[Cite as *State v. Jackson*, 2015-Ohio-3029.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101957

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICHARD JACKSON, JR.

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-583444-A

BEFORE: Celebrezze, A.J., Stewart, J., and Blackmon, J.

RELEASED AND JOURNALIZED: July 30, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Defendant-appellant, Richard Jackson, Jr. ("Jackson"), appeals from the sentence imposed by the common pleas court after he entered guilty pleas to charges of rape, kidnapping, and gross sexual imposition. Jackson avers that the trial court erred in imposing consecutive sentences without making the necessary findings required pursuant to R.C. 2929.14(C)(4). Finding merit to the appeal, we reverse and remand for limited resentencing.

I. Procedural History

{¶2} On July 23, 2014, pursuant to a plea agreement, Jackson pleaded guilty to three counts stemming from sexual offenses committed against two 14-year-old girls: his stepdaughter, D.S., and his stepdaughter's friend, B.W. With regard to B.W., Jackson pleaded guilty to one count of substantial impairment rape under R.C. 2907.02(A)(1)(c), and one count of kidnapping in violation of R.C. 2905.01(A)(4), both first-degree felonies. The state and Jackson agreed that the rape and kidnapping charges were allied offenses of similar import and would merge at sentencing. With regard to D.S., Jackson pleaded guilty to one count of gross sexual imposition under R.C. 2907.05(A)(1), a fourth-degree felony.

{¶3} Jackson was sentenced on August 22, 2014. After hearing from Jackson, his counsel, his family, the victims' families, and the prosecutor, the trial court stated:

> The DNA establishes that to a greater or lesser extent this actually happened. What I find most troubling is that these two incidents took place at different times. So it's not just one evening in which you were so drunk you didn't know what you were doing.

I also am troubled by hearing you say that you regret letting these girls do what they wanted to do. This is not something that a 14-year-old girl is capable of deciding for herself.

I have to take into account as well on the other hand your lack of any serious criminal record, the fact that as has been said you have a history of being a good and supportive husband and father and stepfather.

* * *

Okay. Any sentence I give is going to be arbitrary. There is no way that we can say one sentence is too long, another sentence is too short. It's done because we have — end up having a gut feeling taking all these factors into consideration as to what is the appropriate one.

I said that I don't think that the maximum sentence is appropriate. By the same token, I think close to that is the best thing. * * * I find that the — that consecutive sentences are not only justified but mandatory because anything less than that would not fairly punish you or protect the victims or society from conduct like this. In particular, I note that there are two separate victims, two separate occasions and the two incidents deserve to be sentenced separately; and the two victims need to know that the — that they are each taken seriously.

{¶4} Pursuant to the plea agreement, the trial court merged the rape and kidnapping counts as allied offenses. The state elected for Jackson to be sentenced under the rape count. The trial court imposed prison terms of nine years for rape and one year for gross sexual imposition, with both sentences to be served consecutively for a total of ten years in prison. The court additionally informed Jackson of his status as a tier III sex offender and his lifetime duty to register. It is from this sentence that Jackson appeals.

II. Analysis

{¶5} In his sole assignment of error, Jackson argues that the trial court failed to make the requisite findings under R.C. 2929.14(C)(4) for the imposition of consecutive sentences.

{¶6} An appellate court may reverse, vacate, or modify a consecutive sentence if it clearly and convincingly finds that either (1) the record does not support the sentencing court's findings under R.C. 2929.14(C)(4) or (2) the sentence is otherwise contrary to law. R.C. 2953.08(G)(2). A trial court is required to make specific findings under R.C. 2929.14(C)(4) prior to imposing consecutive sentences. First, the court must find that "consecutive service is necessary to protect the public from future crime or to punish the offender." *Id.* Second, the court must establish 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 apply:

> (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, 2919.17, or 2929.18 fo 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 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.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.
>
> R.C. 2929.14(C)(4)(a)-(c).

