

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

BENJAMIN M. WISE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 BE 0015

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 19 CR 265

BEFORE:

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

JUDGMENT:

Affirmed and Remanded.

Atty. J. Kevin Flanagan, Courthouse Annex I, 147 A-West Main Street, St. Clairsville, Ohio 43950 for Plaintiff-Appellee and

Atty. Rhys B. Cartwright-Jones, 47 N. Phelps Street, Youngstown, Ohio 44503, *Atty. Brent Clyburn*, White & Clyburn, 604 Sixth Street, Moundsville, West Virginia 26041 for - Defendant-Appellant.

Dated: June 23, 2021

Robb, J.

{¶1} Defendant-Appellant Benjamin Wise appeals his sentence entered in Belmont County Common Pleas Court for two counts of gross sexual imposition. The issue in this case is whether the imposition of consecutive sentences was clearly and convincingly contrary to law. For the reasons expressed below, the imposition of consecutive sentences is affirmed, however, the matter is remanded to the trial court with instruction for it to enter a nunc pro tunc entry to conform the judgment entry to the findings made at the sentencing hearing.

Statement of the Facts and Case

{¶2} A two-count indictment was issued by the Belmont County Grand Jury against Appellant. 10/3/19 Indictment. Appellant was charged with rape in violation of R.C. 2907.02(A)(1)(b)(B), a first-degree felony and gross sexual imposition in violation of R.C. 2907.05(A)(1)(C)(1), a fourth-degree felony. The victim of count one was A.E. (dob 4/28/08) and the victim on the second count was A.E. (dob 7/13/03). The incidents allegedly occurred between August 18, 2017 and August 18, 2019.

{¶3} In May 2020, a plea agreement was reached between Appellant and the state. The state amended the indictment to two counts of gross sexual imposition, third-degree felonies (victim A.E. (dob 4/28/08)) and Appellant entered an Alford plea to the amended indictment. The Alford plea was accepted. 5/18/20 J.E.; 5/14/20 Plea Tr. 10.

{¶4} Sentencing occurred on June 1, 2020; Appellant argued for concurrent sentences. The trial court imposed a five-year sentence on each count and ordered those sentences to be served consecutively. 6/3/20 J.E. Appellant was advised that he would be subject to five years of post release control. 6/3/20 J.E. The trial court also found Appellant to be a Tier II sex offender. 6/3/20 J.E.

{¶5} Appellant timely appealed the sentence. 6/30/20 Notice of Appeal.

Assignment of Error

“The trial court committed reversible error by failing to make specific findings, required by section 2929.14(C)(4) of the Ohio Revised Code, to impose consecutive sentences upon the defendant-appellant, Benjamin Wise, in this matter.”

{¶16} Appellant asserts the trial court’s imposition of consecutive terms clearly and convincingly does not support the consecutive sentence findings under R.C. 2929.14(C)(4). Appellant’s argument focuses on the statements made in the sentencing transcript versus statements made in the judgment entry. The statements at sentencing referenced criminal history as the third element warranting imposition of consecutive sentences. Appellant contends his criminal history was minor. The judgment entry, however, utilizes the harm to the victim was so great as the third factor warranting consecutive terms. Appellant contends the discrepancy between the judgment entry and the statements at the sentencing hearing indicates the trial court failed to make the proper findings for imposition of consecutive sentences. Thus, Appellant contends he is entitled to concurrent terms.

{¶17} The state counters arguing the trial court made all the findings in both the judgment entry and at sentencing. It further contends the statements at sentencing were adequate; Appellant had a record. It asserts the imposition of consecutive sentences should be upheld.

{¶18} This court reviews felony sentences using the standard of review set forth in R.C. 2953.08. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 22. Pursuant to R.C. 2953.08(G)(2), we may either increase, reduce, modify, or vacate a sentence and remand for resentencing where we clearly and convincingly find that either the record does not support the sentencing court's findings under R.C. 2929.13(B) or (D), 2929.14(B)(2)(e) or (C)(4), or 2929.20(I), or the sentence is otherwise contrary to law. “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.” *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶9} R.C. 2929.14 governs consecutive sentences and states the following:

(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).

{¶10} “In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings.” *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. “[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.” *Id.* at ¶ 29.

