[Cite as *State v. Moore*, 2005-Ohio-4699.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85451

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
ROBBIE MOORE	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION:	September 8, 2005
CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court Case No. CR-452989
JUDGMENT:	SENTENCE VACATED; CASE REMANDED FOR RESENTENCING
DATE OF JOURNALIZATION:	_____

APPEARANCES:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor CAROL M. SKUTNIK, Assistant 1200 Ontario Street, 8th Floor Cleveland, Ohio 44113
For Defendant-Appellant:	JAMES L. HARDIMAN 75 Public Square Suite 333 Cleveland, Ohio 44113

ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Defendant-appellant Robbie Moore ("appellant") appeals the decision of the trial court. Having reviewed the arguments of the parties and the pertinent law, we vacate the sentence and remand for resentencing.

I.

{¶ 2} According to the case, appellant was indicted on June 14, 2004 with two counts of aggravated vehicular homicide with driving under suspension specifications (felony one) and driving under the influence (misdemeanor one). On August 23, 2004, appellant pled guilty to all three counts of the indictment. Appellant was referred to the county probation department for a presentence investigation report and to the court psychiatric clinic.

{¶ 3} On September 28, 2004, the trial court imposed the maximum sentence allowed on the vehicular homicide charges - a ten-year prison sentence on both count one and count two, to be served consecutive to one another, for a total of twenty years.[1] Post-release control was ordered for the maximum period allowed. Appellant was sentenced to six months on count three to run concurrent to the sentences in counts one and two. Appellant's driver's license was suspended for life, and she was ordered to pay

[1]R.C. 2929.14(A)(1) provides that the sentencing range for a first-degree felony is three, four, five, six, seven, eight, nine, or ten years in prison. In addition, R.C. 2903.06(E) mandates a prison term for an offender who is convicted of aggravated vehicular homicide.

costs. On October 7, 2004, appellant filed a motion to mitigate sentence and/or for reconsideration of sentence. The state filed its brief in opposition on November 30, 2004. The court declined to rule on appellant's motion to mitigate sentence.

{¶ 4} According to the facts, the incident in question occurred on May 20, 2004. On that date, appellant consumed alcohol and drove the wrong way on the I-71/I-90 entrance ramp, striking a motorcycle on which Jeffrey and Ann Bliss were riding. Both Jeffrey and Ann Bliss died at the scene from multiple injuries sustained in the collision. Appellant stated that she had no recollection of the accident, but admitted her culpability by entering guilty pleas to the three-count indictment. Appellant accepted full responsibility for her actions.[2]

{¶ 5} Sentencing occurred on September 28, 2004. The trial court acknowledged that appellant had no prior felony record and had only misdemeanor traffic offenses.[3] Appellant acknowledged her bad judgment, apologized to the victims' families and indicated her "heartfelt remorse" at the sentencing. Various members of the victims' family also addressed the court and asked for the maximum penalty. As previously mentioned, the trial court did impose the maximum penalty, twenty years total, on the vehicular homicide counts. Appellant's appeal now follows.

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[2]Tr. 6 - 7.

II.

{¶ 6} Appellant's assignment of error states the following: "Imposition of a maximum sentence for a first-time offender was inconsistent with similar sentences imposed for similar offenses and constitutes a 'manifest injustice.'"

{¶ 7} Under R.C. 2929.14(E)(4), a trial court is justified in imposing consecutive sentences if it finds that consecutive service is 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. Moreover, under R.C. 2929.14(E)(4)(a)-(c), the trial court must find one of the following:

> "(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.

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[3]Tr. 50.

"(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

{¶ 8} In the case at bar, the first factor, (a) that the offender committed one or more of the multiple offenses while awaiting trial or sentencing, was under a community control sanction, or was under post-release control for a prior offense, does not apply. The third factor, (c) that the *offender's history* of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender, also does not apply. Appellant did not have any prior felony criminal conduct in her history. The first and third factors do not apply, thereby leaving the second factor as the sole factor to address.

