

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

| | | |
|----------------------|---|------------|
| STATE OF OHIO, | : | |
| | : | |
| Plaintiff-Appellee, | : | No. 107088 |
| | : | |
| v. | : | |
| | : | |
| GARY R. KESLAR, | : | |
| | : | |
| Defendant-Appellant. | : | |

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: June 10, 2019

Cuyahoga County Court of Common Pleas
Case No. CR-17-621517-A
Application for Reopening
Motion No. 527085

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Mary M. Frey, Assistant Prosecuting Attorney, *for appellee*.

Gary R. Keslar, *pro se*.

RAYMOND C. HEADEN, J.:

{¶ 1} Applicant, Gary R. Keslar, pursuant to App.R. 26(B), timely seeks to reopen his appeal in *State v. Keslar*, 8th Dist. Cuyahoga No. 107088, 2019-Ohio-540. He claims that appellate counsel was ineffective for not arguing that trial

counsel was ineffective for failing to object to consecutive sentences. We deny the application.

Procedural and Substantive History

{¶ 2} Keslar was convicted of seven counts of burglary that resulted from a series of seven burglaries. He was sentenced to an aggregate 11-year prison term. In his direct appeal, appellate counsel raised assignments of error challenging the validity of his guilty pleas, the imposition of over \$23,000 in restitution, and the ineffectiveness of his trial counsel in failing to object to the imposition of restitution. This court overruled each assigned error and affirmed Keslar's convictions. *Id.* at ¶ 26.

{¶ 3} Keslar then timely filed an application to reopen his appeal, claiming that appellate counsel was ineffective for failing to argue that trial counsel was ineffective when counsel did not lodge an objection to consecutive sentences. The state timely opposed the application.

Law and Analysis

{¶ 4} App.R. 26(B)(1) provides that "[a] defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel." The application shall be granted if "there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). The test for ineffective assistance of counsel requires defendants to show (1) that counsel's performance was deficient and (2) the deficient performance prejudiced them.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under this test, a criminal defendant seeking to reopen an appeal must demonstrate that appellate counsel was deficient for failing to raise the issue presented in the application for reopening and that there was a reasonable probability of success had that issue been raised on appeal. *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

Consecutive Sentences

{¶ 5} Here, Keslar asserts that appellate counsel was ineffective for not challenging the consecutive nature of some of his sentences. He alleges that consecutive sentences are not appropriate based on the facts of the case, the trial court engaged in impermissible fact-findings, and consecutive sentences are not warranted because some sentences were imposed concurrently.

{¶ 6} An appellate court may overturn the imposition of consecutive sentences only if it clearly and convincingly finds either that “the record does not support the sentencing court’s findings under R.C. 2929.14(C)(4),” or “the sentence is otherwise contrary to law.” R.C. 2953.08(G). R.C. 2929.14(C)(4) provides,

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:

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.

{¶ 7} The Ohio Supreme Court has determined that “[i]n order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings.” *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. “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.” *Id.* at ¶ 29.

{¶ 8} When the court was imposing consecutive sentences, it determined certain sentences would run consecutive to others, stating:

And that is because the Court finds that consecutive service is necessary to protect the public from future crimes and to punish the offender, and consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public.

The Court also finds that at least two of the multiple offenses were committed as part of one or more course of conduct and the harm caused by two or more of the multiple offenses 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.

(Tr. 43-44.)

{¶ 9} The trial court made the requisite findings necessary to impose consecutive sentences and incorporated those findings into the sentencing entry. Those findings are also borne out by the record. Appellant admitted to committing a string of burglaries during the middle of 2017. The victim impact statements read for the court and the victims that spoke at sentencing documented the great harm that Keslar's actions caused. Keslar waived a presentence investigation report, but he stated that he had an ongoing drug problem that contributed to his criminal history. Keslar admitted to previously being in prison, being released, and then going back to the same pattern of destructive and criminal acts. The trial court engaged in a thorough consideration of the factors outlined in R.C. 2929.11, 2929.12, and 2929.14(C)(4), and found that consecutive sentences were appropriate.

{¶ 10} Keslar claims that the trial court improperly considered facts outside of the record and employed judicial fact-finding in order to justify consecutive sentences. Keslar cites to a passage in the sentencing transcript where the trial court indicated that police gave Keslar an opportunity to go to a drug rehabilitation facility based on the significant cooperation Keslar offered to them. However, Keslar left the facility within 24 hours of admission. This information was provided by the state during the sentencing hearing, and offered without objection or contradiction. The trial court stated,

[c]ertainly, as [the prosecutor] stated, you did cooperate with the police in terms of assisting them to identify you as the burglar in, at that time then unsolved burglaries. Interesting, though, is that apparently based upon that cooperation, the police gave you the opportunity of going to a rehab center, and then you absconded or escaped or left there within 24 hours having been given that opportunity for help that you say that you need and have never had.

You had that opportunity during the pre-trial phase of this case, but did not take advantage of that.

So in terms of the seriousness factors under 2929.12(B), certainly the victims suffered significant psychological and economic harm. And in terms of the offender's conduct, I understand that you have a drug problem that you have indicated you have had since age twelve. You tell me that you have never had the opportunity for any help or haven't sought any out thinking you could do it on your own, but since so much time has elapsed, you served time in prison apparently, based upon your own statement, I don't have a PSI so I don't know what your record is, you waived the PSI, but nonetheless, there are opportunities even in prison to obtain help and treatment, and obviously you did not -- or if you did take advantage of it, once you were released you went right back to what you were doing before.

(Tr. 39-40.)

{¶ 11} A sentencing court has wide discretion in considering factors necessary to craft a sentence — even uncharged criminal conduct so long as that is not the sole basis for the sentence. *State v. Tidmore*, 8th Dist. Cuyahoga No. 107369, 2019-Ohio-1529, ¶ 26. *See also State v. Cooper*, 8th Dist. Cuyahoga No. 93308, 2010-Ohio-1983, ¶ 15 (“a defendant's uncharged yet undisputed conduct may be considered in sentencing without resulting in error when it is not the sole basis for the sentence”); *State v. Ellis*, 2d Dist. Montgomery No. 25422, 2013-Ohio-2342, ¶ 15 (“[A] trial court may consider ‘a broad range of information when sentencing a

defendant,’ including ‘allegations of uncharged criminal conduct.’”), quoting *State v. Bowser*, 186 Ohio App.3d 162, 2010-Ohio-951, 926 N.E.2d 714, ¶ 13, 15 (2d Dist.).

{¶ 12} There is no indication from this record that the trial court considered improper factors when crafting appellant’s sentence. The statement Keslar points to was in response to his own claim that he never had the opportunity for drug treatment to address his addiction problems. The trial court was pointing out that this was contrary to other information provided in the case, including information provided by Keslar. The trial court considered a statement made by the prosecution that Keslar wasted an opportunity to participate in pretrial drug treatment as contradicting Keslar’s statement. The above-quoted passage that occurred during the trial court’s consideration of seriousness and recidivism factors under R.C. 2929.11 and 2929.12 does not amount to impermissible judicial fact-finding.

{¶ 13} Also, this does not constitute impermissible judicial fact-finding as found by the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. The Ohio Supreme Court recognized in *Bonnell* that the type of judicial fact-finding in which a trial court traditionally engages to determine whether sentences should be served concurrent or consecutive is not constitutionally prohibited, and the requirement for findings for consecutive sentences were revived by the legislature. *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at ¶ 17-23.

{¶ 14} Finally, Keslar argues consecutive sentences are not warranted because the trial court imposed some sentences concurrent to each other. He argues

that because the counts were all counts of burglary, there is no reason to treat some differently than others. In essence, he asserts that the court was required to run all counts consecutive or all counts concurrent.

{¶ 15} A trial court has a great deal of latitude in crafting an appropriate sentence, and sentences imposed for individual offenses should not be lumped together. “[A] judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense.” *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 9. The discretion provided to a trial court by R.C. 2929.11, 2929.12, and 2929.14(C)(4), and other appropriate sentencing statutes gives a court the option to impose concurrent sentences, consecutive sentences where appropriate findings are made, or a combination of the two. Keslar’s argument that the court must treat all sentences the same when determining whether to impose sentences concurrent or consecutive is contrary to well-established Ohio sentencing principles.

{¶ 16} Keslar has not asserted a colorable claim of ineffective assistance of appellate counsel. Therefore, his application is denied.

{¶ 17} Application denied.

RAYMOND C. HEADEN, JUDGE

EILEEN T. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR