[Cite as *State v. Gibson*, 2020-Ohio-3638.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

CHARLES PATRICK GIBSON JR.,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 BE 0021

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 19 CR 89

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Dan Fry, Belmont County Prosecutor*, Atty. J. Flanagan*, Chief Assistant Prosecutor, Courthouse Annex 1, 147 A. West Main Street, St. Clairsville, Ohio 43950, for Plaintiff-Appellee and

Atty. Kathrine E. Rudzik, 26 Market Street #904, Youngstown, Ohio 44503, for Appellant-Defendant.

Dated: June 29, 2020

Robb, J.

{¶1} Defendant-Appellant Charles Patrick Gibson appeals the judgment of the Belmont County Common Pleas Court which sentenced him to maximum, consecutive sentences upon his guilty plea to two counts of robbery. Appellant contends the record does not support the consecutive sentence findings made by the trial court. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On April 29, 2019, Appellant waived indictment and entered a guilty plea to a bill of information charging him with two counts of second degree felony robbery. *See* R.C. 2911.02(A)(2) (inflicting, attempting to inflict, or threatening to inflict physical harm on another while attempting, committing, or fleeing after a theft offense). He admitted that he robbed two banks in Belmont County: one on November 24, 2018 and one on December 14, 2018.

{¶3} As part of the plea agreement, the state agreed to stand silent at sentencing and promised that no charge related to the stolen vehicle Appellant used during one of the robberies would be filed in Belmont County or Guernsey County (where the car was abandoned after the December 14, 2018 bank robbery). In the written plea agreement, Appellant acknowledged that he had criminal charges pending in Pennsylvania and Maryland which would not be affected by the plea in this case. The court accepted the plea and ordered a presentence investigation, victim impact statements, and an evaluation for placement at Eastern Ohio Correction Center (EOCC).

{¶4} At sentencing, defense counsel read a letter containing Appellant's acceptance of responsibility and expression of remorse. (Sent.Tr. 5-6). Counsel noted how EOCC found Appellant appropriate for placement. The court found Appellant's conduct was serious, pointing out that he threatened the bank employees by saying he had a gun. (Sent.Tr. 8-9). The court referred to the letters from three employees who were working during the first bank robbery and noted their continued suffering from the trauma experienced. (Sent.Tr. 7, 9). When Appellant voiced special concern for the first

teller whose fear he noticed, the court replied by pointing out that he robbed another local bank three weeks later. (Sent.Tr. 7). The court observed that Appellant put the public at risk of harm while fleeing after the robberies and mentioned the economic harm to the bank. (Sent.Tr. 9).

{¶5} In finding a likelihood of recidivism, the trial court counted 19 prior felony convictions on Appellant's criminal record, which included at least 11 burglary convictions, a robbery, and some escapes; the convictions were from Pennsylvania, New Jersey, and California. It was noted that Appellant spent much of his adult life under incarceration. (Sent.Tr. 8). The court observed: his record showed he has not responded favorably to prior sanctions; he may have committed these crimes in order to return to prison; and he self-reported a long-term pattern of abusing drugs such as heroin and methamphetamine. (Sent.Tr. 9). The court did not believe Appellant's remorse was genuine, made reference to Appellant's many aliases, and pointed out that Appellant was wanted in Maryland for robbing two banks and in West Virginia for attempting to rob a bank. (Sent.Tr. 10).

{¶6} After making the statutory consecutive sentence findings, the court sentenced Appellant to eight years on each count to run consecutively. Appellant filed a timely appeal from the May 14, 2019 sentencing order.

ASSIGNMENT OF ERROR

{¶7} Appellant's sole assignment of error provides:

"The maximum consecutive sentences imposed in the current case were not supported by the record."

{¶8} Pursuant to R.C. 2953.08(G)(2), the appellate court may reverse a sentence if it clearly and convincingly finds: (a) the record does not support the trial court's findings (as required by certain sentencing statutes) or (b) the sentence is otherwise contrary to law. "The appellate court's standard for review is not whether the sentencing court abused its discretion." R.C. 2953.08(G)(2). One of the sentencing statutes specifically listed is R.C. 2929.14(C)(4). This statute allows a court to order consecutive prison terms when imposing sentences on multiple offenses 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.

R.C. 2929.14(C)(4).

{¶9} As Appellant recognizes, the trial court made the statutory consecutive sentence findings contained in R.C. 2929.14(C)(4), choosing both options (b) and (c). (Sent.Tr. at 11); (5/14/19 J.E. at 4). As required, the court made these findings at the sentencing hearing and in the judgment entry. See *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37 (the court must make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and then incorporate its findings into its sentencing entry). Appellant also acknowledges the court was not required to provide reasons to support the consecutive sentence findings. *Id.* at ¶ 27 (unlike prior versions of the like statute). Appellant says the sentences should have been imposed concurrently and asks this court to review whether the record supports the consecutive sentence findings.

