[Cite as *State v. Stillabower*, 2015-Ohio-2001.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 14 BE 24
V.	)	
	)	OPINION
RALPH O'NEAL STILLABOWER,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Belmont County, Ohio Case No. 13CR189
JUDGMENT:	Affirmed. Remanded.
APPEARANCES: For Plaintiff-Appellee	Attorney Scott A. Lloyd Assistant Prosecuting Attorney 147-A West Main Street St. Clairsville, Ohio 43950
For Defendant-Appellant	Attorney Brent A Clyburn 3521 Fairmont Pike Road Suite B Wheeling, WV 26003

JUDGES:

Hon. Gene Donofrio
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: May 21, 2015

[Cite as *State v. Stillabower*, 2015-Ohio-2001.]
DONOFRIO, P.J.

{¶1} Defendant-appellant, Ralph O'Neal Stillabower, appeals from a Belmont County Common Pleas Court judgment sentencing him to 11 years in prison following his guilty plea to one count of sexual battery and two counts of gross sexual imposition.

{¶2} On September 3, 2013, a Belmont County Grand Jury indicted appellant on two counts of rape of a person under 13 years of age, first-degree felonies in violation of R.C. 2907.02(A)(1)(b), and one count of sexual battery, a second-degree felony in violation of R.C. 2907.03(A)(5). Appellant initially entered a not guilty plea to the charges.

{¶3} Appellant subsequently entered into a Crim.R. 11 agreement with plaintiff-appellee, the State of Ohio. Pursuant to the terms of the plea agreement, appellant pleaded guilty to the amended charges of one count of sexual battery, a second-degree felony in violation of R.C. 2907.03(A)(5), and two counts of gross sexual imposition, fourth-degree felonies in violation of R.C. 2907.05(A)(1). The trial court accepted appellant's guilty plea and set the matter for sentencing.

{¶4} The trial court subsequently held a sentencing hearing. It sentenced appellant to maximum sentences of eight years on the sexual battery count and 18 months on each of the two gross sexual imposition counts. It ordered appellant to serve the sentences consecutively for a total of 11 years in prison. The court also classified appellant as a Tier III sex offender.

{¶5} Appellant filed a timely notice of appeal on May 23, 2014.

{¶6} Appellant raises a single assignment of error that states:

> THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT-APPELLANT, RALPH O'NEAL STILLABOWER, TO A MAXIMUM PRISON TERMS OF ELEVEN (11) YEARS FOR HIS CONVICTIONS FOR ONE (1) COUNT OF "SEXUAL BATTERY," A FELONY OF THE SECOND DEGREE; AND TWO (2) COUNTS OF "GROSS SEXUAL IMPOSITION," FELONIES OF THE FOURTH DEGREE.

{¶7} Appellant's sole assignment of error takes issue with his sentence. Appellant argues the trial court failed to consider R.C. 2929.12(D)(E) and (F). He asserts the trial court should have focused on his lack of criminal and juvenile history, the fact that he led a law-abiding life for a significant number of years, the fact that he was not a substance abuser, and the fact that the crime was committed under circumstances not likely to recur.

{¶8} This court is currently split as to the standard of review to apply in felony sentencing cases. See *State v. Hill*, 7th Dist. No. 13 MA 1, 2014-Ohio-919 (Vukovich, J., Donofrio, J., majority with DeGenaro, J., concurring in judgment only with concurring in judgment only opinion); *State v. Wellington*, 7th Dist. No. 14 MA 115, 2015-Ohio-1359 (Robb, J., DeGenaro, J., majority with Donofrio, J. concurring in judgment only with concurring in judgment only opinion).

{¶9} One approach, as applied in *Hill*, supra, is to apply the test set out in the plurality opinion in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶26. Under the *Kalish* test, we must first examine the sentence to determine if it is "clearly and convincingly contrary to law." *Id*. (O'Conner, J., plurality opinion). In examining "all applicable rules and statutes," the sentencing court must consider R.C. 2929.11 and R.C. 2929.12. *Id*. at ¶¶13-14 (O'Conner, J., plurality opinion). If the sentence is clearly and convincingly not contrary to law, the court's discretion in selecting a sentence within the permissible statutory range is subject to review for abuse of discretion. *Id*. at ¶17 (O'Conner, J., plurality opinion). Thus, we also apply an abuse of discretion standard to determine whether the sentence satisfies R.C. 2929.11 and R.C. 2929.12. *Id*. at ¶17 (O'Connor, J., plurality opinion).

{¶10} The other approach, as applied in *Wellington*, supra, is to strictly follow R.C. 2953.08(G), which provides that appellate courts are only to review felony sentences to determine if they are contrary to law. R.C. 2953.08(G) does not employ an abuse of discretion component.

{¶11} The issue of which felony sentencing standard of review to apply is currently pending before the Ohio Supreme Court. The Court has accepted the

certified question: "[D]oes the test outlined by the [c]ourt in *State v. Kalish* apply in reviewing felony sentences after the passage of R.C. 2953.08(G)?" *State v. Marcum*, 141 Ohio St.3d 1453, 2015-Ohio-239, 23 N.E.3d 1453.

{¶12} As will be seen in this case, regardless of which test we apply here, appellant's sentence must be upheld.

{¶13} Appellant was convicted of a second-degree felony and two fourth-degree felonies. The possible prison sentences for a second-degree felony are two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2). The possible prison sentences for a fourth-degree felony are six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months. R.C. 2929.14(A)(4).

{¶14} The trial court sentenced appellant to eight years for the second-degree felony and 18 months for each of the fourth-degree felonies. These prison terms were within the statutory ranges.

{¶15} The trial court did sentence appellant to maximum sentences. But although the General Assembly has reenacted the judicial fact-finding requirement for consecutive sentences, it has not revived the requirement for maximum sentences. *State v. Riley*, 7th Dist. No. 13 MA 180, 2015-Ohio-94, ¶34. Therefore, the trial court was not required to make any special findings before sentencing appellant to maximum sentences.

{¶16} In sentencing a felony offender, the court must consider the overriding principles and purposes set out in R.C. 2929 .11, which are to protect the public from future crime by the offender and others and to punish the offender. The trial court shall also consider various seriousness and recidivism factors as set out in R.C. 2929.12.

{¶17} Specifically, the court must consider these factors that indicate the offender's conduct is more serious than conduct normally constituting the offense:

> (1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the

physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

R.C. 2929.12(B).

{¶18} The court must also consider these factors that indicate the offender's conduct is less serious than conduct normally constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong

provocation.

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

R.C. 2929.12(C).

{¶19} Next, the court is to consider these factors, which indicate the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, * * *, or under post-release control * * * or had been unfavorably terminated from post-release control for a prior offense * * *.

(2) The offender previously was adjudicated a delinquent child * * * or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child * * * or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

R.C. 2929.12(D).

{¶20} Finally, the court is to consider these factors, which indicate the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been

adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

R.C. 2929.12(E).

{¶21} In appellant's judgment entry of sentence, the trial court stated that it considered, among other things, "the purposes and principles of sentencing under R.C. §2929.11, the seriousness and recidivism factors relevant to the offense and offender, pursuant to R.C. §2929.12, and the need for deterrence, incapacitation, rehabilitation and restitution." Thus, the court indicated that it considered the statutory factors.

{¶22} Additionally, at appellant's sentencing hearing, the trial court stated that it extensively reviewed R.C. 2929.19, R.C. 2929.11, and R.C. 2929.12 in preparing for the sentencing hearing. (Tr. 7). It noted that the "overriding thoughts" of the statutes were to punish the offender and protect the public. (Tr. 7). And the court stated that it was sentencing appellant "based upon the criteria of all of those statutes." (Tr. 7-8).