{¶7} "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." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29. Furthermore, talismanic incantations of the statute are not required, provided the necessary findings can be found in the record. *Id.* at ¶ 37. However, the Ohio Supreme Court has also recognized that "finding" in this context "means only that 'the [trial] court must note that it engaged in the analysis' and that it 'has considered the statutory criteria and specifie[d] which of the given bases warrants its decision.'" *Id.* at ¶ 26, quoting *State v. Edmonson*, 86 Ohio St.3d 324, 326, 715 N.E.2d 131 (1999).

{¶8} In this case, the only finding that we can clearly discern that the trial court made under R.C. 2929.14(C) is the first element. Specifically, the trial court stated, "I find that the — that consecutive sentences are not only justified but mandatory because anything less than that would not fairly punish you or protect the victims or society from conduct like this."

{¶9} The record does not clearly and convincingly demonstrate that the trial court made either of the other two requisite findings under R.C. 2929.14(C)(4). While we recognize that the trial court seriously considered Jackson's troubling statements at sentencing, the disturbing factual circumstances of this case, and the various mitigating factors when fashioning a sentence it believed was fair and just, the court fell short in making the findings required by statute. Moreover, we find it concerning that the trial court indicated that any sentence it decided to impose would be "arbitrary" and based on a "gut feeling." Although a talismanic incantation of the statute is not required, the trial

court in this case neither mentioned that it was engaging in the appropriate analysis nor remarked that it was considering the appropriate statutory elements.

{¶10} Accordingly, Jackson's sentence is reversed and the matter is remanded for the limited purpose of having the trial court consider whether consecutive sentences are appropriate under R.C. 2929.14(C)(4) and, if so, to make the required findings on the record and to incorporate those findings into the court's entry.

{¶11} Therefore, Jackson's sole assignment of error is sustained.

{¶12} Judgment reversed and case remanded to the lower court for further proceedings consistent with this opinion.

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.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

PATRICIA ANN BLACKMON, J., CONCURS; and
MELODY J. STEWART, J., CONCURS WITH SEPARATE OPINION

MELODY J. STEWART, J., CONCURRING WITH SEPARATE OPINION:

{¶13} I agree with the majority's decision to reverse. I write separately, however, to address my concurring with the disposition of this case and the position I have taken in

similar cases where, instead of reversing and remanding for resentencing, I opined that in the absence of the trial court's making all of the statutory findings, the consecutive sentence should be vacated and concurrent service ordered.

{¶14} In separate opinions authored in *State v. Brooks*, 8th Dist. Cuyahoga No. 100455, 2014-Ohio-3906 and *State v. Davis*, 8th Dist. Cuyahoga No. 101338, 2015-Ohio-178, I noted that in *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, *supra*, while referencing the statute that mandates the presumption of concurrent sentences, the Supreme Court stated that:

> [I]f the trial court does not make the factual findings required by R.C. 2929.14(C)(4), then "a prison term, jail term, or sentence of imprisonment *shall* be served concurrently with any other prison term, jail term or sentence of imprisonment imposed * * *."

(Emphasis sic.) *Davis* at ¶ 25, quoting *Bonnell* at ¶ 23. I noted that:

> This statement, coupled with the authority of appellate courts to "reduce, or otherwise modify a sentence" pursuant to R.C. 2953.08(G) means that reviewing courts need not remand a case for resentencing when the trial court fails to make the required findings for consecutive sentences. The court can order that the sentences be served concurrently.

Davis at ¶ 26.

{¶15} R.C. 2953.08(G) gives appellate courts the ability to vacate a sentence and order that a defendant serve a concurrent term when the trial court has failed to make the statutorily required findings. But what appears, at least to me anyway, to be mandatory language in paragraph 23 of *Bonnell* is mandatory as to the trial court: not the appellate court. To read the paragraph otherwise would take away the options that the legislature clearly intended appellate courts to have when reviewing sentences under R.C. 2953.08(G). When the trial court fails to adhere to the mandate, it imposes a sentence that is contrary to law. And when confronted with this infirmity, R.C. 2953.08(G) gives the appellate court several options, including remanding for resentencing. I therefore agree that Jackson's sentence should be reversed and remanded for the purpose of having the trial court determine whether consecutive sentences are indeed appropriate, and if so, to make the required findings.