

[Cite as *State v. Gatewood*, 2015-Ohio-1288.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101271

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

VS.

**PAUL GATEWOOD**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case Nos. CR-12-565160-A and CR-12-566517-A

**BEFORE:** Celebrezze, A.J., McCormack, J., and Stewart, J.

**RELEASED AND JOURNALIZED:** April 2, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Defendant-appellant, Paul Gatewood, appeals from the sentence imposed by the common pleas court following his guilty plea. For the reasons that follow, we affirm appellant's sentence.

### **I. Procedural History**

{¶2} On August 1, 2012, appellant was indicted and charged in Cuyahoga C.P. No. CR-12-565160-A with burglary in violation of R.C. 2911.12(A)(2). The charge contained notice of prior conviction and repeat violent offender specifications.

{¶3} On September 12, 2012, appellant was indicted and charged in Cuyahoga C.P. No. CR-12-566517-A with burglary in violation of R.C. 2911.12(A)(2) and theft in violation of R.C. 2913.02(A)(1). The burglary charge contained notice of prior conviction and repeat violent offender specifications. The cases proceeded together at the trial court level.

{¶4} On November 19, 2012, appellant pled guilty to the sole count of burglary in CR-12-565160-A and the burglary count in CR-12-566517-A. The specifications and the remaining theft charge were dismissed.

{¶5} On December 20, 2012, the trial court imposed a prison term of eight years on each burglary count and ordered them to be served consecutively, for a total sentence of 16 years. The court further ordered \$200 restitution in CR-12-565160-A and \$225 restitution in CR-12-566517-A.

{¶6} Appellant filed a direct appeal with this court, arguing that the trial court imposed an excessive sentence that subjected him to cruel and unusual punishment, that he received ineffective assistance of counsel, and that the trial court erred in imposing consecutive sentences. *State v. Gatewood*, 8th Dist Cuyahoga Nos. 99430 and 99431, 2013-Ohio-5573 (“*Gatewood I*”). On December 19, 2013, this court rejected appellant’s ineffective assistance of counsel claim and determined that, given appellant’s criminal history and the “gravity of the offense,” his 16-year sentence was not excessive. However, we held that the trial court failed to make the necessary findings for imposing consecutive sentences under R.C. 2929.14(C)(4).

{¶7} On remand, the trial court reimposed appellant’s 16-year sentence. The court made the following statements regarding the imposition of consecutive sentences:

Those sentences will be consecutive. The Court makes the following findings with reference to consecutive sentences: That consecutive sentences are necessary to protect the public from future crimes. This Court does find that Mr. Gatewood had 14 prior felony convictions; that consecutive sentences are necessary to punish the offender.

This Court further finds that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct. And let me just indicate for the record that I agree with the finding of the Court of Appeals with reference to proportionality. The Court does — Court of Appeals found that on the proportionality argument, that it was within the statutory sentencing guidelines and therefore it was not disproportionate.

The Court further finds that the offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crimes of the offender, and of course that speaks for itself, because he has 14 prior felony convictions and nothing seems to stop him from his conduct.

{¶8} The court further reiterated the extensive nature of appellant’s criminal history, stating, “Nothing stops him, \* \* \* . He continues to traumatize people, to victimize people, to hurt people, to cause people harm and grief. Nothing stops him.” The trial court included its findings in its sentencing journal entry dated March 31, 2014.

{¶9} Appellant now brings this timely appeal, raising one assignment of error for review.

## **II. Law and Analysis**

{¶10} In his sole assignment of error, appellant argues that the trial court erred in imposing consecutive sentences.

{¶11} R.C. 2929.14(C)(4) requires the court to enter findings before imposing consecutive sentences. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29. Those findings, as made pertinent to the specifics of this case, are (1) that a consecutive sentence 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) that the offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. *Id.*

{¶12} R.C. 2953.08(G)(2) provides two bases for a reviewing court to overturn the imposition of consecutive sentences: the sentence is “otherwise contrary to law” or the reviewing court clearly and convincingly finds that “the record does not support the

sentencing court's findings" under R.C. 2929.14(C)(4). *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 11 (8th Dist.)

{¶13} This court explained the "clear and convincing" standard in *Venes*, stating

It is important to understand that the "clear and convincing" standard applied in R.C. 2953.08(G)(2) is not discretionary. In fact, R.C. 2953.08(G)(2) makes it clear that "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." As a practical consideration, this means that appellate courts are prohibited from substituting their judgment for that of the trial judge.

It is also important to understand that the clear and convincing standard used by R.C. 2953.08(G)(2) is written in the negative. It does not say that the trial judge must have clear and convincing evidence to support its findings. Instead, it is the court of appeals that must clearly and convincingly find that the record does not support the court's findings. In other words, the restriction is on the appellate court, not the trial judge. This is an extremely deferential standard of review.

In reaching this conclusion, we note that the term "record" as used in R.C. 2953.08(G)(2) is very broad. It encompasses all of the proceedings before the court, not just the sentencing. And while the court has the obligation to make separate and distinct findings under R.C. 2929.14(C)(4) before imposing sentence, support for those findings may appear anywhere in the "record" and not just at the time the court imposes consecutive sentences.

