

[Cite as *State v. Street*, 2015-Ohio-2520.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102096

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DE'ANDRE STREET

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-11-549421-A

BEFORE: Jones, P.J., E.A. Gallagher, J., and Boyle, J.

RELEASED AND JOURNALIZED: June 25, 2015

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

{¶1} Defendant-appellant De’Andre Street appeals his maximum, consecutive sentence, which was imposed after his second violation of his community control sanctions. We affirm the sentence, but remand for the issuance of a nunc pro tunc sentencing entry.

I.

{¶2} In April 2011, Street was arrested by the Euclid police. The record indicates that the police were issuing parking tickets on the night in question when they happened upon Street sleeping in a car with a bottle of cognac in his lap. They woke him up, requested identification, and asked if he had a weapon. Due to the “look on his face,” the police asked Street to step out of the car. Street complied, the police searched the car, and they found a loaded gun in the glove compartment. Street told the police that he had given the gun to his girlfriend because of a confrontation she had had with her ex-boyfriend. He further told the police that he put the gun in her car and forgot about it. He used her car the evening he was arrested.

{¶3} Street was charged with having a weapon while under disability and carrying a concealed weapon, both with forfeiture specifications. He pleaded guilty to an amended charge of having a weapon while under disability, that being attempted having a weapon while under disability with the forfeiture specification, a felony of the fourth degree. Street also pleaded guilty to carrying a concealed weapon with the forfeiture

specification, as indicted, a felony of the fourth degree.

{¶4} After a presentence investigative report was prepared, the trial court sentenced Street to one year of community control sanctions, with conditions, including abiding by all rules and regulations of the probation department, “intensive special probation supervision,” and submission to regular drug testing. The trial court advised Street that violating the terms and conditions of his community control sanctions could result in “more restrictive sanctions, or a prison term of 36 months.”

{¶5} In May 2012, it was alleged that Street violated the terms of his community control sanctions. In August 2012, a hearing was had on the alleged violation, at the conclusion of which the trial court found Street guilty. The court extended the community control sanctions until March 2013, and again advised Street that a violation of the sanctions could result in “more restrictive sanctions or a prison term of 36 months.”

{¶6} In January 2013, it was alleged that Street again violated the terms of his community control sanctions, and the court found him to be in violation. The court terminated his community control sanctions and sentenced Street to 18 months on each of the two counts, to be served consecutively, for a total of 36 months. Street now appeals, raising the following as errors:

[I.] The trial court erred when it failed to merge the Appellant’s two offenses, carrying a concealed weapon and having a weapon while under disability, for sentencing when they are allied offenses of similar import.

[II.] The trial court erred when it sentenced the Appellant to the maximum sentence on two fourth degree felonies that were amenable to a community control sanction.

[III.] The trial court erred when it sentenced the Appellant to consecutive terms.

[IV.] The Appellant did not receive effective assistance of counsel at his sentencing hearing.

II.

Merger

{¶7} In his first assignment of error, Street contends that the trial court erred by not merging the two convictions for the purpose of sentencing.

{¶8} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Ohio Supreme Court created a two-part test to determine if offenses should merge. The first prong requires that the court determine if the multiple offenses “were committed by the same conduct.” *Id.* at ¶ 47. The second prong is whether “it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other.” *Id.* If both of these questions are answered affirmatively, then the offenses should be merged.

[I]f the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.

Id. at ¶ 51.

{¶9} Recently, the Ohio Supreme Court clarified that

[a]s a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when a defendant’s conduct supports multiple offenses:

(1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus

or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

State v. Ruff, ___ Ohio St.3d ___, 2015-Ohio-995, ___ N.E.2d ___ ¶ 31.

{¶10} In *State v. Rogers*, 8th Dist. Cuyahoga Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589 and 98590, 2013-Ohio-3235, this court, en banc, held that the trial court has a duty to conduct an allied offense analysis when multiple charges facially present a question of merger under R.C. 2941. *Id.* at ¶ 27.

{¶11} The trial court here did conduct a merger analysis, and relying on *State v. Willis*, 12th Dist. Butler No. CA2012-08-155, 2013-Ohio-2391, found that the convictions did not merge. In *Willis*, the police stopped the defendant for riding his bicycle at night without a light. The defendant initially fled from the police, but was later apprehended. During a search of his person, the police recovered a gun inside a sock tucked in the defendant's waistband. The defendant was charged with and found guilty of, among other things, carrying a concealed weapon and having a weapon while under disability; the convictions did not merge for sentencing.

{¶12} The Twelfth Appellate District considered whether the defendant's convictions for carrying a concealed weapon and having a weapon while under disability should have merged as allied offenses. The court concluded that they were not subject to merger, relying on a pre-*Johnson* case, *State v. Rice*, 69 Ohio St.2d 422, 433 N.E.2d 175 (1982), wherein the Ohio Supreme Court held that carrying a concealed weapon and having a weapon while under disability are not allied offenses.

