[Cite as *State v. Hargrove*, 2015-Ohio-3125.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 15AP-102 (C.P.C. No. 12CR-2820)
John W. Hargrove,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 4, 2015

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Defendant-appellant, John W. Hargrove, appeals from a judgment of the Franklin County Court of Common Pleas in favor of plaintiff-appellee, State of Ohio. For the reasons that follow, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On May 17, 2013, a Franklin County jury found appellant guilty of one count of theft, a violation of R.C. 2913.02(A)(3), a felony of the fifth degree, and one count of solicitation fraud, a violation of R.C. 1716.14(A)(1), a felony of the fourth degree. The trial court did not merge the two convictions for purposes of sentencing. Appellant stipulated that he had a prior conviction in 2007 for a similar solicitation fraud offense.

{¶ 3} On June 14, 2013, the trial court sentenced appellant to a 12-month term on the theft offense and an 18-month term for solicitation fraud. Both sentences represented the maximum term for the offense. The trial court further ordered that appellant serve the prison terms consecutive to one another, for a total term of two and one-half years. Appellant timely appealed to this court.

{¶ 4} In *State v. Hargrove*, 10th Dist. No. 13AP-615, 2014-Ohio-1919, we considered appellant's appeal from the judgment of conviction and sentence. In our decision, we set forth the factual basis underlying appellant's convictions and sentence as follows:

> Both counts against appellant arise from his fund-raising activities on behalf of a purported veteran's organization. Testimony at trial established that appellant registered the trade name Ohio Veteran's Source with the Ohio Secretary of State, but never registered the name as a charitable organization. Appellant established three checking accounts with Huntington Bank in the name of Ohio Veteran's Source. He then engaged in telephone solicitations, mostly from individuals, and mostly procuring small donations. Appellant told potential contributors that his plan for the organization was to produce an informational newsletter to assist veterans in need of assistance to find housing, employment, or medical treatment. He then used the contributions for his own purposes and never produced the planned newsletter, although appellant stated at trial that he was only prevented from producing the newsletter by his intervening arrest. The state presented evidence of multiple solicitations, including the in-court testimony of contributing victims.

Id. at ¶ 2.

{¶ 5} In his second assignment of error in *Hargrove*, appellant argued that "the trial court erred when it did not make the required findings under R.C. 2929.14(C) before sentencing him to consecutive sentences." *Id.* at ¶ 13. We sustained appellant's second assignment of error and reversed the judgment of the trial court. *Id.* at ¶ 14. In our May 6, 2014 decision in *Hargrove*, we set forth our reasoning as follows:

> The state concedes that, pursuant to our recent decisions in *State v. Wilson*, 10th Dist. No. 12AP-551, 2013-Ohio-1520, and *State v. Bender*, 10th Dist. No. 12AP-934, 2013-Ohio-2777, the trial court's failure to make the statutorily-required

> findings constitutes plain error. We note that the state has fully argued and preserved for further appeal the question of whether *Bender* and *Wilson* correctly state the law of Ohio on this question. We further note that appellant in the present case did not object to the trial court's failure to make the statutorily-required findings. In accordance with our recent decisions, however, the record requires a reversal of the trial court's imposition of consecutive sentences and a remand to the trial court for re-sentencing. *Wilson* at ¶ 22.[1]

Id. at ¶ 13.

{¶ 6} Having sustained appellant's second assignment of error, we remanded the case to the trial court "for re-sentencing in compliance with the mandates of R.C. 2929.14(C)." *Id*. at ¶ 14.[2]

{¶ 7} On January 9, 2015, the trial court held a second sentencing hearing, at which time the trial court re-imposed a consecutive prison term of two and one-half years. Appellant timely appealed to this court from the judgment of the trial court.

II. ASSIGNMENT OF ERROR

{¶ 8} Appellant's sole assignment of error is as follows:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY IMPROPERLY SENTENCING HIM TO CONSECUTIVE TERMS OF INCARCERATION IN CONTRAVENTION OF OHIO'S SENTENCING STATUTES.

III. STANDARD OF REVIEW

{¶ 9} R.C. 2929.14(C)(4) provides, in relevant part, as follows:

> 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:

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[1] Klatt, J., concurring as to the consecutive sentence issue but dissenting as to merger.
[2] Appeal to the Supreme Court of Ohio not accepted for review in *State v. Hargrove*, 140 Ohio St.3d 1453, 2014-Ohio-4414.

* * *

> (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.

{¶ 10} The state urges us to apply the "plain error" standard in reviewing appellant's sentence inasmuch as appellant failed to object to the imposition of consecutive sentences in the trial court. In light of our prior reversal in this case in *Hargrove* and our remand to the trial court for resentencing, we will review this appeal under the standard set forth by the Supreme Court of Ohio in *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177.

{¶ 11} In *Bonnell*, the Supreme Court held that a sentencing court is not 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*. at ¶ 37. The court further stated that "a word-for-word recitation of the language of the statute is not required, and as long as 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*. at ¶ 29.

IV. LEGAL ANALYSIS

{¶ 12} In his sole assignment of error, appellant contends that the trial court did not make all the factual findings required by R.C. 2929.14(C)(4) when it imposed a consecutive term of imprisonment. We disagree.

{¶ 13} The findings made by the trial court at the January 9, 2015 sentencing hearing include the following:

> THE COURT: All right. Well, I'm going to reimpose the original sentence of two-and-a-half years in prison, because I think a consecutive sentence in this case, because I think it's

the most serious type of offense like this, it's the worst of the offenses like this, for the following reasons:

First of all, in this case, the Defendant, you know, intentionally, blatantly, solicited from 56 different people, most of them elderly. All of them testified you solicited funds for veterans under a fictitious veterans organization that didn't even exist. I think it was called Ohio Vets or something like that.

[PROSECUTOR]: That's correct.

THE COURT: These people were not rich people, and they gave because they were concerned about the veterans, and the Defendant in this case stuck the money in his pocket and went on his merry way. Now, not a penny went to veterans of any shape or form.

The Defendant, as indicated, has done this previously. He did it previously in 2007. He was sent to prison for 15 months.

Well, that didn't help, so maybe he should go to prison more this time, and that's why I gave him – one of the reasons why I gave him the two-and-a-half years.

I think this is the worst form of the offense, soliciting money for wounded veterans under a false organization and under false pretenses.

I might add that the Defendant himself is not a veteran, and he was preying upon those elderly sympathetic people who wanted to help veterans.

I find that very offensive. I find that the worst form of the offense that we could have in solicitation for funds. That is the reason that I gave the maximum consecutive sentence, which I will impose again.

The sentence is 18 months on the felony of the 4th degree, consecutive to one year on the felony of the 5th degree, for a total of two-and-a-half years.

In view of the fact that the victims in this case number at least 56, and probably many, many more, this is not a case where there's one victim; in view of the fact that he has a prior record for this, for which he did 15 months in prison; and in view of

> the fact that he is soliciting money under false pretenses for veterans for an organization that does not exist, I think it is the worst form of the offense of telephone solicitation for funds.
>
> * * *
>
> [PROSECUTOR]: Judge, I would submit to you that this is – the sentence you have given Mr. Hargrove, once again, is not disproportionate to the seriousness of the offense, and this is coming under consecutive sentencing statute 2929.41.
>
> As well as, are you finding this a part of one or more course of conduct, and that the multiple offenses were so great and unusual that –
>
> THE COURT: It's obviously a course of conduct when he does it to 56 people, and he's done it before in 2007, for which he was in prison, and he continued to do the same thing. So, yes.

(Jan. 9, 2015 Tr. 6-8, 10.)

{¶ 14} In his brief, appellant acknowledges that the trial court "ostensibly" made the finding required by R.C. 2929.14(C)(4) that a consecutive prison term is "necessary to protect the public from future crime or to punish appellant." Appellant also states that the trial court "possibly" made the finding that appellant's "history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime" by appellant under R.C. 2929.14(C)(4)(c). Our review of the transcript of the sentencing hearing leaves no question that the trial court made both findings when the trial court noted that appellant had been convicted of a similar crime in 2007 and that he continued to engage in the same criminal conduct after receiving a 15-month prison sentence.[3] The trial court also found that appellant's criminal conduct in this case was

[3] We also believe that the trial court's comments at the sentencing hearing amount to an additional finding under R.C. 2929.14(C)(4)(b) that multiple offenses were committed as part of a course of conduct and that the harm was so unusual that no single prison term adequately reflects the seriousness of the offender's conduct. The trial court expressly found that there were at least 56 victims in this case and described appellant's conduct as "very offensive." (Jan. 9, 2015 Tr. 7.)

"very offensive" and that he preyed on elderly victims who were sympathetic to injured veterans. (Jan. 9, 2015 Tr. 7.)

{¶ 15} Turning to appellant's primary argument, appellant focuses on the finding required by R.C. 2929.14(C)(4) that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." Appellant claims that the trial court did not make the required finding. We disagree.

{¶ 16} At the sentencing hearing, the trial court made a finding that appellant's criminal conduct represents "the worst form of the offense that we could have in solicitation for funds." (Jan. 9, 2015 Tr. 7.) The trial court also stated that appellant's conduct in this case was the "most serious type of offense like this" and "the worst of the offenses like this." (Jan. 9, 2015 Tr. 6.)

