

**IN THE COURT OF APPEALS OF OHIO**

SEVENTH APPELLATE DISTRICT  
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ZACHARY MICHAEL FOSTER,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**  
**Case No. 20 BE 0016**

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Criminal Appeal from the  
Court of Common Pleas of Belmont County, Ohio  
Case No. 19 CR 104

**BEFORE:**

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

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**JUDGMENT:**

Affirmed

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*Atty. J. Flanagan*, Courthouse Annex 1, 147-A West Main Street, St. Clairsville, Ohio 43950, for Plaintiff-Appellee and

*Atty. John Jurco*, P.O. Box 783, St. Clairsville, Ohio 43950, for Defendant-Appellant.

Dated

June 14, 2021

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**Donofrio, J.**

{¶1} Defendant-appellant, Zachary Foster, appeals from a Belmont County Common Pleas Court judgment convicting him of illegal conveyance with a forfeiture specification and assault of a corrections officer, following his guilty plea, and the resulting sentence.

{¶2} According to a Belmont County Sheriff's Office Incident Report, on February 24, 2019, appellant was brought to the county jail and drugs were found on his person. Appellant tried to dispose of the drugs, punched a corrections officer in the face, and became combative.

{¶3} On July 5, 2019, a Belmont County Grand Jury indicted appellant on one count of aggravated trafficking in drugs, a second-degree felony in violation of R.C. 2925.03(A)(2)(C)(1)(d), with an accompanying forfeiture specification; one count of aggravated possession of drugs, a second-degree felony in violation of R.C. 2925.11(A)(C)(1)(c); one count of illegal conveyance of drugs of abuse onto grounds of a specified government facility, a third-degree felony in violation of R.C. 2921.36(A)(2)(G)(2); one count of tampering with evidence, a third-degree felony in violation of R.C. 2921.12(A)(1)(B); and one count of assault on a corrections officer, a fifth-degree felony in violation of R.C. 2901.13(A)(C)(4)(c). Appellant initially entered a not guilty plea.

{¶4} On May 14, 2020, appellant changed his plea to guilty to illegal conveyance with a forfeiture specification and assault on a corrections officer pursuant to a plea agreement with plaintiff-appellee, the State of Ohio. In exchange, the state dismissed the remaining three counts. The court accepted appellant's plea, ordered a pre-sentence investigation, and set the matter for a sentencing hearing.

{¶5} The court subsequently sentenced appellant to a maximum sentence of 36 months on the illegal conveyance conviction and ordered a forfeiture of \$1,273 and a maximum sentence of 12 months on the assault of a corrections officer conviction. The

court ordered appellant to serve his sentences consecutively for a total of 48 months in prison.

{¶16} Appellant filed a timely notice of appeal on June 30, 2020. He now raises two assignments of error. Both assignments of error assert his sentence is contrary to law.

{¶17} 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. This court recently discussed the Ohio Supreme Court's most recent comments on felony sentencing review and *Marcum*:

The Ohio Supreme Court recently addressed review of felony sentences in *State v. Jones*, -- Ohio St.3d --, 2020-Ohio-6729, -- N.E.3d --. The *Jones* Court clarified the standard of review for felony sentences that was previously announced in *Marcum*. *Marcum* held "that R.C. 2953.08(G)(2)(a) compels appellate courts to modify or vacate sentences if they find by clear and convincing evidence that the record does not support any relevant findings under 'division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code.'" *Marcum*, supra, ¶ 22. The *Jones* Court did not overrule *Marcum* but clarified dicta to reflect that "[n]othing in R.C. 2953.08(G)(2) permits an appellate court to independently weigh the evidence in the record and substitute its judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and 2929.12." *Jones*, supra, at ¶ 42.

*State v. McGarry*, 7th Dist. Belmont No. 19 BE 0049, 2021-Ohio-1281, ¶ 18.

{¶18} Appellants' first assignment of error states:

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO THE CONSECUTIVE SENTENCES.

{¶9} Appellant argues the trial court erred in sentencing him to consecutive sentences. He does not argue that the trial court failed to make the necessary consecutive-sentencing findings but instead contends that consecutive sentences were not warranted in his case.

{¶10} R.C. 2929.14(C)(4) requires a trial court to make specific findings when imposing consecutive sentences:

(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.

{¶11} 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.

{¶12} In this case, the trial court made each of the required findings to sentence appellant to consecutive sentences. The court found that consecutive sentences were necessary to protect the public from future crime and to punish appellant. (Sentencing Tr. 5). It further found that consecutive sentences were not disproportionate to the seriousness of appellant's conduct and to the danger appellant posed to the public. (Sentencing Tr. 5). Finally, the court found that appellant's history of criminal conduct demonstrated that consecutive sentences were necessary to protect the public from future crime by appellant. (Sentencing Tr. 5). The court repeated these findings in its sentencing judgment entry.

{¶13} Appellant goes through a lengthy discussion of cases in an attempt to convince this court that consecutive sentences were not warranted in this case.

{¶14} First, he cites to *State v. Johnson*, 8th Dist. Cuyahoga No. 102449, 2016-Ohio-1536, ¶ 17, where the appellate court found that the trial court made the first required finding and that it "might even be able to stretch the trial court's statements that these crimes were heinous and happened on several occasions to equate to a finding under the third part of the three-tier test under R.C. 2929.14(C)(4)(b)." But the court found it was difficult to discern from the trial court's statements that it made the required finding under the second part of the three-tier test. *Id.* The court then went on to find in the alternative that "even if" it could agree with the state that it could stretch the trial court's statements to say that they satisfied all of the required findings under R.C. 2929.14(C)(4), it could not find that the record supported the second- or third-tier findings. *Id.* at ¶ 18. Because the

trial court did not make the required R.C. 2929.14(C)(4) findings, the appellate court could not affirm the consecutive sentences.

