

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	CASE NO. CA2014-03-076
Plaintiff-Appellee,	:	
	:	<u>OPINION</u>
- vs -	:	5/11/2015
	:	
ROBERT A. LEE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2013-04-0627

Michael T. Gmoser, Butler County Prosecuting Attorney, Michael A. Oster, Jr., Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Fred Miller, Baden & Jones Building, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

M. POWELL, J.

{¶ 1} Defendant-appellant, Robert A. Lee, appeals from an entry of the Butler County Court of Common Pleas revoking his community control and imposing a jail term consecutive to a prison term previously imposed in a separate case. For the reasons outlined below, we reverse as to the sentence only, and remand to the trial court for the purpose of resentencing consistent with this opinion.

{¶ 2} In 2012, Lee was convicted of forgery, a fifth-degree felony, and was sentenced to three years of community control. Lee was notified that a violation of his community control could lead to imposition of a prison term of 12 months. In 2013, Lee was convicted of attempted possession of heroin, a first-degree misdemeanor, and possessing drug abuse instruments, a second-degree misdemeanor. Lee was sentenced to three years of community control. The trial court suspended 180-day and 90-day jail sentences for the two offenses, respectively. Lee's felony case and his misdemeanor case were presided over by different trial judges.

{¶ 3} In March 2014, the trial judge in Lee's felony case found that Lee had violated the terms of his community control, revoked his community control, and sentenced him to serve a prison term of 11 months with credit for 226 days served. Later the same month, the trial judge in Lee's misdemeanor case found Lee had violated the terms of his community control in that case, revoked his community control, and imposed the suspended jail terms of 90 and 180 days. The 90-day jail sentence and 180-day jail sentence for the community control violation for Lee's misdemeanor convictions were ordered to be served concurrent with one another, but consecutive to the 11-month prison sentence for Lee's violation of community control in the felony case. Lee was given credit for 128 days served in the misdemeanor case.

{¶ 4} Lee now appeals, and asserts a single assignment of error for review:

{¶ 5} THE TRIAL COURT ERRED TO THE PREJUDICE OF [LEE] WHEN IT ORDERED HIS MISDEMEANOR SENTENCE TO BE RUN CONSECUTIVELY TO THE FELONY SENTENCE.

{¶ 6} On appeal, Lee argues that it was improper for the trial court to impose a jail term for violation of his community control arising from his misdemeanor convictions consecutive to his community control violation sentence arising from his felony conviction.

Lee's argument pertains to whether R.C. 2929.41 permits jail or prison terms for misdemeanor and felony convictions to be served consecutively. Amended portions of R.C. 2929.41 were revived by 2011 Am.Sub.H.B. No. 86 (H.B. 86) relating to misdemeanor and felony sentencing that were previously severed by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Appellate districts are now split as to whether the amended and revived portions of R.C. 2929.41 permit consecutive sentences for misdemeanors and felonies when jail or prison terms are imposed. See, e.g., *State v. Varney*, 5th Dist. Perry No. 13 CA 00002, 2014-Ohio-193; *State v. Polus*, 6th Dist. Lucas Nos. L-13-1119 and L-13-1120, 2014-Ohio-2321, *motion to certify allowed*, 140 Ohio St.3d 1413, 2014-Ohio-3785. This conflict has recently been accepted by the Ohio Supreme Court. *State v. Polus*, 140 Ohio St.3d 1413, 2014-Ohio-3785.

{¶ 7} We have never addressed whether R.C. 2929.41 permits the imposition of consecutive misdemeanor and felony sentences post-H.B. 86 and this appeal does not call upon us to do so. Based upon the specific facts of this case and in light of our decision in *State v. Richter*, 12th Dist. Clermont No. CA2014-06-040, 2014-Ohio-5396, we find that R.C. 2929.41 is not relevant in this instance.¹ In *Richter*, we held that R.C. 2929.41 is not applicable when the sentence imposed is for the violation of the terms of community control and not the underlying offense. We emphasized that "it is well-established that any penalty imposed for violating a condition of one's community control sanctions is a punishment for that violation and not for the original underlying offense." *Richter* at ¶ 8. In other words, without regard to the classification of the offense for which the community control sanction was imposed, a community control violation is considered neither a misdemeanor nor a felony.

1. Because this appeal does not require that we construe R.C. 2929.41 we do not cite the text of the statute.

{¶ 8} Pursuant to R.C. 2929.25(D)(2), a jail term may be imposed for a violation of community control. "Nothing within R.C. 2929.25(D) regarding the consequences of violating a condition of one's misdemeanor community control sanctions prohibits the sentencing court from ordering the sentence to be served consecutively to any other jail term or sentence of imprisonment." *Richter* at ¶ 10. Rather, the only restriction placed on jail terms is that "the total time spent in jail for the misdemeanor offense and the violation of a condition of the community control sanction shall not exceed the maximum jail term available for the offense for which the sanction that was violated was imposed." R.C. 2929.25(D)(3).

{¶ 9} In this instance, the trial court imposed a 180-day jail term for Lee's violation of his community control for attempted possession of heroin, a first-degree misdemeanor, and imposed a 90-day jail term for Lee's violation of his community control for possessing drug abuse instruments, a second-degree misdemeanor, to run concurrently with each other. Neither of these jail terms exceed the maximum term provided for the respective offenses. R.C. 2929.24(A)(1) and (2). Because R.C. 2929.25(D) does not prohibit the imposition of consecutive sentences for the violation of community control, the imposed jail terms do not exceed the maximum jail terms for the underlying offenses, and R.C. 2929.41 does not apply to community control violation sentences, the trial court had the discretion to impose a consecutive sentence in this case. However, that neither R.C. 2929.25(D) nor R.C. 2929.41 prohibit the imposition of a consecutive sentence here, does not relieve the trial court of the duty to comply with R.C. 2929.14(C)(4) for the imposition of a consecutive sentence.

