[Cite as *State v. Drake*, 2003-Ohio-141.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 77460

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
	:	
SHANNON DRAKE,	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION	:	JANUARY 16, 2003
CHARACTER OF PROCEEDING:	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-369621
JUDGMENT	:	AFFIRMED AND REMANDED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee: William D. Mason, Esq.
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MICHAEL J. CORRIGAN, J.:

{¶1} On November 27, 1998, the appellant Shannon Drake was indicted for aggravated robbery and felonious assault, both with one year and three year firearm specifications. The defendant pled not guilty and the matter proceeded to trial on April 21, 1999. The appellant was convicted of both charges, but was acquitted of the specifications. The appellant was then sentenced to ten years incarceration for the aggravated robbery charge and five years incarceration for the felonious assault charge. The judge further ordered that the sentences were to run consecutive.

{¶2} On December 30, 1999, the appellant timely appealed his conviction. In an opinion journalized on February 20, 2001, this court affirmed the conviction. Thereafter, on March 23, 2001, the appellant appealed to the Supreme Court of Ohio which denied the appeal on June 21, 2001.

{¶3} Previously, on May 9, 2001, the appellant filed an application pursuant to App.R. 26(B) to reopen the judgment of this court in *State v. Drake* (Feb. 8, 2001), Cuyahoga App. No. 77460. On January 9, 2002, this court granted in part appellant's application to reopen. Pursuant to our opinion, the appellant raises the following error:

{¶4} "I. Appellate counsel provided ineffective assistance by failing to raise the trial court's imposition of maximum, consecutive sentences without making the necessary findings in violation of R.C. 2929.14 and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution."

{¶5} The first issue raised by the appellant is that the court erred by imposing consecutive sentences. In the matter, sub judice, the court engaged in the following colloquy: "*** with regard

to the aggravated robbery, according to the docket in this particular case, you were a member of a gang, targeting a victim who was pistol whipped, held and robbed, and then the home was burgled (sic) by you and your cohorts. And as a gratuitous act of violence, for a second time the victim was pistol whipped and beaten and that led to the charges of aggravated robbery.

{¶6} "I find that the facts of this case, considering that you were involved with gang activity, targeting this victim, and the gratuitous violence involved in the commission of the offense, merits you — and in light of your egregious criminal history — ten years incarceration at LCI.

{¶7} "By operation of law, you receive credit for time served. The court finds that you are a risk to other members of decent society, and also a risk for a repeat offense.

{¶8} "With regard to the offense of felonious assault, the court finds that there was a separate animus for the offense of felonious assault, based on the facts of this case, that you pistol whipped this victim after he was down on the ground, and that you were nothing but viciously brutal to the victim. So you are sentenced to five years at LCI. That will be consecutive to the aggravated robbery charge, for which sentence is imposed."

{¶9} According to R.C. 2929.14(E)(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 sentences are 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:

{¶10} "(a) The offender committed 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.

{¶11} "(b) The harm caused by the multiple offenses was so great that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct.

{¶12} "(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} "Pursuant to 2929.14(E)(4), the trial court may impose consecutive prison terms for convictions of multiple offenses upon the making of certain findings enumerated in the statute. Moreover, under 2929.19(B)(2)(c), if the trial court imposes consecutive sentences, it must make a finding on the record that gives its reason for imposing consecutive sentences." *State v. Cardona* (Dec. 16, 1999), Cuyahoga App. No. 75556; see, also, *State v. Albert* (1997), 124 Ohio App.3d 225, 705 N.E.2d 1274; *State v. Beck* (Mar. 30, 2000), Cuyahoga App. No. 75193; *State v. Maynard* (Mar. 16, 2000), Cuyahoga App. No. 75122; *State v. Hawkins* (Aug. 19, 1999), Cuyahoga App. No. 74678; *State v. Lockhart* (Sept. 16, 1999), Cuyahoga App. No. 74113; *State v. Lesher* (July 29, 1999), Cuyahoga App. No. 74469.

{¶14} The State of Ohio asserts that the court did make the necessary findings to justify consecutive sentences. As to the first finding, the state argues that the court found that the appellant is a "risk to other members of decent society ***." However, as we previously stated in our opinion to reopen the appeal, the court's finding that the appellant is "a risk to other members of decent society, and also at risk for a repeat offense," satisfied that statutory requirement for imposing a

maximum sentence for aggravated robbery. See *State v. Drake* (Feb.8, 2001), Cuyahoga App. No. 77460, reopening granted in part (Jan 9, 2002), Motion Nos. 27865 and 28302.

{¶15} The court failed to find that consecutive sentences are not disproportionate to the seriousness of the offender's conduct *and* to the danger the offender poses to the public. Accordingly, the trial court did not make the necessary findings on the record to satisfy the criteria imposed by R.C. 2929.14(E)(4), and the appellant's first assignment of error as to consecutive sentences is well founded.

{¶16} The second issue raised by the appellant is that he incorrectly received the maximum sentence for aggravated robbery. Because we previously addressed this issue in the application to reopen and found it to be without merit, we will not revisit the issue.

