

[Cite as *State v. Moore*, 2003-Ohio-3349.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81724

STATE OF OHIO,	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
LATAVIUS MOORE,	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	JUNE 26, 2003
CHARACTER OF PROCEEDINGS	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-396768
JUDGMENT	:	REVERSED AND REMANDED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee:	William D. Mason, Esq. Cuyahoga County Prosecutor BY: Brendan Sheehan, Esq. Chrisana C. Blanco, Esq. Assistant County Prosecutors The Justice Center - 8 th Floor 1200 Ontario Street Cleveland, Ohio 44113
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MICHAEL J. CORRIGAN, P.J.:

I.

{¶1} Defendant-appellant Latavius Moore appeals the sentence imposed by the trial court. Moore pled guilty to one count each of aggravated robbery, felonious assault, aggravated burglary and kidnapping. The trial court sentenced Moore to the maximum on each count, all to run consecutively for a total of thirty-eight years. Moore successfully appealed (No. 79353), after which the court again imposed a thirty-eight year sentence. On this appeal, because the court failed to make the requisite findings for the imposition of consecutive sentences, we reverse and remand.

II.

{¶2} Moore was living with his (pregnant) girlfriend Kenyatta at her father's house. Also living there were Kenyatta's brother, Ryan, and her father's girlfriend, Mary Jo Gilmore. Mary Jo wanted the three out of the house (Kenyatta's father was incarcerated at the time of these events). After being asked to leave, Moore and Ryan tied Mary Jo up and beat her while Kenyatta robbed her. Mary Jo's call to 911 recorded all of the events, which included Moore's resisting arrest when the police arrived. Moore wants this court to know that what happened was not planned, that he "expressed his extreme remorse" and that he tried to take all the blame.

{¶3} At the resentencing hearing, the court stated:

{¶4} "The defendant has committed the worst forms of these offenses, [sic] this was not just a robbery, this was not just a

felonious assault, this was not just a kidnapping. Tying this woman up, hog fashion, stuffing her mouth, beating her with a padlock, are indeed the worst forms of kidnapping, assault and robbery.

{¶5} "Moreover, there was a relationship between the defendants and this victim. They were rent free tenants of her home. This was a great show of appreciation.

{¶6} "The victim did receive serious injuries, and needed to be transported by ambulance and received medical treatment for these injuries.

{¶7} "I agree with the State that in light of the victim's statements here in this court, there must have been some psychological harm as well, maybe that's continuing.¹

{¶8} "Maybe - I'm not a psychologist, but it appears that while many victims forgive their assaults - the people who assault them, they still though recognize the danger to the public of - of their perpetrators. This victim doesn't seem to have any recognition of that fact.

{¶9} "While the court notes that this is the offender's first prison term, to sentence to community control would number 1, it would violate the spirit of Senate Bill 2. These are all felon[ies] of the first degree² which carry presumption of prison.

¹ The victim came to court and asked the court to impose a light sentence.

² This is not accurate. The felonious assault is a second degree felony.

You don't overcome the presumption of prison merely by having it be your first time. I don't think that's anywhere in the law. I don't even believe our Court of Appeals have [sic] reached that conclusion.

{¶10} "Also, this defendant did commit the worst form of these offenses, and to sentence him to community control would seriously demean the activities of August 17, 2000. It would in fact be open season on the members of our county, on the citizens of our county.

{¶11} "The court finds, [sic] make the following findings: Defendant has committed the worst form of these offense[s], the maximum sentences are necessary to protect the public from future crime, to sentence otherwise would seriously demean the nature of the offenses, given the extreme brutality and seriousness of the offender's conduct and relationship between the parties.

{¶12} "But for the appearance of the police in this case, defendant's conduct would not have abated. Even with the appearance of the police in this case, there was a serious opportunity for the conduct to not have abated, had this woman not been able to squeal loud enough for those two officers to hear her, they may have accepted the blatant representations of this defendant and his cohorts that nothing was going on in that apartment. And this woman may have been beaten to death but for them overhearing her screams.

{¶13} "Consecutive sentences in this case are not disproportionate to the danger this offender poses to the public. This is almost a made for TV movie, but, because the victim survived, due to the good work of the Cleveland Police Department, I don't think Hollywood would be interested.

{¶14} "Therefore, the court imposes the original sentence that the court imposed originally, which is, maximum ten-year sentence for aggravated robbery, which is Count 1, *** eight years on the felonious assault, Count 2, ten years on aggravated burglary [Count 3], and ten years on kidnapping, to run consecutive.

{¶15} "Mr. [Moore], your remorse in this case came almost two years too late. Remorse should have been August 17th, 2000, prior to starting to beat this woman, prior to tying her up, prior to telling the police there was nothing going on in that apartment. That's the remorse."

