[Cite as *State v. McKinney*, 2020-Ohio-4144.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Nos. 109008 and 109123
v.	:	
KEVIN MCKINNEY,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 20, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-16-606219-A and CR-17-618074-A

Appearances:

Michael C. O'Malley Cuyahoga County Prosecuting Attorney, and Christopher D. Schroeder, Assistant Prosecuting Attorney, *for appellee*.

Russell S. Bensing, *for appellant*.

PATRICIA ANN BLACKMON, J.:

{¶ 1} Defendant-appellant, Kevin McKinney, appeals from the order reimposing consecutive sentences for obstruction of justice, weapons while under disability, and tampering with records, following this court's remand in *State v.*

McKinney, 8th Dist. Cuyahoga No. 106377, 2019-Ohio-1118, ¶ 61 ("*McKinney I*"), for the "limited purpose of complying with the statutory language of R.C. 2929.14(C)." McKinney assigns the following error for our review:

> The record clearly and convincingly fails to support the imposition of consecutive sentences in this case.

{¶ 2} Having reviewed the record and the pertinent law, we affirm.

{¶ 3} The relevant facts and proceedings were set forth in *McKinney I* as follows:

> In May 2016, McKinney's younger brother, Douglas Shine ("Shine"), was charged in connection with * * * [the 2015] murders of three individuals, including Brandon White, at the Chalk Linez Barbershop ("the barbershop murders") [and subsequent murder of] Aaron Ladson ("Ladson"), White's brother [who had identified Shine as the barbershop shooter].
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> In February 2016, McKinney was charged with conspiracy to murder Ladson and other related crimes. However, on the same day that Shine was indicted, the indictment against McKinney was dismissed in favor of a superseding 51-count indictment that charged him not only with Ladson's murder but also the barbershop murders. McKinney pleaded not guilty and the matter was scheduled for a jury trial.
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> Prior to trial, the state dismissed Counts 1-34, which related to the barbershop murders. The remaining counts, which pertained solely to the murder of Ladson, included aggravated murder, conspiracy to commit aggravated murder, murder, two counts of felonious assault, aggravated burglary, three counts each of aggravated robbery and theft, obstructing justice, and having weapons while under disability. Most counts also contained one- and three-year firearm specifications. For purposes of trial only, the counts were renumbered and tried to a jury, except for the weapons while under disability offense, which was tried to the bench.

Id. at ¶ 2-4.

{¶ 4} The evidence presented at trial indicated that after the barbershop murders, Ladson went to stay with his grandmother on Harvard Avenue. In recorded phone calls from the Cuyahoga County Jail, Shine and McKinney discussed that Ladson had made a statement incriminating Shine. McKinney's girlfriend purchased a Pure Talk flip phone and left it at McKinney's house. McKinney subsequently ran into Ladson at the Justice Center, and McKinney called Ladson "a snitch[-]ass bitch." *Id*. at ¶ 5.

{¶ 5} Ladson was subsequently murdered at his grandmother's home. In a recorded conversation, Shine told McKinney that no one knew anything about the "502" phone number that communicated with Lawrence Kennedy, another friend of Shine's. Several days later, Kennedy was subsequently shot and killed, and police obtained information from Kennedy's phone. The police learned that Kennedy's phone was in the vicinity of Harvard Avenue where Ladson was murdered. Text messages from Kennedy's phone indicated that the phone purchased by McKinney's girlfriend texted Kennedy Ladson's grandmother's address. Kennedy also texted "Checkmate" to this same phone. In a subsequent text, Kennedy was asked whether it was "done." Kennedy responded affirmatively and then received instructions to get rid of his phone and that he would receive a new one. Kennedy responded "make sho its not trash." Kennedy also texted that he was being chased by police.

{¶ 6} McKinney testified in his defense. As is relevant herein,

> McKinney * * * [denied] that he sent Kennedy to murder Ladson, but [admitted] to the text communications between him and Kennedy. He told the jurors that at the time of Ladson's death, he did not believe that

Shine committed the barbershop murders; however, his opinion has since changed. * * * He stated that Ladson contacted him about giving another statement, which would recant his previous statement given to police that Shine committed the barbershop murders. He further admitted that he was going to pay Ladson some money after the statement was given — "giving him money for — so he could tell the truth, that he didn't see anything." (Tr. 2711.) He denied that the exchange of money for the recanted statement was a bribe; rather, he stated the money was for Ladson's family when Ladson went to prison on a drug offense.

McKinney testified that he sent Kennedy to Ladson's house to retrieve Ladson's new "truthful" statement. He stated that he sent Kennedy because he was fearful of his own safety considering that his brother, Shine, was accused of shooting and killing Ladson's brother, and White's cousin was making threats. According to McKinney, the plan was for Kennedy to go to Ladson's grandmother's house, obtain the statement, bring it back to him, and then McKinney would give Kennedy the money to take back to Ladson. McKinney testified that when he received Kennedy's text message "Checkmate," he assumed Kennedy had obtained Ladson's statement, and when Kennedy responded "make sho its not trash," he believed at the time that he was talking about the statement.

McKinney testified that he learned of Ladson's death on social media and was immediately shocked and concerned because he "never intended for Ladson to get hurt." He contacted Kennedy, questioning what happened because Ladson getting killed was not "what I ordered. It's not what I wanted. It wasn't my orders. This is not what was supposed to happen." (Tr. 2724.) Based on the conversation, McKinney discovered that Kennedy did not go alone to obtain the statement; one of Shines' friends went along. [McKinney] testified that he did not believe that Kennedy killed Ladson, but Kennedy had "something to do with the murder." (Tr. 2740; 2816.)

McKinney stated he subsequently disposed of his 502 Pure Talk cell phone because he was concerned that based on the text messages between him and Kennedy, he could be implicated in Ladson's murder. * * * .

On July 9, 2017, and following the jury verdict, the state indicted McKinney in Cuyahoga C.P. No. CR-17-618074, on two counts of tampering with records, in violation of R.C. 2913.42(A), felonies of the

> third degree. The counts stemmed from McKinney applying for and obtaining a state of Ohio identification card using the identifying information of his cousin, Kelvin Bedell. According to the indictment, the date of the offenses occurred on or about January 8, 2010. On September 13, 2017, and as part of a plea agreement, McKinney pleaded guilty to one count of tampering with records; the remaining count was dismissed. The case was continued for sentencing.
>
> On September 21, 2017, McKinney appeared for sentencing on three cases. In Cuyahoga C.P. No. CR-17-618074, the trial court initially imposed a 24-month sentence on the tampering with records offense. In Cuyahoga C.P. No. CR-16-606219, the trial court imposed the maximum sentence of 36-months on both the obstructing justice and having weapons while under disability offenses. The trial court ordered that all three prison sentences be served consecutively, for a total of eight years. After the sentence was announced and as he was being led out of the courtroom, McKinney expressed his dissatisfaction with receiving eight years in prison by using profane and vulgar language directed at the trial judge. The judge then indicated that he "misspoke" and the 24-month sentence on the tampering with records offense was "actually a 36-month sentence." (Tr. 3162-3163.) Over objection, the trial court issued sentencing journal entries imposing a total prison sentence of nine years.

McKinney I, 2019-Ohio-1118, at ¶ 6-12.

{¶ 7} McKinney appealed his conviction for obstruction of justice and his sentence to this court. This court affirmed the conviction but reversed the imposition of consecutive sentences and remanded, stating:

> The trial court's finding that these crimes constituted a course of conduct "and/or" that the harm caused was so great or unusual that no single prison term for any of these offenses is contrary the statutory language of R.C. 2929.14(C)(4)(b). The statute requires the trial court to find both that (1) the offenses were committed as one or more courses of conduct, and (2) the harm caused was so great or unusual that a single prison term is not an adequate reflection on the seriousness of the conduct. The trial court was required to make both findings, if warranted, before finding that R.C. 2929.14(C)(4)(b) was satisfied. The trial court's inclusion of the word "or," was in error and leaves this court to speculate whether the court made the finding based

> on the conjunctive, as required, or in the disjunctive, which is contrary to law.
> Accordingly, we reverse McKinney's sentence and remand the case to the trial court for the limited purpose of complying with the statutory language of R.C. 2929.14(C)(4), and make the appropriate record-supported findings, if the court finds that the imposition of consecutive sentences is appropriate.

Id. at ¶ 60-61.

{¶ 8} The trial court held a resentencing hearing on July 1, 2019. It reimposed the nine-year term.

Consecutive Sentences

{¶ 9} In his assigned error, McKinney argues that the trial court failed to comply with R.C. 2929.14(C)(4) in sentencing him to consecutive terms. He argues that the record does not support the sentence because he was acquitted of acquitted of fourteen counts of conspiracy to commit murder, murder, kidnapping, aggravated robbery, aggravated burglary, felonious assault, and theft, and the offense of obstruction occurred seven years ago.

{¶ 10} Sentences are presumed to run concurrently unless the trial court makes the findings required under R.C. 2929.14(C)(4). *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 16, 23.

{¶ 11} 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. 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.

{¶ 12} Under R.C. 2929.14(C)(4), the trial court must first find that "consecutive service is necessary to protect the public from future crime or to punish the offender[.]" R.C. 2929.14(C)(4). Second, the trial court must find 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*. Third, the trial court must find that 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 * * *, 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.

Id.

{¶ 13} "The [trial] court must note that it engaged in the analysis and that it 'has considered the statutory criteria and specifie[d] which of the given bases warrants its decision.'" *Bonnell* at ¶ 26, quoting *State v. Edmonson*, 86 Ohio St.3d 324, 326, 1999- Ohio-110, 715, N.E.2d 131. Further, the reviewing court must be able to discern that the record contains evidence to support the findings. *Id*. at ¶ 29. A trial court is not, however, required to state its reasons to support its findings, nor is it required to precisely recite the statutory language, "provided that the necessary findings can be found in the record and are incorporated in the sentencing entry." *Id*. at ¶ 37. The court is not required to engage in "a word-for-word recitation" of R.C. 2929.14(C)(4). *Id*. at ¶ 29. Rather, if "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*.

{¶ 14} In this matter, in the sentencing hearing on remand, the trial court stated:

> I do find that consecutive sentences are necessary to protect the public from future crimes and/or to punish you. I'm sorry, or to punish you, and that the consecutive sentences are not disproportionate to the seriousness of your conduct and to the danger that you pose to the public.
>
> I still feel, Mr. Bensing, that this is all part of a criminal conduct scheme, if you will, that he engaged in, and that these two or more multiple offenses are so great and/or unusual that no single prison term for any of the offenses committed as part of the course of conduct would adequately reflect the seriousness of his conduct.
>
> I do also find that his criminal history demonstrates that consecutive

sentences are necessary to protect the public from future crimes by him.

{¶ 15} In this case, a review of the record shows that the trial court complied with R.C. 2929.14(C)(4) by making the required statutory findings. Beginning with the first finding required under the statute, the court found, both orally and in its judgment entry, that consecutive sentences were necessary to protect the public or to punish McKinney. Secondly, the court found that consecutive sentences were not disproportionate to the seriousness of his conduct and to the danger that he posed to the public. Turning to the third aspect of required consecutive sentence findings, the trial court made two findings. The court concluded that 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. The court also concluded that history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime. These findings were in turn properly set forth in the court's journalized sentencing entry.

{¶ 16} Further, after careful review of the record in its entirety, we do not clearly and convincingly find that the record fails to support the trial court's imposition of consecutive sentences. To the contrary, the record properly supports the trial court's R.C. 2929.14(C) findings relative to its imposition of consecutive sentences. The record demonstrates that he court reviewed McKinney's case files

and also reviewed this court's prior opinion. The court also stated that it was aware of McKinney's extensive prior record. 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 McKinney's sentence. *See, e.g., State v. O'Conner*, 8th Dist. Cuyahoga No. 107191, 2019-Ohio-702; *State v. Jackson*,8th Dist. Cuyahoga No. 104991, 2017-Ohio-7167. Moreover, the record supports that consecutive sentences are necessary to protect the public or punish McKinney, consecutive sentences are not disproportionate to the seriousness of McKinney's conduct and the danger he poses to the public. The record also supports the conclusion that the offenses were part of a course of conduct. The record indicates that the offense of having a weapon while under disability and obstruction of justice were part of a course-of-conduct. As explained in the prior appeal, "McKinney engaged in a series of criminal actions intended to hinder the prosecution of Shine." *McKinney I*, 2019-Ohio-1118, at ¶ 47. The theory of the obstruction charge was that McKinney gave Kennedy the address at which to find Ladson in order to obstruct Shine's prosecution. *Id*. at ¶ 14. The state also maintained that McKinney obtained the weapon due to ongoing concerns over fears of retaliation from Marcus Ladson. Accordingly, the trial court's course-of-conduct finding is supported in the record. This fully satisfies R.C. 2929.14(C)(4). As to the additional R.C. 2929.14(C)(4) finding concerning McKinney's history, the record indicates that McKinney has numerous prior felony convictions. The court's conclusion that his history of criminal conduct demonstrated that consecutive sentences were necessary to

protect the public from future crime by him is likewise properly supported in the record.

{¶ 17} The assigned error lacks merit.

{¶ 18} Judgment is affirmed.

It is ordered that appellee recover from 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.

PATRICIA ANN BLACKMON, JUDGE

MARY JANE BOYLE, P.J., and
LARRY A. JONES, SR., J., CONCUR