[Cite as *State v. Deeb*, 2015-Ohio-2442.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio — Court of Appeals No. E-14-117

Appellee — Trial Court No. 2011-CR-228

v.

David M. Deeb — **DECISION AND JUDGMENT**

Appellant — Decided: June 19, 2015

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Paul Mancino, Jr., for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} David M. Deeb appeals an August 27, 2014 judgment of the Erie County Court of Common Pleas resentencing him on convictions, pursuant to guilty pleas, on one count of rape (a violation of R.C. 2907.02 and a first degree felony) and two counts of importuning (violations of R.C. 2907.07 and third degree felonies). Appellant was

originally sentenced on August 8, 2012. In that judgment, the trial court sentenced appellant to serve a six-year term of imprisonment on the rape conviction and 24-month terms of imprisonment on both importuning convictions. The court also ordered that the sentences be served consecutively, for a total aggregate period of incarceration of ten years.

{¶ 2} On direct appeal of the August 8, 2012 judgment, this court reversed the judgment in part and remanded the case for resentencing on the issue of consecutive sentences alone. *State v. Deeb*, 6th Dist. Erie No. E-12-052, 2013-Ohio-5175, ¶ 25. We directed the trial court on remand "to consider whether consecutive sentences are appropriate under R.C. 2929.14(C), and, if so, to make the proper findings on the record." *Id.*

{¶ 3} On remand, the trial court conducted a resentencing hearing on July 25, 2014. At the hearing, the trial court considered whether consecutive sentences were appropriate under R.C. 2929.14(C) and stated its findings under the statute on the record. The court also included R.C. 2929.14(C) findings in the August 27, 2014 resentencing judgment and ordered that the sentences on the rape and importuning convictions be served consecutively.

{¶ 4} Appellant asserts four assignments of error on appeal:

Assignments of Error

1. Defendant was denied due process of law and his rights under the Sixth Amendment when the court based its sentencing on judicial

factfinding, none of which were alleged in the indictment or as a part of the plea in this case.

2. Defendant was denied due process of law when the court imposed a consecutive sentence which apparently was unauthorized by law and contrary to the presumption of a concurrent sentence.

3. Defendant was denied due process of law when the court imposed a consecutive sentence without considering the current condition of defendant.

4. Defendant was denied due process of law when he was sentenced to a consecutive sentence which, at the time of sentencing was unauthorized by law.

{¶ 5} Under assignment of error No. 1, appellant contends that the trial court denied him due process of law and his rights under the Sixth Amendment to the United States Constitution when the court imposed consecutive sentences at resentencing based upon judicial factfinding. We address the Sixth Amendment argument first.

{¶ 6} Appellant contends that judicial factfinding under R.C. 2929.14(C) in this case denied him his Sixth Amendment right to a jury trial. Appellant cites United States Supreme Court decisions of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 253, 159 L.Ed.2d 403 (2004), and Ohio Supreme Court decisions of *State v. Foster*, 109 Ohio

St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, and *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, in support of this argument.

{¶ 7} The Ohio Supreme Court addressed the constitutionality of judicial factfinding under R.C. 2929.14(C)(4) in considering imposition of consecutive sentences in its decisions in *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, and *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768. In the decisions, the court recognized that in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009), the United States Supreme Court held "that a statutory requirement for judges in a jury trial to find certain facts before imposing consecutive sentences is constitutional." *Bonnell* at ¶ 3; *Hodge* at ¶ 3.

{¶ 8} In *Hodge*, the Ohio Supreme Court stated that the Ohio General Assembly could enact new legislation requiring trial courts to make findings when imposing consecutive sentences in jury cases, despite the ruling in *Foster* that such judicial factfinding was unconstitutional. *Hodge* at ¶ 6; *Bonnell* at ¶ 3. The court's decision in *Mathis* followed *Foster* and was issued prior to *Hodge* and Bonnell. *Mathis* at ¶ 37-38.

{¶ 9} R.C. 2929.14(C) was enacted in Am.Sub.H.B. No. 86, effective September 30, 2011, pursuant to the authority recognized in *Hodge* to enact legislation providing for judicial factfinding to impose consecutive sentences. *Bonnell* at ¶ 4. Accordingly, we conclude that appellant's contention that the trial court denied him his Sixth Amendment rights by undertaking judicial factfinding under R.C. 2929.14(C) with respect to consecutive sentences in this case is without merit.

