[Cite as *State v. Jung*, 2003-Ohio-7346.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 02CA40
	:	
v.	:	
	:	
HEATHER K. JUNG,	:	DECISION AND JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	**RELEASED 9/30/03**

APPEARANCES:

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EVANS, P.J.

{¶1} Defendant-Appellant Heather K. Jung appeals the judgment of the Washington County Court of Common Pleas, which sentenced her to twelve years and eleven months imprisonment upon her guilty pleas to the following: 1) aggravated robbery, a first-degree felony in violation of R.C. 2911.01(A)(1); 2) receiving stolen property, a

fourth-degree felony in violation of R.C. 2913.51; and 3) two counts of breaking and entering, fifth-degree felonies in violation of R.C. 2911.13. Appellant asserts that the trial court erred by imposing the maximum sentence for the offense of aggravated robbery. Appellant also asserts that the trial court erred in ordering that all sentences be served consecutively.

{¶2} For the reasons that follow, we agree with appellant and reverse the judgment of the trial court.

Trial Court Proceedings

{¶3} Defendant-Appellant Heather K. Jung was involved in several theft offenses during late 2001. Appellant and her accomplice, Timothy A. Steward, broke into the home of Steven Haas and stole approximately $4,700 worth of personal property, including a .22 caliber semi-automatic pistol. They also caused $3,000 worth of property damage. Appellant and her accomplice also broke into, and stole merchandise worth several hundred dollars from, two stores. Later, appellant participated in an armed robbery of one of the stores from which they had already stolen property.

{¶4} Appellant drove the "getaway" car during the armed robbery. Her accomplice entered the store and pointed the gun stolen from Haas' home at the owner, Delbert Schafer. Mr. Schafer, who at the time was ninety-one years of age, remained seated and did not resist as Steward took approximately $400 from the cash register. Shortly after the robbery, appellant and Steward were apprehended by the

Washington County Sheriff's Department while sitting in a motor vehicle. Upon searching the vehicle, the Sheriff's Department discovered the stolen, unloaded pistol and approximately $719 in appellant's purse.

{¶5} Appellant was indicted on several charges, including: 1) aggravated robbery with a firearm specification, a first-degree felony in violation of R.C. 2911.01(A)(1); 2) complicity to aggravated robbery with firearm specification, a first-degree felony in violation of R.C. 2923.03 and 2911.01(A)(1); 3) receiving stolen property, a fourth-degree felony in violation of R.C. 2913.51; 4) two counts of burglary, second-degree felonies in violation of R.C. 2911.12(A)(2); and 5) two counts of breaking and entering, fifth-degree felonies in violation of R.C. 2911.13. Eventually, appellant entered into a plea agreement with the state. In exchange for appellant's guilty pleas to aggravated robbery, receiving stolen property, and two counts of breaking and entering, the state amended the indictment so that the firearm specification was deleted and dismissed the remaining charges.

{¶6} Subsequently, the trial court sentenced appellant to a total of twelve years and eleven months incarceration. Specifically, the trial court sentenced appellant to the following periods of incarceration: 1) ten years for aggravated robbery; 2) eighteen months for receiving stolen property; 3) six months for count one of breaking and entering; and 4) eleven months for count two of breaking

and entering. In addition, the trial court ordered that all the sentences be served consecutive to one another. Finally, the trial court also ordered appellant to pay the costs of her prosecution and restitution to the victims of her crimes.

The Appeal

{¶7} Appellant timely filed her notice of appeal and presents the following assignments of error for our review.

{¶8} First Assignment of Error: "Clear and convincing evidence exists to show the trial court erred by imposing the maximum sentence for Count I, aggravated robbery."

{¶9} Second Assignment of Error: "Clear and convincing evidence shows that the trial court erred in imposing consecutive sentences."

I. Maximum Sentence for Aggravated Robbery

{¶10} In her First Assignment of Error, appellant argues that the trial court erred by imposing the maximum sentence (ten years) for her aggravated robbery conviction.

