[Cite as *State v. Armstrong*, 2003-Ohio-5932.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81928

STATE OF OHIO, :
:
Plaintiff-Appellee : JOURNAL ENTRY
: and
vs. : OPINION
:
HERBERT ARMSTRONG, JR., :
:
Defendant-Appellant :

DATE OF ANNOUNCEMENT
OF DECISION : NOVEMBER 6, 2003

CHARACTER OF PROCEEDING : Criminal appeal from
: Common Pleas Court
: Case No. CR-426475

JUDGMENT : AFFIRMED IN PART, REVERSED
: IN PART AND REMANDED FOR
: RESENTENCING.

DATE OF JOURNALIZATION :

APPEARANCES:

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MICHAEL J. CORRIGAN, P.J.

{¶1} On July 22, 2002, appellant, Herbert Armstrong ("appellant"), pled guilty to multiple drug possession charges and on September 17, 2002, appellant pled guilty to one count of theft. After appellant entered his plea of guilty to the theft offense, the trial court proceeded directly to sentencing on both the theft offense and the multiple drug possession offenses. The trial court sentenced appellant to Lorain Correctional Institution for 11 months and fined appellant $250 for each of the drug possession offenses and the theft offense. The trial court further found that the sentence for the theft offense will run consecutively to the concurrent sentence for the drug possession offenses. Appellant now appeals. For the foregoing reasons, we affirm in part and reverse in part.

I

{¶2} In his first assignment of error, appellant contends that the trial court erred when it imposed a consecutive sentence without making the necessary findings and reasons required by R.C. 2929.14(E)(4) and 2929.19(B)(2).[1]

{¶3} R.C. 2929.14 provides in pertinent part:

{¶4} "(E)(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

[1] Appellant's assignments of error address only the consecutive sentence imposed by the trial court, which is appellant's sentence for the theft offense.

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:

{¶5} "(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.

{¶6} "(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.

{¶7} "(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender." See, also, *State v. Bolling* (July 19, 2001), Cuyahoga App. No. 78632; *State v. Stewart*, 149 Ohio App.3d 1, 2002-Ohio-4124, at ¶29, 775 N.E.2d 563; *State v. Parker* (2001), 144 Ohio App.3d 334, 338, 760 N.E.2d 48.

{¶8} Further, R.C. 2929.19 provides in pertinent part:

{¶9} "(B)(1) At the sentencing hearing, the court, before imposing sentence, shall consider the record, any information presented at the hearing by any person pursuant to division (A) of this section, and, if one was prepared, the presentence investigation report made pursuant to section 2951.03 of the Revised Code or Criminal Rule 32.2, and any victim impact statement made pursuant to section 2947.051 [2947.05.1] of the Revised Code.

{¶10} "(2) The court shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances:

{¶11} "***

{¶12} "(c) If it imposes consecutive sentences under section 2929.14 of the Revised Code, its reasons for imposing the consecutive sentences ***."

{¶13} Pursuant to R.C. 2929.14(E)(4), the trial court is required to make at least three findings prior to sentencing an offender to consecutive sentences. Likewise, pursuant to R.C. 2929.19(B)(2)(c), the trial court must give its reasons behind its findings and "make a record at the sentencing hearing that confirms that the trial court's decision-making process included all of the statutorily required sentencing considerations." *State v. Cardona* (Dec. 16, 1999), Cuyahoga App. No. 75556; see, generally, *State v. Edmonson* (1999), 86 Ohio St.3d 324, 715 N.E.2d 131. The trial court need not use the exact words of the statute; however, it must be clear from the record that the trial court made the required findings. *State v. Garrett* (Sept. 2, 1999), Cuyahoga App. No. 74759.

{¶14} Here, the record is not clear that the trial court made the requisite findings. Although the trial court considered various factors pursuant to R.C. 2929.12, such as the likelihood of recidivism, appellant's lack of remorse, appellant's pattern of drug abuse, and appellant's failure to respond favorably to sanctions previously imposed for other offenses, there is nothing in the record that "confirms the trial court's decision-making process included all of the statutorily required sentencing considerations" as required by R.C. 2929.14(E)(4) and R.C. 2929.19 (B)(2)(c). Absent from the record are the findings of the trial court that a consecutive sentence is "necessary to protect the public from future crime" and that a consecutive sentence is not "disproportionate to the seriousness of the

offender's conduct and to the danger the offender poses to the public." R.C. 2929.14(E)(4). The State of Ohio argues that such requisite findings may be inferred from the trial court's finding of appellant's prior criminal convictions, appellant's failure to respond favorably in the past to sanctions imposed for criminal convictions, appellant's lack of remorse, appellant's pattern of drug abuse, and appellant's previous prison term; however, the law requires that the record be clear - not simply inferred or implied - that the trial court made the required findings. Because the trial court did not make clear on the record the requisite findings for the consecutive sentence imposed for appellant's theft offense pursuant to R.C. 2929.14(E)(4) and R.C. 2929.19(B)(2)(c), appellant's first assignment of error is well taken.

