[Cite as *State v. Eaton*, 2004-Ohio-5349.]

COURT OF APPEALS
THIRD APPELLATE DISTRICT
UNION COUNTY

STATE OF OHIO **CASE NUMBER 14-04-12**

PLAINTIFF-APPELLEE

v. **O P I N I O N**

TYRONE EATON

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed in part and reversed in part and remanded for re-sentencing.

DATE OF JUDGMENT ENTRY: October 4, 2004

ATTORNEYS:

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Shaw, P.J.

{¶1} The appellant, Tyrone Eaton, appeals the March 10, 2004 judgment of the Common Pleas Court of Union County, Ohio, sentencing him to a term of imprisonment.

{¶2} On October 7, 2003, a Union County grand jury indicted Eaton with one count of Identity Fraud, in violation of R.C. 2913.49(B), a felony of the third degree; one count of Forgery, in violation of R.C. 2913.31(A)(3), a felony of the fourth degree; Attempted Grand Theft, in violation of R.C. 2923.02 and 2913.02(A)(3), a felony of the fourth degree;[1] and Possessing Criminal Tools, in violation of R.C. 2923.24(A), a felony of the fifth degree. The case was set for trial on March 10, 2004.

{¶3} The indictment arose from the following facts. On March 21, 2003, Eaton entered the National City Bank in Marysville, Ohio. While there, Eaton presented the clerk with a driver's license identifying himself as Jeffrey Eskins. The license contained all of Eskins' information but displayed Eaton's picture. Along with the license, Eaton gave the clerk a savings withdraw slip indicating that he wished to withdraw $8900 from Eskins' account.

[1] In its brief, the State concedes that there was an error in the indictment indicating that attempted grand theft, in this case, was a felony in the fourth degree. As the State noted in its conclusion, the money amount involved here (i.e. more than $5000, but less than $100,000) is a felony in the fourth degree; however, since this is an attempt charge, the felony charged is a felony in the fifth degree.

{¶4} The bank teller became suspicious of the transaction and called the National City Bank in London, Ohio to obtain a copy of the signature card for verification. Upon comparison, the clerk noted that the signatures were starkly different and, therefore, halted the requested transaction.

{¶5} Further investigation, in collaboration with the Columbus Police Department, found that the driver's license presented to the clerk contained Eskins' information with Eaton's picture. In an unrelated trash pull for another investigation, the police discovered the film negatives bearing the forged driver's license with Eskins' information and Eaton's picture. Furthermore, in that same pull, the police found a Sawmill Baptist Church employee badge image displaying Eaton's photograph and Eskins' name, as well as half of Eskins' actual employee badge. With this information, Eaton was indicted and charged.

{¶6} A jury was convened for trial, but before it was impaneled, the State and Eaton reached a plea bargain agreement. The record before this Court is not a model of clarity as to exactly what the terms of the plea agreement were. Only one term can be clearly understood—Count One, Identity Fraud, would be dropped if Eaton changed his plea to guilty on all other counts. From there, the record is vague as to any additional promises, if any, the State made to Eaton. It should be noted that there is also a sentence recommendation discrepancy. The

State, at one point in the hearing, recommended maximum sentences to be served consecutively. Plea Hearing Tr. at 18. The Prosecutor stated:

> **Your Honor, the State would just note that Mr. Eaton does have [a] prior conviction, [and] would ask the Court to consider in this matter, based on his record, that 18 months on Count II would be appropriate, 18 months on Count III, both fourth-degree felonies, and 12 months on Count IV, which is a felony of the fifth degree, and that they be run consecutive.**

Id.

