[Cite as *State v. Coleman*, 2017-Ohio-1067.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 16CA11
vs.	:	
JEFFREY COLEMAN,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Daniel J. O'Brien, Dayton, Ohio, for appellant

Anneka P. Collins, Highland County Prosecuting Attorney, Hillsboro, Ohio, for appellee

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 3-8-17
ABELE, J.

{¶ 1} This is an appeal from a Highland County Common Pleas Court judgment of conviction and sentence. The trial court found Jeffrey Coleman, defendant below and appellant herein, guilty of nine drug-related offenses and, pursuant to the parties' jointly-recommended sentence, ordered appellant to serve nine consecutive twelve-month terms of imprisonment. Appellant raises the following assignment of error for review:

> "A CRIMINAL DEFENDANT IN OHIO IS DENIED STATE AND FEDERAL DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAW AND AN OHIO TRIAL COURT PREJUDICIALLY ERRS WHERE THE TRIAL COURT FAILS TO FOLLOW STATUTORY REQUIREMENTS AND FAILS TO GRANT A CRIMINAL DEFENDANT CONCURRENT SENTENCES ON ALL PROBATIONABLE OFFENSES BASED ON AN

UNCLEAR, VAGUE AND INSUFFICIENT FACTUAL RECORD AND BY IMPOSING CONSECUTIVE SENTENCES WITHOUT EXHAUSTING THE MAXIMUM SENTENCE AVAILABLE TO THE COURT FOR EACH OF 8 COUNTS UNDER THE CRIMINAL CLASSIFICATION CATEGORY OF THE CRIME CHARGED; E.G. EIGHTEEN (18) MONTHS MAXIMUM FOR A FELONY FOUR (4) AND 12 MONTHS FOR A FELONY FIVE (5) BY STRINGING TOGETHER A SERIES OF NINE (9) TWELVE (12) MONTH SENTENCES AD SERIATIM AND CONSECUTIVELY FOR EACH SEPARATE COUNT TO WHICH THE DEFENDANT PLED GUILTY."[1]

{¶ 2} In late 2015, a Highland County grand jury returned a thirty-three count,

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[1] Initially, we observe that appellant's assignment of error conflates the "assignment of error" with the "statement of the issues." App.R. 16(A)(3) and (4) require an appellant's brief to set forth an assignment of error and a statement of the issues. *Accord* Painter and Pollis, Ohio Appellate Practice (2016 Ed.), Section 5:13 (explaining that the "'statement of issues' should identify these key issues separately for each assignment of error"); *see* App.R. 16 (1992 Staff Notes) (stating that the statement of issues "logically follow the assignments of error"). "[T]he assignments of error are purely for the purpose of pinpointing the source of the alleged error." Painter and Pollis, Section 5:13. "The 'Assignments of Error' should designate specific rulings which the appellant challenges on appeal. They may dispute the final judgment itself or other procedural events in the trial court." *N. Coast Cookies, Inc. v. Sweet Temptations, Inc.*, 16 Ohio App.3d 342, 343, 476 N.E.2d 388 (8th Dist.1984); *accord Davis v. Byers Volvo*, 4th Dist. Pike No. 11CA817, 2012-Ohio-882, 2012 WL 691757, fn. 1, citing Painter and Dennis, Ohio Appellate Practice (2007 Ed.), Section 1.45 (stating that "the assignments of error * * * set forth the rulings of the trial court * * * contended to be erroneous"); *see also* App.R. Rule 16 (1992 staff notes) (setting forth an example of a proper assignment of error as, "The trial court erred in overruling defendant-appellant's motion for directed verdict. (Tr. _____)").

On the other hand, "the statement of the issues gives the appellant an opportunity to begin to explain, through advocacy, how the trial court erred." Painter and Pollis, Section 5:13. "The 'Statement of Issues' should express one or more legal grounds to contest the procedural actions challenged by the assigned errors. They may subdivide questions presented by individual assigned errors, or they may be substantially equivalent to the assigned errors." *N. Coast Cookies, Inc.*, 16 Ohio App.3d at 343–44; *accord* App.R. 16 (1992 Staff Notes) (explaining that "[t]he issues presented are the issues raised by the assignments of error").

In the case at bar, appellant's "assignment of error" suggests that the specific ruling he challenges on appeal is the trial court's sentencing decision. The remaining bulk of appellant's "assignment of error" appears to contain the legal grounds to contest the trial court's sentencing decision. If an appellant does not comply with the Appellate Rules, we have the authority to disregard the assignment of error or dismiss the appeal. *Hart v. Hudson*, 4th Dist. Pickaway No. 10CA19, 2010-Ohio-5954, 2010 WL 4949654, ¶11; *Salisbury v. Smouse*, 4th Dist. Pike No. 05CA737, 2005-Ohio-5733, 2005 WL 2812754, ¶11-12 (noting that appellate court has "discretion to dismiss an appeal for a party's failure to comply with the Appellate Rules"). "However, 'it is a fundamental tenet of judicial review in Ohio that courts should decide cases on the merits.'" *Salisbury* at ¶12, quoting *DeHart v. Aetna Life Ins. Co.,* 69 Ohio St.2d 189, 192, 431 N.E.2d 644 (1982), citing *Cobb v. Cobb*, 62 Ohio St.2d 124, 403 N.E.2d 991 (1980). In the interests of justice, therefore, we will extract the assignment of error embedded within appellant's combined assignment of error/statement of the issues, i.e., the trial court erred by sentencing appellant to consecutive prison terms.

