[Cite as *State v. Scott*, 2021-Ohio-1823.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 100085
v.	:	
CLYDE SCOTT,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: May 27, 2021

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-11-557947-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Frank Romeo Zeleznikar, Assistant Prosecuting Attorney, *for appellee*.

Scott J. Friedman, *for appellant*.

EMANUELLA D. GROVES, J.:

{¶ 1} Defendant-appellant Clyde Scott ("Scott") appeals the trial court's judgment resentencing him to 24 years of imprisonment. For the reasons set forth below, we reverse and remand for another sentencing hearing.

Procedural and Factual History

{¶ 2} In January 2012, the grand jury indicted Scott on 12 counts for offenses against two separate victims that occurred on or about December 26, 2011. For the alleged acts against victim Marion Polk ("Polk"), the grand jury indicted Scott with kidnapping, two counts of felonious assault, two counts of aggravated robbery, and one count of theft. For the alleged acts against victim Carlos Williams ("Williams"), the grand jury indicted Scott with one count of kidnapping, one count of felonious assault, one count of aggravated robbery, and one count of theft. The grand jury also indicted Scott with two counts of having weapons while under disability. In addition, the kidnapping, aggravated robbery, and felonious assault charges carried one- and three-year firearm specifications.

{¶ 3} At his arraignment, Scott pled not guilty to the charges. The matter proceeded to trial, and the jury found Scott guilty on all counts, except felonious assault as to the victim, Williams. In July 2012, the court sentenced Scott on all counts to an aggregate sentence of 24 years in prison. Scott timely appealed his convictions.

{¶ 4} In *State v. Scott*, 8th Dist. Cuyahoga No. 98809, 2013-Ohio-1559, we affirmed Scott's conviction for the offenses of kidnaping, felonious assault, aggravated robbery, theft, and having weapons while under disability. We vacated Scott's sentence and remanded the matter for a new sentencing hearing because the trial court failed to merge allied offenses of similar import. Scott did not timely appeal this decision to the Ohio Supreme Court.

{¶ 5} In June 2013, pursuant to our remand order, the trial court resentenced Scott and merged Counts 1, 3, 4, and 5 (kidnapping, aggravated robbery, and theft with respect to the victim Polk), Counts 2 and 3 (felonious assault also with respect to the victim Polk), and Counts 7, 8, and 10 (kidnapping, aggravated robbery, and theft with respect to the victim Williams). The state elected to proceed to sentence on Count 2 (felonious assault), Count 4 (aggravated robbery), and Count 8 (aggravated robbery). Count 11 (having weapons while under disability with respect to the victim Polk) was not subject to merger. The trial court merged all firearm specifications pertaining to each victim. The trial court then sentenced Scott to 8 years on Count 2, to run concurrent to 9 years on Count 4, which was to run consecutive to the 3-year firearm specification, for a total of 12 years on those counts. The trial court sentenced Scott to 9 years on Count 8, consecutive to the 3-year firearm specification, for a total of 12 years. The trial court ordered Scott to serve the 12-year sentences consecutively and imposed a concurrent sentence of 3 years for Count 11 (having weapons while under disability).

{¶ 6} Because the concurrent and consecutive nature of the counts remained the same as previously imposed, the aggregate prison sentence remained 24 years. However, the sentence the trial court imposed on Count 2 was increased from six to eight years. We note, although the sentencing entry reflects that Counts 2 and 3 had been merged, it incorrectly states that "all six counts merge" and does not reflect the state's election or the eight-year concurrent sentence that the trial

court imposed on Count 2. The state concedes this error can be corrected upon remand.

{¶ 7} In July 2013, Scott, pro se, filed a notice of appeal with this court. Scott moved for the appointment of appellate counsel, but the trial court denied his motion. In August 2013, we, sua sponte, dismissed Scott's appeal because he failed to file the record. Scott did not file a timely appeal to the Ohio Supreme Court.

{¶ 8} In October 2013, Scott, pro se, filed a notice of appeal and motion for leave to file a delayed appeal with this court. In his motion for leave, Scott argued that his appeal from the resentencing judgment was untimely because neither the court nor his attorney had advised him of his right to appeal or the 30-day time frame for filing an appeal. Scott also moved for appointment of counsel in the trial court, but his motion was denied. In November 2013, we denied Scott's motion for leave to file a delayed appeal and dismissed his case. Scott did not file a timely appeal to the Ohio Supreme Court.