{¶11} An offender who has received a maximum term of imprisonment has a statutory right to appeal that sentence. See R.C. 2953.08. An appellate court may not reverse the sentence imposed by the trial court unless the court finds, by clear and convincing evidence, that the sentence is contrary to law, was imposed without following the appropriate statutory procedures, or is unsupported by the record. See R.C. 2953.08(G)(1); see, also, *State v. Goff* (June 30, 1999), Washington App. No. 98CA30; *State v. McCain*, Pickaway App. No.

01CA22, 2002-Ohio-5342. "Clear and convincing evidence" refers to a degree of proof "which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54; see *State v. Eppinger*, 91 Ohio St.3d 158, 164, 2001-Ohio-247, 743 N.E.2d 881.

{¶12} The legislature has specified certain factors and purposes that a sentencing court must consider before determining the appropriate sentence to impose upon an offender. See *State v. Dunwoody* (Aug. 5, 1998), Meigs App. No. 97CA11. "[T]he legislature's imposition of standards amounts to a statutory definition of abuse of discretion ***." Id. In conducting our review, we must determine the following four issues: (1) whether the trial court considered the statutory factors; (2) whether the trial court made the required findings; (3) whether there was substantial evidence in the record to support those findings; and, (4) whether the trial court's ultimate conclusion was clearly erroneous. See id.

{¶13} Felony sentences must comply with the overriding purposes of sentencing as outlined in R.C. 2929.11. See *State v. McConnaughey* (Mar. 4, 1998), Athens App. No. 97CA39. The trial court must be directed by the dual overriding purposes of protecting the public from future crimes the offender may commit and punishing the

offender. See R.C. 2929.11(A). To achieve these overriding purposes, the sentencing court must "consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both." Id. The sentencing court must further choose a sentence that is commensurate with, and not demeaning to, the seriousness of the offender's conduct and the impact on the victim. See R.C. 2929.11(B).

{¶14} Pursuant to R.C. 2929.14(B), courts presume the shortest authorized prison term is appropriate if the offender has not previously served a prison term. See R.C. 2929.14(B); *State v. Edmonson*, 86 Ohio St.3d 324, 325, 1999-Ohio-110, 715 N.E.2d 131. Nevertheless, a trial court may impose a longer sentence if it finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime. See R.C. 2929.14(B)(2); *Edmonson*, supra. The trial court is not required to give specific reasons for finding that the minimum prison term is inappropriate. See *Edmonson* at syllabus. However, the court must note on the record that it engaged in the analysis required under R.C. 2929.14(B) and that it deviated from the minimum sentence for at least one of the two sanctioned reasons. See id. at 326.

{¶15} The trial court specifically found in its sentencing entry that as to the offenses of aggravated robbery, receiving stolen

property, and the second count of breaking and entering, the minimum sentence would demean the seriousness of appellant's actions and not adequately protect the public from future crime.[1] Accordingly, we conclude that the trial court complied with the requirements of R.C. 2929.14(B) before imposing sentences greater than the minimum sentences on appellant.

{¶16} However, appellant also contends that the trial court erred in imposing the maximum sentences allowed under law. R.C. 2929.14(C) restricts a court's authority to impose the maximum prison sentence. Maximum sentences are reserved for (1) offenders who have committed the worst forms of the offense; (2) offenders who pose the greatest likelihood of committing future crimes; (3) certain major drug offenders; and, (4) certain repeat offenders. See R.C. 2929.14(C); see, also, *Goff*, supra, and *State v. Kauff* (Nov. 9, 1998), Meigs App. No. 97CA13. The court must find, on the record, that the offender falls into one of these four classifications before it can impose a maximum sentence on an offender. See *Goff*, supra. The trial court must also state on the record its reasons for imposing the maximum sentence. See id. This court will uphold a maximum sentence by a trial court if its stated findings are supported by the record. See id.; *State v. Rose* (Sept. 15, 1997), 12th Dist. No. CA96-11-106.

[1] We note that appellant has not appealed the trial court's imposition of maximum sentences for the receiving stolen property and breaking and entry convictions. Accordingly, we do not review the trial court's decision to impose those sentences.

