[Cite as *State v. Devoe*, 2019-Ohio-3960.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

KORRON J. DEVOE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0126

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 17 CR 166

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Rhonda G. Santha, 6401 State Route 534, West Farmington, Ohio 44491, for Defendant-Appellant.

Dated: September 18, 2019

WAITE, P.J.

{¶1} Appellant Korron J. Devoe appeals the September 5, 2018 Mahoning County Common Pleas Court judgment entry sentencing him to a prison term of 36 months for his convictions on three counts of non-support of dependents. Based on the following, Appellant's sentence is not clearly and convincingly contrary to law. Appellant's assignment of error is without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On February 16, 2017, Appellant was indicted on three counts of non-support of dependents, in violation of R.C. 2919.21(B) and R.C. 2919.21(G)(1), felonies of the fifth degree. An arraignment was set for February 28, 2017. When Appellant failed to appear, the matter was continued for one week in order to obtain proper service and secure Appellant's appearance. According to the record, Appellant did not appear until March 13, 2018, at which time he pleaded not guilty to the charges. Appellant was released on his own recognizance. The matter was called for a pretrial on March 27, 2018. The state's prosecuting attorney was present as well as court appointed defense counsel, but Appellant again failed to appear. The trial court issued a bench warrant for Appellant's arrest. Appellant was apprehended and pretrial was reset for April 5, 2018.

{¶3} On April 5, 2018, the day of the pretrial, Appellant entered into a Crim.R. 11 guilty plea. Appellant pleaded guilty to all three counts in the indictment. The written plea agreement informed Appellant that he could be sentenced to six to twelve months of incarceration for each offense and could pay a fine of up to $2,500 for each offense. The written plea agreement signed by Appellant also indicated that a prison term was

discretionary, and that the maximum term of postrelease control was three years and was optional. Pursuant to plea negotiations, the state agreed that it would recommend community control. This was contingent on Appellant making two monthly payments of $61 on each of the three child support cases prior to sentencing; otherwise, the state would stand silent.

{¶4} A plea hearing was held on the same day. Following the trial court's colloquy, Appellant pleaded guilty to all three counts of non-support of a dependent in violation of R.C. 2919.21(B) and R.C. 2919.21(G)(1). Defense counsel requested that Appellant's personal recognizance bond be reinstated, asserting that Appellant's address in the indictment was incorrect. Counsel claimed that Appellant had actually arrived for his pretrial, but on the wrong day, three days after the pretrial was scheduled. When defense counsel informed Appellant of the outstanding warrant, he turned himself in to the authorities. While the trial court acknowledged that Appellant needed to work to earn income in order to satisfy the support payments required under the plea agreement, the court also noted that Appellant had a history of failing to appear not only in the instant matter, but in two prior cases. (4/5/18 Tr., pp. 13-14.) The state did not object to a recognizance bond being reinstated. Ultimately, the trial court reinstated Appellant's recognizance bond under the following conditions: that Appellant (1) not violate any laws; (2) appear timely and appropriately dressed for all future court dates; (3) avoid guns; (4) avoid drugs; (5) cooperate in obtaining a presentence investigation; and (6) not leave the State of Ohio without permission of the court. The trial court memorialized the plea in an April 5, 2018, judgment entry. The matter was set for sentencing on June 5, 2018. On defense counsel's motion, sentencing was continued until July 10, 2018. Appellant failed

to appear on July 10th and the trial court issued a bench warrant for his arrest. Appellant was apprehended on August 10, 2018.

{¶5} The sentencing hearing was held on August 28, 2018. At sentencing, the state reviewed the terms of the plea agreement, notably, that the state would recommend community control sanction on the condition that Appellant make two sixty-one-dollar child support payments on each of the three cases prior to sentencing. The state itemized payments Appellant had made by the date of sentencing: a single payment in the amount of $2.02 in the first dependency case; two payments made in the second case (one in April of 2017 with no amount stated on the record and a second payment of $14.90 on May 29, 2018) and, a payment in May of 2017 in the third dependency case with no amount stated, followed by a second payment in that case of $14.89 on May 29, 2018. (8/28/18 Tr., p. 3.) Because Appellant had not made sufficient payments he failed to meet the terms of the plea agreement. Hence, the state stood silent at sentencing rather than recommend community control.

{¶6} Defense counsel requested that Appellant be given community control sanctions, alleging that one of the obligors informed counsel that although Appellant had not made the payments as required, he had assisted with childcare. Appellant had secured some temporary employment and the payments made in these cases were as a result of a child support wage withholding. Subsequently, Appellant had secured what he believed would be permanent employment in Toledo taking over a food truck operation, however, counsel admitted Appellant was unsuccessful in that endeavor and was currently looking for work.

