[Cite as *State v. Kilmire*, 2015-Ohio-665.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. JAMES J. KILMIRE Appellant	C.A. Nos. 27319 27320 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE Nos. CR 13 04 0986 CR 13 06 1584

DECISION AND JOURNAL ENTRY

Dated: February 25, 2015

CARR, Presiding Judge.

{¶1} Appellant, James Kilmire, appeals his sentence imposed in the Summit County Court of Common Pleas. This Court affirms but remands the matter for the issuance of a nunc pro tunc entry in case CR-2013-06-1584 ("case two") to correct a clerical error.

I.

{¶2} Kilmire was initially indicted in April 2013, in case CR-2013-04-0986 ("case one") on one count of vandalism, one count of possessing criminal tools, and one count of breaking and entering. A supplemental indictment was issued in June 2013, adding counts 4 through 17. Each was for breaking and entering. Some offenses occurred prior to April 2013, while others occurred while Kilmire was out on bond on case one. A second supplement to the indictment was filed in June 2013, adding an additional count of breaking and entering. An additional two counts of breaking and entering were added in July 2013, bringing the total counts

for case one to 20. In June 2013, Kilmire was indicted in case two for one count of breaking and entering.

{¶3} While it does not appear the cases were ever formally consolidated below, they were heard by the same trial judge and were addressed together at the same plea and sentencing hearings. In August 2013, Kilmire pleaded guilty to all counts in both cases and the matter was referred for a presentence investigation report ("PSI"). In October 2013, the trial court sentenced Kilmire to 6 months in prison on each count. The trial court ordered the sentences in counts 1, 2, and 3 in case one to be served concurrently with each other but consecutively to the remaining sentences. The court ordered the sentences in count 4 through 18 from case one to run consecutively to each other and consecutively to the remaining sentences. The trial court ordered that counts 19 and 20 from case one be served concurrently with count 18. Finally, the trial court ordered that the sentence in case two run consecutively to the sentences in case one. Thus, the trial court sentenced Kilmire to an aggregate prison sentence of 8.5 years.[1]

{¶4} In April 2014, Kilmire filed a motion for delayed appeal in both cases, which this Court granted. Subsequently, he also filed a motion to consolidate the appeals, which this Court also granted. Kilmire has raised two assignments of error for our review, which we will address out of sequence to facilitate our review.

II.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DID NOT FOLLOW THE STATUTORY SENTENCING GUIDELINES UNDER R.C. 2929.11 FOR NON-VIOLENT FIFTH DEGREE FELONIES.

[1] The trial court issued a nunc pro tunc entry in case one in November 2013 to correct a clerical error in the trial court's October 11, 2013 entry with respect to how Kilmire was to serve the six-month sentences.

{¶5} Kilmire argues in his second assignment of error that the trial court failed to give adequate consideration to R.C. 2929.11 and 2929.12. Essentially, Kilmire asserts that the trial court's determination to sentence Kilmire to prison does not comport with the principles and purposes of sentencing. Additionally, Kilmire argues that, because he received an aggregate 8.5 year prison sentence, which exceeds the maximum 12-month prison sentence authorized for a single fifth-degree felony, the trial court committed reversible error.

{¶6} "This Court applies a two-step approach in reviewing criminal sentences: 'The first step is to determine whether the sentence is contrary to law. The second step is to determine whether the court exercised proper discretion in imposing the term of imprisonment.'" *State v. Culver*, 9th Dist. Summit No. 26945, 2014-Ohio-681, ¶ 42, quoting *State v. Smith*, 9th Dist. Medina No. 11CA0115-M, 2012-Ohio-2558, ¶ 3, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4, 26.

{¶7} The Supreme Court of Ohio has held that "[t]rial courts have full discretion to impose a prison sentence within the [applicable] statutory range [.]" *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus. "'This Court continues to recognize that a trial court, after proper adherence to applicable rules and statutes, retains discretion in the imposition of sentences.'" *State v. Maynard*, 9th Dist. Medina No. 13CA0045-M, 2014-Ohio-3978, ¶ 5, quoting *State v. Jordan*, 9th Dist. Summit No. 26598, 2013-Ohio-4172, ¶ 30, citing *State v. Weems*, 9th Dist. Summit No. 26532, 2013-Ohio-2673, ¶ 18-19. In exercising that discretion, "'[a] court must carefully consider the statutes that apply to every felony case[,] * * * includ[ing] R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism

of the offender.'" *State v. Davison*, 9th Dist. Lorain No. 10CA009803, 2011-Ohio-1528, ¶ 12, quoting *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶8} The trial court imposed a 6-month sentence for each of the 21 counts to which Kilmire pleaded guilty. Each count was a felony of the fifth degree. R.C. 2929.14(A)(5) provides that if an offender is sentenced to prison for a fifth-degree felony, "the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months." Thus, each of Kilmire's sentences falls within the statutory range.

{¶9} Prior to imposing sentence, the trial court spent a fair amount of time discussing the case and Kilmire's background. The trial court was aware that these two cases alone involved Kilmire breaking into well over a dozen different businesses between October 2012 and May 2013. Additionally, the trial court pointed out that many of Kilmire's charges arose during a time when he was out on bond awaiting trial under the charges initially filed in case one. The trial court acknowledged Kilmire's difficult childhood and the fact that he was a "daily crack and marijuana user[.]" However, the trial court also found that Kilmire had done little to help himself. The trial court discussed Kilmire's lengthy criminal history, pointing out that he had 12 juvenile referrals, 20 prior convictions, numerous other arrests, and had served 2 prior prison terms. The trial court noted the presence of at least two factors supported the imposition of a prison term: (1) Kilmire's prior prison terms; and (2) the offenses committed while he was out on bond. *See* R.C. 2929.13(B)(1)(b)(x), (xi). Moreover, Kilmire's counsel even stated that Kilmire "knows he needs to be in prison."

{¶10} The trial court also discussed the issues of seriousness of the crimes and recidivism. *See* R.C. 2929.12. The trial court observed that while none of the listed factors that would make the offenses more serious were relevant, the court found the offenses to be more

serious because of the "repetitive nature of this low-level offending[,]" even after he had been sent to prison. The trial court additionally found that Kilmire was likely to recidivate notwithstanding his statements that he wanted to change. In doing so, it pointed to his extensive criminal history, his "matter-of-fact approach to what he's done[,]" and the fact that prior sanctions have not altered his behavior. *See* R.C. 2929.12(D). Ultimately, the trial court concluded that "prison is consistent with the purposes and principles of the felony sentencing guidelines, that this man is not amenable to community control sanctions that are available, at least not now, that's for sure."

{¶11} Given the foregoing, we cannot say that the trial court abused its discretion in sentencing Kilmire to prison. The record supports the trial court's findings and it is apparent that the trial court considered R.C. 2929.11 and 2929.12 in fashioning a sentence. The PSI which was included in the record and considered by the trial court also supports the trial court's conclusion as it indicates that Kilmire was likely to recidivate and recommended that he be sentenced to prison.

{¶12} With respect to Kilmire's contention that the trial court committed reversible error in sentencing him to an 8.5 year aggregate term for the 21 counts when the maximum prison term authorized for a single fifth-degree felony is only 12 months, we find no merit in this contention. *See State v. Graham,* 2d Dist. Montgomery No. 25934, 2014-Ohio-4250, ¶ 32 ("[C]onsecutive sentences for multiple convictions certainly may exceed the maximum sentence for the most serious offense.") (Internal quotations and citation omitted.). Kilmire has cited no law that would support his proposition. *See* App.R. 16(A)(7). The heart of Kilmire's argument rests in the fact that he was sentenced to several consecutive prison terms for many of the offenses; however, we will address his argument concerning consecutive sentences below.

