

[Cite as *State v. Caffey*, 2015-Ohio-1311.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 101833 and 101834

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HARVEY F. CAFFEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-14-583829 and CR-14-584481

BEFORE: E.A. Gallagher, P.J., McCormack, J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: April 2, 2015

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EILEEN A. GALLAGHER, P.J.:

{¶1} In this consolidated appeal, defendant-appellant Harvey Caffey appeals his sentences following his guilty pleas to one count of driving under the influence in Cuyahoga C.P. No. CR-14-583829 and one count of driving under the influence in Cuyahoga C.P. No. CR-14-584481. Caffey contends that his sentences were contrary to law because the trial court failed to properly consider the relevant statutory factors under R.C. 2929.11 and 2929.12 prior to sentencing him and failed to make appropriate findings at his sentencing hearing. For the reasons that follow, we affirm Caffey's sentences. However, we remand the matter for the trial court to issue new sentencing journal entries, nunc pro tunc, to incorporate the findings it made in support of its imposition of consecutive sentences at the sentencing hearing.

Factual and Procedural Background

{¶2} In April 2014, Caffey was indicted by the Cuyahoga County Grand Jury for one count of driving under the influence in violation of R.C. 4511.19(A)(1)(h), a fourth-degree felony, in Case No. CR-14-583829¹ and one count of driving under the influence in violation of R.C. 4511.19(A)(1)(a), a fourth-degree felony, in Case No. CR-14-584481. On July 14, 2014, Caffey pled guilty to both counts as charged in the indictment, and the trial court proceeded directly to sentencing.

¹ This count also included a forfeiture specification under R.C. 2941.1417(A).

{¶3} After hearing from the defendant and his counsel, the trial court sentenced Caffey to 30 months in prison, a ten-year license suspension, a \$250 fine, forfeiture of the vehicle used in the offense, restricted license plates and postrelease control of up to three years in Case No. CR-14-583829 and to 30 months in prison, a ten-year license suspension, a \$250 fine, restricted license plates and postrelease control for up to three years in Case No. CR-14-584481. The sentences were to run consecutively.

{¶4} During the sentencing hearing, the trial court explained the basis for its sentences as follows:

On all consecutive sentences, the Court makes the following finding. The Court finds that consecutive sentences are necessary to protect the public from future crime. That consecutive sentences are also necessary to punish the defendant. That these consecutive sentences are not disproportionate to the seriousness of the offender's conduct, and when the Court makes that finding, the Court does find that this is his sixth conviction within a period of six years.

And the Court find that his history of criminal conduct, which is extensive, demonstrate[s] that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶5} The trial court further stated, when asked whether it "would * * * entertain at some point a motion for judicial release":

This is his sixth conviction in six years and he is on probation for two other cases and he just continues to violate the law. He has no regard for the law. He has no appreciation for abiding to the guidelines. * * * I'm going to you tell something, he is going to hurt somebody. * * * And he comes here today with two new cases that he is violating on and two new DUI cases, and he has an extensive record. * * * He was sent for intensive counseling. So he went through a counseling program.

{¶6} The trial court made no mention of R.C. 2929.11 or 2929.12 during the sentencing hearing. However, in its sentencing journal entries for both cases, dated July 24, 2014, the trial court stated: “The court considered all required factors of the law. The court finds that prison is consistent with the purpose [sic] of R.C. 2929.11.” No findings were included in the sentencing journal entries with respect to the imposition of consecutive sentences.

{¶7} This appeal followed. Caffey raises the following assignment of error for review:

The trial court erred in sentencing appellant by failing to apply the purposes and principles of sentencing in R.C. 2929.11 and R.C. 2929.12.

Law and Analysis

{¶8} In his sole assignment of error, Caffey contends that his sentences are contrary to law because the trial court failed to apply the purposes and principles of sentencing under R.C. 2929.11 and to consider the relevant factors set forth in R.C. 2929.12 prior to sentencing him. Caffey argues that because the trial court failed to make “any findings regarding any of the factors listed in [R.C. 2929.11 and 2929.12]” on the record at the sentencing hearing, his sentences should be vacated. Caffey’s argument lacks merit.

{¶9} We review felony sentences under the standard set forth in R.C. 2953.08(G)(2). Under R.C. 2953.08(G)(2), an appellate court may increase, reduce or modify a challenged felony sentence or may vacate the sentence and remand the matter to

the sentencing court for resentencing if it “clearly and convincingly finds” that the sentence is “contrary to law.” R.C. 2953.08(G)(2).

