[Cite as *State v. Batiste*, 2020-Ohio-3673.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 108986
v.	:	
TAIWAN BATISTE,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: VACATED AND REMANDED
RELEASED AND JOURNALIZED: July 9, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-19-636866-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Lindsay Raskin, Assistant Prosecuting Attorney, *for appellee*.

Allison S. Breneman, *for appellant*.

LARRY A. JONES, SR., J.:

{¶ 1} In this appeal, defendant-appellant Taiwan Batiste ("Batiste") challenges his 24-year prison sentence, which included consecutive terms. Batiste

challenges the imposition of consecutive terms, and he also contends that the sentence constitutes cruel and unusual punishment and is an excessive sentence.

{¶ 2} For the reasons that follow, we vacate Batiste's sentence and remand the case for resentencing.

Procedural and Factual History

{¶ 3} The crimes that gave rise to this case occurred on January 30, 2018, when Batiste broke into a vehicle parked near the Beachland Ballroom and Tavern in Cleveland; Batiste stole property from the vehicle. A short time after breaking into the vehicle, Batiste approached two females from behind as they were walking to their vehicle after having attended a concert at Beachland. Batiste was wearing a ski mask and dark clothing and told the female victims, "[d]on't look back or I'll shoot." He then took one victim's purse, and the other victim's cell phone. Batiste began to walk away, but he returned to the victims and took one victim's backpack. He again threatened the victims telling them, "I have a gun. I'm going to shoot you. Don't turn around." The victims saw Batiste flee in a dark-colored vehicle and alerted law enforcement.

{¶ 4} Approximately 40 minutes later, law enforcement officials located Batiste sitting in a vehicle matching the description they had been given. On the front seat of the vehicle was the purse belonging to one of the victims. Law enforcement ordered Batiste out of the vehicle and conducted a pat-down search of him; they recovered a driver's license and debit card belonging to one of the victims. Law enforcement also found shards of glass on Batiste's clothing. The victims'

property was returned to them. They were not physically harmed, and the two victims who were robbed while walking to their vehicle suffered no economic harm.

{¶ 5} In light of the above, Batiste was charged in a 14-count indictment as follows: Counts 1 and 2, aggravated robbery, with one- and three-year firearm specifications; Counts 3 and 4, abduction, with one- and three-year firearm specifications; Counts 5, 6, 7, and 8, theft; Counts 9, 10, and 11, misuse of credit cards; Count 12, theft; Count 13, petty theft; and Count 14, criminal damaging or endangering.

{¶ 6} At the time of indictment, Batiste was almost 27 years old and had no adult felony record; he had one 2009 juvenile adjudication for robbery, for which he was sentenced to community control sanctions. The sanctions were completed in 2010.

{¶ 7} Batiste maintained that he did not have a gun during the commission of the crimes. The two robbery victims did not see a gun, and no gun was recovered from Batiste's person or vehicle. After negotiations with plaintiff-appellee the state of Ohio, Batiste pled guilty to an amended Count 1, robbery, with a one-year firearm specification; amended Count 2, robbery; Counts 3 and 4, abduction; and Counts 5 and 12, theft. The remaining counts and firearm specifications were dismissed.

{¶ 8} As mentioned, the trial court sentenced Batiste to a 24-year prison term. The sentence was as follows: eight years on Count 1, robbery plus one year on the firearm specification, to be served prior to and consecutive to the underlying charge; eight years on Count 2, robbery; 36 months each on Counts 3 and 4,

abduction; and 12 months each on Counts 5 and 12, theft. The trial court ordered Counts 5 and 12 to be served concurrent to each other, but consecutive to the other counts, which were all to be served consecutive to each other. Batiste now appeals, assigning the following two errors:

> I. The trial court abused its discretion by imposing a consecutive prison sentence contrary to R.C. 2929.14 and the purposes and principles of the felony sentencing guidelines.
>
> II. The trial court imposed an excessive sentence that subjects appellant to cruel and unusual punishment in violation of the Ohio Constitution Art. I, § 9.

Law and Analysis

Consecutive Sentences

{¶ 9} In his first assignment of error, Batiste challenges his consecutive sentences. He contends that the trial court abused its discretion in imposing consecutive terms. R.C. 2953.08(G)(2) provides, in part, that when reviewing felony sentences, our standard is not whether the sentencing court abused its discretion; rather, if this court "clearly and convincingly" finds that (1) "the record does not support the sentencing court's findings under" R.C. Chapter 2929 or (2) "the sentence is otherwise contrary to law," then we may conclude that the court erred in sentencing. *See also State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1; *State v. Gwynne*, 158 Ohio St.3d 279, 2019-Ohio-4761, 141 N.E.3d 169, ¶ 16. Thus, we do not review felony sentencing for an abuse of discretion. *Marcum* at ¶ 10.