{¶17} In its sentencing entry, the trial court found that "by participating in the armed robbery of a 91 year old [sic] store owner who was innocently operating a family business that he has helped run all of his life, the defendant has committed the worst form of this offense, and due to her criminal history as an adult and a juvenile, and given the crime spree that she was involved in, she poses the greatest likelihood of recidivism." Thus, we conclude that the trial court made the requisite findings under R.C. 2929.14(C) and stated the reasons for its findings as mandated by R.C. 2929.19(B)(2)(d).

{¶18} Nevertheless, appellant contends that the record does not support the trial court's conclusions that she committed the worst form of the offense or poses the greatest likelihood of committing future crimes. Appellant asserts that the fact that Mr. Schafer was elderly did not cause appellant's crime to be the worst form of the offense. Furthermore, appellant asserts that Mr. Schafer suffered no physical or mental injury or serious economic harm as a result of the offense. Moreover, appellant asserts that she made sure that the pistol used in the armed robbery was unloaded. As to her likelihood of committing future crimes, appellant argues that the mere facts that she has several prior misdemeanor convictions and a charge pending in another county at the time of the armed robbery are insufficient to show that she poses the greatest likelihood of recidivism.

{¶19} First, we consider whether the record supports the trial court's finding that appellant committed the "worst form of the offense." The sentencing statute concedes that more than one situation might constitute the worst form of an offense. See Griffin & Katz, Ohio Felony Sentencing Law (2002 Ed.) 669, Section 7.6. When determining whether a defendant has committed the worst form of a particular offense, a trial court should consider the impact on the victim, the intent of the offender, the offender's position of responsibility, whether the offense was an organized criminal activity, and the totality of the circumstances, including any mitigating circumstances. See id.; R.C. 2929.12(B); *State v. Edmonson* (Sept. 25 1998), 11th Dist. No. 97-P-0067, affirmed by 86 Ohio St.3d 324, 1999-Ohio-110, 715 N.E.2d 131.

{¶20} The record in the case sub judice reveals that appellant was an accomplice to Steward, who pointed the unloaded weapon at the victim and stole $400 from the cash register. There is no evidence in the record that the victim suffered physical or emotional harm as a result of this crime. Furthermore, the record does not establish that the stolen $400 constituted a substantial economic loss. In any event, the record reveals that the money was recovered from appellant and eventually returned to Mr. Schafer.

{¶21} In addition, appellant accepted responsibility for her actions and expressed remorse at her sentencing hearing. Clearly, the trial court was free to doubt appellant's expressions of remorse.

However, given the lack of serious economic, physical, or emotional harm, we conclude that there is clear and convincing evidence that appellant did not commit one of the worst forms of aggravated robbery.

{¶22} Next we review the trial court's determination that appellant also posed the greatest likelihood of committing future crimes as justification for imposing the maximum sentence for her aggravated robbery conviction. In reaching this conclusion, the trial court noted that at the time of the aggravated robbery, appellant was out on bail for another felony (breaking and entering) allegedly committed in Richland County, Ohio. The trial court also noted that as a juvenile, appellant was found guilty of assault and probation violation. Further, as an adult, appellant was convicted of menacing, operating a motor vehicle without a license, and driving under suspension. We agree with the trial court that appellant's criminal history demonstrates some likelihood of recidivism. Nevertheless, we conclude that the record does not support the trial court's finding that appellant poses the *greatest likelihood* of committing future crime.

{¶23} The use of the term "greatest likelihood" requires the court to determine not simply that recidivism is "likely" or "highly likely." Griffin & Katz, Ohio Felony Sentencing Law (2002 Ed.) 671-672, Section 7.6. "It is a superlative applicable to a very limited number of offenders for whom hope of reformation seems extremely

limited if not truly impossible, at least in the maximum period of imprisonment available for the particular offense." Id. Furthermore, "[b]ecause prison is considered to be the most effective deterrent and because R.C. 2929.14(B) requires that a person who has not been to prison should receive the minimum prison sentence unless the sentencing judge finds that the minimum would demean the seriousness of the offender's conduct or not adequately protect the public from future crime, there would seem to be strong guidance against imposing the maximum prison sentence on one who has not previously been imprisoned." Griffin & Katz, Ohio Felony Sentencing Law (2002 Ed.) 679, Section 7.6.