{¶10} At issue in this case is the trial court’s duty to consider the purposes and principles of sentencing set forth in R.C. 2929.11 and the relevant statutory factors set forth in R.C. 2929.12 when imposing a felony sentence.

{¶11} A sentence is contrary to law if the trial court fails to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12. *State v. Carrington*, 8th Dist. Cuyahoga No. 100918, 2014-Ohio-4575, ¶ 22, citing *State v. Hodges*, 8th Dist. Cuyahoga No. 99511, 2013-Ohio-5025, ¶ 7.

{¶12} R.C. 2929.11 provides that a sentence imposed for a felony shall be reasonably calculated to achieve two “overriding purposes” of felony sentencing: (1) “to protect the public from future crime by the offender and others” and (2) “to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.” R.C. 2929.11(A), (B). R.C. 2929.11(A) states that “[t]o achieve these purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.” R.C. 2929.11(B) further requires that the sentence imposed be “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.”

{¶13} R.C. 2929.12 grants discretion to the trial court to determine the most effective way to comply with the purposes and principles set forth in R.C. 2929.11 when imposing a sentence. However, in exercising this discretion, the court must consider a non-exhaustive list of factors relating to the seriousness of the offender’s conduct and the likelihood of recidivism and may, in addition, consider any other factors relevant to achieving these purposes and principles of sentencing.

{¶14} Caffey asserts that his sentences were contrary to law because the trial court failed to consider certain mitigating factors specified in R.C. 2929.12 when sentencing him. He contends that because the trial court “made no reference” during sentencing to any mitigating factors, in particular, the fact that there were no victims, injuries or damages as a result of Caffey’s conduct (R.C. 2929.12(C)(3)), Caffey’s expression of responsibility and remorse for his actions (R.C. 2929.12(E)(5)) and his acknowledgment that he has a severe alcohol abuse problem, the trial court failed to fulfill its obligations under R.C. 2929.11 and 2929.12.

{¶15} Although there is a mandatory duty to “consider” the relevant statutory factors under R.C. 2929.11 and 2929.12, the trial court is not required to go through each factor on the record or to make specific findings, explaining its analysis of the relevant factors prior to imposing a sentence. *State v. Williams*, 8th Dist. Cuyahoga No. 100042, 2014-Ohio-1618, ¶ 17 (“R.C. 2929.11 and 2929.12 do not require judicial fact-finding;

rather, they direct trial courts to ‘consider’ the factors.”), citing *State v. May*, 8th Dist. Cuyahoga No. 99064, 2013-Ohio-2697, ¶ 15; *State v. Tate*, 8th Dist. Cuyahoga No. 97804, 2014-Ohio-5269, ¶ 58 (“The sentencing court is not required * * * to engage in any factual findings under R.C. 2929.11 or 2929.12.”). “While trial courts must carefully consider the statutes that apply to every felony case, it is not necessary for the trial court to articulate its consideration of each individual factor as long as it is evident from the record that the principles of sentencing were considered.” *Id.*, citing *State v. Roberts*, 8th Dist. Cuyahoga No. 89236, 2008-Ohio-1942, ¶ 10.

{¶16} A trial court’s statement in its sentencing journal entry that it considered the required statutory factors, without more, is sufficient to fulfill a trial court’s obligations under R.C. 2929.11 and 2929.12. *State v. Clayton*, 8th Dist. Cuyahoga No. 99700, 2014-Ohio-112, ¶ 9, citing *State v. Kamleh*, 8th Dist. Cuyahoga No. 97092, 2012-Ohio-2061, ¶ 61; *see also State v. Saunders*, 8th Dist. Cuyahoga No. 98379, 2013-Ohio-490, ¶ 4 (“[T]he sentencing entries in both cases state that ‘the court considered all required factors of the law.’ That statement, without more, is sufficient to fulfill the court’s obligations under the sentencing statutes.”). “[N]o further elaboration is required.” *State v. Glenn*, 8th Dist. Cuyahoga No. 100726, 2014-Ohio-4084, ¶ 7, citing *State v. Pickens*, 8th Dist. Cuyahoga No. 89658, 2008-Ohio-1407, ¶ 6.

