

[Cite as *State v. Tyler*, 2005-Ohio-2022.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 04CA0034

vs. : T.C. CASE NO. 03CR739

MARK A. TYLER, JR. : (Criminal Appeal from
Common Pleas Court)

Defendant-Appellant :

.

O P I N I O N

Rendered on the 29th day of April, 2005.

.

Stephen Schumaker, Pros. Attorney; D. Andrew Wilson, Asst.
Pros. Attorney, 50 East Columbia Street, Springfield, Ohio
45502, Atty. Reg. No. 0073767
Attorney for Plaintiff-Appellee

Eric A. Stamps, 3814 Little York Road, Dayton, Ohio 45414,
Atty. Reg. No. 0071176
Attorney for Defendant-Appellant

.

GRADY, J.

{¶1} Defendant, Mark A. Tyler, Jr., appeals from his convictions for Robbery and Attempted Murder and the maximum, consecutive sentences of incarceration the trial court imposed.

{¶2} Tyler's convictions were entered on his negotiated pleas of guilty. Tyler concedes that his guilty pleas were properly accepted by the court. The error he assigns on appeal concerns his sentences.

{¶3} Tyler argues that in imposing maximum, consecutive sentences the court failed to comply with the requirements for consecutive sentences mandated by R.C. 2929.14(E)(4) and R.C. 2929.19(B)(2)(c). Those sections, respectively, require the court to state certain findings on the record when it imposes consecutive sentences and to give its reasons for imposing consecutive sentences. The court's failure to do so by oral pronouncement at the sentencing hearing is reversible error. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165.

{¶4} Per Article IV, Section 3(B)(2) of the Ohio Constitution, the appellate jurisdiction of the courts of appeals is provided by statute. R.C. 2953.08 (G) authorizes an appellate court to vacate a sentence and remand the case for resentencing if it clearly and convincingly finds that the sentencing court failed to make the findings required by R.C. 2929.14(E)(4) in order to impose consecutive sentences, and/or that the sentence was imposed "contrary to law."

{¶5} In *Comer*, the Supreme Court wrote that "[w]hile consecutive sentences are permissible under the law, a trial court must clearly align each rationale with the specific finding to support its decision to impose consecutive sentences. These findings and reasons must be articulated by the trial court so that an appellate court can conduct a meaningful review of the sentencing decision." *Id.*, at ¶ 21.

{¶6} In *State v. Rothgeb* (Jan 31, 2003), Champaign App.

No. 02CA7, we discussed the policy purposes of the statutory findings and reasons requirements and stated:

{¶7} "The preferred method of compliance with these requirements is to set out each finding that R.C. 2929.14(E)(4) requires the court to make, and in relation to each the particular reason or reasons for making the finding that R.C. 2929.19(B)(2)(c) contemplates. An unrelated 'laundry list' of reasons that doesn't correspond to the statutory findings the court makes presents a difficult puzzle to solve, and requires an appellate court to try to surmise what the trial court's reasons were. Those reasons may have been ample, and on the record correct. The court must nevertheless identify as to each finding what its reason or reasons in fact were if the General Assembly's policy purposes * * * are to be met." *Id.*, at p. 8-9.

{¶8} While the court touched on factors in R.C. 2929.14(E)(4) in the findings it made, the findings lack the exactness that *Comer* requires. Further, some of the findings address other matters. For example, in making the proportionality finding prescribed by R.C.2929.14(E)(4)(b), the court compared the Defendant's conduct to that of other offenders instead of weighing the seriousness of the harm the victim suffered, which is the focus of the prescribed review. Finally, the court did not "clearly align" its reasons with its findings, as *Comer* requires. Therefore, we must vacate the sentence imposed and remand for resentencing.

{¶9} The court's discussion of the facts of the crime and the victim's very serious injuries demonstrate that the court was sincerely motivated by what it learned and acted accordingly. Were we to apply the clear and convincing standard to those matters, an affirmance would follow. However, we are charged to find whether the court complied with R.C. 2929.14(E)(4) and R.C. 2929.19(B)(2)(c) as *Comer* requires it to. On that issue, we find that the court did not.

