[Cite as *State v. Howes*, 2017-Ohio-5508.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case Nos. 16CA3545, 16CA3546 & 16CA3547
vs.	:	
COREY HOWES,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Stephen P. Hardwick, Columbus, Ohio, for appellant.

Matthew S. Schmidt, Ross County Prosecuting Attorney, and Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 6-15-17
ABELE, J.

{¶ 1} This is an appeal from three Ross County Common Pleas Court judgments of conviction and sentence after guilty pleas. Corey Howes, defendant below and appellant herein, assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE RECORD CLEARLY AND CONVINCINGLY DOES NOT SUPPORT THE TRIAL COURT'S FINDING THAT CONSECUTIVE SENTENCES ARE NOT DISPROPORTIONATE TO MR. HOWES'CONDUCT IN HIS BURGLARY AND RECEIVING-STOLEN-PROPERTY CASES. R.C. 2929.14(C)(4) AND 2953.08(G)(2)(a); T.P. 4-5 (APR. 18, 2016)."

SECOND ASSIGNMENT OF ERROR:

"TRIAL COUNSEL WAS INEFFECTIVE FOR ASKING FOR CONSECUTIVE SENTENCES WHEN THE RECORD DOES NOT SUPPORT MORE THAN CONCURRENT SENTENCES. SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; T.P. 2-3 (APR. 18, 2016)."

The Ross County Grand Jury returned an indictment that charged appellant in three separate cases that were later consolidated. The counts appear to involve four separate incidents that occurred between November 18, 2015 and December 8, 2015.

{¶ 2} In Case No. 15CR435 (16CA3545 herein), appellant was indicted on January 8, 2016 on (1) Count One: theft (R.C. 2913.02, first-degree misdemeanor) alleged to have occurred on December 7, 2015; (2) Count Two: burglary (R.C. 2911.12, third-degree felony) alleged to have occurred on December 8, 2015; (3) Count Three: breaking and entering (R.C. 2911.13, fifth-degree felony) alleged to have occurred on December 8, 2015; and (4) Count Four: burglary (R.C. 2911.12, second-degree felony) alleged to have occurred on December 9, 2015.

{¶ 3} In Case No. 16CR11 (16CA3546 herein), appellant was indicted on January 8, 2016 on one count of receiving stolen property (R.C. 2913.51, fourth-degree felony) alleged to have occurred on November 18, 2015.

{¶ 4} Finally, in Case No. 16CR046 (16CA3547 herein), appellant was indicted on February 5, 2016 on one count of burglary (R.C. 2911.12, third-degree felony) alleged to have occurred on November 28, 2015.

{¶ 5} On December 21, 2015, the trial court held a preliminary hearing in 15CR435 and announced its intention to consolidate the three cases. The court also heard testimony regarding one

of the two burglaries in 15CR435.

{¶ 6} At the March 30, 2016 change-of-plea hearing, appellant entered a negotiated plea of guilty to all counts in all three cases. Trial counsel stated his understanding that "In exchange for a plea of guilty in all three cases, I believe the state is prepared to recommend a nine year net prison sentence for everything. The court has indicated it would likely do eight and a half (sic) sentence." Both the state and the court agreed.

{¶ 7} On April 8, 2016, the trial court held one sentencing hearing for all three cases. The prosecutor requested that the court sentence appellant to serve nine years in prison for all offenses, explaining that appellant had been sentenced in 2012 for five counts of receiving stolen property, complicity to burglary, grand theft, weapons under disability, and had also been sentenced in 2010 for theft. Appellant's trial counsel noted that this was a negotiated plea, and further stated that he believed that the court intended to sentence appellant to serve eight and one-half years as a global sentence for all counts. Counsel did, however, object to reimbursement for one of the victim's missed work to appear at the preliminary hearing.

{¶ 8} In Case 15CR435, the trial court sentenced appellant to serve 30 days on count one for theft, 24 months on count two for burglary, 12 months on count three for breaking and entering, and 8 years on count four for burglary. The court also ordered $700 in restitution to Karen Henry and $725 in restitution to Sheila Kassulke. In Case 16CR011, the court sentenced appellant to serve six months for receiving stolen property. Finally, in Case 16CR046, the court sentenced appellant to serve 24 months for burglary and ordered $100 in restitution to Marina Gumm. The court further ordered that all sentences should be served concurrently, except that the six-month sentence for receiving stolen property in 16CR011 must be served consecutively to the eight-year sentence for

burglary in 15CR435, resulting a total of eight and one-half years in prison. In addition to the postrelease control notifications, the court noted: "I specifically find in this case that consecutive sentences are necessary to protect the public and punish the offender. They're not disproportionate; and furthermore I find that the harm is so great or unusual that a single term does not adequately reflect the seriousness of the conduct and the offender's criminal history shows that consecutive terms are necessary to protect the public."

I

{¶ 9} In his first assignment of error, appellant asserts that the record does not clearly and convincingly support the trial court's finding that consecutive sentences are not disproportionate to appellant's conduct in his burglary and receiving-stolen property cases. Appellant argues that consecutive sentences are disproportionate to his conduct when his conduct was no worse than the usual for the offenses.

A. STANDARD OF REVIEW

{¶ 10} R.C. 2953.08 governs appeals based on felony sentencing guidelines. In particular, R.C. 2953.08(G)(2) provides:

> The court hearing an appeal under division (A),(B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(3) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
> (b) That the sentence is otherwise contrary to law.

{¶ 11} In *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, the Supreme Court construed R.C. 2953.08(G)(2) and held that "[i]n the final analysis, we hold that R.C. 2953.08(G)(2)(a) compels appellate courts to modify or vacate sentences if they find clear and convincing evidence that the record does not support any relevant findings under 'division (B) or (D) of section 2929.13, division (B)(2)(3) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code.'" *Marcum* at ¶ 22. Further, the *Marcum* court cited *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus: "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Id.*

{¶ 12} As the Eighth District explained, "the 'clear and convincing' standard used in R.C. 2953.08(G)(2) is written in the negative. It does not say that the trial judge must have clear and convincing evidence to support its findings. Instead, it is the court of appeals that must clearly and convincingly find that the record does not support the court's findings." *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 21 (8th Dist.).

B. CONSECUTIVE SENTENCES

{¶ 13} R.C. 2929.14(C)(4) sets forth certain findings that a trial court must make prior to imposing consecutive sentences. *State v. Bever,* 4th Dist. Washington No. 13CA21, 2014-Ohio-600, ¶ 15; *State v. Black*, 4th Dist. Ross No. 12CA3327, 2013-Ohio-2105, ¶¶ 56-57, *State v. Childers*, 4th Dist. Lawrence No. 15CA6, 2015-Ohio-4881, ¶ 16. Under Ohio law, unless the trial court makes the required R.C. 2929.14(C)(4) findings, a presumption exists that sentences are to

be served concurrently. *See Childers* at ¶ 16, citing *Bever* at ¶ 15, citing *Black* at ¶ 56; R.C. 2929.41(A).

{¶ 8} 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.

{¶ 8} In beginning our review, we note that the trial court "is required to make the findings mandated by R.C. 2929.14(C)(4)at the sentencing hearing and [to] incorporate its findings into the sentencing entry, but it has no obligation to state reasons to support its findings." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. Moreover, on appeal there are two ways that a defendant can challenge consecutive sentences. *State v. Adams*, 2d Dist. Clark No. 2014-CA-13, 2015-Ohio-1160, ¶ 17. "First, the defendant can argue that consecutive sentences are *contrary to law* because the court failed to make the necessary findings required by R.C. 2929.14(C)(4)." (Emphasis sic.) *Id.*, citing R.C. 2953.08(G)(2)(b), and *Bonnell* at ¶ 29. "Second, the defendant can argue that the record does not support the findings made under R.C. 2929.14(C)(4)." *Adams*, citing R.C. 2953.08(G)(2)(a), and *State v. Moore*, 2014-Ohio-5135, 24

N.E.2d 1197 (8th Dist.).

{¶ 9} In the case at bar, appellant raises the latter argument and contends that the consecutive sentences are disproportionate to appellant's conduct in his burglary and receiving stolen property cases. Specifically, appellant contends that this was a "typical home burglary." He notes that he and another man entered a home, took some items, and left when someone approached the house. He argues that burglary is a second-degree felony regardless of whether another person is likely to be present, and here, no one other than appellant and his accomplice were present in the house. Appellant adds that the goods were quickly recovered and the restitution award of $725 indicates that the harm caused is not disproportionately high. Finally, appellant states that while it is true that appellant had prior convictions, that is only relevant to the separate factor of whether the sentence is disproportionate to the "danger the offender poses to the public." R.C. 2929.14(C)(4). Likewise, appellant argues that no evidence exists to show that the harm for receiving the stolen firearm is more than the usual for that offense.

{¶ 10} In *State v. Childers*, 4th Dist. No. 15CA6, 2015-Ohio-4881, this court reviewed consecutive sentences and concluded that no evidence existed in the record to support the trial court's R.C. 2929.14(C)(4) findings because no witnesses testified, no victim impact statements were filed, no bill of particulars was filed, no presentence investigation or report was ordered, no sentencing memorandum was prepared, and no indication existed that the trial court knew of Childers' past criminal record, his social history, or the impact his actions had on the victims. *Childers* at ¶ 19. We stated: "Notably absent from the trial court's statement is any indication that the trial court reviewed the record or any other materials prior to imposing its sentence. Likewise, the trial court's sentencing entry does not indicate that the trial court considered the record materials

when imposing its sentence." *Childers* at ¶ 20.