III.

{¶16} Moore brings a number of arguments relative to this sentence, including his argument that the court failed to make the requisite findings for the imposition of consecutive sentences. We agree with Moore and therefore reverse and remand for resentencing.

Further, because this issue is dispositive of the entire appeal, we need not reach the other specific sentencing questions.

{¶17} To impose consecutive sentences, a court must find that (1) the consecutive service is 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 the offender poses to the public; and (3) one of the following: (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; (b) the harm caused by the multiple offenses was so great or unusual 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; or (c) the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. R.C. 2929.14(E)(4).

The court must also support these findings with reasons. R.C. 2929.19(B)(2)(c).

{¶18} Here, the court did not make the requisite findings for the imposition of consecutive sentences. The court merely stated that consecutive sentences "in this case are not disproportionate to the danger this offender poses to the public."

IV.

{¶19} Because the court failed to make the requisite findings, we are required by R.C. 2305.08(G)(1) to reverse and remand the matter for resentencing.

MICHAEL J. CORRIGAN
PRESIDING JUDGE

PATRICIA A. BLACKMON, J., CONCURS.

ANNE L. KILBANE, J., DISSENTS WITH
SEPARATE OPINION.

ANNE L. KILBANE, J., DISSENTING:

{¶20} On this appeal from an order of Judge Kathleen A. Sutula that resentenced Latavius Moore to the same thirty-eight year prison term that had been vacated and remanded in a prior appeal,¹ I dissent. Although I agree that the judge failed to make the proper findings before imposing consecutive sentences, there is no need to remand for another attempt at sentencing because the judgment should be modified pursuant to R.C. 2953.08 (G) (2).

{¶21} Moore, along with two others, was involved in a violent robbery of Mary Jo Gilmore, who had allowed the three to stay at her home until the attack. Ms. Gilmore was tied up in her bedroom and beaten, both with fists and a padlock, and among her injuries suffered a wound to her head that required five stitches to close. On November 9, 2000, then twenty-year-old Moore pleaded guilty to one count each of aggravated robbery, felonious assault, aggravated burglary, and kidnapping. Three of the four offenses are first degree felonies, while felonious assault is a second degree felony. The judge held a sentencing hearing on November 29, 2000, imposed maximum and consecutive prison sentences resulting in

¹*State v. Moore*, Cuyahoga App. No. 79353, [2002-Ohio-2133](#) (*Moore I*).

an aggregate prison term of thirty-eight years, and entered a judgment of conviction and sentence on February 7, 2001.

{¶22} In *Moore I* this court vacated the sentence and remanded for resentencing because the judge failed to comply with statutory sentencing requirements. A second sentencing hearing was held on August 19, 2002 and, as the majority notes, the judge again found Moore deserving of maximum and consecutive sentences although she again failed to comply with statutory sentencing requirements, and imposed the same sentence previously imposed in *Moore I*.

{¶23} Before imposing consecutive sentences, R.C. 2929.14(E)(4) requires that the judge find that such sentences are necessary to protect the public from future crime or to punish the offender, that the sentences are not disproportionate to the seriousness of the conduct and to the offender's danger to the public, and either: (a) the offense was committed while the offender was subject to other criminal proceedings or sanctions; (b) the harm caused was "so great or unusual" that no single prison term would be adequate; or (c) the offender's criminal history demonstrates the need for consecutive sentences. I agree with the majority that the judge failed to make the necessary findings, as she stated only that consecutive sentences "are not disproportionate to the danger this offender poses to the public."

Nevertheless, it is unnecessary to remand this case pursuant to R.C. 2953.08(G)(1) because the consecutive sentences are not supported by the record. R.C. 2953.08(G)(2) gives a reviewing

court the authority to modify a sentence or vacate and remand for resentencing if it "clearly and convincingly" finds that the record does not support the sentence imposed or that the sentence is "otherwise contrary to law."

{¶24} Moore was not subject to any other criminal proceedings when the offenses took place and, although his criminal history included two prior arrests, there was no indication of prior convictions or that he had previously served a prison term. Therefore, among the three alternatives available in R.C. 2929.14(E)(4)(a)-(c), the only one that possibly could apply to Moore is R.C. 2929.14(E)(4)(b). Although he committed a violent robbery against a victim who had extended her generosity and trust to him, the record clearly and convincingly shows that this is not the type of harm that requires consecutive prison terms.

