[Cite as *State v. VanWinkle*, 2017-Ohio-7642.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2016-CA-25
	:	
v.	:	T.C. NO. 16-CR-66
	:	
BENJIE VanWINKLE	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the ___15th___ day of _____September_____, 2017.

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DONOVAN, J.

{¶ 1} Defendant-appellant Benjie VanWinkle appeals his conviction and sentence for three counts of rape (under thirteen years of age), in violation of R.C. 2907.02(A)(1)(b), all felonies of the first degree. VanWinkle filed a timely notice of appeal with this Court

on December 27, 2016.

{¶ 2} On March 14, 2016, VanWinkle was indicted for thirteen counts of rape involving three minor victims. At his arraignment on March 17, 2016, VanWinkle pled not guilty to all of the counts in the indictment, and the trial court set his bond at $750,000.00.

{¶ 3} Shortly thereafter on April 12, 2016, VanWinkle filed a waiver of his right to speedy trial. On August 3, 2016, VanWinkle pled guilty to Count I, Count II, and Count XIII in his indictment. In return for VanWinkle's guilty pleas, the State agreed to dismiss all of the remaining counts in the indictment (Counts III-XII). The trial court accepted VanWinkle's guilty pleas and sentenced him to a mandatory ten years to life in prison on each count. The trial court ordered that Counts I and II be served concurrently, but further ordered those sentence to run consecutive to Count XIII, for an aggregate sentence of twenty years to life in prison.

{¶ 4} It is from this judgment that VanWinkle now appeals.

{¶ 5} VanWinkle's sole assignment of error is as follows:

{¶ 6} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE SENTENCES CONTRARY TO LAW."

{¶ 7} In his sole assignment, VanWinkle contends that the trial court erred when it imposed consecutive sentences.

{¶ 8} In reviewing felony sentences, appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016–Ohio–1002, 59 N.E.3d 1231, ¶ 9. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce, or modify a sentence, or it may vacate the sentence and remand for resentencing,

only if it "clearly and convincingly" finds either (1) that the record does not support certain specified findings or (2) that the sentence imposed is contrary to law.

{¶ 9} As this Court has previously noted:

> "The trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum or more than minimum sentences." *State v. King*, 2013-Ohio-2021, 992 N.E.2d 491, ¶ 45 (2d Dist.). However, in exercising its discretion, a trial court must consider the statutory policies that apply to every felony offense, including those set out in R.C. 2929.11 and R.C. 2929.12. *State v. Leopard*, 194 Ohio App.3d 500, 2011-Ohio-3864, 957 N.E.2d 55, ¶ 11 (2d Dist.), citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶ 38.

State v. Armstrong, 2d Dist. Champaign No. 2015-CA-31, 2016-Ohio-5263, ¶ 12.

{¶ 10} In general, it is presumed that prison terms will be served concurrently. R.C. 2929.41(A); *State v. Bonnell*, 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.3d 659, ¶ 23 ("judicial fact-finding is once again required to overcome the statutory presumption in favor of concurrent sentences"). However, R.C. 2929.14(C)(4) permits a trial court to impose consecutive sentences if it finds that (1) consecutive sentencing is 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, and (3) any of the following applies:

> (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.

{¶ 11} The trial court must both make the statutory findings required for consecutive sentences at the sentencing hearing and incorporate those findings into its sentencing journal entry. *Bonnell*, 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.3d 659, syllabus. To make the requisite "findings" under the statute, " 'the [trial] court must note that it engaged in the analysis "and that it has considered" the statutory criteria and specifie[d] which of the given bases warrants its decision.' " *Id.* at ¶ 26, quoting *State v. Edmonson*, 86 Ohio St.3d 324, 326, 715 N.E.2d 131 (1999). A trial court need not give a "talismanic incantation of the words of the statute" when imposing consecutive sentences, "provided that the necessary findings can be found in the record and are incorporated in the sentencing entry." *Bonnell* at ¶ 37; *see also State v. Thomas,* 8th Dist. Cuyahoga No. 102976, 2016-Ohio-1221, ¶ 16 ("the trial court's failure to employ the exact wording of the statute does not mean that the appropriate analysis is not otherwise reflected in the transcript or that the necessary finding has not been satisfied").

{¶ 12} At VanWinkle's sentencing hearing, the trial court stated the following when it imposed consecutive sentences:

> The Court: Well the Court has considered the statements made by Mr. VanWinkle as well [as] his defense counsel, Mr. King. The Court has also considered all the Victim Impact Statements that were read here in Court today, as well as those that have been submitted [to] the Court at previous times. And as indicated by counsel earlier, neither of the three Counts that the Defendant has plead guilty to were merged for sentencing purposes.
>
> The Court has also considered the Pre-sentence Investigation in this matter and gone over that extensively. The Court has considered the Purposes and Principals [sic] of Sentencing as set forth in [R.C.] 2929.11. The Court has reviewed the Defendant's criminal record and it is as follows: Defendant has no known juvenile adjudications. As an adult he was previously convicted in 2014 for Falsification, and now he has the current case in front of him.
>
> The Court has also weighed the Recidivism and Seriousness Factors set forth in [R.C.] 2929.12, and makes the following findings: Under the Recidivism Likely Factors, the Court will make a finding there is a history of crim [sic] – there's a history of criminal convictions. *Defendant has not responded favorably to sanctions previously imposed by an adult court*. The Defendant has demonstrated no genuine remorse. With regard to the Recidivism Less Likely Factors, the Court will make a finding that the

Defendant has no prior juvenile record. With regard to the Seriousness Factors, the Court finds that the injury was acerbated by the victim's physical as well – the victim's physical condition as well as a mental condition, as well as age. The victim suffered serious physical, [and] psychological harm. There was a relationship that the Defendant had with the victim that facilitated the offense; both as a step-father and as a father. With regard to the Less Serious Factors the Court makes no findings.

Mr. VanWinkle, the Court finds your conduct in these cases to be reprehensible. The absolute worst form of this type of offense has been demonstrated in this case. You owed a duty to protect these children, not to violate them sexually. And more importantly the Court will note and makes – and considered highly, these were your step-children and your own child. And to make matters worse, they were less than the – the age of thirteen when you subjected them to this abhorrent conduct. You made self-serving statements to my PSI Writer, which I will quote as you stating, "Thankfully this stopped before I ended up having sex with either of these girls." And the Court will also note that you made a statement in the – to the PSI [writer] that this conduct started as a form of comforting them. So that demonstrates to this Court that you took and exploited these children to the 'nth degree.

These statements are offensive, they're inconsistent with the law, and they demonstrate that the only thing that you care about is yourself. I have a duty to protect children from people like you, and I intend to do to --

*** intend to do so today, so that you cannot commit these types of heinous acts in the future.

So after weighing these factors, the Court finds the Defendant, Benjie VanWinkle, is not currently amenable to an available community control sanction, that a prison sentence is consistent with the Purposes and Principles of Sentencing. Therefore, on Count 1 which is a felony of the first degree Rape of a Child Less than Age of Thirteen, the Court will impose a prison sentence of ten years to life, pursuant to [R.C.] 2971.03(A)(1)(b), I guess that's what that is, and this is a mandatory sentence. *** On Count 2 which is another Rape, the Court will impose a sentence of ten years to life pursuant to O.R.C. Section 2971.03(B)(9)(a), this is also a mandatory sentence. Those sentences for Counts 1 and 2 shall run concurrent.

With regard to Count [13], the Court imposes a prison sentence of ten years to life pursuant to O.R.C. Section 2971.3 (sic) (B)(9)(a), to be served at the Ohio Department of Rehabilitation and Correction. This is also a mandatory sentence. *This sentence on Count 13 shall be served consecutively to the sentences on Counts 1 and 2. The Court – because the Court specifically finds that a consecutive sentence on Count 13 is necessary to protect the public from future crime and to punish the* [D]*efendant for his con – his conduct. Further the Court finds that the consecutive sentence in Count 13 is not disproportionate because of the ages of the children and the victims in this matter and the relationship to the Defendant and that the victims suffered such great psychological and*

physical harm, that is unusual, and that a single prison term does not adequately reflect the seriousness of the Defendant's conduct, and again Defendant's version of his conduct causes the – this Court great concern that would – that he would reoffend and that consecutive sentences on Count 13 is necessary to protect the public. The Court also finds that Defendant's conduct represents the worst form of the offense for all re – reasons already stated by the Court.

Tr. 11- 15.

{¶ 13} Upon review, we conclude that the trial court made the appropriate findings before imposing consecutive sentences in the instant case. Here, the trial court clearly believed that VanWinkle's conduct warranted a harsh sentence. Specifically, the trial court found that VanWinkle committed the worst form of the offense by raping his two minor stepdaughters, as well as his own minor daughter. The trial court also found that consecutive sentences were necessary to protect the public and punish VanWinkle because he was a danger to the public and had engaged in multiple rapes of three children over which he had responsibility; consecutive sentences were not disproportionate to the seriousness of his conduct given the minor victims' relationship to VanWinkle; and the fact that the victims suffered great psychological and physical harm as a result of VanWinkle's conduct. Additionally, the trial court found statements made by VanWinkle in his PSI established that he demonstrated no genuine remorse for his conduct.

{¶ 14} With respect to serious psychological harm, one of the victims stated the following in her Victim Impact Statement:

> *** I was about nine or ten years old when [VanWinkle] started doing inappropriate stuff to me. It went on for about two to three years. *What* [VanWinkle] *did to me made me feel violated. The violation makes me feel all gross and icky and uncomfortable towards myself. What* [VanWinkle] *did makes me feel like I can't even trust grown men adults. I also can't be able* [sic] *to get perfect attendance because I have to see a counselor and I had to go to the hospital. It made me have a hard time paying attention in class.* ***

Another one of VanWinkle's minor victims stated in her impact statement that she "was four [years old] when it started and it went on until I was ten."

{¶ 15} We note that in imposing consecutive sentences, the trial court stated "*that the victims suffered such great psychological and physical harm, that is unusual, and that a single prison term does not adequately reflect the seriousness of the Defendant's conduct*," which partially mirrors the language in R.C. 2929.14(C)(4)(b). Close review of the transcript establishes that the trial court failed to specifically state that VanWinkle committed the multiple rapes of the three minor victims as a "course of conduct." However the three guilty pleas span a time frame of February 1, 2015 to February 6, 2016, there were multiple victims, and the trial court specifically alluded to exploitation to the " 'nth degree.' "

{¶ 16} In *Bonnell,* the Ohio Supreme Court took "a more 'relaxed' approach to the requirements of R.C. 2929.14(C), stating that the requisite findings could be made if the reviewing court could 'discern' them from statements made by the sentencing judge." *State v. Kirkman*, 8th Dist. Cuyahoga No. 103683, 2016-Ohio-5326, ¶ 4; *see*

also State v. McCoy, 8th Dist. Cuyahoga No. 103671, 2016-Ohio-5240, ¶ 13–14 (trial court made findings required under R.C. 2929.14(C)(4) that consecutive sentences were not disproportionate to the seriousness of defendant's conduct and the danger he posed to the public where trial judge said "based upon the defendant's actions, three separate cases where firearms were utilized or brandished, individuals being robbed * * * at shopping centers, I don't believe that any punishment would be disproportionate, and I believe it's necessary to protect and punish"); *State v. Chaney,* 2d Dist. Montgomery No. 2015–CA–116, 2016–Ohio–5437, ¶ 11 (" '[T]he trial court's failure to employ the phrase "not disproportionate to the * * * danger [appellant] poses to the public" does not mean that the trial court failed to engage in the appropriate analysis and failed to make the required finding.' "), quoting *State v. Hargrove,* 10th Dist. Franklin No. 15AP–102, 2015-Ohio-3125, ¶ 21.

{¶ 17} Recently, the Eleventh District Court of Appeals held that "when making findings regarding consecutive sentences, 'a verbatim recitation of the statutory language is not required by the trial court.' The trial court is not required to use 'magic words' in order to satisfy its obligation to make findings before imposing consecutive sentences. It is sufficient if the trial court makes statements during the sentencing hearing showing that the decision to impose consecutive prison terms was predicated upon R.C. 2929.14(C)(4)." *State v. Koeser*, 11th Dist. Portage No. 2013-P-0041, 2013-Ohio-5838, ¶ 23.

{¶ 18} In *Koeser*, the trial court imposed consecutive sentences under R.C. 2929.14(C)(4)(b) without expressly stating that the multiple offenses were committed as part of a course of conduct. On appeal, the appellate court held that other statements

the trial court made during the sentencing hearing were sufficient to satisfy the course of conduct finding requirement:

> The trial court found that appellant had pled guilty to three counts: illegal manufacture of marijuana, illegal manufacture of psilocin mushrooms, and endangering children, each of which was committed on February 15, 2012, at appellant's residence. Moreover, the trial court found that appellant was involved in the manufacture of a "bus load" of marijuana and psilocin mushrooms at that time and that this activity occurred in the presence of appellant's child. Thus, the trial court in effect found these three offenses were committed as part of a course of conduct.

Id. at ¶ 27.

{¶ 19} Under *Koeser* a trial court makes a sufficient "course of conduct" finding if, at some point during the sentencing hearing, the court notes that the defendant has been found guilty of multiple offenses that had the necessary temporal relationship. This is consistent with the general principle that a proper finding can be made without the recitation of the specific words used in the statute. *State v. St. John*, 11th Dist. Lake No. 2015-L-133, 2017-Ohio-4043, ¶ 44.

{¶ 20} In *St. John*, the trial court imposed consecutive sentences under R.C. 2929.14(C)(4)(b) without expressly stating that the multiple offenses were committed as part of a course of conduct. We note that similar to VanWinkle, the defendant in *St. John* was convicted for multiple counts of rape and gross sexual imposition committed against two female minors. Relying on its prior holding in *Koeser*, the Eleventh District court of appeals found as follows:

> *** By concluding that the defendant made a separate decision to commit each of the four crimes, the trial court was finding that the crimes did not occur all at once; i.e., the crimes took place as part of one or more courses of conduct. This finding is clearly supported by the underlying facts of the case. Appellant required the two victims to engage in a series of distinct sexual acts over a period of twenty to thirty minutes. Last, requiring a trial court to "find" that the offenses were committed as part of "one or more courses of conduct" serves no purpose as it is true by necessity, not case sensitive. ***

Id. at ¶ 47.

{¶ 21} As previously noted, a trial court need not give a "talismanic incantation of the words of the statute" when imposing consecutive sentences, "provided that the necessary findings can be found in the record and are incorporated in the sentencing entry." *Bonnell* at ¶ 37. Therefore, we conclude that the trial court satisfied its statutory obligations to make the requisite findings on the record for imposing consecutive sentences under R.C. 2929.14(C)(4)(b). The trial court's statements on the record indicate that it considered that VanWinkle committed several rape offenses against multiple minor victims over the course of a year. Viewing the trial court's remarks in their entirety, we can discern that the trial court found that consecutive sentences were appropriate because VanWinkle committed the offenses as part of an ongoing "course of conduct." R.C. 2929.14(C)(4)(b).[1]

