[Cite as *State v. Lyons*, 2005-Ohio-392.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84377

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
	:	
TONY LYONS,	:	
	:	
Defendant-Appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	FEBRUARY 3, 2005
CHARACTER OF PROCEEDING:	:	Criminal appeal from
	:	Common Please Court
	:	Case No. CR-447845
JUDGMENT	:	AFFIRMED IN PART AND
	:	REVERSED IN PART.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee:

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For defendant-appellant:

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JOSEPH J. NAHRA, J.*:

{¶ 1} Tony Lyons appeals his convictions following a jury trial on one count of possession of drugs in violation of R.C. 2925.11 and two counts of drug trafficking in violation of R.C. 2925.03. He was sentenced to twelve months incarceration on the first count, and a term of eleven months on counts two and three, sentences to run concurrently to each other, but consecutively to the first. We affirm in part, and reverse in part to modify appellant's sentence to order that his sentences be served concurrently.

{¶ 2} On the afternoon of November 28, 2003, and after receiving several anonymous complaints, Cleveland police detectives Luther Roddy and Traci Nickerson enlisted the help of a confidential informant to target the area of East 124th Street and Corlett Avenue for suspected drug activity.

{¶ 3} The detectives observed Lyons standing on the street corner and engaging in suspected drug activity by approaching people as they walked by, and not appearing to have any other business in the area. The detectives instructed the informant to buy drugs from Lyons and gave her $10 in marked "buy money." The informant then exited the undercover car and approached Lyons. After a brief conversation, the informant handed Lyons the marked money and received what appeared to be crack cocaine. The informant then walked back to the undercover vehicle, indicated to

the detective that a deal had been made, and turned the drugs over to Detective Nickerson.

{¶ 4} When additional police support arrived, Lyons was arrested and found carrying the marked buy money. He was indicted and after a jury trial, was convicted on one count of possession of drugs and two counts of drug trafficking. He appeals to this court challenging his convictions in the assignments of error set forth in the appendix to this opinion.

{¶ 5} In his first two assignments of error, Lyons claims error in the trial court's denial of his motion for acquittal arguing the state presented insufficient evidence to sustain a conviction. He further claims his conviction was against the manifest weight of the evidence. We address these assignments of error together for purposes of appeal.

{¶ 6} A challenge to the sufficiency of evidence is a matter of law to be determined by the trial court based upon only a favorable interpretation of the evidence produced by the prosecution. Therefore, sufficiency requires this court view the matters adduced in the light most favorable to the prosecution and determine whether a rational fact finder could have found all the material elements of the offense beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184; *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Once the trial court has made its ruling on the sufficiency of the evidence, the issues become a matter for the fact finder who weighs all the evidence,

including evidence presented by the defense, if any, and determines the credibility of the witnesses. *State v. Jenks*, supra; *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717. At trial, detective Nickerson testified that she personally searched the informant for drugs, money, and other contraband prior to conducting the drug buy from Lyons. The informant was given marked and photocopied "buy money" from Detective Roddy, and both detectives personally observed the informant approach Lyons, hand him the marked money and receive an unknown substance in return.

{¶ 7} Upon the informant's return to the undercover car, Detective Nickerson personally searched her and removed one bag of what appeared to be crack cocaine. The detective put the drugs into an evidence bag where it remained under the control of the Cleveland police department. The substance was later tested and determined to contain .07 grams of cocaine.

{¶ 8} Detective Michael Raspberry testified that he personally marked the undercover buy money, inserting a circular mark on the face of the bill, and further testified that after he arrested Lyons, he removed the same marked bill from Lyons's front pocket.

{¶ 9} Based on the evidence presented at trial, it was neither insufficient nor against the manifest weight of the evidence to establish the elements of both drug possession and drug trafficking.

{¶ 10} Lyons' first and second assignments of error are overruled.

{¶ 11} In his third assignment of error, Lyons contends the trial court failed to comply with R.C. 2929.14(C) and R.C. 2929.19(B)(2)(d) when imposing maximum sentences. We review a felony sentence de novo. R.C. 2953.08. A sentence will not be disturbed on appeal unless the reviewing court finds, by clear and convincing evidence, that the record does not support the sentence or that the sentence is contrary to law. R.C. 2953.08(G)(2); *State v. Murrin*, Cuyahoga App. No. 83714, 2004-Ohio-3962, at ¶5. Clear and convincing evidence is more than a mere preponderance of the evidence, it is evidence that will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. *Murrin* at ¶5; *Cincinnati Bar Assoc. v. Massengale* (1991), 58 Ohio St.3d 121, 122, 568 N.E.2d 122. When reviewing the propriety of the sentence imposed, an appellate court shall examine the record, including the oral or written statements at the sentencing hearing and the presentencing investigation report. *Murrin* at ¶5; R.C. 2953.08(F)(1)-(4).

{¶ 12} R.C. 2929.14(C) provides that:

> **"Except as provided in division (G) of this section or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in**

accordance with division (D)(2) of this section."

{¶ 13} In imposing the maximum sentence, the trial court was required to make a finding that Lyons fit within one of the categories set forth in R.C. 2929.14(C) and to give reasons for its finding. *State v. Edmonson* (1999), 86 Ohio St.3d 324, 325, 1999-Ohio-110, 715 N.E.2d 131. In accord with this provision, the trial court stated that, "[i]n considering this matter, the State sentencing scheme would indicate that because there have been numerous prior convictions and prison terms, there is no presumption of community control." The court then referenced Lyons's history of convictions, stating that "this is a longstanding process on the part of this defendant and I feel that because of that prison would be appropriate." It is not necessary for the trial court to use the exact language of R.C. 2929.14(C), as long as it is clear from the record that the court made the required findings. *State v. Alvarado*, Cuyahoga App. No. 84535, 2004-Ohio-7026, at ¶5. We find that the trial court's findings and reasons meet the criteria for imposing the maximum sentences under R.C. 2929.14(C). These findings also meet the criteria for not imposing the minimum sentences under R.C. 2929.14(B). See, e.g., *State v. Comer*, 99 Ohio St.3d 463, 469, 2003-Ohio-4165, 793 N.E.2d 473.

{¶ 14} Appellant's third assignment of error is overruled.

{¶ 15} In his fourth assignment of error, Lyons claims error in the trial court's imposition of consecutive sentences without the appropriate findings and claims the findings were not supported by the evidence.

{¶ 16} R.C. 2929.14(E)(4) requires the trial court to make certain findings prior to sentencing an offender to consecutive sentences. *State v. Thornton*, Cuyahoga App. No. 84038, 2004-Ohio-5225, at ¶9. The court must find that consecutive sentences are: (1) necessary to protect the public from future crime or to punish the offender; (2) not disproportionate to the seriousness of the defendant's conduct; and (3) not disproportionate to the danger the defendant poses to the public. Id.; R.C. 2929.14(E)(4). In addition to these three findings, the trial court must also find one of the following: (1) the defendant committed the offenses while awaiting trial or sentencing on another charge; (2) the harm caused was so great that no single sentence would suffice to reflect the seriousness of defendant's conduct; or (3) the defendant's criminal history is so egregious that consecutive sentences are needed to protect the public. R.C. 2929.14(E)(4)(a)-(c).

{¶ 17} Here, the trial court found that consecutive sentences were necessary to protect the public, that consecutive sentences were not disproportionate to the seriousness of appellant's conduct, and that consecutive sentences were not disproportionate to the danger appellant posed to the public. Although the trial

court made the required initial findings, we are required to review the record to determine the propriety of the sentence imposed and may increase, reduce, or otherwise modify a sentence if the record does not support these findings. R.C. 2953.08(F); R.C. 2953.08(G)(2)(a). In this case, we clearly and convincingly find that the record does not support the trial court's findings that consecutive sentences were not disproportionate to the seriousness of appellant's conduct. Appellant's convictions for selling $10 worth of drugs did not warrant consecutive sentences and were disproportionate to the seriousness of his conduct. We therefore modify appellant's sentence under R.C. 2953.08(G)(2)(a) and order that his sentences be served concurrently.

{¶ 18} Appellant's fourth assignment of error is sustained.

{¶ 19} In his fifth and final assignment of error, Lyons contends that the two counts of drug trafficking were allied to the drug possession count and, as a result, the trial court erred when it ordered the two counts of drug trafficking to be served consecutively to the count of possession. We disagree. We initially note that appellant failed to raise this issue in the trial court and has therefore waived it for purposes of appeal. See, e.g., *State v. Fort*, Cuyahoga App. No. 80604, 2002-Ohio-5068, at ¶52. Appellant's substantive argument lacks merit in any event.

{¶ 20} Ohio's allied offenses statute protects against multiple punishments for the same criminal conduct in violation of the Double Jeopardy Clause of the United States Constitution and the

corresponding clause in the Ohio Constitution. It provides that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." R.C. 2941.25(A). In *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699, the Supreme Court of Ohio explained that offenses are of similar import if the elements of each crime in the abstract "correspond to such a degree that the commission of one crime will result in the commission of the other." Id. at 638 (internal quotation marks and citation omitted). We have routinely held that in comparing the elements of drug trafficking with drug possession, the commission of one does not necessarily require the commission of the other. See, e.g., *State v. Fair*, Cuyahoga App. No. 82278, 2004-Ohio-2971; *State v. Washington*, Cuyahoga App. No. 80418, 2002-Ohio-5834. It is possible to possess drugs without offering it for sale, and it is possible to sell or offer to sell drugs without having drugs in one's possession. *State v. Fair* at ¶64. Thus, we find the offenses are not allied offenses of similar import.

{¶ 21} Appellant's fifth assignment of error is overruled.

{¶ 22} We affirm the judgment in part, and reverse the judgment in part to modify appellant's sentence under R.C. 2953.08(G)(2)(a) and order that appellant's sentences be served concurrently.

{¶ 23} This cause is affirmed in part and reversed in part.

Costs to be divided equally between plaintiff-appellee and defendant-appellant.

It is ordered that a special mandate be sent to said 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.

JOSEPH J. NAHRA*
JUDGE

ANTHONY O. CALABRESE, JR., J., CONCURS.

SEAN C. GALLAGHER, P.J., CONCURS IN PART
AND DISSENTS IN PART WITH SEPARATE OPINION.

(*SITTING BY ASSIGNMENT: Judge Joseph J. Nahra, Retired, of the Eighth District Court of Appeals.)

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).

APPENDIX: ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR ACQUITTAL AS TO THE CHARGES WHEN THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION.

II. APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT TO MAXIMUM SENTENCE WITHOUT MAKING THE APPROPRIATE FINDINGS.

IV. THE TRIAL COURT ERRED BY ORDERING CONSECUTIVE SENTENCES WITHOUT MAKING THE APPROPRIATE FINDINGS.

V. THE TRIAL COURT ERRED WHEN IT ORDERED TWO COUNTS OF DRUG TRAFFICKING TO BE SERVED CONSECUTIVELY TO THE COUNT OF POSSESSION ALTHOUGH THE OFFENSES WERE ALLIED OFFENSES PURSUANT TO R.C. 2941.25 AND THEY WERE PART OF THE SAME TRANSACTION UNDER R.C. 2929.14."

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 84377

STATE OF OHIO	:	
	:	CONCURRING
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	DISSENTING
TONY LYONS	:	
	:	OPINION
Defendant-Appellant	:	
	:	
	:	

DATE: FEBRUARY 3, 2005

SEAN C. GALLAGHER, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶ 24} I respectfully dissent from the majority opinion with respect to the fourth assignment of error. I concur with the majority on the remaining assignments of error.

{¶ 25} While I am aware of valid concerns regarding disproportionate sentences, I do not believe the record in this case, or the case law in this district, supports the holding that: "In this case, we clearly and convincingly find that the record does not support the trial court's findings that consecutive sentences were not disproportionate to the seriousness of appellant's conduct."

{¶ 26} The majority acknowledges that the trial court made the required findings that consecutive sentences were necessary to protect the public, were not disproportionate to the seriousness of appellant's conduct and were not disproportionate to the danger appellant posed to the public, satisfying the basic requirements of R.C. 2929.14(E). The majority simply takes the position that, under the facts of the case, consecutive sentences were not warranted.

{¶ 27} The statute at issue does not adequately define any of the terms required to impose consecutive sentences. Thus, the interpretation of the terms is left largely to the individual determination of the trial judge. This case simply points out the inadequacy of an "a la carte" sentencing system based on nebulous terms that defy definition.

{¶ 28} "The law is well settled that we will not reverse a trial court on sentencing issues unless the defendant shows by clear and convincing evidence that the trial court has erred. *State v. Douse*, Cuyahoga App. No. 82008, 2003-Ohio-5238, citing

R.C. 2953.08(G)(1)." *State v. Banks*, Cuyahoga App. Nos. 83782, 83783, 2004-Ohio-4478.

{¶ 29} Here the trial court specifically referenced Lyon's extensive criminal history as the underlying basis for the consecutive sentence.

{¶ 30} In light of numerous previous holdings supporting the imposition of consecutive sentences where the required findings and reasons are stated on the record, I would affirm the decision of the trial court.