{¶ 10} Under assignment of error No. 1, appellant also argues that the trial court erred by considering facts that are not alleged in the indictment, that were not admitted at the plea hearing, and that were not supported in the record in imposing sentence. Appellant pled guilty to Counts 1, 3, and 7 of a 10 count indictment filed on July 15, 2011. Each of the three counts to which appellant pled stated the birthdate of the victim (a late May 1998 date) and offense dates. Count 1 charged appellant with engaging in sexual conduct with a person less than 13 years of age, a violation of R.C. 2907.02(A)(1)(b), rape, with an offense date of June 2010. Counts 3 and 5 of the indictment charged appellant with soliciting a person to engage in sexual activity and that at the time appellant was 18 years of age or older, and knew the victim was less than 13 years of age or was reckless in that regard, violations of R.C. 2907.97(C)(1), importuning. The offense date under Count 3 is June 1010. The offense date under Count 7 is December 2010.

{¶ 11} Appellant pled guilty to the offenses at a hearing on May 21, 2012. Under a plea agreement, the remaining seven counts of the ten count indictment were dismissed. At the hearing, he also requested preparation of a presentence investigative report ("PSI"). The record demonstrates that a PSI report was prepared and includes police investigative summaries concerning the victim and her relationship with appellant. The record also demonstrates that appellant was provided copies of the PSI report, including police reports.

{¶ 12} At the sentencing hearing, the trial court stated that it relied on the PSI report and the included police reports when determining sentence and that they were the source of the additional detailed facts on which its R.C. 2929.14(C) findings are based:

> [C]ounsel, * * * the Court's talked about the presentence report and investigation, and you indicated you don't know where the Court got those facts from. They must have come from a police report and the police report was unchallenged, there's no way to challenge it and things of that nature. This is the presentence report and investigation. In the presentence report and investigation is all the police reports. Defense counsel had the presentence report and investigation. He had these police reports. When the Court asked him, did you receive a copy of it? Yes. And then the Court gave an opportunity to talk. He could have challenged them. He didn't. * * * [T]he Court wants you to know that it didn't come up with these facts or these police reports of its own. It was in the presentence report and investigation.

{¶ 13} "Evid.R. 101(C)(3) specifically provides that the Ohio Rules of Evidence, other than with respect to privileges, do not apply to miscellaneous criminal proceedings including sentencing. *State v. Cook* (1998), 83 Ohio St.3d 404, 425, 700 N.E.2d 570; Evid.R. 101(C)(3)." *State v. Riley*, 184 Ohio App.3d 211, 2009-Ohio-3227, 920 N.E.2d 388, ¶ 28 (6th Dist.). Ohio appellate courts have recognized that a trial court does not err by relying on a presentence investigative report in sentencing a defendant. *State v. Cisco*,

5th Dist. Delaware No. 13 CAA 04 0026, 2013-Ohio-5412, ¶ 30; *State v. Steimle*, 8th Dist. Cuyahoga Nos. 82183 and 82184, 2003-Ohio-4816, ¶ 14.

{¶ 14} Appellant was provided a copy of the PSI reports and included police reports and an opportunity to challenge the accuracy of the materials. "The burden of proof regarding any inaccuracy in the PSI is on the defendant who alleges the report is inaccurate. R.C. 2951.03(B)(2)." *Cisco* at ¶ 28.

{¶ 15} Sentencing courts are "to acquire a thorough grasp of the character and history of the defendant before it." *State v. Burton*, 52 Ohio St.2d 21, 23, 368 N.E.2d 297 (1977). Sentencing courts may consider at sentencing charges that were reduced or dismissed under a plea agreement. *See State v. Degens*, 6th Dist. Lucas No. L-11-1112, 2012-Ohio-2421, ¶ 19; *State v. Robbins*, 6th Dist. Williams No. WM-10-018, 2011-Ohio-4141, ¶ 9; *State v. Banks*, 10th Dist. Franklin Nos. 10AP-1065, 10AP-1066, and 10AP-1067, 2011-Ohio-2749, ¶ 24; *State v. Johnson*, 7th Dist. Mahoning No. 10 MA 32, 2010-Ohio-6387, ¶ 26.

{¶ 16} Appellant contends that even if the court could consider the PSI report, R.C. 2951.03 limits use of PSI reports. R.C. 2951.03 states that "[t]he officer making the report shall inquire into the circumstances of the offense and the criminal record, social history, and present condition of the defendant."