{¶ 9} In December 2013, Scott filed three, pro se motions in the trial court. (1) "Motion for a Final Approachable [sic] Order," arguing that his sentence was void because he had not been advised of his appellate rights by the court, (2) "Motion to Revise and Correct the Sentencing Entry," and (3) "Motion for Leave Order to Motion for New Trial Order." The trial court denied all three motions. Scott did not appeal any of these rulings.

{¶ 10} In that same month, pursuant to App.R. 26(B), Scott, pro se, filed an application for reopening his initial direct appeal. In the application for reopening,

Scott argued that his appellate counsel was ineffective for failing to raise claims of ineffective assistance of trial counsel and that the verdict was against the manifest weight of the evidence. In February 2014, this court denied Scott's application for reopening as untimely and found that he had not demonstrated good cause for his untimely application. *State v. Scott*, 8th Dist. Cuyahoga No. 98809, 2014-Ohio-379. Scott did not appeal to the Ohio Supreme Court.

{¶ 11} In June 2014, Scott, pro se, filed a petition for a writ of habeas corpus in federal court wherein he argued that the common pleas court possessed no jurisdiction to bring him to trial, thus making the judgment of conviction void. Additionally, Scott argued he was denied the right to appeal, right to appellate counsel, and records at state's expense. Further, Scott claimed that the trial court did not advise him of his fundamental right to appeal ultimately denying him his rights to liberty, procedural, and substantive due process of law, and equal protection under the laws. The writ of habeas corpus was dismissed in part and denied in part.[1]

{¶ 12} In September 2014, Scott, pro se, filed a notice of appeal, and a motion for delayed appeal in the Ohio Supreme Court, attempting to appeal our affirmance of his original conviction and judgment dismissing his appeal of his resentencing. As cause for filing his delayed appeal, Scott stated that he was

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[1] The ground in the petition that fails on the merits results in a denial, and the ground that is procedurally defaulted results in a dismissal. Scott did not demonstrate by clear and convincing evidence that the state court's findings were incorrect. Accordingly, the state court's findings are presumed correct. *See* 28 U.S.C. 2254(e)(1); *see also Railey*, 540 F. 3d at 397.

illiterate; ignorant of the law; relied on the assistance of others; was not advised of his rights to appeal or his right to appellate counsel, his right to a free transcript, and that he was innocent. In December 2014, the Ohio Supreme Court denied Scott's motion for a delayed appeal and dismissed his case.

{¶ 13} In February 2020, after Scott objected to the dismissal in part, and denial in part, of the writ of habeas corpus relief, the U.S. District Court granted the writ on the condition that the state court allow Scott to pursue a direct appeal of his resentencing with appointed counsel. *Scott v. Sloan e*, 6th Cir. No. 19-3095, 2020 U.S. App. LEXIS 6414 (Feb. 28, 2020). Thereafter, the trial court appointed appellate counsel, and we reopened Scott's previously dismissed appeal to allow him to appeal his resentencing.

{¶ 14} In this reopened appeal, Scott assigns the following two errors for review:

Assignment of Error No.1

> The trial court erred in sentencing appellant to consecutive sentences without making the findings necessary to R.C. 2929.14(C).

Assignment of Error No. 2

> The trial court's sentence of twenty-four years was vindictive, in violation of the appellant's Due Process Rights under the United States and Ohio Constitution.

Law and Analysis

{¶ 15} In the first assignment of error, Scott argues that the trial court failed to make the requisite findings to impose consecutive sentences.

{¶ 16} To impose consecutive sentences, a trial court must find that (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) 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) 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 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.
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> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4).

{¶ 17} The trial court must make the requisite findings in support of the imposition of consecutive sentences at the sentencing hearing and incorporate those findings into its sentencing journal entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. In so doing, "'the [trial] court must note that it engaged in the analysis' and that it 'has considered the statutory criteria and specifie[d] which of the given bases warrants its decision.'" *Bonnell* at ¶ 26, quoting *State v. Edmonson*, 86 Ohio St.3d 324, 326, 715 N.E.2d 131 (1999).

{¶ 18} In the instant case, the state concedes that the trial court failed to make the specific finding that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. Following our thorough and meaningful review of the record, we agree that the trial court failed to make this specific finding.

