[Cite as *State v. Davis*, 2004-Ohio-2076.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NOS. 2003-L-027, 2003-L-028 and 2003-L-029**
ANTONIO M. DAVIS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case Nos. 02 CR 000501, 02 CR 000328 and 02 CR 000252.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor and *Brian L. Summers*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender and *Vanessa R. Clapp,* Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} This appeal is taken from a final judgment of the Lake County Court of Common Pleas. Appellant, Antonio M. Davis, challenges the sentences imposed by the trial court for the fourth and fifth degree felonies to which he pleaded guilty.

{¶2} On July 17, 2002, appellant was indicted on one count of theft, a felony of the fifth degree. On August 26, 2002, appellant was charged with possession of cocaine, a felony of the fourth degree, and on November 21, 2002, an information was filed against appellant, charging him with one count of trafficking in cocaine, a felony of the fourth degree. Appellant pleaded guilty to each separate charge and the matters were set for a single sentencing hearing which occurred on January 9, 2003.

{¶3} At the sentencing hearing, the state set forth the following factual bases of the offenses: In April 2002, the residence of Harry Mack was burglarized by Justin Pitts while Mack was away on vacation. Pitts remained in the home for several days. During the course of his stay, Pitts invited several acquaintances to the home, one of which was appellant. While at the Mack residence, appellant pilfered a stereo, speakers, and other electronic equipment.

{¶4} At the hearing, appellant maintained that he actually purchased the equipment from Pitts and was therefore innocent of the theft charge.[1] However, the state noted that it was prepared to call Pitts to testify that he did not sell appellant the equipment; rather, appellant simply removed the equipment from Mack's home without permission.

{¶5} With respect to the possession of cocaine offense, the state asserted that on May 30, 2002, appellant was staying at a Super 6 Motel in Mentor. The Mentor police received a report that a juvenile girl was missing. The police were informed that the girl was staying at the same motel. The police ultimately knocked on appellant's

1. Although appellant pleaded guilty to the theft charge, he was nevertheless permitted to maintain his innocence pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25. In *Alford*, the Supreme Court of the United States held that a trial court may accept a defendant's guilty plea despite his or her remonstrances of innocence. A court may accept an *Alford* plea only where a defendant intelligently concludes that his

door and asked if they could look for the missing juvenile. Appellant consented and the police found the girl hiding under a shower curtain in the bathroom. During their conversations with appellant and the juvenile, the officers determined they would arrest appellant for contributing to the delinquency of a minor. The police subsequently requested to search the room, appellant consented, and, during the search, the police recovered an aspirin bottle containing eight rocks of cocaine. After reading appellant his *Miranda* rights, appellant admitted that the substance was crack cocaine, the drugs were his, and he had been smoking crack earlier in the day.

{¶6} Finally, the trafficking offense was a result of an investigation by the Lake County Narcotics Agency ("LCNA"). On June 5, 2002, the LCNA conducted an investigation into possible drug sales issuing from a Super 8 Motel room in Mentor. An undercover informant, working with LCNA, knocked on the motel room's door and entered. Appellant was present inside the room and ultimately sold the informant an amount of crack cocaine for $160.

{¶7} As a consequence of his guilty pleas, appellant was sentenced to ten months in prison for the theft charge to run concurrent to two consecutive twelve month sentences for the possession and trafficking charges.

{¶8} Appellant assigns two errors for our review:

{¶9} "[1.] The trial court erred to the prejudice of the defendant-appellant when it ordered a term of imprisonment by making findings under the applicable statute that were not supported by the record.

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interests require pleading guilty and the evidence before the judge strongly suggests actual guilt. *Alford*, supra, at 37.

{¶10} "[2.] The trial court erred to the prejudice of the defendant-appellant when it ordered consecutive sentences."

{¶11} We begin by noting that our review of a felony sentence is de novo. See, R.C. 2953.08; *State v. Bradford* (June 1, 2001), 11th Dist. No. 2000-L-103, 2001 Ohio App. LEXIS 2487, at 3. However, we will not upset appellant's sentence unless we determine, by clear and convincing evidence, that the record does not support the sentence or that the sentence is otherwise contrary to law. Id. Clear and convincing evidence is that quantum of proof which would produce a firm belief or conviction in the mind of the trier of fact as to the facts sought to be established. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74.

