

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 109092
	:	
v.	:	
	:	
RODNEY HOLLIS,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED AND REMANDED
RELEASED AND JOURNALIZED: November 12, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-19-639152-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anna Faraglia, Daniel T. Van, and Tasha L. Forchione, Assistant Prosecuting Attorneys, *for appellee*.

Joseph V. Pagano, *for appellant*.

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant Rodney Hollis brings the instant appeal challenging his indefinite prison sentence of 18 to 22 years for two counts of rape, kidnapping, and felonious assault. Appellant argues that his sentence is contrary to law because the record does not support the imposition of consecutive sentences,

and that the sentence is invalid because the sentencing provisions under Senate Bill 201, Am.Sub.S.B. No. 201, commonly known as the Reagan Tokes Act, are unconstitutional. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶ 2} This appeal pertains to an incident that occurred on April 1, 2019. Following her shift at Progressive Field, the victim was enjoying a drink at a bar while she waited for her boyfriend to pick her up. Appellant initiated a conversation with the victim, and they spoke with one another inside the bar. The victim left the bar and walked to a nearby bus shelter where she waited for her boyfriend.

{¶ 3} Appellant followed the victim to the bus shelter. The encounter between appellant and the victim was captured by an RTA surveillance camera, and the video footage was played in open court during the sentencing hearing. After pacing back and forth in front of the victim and removing his jacket and outer clothing, appellant placed one hand and arm across the victim's neck and used his other arm to restrain the victim and prevent her from fighting back. Appellant removed the victim's pants and underwear and sexually assaulted her. The victim lost consciousness during the assault.¹ At one point in the video, appellant is seen putting his clothing back on and getting up off of the ground; at this point the victim is still laying on the ground. When the victim tried to get up off of the ground,

¹ It is unclear whether the victim lost consciousness when appellant had his hand and arm on her neck, or when he slammed her to the ground causing her head to strike the pavement. (Tr. 59, 61.)

appellant pushed her back down onto the bench at the bus shelter. Appellant slammed the victim to the ground causing her head to hit the pavement.

{¶ 4} The victim was eventually able to get the attention of two pedestrians walking by. One of the pedestrians called 911. The video shows appellant walking away from the bus shelter as Cleveland police and EMS personnel arrived on the scene. The victim was taken to the hospital, and a rape-kit examination was performed. The victim spoke with investigators and identified appellant as the individual that attacked her at the bus shelter.

{¶ 5} Appellant was arrested. When appellant spoke to police, he maintained that the encounter with the victim was consensual.

{¶ 6} Appellant was charged for his involvement in the April 1, 2019 incident. In Cuyahoga C.P. No. CR-19-639152-A, a Cuyahoga County Grand Jury returned an 11-count indictment on April 18, 2019, charging appellant with (1) rape, in violation of R.C. 2907.02(A)(2), (2) rape, in violation of R.C. 2907.02(A)(1)(c), (3) kidnapping, in violation of R.C. 2905.01(A)(4), (4) felonious assault, in violation of R.C. 2903.11(A)(1), (5)-(6) kidnapping, in violation of R.C. 2905.01(A)(4), (7) felonious assault, in violation of R.C. 2903.11(A)(1), (8) rape, in violation of R.C. 2907.02(A)(2), (9) felonious assault, in violation of R.C. 2903.11(A)(1), (10) rape, in violation of R.C. 2907.02(A)(2), and (11) felonious assault, in violation of R.C. 2903.11(A)(1). Counts 1, 2, 4, 8, and 10 contained sexually violent predator, notice of prior conviction, and repeat violent predator specifications. Counts 3, 5, 6, 7, 9,

and 11 contained notice of prior conviction, repeat violent offender, sexual motivation, and sexually violent predator specifications.

{¶ 7} Appellant was arraigned on April 23, 2019. He pled not guilty to the indictment.

{¶ 8} The parties reached a plea agreement during pretrial proceedings. On July 8, 2019, appellant pled guilty to an amended Count 1 without the underlying specifications; an amended Count 2 without the underlying specifications; an amended Count 3 with the sexual motivation specification, but without the underlying notice of prior conviction, repeat violent offender, and sexually violent predator specifications; and an amended Count 4 without the underlying specifications. The remaining counts and specifications were nolle.

{¶ 9} The trial court referred appellant to the probation department for a presentence investigation report. The trial court also referred appellant to the court psychiatric clinic for an examination pursuant to R.C. 2947.06(B). The trial court advised appellant that he would be classified a Tier III sex offender.

