[Cite as *State v. Smerczynski*, 2019-Ohio-2712.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOSHUA RYAN SMERCZYNSKI,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 BE 0025

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 18 CR 31

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed in part. Sentence Vacated in part. Remanded in part.

Atty. Dan Fry, Belmont County Prosecuting Attorney, 147-A West Main Street, St. Clairsville, Ohio 43950, for Plaintiff-Appellee, No Brief Filed.

Atty. Brian A. Smith, Brian A. Smith Law Firm, LLC, 755 White Pond Drive, Suite 403, Akron, Ohio 44320, for Defendant-Appellant.

Dated: June 24, 2019

WAITE, P.J.

{¶1} Appellant Joshua Ryan Smerczynski appeals the April 9, 2018, Belmont County Common Pleas Court judgment entry sentencing him to a prison term of 18 months for attempted tampering with evidence, to be served consecutively to a term he was serving on another conviction. Appellant appeals both the imposition of consecutive sentences and the maximum sentence he received for the instant offense. The record, including Appellant's criminal history, supports the imposition of the maximum sentence for the instant conviction. Appellant's second assignment of error is without merit and is overruled. However, based on the following, the trial court did not demonstrate that it adequately considered the necessary factors before imposing consecutive sentences. Appellant's first assignment of error has merit and is sustained. Accordingly, while the trial court's imposition of the maximum sentence for the instant conviction is affirmed, the court's sentencing entry is vacated in part and the matter remanded for the limited purpose of properly considering the statutory consecutive sentencing requirements.

Factual and Procedural History

{¶2} The underlying facts in the record are limited. Appellant was incarcerated on previous drug related charges. While incarcerated, on February 8, 2018, Appellant was indicted on one count of tampering with evidence, in violation of R.C. 2921.12(A)(2), a felony of the third degree. The indictment read:

> [Appellant] knowing that an official proceeding or investigation was in progress, or was about to be or likely to be instituted, did make, present, or use any record, document, or thing, to-wit: a whizzinator; knowing it to be false and with purpose to mislead a public official who is or may be engaged

in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.

(2/8/18 Indictment.)

{¶3} Apparently, a "whizzinator" is a male urine simulation device and Appellant attempted to use this device when he was required to provide a urine sample for testing. In any event, plea negotiations commenced in the matter. Pursuant to an agreement with the state, Appellant pleaded guilty to an amended charge of attempted tampering with evidence, in violation R.C. 2921.12(A)(2) and R.C. 2923.02, a felony of the fourth degree.

{¶4} A sentencing hearing was held on April 9, 2018. The trial court sentenced Appellant to 18 months in prison to be served consecutively to the term Appellant was already serving, with 64 days of jail-time credit. Appellant filed this timely appeal. For clarity, the assignments of error will be addressed out of order.

ASSIGNMENT OF ERROR NO. 2

THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S SENTENCE OF APPELLANT.

{¶5} In his second assignment of error Appellant contends the record does not support imposition of the maximum sentence of 18 months for his conviction on attempted tampering with evidence.

{¶6} Pursuant to the Ohio Supreme Court's holding in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, "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." *Id.*

{¶7} On March 26, 2018, Appellant and the state entered into a plea agreement. In exchange for his guilty plea to attempted tampering with evidence, the state agreed to stand silent on Appellant's request for community control sanctions.

{¶8} Pursuant to Crim.R. 11(C)(2)(c), the court shall not accept a guilty plea on a felony matter without first addressing the defendant personally and engaging in a colloquy. The colloquy includes informing the defendant of both his constitutional and nonconstitutional rights. The defendant must be informed of his right against self-incrimination, the right to a jury trial, the right to confront his accusers, the right to have guilt proven beyond a reasonable doubt, and the right to compel witnesses to testify by compulsory process. *Boykin v. Alabama*, 39 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *State v. Ballard*, 66 Ohio St.2d 473, 478, 423 N.E.2d 115 (1981), paragraph one of the syllabus; Crim.R. 11(C), (D), and (E). The defendant must be "meaningfully informed" of each constitutional right personally by the judge "in a manner reasonably intelligible to that defendant." *Id.* at 480. When informing a defendant of his nonconstitutional rights, the Supreme Court of Ohio has applied a substantial compliance test to the colloquy, requiring consideration using the totality of the circumstances. *State v. Nero,* 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). In effect, this means a slight deviation from the text of Crim.R. 11 is permissible so long as under the totality of the circumstances we can glean that the defendant subjectively understands the implications of his guilty plea. *Id.* at 108. However, the Supreme Court has urged trial courts to

"literally comply with Crim.R.11" and to avoid "inexact plea hearing recitations" in order to avoid error. *State v. Clark,* 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 29.

{¶9} A review of the transcript from the plea hearing reflects that Appellant was asked if he understood the maximum penalty in this case, to which he responded in the affirmative. The trial court also orally advised him of each of the rights enumerated above and fully complied with the requirements of Crim.R. 11. The trial court also accurately advised Appellant of all his nonconstitutional rights at the plea hearing. The written plea form, which Appellant acknowledged that he executed, also clearly stated the potential maximum sentence for Appellant's charge of attempted tampering with evidence, a felony in the fourth degree, was 18 months of imprisonment.

{¶10} After the plea hearing, the court ordered a presentence investigation and set the matter for a sentencing hearing. A sentencing hearing was held on April 9, 2018. The state stood silent at the hearing in accordance with the plea agreement. Appellant's counsel addressed the court and stated that Appellant was requesting community control sanctions:

> [APPELLANT'S COUNSEL]: It's an F4. The circumstances were such that the reason it was reduced to an attempt is because the tampering was interdicted before it was effective.
>
> THE COURT: So the State basically helped him out, in a sense?
>
> [APPELLANT'S COUNSEL]: Well, yeah, they caught it before it could actually mess with the evidence.

(4/9/18 Sentencing Hrg. Tr., p. 2.)

{¶11} As noted above, the trial court then stated that it had reviewed the "entire file in the matter" and that it was "very familiar with [Appellant's] situation and the allegations and conclusions in the file." (4/9/18 Sentencing Hrg. Tr., p. 3.) The court then sentenced Appellant to the maximum sentence for a fourth-degree felony, 18 months, and gave Appellant credit for time served. He ordered the sentence to be served consecutively to the term he was currently serving on another charge.

{¶12} Although Appellant requested community control sanctions and the state agreed to stand silent, the trial court is not a party to the plea negotiations or the agreement itself and is free to impose a sentence greater than that which was negotiated in the plea agreement as long as the trial court forewarns the defendant of the applicable penalties, including the maximum penalty. *State v. Buchanan,* 154 Ohio App.3d 250, 253, 2003-Ohio-4772, 796 N.E.2d 1003, ¶ 13 (5th Dist.).

{¶13} The trial court sentenced Appellant for the offense of attempted tampering with evidence, a fourth-degree felony. The possible sentences for a fourth-degree felony are six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen or eighteen months. R.C. 2929.14(A)(4). The sentence imposed by the trial court was within the statutory range and is supported by the record. The trial court considered the purposes of felony sentencing, the seriousness of the offenses, and Appellant's likelihood of recidivism. The trial court also noted that Appellant was currently incarcerated for violating probation for the instant offense. Therefore, the imposition of the maximum sentence is not contrary to law.

{¶14} Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT'S IMPOSITION OF A CONSECUTIVE SENTENCE ON APPELLANT WAS CONTRARY TO LAW.

{¶15} In the instant matter the trial court ordered Appellant's sentence for the attempted tampering with evidence conviction to be served consecutively to the term he was already serving. In his first assignment of error Appellant claims the trial court failed to consider the requisite factors prior to imposing consecutive sentences.

{¶16} As noted, "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." *Marcum, supra,* ¶ 1.

{¶17} Clear and convincing evidence "is that measure or 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." *Id.* at ¶ 22, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph one of the syllabus.

{¶18} A sentence is considered to be clearly and convincingly contrary to law if it falls outside of the statutory range for the particular degree of offense; if the trial court failed to properly consider the purposes and principles of felony sentencing as enumerated in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12; or if the trial court orders consecutive sentences and does not make the

necessary consecutive sentencing findings. See *State v. Collins,* 7th Dist. Noble No. 15 NO 0429, 2017-Ohio-1264, ¶ 9; *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 30.

{¶19} Appellant first contends the trial court failed to make the necessary findings required by statute before imposing consecutive sentences.

{¶20} R.C. 2929.14(C)(4) sets forth the findings required before a court may impose consecutive sentences:

> [T]hat 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.

{¶21} When a trial court imposes consecutive sentences it must make the R.C. 2929.14(C)(4) findings at the sentencing hearing and must also incorporate those findings into the judgment entry of sentence. *Bonnell*, 2014-Ohio-3177, at ¶ 29.

{¶22} In the instant matter, the trial court stated at the sentencing hearing:

> This Court has reviewed the entire file in the matter. This Court is very familiar with [Appellant's] situation and allegations and conclusions in the file.
>
> I reviewed Ohio Revised Code 2929.11, 2929.12, the overriding purposes principles and factors of sentencing. This Court has also reviewed the Presentence Report in his matter, and I've got to take up the parties' time to go through this, to show everyone that we have attempted to work with [Appellant] on multiple occasions.
>
> This starts in 2007. Unruly habitual behavior; violation of court order; violation of court order; possession and consumption of alcohol, illegal at the time because of his age; operating a vehicle under the influence; speeding, seat belt; theft without consent; fictitious registration; speed; failure to control vehicle; driving under suspension; hit and skip; fictitious registration; assured clear distance; criminal trespass; falsification; assault;

> disturbing the peace. This is out in Denver. So where [Appellant] went, his crimes continued with him. And all of these are certainly not guilty pleas. Criminal damaging or endangering; persistent disorderly conduct; criminal damaging, endangering; persistent disorderly conduct; trafficking in marijuana; possession of drugs; theft; tampering with evidence.
>
> The question becomes where do you go with this gentlemen [sic]? Where do you go? I mean, your family has been extremely supportive to you. I don't see them today. They're there. Thank you, sir. They've been -- your whole extended family have been at all the hearings, and I appreciate that very much. I think family support is very important. But nothing to no avail. No matter what has been done, the situation and the crime waive [sic], let's call it, has continued.
>
> This Court sentences the defendant to the maximum, therefore. He will receive 18 months in the penitentiary. He will be given credit for time served. The sentence is to run consecutive with any other sentence that the defendant is serving.

