[Cite as *State v. Pedicini*, 2020-Ohio-3627.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JAMES E. PEDICINI, II,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0040

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 17 CR 1217A

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed in part. Sentence Vacated in part. Remanded in part.

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. Brian A. Smith, Brian A. Smith Law Firm, LLC, 755 White Pond Drive, Suite 403, Akron, Ohio 44320, for Defendant-Appellant.

Dated: June 30, 2020

WAITE, P.J.

{¶1} Appellant James E. Pedicini II appeals a March 5, 2019 decision of the Mahoning County Court of Common Pleas convicting him on five counts of receiving stolen property. Appellant argues that the trial court failed to consider mitigating evidence before imposing his sentence. Appellant also contends that the trial court erred in making his sentence consecutive, because the court failed to make the requisite R.C. 2929.14(C)(4) consecutive sentencing findings both at the sentencing hearing and within the sentencing entry. For the reasons provided, Appellant's individual sentences are affirmed. However, the trial court's imposition of consecutive sentences is reversed and vacated. The matter is remanded for the limited purpose of addressing consecutive sentences.

Factual and Procedural History

{¶2} Appellant owned a mechanic business located in Poland. The business was based on a partnership agreement between Appellant and his codefendants, James Pedicini III ("James III"), Andrew Devellin, and William Noble. James III is Appellant's son.

{¶3} On December 31, 2016, Northstar Power Sports, which is located in Hermitage, Pennsylvania, was burglarized. (2/26/19 Sentencing Hrg. Tr., p. 6.) The thieves used a box truck to steal three all-terrain vehicles ("ATV") from the store. Apparently the truck carried some identifying information connecting it to a business known as Rice Pool and Spa. On January 3, the truck was found near a house belonging

to Appellant's ex-wife. While Appellant did not live there, he frequently visited the house. James III and Devellin resided at the house.

{¶4} On January 11, 2017, the Mahoning County Dog Pound project was burglarized. Among the stolen items were cordless tools, hand tools, and other construction equipment worth approximately $10,000. On the same date, a burglary was committed at JS Northeast Liberty. (2/26/19 Sentencing Hrg. Tr., p. 7.) The stolen items from that burglary included commercial equipment, a trailer, a Lincoln welder, tools, and other machinery worth approximately $20,000.

{¶5} On January 21, 2017, a burglary was committed at Direct Auto Sales in Boardman. The thieves stole a 2003 Dodge 1500 pick-up truck, three sets of wheels and tires, and a car stereo.

{¶6} On February 6, 2017, Belmont Motors in Youngstown was burglarized. Among the stolen items were several air compressors and tire balancing machines worth $9,000.

{¶7} On February 18, 2017, the Auto Pros shop was vandalized, spray-painted and ransacked. Security cameras were damaged during this burglary. Two vehicles, air compressors, tools, and heavy machines worth approximately $66,000 were stolen. (2/26/19 Sentencing Hrg. Tr., p. 8.)

{¶8} On February 23, 2017, Dale Starvey, owner of JS Northeast Liberty, was contacted by a friend who saw a trailer with a welder that he knew belonged to Starvey. Apparently, the trailer was specially designed for Starvey and was easily recognizable. After receiving the call, Starvey contacted Sergeant Ray Buhala who located the trailer outside of the house belonging to Appellant's ex-wife. The ex-wife consented to a search

of the house, and police found several items that were reported stolen from JS Northeast Liberty and the Mahoning County Dog Pound project. (2/26/19 Sentencing Hrg. Tr., p. 9.) James III and Devellin were at the house at the time of the search and were brought to the police department for questioning. Both codefendants eventually confessed to the burglaries.

{¶9} Police also searched the building where Appellant and his codefendants operated their mechanic business. During the search, police learned that the defendants owned a second building. James III and Devellin were described as "visibly upset and visibly sick" after hearing that investigators knew of the second property. (2/26/19 Sentencing Hrg. Tr., p. 10.) Police searched the second property and located more of the stolen items.

{¶10} Appellant initially appeared to cooperate with police. He told them a man named Brian Doctson was responsible for the burglaries. (2/26/19 Sentencing Hrg. Tr., p. 11.) Appellant led police officers to one of the stolen ATVs, which was located in a wooded area on one of the properties owned or operated by Appellant. However, the fourth business partner, Noble, cooperated with police and allowed them to record a conversation he had with Appellant. During the recorded conversation, Appellant told Noble: "Oh, that's the thing right now is that, um, I mean, I can easily put it [the ATV] somewhere and fucking I'll be -- look like Doctson said that he needed somewhere to put something somewhere and he asked about my woods. I'm just trying to think what I'm doing as I'm manipulating, thinking about how to manipulate around this thing and let them know about other shit he's got." (2/26/19 Sentencing Hrg. Tr., p. 14).

{¶11} During the investigation, police officers learned that James III and Devellin were responsible for committing the burglaries. They brought the stolen items to the business the four operated. Appellant knew the items were stolen, and was allowed to choose which items he wanted and take them from the stash. It is unclear what role Noble played in the scheme.

{¶12} On November 9, 2017, Appellant was indicted on the following charges: five counts of receiving stolen property, felonies of the fourth degree in violation of R.C. 2913.51(A)(C); one count of receiving stolen property, a felony of the fifth degree in violation of R.C. 2913.51(A)(C); one count of possessing criminal tools, a felony of the fifth degree in violation of R.C. 2923.24(A)(C); and one count of engaging in a pattern of corrupt activity, a felony of the second degree in violation of R.C. 2923.32(A)(1), (B)(1). Appellant's codefendants were also charged with various offenses within the indictment.

{¶13} On June 15, 2018, the trial court held a hearing on defense counsel's motion to withdraw from representation of Appellant. Because Appellant failed to appear at the hearing, the court issued a bench warrant and Appellant was subsequently arrested.

{¶14} On January 11, 2019, Appellant pleaded guilty to five counts of receiving stolen property (fourth degree charges). The state dismissed the remaining charges. The state indicated within the plea agreement that it would seek a sentence of five years of incarceration. Appellant sought a lesser sentence.

{¶15} On March 5, 2019, the trial court imposed an aggregate sentence of four years and credited Appellant with nineteen days served. It is from this entry that Appellant timely appeals. For ease of understanding, Appellant's assignments of error will be addressed out of order.

ASSIGNMENT OF ERROR NO. 2

The record does not support the trial court's sentence of Appellant.

{¶16} Appellant argues that his sentence is contrary to law. Appellant argues that his presentence investigation report, "PSI," revealed only "minor criminal history." (Appellant's Brf., p. 10.) Appellant notes that the PSI recommended Appellant be sentenced to a community control sanction, not a prison term. Appellant urges that mitigating evidence was submitted on his behalf in the form of letters from friends and family revealing a strong support system. Evidence of his military service and injuries suffered during his service was also presented. Finally, Appellant compares his situation with that of James III. While James III refused to cooperate with the investigation, Appellant claims that he led police to one of the stolen ATVs and generally cooperated with the investigation.

{¶17} The state responds by arguing that a trial court has absolute discretion to impose a sentence so long as it falls within the sentencing guidelines. Even so, the state notes that Appellant actually attempted to conceal evidence in this matter and continues to deny his involvement in the commission of these offenses.

{¶18} An appellate court is permitted to review a felony sentence to determine if it is contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1. Pursuant to *Marcum*, "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*.

{¶19} When determining a sentence, a trial court must consider the purposes and principles of sentencing in accordance with R.C. 2929.11, the seriousness and recidivism factors within R.C. 2929.12, and the proper statutory ranges set forth within R.C. 2929.14.

{¶20} Appellant pleaded guilty to five counts of receiving stolen property. The sentencing range for those offenses is six to eighteen months of incarceration. Appellant received a twelve month prison term for each charge. Thus, Appellant's sentence falls within the statutory range.

{¶21} Additionally, the trial court stated that it considered section 2929.12 of the revised code at the sentencing hearing and within its sentencing entry.

{¶22} Although Appellant contends that he cooperated with the investigation, the record shows that he attempted to mislead the investigators, lying to police officers when he informed them that Doctson was responsible for burglaries. There is a recorded phone call from Appellant to Noble where Appellant discussed his plan to attempt to implicate Doctson. Not only did Appellant state that he planned to place the ATV in the woods and tell investigators that Doctson had asked him to put it there, he also stated he was attempting to "manipulate around this thing" and implicate Doctson. (2/26/19 Sentencing Hrg. Tr., p. 14.) Additionally, as raised by the state, Appellant continued to maintain his innocence at the sentencing hearing and claimed that he only accepted the plea agreement based on his belief that he would avoid a prison sentence.

{¶23} There is no evidence of record to support Appellant's claim that the court failed to consider his military service, the back injury he suffered during his service, or the letters provided by his friends and family. We note that the trial court's sentence was less

than that recommended by the state. Further, there is no requirement that a trial court make factual findings to demonstrate it considered the relevant sentencing statutes.

{¶24} As Appellant's sentence is within the statutory range and the record reveals that the trial court considered the relevant sentencing statutes, Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 1

> The trial court's sentence of Appellant was contrary to law because the trial court did not make the requisite findings to impose consecutive sentences under R.C. 2929.14(C)(4).

{¶25} Appellant argues that the trial court failed to make the requisite R.C. 2929.14(C)(4) findings when it imposed a consecutive sentence in this matter. Appellant asserts that the findings were deficient both at the sentencing hearing and within the sentencing entry. Appellant argues that at least two of the findings that the court made were incomplete, and so were stripped of their meaning.