{¶ 10} During the change-of-plea hearing, the trial court explained the change in felony sentencing pursuant to the Reagan Tokes Act. (Tr. 16-22.) The trial court also advised appellant that the Reagan Tokes Act applied to Counts 1, 2, 3, and 4, such that the sentences on these counts were indefinite sentences, and that the maximum sentences on Counts 1, 2, and 3 was 16 and one-half years, and the maximum sentence on Count 4 was up to 12 years.

{¶ 11} Defense counsel asserted, in the context of the Reagan Tokes Act and the possibility of an offender's sentence being extended, "[w]e did talk about the Parole Board. I used that term to explain a possible hearing." (Tr. 18.) Defense counsel did not raise a constitutional challenge to the Reagan Tokes Act during the change-of-plea hearing.

{¶ 12} The trial court held a sentencing hearing on September 10, 2019. The trial court sentenced appellant to a prison term of eight years on Count 1, three years on Count 2, five years on Count 3, and two years on Count 4. The trial court ordered the counts to run consecutively to one another. The trial court's sentencing journal entry provides, in relevant part,

The court imposes prison terms consecutively finding that consecutive service is necessary to protect the public from future crime or to punish defendant; that the consecutive sentences are not disproportionate to the seriousness of defendant's conduct and to the danger defendant poses to the public; and that, defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by defendant.

{¶ 13} Pursuant to the Reagan Tokes Act, the trial court imposed an indefinite sentence, with an aggregate minimum prison term of 18 years and an aggregate maximum prison term of 22 years. The trial court explained that the Reagan Tokes Act applied to Counts 1, 2, 3, and 4 because they were all qualifying offenses. The trial court advised appellant about the presumptive release date pursuant to R.C. 2967.271(B), and that the presumption can be rebutted by the Ohio Department of Rehabilitation and Correction ("ODRC"). The trial court advised appellant that if ODRC rebuts the presumption, appellant's sentence may be

extended for a period that does not exceed the maximum prison term imposed by the trial court pursuant to R.C. 2967.271(C). (Tr. 74-80.) Defense counsel did not raise a constitutional challenge to the Reagan Tokes Act during the sentencing hearing.

{¶ 14} On October 8, 2019, appellant filed the instant appeal challenging the trial court's sentence. He assigns two errors for review:

I. Appellant's sentence is contrary to law because the record does not support the imposition of consecutive sentences.

II. Appellant's sentence is invalid because it was imposed pursuant to the Reagan Tokes Act Amendments, S.B. 201, which violates the United States and Ohio Constitutions.

II. Law and Analysis

A. Consecutive Sentences

{¶ 15} In his first assignment of error, appellant argues that the trial court erred in imposing consecutive sentences.

{¶ 16} We review felony sentences under the standard set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 16. R.C. 2953.08(G)(2) provides that when reviewing felony sentences, a reviewing court may overturn the imposition of consecutive sentences where the court "clearly and convincingly" finds that (1) "the record does not support the sentencing court's findings under R.C. 2929.14(C)(4)," or (2) "the sentence is otherwise contrary to law."

{¶ 17} R.C. 2929.14(C)(4) provides that in order to impose consecutive sentences, the trial court must find that consecutive sentences are (1) necessary to

protect the public from future crime or to punish the offender, (2) that such sentences would not be disproportionate to the seriousness of the conduct and to the danger the offender poses to the public, and (3) that 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.

{¶ 18} Conformity with R.C. 2929.14(C)(4) requires the trial court to make the statutory findings at the sentencing hearing, which means that “the [trial] court must note that it engaged in the analysis’ and that it ‘has considered the statutory criteria and specific[d] which of the given bases warrants its decision.’” *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 26, quoting *State v. Edmonson*, 86 Ohio St.3d 324, 326, 715 N.E.2d 131 (1999). To this end, a reviewing court must be able to ascertain from the record evidence to support the trial court's findings. *Bonnell* at ¶ 29. “A trial court is not, however, required to state its reasons to support its findings, nor is it required to [recite verbatim] the statutory language, ‘provided that the necessary findings can be found in the record and are

incorporated in the sentencing entry.” *State v. Sheline*, 8th Dist. Cuyahoga No. 106649, 2019-Ohio-528, ¶ 176, quoting *Bonnell* at ¶ 37.

{¶ 19} In the instant matter, appellant first argues that “the [trial] court failed to make all of the findings necessary to justify the imposition of consecutive sentences.” Appellant’s brief at 10. Specifically, appellant contends that the trial court failed to make the second R.C. 2929.14(C)(4) finding, known as the proportionality finding.

