

[Cite as *State v. Allen*, 2015-Ohio-1448.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101342

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JAMES D. ALLEN**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
VACATED AND REMANDED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-12-558112-A

**BEFORE:** Keough, J., Jones, P.J., and Blackmon, J.

**RELEASED AND JOURNALIZED:** April 16, 2015

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KATHLEEN ANN KEOUGH, J.:

{¶1} Defendant-appellant, James Allen (“Allen”), appeals from the trial court’s judgment sentencing him to consecutive sentences. Allen contends that the trial court erred in imposing consecutive sentences without making the factual findings required under R.C. 2929.14(C)(4). Finding merit to the appeal, we vacate the sentence and remand for resentencing consistent with this opinion.

{¶2} Allen was indicted in Cuyahoga C.P. No. CR-11-553522 on one count of kidnapping in violation of R.C. 2905.01(A)(2) and two counts of domestic violence in violation of R.C. 2919.25(A). He pleaded guilty to one count of domestic violence.

{¶3} After his plea but before sentencing, Allen was indicted in Cuyahoga C.P. No. CR-12-558112 on one count of felonious assault in violation of R.C. 2903.11(A)(2); one count of failure to comply in violation of R.C. 2921.331(B); fourteen counts of aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a); and one count of driving while under the influence in violation of R.C. 4511.19(A)(1)(g). Allen pleaded guilty to attempted felonious assault in violation of R.C. 2923.02/2903.11(A)(2); three counts of aggravated vehicular assault, and driving while under the influence.

{¶4} At sentencing on June 20, 2012, the trial court reviewed Allen’s prior criminal history. The trial judge then stated:

So the court, in considering all the relevant seriousness and recidivism factors, the overriding principles of felony sentencing, namely to protect the public from future crime by the defendant and others, and also to punish the defendant using the minimum sanctions the court determines accomplishes

those purposes without imposing an undue or unnecessary burden on local and state resources, the court further finds that the harm done in this case was significant to multiple people, that Mr. Allen has failed to change his criminal conduct, even though he's been severely punished in the past, that this sentence is appropriate under these circumstances.

{¶5} The trial judge then sentenced Allen to three years on the domestic violence conviction in Case No. CR-11-553522. In Case No. CR-12-558112, the trial court sentenced Allen to three years on the attempted felonious assault conviction, and eight years each on the aggravated vehicular assault convictions, to be served consecutive to the three years on the attempted felonious assault conviction, for a total of eleven years. The court ordered that the eleven-year sentence in Case No. CR-12-558112 be served consecutive to the three-year sentence in Case No. CR-11-553522, for an aggregate term of fourteen years.

{¶6} The record reflects that the trial court did not sentence Allen at the sentencing hearing on Count 16, driving while under the influence. However, the trial court's subsequent journal entry of sentencing stated that Allen was sentenced to time served on Count 16. It also indicated that a restitution hearing was deferred until a later date.

{¶7} Allen subsequently filed a pro se appeal, but this court dismissed the appeal for lack of a final, appealable order, finding that he had failed to file a timely appeal. *State v. Allen*, 8th Dist. Cuyahoga No. 98736 (Aug. 13, 2012). Counsel for Allen also filed an appeal; this court dismissed that appeal for lack of a final, appealable order,

finding that the trial court had not disposed of all of the counts in its judgment entry. *State v. Allen*, 8th Dist. Cuyahoga No. 98701 (November 9, 2012).

{¶8} On April 8, 2014, the trial court issued a nunc pro tunc order correcting its judgment entry of sentencing to reflect that Count 2 had been nolle. Allen again appealed, but this court again dismissed the appeal for lack of a final, appealable order because the sentencing entry improperly deferred a determination of the amount of restitution to a later date. *State v. Allen*, 8th Dist. Cuyahoga No. 101342 (May 5, 2014).

{¶9} Upon remand, after a pretrial, the trial court entered a new judgment entry of sentencing imposing the sentence as noted above, including that Allen was sentenced on Count 16 to time served, and specifying that the parties agreed that restitution is not part of the sentence but could be pursued in a civil proceeding. It is from this judgment entry that Allen now appeals.