{¶ 17} The trial court's finding that appellant's criminal conduct was the worst and most serious type punishable under R.C. 1716.14 is indicative of the requisite proportionality analysis. It stands to reason that when a sentencing court finds that an offender has engaged in the worst and most serious conduct prohibited by the law under which he was convicted, the sentencing court believes a consecutive prison term is not disproportionate to the seriousness of the offense. Under *Bonnell*, the trial court's failure to employ the phrase "not disproportionate" when it imposes a consecutive term of imprisonment does not mean that the appropriate analysis is not otherwise reflected in the transcript of the sentencing hearing or that the necessary finding has not been made. *See*, *e.g.*, *State v. Giles*, 9th Dist. No. 27339, 2015-Ohio-2132 (trial court's statement that defendant's conduct was among the most serious form of the offense and its assertion that a consecutive term was necessary to protect the public from future crime amounts to a finding that consecutive terms are not disproportionate to the seriousness of the offense and the danger defendant poses to the public); *State v. Hartman*, 7th Dist. No. 13 JE 36A, 2014-Ohio-5718, ¶ 28-31 (statements by the sentencing judge that defendant committed "the most serious form of felonious assault," and "I don't know how you get much worse than this" "demonstrate[s] that the court made the second required finding—that consecutive sentences are not disproportionate to the seriousness of the offender's conduct"). Accordingly, in this case, the trial court's finding that appellant's criminal

conduct is the "worst form of the offense" is a factual finding on which this court can conclude that the sentencing court engaged in the required proportionality analysis by finding that consecutive service is "not disproportionate to the seriousness of [appellant's] conduct." *Id*. at ¶ 31.

{¶ 18} With respect to the danger appellant poses to the public, the trial court found that appellant had been convicted of a similar crime in 2007 and that a 15-month sentence "didn't help, so maybe he should go to prison more this time, and that's why I gave him – one of the reasons why I gave him the two-and-a-half years." (Jan. 9, 2015 Tr. 7.) The trial court further noted that "he's done it before in 2007, for which he was in prison, and he continued to do the same thing." (Jan. 9, 2015 Tr. 10.) These statements of fact by the sentencing judge permit us to conclude that the trial court found not only that consecutive service is necessary to punish appellant but also that consecutive service is not disproportionate to the danger appellant poses to the public.

{¶ 19} The relevant case law shows that appellate courts have been fairly deferential to the trial court when reviewing the transcript of a sentencing hearing to determine whether the trial court has made the findings required by R.C. 2929.14(C)(4). In *State v. Hillman*, 10th Dist. No. 14AP-252, 2014-Ohio-5760, this court held that statements by the trial court that defendant's criminal conduct "shows a very serious disregard for people's safety" and that there were "several different victims" shows that the trial court made the second required finding under R.C. 2929.14(C)(4). *Id*. at ¶ 68. The trial court in this case noted that appellant had previously committed a similar offense and that "the victims in this case number at least 56, and probably many, many more, this is not a case where there's one victim." (Jan. 9, 2015 Tr. 8.)

{¶ 20} In *Bonnell*, the trial court sentenced the offender to 30 months in prison for each of the 3 burglary convictions and 11 months in prison for tampering with coin machines, imposing a consecutive prison sentence totaling 8 years and 5 months. The Supreme Court stated that the trial court's description of the offender's criminal record as "atrocious" and the notation of his "lack of respect for society" did not permit it to conclude that the trial court found "consecutive sentences were not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." *Id*. at ¶ 34, 36.

{¶ 21} Unlike the trial court in *Bonnell*, the sentencing court in this case set forth the factual basis for its decision to impose a consecutive term of imprisonment. The trial court found that appellant's criminal conduct was the "worst form" and "most serious type" of telephone solicitation fraud, that the 15-month sentence for a prior conviction "didn't help," and that appellant "should go to prison more this time." (Jan. 9, 2015 Tr. 6, 7.) The sentencing court also noted that the victims in this case numbered 56 and "probably many, many more." (Jan. 9, 2015 Tr. 8.) The trial court found that appellant "prey[ed] upon * * * elderly sympathetic" victims who "were not rich people." (Jan. 9, 2015 Tr. 6, 7.) The trial court's finding that the prison sentence received by appellant for a prior similar conviction did not discourage appellant from engaging in the same conduct on his release, and the trial court's reference to the number and relative vulnerability of appellant's recent victims amounts to a finding that consecutive service was not disproportionate to the danger appellant poses to the public. Under the settled law, as set forth above, the trial court's failure to employ the phrase "not disproportionate to the * * * danger [appellant] poses to the public" does not mean that the trial court failed to engage in the appropriate analysis and failed to make the required finding.[4] R.C. 2929.14(C)(4). *Giles*. *See also State v. Adams*, 10th Dist. No. 13AP-783, 2014-Ohio-1809, ¶ 20-21, quoting *State v. Power*, 7th Dist. No. 12 CO 14, 2013-Ohio-4254, ¶ 45 (trial court's statement that the imposition of consecutive sentences "does not discredit the conduct or danger imposed by the defendant" shows that the trial court engaged in the appropriate statutory analysis and "made the required finding that consecutive sentences are 'not disproportionate to the seriousness of the conduct and the danger to the public' "); *State v. Barry*, 9th Dist. No. 27285, 2015-Ohio-2129, ¶ 9 (trial court statement that it generally disfavors lengthy prison terms but that consecutive sentences are "warranted" in this case denotes the trial court's belief that a consecutive sentence is not disproportionate either to the seriousness of the offender's criminal conduct or to the danger that he poses to the

