

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-975
Trushaun D. Boynton,	:	(C.P.C. No. 12CR-05-2521)
Defendant-Appellant.	:	(REGULAR CALENDAR)
State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-976
Trushaun D. Boynton,	:	(C.P.C. No. 12CR-06-2807)
Defendant-Appellant.	:	(REGULAR CALENDAR)

---

D E C I S I O N

Rendered on September 3, 2013

---

*Ron O'Brien*, Prosecuting Attorney, and *Valerie Swanson*, for appellee.

*Carpenter Lipps & Leland LLP*, *Kort Gatterdam* and *Erik P. Henry*, for appellant.

---

APPEALS from the Franklin County Court of Common Pleas  
MCCORMAC, J.

{¶ 1} Defendant-appellant, Trushaun D. Boynton, appeals the sentences imposed upon him by the Franklin County Court of Common Pleas following his convictions on

multiple felonies. Because the trial court erred in sentencing appellant, we reverse the trial court's judgments and remand for a new sentencing hearing on both cases.

{¶ 2} On September 12, 2012, appellant entered guilty pleas in case No. 12CR-05-2521 to aggravated robbery with a three-year firearm specification, robbery with a one-year firearm specification, and having a weapon while under disability. These guilty pleas stemmed from the robberies of two separate victims in two separate incidents occurring on May 11, 2012. At the same hearing, appellant also pled guilty in case No. 12AP-06-2807 to one count of burglary arising from the break-in of a residence on May 6, 2012. The trial court accepted appellant's pleas, found him guilty, entered nolle prosequis on the remaining counts in the two charging indictments, and ordered a presentence investigation ("PSI"). The court then set the matters for sentencing.

{¶ 3} At the October 9, 2012 sentencing hearings, the court imposed the following sentence in case No. 12CR-05-2521: five years on the aggravated robbery count plus a mandatory consecutive three years of actual incarceration for the firearm specification, five years on the robbery count plus a mandatory consecutive one year of actual incarceration for the firearm specification, and three years on the weapon under disability count. The court ordered the aggravated robbery and robbery sentences to be served consecutively to each other and to a pending case in Clark County. The court ordered the sentence on the weapon under disability count to be served concurrently with the aggravated robbery and robbery counts. On the conviction for burglary in case No. 12AP-06-2807, the court imposed a four-year sentence to be served consecutively to the sentence in case No. 12CR-05-2521 and the pending Clark County case. In sum, the court imposed an 18-year term of imprisonment.

{¶ 4} After the time for filing an appeal expired, appellant filed a motion for delayed appeal, which this court granted. Appellant sets forth two assignments of error for our review:

[I.] THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE REQUIRED FINDINGS PURSUANT TO R.C. 2929.14(C)(4) DEPRIVING APPELLANT OF DUE PROCESS CONTRARY TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND CORRESPONDING RIGHTS UNDER THE OHIO CONSTITUTION.

[II.] THE TRIAL COURT'S SENTENCE WAS CLEARLY AND CONVINCINGLY CONTRARY TO LAW AND CONSTITUTED AN ABUSE OF DISCRETION DEPRIVING APPELLANT OF DUE PROCESS CONTRARY TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND CORRESPONDING RIGHTS UNDER THE OHIO CONSTITUTION.

{¶ 5} In his first assignment of error, appellant contends the trial court erred in imposing consecutive sentences without first making the findings mandated by R.C. 2929.14(C)(4). We agree.

{¶ 6} We note initially that appellant failed to object to the imposition of consecutive sentences at the sentencing hearing and thus has forfeited all but plain error. *See* Crim.R. 52(B); *State v. Wilson*, 10th Dist. No. 12AP-551, 2013-Ohio-1520, ¶ 8. Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "To constitute plain error, the error must be obvious on the record, palpable, and fundamental such that it should have been apparent to the trial court without objection." *State v. Gullick*, 10th Dist. No. 13AP-26, 2013-Ohio-3342, ¶ 3, citing *State v. Tichon*, 102 Ohio App.3d 758, 767 (9th Dist.1995). In addition, "plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions." *Id.*, citing *State v. Waddell*, 75 Ohio St.3d 163, 166 (1996). A reviewing court notices plain error "with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Gullick* at ¶ 3, citing *State v. Phillips*, 74 Ohio St.3d 72, 83 (1995).

{¶ 7} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Supreme Court of Ohio enunciated the standard to be applied by an appellate court when reviewing felony sentencing. The reviewing court must first "ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." *Id.* at ¶ 14. If this first prong is satisfied, the appellate court then reviews whether the trial court abused its discretion in selecting sentences within the range permitted by the statute. *Id.* at ¶ 17.

