

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

CLARENCE R. BLACKERT

Appellant

C.A. Nos.    27314  
                  27315

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE Nos.    CR 2013 03 0659  
                  CR 2013 08 2203(A)

DECISION AND JOURNAL ENTRY

Dated: June 10, 2015

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MOORE, Judge.

{¶1} Defendant-Appellant Clarence R. Blackert appeals from the judgments of the Summit County Court of Common Pleas. This Court affirms but remands the matter for the issuance of two nunc pro tunc entries to correct clerical errors.

I.

{¶2} In March 2013, in case number CR-2013-03-0659 (“case one”), Mr. Blackert was indicted on one count of telecommunications fraud and one count of receiving stolen property (a motorcycle), both fourth-degree felonies. Ultimately, Mr. Blackert entered a guilty plea to receiving stolen property and the telecommunications fraud count was dismissed. The trial court sentenced Mr. Blackert to three years of community control and notified him that if he violated the terms of community control he could receive a longer or more restrictive sanction or a prison term of 18 months.

{¶3} On August 14, 2013, Mr. Blackert was indicted in case CR-2013-08-2203(A) (“case two”) on one count of receiving stolen property (a truck belonging to the State of Ohio), a felony of the fourth degree. This also led to community control violation proceedings in case one.

{¶4} Both cases were heard together at the plea and sentencing stages. Mr. Blackert pleaded guilty to receiving stolen property in case two and to the community control violation in case one. The trial court revoked Mr. Blackert’s community control and sentenced him to 18 months in prison in case one. At sentencing, with respect to case two, the State asked the trial court to also sentence Mr. Blackert for a violation of post-release control. The trial court sentenced him to 18 months in prison for the receiving stolen property charge and 375 days in prison for the post-release control violation. The trial court ordered the sentences in case two to run consecutively to each other and to run consecutively to the sentence in case one.

{¶5} Mr. Blackert filed notices of appeal in both cases, and the cases were subsequently consolidated for purposes of appeal. Additionally, Mr. Blackert filed a motion to supplement the record with the presentence investigation (“PSI”), which this Court granted. Mr. Blackert now raises two assignments of error for our review.

## II.

### **ASSIGNMENT OF ERROR I**

THE TRIAL COURT FAILED TO MAKE THE FACTUAL FINDINGS AT THE SENTENCING HEARING NECESSARY TO IMPOSE CONSECUTIVE SENTENCES ON THE TWO RECEIVING STOLEN PROPERTY CHARGES [CR2013-03-0659 AND CR2013-08-2203(A)] AS REQUIRED BY O.R.C. 2929.14(C)(4).

{¶6} Mr. Blackert argues in his first assignment of error that the trial court failed to make the requisite findings at the sentencing hearing to impose consecutive sentences on the two

receiving stolen property charges. We disagree; however, because the trial court failed to incorporate those findings into the sentencing entries, we remand the matter to the trial court for the issuance of nunc pro tunc entries.

{¶7} “A plurality of the Supreme Court of Ohio held that appellate courts should implement a two-step process when reviewing a felony sentence.” *State v. Bulls*, 9th Dist. Summit No. 27029, 2015-Ohio-276, ¶ 26, quoting *State v. Clayton*, 9th Dist. Summit No. 26910, 2014-Ohio-2165, ¶ 43, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26. “The first step, reviewed de novo, is to ensure that the trial court complied with applicable rules and statutes in imposing the sentence.” *Bulls* at ¶ 26, quoting *Clayton* at ¶ 43. “If the first step is satisfied, the second [step] is to review the term of imprisonment for an abuse of discretion.” *Bulls* at ¶ 26, quoting *Clayton* at ¶ 43.

{¶8} R.C. 2929.14(C)(4) provides:

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.

{¶9} “With exceptions not relevant here, if the trial court does not make the factual findings required by R.C. 2929.14(C)(4), then ‘a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States.’” *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶ 23, quoting R.C. 2929.41(A).

