

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 14AP-486 (C.P.C. No. 09CR-7310)
Albert D. Dennison,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 26, 2015

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

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

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, Albert D. Dennison ("appellant"), appeals the June 4, 2014 judgment of the Franklin County Court of Common Pleas resentencing appellant. For the reasons that follow, we reverse the judgment of the trial court.

I. Facts and Procedural History

{¶ 2} On December 8, 2009, a Franklin County Grand Jury indicted appellant, charging him with 11 criminal counts. On July 26, 2012, the trial court filed a judgment entry reflecting the findings of the jury following trial and imposing sentence upon appellant. The jury found appellant guilty of one count of burglary, four counts of aggravated robbery, and four counts of kidnapping, corresponding to the four victims present in the home. The jury also found appellant guilty of firearm specifications that

had been charged as to each of the above nine counts. Additionally, the trial court found appellant guilty of a weapons under disability ("WUD") charge.

{¶ 3} The trial court sentenced appellant to nine years on each of the four aggravated robberies for a total of 36 years, and 8 years on each of the 4 counts of kidnapping for a total of 32 years, but merged the aggravated burglary count with the counts of aggravated robbery. The court sentenced appellant to three years for the WUD charge and three years for only one of the firearm specifications. The court ordered the sentences to be served consecutively, resulting in a total sentence of 74 years.

{¶ 4} Appellant timely appealed from his conviction, and the state cross-appealed. On December 17, 2013, we reversed, overruling all of appellant's assignments of error and sustaining the state's two cross-assignments of error. *State v. Dennison*, 10th Dist. No. 12AP-718, 2013-Ohio-5535, ¶ 92. We found that: (1) the trial court improperly merged appellant's aggravated burglary conviction with his aggravated robbery convictions; and (2) the trial court was required, pursuant to R.C. 2929.14(B)(1)(g), to sentence appellant to at least two three-year firearm specification sentences. *Id.* at ¶ 85, 89. Accordingly, we "remand[ed] this case for resentencing," instructing the trial court to "resentence appellant in light of our finding that the aggravated burglary conviction does not merge with appellant's aggravated robbery conviction" and to "correctly apply R.C. 2929.14(B)(1)(g) as provided herein." *Id.* at ¶ 85, 90, 92.

{¶ 5} On June 2, 2014, the trial court held a resentencing hearing at which it stated that it was conducting a "sentencing de novo." (Tr. 6.) The trial court sentenced appellant to nine years both on the sole count of aggravated burglary and each of the nine counts of aggravated robbery, in addition to eight years on each of the four counts of kidnapping and three years for the sole count of WUD. Appellant was also sentenced to three years each on two of the gun specifications, to be served consecutively, with the remaining specifications to be served concurrently. The trial court ordered the count of aggravated burglary and the count of WUD to be served concurrently to the other counts, with the remaining counts to be served consecutively for a total sentence of 74 years. On June 4, 2014, the trial court filed a resentencing entry.

II. Assignments of Error

{¶ 6} Appellant appeals assigning the following three errors for our review:

I. THE TRIAL COURT ERRED AND IMPOSED A SENTENCE CLEARLY AND CONVINCING CONTRARY TO LAW BECAUSE THE SENTENCE WAS DISPROPORTIONATE TO THAT OF APPELLANT'S CO-DEFENDANTS AND WAS IMPOSED BECAUSE APPELLANT EXERCISED HIS RIGHT TO TRIAL, CONTRARY TO R.C. 2929.11(B), ARTICLE I, SECTION 9 OF THE OHIO CONSTITUTION, THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND THE DUE PROCESS CLAUSES OF THE UNITED STATES AND OHIO CONSTITUTIONS.

II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT SENTENCED APPELLANT TO CONSECUTIVE TERMS OF IMPRISONMENT FOR ALLIED OFFENSES OF SIMILAR IMPORT CONTRARY TO THE DOUBLE JEOPARDY PROVISIONS OF THE UNITED STATES AND OHIO CONSTITUTIONS.

III. 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.

For ease of discussion, we address appellant's assignments of error out of order.

III. Second Assignment of Error—Allied Offenses

{¶ 7} In his second assignment of error, appellant asserts that the trial court erred by sentencing appellant to consecutive terms of imprisonment for allied offenses of similar import. The state responds that res judicata bars appellant's claim.