{¶24} The record reveals that appellant was convicted of assault as a juvenile and violated her probation. As an adult, appellant has had several misdemeanor convictions for driving without a license and driving under suspension. The only remaining offense considered during sentencing, aside from those for which she was being sentenced, was a charge of breaking and entering in Richland County. Appellant was out on bail when she committed the crimes that relate to this appeal. While this fact reveals a likelihood of committing future crimes, when viewed in context of the overall circumstances, including that the offense occurred within weeks of the offenses now at issue and appellant's young age (twenty years of age), we cannot find that appellant poses the *greatest likelihood* of committing future crime. Furthermore, given that appellant has not previously

served a prison sentence, we cannot conclude that imposing the maximum sentence is necessary. Accordingly, based upon the specific facts and evidence presented in this case, we conclude that the record does not support the trial court's finding that appellant poses the greatest likelihood of recidivism.

{¶25} Therefore, we sustain appellant's First Assignment of Error and reverse the trial court's imposition of the maximum sentence as to the aggravated robbery conviction.

II. Consecutive Sentences

{¶26} In her Second Assignment of Error, appellant asserts that the trial court's imposition of consecutive sentences was inappropriate.

{¶27} Generally, trial courts in Ohio must impose concurrent sentences. See R.C. 2929.41(A). In order to impose consecutive sentences, a trial court must make certain findings and give its reasons for the imposition of consecutive sentences upon the offender. See R.C. 2929.19(B)(2)(c); *State v. Martin* , 140 Ohio App.3d 326, 2000-Ohio-1942, 747 N.E.2d 318; *State v. Brice* (June 9, 1999), Lawrence App. No. 98CA24. R.C. 2929.14(E)(4) provides:

{¶28} "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:

{¶29} "(a) The offender committed 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.

{¶30} "(b) The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct.

{¶31} "(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(E)(4).

{¶32} Thus, the trial court must first find that consecutive sentences are necessary to protect the public from future crime or to punish the offender. See R.C. 2929.14(E)(4). Second, the trial court must then find that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. See id. Finally, the trial court must also find that one of the three factors listed in R.C. 2929.14(E)(4)(a)-(c) applies. See id.

{¶33} Furthermore, these findings must be affirmatively set forth in the record. See *State v. Finch* (1998), 131 Ohio App.3d 571, 723

N.E.2d 147. "The record 'must contain some indication, *by use of specific operative facts*, that the court considered the statutory factors in its determination.'" (Emphasis sic.) *State v. Volgares* (May 17, 1999), Lawrence App. No. 98CA6, quoting *State v. Kase* (Sept. 25, 1998), 11th Dist. No. 97-A-0083. In *State v. Martin*, supra, we held as follows:

{¶34} "The statutory guidelines set out in R.C. 2929.14(E)(4) require a trial court to make three findings before it may impose consecutive sentences. Furthermore, the trial court must state the reasons upon which it based those findings. R.C. 2929.19(B)(2)(c). These requirements are separate and distinct. *State v. Brice* (Mar. 29, 2000), Lawrence App. No. 98CA24 []. Failure to comply with either requirement justifies remand of the sentence. Id., *State v. Volgares* (May 17, 1999), Lawrence App. No. 98CA6 [] (trial court failed to make specific findings pursuant to R.C. 2929.14(E)), *State v. Blair* (Dec. 27, 1999), Scioto App. Nos. 98CA2588 and 98CA2589 [] (trial court made findings required by R.C. 2929.14(E), but failed to give any reasons to support its findings pursuant to R.C. 2929.19(B)(2)(c)). The trial court's findings and reasoning need not appear in the judgment entry, although we have suggested this as the best practice." *State v. Martin*, 140 Ohio App.3d at 334; see, also, *Volgares*, supra.

{¶35} In its sentencing entry, the trial court found that "the harm caused by the multiple offenses was so great or unusual that no

single prison term for any of the offenses committed as part of the offender's course of criminal conduct reflect the seriousness of the offender's conduct." The trial court also found that "the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by this offender." Further, the court found that "consecutive sentences are necessary to protect the public from future crime or to punish the offender, and said consecutive sentences are not disproportionate to the serousness [sic] of the offender's conduct and to the danger the offender imposes [sic] to the public." These findings are sufficient to satisfy the statutory requirements of R.C. 2929.14(E)(4).