{¶7} A few moments later, however, the State announced that

> **[t]he State did indicate to defense counsel that, understanding that we were past scheduling today, and we were already prepared for trial, and that the Court is not bound by any recommendation of the State or defense counsel, the State would put on the record that up until this morning, had indicated, yes, the State would be, would accept an 18-month sentence, and certainly, if the Court so chooses to do 18 months in an arrangement of concurrent, the State certainly would be fine with that also.**

R. at 21-22.

{¶8} Defense counsel did not object to the State's dual recommendations. Accordingly, the State dropped Count One, Identity Fraud. The court accepted the plea to the remaining charges and immediately proceeded to sentencing.[2]

{¶9} After reviewing the possible implications of a guilty plea with Eaton and the requirements outlined in Criminal Rule 11, the court proceeded to identify

[2] Both parties understood that no pre-sentencing report would be prepared. Furthermore, the record indicates that Eaton was fully aware that sentencing would occur that same day. Plea Hearing Tr. at 12.

mitigating and aggravating factors to determine sentencing. First, the court noted that Eaton had two prior convictions—forgery and bank robbery. Second, the court acknowledged that Eaton had charges currently pending against him arising out of events in Franklin County—two counts of rape and one count of RICO. Next, the State apprised the court that the victim in the case, even though he did not suffer any monetary loss, was emotionally disturbed that his identity was stolen so easily. Finally, in mitigation, Eaton stated that there was no violence involved in the case, he was not currently under community control, and the victim did not suffer any monetary loss.

{¶10} Based on these considerations, the court stated:

> **The Court has balanced and considered the purposes and principles of sentencing under Revised Code 2929.11, et sec., and the Court finds under 2929.12(B) through (E) that the victim suffered serious psychological harm at the least, and that the offense was committed as part of organized criminal activity. The Court further finds that no physical harm to persons or property was caused, and most weight though would be given to more serious [sic] as far as the offense is concerned.**
> **The Court finds that there's been a prior history of criminal convictions, and that there's been a failure to respond favorably in the past to probation or parole, and the Court further finds that there's no genuine remorse exhibited at this by the defendant. Most weight is given to likely recidivism.**
> **Further, under 2929.13(B), the Court finds again that the offense was committed as part of an organized criminal activity, and that the offense was committed while under a community control sanction. Weighing the seriousness and recidivism factors, a prison term is consistent with the purposes of Revised Code 2929.11, and the offender is not amenable to available community sanctions.**

> *******
> **The Court further finds that you have no ability to pay anything now or in the foreseeable future here.**
> **On the charge of possessing criminal tools, … a felony in the fifth degree, the Court imposes a prison sentence of 12 months. On the count of forgery, … a felony in the fourth degree, the Court imposes a prison sentence of 18 months. On one count of attempted grand theft, … a felony of the fourth degree, the Court imposes a prison sentence of 18 months.**
> **The Court finds that the offender has previously served a prison term, and that the shortest term possible would demean the seriousness of the offense, and does not adequately protect the public. The longest term has been imposed on each of these cases, and the Court finds that the offender poses the greatest likelihood of committing future crimes, and that the offender has committed the worst form of each of the offenses. And I look at the record that has been imparted to the Court here at sentencing, and the fact that the defendant has previously committed offenses for which he has been in prison, and continues to offend.**
> *******
> **The Court finds that the harm here was so great or unusual that a single term does not adequately reflect the seriousness of the conduct, and the offender's criminal history shows that consecutive terms are needed to protect the public, and it is, therefore, the judgment and sentence of this Court that each of these prison terms to be [sic] served consecutively, again, that the, [sic] to protect the public from repeated violations, and the criminal history shows that the offender is certainly not amendable to rehabilitation at this time, and that a short-term or concurrent terms would not be conducive to the public's welfare.**

Plea Hearing Tr. at 29-31, 32-33, 34-35.

{¶11} Based on the court's findings, Eaton was given the maximum sentence for all three charges and sentenced to serve them consecutively. This appeal followed, and Eaton asserts three assignments of error.

