

[Cite as *State v. Glass*, 2004-Ohio-3616.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83224

STATE OF OHIO	:	JOURNAL ENTRY
	:	AND
Plaintiff-appellee	:	OPINION
	:	
-vs-	:	
	:	
CARLOS D. GLASS	:	
	:	
Defendant-appellant	:	

DATE OF ANNOUNCEMENT  
OF DECISION:

JULY 8, 2004

CHARACTER OF PROCEEDING:

Criminal appeal from the  
Court of Common Pleas  
Case No. CR-399243

JUDGMENT:

Affirmed.

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:

WILLIAM D. MASON, ESQ.  
CUYAHOGA COUNTY PROSECUTOR  
BY: PATRICK J. LAVELLE, ESQ.  
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For Defendant-Appellant:

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ANN DYKE, P.J.:

{¶1} Defendant Carlos G. Glass appeals from the sentence imposed on remand from this court, in connection with his conviction for possession of drugs and preparation of drugs for sale. For the reasons set forth below, we affirm.

{¶2} On November 27, 2000, defendant was charged with possession of drugs and preparation of drugs for sale. Following a jury trial, he was convicted of both offenses. The trial court subsequently sentenced defendant to a seven years term of incarceration for possession, to be served concurrently with a seventeen month sentence for preparation of drugs for sale. The trial court further ordered that this sentence run consecutive to a concurrent term of seventeen months and eleven months for unrelated charges contained in Case No. 404404.

{¶3} On appeal, this court observed that the trial court made no “mention of what ‘conduct’ supported the convictions in case number 404404,” and held that it could not “justify the trial court’s determination and decision to impose consecutive sentences that would be in compliance with R.C. 2929.14(E)(4).” This Court therefore reversed the sentence and remanded the matter for re-sentencing pursuant to R.C. 2953.08(G)(1). See *State v. Glass*, Cuyahoga App. No. 81275, 2003 Ohio 1505.

{¶4} On June 27, 2003, the trial court held a second sentencing hearing. At this time, the court outlined the charges set forth in case no. 404404. In addition, the court noted that defendant had an extensive record, and it refuted defendant’s counsel’s claims that defendant had simply pushed a telephone across a table and hit the victim and that there was no indication that she had

obtained medical treatment for her injuries. The court then reimposed the sentence which it had previously ordered. Defendant now appeals and assigns two errors for our review.

{¶5} Defendant’s first assignment of error states:

{¶6} “The trial court erred by imposing a sentence without considering the nature of the offenses for which Mr. Glass was convicted.”

{¶7} Within this assignment of error, defendant complains that the trial court erred by considering offenses for which defendant had been charged but not convicted, viz: rape and felonious assault. In opposition, the state asserts that the court merely outlined the events which preceded the convictions.

{¶8} Our review of the record reveals that during the re-sentencing, defendant’s trial counsel argued, with respect to the relative seriousness of the conduct, that defendant had been indicted for rape and felonious assault but he was convicted only of aggravated assault. Thereafter, the trial court outlined defendant’s record and stated as follows:

{¶9} “And then you have this case, 399243, where you were convicted of a felony of the first degree and a felony of the fourth degree involving drugs.

{¶10} “Then you have before this Court case number 404404, a felony of the fourth degree of aggravated assault in count three, a breaking and entering, being a felony of the fifth degree, to which you pled guilty.” (Tr. 9-10).

{¶11} Thereafter, in compliance with our mandate that on remand the trial court specify the “conduct that gave rise to those offenses [case number 404404]” in conducting the proportionality analysis required under R.C. 2929.12(E)(4), see *State v. Glass*, supra, at 6-7, the court provided an offense summary for this matter. The Court explained:

{¶12} “I have read your record into this record for purposes of the appeal that you previously filed, making clear to the Court of Appeals, should you choose to file another one, exactly what went on in this case as well as what the offenses were for which you were convicted.” (Tr. 14).

{¶13} In accordance with the foregoing, we cannot credit defendant’s claim that the trial court relied upon conduct for which defendant was not convicted in fashioning its sentence. Rather, the indicted offenses were first mentioned by defendant’s trial counsel. Thereafter, the trial court identified the offenses for which defendant was convicted. The court outlined the conduct of case number 404404 only in response to our mandate on remand. This assignment of error lacks support in the record and is overruled. *State v. Nickleberry* (Nov. 22, 2000), Cuyahoga App. No. 77516.