{¶12} In his first assignment of error, appellant asserts that the trial court erred by imposing a prison term where its findings pursuant to R.C. 2929.12 and 2929.13 were not supported by the record. Appellant first contends that the lower court erred by failing to consider the factors set forth under R.C. 2929.12(C).

{¶13} A trial court that imposes a sentence upon a felony offender has the discretion to determine the most effective way to comport with the purposes and designs of sentencing set forth in R.C. 2929.11. In doing so, the trial court must consider the factors set forth in R.C. 2929.12(B) and (C) relating to the seriousness of the offender's conduct; moreover, the court shall consider those factors enumerated under R.C. 2929.12(D) and (E) relating to the defendant's likelihood to reoffend. The court may also consider any other factors relevant to achieving the purposes and principles of sentencing. See, e.g., *State v. South* (June 23, 2000), 11th Dist. No. 98-P-0050, 2000 Ohio App. LEXIS 2768, at 7-8

{¶14} R.C. 2929.12(C) requires a court to consider all relevant factors which indicate an offender's conduct is less serious than that normally constituting the offense. In the current matter, the court expressly stated at the hearing that none of the factors under R.C. 2929.12(C) applied to appellant's case. However, appellant contends that the seriousness of the trafficking offense should have been reduced because he was not the facilitator of the offense. That is, because the state used a confidential informant in order to arrange the purchase of the cocaine, the state "induced or facilitated" the offense. We disagree.

{¶15} Specifically, R.C. 2929.12(C)(1) pertains to situations where "[t]he victim induced or facilitated the offense." In the current situation, we have no ostensible victim. Although any criminal activity prosecuted by the state may stand as an affront to the public at large, we cannot conclude that the public operated to induce or facilitate the offense. As such, the court did not err by refusing to consider R.C. 2929.12(C)(1).

{¶16} Additionally, appellant argues that the trafficking offense should have been reduced pursuant to R.C. 2929.12(C)(2). This subsection mitigates the seriousness of criminal conduct where "the offender acted under strong provocation." Appellant maintains that the confidential informant sought him out and "strongly provoked" him to sell the cocaine. Although the state's informant did in fact seek to purchase cocaine from appellant, we can hardly construe the solicitation as a form of strong provocation. As far as we can discern, appellant accepted the informant's offer to purchase the cocaine. Appellant acted on his own volition without any overreaching tactics on behalf of the state. Although not beyond the realm of possibility, it is difficult to imagine a scenario wherein a party could be so strongly provoked into trafficking cocaine that the

provocation itself would act to lessen the severity of the underlying crime. Thus, the court did not err by refusing to consider R.C. 2929.12(C)(2).

{¶17} Appellant further argues that the seriousness of the theft offense should have been reduced pursuant to R.C. 2929.12(C)(3).[2] R.C. 2929.12(C)(3) lessens the seriousness of an offender's conduct where "the offender did not cause or expect to cause physical harm to any person or property." Appellant maintains that he purchased the stereo equipment from a party who he thought was the rightful owner of the property. Therefore, appellant concludes, he never intended to cause any physical harm to Mack or his property.

{¶18} By virtue of his *Alford* plea, appellant was permitted to plead guilty while still maintaining his innocence regarding the theft offense. However, the court was not obligated to give credence to appellant's informal defense of mistake. In fact, *Alford* is only operative where there is strong evidence of actual guilt. *Alford*, supra, at 37.

{¶19} Moreover, at the hearing, the state noted that, had this case gone to trial, it would have subpoenaed Justin Pitts, the party from whom appellant allegedly purchased the equipment. According to the state, Pitts would testify that he did not sell appellant the electronic equipment, but rather appellant removed the equipment from the residence without the rightful owner's permission. The court therefore did not err by failing to reduce the theft sentence pursuant to R.C. 2929.12(C)(3).

