

[Cite as *State v. Williams*, 2017-Ohio-856.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	CASE NO. 16 MA 0041
)	
PLAINTIFF-APPELLEE,)	
)	
VS.)	OPINION
)	
LEXTER WILLIAMS,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio
Case No. 2009 CR 78

JUDGMENT: Affirmed and Remanded.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains
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JUDGES:

Hon. Carol Ann Robb
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: March 1, 2017

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ROBB, P.J.

{¶1} Defendant-Appellant Lexter Williams appeals his sentence entered in Mahoning County Common Pleas Court. This is the third time Appellant's conviction and sentence is before our court. The issue in this appeal is whether the trial court's sentencing order complied with the Ohio Supreme Court's decision in *State v. Bonnell*, 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.3d 654, and R.C. 2929.14(C)(4), the consecutive sentencing statute. Upon review of the record, we hold the trial court made the necessary consecutive sentence findings at the sentencing hearing. However, the judgment entry does not adequately set forth those sentencing factors. Therefore, the sentence is affirmed, but the matter is remanded to the trial court to enter a nunc pro tunc entry setting forth the applicable consecutive sentence findings made at the sentencing hearing.

Statement of Facts and Procedure

{¶2} In October 2009, Appellant was indicted for three counts of aggravated robbery, two counts of aggravated burglary, four counts of kidnapping (two of those applied to the female victim), one count of rape, and one count of having weapons under disability. *State v. Williams*, 7th Dist. No. 11 MA 131, 2012-Ohio-6277, ¶ 5 (*Williams I*). The rape charge was later amended to gross sexual imposition. *Id.* at ¶ 7. All counts, except the having weapons under disability, carried attendant firearm specifications. *Id.* at ¶ 5.

{¶3} In October 2010, the state and Appellant entered into a plea agreement. *Id.* at ¶ 7. The state agreed to recommend an aggregate 13 year sentence and Appellant entered a guilty plea. *Id.* The trial court accepted the guilty plea and set sentencing for November 2010. *Id.* at ¶ 8. Appellant was released on bond pending sentencing.

{¶4} Prior to sentencing, Appellant violated the terms of the agreement; Appellant fled the jurisdiction and was later arrested in Philadelphia, Pennsylvania. *Id.* at ¶ 8-9.

{¶5} Sentencing occurred in February 2011. *Id.* ¶ 10. Due to the violation of the plea agreement, the state did not recommend the 13 year sentence, instead it recommended the maximum sentence. *Id.* At the sentencing hearing, the trial court

ordered consecutive sentences and imposed an aggregate sentence of 89.5 years. *Id.* at ¶ 12. In the judgment entry, consecutive sentences were ordered, but the aggregate sentence imposed was 83.5 years. *Id.* Appellant appealed and raised, in addition to other issues, sentencing violations. *Id.* at ¶ 50-78.

{¶6} Upon review, we affirmed the conviction, but found merit with the sentencing arguments. *Id.* at ¶ 79. We held the trial court erred by imposing inconsistent sentences at the sentencing hearing and in the judgment entry, erred by failing to properly notify Appellant about postrelease control, and committed plain error by failing to conduct an inquiry into whether certain offenses were allied offenses of similar import. *Id.* Thus, we vacated the sentence and remanded for resentencing. *Id.*

{¶7} Resentencing occurred in April 2013. Appellant argued the aggravated robbery convictions for all the victims should merge with the kidnapping charges for the respective victims for purposes of sentencing. 4/29/13 Sentencing Tr. 18-19, 22. He further asserted the aggravated robbery, two kidnappings and gross sexual imposition charges for the female victim should merge for purposes of sentencing. 4/29/13 Sentencing Tr. 19-22. Lastly, he asserted the two aggravated burglary convictions should merge for purposes of sentencing. 4/29/13 Sentencing Tr. 17. The state agreed the aggravated burglary convictions should merge, but disagreed with the remainder of Appellant's arguments regarding merger. 4/29/13 Sentencing Tr. 7-11.

{¶8} The trial court agreed with the state's merger arguments. Appellant received an aggregate sentence of 81.5 years, which included the imposition of consecutive sentences. Appellant appealed the sentence; his arguments included merger and failure to comply with consecutive sentencing mandates. *State v. Williams*, 7th Dist. 13 MA 125, 2015-Ohio-4100, ¶ 1-3 (*Williams II*).

{¶9} We found some merit with the merger arguments. *Id.* at ¶ 59. Although we disagreed with Appellant's argument that the one kidnapping charge as to the female victim was an allied offense of similar import to her sexual assault, we found the hearing on the merger as to the kidnapping and robbery charges surrounding all three victims was incomplete. *Id.* Therefore, the matter was remanded for further

proceedings. *Id.* Furthermore, we found error with other sentencing issues, specifically consecutive sentence findings and postrelease control advisements. *Id.*