{¶17} Indeed, it can be presumed that the trial court considered the relevant statutory factors under R.C. 2929.11 and 2929.12 unless the defendant affirmatively shows otherwise. *See, e.g., State v. Jones*, 8th Dist. Cuyahoga No. 99759,

2014-Ohio-29, ¶ 13; *see also State v. Rogers*, 8th Dist. Cuyahoga No. 100903, 2014-Ohio-4573, ¶ 4 (“Although the trial court’s consideration of these factors is mandatory, proof of that consideration is not — “where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration of those statutes.” * * * This presumption can be rebutted by an affirmative showing by the defendant.”), quoting *State v. Esner*, 8th Dist. Cuyahoga No. 90740, 2008-Ohio-6654, ¶10, quoting *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶18, fn. 4; *Clayton* at ¶ 7 (Where a criminal sentence is within the statutory limits, an appellate court “should accord the trial court the presumption that it considered the statutory mitigating criteria in the absence of an affirmative showing that it failed to do so.”), quoting *State v. White*, 8th Dist. Cuyahoga No. 99691, 2013-Ohio-4925, ¶ 10.

{¶18} Caffey’s argument that the trial court failed to consider the relevant statutory factors under R.C. 2929.11 and 2929.12 is without merit. The record in this case reflects that the trial court did, in fact, consider both the purposes and principles of sentencing under R.C. 2929.11 and the relevant factors under R.C. 2929.12 when sentencing Caffey. Both Caffey and his counsel addressed the trial court prior to sentencing. The trial court heard Caffey’s claims of responsibility for his actions, his remorse regarding how his actions had adversely impacted his family members and his acknowledgment that he had a serious alcohol abuse problem. However, the trial court also noted that these were Caffey’s fifth and sixth OVI offenses in six years (R.C.

2929.12(D)(2)-(4)), that these offenses had been committed while he was on probation for other offenses (R.C. 2929.12(D)(1)), that prior attempts at counseling had proven unsuccessful and that based on his “extensive history of criminal conduct” and his continued failure to comply with the law (R.C. 2929.12(D)(2)-(4)), the court was concerned that he was going to harm someone by his actions. Although the trial court made no specific reference to R.C. 2929.11 or 2929.12 during the sentencing hearing, it was not required to do so.

{¶19} The trial court’s sentencing journal entries in this case state that “[t]he court considered all required factors of the law” and concluded that “prison is consistent with the purpose [sic] of R.C. 2929.11.” “This court has refused to find that a sentence is contrary to law when the sentence is in the permissible range and the court’s journal entry states that it ‘considered all required factors of the law’ and ‘finds that prison is consistent with the purposes of R.C. 2929.11.’” *Williams*, 2014-Ohio-1618 at ¶ 17, citing *May*, 2013-Ohio-2697 at ¶ 16. Caffey does not dispute that his sentences for driving under the influence were within the statutory range. Caffey’s sentences, therefore, are not contrary to law.

{¶20} Accordingly, we overrule Caffey’s assignment of error.

Omission of Findings Supporting the Imposition of Consecutive Sentences in Sentencing Entries

{¶21} In addition to the assignment of error raised by Caffey, the state raises a second “assignment of error,” i.e., that “[t]he trial court imposed a sentence contrary to law and violated Mr. Caffey’s right to due process when it ordered consecutive sentences

without stating the requisite statutory findings on the record.” As the state points out, although the trial court made findings in support of its imposition of consecutive sentences at the sentencing hearing, it failed to incorporate those findings in the sentencing journal entries as required under *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus (holding that a trial court must both (1) make the statutory findings mandated for consecutive sentences under R.C. 2929.14(C)(4) at the sentencing hearing and (2) incorporate those findings into its sentencing journal entry).

{¶22} A trial court’s failure to incorporate statutory findings made under R.C. 2929.14(C)(4) in the sentencing journal entry after properly making those findings at the sentencing hearing is a “clerical mistake” that may be corrected by the court through a nunc pro tunc entry “to reflect what actually occurred in open court.” *Id.* at ¶ 29. It “does not render the sentence contrary to law.” *Id.* Accordingly, this matter is remanded to the trial court to issue new sentencing journal entries, nunc pro tunc, that incorporate the findings it made in support of the imposition of consecutive sentences at the sentencing hearing.

{¶23} Judgment affirmed; case remanded for the limited purpose of incorporating the consecutive sentence findings made at sentencing into the trial court’s sentencing journal entries.

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.

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

EILEEN A. GALLAGHER, PRESIDING JUDGE

TIM McCORMACK, J., and
EILEEN T. GALLAGHER, J., CONCUR