First Assignment of Error

THE SENTENCE OF THE LOWER COURT SHOULD BE REVERSED ON THE BASIS OF PROSECUTORIAL MISCONDUCT IN NOT FOLLOWING THE TERMS OF THE PLEA AGREEMENT AND/OR THE PLEA AND SENTENCING SHOULD BE REVERSED BECAUSE THE PLEA WAS ENTERED INTO UPON FALSE PROMISES IN VIOLATION OF CRIMINAL RULE 11.

{¶12} Appellant's first assignment of error is twofold. First, Appellant argues that the State's actions when recommending a sentence amounted to prosecutorial misconduct and breached the terms of the established plea agreement. Second, Appellant asserts that the plea and sentencing should be reversed due to a Criminal Rule 11 violation. For guidance, Appellant asserts that *Santobello v. New York* (l971), 404 U.S. 257 and its progeny, are the controlling cases in this matter. The *Santobello* line stands for the proposition that plea bargaining is akin to contract law principles—both parties bargain for an agreement. If one side breaks their agreement, then the other side is entitled to a remedy. Id. at 262.

{¶13} While Appellant may be correct in his fundamental understanding of contract law applications to the criminal law plea bargaining process, this argument is problematic to the case at bar. In the case sub judice, the record indicates that dismissing the identity fraud charge in exchange for appellant's guilty plea to all other charges was the extent of the bargain. In fact, when the

State presented the terms to the court, defense counsel acknowledged that dismissing the identity fraud for a guilty plea on all other charges was the resolution agreed upon by both parties. Plea Hearing Tr. at 4. Appellant's assertion that specific sentencing recommendations were to be made in court is simply not supported by the record.

{¶14} Assuming, arguendo, that promises were made, the State did go on the record and indicate an eighteen month, concurrent sentence would be satisfactory. Nevertheless, the State's other recommendation, i.e. maximum, consecutive sentences, was presented to the court without objection. This leads us to conclude that, if there was a sentencing recommendation as part of the plea, the State's latter statement of a concurrent sentence satisfied its end of the bargain. Therefore, without a more thorough record, this Court cannot find prosecutorial misconduct or false promises. The appellant's first assignment of error, therefore, is overruled.

Second Assignment of Error

THE DEFENDANT WAS DEPRIVED OF DUE PROCESS OF LAW BY INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶15} In his brief to this Court, Appellant alleges that counsel was ineffective because she failed to notify him of the plea in a timely manner and did not object to the State's maximum, consecutive sentence recommendation. We find this argument to be without merit.

{¶16} As this Court has previously stated, the State of Ohio has adopted the two-part test outlined by the United State's Supreme Court in *Strickland v. Washington* for determining whether a criminal defendant has been denied ineffective assistance of counsel. See, e.g. *State v. Brown*, 3d Dist. No. 8-02-09, 2002-Ohio-4755, at ¶50. In order to claim ineffectiveness, the defendant must first show "that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674. Secondly, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

{¶17} In order for the Appellant to be successful in his first alleged ineffective claim, he must demonstrate that his trial counsel did not apprise him of the plea in a reasonable and timely manner and, but for not apprising him, he would not have pled guilty.

{¶18} According to the record, defense counsel acknowledged to the court, in the presence of and without comment from appellant, that he was fully apprised of the terms of the agreement. The record states:

> **The Court: All right. And thank you, counsel. Defense counsel, Mrs. Pelanda, you've heard what the Prosecutor has said. Is that your understanding of the resolution?**
> **Ms. Pelanda: It is, your honor.**
> **The Court: And have you discussed this with your client?**
> **Ms. Pelanda: I have at length, your Honor.**

> **The Court: And have you discussed his possible defenses with him in the charge?**
> **Ms. Pelanda: Yes, your Honor, over the course of my representation I have.**
> **The Court: And have you discussed the fact that no sentencing recommendation is binding upon the Court?**
> **Ms. Pelanda: I have, your Honor.**

Plea Hearing Tr. at 4-5.