{¶20} Next, appellant argues that the trial court erred when it found appellant had refused to acknowledge and accept treatment for his drug and alcohol problem pursuant to R.C. 2929.12(D)(4). Further, appellant claims that the lower court erred

when it found that appellant failed to express genuine remorse. See R.C. 2929.12(D)(5) and R.C. 2929.12(E)(5). Although the record indicates that appellant acknowledged his drug problem, it is equally evident that the court examined appellant regarding his past treatment for the problem. The following exchange is germane:

{¶21} "THE COURT: You did go through the jail treatment program while you were incarcerated from the Willoughby Court case earlier this year?

{¶22} "THE DEFENDANT: Yes, I did.

{¶23} "THE COURT: That, obviously, didn't do you any good, you reoffended with two separate drug offenses after that program was completed.

{¶24} "THE DEFENDANT: Excuse me?

{¶25} "THE COURT: You picked up two more drug offenses after you completed the jail treatment program, obviously you didn't learn anything there, correct?

{¶26} "THE DEFENDANT: Well, at that time I hadn't really taken my treatment seriously. I mean, I was in what you call - - probably call denial stage, I don't believe I had a problem at that time or didn't want to believe that I had a problem. So, when I got out, I like went through the drug program, I did what I had to do to complete it, but I don't think that I - - I didn't think that I got what I need out of it. I think maybe I need more strict treatment, maybe some inpatient like N.E.O.C.A.P., a halfway house, where I can go and seek treatment there."

{¶27} While making its findings regarding whether appellant was more than likely to reoffend, the court stated:

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2. It is worth noting that the theft offense was ordered to run concurrent with the possession and trafficking offenses. Hence, even if the seriousness of the offense were reduced, there would be no practical effect. Any error, in this respect, would be arguably harmless.

{¶28} "The Court also finds there is a pattern of drug and alcohol abuse, and that the Defendant has refused to acknowledge the problem and seek and accept treatment in the past. As indicated earlier that the Defendant has completed the jail treatment program earlier in 2002, obviously reoffended shortly thereafter with respect to these particular offenses." In our view, the court did not err in drawing this conclusion.

{¶29} Further, "the trial court is in the best position to determine the genuineness of the remorse expressed by a defendant." *State v. Chike*, 11th Dist. No. 2001-L-120, 2002-Ohio-6912, at ¶12. Although the colloquy between the court and appellant indicated that appellant was remorseful for his drug habit, it is unclear whether he exhibited remorse regarding the offenses themselves. In any event, because the trial court observed appellant directly, it was in the best position to assess his demeanor and sincerity regarding his remorse for the offenses. The lower court found that appellant expressed no genuine remorse. Therefore, we cannot conclude that it erred in finding that appellant did not express genuine remorse for his conduct.

{¶30} Finally, appellant contends that the trial court failed to make the appropriate findings under R.C. 2929.13 before imposing prison terms upon him for the fourth and fifth degree felonies to which he pleaded guilty. We disagree.

{¶31} R.C. 2929.13(B) provides general guidance regarding the imposition of a sentence for offenders committing fourth or fifth degree felonies. The statute lists various factors to assist the court in making its sentencing determination. R.C. 2929.13(B)(1)(a)-(i). After considering the applicable factors under R.C. 2929.13(B)(1) in conjunction with those set forth under R.C. 2929.12, the court may impose a prison

term if it finds the offender is not amenable to community control sanctions. R.C. 2929.13(B)(2)(a).

{¶32} At the sentencing hearing, the trial court explicitly found that the theft offense was committed as part of an organized criminal activity with other offenders. See R.C. 2929.13(B)(1)(e). The court also found two factors relating to each offense: that appellant had previously served a prison term and that he had committed the offenses while on probation imposed by the Willoughby Municipal Court. See R.C. 2929.13(B)(1)(g) and (h). These were the factors applicable to appellant's case. Moreover, the court stated that appellant did not appear to be amenable to community control sanctions. The court did not err in making its findings. Therefore, the court met its obligation under R.C. 2929.13(B).

{¶33} Appellant's first assignment of error is without merit.