{¶ 8} "A remand for a new sentencing hearing generally anticipates a de novo sentencing hearing. R.C. 2929.19(A). However, a number of discretionary and mandatory limitations may apply to narrow the scope of a particular resentencing hearing." *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, ¶ 15. In one such limitation on the scope of a resentencing hearing, "only the sentences for the offenses that were affected by the appealed error are reviewed de novo; the sentences for any offenses that were not affected by the appealed error are not vacated and are not subject to review." *Id.*, citing *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, paragraph three of the syllabus.

{¶ 9} " 'Under the doctrine of res judicata, a final judgment bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that the defendant raised or could have raised at trial or on appeal.' " *State v. Greenberg*, 10th Dist. No. 12AP-11, 2012-Ohio-3975, ¶ 11, quoting *State v. Myers*, 10th Dist. No. 11AP-909, 2012-Ohio-2733, ¶ 5. "The scope of an appeal from a new sentencing hearing is limited to issues that arise at the new sentencing hearing." *Wilson* at ¶ 30, citing *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 40. Therefore, "[t]he doctrine of res judicata does not bar a defendant from objecting to issues that arise at the resentencing hearing or from the resulting sentence." *Wilson* at ¶ 30.

{¶ 10} In our prior decision, we remanded for the trial court to "resentence appellant in light of our finding that the aggravated burglary conviction does not merge with appellant's aggravated robbery conviction" and to "correctly apply R.C. 2929.14(B)(1)(g) as provided herein." *Dennison* at ¶ 85, 90. Appellant claims that the trial court's stated intention to conduct a de novo sentencing hearing renders res judicata inapplicable in the present case.

{¶ 11} Here, the trial court's statement that it was conducting a "sentencing de novo" exceeded the scope of our remand order as only the sentences affected by the appealed error were subject to de novo review upon resentencing. *Wilson* at ¶ 15. However, with regard to the issue he raises now, the trial court considered merger of offenses in the original sentence, as reflected by our prior decision reversing the trial court's merger of appellant's aggravated burglary and aggravated robbery convictions. See *Dennison* at ¶ 81-85. Therefore, the trial court's de novo approach to resentencing does not alter the fact that appellant could have presented his claims regarding allied offenses in his original appeal to this court. *Myers* at ¶ 6. Because he did not raise the alleged allied offenses error on direct appeal of the original sentence, res judicata bars appellant from raising this issue now. *Wilson* at ¶ 30; *State v. Padgett*, 8th Dist. No. 95065, 2011-Ohio-1927, ¶ 8 (finding "the proper avenue for appellant's merger challenge would have been a direct appeal," not following resentencing); *State v. Dillard*, 7th Dist. No. 08 JE 35, 2010-Ohio-1407, ¶ 23.

{¶ 12} Accordingly, we overrule appellant's second assignment of error.

IV. Third Assignment of Error—Consecutive Sentence Findings

{¶ 13} In his third assignment of error, appellant asserts that the trial court erred by failing to state findings required for the imposition of consecutive sentences under R.C. 2929.14(C)(4).

{¶ 14} R.C. 2929.14(C)(4) provides:

If 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.

{¶ 15} Thus, pursuant to R.C. 2929.14(C)(4), in order to impose consecutive terms of imprisonment, the trial court is required to make at least three distinct findings: "(1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender; (2) 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 (3) that one of the subsections (a), (b) or (c) applies." (Emphasis sic.) *State v. Price*, 10th Dist. No. 13AP-1088, 2014-Ohio-4696, ¶ 31, citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177. A trial court seeking to impose consecutive sentences must make

the findings required by R.C. 2929.14(C)(4) at the sentencing hearing and also incorporate such findings into its sentencing entry. *Bonnell* at ¶ 37. However, the trial court need not state reasons to support its findings, nor is the court "required to give a talismanic incantation of the words of the statute, provided that the necessary findings can be found in the record and are incorporated into the sentencing entry." *Id.* See also *State v. Ayers*, 10th Dist. No. 13AP-371, 2014-Ohio-276, ¶ 12. "[A] word-for-word recitation of the language of the statute is not required," but where "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* at ¶ 29.