{¶19} Moreover, the appellant, when fully recounted with the terms of the resolution, stated he fully understood that the identity fraud charge would be dismissed in exchange for him changing his plea to guilty on all other counts. The record states:

> **The Court: Mr. Eaton, you've heard what's been stated by the Prosecuting Attorney, as well as your counsel, and I understand then that you're willing to withdraw your former plea of not guilty, and enter a plea of guilty, to the offenses of one count of possessing criminal tools, …,one count of forgery, …, and one count of attempted grand theft…. In exchange for these change of pleas then, the count of identity fraud… would be dismissed by the State. Do you understand then what would be happening?**
> **The Defendant: Yes, your Honor.**
> **The Court: And you wish to enter into that type of an arrangement. Is that correct?**
> **The Defendant: Yes, your Honor.**

Plea Hearing Tr. at 5-6.

{¶20} Finally, the appellant initialed and signed all appropriate places on a written plea agreement indicating that he was changing his plea. Therefore, the

record indicates that the appellant was fully apprised of the plea and its consequences. Because of this, counsel was not ineffective.

{¶21} In the second ineffective claim, Appellant argues that because defense counsel did not object to the State's maximum, consecutive sentence recommendation, counsel was ineffective. As stated, supra, the record is not clear as to the exact terms of the plea. It is not obvious as to whether there were any additional sentencing terms even associated with the resolution. Without a more developed record, therefore, this Court cannot find the defense counsel was ineffective on this basis. Thus, appellant's second argument is without merit. Consequently, the second assignment of error is overruled

Third Assignment of Error

THE COURT ERRED BY SENTENCING THE DEFENDANT TO MAXIMUM CONSECUTIVE SENTENCES.

{¶22} In this assignment of error, appellant contends that the trial court erred in sentencing him to serve maximum, consecutive sentences. Specifically, appellant alleges that even though the trial court stated "the proper (magic words) on the record, the [C]ourt made several errors of fact" that lead to its sentencing decision. Appellant's Brief at 18 (parenthesis in original). Furthermore, appellant asks this Court to review his sentence and grant him jail time credit for the time that he served in the Franklin County Jail while awaiting trial in Union County.

{¶23} When deciding what sentence to impose on a defendant, the trial court is granted broad discretion in determining the most effective way to uphold the two overriding purposes of felony sentencing: to protect the public from future crime and to punish the offender. *State v. Avery* (1998), 126 Ohio App.3d 36, 50, 709 N.E.2d 875. However, trial courts are governed by the sentencing guidelines prescribed by the Ohio Legislature. In other words, trial courts are required to make various, statutorily required findings before properly imposing a felony sentence. *State v. Martin* (1999), 136 Ohio App.3d 355, 362, 736 N.E.2d 907. Once those findings are made, a trial court's decision will not be disturbed absent a showing by clear and convincing evidence that the lower court committed one of the errors described by Ohio Revised Code 2953.08(G). R.C. 2953.08(G) reads:

> **The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division 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, division (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code, whichever, if any, is relevant;**
> **(b) That the sentence is otherwise contrary to law.**

The clear and convincing standard of review is defined as "[T]hat 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." *Cross v. Ledford* (1954), 161 Ohio St. 469, 53 O.O. 361, 120 N.E.2d 118, at paragraph three of the syllabus.

Maximum Sentences

{¶24} In order for a trial court to impose the maximum sentence prescribed by law, the judge must make certain findings in accordance with R.C. 2929.14(C). That sections states:

> **Except as provided in division (G) of this section or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section *only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes,* upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.**

Ohio Revised Code 2929.14(C) (emphasis added).

{¶25} In the present case, the trial court sentenced the appellant to the maximum possible sentence on each charge because it concluded that he committed the worst form the offense and had a likely chance of recidivism. The judge based this conclusion on the appellant's previous criminal history, which included two prison sentences. Also, it was noted in the record that appellant showed no signs of "genuine remorse" for the crimes he committed. Moreover,

the court stated that this offense was committed as part of organized criminal activity and while the appellant was under community control. Finally, the court found that the victim suffered "serious psychological harm."

