

[Cite as *State v. Rotarius*, 2003-Ohio-1167.]

Please see the nunc pro tunc journal entry concerning this decision at 2003-Ohio-1526.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81555

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	
-VS-	:	AND
	:	
MARK ROTARIUS	:	OPINION
	:	
Defendant-Appellant	:	

Date of Announcement of Decision:	MARCH 13, 2002
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Character of Proceeding:	Criminal appeal from Court of Common Pleas Case No. CR-391050
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Judgment:	Reversed and remanded for resentencing.
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Date of Journalization:

Appearances:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor JOHN J. GALLAGHER, Assistant Prosecuting Attorney 1200 Ontario Street Cleveland, Ohio 44113
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For Defendant-Appellant:	RICHARD AGOPIAN, ESQ. The Hilliard Building 1415 West 9th Street
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Second Floor  
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

{¶1} Defendant-appellant Mark Rotarius appeals the resentencing by the trial court and claims that the trial court's sentence fails to comply with the sentencing guidelines. For the following reasons, we find merit to the appeal and vacate defendant's sentence and remand for resentencing.

{¶2} On May 11, 2000, defendant was indicted for one count of possession of marijuana in an amount exceeding 20,000 grams, in violation of R.C. 2925.11 (a felony of the second degree with a mandatory term of incarceration of eight years) and preparation of marijuana for sale in an amount exceeding 20,000 grams, in violation of R.C. 2925.07 (a felony of the fourth degree).

{¶3} On September 27, 2000, defendant was found guilty on both counts and sentenced to a mandatory term of eight years on the possession count and a consecutive maximum sentence of 18 months on the preparation for sale count.

{¶4} Defendant appealed his conviction and sentence. On February 21, 2002, this Court affirmed the conviction but vacated the sentence and remanded for resentencing due to the trial court's failure to make findings on the record as to the imposition of consecutive sentences. See *State v. Rotarius* (Feb. 21, 2002), Cuyahoga App. No. 78766.

{¶5} At the resentencing hearing on June 18, 2002, the trial court imposed the same sentence as had been originally imposed and stated the following, in pertinent part:

{¶6} "This Court is going to state at this time, that as part of this sentencing structure, that the consecutive sentence is necessary to protect the public from future crimes, and to punish the

offender, and that consecutive sentences are not disproportionate to the seriousness of your conduct and to the danger the offender poses to the public.

{¶7} “When the Court says this to you, the Court is saying that your conduct involved in the handling of these drugs, and the way you handled it, this Court believes that the public is at risk and that you pose a danger as a result of that.

{¶8} “The Court further finds that the harm caused by these offenses was so great and unusual, that no single prison term adequately reflects the seriousness of the conduct.

{¶9} “The offense was committed as part of a single course of conduct, and this Court finds that you made numerous trips back and forth from California, and they were consistent with heavy drug dealing.

{¶10} “Although your counselor states that you have no criminal conduct previously, the testimony throughout the course is that, that was not just a one-time thing or one-time engagement.

{¶11} “So the Court believes further crimes can be committed by you and the public needs to be protected from any future occurrences that may occur.

{¶12} “The Court further finds that no single prison term—no single prison term for any single offense committed adequately reflects the seriousness of the crime committed or the harm done, or that your history indicates that consecutive sentences are necessary to protect the public from you.

{¶13} “That’s because this Court believes that’s based upon the way you were involved with drugs, the sophistication of the transport and delivery, and the public is in danger of you committing future offenses.”

{¶14} Defendant appeals the trial court's resentencing and asserts three assignments of error.

Assignments of Error I and II state:

{¶15} "I. The trial court's decision to impose the maximum sentence for a fourth degree felony was error.

{¶16} "II. The trial court's failure to impose the minimum prison term was error."

{¶17} In these assignments of error, defendant maintains that the trial court failed to comply with R.C. 2929.14 (B) and (C) when it deviated from imposing the minimum term of incarceration and imposed the maximum sentence. We agree.

{¶18} Defendant was found guilty of preparation of drugs for sale which is a fourth-degree felony. Pursuant to R.C. 2929.14(A)(4), a trial court may impose a sentence of six to 18 months for a felony of the fourth degree. R.C. 2929.14(B) requires the court to impose the minimum term of six months imprisonment unless the court specifically finds that the minimum term will demean the seriousness of the defendant's conduct or will not adequately protect the public from future crime by the defendant. R.C. 2929.14(C) permits the court to impose the maximum term of 18 months imprisonment if it finds the defendant has committed the worst form of the offense or imposes the greatest likelihood of committing future crimes. In determining the length of a sentence, the court must comply with the purposes and principles of sentencing enumerated in R.C. 2929.11, bearing in mind the seriousness and recidivism factors listed in R.C. 2929.12.

{¶19} An appellate court may not disturb a sentence imposed under felony sentencing law unless it finds by clear and convincing evidence that the sentence is not supported by the record or is contrary to law. R.C. 2953.08(G)(2); *State v. Garcia* (1998), 126 Ohio App.3d 485, 487. When reviewing the propriety of the sentence imposed, an appellate court shall examine the trial court

record, including the pre-sentence investigative report, and any oral or written statements made to or by the court at the sentencing hearing. R.C. 2953.08(F)(1)-(4).

{¶20} Here, the trial court imposed the maximum sentence of 18 months for the preparation of drugs for sale count. However, the sentencing transcript reveals that the trial court did not specifically speak to the statutory language of R.C. 2929.14(B) or (C). Indeed, the sentencing transcript reveals that the trial court made no findings at all as to why it deviated from imposing the shortest prison term or imposed the maximum sentence. Rather, a review of the transcript shows that the trial court merely addressed the findings required by R.C. 2929.14 for the imposition of consecutive sentences.

{¶21} When a case is remanded for resentencing, the trial court must conduct a complete sentencing hearing and must approach resentencing as an independent proceeding. *State v. Gray* (Jan. 30, 2003), Cuyahoga App. No. 81474, citing *State v. Bolton* (2000), 143 Ohio App.3d 185, 188-189. Here, the trial court did not conduct a new sentencing hearing and did not approach the resentencing as an independent proceeding. Since reversal is required, the issues raised in the third assignment of error regarding the imposition of consecutive sentences is moot.

{¶22} Assignments of Error I and II are well taken.

{¶23} “III. The imposition of consecutive sentences was contrary to law.”

{¶24} Given our disposition of Assignments of Error I and II, we do not find it necessary to address Assignment of Error III, which is moot. App.R. 12(A)(1)(c).

Judgment reversed and remanded for resentencing.

It is ordered that appellant recover of appellee his 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 Court Common Pleas to carry this judgment into execution. Case remanded to the trial court for resentencing.

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

ANN DYKE, P.J., and

FRANK D. CELEBREZZE, JR., J., CONCUR.

JAMES J. SWEENEY  
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).