

[Cite as *State v. Gum*, 2015-Ohio-1539.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101496

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

JEREMY J. GUM

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-09-528313-A

BEFORE: Stewart, J., E.T. Gallagher, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: April 23, 2015

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MELODY J. STEWART, J.:

{¶1} In this sentencing appeal, defendant-appellant Jeremy Gum, complains that the court failed to conduct a de novo resentencing after we vacated his original sentence because the sentencing judge failed to apprise him of his appellate rights. He also complains, among other things, that the court failed to merge certain offenses and did not make the statutory findings required before ordering him to serve consecutive sentences.

{¶2} In November 2009, Gum pleaded guilty to multiple counts in two separate cases: in Cuyahoga C.P. No. CR-09-527195-A, he pleaded guilty to two counts of receiving stolen property and one count of obstructing justice; in Cuyahoga C.P. No. CR-09-528313-A, he pleaded guilty to breaking and entering, tampering with evidence, attempted felonious assault on a peace officer, assault on a peace officer, obstructing official business, and vandalism. Some of the counts in CR-09-528313-A carried firearm and forfeiture specifications. The court sentenced Gum to a total of nine years in the two cases, running some of the sentences consecutively.

{¶3} Gum did not immediately appeal. In October 2010, he filed a notice of appeal and a motion for a delayed appeal. We denied leave and dismissed the appeal. *See State v. Gum*, 8th Dist. Cuyahoga No. 95898 (Oct. 25, 2010), Motion Nos. 438606 and 438644. In 2013, Gum filed a motion for “resentencing” on grounds that the court failed to apprise him of his appellate rights consistent with Crim.R. 32(B). The court denied the motion for resentencing. On appeal, the state conceded that the court failed to apprise Gum of his appellate rights. Construing Gum’s motion for resentencing as a “petition for

postconviction relief,” we sustained Gum’s assignment of error on grounds that the record failed to show that Gum had been apprised of his appeal rights and that he demonstrated prejudice because his inability to challenge his sentence on direct appeal foreclosed the assertion of an allied offenses error. *State v. Gum*, 8th Dist. Cuyahoga No. 100156, 2014-Ohio-401, ¶ 5. We ordered the court to “reenter the judgment of conviction against Gum, thereby reinstating the time within which he may timely file a notice of appeal pursuant to App.R. 4(A).” *Id.* at ¶ 5.

{¶4} On remand, Gum sought to reopen sentencing to argue that some of the offenses he pleaded guilty to were allied offenses of similar import that should merge for sentencing. The court denied that motion, stating that the remand ordered by this court was not for a complete resentencing, but to “reenter the judgment of conviction.” The court told Gum that:

[W]e are reinstating the terms that were given at that time. Which are specifically, in case number 528313, a prison term of 8 years total. As to case number 527195, a prison term of 1 year, for a total time of 9 years in prison.

Tr. 184.

{¶5} Consistent with what it told Gum during sentencing, the court issued a sentencing entry that imposed an aggregate prison sentence of eight years in CR-09-528313-A, to run consecutively to the one-year sentence imposed in CR-09-527195-A.

{¶6} Gum first argues that the court erred by denying him the right to a de novo resentencing hearing. He maintains his right to a de novo resentencing because the

court's failure to advise him of his appellate rights rendered the first sentencing hearing void.

{¶7} In the first appeal, Gum argued only that “the trial court abused its discretion in denying his motion for resentencing because the court failed to advise him of his appellate rights, including his right to appeal his sentence and his right to counsel for appeal.” *Id.* at ¶ 4. In light of the state's concession on this point, this court made it clear that the “the appropriate relief” for failing to advise a defendant of his appellate rights “is not for a complete resentencing hearing.” *Id.* at fn. 1. This court's mandate on remand was to “vacate the original judgment entry and reenter the judgment of conviction in order to reinstate the time for a timely appeal.” *Id.*

{¶8} The trial court had no authority to disregard or enlarge the scope of the remand, *Nolan v. Nolan*, 11 Ohio St.3d 1, 462 N.E.2d 410 (1984), syllabus, so the court properly reentered Gum's sentence and advised him of his appellate rights. The court was not obligated to do more. And it bears noting that Gum did not argue in the first appeal that his sentence was void, nor would that have been a viable argument on appeal — a court's failure to advise a defendant of his appellate rights only renders a sentence voidable, not void.¹

¹ Gum's reliance on *State v. Hunter*, 8th Dist. Cuyahoga No. 92626, 2010-Ohio-657, is misplaced. *Hunter* did not hold that a court's failure to advise a defendant of his appellate rights rendered a sentence void; it held merely that “[t]he failure to advise Hunter of his appellate rights at the hearing to correct his void sentence violated Crim.R. 32.” *Id.* at ¶ 19.

