[Cite as *State v. McGlothan*, 2015-Ohio-2713.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NOS. 2014-CA-120
	:	2014-CA-121, 2014-CA-122
v.	:	
	:	T.C. CASE NOS. 14CR236
TYON McGLOTHAN	:	14CR159, 14CR358
	:	
Defendant-Appellant	:	(Criminal Appeal from
	:	Common Pleas Court)

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O P I N I O N

Rendered on the ___30th___ day of ____June_____, 2015.

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FROELICH, P.J.

{¶ 1} In 2014, after entering guilty pleas, Tyon McGlothan was convicted of several offenses which were charged in three cases in the Clark County Court of Common Pleas, as detailed below. In exchange for his pleas, additional counts and specifications in these cases were dismissed. McGlothan was sentenced to maximum,

consecutive sentences, with an aggregate term of seven years. McGlothan appeals, claiming that his sentences were contrary to law and violated his Eighth Amendment right to be free from cruel and unusual punishment. For the following reasons, the judgments of the trial court will be affirmed.

{¶ 2} In Case No. 14-CR-159, McGlothan pled guilty to receiving stolen property, a felony of the fourth degree, in exchange for which a firearm specification and two counts of having weapons under disability were dismissed. He was sentenced to 18 months for receiving stolen property.

{¶ 3} In Case No. 14-CR-236, McGlothan pled guilty to possession of heroin (greater than or equal to one gram, less than five grams), a felony of the fourth degree; McGlothan also agreed to the forfeiture of certain property. A firearm specification and counts of trafficking in heroin, trafficking in cocaine, and possession of cocaine were dismissed. McGlothan was sentenced to 18 months in prison.

{¶ 4} In Case No. 14-CR-358, McGlothan pled guilty to failure to comply, a felony of the third degree, and possession of cocaine (less than five grams), a felony of the fifth degree. Counts of possession of heroin, trafficking in heroin, and trafficking in cocaine were dismissed. McGlothan was sentenced to three years for failure to comply and to one year for possession of cocaine. The court ordered that the sentence for failure to comply run consecutively to the sentence for possession of cocaine, as required by R.C. 2921.331(D).

{¶ 5} In each case, the trial court specified that the sentences in the three cases were to run consecutively, for a total of seven years.

{¶ 6} McGlothan raises one assignment of error on appeal:

The sentence[s] of the trial court should be reversed and remanded to the trial court given that they are contrary to law and in violation of his rights under the Eighth Amendment to the United States Constitution.

{¶ 7} McGlothan contends that the trial court's maximum, consecutive sentences are not supported by the record because he is "a very young man" and, although some factors set forth in R.C. 2929.12(B) weigh in favor of a finding that his conduct was more serious than conduct normally constituting the offense, other factors exist tending to show that his conduct was less serious than conduct normally constituting the offense, R.C. 2929.12(C). He further contends that he did not commit the worst form of the offense, that his conduct did not warrant maximum, consecutive sentences, and that the imposition of such sentences violated the Eighth Amendment's prohibition on cruel and unusual punishment.

{¶ 8} After determining the sentence for a particular crime, a sentencing judge has discretion to order an offender to serve individual counts of a sentence consecutively. 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.

{¶ 9} "The trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum or more than minimum sentences." *State v. King,* 2013-Ohio-2021, 992 N.E.2d 491, ¶ 45 (2d Dist.). However, in exercising its discretion, a trial court must consider the statutory policies that apply to every felony offense, including those set out in R.C. 2929.11 and R.C. 2929.12. *State v. Leopard,* 194 Ohio App.3d 500, 2011-Ohio-3864, 957 N.E.2d 55, ¶ 11 (2d Dist.), citing *State v. Mathis,* 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶ 38.

{¶ 10} R.C. 2929.11 requires trial courts to be guided by the overriding principles of felony sentencing. Those purposes are "to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden

on state or local government resources." R.C. 2929.11(A). The court must "consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both." *Id.* R.C. 2929.11(B) further provides that "[a] sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing * * *, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."

{¶ 11} R.C. 2929.12(B) sets forth nine factors indicating that an offender's conduct is more serious than conduct normally constituting the offense; these factors include whether the physical or mental injury to the victim was exacerbated because of the physical or mental condition of the victim, serious physical, psychological, or economic harm suffered by the victim as a result of the offense, whether the offender's relationship with the victim facilitated the offense, and whether the offender committed the offense for hire or as a part of an organized criminal activity. R.C. 2929.12(C) sets forth four factors indicating that an offender's conduct is less serious than conduct normally constituting the offense, including whether the victim induced or facilitated the offense, whether the offender acted under strong provocation, whether, in committing the offense, the offender did not cause or expect to cause physical harm to any person or property, and the existence of substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense. R.C. 2929.12(D) and (E) each lists five factors that trial courts are to consider regarding the offender's likelihood of committing future crimes. Finally, R.C. 2929.12(F) requires the sentencing court to consider the

offender's military service record.

