

[Cite as *State v. Vargas*, 2015-Ohio-2856.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101796

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JULIO C. VARGAS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART,
REVERSED IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-584296-A

BEFORE: Blackmon, J., Jones, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: July 16, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Julio C. Vargas appeals his sentence following his no contest pleas and assigns the following errors for our review:

I. The trial court committed prejudicial error at sentencing by failing to merge Counts One and Three, and sentencing Defendant-Appellant to consecutive terms.

II. The trial court committed prejudicial error by sentencing Defendant-Appellant to an excessive term of imprisonment.

{¶2} Having reviewed the record and pertinent law, we affirm in part and reverse in part and remand for proceedings consistent with this opinion. The apposite facts follow.

{¶3} On April 11, 2014, the Cuyahoga County Grand Jury indicted Vargas on two counts of aggravated vehicular homicide, four counts of aggravated vehicular assault, and three counts of driving while under the influence. At his arraignment on April 16, 2014, Vargas pleaded not guilty to the charges. On June 26, 2014, Vargas retracted his former pleas and pleaded no contest to all nine counts of the indictment.

{¶4} On July 29, 2014, the trial court sentenced Vargas to nine years in prison for Count 1, aggravated vehicular homicide, six years for Count 3, aggravated vehicular assault, and ordered them to be served consecutively for a total of 15 years. The trial court also sentenced Vargas to serve two-years concurrent sentences for Counts 5 and 6, aggravated vehicular assaults, and six-months concurrent sentences for Counts 7, 8, and 9. These sentences were to be served concurrently to the consecutive sentences in Counts 1 and 3.

Allied Offenses

{¶5} In the first assigned error, Vargas argues the trial court erred when it failed to merge the aggravated vehicular homicide of the passenger with the aggravated vehicular assault of the driver. Within this assigned error, Vargas also argues the trial court erred in imposing consecutive sentences. However, for ease of analysis and because the second assigned error raises a sentencing issue, we will limit our discussion in this assigned error to the issue of merger.

{¶6} Ohio courts have long used a two-prong test to determine whether multiple offenses should be considered allied offenses and merged. “The first prong looks to the import of the offenses and requires a comparison of their elements.” *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 13. “If the elements ‘correspond to such a degree that the commission of one offense will result in the commission of the other,’ the offenses share a similar import.” *Id.*, citing *State v. Mitchell*, 6 Ohio St.3d 416, 418, 453 N.E.2d 593 (1983). “The second prong looks to the defendant’s conduct and requires a determination whether the offenses were committed separately or with a separate animus.” *State v. Thomas*, 8th Dist. Cuyahoga No. 101067, 2014-Ohio-4929, citing *Washington* at ¶ 13.

{¶7} Recently, in *State v. Ruff*, Slip Opinion No. 2015-Ohio-995, the Ohio Supreme Court added a third element to be considered in determining if the offenses are allied. The court held that along with determining whether the offenses were committed separately and with a separate animus, the court must also determine whether the offenses

are of dissimilar import. The court held that crimes are of dissimilar import if the defendant's conduct involved separate victims or if the harm that resulted from each offense is separate and identifiable. *Ruff* at paragraph two of the syllabus.

{¶8} In the instant case, in declining to merge the two aforementioned counts, the trial court stated: "I know you plan to take this to the Court of Appeals, and perhaps they will correct me if I am wrong on that. But I do agree that if the same act causes such overwhelming loss to two separate individuals that merger should not apply." Tr. 41.

{¶9} Here, the trial court's assessment is totally in line with the Ohio Supreme Court's pronouncements in *Ruff*. This matter involved two separate victims with separate harms, one fatal and the other involving near life threatening injuries. Consequently, the trial court did not err when it declined to merge Counts 1 and 3. Accordingly, we overrule the first assigned error.

Consecutive Sentence

{¶10} In the second assigned error, Vargas argues the trial court erred by imposing consecutive sentences, which he contends is excessive.

{¶11} R.C. 2929.14(C)(4) requires a sentencing judge to make three statutory findings before imposing consecutive sentences and incorporate those findings in the journal entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio- 3177, 16 N.E.3d 659, ¶ 29. First, the trial court must find that "consecutive service is necessary to protect the public from future crime or to punish the offender." R.C. 2929.14(C)(4). Second, the trial court must find that "consecutive sentences are not disproportionate to the

seriousness of the offender's conduct and to the danger the offender poses to the public.”

Id.

{¶12} Finally, the trial court must find that at least one of the following 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 postrelease 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).

{¶13} “[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.* The failure to make the findings, however, is “contrary to law.” *Bonnell* at ¶ 37.

{¶14} In the instant case, Vargas claims the trial court failed to make the requisite findings prior to imposing a consecutive sentence. The state concedes that the trial court failed to make the specific finding that the sentences are “not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public.”

In conceding, the state points out that the trial court only stated:

I believe that your actions that night were so serious, both for the victims and for other potential victims, that nothing less than that would adequately punish you or protect society from further similar acts. I think that only consecutive sentences can accomplish that goal.

Tr. 42.

{¶15} Pursuant to *Bonnell, supra*, in cases where the trial court has imposed consecutive sentences, but failed to make requisite statutory findings, the proper remedy is to vacate the sentence and remand for resentencing. Consequently, we vacate Vargas's sentence and remand to the trial court for the limited purpose of considering whether consecutive sentences are appropriate under R.C. 2929.14(C)(4), and to make the necessary findings. *See State v. Nia*, 2014-Ohio-2527, 15 N.E.3d 892, ¶ 28 (8th Dist.). Accordingly, we sustain the second assigned error.

{¶16} Judgment affirmed in part, reversed in part, and remanded.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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 execution of sentence.

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

PATRICIA ANN BLACKMON, JUDGE

LARRY A. JONES, SR., P.J., and
EILEEN T. GALLAGHER, J., CONCUR