[Cite as *State v. Brahler*, 2002-Ohio-2252.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 79710

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
	:	
GEORGE BRAHLER,	:	
	:	
Defendant-Appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	MAY 9, 2002
CHARACTER OF PROCEEDING:	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-375565
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee:

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[Cite as *State v. Brahler*, 2002-Ohio-2252.]
MICHAEL J. CORRIGAN, P.J.:

{¶1} In 1999, defendant George Brahler pleaded guilty to one count of kidnapping and one count of robbery. The court sentenced him to consecutive seven year terms on each count. On appeal, we held that the court failed to make the findings necessary for imposing consecutive terms of incarceration and remanded for resentencing. See *State v. Brahler* (Oct. 12, 2000), Cuyahoga App. No. 76941. On remand, the court again sentenced defendant to consecutive seven year terms. The issues on appeal are whether the court erred by refusing to find the offenses allied for purposes of sentencing and whether the court satisfied the statutory requirements for imposing consecutive sentences.

I

{¶2} Defendant first maintains that robbery and kidnapping as charged in this case were allied offenses that should have merged for purposes of sentencing. The state points out that defendant not only did not make this argument in the first appeal, but in fact conceded in that appeal that "those offenses are not allied offenses of similar import as a matter of law ***."

{¶3} The courts have consistently held that robbery and kidnapping are not allied offenses of similar import sufficient to merge for purposes of sentencing. See R.C. 2941.25; *State v. Latson* (Nov. 1, 2001), Cuyahoga App. No. 79093; *State v. Martin*

(Jan. 27, 2000), Cuyahoga App. No. 76455; *State v. Lee* (Oct. 25, 2000), Summit App. No. 4918.

{¶4} The state's concern that defendant conceded that the offenses were not allied in the first appeal is of no consequence, as the court's act of resentencing him to both counts constituted a separate sentencing that permitted him to raise this claim in this appeal. We do note the general rule that appeals from limited remands are, of course, limited to issues raised on remand. See *State v. Ledford* (Feb. 9, 1998), Warren App. No. CA97-05-049. But that rule is not in play here. The first assignment of error is overruled.

II

{¶5} In his second assignment of error, defendant complains that the court once again failed to satisfy the statutory prerequisites for imposing consecutive sentences. Although defendant does not articulate a clear basis for this assignment, he appears to suggest that the consecutive sentences were disproportionate to the offenses and that we should exercise our authority under R.C. 2953.08(G) and impose concurrent sentences.

{¶6} In order for us to reverse the court's decision to impose consecutive sentences, we must find by clear and convincing evidence that (1) the sentence is not supported by the record; (2) the trial court imposed a prison term without following the appropriate statutory procedures; or (3) the sentence imposed was

contrary to law. See R.C. 2953.08(G). While the scope of our review has been expanded under R.C. 2953.08(G) to permit us to modify or vacate or remand for resentencing any sentence that is imposed in violation of the sentencing statutes, we are not permitted to substitute our judgment for that of the court. See *State v. Jones* (2001), 93 Ohio St.3d 391, 399-400, 2001-Ohio-1341.

{¶7} As applicable here, consecutive sentences may be imposed when the court finds either that consecutive sentences are necessary to protect the public from future crime or to punish the offender, and when the court finds 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 that the harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses would adequately reflect the seriousness of the crime. See R.C. 2929.14(E)(4).

{¶8} In addition to remarks made on the record, the court journalized a form entry that listed various statutory factors relevant to sentencing. That form shows the court found that the harm caused was great or unusual, that defendant's criminal history required consecutive sentences, that consecutive sentences were necessary to fulfill the purpose of R.C. 2929.11, and that consecutive sentences were not disproportionate to the seriousness of the offender's conduct and the danger to the public and were likewise necessary to fulfill the purpose of R.C. 2929.11. The

form entry also indicates that the victim suffered serious "physical/emotional/psychological harm" and defendant was an offender under court control, had prior convictions and an unsuccessful probation or parole. These findings are sufficient to satisfy the core requirements for imposing consecutive sentences and defendant does not contest them on appeal.

{¶9} The remaining question is whether the consecutive sentences were disproportionate to the harm caused. During resentencing, defense counsel tried to argue that the victim did not suffer physical harm. In response, the court noted that defendant tried to carjack the victim's vehicle by force, hitting her several times before she fought him off and he fled. The court recalled that at the time of the original sentencing, the victim "was incredibly harmed psychologically" and that defendant "caused extreme emotional and physical and psychological harm on this woman."

{¶10} The need to protect the public is proportionately served by the consecutive sentences. Although defendant was not charged with a sexually-oriented offense, his ultimate motive with the car jacking can be fairly inferred from the record. When the police apprehended him, defendant was wearing a coat and ski mask despite outside temperatures of sixty degrees or more. He admitted that he had been peeping into windows and looking at women, and the police statement shows that he intended to retain and use mental images of

these women as a catalyst for future self-gratification. Moreover, the court properly acknowledged that defendant had been paroled for only two months at the time of the offense, a fact that suggested he posed a high risk of recidivism.

{¶11} Taking all these factors into account, we cannot say that there is clear and convincing evidence to show that the court erred by imposing consecutive sentences. The second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN
PRESIDING JUDGE

JAMES J. SWEENEY, J., CONCURS.

ANNE L. KILBANE, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE CONCURRING AND DISSENTING OPINION.

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COUNTY OF CUYAHOGA

NO. 79710

STATE OF OHIO,	:	
	:	
	:	CONCURRING
Plaintiff-Appellee	:	
	:	and
v.	:	
	:	DISSENTING
GEORGE BRAHLER,	:	
	:	OPINION
	:	
Defendant-Appellant	:	

DATE: MAY 9, 2002

KILBANE, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶12} On this appeal from a resentencing order of Judge Nancy Margaret Russo, I concur in part and dissent in part. While I agree that the multiple punishments are not prohibited by R.C. 2941.25, the record does not show that Brahler's conduct was more serious than that normally attending crimes of this nature, and the evidence of his criminal history is inadequate to draw conclusions concerning his threat to commit future serious offenses.

{¶13} While I concur in the resolution of the first assignment of error, I would certify this issue, sua sponte, to the Ohio

Supreme Court because it conflicts with the Hamilton County Court of Appeals' decision in *State v. Grant*.[1]

{¶14} Brahler's second assignment of error directly implicates the core purposes of R.C. 2929.11(B), which states that a felony sentence should be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, **and consistent with sentences imposed for similar crimes by similar offenders**." (Emphasis added.) Prior to *State v. Rance*,[2] robbery and kidnapping were considered allied offenses of similar import and, as noted in *Grant*, supra, the Ohio Supreme Court appears to have continued to consider the offenses allied since *Rance*.[3] Even if the offenses are no longer considered allied, the fact that they were so considered prior to *Rance* suggests that, traditionally, concurrent sentences have been warranted and imposed for these offenses. Therefore, even before assessing the facts of

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[1](Mar. 23, 2001), Hamilton App. No. C-971001, unreported.

[2](1999), 85 Ohio St.3d 632, 710 N.E.2d 699.

[3]*State v. Fears* (1999), 86 Ohio St.3d 329, 343-344, 715 N.E.2d 136, 151.

Brahler's crime, the judge's sentence appears inconsistent with sentences imposed for similar crimes.

{¶15} Moreover, any argument that the sentence here was necessary to avoid demeaning the seriousness of Brahler's conduct necessarily implies that the concurrent sentences imposed in innumerable cases prior to *Rance* were demeaning to the seriousness of those offenses, a conclusion which I cannot accept.

{¶16} The facts of Brahler's offenses also show that consecutive sentences are unwarranted. Before imposing consecutive sentences, a judge must find, inter alia, that the sentences are "not disproportionate to the seriousness of the offender's conduct **and** to the danger the offender poses to the public[.]"[4] (Emphasis added.) The multiple findings required reflect the general disfavor for consecutive sentences within the statutory scheme,[5] as does the inclusion of specific provisions concerning the right to appeal consecutive sentences.[6] Therefore, even though we will not modify a sentence unless the record clearly and convincingly does not support the sentence imposed, that standard must be understood in light of the general disfavor of consecutive sentences. We

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[4]R.C. 2929.14(E)(4).

[5]Cf. *State v. Edmonson* (1999), 86 Ohio St.3d 324, 328, 715 N.E.2d 131, 135 (statutory restrictions on imposition of maximum sentences establish policy disfavoring such sentences).

[6]R.C. 2953.08.

should not blindly defer to the judge's findings and reasons, because substantial record evidence must support the imposition of a presumptively disfavored sentence(s). Where the record does not support the sentence, reversal or modification is not a substitution of judgment, but an application of our authority and obligation to review judgments and remedy errors.

{¶17} R.C. 2929.12(B) lists a number of factors to be used in assessing the seriousness of an offender's conduct, and expressly states that those factors are used to determine whether the conduct **"is more serious than conduct normally constituting the offense."** (Emphasis added.) This requirement appears to have been forgotten, because neither the judge nor the majority has attempted to address Brahler's conduct in light of other conduct constituting the same offenses.

{¶18} Brahler's conduct was undoubtedly serious; hence the classification of both kidnapping and robbery as second degree felonies, each punishable by a minimum prison term of two years and a maximum of eight years,[7] a fine of up to $15,000.00,[8] a presumption that a prison term is necessary,[9] and a mandatory

[7]R.C. 2929.14(A)(2).

[8]R.C. 2929.18(A)(2)(b).

[9]R.C. 2929.13(D).

three-year term of post-release control.[10] While he deserves to be in prison for his crimes, the record fails to disclose any circumstances making his conduct more serious than other robberies and kidnappings.

