

[Cite as *State v. Vargas*, 2017-Ohio-9177.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105680

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JULIO C. VARGAS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

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

BEFORE: Blackmon, J., Kilbane, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: December 21, 2017

FOR APPELLANT

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PATRICIA ANN BLACKMON, J.:

{¶1} Defendant-appellant Julio C. Vargas (“Vargas”) appeals from his re-sentencing, following a remand from this court. Vargas assigns the following error for our review:

Trial court committed prejudice error when the court failed to find the statutory requirement under R.C. 2929.14(C)(4)(b) whether the sentence imposed for count 1 and 3 also 7-9 are dissimilar offenses R.C. 2941.25(B) at the sentencing hearing was contrary to law violation of defendant United States Constitutional Rights Amendment, 5, 6, and 14 Multiple Punishment. [Sic.]

{¶2} Having reviewed the record and pertinent law, we affirm the decision of the trial court. The apposite facts follow.

{¶3} Vargas was indicted in a nine-count indictment in connection with a wrong-way collision on Interstate 480 on April 5, 2014. In Counts 1 and 2, Vargas was charged with aggravated vehicular homicide in connection with the death of Desiree Snyder. In Counts 3 and 4, he was charged with aggravated vehicular assault in connection with injuries to Antonio Rodriguez, and Counts 5 and 6 charged him with aggravated vehicular assault as to other drivers. Counts 7-9 charged him with driving under the influence of drugs or alcohol under three separate provisions of R.C. 4511.19(A)(1). On June 26, 2014, Vargas pled no contest to all charges. The trial court merged Counts 1 and 2, and Counts 3 and 4. Vargas was subsequently sentenced to nine years in prison for Count 1 (aggravated vehicular homicide as to Snyder), six years for Count 3 (aggravated vehicular assault as to Rodriguez), and ordered them to be served

consecutively for a total of 15 years. The trial court also imposed two-years concurrent sentences for Counts 5 and 6, (aggravated vehicular assaults), and six-months concurrent sentences for Counts 7, 8, and 9 (driving under the influence), all to be served concurrently to the consecutive sentences in Counts 1 and 3. *See State v. Vargas*, 8th Dist. Cuyahoga No. 101796, 2015-Ohio-2856 (“*Vargas I*”).

{¶4} Vargas appealed his sentence to this court. *Id.* He argued that the trial court erred when it failed to merge the aggravated vehicular homicide of Snyder with the aggravated vehicular assault of Rodriguez, and that the trial court erred by imposing consecutive sentences. This court concluded that because the matter involved two separate victims with separate harms, one fatal and the other involving near life threatening injuries, the trial court did not err when it declined to merge Counts 1 and 3. *Id.* at ¶ 9. However, this court concluded 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.” Therefore, this court issued the following limited remand:

[W]e 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.).

Id. at ¶ 16.

{¶5} On March 22, 2017, the trial court held a resentencing hearing. The court stated on the record as follows:

Based upon that, and upon this Court’s finding, I will repeat the first part, that the — Mr. Vargas, your actions that night were both serious for the

victims and for other potential victims, that nothing less than consecutive sentences would adequately protect society from further similar acts. I think that only consecutive sentences can accomplish that goal.

I further 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.

I'll further note for the record that these multiple offenses were committed as part of one or more courses of conduct, and the harm caused by these offenses was so great or unusual that no single prison term for any one of the offenses, that as part of this course of conduct adequately reflects the seriousness of your conduct.

{¶6} The trial court then reimposed the original sentence, nine years in prison for Count 1 (aggravated vehicular homicide as to Snyder), to be served consecutive to six years for Count 3 (aggravated vehicular assault as to Rodriguez), concurrent two-year sentences for aggravated assault for Counts 5 and 6, and concurrent six-month sentences for Counts 7, 8, and 9 (driving under the influence).

Allied Offenses

{¶7} Within this appeal from the resentencing, Vargas argues that the trial court erred in refusing to merge Count 1 (aggravated vehicular homicide of Snyder) with Count 3 (aggravated vehicular assault of Rodriguez) as allied offenses of similar import and failing to merge the driving under the influence of alcohol charges in Counts 7-9.

{¶8} A trial court must follow a mandate from a reviewing court. *State v. Gates*, 8th Dist. Cuyahoga No. 82385, 2004-Ohio-1453, ¶ 9; *State v. Bronston*, 8th Dist. Cuyahoga No. 97558, 2012-Ohio-2631, ¶ 4; *State v. Carlisle*, 8th Dist. Cuyahoga No.

93266, 2010-Ohio-3407, ¶ 16. In *Carlisle*, we explained the appellate mandate as follows:

An appellate mandate works in two ways: it vests the lower court on remand with jurisdiction and it gives the lower court on remand the authority to render judgment consistent with the appellate court's judgment.

Under the "mandate rule," a lower court must "carry the mandate of the upper court into execution and not consider the questions which the mandate laid at rest."

Id. There is no authority to extend or vary the mandate of the appellate court. *State v. Bell*, 8th Dist. Cuyahoga No. 92037, 2009-Ohio-2138, ¶ 20.

{¶9} As to the contention that the trial court erred in failing to merge Counts 1 and 3, the trial court had no jurisdiction to consider this issue in light of our limited remand in *Vargas I*. In any event, the *Vargas I* court expressly rejected this identical argument because "the matter involved two separate victims with separate harms, one fatal and the other involving near life threatening injuries." *Id.* at ¶ 9.

{¶10} As to the contention that the trial court erred in failing to merge the driving under the influence convictions in Counts 7-9, the trial court had no jurisdiction to consider this new issue in light of the *Vargas I* limited remand. See *State v. Ivey*, 9th Dist. Summit No. 28162, 2017-Ohio-4162. Further, even if the trial court had jurisdiction to consider the motion, a new determination was barred by the principles of res judicata. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, paragraph three of the syllabus; *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 33 ("any prior issues not successfully challenged in [prior] appeal are outside the scope of his re-sentencing remand and will be precluded from further review

under the principles of res judicata.”); *State v. McCornell*, 8th Dist. Cuyahoga No. 97406, 2012-Ohio-2503, ¶ 4.

{¶11} Therefore, this portion of the assigned error lacks merit.

Consecutive Sentences

{¶12} Vargas next argues that the trial court erred in imposing consecutive sentences.

{¶13} In *Vargas I*, this court explained the findings that a court must make before imposing consecutive sentences:

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.*

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.

Id. at ¶ 11-12.

{¶14} In this matter, our review of the record demonstrates that the trial court made all of the required findings under R.C. 2929.14(C). The court determined that service is necessary to punish Vargas and to protect the public from future crime. Next, the court determined that consecutive sentences are not disproportionate to the seriousness of Vargas's conduct and to the danger he poses to the public. Further, the court stated that multiple offenses were committed as part of one or more courses of conduct, and the harm caused by these offenses was so great or unusual that no single prison term adequately reflects the seriousness of the offender's conduct. Accord R.C. 2929.14(C). In addition, the trial court's journal entry sets forth and incorporated those findings in the journal entry. *Bonnell* at ¶ 29.

{¶15} In accordance with the foregoing, this portion of the assigned error lacks merit.

{¶16} The assigned error is without merit.

{¶17} Judgment affirmed.

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 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

MARY EILEEN KILBANE, P.J., and
SEAN C. GALLAGHER, J., CONCUR