

[Cite as *State v. Collins*, 2017-Ohio-1264.]

STATE OF OHIO, NOBLE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 15 NO 0429
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
CLIFTON D. COLLINS)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Noble County, Ohio Case No. 215-2041

JUDGMENT: Reversed. Sentence Vacated. Remanded for Resentencing.

APPEARANCES:

For Plaintiff-Appellee: Atty. Kelly A. Riddle
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Caldwell, Ohio 43724

For Defendant-Appellant: Atty. Robert Henry
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: March 27, 2017

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WAITE, J.

{¶1} Appellant Clifton D. Collins appeals sentencing in the Noble County Common Pleas Court. The sole issue raised on appeal is whether the trial court erred in imposing consecutive sentences on Appellant. Based on a review of the record, the trial court's imposition of consecutive sentences without making the requisite statutory findings was contrary to law. Therefore, the trial court's decision is reversed and the matter is remanded for resentencing.

Factual and Procedural Background

{¶2} On May 27, 2015, Appellant was indicted on one count of burglary, in violation of R.C. 2911.12(D); one count of kidnapping, in violation of R.C. 2905.01(C); one count of assault, in violation of R.C. 2903.13(C)(1); one count of grand theft, in violation of R.C. 2913.02(B)(4); and one count of robbery, in violation of R.C. 2911.02(B). On September 11, 2015, Appellant pleaded guilty to burglary, kidnapping and assault. The remaining counts were dismissed. The sentencing hearing was held on September 11, 2015. The trial court sentenced Appellant to five years of imprisonment on the burglary charge, five years of imprisonment on the kidnapping charge, and imposed court costs for assault. The sentences were to run concurrently with each other but consecutive to a fifty-eight (58) month term of imprisonment Appellant was to serve from a conviction in Washington County. Appellant was sentenced pursuant to a plea agreement in Washington County for felonies committed prior to the instant case. Appellant pleaded guilty to two counts of burglary; two counts of breaking and entering; one count of possession of drugs; and

one count of failure to register as a sex offender. The Washington County trial court sentenced Appellant to fifty-eight months of imprisonment.

{¶3} Because the trial court in the case *sub judice* ordered the sentence to be served consecutively to the Washington County sentence, Appellant now brings this timely appeal.

ASSIGNMENT OF ERROR

The trial court's imposition of consecutive sentences upon Appellant is contrary to law.

{¶4} Appellant contends that the trial court abused its discretion in ordering the sentence to be served consecutively to the Washington County matter. In response, the state admits error and concurs that the trial court's sentence is contrary to law.

{¶5} This Court must review felony sentences under the standard 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, ¶ 1. Under R.C. 2953.08(G)(2), an appellate court must "review the record, including the findings underlying the sentence * * * given by the sentencing court." An appellate court "may increase, reduce, or otherwise modify a sentence" or it may vacate a sentence and remand the matter to the trial court for resentencing if it "clearly and convincingly" finds either that: (1) "the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant" or (2) "the sentence is otherwise contrary to law."

R.C. 2953.08(G)(2); *Marcum* at ¶ 1. A sentence is contrary to law if the sentence falls outside the statutory range for the particular degree of offense or if the trial court fails to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors pursuant to R.C. 2929.12. When a sentence is imposed solely after consideration of the factors in R.C. 2929.11 and R.C. 2929.12, “an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence.” *Marcum* at ¶ 23.

{¶16} Appellant does not challenge the individual sentences he received for each offense. Instead, he appeals the trial court’s determination that this sentence is to be served consecutive to a sentence he received on unrelated charges in another jurisdiction. A defendant can challenge a consecutive sentence on appeal by one of two means. First, by contending the sentence is contrary to law because the trial court failed to make the necessary findings required by R.C. 2929.14(C)(4). See R.C. 2953.08(G)(2)(b). Second, the defendant can argue the record does not support the findings made under R.C. 2929.14(C)(4). R.C. 2953.08(G)(2)(a). Appellant contends the findings made by the trial court were insufficient to allow for the imposition of a consecutive sentence.

{¶17} R.C. 2929.14(C)(4) sets forth the findings required for imposition of consecutive sentences:

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 protect the public from future crime by the offender.

{¶18} Thus, the sentencing court must find that (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender; (2) that consecutive sentences are not disproportionate to the seriousness of the defendant's

conduct and to the danger he poses to the public; and (3) one of the findings described in subsections (a), (b) or (c). R.C. 2929.14(C)(4); *State v. Bellard*, 7th Dist. No. 12 MA 97, 2013-Ohio-2956, ¶ 17. In determining whether a sentencing court complied with R.C. 2929.14(C)(4), we have held that the trial court need not recite any magic or talismanic words when imposing consecutive sentences. However, it must be clear from the record that the trial court engaged in the required analysis. *Bellard* at ¶ 17.

{¶9} The Ohio Supreme Court has held that the findings required by R.C. 2929.14(C)(4) must be made at the sentencing hearing and included in the sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. Moreover, the Court held that the sentencing court “has no obligation to state reasons to support its findings.” *Id.*

{¶10} A review of the record in the instant case reveals the trial court did not make the required findings at the hearing or in the judgment entry of sentence. In sentencing Appellant, the court made the following statement:

The Court’s going to find that the Defendant has been convicted of one count of burglary a felony of the second degree, one count of kidnapping a felony of the first degree and one count of assault a misdemeanor of the first degree. I have considered principals [sic] and purposes of sentencing and waived seriousness and recidivism factors. The Court’s going to find that the record of this Defendant would indicate that [if] this Court were to impose community control sanctions

it would tend to demean the seriousness of these offenses. I really think that a prison sentence is more appropriate and that's what the Court is going to impose.

9/11/15 Tr., p. 10.

{¶11} The court made no further findings on the record regarding Appellant's consecutive sentence. Moreover, in the court's judgment entry of sentence, it made no additional findings. The judgment entry states:

Over no objection from the defendant, the Court proceeded to sentencing. The defendant was afforded all rights pursuant to Criminal Rule 32. The Court considered the record, oral statements, and recommendations of all parties as well as the principles and purposes of sentencing, and weighed in the seriousness and recidivism factors. The Court considered the statements from the victim, as well as, the victim's guardian.

The Court finds that the defendant is not an appropriate candidate for community control sanctions, and that community control sanctions would demean the seriousness of the offenses. The Court finds that a prison sentence is appropriate.

9/16/15 J.E., p. 2.

{¶12} Thus, the trial court did not comply with the requirements of R.C. 2929.14(C)(4) in sentencing Appellant to a consecutive sentence. There was no finding that consecutive sentences were necessary to protect the public from future

crime or to punish Appellant. The trial court did not find that consecutive sentences were not disproportionate to the seriousness of Appellant's conduct and to the danger posed to the public. Finally, the trial court did not find any of the three options set forth in R.C. 2929.14(C)(4)(a)-(c) and the state, in its appellate brief, concedes this error in sentencing. Therefore, absent sentencing mandates pursuant to R.C. 2929.14(C)(4), Appellant's consecutive sentence is contrary to law. Accordingly, Appellant's assignment of error has merit and is sustained.

{¶13} The judgment of the trial court is reversed and this matter is remanded for resentencing with instructions to the trial court to either impose concurrent sentences or impose consecutive sentences only after making the required findings mandated pursuant to R.C. 2929.14(C)(4). These findings must be made both at the sentencing hearing and in the judgment entry of sentence pursuant to *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659.

Donofrio, J., concurs.

Robb, P.J., concurs.