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[1] While we find that the trial court's statements during the sentencing were sufficient to satisfy the "course of conduct" finding in R.C. 2929.14(C)(4)(b), the better practice is to use the wording provided in the statute so as to avoid any confusion when consecutive

{¶ 22} Having reviewed VanWinkle's PSI, however, we find that a single prior misdemeanor conviction for falsification does not constitute a "history of criminal conduct" necessary to support the imposition of consecutive sentences in order "to protect the public from future crime by the offender." R.C. 2929.14(C)(4)(c).[2] During the sentencing hearing, the trial court noted that VanWinkle had not responded favorably to previously imposed sanctions. However a review of the PSI establishes that VanWinkle has never been placed on supervision or incarcerated for any prior offenses. In fact, the PSI specifically states that VanWinkle has "no identifiable terms of supervision" and "no identifiable prior prison/jail terms." Thus, to the extent that the trial court relied on VanWinkle's solitary prior misdemeanor conviction for falsification as a basis for imposing consecutive sentences pursuant to R.C. 2929.14(C)(4)(c), we find that the record does not "clearly and convincingly" support the trial court's finding regarding VanWinkle's "history of criminal conduct." However, in light of the trial court's other findings made pursuant to R.C. 2929.14(C)(4)(b), we find no basis for vacating the trial court's imposition of consecutive sentences.

{¶ 23} VanWinkle's sole assignment of error is overruled.

{¶ 24} Finally, we note that although the trial court made sufficient requisite findings pursuant to R.C. 2929.14(C)(4) before imposing consecutive sentences at the hearing, it failed to incorporate those findings into VanWinkle's termination entry. A similar situation was addressed by the Ohio Supreme Court in *Bonnell*, where it stated as

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sentences are imposed.

[2] Besides the conviction for misdemeanor falsification, VanWinkle's PSI establishes that he has been cited several times for misdemeanor traffic offenses including speeding, no seat belt, expired plates, and one conviction for driving under suspension.

follows:

> A trial court's inadvertent failure to incorporate the statutory findings in the sentencing entry after properly making those findings at the sentencing hearing does not render the sentence contrary to law; rather, such a clerical mistake may be corrected by the court through a nunc pro tunc entry to reflect what actually occurred in open court. *See State v. Qualls,* 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 15 (where notification of post-release control was accurately given at the sentencing hearing, an inadvertent failure to incorporate that notice into the sentence may be corrected by a nunc pro tunc entry without a new sentencing hearing). But a nunc pro tunc entry cannot cure the failure to make the required findings at the time of imposing sentence. *See State v. Miller,* 127 Ohio St.3d 407, 2010-Ohio-5705, 940 N.E.2d 924, ¶ 16 ("a nunc pro tunc order cannot cure the failure of a judge to impose restitution in the first instance at sentencing").
>
> And a sentencing entry that is corrected by a nunc pro tunc entry incorporating findings stated on the record at the sentencing hearing does not extend the time for filing an appeal from the original judgment of conviction and does not create a new final, appealable order. *See State v. Lester,* 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 20 ("a nunc pro tunc judgment entry issued for the sole purpose of complying with Crim.R. 32(C) to correct a clerical omission in a final judgment entry is not a new final order from which a new appeal may be taken").

Bonnell at ¶¶ 30, 31.

{¶ 25} Accordingly, the judgment of the trial court is affirmed, and this matter is remanded for the issuance of a nunc pro tunc entry which incorporates into the judgment entry the trial court's findings that were made at the sentencing hearing with respect to the imposition of consecutive sentences, exclusive of R.C. 2929.14(C)(4)(c). We note that the trial court's issuance of such an amended judgment entry "is not a new final order from which a new appeal may be taken." *Bonnell* at ¶ 31; *State v. Snowden*, 2d Dist. Montgomery No. 26329, 2015-Ohio-1049, ¶ 18.

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FROELICH, J. and TUCKER, J., concur.

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