drug-offense-related indictment against appellant and others. Later, appellant and the state entered into a plea agreement. Under the agreement, appellant consented to plead guilty to ten of the thirty-three counts and the state agreed to dismiss the remaining counts. Additionally, the state and appellant "jointly recommend[ed] 12 months on each count consecutive for a total of 108 months (9 years)."[2] At the plea hearing, the trial court read the parties' agreement into the record: "Defendant will plead guilty to Counts 4, 6, 8, 12, 18, 20, 24, 26, and 33. The State will dismiss the remaining counts. The State and defense jointly recommend twelve (12) months on each count consecutive, for a total of one hundred and eight (108) months, or nine (9) years." The court asked appellant whether that was his understanding of the agreement, and appellant responded affirmatively. Later, at the sentencing hearing, the court specifically noted that "in imposing these consecutive sentences [the court] finds first of all that this was an agreed upon recommended sentence by the parties."

{¶ 3} On March 28, 2016, the trial court found that appellant had been convicted upon a plea of guilty to nine drug-related offenses: (1) four counts of trafficking in heroin in the vicinity of a school; (2) two counts of trafficking in cocaine in the vicinity of a school; (3) two counts of fourth-degree felony trafficking in heroin; and (4) one count of fifth-degree felony trafficking in heroin. The court dismissed the remaining counts. The court sentenced appellant to serve twelve months on each count, and ordered appellant to serve the sentences consecutively to one another for a total of 108 months imprisonment. The court found that (1) "the

[2] The tenth count to which appellant pled guilty was a forfeiture specification. Thus, the state and appellant did not recommend a prison sentence for the tenth count, but instead, appellant agreed to forfeit certain property. The forfeiture specification is not relevant to the issues in this appeal. We merely mention it to explain the apparent discrepancy between appellant pleading guilty to ten counts and the jointly-recommended sentence of one year on each count, for a total of nine (not ten) years.

consecutive sentences are necessary to protect the public from future crime or to punish the offender"; (2) "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public"; (3) "[a]t least two of the multiple offenses were committed as part of one or more courses of conduct; (4) "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"; and (5) "[t]he offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender." This appeal followed.

{¶ 4} In his sole assignment of error, appellant argues that the trial court erred by imposing consecutive sentences. He contends that the underlying facts fail to justify the trial court's decision to impose consecutive sentences. The state asserts that R.C. 2953.08(D)(1) precludes appellant from appealing the jointly-recommended sentence that the court imposed.

{¶ 5} R.C. 2953.08 limits appellate review of felony sentences. *See generally State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231. R.C. 2953.08(G)(2) specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either that (1) "the record does not support the sentencing court's findings" under certain statutory provisions, or (2) "the sentence is otherwise contrary to law." *Accord State v. Pulliam*, 4th Dist. Scioto No. 16CA3759, 2017-Ohio-127, 2017 WL 132681, ¶6; *State v. Perry*, 4th Dist. Pike No. 16CA863, 2017-Ohio-69, 2017 WL 105959, ¶13. R.C. 2953.08(D)(1) states, however, that "[a] sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized

by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." Consequently, an appellate court lacks the authority to review a jointly-recommended sentence that "is authorized by law" and that "is imposed by a sentencing judge." Therefore, in the case sub judice, we cannot review appellant's felony sentence if it was (1) jointly recommended, (2) authorized by law, and (3) imposed by the sentencing judge. *State v. Underwood*, 124 Ohio St.3d 365, 2010–Ohio–1, 922 N.E.2d 923, ¶16.

{¶ 6} Our review of the record reveals that appellant and the state jointly recommended the sentence. The plea agreement recites that the state and appellant jointly recommended a sentence consisting of nine consecutive twelve-month prison terms. During the plea hearing, the trial court read the parties' jointly-recommended sentence into the record. At the sentencing hearing, the court noted that the parties jointly recommended a sentence.

{¶ 7} Additionally, appellant's sentence is authorized by law. "A sentence is 'authorized by law' and is not appealable within the meaning of R.C. 2953.08(D)(1) only if it comports with all mandatory sentencing provisions." *State v. Sergent*, — Ohio St.3d —, 2016-Ohio-2696, — N.E.3d —, ¶26, quoting *Underwood* at paragraph two of the syllabus. Appellant entered guilty pleas to eight fourth-degree felonies and one fifth-degree felony. R.C. 2929.14(A)(4) authorizes a prison term between six and eighteen months for a fourth-degree felony. R.C. 2929.14(A)(5) authorizes a prison term between six and twelve months for a fifth-degree felony. The state and appellant jointly recommended twelve month prison terms for each felony. R.C. 2929.14(A)(4) and (5) thus authorize the twelve-month prison terms the court imposed.

