

[Cite as *State v. McDaniel*, 2018-Ohio-2071.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105252

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEWAYNE MCDANIEL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-600835-C

BEFORE: Jones, J., Boyle, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: May 24, 2018

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LARRY A. JONES, SR., J.:

{¶1} Defendant-appellant DeWayne McDaniel (“McDaniel”) appeals his sentence, rendered after he pleaded guilty to four criminal offenses. For the reasons that follow, we affirm.

{¶2} McDaniel and coconspirators Lamont Weakley (“Weakley”) and Melissa Coles (“Coles”) were involved in a scheme to use the personal information stolen from patients of American Dental Centers to obtain fraudulent lines of credit and make purchases at various retail stores. They used the stolen patient information to create fake driver’s licenses and

identification cards in the names of the victims, establish lines of credit in the names of the victims, and make various purchases, including purchases of jewelry, clothing, gift cards and cell phones using the credit that had been established.

{¶3} In December 2015, the trio were charged in a 45-count indictment. Weakley proceeded to trial on 34 of the 45 counts and was convicted of 20 counts. Coles, who had no prior felony record, pleaded guilty to an amended indictment and testified against Weakley at trial.

{¶4} McDaniel entered into plea negotiations with the state and pleaded guilty to an amended indictment. He pleaded guilty to one count of conspiracy to engage in a pattern of corrupt activity and one count of identity fraud, felonies of the third degree. He also pleaded guilty to one count of aggravated theft and one count of attempted money laundering, felonies of the fourth degree. As part of the plea agreement, McDaniel agreed that none of the offenses merged for the purposes of sentencing.

{¶5} The trial court sentenced McDaniel to a total of six years in prison and ordered him to pay \$37,000 in restitution, jointly and severally liable with his codefendants. The sentence consisted of consecutive terms.

{¶6} McDaniel filed a notice of appeal and filed one assignment of error for our review:

I. The trial court misunderstood the sentencing law regarding consistency and proportionality at the time it sentenced appellant.

{¶7} Weakley also appealed his convictions. After McDaniel filed his appellate brief, this court issued its decision in *State v. Weakley*, 8th Dist. Cuyahoga No. 105293, 2017-Ohio-8404, vacating Weakley's convictions and remanding the case to the trial court. McDaniel moved this court to reopen briefing. This court granted his motion and McDaniel

filed a supplemental assignment of error:

II. The trial court imposed a sentence contrary to law and violated appellant's due process rights when it imposed a sentence upon appellant that was inconsistent with and disproportionate to the sentence imposed upon his more culpable co-defendant.

{¶8} In the first assignment of error, McDaniel claims that his sentence should be reversed because it is unclear that the trial court sentenced him with a "full understanding of the law."

{¶9} R.C. 2953.08(G)(2) provides, in part, that when reviewing felony sentences, the appellate court's standard for review is not whether the sentencing court abused its discretion; rather, if this court "clearly and convincingly" finds that (1) "the record does not support the sentencing court's findings under R.C. 2929.14(C)(4)," or that (2) "the sentence is otherwise contrary to law," then we "may increase, reduce, or otherwise modify a sentence * * * or [a reviewing court] may vacate the sentence and remand the matter to the sentencing court for re-sentencing."

{¶10} The Ohio Supreme Court has further explained:

[S]ome sentences do not require the findings that R.C. 2953.08(G) specifically addresses. Nevertheless, it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court. That is, an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence.

State v. Marcum, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23.

{¶11} In determining what sentence to impose, a sentencing court is required to consider the purposes and principles of sentencing pursuant to R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12. Under R.C. 2929.11(A), a felony sentence shall be reasonably calculated to achieve two overriding purposes: (1) to protect the public from future crimes by the offender, and (2) to punish the offender using the minimum sanctions the court determines will achieve those purposes. Further, under R.C. 2929.11(B), the sentence imposed for a felony must be commensurate with the seriousness of the offender's conduct and consistent with sentences imposed for similar crimes committed by similar offenders.

{¶12} Under R.C. 2929.12(A), a court sentencing a felony offender has discretion to determine the most effective way to comply with the purposes and principles of sentencing outlined in the statute. In exercising its discretion, however, the sentencing court must consider the seriousness, recidivism, and other mitigating factors set forth in R.C. 2929.12. *Id.* Although the trial court must consider the purposes and principles of sentencing as well as the factors in R.C. 2929.12, the court is not required to use particular language or make specific findings on the record regarding its consideration of those factors. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31.

{¶13} In sentencing an offender to consecutive sentences, R.C. 2929.14(C)(4) provides that a trial court may impose consecutive sentences if the court finds that the consecutive service is (1) necessary to protect the public from future crime or to punish the offender, and (2) that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. Additionally, the trial court must find that at least 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.

{¶14} At the sentencing hearing, the trial court considered that McDaniel was on postrelease control at the time he committed the offenses to which he had pled guilty. The court also noted that while on postrelease control, McDaniel failed to submit to drug screens, failed drug tests, was sanctioned for harassing the mother of one of his children, and had a 46-page criminal record dating back to when he was a juvenile. As to his criminal record, the court noted that he had multiple felony convictions, including two prior felony convictions for similar identity theft and fraud cases. His most recent identity theft and fraud case, the court noted, was from 2011, when he was ordered to pay \$83,000 in restitution and sentenced to "some consecutive [prison] time."

{¶15} As to his drug history, the court noted McDaniel gave inconsistent statements about prior drug use, but detailed for the probation department a long history of abusing drugs, including phencyclidine, amphetamines, ecstasy, cocaine, and heroin.

{¶16} In discussing the culpability of McDaniel in comparison to his co-conspirators, the state opined that it felt that McDaniel was part of the conspiracy, but his "particular conspiracy conduct" was less culpable than his codefendants because his conduct was "less frequent" and "less productive."

{¶17} The trial court then stated the following as to McDaniel's sentence:

Let me just clear the air here on this thing of proportionality. Proportionality, under Ohio law, really deals with the seriousness of sentence you get for the conduct, compared to the sentence of another guy with similar conduct.

So it isn't a matter of in between. You can't say, I want a sentence commensurate with what my co-defendant got. I already sentenced one co-defendant. She had no prior felonies. So, it's a very different situation.

And here we have Mr. McDaniel, who is here for his third identity fraud, okay? So, he's getting to look like a dedicated practitioner of a certain kind of crime. And, we know that people who are victims of identity fraud don't always end up being out any money but they're out damage to their reputation and damage to their credit record and they have to go through all kinds of machinations to get that all corrected.

And then just the other harassment and bother that you caused someone and they have done nothing but live their lives * * * .

So, Mr. McDaniel has be to sentenced in his own skin. He doesn't get to be sentenced along with either of his co-defendants, because he's a different guy. So that's why the court bothered to go through your exceedingly lengthy criminal record. And, for many years of it, seemed to indicate you were a drug addict. Now you started doing felonies and your most recent trip to prison is on four separate felony case numbers, one of which was a second degree felony which is why you were on mandatory supervision.

This is very serious stuff and I appreciate what the prosecutor and your lawyer have said to me, that your involvement in this particular matter was smaller than the involvement of some other people. But, your involvement in this is pretty dedicated, you know, to have this many identity fraud cases and to be in the criminal justice system, for whatever reason. Whether it was drugs then and greed now, I don't know. But we sentence you. We don't sentence the community or the group.

* * *

So, proportionality is not among co-defendants.

{¶18} We find that the trial court did not err when it sentenced McDaniel to consecutive sentences that totaled six years in prison, nor did the trial court show that it did not fully understand the law. Although McDaniel may not have been the mastermind behind the criminal

conspiracy, the court noted that he was still fully involved in the conspiracy, had a lengthy criminal record that included similar crimes, was on postrelease control when he committed the instant crimes, and could not be compared to codefendant Coles, who did not have a felony criminal record.

{¶19} The court further considered the seriousness and recidivism factors, including that the victims suffered serious economic harm, the crimes were committed as part of an organized criminal activity, McDaniel was on postrelease control during the commission of the crimes, had a pattern of drug and alcohol abuse, and has a lengthy criminal record. The court also made the requisite statutory findings as to consecutive sentences, including that consecutive sentences were not disproportionate to the seriousness of McDaniel's conduct and the danger he poses to the public.

{¶20} In light of the above, the first assignment of error is overruled.

{¶21} In the second assignment of error, McDaniel claims that the trial court erred when it sentenced him to a total of six years in prison because his sentence is inconsistent with and disproportionate to the sentence the court gave Weakley, who was more culpable.

{¶22} Weakley was originally sentenced to 15 years and 9 months in prison. As mentioned, in *Weakley*, 8th Dist. Cuyahoga No. 105293, 2017-Ohio-8404, this court vacated Weakley's convictions and remanded the case with instructions for the trial court to order the state to reoffer its original plea offer. *Id.* at ¶ 61. This court further ordered: "If Weakley chooses not to accept the reoffered plea offer or if the trial court refuses to accept his guilty pleas, then Weakley shall be entitled to a new trial on the offenses of which he was previously convicted."