{¶ 8} H.B. No. 86, effective September 30, 2011, revived the requirement that trial courts make specific findings on the record at the sentencing hearing before imposing consecutive sentences. R.C. 2929.14(C)(4) now requires that a trial court engage in a three-step analysis in order to impose consecutive sentences. The trial court must first find the sentence is "necessary to protect the public from future crime or to punish the offender." Next, 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." Finally, the trial court must find that at least one of the following applies: (1) "[t]he 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"; (2) "[a]t 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"; or (3) "[t]he offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender." R.C. 2929.14(C)(4)(a)-(c).

{¶ 9} Accordingly, under the first prong of the *Kalish* analysis, a reviewing court must determine whether the trial court made the statutory findings pursuant to R.C. 2929.14(C) before imposing consecutive sentences. While a trial court is not required to use talismanic words to comply with R.C. 2929.14(C)(4), the trial court must make clear on the record that it made the required findings. *State v. Marton*, 8th Dist. No. 99253, 2013-Ohio-3430, ¶ 13.

{¶ 10} In the present case, immediately prior to sentencing appellant, the trial court stated:

Mr. Boynton, I'm going to be real honest with you. [Defense counsel] has been fighting with me now for several weeks about what to do with you. He's been in your corner all the way. He's done a heck of a job for you. I was above 20 when we last talked, okay? He's done something for you.

(Oct. 9, 2012 Tr. 12.)

{¶ 11} The court made no other statement regarding appellant's sentences. Plaintiff-appellee, the State of Ohio, essentially concedes that the trial court did not make any of the findings required by R.C. 2929.14(C). Appellee nonetheless contends that appellant cannot demonstrate plain error because the evidence supports the imposition of consecutive sentences, and the record provides no indication that the trial court would have sentenced appellant differently had it made the required findings on the record.

{¶ 12} While we are aware that the sentencing judge also presided at appellant's plea hearing and thus was intimately aware of the facts of this case, the court was nevertheless mandated by statute to make the R.C. 2929.14(C)(4) findings on the record. Because the record demonstrates that the trial court failed to do so, appellant's sentences are contrary to law and constitute plain error. *See Wilson* at ¶ 18. Accordingly, we must remand the matters to the trial court to consider whether consecutive sentences are appropriate pursuant to R.C. 2929.14(C)(4) and, if so, to enter the proper findings on the record. Appellant's first assignment of error is sustained.

{¶ 13} In his second assignment of error, appellant contends the trial court failed to properly consider the purposes and principles of sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12.

{¶ 14} Given our determination that the matter must be returned to the trial court for resentencing due to the trial court's failure to make the appropriate findings pursuant to R.C. 2929.14(C)(4), appellant's contention is moot. App.R. 12(A)(1)(c). We note, however, that the Supreme Court of Ohio observed in *Kalish* that "R.C. 2929.11 and 2929.12, however, are not fact-finding statutes like R.C. 2929.14." *Id.* at ¶ 17. Thus, "[t]he failure to indicate at the sentencing hearing that the trial court has considered the factors in R.C. 2929.11 and 2929.12 does not automatically require reversal." *State v. Saur*, 10th Dist. No. 10AP-1195, 2011-Ohio-6662, ¶ 44. " 'When the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes.' " *Id.*, quoting *State v. Reed*, 10th Dist. No. 09AP-1164, 2010-Ohio-5819, ¶ 8, citing *Kalish* at ¶ 18, fn. 4.

{¶ 15} In the present case, the trial court's October 10, 2012 judgment entries state that it "has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12." This court has determined that such language

in the judgment entry belies a claim that the trial court failed to consider the purposes and principles of sentencing. *Saur* at ¶ 45, citing *State v. Reeves*, 10th Dist. No. 09AP-493, 2010-Ohio-4018, ¶ 16; *State v. Peterson*, 10th Dist. No. 12AP-646, 2013-Ohio-1807, ¶ 31.

{¶ 16} With this caveat, appellant's second assignment of error is rendered moot.

{¶ 17} Having sustained appellant's first assignment of error, and having rendered appellant's second assignment of error moot, the judgments of the Franklin County Court of Common Pleas are hereby reversed and the matter is remanded to that court for further proceedings in accordance with law and consistent with this decision.

*Judgments reversed;  
causes remanded.*

KLATT, P.J., and SADLER, J., concur.

---