{¶ 20} In making the first two findings under R.C. 2929.14(C)(4), the trial court stated, “[g]enerally, the law states that concurrent terms of imprisonment are — there is a presumption of concurrent terms; however, the court does have discretion to impose consecutive sentences, if necessary, to protect the public and/or punish the offender and *it cannot be disproportionate to the crime.*” (Emphasis added.) (Tr. 72.)

{¶ 21} The trial court’s statement that consecutive sentences “cannot be disproportionate to the crime” is sufficient to constitute a finding that consecutive sentences are not disproportionate to “the seriousness of the offender’s conduct” under R.C. 2929.14(C)(4). The trial court made this statement after detailing appellant’s criminal history that dated back to 2001. Appellant’s criminal history included a juvenile adjudication of delinquency and convictions for kidnapping with a sexual motivation specification and attempted rape for which he served eight years in prison (2005), failure to provide a notice of change of address (2013), petty theft (2014), and simple assault (2018). The trial court emphasized, “I do not find that

[appellant has] led a law-abiding life for a significant number of years. And based on the fact that he already had a prior sex offense, I cannot find that this offense was committed under circumstances unlikely to reoccur.” (Tr. 72.)

{¶ 22} As noted above, however, there are two components to the proportionality finding under R.C. 2929.14(C)(4). The trial court is required to find that consecutive sentences are not disproportionate to *both* (1) the seriousness of the offender’s conduct, *and* (2) the danger the offender poses to the public.

{¶ 23} The record reflects that the trial court did not make an explicit, specific finding that consecutive sentences were not disproportionate to the danger appellant poses to the public. However, the trial court’s statements during the sentencing hearing, when viewed in their entirety, clearly indicate that the trial court considered proportionality with respect to both the seriousness of appellant’s conduct and the danger appellant posed to the public. *See State v. Hicks*, 8th Dist. Cuyahoga No. 107055, 2019-Ohio-870, ¶ 14-16, citing *State v. Gonzalez*, 8th Dist. Cuyahoga No. 105952, 2018-Ohio-1302, ¶ 11-13; *see also State v. McGowan*, 8th Dist. Cuyahoga No. 105806, 2018-Ohio-2930, ¶ 19-25 (the trial court’s failure to explicitly make the proportionality finding did not preclude the imposition of consecutive sentences where trial court’s statements during the sentencing hearing, when viewed in their entirety, indicated that the court considered proportionality both with regard to the seriousness of defendant’s conduct and the danger he posed to the public); *State v. Morris*, 2016-Ohio-7614, 73 N.E.3d 1010, ¶ 27-34 (8th Dist.) (the proportionality finding could be discerned from the record and the trial court’s

statement that “consecutive sentences in this matter are necessary to protect and punish [and] are not disproportionate” combined with its statements regarding defendant’s criminal history, the danger defendant posed to the public in failing to report his whereabouts, and the fact the crimes at issue were committed while defendant was on postrelease control for an “identical offense”); *State v. Amey*, 8th Dist. Cuyahoga Nos. 103000 and 103001, 2016-Ohio-1121, ¶ 15-19 (trial court’s statement that consecutive sentences “would not be disproportionate” combined with statements regarding defendant’s extensive criminal history and the trial court’s statement that defendant had not “responded favorably to sanctions previously imposed” satisfied proportionality finding); *State v. Cooperwood*, 8th Dist. Cuyahoga Nos. 99309, 99310 and 99311, 2013-Ohio-3432, ¶ 40 (the trial court’s statement that consecutive sentences “would not be disproportionate,” when viewed “in its context,” constituted a proportionality finding that complied with R.C. 2929.14(C)(4)); *State v. Blevins*, 2017-Ohio-4444, 93 N.E.3d 246, ¶ 18-23 (8th Dist.) (although the trial court only made a specific finding that consecutive sentences were not disproportionate to the seriousness of defendant’s conduct, the trial court’s statements on the record at sentencing, when viewed in their entirety, clearly indicated that the court considered proportionality with regard to both the seriousness of defendant’s conduct and the danger the defendant posed to the public).

{¶ 24} After reviewing the record from the sentencing hearing, we are able to discern from the trial court’s statements that the trial court found both that

consecutive sentences are not disproportionate to the seriousness of appellant's conduct and are not disproportionate to the danger appellant poses to the public. As noted above, the trial court detailed appellant's lengthy criminal history, his prior conviction for attempted rape and kidnapping, and appellant's failure to respond favorably to the sanctions imposed in juvenile court or his eight-year prison sentence. As set forth in further detail below, the trial court also detailed the "great or unusual harm" — particularly the physical harm — that appellant's conduct caused the victim. (Tr. 73.) "[T]he trial court's failure to identify the factors — or 'the reasons' — that were considered in its proportionality analysis does not render the consecutive sentences contrary to law." *Blevins* at ¶ 20, quoting *State v. Crawley*, 8th Dist. Cuyahoga No. 102781, 2015-Ohio-5150, ¶ 12-13.

