

[Cite as *State v. Bryant*, 2015-Ohio-2263.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101531

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SHAMANIQUE BRYANT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-580790-A

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

RELEASED AND JOURNALIZED: June 11, 2015

ATTORNEY FOR APPELLANT

Russell S. Bensing
1350 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

BY: Jennifer L. O'Malley
Assistant County Prosecutor
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

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

{¶1} Defendant-appellant, Shamanique Bryant, appeals the imposition of consecutive sentences and postrelease control following her convictions for aggravated vehicular homicide and aggravated vehicular assault. We affirm in part; reverse in part and remand.

{¶2} In 2013, Bryant was charged with one count of aggravated vehicular homicide, four counts of aggravated vehicular assault, one count of failure to stop after accident, and two counts of driving while under the influence. In 2014, she pleaded guilty to an amended indictment, as follows: one count each of aggravated vehicular homicide, aggravated vehicular assault, failure to stop after accident, and driving while under the influence.

{¶3} At the sentencing hearing, the court found that the failure to stop after accident and driving while under the influence convictions merged with the aggravated vehicular homicide and aggravated vehicular assault convictions. The state elected to proceed to sentencing on the aggravated vehicular homicide and aggravated vehicular assault convictions. The trial court sentenced Bryant to seven years for aggravated vehicular homicide and an additional three years for aggravated vehicular assault, to be served consecutively for a total sentence of ten years in prison.

{¶4} Bryant appealed and raises two assignments of error for our review in which she challenges the imposition of consecutive sentences and postrelease control.

{¶5} In her first assignment of error, Bryant argues that the record did not support the imposition of consecutive sentences.

{¶6} R.C. 2953.08(G)(2) provides, in part, that when reviewing felony sentences, the appellate court’s standard for review is not whether the sentencing court abused its discretion; rather, if this court “clearly and convincingly” finds that (1) “the record does not support the sentencing court’s findings under R.C. 2929.14(C)(4),” or that (2) “the sentence is otherwise contrary to law,” then we “may increase, reduce, or otherwise modify a sentence * * * or [a reviewing court] may vacate the sentence and remand the matter to the sentencing court for re-sentencing.”

{¶7} R.C. 2929.14(C)(4) requires that a trial court engage in a three-step analysis prior to imposing consecutive sentences. First, the trial court must find that “consecutive service is necessary to protect the public from future crime or to punish the offender.” *Id.* Next, the trial court must find that “consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public.” *Id.* Finally, the trial court must find that at least one of the following applies: (1) the offender committed one or 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 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. *Id.*

{¶8} In order to impose consecutive terms of imprisonment, 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 entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus.

{¶9} Bryant argues that the “record clearly and convincingly does not support the court’s finding that consecutive sentences are not disproportionate to the seriousness of Bryant’s conduct and the danger she poses to the public” because the facts of the case as presented at the sentencing hearing do not support consecutive sentences. During oral argument, Bryant conceded that the trial court made the necessary findings to impose consecutive sentences, but argued that the record did not support the findings.

{¶10} A sentence is not clearly and convincingly contrary to law

where the trial court considers the purposes and principles of sentencing under R.C. 2929.11 as well as the seriousness and recidivism factors listed in R.C. 2929.12, properly applies postrelease control, and sentences a defendant within the permissible statutory range.

State v. A.H., 8th Dist. Cuyahoga No. 98622, 2013-Ohio-2525, ¶ 10, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 18.

{¶11} R.C. 2929.11(A) provides that

[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and 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.

Under R.C. 2929.12(A), trial courts must consider a nonexhaustive list of factors,

including the seriousness of the defendant's conduct, the likelihood of recidivism, and "any other factors that are relevant to achieving those purposes and principles of sentencing."

{¶12} Again, in order to reverse based on Bryant's claims, this court would have to find that the record "clearly and convincingly" does not support the court's finding that consecutive sentences were not disproportionate to the seriousness of Bryant's conduct and the danger she poses to the public. We cannot make this finding.

{¶13} According to the facts as presented at the sentencing hearing, Bryant was at a bar with her brother and his date, Mattie Stubbs. At some point, someone shot Bryant's brother in the stomach and Bryant and Stubbs put him in a car. Bryant attempted to drive her brother to the hospital with Stubbs in the car. Bryant first hit a parked car, resulting in injuries to the occupants of the parked car. She then reached speeds of over 80 m.p.h. on city streets before she hit a traffic median, which resulted in her brother and Stubbs being ejected from the car. Bryant drove away from the scene and left her brother and Stubbs in the street. She made two U-turns and ran over Stubbs, dragging her body a substantial distance. Stubbs died from her injuries. At the time Bryant submitted to a breath test, her blood alcohol level was .202, which is over twice the legal limit.