{¶13} Kilmire's second assignment of error is overruled.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN IMPOSING CONSECUTIVE SENTENCES.

{¶14} Kilmire argues in his first assignment of error that the trial court erred in imposing consecutive sentences.

{¶15} 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.

"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).

{¶16} "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[.]" *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." *Id.* "[T]he court should also incorporate its statutory findings into the sentencing entry." *Id.* "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." *Id.* at ¶ 30.

{¶17} In the instant matter, the trial court made the required R.C. 2929.14(C)(4) findings at the sentencing hearing. The trial court stated that consecutive sentences were "necessary to protect the community and * * * punish this man for his nonsensical behavior, his matter-of-factness about it[.]" Additionally, the trial court stated that "[c]onsecutive sentencing is not disproportionate to the harm that each one of these individuals undoubtedly suffered." Finally, the trial court found that, "given the harm caused and a single term is not adequately reflecting the seriousness of the offense, given your history, these consecutive terms are necessary to protect the public."

{¶18} While the trial court may not have used the precise language of the statute at all times, it is clear from the record that the trial court undertook the appropriate analysis and made the requisite findings. *See Bonnell* at ¶ 29. With respect to case one, the trial court did incorporate these findings into its journal entry. However, the trial court did not incorporate those same findings into its journal entry resolving case two. *See State v. Hill*, 7th Dist. Carroll

No. 13 CA 892, 2014-Ohio-1965, ¶ 20 ("Pre-*Foster*, appellate courts consistently stated that consecutive sentencing findings are required when the sentences are imposed in separate cases. * * * The wording of R.C. 2929.14(C) and R.C. 2929.41 indicates that that rule of law is still applicable."); *see also* R.C. 2929.41(A) ("Except as provided in division (B) of this section, division (C) of section 2929.14, or division (D) or (E) of section 2971.03 of the Revised Code, 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.").

{¶19} The trial court's inadvertent failure to include the R.C. 2929.14(C)(4) findings in the sentencing entry does not render the sentence contrary to law, in light of the fact that it made the findings at the sentencing hearing. *See Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, at ¶ 30. "[S]uch a clerical mistake may be corrected by the court through a nunc pro tunc entry to reflect what actually occurred in open court." *Id*. at ¶ 30. Accordingly, we remand this case to the trial court to issue a nunc pro tunc entry in case two to incorporate the findings previously stated at the hearing into the entry. *See State v. Hillman*, 10th Dist. Franklin Nos. 14AP-252, 14AP-253, 2014-Ohio-5760, ¶ 71.

{¶20} Kilmire also appears to assert that the trial court's finding that consecutive sentencing is not disproportionate to the seriousness of the crimes and the danger he poses to the public is not supported by the record. After reviewing the record, we cannot say the trial court abused its discretion in making this finding.

{¶21} The trial court discussed Kilmire's lengthy criminal history pointing out that, "when [Kilmire's] not in prison[,] [he's] been actively committing crimes, victimizing people in the community." The trial court noted that Kilmire's prior prisons terms, which included a four-

year term, did not seem to alter his behavior. While Kilmire expressed a desire to receive help for his drug problems, the trial court found that Kilmire had done little to help himself. The trial court stated that Kilmire did not seem to appreciate how his behavior would impact each of the numerous businesses he victimized, particularly, "the small business owners who are struggling to try to make it, and then have to come in to work and deal with the kind of issue where they have to now reconstruct, fix broken windows, and locks * * * and be shaken emotionally by the fact that their security's been breached." Given the record before us, including the PSI, we cannot say the trial court abused its discretion in making the findings it did. Kilmire's first assignment of error is overruled.

III.

{¶22} Kilmire's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed, but we remand the matter for the trial court to issue a nunc pro tunc entry in case two to incorporate the R.C. 2929.14(C)(4) findings into the sentencing entry in that case.

Judgment affirmed,
and cause remanded.

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 to Appellant.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR.

APPEARANCES:

JASON D. WALLACE, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.