offense." *Id*. at ¶ 20. But, "a trial court may not impose community-control sanctions on one felony count to be served consecutively to a prison term imposed on another felony count," unless there is a statutory provision authorizing such a sentence. *Id*. at ¶ 1.

{¶34} The other limitation is that " '[t]he duration of all community control sanctions imposed upon an offender under this division shall not exceed five years.' " *State v. Page*, 153 Ohio St.3d 214, 2018-Ohio-813, 103 N.E.3d 800, ¶ 10, quoting R.C. 2929.15(A)(1). But "[n]othing in the sentencing statutes requires the duration of a community-control sanction to match that of a concurrent prison term." *Id*. The Supreme Court also reiterated that imposing a prison term sentence for one offense and a community-control sanction for a separate offense is not a "split sentence." *Id.* at ¶ 6.

{¶35} In the case at bar, the trial court imposed 48 months of community-control sanction as to Counts One and Three in 21CR168 to be served concurrently to each other. For the sole count of violating a protection order in 21CR221, the trial court imposed 11 months imprisonment. Stutes maintains that the trial court ordered the community-control sanctions in 21CR168 to be served consecutively to the 11-month prison term in 21CR221. The state on the other hand, argues the trial court ordered the sentences to be served concurrently. Technically, both are correct. This is because the trial court's announcement at disposition was for the sentences to be served consecutively,

but the judgment entry in 21CR168 states that the community-control sanctions will be served concurrently to the 11-month prison term.

{¶36} At the hearing, the trial court stated the following:

> Now, however, on case number 21 CR 168 I am going to uh, that happened on different dates, different cases. I'm going to find community control uh, appropriate in that case after you have served the prison term. Find it's consistent with the overriding purposes of felony sentencing. Find that after your service of your prison term you are amenable to a community control sanction and further prison is not consistent with the purposes and principles of sentencing. Um, as part of your sentence on, your, you will be uh, under a community control sanction on each of these counts for 48 months. You'll serve that concurrently for one 48 month period.

{¶37} But in the sentencing entry in 21CR168, the trial court ordered the community-control sanctions to be served concurrently to the 11-month prison term in 21CR221 but also included the factors in support of consecutive sentencing:

> These terms of community control shall be served **concurrently** with each other and with the sentence imposed in Case Number 21 CR 221.
>
> * * *
>
> The Court finds that consecutive sentences are necessary to protect the public from future crime and to punish the offender. Consecutive sentences are not disproportionate to the seriousness of the offender's conduct nor are they disproportionate to the danger the offender poses to the public. Further, Defendant committed this offense while incarcerated. And, the Defendant's history of criminal conduct demonstrates the necessity of consecutive sentences to protect the public from future crime. Ohio Revised Code Section 2929.14(C). (Boldface sic.)

{¶38} Generally, a trial court speaks through its journal entries and not by oral pronouncement. *See State v. Guilkey*, 4th Dist. Scioto No. 04CA9432, 2005-Ohio-3501, ¶ 10. But there is an exception in criminal cases "because the defendant has a constitutional right to be present at every stage of the

proceedings and to know his sentence at the sentencing hearing." *State v. Rhodes*, 8th Dist. Cuyahoga Nos. 95683 and 96337, 2011-Ohio-5153, ¶ 11, citing Crim.R. 43. In the matter at bar, the trial court made a substantive discrepancy of imposing consecutive sentences at the disposition hearing but ordering the sentences to be served concurrently in the sentencing entry. This substantive discrepancy requires a new sentencing hearing solely in case number 21CR168 in which the entry does not comport with the sentence announced at the hearing. *See State v. Liddy*, 2022-Ohio-4282, 202 N.E.3d 172, ¶ 65 (11th Dist.) ("a *substantive* discrepancy between the sentence imposed at the hearing and the sentence reflected in the entry constitutes reversible error that requires a new sentencing hearing.") (Emphasis sic.); *See also State v. Smith*, 10th Dist. Franklin No. 17AP-573, 2018-Ohio-3875, ¶ 7 (same.)

{¶39} In conclusion, we overrule Stutes' arguments as to the sentence imposed in 21CR221 of 11 months in prison but remand the matter to the trial court to issue a nunc pro tunc entry to incorporate all factors announced at disposition in support of consecutive sentencing in the sentencing entry. We sustain Stutes' argument as to his challenge to the community-control sentences imposed in 21CR168 due to the discrepancy in the sentence announced at the disposition hearing and that which was incorporated in the sentencing entry. We thus, remand the matter in 21CR168 for a new sentencing hearing.[1]

[1] We note that even if the "concurrent" in the sentencing entry in 21CR168 is a typographical error that may be considered clerical and corrected through a nunc pro tunc entry, we nonetheless would remand the matter for resentencing because ordering a community-control sanction to be served consecutively to a prison term in two separate felonies is contrary to law. *See Hitchcock*, 157 Ohio St.3d 215, 2019-Ohio-3246, 134 N.E.3d 164, ¶ 1.

