[Cite as *State v. McClenton*, 2018-Ohio-5378.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2017-A-0091**
- vs -	:	
GREGORY L. MCCLENTON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2016 CR 0653.

Judgment: Affirmed.

Nicholas A. Iarocci, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Edward F. Borkowski, Jr., P.O. Box 609151, Cleveland, OH 44109 (For Defendant-Appellant).

THOMAS R. WRIGHT, P.J.

{¶1} Appellant, Gregory L. McClenton, appeals his twenty-four-month prison sentence on one count of assault of a corrections officer consecutive to a prison term in an unrelated case. We affirm.

{¶2} This is the second time appellant has appealed his sentence. In *State v. McClenton*, 11th Dist. Ashtabula No. 2017-A-0019, 2017-Ohio-8361, we summarized the

facts as follows:

{¶3} "In 2015, appellant was convicted of resisting arrest and failure to comply with a police officer's signal in the Cuyahoga County Court of Common Pleas. Initially, he was placed on community control. After being found guilty of violating the terms of community control, he was sentenced to a three-year prison term.

{¶4} "While incarcerated in the Lake Erie Correctional Institution, appellant exited his housing unit without permission. A corrections officer was dispatched to find him. After locating appellant at a recreational facility, the officer coaxed him to return to the housing unit. But, as they were walking toward the unit, appellant was disrespectful to the officer and would not follow his directives. Accordingly, before taking appellant to the officer's station in the unit, the officer conducted a pat-down search.

{¶5} "Appellant was ordered to stand still with his hands on a wall. As the officer began the search, appellant tried to turn around and face him, but the officer was able to regain control by placing his hand on appellant's back. When the officer tried to resume the search, appellant removed his hands from the wall, made a fist with his right hand, and threw a punch. The officer easily blocked the punch and pinned appellant against the wall. Appellant was now facing the officer and grabbed the officer in the face/throat area. Since the seriousness of the situation had escalated, a second corrections officer immediately sprayed a substance in appellant's face, causing him to release his hold on the first officer." *Id*. at ¶2-4.

{¶6} Appellant was indicted on one count of assault, a third-degree felony, R.C. 2903.13(A) & (C)(3). Ultimately, appellant pleaded guilty to that charge and, in exchange, the state agreed to recommend a twenty-four-month sentence, twelve months less than

the maximum for a third-degree felony. After accepting the plea and hearing arguments, the trial court accepted the state's recommendation and sentenced appellant to twenty-four months on the assault conviction consecutive to the three-year term on the Cuyahoga County conviction.

{¶7} In his first appeal, appellant argued that his conduct does not warrant a consecutive prison term. That issue, however, went unaddressed. We instead reversed on alternative grounds due to a failure to make necessary findings and remanded for resentencing.

{¶8} All aspects of appellant's sentence were reargued during resentencing. As to the length, appellant asserted that his conduct was not as serious as a typical assault because the corrections officer was not hurt, and appellant is an Iraqi War veteran who suffers from schizophrenia and post-traumatic stress disorder. As to consecutive sentences, appellant argued that his criminal record is not significant. The state contested both points.

{¶9} The trial court again imposed a twenty-four-month prison term, consecutive to the Cuyahoga County case. In relation to length, the court found appellant likely to commit future crimes, and that his conduct was more serious than a typical assault offense because the victim was a corrections officer. The court found consecutive sentences necessary to protect the public and punish appellant; not disproportionate to the seriousness of the offense and the danger appellant poses to the general public; and necessary to adequately protect the public from future crime.

{¶10} In again contesting his sentence, appellant assigns the following as error:

{¶11} "[1.] The record does not clearly and convincingly support the imposition of

a consecutive sentence.

{¶12} "[2.] The sentence imposed by the trial court is contrary to law because the court failed to properly consider and weigh the purpose and principles of felony sentencing and the factors relating to the seriousness of the offense and risk of recidivism."

{¶13} Under his first assignment, appellant contests the findings that consecutive terms are not disproportionate to the seriousness of the offense because he did not physically injure the corrections officer and that his criminal record justifies consecutive sentences to adequately protect the public.

{¶14} Appellate review of a felony sentencing is governed by R.C. 2953.08(G):

{¶15} "(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

{¶16} "The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard of review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

{¶17} "(a) That the record does not support the sentencing court's 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, whichever, if any, is relevant;

{¶18} "(b) That the sentence is otherwise contrary to law."

{¶19} "'[T]he clear and convincing standard used by R.C. 2953.08(G)(2) is written

in the negative. It does not say that the trial judge must have clear and convincing evidence to support its findings. Instead, it is the court of appeals that must clearly and convincingly find that the record does not support the court's findings.' [*State v.*] *Venes*, 2013-Ohio-1891, 992 N.E.2d 453, at ¶21. 'In other words, the restriction is on the appellate court, not the trial judge. This is an extremely deferential standard of review.' *Id*." *State v. Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069, ¶31 (2d Dist.).