{¶10} “When imposing consecutive sentences, a trial court must state the required findings as part of the sentencing hearing[; h]owever, a word-for-word recitation of the language of the statute is not required[.]” *State v. Kilmire*, 9th Dist. Summit Nos. 27319, 27320, 2015-Ohio-665, ¶ 16, quoting *Bonnell* at ¶ 29. “[A]s long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld.” *Kilmire* at ¶ 16, quoting *Bonnell* at ¶ 29.

{¶11} “[T]he court should also incorporate its statutory findings into the sentencing entry.” *Kilmire* at ¶ 16, quoting *Bonnell* at ¶ 29. “A trial court’s inadvertent failure to incorporate the statutory findings in the sentencing entry after properly making those findings at the sentencing hearing does not render the sentence contrary to law; rather, such a clerical mistake may be corrected by the court through a nunc pro tunc entry to reflect what actually occurred in open court.” *Kilmire* at ¶ 16, quoting *Bonnell* at ¶ 30. Further, despite Mr. Blackert’s argument to the contrary, the Supreme Court has concluded that the trial court “has no obligation to state reasons to support its findings.” *Bonnell* at syllabus.

{¶12} At the sentencing hearing, the trial court found that “[c]onsecutive service is necessary to protect the public and punish you. It’s not disproportionate to your felony record.” Shortly thereafter, the trial court reiterated the findings: “[C]onsecutive service is necessary to

protect the public from future crime, to punish the offender, and is not disproportionate to the seriousness of your conduct and to the danger you pose to the public. Moreover your criminal history demonstrates consecutive sentences are necessary to protect the public from future crime.”

{¶13} Given these findings made at the sentencing hearing, we can only conclude that Mr. Blackert’s argument has no merit. The trial court made the necessary findings. Further, Mr. Blackert has not argued that those findings are unsupported by the record. However, because the trial court did fail to incorporate its findings into the two judgment entries in these cases, we remand the matter for the issuance of nunc pro tunc entries so that the record can reflect the findings that were made. *See Kilmire* at ¶ 18-19.

{¶14} Mr. Blackert’s first assignment of error is overruled, but the matter is remanded for the issuance of nunc pro tunc entries in case one and case two.

### **ASSIGNMENT OF ERROR II**

THE TRIAL COURT ERRED IN SENTENCING [MR. BLACKERT] TO 375 DAYS FOR A POST-RELEASE CONTROL VIOLATION AS THE STATE FAILED TO PRESENT ANY EVIDENCE TO SUPPORT THAT [MR. BLACKERT] WAS IN FACT PLACED ON POST-RELEASE CONTROL AT THE TIME OF THE COMMISSION OF THE “NEW” FELONY[.]

{¶15} Mr. Blackert asserts in his second assignment of error that the trial court erred in sentencing him for a post-release control violation as there was no evidence that he was on post-release control at the time he committed the new felony. We do not agree.

{¶16} R.C. 2929.141 provides that,

[u]pon the conviction of or plea of guilty to a felony by a person on post-release control at the time of the commission of the felony, the court may terminate the term of post-release control, and the court may do either of the following regardless of whether the sentencing court or another court of this state imposed the original prison term for which the person is on post-release control:

(1) In addition to any prison term for the new felony, impose a prison term for the post-release control violation. The maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony. In all cases, any prison term imposed for the violation shall be reduced by any prison term that is administratively imposed by the parole board as a post-release control sanction. A prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony. The imposition of a prison term for the post-release control violation shall terminate the period of post-release control for the earlier felony.

(2) Impose a sanction under sections 2929.15 to 2929.18 of the Revised Code for the violation that shall be served concurrently or consecutively, as specified by the court, with any community control sanctions for the new felony.

