

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 107980
 v. :
 :
 ROBERT BANKS, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED AND REMANDED
RELEASED AND JOURNALIZED: September 12, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-632911-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecutor, and
Nathaniel Tosi, Assistant Prosecuting Attorney, *for*
appellee.

Myriam A. Miranda, *for appellant.*

ANITA LASTER MAYS, J.:

{¶ 1} Defendant-appellant Robert Banks (“Banks”) appeals his sentence and asks this court to vacate his prison sentence and remand to the trial court for

resentencing. We affirm the trial court's sentence, but we remand this case for the sole purpose of issuing a nunc pro tunc entry to reflect what occurred at sentencing.

{¶ 2} After a five-count indictment, Banks pleaded guilty to one count of breaking and entering, a fifth-degree felony, in violation of R.C. 2911.13(A); one count of theft, a first-degree misdemeanor, in violation of R.C. 2913.02(A)(1); and one count of criminal damaging, a second-degree misdemeanor, in violation of R.C. 2909.06(A)(1) in Cuyahoga C.P. No. CR-18-632911. One count of breaking and entering and one count of theft was nolle. Banks was sentenced to 12 months of incarceration for breaking and entering; 180 days of incarceration for theft; and 90 days of incarceration for criminal damaging. Banks was also ordered to pay restitution in the amount of \$1,481.34 payable to the Farmer's Market. The sentences were ordered to be served concurrently to one another but consecutively to a 12-month sentence imposed on a probation case,¹ for an aggregate of two years of incarceration.

I. Facts and Procedural Posture

{¶ 3} On September 14, 2018, East Cleveland police officers responded to a call reporting a break-in at a local business. The officers observed damage to the business door and damage to the security system. Officers spoke to the business owners, who observed Banks gather items in a cart and then flee the scene. Two days later, officers were called to another break-in at another business. Officers

¹ Cuyahoga C.P. No. CR-17-617530.

arrested Banks at the scene as they observed him leaving the business. Banks also admitted to the break-in at the other business two days earlier.

{¶ 4} After several pretrials and discovery, Banks pleaded guilty to breaking and entering, theft, and criminal damaging. The trial court sentenced Banks to two years of incarceration. Banks filed this appeal assigning one error for our review:

I. Appellant's sentence is contrary to law and not supported by the record.

II. Sentence Contrary to Law

A. Standard of Review

{¶ 5} The Ohio Supreme Court has mandated the current standard for appellate review of felony sentences:

Applying 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. In other words, an appellate court need not apply the test set out by the plurality in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1. If upon making a determination in defendant's favor, the appellate court "may increase, reduce, or otherwise modify a sentence * * * or may vacate the sentence and remand the matter to the sentencing court for resentencing." *State v. Pluhar*, 8th Dist. Cuyahoga No. 102012, 2015-Ohio-3344, ¶ 13.

State v. Hunt, 8th Dist. Cuyahoga No. 107125, 2019-Ohio-1643, ¶ 10.

B. Whether the Prison Sentence is Contrary to Law and Not Supported by the Record

{¶ 6} Banks argues that his sentence was contrary to law because the trial court incorrectly sentenced him to consecutive sentences.

For a sentence to be contrary to law, the sentence must fall “outside the statutory range” for the offense or the record must reflect a failure by the trial court to “consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors in R.C. 2929.12.” *State v. Lee*, 8th Dist. Cuyahoga No. 104190, 2016-Ohio-8317, ¶ 9, citing *State v. Hinton*, 8th Dist. Cuyahoga No. 102710, 2015-Ohio-4907, ¶ 10, citing *State v. Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, ¶ 13.

Id. at ¶ 11.

{¶ 7} Specifically, Banks contends his consecutive sentences are clearly and convincingly not supported by the record as required under relevant statutes set forth in R.C. 2953.08(G). We disagree. Banks’s sentence of 12 months imprisonment does not fall outside of the statutory range, and “a sentence is not contrary to law when it is within the statutory range.” *State v. Jones*, 2018-Ohio-498, 105 N.E.3d 702, ¶ 20 (8th Dist.).

{¶ 8} A review of the sentencing journal entry record reveals that the trial court considered the purposes and principles of felony sentencing set forth in the statutes. However, Banks argues that his sentence was excessive.

In determining what sentence to impose, a sentencing court is required to consider the purposes and principles of sentencing pursuant to R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12. Under R.C. 2929.11(A), a felony sentence shall be reasonably calculated to achieve two overriding purposes: (1) to protect the public from future crimes by the offender, and (2) to punish the offender using the minimum sanctions the court determines will achieve those purposes. Further, under R.C. 2929.11(B), the sentence imposed for a felony must be commensurate with the seriousness of the offender’s conduct and consistent with sentences imposed for similar crimes committed by similar offenders.

