

[Cite as *State v. Spann*, 2015-Ohio-743.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,

PLAINTIFF-APPELLEE,

V.

DEVIN V. SPANN,

DEFENDANT-APPELLANT.

CASE NO. 14 MA 22

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from Court of Common
Pleas of Mahoning County, Ohio
Case No. 13CR749

JUDGMENT:

Reversed and Remanded

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: February 11, 2015

{¶1} Defendant-appellant Devin Spann appeals his consecutive sentences comprising 15 years in prison entered in the Mahoning County Common Pleas Court for his conviction following his guilty pleas to four counts of felonious assault and one accompanying firearm specification.

{¶2} On July 20, 2013, Spann got into an argument with a relative who would not loan him money to purchase a firearm. After Spann was denied the money, he shot several relatives present at the location, and then attempted to burn the house down. Spann was seen leaving the home and was arrested shortly after.

{¶3} A Mahoning County grand jury issued a 12-count indictment against Spann on July 25, 2013, as follows: four counts of felonious assault (counts 1, 2, 3, and 4) in violation of R.C. 2903.11(A)(2)(D), second-degree felonies; firearm specifications attendant to each of those counts in violation of R.C. 2941.145(A); seven counts of aggravated arson (counts 5, 6, 7, 8, 9, 10, and 11) in violation of R.C. 2909.02(A)(1)(1)(2), first-degree felonies; and aggravated arson (count 12) in violation of 2909.02(A)(2)(B)(1)(3), a second-degree felony.

{¶4} Spann pleaded not guilty by reason of insanity on August 8, 2013. Following a psychological evaluation based on his insanity plea, Spann entered into a Crim.R. 11 agreement on October 31, 2013, in which he withdrew his not guilty plea. Pursuant to the agreement, the state moved to dismiss all of the aggravated arson counts (counts 5, 6, 7, 8, 9, 10, 11, and 12) and all but one of the firearm specifications (those attendant to counts 2, 3, and 4). The court sustained the motion and Spann pleaded guilty to count 1 (felonious assault) and its firearm specification, and counts 2, 3, and 4 (felonious assault).

{¶5} The trial court held Spann's sentencing hearing on January 31, 2014. The court sentenced Spann to a three-year term of imprisonment for count one (felonious assault), three years for the firearm specification attendant to that count; and three years each for counts 2, 3, and 4 (felonious assault). The trial court ordered that all of the sentences be served consecutively for an aggregate sentence of 15 years in prison. This appeal followed.

{¶16} Spann's sole assignment of error states:

The trial court's sentencing of Devin Spann was clearly and convincingly contrary to law as well as an abuse of discretion.

{¶17} Spann contends that the trial court abused its discretion and should have sentenced him to concurrent, not consecutive prison terms. In response, the state argues that the trial court's 15-year prison term was not clearly and convincingly contrary to law and, thus, that the trial court's sentence was proper.

{¶18} Appellate review of felony sentences entails a limited, two-fold approach, as outlined in the plurality opinion in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 26. First, the reviewing court must examine the sentence to determine if it is "clearly and convincingly contrary to law." *Id.* (O'Connor, 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'Connor, 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'Connor, J., plurality opinion). Thus, the reviewing court applies 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).

{¶19} Spann was convicted of four counts of felonious assault in violation of R.C. 2903.11(A)(2)(D), second-degree felonies, and one accompanying firearm specification. For a second-degree felony, the prison term shall be two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2). The firearm specification mandated a three-year sentence to be served prior and consecutive to any terms of imprisonment imposed for the underlying felonies. R.C. 2941.145; R.C. 2929.14(B)(1)(a)(ii); R.C. 2929.14(C)(1)(a).

{¶10} The trial court sentenced Spann to three years on each of the four counts of felonious assault, to be served consecutively to one another. Additionally,

the trial court sentenced Spann to serve three years for the firearm specification to be served prior to and consecutive to the sentences imposed for the felonious assaults. Since Spann's individual sentences fell within the permissible statutory range pursuant to R.C. 2929.14(A)(2), they were not contrary to law. See *State v. Koffel*, 7th Dist. No. 06 CO 36, 2007-Ohio-3177, ¶ 31.

{¶11} While Spann's individual sentences were authorized by law, whether the trial court's imposition of consecutive sentences was authorized by law is a different matter. R.C. 2929.14(C)(4), enacted pursuant to 2011 H.B. 86 effective September 20, 2011, creates a statutory presumption in favor of concurrent sentences and requires sentencing courts to make enumerated findings prior to imposing consecutive sentences.