{¶ 25} The record reflects that the trial court made the third required finding during the sentencing hearing. In making the third finding, the trial court determined that R.C. 2929.14(C)(4)(b) and (c) applied:

I cannot make the finding that the crimes committed were while [appellant] was awaiting trial or sentencing, or that he was under a sanction or under post-release control. I don't see that in my file.

I can make the finding, however, that the harm in this matter was so great or unusual that a single term does not adequately reflect the seriousness of the conduct. Again, this is based on multiple factors that happened in this case, one being the victim's testimony, her statement to the Court today; the physical harm that was imposed upon her in addition to the rapes that happened, those being the basis of the felonious assault, having her head slammed into the ground, the fact that she did lose consciousness during the course of the event. So I can make that finding based on the conduct that was observed on the video.

And I do find that his criminal history specifically related to a prior kidnapping and attempted rape show that consecutive terms are needed to protect the public.

(Tr. 72-73.)

{¶ 26} Finally, the trial court incorporated its consecutive-sentence findings into its September 10, 2019 sentencing journal entry, as required by *Bonnell*. The trial court’s sentencing journal entry provides, in relevant part,

The court imposes prison terms consecutively finding that consecutive service is necessary to protect the public from future crime or to punish defendant; that the consecutive sentences are not disproportionate to the seriousness of defendant’s conduct and to the danger defendant poses to the public; and that, defendant’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by defendant.

{¶ 27} For all of the foregoing reasons, we find that the trial court made the requisite findings during the sentencing hearing under R.C. 2929.14(C)(4) in imposing consecutive sentences, and incorporated the findings into its sentencing journal entry.

{¶ 28} Appellant further contends that even if the trial court made the requisite findings, the imposition of consecutive sentences was not supported by the record. Specifically, appellant argues that consecutive sentences “are in excess of what is necessary to incapacitate [him], deter him from committing future crimes and to rehabilitate him.” Appellant’s brief at 13. In support of this argument, appellant asserts that the trial court did not “adequately explain why appellant’s conduct required the imposition of consecutive sentences” and that the trial court

failed to “give any consideration to [appellant’s] mental health issues.” Appellant’s brief at 14.

{¶ 29} After reviewing the record, we cannot say that the record clearly and convincingly does not support the trial court’s findings under R.C. 2929.14(C)(4). Regarding appellant’s adequate explanation argument, as noted above, the trial court is not required to state any reasons to support its consecutive-sentencing findings. *Sheline*, 8th Dist. Cuyahoga No. 106649, 2019-Ohio-528, at ¶ 176, citing *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at ¶ 37.

{¶ 30} Appellant’s argument that the trial court failed to consider his mental health issues is entirely unsupported by the record. During the sentencing hearing, the prosecutor asserted that “the [s]tate appreciates the mental illness that one has” but argued that mental illness “doesn’t excuse one’s behavior.” (Tr. 60.) The prosecutor further stated, “[w]e live in a civilized society, and until we find a place to assist people with mental health problems, this will continue; but until then, [appellant] needs to be incarcerated so he doesn’t do it again.” (Tr. 61.)

{¶ 31} Defense counsel detailed appellant’s difficult upbringing and involvement in the foster care system. Furthermore, defense counsel asserted, “[appellant] has an IQ of 67. He has PTSD. He has a tenth grade education after repeating three separate grades through elementary school. Woefully inadequate education. * * * Chronic severe depression.” (Tr. 66.)

{¶ 32} The record reflects that the trial court took the statements made by the prosecutor and defense counsel during the sentencing hearing into

consideration. The trial court viewed a video of the April 1, 2019 incident and took the victim's statement into consideration. At the outset of the sentencing hearing, the trial court stated that it reviewed appellant's presentence investigation report, the report completed by the court psychiatric clinic, and the state's sentencing memorandum. (Tr. 45.) In determining whether appellant was likely to reoffend in the future, the trial court stated, "I don't have any indication that there is a pattern of drug or alcohol use in [appellant's] PSI, however, they do diagnose him with cannabis disorder, severe, in the court psychiatric clinic. Also, alcohol use disorder, severe." (Tr. 71.)