{¶26} At the outset, there is nothing in the record that supports that these crimes were committed as part of organized criminal activity[3] or that the victim suffered serious psychological harm. Moreover, the record clearly states that the appellant was not under any form of community control sanction while these particular crimes were committed.[4] Nevertheless, based on the trial court's conclusions that appellant served two previous prison sentences for bank robbery and forgery, and is currently in the Franklin County Jail facing two charges of rape and one charge of RICO, and that he showed no remorse for the crimes he was being currently sentenced for, this Court cannot find by clear and convincing evidence that appellant's maximum sentences were unsupported by the record or that the sentences were contrary to law. See, supra, R.C. 2953(G). Placing the organized crime, psychological harm, and community control allegations aside,

[3] The record does indicate that Eaton was currently being held in Franklin County for two counts of rape and one count of RICO. The record, however, does not tie the Franklin County RICO charge with the crimes Eaton was being sentenced to in this case.

[4] The plea hearing at page seven states:

The Court: Now, are you currently on felony probation or parole?

The Defendant: No, I'm not, your Honor.

the sentencing court, with the other information it possessed, could reasonably find that appellant posed the greatest likelihood of committing future crimes.

Consecutive Sentences

{¶27} When a defendant pleads guilty to multiple offenses, the sentencing court is to impose concurrent sentences unless it finds that consecutive sentences are permissible pursuant to R.C. 2929.14(E)(4). *State v. Mendez*, 3rd Dist No. 12-02-99, 2003-Ohio-717, at ¶12. In making a consecutive sentence recommendation, the court must comply with the relevant sentencing statutes by making all necessary findings on the record at the sentencing hearing. *Martin*, 136 Ohio App.3d at 361-62, 736 N.E.2d 907.

{¶28} Ohio Revised Code section 2929.19(B)(2) states that "**a court shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances:… (c) If it imposes consecutive sentences under section 2929.14 of the Revised Code, its reasons for imposing the consecutive sentences.**" Additionally, R.C. 2929.14(E)(4) states, in relevant part:

> **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:… (c) The**

> **offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.**

In other words, in order for a trial court to impose consecutive sentences, it must make specific findings that consecutive sentences are (1) necessary to protect the public from future crimes or to punish the offender; (2) not disproportionate to the seriousness of the offenders conduct; (3) not disproportionate to the danger the offender poses to the public; and (4) one other additional finding stated in R.C. 2929.14(E)(4)(a)-(c). R.C. 2929.14(E)(4).

{¶29} In the case sub judice, the trial court determined that consecutive sentences were necessary because the appellant possessed a criminal history that required two separate prison terms, and "the harm…was so great or unusual that that a single term does not adequately reflect the seriousness of the conduct." Plea Hearing Tr. at 34. Furthermore, the court found that these prison terms be served consecutively "to protect the public from repeated violations [because] the criminal history shows that the offender is certainly not amenable to rehabilitation at this time…." Id. at 34-34. The court's conclusions, however, do not address the issue of proportionality of consecutive sentences to the seriousness of appellant's conduct in this situation and the danger to the public. Moreover, there is nothing in the record that suggests the victim suffered "great or unusual" psychological or economic harm. While all other findings are present, the lack of

a "proportionality" and "harm" findings place the sentencing court below the threshold standard required to impose consecutive sentences. Therefore, the trial court did err in sentencing appellant consecutively.