{¶14} Defendant’s second assignment of error states:

{¶15} “The trial court erred by imposing consecutive prison terms when the sentence is not supported by findings in the record pursuant to R.C. 2929.14(E)(4) and R.C. 2929.19(B)(2)(c).”

{¶16} Defendant next asserts that the trial court failed to enumerate the findings and reasons for which it imposed consecutive sentences.

{¶17} When a court imposes consecutive sentences, it must follow R.C. 2929.14(E)(4) and 2929.19(B)(2)(c).

{¶18} R.C. 2929.14(E)(4) governs the imposition of consecutive sentences. It provides that a court may impose consecutive sentences only when it concludes that the sentence is: (1) necessary to protect the public from future crime or to punish the offender; (2) 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 applies: a) the offender committed the offenses while awaiting trial or sentencing, under sanction or under post-release control; b) the harm caused by the multiple offenses was so

great or unusual that a single prison term would not adequately reflect the seriousness of his offense; or c) the offender's criminal history demonstrates that consecutive sentences are necessary to protect the public from future crime.

{¶19} R.C. 2929.19(B)(2) provides that:

{¶20} “The court shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances:

{¶21} “\*\*\*

{¶22} “(c) If it imposes consecutive sentences under section 2929.12 of the Revised Code, its reasons for imposing the consecutive sentences.”

{¶23} “Reasons are different from findings. Findings are the specific criteria enumerated in [R.C. 2929.14(E)(4)] which are necessary to justify [consecutive] sentences; reasons are the trial court's bases for its findings \* \* \*.” *State v. Anderson* (2001), 146 Ohio App. 3d 427, 437, 439, 2001 Ohio 4297, 766 N.E.2d 1005. Moreover, the court must orally make its findings and state its reasons on the record at the sentencing hearing. *State v. Comer*, 99 Ohio St.3d 463, 2003 Ohio 4165, at P21, 793 N.E.2d 473. Failure to sufficiently state these reasons on the record constitutes reversible error. *Id.*; *State v. Gary* (2001), 141 Ohio App.3d 194, 196-198, 750 N.E.2d 640, citing *State v. Albert* (1997), 124 Ohio App.3d 225, 705 N.E.2d 1274.

{¶24} Here, the trial court noted that defendant had an extensive criminal history which involved numerous offenses and found that consecutive sentences were necessary to protect the public and not disproportionate to the seriousness of defendant's conduct, and that consecutive sentences were necessary due to the danger which defendant posed to the public. The second assignment of error is without merit.

Affirmed.

JAMES J. SWEENEY, J., CONCURS.

DIANE KARPINSKI, J., DISSENTS.

KARPINSKI, J., DISSENTING:

{¶25} I respectfully dissent from the majority’s ruling, because the court failed to adequately align its reasons for its findings in imposing consecutive sentences as required by R.C. 2929.19.

{¶26} The sentence in this case was previously vacated by this court and reversed because the trial court failed to state what the offenses were when it imposed the sentence. I note that when the court imposed the sentence for possession of drugs, it again failed to state what one of the offenses was. Instead, sentencing him, the court stated, “in case number 399243, a felony of the first degree, with a presumption of prison, to seven years. Count two, preparation of drugs for sale, to 17 months, to be served concurrent to each other.” Tr. at 14.

{¶27} Additionally, the court did not adequately align those findings to its reasons for imposing consecutive sentences. The Ohio Supreme Court noted in *State v. Comer* (2003), 99 Ohio St.3d 463, “[w]hile consecutive sentences are permissible under the law, a trial court must **clearly align each rationale with the specific finding** to support its decision to impose consecutive sentences. These findings and reasons must be articulated by the trial court so an appellate court can conduct a meaningful review of the sentencing decision. Griffin & Katz, Ohio Felony Sentencing Law, *supra*, at 458-459, Section 1.21.” ¶21. (Emphasis added.)

{¶28} Here, the court pointed out defendant’s extensive criminal history, stating:

THE COURT: Mr. Glass, your record at the time of the original sentence indicates that you had a prior prison term for receiving stolen property, you had prior convictions for RSP, drug abuse and then you had disorderly conduct, a domestic violence, a theft, another theft, an aggravated trafficking and drug abuse, domestic violence with a prior conviction, noise in a motor vehicle, possession of drugs and PCT, another RSP, another possession of drugs.

And then you have this case, 399243, where you were convicted of a felony of the first degree and a felony of the fourth degree involving drugs.

Then you have before this Court case number 404404, a felony of the fourth degree of aggravated assault in count three, a breaking and entering, being a felony of the fifth degree, to which you pled guilty.

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In addition, you've served numerous prison terms. And although [your counsel] tells me that you were merely convicted of pushing a phone across, there were no objections made at the time of the original sentencing to the offense summary that was provided to the Court, including the victim's statement. And so we will read this into the record so that the record is clear. Tr. at 9-10.

{¶29} The court then proceeded to read the police report into the record. Defense counsel objected but was told, "[e]xcuse me. I didn't interrupt you. There was no objection made to this offense summary the first time and no objections made by you today." Tr. at 12. Following the court's reading the police report into the record, the court stated:

Mr. Glass, in that case, 404404, you were convicted of aggravated assault. You were also convicted of breaking and entering. I read your record into this record for purposes of the appeal that you previously filed, making it clear to the Court of Appeals, should you choose to file another one, exactly what went on in this case as well as what the offenses were for which you were convicted.

The Court believes that the sentence previously imposed is adequate and is appropriate and sentences you in case number 339243, a felony of the first degree, with a presumption of prison, to seven years. Count two, a felony of the fourth degree, preparation of drugs for sale, to 17 months, to be served concurrent to each other.

In case number 404404, count two, a felony of the fourth degree, aggravated assault, you are sentenced to 17 months in prison. On count three, breaking and entering, a felony of the fifth degree, 11 months in prison, to be curved [sic] concurrent to each other but consecutive to the sentence in 399243.

The Court also notes that you have an extensive criminal history, that you pose a great risk of recidivism base upon the criminal history that involves numerous

offenses, prior prison terms and spans a period of time from 2003 [sic] through the dates of the trial in 2002.

In addition, the Court notes that your criminal history requires consecutive sentences in order to fulfil the purposes of the legislation in 2929.11 and these consecutive sentences are not disproportionate to the seriousness of your conduct.



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The danger to the public requires consecutive sentences in order to fulfil the purposes of Ohio Revised Code 2929.11.

{¶30} The court then proceeded to inform defendant about post-release control.

{¶31} The trial court’s statement that Defendant has a history of numerous crimes is a fair summary of her earlier specific recitation of defendant’s prior offenses. His history of recidivism provides an adequate reason to support the court’s findings that the consecutive sentences were necessary to protect the public from future crime and to protect the public from the danger defendant posed to the public.

{¶32} However, the court never gave its reason for finding that the consecutive sentences were not disproportionate to the seriousness of defendant’s conduct in these particular crimes. The record indicates that he had only two grams above the minimum for the two drug offenses, and the upper range was considerably higher.<sup>1</sup> To go to consecutive sentences for that offense would require a substantial reason to overcome such a small amount. Moreover, the particular crimes he was convicted of were possession of drugs, preparation of drugs for sale, aggravated assault, and breaking and entering. The police report addressed only the aggravated assault and the breaking and entering. The court never specifies what about the crime of breaking and entering is serious. As to the drug crimes, the court gives no details whatsoever. I would, therefore, remand for a full resentencing.

{¶33} I must also note another irregularity. When the attorney objected to the judge’s reading from the police report, the judge said: “Excuse me. I didn’t interrupt you. There was no objections made to this offense summary the first time and no objections made by you today.” Tr. 12. In this comment, the judge completely misrepresented what happened.

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<sup>1</sup>The crime covered a range from 25 to 100 grams.

{¶34} Moreover, the judge apparently believed that what had occurred at the first sentencing hearing controlled the second. The court's understanding of this process was an error. When a case is sent back for resentencing, a complete resentencing must occur. *State v. Fair*, Cuyahoga App. No. 82278, 2004-Ohio-2971. The failure to object at the first sentencing does not transfer to the second. Moreover, because the judge refused to acknowledge the attorney's objection to the police report, I must presume the attorney had no opportunity to refute anything that the judge read into the record from the police report. Denying this opportunity is even more egregious error and is further reason for a complete and new resentencing hearing.