{¶ 12} "On appeals involving the imposition of consecutive sentences, R.C. 2953.08(G)(2)(a) directs the appellate court 'to review the record, including the findings underlying the sentence' and to modify or vacate the sentence 'if it clearly and convincingly finds * * * [t]hat the record does not support the sentencing court's findings under division * * * (C)(4) of section 2929.14 * * * of the Revised Code.' " *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 28. In *State v. Rodeffer,* 2013-Ohio-5759, 5 N.E.3d 1069 (2d Dist.), we held that we would no longer use an abuse of discretion standard in reviewing a felony sentence, but would apply the standard of review set forth in R.C. 2953.08(G)(2).[1]

{¶ 13} Under R.C. 2953.08(G)(2), an appellate court may increase, reduce, or modify a sentence, or it may vacate the sentence and remand for resentencing, only if it "clearly and convincingly" finds either (1) that the record does not support certain specified findings or (2) that the sentence imposed is contrary to law. *Rodeffer* stated that "[a]lthough [*State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124] no longer provides the framework for reviewing felony sentences, it does provide * * * adequate guidance for determining whether a sentence is clearly and convincingly contrary to law. * * * According to *Kalish,* a sentence is not contrary to law when the trial court imposes a sentence within the statutory range, after expressly stating that it had

[1] Since then, several opinions from this court have expressed reservations about whether that decision in *Rodeffer* is correct. *See, e.g., State v. Garcia,* 2d Dist. Greene No. 2013-CA-51, 2014-Ohio-1538, ¶ 9, fn.1; *State v. Dover,* 2d Dist. Clark No. 2013-CA-58, 2014-Ohio-2303, ¶ 23; *State v. Johnson,* 2d Dist. Clark No. 2013-CA-85, 2014-Ohio-2308, ¶ 9, fn.1; *State v. Byrd,* 2d Dist. Montgomery No. 25842, 2014-Ohio-2553, ¶ 44; *State v. Collins,* 2d Dist. Montgomery No. 25874, 2014-Ohio-2443, ¶ 21, fn. 1.

considered the purposes and principles of sentencing set forth in R.C. 2929.11, as well as the factors in R .C. 2929.12." (Citations omitted.) *Rodeffer* at ¶ 32.

{¶ 14} McGlothan acknowledges that the trial court made the findings required by statute for the imposition of consecutive sentences, but he asserts that the circumstances of the case did not warrant the imposition of maximum, consecutive sentences. Specifically, he contends that "many" of the factors indicating that his offenses were "less serious" were present, along with "some" of the more serious factors, but that, on the whole, the maximum and consecutive sentences were not warranted. McGlothan's brief does not specifically identify any of the statutory factors to which he refers, but he points out that he is "a very young man."

{¶ 15} The prosecutor's statements at the plea hearing established that the counts of receiving stolen property and possession of heroin arose from a search of McGlothan's residence pursuant to a search warrant. The police found a firearm that had been stolen from a residence in Champaign County and more than one gram of heroin. The count of failure to comply arose from a motor vehicle chase in which McGlothan fled from police vehicles at a speed in excess of 100 miles per hour, crashed the vehicle, and then "took off on foot." A probable cause affidavit, submitted by one of the arresting officers and contained in the presentence investigation, additionally stated that McGlothan had "never slowed at all for posted stop signs." When he was apprehended, he had 2.05 grams of cocaine in his possession.

{¶ 16} The presentence investigation stated that McGlothan had admitted his culpability in the offenses to which he pled guilty and that, at 24 years old, he had a significant criminal record. He had previously been convicted of burglary, trafficking in

crack cocaine and marijuana, and falsification. He also had a significant juvenile record. All of the offenses charged in the current cases were committed while other charges were pending against him for which warrants had been issued, mostly on misdemeanor traffic offenses. Moreover, the prosecutor stated, without objection, that after McGlothan's indictments in the current cases, he was indicted for involuntary manslaughter and trafficking in heroin in Champaign County; this assertion is not otherwise substantiated in the record.

{¶ 17} The trial court found that consecutive sentences were necessary to protect the public and to punish McGlothan, and that such sentences were not disproportionate to the seriousness of his conduct or the danger he poses to the public, particularly in light of his history of criminal conduct and his prior prison term. In its judgment entries, the court stated that it had considered the principles and purposes of sentencing under R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12.

{¶ 18} In light of McGlothan's criminal history, including a prior prison term, his continued criminal activity following the prior prison term, the numerous offenses charged in these cases (although some were dismissed pursuant to the plea agreement), the absence of any indication of remorse, and the danger to police officers and to the public posed by McGlothan's conduct in fleeing the police in Case No. 14 CR 358, McGlothan has not demonstrated by clear and convincing evidence that his sentence was contrary to law. And notwithstanding his relative youth, McGlothan was not new to the criminal system.

{¶ 19} With respect to McGlothan's Eighth Amendment challenge, we note that "Eighth Amendment violations are rare, and instances of cruel and unusual punishment

are limited to those punishments, which, under the circumstances, would be considered shocking to any reasonable person." (Citations omitted.) *State v. Mayberry*, 2014-Ohio-4706, 22 N.E.3d 222, ¶ 38 (2d Dist.); *State v. Harding,* 2d Dist. Montgomery No. 20801, 2006-Ohio-481, ¶ 77. Therefore, " 'as a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment.' " *State v. Hairston,* 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, ¶ 21, quoting *McDougle v. Maxwell,* 1 Ohio St.2d 68, 69, 203 N.E.2d 334 (1964). (Other citations omitted.) Because McGlothan's prison terms fall within the specific ranges of punishment set forth by the legislature for his offenses, and the trial court concluded that he should serve those sentences consecutively, we do not find that the sentence constitutes cruel and unusual punishment under the Eighth Amendment.

{¶ 20} The assignment of error is overruled.

{¶ 21} The judgment of the trial court will be affirmed.

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FAIN, J. and DONOVAN, J., concur.

Copies mailed to:

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