{¶ 17} We have reviewed the PSI report and included police narrative reports. The materials considered by the trial court in imposing consecutive sentences concerned

the circumstances of the rape and importuning offenses on which appellant was convicted and appellant's social history.

{¶ 18} We conclude that appellant's argument that the trial court violated due process of law by basing its sentence on facts that are not alleged in the indictment, that were not admitted at the plea hearing, and that were not supported in the record to be without merit.

{¶ 19} We find assignment of error No. 1 not well-taken.

{¶ 20} We consider the remaining assignments of error out of turn. Under assignment of error No. 4, appellant contends that under R.C. 2929.41(A) and this court's judgment on direct appeal, the trial court was unauthorized by law to impose consecutive sentences on remand.

{¶ 21} As we discussed under assignment of error No. 1, the Ohio Supreme Court has determined that judicial factfinding by a trial court to impose consecutive sentences under R.C. 2929.14(C)(4) does not violate a defendant's right to trial by jury. Nor is it prohibited under R.C. 2929.41(A)'s presumption that sentences are to run concurrent. R.C. 2929.41(A) provides for a presumption, with exceptions listed in the statute, that "a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States." R.C. 2929.41(A). One exception listed in the statute, however is where consecutive sentences are imposed under R.C. 2929.14(C)(4). *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.2d 659, ¶ 23.

{¶ 22} On direct appeal, we reversed the trial court's judgment imposing consecutive sentences and remanded the case to the trial court "to the extent necessary to consider whether consecutive sentences are appropriate under R.C. 2929.14(C), and, if so, to make the proper findings on the record." *Deeb*, 6th Dist. Erie No. E-12-052, 2013-Ohio-5175, ¶ 25. This was based upon a conclusion that the trial court had failed to comply with the requirements of R.C. 2929.14(C) when it imposed consecutive sentences. *Id.* at ¶ 11.

{¶ 23} Nevertheless, we expressly recognized in the judgment that the trial court "had the ability to sentence appellant to consecutive terms" in this case. *Id.* at ¶ 10. We remanded the case with instructions for the trial court to consider consecutive sentences on remand and to assure compliance with the requirements of R.C. 2929.14(C) when it did so.

{¶ 24} We find assignment of error No. 4 not well-taken.

{¶ 25} Under assignment of error No. 2, appellant, in part, reargues issues addressed in our consideration of assignment of error No. 1—the contention that the trial court improperly considered material outside of the record at sentencing. Appellant also argues under assignment of error No. 2 that the trial court's findings under R.C. 2929.14(C) are not supported in the record.

Standard of Review of Felony Sentencing

{¶ 26} After September 30, 2011, R.C. 2953.08(G)(2) provides the standard of review by appellate courts with respect to felony sentencing. *State v. Tammerine*, 6th

Dist. Lucas No. L-13-1081, 2014-Ohio-425, ¶ 11; *State v. Steck*, 6th Dist. Wood Nos. WD-13-017 and WD-13-018, 2014-Ohio-3623, ¶ 11-14. As stated in *Tammerine*:

> R.C. 2953.08(G)(2) establishes that an appellate court may increase, reduce, modify, or vacate and remand a dispute[d] sentence if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13(B) or (D), 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;
>
> (b) That the sentence is otherwise contrary to law. *Tammerine* at ¶ 11, quoting R.C. 2953.08(G)(2).

{¶ 27} Accordingly, under R.C. 2953.08(G)(2)(a), we consider whether there is clear and convincing evidence that the record does not support the sentencing court's findings under R.C. 2929.14(C)(4) to impose consecutive sentences in this case.

Required R.C. 2929.14(C)(4) Findings

{¶ 28} In *State v. Bonnell*, the Supreme Court of Ohio reviewed the procedure and required judicial factfinding necessary to impose consecutive sentences under R.C. 2929.14(C)(4):

> When imposing consecutive sentences, a trial court must state the required findings as part of the sentencing hearing, and by doing so it affords notice to the offender and to defense counsel. See Crim.R.

32(A)(4). And because a court speaks through its journal, State v. Brooke, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, ¶ 47, the court should also incorporate its statutory findings into the sentencing entry. However, 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*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29.