*Id.* at ¶ 20-22.

{¶14} In the case at hand, appellant does not contend that the trial court failed to make the requisite findings under R.C. 2929.14(C)(4). Instead, appellant argues that (1) the trial court's findings relied on "inaccurate and unsubstantiated" information; and (2) the record does not support the trial court's finding that consecutive sentences are not disproportionate to the seriousness of his conduct.

{¶15} Initially, appellant claims that the trial court's statement that he had 14 previous felony convictions is not factually accurate. Appellant maintains that he only has seven other felony convictions. However, our review of the record supports the trial court's findings. Prior to sentencing, the trial court ordered that a presentence investigation report ("PSI") be completed. The PSI was in the court's possession at the time it sentenced appellant and reflects that the seven felony convictions appellant refers to in his brief only includes his convictions in Cuyahoga County. He does not consider the multiple felony convictions he has in Lorain County. Appellate counsel conceded this fact at oral arguments. Accordingly, we find that the trial court's discussion of appellant's extensive criminal history was supported by the record and was factually accurate.

{¶16} Next, appellant contends that the trial court improperly relied on the fact "that one of the victims was a mother and a nine-year-old daughter, who was so traumatized [by appellant's actions] she couldn't sleep at night[.]" Appellant submits that trauma allegedly suffered by the nine-year-old is unsubstantiated because the victims did not appear at the sentencing hearing and there is no reference to a nine-year-old daughter in the police reports submitted to the trial court.

{¶17} After careful review of the record, we cannot say that the trial court's reference to the victim's nine-year-old daughter was inaccurate or unsubstantiated. Here, the prosecutor provided a recitation of the facts prior to sentencing and expressed to the court that "the victim wanted me to inform the court that her nine-year-old daughter is afraid to sleep in her own bed." Further, the victim also submitted a victim impact

statement that described the effect appellant's conduct has had on her family, specifically, her nine-year-old daughter. The details of the victim impact statement were included in appellant's PSI. Thus, the court's discussion of the victim's nine-year-old daughter was supported by the record.

{¶18} Finally, appellant contends that the record does not support the trial court's finding that consecutive sentences are not disproportionate to the seriousness of his conduct. Appellant states that the burglaries at issue involved situations where the homeowners were not home at the time the crimes were committed and, therefore, "no persons were threatened or harmed in a direct way." However, there is no evidence in the record to suggest that appellant knew the houses were unattended at the time he entered them. Furthermore, this court has already held that the gravity of appellant's conduct was not disproportionate to the sentence he received. *See Gatewood I* at ¶ 14-16. While this court's discussion of appellant's conduct was made within the context of an Eighth Amendment analysis in *Gatewood I*, this court's determination that "the victims of [appellant]'s crimes suffered a significant amount of fear because of his [conduct]" applies equally to our seriousness analysis herein. *See id.* Although the homeowners were not physically injured in these cases, appellant disregards the lasting impact his conduct has had, and will continue to have, on the victims of his crimes.

{¶19} Accordingly, we cannot clearly and convincingly find that the record does not support the trial court's finding that consecutive sentences are not disproportionate to the seriousness of appellant's conduct.



{¶20} Appellant's sole assignment of error is overruled.

### **III. Conclusion**

{¶21} The trial court made the requisite findings necessary to impose consecutive sentences. There is no requirement that those findings be supported by reasons on the record. As long as the findings are not clearly and convincingly unsupported in the record, there is no basis to reverse the consecutive nature of the sentences. The record in this case supports consecutive sentences.

{¶22} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

TIM McCORMACK, J., CONCURS;  
MELODY J. STEWART, J., CONCURS  
(SEE ATTACHED SEPARATE OPINION)

MELODY J. STEWART, J., CONCURRING WITH SEPARATE OPINION:

{¶23} I concur in the decision reached by the majority, but write separately to caution finding that the disproportionate-to-the-offender's-conduct prong of R.C. 2929.14(C)(4) is satisfied because a sentence does not fall outside the statutory guidelines of sentences for a particular degree of felony. This is not the proper analysis for this aspect of the consecutive sentencing statute. *See State v. Moore*, No. 99788, 2014-Ohio-5135, 24 N.E.3d 1197 (8th Dist.). The proper inquiry is whether a consecutive sentence is not disproportionate to the seriousness of the offender's conduct and to the danger he poses to the public — not whether the sentence is within a statutorily permitted range.

{¶24} As the majority points out, this court's discussion of proportionality in Gatewood's direct appeal was in the context of an Eighth Amendment cruel and unusual punishment analysis. As *Moore* notes, the proportionality (or disproportionality) inquiry for the purpose of consecutive sentencing relates to the offender's conduct during the commission of the offense(s). *See id.* at ¶ 33.

{¶25} The trial court relied on the proportionality analysis in the context of cruel and unusual punishment, which looks at the sentence in light of the offense instead of offender's conduct. Also, this analysis in Gatewood's direct appeal is dicta, so the trial court erred in its analysis of proportionality at resentencing. But as the majority notes, the record in this case is such that we cannot clearly and convincingly find that it does not support the trial court's findings for consecutive sentences.