{¶10} The sober fact is that sentencing courts must now engage in a form of scripted process, articulating each finding and reason required by the statutory sections concerned on which the court relies. We are familiar with the practice of one common pleas court in this appellate district which does just that, from a written entry of conviction and sentence prepared by its probation officer after prior consultation with the court. That may shock some who believe that the court could then ignore what it might learn at the sentencing hearing. However, the matters which the statutory findings involve are largely historical, and if the arguments persuade the court to a different course, it can change its anticipated sentence.

{¶11} The assignment of error is sustained. Defendant-Appellant's sentence will be vacated and the case remanded for resentencing.

BROGAN, P.J. concurs.

DONOVAN, J., dissenting:

{¶12} I disagree. In the *Comer* case, the trial court failed to state its findings or reasons for consecutive sentences orally at the sentencing hearing, merely explaining later in a journal entry. In *Comer*, the Supreme Court held that "pursuant to R.C. 2929.14(E)(4) and 2929.19(B)(2)(c) when imposing consecutive sentences, a trial court is required to make the statutory enumerated findings and give reasons supporting those findings at the sentencing hearing." *Id.* at 20.

{¶13} The holding in *Comer* makes it clear that R.C. 2929.14(E)(4) and 2929.19(B)(2) require the court to make the mandated findings and to state its reasons for certain of those findings on the record. However, *Comer* does not mandate a particular process that directly correlates each reason to each finding. All that is required is an articulation of reasons and findings that provides an appellate court the ability to conduct a meaningful review of the sentencing decision.

{¶14} I recognize that in *Comer* the Supreme Court stated that "a trial court must clearly align each rationale with the specific finding to support its decision to impose consecutive sentences." *Id.* at 21. Further, this court held in *Rothgeb* that the "preferred method of compliance with these requirements is to set out each finding that R.C. 2929.14(E)(4) requires the court to make, and in relation to each the particular reason or reasons for making the finding that R.C. 2929.19(B)(2)(c) contemplates." However, neither *Comer* nor

Comer nor *Rothgeb* stand for the proposition that the sentencing court must use a proscribed format or mechanical analysis to satisfy the statutory requirements.

{¶15} I am wary of an "exactness" that not only burdens the trial court with a "precision alignment" more appropriate for a mechanical device such as the wheels of a motor vehicle but one which also relegates the deprivation of human liberty to a tedious calculation and formula that is indecipherable to the average defendant.

{¶16} Nothing in the sentencing statutes requires that the reasons for a consecutive sentence be stated within the "immediate purview" of each finding. Thus, I would not interpret *Comer* quite as literally as the majority. Nor would I find the "preferred method" *Rothgeb* suggests is the only method.

{¶17} The record of sentencing herein is sufficient to conduct a meaningful review and determines that the findings are logically supported by the trial court's reasoning. The trial court did provide sufficient nexus between operative facts and the criteria found to warrant consecutive sentences. In pertinent part, the trial judge stated:

{¶18} "The Court, in reviewing the factors under 2929.12(B) and 2929.12(C) those factors which are relevant to the seriousness of the offense, finds that in fact the actions of the Defendant caused serious physical harm to the victim. Not only was there serious physical harm to the use of the

of the victim's arm and hand but in order to regain partial use of that arm and hand, some nerve damage had to be taken care of which required the removal of nerve from the foot area during that surgery and now the Defendant suffers permanent numbness to her foot as well as the damage to her arm and hand. This is a proximate result of the attack she suffered at the Defendant's hands. It appears to the Court from the records this is a serious permanent harm. I find no factors under 2929.12(C), so in balance this is, both as to the robbery and the attempted murder, a more serious offense.

{¶19} "As it to recidivism, the Court does find the Defendant has prior delinquency adjudication and criminal convictions and as indicated by the State, criminal conviction was for aggravated robbery with firearm for which he spent significant time in prison.

