[Cite as *State v. Torres*, 2019-Ohio-434.]

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

State of Ohio — Court of Appeals No. OT-18-008

Appellee — Trial Court No. 17 CR 082

v.

Oreste Fuste Torres — **DECISION AND JUDGMENT**

Appellant — Decided: February 8, 2019

* * * * *

James J. VanEerten, Ottawa County Prosecuting Attorney, and
Barbara Gallé Rivas, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

MAYLE, P.J.

{¶ 1} Defendant-appellant, Oreste Fuste Torres, appeals the January 31, 2018 judgment of the Ottawa County Court of Common Pleas, convicting him of identity fraud and forgery and sentencing him to an aggregate prison term of five years. For the following reasons, we affirm the trial court judgment.

I. Background

{¶ 2} On June 15, 2017, Oreste Fuste Torres was charged in a 67-count indictment with two counts of engaging in a pattern of corrupt activity, violations of R.C. 2923.32(A)(1) and (B)(1), 59 counts of identity fraud, violations of R.C. 2913.49(B)(2) and (I)(2), and six counts of forgery, violations of R.C. 2913.31(A)(3) and (C)(1)(b). These charges arose from two incidents. The first incident occurred in November of 2016, when Torres was found to be in possession of suspicious electronic equipment and numerous fraudulent credit cards and gift cards, which he attempted to pass off as his own. The second incident occurred on May 29, 2017, when Torres attempted to make a purchase at a Kroger store using a suspicious credit card. Law enforcement was summoned to the store and Torres consented to a search of his trunk where officers discovered "well over fifty" fraudulent Visa cards, MasterCards, and gift cards.

{¶ 3} Torres entered a plea of guilty to five counts of identity fraud (Counts 2 to 6) and five counts of forgery (Counts 21 to 25) in exchange for dismissal of the remaining counts. The trial court imposed a prison term of 12 months as to each count, with the sentences imposed for Counts 2 through 6 to run consecutively to each other, the sentences for Counts 21 through 25 to run consecutively to each other, and the sentences imposed for Counts 2 through 6 to run concurrently to those imposed for Counts 21 through 25. This resulted in a total period of incarceration of five years.

{¶ 4} Torres appealed and assigns a single error for our review:

> Appellant's sentence should be vacated due to the trial court's failure to comply with the specific directives of R.C. 2929.11 and 2929.12.

II. Law and Argument

{¶ 5} In his sole assignment of error, Torres argues that the trial court failed to follow the directives of R.C. 2929.11 and 2929.12 when it sentenced him to a total period of incarceration of five years. He also argues that his sentence was contrary to law because the trial court determined that his past criminal record outweighed any consideration for leniency.

{¶ 6} We review felony sentences under R.C. 2953.08(G)(2). An appellate court will not modify or vacate a sentence unless it finds by clear and convincing evidence that the sentence is contrary to law or that the record does not support any relevant 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." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 22; R.C. 2953.08(G)(2). "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." *Marcum* at ¶ 22, citing *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 7} In determining whether a sentence is clearly and convincingly contrary to law for purposes of R.C. 2953.08(G)(2)(b), we recognized in *State v. Tammerine*, 6th Dist. Lucas No. L-13-1081, 2014-Ohio-425, ¶ 15, that *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, provides guidance. In *Kalish*, the Ohio Supreme Court held that where the trial court expressly states that it considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors listed in R.C. 2929.12, properly applies postrelease control, and sentences the defendant within the statutorily-permissible range, the sentence is not clearly and convincingly contrary to law. *Kalish* at ¶ 18.

{¶ 8} Torres does not challenge any findings under R.C. 2929.13(B) or (D), 2929.14(B)(2)(e) or (C)(4), or 2929.20(I).[1] And while he argues that his sentence is contrary to law, he acknowledges that it falls within the statutorily-permissible range. Torres does not claim that postrelease control was not properly applied or that the court failed to expressly state that it considered the purposes and principles of sentencing in R.C. 2929.11 and the seriousness and recidivism factors listed in R.C. 2929.12. Rather, he disputes that his sentence achieves the purposes and principles set forth in R.C. 2929.11, and he challenges the weight that the court assigned to the various factors it was required to consider under R.C. 2929.12.

{¶ 9} An appellate court may review a sentence imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 "under a standard that is equally deferential to

[1] The court found that under R.C. 2929.14(C)(4), consecutive sentences were appropriate, and Torres does not claim error in the imposition of consecutive sentences.

the sentencing court." *Marcum* at ¶ 23. It may vacate or modify the sentence only if it finds by clear and convincing evidence that it is not supported by the record. *Id.*

{¶ 10} Under R.C. 2929.11(A), the purposes of felony sentencing are "to protect the public from future crime by the offender and others, to punish the offender, and to promote the effective rehabilitation of the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." To achieve these purposes, the sentencing court must consider "the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both." R.C. 2929.11(A). The sentence imposed shall be reasonably calculated to achieve the overriding purposes, "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(B).

