

[Cite as *State v. Lariche*, 2018-Ohio-3581.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106106

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL LARICHE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART; REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-575887, CR-595648 and CR-611898

BEFORE: E.A. Gallagher, A.J., Jones, J., and Keough, J.

RELEASED AND JOURNALIZED: September 6, 2018

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EILEEN A. GALLAGHER, A.J.:

{¶1} Defendant-appellant Michael Lariche appeals his sentences in three cases, Case Nos. CR-575887, CR-595648 and CR-611898 after he violated community control sanctions in the two lower case numbers and pled guilty to escape for removing a court-ordered GPS monitoring device in CR-611898. Lariche contends that his sentences in all three cases should be vacated because the record does not support the imposition of maximum sentences and the trial court failed to make the requisite findings for imposing consecutive sentences under R.C. 2929.14(C). For the reasons that follow, we vacate Lariche's consecutive sentences and remand for the trial court to consider whether the imposition of consecutive sentences is appropriate under R.C. 2929.14(C)(4) and, if so, to make the required findings on the record and to incorporate those findings in the sentencing journal entry. We otherwise affirm Lariche's sentences.

Factual and Procedural Background

{¶2} In November 2013, Lariche pled guilty to two counts of drug possession in violation of R.C. 2925.11(A), fifth-degree felonies, in CR-575887. In January 2014, the trial court sentenced Lariche to 16 months of community control sanctions,¹ including 300 hours of community service, random drug testing, completion of an intensive outpatient drug treatment program, attending 12-step meetings and obtaining employment. The trial court informed Lariche that if he violated his community control

¹ The sentencing journal entry states that Lariche was sentenced to 60 months of community control sanctions. However, the transcript of the sentencing hearing reflects that Lariche was sentenced to 16 months of community control sanctions.

sanctions he would receive a total prison sentence of 24 months (i.e., 12 months on each count to be served consecutively).

{¶3} On July 1, 2014, the trial court held a community control violation hearing based on Lariche's failure to report to his probation officer. Lariche admitted the allegation against him and the trial court found that Lariche had violated the terms of his community control. After hearing from defense counsel, Lariche's probation officer and Lariche, the trial court extended his community control until January 16, 2017 with the prior conditions and an additional 100 hours of community service. The trial court advised Lariche that if he violated his community control sanctions again he would receive an aggregate prison sentence of 24 months on the two felony counts.

{¶4} While he was on community control in CR-575887, Lariche committed additional drug offenses. In November 2015, LaRiche pled guilty to one count of drug possession in violation of R.C. 2925.11(A), a fifth-degree felony, and one count of possessing drug abuse instruments in violation of R.C. 2925.12(A), a first-degree misdemeanor (Case No. CR-595648). Lariche was sentenced in December 2015. At the time, he was serving a nine-month prison sentence for a conviction in Lake C.P. No. CR-000334 (the "Lake County case"). In CR-595648, the trial court sentenced Lariche to 24 months of community control sanctions on the drug possession charge,² including

² Although the transcript reflects that the trial court announced a sentence of 36 months of community control sanctions on the drug possession charge at the sentencing hearing, in its December 22, 2015 journal entry, the trial court sentenced Lariche to 24 months of community control sanctions for that offense.

placement in a community-based correctional facility (“CBCF”) for inpatient drug treatment for six months (which was to commence after he completed his prison sentence in the Lake County case) and suspended his driver’s license for one year. The trial court imposed a six-month suspended sentence on the possessing drug abuse instruments charge and placed Lariche on 24 months probation. The trial court advised Lariche that if he violated the terms of his community control he would receive a 12-month prison sentence on the drug possession charge.

{¶5} The trial court also found that Lariche had violated the terms of his community control sanctions in CR-575887. The trial court stayed the community control sanctions until Lariche’s incarceration for the Lake County case was complete and extended supervision to December 15, 2018 with the prior conditions and an additional 200 hours of community service.³ The trial court informed Lariche that the “[n]ext violation” would result in “24 months in prison, 12 months on each of the two felonies of the fifth degree, consecutive.”