{¶14} The trial court stated that it gave consideration to the fact that Bryant pleaded guilty but it also weighed her criminal history of driving under the influence, prior drug trafficking and drug possession offenses, and that she had operated "vehicles without a driver's license on several occasions." The court noted the medical bills from

the victims of the car Bryant hit amounted to close to \$10,000 and ordered restitution. The court took into account that Bryant chose not to call 911 after her brother was shot but to put him in a car and tried to drive him to the hospital herself while intoxicated, drove the car at a high rate of speed, and got into an accident that caused her two passengers to be ejected from the car. The court gave great consideration to the fact that Bryant then decided to drive away, made two U-turns and ran over Stubbs, noting that things may have been different if Bryant had not decided to keep driving after getting into her second accident. The court reasoned:

Given the situation relative to the priors that she had, multiple times she was on probation to this Court for a drug case when this occurred, the Court feels that consecutive sentences are necessary to protect the public and to punish the offender given the nature of this case.

Given a death and an injury, several people injured in the other car, this in no way can be viewed as being disproportionate. As indicated prior, she was on probation to this Court, and her history is the basis for this.

{¶15} Bryant argues that she did not intentionally harm the victims, she showed remorse, and she took full responsibility for her actions; therefore, the record does not support the trial court's finding that she deserved consecutive sentences. Bryant asks this court to reduce or modify her sentence or remand the case for re-sentencing. Bryant cites this court's decision in *State v. Moore*, 8th Dist. Cuyahoga No. 99788, 2014-Ohio-5135, in which this court found that the record did not support the trial court's finding that consecutive sentences were not disproportionate to the seriousness of the defendant's conduct in the commission of the offenses and to the danger he posed to the public.

{¶16} In *Moore*, the defendant participated in a robbery of the Hard Rock Café in Cleveland. He was not armed and was described by a victim as having shown some compassion during the crime. His codefendant, Lamar Chaney, was the mastermind behind the robbery, carried a gun, and used the gun to terrorize the victims. Chaney pleaded guilty and received concurrent nine-year prison terms on two counts of kidnapping with firearm specifications and one count of aggravated robbery with firearm specifications. Moore decided to go to trial and, after being convicted, received a prison term of ten years on each count, which the court ordered to run consecutive to each other plus the firearm specification for a total of 33 years in prison. Moore appealed and this court reversed and remanded for resentencing, at which he was resentenced to 27 years in prison.

{¶17} The *Moore* court considered the defendant's behavior in comparison to his codefendant to conclude that his conduct did not merit a consecutive sentence. This court stated that *Moore* was a "rare case" in which an appellate court should exercise its authority under R.C. 2953.08(G)(2) to reduce or modify the defendant's sentence and ordered his sentence to be served concurrently. *Id.* at ¶ 41.

{¶18} Bryant urges this court to find *Moore* instructive. But, in this case, unlike *Moore*, the record supports the trial court's findings for consecutive sentences. In *Moore*, this court found that the record did not support the trial court's findings based on the defendant's conduct and the codefendant's "worse" conduct. In this case, we have only the defendant's conduct to consider. While she did show remorse, we agree with the trial court that her criminal history, the severity of the injuries including a death, her

conduct during the incident, and the fact that she was on probation to the court are proper considerations to take into account in fashioning an appropriate sentence.

{¶19} Thus, the record does not clearly and convincingly support a finding that the trial court erred when it found that consecutive sentences were not disproportionate to the seriousness of Bryant's conduct and the danger she posed to the public.

{¶20} Having found that Bryant's sentence is in accordance with law, the first assigned error is overruled.

{¶21} In the second assignment of error, Bryant argues that the trial court erred in imposing postrelease control. The state concedes the error.

{¶22} "It is mandatory that every person ordered to serve a term of postrelease control be notified of the consequences for a violation of postrelease control." *State v. Loyed*, 8th Dist. Cuyahoga No. 101504, 2014-Ohio-5141, ¶ 5, citing *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 8. When a trial court fails to properly impose statutorily mandated postrelease control as part of a defendant's sentence, the postrelease control sanction is void. *State v. Holdcroft*, 137 Ohio St.3d 526, 529, 2013-Ohio-5014, 1 N.E.3d 382.

{¶23} Here, the trial court failed to inform Bryant of the consequences if she violates the conditions of her postrelease control. The new sentencing hearing to which she is entitled, however, is limited to proper imposition of postrelease control. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, paragraph two of the syllabus; *see also State v. White*, 8th Dist. Cuyahoga No. 99280, 2013-Ohio-3808, ¶ 9; *State v. Jones*, 8th Dist. Cuyahoga No. 95882, 2011-Ohio-2929, ¶ 8; *State v. Braddy*, 8th

Dist. Cuyahoga No. 97816, 2012-Ohio-4720, ¶ 7.

{¶24} Therefore the second assignment of error is sustained.

{¶25} Judgment affirmed in part, reversed in part, and remanded. Case remanded for a new sentencing hearing limited to the advisement of postrelease control.

It is ordered that appellant and appellee split the 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.

LARRY A. JONES, SR., PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
MELODY J. STEWART, J., CONCUR