{¶9} Gum next argues that the court erred by failing to sentence him under the provisions of Am.Sub.H.B. No. 86. That bill took effect on September 30, 2011, before the court reentered Gum’s sentence consistent with this court’s remand. For Gum, the supposed benefit of H.B. 86 is that it has a presumption of the lowest sentence for felonies of the third degree (9 months) as opposed to the one year minimum for felonies of the third degree in the prior statute.

{¶10} Gum’s argument rests on the assumption that he was “resentenced.” As stated in our discussion of Gum’s first assignment of error, we did not order a “resentencing” when remanding to the trial court in the prior appeal. We made it clear that Gum was not entitled to a complete resentencing and that the court was to “reenter” the judgment of conviction for the sole purpose of affording Gum his right to appeal. The remand was essentially ministerial in nature, so there was no “resentencing” as that term is normally understood.

{¶11} In his third assignment of error, Gum complains that the court violated the sentencing package doctrine by imposing a collective prison sentence of eight years without stating a term for each individual count.

{¶12} Prior to appeal, we recognized that the court’s sentencing did not state a prison term for each offense. This failure did not comport with the requirements set forth in *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, paragraph one of the syllabus, stating that a judgment of conviction must set forth “(1) the fact of the conviction, (2) the sentence, (3) the judge’s signature, and (4) the time stamp indicating

the entry upon the journal by the clerk.” We remanded the matter to correct the record. The court did so, setting forth the individual sentence on each count. Having done so, the court mooted Gum’s third assignment of error.

{¶13} The court ordered Gum to serve his eight-year sentence in this case consecutive to the one-year sentence imposed in CR-09-527195-A. Gum complains that the court failed to make the findings required by R.C. 2929.14(C)(4) before ordering consecutive service of the sentences.

{¶14} Under R.C. 2929.14(C)(4), the sentencing judge must make the following findings before imposing consecutive sentences: that consecutive sentences are necessary to protect the public from future crime or to punish the offender; 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 third that (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 postrelease 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, or the offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶15} In this district, we stated that the court needed to make separate and distinct findings under R.C. 2929.14(C)(4) to impose consecutive sentences. *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453 (8th Dist.), ¶ 17. However, the Ohio Supreme Court has taken a more relaxed approach toward the findings required by R.C. 2929.14(C)(4), finding that it could “discern” those findings from statements made by a sentencing judge. *See State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 33.

{¶16} The transcript of Gum’s sentencing shows that the court voiced its concern over “a certain pattern here in your criminal history,” detailing Gum’s criminal history and finding that “the fact that you have not been satisfactorily rehabilitated in the past after sanctions imposed indicates a likelihood of reoffending * * *.” Tr. 162. The court also considered the seriousness of Gum’s conduct, noting that he led the police on a high-speed chase, caused financial harm to the victim, and “pose[d] a direct threat to the safety of our streets.” Finally, the court found that Gum committed his offenses in violation of community control sanctions. These findings were sufficient under R.C. 2929.14(C)(4).

{¶17} The court did not, however, state these findings in its sentencing entry consistent with Crim.R. 32. We therefore remand this case so that the court can issue a nunc pro tunc order to state those findings in the sentencing entry. *Bonnell* at ¶ 30.

{¶18} Finally, Gum argues that the court erred by failing to undertake any analysis as to whether some of the counts were allied offenses of similar import that should merge for sentencing.

{¶19} Gum pleaded guilty to his charges. He did not raise the issue of allied offenses at his sentencing nor did the court consider the issue on its own initiative. “When a facial review of the charges and the elements of the crimes present a viable question of merger,” the court commits plain error by failing to consider on its own initiative whether allied offenses of similar import should merge for sentencing. *State v. Rogers*, 2013-Ohio-3235, 994 N.E.2d 499 (8th Dist.), ¶ 28, *conflict certified*, 136 Ohio St.3d 1508, 2013-Ohio-4657, 995 N.E.2d 1212.

{¶20} In his merit brief, Gum notes that the court imposed sentence on “numerous counts,” but offers nothing more than the generic argument that “the trial court never undertook any analysis as to whether those counts were allied offenses of similar import.” Appellant’s brief at 18. By failing to identify which of the “numerous” counts to which he pleaded guilty were allied offenses of similar import, Gum has failed to comply with the App.R. 16(A)(7) requirement that an appellant file a brief containing an argument with citations to the parts of the record on which the appellant relies. The assigned error, therefore, fails to establish a facial issue regarding the court’s failure to merge allied offenses of similar import.

{¶21} Judgment affirmed and remanded.

It is ordered that appellee recover of 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. The defendant’s conviction having

been affirmed, any bail pending appeal is terminated. 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.

MELODY J. STEWART, JUDGE

EILEEN T. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR

KEYWORDS:

Remand; scope; consecutive sentences; allied offenses; facial inquiry. When court of appeals remanded with instructions for court to reenter judgment of conviction in light of error relating to court's failure to advise defendant of his appellate rights, the defendant was not entitled to a de novo resentencing because that would have exceeded the appellate court's mandate on remand.