{¶ 9} In the case sub judice, the trial judge sentenced appellant to the maximum on the vehicular homicide counts and ran those two counts consecutively. The trial judge stated the following:

> "This is not an accident. This is an intentional act. One intends to drink alcohol, one intends to drive. I don't know why the state legislature doesn't call this murder. It is indeed murder. It is not an accident. I don't know why the state legislature doesn't impose higher and stricter penalties for this crime, but I am limited to those penalties that they have given me to use. Let no one walk out of here believing this was an accident. ***
>
> "*This sentence will be to protect the public.* I have read all of the numerous letters from both sides of the

families. I know that both sides of these families are hurt and that it is a tragedy from both sides of the families, but for you, Miss Moore, you will be sentenced to the maximum term on Count 1 and Count 2 of ten years and you will be sentenced consecutively on those two counts and on Count 3, which was the driving under the influence, which is a misdemeanor of the first degree, I will sentence you to six months. That will be consecutive -- concurrent with the consecutive sentences.

"Just one thing. Remember that post-release control as we went over at the time of the plea will apply to your sentence and that is for five years; and during post-release control, if you violate any of the conditions of post-release control or any other laws of the State of Ohio or any state or municipality thereof, the parole authority can take you back to prison for up to one-half of the court-announced sentence or they could have you charged with a new case."

(Emphasis added.)

{¶ 10} R.C. 2929.14(E)(4) states the following:

"(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 service is 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:* ***

"(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."

{¶ 11} The sentencing transcript above demonstrates that the trial court judge did not address the additional R.C. 2929.14(E)(4)(b) requirements in her sentencing. For example, after the trial court judge stated that "[t]his sentence will be to protect the public," she went on to address the letters written by the victims' families instead of addressing the R.C. 2929.14(E)(4)(b) requirements.

{¶ 12} Ordinarily, sentences for more than one felony will be served concurrently. The law "disfavors consecutive sentencing." *State v. DeAmiches* (Mar. 1, 2001), Cuyahoga App. No. 77609, appeal dismissed by 92 Ohio St.3d 1432. ("The imposition of *** consecutive sentences *** must be justified by extraordinary circumstances.")

{¶ 13} Accordingly, we find that the trial court did not adequately satisfy the R.C. 2929.14(E)(4) requirements on the record. Specifically, the court did not address how the sentences related to the fact that at least two of the multiple offenses were committed as part of one or more course of conduct, and the harm caused by two or more of the multiple offenses so committed was so

great or unusual that a single prison term does not adequately reflect the seriousness of the offender's conduct.

{¶ 14} Assuming arguendo that the trial court did provide more support in its sentencing rationale, thereby satisfying R.C. 2929.14(E), the sentence would still be contrary to law. It is the task of the appellate courts to review the consideration given by the trial judge to assure that the sentence is consistent with the purposes and principles applicable to all sentences. R.C. 2929.11(A), R.C. 2929.11(B), R.C. 2929.13. It is also the task of the appellate courts to review the trial court's findings on the record for not imposing the minimum prison sentence within the sentencing range where the defendant has not previously served a prison term. R.C. 2929.14(B). Moreover, the appellate courts are tasked with reviewing the trial court's determination and reasons for imposing the maximum prison term. R.C. 2929.14(C), 2929.19(B)(2)(d), 2929.19(B)(2)(e).

{¶ 15} Appellant's sentence in the case at bar is contrary to law. It is inconsistent with sentences of similar defendants in similar cases. An appellant must clearly and convincingly establish that his sentence is contrary to law by one of two mutually exclusive avenues. First, the appellant can show that his sentence is inconsistent with sentences of similar defendants in similar cases. Second, the appellant can demonstrate that the trial court did not make the statutorily required findings on the

record before imposing the sentence. *State v. Short*, Lucas App. No. L-03-1117, 2004-Ohio-2050.