{¶ 33} Regarding the April 1, 2019 incident, appellant forcibly slammed the victim to the ground. Appellant slammed the victim's head into the cement pavement. During the assault, appellant had his hand or arm across the victim's neck. The victim lost consciousness during the assault. (Tr. 59, 61.) In addition to violently attacking the victim and causing physical harm, appellant raped the victim.

{¶ 34} Appellant became involved in the juvenile system in 2001 and has an adult criminal history dating back to 2004. Appellant has prior convictions for kidnapping and attempted rape. According to defense counsel, following appellant's prior kidnapping and attempted rape convictions, appellant "spent almost a year in Columbus going through a child sexual rehabilitation program[.]" (Tr. 67.) Although defense counsel asserted that appellant "seemed to do very well" during the period of time he was in that program, the program did not effectively modify appellant's conduct. Furthermore, neither appellant's involvement in the juvenile

system nor eight-year prison sentence for kidnapping and attempted rape effectively modified appellant's conduct.

{¶ 35} For all of the foregoing reasons, we find that the record before this court clearly and convincingly supports the trial court's R.C. 2929.14(C)(4) findings. Because the trial court made the requisite findings during the sentencing hearing under R.C. 2929.14(C)(4), incorporated the findings into its sentencing journal entry, and the findings are clearly and convincingly supported by the record, the trial court did not err in imposing consecutive sentences.

{¶ 36} We note that the trial court's sentencing journal entry contains a clerical error. As noted above, regarding the third consecutive-sentence finding, the trial court determined that R.C. 2929.14(C)(4)(b) and (c) applied during the sentencing hearing. The trial court's sentencing journal entry, however, only contains the R.C. 2929.14(C)(4)(c) finding. This clerical error can be corrected through a nunc pro tunc sentencing entry to accurately reflect the findings made by the trial court during the sentencing hearing. *See Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at ¶ 30, citing *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 15.

{¶ 37} Finally, in order to preserve the issue for further appellate review, and as an alternative basis for modifying the trial court's sentence, appellant appears to argue that the trial court's imposition of consecutive sentences and an aggregate prison term of 18 to 22 years is contrary to law based on the sentencing factors set forth in R.C. 2929.11 and 2929.12. Appellant concedes that the trial court is not

required to make specific findings regarding its consideration of the sentencing factors under R.C. 2929.11 and 2929.12.

{¶ 38} A sentence is contrary to law if the sentence falls outside the statutory range for the particular degree of offense or the trial court failed to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11, and the seriousness and recidivism factors set forth in R.C. 2929.12. *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. Unlike R.C. 2929.14(C)(4), governing consecutive sentences, R.C. 2929.11 and 2929.12 are not fact-finding statutes. *State v. Wenmoth*, 8th Dist. Cuyahoga No. 103520, 2016-Ohio-5135, ¶ 16.

{¶ 39} Although the trial court must consider the principles and purposes of sentencing, as well as any mitigating factors, the court is not required to use particular language nor 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. Jones*, 8th Dist. Cuyahoga No. 99759, 2014-Ohio-29, ¶ 13. In fact, unless the defendant affirmatively shows otherwise, it is presumed that the trial court considered the relevant sentencing factors under R.C. 2929.11 and 2929.12. *State v. Keith*, 8th Dist. Cuyahoga Nos. 103413 and 103414, 2016-Ohio-5234, ¶ 11. This court has held that a trial court's statement in its sentencing journal entry that it considered the required statutory factors, without more, is sufficient to fulfill its obligations under R.C. 2929.11 and 2929.12. *State v. Paulino*, 8th Dist. Cuyahoga No. 104198, 2017-Ohio-15, ¶ 37.

{¶ 40} In the instant matter, the trial court’s sentences are within the permissible statutory ranges for first-degree and second-degree felonies set forth in R.C. 2929.14(A)(1) and (2). The trial court’s sentencing journal entry provides, in relevant part, “[t]he court considered all required factors of the law. The court finds that prison is consistent with the purpose of R.C. 2929.11.” Aside from the trial court’s notation in the sentencing entry, the record reflects that the trial court did, in fact, consider both R.C. 2929.11 and 2929.12 when sentencing appellant.

{¶ 41} During the sentencing hearing, the trial court explicitly referenced the overriding purposes and principles of felony sentencing. (Tr. 68.) The trial court went on to discuss the applicable R.C. 2929.12 factors in determining an appropriate sentence. (Tr. 69-72.) Appellant’s sentence is not contrary to law merely because he disagrees with the way in which the trial court weighed the R.C. 2929.11 and 2929.12 factors and applied these factors in crafting an appropriate sentence. *See State v. Nelson*, 8th Dist. Cuyahoga No. 106858, 2019-Ohio-530, ¶ 25, citing *State v. Mock*, 8th Dist. Cuyahoga No. 105060, 2017-Ohio-8866, ¶ 21.

{¶ 42} For all of the foregoing reasons we find that the trial court’s indefinite, aggregate prison term of 18 to 22 years in prison is not contrary to law.

{¶ 43} Appellant’s first assignment of error is overruled.

B. Reagan Tokes Act

{¶ 44} As noted above, the trial court sentenced appellant pursuant to the indefinite sentencing scheme set forth under the Reagan Tokes Act. In his second assignment of error, appellant argues that his sentence is invalid because the Reagan

Tokes Act is unconstitutional. Specifically, appellant contends that the Reagan Tokes Act violates the separation of powers doctrine, his right to due process, and his right to a jury trial.

The Reagan Tokes Law (S.B. 201) was enacted in 2018 and became effective on March 22, 2019. R.C. 2901.011. Under the law, qualifying first- and second-degree felonies committed on or after March 22, 2019 are now subject to the imposition of indefinite sentences. The law specifies that these indefinite terms will consist of a minimum term selected by the sentencing judge from a range of terms set forth in R.C. 2929.14(A) and a maximum term determined by formulas set forth in R.C. 2929.144.

Additionally, the law establishes a presumptive release date at the end of the minimum term imposed. R.C. 2967.271(B). However, the Ohio Department of Rehabilitation and Correction (ODRC) may rebut that presumption and keep the offender in prison for an additional period not to exceed the maximum term imposed by the sentencing judge. R.C. 2967.271(C).

State v. Barnes, 2d Dist. Montgomery No. 28613, 2020-Ohio-4150, ¶ 28-29.

{¶ 45} Appellant committed the acts giving rise to this case on April 1, 2019, and the offenses to which he pled guilty, rape, kidnapping, and felonious assault, were qualifying felonies of the first- and second-degree. R.C. 2929.144, governing maximum prison terms for qualifying felonies committed on or after March 22, 2019, provides, in relevant part,

(B) The court imposing a prison term on an offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree shall determine the maximum prison term that is part of the sentence in accordance with the following:

* * *

(2) If the offender is being sentenced for more than one felony, if one or more of the felonies is a qualifying felony of the first or second

degree, and if the court orders that some or all of the prison terms imposed are to be served consecutively, the court shall add all of the minimum terms imposed on the offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree that are to be served consecutively and all of the definite terms of the felonies that are not qualifying felonies of the first or second degree that are to be served consecutively, and the maximum term shall be equal to the total of those terms so added by the court plus fifty per cent of the longest minimum term or definite term for the most serious felony being sentenced.

{¶ 46} As noted above, the trial court imposed an indefinite sentence pursuant to the Reagan Tokes Act and ordered appellant to serve the four counts consecutively. Pursuant to R.C. 2929.144(B)(2), the trial court imposed an indefinite sentence with a minimum aggregate prison term of 18 years and a maximum aggregate prison term of 22 years.

{¶ 47} The record reflects that appellant failed to raise a constitutional challenge to the Reagan Tokes Act — either during the change-of-plea hearing or sentencing hearing — in the trial court.

The “[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state’s orderly procedure, and therefore need not be heard for the first time on appeal.” *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus. *See also State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15 (courts have discretion to decline consideration of forfeited constitutional challenges raised for the first time on appeal).

State v. Young, 8th Dist. Cuyahoga No. 108868, 2020-Ohio-4135, ¶ 20.

{¶ 48} In *State v. Dames*, 8th Dist. Cuyahoga No. 109090, 2020-Ohio-4991, the defendant-appellant filed an appeal challenging the trial court’s indefinite sentence of seven to ten and one-half years, imposed pursuant to the Reagan Tokes

Act. On appeal, the defendant argued that the Reagan Tokes Act violated the constitutions of the United States and the state of Ohio. However, the defendant failed to object to the trial court's imposition of an indefinite sentence or challenge the constitutionality of the Reagan Tokes Act in the trial court. This court recently declined to address defendant's constitutional challenge to the Reagan Tokes Act, concluding that he "failed to preserve his claim challenging the constitutionality of the Reagan Tokes Act[.]" *Id.* at ¶ 12. This court also recognized that the defendant failed to present a plain error argument on appeal, nor demonstrate that plain error occurred below. *Id.* at ¶ 13-14. Finally, although appellate courts have discretion to consider constitutional challenges to the application of a statute despite a party's forfeiture of the constitutional challenge, this court declined to exercise this discretion because (1) statutes are presumed to be constitutional, (2) the trial court did not address the constitutionality of the Reagan Tokes Act, and (3) defendant did not raise a plain error argument on appeal. (Citations omitted.) *Id.* at ¶ 15-18.

{¶ 49} In the instant matter, the trial court detailed the effect of the Reagan Tokes Act on appellant's sentence at both the change-of-plea and sentencing hearings. Like *Dames*, appellant and his counsel had multiple opportunities to object to the application of the Reagan Tokes Act or raise a constitutional challenge to the Act in the trial court. Like *Dames*, appellant failed to do so, and as a result, has forfeited his constitutional challenge to the Reagan Tokes Act. *Dames* at ¶ 12; *see Barnes*, 2d Dist. Montgomery No. 28613, 2020-Ohio-4150, at ¶ 31, 37, citing *State v. Brewer*, 2d Dist. Montgomery No. 26153, 2015-Ohio-693, ¶ 36; *State v.*

Alexander, 12th Dist. Butler No. CA2019-12-204, 2020-Ohio-3838, ¶ 8, citing *State v. Garcia*, 12th Dist. Madison No. CA2019-11-030, 2020-Ohio-3232, ¶ 19, and *Quarterman* at ¶ 20 (the Twelfth District declined to address defendant-appellant's constitutional challenge to the Reagan Tokes Act because the defendant forfeited the issue by failing to raise his constitutional challenge in the trial court).

{¶ 50} Furthermore, like *Dames*, appellant failed to raise a plain error argument in this appeal, and we decline to construct a plain error argument on appellant's behalf. *Dames* at ¶ 13-14, 18; see *State v. Conant*, 4th Dist. Adams No. 20CA1108, 2020-Ohio-4319, ¶ 40 (declining to address defendant-appellant's constitutional challenge to the Reagan Tokes Act on appeal because the defendant did not challenge the constitutionality of the Reagan Tokes Act in the trial court at sentencing and did not raise a plain error argument on appeal). Accordingly, we decline to address the issue for the first time in this appeal. See *Dames* at ¶ 12; *Young*, 8th Dist. Cuyahoga No. 108868, 2020-Ohio-4135, at ¶ 21.

{¶ 51} We recognize the Ohio Supreme Court's holding in *Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, that appellate courts may still review a forfeited constitutional issue or a trial court's decision for plain error or "where the rights and interests involved may warrant it." *Id.* at ¶ 16, quoting *In re M.D.*, 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), syllabus. In *Barnes*, the Second District exercised this discretion, reviewing a challenge to the Reagan Tokes Act despite the defendant's failure to object to an indefinite sentence or the Reagan Tokes Act's sentencing provisions in the trial court, and concluded that the Reagan

Tokes Act was constitutional. In the instant matter, however, and for the same reasons based upon which this court declined to exercise this discretion in *Dames*, we decline to exercise this discretion to review appellant's constitutional challenge.

{¶ 52} First, in determining whether a statute is constitutional, this court presumes constitutionality. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 36, citing *State v. Thompkins*, 75 Ohio St.3d 558, 560, 664 N.E.2d 926 (1996). As this court recognized in *Dames*, other appellate courts in the state of Ohio, in applying this presumption of constitutionality, have concluded that the Reagan Tokes Act was constitutional, did not violate the defendants' due process rights, and did not violate the separation of powers doctrine. *Dames*, 8th Dist. Cuyahoga No. 109090, 2020-Ohio-4991, at ¶ 16, citing *State v. Guyton*, 12th Dist. Butler No. CA2019-12-203, 2020-Ohio-3837, *State v. Ferguson*, 2d Dist. Montgomery No. 28644, 2020-Ohio-4153, and *State v. Leet*, 2d Dist. Montgomery No. 28670, 2020-Ohio-4592.

{¶ 53} Second, because appellant did not object to the trial court's imposition of an indefinite sentence nor challenge the constitutionality of the Reagan Tokes Act below, the trial court did not rule on the constitutionality of the Reagan Tokes Act. As this court recognized in *Dames*, "the Ohio Supreme Court has observed that justice is better served when there is a lower court decision to consider." *Dames* at ¶ 17, citing *Sizemore v. Smith*, 6 Ohio St.3d 330, 333, 453 N.E.2d 632 (1983), fn. 2.

{¶ 54} Third, appellant failed to raise a plain error argument with respect to the Reagan Tokes Act, much less make a showing that plain error occurred below.

The Ohio Supreme Court recently held that in order to review a forfeited constitutional challenge, the appellate court “require[s] a showing that there was an error, that the error was plain or obvious, that but for the error the outcome of the proceeding would have been otherwise, and that reversal must be necessary to correct a manifest miscarriage of justice.” *State v. Buttery*, Slip Opinion No. 2020-Ohio-2998, ¶ 7.

{¶ 55} Finally, the state argues that appellant’s constitutional challenge to the Reagan Tokes Act is not ripe for review because the Act’s provisions that authorize the ODRC to extend appellant’s sentence beyond the minimum term imposed by the trial court have not been applied. Because appellant failed to preserve his constitutional challenge to the Reagan Tokes Act, we need not address the state’s ripeness argument. *See Dames*, 8th Dist. Cuyahoga No. 109090, 2020-Ohio-4991, at ¶ 21.

{¶ 56} We note, however, that some of the other appellate districts in the state of Ohio have held that constitutional challenges to the Reagan Tokes Act are not ripe for appellate review. *See State v. Downard*, 5th Dist. Muskingum No. CT2019-0079, 2020-Ohio-4227; *State v. Manion*, 5th Dist. Tuscarawas No. 2020 AP 03 0009, 2020-Ohio-4230; *State v. Kibler*, 5th Dist. Muskingum No. CT2020-0026, 2020-Ohio-4631; *State v. Maddox*, 6th Dist. Lucas No. CL-19-1253, 2020-Ohio-4702. In *Downard*, the Fifth District concluded that the appropriate manner in which to challenge the constitutionality of the Reagan Tokes Act, and specifically the provisions under R.C. 2967.271 governing the presumption of release, is for a

defendant to file a writ of habeas corpus in the event that he or she is not released after serving the minimum sentence imposed by the trial court. *Downard* at ¶ 12.

{¶ 57} During oral arguments, appellant argued that the constitutional issue is, in fact, ripe for review. In support of his assertion, appellant directed this court to *State v. Velliquette*, 6th Dist. Lucas No. L-19-1232, 2020-Ohio-4855. In *Velliquette*, based on prior precedent from the Sixth and Fifth Districts,² the court held that “the issue of constitutionality regarding potential extensions to appellant’s presumed minimum prison term [under the Reagan Tokes Act] to be not ripe for review.” *Id.* at ¶ 32. The Sixth District did, however, recognize that other appellate districts in the state of Ohio have issued conflicting decisions on the ripeness issue:

[w]e note that other jurisdictions have implicitly determined the issue to be ripe for review by addressing the constitutional challenge to the [Reagan] Tokes provisions regarding future, possible extensions of a prison term beyond the presumed minimum term. The Second District Court of Appeals found the law constitutional in *State v. Barnes*, 2d Dist. Montgomery No. 28613, 2020-Ohio-4150, *State v. Leet*, 2d Dist. Montgomery No. 28670, 2020-Ohio-4592, and *State v. Ferguson*, 2d Dist. Montgomery No. 28644, 2020-Ohio-4153. The Twelfth District Court of Appeals also determined the law was constitutional in *State v. Guyton*, 12th Dist. Butler No. CA2019-12-203, 2020-Ohio-3837, *State v. Rogers*, 12th Dist. No. Butler CA2019-11-194, 2020-Ohio-4102, and *State v. Morris*, 12th Dist. Butler No. CA2019-12-205, 2020-Ohio-4103.

Velliquette at ¶ 30. Based on these conflicting decisions, the *Velliquette* court certified a conflict, sua sponte, to the Ohio Supreme Court for a review and determination on the issue of whether the sentencing provisions under the Reagan

² *Maddox*, 6th Dist. Lucas No. L-19-1253, 2020-Ohio-4702, ¶ 13; *Manion*, 5th Dist. Tuscarawas No. 2020 AP 03 0009, 2020-Ohio-4230; and *Downard*, 5th Dist. Muskingum No. CT2019-0079, 2020-Ohio-4227.

Tokes Act are ripe for review on direct appeal. *Id.* at ¶ 32. The matter is currently pending in the Ohio Supreme Court.³

{¶ 58} For all of the foregoing reasons, appellant's second assignment of error is overruled.

{¶ 59} Judgment affirmed. This case is remanded to the trial court for the limited purpose of issuing a nunc pro tunc sentencing entry accurately reflecting the consecutive-sentence findings made by the trial court during the sentencing hearing.

It is ordered that 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 convictions having been affirmed, any bail pending is terminated. Case remanded to the trial court for correction of the journal entry.

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

FRANK D. CELEBREZZE, JR., JUDGE

EILEEN T. GALLAGHER, A.J., and
MICHELLE J. SHEEHAN, J., CONCUR

³ Ohio Supreme Court Case No. 2020-1243.