{¶ 16} We first note that, because appellant failed to object to the imposition of consecutive sentences at the resentencing hearing, our review is limited to consideration of whether the trial court committed plain error. *Ayers* at ¶ 7. Under 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. Jones*, 10th Dist. No. 14AP-80, 2014-Ohio-3740, ¶ 11, quoting *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). "We have previously found that when the record demonstrates that the trial court failed to make the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences on multiple offenses, 'appellant's sentence is contrary to law and constitutes plain error.' " *Ayres* at ¶ 15, quoting *Wilson* at ¶ 18.

{¶ 17} The state argues that the trial court did not have to articulate findings when imposing consecutive sentences because such findings were not required under the law in effect at the time appellant committed the offenses. H.B. No. 86, which became effective on September 30, 2011, "revived the language in R.C. 2929.14(E)(4) regarding consecutive sentences and codified it as R.C. 2929.14(C)(4)." *State v. Wilson*, 10th Dist. No. 12AP-551, 2013-Ohio-1520, ¶ 12. In *Wilson*, we rejected the state's contention that "because appellant committed the offenses prior to the effective date of H.B. No. 86, * * * the trial court was not required to articulate any specific statutory findings before

ordering appellant's multiple prison terms to be served consecutively." *Id.* at ¶ 14. The state contends that our decision in *Wilson* is in conflict with our decision in *State v. Gilbert*, 10th Dist. No. 12AP-142, 2012-Ohio-5521. As the state acknowledges, we have rejected this same contention from the state in prior decisions, and we continue to reject such contention here. *State v. Revels*, 10th Dist. No. 12AP-831, 2014-Ohio-795, ¶ 10; *State v. Castlin*, 10th Dist. No. 13AP-331, 2014-Ohio-223, ¶ 5 (finding that there is "no way to link the analysis in *Gilbert* * * * to the precedent established in *Wilson* and its progeny"); *State v. Jones*, 10th Dist. No. 14AP-80, 2014-Ohio-3740, ¶ 16-17. Thus, pursuant to *Wilson*, we find that the trial court was required to apply R.C. 2929.14(C)(4) in making findings when imposing consecutive sentences.

{¶ 18} Having found, pursuant to *Wilson*, that the trial court was required to apply R.C. 2929.14(C)(4) when imposing consecutive sentences, we next examine whether: (1) the trial court engaged in the correct analysis; and (2) the record contains evidence to support the trial court's findings. *Bonnell* at ¶ 29. Here, the trial court engaged in the following dialogue before imposing consecutive terms of imprisonment:

THE COURT: In dealing with the ones I have to sentence, 2929.14(B) – (C)(4), I'm sorry, requires that I must look at the following: If multiple prison terms are imposed on an offender convicted 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 will not be 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 the following:

[a] That the offender committed one or more offenses, multiple offenses, while the offender was awaiting trial; [b] at least two of the multiple offenses were committed as part of one or more courses of conduct and that 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.

And, finally, (c) the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

Clearly the course of conduct, this has always been the worst home invasion I've ever had. They tortured the people inside. It justifies the consecutive sentences that I'm going to give on this case. It is not disproportionate. I know Mr. Moore makes the argument, but the other gentlemen had come forward and admitted it. If they were placed in the same circumstance, they would have received a similar sentence from me on this case. Okay?

* * *

We had multiple victims. Okay. The course of conduct would be the entry of the place, the aggravated burglary. It continued on with the kidnappings and basically making everybody strip down, confiscated – the 2-year-old, the child, was present during the whole time and was forced to watch through this. They were separated. While naked they were required to gather the items for them, pack them so that they could leave the place. That sounds like a course of conduct to me that would adequately represent, how should I say, the sadistic nature of the activity that went on with these three individuals that night.

* * *

Anything else for the record on that?

[PROSECUTOR]: Just note, in addition to what you've pointed out, they were physically assaulted as well.

THE COURT: That also was part of the testimony in the trial, yes. Like I said, it was probably one of the most sadistic events I've ever seen. I think I made adequate findings on that. Unless there's any other objections, I'll just go forward with the sentencing at this point in time.

[PROSECUTOR]: He did have a prior record as well.

THE COURT: Okay. Anything you want to put on the record about it?

[PROSECUTOR]: No. That is just another one of those prongs. That's it.

THE COURT: Okay. Well, I think I made a sufficient finding to justify it.

(Tr. 7-9.)