{¶ 16} Although simply citing similar cases is not enough to show a sentence is in error, it is significantly relevant. Appellant's counsel cited numerous cases in which similar defendants received substantially shorter sentences than appellant received in the case at bar. For example, appellant stated the following in his motion to mitigate sentence:

> "In the case of *Ohio v. Patrick Cleary*, Case No. CR 03-443272 the defendant was sentenced to serve one year incarceration for Aggravated Vehicular Homicide and was, subsequently, granted judicial release. In the case of *State of Ohio v. Lisa Pribula*, Case No. CR 03-435845 after getting high on beer and marijuana and fooling around with a front passenger, the defendant caused the death of one passenger and critically injured three others. This defendant was sentenced to serve four *years* incarceration. In the case of *State of Ohio v. Nicholas Ulvila*, Case No. CR 02-431286 the defendant left his friend in [the] road to die and received a sentence of four years incarceration for the crime of Aggravated Vehicular Homicide. In the case of *Ohio v. Kravochuch*, the defendant received a sentence of eight years for Aggravated Vehicular Homicide though this was her 'fifth'

DUI arrest. In the case of *Ohio v. Yakubics*, Case No. CR 02-427919 the defendant received a sentence of five years though he also had five prior DUI arrests."[4]

{¶ 17} Appellant's counsel also mentioned that the day before appellant was sentenced, the Cuyahoga County Common Pleas Court sentenced James Skolsky in Case No. CR 04-454131A, which was a very similar case. Skolsky operated his motor vehicle under the influence of alcohol, drove the wrong way on Bolivar Road past five "wrong way" signs onto East Ninth Street in Cleveland and struck a taxicab, causing the death of two people. Unlike appellant in the case sub judice, Skolsky had been previously arrested for driving under the influence of alcohol. At the time of the accident, Skolsky's blood-alcohol content was .25.

{¶ 18} At sentencing, Skolsky apologized to the victims' families and the court for his involvement in the accident that caused the death of two people. However, in Skolsky's case, he was sentenced to three years for each death, for a combined total of six years. As previously mentioned, appellant was sentenced to twenty years in the case at bar.

{¶ 19} While the circumstances of this case are indeed tragic, the evidence demonstrates that the trial court's sentence was statutorily deficient and inconsistent with similar sentences

[4]See footnote 1 in defendant's motion to mitigate sentence and/or for reconsideration of sentence.

imposed for similar offenses. We hereby find the trial court's sentence to be in error.

{¶ 20} Accordingly, appellant's assignment of error is sustained.

Sentence vacated and case remanded for resentencing.

It is, therefore, considered that said appellant recover of said appellee her costs herein.

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.

ANTHONY O. CALABRESE, JR.
JUDGE

PATRICIA ANN BLACKMON, A.J., CONCURS;

CHRISTINE T. MCMONAGLE, J., CONCURS IN PART AND DISSENTS IN PART. (SEE SEPARATE CONCURRING AND DISSENTING OPINION.)

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).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85451

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	CONCURRING AND DISSENTING
	:	
	:	OPINION
v.	:	
	:	
ROBBIE MOORE,	:	
	:	
Defendant-Appellant	:	

DATE: September 8, 2005

CHRISTINE T. McMONAGLE, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶ 21} I respectfully concur in part and dissent in part. I concur with the majority's finding that the trial court did not adequately satisfy the requirements of R.C. 2929.14(E)(4) in sentencing appellant to consecutive sentences, and that the sentence appellant received was inconsistent and disproportionate to similarly situated defendants. However, pursuant to R.C. 2953.08, which governs appeals from felony sentences, I would modify the sentence rather than reverse and remand the case to the trial court.

{¶ 22} R.C. 2953.08 provides that this court's review of appellant's sentence is de novo. Further, R.C. 2953.08(G) provides that a reviewing court may modify a felony sentence if it finds by clear and convincing evidence one of the following: "(a) that the record does not support the sentencing court's findings *** [or] (b), that the sentence is otherwise contrary to law." Under R.C. 2953.08(F), this court's review of the record shall include any presentence, psychiatric, or other investigative report submitted to the court in writing prior to the imposition of sentence, and any oral or written statements made to or by the court at the sentencing hearing.

{¶ 23} In this case, the trial court erred, in part, in sentencing appellant because it did not undergo the necessary analysis to insure that appellant's sentence was consistent with sentences imposed on similar offenders.