ASSIGNMENT OF ERROR II

{¶40} In the second assignment of error, Stutes challenges his appellate counsel's inability to obtain a copy of the PSI report. Within this assignment of error Stutes presents several arguments. First, he argues the failure to obtain a copy was inconvenient and would result in the ineffective representation of Stutes since the drive to the court in which the PSI report was located is a 5-hour drive, which would take away from the limited time appointed counsel has on the case. Second, the PSI report was essential in this case as the trial court rejected the jointly recommended sentence.

{¶41} Third, Stutes asserts that R.C. 2951.03 is unconstitutional on its face and as applied to preclude appellate counsel to obtain and retain a copy of the PSI report, yet, it allows the trial court, the correctional department, and others to retain a copy of the PSI report. Stutes argues that if strict scrutiny is the proper standard then the statute fails because even though the state has a compelling interest in keeping the PSI report confidential, there are less intrusive measures than denying appellate counsel a copy of the report. Stutes additionally argues that if the test is rational basis, the statutory provision is still unconstitutional as it is over-inclusive and irrational.

{¶42} The state disagrees and claims that Stutes was not denied access to the PSI report, but rather, similar to the prosecution, Stutes' appellate counsel was denied a copy of the PSI report. Further, the state contends that we do not need to reach the due process and equal protection arguments because PSI reports are confidential and are not public record pursuant to R.C. 2951.03(D)(1).

{¶43} In his reply, Stutes maintains that his appellate counsel should be provided a copy of the PSI report since R.C. 2951.03(D)(1) gives defense counsel a copy of the PSI report and R.C. 2953.08(F)(1) mandates that the PSI report be part of the record. Finally, Stutes reiterates his constitutional challenge and contends that his appellate counsel is burdened by not being able to obtain a copy of the PSI report while other classified persons can. Stutes concludes by stating that this court does not need to address the constitutional challenge if it reads R.C. 2951.03 as granting appellate counsel a copy of the PSI report.[2]

Law and Analysis

1. Constitutionality of R.C. 2951.03

{¶44} We decline to address Stutes' constitutional challenge to R.C. 2951.03 because he failed to raise the issue at trial.

> [T]he question of the constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court. See *State v. Woodards* (1966), 6 Ohio St.2d 14, 215 N.E.2d 568 [35 O.O.2d 8]. This rule applies both to appellant's claim that the statute is unconstitutionally vague on its face and to his claim that the trial court interpreted the statute in such a way as to render the statute unconstitutionally vague. Both claims were apparent but yet not made at the trial court level.

State v. Awan, 22 Ohio St.3d 120, 122-123, 489 N.E.2d 277 (1986).

{¶45} As Stutes correctly acknowledges, R.C.2951.03(D)(2) mandates that his trial counsel and prosecution return any copies and summaries of the PSI report after sentence is imposed. Stutes' trial counsel did not challenge the

[2] Attached to Stutes' reply brief is an entry titled "statement of the evidence" outlining Stutes' appellate counsel's efforts to obtain the PSI report. This document was improperly attached as it is not part of the record of the case in which it was filed after the notice of appeal. Moreover, on October 26, 2022, we denied Stutes' motion to supplement the record with a Rule 9(C) statement relating to his PSI report request since the discussions were held outside the record.

mandate to return the copy of the PSI at trial. Moreover, R.C. 2951.03(D)(2) did not require other personnel/departments who had a copy of the PSI to return it. Therefore, the same challenge that Stutes now brings could have been raised at trial, but was not.

2. Appellate counsel is not entitled to a copy of the PSI report.

{¶46} We begin with R.C. 2951.03 which provides:

> (B)(1) If a presentence investigation report is prepared pursuant to this section, section 2947.06 of the Revised Code, or Criminal Rule 32.2, the court, **at a reasonable time before imposing sentence**, shall permit the defendant or the defendant's counsel to read the report, except that the court shall not permit the defendant or the defendant's counsel to read any of the following:
>
> (a) Any recommendation as to sentence;
>
> (b) Any diagnostic opinions that, if disclosed, the court believes might seriously disrupt a program of rehabilitation for the defendant;
>
> (c) Any sources of information obtained upon a promise of confidentiality;
>
> (d) Any other information that, if disclosed, the court believes might result in physical harm or some other type of harm to the defendant or to any other person.
>
> (2) Prior to sentencing, the court shall permit the defendant and the defendant's counsel to comment on the presentence investigation report and, in its discretion, may permit the defendant and the defendant's counsel to introduce testimony or other information that relates to any alleged factual inaccuracy contained in the report.
>
> * * *
>
> (4) Any material that is disclosed to the defendant or the defendant's counsel pursuant to this section shall be disclosed to the prosecutor who is handling the prosecution of the case against the defendant.
>
> * * *
>
> (D)(1) The contents of a presentence investigation report prepared pursuant to this section, section 2947.06 of the Revised Code, or Criminal Rule 32.2 and the contents of any written or oral summary of a presentence investigation report or of a part of a presentence investigation report described in division (B)(3) of this section are **confidential information and are not a public record**. The court, an appellate court, authorized probation officers,