{¶ 19} We first consider whether the trial court made a finding that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. *Price* at ¶ 36-38. Here, the trial court stated that "[i]t is not disproportionate," but then followed this finding by stating that "I know [appellant's counsel] makes the argument, but the other gentlemen had come forward and admitted it. If they were placed in the same circumstance, they would have received a similar sentence from me on this case." (Tr. 8.)

{¶ 20} The trial court's statements reflect that, in conducting the required proportionality analysis, it considered the consistency between appellant's sentence and the sentences imposed upon appellant's co-defendants who entered guilty pleas. However, R.C. 2929.14(C)(4) does not direct the trial court to compare sentences between similarly situated offenders in making the required proportionality analysis. Instead, the trial court must determine whether consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public.¹ *See Bonnell* at ¶ 33-34 (finding that the trial court failed to make mandated statutory findings relating to proportionality of consecutive sentences despite "court's description of Bonnell's criminal record as atrocious and its notation of his lack of respect for society"); *State v. J.H.S.*, 10th Dist. No. 14AP-399, 2015-Ohio-254, ¶ 14-18. Further, while we note that the trial court read and acknowledged the required statutory findings, reading the requirements does not equate to applying the correct analysis and actually making the findings required by statute. *State v. Walker*, 10th Dist. No. 14AP-181, 2014-Ohio-4586, ¶ 9 ("Although the trial court read and acknowledged the required statutory findings, the trial court failed to actually make the findings required by [statute].").

¹ See generally *State v. Moore*, 8th Dist. No. 99788, 2014-Ohio-5135, ¶ 20 (describing conflation of consistency between sentences imposed on similarly situated offenders and disproportionality analysis under R.C. 2929.14(C)(4)).

{¶ 21} Because the record demonstrates that the trial court engaged in an incorrect analysis, we conclude that the trial court failed to make the proportionality finding required by R.C. 2929.14(C)(4). This conclusion is supported by the trial court's failure to journalize consecutive sentence findings into the sentencing entry. *State v. Williams*, 10th Dist. No. 13AP-552, 2013-Ohio-4891, ¶ 6 ("It is a well-settled rule that a court speaks through its journal entries."), citing *State v. Miller*, 127 Ohio St.3d 407, 2010-Ohio-5705, ¶ 12; *Bonnell* at ¶ 30 ("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." (Emphasis added.)). Therefore, because the record reflects that the " 'trial court failed to make the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences on multiple offenses, "appellant's sentence is contrary to law and constitutes plain error." ' " *J.H.S.* at ¶ 17, quoting *Ayers* at ¶ 15, quoting *Wilson* at ¶ 18. Finally, as we have determined that the trial court erred by failing to make the required proportionality finding, we need not consider whether the trial court made the other findings required by R.C. 2929.14(C)(4).

{¶ 22} Accordingly, we sustain appellant's third assignment of error and remand this matter to the trial court for it " 'to consider whether consecutive sentences are appropriate, pursuant to R.C. 2929.14(C)(4), and, if so, to make the proper findings on the record at the sentencing hearing and incorporate those findings into its sentencing entry.' " *J.H.S.* at ¶ 18, quoting *Jones* at ¶ 18, citing *Bonnell*.

V. First Assignment of Error—Consistency of Sentence

{¶ 23} In his first assignment of error, appellant asserts that he was punished for exercising his right to trial because his sentence was inconsistent with or disproportionate to the severity of the crime when compared with similarly situated offenders, namely his co-defendants, in contravention of R.C. 2929.11(B), Article I, Section 9 of the Ohio Constitution, the Eighth Amendment to the United States Constitution, and the Due Process Clauses of the United States and Ohio Constitutions. However, because we must reverse appellant's sentence for the trial court to enter findings pursuant to R.C. 2929.14(C)(4), we find appellant's first assignment of error to be moot, as the trial court may, at its discretion, choose to impose a different sentence upon remand when making the proper findings.

VI. Disposition

{¶ 24} Having rendered appellant's first assignment of error moot, overruled appellant's second assignment of error, and sustained appellant's third assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand this case to that court for further proceedings in compliance with R.C. 2929.14(C)(4).

Judgment reversed and cause remanded.

SADLER and T. BRYANT, JJ., concur.

T. BRYANT, J., retired, of the Third Appellate District,
assigned to active duty under the authority of the Ohio
Constitution, Article IV, Section 6(C).
