

[Cite as *State v. Diaz*, 2015-Ohio-4382.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102582

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM A. DIAZ

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-588078-A

BEFORE: Stewart, J., E.A. Gallagher, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: October 22, 2015

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant William Diaz pleaded guilty to felony counts of attempted having a weapon while under disability and receiving stolen property, and a misdemeanor count of domestic violence. The court sentenced Diaz to serve a total of 36 months in prison: 18 months on both the weapons disability and receiving stolen property counts (to be served consecutively) and six months on the domestic violence count (served concurrent to the other counts). The sole assignment is that consecutive sentences were contrary to law because the court failed to make all of the findings required by R.C. 2929.14(C)(4).

{¶2} R.C. 2929.14(C)(4) requires the sentencing judge to make the following findings before imposing consecutive sentences: 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 third, that (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, or the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶3} Diaz acknowledges that the court made the first and third findings; it stated that, "I find that a 36 month sentence is necessary to protect your victim who is obviously in terror of you and to punish you for your crime that you have, I find, have not taken full responsibility for" and "I find the harm in your case is so great and unusual that a single term does not adequately reflect the seriousness of your behavior and/or conduct." Tr. 36-37. He complains that these findings were based on hearsay contained in a victim impact statement, but the Confrontation Clause does not apply to sentencing proceedings.

Williams v. New York, 337 U.S. 241, 246-250, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949) (holding that defendant has no constitutional right at sentencing to confront witnesses and that the sentencing court can consider a full range of relevant information about defendant including hearsay); *State v. Williams*, 8th Dist. Cuyahoga No. 98934, 2013-Ohio-2201, ¶ 18. The court did not err by relying on a victim impact statement to make findings under R.C. 2929.14(C)(4).

{¶4} The next question is whether the court made the finding that consecutive sentences were not disproportionate to the seriousness of the Diaz's conduct and to the danger he poses to the public.

{¶5} The court made several statements that support a finding that consecutive sentences were not disproportionate to Diaz’s conduct and the danger he poses to the public. For example, the court stated that “I find consecutive sentences are necessary to punish your behavior in this case and your behavior towards family members in your other cases.” It went on to note that the present case was Diaz’s “fourth domestic violence case” and that “[e]nough is enough.” The court told Diaz that “[y]ou have a problem. It’s apparent from reading your victim’s letter that you are sadistic and some kind of controlling monster and there’s one place for you, and that place is a place that you shall go for as long as I can send you.”

{¶6} Although the court did not use the word “disproportionate” in its findings, it did not have to make the R.C. 2929.14(C)(4) findings in verbatim terms. *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 13 (8th Dist.). Consecutive sentences will be upheld if “the reviewing court can discern that the trial court engaged in the correct analysis * * *.” *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29.

{¶7} We view the court’s statements as sufficient to satisfy the R.C. 2929.14(C)(4) finding that consecutive sentences were not disproportionate to Diaz’s conduct and the danger he poses to the public.

{¶8} At oral argument, Diaz for the first time raised the question of whether the findings made in support of consecutive service had to be specific to those counts for which consecutive service was ordered. For example, in this case, the court ordered the counts of attempted having a weapon under disability and receiving stolen property to be

served consecutively, but Diaz maintains that the court's reasons for ordering consecutive service were based on his history of domestic violence. Diaz argues that this is inadequate under R.C. 2929.14(C)(4).

{¶9} We previously noted that Diaz limits his argument on appeal to the question of whether the court made the finding that consecutive sentences were not disproportionate to the seriousness of Diaz's conduct and to the danger he poses to the public. Importantly, R.C. 2929.14(C)(4) uses the words "conduct" and "offense" in different ways. The word "conduct" is not defined in R.C. 2929.14(C)(4), so in the context of this statute, we give the word its usual meaning as the manner in which a person behaves. Consistent with that definition, we have broadly construed the word "conduct" under R.C. 2929.14(C)(4), noting that it has "significance apart from whether the defendant's acts established the elements of a particular crime." *State v. Moore*, 2014-Ohio-5135, 24 N.E.3d 1197, ¶ 33 (8th Dist.). We understand the word "conduct" to encompass more than just the facts supporting conviction on a particular offense. For purposes of determining whether consecutive sentences are disproportionate to an offender's conduct, a sentencing judge can consider the entirety of a defendant's actions in a particular case, not just the defendant's behavior or actions when committing any one offense.

{¶10} In this case, the court's focus on Diaz's history of domestic violence had to be viewed in the context of Diaz's gun crimes. The charges at issue in this appeal arose from an incident where Diaz "trashed" the house, broke dinner plates, and physically

threatened the victim. The relationship ended after this incident. When the victim tried to retrieve some of her personal belongings from a house owned by Diaz's father, she noticed that a firearm she owned was missing. She called the police, and detectives found the firearm in a hidden compartment of the house. Diaz's guilty pleas to attempted possession of a weapon while under disability and receiving stolen property admitted his culpability in the gun offenses.

{¶11} Although the firearm itself was not directly involved in the domestic violence incident, the court's statements during sentencing showed that it focused on Diaz's lengthy history of domestic violence in connection with his access to the victim's firearm as justifying consecutive service. The present charge was the fourth time Diaz had been charged with domestic violence. This history of domestic violence was documented by the victim, who gave the court a compelling statement of the physical and emotional abuse she suffered from Diaz. Although he did not explain his motivation for committing the firearm offenses, the court may well have been concerned that Diaz, who by his own admission was furious after learning that the victim had been unfaithful ("I found out that she was having an affair on me and, you know, what could a guy do?"), would use the firearm to escalate his abuse to deadly levels. Viewed in this light, we find that the court did not err by considering Diaz's history of domestic violence in the context of the firearm charges when finding that consecutive sentences were not disproportionate to Diaz's conduct. The assigned error is overruled.

{¶12} We do conclude, consistent with the state’s concession, that the court failed to incorporate its findings into the sentencing entry as required by Crim.R. 32(A). We therefore affirm the consecutive sentences, but remand the case to the trial court so that it may correct the sentencing entry nunc pro tunc. *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at ¶ 30.

{¶13} Judgment is affirmed, but the case is remanded for the limited purpose of correcting the sentencing entry nunc pro tunc.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

MELODY J. STEWART, JUDGE

EILEEN A. GALLAGHER, P.J., and
EILEEN T. GALLAGHER, J., CONCUR