{¶34} In his second assignment of error, appellant attacks the trial court's imposition of consecutive sentences. The court may impose consecutive sentences on an offender being sentenced for multiple offenses if it finds three statutory factors pursuant to R.C. 2929.14(E)(4): First, the court must find that consecutive sentences are necessary to protect the public from future crime or to punish the offender. *State v. Comer,* 2003-Ohio-4165, 99 Ohio St.3d 463, ¶13. Next, the court must determine that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. Id. Finally, the court must find the existence of one of the three enumerated circumstances in R.C. 2929.14(E)(4)(a) – (c).[3]

3. R.C. 292914.(E)(4) (a) – (c) provide:

{¶35} Finally, a court imposing consecutive sentences must additionally comply with R.C. 2929.19(B)(2)(c), which requires the sentencing court to make a finding that gives its reasons for selecting the sentence imposed. Pursuant to this provision, the trial court's findings and reasons for consecutive sentences must be given at the sentencing hearing. *Comer*, supra, at ¶14. This means that the trial court must expressly "align each rationale with the specific finding to support its decision to impose consecutive sentences." Id. at ¶21.

{¶36} That said, under his second assignment of error appellant claims the trial court erred when it imposed consecutive sentences under R.C. 2929.14(E)(4) without providing its reasons for doing so as mandated by R.C. 2929.19(B)(2)(c). With respect to R.C. 2929.14(E)(4), the trial court found:

{¶37} "*** that consecutive sentences are necessary to protect the public from future crime and to punish the Defendant. Also, the consecutive sentences are not disproportionate to the seriousness of the Defendant's conduct and the danger the Defendant poses to the public.

{¶38} "Further the Court finds specifically that these offenses were committed while the Defendant was on probation with the Willoughby Municipal Court. The court finds that the Defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the Defendant."

{¶a} "(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 *** [R.C.] 2929.16, [R.C.] 2929.17, or [R.C.] 2929.18 ***, or was under post-release control for a prior offense.

{¶b} "(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.

{¶39} Moreover, in its judgment entries relating to the drug offenses the court stated:

{¶40} "the Defendant committed the multiple offenses while the Defendant was awaiting trial or sentencing; and the Defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the Defendant."

{¶41} Accordingly, the court followed the mandates of R.C. 2929.14(E)(4).

{¶42} Next, the court was required to justify its imposition of consecutive sentences by stating its reasons. See R.C. 2929.19(B)(2)(c). Appellant contends that although the trial court stated vague reasons for the consecutive sentences, it failed to apply the specific facts to the factors listed in R.C. 2929.14(E)(4). We disagree.

{¶43} Specifically, the court stated:

{¶44} "*** these offenses were committed while the Defendant was on probation, one year probation imposed by the Willoughby Municipal Court in January 2002.

{¶45} "***

{¶46} "With respect to recidivism, the Court finds the defendant is more likely to commit offenses in the future, again, the Defendant committed these offenses while on probation from Willoughby Municipal Court. Further, the Defendant has a previous criminal history consisting of a conviction for robbery, felony of the second degree in which a 3 to 15 year prison term was imposed. The Defendant was also convicted of domestic violence in 1998, and attempted trafficking in marijuana in 2002. Court finds there has been a rehabilitation failure after those prior convictions."

{¶c} "(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

{¶47} The above findings provide ample justification for the court's imposition of consecutive sentences pursuant to R.C. 2929.14(E)(4). To wit, R.C. 2929.14(E)(4)(a) guides the court's discretion via consideration of whether the "offender was awaiting trial or sentencing or was under a community control sanction." Because appellant was on probation when he committed the underlying crimes, the court properly applied the facts to the statute in justification of its sentence.

{¶48} Moreover, R.C. 2929.14(E)(4)(c) asks whether "the offender's prior criminal history demonstrates that consecutive sentences are necessary to protect the public from future crime." The court's discussion of appellant's particular criminal history supported its conclusion that he would be a likely recidivist. Thus, the court determined that the consecutive sentences were necessary for public protection. Although the court was only required to find one of the additional factors delineated in R.C. 2929.14(E)(4)(a)-(c), it found two. Therefore, the trial court fully complied with the dictates of R.C. 2929.19(B)(2)(c).

{¶49} The preceding analysis demonstrates that the trial court properly sentenced appellant to consecutive sentences. Thus, appellant's second assignment of error is without merit.

{¶50} For the aforestated reasons, appellant's two assignments of error are overruled. Therefore, the sentence of the Lake County Court of Common Pleas is affirmed.

WILLIAM M. O'NEILL and DIANE V. GRENDELL, JJ., concur.