

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2016-T-0086
MARVIN PORTER, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2016 CR 00026.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *Deena L. DeVico*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Michael A. Partlow, 112 South Water Street, Suite C, Kent, OH 44240 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Marvin Porter, Jr., appeals the imposition of consecutive sentences by the Trumbull County Court of Common Pleas following his plea to charges of Identity Fraud, Forgery, Possessing Drug Abuse Instruments, and Illegal Use or Possession of Drug Abuse Paraphernalia. The issue before this court is whether an otherwise valid sentence including consecutive sentences is rendered contrary to law by statements made during the plea hearing by the trial court that the

defendant would go to prison if he tested positive for methadone where the defendant was legally receiving methadone for addiction. For the following reasons, we affirm the judgment of the court below.

{¶2} On February 17, 2016, the Trumbull County Grand Jury returned an Indictment against Porter, charging him with Identity Fraud (Count 1), a felony of the fifth degree in violation of R.C. 2913.49(B)(1), (I)(1) and (2); Forgery (Count 2), a felony of the fifth degree in violation of R.C. 2913.31(A)(3), (C)(1)(a) and (b); Forgery (Count 3), a felony of the fifth degree in violation of R.C. 2913.31(A)(3), (C)(1)(a) and (b); Possessing Drug Abuse Instruments (Count 4), a misdemeanor of the second degree in violation of R.C. 2925.12(A) and (C); and Illegal Use or Possession of Drug Abuse Paraphernalia, a misdemeanor of the fourth degree in violation of R.C. 2925.14(C)(1) and (F)(1).

{¶3} On May 19, 2016, Porter entered a plea of guilty to all charges in the Indictment.

{¶4} At the change of plea hearing, the State offered the following factual basis for the charges:

[O]n or about [December 14, 2015], in Trumbull County, state of Ohio, this defendant was arrested by the Liberty Township Police Department for possession of syringes and other various drug paraphernalia and drug abuse instruments. * * * [W]hen he was arrested, he identified himself as a Claude D. Clay. And once he was booked out, he actually forged the name of Claude D. Clay on a personal recognizance bond in Girard Municipal Court and forged the name of Claude D. Clay on a fingerprint card presented by the Liberty Police Department.

{¶5} At the same hearing, the trial court asked Porter what he would test positive for if he were drug tested. Porter replied he would test positive for methadone because he goes to the clinic. Thereupon, the court addressed Porter as follows:

I'm going to give you a piece of advice when you come back here for sentencing. You're not going to be on methadone. That's a forbidden drug in this Court. So you better do everything you've got to do to get off it. When you come back here for sentencing, if you test positive for it, you're going to be going to prison, is that clear?

{¶6} On July 21, 2016, Porter was sentenced. At the sentencing hearing, the trial court stated that it had considered the principles and purposes of felony sentencing and the seriousness and recidivism factors. The court stated that "a consecutive sentence is not disproportionate to the seriousness of the offenses and the conduct of the defendant," and that "a single prison term would not adequately reflect the seriousness of the conduct of the defendant." The court made the following specific findings:

The Court: Defendant has a lengthy criminal record dating back to his age of 18 [Porter was age 51 at sentencing]. He served a prior prison term. He's been rejected by NEOCAP, and has shown no genuine remorse for crimes committed, nor accepted any responsibility. As I said, Mr. Porter, I've seen a lot of criminal records by people. I don't think I've ever seen one worse than yours. I don't know how you can get convicted of so many different crimes.

You also tested positive when you showed up for your presentence investigation for Methadone, opiates and Oxycodone. You then gave the probation department – told them you wanted a retest. They gave you a retest, and you tested positive for Methadone and benzodiazepines.

The Defendant: That's because they wouldn't take me off Methadone. I had to be weaned off of it.

The Court: The Court finds pursuant to Ohio Revised Code Section 2929.14, that it's necessary to protect the public from

future crimes, and that a consecutive sentence is not disproportionate to the seriousness of the offenses and the conduct of the defendant. And due to the conduct of the defendant, a single prison term would not adequately reflect the seriousness of the conduct of the defendant. His prior criminal history clearly demonstrates consecutive sentences [are] necessary to protect the public.