{¶ 24} The mandate for consistency in sentencing is set forth in R.C. 2929.11(B) as follows:

{¶ 25} "A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."

{¶ 26} This mandate is directed to the trial court and, thus, it is the trial court's responsibility to insure consistency among the sentences it imposes. See *State v. Lyons*, Cuyahoga App. No. 80220, 2002-Ohio-3424. See, also, *State v. Stern* (2000), 137 Ohio App.3d 110, 738 N.E.2d 76. As this court stated in *Lyons*, "with the resources available to it, a trial court will, and indeed it must, make these sentencing decisions in compliance with this statute." Id. at ¶33.

{¶ 27} Here, appellant's counsel filed a comprehensive sentencing memorandum in the trial court prior to the sentencing hearing setting forth examples of similar cases where defendants drove under the influence of alcohol and one or more deaths resulted. A review of those cases shows that even in the cases where an aggravating factor(s) was present, defendants in Cuyahoga County were not sentenced to the maximum term.[1]

{¶ 28} The one case relied on by the trial court as justification for sentencing appellant to maximum, consecutive sentences, *State v. Sneed*, Cuyahoga App. No. 80902, 2002-Ohio-6502, is readily distinguishable from the instant case. First, at the time of the accident that gave rise to the charges in that case,

[1]The trial court stated at sentencing that "[j]udges of our court [give] maximum consecutive sentences to drunk drivers for causing a death[,]" but did not indicate cases where that occurred. The State did not file a sentencing memorandum, or oppose the one filed by defense counsel, setting forth instances where defendants were sentenced to the maximum, consecutive term for circumstances similar to the within case.

Sneed was on probation for another DUI accident. Second, even though Sneed was on probation for a similar offense at the time of the crime, he did not receive the maximum sentence but, rather, was sentenced to one year shy of the maximum sentence.[2] Moreover, Sneed reacquired his car keys after they had been taken away from him, and in addition to the two victims who died as a result of his actions, he caused injuries to five other victims. Thus, I believe that the trial court's reliance on *Sneed* was misplaced, in that Sneed, who had several aggravating factors present in his case and whose actions caused two deaths *and* five injuries, unlike this case, received *less* of a sentence than appellant did in this case.

{¶ 29} Furthermore, after appellant was sentenced, defense counsel filed a post-sentencing motion to mitigate sentence, (which was never ruled on by the trial court) wherein defense counsel cited the sentencing of another defendant, which occurred the day before appellant's sentencing, who drove the wrong way while under the influence of alcohol, caused two deaths, and received two consecutive three-year sentences. Thus, based on that case, defense counsel argued that appellant's sentence was inconsistent and disproportionate.

[2]Sneed was sentenced to a total of 15½ years in prison for two counts of aggravated vehicular homicide with a driving under the influence specification, five counts of aggravated vehicular assault with a driving under the influence specification, and one count of driving under the influence.

{¶ 30} I recognize that consistency does not require uniformity, Griffin & Katz, Felony Sentencing Law (2001), 59, and there may, in fact, be valid reasons for the discrepancy between one defendant and other defendants' sentences. When presented with evidence of the gross disparity between a defendant and other defendants' sentences, as was done for the trial court by defense counsel in this case, however, the trial judge should consider the information in making its sentencing decision and distinguish the defendant's sentence from that of the other defendants to ensure that the defendant's sentence meets the consistency requirement of R.C. 2929.11(B). *State v. Quine*, Summit App. No. 20968, 2002-Ohio-6987, at ¶16. That did not happen in this case.

{¶ 31} It is unusual for this court to have a plethora of information regarding consistency in sentencing made part of the record. This is the level of research and care this court has been encouraging since the issue of consistency has come before it. Accordingly, when an appellate court has ample evidence in the record concerning all sentencing issues, it is appropriate to modify the sentence pursuant to R.C. 2953.08 if it finds the sentence to be in error pursuant to R.C. 2929.11(B).

{¶ 32} A de novo review of the record in this case does not support a maximum, consecutive sentence and, therefore, I would modify the sentence pursuant to R.C. 2953.08 to reflect a sentence in accordance with R.C. 2929.11(B).