{¶26} In response, the state contends that a trial court is not required to cite the exact language of the statute when making consecutive sentence findings. As long as the imposition of consecutive sentences is supported by facts within the record, the state urges that it is inconsequential that the court failed to completely articulate the findings.

{¶27} Pursuant to R.C. 2929.14(C)(4), before a trial court can impose consecutive sentences on a defendant, the court must find:

> [T]hat 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.

{¶28} A trial court judge must not only make the consecutive sentence findings at the sentencing hearing, it must incorporate those findings into the sentencing entry. *State v. Williams*, 2015-Ohio-4100, 43 N.E.3d 797, ¶ 34 (7th Dist.), citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. A court need not state reasons to support a finding nor is it required to use any “magic” or “talismanic” words, so long as it is apparent from the record that the court conducted the appropriate analysis. *Id*., citing

State v. Jones, 7th Dist. Mahoning No. 13 MA 101, 2014-Ohio-2248, ¶ 6; *State v. Verity*, 7th Dist. Mahoning No. 12 MA 139, 2013-Ohio-1158, ¶ 28-29.

{¶29} The state cites to the following statement from the court to show compliance with R.C. 2929.14(C)(4): "Well, considering the factors contained in Section 2929 of the Revised Code, I'm going to find that a non-prison sanction would demean the seriousness of these offenses. It would not adequately protect the public or punish the defendant." (2/26/19 Sentencing Hrg. Tr., pp. 36-37.)

{¶30} Later in the sentencing hearing, the judge stated: "I am going to additionally find, based upon the evidence presented during the sentencing hearing, that the harm was so great or unusual that a single term does not adequately reflect the seriousness of the conduct." (2/26/19 Sentencing Hrg. Tr., p. 37.) It appears from the court's language that it was attempting to make a finding pursuant to R.C. 2929.14(C)(4)(b), which states:

> 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.

{¶31} As pointed out by Appellant, while the court's statement tracks the language of the second part of the subsection, it omits any reference to the first part, which requires a finding of two or more offenses that were committed as part of a course of conduct. The trial court did not address a course of conduct at any other point during the sentencing hearing.

{¶32} Although a trial court is not required to use any "talismanic language," it must be clear from the record that the court conducted the relevant analysis. The Eighth District faced a similar issue in *State v. Squires,* 8th Dist. Cuyahoga No. 108071, 2019-Ohio-4676. In *Squires,* the trial court imposed consecutive sentences based on R.C. 2929.14(C)(4)(b). Similar to the instant case, the court stated "that 'the harm is so great or unusual that a single term does not adequately reflect the seriousness of the defendant's conduct,' " however, the court did not reference the course of conduct language. *Id.* at ¶ 33. The *Squires* court found this language was deficient and remanded the matter to allow the trial court to determine if consecutive sentences were appropriate and, if so, to make the requisite findings.

{¶33} Similarly, the trial court in this case omitted any reference to a course of conduct and did not provide any facts to indicate that a course of conduct was considered. As such, the trial court failed to make the requisite findings at the sentencing hearing.

{¶34} Turning to the sentencing entry, the trial court made only a partial finding that consecutive sentences were "not disproportionate." (3/5/19 Sentencing Entry.) The court did not refer to the remaining language of the statutes, which require a finding that the imposition of consecutive sentences is not disproportionate to the seriousness of the offender's conduct. The *Squires* court held that a sentencing entry merely stating that consecutive sentences are not "disproportionate," and which does not indicate to what this sentence is being compared, is deficient. *Id.* at ¶ 30. Hence, the sentencing entry in this matter is also deficient.

{¶35} As the trial court failed to properly make the requisite R.C. 2929.14(C)(4) findings at both the sentencing hearing and within its sentencing entry, Appellant's first assignment of error has merit and is sustained.

Conclusion

{¶36} Appellant argues that the trial court failed to consider mitigating evidence before imposing his sentence. Appellant also argues that the trial court failed to make the requisite R.C. 2929.14(C)(4) consecutive sentencing findings both at the sentencing hearing and within the sentencing entry. For the reasons provided, Appellant's individual sentences are affirmed. However, the trial court's imposition of consecutive sentences is reversed and vacated. The matter is remanded for the limited purpose of addressing consecutive sentences.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's second assignment of error is overruled and his first assignment is sustained. 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. However, because the record reveals the trial court failed to consider the R.C. 2929.14(C) factors when it sentenced Appellant to consecutive prison terms, his sentence is vacated in part and this matter is hereby remanded to the trial court for the limited purpose of imposing consecutive sentences according to law and consistent with this Court's Opinion. 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.