[Cite as *State v. Conley*, 2014-Ohio-4659.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff - Appellee	:	Hon. Patricia A. Delanely, J.
	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	
DOMINICK A. CONLEY	:	Case No. CT2014-0015
	:	
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Muskingum County Court of Common Pleas, Case No. CR2009-0183
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	October 16, 2014

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ROBERT L. SMITH Assistant Prosecuting Attorney 27 North Fifth Street Zanesville, OH 43701	DAVID J. GRAEFF P.O. Box 1948 Westerville, OH 43086-1948

Baldwin, J.

{¶1} Defendant-appellant Dominick Conley appeals his sentence from the Muskingum County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On September 2, 2009, the Muskingum County Grand Jury indicted appellant on one count (Count One) of felonious assault on a peace officer in violation of R.C. 2903.11(A)(2), a felony of the first degree, one count (Count Two) of assaulting a police dog in violation of R.C. 2921.321 (A)(1), a felony of the fourth degree, two counts (Counts Three and Four) of kidnapping in violation of R.C. 2905.01(A)(2), felonies of the first degree, and one count (Count Five) of aggravated burglary in violation of R.C. 2911.11(A)(2), a felony of the first degree. Appellant also was indicted on six counts (Counts Six through Eleven) of abduction in violation of R.C. 2905.02(A), felonies of the third degree, and one count (Count Twelve) of tampering with evidence in violation of R.C. 2921.12(A)(1), a felony of the third degree. All of the counts except tampering with evidence were accompanied by firearm specifications. At his arraignment on September 9, 2009, appellant entered a plea of not guilty to the charges.

{¶3} Subsequently, on March 8, 2011, appellant withdrew his former not guilty plea and pleaded guilty to one count of felonious assault on a peace officer with a fireman specification pursuant to R.C. 2941.1412, one count of assault on a police dog with a firearm specification pursuant to R.C. 2941.145, four counts of abduction with firearm specifications pursuant to R.C. 2941.145, and one count of tampering with evidence. Appellant also pleaded guilty to two amended counts of kidnapping, felonies

of the second degree, along with two firearm specifications pursuant to R.C. 2941.145. The remaining three counts were dismissed.

{¶4} Following a presentence investigation and record, the trial court, as memorialized in an Entry filed on April 13, 2011, sentenced appellant to an aggregate prison sentence of 26 years. The trial court sentenced appellant to five (5) years on Count One and seven (7) years on the accompanying firearm specification, to one (1) year on Count Two and three (3) years on the accompanying firearm specification, to three (3) years on Count Three and to three (3) years on the accompanying firearm specification, and to one (1) year on Count Six and three (3) years on the accompanying firearm specification.[1] The trial court ordered that Counts One, Two, Three and Six be served consecutively to each other and concurrently to Count Twelve. The trial court also ordered that such Counts be served consecutively to all of the firearm specifications, which totaled 16 years.

{¶5} Appellant did not file a timely direct appeal. On February 20, 2014, appellant filed a Motion for Leave to File a Delayed Appeal. Pursuant to a Judgment Entry filed on March 31, 2014, this Court granted such motion.

{¶6} Appellant now raises the following assignments of error on appeal:

{¶7} THE TRIAL COURT ERRED WHEN IT IMPOSED THREE CONSECUTIVE THREE YEAR SENTENCES ON FIREARM SPECIFICATIONS WHEN THE FACTS DEMONSTRATE THE UNDERLYING CONVICTIONS AROSE FROM A SINGLE CONTINUOUS EVENT, CONTRA THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

[1] The trial court merged Counts Three and Four and Counts Six, Nine, Ten and Eleven.

{¶8} THE TRIAL COURT ERRED WHEN IT IMPOSED CONSECUTIVE SENTENCES AND DID NOT MAKE THE FINDINGS REQUIRED BY STATUTE.

I

{¶9} Appellant, in his first assignment of error, argues that the trial court erred when it imposed three consecutive three year sentences on firearm specifications. Appellant specifically argues that the facts demonstrate that the underlying convictions arose from a single, continuous event and that, therefore, the trial court could only have sentenced him on the seven year firearm specification and not the other three firearm specifications that totaled nine years.

{¶10} R.C. 2929.14 states, in relevant part, as follows:

> (B)(1)(a) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.141, 2941.144, or 2941.145 of the Revised Code, the court shall impose on the offender one of the following prison terms:…
>
> (ii) A prison term of three years if the specification is of the type described in section 2941.145 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;…

(b) If a court imposes a prison term on an offender under division (B)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2967.19, section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. Except as provided in division (B)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (B)(1)(a) of this section for felonies committed as part of the same act or transaction….