{¶19} Robbery is, after all, generally defined as a theft committed by force or threat of force,[11] and kidnapping is the forcible detention or asportation of another;[12] such crimes necessarily induce fear in the victim[13] and often result in physical harm. While I understand that Brahler's victim was terrified, I am not convinced that his conduct was any more frightening than that

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[10]R.C. 2967.28(B)(2). Although the judge purported to impose a five-year term of post-release control at the hearing, such a term is not authorized. Moreover, the judgment entry failed to include post-release control as part of the sentence.

[11]R.C. 2911.02(A)(3).

[12]R.C. 2905.01(A).

[13]In fact, R.C. 2905.01(A)(3) defines one form of kidnapping as committed with the specific intent of terrorizing the victim.

attending any other robbery or kidnapping, or that a single seven-year prison sentence would demean the seriousness of that conduct.

{¶20} A seven-year prison term is not a light sentence[14] and does not demean the severity of the offense or the victim's trauma; Brahler did not use a weapon in the offense, and the victim's resistance dissuaded his conduct rather than escalating it to acts of further or more serious violence. Moreover, the majority's conclusion that Brahler intended to rape the victim is rank speculation, not allowable inference. The judge made no such statement in sentencing him, and it is inappropriate to make such inflammatory comments at this point, and upon this record. Judges should encourage reason and disdain hysteria, not the opposite.

[14]I also note that R.C. 2929.13(A) requires that a sentence "shall not impose an unnecessary burden on * * * resources."

{¶21} The judge was also required to make a separate finding that Brahler's conduct was not disproportionate to the danger he poses to the public. Such a finding is typically supported by evidence of the offender's criminal history, and should show both a propensity for recidivism[15] and for committing violent or otherwise serious offenses.[16] The judgment of conviction, entered August 13, 1999, expressly stated that Brahler "is not referred to the county probation department for a pre-sentence investigation and report." While such a ruling is within the judge's discretion under R.C. 2947.06, the lack of a pre-sentence investigation report leaves a slim record from which to review a defendant's criminal history, and opens the door to questions concerning the information the judge had concerning that history.

{¶22} The only evidence of Brahler's criminal history was his own testimony in the sentencing transcript, when he stated that he served a single prison sentence for offenses charged in four separate cases, the most serious being burglary. Without a pre-sentence investigation report we cannot meaningfully review whether Brahler's criminal history supports the imposition of consecutive sentences, and the lack of such a record should prevent us from affirming their imposition. The statutory sentencing mandates no

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[15]R.C. 2929.12(D), 2929.14(E)(4)(c).

[16]Cf. *State v. Sheppard* (1997), 124 Ohio App.3d 66, 68, 705 N.E.2d 411, 412-413 (prior conviction for solicitation did not support belief that offender would commit future arson offenses).

longer allow us to presume regularity from a silent record -- despite its deferential standard of review, R.C. 2953.08 nonetheless requires a record that supports the sentence imposed.[17] This record does not provide enough evidence of Brahler's criminal history to allow a judge to rely on that history in imposing consecutive sentences.

[17]*State v. Ayala* (Dec. 16, 1999), Cuyahoga App. No. 75207, unreported; *Sheppard*, supra.

{¶23} In addition to my dissent on the proportionality issue, I must also note my disagreement with the majority's statement that the judge's use of a sentencing checklist is permissible and adequate evidence that she made the necessary findings to support consecutive sentences under R.C. 2929.14(E)(4).[18] This statement conflicts with the plain language of R.C. 2929.19, which sets forth the procedures for holding a sentencing hearing, and which requires that findings relevant to sentencing be made **at the hearing**.[19]

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[18]I agree, however, that in this case the judge sufficiently stated her findings at the hearing.

[19]*State v. Gaddis*, Cuyahoga App. No. 77835, 2002-Ohio-1830, at ¶7-9.

{¶24} At least one purpose of R.C. 2929.19(B) is to ensure that a judge imposes sentence only after considering the record and the relevant statutory factors, rather than justifying an unconsidered or ill-considered sentence after the fact. Since the judgment of sentence must correlate with that imposed at the hearing,[20] it follows that the judge must consider the relevant factors at or before the hearing, and R.C. 2929.19 is designed to ensure just that. Unless the judge makes the checklist and presents it to the defendant **at the hearing**, it cannot be relied on to show that findings were made **at the hearing** in compliance with R.C. 2929.19(B).

{¶25} Because the imposition of consecutive sentences is not supported by the record, and because this case is an appeal of a resentencing proceeding, I would modify the sentence to impose concurrent seven-year prison terms.

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[20]See, e.g., *State v. Bell* (1990), 70 Ohio App.3d 765, 773, 592 N.E.2d 848, 853 (new sentence cannot be imposed outside defendant's presence).

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KEYWORD SUMMARY

Sentence, punishment — Consecutive, concurrent.