

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

: JUDGES:

Plaintiff-Appellee

: Hon. William B. Hoffman, P.J.
: Hon. John W. Wise, J.
: Hon. Patricia A. Delaney, J.

-VS-

: Case No. 2014CA00086

AGATHA MARTIN-WILLIAMS

Defendant-Appellant

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas, Case No. 2012 CR
0164

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

March 2, 2015

APPEARANCES:

For Plaintiff-Appellee:

For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant Agatha Martin Williams appeals the April 21, 2014 sentencing entry of the Stark County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

{¶2} Defendant-Appellant Agatha Martin Williams was admitted to the practice of law in Ohio in 1991. She practiced law for approximately twenty years.

{¶3} On February 10, 2012, Williams entered a plea of guilty to four counts of grand theft, one count of theft, and one count of forgery. The trial court sentenced Williams to five years of community control, one year of which was to be intensive supervision probation. Williams was fined \$27,500.00 and ordered to pay restitution to each of her clients for the amounts stolen. The trial court informed Williams at sentencing that a violation of her community control sanction would result in a maximum consecutive prison sentence imposed on each offense, for a total prison term of 102 months.

{¶4} On September 27, 2010, the Ohio Supreme Court Board of Commissioners on Grievances and Discipline held proceedings to determine whether Williams should be permanently disbarred from the practice of law. Counsel for Relator called Williams on cross examination, inquiring as to when Williams had last left the State of Ohio. Williams responded that she had gone to Pittsburgh, Pennsylvania to gamble approximately one week prior to the hearing. Her conduct in leaving the state to gamble violated the terms and conditions of her probation.

{¶5} Based on the testimony before the Board of Commissioners on Grievances and Discipline, the State filed a motion to revoke her probation. Multiple

hearings were held on the motion to revoke. At a hearing on October 4, 2012, the trial court granted the motion to revoke probation. The trial court then sentenced Williams to 18 months in prison on each of the four counts of grand theft, 18 months in prison for the one count of forgery, and 12 months in prison for the one count of theft. Williams was ordered to serve her sentences consecutively for a total prison term of 102 months. When the trial court imposed consecutive sentences, however, the trial court failed to make the necessary findings pursuant to R.C. 2929.14(C)(4). The sentencing entry was filed on October 15, 2012.

{¶6} Williams filed an appeal of the October 15, 2012 sentencing entry. In her appeal, she raised as an assignment of error that the trial court erred when it sentenced Williams to consecutive terms of imprisonment without first making the required findings under R.C. 2929.14(C)(4). In our decision in *State v. Williams*, 5th Dist. Stark No. 2013CA00189, 2013-Ohio-3448, we agreed the trial court erred when it failed to make the necessary findings prior to imposing consecutive sentences. In so finding, we stated, "[a]ppellant's first assignment of error is sustained and Appellant's sentence is reversed, and the matter is remanded to the trial court for the limited purpose of resentencing." *Id.* at ¶ 33.

{¶7} Williams appealed our decision as to an assignment of error unrelated to the within appeal. The Ohio Supreme Court declined to accept the appeal for review. See *State v. Williams*, 137 Ohio St.3d 1442, 2013-Ohio-5678, 999 N.E.2d 696. The U.S. Supreme Court denied a petition of writ of certiorari in *State v. Williams*, -- U.S. --, 134 S.Ct. 2294, 189 L.Ed.2d 180 (2014).

{¶8} The case returned to the trial court on April 16, 2014 for a resentencing hearing. At the time of the resentencing hearing, Williams had spent approximately 20 months in prison.

{¶9} Williams filed a Motion to Waive Fines and Costs prior to the resentencing hearing. At the hearing, the trial court denied the motion.

{¶10} The State and Williams disputed the breadth of the resentencing hearing pursuant to this court's remand in *State v. Williams*. The State argued the trial court could only consider the evidence presented at the October 4, 2012 sentencing hearing. Williams argued the trial court could consider evidence that occurred after the October 4, 2012 sentencing hearing. The trial court stated that our decision in *State v. Williams* ordered the case remanded to the trial court for the limited purpose of resentencing pursuant to R.C. 2929.14(C)(4). The trial court permitted Williams to submit evidence of events that occurred after October 4, 2012, over the State's objection. Williams submitted her Institution Summary Report and Inmate Summary from the Department of Rehabilitation and Correction as exhibits. One of the victims involved in Count One of the Bill of Information testified on Williams's behalf. Williams made a statement to the court.

