

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. CT2014-0046
JEFFREY GREGORY	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Muskingum County Court of Common Pleas, Case No. CR2014-0216

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 29, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

D. MICHAEL MADDOX
Prosecuting Attorney
By: Gerlad V. Anderson II.
Assistant Prosecuting Attorney
27 North Fifth St., Box 189
Zanesville, OH 43702-0189

ERIC J. ALLEN
713 S. Front Street
Columbus, OH 43206

Gwin, P.J.

{¶1} Appellant Jeffrey Gregory [“Gregory”] appeals from the November 24, 2014 Judgment Entry of Prison Sentence of the Muskingum County Court of Common Pleas. Appellee is the state of Ohio.

Facts and Procedural History

{¶2} A statement of the facts underlying Gregory’s criminal conviction is not necessary to our resolution of this appeal.

{¶3} On July 23, 2014, Gregory was indicted on a single count of failing to register as a sex offender.

{¶4} On October 1, 2014, Gregory entered a plea of guilty. He was remanded to the custody of the sheriff to complete a presentence report.

{¶5} On November 24, 2014, Gregory was sentenced to ten months for his guilty plea to the single count in the indictment. He was sentenced to an additional eight months for violating his post release control to be served consecutively.

Assignment of Error

{¶6} Gregory raises one assignment of error,

{¶7} “I. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE SENTENCES AS THE COURT FAILED TO ENGAGE IN THE REQUISITE THREE PART ANALYSIS REQUIRED TO SENTENCE A DEFENDANT TO CONSECUTIVE SENTENCES.”

Analysis

{¶8} The General Assembly has enacted Am.Sub.H.B. No. 86 (“H.B. 86”), effective September 30, 2011. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177,

16 N.E.2d 659, ¶20. In Am.Sub. H.B. 86, the General Assembly revived R.C. 2929.14(E)(4) and renumbered it as R.C. 2929.14(C)(4), which now provides:

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 **665 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.

See, *Bonnell*, ¶22. In *Bonnell*, the Ohio Supreme Court noted,

With exceptions not relevant here, if the trial court does not make the factual findings required by R.C. 2929.14(C)(4), then “a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States.” R.C. 2929.41(A). Thus, judicial fact-finding is once again required to overcome the statutory presumption in favor of concurrent sentences.

Bonnell, ¶23. Gregory’s case is one of those exceptions.

{¶9} R.C. 2929.141, provides,

(A) Upon the conviction of or plea of guilty to a felony by a person on post-release control at the time of the commission of the felony, the court may terminate the term of post-release control, and the court may do either of the following regardless of whether the sentencing court or another court of this state imposed the original prison term for which the person is on post-release control:

(1) In addition to any prison term for the new felony, impose a prison term for the post-release control violation. The maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony. In all cases, any prison term imposed for the violation shall be reduced by any prison term that is administratively imposed by the parole board as a post-release control sanction. A prison term imposed for the violation shall be served

consecutively to any prison term imposed for the new felony. The imposition of a prison term for the post-release control violation shall terminate the period of post-release control for the earlier felony.

* * *

{¶10} In *State v. Proctor*, 12th Dist. Butler Nos. CA2006-03-042, CA2006-03-043, 2007-Ohio-909, the Court observed,

This statute clearly and unambiguously required the trial court to order that appellant's sentence for the post-release control violation be served consecutively with the sentence on the new felony. The statute mandates imposition of consecutive sentences without reference to the R.C. 2929.14(E)(4) consecutive factors which were found unconstitutional in *Foster*. R.C. 2929.141(B) usurps the trial court's discretion to sentence appellant to anything but consecutive sentences. Simply stated, the unconstitutional consecutive factors in R.C. 2929.14(E)(4) have no application to the present instance, where the trial court sentenced appellant for a new felony violation, and then proceeded to sentence him for a post-release control violation

Proctor, ¶8; *Accord*, *State v. Pena*, 6th Dist. Lucas No. L-13-1030, 2014-Ohio-3438, ¶15; *State v. Sheehi*, 10th Dist. Franklin No. 12AP-641, 2013-Ohio-2213, ¶13; *State v. Gillespie*, 172 Ohio App.3d 304, 2007-Ohio-3439, 874 N.E.2d 870(2nd Dist.), ¶24.

{¶11} In the case at bar, the offense of failure to register was committed while Gregory was under post-release control. Pursuant to R.C. 2929.141(B)(1), the court's sentence for the post release-control violation must be served consecutively to the

sentence imposed by the court for this new felony offense. R.C. 2929.14(C)(4) is not implicated. Statutory findings for consecutive sentences are not required by the trial court.

{¶12} For the foregoing reasons, we find no error in the sentence imposed by the trial court. Accordingly, Gregory's sole assignment of error is overruled.

{¶13} The judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Gwin, P.J.,
Farmer, J. and
Baldwin, J., concur