{¶20} "In fact, the Defendant was paroled from prison on March 13, 2002. I note that it was an aggravated robbery and an aggravated burglary juvenile court in the original adjudication placed the Defendant on probation. That probation, according to the record, ended June 8, 1994. His conviction to the aggravated robbery and aggravated burglary was October the 19th, 1994, just over four months later. He's not responded favorably to past sanctions.

{¶21} "This was a senseless attack. The State is quite correct had it not been for the intervention of another who was concerned about the well-being of a fellow human, this

human, this probably would have resulted in a murder charge. There is no presumption for a minimum sentence in this case because it is not the first time the Defendant will be sentenced to prison. However, it's obvious that a minimum sentence would demean the seriousness of this offense and would not adequately protect the public.

{¶22} "The Court does find under 2929.14(C) that as to both of these counts, the Defendant has committed the worst form of the offense and does possess the greatest likelihood of recidivism.

{¶23} "The Court further finds that consecutive sentences are necessary to protect the public and to punish this offense.

{¶24} "The Defendant is now 26 years of age. Prior to becoming an adult, he had already committed serious felony offenses for which significant prison time was imposed. Shortly after being released from prison, we have this situation where a human life was placed in tremendous danger and where significant suffering was suffered and will continue to be suffered, not only by the victim herself but the victim's family.

{¶25} "I note in the presentence report that at least one child of the victim has significant psychological difficulties in accepting what's happened and is receiving counseling to try to learn how to cope with what happened to the child's mother. Because of the likelihood of recidivism and such violent acts, consecutive sentences are necessary to

to protect the public. Because of the seriousness of the offense, it is necessary to punish the offense; and consecutive sentences under these circumstances would not be disproportionate to crimes of a similar nature to individuals under similar circumstances. Further, the Court finds, as has been placed on the record, the harm caused was great. The Defendant's criminal history requires consecutive sentences." Tr., pg. 9-16.

{¶26} In fact, the trial court further elucidated a nexus between factors and reasons at the urging of the prosecuting attorney, demonstrated in this trial exchange:

{¶27} "THE COURT: Well, I thought I had that the reason for the findings is the worst form. You talking about the worst form of the offense?

{¶28} "MR. WILSON: And I understand you gave the reasons, but there's some law coming out of the Second District that's requiring to go pretty much factor reasons - - well, as I indicated, to protect the community.

{¶29} "THE COURT: The Defendant's prior convictions of aggravated robbery and aggravated murder with firearm specification was committed while he was still a juvenile and was bound over to the adult court. He served significant prison time for that. He was released on probation or parole and shortly after parole terminated, he was again engaged in a violent criminal activity.

{¶30} "The harm was great as has been indicated more than once on the record. It was life threatening. Had it not

it not been for the victim's ability to get out of the car to fight off the attack and the intervention of the third party, the Court is quite certain the Defendant would not have stopped the attack until the victim was dead. Under such serious circumstances, the consecutive sentence and a maximum sentence is hardly disproportionate to the offense and to the situation the Defendant has placed himself in, the type of crime that he's committed and his record.

{¶31} "It's been noted that the harm was great and that the Defendant suffered serious lacerations and required surgery to not only close the lacerations but to try to repair nerve damage. The best that could be done at that time was for the nerve damage to get some capability restored to the arm and hand. Nerves had to be removed from the leg area which now results in a constant numbing to the victim's foot.

{¶32} "I believe all the facts have been linked to the factors required under the Revised Code for a consecutive maximum sentence." Tr., pg. 14-16.

{¶33} Thus, I am satisfied that the record allows a meaningful analysis. I would conclude all the facts have been sufficiently linked to the factors required by law for consecutive maximum sentences. I also note the judgment entry contains the factors and reasons as well. Accordingly, I would overrule the sole assignment of error and affirm.

.

Copies mailed to:

D. Andrew Wilson, Esq.
Eric A. Stamps, Esq.
Hon. Richard J. O'Neill