II

{¶15} Appellant's second assignment of error contends that the trial court erred by failing to ensure that the sentence imposed upon appellant is consistent with sentences imposed upon similarly situated offenders.

{¶16} Appellant contends that it is the trial court's obligation to ensure that any sentence it imposes is consistent with those sentences imposed for similar offenses. The goal of felony sentencing pursuant to R.C. 2929.11(B) is to achieve "consistency" not "uniformity." *State v. Klepatzki*, Cuyahoga App. No. 81676, 2003-Ohio-1529, at ¶32.

{¶17} R.C. 2929.11(B):

{¶18} "*** does not impose an affirmative duty on a state court sentencing judge to calibrate sentences in accord with the other terms of incarceration being imposed within a county, within an appellate district or within the state. Rather, this is a guide for a sentencing judge to follow in conformity with the overriding purpose of felony sentencing."

State v. McKinney, Cuyahoga App. No. 80991, 2002-Ohio-7249, at ¶55 (O'Donnell, J., dissenting).

{¶19} Here, appellant failed to illustrate, at the trial court level or in his appeal, that similarly situated offenders were sentenced differently than appellant. There is nothing in the record that would indicate that the imposed sentence is either inconsistent with or disproportionate to sentences that have been imposed on similar offenders who have committed similar offenses. Accordingly, appellant's second assignment of error is not well taken.

{¶20} Judgment affirmed in part, reversed in part and remanded for resentencing.

{¶21} This cause is affirmed in part, reversed in part and remanded for resentencing.

Costs assessed against defendant-appellant.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for resentencing.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN
PRESIDING JUDGE
ANN DYKE, J., CONCURS.

TIMOTHY E. McMONAGLE, J., CONCURS IN PART AND CONCURS IN JUDGMENT ONLY IN PART WITH SEPARATE CONCURRING OPINION.

TIMOTHY E. McMONAGLE, J., CONCURRING IN PART AND CONCURRING IN JUDGMENT ONLY IN PART.

{¶22} I concur with the majority's resolution of appellant's first assignment of error but concur in judgment only regarding assignment of error two and write separately to address the consistency in sentencing issue raised by appellant.

{¶23} The mandate for consistency in sentencing is set forth in R.C. 2929.11(B) as follows:

{¶24} "A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."

{¶25} "The requirement of consistency addresses the concept of proportionality by directing the court to consider sentences imposed upon different offenders in the same case or on offenders in other similar cases. The consistency concept gives legal relevance to the sentences of other judges. It adopts the premise that an overwhelming majority of judges sentence similarly, that a relatively small minority sentence outside of the mainstream, and

that sentences outside of the mainstream of judicial practice are inappropriate." Griffin & Katz, Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan (2002), 53 Case W.Res.L.Rev. 1, 12-13.

{¶26} As this court has previously determined, because the mandate of consistency in sentencing is directed to the trial court, it is the trial court's responsibility to insure consistency among the sentences it imposes. See *State v. Lyons*, Cuyahoga App. No. 80220, 2002-Ohio-3424, ¶30. See, also, *State v. Stern* (2000), 137 Ohio App.3d 110. As we stated in *Lyons*, "with the resources available to it, a trial court will, and indeed it must, make these sentencing decision in compliance with this statute." *Lyons*, supra at ¶33.

{¶27} Thus, I disagree with the majority's conclusion that the requirement of consistency in sentencing is merely "a guide for a sentencing judge to follow in conformity with the overriding purpose of felony sentencing," rather than a statutory requirement.

{¶28} I recognize, however, that trial courts are limited in their ability to address the consistency mandate and appellate courts are hampered in their review of this issue by the lack of a reliable body of data upon which they can rely. As noted by this court in *State v. Biascochea*, Cuyahoga App. No. 82481, 2003-Ohio-4950, fn.2:

{¶29} "Although R.C. 2929.11(B) directs trial courts to impose felony sentences which are 'consistent with sentences imposed for

similar crimes by similar offenders,' the legislature has not identified the means by which the courts should attain this goal. Neither individual practitioners, government attorneys, trial courts nor appellate courts have the resources to assemble reliable information about sentencing practices throughout the state. *State v. Haamid*, Cuyahoga App. Nos. 80161, and 80248, 2002-Ohio-3243 (Karpinski, J., concurring). Identification of the data and factors which should be compared in deciding whether a crime or an offender is 'similar' in itself would be a massive task, yet the identification of such data would be essential even to begin to build a database. Unless and until someone undertakes this daunting task, 'appellate courts will be able to address the principle of consistency only to a very limited degree.'"

{¶30} Here, however, we are once again presented with a case in which the defendant failed to present *any evidence* to the trial court that his sentence was inconsistent with sentences imposed on similar offenders and merely raised the inconsistency issue on appeal. Although a defendant cannot be expected to produce his or her own database to demonstrate the alleged inconsistency, the issue must at least be raised in the trial court and some evidence, however minimal, must be presented to the trial court to provide a starting point for analysis and to preserve the issue for appeal.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).