{¶7} The trial court sentenced Porter to twelve months in prison for Identity Fraud (Count 1), twelve months in prison for each count of Forgery (Counts 2 and 3), two months in prison for Possessing Drug Abuse Instruments (Count 4), and one month in prison for Illegal Use or Possession of Drug Abuse Paraphernalia (Count 5). The court ordered the sentences for Count 2, 3, 4, and 5 to be served concurrently to each other and/or with a companion case, but consecutively to the sentence for Count 1 for an aggregate prison term of twenty-four months.

{¶8} On July 28, 2016, the trial court journalized a written Entry on Sentence.

{¶9} On August 29, 2016, Porter filed a Notice of Appeal. On appeal, he raises the following assignment of error:

{¶10} “[1.] The trial court erred and abused its discretion by imposing consecutive terms of incarceration on appellant.”

{¶11} The Ohio Revised Code provides, in relevant part, as follows regarding consecutive felony sentences:

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 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.

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

{¶12} Under R.C. 2929.14(C)(4), a sentencing court is required to make three distinct findings in order to require an offender to serve consecutive prison terms: (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"; (3) "and * * * also" that one of the circumstances described in subdivision (a) to (c) is present.

{¶13} In reviewing a felony sentence, "[t]he appellate court * * * may vacate the sentence and remand the matter to the sentencing court for resentencing * * * if it clearly and convincingly finds * * * [t]hat the sentence is otherwise contrary to law." R.C. 2953.08(G)(2)(b). The failure to make the required findings to impose consecutive sentences at the sentencing hearing renders the sentence contrary to law. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 36-37.

{¶14} Porter contends that the trial court erred “by imposing consecutive terms of incarceration as [the] result of [his] participating in a perfectly legal methadone program, which the trial court personally opposes.” Appellant’s brief at 3. Porter cites to R.C. 3719.61, which provides that “[n]othing in the laws dealing with drugs of abuse shall be construed to prohibit treatment of narcotic drug dependent persons by the continuing maintenance of their dependence through the administration of methadone * * *.” Thus, according to Porter, “the very terms of the statute prohibit punishment of an alleged offender on the basis that the offender is pursuing treatment.” Appellant’s brief at 7.

{¶15} The inappropriateness of the trial judge’s comments made during the plea hearing cannot be understated. Under due process principles, a “defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.” (Citation omitted.) *State v. Arnett*, 88 Ohio St.3d 208, 218, 724 N.E.2d 793 (2000). Methadone maintenance treatment is legally sanctioned under the laws of Ohio. That being so, the trial court lacked any justification for declaring it a “forbidden drug” in his courtroom.

{¶16} The record before this court does not, however, support Porter’s contention that the trial court imposed consecutive sentences based on his participation in a methadone program. At the sentencing hearing, the court made the findings mandated by R.C. 2929.14(C)(4) based on a consideration of the relevant seriousness and recidivism factors including: Porter’s lengthy criminal record, prior prison term, rejection by NEOCAP for residential treatment, absence of remorse, failure to accept

responsibility¹, and testing positive for methadone and benzodiazepines (or, alternatively, methadone and opiates).² The court also noted Porter's conduct in the current offenses, the most serious of which (the felonies) were Identity Fraud and Forgery.³ These offenses were only remotely related to Porter's treatment for addiction: Porter claimed a false identity because he believed there was a "warrant out for [him]" and he "just want[ed] to get it over with and done." Neither the court's findings nor consideration of the sentencing factors is clearly and convincingly contrary to law.

{¶17} The only support for Porter's contention is the comment made by the trial court during the plea hearing that if he tests positive for methadone, he is "going to prison." In light of the court's findings during the sentencing hearing, it cannot be seriously maintained that, but for testing positive for methadone, Porter would have avoided a prison sentence, particularly in light of the fact that he tested positive for benzodiazepines. Assuming, arguendo, that the court improperly considered Porter's methadone treatment in its decision to impose consecutive sentences, this fact would not render his sentence contrary to law in light of the court's other findings and other factors rendering his crimes more serious and recidivism more likely. *State v. Cherry*, 159 Ohio App.3d 307, 2004-Ohio-6431, 823 N.E.2d 911, ¶ 4 ("a trial court's 'improper consideration of a defendant's failure to appear at sentencing is harmless error where the trial court properly relies on other factors supporting the consecutive sentences'") (citation omitted).

