[Cite as *State v. Murphy*, 2021-Ohio-4663.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

BRYANT MURPHY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0122

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 16CR345

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera*, Assistant Chief Prosecuting Attorney, Criminal Division, and *Atty. Edward Czopur*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Robert T. McDowall Jr., Robert T. McDowall Co., LLC, 415 Wyndclift Place, Youngstown, Ohio 44515, for Defendant-Appellant.

Dated: December 22, 2021

WAITE, J.

{¶1} Appellant, Bryant Murphy, appeals his sentence entered in the Mahoning County Court of Common Pleas on one count of harassment with a bodily substance pursuant to R.C. 2921.38(B) and (D), a felony of the fifth degree. Division (B) involves a law enforcement officer as victim. Based on the following, the judgment and sentence of the trial court is affirmed.

Factual and Procedural History

{¶2} While an inmate at the Ohio State Penitentiary, Appellant was indicted on a January 9, 2016 incident that was reported by a correctional officer. He was charged with harassment with a bodily substance under R.C. 2921.38 divisions (B) and (D), which involve both the fact of his confinement and that a law enforcement officer was his victim, and is a felony of the fifth degree. The correctional officer, Monica Ward ("Ward"), alleged that Appellant squirted a substance containing urine and feces, or other bodily fluids, through the cuff-port of his cell, into her face and over her body, with an intent to harass, annoy, threaten, or alarm her. A superseding indictment added a repeat violent offender specification and a charge of felonious assault in violation of R.C. 2903.11(A)(1), knowingly causing serious physical harm, a felony of the second degree. The bill of particulars states that the incident caused Ward to fall and injure her eye as well as suffer emotional distress requiring psychological treatment.

{¶3} A jury trial began on July 30, 2018. Ward testified on the third day of trial that Appellant used a bottle to spray her in the face with a substance she believed to contain a mixture of feces and urine, which caused her to fall to the floor. The substance entered her mouth and eyes, and covered her hair and uniform. On cross-examination, defense counsel noted that test results revealed the substance was urine, but did not contain feces.

{¶4} That same day, after Ward's cross-examination but before redirect, lunch recess was called. During recess, the assistant prosecutor spoke with Ward regarding her testimony. Based on this discussion, the trial court granted defense counsel's motion for a mistrial in an August 8, 2018 judgment entry.

{¶5} On December 10, 2018, Appellant filed a motion to dismiss on double jeopardy grounds, alleging that although the prosecutor claimed to be unaware that the communication with Ward was improper, it was an intentional act and the mistrial was entirely attributable to that act. The trial court denied the motion to dismiss and Appellant filed an appeal with this Court. On December 30, 2019, we affirmed the judgment of the trial court. *State v. Murphy,* 7th Dist. Mahoning No. 19 MA 0018, 2019-Ohio-5462. ("*Murphy I*").

{¶6} On September 14, 2020, Appellant and the state entered into a Crim.R. 11 plea agreement whereby Appellant agreed to plead guilty to one count of harassment with a bodily substance in violation of R.C. 2921.38(B) and (D), a felony of the fifth degree. A sentencing hearing was held on October 28, 2020. The trial court imposed a 12-month maximum prison term to be served consecutively to the term Appellant was currently serving.

{¶7} Appellant filed this timely appeal.

ASSIGNMENT OF ERROR

DEFENDANT-APPELLANT'S SENTENCE WAS UNDULY HARSH.

{¶8} Appellant asserts that a prison term was not mandatory in this case and that he did not commit the worst form of the offense to warrant consecutive sentences. He contends the injury inflicted on the victim did not cause death or permanent injury and he did not continue the assault after the victim was rendered helpless. He also contends the factors set forth in R.C. 2929.12 were improperly considered by the trial court and the trial court ignored that other administrative remedies had already been imposed, namely solitary confinement.

