[Cite as *State v. Yukon*, 2020-Ohio-4738.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

NICHOLAS YUKON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0005

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2019 CR 624

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

JUDGMENT:
Remanded.

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 and

Atty. Jane Timonere, Timonere Law Offices, LLC. 4 Lawyers Row, Jefferson Ohio 44057, for Defendant-Appellant.

Dated: September 23, 2020

D'Apolito, J.

{¶1} Appellant, Nicholas Yukon, appeals from the December 11, 2019 judgment of the Mahoning County Court of Common Pleas sentencing him to a total of ten and one-half years in prison for pandering obscenity involving a minor, tampering with evidence, and labeling him a Tier II sex offender following a guilty plea. On appeal, Appellant takes issue with his consecutive sentence. Although it is clear that the trial court complied with the dictates of R.C. 2929.14(C)(4) at the sentencing hearing, the court failed to additionally incorporate the findings into its sentencing entry. Accordingly, this court remands the matter to the trial court for the limited purpose of entering a nunc pro tunc entry addressing the consecutive sentence findings made at the sentencing hearing.

FACTS AND PROCEDURAL HISTORY

{¶2} On August 22, 2019, Appellant was indicted by the Mahoning County Grand Jury on 50 counts of pandering obscenity involving a minor, felonies of the fourth degree, in violation of R.C. 2907.321(A)(5), and two counts of tampering with evidence, felonies of the third degree, in violation of R.C. 2921.12(A)(1).[1] Appellant retained counsel, pleaded not guilty at his arraignment, and waived his right to a speedy trial.

{¶3} Appellant subsequently withdrew his former not guilty plea and entered an oral and written plea of guilty to seven counts of pandering obscenity involving a minor, felonies of the fourth degree, in violation of R.C. 2907.321(A)(5), and one count of tampering with evidence, a felony of the third degree, in violation of R.C. 2921.12(A)(1). As part of the agreement, Appellee, the State of Ohio, moved to dismiss 43 counts of pandering obscenity involving a minor and one count of tampering with evidence. The trial court accepted Appellant's guilty plea after finding it was made in a knowing, intelligent, and voluntary manner pursuant to Crim.R. 11. The court ordered a PSI and deferred sentencing.

[1] The charges stem from Appellant's involvement in downloading over 1,000 child pornography files. Appellant shared pictures with a BCI agent at the beginning of the investigation. Officers later discovered Appellant destroying electronic devices by smashing them and submerging one in toilet water.

{¶4} At the December 3, 2019 sentencing hearing, after considering the record, statements, the PSI, the purposes and principles of sentencing under R.C. 2929.11, and the seriousness and recidivism factors under R.C. 2929.12, the trial court found that consecutive sentences pursuant to R.C. 2929.14 are necessary to protect the public from future crimes and to punish Appellant.

{¶5} In its December 11, 2019 sentencing entry, the trial court again referenced that it considered the R.C. 2929.11 and 2929.12 factors. However, there is no reference in the court's entry addressing the R.C. 2929.14 consecutive sentence findings. The court sentenced Appellant to 18 months in prison on each of the seven counts of pandering obscenity involving a minor and three years on the tampering with evidence count, some counts were ordered to be served concurrently and others consecutively, for a total of ten and one-half years in prison, with 139 days of jail-time credit. The court also notified Appellant that post-release control is mandatory for a period of five years and labeled him a Tier II sex offender.

{¶6} Appellant filed a timely appeal and raises one assignment of error.

ASSIGNMENT OF ERROR

THE RECORD DOES NOT CLEARLY AND CONVINCINGLY SUPPORT THE SENTENCING COURT'S FINDINGS UNDER (C)(4) OF SECTION 2929.14 OF THE REVISED CODE. AS A RESULT, THE COURT FAILED TO LAWFULLY IMPOSE CONSECUTIVE SENTENCES OF INCARCERATION.

{¶7} When reviewing a felony sentence, an appellate court must uphold the sentence unless the evidence clearly and convincingly does not support the trial court's findings under the applicable sentencing statutes or the sentence is otherwise contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1; R.C. 2953.08(G)(2)(a)-(b).

{¶8} Regarding consecutive sentences, R.C. 2929.14(C)(4) states:

> (4) 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.

R.C. 2929.14(C)(4)(a)-(c).

> It has been held that although the trial court is not required to recite the statute verbatim or utter "magic" or "talismanic" words, there must be an indication that the court found (1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger posed to the public, and (3) one of the findings described in R.C. 2929.14(C)(4)(a), (b), or (c). *State v. Bellard*, 7th Dist. Mahoning No. 12-MA-97, 2013-Ohio-2956, ¶ 17. The court need not give its reasons for making those findings however. *State v. Power*, 7th Dist. Columbiana No. 12 CO 14, 2013-Ohio-4254, ¶ 38. A trial court must make the consecutive sentence findings at the sentencing hearing and must

> additionally incorporate the findings into the sentencing entry. *State v. Williams*, 7th Dist. Mahoning No. 13-MA-125, 2015-Ohio-4100, ¶ 33-34, citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37.

