

[Cite as *State v. O'Conner*, 2019-Ohio-702.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107191

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CARLOS O'CONNER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-17-619722-A, CR-17-621052-A, and CR-17-621495-A

BEFORE: Sheehan, J., E.T. Gallagher, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: February 21, 2019

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MICHELLE J. SHEEHAN, J.:

{¶1} Defendant-appellant, Carlos O'Conner, appeals from a judgment of the trial court imposing consecutive sentences for his convictions in three cases. He claims the trial court failed to make the statutory findings required for imposing consecutive sentences. Having reviewed the record and applicable law, we affirm O'Conner's consecutive sentences but remand the matter for the trial court to issue a new sentencing entry nunc pro tunc to reflect the findings made at the sentencing hearing.

Procedural Background

{¶2} O'Conner was indicted in three separate cases for his conduct between July and September 2017. In Cuyahoga C.P. No. CR-17-619722-A, he was charged with two counts of felonious assault and one count of domestic violence, which stemmed from an incident on July 4,

2017, where he physically assaulted his sister and mother in a fight. In Cuyahoga C.P. No. CR-17-621052-A, he was charged with two counts of felonious assault, which stemmed from an incident on August 30, 2017, where O'Connor assaulted a man who has a child with O'Connor's children's mother. In Cuyahoga C.P. No. CR-17-621495-A, O'Conner was charged with one count of endangering children, which stemmed from an incident on September 6, 2017, involving his own son.

{¶3} O'Conner pleaded guilty to an amended count of aggravated assault, a felony of the fourth degree, in both CR-17-619722 and in CR-17-621052. He also pleaded guilty to endangering children, also a fourth-degree felony, in CR-17-621495. The trial court sentenced him to a 16-month term of imprisonment in each case, to be served consecutively.

{¶4} O'Conner now appeals, assigning the following error for our review:

1. The trial court failed to make the necessary findings to impose consecutive sentences.

Necessity of Findings for Consecutive Sentences

{¶5} Pursuant to R.C. 2953.08(G)(2), a reviewing court may modify or vacate a sentence only if we clearly and convincingly find that the record does not support the mandatory findings, or that the sentence is otherwise “contrary to law.” Consecutive sentences are “contrary to law” if the trial court fails to make the findings required to order consecutive service of sentences under R.C. 2929.14(C)(4). *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37.

{¶6} H.B. 86 revived a presumption of concurrent sentences, and consecutive sentences can only be imposed if the trial court makes the required findings pursuant to R.C. 2929.14(C)(4). *Bonnell* at ¶ 20-22. R.C. 2929.14(C)(4) requires,

[i]f 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:

(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.

{¶7} “When imposing consecutive sentences, a trial court must state the required findings as part of the sentencing hearing, and by doing so it affords notice to the offender and to defense counsel.” *Bonnell* at ¶ 29, citing Crim.R. 32(A)(4).

{¶8} The Supreme Court of Ohio has instructed, however, that “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*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at ¶ 29. The court expressly rejected the claim that a trial court must give a “talismanic incantation of the words of the statute” when imposing consecutive sentences. *Id.* at ¶ 37.

Findings Made by the Trial Court at Sentencing

{¶9} Here, the trial court ordered the presentence investigation report before it held the sentencing hearing. The initially scheduled sentencing hearing was not completed because O’Conner had an outburst immediately after the trial court announced that he was not amenable to community control sanctions. The court held a second hearing to conclude the proceeding. At the hearings, O’Conner addressed the court, expressing remorse. His counsel noted that the presentence investigation report indicated O’Conner could benefit from drug and mental health treatment. The prosecutor, on the other hand, emphasized O’Conner’s criminal conduct which escalated in the three months between July and September 2017. In July, he beat his sister with a baton during a fight, rendering her unconscious, and also assaulted his mother during the same fight. In August, he beat his children’s mother’s partner with a pole. In September, he assaulted his own son.

{¶10} Before imposing consecutive sentences, the court stated the following:

In reviewing your criminal history, I do see that you have a history of violence that included assault on EMS workers, violence against children. You’ve had multiple probation violations. You’ve had a prior prison sentence. We’ve already talked about your testing positive for drugs while on probation or at least while the case is pending. And, obviously, here you’re being sentenced on three separate cases.

So I do think — I do find that consecutive sentences are necessary to protect the public from future crimes and to punish you, that they are not disproportionate to the seriousness of your conduct and to the danger that you pose to the public.

Again, you’ve got multiple cases pending here, plus your criminal history. So I do find that consecutive sentences are necessary in this case.

{¶11} O’Conner concedes the trial court made two of the three statutory findings: that consecutive sentences (1) were necessary to protect the public and punish the offender, and (2) they were not disproportionate to the seriousness of the offender’s conduct and to the danger

posed to the public. O’Conner argues, however, that the trial court failed to make the third requisite finding, i.e., one of the R.C. 2929.14(C)(a)-(c) findings.

{¶12} We disagree with O’Conner’s contention. Our review of the sentencing transcript shows that the trial court made the finding under R.C. 2929.14(C)(b) (“[t]he offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crimes by the offender”). The trial court did not recite the statutory language word for word, but it was not required to. *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at ¶ 29. The court prefaced its consecutive findings by stating that it had reviewed O’Conner’s criminal history, noting his history of violence which included assault on EMS workers and children, his multiple probation violations, his prior prison sentence, and his convictions in the three criminal cases before the court. Following the recitation of O’Conner’s history of criminal conduct, the court stated “[s]o I do think — I do find that consecutive sentences are necessary to protect the public from future crimes * * *.” Because we are able to discern that the trial court engaged in the correct, requisite analysis and the record contains evidence to support the finding, we must uphold O’Conner’s sentence. *See, e.g., State v. Jackson*, 8th Dist. Cuyahoga No. 104991, 2017-Ohio-7167 (while the trial court did not recite the R.C. 2929.14(C) statutory findings word for word, defendant’s consecutive sentences were affirmed because the appellate court was able to discern the court engaged in the correct analysis and can determine that the record contains evidence to support the findings); and *State v. Jordan*, 8th Dist. Cuyahoga No. 103813, 2016-Ohio-5709 (although the trial court did not use the exact language of the statute, the appellate court can discern that it engaged in the proper analysis and made the required findings).

Incorporation of Findings in the Sentencing Entry

{¶13} After making the statutory findings at sentencing, the sentencing court is also required to incorporate the findings into the sentencing entry, as the court speaks through its journal. *Bonnell* at ¶ 29. The Supreme Court of Ohio distinguishes between cases in which a trial court failed to make the required consecutive sentence findings at the sentencing hearing and cases in which a trial court made the required findings at the sentencing hearing but failed to incorporate its findings into the sentencing journal entry. *State v. Burrell*, 8th Dist. Cuyahoga No. 104593, 2017-Ohio-1041, ¶ 16, citing *Bonnell* at ¶ 30. For the former, the trial court cannot correct its failure by simply issuing a nunc pro tunc entry; for the latter, however, the error is a clerical mistake and it may be corrected through a nunc pro tunc entry “to reflect what actually occurred in open court.” *Bonnell* at ¶ 30, citing *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 15. In other words, a trial court’s inadvertent failure to incorporate the statutory findings in the sentencing entry after properly making the findings at the sentencing hearing does not render the sentence “contrary to law”; rather, such a clerical mistake may be corrected by the court through a nunc pro tunc entry to accurately reflect what actually occurred in open court. See, e.g., *State v. Sailes*, 8th Dist. Cuyahoga No. 103095, 2016-Ohio-5132; *State v. Miller*, 8th Dist. Cuyahoga No. 100461, 2014-Ohio-3907, ¶ 107; and *State v. Caffey*, 8th Dist. Cuyahoga Nos. 101833 and 101834, 2015-Ohio-1311.

{¶14} Contrary to O’Conner’s contention, the trial court made the appropriate consecutive sentence findings and engaged in the analysis required under R.C. 2929.14(C)(4). However, although our review reflects the trial court made the R.C. 2929.14(C)(4)(c) finding at sentencing, its sentencing entry erroneously recited the language under R.C. 2929.14(C)(4)(b). Accordingly, the matter is remanded to the trial court to issue a new sentencing journal entry

nunc pro tunc, to incorporate the statutory findings made at sentencing, including R.C. 2929.14(C)(4)(c).

{¶15} Judgment affirmed. Case remanded for the issuance of a nunc pro tunc sentencing journal entry.

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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MICHELLE J. SHEEHAN, JUDGE

EILEEN T. GALLAGHER, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR