[Cite as *State v. Steinmiller*, 2015-Ohio-3080.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-13-091

Appellee — Trial Court No. 2012-CR-0355

v.

Brian E. Steinmiller — **DECISION AND JUDGMENT**

Appellant — Decided: July 31, 2015

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Gwen Howe-Gebers and David T. Harold, Assistant Prosecuting Attorneys, for appellee.

Alan S. Konop, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a November 22, 2013 sentencing judgment of the Wood County Court of Common Pleas, which sentenced appellant to an 11-year term of

incarceration for his conviction of one count of involuntary manslaughter, in violation of R.C. 2903.04(A)(C), and two 36-month terms of incarceration for his convictions of two counts of endangering children, in violation of R.C. 2919.22(A)(E)(2)(C). The trial court ordered the 11-year term and one of the 36-month terms to be served consecutively to each other, with the remaining 36-month term to be served concurrently. For the reasons set forth below, this court affirms, in part, and reverses and remands, in part, the sentencing judgment of the trial court.

{¶ 2} Appellant, Brian Steinmiller, sets forth the following two assignments of error:

> I. The trial court erred in sentencing appellant to serve maximum consecutive sentences, as the appellant's sentence is clearly and convincingly contrary to law.
>
> A. The trial court's imposition of maximum sentences is clearly and convincingly contrary to law.
>
> B. The trial court imposed a sentence contrary to law when it ordered consecutive sentences without making the required statutory findings of R.C. 2929.14(C)(4).
>
> II. The trial court committed plain error by failing to merge allied offenses of similar import pursuant to State v. Johnson.

{¶ 3} The following undisputed facts are relevant to the issues raised on appeal. On May 5, 2012, police and emergency medical personnel were called to appellant's

home due to his four-month old child being unresponsive. CPR and other revival techniques were unsuccessful. It appeared to the emergency respondent that the child was suffocating.

{¶ 4} The child was pronounced dead at the hospital. Hospital personnel observed various injuries to the child's scalp and head area. They further observed burns on the child's hands and feet. The coroner determined that the infant had sustained 23 bone fractures during the course of his four-month life. The victim sustained 15 broken ribs, a spinal fracture, and a broken arm. Ultimately, these multiple, untreated injuries were fatal to the infant. The coroner ruled the cause of death to be, "abusive head trauma." Appellant resided with the victim's mother and was often the caregiver for the child. Appellant's wife disclosed to investigators that she thought appellant was repeatedly injuring the baby when she was not home, that appellant threatened her to not divulge anything against him to investigators, and that appellant had apologized to her and never meant for it to happen on the day the baby died. Appellant initially denied culpability, but ultimately conceded to repeatedly hurting his child.

{¶ 5} On July 11, 2012, appellant was indicted on one count of murder, in violation of R.C. 2903.02(B)(D) and 2929.02(A); one count of involuntary manslaughter, in violation of R.C. 2903.04(A)(C); and four counts of endangering children, two in violation of R.C. 2919.22(B)(1)(E)(2)(D), and two in violation of R.C. 2919.22(A)(E)(2)(C). Appellant entered not guilty pleas on all charges.

{¶ 6} On September 18, 2013, pursuant to a negotiated plea agreement, appellant entered a plea of guilty to one count of involuntary manslaughter, and two counts of endangering children. The remaining charges against appellant were dismissed. A presentence investigation report was ordered.

{¶ 7} On November 22, 2013, appellant was sentenced. At sentencing, the court emphasized the presentence investigation report and the aggravating sentencing factors revealed in the report that led the court to conclude that a maximum sentence was appropriate. The trial court noted, "[at] the time counsel presented to me this plea agreement, I was not aware of everything. I was not aware of the 23 bone fractures and the cigarette burns. This is atrocious. This is an atrocious crime. This child was basically tortured at [a] young age." The trial court proceeded to impose a maximum sentence. It did not conduct R.C. 2941.25 merger analysis. This appeal ensued.

{¶ 8} In the first assignment of error, appellant claims the trial court erred in sentencing him to the maximum sentence and in sentencing him to serve consecutive sentences without making the R.C. 2929.14(C)(4) required statutory findings. We will first evaluate whether the maximum component of the sentence was proper.

{¶ 9} R.C. 2929.11 (A) states in relevant part:

> A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing 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.