(4/9/18 Sentencing Hrg. Tr., pp. 3-4.)

{¶23} While the sentencing court clearly did not recite the language of the statute verbatim, it is well-established that "a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Bonnell* at ¶ 29.

However, where it is unclear from a reading of the sentencing transcript that the trial court actually conducted a meaningful contemplation of the three required findings, the sentence cannot stand.

{¶24} The trial court was required to find that consecutive sentences were necessary to protect the public or punish the defendant; that they are not disproportionate to the seriousness of the defendant's conduct and the danger posed to the public; and was required to make one of the three alternative findings from subsection R.C. 2929.14(C)(4)(a). Those are: (a) that the defendant was under postrelease control, statutory community control or awaiting trial/sentencing; (b) the offenses were committed during a course of conduct and the harm was so great/unusual that a single term does not reflect the seriousness of the conduct; or (c) the defendant's criminal history demonstrates the need to protect the public from future harm.

{¶25} The court's finding that Appellant engaged in a "crime waive [sic]" as well as its recitation of Appellant's extensive past offenses could indicate that the court found Appellant has engaged in a course of conduct where the resulting harm was unusual or great, or that Appellant's criminal history reveals a need to protect the public from future harm. However, the record does not clearly reflect that the trial court conducted a meaningful analysis of the required factors before imposing consecutive sentences. Although utilizing "magic" or "talismanic" words is not required in order to impose consecutive sentences, there must be some indication at both the sentencing hearing and in the written judgment entry of sentence that the trial court engaged in the correct analysis and complied with the mandates of R.C. 2929.14(C)(4) and *Bonnell*. *State v. Bellard*, 7th Dist. Mahoning No. 12 MA 97, 2013-Ohio-2956, ¶ 17. The record in this

matter does not clearly indicate that the trial court complied with the requirements of R.C. 2929.14(C)(4) at the sentencing hearing.

{¶26} As earlier stated, the trial court is also required to state the consecutive sentence findings in the judgment entry of sentence. Even if the court's dialogue contained the requisite findings, the entry in this case does not. The judgment entry in this matter states:

> The Court makes all findings based upon the sentencing factors of R.C. §§2929.11, 2929.12, 2929.13 and 2929.14, as such have been amended and/or modified by **State v. Foster, 109 Ohio St.3d, and in accord with House Bill 86, effective September 30, 2011.**
>
> THEREFORE, it is Ordered that the offender serve a stated prison term of **Eighteen (18) Months in the Penitentiary for Attempted Tampering with Evidence, a violation of R.C. § 2921.12(A)(2) and R.C. §2923.02, a Felony of the Fourth Degree. Defendant is given credit for 64 days jail time served. Said sentence shall run consecutive to any sentence the Defendant is currently serving.** (Emphasis sic.)

(4/9/18 J.E., p. 2.)

{¶27} It is apparent in the written sentencing entry the trial court did not comply with the mandates of R.C. 2929.14(C)(4) and *Bonnell* when sentencing Appellant to consecutive sentences. The entry contains no findings that consecutive sentences were necessary to protect the public from future crime or to punish Appellant. The entry makes no finding that the consecutive sentences were not disproportionate to the seriousness

of Appellant's conduct and to the danger posed to the public. Lastly, the trial court did not mention any of the three options enumerated in R.C. 2929.14(C)(4)(a)-(c). As the trial court did not correctly enumerate the statutory factors before imposing consecutive sentences either at the sentencing hearing or in its written judgment entry, Appellant's first assignment of error has merit and is sustained.

Conclusion

{¶28} Regarding Appellant's second assignment of error, the trial court did not err in imposing the maximum sentence of 18 months, as the sentence is not clearly and convincingly contrary to law. Therefore, the trial court's imposition of the maximum sentence is affirmed. The record reflects, however, that the trial court did not make the requisite R.C. 2929.14(C) findings at the sentencing hearing or in the judgment entry of sentence when it imposed consecutive sentences. Accordingly, Appellant's first assignment of error regarding the imposition of consecutive sentences has merit and is sustained. Appellant's sentence is vacated only as it relates to consecutive sentencing and the matter is hereby remanded for the limited purpose of properly considering the consecutive sentencing factors according to law and consistent with this Court's Opinion.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first assignment of error is sustained and his second assignment is overruled. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. However, because the record reveals the trial court failed to consider the R.C. 2929.14(C) factors when it sentenced Appellant to consecutive prison terms, his sentence is vacated in part and this matter is hereby remanded to the trial court for the limited purpose of imposing consecutive sentences according to law and consistent with this Court's Opinion. Costs taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.