{¶23} On April 23, 2018, Weakley entered into a plea agreement with the state and

pleaded guilty to one count each of conspiracy to engage in a pattern of corrupt activity, identity fraud, aggravated theft, and having weapons while under disability, all felonies of the third degree. The court sentenced him to three years in prison.

{¶24} We begin with the premise that the Ohio Supreme Court has held that proportionality review of sentences should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively. *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, ¶ 20. In *State v. Brewster*, 8th Dist. Cuyahoga No. 103789, 2016-Ohio-3070, ¶ 10, this court stated that “[p]roportionality’ relates solely to the punishment in the context of the offender’s conduct (does the punishment fit the crime),” whereas “consistency,” for purposes of R.C. 2929.11(B), relates to the sentences in the context of sentences given to other offenders. *Id.*

{¶25} We find that McDaniel’s contention that his sentence of six years is disproportionate to Weakley’s three-year sentence is without merit. Although, as mentioned, the state conceded that Weakley was the more culpable of the two codefendants, McDaniel was also on postrelease control for similar crimes at the time he committed his current offenses and has a very lengthy criminal record, including multiple convictions for fraud and identity theft-related crimes.¹

{¶26} Having found that the record supports the sentencing court’s findings under R.C. 2929.14(C)(4) and the sentence is not otherwise contrary to law, we affirm the judgment of the trial court.

{¶27} The assignments of error are overruled.

¹ Weakley’s April 24, 2018 sentencing entry was filed with this court the same day. Weakley’s criminal history, which McDaniel claims is worse than his, is not part of the record on appeal.

{¶28} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., JUDGE

SEAN C. GALLAGHER, J., CONCURS IN
JUDGMENT ONLY WITH SEPARATE
OPINION;
MARY J. BOYLE, P.J., CONCURS WITH
MAJORITY OPINION AND CONCURS
WITH SEPARATE CONCURRING
OPINION

SEAN C. GALLAGHER, J., CONCURRING IN JUDGMENT ONLY:

{¶29} I concur in judgment only with the majority opinion. I write separately to address the distinction between “consistency” and “proportionality” in sentencing.

{¶30} Under the first assignment of error, appellant’s counsel contends that the trial court misunderstood the sentencing law regarding “consistency” and “proportionality” when it sentenced McDaniel. Counsel recognizes that “consistency” is explicitly required by R.C. 2929.11(B), but further maintains that a comparison between codefendants is appropriate in measuring “proportionality.” These are distinct concepts, yet are often conflated by practitioners, and the terms become intermixed by sentencing courts. Such is the case here.

Appellant's counsel further conflates the terms under the second assignment of error, which argues the sentence imposed was "inconsistent with and disproportionate to" the sentence imposed upon a codefendant.

{¶31} "Consistency" is a term related to the purposes and principles of felony sentencing contained in R.C. 2929.11. R.C. 2929.11(A) provides that a felony sentence shall be reasonably calculated to achieve two "overriding purposes" of felony sentencing: (1) "to protect the public from future crime by the offender and others," and (2) "to punish the offender using the minimum sanctions that the court determines accomplish those purposes * * *." In order to achieve these purposes, the sentence imposed for a felony must be "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.*" (Emphasis added.) R.C. 2929.11(B).

{¶32} "Consistency" is not the same as "proportionality." "Consistency" is derived from R.C. 2929.11(B) and relates to an offender's sentence compared to that of a similarly situated offender. *Id.* On the other hand, "proportionality" is a concept derived from consecutive sentencing under R.C. 2929.14(C)(4), or the constitutional prohibition against cruel and unusual punishment. As this writer has previously stated,

It is important to note that although courts have minced consistency in sentencing, pursuant to R.C. 2929.11(B), with the constitutional or statutory concept of proportionality derived from consecutive sentencing or the prohibition of cruel and unusual punishment review, proportionality is not a creature of R.C. 2929.11(B) consistency analysis, and vice versa. * * *

The concept of proportionality, referring to the shocking to the sense of

justice in the community standard, under the cruel and unusual punishment analysis, or disproportionate to the offender's conduct standard set forth in R.C. 2929.14(C)(4) under consecutive sentencing review, focuses on the offender's own conduct as it relates to his crimes, and not to the sentences or conduct of other similarly situated offenders. [*State v. Chaffin*, 30 Ohio St.2d 13, 17, 282 N.E.2d 46 (1972),] at paragraph three of the syllabus (“[a] punishment does not violate the constitutional prohibition against cruel and unusual punishments, if it be not so greatly disproportionate to the offense as to shock the sense of justice of the community”); R.C. 2929.14(C)(4) (“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”). Consistency analysis, pursuant to R.C. 2929.11(B), focuses on an offender's sentence compared to that of a similarly situated offender * * *.”

State v. Moore, 2014-Ohio-5135, 24 N.E.3d 1197, ¶ 50-51 (8th Dist.) (S. Gallagher, J., concurring in judgment only in part and dissenting in part).

{¶33} In this case, the record reflects that defense counsel conflated the terms. Defense counsel requested that because McDaniel's involvement in the crimes was probably the least serious when compared to his codefendants' conduct, that the trial court “consider the directives and laws related to proportionality here.” Defense counsel proceeded to ask the court to impose “[a] sentence that is consistent with how the other defendants are or will be treated in the future * * *.” It is obvious that defense counsel was only invoking R.C. 2929.11(B). The challenge was one of consistency, not proportionality.

{¶34} Although the trial court then used the term “proportionality” in its response, the record reflects that the trial court was recognizing individualized factors in sentencing and that there is no requirement for like sentences among codefendants. As this court has previously stated,

[W]hile R.C. 2929.11(B) requires consistency in sentencing, this “consistency” does not require that codefendants receive equal sentences. *State v. Pruitt*, 8th Dist. Cuyahoga No. 98080, 2012-Ohio-5418, ¶ 26, citing *State v. Nelson*, 11th Dist. Lake No. 2008-L-072, 2008-Ohio-5535. Instead, an appellate court must examine the record to determine “whether the sentence is so unusual as to be outside the mainstream of local judicial practice. Although the offense may be similar, distinguishing factors may justify dissimilar treatment.” *State v. Dawson*, 8th Dist. Cuyahoga No. 86417, 2006-Ohio-1083, ¶ 31, quoting *State v. Turner*, 8th Dist. Cuyahoga No. 81449, 2003-Ohio-4933.

State v. Jones, 8th Dist. Cuyahoga No. 103359, 2016-Ohio-5320, ¶ 37.

{¶35} The record reflects that the trial court understood this concept. Although McDaniel may not have been the ringleader, the trial court recognized that his involvement in the conspiracy was “pretty dedicated.” The trial court clearly considered McDaniel’s “exceedingly lengthy criminal history,” which included multiple convictions for fraud and identity theft crimes, and his being on postrelease control when the current crimes were committed to be distinguishing factors when imposing the sentence in this case.

{¶36} Importantly, consistency in sentencing pursuant to R.C. 2929.11(B) is not synonymous with uniformity. *State v. Cargill*, 8th Dist. Cuyahoga No. 103902, 2016-Ohio-5932, ¶ 11. “Consistency accepts divergence within a range of sentences and takes

into consideration the trial court's discretion to weigh statutory factors.'" *Id.* at ¶ 12, quoting *State v. Hyland*, 12th Dist. Butler No. CA2005-05-103, 2006-Ohio-339, ¶ 29. "'Although the offenses may be similar, distinguishing factors may justify dissimilar treatment.'" *Cargill* at ¶ 12, quoting *State v. Dawson*, 8th Dist. Cuyahoga No. 86417, 2006-Ohio-1083, ¶ 31. "[T]he consistency requirement is satisfied when a trial court properly considers the statutory sentencing factors and principles." *Cargill* at ¶ 11, citing *State v. O'Keefe*, 10th Dist. Franklin Nos. 08AP-724, 08AP-725 and 08AP-726, 2009-Ohio-1563, ¶ 41.

{¶37} As this court has recognized,

The legislature's purpose for inserting the consistency language contained in R.C. 2929.11(B) is to make consistency rather than uniformity the aim of the sentencing structure. See Griffin and Katz, *Ohio Felony Sentencing Law* (2001), 59. Uniformity is produced by a sentencing grid, where all persons convicted of the same offense with the same number of prior convictions receive identical sentences, *Id.* Consistency, on the other hand, requires a trial court to weigh the same factors for each defendant, which will ultimately result in an outcome that is rational and predictable. Under this meaning of "consistency," two defendants convicted of the same offense with a similar or identical history of recidivism could properly be sentenced to different terms of imprisonment.

State v. Georgakopoulos, 8th Dist. Cuyahoga No. 81934, 2003-Ohio-4341, ¶ 26, quoting *State v. Quine*, 9th Dist. Summit No. 20968, 2002-Ohio-6987, ¶ 12-13. *Accord State v. Bonness*, 8th Dist. Cuyahoga No. 96557, 2012-Ohio-474, ¶ 27.

{¶38} Thus, although appellant argues his sentence is not consistent with the sentences imposed upon his codefendants, consistency does not require such a result. Regardless, there is

nothing in the record to show that the difference was the result of anything other than individualized factors that were applied to McDaniel. Further, appellant's supplemental reliance on a plea offer to his codefendant does not show that the trial court failed to consider whether McDaniel's sentence was "consistent with sentences imposed for similar crimes committed by similar offenders." *See State v. Beasley*, 8th Dist. Cuyahoga No. 82884, 2004-Ohio-988, ¶ 23.

{¶39} Furthermore, there is nothing to suggest that the trial court failed to consider the purposes and principles of sentencing stated in R.C. 2929.11. Consideration of the appropriate factors can be presumed unless the defendant can affirmatively show to the contrary. *State v. Clinton*, Slip Opinion No. 2017-Ohio-9423, ¶ 243, citing *State v. Davis*, 8th Dist. Cuyahoga No. 104221, 2016-Ohio-7964, ¶ 35. The trial court reviewed the presentence investigation report, heard from the assistant prosecutor and defense counsel concerning McDaniel's involvement in the conspiracy and his lengthy prior criminal record, and heard from McDaniel, who expressed remorse. The transcript reflects the trial court judge considered seriousness and recidivism factors. Also, the court stated in the sentencing entry that it had "considered all required factors of the law" and found that "prison is consistent with the purpose of R.C. 2929.11." It follows then that McDaniel's sentence cannot be deemed contrary to law because of a failure of the trial court to consider the purposes and principles of sentencing in R.C. 2929.11(B).

{¶40} Appellant has not specifically challenged the imposition of consecutive sentences. Nevertheless, it must be recognized that "proportionality" is a term related to consecutive sentencing under R.C. 2929.14(C)(4), which directs that certain findings must be made by a trial court when imposing consecutive prison terms for convictions of multiple offenses. One of the three required findings is that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public[.]" *Id.* Thus,

appellant's use of "proportionality" is misplaced because proportionality in the context of consecutive sentencing focuses on the offender's own conduct as it relates to his crimes, and not to the sentences or conduct of other similarly situated offenders.

{¶41} A trial court must both make the statutory findings required for consecutive sentences at the sentencing hearing and incorporate those findings into its sentencing journal entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. A "word-for-word" recitation of the statutory language is not required. *Id.* at ¶ 29. As long as the reviewing court can discern from the record 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. *Id.*

{¶42} In imposing consecutive sentences under R.C. 2929.14(C)(4), the trial court engaged in a proper analysis and made each of the three requisite findings. The court stated the following on the record:

So, Court concludes that consecutive prison terms are necessary to protect the public from future crime from you. And that, of course, is influenced by the fact that there are so many prior identity theft convictions and now here we are back again.

And also, to punish you for this conduct. Consecutive sentences, that I have fashioned, are not disproportionate to the seriousness of your conduct. And, that would relate to the fact that the seriousness relates to the sheer size of the loss here as well as the fact that you assigned yourself with a crime concept scheme, to become a foot soldier in a plan orchestrated by someone else.

My consecutive sentences are not disproportionate to the danger you pose to the public, danger I have already addressed.

And, I also find that at least two, if not three additional factors are present. First of all, you committed these offenses while you were on post-release control supervision. That's known as the A finding.

Your history of criminal conduct demonstrates consecutive sentences are

necessary to protect the public from future crime. That's the C finding. And then the B finding is that you have at least two of your multiple offenses being committed as part of a course of conduct and the harm caused by two or more of these offenses was so great or unusual that no single prison term for any of the offenses adequately reflects the seriousness of your conduct.

{¶43} As reflected in the transcript, the trial court made the requisite finding with regard to proportionality and engaged in the proper analysis in focusing on McDaniel's own conduct. The trial court found consecutive sentences "are not disproportionate to the seriousness of your conduct" or "to the danger you pose to the public * * *." The trial court incorporated the required findings into its sentencing entry, and its findings were supported by the record. Upon a review of the record, it cannot be said that the imposition of consecutive sentences is clearly and convincingly contrary to law. *See* R.C. 2953.08.

{¶44} Accordingly, I would affirm the judgment of the trial court.