{¶ 10} As a general rule in Ohio, there is a presumption in favor of concurrent sentences unless the court makes the requisite findings under R.C. 2929.14(C)(4). *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 22-23. There are three distinct findings under R.C. 2929.14(C)(4) that must be made in imposing consecutive sentences:

> (1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender; (2) 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 (3) that one of the subsections (a), (b) or (c) applies.

State v. Price, 10th Dist. Franklin No. 13AP-1088, 2014-Ohio-4696, ¶ 31, citing *Bonnell*.

{¶ 11} Subsections (a), (b), and (c) of R.C. 2929.14(C)(4) provide as follows:

> (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 post-release 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.

{¶ 12} When imposing consecutive sentences, a trial court must state the required findings on the record at the sentencing hearing, and also incorporate its statutory findings into the sentencing entry. *Bonnell* at ¶ 29.

{¶ 13} Here, the trial court found that consecutive sentences were "necessary to protect the public from future crime" and that they were "necessary to punish the offender." The trial court further found that consecutive sentences were "not disproportionate to the seriousness of the offender's conduct * * * [and] not disproportionate to the danger the offender poses to the public." These findings satisfied the first two required findings that must be made under R.C. 2929.14(C)(4).

{¶ 14} In regard to the last finding that must be made, which can be either subsection (a), (b), or (c) of R.C. 2929.14(C)(4), the trial court found that Batiste's "history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. * * * The Court making that finding * * * notes again that he does have a prior robbery conviction as a juvenile and the Court does find that there were two separate instances of robbery in this case."

{¶ 15} Thus, the trial court made all the statutorily required findings for the imposition of consecutive sentences. Further, the findings were incorporated into the sentencing judgment entry, as required by *Bonnell*. Our inquiry does not end there, however. As this court stated in *State v. Metz*, 8th Dist. Cuyahoga Nos. 107212, 107246, 107259, and 107261, 2019-Ohio-4054,

> Our review of felony sentencing must be "meaningful." *See State v. Bratton*, 6th Dist. Lucas Nos. L-12-1219 and L-12-1220, 2013-Ohio-3293, ¶ 8, citing *State v. Carter*, 11th Dist. Portage No. 2003-P-0007, 2004-Ohio-1181. In order to conduct a "meaningful review," we are required to review the entire record, including any reports that were

> submitted to the court (i.e., a presentence, psychiatric, or other investigative report), the trial record, and any statements made to or by the court at sentencing. *See* R.C. 2953.08(F)(1)-(3).

Metz at ¶ 92.

{¶ 16} The *Metz* court, citing R.C. 2953.08(G)(2) and *Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, at ¶ 1, noted an appellate court has the authority to increase, reduce, or otherwise modify a sentence, if, after reviewing the entire record, the court finds, clearly and convincingly, that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law. *Metz* at ¶ 93.

{¶ 17} As stated by the Ohio Supreme Court,

> In the final analysis, * * * R.C. 2953.08(G)(2)(a) compels appellate courts to modify or vacate sentences if they find by clear and convincing evidence that the record does not support any relevant findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code.

Marcum at ¶ 22.

{¶ 18} Our review here leads us to find, by clear and convincing evidence, that the record does not support the trial court's finding that Batiste's "history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender." As stated, the trial court relied on two factors in making its determination: (1) Batiste's prior juvenile adjudication, and (2) the crimes charged in this case.

{¶ 19} As to the second reason—using the crimes in this case to find a history of criminal conduct—that is impermissible. This court has held that "history of

criminal conduct" for the purpose of imposing consecutive sentences does not include the offenses of the case at issue. *State v. Green*, 8th Dist. Cuyahoga No. 102421, 2015-Ohio-4078, ¶ 17 ("[T]he trial court erroneously relied on the Green's underlying conduct to support a finding under R.C. 2929.14(C)(4)(c)."); *State v. Ferrell*, 8th Dist. Cuyahoga No. 100659, 2014-Ohio-4377, ¶ 46 ("[T]he trial judge erroneously focused on the defendant's history of criminal conduct related to the underlying charges — not his criminal conduct in general.")

{¶ 20} Thus, when we take the crimes of this case out of consideration, what is left is Batiste's sole juvenile adjudication. We recognize that although "a juvenile adjudication is not a conviction of a crime and should not be treated as one,"[1] it is widely accepted that an offender's juvenile history can be used as prior criminal history for the purpose of imposing consecutive sentences. *See State v. Bonner*, 8th Dist. Cuyahoga No. 97747, 2012-Ohio-2931, ¶ 8; *State v. Daniel*, 5th Dist. Ashland No. 11-COA-047, 2012-Ohio-2952, ¶ 20; *State v. Love*, 194 Ohio App.3d 16, 2011-Ohio-2224, 954 N.E.2d 202, ¶ 8 (1st Dist.); *State v. Deters*, 163 Ohio App.3d 157, 2005-Ohio-4049, 837 N.E.2d 381, ¶ 24 (1st Dist.). However, use of an offender's juvenile criminal history is generally reserved for instances where the offender has an *extensive* juvenile history.[2]

---

[1]*State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.2d 448, ¶ 38.