[4] We reject the state's contention that the trial court's expression of agreement with the prosecutor's argument in favor of consecutive sentences equates to a proportionality finding for purposes of R.C. 2929.14(C)(4). *See State v. Barber*, 10th Dist. No. 14AP-557, 2015-Ohio-2653, ¶ 28 (sentencing court's adoption of the arguments made by the state at the sentencing hearing and its statement that consecutive service "meets all the requirements as set forth in the Revised Code" does not equate to a proportionality finding).

public). Accordingly, we hold that the trial court engaged in the appropriate statutory analysis and made all the findings required by R.C. 2929.14(C)(4) in support of consecutive sentences.

{¶ 22} Under R.C. 2953.08(G)(2), once the trial court makes the factual findings required by R.C. 2929.14(C)(4), an appellate court may overturn the imposition of consecutive sentences only if it finds, clearly and convincingly, that the record does not support the sentencing court's findings or that the sentence is otherwise contrary to law. R.C. 2953.08(G); *Adams* at ¶ 7. Several appellate courts have noted that the "clearly and

convincingly" standard under R.C. 2953.08(G)(2) is written in the negative which means that it is an "extremely deferential standard of review." *See, e.g., State v. Bittner*, 2d Dist. No. 2013-CA-116, 2014-Ohio-3433, ¶ 9; *State v. Venes*, 8th Dist. No. 98682, 2013-Ohio-1891, ¶ 21; *State v. Moore*, 11th Dist. No. 2014-G-3183, 2014-Ohio-5182, ¶ 29; *State v. Hale*, 5th Dist. No. 14-CA-00014, 2014-Ohio-5028.

{¶ 23} Appellant does not directly challenge the trial court's summary of the testimony produced at trial, and he has stipulated that he has a prior conviction for a similar offense in 2007. The record supports the trial court's findings regarding the number of victims, the relative vulnerability of appellant's victims, and the offensive nature of the fraud. The trial court stated that the two and one-half year sentence was "appropriate," given the facts of the case. (Jan. 9, 2015 Tr. 9.) We find that the evidence produced at the trial of this matter supports the findings made by the trial court and that the findings support a consecutive prison term totaling two and one-half years.

{¶ 24} In the final analysis, we find that the trial court engaged in the appropriate statutory analysis and made all the findings required by R.C. 2929.14(C)(4). Additionally, the record in this case does not show clearly and convincingly either that the trial court's findings are unsupported by the facts in the record or that the sentence is contrary to law. R.C. 2953.08(G)(2). For the foregoing reasons, appellant's sole assignment of error is overruled.

{¶ 25} Although we have overruled appellant's assignment of error, the *Bonnell* case holds that Ohio's consecutive sentencing laws require the trial court to (1) make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing, and (2) incorporate its findings into its sentencing entry. *Id*. at ¶ 30. In this case, the trial court made the required findings at the sentencing hearing but did not incorporate its findings into the judgment entry. The relevant portion of the trial court's judgment entry states only that "the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14." (Jan. 14, 2015 Judgment Entry, 2.) Pursuant to *Bonnell*, "[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.

Consistent with our precedent in *Hillman* at ¶ 71, we remand this case to the trial court for a nunc pro tunc judgment entry incorporating findings stated on the record.

V. CONCLUSION

{¶ 26} Having overruled appellant's assignment of error, but having found that the trial court's judgment entry contains a clerical error, we affirm the judgment of the Franklin County Court of Common Pleas and remand the matter for the issuance of a nunc pro tunc judgment entry consistent with this decision and the rule of law in *Bonnell.*

Judgment affirmed;
remanded for issuance of
nunc pro tunc judgment entry.

DORRIAN and BRUNNER, JJ., concur.

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