{¶ 10} In support of his contention that a maximum sentence was not proper, appellant relies upon *State v. Wilson*, Ohio 2d Dist. No. 24978, 2012-Ohio-4756. Appellant incorrectly asserts that, "[I]n order for a trial court to make the necessary determination, the trial court must explain how a maximum sentence meets those requirements without causing unnecessary expense."

{¶ 11} We have reviewed *Wilson* and find that it does not support the notion that the trial court must explicitly discuss why the imposition of a maximum sentence does not cause undue expense. On the contrary, R.C. 2929.11(A) encompasses no requirement that the trial court explicitly state or utilize talismanic language that a maximum sentence does not constitute an undue expense.

{¶ 12} Conversely, *Wilson* states "[W]here the interests of public protection and punishment are well served by a prison sentence, the claim is difficult to make that the prison sentence imposes an unnecessary burden on government resources." *Wilson* at

{¶ 13} ¶ 6. *Wilson* further elaborates that a, "sentencing court satisfies its obligations under R.C. 2929.11 and R.C. 2929.12 when it considers the general guidance factors set forth in those sections. * * * The court is not required to make specific findings or to use the exact wording of the statute."

{¶ 14} This court has carefully reviewed the sentencing transcript pertaining to maximum sentencing. We do not concur with appellant's assertion that the maximum sentence was contrary to law. That portion of the argument is found not well-taken.

{¶ 15} Next, appellant argues that the trial court erred when it sentenced appellant to serve a consecutive sentence without making the required statutory findings set forth in R.C. 2929.14(C)(4).

{¶ 16} In order to impose consecutive sentencing a trial court must make three findings under R.C. 2929.14 (C)(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 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.

{¶ 17} R.C. 2929.14 (C)(4).

{¶ 18} Appellee concedes, "The State recognizes that a remand in this matter should be ordered; so that, there is no question that the trial court did not vary in the least from the strict requirements of R.C. 2929.14(C)(4)."

{¶ 19} Wherefore, we affirm the sentence as to the maximum component, but reverse and remand for purposes of the trial court fully addressing the consecutive component of sentencing in accordance with the mandates of R.C. 2929.14(C). According, we find the appellant's first assignment of error not well-taken, in part, and well taken, in part.

{¶ 20} In the second assignment of error, appellant contends that the trial court committed plain error by failing to merge allied offenses of similar import.

{¶ 21} In support, appellant claims that the involuntary manslaughter and the child endangering offenses are allied and must be merged. Appellant contends that the child endangerment offense serves as a predicate offense for appellant's involuntary

manslaughter conviction. Appellant further maintains that all of the offenses should have been merged pursuant to R.C. 2941.25 analysis.

{¶ 22} R.C. 2941.25 requires the trial court to determine whether offenses merge by evaluating the following guidelines before sentencing on multiple counts:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 23} R.C. 2941.25.

{¶ 24} To determine whether offenses charged are subject to merger, the court must first determine "whether it is possible to commit one offense and commit the other with the same conduct * * *." *State v. Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 48. If multiple offenses can be committed by the same conduct, the next step is to determine whether the offenses were committed by the same conduct. *Id.* at ¶ 49. If the answer to both phases of the inquiry is yes, the offenses will be merged. *Id*. at ¶ 50. The trial court did not conduct the required merger analysis.

{¶ 25} Although appellee partially concedes the veracity of the second assignment of error, it disputes appellant's attempt to merge both of the child endangering offenses. The appellee notes that the actions and injuries that occurred between February 1, 2012 and May 4, 2012, constitutes a separate act and properly invokes a separate child endangerment offense.

{¶ 26} This court finds that the appropriate course of action is to remand specifically for a determination of what, if any, of the charges that appellant actually plead guilty to are proper for R.C. 2941.25 merger. We do not concur with appellant that all charges of the indictment should be deemed to have merged at sentencing, but we nevertheless find the second assignment well-taken with respect to the need for remand for merger consideration of the plea agreement convictions.

{¶ 27} On consideration whereof, the judgement of the Wood County Court of Common Pleas is hereby affirmed in part, as to the maximum sentence, and reversed and remanded, in part, to the trial court for full consecutive sentencing and merger consideration. Appellant and appellee are ordered to split costs of this appeal pursuant to App.R.24.

Judgment affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____

JUDGE

Thomas J. Osowik, J. _____

JUDGE

James D. Jensen, J. _____
CONCUR.

JUDGE