{¶7} The trial court stated that Appellant's repeated failure to appear in court was "the biggest problem." (8/28/18 Tr., p. 5.) The court also stated, "[h]e makes babies but doesn't support them. And so now I've got to put him in the penitentiary and we have to pay for him and for the babies." (8/28/18 Tr., p. 6.) On being offered his right to allocution, Appellant offered no explanation for his behaviors:

> Your Honor, I accept full responsibility for not showing up for court. It was not my intention so I turned myself in. I do the best I can for my kid. Unfortunately financially I haven't been able to. And that's it.

(8/28/18 Tr., p. 6.)

{¶8} After specifically mentioning its consideration of the purposes and principles of sentencing and the seriousness and recidivism factors, the court imposed a prison term of one year on each of the three counts to be served consecutively to one another. Regarding consecutive sentences, the court decided:

> Consecutive findings are necessary according to the local court of appeals. They are necessary to protect the public and punish the offender. They are not disproportionate to the harm caused to three separate children who have been denied support and are forced to face this world without such support.
>
> The defendant has failed to appear before the court. The harm is so great or unusual that a single term does not adequately reflect the seriousness of

> the conduct. If I were to grant concurrent sentences it would be as if one of the children counts but the other two do not.
>
> Further, the offender's criminal history shows that consecutive terms are necessary to protect the public.

(8/28/18 Tr., pp. 7-8.)

{¶9} The trial court also informed Appellant regarding possible postrelease control and that if he violated the terms of postrelease control he could be returned to prison for a maximum of nine months for each violation, for a total term not to exceed one-half of his minimum stated prison term. *State v. Grimes,* 151 Ohio St.3d 19, 2017-Ohio-2927, 85 N.E.3d 700, ¶ 9. In addition, the trial court signed and ordered filed three agreed judgment entries, executed by Appellant and the state, regarding payment of the outstanding arrearages in each of the three child support cases.

{¶10} On September 5, 2018, the trial court issued a written judgment entry sentencing Appellant to one year on each count to be served consecutively:

> The Court has considered the record, the statements and recommendations of counsel and of Defendant, the pre-sentence investigation and report prepared by the Community Corrections Association in this matter, as well as the purposes and principles of sentencing under O.R.C. 2929.11. The Court has balanced the seriousness and recidivism factors under O.R.C. 2929.12 and has followed the guidance by degree of felony in O.R.C. 2929.13.

* * *

> Pursuant to O.R.C. 2929.14(C)(4), the Court finds that consecutive service is necessary to protect the public from future crime and 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. The Court further finds pursuant to O.R.C. 2929.14(C)(4)(b) that 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; and finds pursuant to O.R.C. 2929.14(C)(4)(c) that the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

(9/5/18 Sentencing J.E.)

{¶11} Appellant presents a single assignment of error after timely filing this appeal.

ASSIGNMENT OF ERROR

APPELLANT'S SENTENCE WAS CONTRARY TO LAW.

{¶12} Appellant raises four separate issues within his sole assignment: (1) whether the trial court violated R.C. 2929.21(G)(1)(a) when sentencing Appellant to

community control; (2) whether the trial court failed to follow the purposes and principles of felony sentencing pursuant to R.C. 2929.11; (3) whether the trial court failed to consider the seriousness of the conduct and the recidivism factors under R.C. 2929.12; and (4) whether the trial court failed to make the findings required by R.C. 2929.14(C)(4) for imposing consecutive sentences.

{¶13} Pursuant to the Ohio Supreme Court's holding in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id.*

{¶14} 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." *Id.* at ¶ 22, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶15} Appellant contends that there is a preference in the law for a sentence of community control for his offenses. He claims that, while there are three exceptions, they do not apply to his case. Thus, according to Appellant, the trial court was required to sentence him to community control.

{¶16} Pursuant to R.C. 2919.21(G)(1)(a),

> Except as otherwise provided in division (G)(1)(b) of this section, the court in imposing sentence on the offender shall first consider placing the offender

> on one or more community control sanctions under section 2929.16, 2929.17, or 2929.18 of the Revised Code, with an emphasis under the sanctions on intervention for nonsupport, obtaining and maintaining employment, or another related condition.

{¶17} However, R.C. 2919.21(G)(1)(b) reads:

> The preference for placement on community control sanctions described in division (G)(1)(a) of this section does not apply to any offender to whom one or more of the following applies:
>
> (i) The court determines that the imposition of a prison term on the offender is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code.