{¶15} This case is distinguishable from *Johnson* because here the court made the requisite findings. Appellant also cites to *State v. Boyd*, 8th Dist. Cuyahoga No. 98342, 2013-Ohio-30, and *State v. Butch*, 6th Dist. Lucas No. L-03-1328, 2005-Ohio-4878. But in both of those cases the appellate courts found that the trial court failed to make the required statutory findings. *Boyd* at ¶ 25; *Butch* at ¶ 10.

{¶16} Appellant additionally cites *State v. Childers*, 4th Dist. Lawrence No. 15CA6, 2015-Ohio-4881, where the appellate court reversed the consecutive sentences finding that the record did not support the findings made by the trial court under R.C. 2929.14(C)(4). In so doing, the Fourth District relied on the facts that “[n]o witnesses testified; no victim impact statements were ever filed; no bill of particulars was filed; no presentence investigation or report was ordered; and no sentencing memoranda were prepared.” *Id.* at ¶ 19. It further found there was no indication that the trial court was aware of the defendant's past criminal record, his social history, or the impact of his actions on the victims. Finally, it stated no statement of facts underlying the indictment was ever offered by the State or defense counsel at the plea or sentencing hearing. *Id.*

{¶17} The facts in this case are distinguishable from the facts in *Childers*. In this case, on appellant's request, the state filed a bill of particulars. Additionally, the court ordered and reviewed a presentence investigation report (PSI). The PSI included appellant's long criminal history as well as a detailed narrative from the incident report of the circumstances surrounding appellant's offenses as well as a written narrative from appellant describing what happened. Thus, unlike in *Childers*, the trial court in this case had numerous facts in the record on which to make the statutory consecutive sentencing findings.

{¶18} In sum, none of the cases appellant offers address the facts of this case. Here, the trial court made each of the statutorily-required consecutive sentencing findings both at the sentencing hearing and again in the sentencing judgment entry. Moreover, the trial court had sufficient facts from which to make these findings including the bill of particulars and the PSI, which included appellant's lengthy criminal history, a detailed incident report, and appellant's own narrative of the incident. Thus, there is no indication

that the evidence does not clearly and convincingly support the trial court's findings or that appellant's sentence is otherwise contrary to law.

{¶19} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶20} Appellant's second assignment of error states:

THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT  
TO THE MAXIMUM SENTENCE ON EACH CRIME.

{¶21} Here appellant contends the trial court erred in considering his criminal history, including charges that were ultimately dismissed, in imposing maximum sentences. He further argues that the aggravating sentencing factors did not support a maximum sentence and some mitigating factors were present.

{¶22} Although the General Assembly has reenacted the judicial fact-finding requirement for consecutive sentences, it has not revived the requirement for maximum sentences. *State v. Riley*, 7th Dist. Mahoning No. 13 MA 180, 2015-Ohio-94, ¶ 34. Therefore, the trial court was not required to make any special findings before sentencing appellant to a maximum sentence.

{¶23} At the sentencing hearing, the trial court stated that it considered R.C. 2929.11, R.C. 2929.12, the overriding purposes and principals of sentencing, and appellant's extensive criminal record including convictions and dismissals. (Sentencing Tr. 4).

{¶24} Pursuant to R.C. 2929.12(B), sentencing courts should consider the following factors to determine if the offender's conduct is more serious than conduct normally constituting the offense: physical or mental injury suffered by the victim; the victim suffered severe physical, psychological, or economic harm; the offender held public office; the offender's occupation, elected office, or profession obliged offender to prevent the offense; the offender's reputation, occupation, elected office, or profession were used to facilitate the offense; the offender's relationship with the victim facilitated the offense; the offender committed the offense for hire or as part of organized crime; the offender was motivated by a discriminatory factor; or the offense was of a domestic nature. Appellant is correct that none of these factors appear to apply here.

**{¶25}** Pursuant to R.C. 2929.12(C), sentencing courts should consider the following factors to determine if the offender's conduct is less serious: the victim induced or facilitated the offense; in committing the offense, the offender acted under strong provocation; in committing the offense, the offender did not cause or expect to cause physical harm to any person or property; there are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense. None of these factors appear to apply here.

**{¶26}** But pursuant to R.C. 2929.14(D)(2), the sentencing court shall consider an offender's criminal history to determine whether the offender is likely to recidivate. The trial court stated that it considered appellant's criminal history, which is detailed in the PSI. Even without considering the dismissed charges against appellant, he has a lengthy misdemeanor and felony record. Based on appellant's criminal history, he is likely to recidivate.

**{¶27}** In sum, appellant has failed to demonstrate that his maximum sentences are not clearly and convincingly supported by the record or that they are contrary to law.

**{¶28}** Accordingly, appellant's second assignment of error is without merit and is overruled.

**{¶29}** For the reasons stated above, the trial court's judgment is hereby affirmed.

Robb, J., concurs.

D'Apolito, J., concurs.



For the reasons stated in the Opinion rendered herein, the assignments of error are 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 to be 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.**