{¶36} After making these findings, the court then stated that it found certain facts present that make this offense more serious including: (1) the age of the victim of the aggravated robbery and the fact that the victim was working at his own store when he was threatened with a gun pointed in his face; (2) the fact that appellant's accomplice was in possession of a .22 caliber pistol which was used to threaten the victim and facilitate the crime; (3) the fact that the crime was a part of a series of criminal activity by appellant and her accomplice; (4) the serious economic harm caused to Mr. Schafer and the other victims; (5) and the serious emotional harm to the Haas family. The trial court also found that appellant was more likely to commit future crimes because she was out on bail with charges pending in Richland County at the time of the present

offenses and she had prior juvenile and adult convictions. Based on a review of the entry, we conclude that the court cited these factors as its reasons for imposing consecutive sentences and, therefore, complied with the mandate of R.C. 2929.19(B)(2)(c).

{¶37} However, appellant argues that the record does not support the imposition of consecutive sentences, and we must agree. First, it is important to note that the imposition of consecutive sentences is subject to greater restrictions than the imposition of maximum terms of incarceration. See *State v. DeAmiches* (Mar. 1, 2001), 8th Dist. No. 77609. As the Eighth District noted in *DeAmiches*, "[w]hile R.C. 2929.14(C) essentially allows a maximum term upon a finding that either the punishment or public protection purposes of R.C. 2929.11 will be served thereby, the imposition of consecutive sentences must be analyzed with respect to both purposes. Although the judge can impose the sentence primarily for punishment purposes (by citing the gravity of the offenses) or for public protection purposes, he must also find that the sentences are not disproportionate with respect to both purposes. Moreover, the judge may not consider whether the sentences are disproportionate with respect to the risk of future crime by others; R.C. 2929.14(E)(4) requires a finding that the sentences are not disproportionate to the danger the offender poses to the public."

{¶38} For the reasons stated in the previous assignment of error, there is insufficient evidence to support the trial court's finding

that the harm caused by appellant's commission of aggravated robbery was "so great or unusual" that no single prison term adequately reflects the seriousness of the offender's conduct. Moreover, implicit in our determination that the maximum sentence for the aggravated robbery conviction is unsupported because appellant did not commit the "worst form" of the offense is the conclusion that a single prison term adequately reflects the seriousness of appellant's conduct. Thus, R.C. 2929.14(E)(4)(b) is inapplicable. See Griffin & Katz, Ohio Felony Sentencing Law (2002 Ed.) 716, Section 7.6 (stating that if the maximum sentence for the most serious offense is insufficient, then the court should consider the imposition of consecutive sentences).

{¶39} Similarly, the trial court's finding that appellant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by appellant is unsupported. Again, "[i]mplicit in R.C. 2929.14(E)(4)(c) is that the court has considered imposing the maximum sentence for the most serious offense and has determined that sentence to be inadequate to protect the public." Griffin & Katz, Ohio Felony Sentencing Law (2002 Ed.) 717, Section 7.6. In the previous assignment of error, we concluded that the record demonstrates that the imposition of the maximum sentence for aggravated robbery is unnecessary to protect the public from appellant as a lesser term of imprisonment is sufficient to provide such protection. For the same reasons previously cited,

we must conclude that consecutive sentences are likewise unnecessary for the protection of the public.

{¶40} Therefore, we conclude that based on the specific facts and evidence of this case, the imposition of consecutive sentences is unsupported by the record. Thus, we sustain appellant's Second Assignment of Error.

Conclusion

{¶41} Based on the specific facts of this case, we find that the trial court's imposition of the maximum sentence for appellant's aggravated robbery conviction was unsupported by the record. Likewise, the trial court's order that appellant's sentences be served consecutive is also unsupported by the record.

{¶42} Thus, we sustain appellant's assignments of error and remand this matter to the trial court for further actions consistent with this opinion.

Judgment reversed and remanded.

Harsha, J., and Abele, J.: Concur in Judgment and Opinion.

FOR THE COURT

BY: _____
David T. Evans
Presiding Judge