{¶20} Consecutive sentences are governed by R.C. 2929.14(C)(4).

{¶21} "Pursuant to R.C. 2929.14(C)(4), a trial court 'may' sentence an offender to consecutive sentences if it finds that: (1) such terms are 'necessary to protect the public from future crime or to punish the offender'; (2) such terms 'are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public'; and (3) one of three alternative factors exist * * *:

{¶22} "'(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, and 2929.18 of the Revised Code, or was under post-release control for a prior offense.'

{¶23} "'(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.'

{¶24} "'(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crimes by the

offender.'" *McClenton*, 2017-Ohio-8361, at ¶11-14.

{¶25} Appellant's prior criminal record consists of two felony and five misdemeanor convictions arising from five separate proceedings: unauthorized use of a motor vehicle (fifth-degree felony 2009); failure to comply with a police officer's order or signal (third-degree felony 2013); disobeying a police officer (misdemeanor 2009); impersonating an officer (misdemeanor 2010); resisting arrest (misdemeanor 2010); sexual imposition (misdemeanor 2010); and resisting arrest (misdemeanor 2013). On the date appellant assaulted the corrections officer, he was serving a thirty-six-month term for a 2013 failure to comply, a third-degree felony.

{¶26} In that appellant assaulted a corrections officer while serving time for a prior offense, and has been convicted of the offenses stated, we cannot clearly and convincing find the record does not support the challenged findings. That appellant did not cause significant physical harm does not change the seriousness or proportionality. Appellant's first assignment is without merit.

{¶27} Under his second assignment, appellant asserts that the facts do not support the imposition of a twenty-four-month sentence. He argues that, had the trial court applied the sentencing R.C. 2929.12 factors correctly, it would have found that his offense is not as serious as a typical assault offense, and that the likelihood he will commit a future crime is relatively low.

{¶28} An appellate court has the authority to vacate or modify a felony sentence if it clearly and convincingly finds that the sentence is "contrary to law." R.C. 2953.08(G)(2)(b).

{¶29} "'A sentence is contrary to law if (1) the sentence falls outside the statutory

range for the particular degree of offense, or (2) the trial court failed to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors in R.C. 2929.12. *State v. Hinton*, 8th Dist. Cuyahoga No. 102710, 2015-Ohio-4907, ¶10, citing *State v. Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, ¶13. When a sentence is imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12, appellate courts "may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence." *State v. Marcum*, 146 Ohio St.3d 2016-Ohio-1002, 59 N.E.3d 1231, ¶23.' *State v. Price*, 8th Dist. Cuyahoga No. 104341, 2017-Ohio-533, ¶14." *State v. Drought*, 11th Dist. Ashtabula No. 2106-A-0060, 2017-Ohio-1415, ¶12.

{¶30} Here, appellant does not dispute that the twenty-four-month sentence falls within the statutory range for a third-degree felony. *See* R.C. 2929.14(A)(3). Thus, the scope of our review is limited to whether the sentence is based upon consideration of the purposes and principles of felony sentencing, as delineated in R.C. 2929.11 and 2929.12. We reverse only if we clearly and convincingly find that it is not supported by the record. R.C. 2953.08(G)(2). *Id*. at ¶14.

{¶31} The basic principle of felony sentencing is to protect the public from future crime and punish the defendant for his offense. R.C. 2929.11(A). The statute instructs trial courts to achieve these goals by imposing the minimum sanction that will not place an unnecessary burden on government resources. *Id*. In turn, "[a] trial court imposing a felony sentence is required to consider the seriousness and recidivism factors found in R.C. 2929.12 to ensure the sentence complies with the overriding principles of felony

sentencing * * *." *State v. Miller*, 11th Dist. Lake No. 2017-L-074, 2017-Ohio-8809, ¶8.

{¶32} As to the seriousness of his assault offense, appellant maintains that the physical altercation was initiated by the officer, and that he was only responding to the officer's show of force. The officer, however, asserts otherwise. According to him, he only sought to conduct a pat-down search. He did not challenge appellant or try to harm him. It was appellant who escalated the incident to a physical altercation.

{¶33} As to the likelihood that he will commit future crimes, appellant notes that he showed remorse for the incident and that the assault occurred under circumstances that are unlikely to happen again. However, given his substantial criminal history, these points are not entitled to significant weight. Again, appellant's prior record is sufficient to show that he cannot conform his behavior to the law and has not taken the necessary steps to obtain treatment for his issues.

{¶34} Appellant further argues that the trial court did not afford adequate weight to his past military service. But, given that appellant now has committed three felonies and five misdemeanors over a seven-year period, we cannot clearly and convincingly find that a twenty-four-month prison is not supported. Appellant's second assignment is also without merit.

{¶35} The judgment of the Ashtabula County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.