{¶13} The Twelfth District reasoned that although *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, “altered the analysis as to the first prong of the allied offenses test, the second prong has consistently remained the same.” *Willis* at ¶ 41. In *Rice*, the Ohio Supreme Court discussed what would become the second prong of the *Johnson* test, whether a defendant committed a single act with a single state of mind, and in finding that carrying a concealed weapon and having weapons under disability were not allied offenses, reasoned as follows:

The intent, or animus, necessary to commit the crime of carrying a concealed weapon, is to carry or conceal, on the person or ready at hand, a deadly weapon or dangerous ordnance. The gist of the offense is concealment * * *. The gravamen of the offense of having a weapon while under disability, is to “knowingly * * * acquire, have, carry, or use,” a weapon while under a legal disability. It may be concluded that there is a difference in the mental state required for both crimes. It may also be concluded that the General Assembly intended that the crimes be treated differently by the courts.

Rice at 427.

{¶14} Other Ohio appellate courts have followed *Rice* in the *post-Johnson* era. See *State v. Ryan*, 7th Dist. Mahoning No. 10-MA-173, 2012-Ohio-1265, ¶ 51-53; *State v. Young*, 2d Dist. Montgomery No. 23642, 2011-Ohio-747, ¶ 45-49.

{¶15} In this case, the state concedes, and we agree, that it is possible to commit the offense of carrying a concealed weapon and having a weapon while under a disability with the same conduct. The state contends that, under the second prong of the *Johnson* test, the record shows that they were committed with separate conduct, however. According to the state, Street possessed the gun when he retrieved it for his girlfriend, and

he concealed it when he put it in the glove compartment of her car. Based on the reasoning set forth in *Willis*, 12th Dist. Butler No. CA2012-08-155, 2013-Ohio-2391, *Ryan*, and *Young*, we agree with the state. Thus, Street acted with a different animus for the crimes of having weapons under disability and carrying a concealed weapon, and they were not subject to merger.

{¶16} The first assignment of error is overruled.

Maximum Sentence

{¶17} For his second assigned error, Street contends that the trial court erred in sentencing him to the maximum terms because (1) the offenses were amenable to community control sanctions, (2) it failed to find that he committed the worst form of the offense and state its reasons to support that finding, and (3) it failed to properly consider R.C. 2929.11, 2929.12 and 2929.13. We disagree.

{¶18} In regard to the offenses being amenable to community control, yes they were, and the trial court had already imposed that twice, and both times Street violated. At both the original sentencing hearing and the first violation hearing, Street was informed that a violation of the sanctions could possibly result in the maximum sentence being imposed. Thus, the court properly considered the imposition of community control sanctions under R.C. 2929.13. There was no error in the court terminating his community control and sentencing him to a prison term.

{¶19} Regarding the imposition of the maximum sentence, presently, as a result of H.B. 86, there is no statutory requirement for findings in order to impose such a sentence,

and a trial court has the discretion to impose a prison sentence within the statutory range. “Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum * * * sentences.” *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus. Street’s offenses were fourth-degree felonies, which were punishable with a prison term of anywhere between 6 to 18 months. *See* R.C. 2929.14(A)(4). Because the trial court sentenced within the statutory range, there was no error with the imposition of a maximum sentence.

{¶20} In imposing any felony sentence, the trial court must consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the serious and recidivism factors set forth in R.C. 2929.12.

{¶21} In accordance with R.C. 2929.11, a sentence imposed for a felony shall be reasonably calculated to achieve the 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.” R.C. 2929.11(A).

{¶22} 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.”

{¶23} The sentencing court is not required, however, to engage in any factual

findings under R.C. 2929.11 or 2929.12. *State v. Bement*, 8th Dist. Cuyahoga No. 99914, 2013-Ohio-5437, ¶ 17; *State v. Combs*, 8th Dist. Cuyahoga No. 99852, 2014-Ohio-497, ¶ 52. 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. *State v. Roberts*, 8th Dist. Cuyahoga No. 89236, 2008-Ohio-1942, ¶ 10. Instead, the trial court still has the discretion to determine whether the sentence satisfies the overriding purpose of Ohio’s sentencing structure. *Bement* at ¶ 17, citing *State v. Jones*, 12th Dist. Butler No. CA2012-03-049, 2013-Ohio-150, ¶ 49.

{¶24} This court has held that a trial court complies with the statutory requirement when it has stated that it considered the factors under R.C. 2929.11 and 2929.12. *See State v. Clayton*, 8th Dist. Cuyahoga No. 99700, 2014-Ohio-112, ¶ 9; *State v. Kamleh*, 8th Dist. Cuyahoga No. 97092, 2012-Ohio-2061, ¶ 61. Here, the trial court stated at sentencing it has “considered all the factors necessary [and] the appropriate statutory requirement.” The sentencing judgment entry is silent as to the court’s consideration of the factors under R.C. 2929.11 and 2929.12.

{¶25} But 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.

{¶26} “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 RC. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration of those statutes.’” *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. This presumption can be rebutted by an affirmative showing by the defendant. *State v. Cyrus*, 63 Ohio St.3d 164, 586 N.E.2d 94 (1992).

{¶27} Street has not affirmatively demonstrated that the trial court did not consider the factors set forth under R.C. 2929.11 and 2929.12. We, therefore, find that the trial court’s statement that it “considered all the factors necessary [and] the appropriate statutory requirement,” compliant.