{¶23} Furthermore, "explanations regarding the trial court's consideration of R.C. 2929.11 and R.C. 2929.12 are not required at the sentencing hearing or in the sentencing entry." *State v. Burch*, 7th Dist. No. 12 JE 28, 2013-Ohio-4256, ¶31, citing *State v. McGowan*, 7th Dist. No. 09 JE 24, 2010-Ohio-1309, ¶69. Thus, the trial court's statements in the sentencing entry and at the sentencing hearing were sufficient to show that it considered the R.C. 2929.11 principles and purposes of sentencing and the R.C. 2929.12 seriousness and recidivism factors.

{¶24} Finally, we must consider appellant's consecutive sentences.

{¶25} R.C. 2929.14(C)(4) requires a trial court to make specific findings when

imposing consecutive sentences:

> (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.

{¶26} It has been held that although the trial court is not required to recite the statute verbatim or utter “magic” or “talismanic” words, there must be an indication that the court found (1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger posed to the public, and (3) one of the findings described in R.C. 2929.14(C)(4)(a),

(b), or (c). *State v. Bellard*, 7th Dist. No. 12-MA-97, 2013-Ohio-2956, ¶17. The court need not give its reasons for making those findings however. *State v. Power*, 7th Dist. No. 12 CO 14, 2013-Ohio-4254, ¶38.

{¶27} The Ohio Supreme Court recently held, however, that the trial court must make its findings at the sentencing hearing and not simply in the sentencing judgment entry:

> In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its 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. The court stressed the importance of making the findings at the sentencing hearing, noting this gives notice to the offender and to defense counsel. *Id*. at ¶29. And while the trial court should also incorporate its statutory findings into the sentencing entry, the court's inadvertent failure to do so is merely a clerical mistake and does not render the sentence contrary to law. *Id*. at ¶30.

{¶28} The transcript of the sentencing hearing must make it "clear from the record that the trial court engaged in the appropriate analysis." *State v. Hill*, 7th Dist. No. 13 CA 82, 2014-Ohio-1965, ¶27. At appellant's sentencing hearing, the trial court commented:

> I'd like to point out that the overriding thoughts of the statute, or point of the statute is to punish the offender and protect the public. I can't think of something more applicable than in this case to achieve both of those goals, and that is to punish the offender and to protect the public.

(Tr. 7). The court went on to state:

> [T]he [consecutive sentences] statute does provide that I can go consecutively, instead of concurrently, if the harm is so great and unusual a single term does not adequately reflect the seriousness of the conduct.
>
> The statute then speaks in the disjunctive with an "or", but I can easily speak with a conjunctive with an "and". And consecutive terms are needed to protect the public. I, in fact, make those findings.
>
> * * *
>
> I've studied the statutes. I've studied the facts of the case. This is right on point of what the statutes call for, in terms of protection of the public; in terms of punishment of the victim [sic.]; in terms of the statute not being consecutively would not seriously address the magnitude of the crime.

(Tr. 8-9).

{¶29} These statements by the trial court make clear that it engaged in the appropriate analysis. The court noted that it needed to punish appellant and protect the public. It found that the harm appellant caused was so great and unusual that a single prison term would not be adequate. And it found that consecutive sentences were necessary in order to protect the public, to punish appellant, and to address the magnitude of the crimes.

{¶30} Because the record demonstrates that the court made the required findings at the sentencing hearing, the trial court did not err in imposing consecutive sentences.

{¶31} We should note, however, that the court did not include the consecutive sentence findings in the judgment entry of sentence. These findings are required to be included in the sentencing entry. *Bonnell*, 140 Ohio St.3d 209, syllabus. However, the court's inadvertent failure to do so is merely a clerical mistake and does not render the sentence contrary to law. *Id*. at ¶30. The *Bonnell* court indicated that this type of clerical mistake is corrected by a nun pro tunc entry. *Id*.

{¶32} Accordingly, appellant's sole assignment of error is without merit.

{¶33} For the reasons stated above, the trial court's judgment is hereby affirmed. The matter is remanded for the trial court to enter a nun pro tunc judgment entry that includes the consecutive sentence findings that it made at the sentencing hearing.

DeGenaro, J., concurs.

Robb, J., concurs.