

[Cite as *State v. Brown*, 2016-Ohio-5701.]

STATE OF OHIO, JEFFERSON COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	
PLAINTIFF-APPELLEE,)	
)	CASE NO. 15 JE 0014
V.)	
)	OPINION
GERALD E. BROWN,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common Pleas of Jefferson County, Ohio
Case Nos. 14 CR 160, 15 CR 15

JUDGMENT: Reversed and Remanded

APPEARANCES:	
For Plaintiff-Appellee	George M. Sarap Assistant Prosecutor 16001 S.R. 7 Steubenville, Ohio 43952
For Defendant-Appellant	Attorney Bernard C. Battistel 2021 Sunset Boulevard Steubenville, Ohio 43952

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Carol Ann Robb

Dated: August 31, 2016

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DONOFRIO, P.J.

{¶1} Defendant-appellant, Gerald Brown, appeals from a Jefferson County Common Pleas Court judgment imposing his prison sentence after he violated the terms of his community control for convictions on one count of burglary and two counts of vandalism.

{¶2} This appeal involves two related criminal cases.

{¶3} In the first case, on December 3, 2014, a Jefferson County Grand Jury indicted appellant on one count of burglary, a third-degree felony in violation of R.C. 2911.12(A)(3); one count of violating a temporary protection order, a first-degree misdemeanor in violation of R.C. 2919.27(A)(1); and one count of menacing by stalking, a fourth-degree felony in violation of R.C. 2903.211(A)(1) and (B)(2)(b)(c). These charges stemmed from an incident involving appellant's girlfriend. Appellant initially entered a not guilty plea.

{¶4} In the second case, on February 4, 2015, a Jefferson County Grand Jury indicted appellant on eight counts of vandalism, all fifth-degree felonies in violation of various subsections of R.C. 2909.05. These charges occurred while appellant was in the Jefferson County Justice Center awaiting trial on the first set of charges. Again, appellant initially entered a not guilty plea.

{¶5} Appellant subsequently changed his pleas in both cases pursuant to a plea agreement with plaintiff-appellee, the State of Ohio. Pursuant to the terms of the agreement, in the first case, appellant pleaded guilty to the charges of burglary and violating a temporary protection order and the state dismissed the charge of menacing by stalking. In the second case, appellant pleaded guilty to two counts of vandalism and the state dismissed the other six counts of vandalism. The court accepted appellant's pleas and set the matter for sentencing.

{¶6} The trial court held appellant's sentencing hearing on March 27, 2015. At the hearing, the trial court sentenced appellant to three years of community control sanctions, including residential, non-residential, and financial sanctions. The court also sentenced appellant to a reserved sentence of 36 months in prison on the burglary count and it found that the violating a temporary restraining order count

merged with the burglary count. The court additionally sentenced appellant to a reserved sentence of 12 months on each of the two vandalism counts. The court ordered appellant to serve the sentences consecutively. The sentences were reserved so that the court could order appellant to serve them if he violated the terms of his community control. The court issued a single judgment entry of sentence.

{¶17} On May 22, 2015, appellant filed a pro se notice of appeal listing both trial court case numbers. Counsel was appointed.

{¶18} On June 2, 2015, the state filed a motion to revoke appellant's community control sanctions stating that he was unsuccessfully terminated from the Eastern Ohio Correction Center (EOCC).

{¶19} The trial court held a hearing on the motion to revoke community control. It found that appellant violated the terms of his community control by failing to comply with EOCC's rules, regulations, and recommendations and also continued to make threats against the victim of his offenses. Therefore, the court imposed the sentence it had previously set out, totaling five years in prison. Appellant's appointed counsel filed a timely notice of appeal from this judgment entry on June 19, 2015, listing both case numbers.

{¶110} Appellant now raises two assignments of error.

{¶111} Appellant's first assignment of error states:

THE TRIAL COURT ERRED IN SENTENCING THE
DEFENDANT TO CONSECUTIVE TERMS OF IMPRISONMENT.

{¶112} Appellant argues the trial court failed to make the required findings at the sentencing hearing to impose consecutive sentences.

{¶113} 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.

{¶14} 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. However, the court need not give its reasons for making those findings. *State v. Power*, 7th Dist. No. 12 CO 14, 2013-Ohio-4254, ¶ 38.

{¶15} The Ohio Supreme Court has held 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. The trial court should also incorporate its statutory findings into the sentencing entry. *Id.* at ¶ 30.

{¶16} 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.

{¶17} The trial court did not make the necessary findings at the original sentencing hearing. Nor did it make the findings at the hearing revoking appellant’s community control and imposing the original sentence.

{¶18} At the original sentencing hearing, the trial court did not make the first required finding that consecutive sentences were necessary to protect the public from future crime or to punish appellant. In fact, the court found that community control sanctions would adequately punish appellant and protect the public. (Sentencing Tr. 29). Likewise, the court did not make the second required finding that consecutive sentences were not disproportionate to the seriousness of appellant’s conduct and to the danger appellant posed to the public. In fact, the court found that community control sanctions would not demean the seriousness of the offense. (Sentencing Tr. 29). The court did make a finding that appellant committed the vandalism offenses while he was in jail awaiting trial on the burglary charge, which would comply with the third consecutive-sentence finding. (Sentencing Tr. 39). But the court failed to make the first two consecutive sentencing findings at the original sentencing hearing.

{¶19} The court did state in its judgment entry of sentence that consecutive sentences were necessary to punish the offender and protect the public from future crime. It also stated in its judgment entry that consecutive sentences were not disproportionate to the seriousness of appellant's conduct and the danger posed by appellant. And it stated that the vandalism offenses occurred in the Jefferson County Justice Center while appellant was awaiting trial on the burglary case. Thus, the court did put the necessary findings in the judgment entry of sentence. But the court must make the findings at the sentencing hearing, not simply in the judgment entry. *Bonnell*, 140 Ohio St.3d at the syllabus. Moreover, the court made findings at the hearing that favored community control, not consecutive sentences.

{¶20} And at the community control revocation hearing, the court did not make any of the consecutive-sentence findings. In fact, it was suggested to the court at the hearing that it needed to put the consecutive-sentence language on the record. (Revocation Tr. 45). The court stated that it already made those findings. (Revocation Tr. 45). But the findings do not appear in the transcript of the revocation or the original sentencing hearing.

{¶21} Therefore, because the trial court failed to make the required consecutive-sentence findings, appellant's sentence must be reversed and remanded for a new sentencing hearing.

{¶22} Accordingly, appellant's first assignment of error has merit.

{¶23} Appellant's second assignment of error states:

THE IMPOSITION OF THE MAXIMUM PERIOD OF
INCARCERATION AGAINST THE DEFENDANT IS CONTRARY TO
O.R.C. §2929.11 AND §2929.12.

{¶24} In this assignment of error, appellant contends the imposition of maximum sentences was an abuse of discretion because maximum sentences do not comply with the statutory principles and purposes of sentencing. He further argues that the court's imposition of maximum sentences is not consistent with the

findings that it made in favor of community control.

{¶25} When reviewing a felony sentence, an appellate court must uphold the sentence unless the evidence clearly and convincingly does not support the trial court's findings under the applicable sentencing statutes or the sentence is otherwise contrary to law. *State v. Marcum*, Slip Opinion No. 2016-Ohio-1002, ¶ 1.

{¶26} 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 a maximum sentence.

{¶27} At appellant's initial sentencing hearing, the court sentenced appellant to 36 months on the burglary count, a third-degree felony, and 12 months on each of the two vandalism counts, fifth-degree felonies. These were all maximum sentences. The maximum sentence for a third-degree felony that is not specifically referenced in R.C. 2929.14(A)(3)(a) is 36 months. R.C. 2929.14(A)(3)(b). The maximum sentence for a fifth-degree felony is 12 months. R.C. 2929.14(A)(5).

{¶28} The court's findings at the sentencing hearing are inconsistent with its imposition of maximum sentences. At the sentencing hearing, the court found that community control sanctions or a combination of community control sanctions would adequately punish appellant and protect the public from future harm. (Sentencing Tr. 29). It further found that a combination of those sanctions would not demean the seriousness of the offense if appellant followed the terms of community control. (Sentencing Tr. 29). The court also found that a mandatory prison term was not required and there was no presumption for prison. (Sentencing Tr. 29).

{¶29} The sentence the court imposed cannot be reconciled with the findings it made. The court's findings at the sentencing hearing are contradictory to the maximum sentences it imposed. Therefore, we find that appellant's sentence is contrary to law.

{¶30} According, appellant's second assignment of error has merit.

{¶31} For the reasons stated above, the trial court's judgment is hereby reversed. The matter is remanded to the trial court for a new sentencing hearing.

Waite, J., concurs.

Robb, J., concurs.