{¶ 11} R.C. 2929.12 grants discretion to the trial court to determine the most effective way to comply with the purposes and principles of sentencing, and it lists general factors that the trial court must consider relating to the seriousness of the offender's conduct, the likelihood of recidivism, and, if applicable, the offender's service in the U.S. armed forces and whether the offender has an emotional, mental, or physical condition traceable to that service that contributed to the commission of the offenses. R.C. 2929.12(A) also permits the court to "consider any other factors that are relevant to achieving those purposes and principles of sentencing." "A sentencing court has broad

discretion to determine the relative weight to assign the sentencing factors in R.C. 2929.12." *State v. Brimacombe*, 195 Ohio App.3d 524, 2011-Ohio-5032, 960 N.E.2d 1042, ¶ 18 (6th Dist.).

{¶ 12} In its sentencing judgment entry, the trial court stated that it "considered the record, oral statements, all victim impact statements, the pre-sentence report, * * * the principles and purposes of sentencing under [R.C.] 2929.11[, and] the seriousness and recidivism factors under [R.C.] 2929.12." Moreover, at Torres's sentencing hearing, the trial court recited the principles and purposes of sentencing under R.C. 2929.11, and it acknowledged that in fashioning a sentence, it is required to consider factors under R.C. 2929.12 relating to the seriousness of the offender's conduct and the likelihood of recidivism. It expressly determined that the more likely recidivism factors outweigh the less likely factors and the more serious factors outweigh the less serious factors.

{¶ 13} These statements all demonstrate that the trial considered R.C. 2929.11 and 2929.12 as required. *See State v. Kilgour*, 3d Dist. Marion Nos. 9-16-04, 9-16-05, 2016-Ohio-7261, ¶ 14 (finding that similar language used by trial court demonstrated that it properly considered R.C. 2929.11 and 2929.12). But Torres argues that the trial court assigned insufficient weight to mitigating factors under R.C. 2929.12(D)(5)—such as his genuine remorse and his cooperation with the officers investigating the case—and he contends that the court ignored the directive in R.C. 2929.11(A) that it use the minimum sanctions available.

{¶ 14} First, we observe that a trial court is not required to state the specific statutory factors in R.C. 2929.11 and 2929.12 on which it relied. *State v. Dash*, 7th Dist.

Mahoning No. 16 MA 0090, 2017-Ohio-9009, ¶ 8. And while remorse is a factor to be weighed in a trial court's sentencing determination, it is but one factor. *State v. Cochran*, 2d Dist. Clark No. 2016-CA-33, 2017-Ohio-217, ¶ 13. A trial court is free to conclude that the defendant's remorse is outweighed by his conduct in committing the offense. *Id.* As an appellate court, we may not substitute our judgment for that of the trial judge even if a different judge may have weighed the statutory factors differently. *State v. Belew*, 140 Ohio St.3d 221, 2014-Ohio-2964, 17 N.E.3d 515, ¶ 18, 24.

{¶ 15} Here, the state argued at the sentencing hearing that Torres's conduct caused serious economic harm to the victims that was of an ongoing nature. It also argued that Torres has a substantial criminal history across multiple states, he has multiple prior felony convictions for similar conduct, and he has served prison sentences yet continues to reoffend. All of this information is confirmed by the presentence investigation report, which the trial judge had at his disposal when sentencing Torres. To that end, the trial court told Torres:

> I hope you are being honest with me when you say you are done with this life, but your past history doesn't show me that, so we will see how you do in prison, if you behave yourself well and if you take advantage of classes and things that are available there, so good luck to you.

{¶ 16} We find that the trial court properly considered R.C. 2929.11 and 2929.12, and Torres has failed to show by clear and convincing evidence that his sentence is not supported by the record.

{¶ 17} Torres also complains that the trial court did not impose the minimum sanction and failed to consider community control. The state maintains that the trial court properly found that the minimum penalty for the offense was not warranted here. It acknowledges that under certain circumstances, there is a presumption of community control for non-violent fourth or fifth-degree felonies, but it maintains that that presumption is limited and is inapplicable where, as here, the offenses are part of an organized criminal activity, the offender has previously served a prison term, or where there has been a plea to numerous felonies committed against multiple victims.

{¶ 18} Here, the court expressly found that Torres was not amenable to community control. And as to the "minimum sanction," R.C. 2929.11(A) requires the trial court to impose "the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." This does not mean that the court must impose the statutory minimum sentence. To the contrary, "the trial court ha[s] full discretion to impose any sentence within the authorized statutory range * * *." *State v. Connors*, 2d Dist. Montgomery No. 26721, 2016-Ohio-3195, ¶ 6. Given that multiple victims were involved, and given that Torres has continued to reoffend despite having served various periods of imprisonment and probation for similar offenses, we find no error in the trial court's conclusion. *See, e.g., State v. Allison*, 2017-Ohio-7720, 97 N.E.3d 1043, ¶ 24, 28 (8th Dist.) (affirming non-minimum sentence where, despite appellant's mental disabilities, remorse, and good behavior while awaiting trial, appellant had criminal history and demonstrated inability to comply with terms of probation in the past).

{¶ 19} We find Torres's assignment of error not well-taken.

III. Conclusion

{¶ 20} We find Torres's sole assignment of error not well-taken. The trial court properly considered the purposes and principles of sentencing under R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12, and Torres presented no clear and convincing evidence that his sentence was not supported by the record. We affirm the January 31, 2018 judgment of the Ottawa County Court of Common Pleas. The costs of this appeal are assessed to Torres under 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.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Christine E. Mayle, P.J. _____
JUDGE
CONCUR.