[Cite as *State v. Taylor*, 2017-Ohio-5580.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104892

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRYANT D. TAYLOR

DEFENDANT-APPELLANT

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

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-586331-B

BEFORE: Stewart, J., Keough, A.J., and McCormack, J.

RELEASED AND JOURNALIZED: June 29, 2017

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant Bryant D. Taylor pleaded guilty to counts of drug trafficking and possession of criminal tools. The court ordered Taylor to serve concurrent prison terms of 36 months on the drug trafficking count and 12 months on the criminal tools count. The court further ordered Taylor to serve those sentences consecutive with "Fed time," a reference to *United States v. Taylor*, No. 3:14-cr-00134 (S.D.W.V. 2015), in which Taylor received a prison term of 78 months for violating federal drug laws. In this appeal, Taylor argues that his guilty plea was involuntary because the court failed to explain the possibility of consecutive sentences, failed to consider the relevant statutory factors for sentencing, failed to make the necessary findings for ordering consecutive service with the federal prison time, imposed a fine despite declaring Taylor to be indigent, and that trial counsel was ineffective for failing to object to consecutive sentences and the fine.

{¶2} The state concedes that the court erred by imposing consecutive sentences without first making the findings required by R.C. 2929.14(C)(4). It also concedes that the court ordered Taylor to pay a fine despite stating at sentencing that "[d]ue to an affidavit of indigence, the fine will be suspended." Tr. 17. We have confirmed the errors conceded by the state and summarily sustain the third and fourth assignments of error. We also find the fifth assignment of error — that trial counsel was ineffective for

failing to object to consecutive sentences and the imposition of the fine — to be moot. *See* App.R. 12(A)(1)(c).

{¶3} In his first assignment of error, Taylor maintains that he did not voluntarily enter his guilty plea because the court failed to advise him, with respect to the maximum sentence, that he could be ordered to serve his sentences consecutively to the sentence imposed in the federal case.

{¶4} Crim.R. 11(C)(2)(a) requires the court to advise the defendant of certain constitutional and statutory rights, among those the maximum penalty involved. However, "[f]ailure to inform a defendant who pleads guilty to more than one offense that the court may order him to serve any sentences imposed consecutively, rather than concurrently, is not a violation of Crim.R. 11(C)(2), and does not render the plea involuntary." *State v. Johnson*, 40 Ohio St.3d 130, 532 N.E.2d 1295 (1988), syllabus.

{¶5} We can likewise make short work of Taylor's argument in his second assignment of error that the court failed to consider the statutory sentencing factors set forth in R.C. 2929.12. The court's sentencing entry indicates that it "considered all required factors of the law." That statement shows that the court did considered the relevant sentencing factors. *State v. Powell*, 8th Dist. Cuyahoga No. 99386, 2014-Ohio-2048, ¶ 113; *State v. Kamleh*, 8th Dist. Cuyahoga No. 97092, 2012-Ohio-2061, ¶ 61.

{¶6} We sustain the third and fourth assignments of error. The matter is remanded for the limited purpose of determining whether consecutive sentences should

be imposed. The court is also instructed to issue a nunc pro tunc sentencing entry deleting the imposition of the fine.

{¶7} Judgment affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share 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.

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MELODY J. STEWART, JUDGE

KATHLEEN ANN KEOUGH, A.J., CONCURS (SEE SEPARATE CONCURRING OPINION);
TIM McCORMACK, J., CONCURS WITH MAJORITY OPINION AND CONCURS WITH SEPARATE CONCURRING OPINION

KATHLEEN ANN KEOUGH, A.J., CONCURRING WITH SEPARATE CONCURRING OPINION:

{¶8} I concur with the majority's decision. However, I write separately to observe that the maximum prison terms imposed by the trial court are not contrary to law and the record supports those prison terms.

{¶9} In this case, the trial court stated in the sentencing journal entry, "the court considered all required factors of the law," and "the court finds that prison is consistent with the purpose of R.C. 2929.11." I recognize that this court has held that these statements are sufficient to demonstrate that the trial court gave proper consideration to R.C. 2929.11 and 2929.12 if the sentence falls within the statutory range. *See, e.g., Powell,* 8th Dist. Cuyahoga No. 99386, 2014-Ohio-2048; *Kamleh,* 8th Dist. Cuyahoga No. 97092, 2012-Ohio-2061.

{¶10} In fact, the Ohio Supreme Court has stated that while a trial court is required to take these factors into consideration when fashioning a proper sentence, the trial court is not required to make specific findings on the record. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31. Where the trial court does not put on the record its reasoning under R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration of the statutes, unless the defendant affirmatively shows otherwise. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 18, fn. 4, *overruled on other grounds*, *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231.

{¶11} However, after reviewing *Marcum* and the subsequent cases where the Ohio Supreme Court applied *Marcum*, I conclude that this court reviews the record to determine whether the record supports the maximum sentence imposed. In *Marcum*, the Ohio Supreme Court held that, "[a]pplying the plain language of R.C. 2953.08(G)(2), we hold that an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id*. at ¶ 1.

{¶12} The trial court is not required to give findings prior to imposing a maximum prison term. That requirement was removed by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, and not revived by the Ohio General Assembly. *See Kalish* at ¶ 1. But *Marcum* addressed appellate review of those sentences under R.C. 2953.08(G) that do not require findings, such as a maximum prison term. The court stated:

> We note that some sentences do not require the findings that R.C. 2953.08(G) specifically addresses. Nevertheless, it 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.

(Emphasis added.) *Id*. at ¶ 23.

{¶13} In *State v. McGowan*, 147 Ohio St.3d 166, 2016-Ohio-2971, 62 N.E.3d 178, and *State v. Brandenburg*, 146 Ohio St.3d 221, 2016-Ohio-2970, 54 N.E.3d 1217, where the Supreme Court reversed the appellate court and remanded the case for application of *Marcum*, the court stated in each case:

> In *State v. Marcum*, 146 Ohio St. 3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, we held that R.C. 2953.08(G)(2) allows an appellate court to increase, reduce, or otherwise modify a sentence only when it clearly and convincingly finds that the sentence is (1) contrary to law or (2) unsupported by the record. *Id*. at ¶ 7.

McGowan at ¶ 1; *Brandenburg* at ¶ 1. In both of those cases, the appellate court was reviewing a maximum sentence imposed by the trial court.

{¶14} Therefore, for an appellate court to modify or vacate a sentence, the sentence must be (1) clearly and convincingly contrary to law; or (2) clear and convincing evidence must exist that the record does not support the sentence. As *Marcum* states, this review is made with deference to the trial court.

{¶15} Applying *Marcum* and R.C. 2953.08(G), I would conclude that the maximum prison terms imposed are not contrary to law because they are within the statutory range, and the trial court stated in its sentencing journal entry that it considered the required factors.

{¶16} Furthermore, Taylor has failed to show by clear and convincing evidence that the record does not support the maximum prison terms imposed. Instead, he makes public policy arguments about the importance of "transparency in the judicial system." After a full review of the record, I find the imposition of maximum prison terms is supported by the record.