1. At the sentencing hearing, Porter maintained "I shouldn't have even been charged with anything * * * [because] I didn't really do anything."

2. Porter tested positive for methadone and opiates at the time of his initial interview with the adult probation department. He was retested thirty days later (on June 20, 2016) and tested positive for methadone and benzodiazepines.

3. According to the presentence investigation report, Claude Clay is the name of Porter's brother-in-law and Porter had used this identity on other occasions to avoid prosecution.

{¶18} The sole assignment of error is without merit.

{¶19} For the foregoing reasons, the Trumbull County Court of Common Pleas' imposition of consecutive sentences on Porter is affirmed. Costs to be taxed against the appellant.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

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{¶20} I respectfully dissent.

{¶21} The majority holds that the trial court did not abuse its discretion in imposing consecutive sentences upon appellant. For the following reasons, I disagree.

{¶22} Regarding this standard, the term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.)

{¶23} The appellant was in treatment for heroin addiction having been prescribed methadone. The record in this case shows that at the plea hearing, the trial court informed defendant not to come back with methadone in his system. The trial

court stated, “I’m going to give you a piece of advice, when you come back here for sentencing, you’re not going to be on Methadone. That’s a forbidden drug in this Court. So you better do everything you’ve got to do to get off it. When you come back here for sentencing, if you test positive for it, you’re going to be going to prison.”

{¶24} According to R.C. 3719.61, “Nothing in the laws dealing with drugs of abuse shall be construed to prohibit treatment of narcotic drug dependent persons by the continuing maintenance of their dependence through the administration of methadone * * *.” This demonstrates the General Assembly’s stated public policy in favor of methadone treatment.

{¶25} Methadone treatment is a widely accepted treatment for opiod addiction. According to the website of the Legal Action Center, a National Policy Center in Washington D.C. “MAT” (Medication Assisted Treatment) is to treat opiod addiction using medications such as burprenorphine, naltrexone, and methadone to provide a whole-patient approach to treatment. (<https://lac.org/resources/substance-use/medication-assisted-treatment-resources/>) (<https://lac.org/mat-advocacy/>) The National Institute of Health has unequivocal evidence of MAT’s effectiveness and safety. (www.heroinetoxcentersllc.com/heroin-dtox-centers-charleston-wv-25365) It states that MAT is “...an essential component of ongoing treatment. MAT works to stabilize brain chemistry, block the euphoric effects of opioids, relieve physiological cravings and normalize body functions.” (<https://lac.org/wp-content/uploads/2016/04MatinDrugCourts.>).

{¶26} The record shows that the appellant was in an authorized methadone opiod treatment program and was legally prescribed methadone according to his own

statement. He explained at his sentencing hearing that he is being weaned off his drug dependency with methadone by his licensed treatment center, Meridian Services, which is documented in the pre-sentence investigation. During the pre-sentence investigation appellant tested positive for Methadone in violation of the trial court's admonition. When asked why he retested positive for methadone and benzodiazepines at the sentencing hearing he stated, "That's because they wouldn't take me off methadone. I had to be weaned off of it."

{¶27} The trial court sentenced appellant to consecutive sentences. Even though the trial court stated that the sentencing was not disproportionate to his crimes, it is reasonable to assume, based on the judge's statements in the plea hearing, that appellant's testing positive for methadone was a factor in consecutive sentences.

{¶28} The trial court's policy raises the specter of an improper criterion for sentencing. It places defendants on notice that they must cease their use of methadone, which is contrary to their addiction treatment. The trial court does not possess the authority to require defendants to stop authorized medical treatment or to sentence defendants more harshly because they choose to continue medical treatment in order to treat drug dependency. We must consider the public policy implications of the trial court's rule on methadone use as drug addiction is considered a disability under the American with Disabilities Act. *State v. Jackson*, 157 Ohio App.3d 574, 2004-Ohio-3446, ¶6. Opioid addiction is a medical/public health problem. To prohibit defendants from seeking legitimate medical treatment is contrary to the sentencing provisions and is clearly and convincingly contrary to law.

{¶29} I respectfully dissent.