{¶ 8} Furthermore, R.C. 2929.14(C)(4) permits, but does not require, a trial court to

impose consecutive sentences.[3] R.C. 2929.14(C)(4) thus is not a mandatory sentencing provision. See *Sergent* at ¶28-30. Accordingly, the absence of discretionary consecutive-sentence findings does not render a jointly- recommended sentence that includes nonmandatory consecutive sentences unauthorized by law. *Id.* at ¶30. Instead, the parties' agreement obviates the need for R.C. 2929.14(C)(4) findings. *Id.* at ¶42. Thus, even when a trial judge fails to make the statutorily-defined consecutive-sentence findings, the jointly-recommended sentence is nevertheless "authorized by law," and therefore, not appealable pursuant to R.C. 2953.08(D)(1). *Id.*; *accord State v. Porterfield,* 106 Ohio St.3d 5, 829 N.E.2d 690, 2005–Ohio–3095, ¶25 ("Once a defendant stipulates that a particular sentence is justified, the sentencing judge no longer needs to independently justify the sentence."); *State v. Johnson*, 4th Dist. Athens No. 16CA6, 2016-Ohio-8575, 2016 WL 7737176, ¶15.

{¶ 9} Lastly, in the case sub judice, the sentencing judge imposed the parties'

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[3] R.C. 2929.14(C)(4) states:

> 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

jointly-recommended sentence. The parties recommended nine consecutive twelve-month terms of imprisonment. That is exactly the sentence that the trial court imposed. Thus, all three of the requirements set forth in R.C. 2953.08(D)(1) apply. Consequently, appellant's sentence is not subject to appellate review.

{¶ 10} Appellant nevertheless claims that we should review his sentence because it "was not a normal or ordinary joint recommendation plea when the [trial judge] stated he would not be bound by the terms of the plea." Generally, a "trial court is not bound by a recommendation." *State v. Bailey,* 5th Dist. Knox No. 05-CA-13, 2005–Ohio–5329, ¶15. "'A trial court does not err by imposing a sentence greater than "that forming the inducement for the defendant to plead guilty when the trial court forewarns the defendant of the applicable penalties, including the possibility of imposing a greater sentence than that recommended by the prosecutor."'" *State ex rel. Duran v. Kelsey,* 106 Ohio St.3d 58, 2005–Ohio–3674, 831 N.E.2d 430, ¶6, quoting *State v. Buchanan,* 154 Ohio App.3d 250, 2003–Ohio–4772, 796 N.E.2d 1003, ¶13 (5th Dist.), quoting *State v. Pettiford,* 12th Dist. Fayette No. CA2001–08–014, 2002 WL 652371, *3 (Apr. 22, 2002). Most important, however, is that if the trial court in the case at bar had imposed a sentence other than the jointly-recommended sentence, then the last clause of R.C. 2953.08(D)(1) would render the statute inapplicable, and hence, the sentence would be appealable. In the case at bar, however, appellant received the sentence for which he bargained. R.C. 2953.08(D)(1) thus prohibits us from reviewing the sentence.

{¶ 11} In his reply brief, appellant further challenges the constitutionality of R.C.

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protect the public from future crime by the offender.

2953.08(D)(1). However, the purpose of a reply brief is to afford the appellant an opportunity to respond to the appellee's brief, not to raise an issue for the first time. *State v. Mitchell,* 10th Dist. Franklin No. 10AP–756, 2011–Ohio–3818, ¶47. "'The appellant cannot raise an issue for the first time in a reply brief, and thus effectively deny the appellee an opportunity to respond to it.'" *State v. Nguyen,* 4th Dist. Athens No. 12CA14, 2013-Ohio-3170, 2013 WL 3816605, ¶34, quoting *Nemeth v. Nemeth,* 11th Dist. Geauga No. 2007–G–2791, 2008–Ohio–3263, ¶22. Thus, "[a]ppellate courts generally will not consider a new issue presented for the first time in a reply brief." *State v. Spaulding*, — Ohio St.3d —, 2016-Ohio-8126, — N.E.3d —, ¶179, quoting *State v. Quarterman,* 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶18; *see State v. Murnahan,* 117 Ohio App.3d 71, 82, 689 N.E.2d 1021 (2d Dist.1996) (refusing to consider error asserted in reply brief, because "[a]n appellant may not use a reply brief to raise new issues or assignments of error"); *State v. McComb,* 2d Dist. Montgomery No. 26481, 2015–Ohio–2556, ¶14 (again refusing to consider error raised for the first time in reply brief.); *State v. Shaffer,* 11th Dist. Portage No. 2002–P–0133, 2004–Ohio–336, ¶39 (refusing to consider issue that trial counsel was ineffective in failing to object to testimony of police officers, where issue was raised only in appellant's reply brief); *State ex rel. Petro v. Gold,* 166 Ohio App.3d 371, 2006–Ohio–943, 850 N.E.2d 1218, ¶76 (10th Dist.) (refusing to consider issue that was raised only in reply brief). We therefore decline to consider appellant's constitutional challenge.

{¶ 12} Accordingly, based upon the foregoing reasons, we overrule appellant's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.