{¶ 10} When appellate courts have approved imposition of consecutive misdemeanor and felony sentences, the trial court was required to engage in analysis under R.C. 2929.14(C)(4). See *Varney*, 5th Dist. Perry No. 13 CA 00002, 2014-Ohio-193; *State v. Barker*, 8th Dist. Cuyahoga No. 99320, 2013-Ohio-4038. Furthermore, R.C. 2929.15(B)(1)(c) provides that when a prison term is imposed as a penalty for a felony community control

violation, the sentencing court must do so in compliance with R.C. 2929.14. See *State v. Stevens*, 2d Dist. Greene No. 2014-CA-10, 2015-Ohio-1051, ¶ 9. We recognize that the imposition of consecutive sentences in this instance was for the violation of community control and not a sentence for the underlying offenses. We are further cognizant that the trial court ordering the consecutive sentence was sentencing Lee on a misdemeanor community control violation. Nonetheless, because a felony community control violation sentence is involved with the consecutive sentences, we find the reasoning of the above cited cases and the mandate of R.C. 2929.15(B)(1)(c) persuasive and requires a trial court to engage in analysis under R.C. 2929.14(C)(4) in these circumstances.

{¶ 11} R.C. 2929.14(C)(4) requires the trial court to make three findings to impose consecutive sentences. *State v. Neal*, 12th Dist. Clermont No. CA2014-04-031, 2015-Ohio-1412, ¶ 20. First, the trial court must find that the consecutive sentences are necessary to protect the public from future crime or punish the offender. R.C. 2929.14(C)(4). Second, the trial court must find that the consecutive sentences are not disproportionate to the seriousness of the conduct and to the danger the offender poses to the public. *Id.* Third, the trial court must find that one of the following applies:

(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)(a)-(c).

{¶ 12} When a trial court imposes consecutive sentences, it must state the required findings on the record at the sentencing hearing and incorporate such findings into the sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶ 29. It must be clear from the record that the trial court engaged in the required sentencing analysis and made the findings required by the statute. *State v. Smith*, 12th Dist. Clermont No. CA2014-07-054, 2015-Ohio-1093, ¶ 8. 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* at ¶ 29. In other words, "a talismanic incantation of the words in the statute" is not required to affirm consecutive sentences as long as the necessary findings can be found in the record and are incorporated into the sentencing entry. *Id.* at ¶ 37.

{¶ 13} In this instance, the trial court failed to engage in the analysis required by R.C. 2929.14(C)(4) at the sentencing hearing. The trial court commented on Lee's regular drug use and that he had committed "the new case" while on community control.² The trial court further expressed concern about the "short period of time" remaining on the felony sentence after credit for time served and the significant jail time credit to which Lee was entitled against the sentence for his violation of community control for the misdemeanor offenses. The trial court sought to craft a sentence of such duration to permit Lee "to get acquainted with the place."

{¶ 14} There is absolutely nothing in the record to support a finding that a consecutive

2. Lee's community control violations consisted of a failure to communicate with his probation officer and a theft charge that was still pending in Hamilton Municipal Court at the time of the sentencing in this case. Presumably, this is the "new case" referred to by the trial court.

sentence is not disproportionate to Lee's conduct or the danger that he poses to the public or any of the R.C. 2929.14(C)(4)(a)-(c) findings.³ Thus, the trial court did not engage in the required sentencing analysis, nor did it make the findings required by statute. Additionally, no such findings were incorporated into the sentencing entry. As such, the trial court erred in imposing consecutive sentences by failing to make the required findings pursuant to R.C. 2929.14(C)(4). Lee's sole assignment of error is overruled as it relates to R.C. 2929.41 prohibiting the imposition of consecutive sentences but sustained for failure of the trial court to make the requisite findings under R.C. 2929.14(C)(4).

{¶ 15} Consequently, we vacate Lee's consecutive sentences and remand this matter to the trial court for resentencing. See *Bonnell* at ¶ 30, 37. On remand, the trial court shall consider whether consecutive sentences are appropriate under R.C. 2929.14(C)(4), and if so, shall make the required statutory findings on the record at resentencing and incorporate its findings into the subsequent sentencing entry.

{¶ 16} Judgment reversed and cause remanded to the trial court for the sole purpose of resentencing consistent with this opinion.

PIPER, P.J., and HENDRICKSON, J., concur.

3. The trial court stated at sentencing, "This Court originally made the sentence 180 days, 90 days consecutive, suspended that and placed [Lee] on community control and commits the new case." This does not satisfy the R.C. 2929.14(C)(4)(a) finding that Lee committed the offense while serving a community control sanction pursuant to R.C. 2929.16, 2929.17, or 2929.18 as these sections refer to felony community control sanctions. It is clear that the trial court was referring to Lee's misdemeanor case community control when it made the above cited statement. Additionally, R.C. 2929.14(C)(4)(a) and (b) require the trial court find that the offender committed an "offense." A community control violation is not an "offense" as defined in R.C. 2901.02 and 2901.03 and therefore may not serve as the basis for either the R.C. 2929.14(C)(4)(a) or (b) findings.