

[Cite as *State v. Brown*, 2004-Ohio-227.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 82298

STATE OF OHIO,	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
vs.	:	AND
HOWARD BROWN,	:	OPINION
Defendant-Appellant	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	JANUARY 22, 2004
	:	
	:	
CHARACTER OF PROCEEDING	:	Criminal appeal from Common Pleas Court Case No. CR-422508
JUDGMENT	:	SENTENCE VACATED AND REMANDED FOR RESENTENCING
DATE OF JOURNALIZATION	:	

APPEARANCES:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor MARK J. MAHONEY Assistant County Prosecutor Justice Center - 8 th Floor 1200 Ontario Street Cleveland, Ohio 44113
-------------------------	--

For Defendant-Appellant:

JOHN P. PARKER
The Brownhoist Building
4403 St. Clair Avenue
Cleveland, Ohio 44103

ANNE L. KILBANE, P.J.

{¶1} Howard Brown appeals from a sentence imposed by Judge Jose Villanueva after he pleaded no contest to the indictment for four counts of rape, one count of aggravated burglary, one count of aggravated robbery, one count of kidnapping, and one count of gross sexual imposition. He contends that the aggregate sentence of fifteen years is inconsistent with sentences imposed for similar crimes, and the consecutive sentences are not supported by the record. We vacate the sentence and remand for resentencing.

{¶2} From the record we glean the following: In the early hours of April 10, 2002, Brown, purportedly high on marijuana and ecstasy and wearing a black hooded sweatshirt, gloves, a bandana around his face, and carrying a backpack, used a key to enter L.M.'s apartment. She awoke to find a man standing at the foot of her bed who demanded oral sex. She got up and tried to lead him out of her bedroom, but he grabbed her and forced her to perform fellatio. He then vaginally raped her and, during the act, she pleaded with him to use a condom and he agreed. He followed her to the bathroom, forced her to perform oral sex again and, wearing a condom, then vaginally raped her a second time. When he left she called the police and, when they arrived, told them she believed that her assailant was someone who lived in her building and that

he had also rummaged through her belongings and taken money from her purse.

{¶3} The Officers knocked on various apartment doors until reaching Brown's unit. When he opened the door, he was dressed in a manner described by the victim and was taken into custody. The victim was unable to visually identify Brown but, when she asked that he speak, she was able to positively identify him as her assailant.¹ Although Brown claimed that he found the keys to apartment number five and went in because he believed it was empty, he could not explain why he didn't leave immediately or the purposes for his disguise.

{¶4} Following his plea to the indictment, Brown was referred for a pre-sentence investigation and a psychiatric examination. He was found to be a sexually oriented offender and sentenced to consecutive three-year terms of imprisonment on each rape count and the aggravated burglary count, concurrent sentences of three years on the aggravated robbery count and one year for the gross sexual imposition.² He asserts three assignments of error set forth on Appendix A.

CONSECUTIVE SENTENCES

{¶5} Brown contends that the judge erred in imposing consecutive sentences because he did not make the statutorily enumerated findings and reasons supporting those findings under

¹DNA samples confirmed that Brown was the rapist.

R.C. 2929.14(E). To justify consecutive sentences "reserved for the worst offenses and offenders,"³ the judge must make specific findings on the record. First, he must find that the consecutive sentences are necessary to protect the public or punish the offender. Second, he must find that the proposed consecutive sentences are not disproportionate both to the seriousness of the offender's conduct and the danger the offender possesses. And third, he must find that one of the following exist:

"(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."

{¶6} At Brown's sentencing hearing the judge offered the following rational:

"With respect to the sentence, my sentence is as follows. And first of all, I have to say that I think the nature of this offense and the dynamics of that evening, which I'm sure neither one of these two individuals will ever forget, suggests that there ought to be separate sentences for each act, and that these ought to be consecutive sentences.

It's my view that consecutive sentences are necessary, both

²The kidnapping count was merged with the rape counts.

³*State v. Comer*, 99 Ohio St.3d 463, [2003-Ohio-4165](#), 793 N.E.2d 473.

to protect the public and to punish Mr. Brown, and that the harm caused to Miss [M] by his behavior is such that no single prison term for any of these offenses adequately reflects the seriousness of his conduct."

{¶7} As we have held:

"Imposing consecutive prison terms for convictions of multiple offenses, therefore, is appropriate upon making certain findings as enumerated in this statute. When the trial court does so, however, it must state its reasons on the record. See R.C. 2929.19(B)(2)(c). Failure to sufficiently state these reasons on the record constitutes reversible error."⁴

{¶8} It is insufficient for the judge to merely make conclusory statements without analyzing whether Brown's conduct justified his conclusions.⁵ The Ohio Supreme Court has held that R.C. 2929.19(B)(2)(c) mandates that "when imposing consecutive sentences, a trial court is required to make its statutorily enumerated findings and give reasons supporting those findings at the sentencing hearing."⁶ Absent these findings and reasons, an appellate court cannot conduct "a meaningful review of the sentencing decision."⁷

{¶9} The dissent cites *State v. Fincher*⁸, a 1997 Franklin county case, for the proposition that no magic words are necessary

⁴*State v. Johnson*, Cuyahoga App. No. 80436, [2002-Ohio-7057](#). (Internal citations omitted.)

⁵*State v. Gary* (2001), 141 Ohio App.3d 194, 750 N.E.2d 640.

⁶*State v. Comer*, *supra*.

⁷*Id.* at 468, paragraph 21.

⁸(Oct. 14, 1997), Franklin App. No. 97APA03-352.

when imposing a sentence. This Court is required, however, to follow the precedent set forth by the Ohio Supreme Court in *State v. Comer*, supra, which mandates an analysis by the trial judge when imposing consecutive sentences.⁹

{¶10} Because the record does not contain the full analysis for the imposition of consecutive sentences, the second assignment of error has merit. We find assignments of error one and three are moot.¹⁰

{¶11} We vacate the sentence and remanded for resentencing.

APPENDIX A

"I. THE TRIAL COURT FAILED TO COMPLY WITH R.C. 2929.11(B), STATE V. LYONS, 2002 OHIO 3424, AT PARA. 30, CUYAHOGA APP. NO. 80220, AND THE TRIAL COURT FAILED TO ENSURE THE SENTENCE

⁹See also, *State v. Edmonson* (1999), 86 Ohio St.3d 324, [1999-Ohio-110](#), 715 N.E.2d 131.

¹⁰App.R. 12(A)(1)(c).

IMPOSED WAS CONSISTENT WITH SENTENCES [SIC] IMPOSED FOR
SIMILAR CRIMES COMMITTED BY SIMILAR OFFENDERS.

"II. THE TRIAL COURT VIOLATED R.C. 2929.14 IN IMPOSING
CONSECUTIVE SENTENCES.

"III. THE SENTENCE OF 15 YEARS FOR AN OFFENDER WHO HAS NOT
BEEN SENTENCED TO PRISON VIOLATES 2929.14(B)."

JAMES J. SWEENEY, J., concurs.

FRANK D. CELEBREZZE JR., J., DISSENTS WITH SEPARATE
OPINION ATTACHED.

FRANK D. CELEBREZZE, JR., J., dissenting.

{¶12} I respectfully dissent from the majority in this case. When a judge imposes consecutive terms of incarceration, but fails to comply with R.C. 2929.14(E)(4), there is reversible error. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4164; see, also, *State v. Beck* (March 30, 2000), Cuyahoga App. No. 75193, citing *State v. Albert* (1997), 124 Ohio App.3d 225. Thus, the court must make the three findings, as outlined in the majority opinion, before a defendant can be properly sentenced to consecutive terms. However, in *State v. Fincher* (Oct. 14, 1997), Franklin App. No. 97APA03-352, appeal dismissed (1998), 81 Ohio St. 3d 1443, the appellate court determined that the S.B. 2 sentencing guidelines do not "require talismanic words from the sentencing court" when a court imposes a sentence.

{¶13} I believe that the record and the trial court's stated reasons and findings support the imposition of consecutive sentences. The court obviously took into account the presentence investigation report, psychiatric evaluation, the victim impact

statement and the statement of the appellant in making its sentencing determination. The trial judge cites the "nature of the offense" and the "dynamics of that evening" as reasons for imposing consecutive sentences. Further, he goes on to state that consecutive sentences are necessary to protect the public and punish the offender. Finally, the court noted that the extent of harm done to the victim was such that no single prison term could adequately reflect the seriousness of the appellant's conduct. That he did not use the word "disproportionate" while making the findings does not negate the fact that the trial judge obviously undertook the appropriate analysis prior to making the sentencing findings. The record is not totally devoid of the necessary language, and I do not find the trial court's statements merely "conclusory." Therefore, I would not sustain the appellant's assignments of error and would affirm the sentence.

It is ordered that the appellant recover from appellee costs herein taxed.

The Court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate

pursuant to Rule 27 of the Rules of Appellate Procedure.

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. II, Section 2(A)(1).