{¶25} I do not doubt that Ms. Gilmore suffered emotional and psychological trauma as a result of the event, but there was no evidence that she sought or required treatment for psychological trauma, and her most serious physical injury was a wound to the head that required five stitches to treat. Moreover, she stated her forgiveness of Moore and requested leniency at both sentencing hearings. When compared with other "conduct normally constituting the offense"² and the injuries suffered by other robbery victims,

²R.C. 2929.12(B); see, also, *State v. Brahler*, Cuyahoga App. No. 79710, [2002-Ohio-2252](#), at ¶17-19 (Kilbane, J., concurring in part and dissenting in part).

the record does not show that her injuries are so great or unusual that consecutive sentences are necessary.

{¶26} In addition, even though the charged offenses arose from a single event, Moore pleaded guilty to all four and the judge sentenced him to maximum consecutive terms. Based upon the “abstract” analysis employed by *State v. Rance*,³ the *Moore I* court rejected his claims that some or all of the offenses were allied⁴ and that determination is not reviewable here. Nevertheless, consecutive sentences based on offenses arising from a single event should be carefully scrutinized to ensure that multiple punishments are not only authorized, but necessary and appropriate to crimes arising from a single event.⁵ Despite the “abstract” analysis employed in *Rance*, the facts of the offenses committed can and should be considered when imposing sentence. Where offenses are factually allied the judge should be less inclined to impose consecutive prison terms even if the offenses are not legally allied under *Rance*.⁶

³85 Ohio St.3d 632, 637, [1999-Ohio-291](#), 710 N.E.2d 699.

⁴*Moore I*, [2002-Ohio-2133](#), at ¶27.

⁵R.C. 2929.14(E)(4)(b).

⁶*Rance* also has been criticized in a number of cases, both because it leads to seemingly indefensible results and because its analysis on a constitutional issue conflicts with that of the United States Supreme Court. See, e.g., *State v. McIntosh* (2001), 145 Ohio App.3d 567, 581-582, 763 N.E.2d 704 (Painter, P.J., concurring in part and dissenting in part); *State v. Zima*, Cuyahoga App. No. 80824, [2002-Ohio-6327](#), at ¶47-48 (Kilbane, J., concurring in part and dissenting in part).

{¶27} Not only does R.C. 2929.14(E)(4) require particular findings, as well as adequate reasons and a record in support of such findings, before imposing consecutive sentences, R.C. 2929.11(B) requires a judge to impose sentences "consistent with sentences imposed for similar crimes committed by similar offenders" and R.C. 2929.13(A) states that a sentence "shall not impose an unnecessary burden on state or local government resources." Nothing in the record indicates that the judge considered either of these factors before imposing a thirty-eight year prison term, without eligibility for parole or judicial release, upon a twenty-year-old offender with no prior prison record.

{¶28} A defendant convicted of murder pursuant to R.C. 2903.02 becomes eligible for parole after fifteen years.⁷ The definite prison term imposed upon Moore is over 2½ times longer. Furthermore, defendants convicted of aggravated murder pursuant to R.C. 2903.01 can become eligible for parole in twenty years, and even those convicted of aggravated murder with aggravating circumstances⁸ can become eligible for parole in twenty-five or thirty years.⁹ I cannot fathom how Moore, who caused a physical injury requiring five stitches, can twice be sentenced to a

⁷R.C. 2929.02(B).

⁸These circumstances are listed in R.C. 2929.04.

⁹R.C. 2929.022, 2929.03.

definite prison term preventing his release until the age of fifty-eight without this court taking some more concrete action.

{¶29} I agree that the power to modify a sentence under R.C. 2953.08(G)(2) should be carefully employed,¹⁰ but a sentence that is not supported by the record need not be remanded for clarification.¹¹ In this case the judge has twice imposed a thirty-eight year maximum and consecutive prison term on Moore, and in both cases she failed to consider express and unambiguous statutory terms despite her desire to impose the most severe sentence possible.¹² The record does not support the sentence and, despite having ample opportunity to explain her decision properly, the judge has failed to do so. Such conduct demonstrates either a failure to understand the statutory provisions or a disregard for them, and thus it is appropriate to modify Moore's sentence to omit consecutive prison terms rather than remanding the judgment.

{¶30} Because there is no basis for finding that a single prison term will be inadequate to punish him or protect the public from future crime and his lack of a significant criminal history prevents a finding that he presents an extraordinary risk of

¹⁰*State v. Jones*, 93 Ohio St.3d 391, 399-400, [2001-Ohio-1341](#), 754 N.E.2d 1252.

¹¹*Id.*

¹²See *State v. Duvall*, Cuyahoga App. No. 80316, [2002-Ohio-4574](#), at ¶75 (Kilbane, J., concurring in part and dissenting in part) (belief that harshest possible sentence is necessary should “inspire the judge to take every precaution to ensure the validity of her judgment.”)

recidivism, I would sustain Moore's third and fourth assignments of error, find the others moot,¹³ and modify his sentence to make the sentences concurrent instead of consecutive.

¹³App.R. 12(A)(1)(c).