[Cite as *State v. Davis*, 2015-Ohio-775.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-140351 TRIAL NO. B-1400879
Plaintiff-Appellee,	:	
vs.	:	*O P I N I O N.*
ERIC DAVIS,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed and Cause Remanded

Date of Judgment Entry on Appeal: March 6, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Timothy J. McKenna, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

FISCHER, Judge.

{¶1} Defendant-appellant Eric Davis appeals a three-year prison sentence imposed by the trial court, after he had pleaded guilty to trafficking in heroin and cocaine, and possession of heroin. Davis argues that the trial court erred in imposing consecutive sentences, and that the offenses to which he pleaded guilty were allied offenses of similar import. Because Davis and the state entered into a plea agreement, and the trial court imposed the parties' jointly-recommended, three-year prison sentence, we determine that Davis cannot appeal the trial court's decision to impose consecutive sentences under R.C. 2953.08(D)(1), except to the extent that the trial court should have included its consecutive-sentencing findings in its sentencing entry. Davis can raise allied offenses as an issue on appeal under R.C. 2953.08(D)(1); however, Davis's assignment of error on that issue is not well-taken because the drug offenses occurred separately.

{¶2} The state filed a nine-count indictment against Davis in February 2014. Davis and the state subsequently entered into a plea agreement whereby Davis agreed to plead guilty to five counts, in exchange for the state's dismissal of the other four counts. Davis and the state also agreed to jointly recommend to the trial court that it impose an aggregate three-year prison sentence on the five counts. Davis pleaded guilty to Counts 1, 2, 5, 7, and 9, which charged Davis with trafficking in heroin on November 21, 2013, and February 12, 2014; trafficking in cocaine on November 22, 2013, and February 18, 2014; and possession of heroin on February 21, 2014.

{¶3} The trial court accepted Davis's guilty pleas after a Crim.R. 11 colloquy. The trial court imposed a one-year prison sentence on Count 1, and a six-month

prison sentence on each of the remaining counts. The trial court then imposed the sentences on each count consecutively to reach the jointly-recommended sentence of three years. This appeal by Davis ensued.

R.C. 2953.08(D)(1) and Consecutive Sentences

{¶4} In his first and third assignments of error, Davis contends that the trial court erred in imposing consecutive prison terms. Davis's first assignment of error contends that the evidence in the record does not support the trial court's imposition of consecutive prison terms under R.C. 2929.14(C)(4). Davis's third assignment of error contends that the trial court failed to incorporate the required consecutive-sentencing findings in its sentencing entry, although the trial court made the required findings at the sentencing hearing.

{¶5} As an initial matter, our review of felony sentences is governed by R.C. 2953.08(G)(2), and we may vacate a felony sentence only if we "clearly and convincingly" find (1) that the record does not support the trial court's findings, or (2) that the sentences are otherwise contrary to law. *State v. White*, 2013-Ohio-4225, 997 N.E.2d 629 (1st Dist.), quoting R.C. 2953.08(G)(2).

{¶6} Because Davis and the state entered into an agreed plea, and they jointly recommended a sentence, which the trial court then imposed, Davis's appeal is further limited by R.C. 2953.08(D)(1). R.C. 2953.08(D)(1) provides that "[a] sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." The Supreme Court has held that "a sentence is 'authorized by law' and is not appealable within the meaning of R.C. 2953.08(D)(1) only if it comports with all mandatory sentencing

provisions." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 20. The *Underwood* court went on to note that R.C. 2953.08(D)(1) bars appeals challenging a trial court's "discretion in imposing a sentence, such as * * * whether consecutive or maximum sentences were appropriate under certain circumstances." *Id.* at ¶ 22.

{¶7} A trial court is statutorily required to make certain findings as listed under R.C. 2929.14(C)(4) before imposing consecutive sentences. *See State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. Nothing in the statute requires a trial court "to give a talismanic incantation of the words of the statute," as long as "the necessary findings can be found in the record." *Id.* at ¶ 37. In *Bonnell*, the Supreme Court held 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." *Id.* at syllabus. The *Bonnell* court further reasoned that "[a] trial court's inadvertent failure to incorporate the statutory findings in the sentencing entry after properly making those 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 reflect what actually occurred in open court." *Id.* at ¶ 30.

{¶8} The transcript of proceedings in Davis's case reflects that the trial court made the consecutive-sentencing findings required by R.C. 2929.14(C)(4) at the sentencing hearing; however, the trial court inadvertently failed to include those findings in its sentencing entry. To the extent that the trial court failed to include its consecutive-sentencing findings in the sentencing entry, we determine that the trial

court failed to comply with a mandatory sentencing provision, and R.C. 2953.08(D)(1) does not bar Davis's appeal of that issue. *See Bonnell* at syllabus; *State v. Bell*, 11th Dist. Portage No. 2014-P-0017, 2015-Ohio-218 (a trial court's failure to make the required consecutive-sentencing findings is reversible error, even in the context of an agreed plea and jointly-recommended sentence imposed by the trial court); *compare State v. Davis*, 4th Dist. Scioto Nos. 13CA3589 and 13CA3593, 2014-Ohio-5371, ¶ 24 (where a plea agreement specifically included the parties' stipulation to consecutive sentences, the court held that R.C. 2953.08(D)(1) bars a defendant's appeal as to compliance with R.C. 2929.14(C)(4)).

{¶9} Beyond the trial court's failure to include the findings required by R.C. 2929.14(C) in the sentencing entry, Davis has not shown that the trial court otherwise failed to comply with any mandatory provision under R.C. 2929.14(C)(4), and, therefore, the consecutive nature of his sentences is unreviewable under R.C. 2953.08(D)(1). *See State v. Wardlow*, 12th Dist. Butler No. CA2014-01-011, 2014-Ohio-5740 (where the court determined that R.C. 2953.08(D)(1) barred appellate review of the trial court's imposition of consecutive sentences because the trial court made consecutive-sentencing findings at the sentencing hearing and incorporated those findings in its sentencing entry, and thus complied with the mandates of R.C. 2929.14(C)(4)).

{¶10} We overrule Davis's first assignment of error, and we sustain Davis's third assignment of error because the trial court erred by failing to include its consecutive-sentencing findings in the sentencing entry.

Allied Offenses

{¶11} In his second assignment of error, Davis contends that his offenses were allied offenses of similar import such that the trial court should have merged the offenses for purposes of sentencing under R.C. 2941.25, Ohio's multiple-count statute.

{¶12} This court can review Davis's allied-offense argument under R.C. 2953.08(D)(1) for plain error even though Davis entered into an agreed plea and sentence and did not raise allied offenses as an objection at sentencing. *See State v. Anderson*, 2012-Ohio-3347, 974 N.E.2d 1236, ¶ 14 (1st Dist.), citing *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, at ¶ 20.

{¶13} In conducting an allied-offense analysis, if a review of the record indicates that the offenses for which the defendant was convicted occurred separately, then the defendant is not entitled to the protection of R.C. 2941.25. *See State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661; *State v. Ruff*, 2013-Ohio-3234, 996 N.E.2d 513, ¶ 31 (1st Dist.). Where the defendant's conduct occurs on multiple days, the defendant's conduct occurs separately for purposes of R.C. 2941.25. *See State v. Thomas*, 1st Dist. Hamilton Nos. C-130620, C-130621, C-130622, C-130623 and C-130624, 2014-Ohio-2803, ¶ 16.

{¶14} A review of the record indicates that Davis's drug convictions stemmed from possession and selling of drugs that occurred on separate days; therefore, Davis's convictions occurred separately, and he is not entitled to the protections of R.C. 2941.25. Thus, the trial court did not commit plain error in imposing a sentence on each of Davis's drug offenses. We overrule Davis's second assignment of error.

Conclusion

{¶15} We affirm the judgment of the trial court, but we remand the cause solely for the trial court to issue a nunc pro tunc order correcting the omission of the consecutive-sentencing findings from the sentencing entry.

Judgment affirmed and cause remanded.

HENDON, P.J., and **CUNNINGHAM, J.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.