{¶11} In imposing consecutive sentences, the trial court made the following statement at the sentencing hearing:

The court has spent a great deal of time analyzing the statute and the language regarding this. I find that consecutive service is necessary to protect the public from future crime and to punish the offender, and that consecutive sessions – sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public.

This Court concludes that the offender’s history of criminal conduct demonstrates that consecutive sessions – sentences are necessary to protect the public from future crime by this particular offender.

6/1/20 Sentencing Tr. 6.

{¶12} In the judgment entry, the trial court stated:

In accord with R.C. 2929.14(C)(4), the Court finds that consecutive sentence is necessary to protect the public from future crime and to punish the offender, and consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and the danger this offender poses to the public. The Court specifically finds that imposition of consecutive sentences is reasonable and appropriate. The Court further finds that consecutive sentences are necessary to protect the public from future crimes. The Court further finds that the harm to the victim was so great that a single term does not adequately reflect the seriousness of Defendant’s conduct and that consecutive sentences are necessary to protect the public from future crimes by this offender and by others.

6/3/20 J.E.

{¶13} Clearly, the trial court made the required findings. At the sentencing hearing and in the judgment entry it found consecutive sentences were necessary and were not disproportionate to the seriousness of the offender’s conduct and the danger to the public. Those are the first two consecutive sentence factors. As to the third factor, at the sentencing hearing, the trial court utilized the criminal record factor. However, in the

sentencing judgment entry, the trial court utilized the multiple offenses were part of a course of conduct and the harm was so great or unusual that no single prison term reflects the seriousness of the offender's conduct factor.

{¶14} Both of the trial court's third factor findings are supported by the record. The statement in the PSI and the victim's age indicated that there is a course of conduct and the harm is so serious to warrant consecutive sentences and supports the trial court's third factors finding in the judgment entry. Likewise, despite Appellant's insistence to the contrary, the trial court's reliance on Appellant's criminal history factor at the sentencing hearing is also supported by the record. The PSI indicates he does have a criminal record consisting of three offenses while a juvenile - unruliness, domestic violence if committed by an adult, and a violation of a court order. As an adult, he had two offenses, one for an expired license and then the current offenses. It has been held that although a juvenile adjudication is not a conviction of a crime, that history can be used as prior criminal history for the purpose of imposing consecutive sentences. *State v. Brown*, 8th Dist. No. 109007, 2020-Ohio-4474, 158 N.E.3d 972, ¶ 56 (Offender was 18 at the time of the incident at issue and had a significant juvenile history of criminal conduct.). Consequently, there is a criminal history and the trial court's reliance upon it is not misplaced.

{¶15} Although the above reveals that both of the trial court's third factor findings are supported by the record, admittedly the third factor finding made at the sentencing hearing does not coincide with the third factor finding made in the judgment entry. Appellant contends this discrepancy evinces that the trial court failed to make the proper findings for imposition of consecutive sentences.

{¶16} In *Bonnell*, the Ohio Supreme Court explained that a reviewing court must be able to discern from the record that the trial court engage in the correct analysis. *Bonnell*, 140 Ohio St.3d 209 at ¶ 29. Since the records supports both findings, we are able to discern that the trial court engaged in the appropriate analysis. However, the stating of different factors at the sentencing hearing and in the judgment entry requires correction. When imposing consecutive sentences, the trial court must state the findings at the sentencing hearing and incorporate those findings into the sentencing entry. *Id.* Failure to incorporate them into the judgment entry is a clerical error that must be corrected through a nunc pro tunc entry. *Id.* at ¶ 30. Accordingly, this matter requires

remand for a nunc pro tunc entry to correct the judgment entry to conform to the findings stated at the sentencing hearing.

{¶17} In conclusion, the sole assignment of error lacks merit. We affirm the imposition of consecutive sentences. However, we remand the matter to the trial court to issue a nunc pro tunc entry to reflect the third factor finding that was made in open court.

Donofrio, P J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the sole assignment of error lacks merit and it is the final judgment and order of this Court that the imposition of consecutive sentences by the Court of Common Pleas of Belmont County, Ohio, is affirmed. We hereby remand this matter to the trial court to issue a nunc pro tunc entry to reflect the third factor finding that was made in open court 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.