{¶10} In his single assignment of error, Allen contends that the trial court erred in ordering that the eleven-year sentence imposed in Case No. CR-12-558112 be served consecutive to the three-year sentence imposed in Case No. CR-11-553522 because the court did not make the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences.

{¶11} Consecutive sentences may be imposed only if the trial court makes the required findings pursuant to R.C. 2929.14(C)(4). *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.2d 659, ¶ 20-22; *State v. Trotter*, 8th Dist. Cuyahoga No. 100617, 2014-Ohio-3588, ¶ 18. Under the statute, consecutive sentences may be

imposed if the trial court finds that (1) a consecutive sentence is necessary to protect the public from future crime or to punish the offender, and (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. In addition to these two factors, the court must find that any one of the following apply:

(1) the offender committed one of more of the multiple offenses while awaiting trial or sentencing, while under a sanction, or while under postrelease control for a prior offense;

(2) at least two of the multiple offenses were committed as part of one or more courses of the conduct, and the harm caused by two or more of the offenses 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; or

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

{¶12} In order to impose consecutive terms of imprisonment, a trial court must both make the statutory findings mandated for consecutive sentences under R.C. 2929.14(C)(4) at the sentencing hearing and incorporate those findings into its sentencing entry. *Bonnell* at the syllabus.

{¶13} A trial court is not required to give “a talismanic incantation” of the words in the statute to satisfy its obligation. *Id.* at ¶ 17. “[A] word-for-word recitation of the language of the statute is not required; as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentencing should be upheld.” *Id.* at ¶ 29.

A trial court satisfies this statutory requirement when the record reflects that the court has engaged in the required analysis and has selected the appropriate statutory criteria. *State v. Evans*, 8th Dist. Cuyahoga No. 100151, 2014-Ohio-3584, ¶ 30.

{¶14} The record in this case reflects that the trial court did not make the necessary findings at sentencing to impose consecutive sentences. The trial court did mention that Allen was awaiting sentencing on the domestic violence case when he committed the offenses charged in Case. No. CR-12-558112 (the third finding). However, the court made no finding that consecutive sentences were necessary to protect the public from future crime or to punish Allen, and that consecutive sentences were not disproportionate to the seriousness of Allen's conduct and the danger he poses to the public. Likewise, no findings regarding consecutive sentences were included in the judgment entry of sentencing. Accordingly, we cannot conclude that the trial court engaged in the required analysis under R.C. 2929.14(C) before imposing consecutive sentences. We therefore vacate Allen's sentence and remand for resentencing so that the trial court may consider whether consecutive sentences are appropriate under R.C. 2929.14(C)(4) and, if so, to make the required findings on the record. *State v. Littlejohn*, 8th Dist. Cuyahoga No. 101549, 2015-Ohio-875, ¶ 44. In accordance with *Bonnell*, the required statutory findings, if any, must be both pronounced in open court and placed in the sentencing journal entry. *Id.*, citing *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.2d 659, at syllabus.

{¶15} Although not raised as error, we note that the trial court did not sentence Allen on the driving while under the influence charge (Count 16) in the sentencing proceedings on June 20, 2012, but then included a sentence of “time served” on this count in its subsequent journal entry of sentencing. Under Crim.R. 43(A), a defendant must be present during the modification of a sentence. If the trial court amends a sentence in the absence of the defendant, the sentence is a nullity and the trial court must resentence the defendant in his presence. *State v. Croy*, 3d Dist. Union No. 14-93-2, 1993 Ohio App. LEXIS 6164, \*16 (Dec. 8, 1993); *State v. Payne*, 8th Dist. Cuyahoga Nos. 51962, 51963, 51964, and 51965, 1987 Ohio App. LEXIS 6788, \*11 (Mar. 26, 1987). Accordingly, the trial court’s sentencing judgment is likewise vacated on this basis and remanded for resentencing.

{¶16} Judgment vacated and remanded.

It is ordered that appellant recover from appellee 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.

KATHLEEN ANN KEOUGH, JUDGE

LARRY A. JONES, SR., P.J., and

PATRICIA ANN BLACKMON, J., CONCUR