{¶11} At the conclusion of the testimony, the trial court entered its sentence. The trial court first discussed the R.C. 2929.12(B) factors of felony sentencing. The trial court next reviewed its findings under R.C. 2929.14(C)(4). The trial court imposed the maximum sentence on each count to be served consecutively, for a prison term of 102 months. Williams was given credit for jail time served. The trial court's decision was journalized on April 21, 2014.

{¶12} It is from this decision Williams now appeals.

ASSIGNMENTS OF ERROR

{¶13} Williams raises three Assignments of Errors:

{¶14} "I. THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO CONSECUTIVE PRISON TERMS FOR A PROBATION VIOLATION.

{¶15} "II. THE TRIAL COURT LACKED THE AUTHORITY TO RE-SENTENCE THE APPELLANT ON COUNT ONE OF THE INDICTMENT BECAUSE THAT SENTENCE HAS BEEN SERVED PRIOR TO THE RE-SENTENCING HEARING.

{¶16} "III. THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING APPELLANT TO PAY A FINE IN EXCESS OF \$27,000.00, AFTER REFUSING TO CONSIDER HER FINANCIAL ABILITY TO PAY THE FINE."

ANALYSIS

I.

{¶17} Williams argues in the first Assignment of Error that the trial court erred when it sentenced her to consecutive prison terms. We disagree.

Standard of Review

{¶18} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court established a two-step procedure for reviewing a felony sentence. The first step is to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶ 4. If the first step is satisfied, the second step requires the trial court's decision be reviewed under an abuse of discretion standard. *Id.*

{¶19} This district relies upon *Kalish's* two-step standard of review to review the imposition of consecutive sentences. *State v. Bailey*, 5th Dist. Ashland No. 14-COA-008, 2014-Ohio-5129, ¶ 19. This approach has been followed by some appellate districts and rejected by others. *Id.* The appellate courts that reject the *Kalish* two-step standard of review find only R.C. 2953.08(G)(2) is applicable and the abuse of discretion standard of review is no longer allowed. *Id.* R.C. 2953.08(G)(2) provides two grounds for an appellate court to overturn the imposition of consecutive sentences: (1) the sentence is "otherwise contrary to law"; or (2) the appellate court, upon its review, clearly and convincingly finds that "the record does not support the sentencing court's findings" under R.C. 2929.14(C)(4).

{¶20} At the time of the authoring of this opinion, the Ohio Supreme Court has accepted for review the issue of whether: "the test outlined by the [c]ourt in *State v. Kalish* appl[ies] in reviewing felony sentences after the passage of R.C. 2953.08(G)?" See 1/28/2015 *Case Announcements*, 2015-Ohio-239.

{¶21} The presumption in Ohio is that sentencing is to run concurrent, unless the trial court makes the required findings for imposing consecutive sentences set forth in R.C. 2929.14(C)(4). See R.C. 2929.41(A).

{¶22} R.C. 2929.14(C) states:

(4) 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 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) The harm caused by the multiple offenses was so great or unusual that no single prison terms for any of the offenses committed as part of a single course 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.

{¶23} 2011 Am.Sub.H.B. 86, which became effective on September 30, 2011, revived the language in former R.C. 2929.14(E) and moved it to R.C. 2929.14(C)(4). The revisions require the trial court to make specific findings when imposing consecutive sentences.

{¶24} In *State v. Bonnell*, the Ohio Supreme Court held that a trial court must make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but the trial court has no obligation to state reasons to support its findings. *State v. Bailey*, 2014-Ohio-5129, ¶ 24 citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. The Court further explained, "a word-for-word recitation of the language of the statute is not

required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Id.* at ¶ 24 citing *Bonnell* at ¶ 29.

The Record Supports Consecutive Sentences

{¶25} Williams argues the evidence in the record does not support the trial court's decision to impose consecutive sentences pursuant to R.C. 2929.14(C)(4). At the beginning of the April 16, 2014 resentencing hearing, the trial court noted for the record that the matter was remanded to the trial court for the limited purpose of resentencing pursuant to R.C. 2929.14(C)(4). (Tr., p. 32-33). The trial court discussed the application of the subsections of R.C. 2929.14(C)(4) with the parties and determined that it would examine R.C. 2929.14(C)(4)(b) to resolve whether to impose consecutive sentences. (Tr., p. 37). The statute analyzed by the trial court at the April 16, 2014 resentencing hearing reads:

(4) 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:

* * *

(b) The harm caused by the multiple offenses was so great or unusual that no single prison terms for any of the offenses committed as part of a

single course of conduct adequately reflects the seriousness of the offender's conduct.