{¶10} The second resentencing occurred on December 1, 2015. At resentencing, the state stipulated the robbery charges for the three victims merged with the kidnapping charges. 12/1/15 Resentencing Tr. 3. Appellant was sentenced to an aggregate sentence of 53 years. Appellant received 10 years for each aggravated robbery conviction. 12/1/15 Resentencing Tr. 11; 3/4/16 J.E. Those sentences were ordered to run consecutive to each other. 12/1/15 Resentencing Tr. 11; 3/4/16 J.E. The court ordered the kidnapping convictions for each respective victim to merge with the aggravated robbery convictions for each respective victim. 12/1/15 Resentencing Tr. 11; 3/4/16 J.E. As for the two convictions for aggravated burglary, the trial court merged those, ordered a 10 year sentence, and ordered the sentence to be served consecutively to the sentences for aggravated robbery. 12/1/15 Resentencing Tr. 11; 3/4/16 J.E. Appellant was sentenced to 10 years for the second kidnapping that was associated with the sexual assault conviction and that sentence was also ordered to be served consecutive to above sentences. 12/1/15 Resentencing Tr. 11; 3/4/16 J.E. Appellant was sentenced to 18 months for the gross sexual imposition conviction; the sentence was ordered to be served concurrently. 12/1/15 Resentencing Tr. 11; 3/4/16 J.E. Appellant was sentenced to 3 years for having weapons while under disability, and the sentence was ordered to be served concurrently. 12/1/15 Resentencing Tr. 11-12; 3/4/16 J.E. Appellant was then sentenced to 3 years for the firearm specification, which was required to be served consecutive to all other offenses. 12/1/15 Resentencing Tr. 12; 3/4/16 J.E. Lastly, the trial court advised Appellant about postrelease control. 12/1/15 Resentencing Tr. 12; 3/4/16 J.E.

{¶11} Appellant timely appealed the sentence.

Assignment of Error

“The sentence imposed against Appellant was in violation of R.C. 2929.14(C)(4) and contrary to law as the trial court did not include the required consecutive sentencing factors in the sentencing order.”

{¶12} The arguments presented on appeal concern consecutive sentence findings and the court’s compliance with R.C. 2929.14(C)(4).

{¶13} The Ohio Supreme Court recently articulated the appropriate standard of review for felony sentencing appeals. “Applying the plain language of R.C. 2953.08(G)(2), * * * an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court’s findings under relevant statutes or that the sentence is otherwise contrary to law.” *State v. Marcum*, 146 Ohio St.3d 516, 2016–Ohio–1002, 59 N.E.3d 1231, ¶ 1. The abuse of discretion standard is no longer applied. *Id.* at ¶ 10.

{¶14} When a trial court imposes a consecutive sentence it must make the required R.C. 2929.14(C)(4) findings at the sentencing hearing, and it must incorporate those findings into the sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.3d 654, ¶ 29. R.C. 2929.14(C)(4) provides:

(4) 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.

R.C. 2929.14(C)(4).

{¶15} At the sentencing hearing, the trial court ordered consecutive sentences and made the following findings:

The court further finds that there was a conviction for multiple offenses and the court will therefore require the defendant to serve consecutive time, which is necessary to protect the public from future crime and punish – and/or to punish the offender, and is not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public.

The court finds that at least two of the multiple offenses were committed as part of one or more courses of conduct, and that 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 actions and conduct.

12/1/15 Resentencing Tr. 10.

{¶16} Consequently, the trial court found R.C. 2929.14(C)(4)(b) was applicable and thus, consecutive sentences were necessary. The trial court's findings at the sentencing hearing comply with R.C. 2929.14(C)(4) and the *Bonnell* mandates.

{¶17} That said, the trial court did not appropriately incorporate those findings in the judgment entry. In the judgment entry, the trial court stated:

If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require offender to serve 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 offenders conduct and to the danger the offender poses to the public, and if the court finds the following: (b) at least two 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 the courses of conduct adequately reflects the seriousness of the offenders conduct.

3/4/16 J.E.

{¶18} Appellant argues this statement does not comply with R.C. 2929.14(C)(4) because the trial court merely quoted directly from the statute. Furthermore, Appellant contends the excerpt is devoid of any reference to his case and makes no findings relevant to him.

{¶19} We agree with his argument in part. We have explained multiple times that “magic” or “talismanic” words are not needed, rather there merely needs to be an indication that the trial court made the necessary findings. *State v. Bellard*, 7th Dist. No. 12–MA–97, 2013–Ohio–2956, ¶ 17. The trial court is not required to give reasons, rather it only needs to make the findings. *State v. Power*, 7th Dist. No. 12 CO 14, 2013–Ohio–4254, ¶ 38. Therefore, the trial court was not required to reference Appellant or his case in making the consecutive sentence findings as long as there is an indication the trial court engaged in the appropriate analysis.

{¶20} The trial court’s statements at the sentencing hearing clearly indicate it engaged in the appropriate analysis. However, the judgment entry is lacking. A recitation of the trial court’s findings in the judgment entry indicates the court quoted requirements of the court directly from the statute. Quoting requirements from the statute is not problematic per se. While we do not require trial court’s to use talismanic or magic words, we have urged trial courts to track the language of the statute. The problem here is the trial court did not alter the language of the statute to indicate it was actually making the findings. The finding as it was stated in the

judgment entry provided, “if multiple prison terms are imposed,” “the court may require,” and “if the court finds.” The “if” and “may” language does not indicate an actual finding by the trial court. It would have been simple for the trial court to reword the language to show that it was making the findings.

{¶21} In *Bonnell*, the Court held the trial court should also incorporate its statutory findings into the sentencing entry. *Bonnell*, 2014–Ohio–3177 at ¶ 30. “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.” *Id.* Considering the language used in the judgment entry and the findings made at the sentencing hearing, the failure to incorporate the findings was inadvertent. Consequently, a nunc pro tunc entry is appropriate in this instance.

{¶22} Lastly, it is noted Appellant argues the *Bonnell* court was incorrect in holding a nunc pro tunc judgment can correct the error. It is not the position of an inferior court to determine if the superior court correctly determined an issue. We are bound to follow the Ohio Supreme Court’s decision in *Bonnell*.

{¶23} In conclusion, the sentence is affirmed. However, the matter is remanded solely for the trial court to enter a nunc pro tunc entry setting forth the applicable consecutive sentence findings made at the sentencing hearing

Waite, J., concurs.

DeGenaro, J., concurs.