{¶10} An appellate court must modify or vacate a sentence if it finds by clear and convincing evidence that the record does not support the findings in R.C. 2929.14(C)(4). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 22; R.C. 2953.08(G)(2). Clear and convincing evidence is the measure of proof which "will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Marcum*, 146 Ohio St.3d 516 at ¶ 22, citing *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. The standard requires more than a preponderance of the evidence but less than beyond a reasonable doubt. *Id.*

{¶11} Contrary to Appellant's suggestion, it is not the trial judge who is bound by the clear and convincing standard. In other words, the trial court does not need to have clear and convincing evidence to support the statutory findings before imposing consecutive sentences. *Compare* R.C.2929.14(C)(4) *with* R.C.2953.08(G)(2). *Accord State v. Withrow*, 2016-Ohio-2884, 64 N.E.3d 553, ¶ 38 (2d Dist.) ("the question is not whether the trial court had clear and convincing evidence to support its findings, but rather, whether we clearly and convincingly find that the record fails to support the trial court's findings"); *State v. Powell*, 8th Dist. Cuyahoga No. 99386, 2014-Ohio-2048, ¶ 112 ("the clear and convincing evidence standard is a restriction placed on the appellate court, not the sentencing court").

{¶12} Again, to reverse the consecutive nature of a sentence, *the appellate court* must find by clear and convincing evidence that the record *does not support* the trial court's consecutive sentencing findings. *Marcum*, 146 Ohio St.3d 516 at ¶ 22; R.C. 2953.08(G)(2). Therefore, in the context of consecutive sentencing, the clear and convincing standard applies only to the appellate court's review of the trial court's sentence.

{¶13} As set forth in our Statement of the Case above, the trial court (although not required to do so) explained many of its reasons for believing Appellant's conduct was serious and he was likely to recidivate. This also provided background on why the public needed to be protected from him; why Appellant needed punished by consecutive service; why such service was proportionate to the seriousness of the conduct and the danger posed to the public; why the harm was great or unusual; and why his criminal record

showed how consecutive sentences were needed in order to protect the public from future crime by him. The trial court did not believe Appellant's remorse was genuine. The court reasonably emphasized the danger to the public during the bank robbery and while immediately fleeing from the robbery. Three police departments responded to the first robbery, and the plea agreement mentioned the crashed stolen vehicle after the second robbery.

{¶14} Appellant says the harm caused by his course of conduct in robbing the Belmont County banks was not great and unusual in order to satisfy the option in R.C. 2929.14(C)(4)(b). Although he handed the employee at each bank a note saying he had a gun, he points out that he did not actually brandish a weapon during the bank robberies. He says the harm to the bank was merely economic in that it lost the money he stole (and the bank being temporarily closed as a result of the robbery). As for the bank employees, Appellant emphasizes the lack of physical harm and contends the emotional harm should not be considered "great or unusual" for purposes of consecutive sentencing. Although he did not brandish a gun, he disclosed that he had a gun. This would reasonably engender fear of being shot by the robber during the transaction (or fear of being caught in a shootout during the bank robbery or as the robber fled). The trauma and panic that was experienced by some employees and their continued fear while at work was expressed in victim impact statements. In addition to the trauma of the experience, they continued to have stress at work, such as when the door is first unlocked in the morning or when a customer approaches the teller window uninvited, quicker than usual, holding a note, or wearing a hood. Appellant's statement, which was read at sentencing, described the fear he saw in an employee's eyes as he demanded money from her. He noted that he stole her sense of security, instilled fear into her life, and damaged her emotionally. In sum, the trial court reasonably gave weight to the psychological harm suffered by the bank employees who experienced the robbery, and the record does not clearly and convincingly show the harm was less than great or unusual.

{¶15} Regardless, the court alternatively made the consecutive sentence finding in R.C. 2929.14(C)(4)(c): Appellant's history of criminal conduct demonstrated that consecutive sentences are necessary to protect the public from future crime by him. On

this topic, Appellant notes that he stole to support his drug habit and believes the court placed too much emphasis on his criminal history. To the contrary, his record of felony criminal convictions spanned many years and multiple states. The contents of his record, including at least 11 felony burglaries and some felony escape convictions, was meaningful and revelatory. His prior lengthy prison sentences did not reform him. He says the court should not have speculated that he may have been wanted in other states due to his use of aliases. Nevertheless, Appellant *was* wanted in Maryland for robbing two banks and in West Virginia for attempting to rob a bank. (Sent.Tr. 10). And, his plea agreement acknowledged he had charges pending in Pennsylvania as well.

{¶16} Upon reviewing the entire record, including the transcript, the presentence investigation report, and the victim impact statements, we cannot clearly and convincingly find that the record fails to support the imposition of consecutive sentences. Rather, the record supports the finding that: (1) consecutive service is necessary to protect the public from future crime or to punish the offender; (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and (3) the harm caused by his course of conduct was so great or unusual that no single prison term would adequately reflect the seriousness of the offender's conduct *or* Appellant's criminal history demonstrated that consecutive sentences are necessary to protect the public from future crime by him. Accordingly, Appellant's assignment of error is overruled.

{¶17} For the foregoing reasons, the trial court's judgment is affirmed.

Donofrio, 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 Belmont 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.