The trial court also requested the parties address the R.C. 2929.12 factors of felony sentencing. In making its resentencing determination, the trial court held (over the State's objection) that it would consider evidence that occurred after the original October 4, 2012 sentencing hearing. (Tr., p. 38).

{¶26} At the conclusion of the resentencing hearing, the trial court discussed R.C. 2929.14(C)(4) and its findings under the statute to impose consecutive sentences:

So in going through my responsibilities in this matter, I am looking at Ohio Revised Section 2929.14 subsection 4. * * * I am finding that because of the findings that I just stated in regard to 2929.12(B), it is necessary to protect the public from future crime. She did this with six different individuals: July 2007, August 24, 2009 through February 28, 2011; August 24, 2009. Third count February 28, 2011. Fourth count March 19, 2010 to February 28, 2011. Count 5 March 19, 2010; February 28, 2011. And then 6, May 28, 2010; September 28, 2010.

Or to punish the offender because of the position that she held, the vulnerability of the victims. The fact that the victims came to her in their time of need and the other matters I discussed in regard to the oath which she took when she became an attorney, I am finding that that requires me to impose consecutive sentences.

And under the statute I have to find that consecutive sentences are not disproportionate to the seriousness of the offender's conduct.

Consecutive sentences – in my opinion when a person has taken from clients who came to her in their time of need, \$266,000, I don't find that consecutive sentences are disproportionate to that seriousness for each one of those victims.

* * *

And the danger the offender poses to the public, goes back to taking advantage of people when they are the most vulnerable. They come to an attorney when their life is crumbling around them, whether it's a child who's had an accident, as Mr. Jackson talked about; they go to an attorney. Help me, I need help. So I find that also qualifies.

(Tr., p. 98-100).

{¶27} The trial court went on to analyze the consecutive sentencing factors pursuant to R.C. 2929.14(C)(4)(b). The trial court determined the harm caused by her multiple offenses was so great that no single prison term adequately reflected the seriousness of her conduct. The trial court discussed the five victims of Williams' conduct; he stated, "[w]hich one of these people am I to say what happened to you doesn't matter, it doesn't need to be sentenced?" (Tr., p. 101).

{¶28} The trial court has discretion to impose any sentence within the statutory range. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1. The sentence imposed by the trial court was within the range permitted by law for the fourth and fifth-degree felonies upon which Williams was convicted. Williams does not argue the trial court erred in sentencing her to the maximum sentence for each count.

{¶29} In this appeal, Williams first argues the record does not support the trial court's findings that consecutive sentences were necessary to protect the public from future crime or to punish the offender. Williams next argues the evidence does not support the trial court's determination that that harm caused was "great" or "unusual" to warrant the need for consecutive sentences. Williams contends that it was fortunate that she was an attorney because her victims were made financially whole through the Client Security Fund and her bonding company. Williams also has no prior criminal record and is permanently disbarred from the practice of law.

{¶30} The record in this case supports the trial court's findings. As the trial court discussed when making its findings at the resentencing hearing, the position Williams held as an attorney was a position of trust. Individuals sought her services to assist them in their time of need. Williams abused their trust and victimized multiple people to maintain her gambling habit. While on community control and aware that a violation of her community control would result in the imposition of a 102 month prison sentence, Williams willfully violated her community control by leaving the state to gamble. The trial court acknowledged mitigation factors, such as the fact that her victims were reimbursed by the Client Security Fund. The trial court noted, however, that the Client Security Fund is funded by money from Ohio attorneys. (Tr., p. 94).

{¶31} In this case, the trial court noted factors it considered at sentencing, and specifically stated that it considered the purposes and principles of sentencing under R.C. 2929.11, as well as the sentencing factors in R.C. 2929.12. The transcript of the resentencing hearing and judgment entry clearly indicate the trial court engaged in the appropriate analysis and made the required findings under R.C. 2929.14(C)(4) pursuant

to our limited remand. Rather than establishing error, the record supports the trial court's findings for imposing consecutive sentences.

{¶32} The first Assignment of Error is overruled.

II.