{¶9} In response, the state cites to *State v. Jones,* 163 Ohio St.3d 242, 2020-Ohio-6729, 169 N.E.3d 649. The *Jones* Court held that the felony sentencing statutory framework in Ohio does not permit a court of appeals to modify or vacate a sentence based on its view that the sentence is not supported by the record under R.C. 2929.11 and R.C. 2929.12.

{¶10} Until *Jones*, appellate courts have followed the Supreme Court of Ohio's language in *State v. Marcum,* 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231:

> [I]t is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court. That is, an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by

> clear and convincing evidence that the record does not support the sentence.

Id. at ¶ 23.

{¶11} In *State v. Jones, supra,* the Ohio Supreme Court concluded that this language was dicta. *Jones,* ¶ 27. Specifically, the court held that R.C. 2953.08(G)(2)(b) "does not provide a basis for an appellate court to modify or vacate a sentence based on its view that the sentence is not supported by the record under R.C. 2929.11 and 2929.12." *Id*. at ¶ 39. The *Jones* court held, "[A]n appellate court's determination that the record does not support a sentence does not equate to a determination that the sentence is 'otherwise contrary to law' as that term is used in R.C.2953.08(G)(2)(b)." *Id.* at ¶ 32. The court ultimately held that an appellate court errs if it relies on the dicta in *Marcum* to modify or vacate a sentence based on a lack of support in the record for the trial court's findings under R.C. 2929.11 and R.C. 2929.12. *Jones* at ¶ 29.

{¶12} Although the trial court imposed the maximum sentence, this sentence does fall within the statutory guidelines. Pursuant to *Jones,* in reviewing an alleged error under R.C.2929.11 and R.C. 2929.12, we may no longer evaluate whether sentences are supported by the record. Instead, we are directed to evaluate whether the sentence is contrary to law. In *Jones* the court defined "contrary to law" as "in violation of statute or legal regulations at a given time." *Jones,* at ¶ 34. The *Jones* court unequivocally stated that "contrary to law" is not equivalent to finding that the sentence is not supported by the record. *Id.*

{¶13} R.C. 2929.14(C)(4) governs consecutive sentencing and provides that the trial court must find that consecutive sentences are necessary to protect the public from

future crime or to punish the offender, 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 that at least one of the following also applies: (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 a course 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 crimes by the offender. R.C. 2929.14(C)(4)(a)-(c).

{¶14} A trial court must make the consecutive findings at the sentencing hearing and must also incorporate those findings into the sentencing entry. *State v. Williams,* 2015-Ohio-4100, 43 N.E.3d 797, 806, ¶ 33-34 (7th Dist.), citing *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. The court is not required to state reasons in support of its findings nor is it required to use any specific language, so long as it is apparent that the court conducted the proper analysis. *Williams* at ¶ 34.

{¶15} At the sentencing hearing the trial court made the following statements:

> I am bound to follow the law, and the law is right here. It's Ohio Revised Code Section 2929.11, .12, and .13. They're called the purposes and principles of sentencing. They are to protect the public from future crime by

the defendant, to punish the offender using the minimum sanctions that can accomplish that without imposing an unnecessary burden on the state or government resources. I have to consider the need for incarcerating, deterring, and rehabilitating the defendant, not to base my sentence on impermissible purposes, consistent with other similar offenses committed by like offenders, considering the seriousness and recidivism factors laid out in the statute, 2929.12, consider the degree of the felony, and it is a low-level felony under 2929.13. Not to base my sentence on the defendant's race, ethnicity, gender or religion.

When I weigh the factors that are enumerated, I find the defendant not amenable to community control, and not imposing a prison term would demean the seriousness of the conduct and the impact that his actions have.

To me this case is quite simply about the harm that the victim has gone through. And I know that at different points it was argued that the victim was overly sensitive to the effects of what happened, that you did not intend to cause the harm that you did. And that was in some degree accounted for by your lawyer's argument and by the state's dismissal of the felonious assault. It did not I believe fall into what the statute would require for a conviction. So that was considered already.