{¶ 11} By contrast, in the case sub judice our review indicates that the trial court stated that it had considered the victim impact statement, the record, and the statements of defendant and counsel. Further, the transcript indicates that the state highlighted the appellant's prior criminal history, including (1) a 2012 case in which appellant was incarcerated for five counts of receiving stolen property, complicity to burglary, grand theft, and having a weapon under disability; and (2) appellant's 2010 theft conviction. In *State v. Withrow*, 2016-Ohio-2884, 64 N.E.3d 553, the Second District considered a consecutive sentence case in which the defendant had a fairly substantial juvenile record, but had had no felony convictions in the ten years preceding the crimes in question. The court found that while the prior delinquency indicated potential for recidivism, a R.C. 2929.12(D) factor that indicates a likelihood to commit future crimes, the effect of that factor was diminished by the defendant's relative lack of transgressions in the ten years after he became an adult. However, despite characterizing the trial court findings as "thin," the court acknowledged that the record did not support a contrary result concerning the imposition of consecutive sentences. *Withrow* at ¶ 40. Moreover, the court emphasized that the defendant had engaged in a course of criminal conduct over a three-day period of time. "The fact that the crime was not a one-time incident, but was an ongoing criminal endeavor against multiple victims, indicates that he has the ability to continue down a criminal path, thereby exhibiting a sustained danger to members of the public." *Withrow* at ¶ 42.

{¶ 12} Much like the defendant in *Withrow*, here the appellant engaged in a course of criminal conduct on November 18, November 28, December 7, and December 8, 2015, that involved multiple victims. Furthermore, appellant has a relatively recent criminal history of committing

similar crimes.

{¶ 13} In examining whether the consecutive sentence is disproportionate to the seriousness of appellant's conduct, and to the danger that appellant may pose to the public, the sentencing transcript reveals that the trial court engaged in the R.C. 2929.14(C)(4) statutory analysis. The court also recited the statutory language in each of the three sentencing entries. Further, the trial court had the benefit of the transcript of the December 21, 2015 preliminary hearing. At the preliminary hearing, the court heard the testimony of the bus driver who had transported one of the victims' two children to the residence at the time appellant was inside. The court also heard the testimony of the twelve-year-old daughter of one of the victims, who testified that she and her brother are dropped off each day around that same time and are typically home alone for about thirty minutes until their father gets home. In addition, one of the adult victims and two investigating officers testified.

{¶ 14} In its sentencing entry, the trial court stated that it had considered the principles and purposes of sentencing under R.C. 2929.11 and had balanced the seriousness and recidivism factors under R.C. 2929.12. The court's sentences fell within the statutory range and the court stated that it had considered appellant's prior criminal history. The state notes that appellant faced sixteen and one-half years in prison, but that the state's recommendation in the case at bar was a nine year sentence. Also, trial counsel sought an eight and one-half year sentence as part of a negotiated plea. Considering all of the charges in these cases, combining three indictments with at least four victims, and considering appellant's criminal record, we cannot say that the trial court erred by ordering consecutive sentence. As noted above, our review in sentencing is deferential. In light of the deference we must give to the trial court, we cannot clearly and convincingly find that the record does not support the trial court's findings.

{¶ 15} Accordingly, we hereby overrule appellant's first assignment of error.

II

{¶ 16} In his second assignment of error, appellant asserts that trial counsel was ineffective for accepting consecutive sentences when the record does not support more than concurrent sentences. Appellant argues that trial counsel had nothing to lose by asking for concurrent sentences because there was no jointly recommended sentence, further arguing that if counsel had asked for concurrent sentences, a reasonable probability exists that either the trial court, or this court, would have required the sentences to be served concurrently.

{¶ 17} *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, sets forth the standard for judging ineffective-assistance claims. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id*. at 687-688, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. Further, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. *See also State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus.

{¶ 18} As the Supreme Court of Ohio instructed in *State v. Sanders*, 94 Ohio St.3d 150, 2002-Ohio-350, 761 N.E.2d 18, "*Strickland* charges us to '[apply] a heavy measure of deference to counsel's judgments,' 466 U.S. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d at 695, and to 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' *id*. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. * * * [W]e note that courts must 'judge the

reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.' *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed.2d at 695." *Sanders* at ¶ 3-5.

{¶ 19} Reversal of a conviction for ineffective assistance of counsel requires that the defendant show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 205. To establish prejudice, an appellant must show a reasonable probability exists that, but for the alleged errors, the result of the proceeding would have been different. *State v. Conway* (2006), 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 143, 538 N.E.2d 373.

{¶ 20} In the case at bar, appellant faced a maximum of sixteen and one-half years in prison. The state requested a nine-year sentence. The trial court notified the parties of its intention to sentence appellant to eight and one-half years in prison. The trial court ordered that the majority of the sentence be served concurrently to each other. Certainly, trial counsel's decision not to object to the negotiated sentence could have been a strategic decision. As noted above, appellant's sentence is within the statutory range, and the consecutive sentences were within the parameters of R.C. 2929.14(C)(4).

{¶ 21} After our review, appellant has not persuaded this court that his counsel was ineffective, nor has he demonstrated how he was prejudiced and would have received a lesser sentence had counsel requested a lesser sentence. Thus, we cannot conclude that trial counsel's representation fell below an objective standard of reasonableness, and nor can we find a reasonable

probability that, but for counsel's errors, the result of the proceeding would have been different.

{¶ 22} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that the appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty-day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Supreme Court of Ohio in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, J.: Concurs in Judgment & Opinion
McFarland, J.: Concurs in Judgment Only

For the Court

BY: _____

Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.