State v. Thomas, 7th Dist. Mahoning No. 18 MA 0025, 2020-Ohio-633, ¶ 41.

{¶9} At the sentencing hearing, the State sufficiently set forth the basis for the charges against Appellant: the human trafficking task force investigated an IP address that led them to Appellant's residence; when officers went to Appellant's home, they found him destroying computer devices; and officers discovered over 1,000 pornographic images of children, mostly under the age of ten years old, on Appellant's devices which he downloaded and shared with a BCI agent. (12/3/2019 Sentencing Hearing T.p. 3-6).

{¶10} Also at the sentencing hearing, the trial judge indicated that she reviewed the PSI and considered the R.C. 2929.11 and 2929.12 factors. Further, the judge, regarding consecutive sentences pursuant to R.C. 2929.14, specifically stated:

> * * * The court further finds that consecutive sentences are necessary to protect the public from future crimes and punish the defendant, and that consecutive sentences are not disproportionate to the seriousness of the defendant's conduct and to the danger the offender poses to the public.
>
> The court also finds that at least two multiple offenses were committed as part of one or more courses of conduct and the harm caused is so great or unusual that no single prison term for any of the offenses committed as part of the course of conduct as to reflect the seriousness of the offender's conduct.

(12/3/2019 Sentencing Hearing T.p. 13-14).

{¶11} Thus, the record reflects that Appellant possessed and shared child pornography and destroyed evidence. The record further reflects that the trial court made the consecutive sentence findings required by R.C. 2929.14(C)(4) at the sentencing hearing. The court found 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[.]" R.C. 2929.14(C)(4). The court also found the offenses were committed during a course of conduct and that the harm was so great or unusual that a single term does not "adequately reflect the seriousness of the offender's conduct." R.C. 2929.14(C)(4)(b).

{¶12} It is clear that the trial court complied with the dictates of R.C. 2929.14(C)(4) at the sentencing hearing. However, Appellant correctly points out, and the record establishes, that the court failed to additionally incorporate the findings into its December 11, 2019 sentencing entry. *See* (2/19/2020 Appellant's Brief, p. 4); *Williams*, *supra*, at ¶ 33-34; *Bonnell*, *supra,* at ¶ 37; *Thomas, supra,* at ¶ 41. The State also agrees that the entry does not include the statutory findings.

{¶13} In its entry, the trial court merely stated:

> The Court has considered the record and the oral statements and a Pre-Sentence Investigation and Mental Health Assessment, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12.
>
> * * *
>
> The Court believes the Defendant is not amenable to community control and that prison is consistent with the purposes of R.C. 2929.11.
>
> * * *
>
> Defendant has been given notice under R.C. 2929.19(B)(3) and of appellate rights under R.C. 2953.08.

(12/11/2019 Sentencing Entry, p. 1-3).

{¶14} The sentencing entry does not include R.C. 2929.14(C)(4) statutory findings. Thus, the trial court erred because it failed to incorporate its consecutive sentence findings made at the sentencing hearing into the sentencing entry. *See State*

v. Black, 7th Dist. Mahoning No. 16 MA 0085, 2018-Ohio-1342, ¶ 34; *State v. Lung*, 12th Dist. Clermont No. CA2014-12-081, 2015-Ohio-3833, ¶ 19–20 (remanding matter to the trial court for the limited purpose of issuing a nunc pro tunc sentencing entry to reflect the trial court's statutory findings under R.C. 2929.14(C)(4)).

> [However, a] trial court's failure to incorporate the statutory findings into the sentencing entry after properly making those findings at the sentencing hearing does not render the sentence contrary to law; such a clerical mistake may be corrected by the court through a *nunc pro tunc* entry to reflect what actually occurred in open court at the sentencing hearing.

Black, supra, at ¶ 32.

{¶15} Accordingly, the record before us reveals that the findings of the trial court, pronounced orally during the sentencing hearing, demonstrate the court engaged in the required statutory analysis prior to imposing consecutive sentences. The court's failure to incorporate those findings into the written sentencing entry amounts to a clerical error necessitating a nunc pro tunc entry to correctly align the language of the entry with the findings made at the sentencing hearing and in accordance with *Bonnell* and its progeny. *See Black, supra,* at ¶ 33.

CONCLUSION

{¶16} For the foregoing reasons, this court remands the matter to the Mahoning County Court of Common Pleas for the limited purpose of entering a nunc pro tunc entry addressing the consecutive sentence findings made at the sentencing hearing.

Waite, P.J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, we hereby remand this matter to the County Court of Common Pleas of Mahoning County, Ohio for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

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.