{¶12} R.C. 2929.14(C)(4) sets forth the findings required for imposition of 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.

{¶13} Thus, the sentencing court must find that (1) 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 they pose to the public, and (3) one of the findings described in subsections (a), (b) or (c) of R.C. 2929.14(C)(4). *See State v. Bellard*, 7th Dist. No. 12 MA 97, 2013-Ohio-2956, ¶ 17; *see also State v. Power*, 7th Dist. No. 12 CO 14, 2013-Ohio-4254, ¶ 37. In analyzing whether a sentencing court complied with R.C. 2929.14(C)(4), this court had held that a trial court was not required to recite any magic or talismanic words when imposing consecutive sentences but that it must be clear from the record that the trial court had engaged in the appropriate analysis. *Power* at ¶ 40; *Bellard* at ¶ 17.

{¶14} However, appellate case law had been in flux concerning the extent to which a sentencing court was required to make these findings, particularly as it regarded the extent to which the court needed to make those findings at the sentencing hearing and in the subsequent sentencing entry. Following Spann's sentencing in this case, the Ohio Supreme Court in *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, provided clarification holding that the findings required by R.C. 2929.14(C)(4) must be made at the sentencing hearing *and* be included in the sentencing entry. *Id.* at the syllabus. The Court confirmed that a sentencing court is not required to recite "a talismanic incantation of the words" of the consecutive sentences provision of the felony sentencing statute, so long as the required findings can be gleaned from the record. *Id.* at ¶¶ 36-37. Additionally, the Court also held that the sentencing court "has no obligation to state reasons to support its findings." *Id.*

{¶15} 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. This type of clerical mistake may be corrected by a nunc pro tunc entry. *Id.* But a "nunc pro tunc entry cannot cure the failure to make the required findings at the time of imposing sentence." *Id.*

{¶16} In this case, the only statements the trial court made relative to imposition of consecutive sentences were as follows:

It is the sentence of the Court that the defendant be taken from here to the Mahoning County Justice Center, and from there to the Department of Rehabilitation and Correction, there to serve a term of three years on each of the four felonious assaults, to be served consecutively to one another and consecutively to the sentence imposed by this Court this date for the firearm specification, three years of actual incarceration to be served prior to and consecutive to the sentences imposed for the felonious assaults.

* * *

The Court makes a finding that consecutive terms are necessary because the harm is so great and unusual that a single term does not adequately reflect the seriousness of the offender's conduct.

(01/31/2014 Sentencing Hearing Tr. 20, 23.)

{¶17} These statements made by the trial court reflect that it made only one of the three required statutory findings required for imposition of consecutive sentences. It can be gleaned from the last statement made by the trial court regarding imposition of consecutive sentences that it met the third requirement by making one of the findings described in subsections (a), (b) or (c) of R.C. 2929.14(C)(4); more

specifically, the finding described in subsection (b) of R.C. 2929.14(C)(4), i.e., that 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 Spann's conduct. However, the trial court did not make any findings regarding whether (1) consecutive sentences were necessary to protect the public from future crime or to punish Spann, and (2) whether or not consecutive sentences were disproportionate to the seriousness of Spann's conduct and to the danger he poses to the public.

{¶18} The trial court did make all of the required findings in the judgment entry of sentence filed on February 10, 2014:

Pursuant to O.R.C. 2929.14(C)(4), the Court finds that 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. The Court further finds that pursuant to O.R.C. 2929.14(C)(4)(b), that 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. Therefore, the sentences imposed on each of the charges of Felonious Assault in Counts One through Four are Ordered to be served consecutively to one another in the Department of Rehabilitation and Corrections.

{¶19} In sum, given the trial court's failure to make all three of the required

findings for imposition of consecutive sentences at the sentencing hearing itself and according to the Ohio Supreme Court's decision in *Bonnell*, the trial court's subsequent inclusion of all the required findings in its judgment entry of sentence did not cure that error. Thus, the trial court's imposition of consecutive sentences was contrary to law.

{¶20} Accordingly, Spann's sole assignment of error has merit.

{¶21} The judgment of the trial court is reversed and this matter is remanded for resentencing.

Waite, J., concurs.

DeGenaro, J., concurs.