Jail Time Credit

{¶30} While it is the parole authority's duty to reduce the term of incarceration by the number of days served prior to sentencing, it is the responsibility of the sentencing court to properly calculate the amount of days for which such credit may be extended. *State v. Young*, 5th Dist. No. 03-CAA-10051, 2004-Ohio-4002, at ¶12; *State ex. rel. Corder v. Wilson* (1991), 68 Ohio App.3d 567, 572, 589 N.E.2d 113. Furthermore, a defendant may raise jail time credit directly on appeal. *State ex. rel. Jones v. O'Connor*, 84 Ohio St.3d 426, 704 N.E.2d 1223, 1999-Ohio-470 (per curium)(holding that defendant had an adequate remedy at law by appeal to review any sentencing error the trial judge in failing to calculate his correct jail-time credit). A defendant, however, is entitled to credit for only the time served in connection with the crime currently charged**.** *State v. Whitfield*, 8th Dist. No. 81247, 2003-Ohio-1504 at ¶6; see also *State ex rel. Carter v. Wilkinson*, 10th Dist. No. 03AP-737, 2004-Ohio-3386 at ¶8 ("**Clearly, R.C. 2967.191 pertains only to credit for time spent in jail awaiting disposition of the particular case out of which the inmate's sentence arises, and does not**

pertain to time spent serving a sentence pursuant to a case from another jurisdiction….").

{¶31} Appellant alleges that he is entitled to 140 days of jail time credit for the time served in the Franklin County Jail while awaiting his trial in Union County. Specifically, appellant alleges that while he could have made bond from the charges pending against him in Franklin County, he chose not to because he could not have afforded the bond set in the Union County case. The appellant alleges, therefore, that he chose not to post bond in Franklin County because he would have immediately been incarcerated in Union County, where he could not afford the bond.

{¶32} There is nothing in the record that supports the fact that appellant was serving time in Franklin County in connection with his time to be served in Union County. The Plea Hearing transcript at page 34 states:

> **The Court: …and I need to ask, is there any current jail-time credit?**
> **Mrs. Boggs: No, your Honor. Mr. Eaton is currently in the Franklin County Jail on the charges that Detective McGlenn indicated. There is no Union County time accruing at this point for time he's in Franklin County Jail.**
> **The Court: Mrs. Pelanda?**
> **Ms. Pelanda: No, your Honor, we have nothing further to add to that.**

There being no basis for jail time credit on the Union County sentence for the time served in Franklin County, the appellant's argument is without merit. The third

assignment of error, therefore, is overruled except for the imposition of consecutive sentences.

Statutory Sentencing Mistake

{¶33} Crimes, as well as their associated penalties, are statutory in nature. *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438 O.O.2d 447, 195 N.E.2d 811. Accordingly, "[a]ny such attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, 14 O.B.R. 511, 471 N.E.2d 774. Subsequently, this Court has consistently held that the fact that a defendant has commenced execution of an incorrectly stated prison term, and is later re-sentenced according to the proper statutory scheme, does not give rise to any claim under the Double Jeopardy Clauses of the United States and Ohio Constitutions. *In re Futrell* (2003), 153 Ohio App.3d 20, 22, 790 N.E.2d 810 (citing *State v. McColloch* (1991), 78 Ohio App.3d 42, 44, 603 N.E.2d 1106).

{¶34} Here, as the State correctly points out in its brief, the trial court erred in sentencing the appellant to the maximum sentence of eighteen months for attempted grand theft in violation of R.C. 2923.02 as it relates to R.C. 2913.02(A)(3). Appellee's brief at 12. Contrary to the sentencing court's decision, attempted grand theft is not a felony of the fourth degree; it is a felony of the fifth degree, which carries a maximum sentence of twelve months. Thus, in

accordance with the authority supra, the eighteen month sentence for attempted grand theft is void. This case must be remanded so that the sentencing court can impose the proper sentence in accordance with the Ohio sentencing statutes and guidelines.

Conclusion

{¶35} Thus, in accordance with the foregoing opinion, we must reverse the sentence of the trial court as to the consecutive sentencing scheme and as to the sentence for the attempted grand theft. The judgment of the trial court is affirmed in all other respects. Accordingly, this case must be remanded for re-sentencing in accordance with this opinion.

Judgment affirmed in part and reversed in part and remanded for re-sentencing.

BRYANT and ROGERS, JJ., concur.
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