{¶ 19} Relative to the imposition of consecutive sentences, the trial court stated:

> So I feel that it is necessary to impose consecutive type sentences upon you and let me make those findings now. The harm was so unusual in this case that a single term would not adequately reflect the seriousness of your conduct and your criminal history shows that consecutive terms are needed to protect the public. You committed aggravated robbery in the past, you committed aggravated robbery here. It is likely, therefore, that you will again commit a serious crime of aggravated robbery.

Based on the above excerpt, and elsewhere in the record, it is clear that the trial court failed to make the findings necessary to impose consecutive sentences that, in the aggregate, amounted to a prison term of 24 years.

{¶ 20} Accordingly, we sustain the first assignment of error, vacate Scott's sentence, and adhere to our general standing policy of remanding cases for the limited purpose of determining whether consecutive sentences should be imposed and, if so, making the required findings. *State v. Nia*, 2014-Ohio-2527, 15 N.E.3d 892, ¶ 20-22 (8th Dist.). *See, e.g., State v. Brown*, 8th Dist. Cuyahoga No. 106771, 2018-Ohio-4707, ¶ 17; *State v. Lasalla*, 8th Dist. Cuyahoga No. 101316, 2015-Ohio-

106, ¶ 21; *State v. Matthews*, 8th Dist. Cuyahoga No. 102217, 2015-Ohio-4072, ¶ 18; *State v. Frost*, 8th Dist. Cuyahoga No. 100498, 2014-Ohio-2645, ¶ 10.

{¶ 21} In the second assignment of error, Scott argues the trial court's re-imposition of the same aggregate, 24-year, prison sentence was vindictive. Scott also claims the individual sentence in Count 2, which the trial court increased by two years over the previous sentence, is evidence of vindictiveness.

{¶ 22} Due process prohibits a court from imposing a harsher sentence on a defendant on remand in retaliation for exercising his or her right to appeal. *State v. Schneider*, 8th Dist. Cuyahoga No. 98938, 2013-Ohio-2532, ¶ 7, citing *North Carolina v. Pearce*, 395 U.S. 711, 724-725, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Generally, when an increased sentence is imposed after a successful appeal, there is a presumption of vindictiveness that can be rebutted only by objective information in the record justifying the increased sentence. *State v. Collins*, 8th Dist. Cuyahoga Nos. 98575 and 98595, 2013-Ohio-938, ¶ 8, citing *Pearce* at 726. A presumption of vindictiveness does not, however, apply "'in every case where a convicted defendant receives a higher sentence.'" *Alabama. v. Smith*, 490 U.S. 794, 799, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989), quoting *Texas v. McCullough*, 475 U.S. 134, 138, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986). It is only a "narrow band of cases in which vindictiveness is presumed." *State v. Rahab*, 150 Ohio St.3d 152, 2017-Ohio-1401, 80 N.E.3d 431, ¶ 15.

{¶ 23} In the instant case, the record reveals that on remand, the trial court reimposed the same sentences on Counts 4, 8, and 11, but increased the sentence on

Count 2, from six to eight years. However, no objective, nonvindictive reasons for a harsher sentence on Count 2, appear on the record, thus there is a presumption of vindictiveness. In order to assure the absence of such a motivation, whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for them doing so must affirmatively appear. *State v. Thomas*, 8th Dist. Cuyahoga No. 105613, 2017-Ohio-9274, ¶ 13, citing *State v. Bradley*, 2d Dist. Champaign No. 06CA31, 2008-Ohio-720, ¶ 7, citing *Pearce* at 726.

{¶ 24} "Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. * * * And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.*, quoting *State v. Mitchell*, 6th Dist. Erie No. E-11-039, 2012-Ohio-1992, ¶ 9.

{¶ 25} Based on the record before us, the presence of no objective, non-vindictive reasons for the increase sentence in Count 2 appearing on the record, the presumption of vindictiveness remains.

{¶ 26} Accordingly, we sustain the second assignment of error as it relates to Count 2. We vacate the sentence the trial court imposed in Count 2, and remand for resentencing on that count.

{¶ 27} Judgment reversed, case is remanded to the trial court for the limited purpose of determining whether consecutive sentences should be imposed and, if

so, making the required findings. In addition, the trial court is ordered to resentence Scott on Count 2.

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.

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EMANUELLA D. GROVES, JUDGE

MARY J. BOYLE, A.J., and
SEAN C. GALLAGHER, J., CONCUR