{¶28} The second assignment of error is overruled.

Consecutive Sentences

{¶29} For his third assigned error, Street contends that the trial court did not make the required findings for the imposition of consecutive sentences.

{¶30} Consecutive sentences can 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.3d 659, ¶ 20-22; *State v. Trotter*, 8th Dist. Cuyahoga No. 100617, 2014-Ohio-3588, ¶ 18. R.C. 2929.14(C)(4) provides as follows:

If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is

necessary to protect the public from future crime or to punish the offender and 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 if the court also finds any of the following:

(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 post-release 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.

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

{¶31} Compliance with R.C. 2929.14(C)(4) requires the trial court to make the statutory findings as part of the sentencing hearing. However, "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 sentences should be

upheld.” *Bonnell* at ¶ 29. The Supreme Court of Ohio further explained that the word “finding” in this context means that the trial court “must note that it engaged in the analysis” and that it “considered the statutory criteria and specific[d] which of the given bases warrants its decision.” *Id.* at ¶ 26. The court emphasized that the trial court is not required to give a “talismanic incantation” of the words of the statute, provided the necessary findings can be found in the record. *Id.* at ¶ 37.

{¶32} The trial court here stated the following in ordering the sentences to be served consecutively:

The Court finds that a single sentence would not adequately protect our community based on [Street’s] prior record, which is several violent offenses, arrests; several arrests with respect to sex offenses; obstructions; escape; thefts; domestic violence; trespassing; public indecency; aggravated assault. And for that reason, a consecutive sentence is necessary to punish and protect the community.

* * *

* * * I believe I’ve indicated that this consecutive sentence is necessary to punish; it’s not disproportionate to what occurred in the case. And the seriousness of the conduct or his history — this case, definitely his criminal history showed that consecutive terms are necessary to protect the public.

{¶33} This record demonstrates that the trial court complied with the statutorily mandated findings necessary for the imposition of consecutive sentences. The court found that consecutive terms were necessary to punish Street and to protect the community. The court also made the disproportionality finding. Further, it found under R.C. 2929.14(C)(4)(c) that Street’s criminal history demonstrated the need for consecutive terms.

{¶34} Street contends that the finding relative to his criminal history was improper because neither the trial court nor the state “entered [his] criminal record into the record,” and because the trial court based some of its reasoning on arrests.

{¶35} The trial court did state Street’s prior criminal history on the record. In regard to the trial court mentioning arrests as part of Street’s criminal history, it is true that his presentence report shows a number of offenses for which he was arrested, but for which the disposition was “unavailable,” or the case was dismissed. But, the report also shows a number of juvenile delinquent adjudications as well as convictions in adult court.

The adult convictions included aggravated assault, grand theft of a motor vehicle, drug abuse, and open container. The delinquencies and convictions support a finding that Street’s criminal history demonstrated a need for consecutive sentences.¹

{¶36} In light of the above, the trial court properly sentenced Street to consecutive terms. However, the trial court failed to incorporate its findings into the sentence judgment entry, as required under *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at ¶ 29. Thus, under *Bonnell*, we remand the case to the trial court so that it can issue a nunc pro tunc entry incorporating its findings into its sentencing judgment entry. *Id.*

{¶37} The third assignment of error is overruled as it relates to the imposition of consecutive sentences; the case is remanded, however, for the trial court to put forth a

¹That Street was acquitted of all charges in a 2014 case does not diminish this criminal history as he contends.

nunc pro tunc sentencing entry with its consecutive sentence findings.

Ineffective Assistance of Counsel

{¶38} In his fourth assignment of error, Street contends that his counsel was ineffective because he did not “sufficiently argue” (1) for merger of the offenses and (2) against consecutive, maximum terms.

{¶39} An ineffective assistance of counsel claim will lie only when it is shown that both the performance of defense counsel was seriously flawed and deficient, and the result of the defendant’s trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We do not find that counsel was deficient and, therefore, do not need to consider the second prong, that is, if the result of the sentencing would have been different.

{¶40} The record demonstrates that trial counsel advocated for another chance at community control for Street. He supported his request by informing the court about Street’s remorse, the family support that he had, and his desire to turn his life around. After the assistant prosecuting attorney requested that the trial court sentence Street to prison, defense counsel requested to address the court again. The court obliged, and counsel responded to the state’s argument and again requested that court give Street another chance at community control sanctions. This record demonstrates that counsel was not deficient in his representation of Street as it related to advocating for the type of sentence to be imposed.

{¶41} The record further demonstrates that counsel was not deficient in his representation of Street as it related to the merger of the offenses. Counsel urged the court to merge the offenses, contending that they should merge because Street “acknowledged [to the police] that he had the gun, [and] told them why he had it.”

{¶42} On this record, counsel was not deficient and the fourth assignment of error is overruled.

III.

{¶43} Judgment affirmed; case remanded for the issuance of a nunc pro tunc sentencing entry incorporating the trial court’s findings for the imposition of consecutive sentences.

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.

LARRY A. JONES, SR., PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
MARY J. BOYLE, J., CONCUR