I don't believe that you meant to cause the harm on Ms. Ward that you did, but you did. In the civil realm, we call it the glass-jawed victim, that if

someone punches someone in the face not knowing they have a glass jaw, they'll cause a lot more damage than they would if that victim was like other victims. You take a victim as you find them. I can't discount, and I can't overlook what you did to Ms. Ward. I believe she has undergone severe emotional harm. In her mind, that was feces. Whether the tests prove it or not, in her mind that's how it's always going to be, and that's how it affected her. And she'll have that to deal with the rest of her life.

I think you're a different person than even you were when we started this case, to be honest with you. I think that you have potential to do things to help people not be in your situation going forward. I understand what effect solitary confinement has. I've read about it. I think that it can make people more callus and hardened. I can't solve all those problems, though, Mr. Murphy. That's not within my scope of what I could do. All I could do is deal with the case in front of me and the facts and the harm that have been caused.

And when I weigh those factors, I do find that for this sentence, you shall serve 12 months in the Ohio Department of Rehabilitation and Corrections. That is the maximum sentence. I believe this was the worse form of the offense that could be inflicted on someone. I understand the offense itself is the lowest level felony. It wasn't a Felony 2 or 1 that you were originally charged with. The sentence shall run consecutive to the sentence imposed in the case to which the defendant is serving at this time in that it is

> necessary to protect the public from future crime and punish the offender, and that consecutive sentences are not disproportionate to the seriousness of the defendant's conduct and to the danger he poses to the public, but more importantly, to the harm that was caused. This is in accordance with 2929.14(D).

(10/28/20 Sentencing Hrg. Tr., pp.19-23.)

{¶16} In reviewing the findings made by the trial court, its statements do not completely mirror the language of R.C. 2929.14(C)(4). Again, this is not required. The trial court did clearly find that the harm caused by Appellant was so great that consecutive sentences are necessary to protect the public from future crime under both R.C. 2929.14(C)(4)(b) and (c), although only one was required. Although the court did not explicitly recite these two factors verbatim, this Court has held that the consecutive sentencing factors overlap each other and tend to be redundant in nature, so that it is possible for the trial court to make the appropriate findings without using the exact language of the statute. *State v. White,* 7th Dist. Mahoning No. 16 MA 0143, 2017-Ohio-7797, ¶ 12-15.

{¶17} Here, the trial court found that consecutive sentences were necessary to protect the public from future crime and that the harm caused was so great that a single term would not adequately reflect the seriousness of Appellant's conduct and that consecutive sentences were not disproportionate to Appellant's conduct. Although the better practice may have been to track the statutory language, it is clear from the trial court's statements at sentencing that it made all of the required findings before imposing consecutive sentences. *Bonnell,* ¶ 29.

{¶18} The trial court was also required to incorporate its findings in the sentencing entry. *Id.* at ¶ 37. In the judgment entry, the trial court provided:

> The Court finds that in this matter consecutive sentences are necessary to protect the public from future crime and to punish the offender and; that consecutive sentences are not disproportionate to the seriousness of the Defendant's conduct and to the danger the Defendant poses to the public.
>
> The Court also finds that the minimum sentence would not accomplish the purpose of Felony sentencing without imposing an undue burden on State and Local resources. The maximum sentence is necessary due to the Defendant's previous history of offenses and this being the worst form of the crime.

(10/20/20 Sentencing J.E.)

{¶19} These statements comply with the mandates of R.C. 2929.14(C). Thus, appropriate findings for consecutive sentences were made at the sentencing hearing and in the judgment entry. The trial court has broad discretion to determine the most effective way to comply with the purposes and principles of sentencing within the statutory guidelines. R.C. 2929.12(A). Based on this record, the trial court did not make any reversible error. Accordingly, Appellant's assignment of error is without merit and is overruled.

{¶20} For the reasons stated above, Appellant's assignment of error is without merit and the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

Robb, 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 Mahoning 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.