{¶17} At the sentencing, the State asked the trial court to impose prison time for a post-release control violation pursuant to a request from the Ohio Department of Rehabilitation and Corrections. The trial court agreed. While there is little detail concerning Mr. Blackert's post-release control supervision or his violation thereof in the sentencing transcript, Mr. Blackert's counsel did acknowledge that Mr. Blackert was on post-release control. Mr. Blackert's counsel stated that Mr. Blackert "[is] on [post-release control]. And I would point out to the Court that when Mr. Blackert was charged with these offenses – [post-release control] has already sanctioned him to a certain extent. He spent 34 days in jail before he made bond. And then his parole officer made him do an additional 90 days of electronic-monitored house arrest. So he has paid a penalty from the [post-release control] side of things for the violation of his probation in this new offense."

{¶18} Moreover, the PSI provides additional information about Mr. Blackert's post-release control. The PSI submitted by a probation officer states in part that,

[t]he most recent time [Mr. Blackert] was on community supervision began in February 2013 when he was placed with the Adult Parole Authority ("APA") on [post-release control] for Portage County case #2006-CR-0329 (Burglary, F-2). This Officer spoke with Parole Officer Todd Liggett, who is supervising [Mr. Blackert's] [post-release control] case. Officer Liggett stated that the APA

requires that the instant charges [case two] be disposed prior to sanctions in the [post-release control] case. Liggett further stated that upon disposition of the instant case, he will be seeking [Mr. Blackert's] return to prison for the [post-release control] case, with sentence enhancements (376 days).

{¶19} Later in the report, the probation officer stated that Mr. Blackert “was only out of prison on [post-release control] when he got a new set of felony charges and the instant offense is the second set of felony charges that [he] has been involved in less than a year of being released from prison.” Mr. Blackert has not argued that the trial court could not consider these statements in the PSI in determining whether he was on post-release control at the time he committed the new felony offense. *See* App.R. 16(A)(7).

{¶20} Mr. Blackert was alleged to have received the stolen truck in case two on or about August 8, 2013. Given that the record indicates that Mr. Blackert began serving a term of post-release control in February 2013, there is nothing that indicates his post-release control was terminated, and Mr. Blackert's counsel indicated that Mr. Blackert was on post-release control at the time of sentencing, there was evidence that Mr. Blackert committed a felony while on post-release control. Further, as Mr. Blackert was serving post-release control for a second-degree felony, he was subject to a term of three years of post-release control. *See* R.C. 2967.28(B)(2). Thus, Mr. Blackert's post-release control should have not expired until 2016. Mr. Blackert's argument that there was no evidence in the record that he was on post-release control is therefore unfounded. *See State v. McDowell*, 9th Dist. Summit No. 26697, 2014-Ohio-3900, ¶ 15 (noting the fact of an offender being on post-release control at the time a new felony is committed “can be determined from information contained in court documents”).

{¶21} This matter is unlike *State v. Johnson*, 9th Dist. Summit No. 25525, 2011-Ohio-3941, ¶ 23-25, wherein we concluded that the State failed to present any evidence that Mr. Johnson was placed on, or violated post-release control. In *Johnson*, we cited to *State v. Jordan*,

124 Ohio St.3d 397, 2010-Ohio-281, ¶ 6-15, which involved the evidence necessary to prove the crime of escape. *Johnson* at ¶ 25. In citing *Jordan*, we parenthetically noted a list of types of evidence that the Supreme Court found acceptable in establishing a defendant was on post-release control for purposes of escape. *Johnson* at ¶ 25. However, in *Johnson*, we did not limit the types of acceptable evidence or even hold what evidence would be sufficient to establish whether a defendant was on post-release control at the time of the commission of felony for purposes of R.C. 2929.141. Given the record before us, we conclude that Mr. Blackert has failed to demonstrate that the State offered no evidence that he was on post-release control at the time he committed the new felony.

{¶22} Mr. Blackert's assignment of error is overruled.

### III.

{¶23} In light of the foregoing, we affirm the judgment of the Summit County Court of Common Pleas, but remand the matter for the issuance of nunc pro tunc entries in both cases as specified above.

Judgment affirmed,  
and cause remanded.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

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CARLA MOORE  
FOR THE COURT

HENSAL, P.J.  
WHITMORE, J.  
CONCUR.

APPEARANCES:

EDWIN C. PIERCE, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.