{¶18} In the instant matter, the trial court found that sentencing Appellant to a prison term was consistent with the principles and purposes of sentencing set forth in R.C. 2929.11. The court specifically made this finding both at the sentencing hearing and in the written sentencing entry. See *State v. Johnson,* 12th Dist. Butler No. CA2012-10-210, 2013-Ohio-2275, ¶ 10. In *Johnson,* the Twelfth District held that the trial court acted properly when it considered community control sanctions, but then imposed a prison term where the defendant had failed to appear in court more than once. In the case before us, not only did Appellant have a history of failing to appear, but he also failed to abide by the terms of his plea agreement by making regular and complete payments in his three

support cases. Contrary to his assertions, there was no requirement that Appellant be sentenced to community control in this matter.

{¶19} Appellant next contends that the trial court failed to consider R.C. 2929.11 and R.C. 2929.12.

{¶20} "The Code does not specify that the sentencing judge must use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors." *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000). We have consistently held that the trial court is not required to specify its findings regarding the seriousness and recidivism factors at the sentencing hearing or within the written judgment entry. *State v. Michaels,* 7th Dist. Mahoning No. 17 MA 0122, 2019-Ohio-497, ¶ 6.

{¶21} At the sentencing hearing, the trial court stated:

> The court considers the purposes and principles of sentencing and the seriousness and recidivism factors and the guidance by degree of felony, and the fact that this guy doesn't pay for these children, and the fact that this guy doesn't show up for court[.]

(8/28/18 Tr., pp. 6-7.)

{¶22} The trial court similarly reiterated those considerations within the written sentencing entry. The record shows that at both the sentencing hearing and in the written judgment entry the trial court considered the factors set forth in R.C. 2929.11 and R.C. 2929.12.

{¶23} Appellant also argues that the trial court erred in ordering consecutive sentences. Appellant can challenge the imposition of consecutive sentences in two ways. The first is by contending the sentence is contrary to law, because the trial court failed to make the findings required pursuant to R.C. 2929.14(C)(4). See R.C. 2953.08(G)(2)(b). The second is to assert that the record does not support the findings made under R.C. 2929.14(C)(4). See R.C. 2953.08(G)(2)(a); *State v. Collins,* 7th Dist. Noble No. 15 NO 0429, 2017-Ohio-1264, ¶ 6.

{¶24} Appellant's challenge to the trial court's imposition of consecutive sentences alleges that the record does not support the trial court's findings.

{¶25} R.C. 2929.14(C)(4) sets forth the findings a trial court must make in order to impose consecutive sentences:

> 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.

{¶26} When a trial court imposes consecutive sentences it must make the R.C. 2929.14(C)(4) findings at the sentencing hearing and must also incorporate those findings into the judgment entry of sentence. *State v. Bonnell*, 2014-Ohio-3177, ¶ 29.

{¶27} In the instant matter, the trial court stated at the sentencing hearing:

Consecutive findings are necessary according to the local court of appeals. They are necessary to protect the public and punish the offender. They are not disproportionate to the harm caused to three separate children who have been denied support and are forced to face this world without such support.

The defendant has failed to appear before the court. The harm is so great or unusual that a single term does not adequately reflect the seriousness of the conduct. If I were to grant concurrent sentences it would be as if one of the children counts but the other two do not.

> Further, the offender's criminal history shows that consecutive terms are necessary to protect the public.

(8/28/18 Tr., pp. 7-8.)

{¶28} The Ohio Supreme Court has indicated that "a word-for-word recitation of the language of the statute is not required, and as 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." *Bonnell,* at ¶ 29. Thus, the use of "magic" or "talismanic" words is not required in order to impose consecutive sentences. *State v. Bellard*, 7th Dist. Mahoning No. 12 MA 97, 2013-Ohio-2956, ¶ 17. In reviewing the statements made by the trial court at the sentencing hearing, it is apparent the trial court engaged in the correct analysis and complied with the mandates of R.C. 2929.14(C)(4) and *Bonnell.*

{¶29} The trial court is also required to state the consecutive sentence findings in the judgment entry of sentence. The sentencing entry reads:

> Pursuant to O.R.C. 2929.14(C)(4), the Court finds that consecutive service is necessary to protect the public from future crime and 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. The Court further finds pursuant to O.R.C. 2929.14(C)(4)(b) that 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; and finds pursuant to O.R.C. 2929.14(C)(4)(c) that the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

(9/5/18 Sentencing J.E.)

{¶30} The record reveals that the trial court appropriately considered the statute prior to imposing consecutive sentences. The court determined that both Appellant's criminal history as well as Appellant's course of conduct warranted consecutive sentences. Those findings are supported by the record. It is clear that the trial court included the same findings from the sentencing hearing in the written judgment entry. Appellant's assignment of error is without merit and is overruled.

Conclusion

{¶31} Appellant's sentence is supported by the record and is not contrary to law. Accordingly, Appellant's assignment of error is without merit and the judgment of the trial court is affirmed.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.