(f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in section 2941.1412 of the Revised Code that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in section 2935.01 of the Revised Code or a corrections officer, as defined in section 2941.1412 of the Revised Code, the court, after imposing a prison term on the offender for the felony offense under division (A), (B)(2), or (B)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. If an offender is convicted of or pleads guilty to two or more

felonies that include, as an essential element, causing or attempting to cause the death or physical harm to another and also is convicted of or pleads guilty to a specification of the type described under division (B)(1)(f) of this section in connection with two or more of the felonies of which the offender is convicted or to which the offender pleads guilty, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(f) of this section for each of two of the specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications. If a court imposes an additional prison term on an offender under division (B)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (B)(1)(a) or (c) of this section relative to the same offense.

(g) If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of

> this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

{¶11} Appellant, as is stated above, argues that the facts show that the underlying convictions arose from one transaction. "Transaction" as used in R.C. 2929.14(B)(1)(b) means "a series of continuous acts bound together by time, space and purpose, and directed toward a single objective." *State v. Wills*, 69 Ohio St.3d 690, 691, 635 N.E. 2d 370 (1994) (Citation omitted.). The commission of multiple crimes constitutes only one transaction if "the defendant 'had a common purpose in committing [the] crimes' and engaged in a 'single criminal adventure.' "*State v. Like,* 2nd Dist. Montgomery App. No. 21991, 2008–Ohio–1873, at ¶ 40 (Citation omitted.). As noted by the court in *State v. Beatty-Jones*, 2nd Dist. Montgomery No. 24245, 2011-Ohio-3719 at paragraph 12, "[w]hen the crimes create multiple victims, there is a single transaction if the evidence shows that the defendant's criminal objectives were focused on each victim individually (e.g., murdering/raping/robbing this victim) rather than on something more abstract (e.g., robbing this car, regardless of who is inside; shooting into a crowd, regardless of who is in it). Therefore '[t]he focus of the inquiry is 'on the defendant's overall criminal objectives.' *State v. Stevens,* 179 Ohio App.3d 97, 2008–Ohio–5775, at ¶ 5 (Citation omitted.)."

{¶12} The presentence investigation report was reviewed by the trial court. According to the same, after Patrolman Schiele and his canine partner, Bosco,

attempted to arrest appellant, appellant got lose. The officer then released Bosco to pursue appellant who, when Bosco was three to five feet away, fired two shots from a handgun at Bosco. Bosco was hit twice in the neck.

{¶13} According to the report, appellant then raised his gun to target Patrolman Schiele who was then shot in the left hip.

{¶14} After the shooting, appellant approached a woman who was getting into a vehicle with her small child and forced her to drive him to Dietz Lane where his mother lived. No one was home. Appellant then went to the home of relatives where he told his relatives that no one was leaving. At the time, appellant had his weapon. Finally, after leaving his relatives house, appellant took off on foot and disposed of his weapon by throwing it off of a bridge.

{¶15} Based on the foregoing, we find that the charges for which appellant received consecutive sentences on firearm specifications arose from separate criminal transactions. As noted by appellee, "these crimes and attendant firearm violations were committed at separate locations and separate times and involved separate victims."

{¶16} Appellant's first assignment of error is, therefore, overruled.

II

{¶17} Appellant, in his second assignment of error, argues that the trial court erred when it imposed consecutive sentences without making the findings required by statute.

{¶18} Am.Sub. H.B. No. 86, which was effective September 30, 2011, revived judicial fact-finding requirements prior to imposing consecutive sentences. In the recent case of *State v. Bonnell*, -N.E.3d--, 2014-Ohio-3177, the Ohio Supreme analyzed this

new legislation which revived some of the statutory language severed by the court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Upon the U.S. Supreme Court's decision in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.E.2d 517 (2009), the Ohio Supreme Court held in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, that *Ice* did not automatically revive the consecutive sentencing provisions that were held unconstitutional and severed from the statute in *Foster* and that , as a result, judicial fact-finding would not be required prior to imposing consecutive sentences unless the General Assembly enacted new legislation requiring the trial court to make findings when doing so.

{¶19} In the case sub judice, appellant was not sentenced until after the effective date of Am.Sub.H.B. 86. The trial court, therefore, was not required to make the findings now required by R.C. 2929.14 prior to sentencing appellant to consecutive sentences.

{¶20} Appellant's second assignment of error is, therefore, overruled.

{¶21} Accordingly, the judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Baldwin, J.

Hoffman, P.J. and

Delaney, J. concur.