{¶33} Williams argues in her second Assignment of Error the trial court could not resentence Williams on Count One of the indictment because she served that sentence at the time of the resentencing. We disagree.

{¶34} The trial court sentenced Williams to serve 18 months in prison on Count One of forgery, a felony of the fourth degree. Williams was conveyed to prison on September 18, 2012. At the time of the resentencing hearing on April 16, 2014, Williams had served approximately 20 months in prison.

{¶35} Williams argues this court should apply the rationale of *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382. In *Holdcroft*, the trial court held a trial court does not have authority to resentence a defendant for purpose of adding postrelease control as sanction for a particular offense after the defendant has already served the prison term for that offense. Williams argues that because Williams already served a portion of her prison term, the trial court could not impose a consecutive sentence on the counts already served. Williams states that the 18 months imposed for Count One by the trial court must be concurrent with the remaining counts.

{¶36} We decline to adopt the rationale of *Holdcroft* in this case. *Holdcroft* involves the imposition of postrelease control. The present case involves a resentencing for the limited purpose of making the proper findings under R.C. 2929.14(C)(4). At the

resentencing hearing, the trial court ordered that Williams was eligible for earned days of credit for time already served. (Tr., p. 105).

{¶37} The second Assignment of Error is overruled.

III.

{¶38} Williams contends in her third Assignment of Error that the trial court abused its discretion when it ordered Williams to pay a fine of \$27,500.00. We disagree.

{¶39} Williams was originally sentenced on October 15, 2012. The original sentencing entry ordered Williams to pay a \$27,500.00 fine. Williams appealed the October 15, 2012 sentencing entry, but did not raise the imposition of the \$27,500.00 fine as error.

{¶40} Before the resentencing hearing on April 16, 2014, Williams filed a motion to waive fines and costs. Williams argued that as of the April 16, 2014 resentencing hearing, she was indigent. The trial court discussed the motion at the resentencing hearing. It found that it had informed Williams at her plea hearing and the original sentencing hearing that the trial court was going to impose fines and costs. Williams did not object at that time to the imposition of fines and costs. (Tr., p. 18). The trial court also noted that Williams did not appeal the appropriateness of requiring fines and costs. (Tr., p. 18). The trial court found Williams waived the issue and denied the motion to waive fines and costs. (Tr., p. 18).

{¶41} Williams argues that pursuant to R.C. 2929.19(B)(5), the trial court must consider the offender's present and future ability to pay the fine before imposing the financial sanction. Williams contends she preserved her issue of her ability to pay the fine by filing a motion to waive the fine prior to her de novo resentencing hearing.

{¶42} Williams bases her argument as to the fine and costs on the contention that the April 16, 2014 resentencing hearing was a de novo hearing. In *State v. Williams*, 5th Dist. Stark No. 2013CA00189, 2013-Ohio-3448, we found the trial court failed to make the requisite findings to impose consecutive sentences. We held, "[a]ppellant's first assignment of error is sustained and Appellant's sentence is reversed, and the matter is remanded to the trial court for the limited purpose of resentencing." *Id.* at ¶ 33. In *State v. Nia*, the Eighth District Court of Appeals resolved that upon a limited remand for the purpose of determining whether consecutive sentences should be imposed, the trial court is limited on remand to only the question raised regarding the required findings pursuant to R.C. 2929.14(C)(4) to justify consecutive sentences. *State v. Nia*, 2014-Ohio-2527, 15 N.E.3d 892, ¶ 22 (8th Dist.), appeal not allowed, 140 Ohio St.3d 1522, 2014-Ohio-5251, 20 N.E.3d 730, ¶ 22 (2014). The April 16, 2014 resentencing hearing was not a de novo resentencing hearing. The only matters before the trial court on April 16, 2014 were issues regarding the required findings pursuant to R.C. 2929.14(C)(4).

{¶43} Next, we find the trial court was correct to find Williams waived the issue of the imposition of the fine and costs. The doctrine of res judicata establishes that "a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, 387, ¶ 30 citing *State v. Perry*, 10 Ohio St.2d 175,

226 N.E.2d 104 (1967), at paragraph nine of the syllabus. The resentencing hearing was not a de novo hearing and res judicata prevented the trial court from entertaining the motion to waive fines and costs.

{¶44} The third Assignment of Error of Williams is overruled.

CONCLUSION

{¶45} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.,

Hoffman, P.J. and

Wise, J., concur.