{¶6} On May 26, 2016, after he completed his sentence in the Lake County case, Lariche was transported to the CBCF. In August 2016, Lariche filed a motion to modify the conditions of his community control sanctions. Based on the fact that he had “done well” at the CBCF and, due to his father’s failing health, Lariche requested that he be released early from the CBCF and permitted to complete drug treatment through day

³ The trial court indicated that the six-month CBCF term imposed in CR-595648 did not apply to CR-575887.

programming so that he could “attend to family issues.” The trial court granted the motion, allowing Lariche to attend day programming plus aftercare in lieu of inpatient drug treatment at the CBCF and ordered him to wear a GPS monitoring device for 120 days.

{¶7} Once again, Lariche violated the terms of his community control sanctions.

On September 30, 2016, Lariche removed the ankle bracelet he had been ordered to wear as a condition of his modified community control sanctions in CR-595648. In March 2017, he pled guilty to one count of escape in violation of R.C. 2921.34(A)(1), a third-degree felony, for removing the ankle bracelet (Case No. CR-611898).

{¶8} On April 19, 2017, the trial court held an initial sentencing hearing in CR-611898 and a violation of community control hearing in CR-575887 and CR-595648. The trial judge indicated that, “[p]rior to coming out on the bench”, he had reviewed the “entire case file”, the presentence investigation report, the principles and purposes of sentencing in R.C. 2929.11, the seriousness and recidivism factors in R.C. 2929.12 and R.C. 2929.13 and “other Revised Code Sections for felony sentencing of the third degree.” After hearing from the state, defense counsel and Lariche, the trial court sentenced Lariche to 36 months in prison and up to three years of postrelease control on the escape charge in CR-611898. The trial court also found Lariche to have violated the terms of his community control sanctions in CR-575887 and CR-595648, terminated community control in each case and sentenced Lariche to 12 months on each of the drug possession charges in CR-575887 and CR-595648. The trial court ordered that the

12-month sentences in CR-575887 and the 12-month and 6-month sentences in CR-595648 be served concurrently. The trial court ordered that the 12-month sentences in CR-575887 and CR-595648 be served consecutively to each other and consecutively, and prior to, the 36-month sentence in CR-611898, for an aggregate prison term of five years. With respect to its decision to impose consecutive sentences, the trial court stated:

The Court finds it is necessary to protect the public and punish the offender and the offender's criminal history which as set forth in the presentence investigation report dates back to 1985 to driving under the influence as a juvenile. He has a string of passing bad checks charges, unauthorized use of a motor vehicle. '95, first felony, receiving stolen property in '95. Forgery in '95. Receiving stolen property in '95. Trafficking in cocaine in '98. Theft offenses in '98. 2013, you began these two cases, and you were sentenced to prison in Lake County in the case that we talked about a little bit earlier. * * *

{¶9} Lariche appealed, raising the following two assignments of error for review:

Assignment of Error 1: The trial court erred by imposing consecutive sentences where it did not make the appropriate findings to impose consecutive sentences.

Assignment of Error 2: The trial court erred in imposing maximum sentences for all three cases without giving due consideration to sentencing factors in R.C. 2929.11 and 2929.12.

Law and Analysis

{¶10} For ease of discussion, we consider Lariche's second assignment of error first.

Maximum Sentences

{¶11} In his second assignment of error, Lariche challenges the trial court’s imposition of maximum prison sentences on his felony convictions in each of the three cases at issue.⁴ He contends that his sentences are contrary to law and should be vacated because the trial court did not give “due consideration” to the principles and purposes of sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12 when sentencing him. Specifically, he contends that the trial court failed to make a “proper determination of the aggravating and mitigating factors” specified in R.C. 2929.12 and that the sentences imposed were not the “minimum sanction available to accomplish the * * * goal of protecting the public from future crime and punishing Lariche without imposing an unnecessary burden on government resources, as contemplated in R.C. 2929.11.”

{¶12} “Following a community control violation, the trial court conducts a second sentencing hearing. At this second hearing, the court sentences the offender anew and must comply with the relevant sentencing statutes.” *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, ¶ 17; *State v. Jackson*, 150 Ohio St.3d 362, 2016-Ohio-8127, 81 N.E.3d 1237, ¶ 11.