> investigators, and court personnel, the defendant, the defendant's counsel, the prosecutor who is handling the prosecution of the case against the defendant, and authorized personnel of an institution to which the defendant is committed may inspect, receive copies of, retain copies of, and use a presentence investigation report or a written or oral summary of a presentence investigation only for the purposes of or only as authorized by Criminal Rule 32.2 or this section, division (F)(1) of section 2953.08, section 2947.06, or another section of the Revised Code.
>
> (2) **Immediately following the imposition of sentence** upon the defendant, the defendant or the defendant's counsel and the prosecutor shall return to the court all copies of a presentence investigation report and of any written summary of a presentence investigation report or part of a presentence investigation report that the court made available to the defendant or the defendant's counsel and to the prosecutor pursuant to this section. The defendant or the defendant's counsel and the prosecutor shall not make any copies of the presentence investigation report or of any written summary of a presentence investigation report or part of a presentence investigation report that the court made available to them pursuant to this section.
>
> (3) Except when a presentence investigation report or a written or oral summary of a presentence investigation report is being used for the purposes of or as authorized by Criminal Rule 32.2 or this section, division (F)(1) of section 2953.08, section 2947.06, or another section of the Revised Code, the court or other authorized holder of the report or summary shall retain the report or summary under seal. (Boldface added).

R.C. 2953.01(B)(1) & (2) & (4) and (D)(1) & (2) & (3).

{¶47} The statutory language is clear and unambiguous in that prior to sentencing, the defendant or his counsel and prosecution may review some parts of the PSI report. R.C. 2953.01(B)(1) & (4). Further, prior to sentencing, the defendant and his counsel may comment on the PSI report and may even introduce evidence that relate to factual inaccuracies in the report. R.C. 2953.01(B)(2). But that "immediately following the imposition of sentence," the defendant, his counsel and prosecution must return to the court all copies of the PSI report "and any of the written summary of a presentence investigation

report[.]" R.C. 2951.03(D)(2). This is because the PSI report contains "confidential information and are not a public record." R.C. 2951.03(D)(1).

{¶48} In *State v. Johnson*, the Supreme Court addressed the certified conflict question on whether "newly-appointed appellate counsel is entitled to obtain a copy of the defendant's presentence investigation report." 138 Ohio St.3d 282, 2014-Ohio-770, 6 N.E.3d 38, ¶ 1, citing 135 Ohio St.3d 1411, 2013-Ohio-1622, 986 N.E.2d 28. The Court answered the question in the affirmative holding R.C. 2951.03(D) permits "newly appointed appellate counsel to have access to a presentence investigation report upon a proper showing" but "subject to similar restrictions as contained in R.C. 2951.03 and 2953.08(F)(1) and any further directives of the appellate court." *Johnson* at ¶ 14.

{¶49} Therefore, access to the PSI report is subject to the limitations in R.C. 2951.03, which includes the return of all copies "immediately following the imposition of sentence[.]" R.C. 2953.01(D)(2). Accordingly, the defense and prosecution must return all copies and nothing in the *Johnson* decision permits a deviation from the statutory language. To the contrary, *Johnson* makes clear that the limitations in R.C. 2951.03 must be complied with. Further support that the report must remain confidential is the language in R.C. 2953.08(F)(1) which mandates that the PSI report is part of the appellate record and that when an appellate court is reviewing the PSI report that review

> does not affect the otherwise confidential character of the contents of that report as described in division (D)(1) of section 2951.03 of the Revised Code and does not cause that report to become a public record, as defined in section 149.43 of the Revised Code, following the appellate court's use of the report.

R.C. 2951.03(D)(3) additionally mandates that when the PSI report is not being used, "the court or other authorized holder of the report or summary shall retain the report or summary under seal."

{¶50} Pursuant to the Supreme Court's decision in *Johnson* and the clear statutory language in R.C. 2953.01 and R.C. 2953.08, we hold that Stutes' appellate counsel was not entitled to a copy of the PSI report. We interpret access as the opportunity to review the PSI report, which was granted in this case. "While we understand that this procedure appellant outlines could indeed create a hardship for appellant's counsel, as an intermediate appellate court we may not depart from Supreme Court of Ohio directives and statutory requirements." *State v. Cihon*, 4th Dist. Gallia No. 22CA13, 2023-Ohio-3108, ¶ 31.

{¶51} Accordingly, we overrule Stutes' second assignment of error.

CONCLUSION

{¶52} In 21CR221, we affirm Stutes' 11-month prison term but remand the matter to the trial court to issue a nunc pro tunc entry incorporating all the consecutive sentencing factors announced at the disposition hearing. In 21CR168, we remand the matter for resentencing.

JUDGMENT AFFIRMED IN PART REVERSED IN PART AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and the CAUSE IS REMANDED. Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallia 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 60 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 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-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 60 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.

Smith, P.J. and Hess, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Kristy S. Wilkin, 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.