

[Cite as *State v. Brewer*, 2004-Ohio-3397.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 02CA0057

vs. : T.C. CASE NO. 02CR258

GARY L. BREWER : (Criminal Appeal from
Common Pleas Court)
Defendant-Appellant :

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O P I N I O N

Rendered on the 25th day of June, 2004.

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GRADY, J.

{¶1} Defendant, Gary Brewer, appeals from his
conviction and sentence for breaking and entering,
vandalism, and grand theft.

{¶2} Defendant broke a large glass display window at
Kincaid's Music Store in Springfield, and then stole four

guitars valued at over five thousand dollars. Defendant was indicted on one count of breaking and entering, R.C. 2911.13, one count of vandalism, R.C. 2909.05(B)(1)(a), and one count of grand theft, R.C. 2913.02.

{¶3} Defendant subsequently pled guilty to all of the charges. The trial court imposed maximum sentences of one year for breaking and entering, one year for vandalism, and one and one-half years for grand theft, and ordered the sentences to be served consecutively.

{¶4} Defendant has timely appealed to this court, challenging only his sentences.

FIRST ASSIGNMENT OF ERROR

{¶5} "THE TRIAL ABUSED ITS DISCRETION IN IMPOSING PUNISHMENT IN RELIANCE ON OFFENSES WITH WHICH THE APPELLANT HAD NEVER BEEN CHARGED OR CONVICTED."

{¶6} Defendant argues that the trial court abused its discretion when it considered other offenses for which he had never been charged or convicted as a basis for the findings the court made to support maximum and consecutive sentences. In imposing the maximum and consecutive sentences the trial court indicated that it had reviewed the presentence investigation report, which includes Defendant's criminal history and a victim impact statement. The court commented extensively upon Defendant's prior criminal record, which dates back to 1969 and includes many offenses such as burglary, various theft offenses, assault, attempted aggravated murder, kidnaping, and aggravated robbery. The

court also noted that the current offenses were committed while Defendant was on parole, and that Defendant has been sent back to prison for parole violations on three previous occasions.

{¶7} The court cited Defendant's extensive criminal record as a reason for finding both that Defendant poses the greatest likelihood for committing future crimes, which justifies a maximum sentence, R.C. 2929.14(C), and found that Defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by Defendant, which justifies consecutive sentences. R.C. 2929.14(E)(4)(c).

{¶8} In discussing the victim impact statement the trial court further commented:

{¶9} "And in his statement he says this is the fourth time, I believe, that this has happened to him since this defendant was released from the penitentiary on parole in October of 2000.

{¶10} "The first break - in was in 2001 and then those break-ins in 2002, well, there were three prior to this; and significantly all were done in exactly the same manner as this offense with Taylor guitars being stolen from the same rack with the same modus operandi.

{¶11} "I think this is a significant fact in the past history. One of the burglaries, the breaking and entering, the culprit cut himself then on the glass and then in this incident the defendant's wearing socks on his hands to avoid

being cut.

{¶12} "But it does indicate the defendant's pattern or scheme here of committing one crime after another, and I can justify that simply on the convictions that I've read in the record already." (Sentence T. 9-10)

{¶13} The court's references to prior similar break-ins at Kincaid's Music Store contains facts which appear to have been gleaned from the victim impact statement of the store's owner or operator. There is nothing in this record to connect Defendant Brewer to those events. Therefore, the trial court erred when it considered them. However, Defendant failed to raise this issue or object at sentencing to the court's consideration of uncharged offenses. Thus, Defendant has waived all but "plain error." *State v. Wickline* (1990), 50 Ohio St.3d 114. Plain error does not exist unless but for the error the outcome of the trial or proceeding clearly would have been different. *State v. Long* (1978), 53 Ohio St.2d 91. This record does not demonstrate that the trial court relied upon those or any other uncharged offenses as the sole basis for the sentence it imposed. To the contrary, in making the statutory findings necessary to support maximum and consecutive sentences, the trial court relied heavily upon Defendant's extensive history of criminal convictions which the court recited in detail. That criminal history provides ample reasons and sufficient support for the court's findings. No prejudicial error, much less plain error, has been

demonstrated.

{¶14} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶15} "THE TRIAL COURT ABUSED ITS DISCRETION IN DETERMINING APPELLANT HAD COMMITTED THE WORST FORM OF THE OFFENSES WITH WHICH HE WAS CHARGED."

{¶16} Pursuant to R.C. 2929.14(C), a trial court may impose a maximum sentence only upon offenders who, among other things, either commit the worst form of the offense or pose the greatest likelihood of committing future crimes. Courts that impose a maximum sentence must provide reasons for doing so. R.C. 2929.19(B)(2)(d) and (e).

{¶17} In imposing maximum sentences in this case on all of the offenses to which Defendant pled guilty, the trial court stated:

{¶18} "Now, the reason I'm imposing the longest sentence is that I find that the defendant did commit the worst form of the offense which I would link to his past background, no ability for restitution; and his own excuse seems to be that he's involved heavily in drugs which does not mitigate in my mind the seriousness of this offense.

{¶19} "Drug programs have not been successful for this defendant. He hasn't completed them, and so further attempts on that line would be a waste of time.

{¶20} "So I find that he committed the worst form of the offense, and I also find that he poses the greatest likelihood of committing future crimes based on his prior

history. So I do feel that the maximum term on each of these charges should be imposed." (Sentence T. 11-12).

{¶21} Defendant argues that in determining that he committed the worst form of the offenses the trial court relied upon improper factors other than the facts and circumstances that comprise each offense, such as Defendant's prior criminal history, his indigency and resulting inability to make restitution, and his drug abuse problems. *State v. McDaniel* (2001), 141 Ohio App.3d 487. Once again, Defendant failed to object or raise this issue at sentencing and thus we will apply a plain error standard of review.

{¶22} The State concedes in its appellate brief that the trial court relied upon improper circumstances other than the facts of each crime in determining that Defendant committed the worst form of the offenses. Nevertheless the State argues, and we agree, that this error is harmless because the trial court additionally made the alternative finding in R.C. 2929.14(C), that Defendant poses the greatest likelihood of committing future crimes, which likewise allows imposition of a maximum sentence. The trial court also gave its reasons for that alternative finding: Defendant's extensive prior criminal history. R.C. 2929.19(B)(2). No prejudicial error, much less plain error, has been demonstrated in the court's imposition of maximum sentences.

{¶23} The second assignment of error is overruled. The

judgment of the trial court will be affirmed.

FAIN, P.J. and WOLFF, J., concur.

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Hon. Gerald F. Lorig