

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2017-T-0050
CHRISTOPHER L. McBRIDE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2002 CR 00517.

Judgment: Modified and affirmed as modified.

Dennis Watkins, Trumbull County Prosecutor, and *Charles L. Morrow* and *Ashleigh Musick*, Assistant Prosecutors, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Christopher McBride, pro se, PID: A444-136, Trumbull Correctional Institution, P.O. Box 901, 5701 Burnett Road, Leavittsburg, OH 44430 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellant, Christopher L. McBride, appeals the judgment of the Trumbull County Court of Common Pleas denying his motion for resentencing, which was filed 14 years after his guilty plea and sentencing on multiple counts of aggravated robbery, aggravated burglary, kidnapping, rape, and related felonies. At issue is whether the trial court erred in denying the motion. For the reasons that follow, we modify the judgment and affirm as modified.

{¶2} On August 29, 2002, appellant was charged in a ten-count indictment with two counts of aggravated robbery, each being a felony-one; two counts of aggravated burglary, each being a felony-one; two counts of rape, each being a felony-one; kidnapping, a felony-one; kidnapping, a felony-two; burglary, a felony-two; and receiving stolen property, a felony-four. Appellant pled not guilty. Subsequently, he pled guilty to each count as charged.

{¶3} On March 31, 2003, the case came on for sentencing. The court noted in its sentencing entry that appellant “terrorized a minor, a 71-year-old widow, and a 51-year-old professional woman, whom he raped in her own house.” The court also noted appellant has an extensive criminal history. The court sentenced appellant to seven years in prison on five of the felony-ones, and five years on one of the felony-twos, each of which was ordered to be served consecutively to the other, for a total of 40 years. The court also sentenced appellant to seven years on two other felony-ones, six years on one felony-two, and one year on the felony-four, each of which was to be served concurrently.

{¶4} Appellant did not file a direct appeal of his conviction. Seven years later, in November 2010, he filed a pro se petition for relief after judgment. The trial court dismissed the petition. Again, appellant did not appeal that ruling.

{¶5} On October 30, 2015, some 13 years after his sentencing, appellant filed a pro se motion to withdraw his guilty plea. Appellant did not argue his plea was involuntary or otherwise invalid; instead, he asked for a resentencing, arguing the trial court in its sentencing entry failed to set forth the order in which his consecutive sentences were to be served. The trial court denied the motion and appellant appealed

this ruling. This court, in *State v. McBride*, 11th Dist. Trumbull No. 2016-T-0006, 2017-Ohio-891 (“*McBride I*”), affirmed the court’s judgment, but sua sponte remanded for the trial court to correctly impose post-release control. Appellant filed a notice of appeal in the Ohio Supreme Court, which recently declined jurisdiction at 2017-Ohio-8842.

{¶6} Appellant then filed a motion to reopen his appeal in *McBride I*, which this court denied.

{¶7} In March 2017, the trial court resentenced appellant via a nunc pro tunc sentencing entry pursuant to this court’s remand in *McBride I*.

{¶8} One month later, on April 24, 2017, appellant filed the instant motion for resentencing. The trial court denied the motion. He now appeals the trial court’s judgment, asserting the following as his sole assignment of error:

{¶9} “The trial court erred in denying McBride’s Motion for Resentencing in violation of his Due Process protections under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 10 of the Ohio Constitution.”

{¶10} As a preliminary matter, we note that appellant has failed to file a transcript of his guilty plea hearing or of his sentencing hearing. Our review is thus limited to a consideration of the trial court’s docket and judgment entries.

{¶11} Appellant argues that he is entitled to resentencing, pursuant to *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504. The Ohio Supreme Court in *Hand* held that R.C. 2901.08(A), which treats a juvenile adjudication as a prior conviction to enhance either the degree or the sentence for a subsequent offense committed as an adult, violates due process. *Hand* at paragraph one of the syllabus. The Court further held that, because a juvenile adjudication does not involve the right to a jury trial, it cannot be

used to increase a sentence beyond a statutory maximum or mandatory minimum. *Hand* at paragraph two of the syllabus, following *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

{¶12} Appellant argues that *Hand* applies to all sentencing statutes, including R.C. 2929.12. Thus, he argues the trial court erred in considering his juvenile delinquency adjudications in imposing his sentence. He argues that he should be resentenced and that the court should only be permitted to consider his prior criminal convictions and the facts and circumstances surrounding his present case. However, as appellant concedes, *Hand* only addressed the issue of whether a defendant's juvenile delinquency adjudications could be used to increase a sentence beyond a statutory maximum or mandatory minimum, in violation of *Apprendi*. Nothing in *Hand* prohibits a trial court from *considering* a defendant's prior criminal history, including his juvenile delinquency adjudications, when considering and weighing the recidivism factors in R.C. 2929.12.

{¶13} The Ohio Supreme Court, in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, held that appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2) when reviewing felony sentences. *Id.* at ¶1. Thus, applying the plain language of that statute, the Supreme Court held that "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*.

{¶14} Further, as the Ohio Supreme Court has held, R.C. 2929.11 and R.C. 2929.12 do not require judicial fact-finding. *State v. Foster*, 109 Ohio St.3d 1, 2006-

Ohio-856, ¶42; *State v. Macko*, 11th Dist. Lake No. 2016-L-022, 2017-Ohio-253, ¶75. “Rather, in sentencing a defendant for a felony, a court is merely required to consider the purposes and principles of sentencing in R.C. 2929.11 and the statutory * * * factors in R.C. 2929.12.” *Macko*, *supra*, citing *Foster*, *supra*.

{¶15} R.C. 2929.12(A) provides, in pertinent part, that “a court that imposes a sentence under this chapter * * * shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct [and] the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism * * *.”

{¶16} Further, R.C. 2929.12(D) provides, in pertinent part, that “[t]he sentencing court *shall* consider all of the following that apply regarding the offender * * * as factors indicating that the offender is likely to commit future crimes: * * * (2) The offender previously was adjudicated a delinquent child * * * or the offender has a history of criminal convictions.” (Emphasis added).

{¶17} Since *Foster* requires the sentencing court to consider the factors in R.C. 2929.12, which include the defendant’s juvenile adjudications, in imposing sentence and *Hand* does not prohibit a sentencing court from considering those adjudications, the trial court did not violate *Hand* in doing so. In fact, the Supreme Court in *Hand* acknowledged that “there is a significant difference between allowing a trial judge to consider an adjudication during adult sentencing [which is allowed] and requiring [an enhanced] prison term to be imposed because of it [which is not].” *Id.* at ¶20.

{¶18} We therefore hold the trial court did not err in considering appellant’s juvenile adjudications in imposing his more-than-the-minimum and consecutive

sentences. Further, since we hold that appellant's sentence did not violate *Hand*, his sentence was authorized by law and is not void. Thus, his argument that the trial court erred in imposing his sentence is additionally barred by res judicata.

{¶19} Contrary to the state's brief, appellant does not argue that the trial court improperly imposed a mandatory sentence on him due to his juvenile delinquency adjudications. In fact, appellant does not challenge the mandatory nature of his sentence on appeal. Rather, it is the state that raises this issue. The state argues that "a mandatory sentence was not appropriate in this case." (This argument applies to Counts 1-3, 6-8, and 10 as these are the only counts on which the trial court imposed mandatory sentences.) However, the state argues that the error in imposing a mandatory sentence is harmless because the court made the necessary findings for consecutive sentences and, but for the mandatory language, the sentence would have been the same. Thus, the state asks this court to either: (1) strike the reference in the court's nunc pro tunc sentencing entry to the sentences being mandatory, or to (2) remand for the trial court to exclude the "mandatory" language from the sentencing entry.

{¶20} Pursuant to the court's nunc pro tunc sentencing entry, the court incorrectly imposed mandatory sentences on appellant's guilty plea to the instant counts because he was not previously convicted of a first or second-degree felony. See R.C. 2929.13(F)(6).

{¶21} Appellant's assignment of error lacks merit and is overruled. We therefore hold that the trial court did not err in sentencing appellant with the limited exception of the reference in the sentencing entry to the sentences on the subject counts being

mandatory. We therefore modify the trial court's March 31, 2017 nunc pro tunc sentencing entry by deleting the language stating that the sentences imposed on counts 1-3, 6-8, and 10 are mandatory.

{¶22} For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is hereby modified and affirmed as modified.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDALL, J., concurs in judgment only.