{¶17} Accordingly, in this case, we affirm the judgment of the court in imposing the sentences of ten years for the aggravated robbery and five years for the felonious assault. However, based upon the foregoing analysis, we remand the matter to permit the trial court to make and journalize its findings in accordance with R.C. 2929.14(E)(4) and 2929.19(B)(2)) as to whether the sentences should be consecutive or concurrent.

{¶18} Judgment accordingly.

MICHAEL J. CORRIGAN

JUDGE

TERRENCE O'DONNELL, J., CONCURS.

DIANE KARPINSKI, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE OPINION.

KARPINSKI, P.J., CONCURRING IN PART AND DISSENTING IN PART:

{¶19} I concur in part and dissent in part with the majority opinion. I agree that this case should be remanded for resentencing for the proper findings as to the imposition of consecutive sentences. I disagree, however, with the court's holding that it need not address the issue of the imposition of the maximum sentence.

{¶20} App.R. 26(B)(7) states that "the court may limit its review to those assignments of error and arguments not previously considered." In its decision granting a rehearing, this court explicitly stated "the issue on appeal is limited to assignment of error one." That assignment specified an error in both maximum and consecutive sentences procedure. Thus I disagree with the majority's conclusion that, because it disposed of the maximum issue in its response to the motion to reopen, the majority is not now required to address this issue. I am therefore including my dissent on the maximum sentence.

{¶21} In the matter before us, defendant argues the trial court erred in imposing both the maximum and consecutive sentences without making the requisite findings and giving the requisite reasons for those findings. I agree. The trial court did not meet the standard required. As I stated in my dissent in the decision to reopen:

{¶22} "Although I agree that the case should be reopened because of the trial court's procedure in imposing consecutive sentences, I must respectfully dissent regarding the procedure the court used when it imposed a maximum sentence. First, the trial court never announced it was imposing a maximum sentence. Nor did the court provide a reason that fully qualifies under the statute for imposing the maximum. The court found only that defendant was "at risk for a repeat

offense." (Tr. 313.) A risk of reoffending is not the same as "greatest likelihood" of reoffending. As Griffin and Katz state, "The Ohio Supreme Court has made clear in *State v. Edmonson* that, where the sentencing statute requires 'findings' to be made, close adherence to the precise statutory language will be required." Ohio Felony Sentencing Law, 2001, p. 411.

{¶23} "The First Appellate District has explained what language is required: 'The legislature created a recidivism standard for imposition of the maximum sentence different from the standard applied for the imposition of a prison sentence. R.C. 2929.12(D) merely requires the finding that an offender is likely to commit future crimes. R.C. 2929.14(C), in contrast, requires a finding that an offender poses the *greatest* likelihood of committing future crimes. When the legislature inserts language in a statute, that language "is inserted to accomplish some definite purpose, and words may not be deleted. The legislature used the superlative form of 'great' to describe the likelihood of recidivism necessary to impose the maximum sentence. Such language obviously reflects the legislature's intention to limit maximum prison terms to the most incorrigible offenders." ' [Footnotes omitted.] *State v. Howard*, (Sept. 11, 1998), Hamilton App. No. C-971049."

{¶24} Second, the trial court erred in its summary of defendant's record. As this court previously noted in a dissent:

{¶25} "In response to a plea for mercy by Drake's girlfriend, the judge stated that he had 'over 25 or 30 felony convictions,' which included violent offenses. In support of this statement, she read into the record the complete list of Drake's offense history as stated in his pre-sentence investigation report. Almost half of the '25 or 30 felony convictions' were part of Drake's juvenile record, [footnote omitted] another five concerned driving offenses, and several more concerned petty drug offenses. The judge apparently made no distinction between charges and actual convictions,

because at least seven of the listed charges were nolled or dismissed, and did not result in convictions. Some of the offenses could only be charged as misdemeanors, and many concerned theft charges that could not be specified as either felony or misdemeanor charges without further details concerning the character and value of the property at issue. R.C. 2913.02. The final tally, as stated by the officer who prepared the pre-sentence report, was that Drake had four adult felony convictions and five adult misdemeanor convictions. His juvenile record primarily consisted of a string of theft charges, none of which were described***.

{¶26} "Although the evidence at trial clearly showed that Drake had not personally committed any violence upon the victim, the judge sentenced him on the felonious assault conviction after stating her conclusion that he had personally 'pistol whipped' the victim." [Emphasis added.] *State v. Shannon Drake*, (Jan 9, 2002), Cuyahoga App. No. 77460. About the violence in the case at bar, the presentence report does summarize a second statement by the victim that provides conflicting details, one of which is that Drake hit the victim. There is no evidence in that report or in the record in the case at bar, however, to indicate he "pistol whipped" the victim.

{¶27} Because of the glaring inaccuracies in the trial judge's summary of defendant's criminal record and an error regarding an important detail of the current case, as well as the court's obvious failure to comply with the sentencing requirements, I would reopen this case for more than merely the consecutive sentences issue.