[2]*See, e.g., Bonner* at ¶ 6, quoting trial court ("'You were convicted of this stuff as a juvenile. You were a delinquent child breaking and burglarizing as a juvenile. You would think something would have sunk in.'"); *Daniel* at *id.* ("The record reflects that appellant had an extensive criminal history as both a juvenile and an adult."); *Love* at *id.* ("The trial court also had reviewed the presentence investigation, which revealed Love's extensive and violent criminal and juvenile history."); and *Deters* at ¶ 14 ("Here, Deters's adult

{¶ 21} Here, however, Batiste only had one juvenile adjudication. Part of the reason why juvenile adjudications can be considered in adult court is because although they are not "convictions," they are "conduct." On this record, we find that this sole juvenile adjudication does not support the imposition of consecutive sentences. Batiste completed his community control sanctions for his juvenile conviction in 2010 without incident, and approximately nine years passed until he was indicted in this case.

{¶ 22} Nonetheless, we recognize that it is generally accepted that when a defendant commits crimes against more than one victim, consecutive sentences are reasonable to hold the defendant accountable for the crimes committed against the victims. *See, e.g., State v. Thome*, 8th Dist. Cuyahoga No. 104445, 2017-Ohio-963, ¶ 16. It is not mandatory that consecutive sentences be imposed when there is more than one victim, however, and the record still must support the imposition of consecutive terms.

{¶ 23} In this case, we are reminded of this court's discussion in *Metz*, 8th Dist. Cuyahoga Nos. 107212, 107246, 107259, and 107261, 2019-Ohio-4054, regarding lengthy prison sentences: "'lengthy prison sentences do not make the public safer, in part, because long-term sentences produce diminishing returns for public safety as individuals age out of the high-crime years.'" *Id.* at ¶ 103, quoting

---

record was short: he had only a receiving-stolen-property conviction. But he was only 18 years old at the time of the offenses; he had not yet had time to build up his adult record. And his juvenile record was long and replete with other violent offenses.").

Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. Rev. 121 (2018).

{¶ 24} The *Metz* court also addressed the occurrence of "aging out of crime." Specifically, research has shown that criminal behavior peaks in the mid- to-late-teenage years, begins to decline when individuals are in their mid-20s, and thereafter, "drops sharply as adults reach their 30s and 40s." *Id.* Thus, "'[b]ecause recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous offenders, are an inefficient approach to preventing crime by incapacitation.'" *Id.*, quoting the National Research Council.

{¶ 25} Finally, Batiste is African-American and, thus, this sentence raises issues regarding the racial disparities that exist in sentencing in our criminal justice system. As I noted as the dissent in *State v. Franklin*, 8th Dist. Cuyahoga No. 107482, 2019-Ohio-3760:

> In 2014, there were 289 per 100,000 whites in prison versus 1,625 per 100,000 imprisoned blacks. Shadow Report to the United Nations on Racial Disparities in the United States Criminal Justice System (Aug. 31, 2013), racial-disparities-in-the-united-states-criminal-justice-system (accessed May 8, 2019). "Racial minorities are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences." *Id.* At the current rates of incarceration, 1 in 3 black men can expect to go to prison in their lifetime. Sentencing Policy, https://www.sentencingproject.org/issues/sentencing-policy (accessed May 8, 2019).

Id. at ¶ 77 (Jones, J., dissenting); *see also id.* at ¶ 79-80 (Jones, J., dissenting).

> We do not take our position on the consecutive sentences in this case lightly. But for too long appellate courts, including this one, have been too much of a "rubber stamp" when it comes to sentencing, especially in instances of excessive, consecutive sentences. And we certainly are aware that there are instances when severe, lengthy sentences are appropriate either to protect the public, punish the offender, or both. We just do not find that to be the case here.

Metz at ¶ 109.

{¶ 26} Similarly here, we do not find that this case justifies an excessive, lengthy consecutive sentence. In light of the above, the first assignment of error is well taken.

{¶ 27} We clearly and convincingly find that the record does not support the trial court's findings for the imposition of consecutive sentences under R.C. 2929.14(C)(4). Thus, on the authority contained in Section 3(B)(2), Article IV of the Ohio Constitution and R.C. 2953.08(G)(2)(b), we vacate the sentence and remand for resentencing.

{¶ 28} Based on our resolution of the first assignment of error, the second assignment of error is moot and we decline to address it. App.R. 12(A)(1)(c).

{¶ 29} Judgment vacated; case remanded.

It is ordered that appellant recover from appellee 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.

LARRY A. JONES, SR., JUDGE

KATHLEEN ANN KEOUGH, J., CONCURS;
EILEEN T. GALLAGHER, A.J., CONCURS
IN JUDGMENT ONLY