Under R.C. 2929.12(A), a court sentencing a felony offender has discretion to determine the most effective way to comply with the purposes and principles of sentencing outlined in the statute. In exercising its discretion, however, the sentencing court must consider the seriousness, recidivism, and other mitigating factors set forth in R.C. 2929.12. *Id.* Although the trial court must consider the purposes and principles of sentencing as well as the factors in R.C. 2929.12, the court is not required to use particular language or make specific findings on the record regarding its consideration of those factors. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31.

State v. Williams, 8th Dist. Cuyahoga No. 105903, 2018-Ohio-1297, ¶ 20-21.

{¶ 9} The record reveals that the trial court allowed Banks allocution at his sentencing hearing, detailing his drug abuse and addiction, in addition to how he was remorseful of the incident. (Tr. 23-24.) The trial court considered allowing Banks to remain on probation, but after a review of his record, determined that Banks was not previously successful on probation and therefore saw no value to place Banks on probation again. The trial court decided that jail time would be appropriate. (Tr. 41.)

{¶ 10} After a review of the record, we determine that the trial court did consider the purposes and principles of sentencing pursuant to R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12.

{¶ 11} Banks further contends that R.C. 2929.13(B)(1) creates a presumption in favor of community control sanctions for felonies of the fifth degree, and that the presumption was not overcome and his sentence was contrary to law. However, R.C. 2929.13(B)(1)(b)(xi) states,

The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense if any of the following apply:

The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance.

{¶ 12} Banks committed these offenses while on probation. Therefore, we find that Banks's argument that he should have received probation instead of jail time is without merit. In addition, the trial court explained why it chose to sentence Banks to jail time rather than probation. The trial court stated,

So the first decision I have to make is whether or not I'm going to place you on probation in the new case or prison. I think under these circumstances and looking at your record, Mr. Banks, that probation has not worked obviously in the other case that we will deal with in a minute.

So I don't see any value in doing that. So I am going to place you in prison for the full 12-month period. You have a long history of this kind of conduct, and I think the only appropriate sentence for you is to place you in prison for 12 months.

(Tr. 41-42.)

{¶ 13} Therefore, we find that the record supports the trial court's decision.

{¶ 14} Banks also contends that the trial court erred by ordering his sentence to run consecutively to the sentence he received in Cuyahoga C.P. No. CR-18-617530.

There is a presumption in Ohio "that prison sentences should be served concurrently unless the trial court makes the findings outlined in R.C. 2929.14(C)(4) to warrant consecutive service of the prison terms." *State v. Vinson*, 2016-Ohio-7604, 73 N.E.3d 1025, ¶ 67 (8th Dist.), citing *State v. Primm*, 8th Dist. Cuyahoga No. 103548, 2016-

Ohio-5237, ¶ 64, citing *State v. Cox*, 8th Dist. Cuyahoga No. 102629, 2016-Ohio-20, ¶ 3; R.C. 2929.41(A).

Hunt, 8th Dist. Cuyahoga No. 107125, 2019-Ohio-1643, at ¶ 13.

{¶ 15} However,

[t]he consecutive sentencing statute, R.C. 2929.14(C)(4), provides:

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 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:

(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 ¶ 17.

{¶ 16} Banks concedes that the trial court strictly complied with R.C. 2929.14(C)(4) when sentencing him to consecutive sentences and incorporated its findings in the journal entry, but argues that the consecutive sentences are in excess of what is necessary to incapacitate him, deter him from committing future

crime, and to rehabilitate him. The trial court, at sentencing, stated that Banks's "criminal history demonstrates that consecutive sentences are necessary to protect the public from future crime." (Tr. 43.) Additionally, the trial court noted that Banks was on probation when he committed these crimes. *Id.*

R.C. 2953.08(G)(2) makes it clear that if the court has made the requisite statutory findings to impose consecutive sentences, we must affirm those sentences unless we "clearly and convincingly" find "[t]hat the record does not support the court's findings[.]" This is an "extremely deferential" standard of review. *See, e.g., State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 21, (8th Dist.).

State v. Bridges, 2017-Ohio-8579, 101 N.E.3d 108, ¶ 14 (8th Dist.).

{¶ 17} We find that the record supports the trial court's findings.

{¶ 18} We find that the trial court did not err in sentencing Banks; however, the journal entry sentencing Banks to 18 days of imprisonment on the theft count is incorrect. A review of the trial transcripts reveals that Banks was sentenced to 180 days of imprisonment. (Tr. 42.) This error does not invalidate Banks's sentence. It is instead a clerical error that may be corrected by the court through a nunc pro tunc entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 30.

{¶ 19} Banks's sole assignment of error is overruled.

{¶ 20} Judgment affirmed. This case is remanded for the sole purpose of issuing a nunc pro tunc entry to correct jail-time days.

It is ordered that the appellee recover from 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

ANITA LASTER MAYS, JUDGE

**MARY J. BOYLE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR**