

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 05AP-189
Plaintiff-Appellee,	:	(C.P.C. No. 04CR04-2759)
v.	:	and
	:	No. 05AP-190
Eugene G. Ward,	:	(C.P.C. No. 04CR08-5369)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 8, 2005

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Eugene G. Ward, appeals from judgments of the Franklin County Court of Common Pleas finding him guilty, pursuant to guilty plea, of robbery in violation of R.C. 2911.02, and attempted robbery in violation of R.C. 2923.02 as it relates to R.C. 2911.02. Because the trial court erred in rendering factual findings relevant to the sentence out of the presence of defendant and counsel, we reverse.

{¶2} By indictment filed April 23, 2004, defendant was charged with two counts of robbery, a felony of the second degree and a felony of the third degree, arising out of

the robbery of Bank One on January 13, 2004 (case No. 05AP-189). By a second indictment filed on August 12, 2004, defendant was charged with one count of aggravated robbery with a specification, a first-degree felony, as well as two counts of robbery, second and third degree felonies, arising out the robbery of a Key Bank on February 24, 2004 (case No. 05AP-190).

{¶3} In case No. 05AP-189, defendant entered a guilty plea to robbery, a felony of the third degree; in case No. 05AP-190, defendant entered a guilty plea to the stipulated lesser included offense of attempted robbery, a felony of the fourth degree. Pursuant to a sentencing hearing held February 4, 2005, the trial court sentenced defendant to four years and ordered \$2,143 in restitution in case No. 05AP-189, and 18 months and \$4,665 in restitution in case No. 05AP-190; the court ordered the sentences to be served consecutively. By judgment entries filed February 7, 2005, the court journalized the sentences imposed during the sentencing hearing. Defendant appeals, assigning seven errors:

ASSIGNMENT OF ERROR NUMBER ONE

THE TRIAL COURT ERRED WHEN IT RENDERED FACTUAL FINDINGS, RELEVANT TO THE SENTENCE AND REQUIRED BY LAW, AFTER THE IMPOSITION OF SENTENCE AND OUT OF THE PRESENCE OF THE DEFENDANT AND COUNSEL FOR THE PARTIES IN VIOLATION OF THE REQUIREMENTS OF *STATE v. COMER*, 99 Ohio St. 3d 463, 2003-Ohio-4165, 793 N.E.2d 473.

ASSIGNMENT OF ERROR NUMBER TWO

THE TRIAL COURT ERRED WHEN IT MADE FINDINGS, NOT SUPPORTED BY THE RECORD, TO DEVIATE FROM ITS OBLIGATION TO IMPOSE THE SHORTEST PRISON

TERM ON AN OFFENDER WHO HAD NEVER SERVED A PREVIOUS PRISON TERM.

ASSIGNMENT OF ERROR NUMBER THREE

THE TRIAL COURT ERRED WHEN IT IMPOSED A MAXIMUM SENTENCE ON THE ATTEMPTED ROBBERY CHARGE.

ASSIGNMENT OF ERROR NUMBER FOUR

THE TRIAL COURT ERRED WHEN IT FAILED TO MAKE SUFFICIENT FINDINGS, SUPPORTED BY THE RECORD, TO JUSTIFY THE IMPOSITION OF CONSECUTIVE SENTENCES.

ASSIGNMENT OF ERROR NUMBER FIVE

THE TRIAL COURT ERRED WHEN IT IMPOSED A SENTENCE GREATER THAN THE SHORTEST PRISON TERMS AUTHORIZED FOR THE OFFENSES OF ROBBERY AND ATTEMPTED ROBBERY IN THE ABSENCE OF ANY FACTS, EITHER ADMITTED BY THE DEFENDANT OR FOUND BY A JURY, THAT WOULD HAVE ALLOWED THE TRIAL COURT TO DEPART FROM ITS OBLIGATION TO IMPOSE THE SHORTEST PRISON TERM UPON AN OFFENDER WHO HAD NEVER SERVED A PREVIOUS PRISON TERM PURSUANT TO R.C. 2929.14(B).

ASSIGNMENT OF ERROR NUMBER SIX

THE TRIAL COURT ERRED WHEN IT IMPOSED CONSECUTIVE SENTENCES ON THE OFFENSES OF ROBBERY AND ATTEMPTED ROBBERY IN THE ABSENCE OF ANY FACTS, EITHER ADMITTED BY THE DEFENDANT OR FOUND BY A JURY, THAT WOULD HAVE ALLOWED THE TRIAL COURT TO IMPOSE CONSECUTIVE SENTENCES UNDER R.C. 2929.14(E)(4).

ASSIGNMENT OF ERROR NUMBER SEVEN

THE TRIAL COURT ERRED WHEN IT IMPOSED THE MAXIMUM SENTENCE ON THE OFFENSE OF ATTEMPTED ROBBERY IN THE ABSENCE OF ANY

FACTS, EITHER ADMITTED BY THE DEFENDANT OR FOUND BY A JURY, THAT WOULD HAVE ALLOWED THE TRIAL COURT TO IMPOSE THE MAXIMUM SENTENCE.

{¶4} Defendant's first assignment of error asserts the trial court violated *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, in rendering factual findings, relevant to the sentence and required under the law, out of the presence of defendant and counsel for the parties.

{¶5} In *Comer*, the Ohio Supreme Court stated that when the trial court imposes consecutive sentences pursuant to R.C. 2929.14(E)(4) and 2929.19(B)(2)(c), it is "required to make its statutorily enumerated findings and give reasons supporting those findings at the sentencing hearing." *Id.* at paragraph one of the syllabus. Similarly, the court held that "when imposing a nonminimum sentence on a first offender, a trial court is required to make its statutorily sanctioned findings at the sentencing hearing." *Id.* at paragraph two of the syllabus. As the court explained, "an in-court explanation gives counsel the opportunity to correct obvious errors. Moreover, an in-court explanation encourages judges to decide how the statutory factors apply to the facts of the case." *Id.* at ¶22.

{¶6} The state properly concedes error in this case. The trial court sentenced defendant, who apparently had never before been imprisoned, to more than the minimum in both cases and to the maximum in one case; it further ordered that the sentences be served consecutively. Each of those sentences is governed by a provision of the code requiring statutory findings. See R.C. 2929.14(B) (addressing sentences for those who have not before been imprisoned); R.C. 2929.14(C) (addressing maximum sentences);

R.C. 2929.14(E) (addressing consecutive sentences). In addition, in the case of a maximum or consecutive sentence, the trial court is required to state its reasons supporting the findings. See R.C. 2929.19(B)(2). Because the trial court supplied its findings and reasons out of the presence of defendant and counsel for the parties, it violated *Comer*.

{¶7} Accordingly, we sustain defendant's first assignment of error, rendering moot his remaining assignments of error. Although we affirm that aspect of the trial court's judgments finding defendant guilty of the offenses to which he entered a guilty plea, we reverse the trial court's sentences and remand for resentencing.

*Judgments affirmed in part
and reversed in part; cases
remanded for resentencing.*

PETREE and KLATT, JJ., concur.