Standard of Review for Felony Sentences

⁴ In CR-595648, Lariche was convicted of both drug possession in violation of R.C. 2925.11(A) (a fifth-degree felony) and possessing drug abuse instruments in violation of R.C. 2925.12(A) (a first-degree misdemeanor). However, he argues only that his sentences are contrary to law because the trial court failed to comply with statutory requirements for felony sentencing. Because Lariche did not include any argument or authority related to the sentencing on his misdemeanor offense, we do not interpret his assignment of error as applying to that offense. *See also* App.R. 12(A)(2) and 16(A)(7).

{¶13} We review felony sentences under the standard set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, 21-23 (“R.C. 2953.08 specifically and comprehensively defines the parameters and standards—including the standard of review—for felony-sentencing appeals.”). Under R.C. 2953.08(G)(2), an appellate court must “review the record, including the findings underlying the sentence * * * given by the sentencing court.” An appellate court “may increase, reduce, or otherwise modify a sentence” or it may vacate a sentence and remand the matter to the trial court for resentencing if it “clearly and convincingly” finds either that: (1) “the record does not support the sentencing court's 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, whichever, if any, is relevant” or (2) “the sentence is otherwise contrary to law.” R.C. 2953.08(G)(2); *Marcum* at ¶ 1, 21-23.

{¶14} A sentence is contrary to law if the sentence falls outside the statutory range or if the trial court fails to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12. *See, e.g., State v. Pawlak*, 8th Dist. Cuyahoga No. 103444, 2016-Ohio-5926, ¶ 58; *State v. Keith*, 8th Dist. Cuyahoga Nos. 103413 and 103414, 2016-Ohio-5234, ¶ 8, citing *State v. Hinton*, 8th Dist. Cuyahoga No. 102710, 2015-Ohio-4907, ¶ 10. When a sentence is imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12, “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.” *Marcum* at ¶ 23; *see also State v. McGowan*, 147 Ohio St.3d 166, 2016-Ohio-2971, 62 N.E.3d 178, ¶ 1.

{¶15} Pursuant to R.C. 2929.11, a sentence imposed for a felony must 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” — while “using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.” R.C. 2929.11(A)-(B).

{¶16} A court imposing a sentence for a felony “has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code.” R.C. 2929.12(A). However, the sentencing court must consider various seriousness factors set forth in R.C. 2929.12(B) and (C) and recidivism factors set forth in R.C. 2929.12(D) and (E) in determining the most effective way to comply with the purposes of sentencing set forth in R.C. 2929.11.

{¶17} Although the trial court must consider both the principles and purposes of felony sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12 when sentencing a defendant on a felony, the trial court is not required to use particular language or to make specific findings on the record demonstrating its consideration of those purposes, principles and factors. *See, e.g., State v. Gaines*, 8th Dist. Cuyahoga No. 103476, 2016-Ohio-4863, ¶ 11. Even where a trial court does not

reference its consideration of R.C. 2929.11 and 2929.12 at the sentencing hearing or in its sentencing journal entry, this court has held that it can be presumed that the trial court complied with R.C. 2929.11 and 2929.12 unless the defendant affirmatively shows otherwise. *See, e.g., State v. Jones*, 8th Dist. Cuyahoga No. 99759, 2014-Ohio-29, ¶ 13 (“R.C. 2929.11 and 2929.12 are not fact-finding statutes, and consideration of the appropriate factors can be presumed unless the defendant affirmatively shows to the contrary.”); *see also State v. Rogers*, 8th Dist. Cuyahoga No. 100903, 2014-Ohio-4573, ¶ 4._

{¶18} In support of his contention that the trial court did not “proper[ly]” consider R.C. 2929.11 and 2929.12 when sentencing him, Lariche asserts that: (1) all of the charges at issue are “charges associated with drug possession,” (2) Lariche has never been convicted of any charges involving “violence against any specific person” or “gun activity,” (3) there was a substantial gap in his criminal history in which he did not incur any criminal charges, (4) he has “strong family ties” and (5) he took responsibility for his actions related to the removal of his ankle bracelet and turned himself in after voluntarily completing two substance abuse programs.

{¶19} Lariche’s argument is without merit. He has made no showing that the trial court did not comply with its obligation to consider all of the relevant sentencing principles, purposes and factors under R.C. 2929.11 and 2929.12 when sentencing him.

{¶20} In this case, the trial judge expressly stated on the record that he reviewed the entire case file, the presentence investigation report, the principles and purposes of

sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12 prior to sentencing Lariche. In its sentencing journal entry in CR-611898, the trial court further indicated that it had “considered all required factors of the law.”

{¶21} The same trial judge presided over the original sentencing hearings in CR-575887 and CR-595648 and each of the violation of community control hearings in those cases. Both Lariche and his counsel addressed the trial court at the April 2017 hearing. The trial court heard Lariche’s claims of responsibility for his actions, his remorse regarding how his actions had adversely impacted his family, his voluntary completion of two drug treatment programs and his acknowledgment that he had a serious drug problem. However, the trial court had already given Lariche multiple opportunities to comply with community control sanctions and turn his life around. The trial court had previously warned Lariche that if he did not comply with the community control sanctions, he would receive the maximum sentences on the offenses of which he had been convicted. Lariche nevertheless continued to violate his community control sanctions. On the record before us, we cannot say that Lariche’s individual felony sentences are clearly and convincingly contrary to law or that the record clearly and convincingly does not support his individual sentences. Accordingly, Lariche’s second assignment of error is overruled.

Consecutive Sentences

{¶22} In his first assignment of error, Lariche argues that the trial court failed to make the proportionality finding required for the imposition of consecutive sentences under R.C. 2929.14(C)(4)._

{¶23} Pursuant to R.C. 2929.14(C)(4), in order to impose consecutive sentences, the trial court must find that (1) consecutive sentences are necessary to protect the public from future crime or to punish_the offender, (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public and (3) 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.

R.C. 2929.14(C)(4)._

{¶24} The court must make the required statutory findings at the sentencing hearing and incorporate those findings into its sentencing journal entry. *See State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. Although the

trial court is not required to use “talismanic words,” it must be clear from the record that it actually made the findings required by statute. *Id.* at ¶ 37.

{¶25} In this case, at the sentencing hearing, the trial court found that consecutive sentences were necessary to protect the public and to punish Lariche. The trial court also discussed Lariche’s criminal history. However, based on our review of the transcript, the trial court did not make the required finding that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public. Nor was any such finding set forth in the trial court’s sentencing journal entries. In its April 20, 2017 journal entries in CR-575887 and CR-595648, the trial court stated: “Court finds that it is necessary to protect the public and punish the offender and the offender’s criminal history shows that consecutive terms are needed to protect the public.” No consecutive sentencing findings were included in the sentencing journal entry in CR-611898. Because the trial court did not make the proportionality finding required by R.C. 2929.14(C)(4), the consecutive sentences are contrary to law.

{¶26} The state concedes the error in all three cases.

{¶27} Lariche’s first assignment of error, as conceded by the state, is sustained. The imposition of consecutive sentences is vacated and the matter is remanded for the trial court to consider whether consecutive sentences are appropriate under R.C. 2929.14(C)(4) and, if so, to make all of the required findings on the record and incorporate those findings in the sentencing journal entry. *See, e.g., State v. Wells*, 8th

Dist. Cuyahoga No. 105723, 2017-Ohio-8738, ¶ 7; *State v. Ferrell*, 8th Dist. Cuyahoga No. 104047, 2016-Ohio-7715, ¶ 9.

{¶28} Judgment affirmed in part; reversed in part; remanded for resentencing.

It is ordered that appellant recover from appellee the 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 Cuyahoga County Court of Common Pleas 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.

EILEEN A. GALLAGHER, ADMINISTRATIVE JUDGE

LARRY A. JONES, SR., J., and
KATHLEEN ANN KEOUGH, J., CONCUR