{¶ 29} The trial court made R.C. 2929.14(C)(4) findings at the resentencing hearing. The court found "it's necessary to protect the public from future crime or punish this defendant," satisfying the first requirement under R.C. 2929.14(C)(4). While discussing dangers posed to the public by the appellant's conduct, the court also stated: "The Court finds consecutive sentences were not disproportionate to the seriousness of this conduct," satisfying the second requirement.

{¶ 30} Third, a trial court must also find one of the circumstances listed in R.C. 2929.14(C)(4)(a)-(c). The court made a finding under R.C. 2929.14(C)(4)(b), finding first that "At least two of the multiple offenses were committed as part of one or more courses of conduct." After discussing the facts, the court continued, stating "the harm caused by two or more of these offenses so committed was so great or unusual no single prison term for any offense committed as a part of the course of conduct adequately reflects the seriousness of his conduct."

{¶ 31} We begin our analysis with the understanding that a trial court is not required to state the reasons for its R.C. 2929.14(C)(4) findings when imposing consecutive sentences. *Bonnell* at ¶ 27.

{¶ 32} We have reviewed the record, including the PSI report and associated police reports and the transcript of the resentencing hearing. Appellant was age 21 when he committed the offenses in this case. The victim was age 12. He stands convicted of raping a person under 13 years of age and of two counts of soliciting the girl to engage in sexual activity knowing the victim was less that 13 years of age or was reckless in that regard, importuning. Those offenses were committed in June and December 2010.

{¶ 33} The record discloses that appellant's relationship with the victim was discovered by the victim's mother who confronted appellant and attempted to terminate any further contact between appellant and the victim. The record also demonstrates that despite the mother's efforts, appellant maintained contact with the child surreptitiously for months, into May 2011, when criminal proceedings were filed.

{¶ 34} The trial court considered risks to the victim and other young girls presented by appellant's conduct and appellant's refusal to terminate the relationship. In considering the harm to the victim, the court considered a report included in the PSI report indicating that the victim made multiple cuts to her left wrist with a knife, threatening to kill herself, in an argument with her mother in March 2011. The argument was over the mother's efforts to prevent any contact between the victim and appellant.

{¶ 35} We conclude that the record, through the PSI report and associated police reports, contains evidence to support the determination that consecutive sentences are necessary to protect the public from future crime and to punish the offender and that the record supports the finding that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public.

{¶ 36} The final finding by the trial court was a finding under R.C. 2929.14(C)(4)(b). The court found that offenses were committed as part of an ongoing course of criminal conduct and that the harm caused by two or more of the offenses was so great or unusual that no single prison term for any offense committed as part of the course of conduct adequately reflects the seriousness of the conduct.

{¶ 37} The record also supports the trial court's conclusion that the three offenses were committed as part of one or more courses of conduct. Further, the record supports a conclusion that the harm caused by two or more of the criminal offenses was so great or unusual that not one single prison term for any of the offenses adequately reflects the seriousness of appellant's conduct. We conclude that the trial court's findings under R.C. 2929.14(C)(4)(b) are supported by evidence in the record.

{¶ 38} We conclude that the trial court conducted the correct analysis in making its findings under R.C. 2929.14(C) and that the findings are supported by evidence in the record.

{¶ 39} We find assignment of error No. 2 not well-taken.

{¶ 40} Under assignment of error No. 3, appellant contends that the trial court denied him due process of law by imposing consecutive sentences without considering his current condition. At the resentencing hearing, defense counsel requested that the trial court consider the present situation of appellant. Appellant had been in prison approximately two years at the time of resentencing. At the resentencing hearing, counsel for appellant stated that Dr. Robert Stinson could testify as to appellant's present condition, but was unavailable to testify on the date of the hearing.

{¶ 41} The state argues that a de novo resentencing hearing was not required, because the order of remand limited proceedings to consideration of whether consecutive sentences pursuant to R.C. 2929.14(C)(4) were appropriate and to make the proper findings on the record.

{¶ 42} Our review of the record discloses that the trial court did not refuse to permit Dr. Stinson to testify at the resentencing hearing. The court offered to continue the hearing to permit Dr. Stinson to testify, but stated it would limit the scope of the testimony to issues presented in resentencing under the order of remand from this court.

{¶ 43} We find no error in the trial court limiting evidence at the resentencing hearing to the scope of resentencing as identified in the order of remand.

{¶ 44} We find assignment of error No. 3 not well-taken.

{¶ 45} Justice having been afforded the party complaining, we affirm the judgment of the Erie County Court of Common Pleas. We order appellant to pay the costs of this appeal, pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE