

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102523

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM CALDERO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED FOR A
NUNC PRO TUNC SENTENCING ENTRY

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-14-584054-A, CR-14-589312-A, and
CR-14-590992-A

BEFORE: Boyle, J., Kilbane, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: October 29, 2015

ATTORNEY FOR APPELLANT

Allison S. Breneman
1220 West 6th Street
Suite 303
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Owen M. Patton
Assistant County Prosecutor
Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶1} Defendant-appellant, William Caldero, appeals his sentence. He raises two assignments of error for our review:

1. The trial court erred by imposing consecutive sentences.
2. The sentence conveyed to the department of correction was considerably different than the one issued in the transcript by the trial court.

{¶2} Finding no merit to his arguments, we affirm.

A. Procedural History and Factual Background

{¶3} In April 2014, Caldero was indicted in Cuyahoga C.P. No. CR-14-584054-A for failure to provide notice of change of address in violation of R.C. 2950.05(E)(1), a felony of the third degree.

{¶4} While out on bond in Cuyahoga C.P. No. CR-14-584054-A, Caldero was indicted on 11 counts in Cuyahoga C.P. No. CR-14-589312-A for allegations of theft, grand theft, forgery, and receiving stolen property. The dates of the alleged offenses were from July 28, 2014, to August 28, 2014.

{¶5} In November 2014, Caldero was charged by way of information in Cuyahoga C.P. No. CR-14-590992-A for theft and grand theft. The date of the alleged offenses was September 4, 2014; the offenses were allegedly committed while he was still out on bond in the previous cases. The court continued bond in the previous cases and set a bond for the new case, subject to court supervised release as a condition of the bond.

{¶6} Four days after he was charged by way of information, Caldero entered into a plea agreement in all three cases. In Cuyahoga C.P. No. CR-14-584054, Caldero pleaded guilty to failure to provide notice of change of address in violation of R.C. 2950.05(E)(1), a felony of the

third degree. In Cuyahoga C.P. No. CR-14-589312, he pleaded guilty to an amended indictment on one count of grand theft in violation of R.C. 2913.02(A)(1), a felony of the fourth degree, with an additional victim added and agreed restitution to both victims. The remaining counts were nolle. In Cuyahoga C.P. No. CR-14-590992, Caldero pleaded guilty to an amended indictment of receiving stolen property in violation of R.C. 2913.51(A), a felony of the fifth degree, plus restitution. The remaining count was nolle.

{¶7} At the close of the plea hearing, the court continued Caldero's bond in all three cases, ordered court supervised release, and ordered that a presentence investigation report be completed.

{¶8} The trial court held a sentencing hearing on all three cases in late December 2014. At the beginning of the sentencing hearing, defense counsel requested a continuance so that a presentence investigation report could be completed. The state objected, arguing that the sentencing hearing should go forward because Caldero failed to show for his presentence investigation and that the victims were present for sentencing. The trial court denied defense counsel's request and proceeded with sentencing.

{¶9} At the sentencing hearing, the court heard from defense counsel first; he requested that the court give Caldero community control sanctions. Defense counsel explained that Caldero had the ability to work at many jobs, and had even tutored other inmates when he was previously in prison.

{¶10} Caldero spoke next, asking that the court give him supervision so that he could work to pay back the victims in the case. He further stated that his children needed his guidance in their lives. He told the court that if he received probation, he would work hard and follow all of the rules of his probation.

{¶11} The prosecutor discussed Caldero's lengthy criminal record, stating that Caldero had

a consistent history of theft and forgery dating back to 1997. The state also discussed the facts from Caldero's three present cases, explaining the failure to provide notice of change of address, theft, and receiving stolen property cases. For the theft and receiving stolen property cases, the state told the court that Caldero befriends people and then uses aliases to defraud them out of money. The state asked the court to give Caldero prison time because Caldero's behavior had not changed "in well over a decade." The state informed the court:

In looking at [Caldero's] criminal history, everything is the same, it's theft, robbery, bad checks. There's a probation violation in August of 1998. Thefts in 1998. Thefts in 1998 again. Probation violation in '99. Passing bad checks in '02. The sexual battery that gives him the underlying sex offense.

And the comments that he was only given this many years, three years on the sexual battery, well, it was an F-3, so I think it was a pretty just sentencing mark.

He's got receiving stolen properties in '06, receiving stolen property in '06 again. A probation violation in August of 2009. Escapes, a failure to — failure to verify address in '09. Every single crime that he has has been the same, nothing's changed.

And the fact that he's stealing, you know, amounts that are small enough that these are F-4s and F-5s is the reason why he continually doesn't see prison time. And that's what the state thinks is necessary at this point. His behavior hasn't changed in well over a decade. He manipulates individuals to get what he wants, he steals their checks, he cashes their money, then he sings a sob story to the court. And I think it's the point in time that the court tells him we are not going to listen to it anymore.

Now, the request for probation, I don't think he's a bad candidate for probation. I think he's a terrible candidate for probation. I think it's exercised by just looking at his cases. He's gone capias on May 8th, October 14th, September 16th, and December 23rd, all in these last run of cases with the court. I think most important, though, is the second motion to revoke bond that the state filed. At that hearing Mr. Caldero was out in the hallway, he was there all morning long, and then we finally were told that we were going to come here on the motion to revoke bond after he picked up his second case while on bond. Mr. Caldero, Alexander Caraballo, whatever he was going by that day, decided to leave the building. He called his attorney on the phone, he absconded from the court intentionally on the fear that he was going to have his bond revoked. He shows that he can't follow directive.

{¶12} Two of the three victims spoke to the court, as well as the father of one of the victims. Both victims informed the court that Caldero befriended them and then stole from them.

{¶13} The trial court stated that it considered all of the information that it heard at sentencing, the principles and purposes of felony sentencing, and the appropriate recidivism and seriousness factors. The trial court indicated that it was also relying on a presentence investigation report from 2009, which included Caldero's criminal history up until that point, a summary of personal information, and family history. The trial court stated that Caldero's criminal history was "replete with multiple cases of [Caldero] displaying dishonesty that's been described here, thefts, passing bad checks in multiple jurisdictions and even states."

{¶14} The court noted that it was "particularly troubling" that Caldero had multiple opportunities "to show some kind of track record with respect to being out on bond," and yet Caldero "could not do the appropriate thing." The court stated that not only was Caldero not following the court's orders while on bond, but also "committing crimes while [he was] on bond." The court told Caldero that the way he acted while on bond represented to the court "that probation is not going to stop [him] from committing crimes and that any level of supervision or rewiring that may be possible on probation is just not appropriate for [him]."

{¶15} The court further told Caldero that it was clear from the victim's statements that Caldero uses his charm to "suck people in," get them to trust him, and then victimize them. The court said that people "show some empathy" for Caldero, which is part of his "con," and that was especially hurtful to people.

{¶16} The court indicated that it was sentencing Caldero on three separate cases with multiple victims. It said, "hopefully the things I've stated are reasons enough for the justification of multiple sentences."

{¶17} The court found "that it's necessary to punish [Caldero] and to protect our

community and it's not disproportionate to impose consecutive sentences.” The court found “specifically that Case 589312 and 590992 were committed while [Caldero] was awaiting trial * * * on bond.” The court found that the harm is such that a “single term wouldn’t adequately reflect the seriousness” of Caldero’s conduct. And the court noted that Caldero’s “method of manipulation and emotional con game” also indicated that a single sentence is not adequate. Finally, the court found that Caldero’s criminal history, dating back to 1992, with multiple felonies, misdemeanors, thefts, stolen property, passing bad checks, the sexual battery case where he victimized a woman, and failure to register with the sheriff’s office, demonstrates that he cannot be honest with anyone.

{¶18} At the sentencing hearing, the court sentenced Caldero to 30 months in prison for failure to provide notice of change of address in Cuyahoga C.P. No. CR-14-584054; 12 months in prison for grand theft in Cuyahoga C.P. No. CR-14-589312; and 12 months in prison for receiving stolen property in Cuyahoga C.P. No. CR-14-590992, all to be served consecutive to each other, for a total of four and one-half years (the trial court incorrectly added the years together and said three and one-half years at the sentencing hearing, which we will address in Caldero’s second assignment of error). The trial court also ordered \$2,800 in restitution to one victim, \$11,800 to another, and \$1,700 to the third victim. The trial court further notified Caldero that he would be subject to three years of discretionary postrelease control upon his release from prison. It is from these three judgments that Caldero appeals.

B. Consecutive Sentences

{¶19} In his first assignment of error, Caldero argues that the trial court erred in imposing consecutive sentences. He “argues specifically that the consecutive sentence was contrary to the felony sentencing guidelines.”

{¶20} R.C. 2953.08(G)(2) provides that our review of felony sentences is not an abuse of

discretion. An appellate court must “review the record, including the findings underlying the sentence or modification given by the sentencing court.” *Id.* If an appellate court clearly and convincingly finds either that (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,” then “the appellate court may increase, reduce, or otherwise modify a sentence * * * or may vacate the sentence and remand the matter to the sentencing court for resentencing.” *Id.*

{¶21} R.C. 2929.14(C)(4) requires trial courts to engage in a three-step analysis when imposing consecutive prison 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 imposed under R.C. 2929.16, 2929.17, or 2929.18, 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.*

{¶22} Caldero “concedes that the trial court put the required factors on the record[,]” but argues that “the facts do not support consecutive sentences in his three separate cases.” We disagree.

{¶23} Caldero argues that although he pleaded guilty to failure to provide notice of change

of address, the facts at the sentencing hearing demonstrated that he did provide a second address, which he claims “puts his crime at a different level than one who purposefully evaded the authorities by not disclosing his whereabouts.” This argument is ironic, considering that at one point during the pendency of his first case, Caldero purposefully left the justice center before a motion hearing when he learned the state had filed a motion to revoke his bond; as a result, the court issued a *capias*. But also, Caldero’s argument is wholly without merit. Caldero pleaded guilty to failure to provide notice of change of address, which is a third-degree felony. There is nothing in the definition of this offense that “puts his crime at a different level.” And according to the state, Caldero was not even living at the second address in Cleveland Heights, but somewhere in Rocky River.

{¶24} Caldero further maintains that the trial court did not give him the maximum sentence of 30 months for failure to provide notice of change of address, sentencing him to only 24 months instead, because it recognized that he took responsibility. Caldero seems to be arguing that the court recognized that he took responsibility because he provided a second address. That is entirely not the case. The court was referring to the fact that Caldero pleaded guilty; the court did not recognize that he provided a second address.

{¶25} Caldero also asserts that his other two cases “revolve around non-violent acts which require a hefty restitution amount paid back to multiple victims,” arguing that “[a] long prison sentence goes against this goal and will not allow the victims to become whole for a long time.” Although Caldero is correct, he seems to be forgetting the fact that it was his criminal conduct that put the victims in this unfortunate place — his actions that he committed while on bond for his first case involving his failure to provide his address to the proper authorities. Caldero repeatedly violated court orders and continued to commit new crimes while the court continued to give him second chances.

{¶26} Accordingly, we find that the record clearly and convincingly supports the trial court's findings to impose consecutive prison sentences under R.C. 2929.14(C).

{¶27} We note, however, that the trial court failed to place the consecutive sentence findings in the sentencing entry. A trial court is required not only to make the statutory findings required for consecutive sentences at the sentencing hearing, but also to incorporate its findings into its sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. Thus, in light of *Bonnell*, this matter is remanded to the trial court for the court to issue a new sentencing journal entry, nunc pro tunc, to incorporate its findings.

C. Sentence Discrepancy

{¶28} In his second assignment of error, Caldero argues that the sentence conveyed to him at the sentencing hearing of three and one-half years was “considerably different” than the four and one-half years that the trial court imposed in the sentencing entry. He asks this court to modify his sentence to three and one-half years. We decline to do so.

{¶29} Although the trial court stated at the sentencing hearing that three and one-half years was Caldero's total sentence, it was a mere calculation mistake when adding 12 months, 12 months, and 30 months together. After imposing the sentence for each individual offense, the trial court stated, “So that's a total of * * * 12 and 12 is 24 and 30 months is three-and-a-half years.” The sentencing entry of four and one-half years reflects the true sentence that the trial court imposed for each individual offense on the record in open court at the sentencing hearing.

{¶30} At oral argument, Caldero argued that *State v. Santiago*, 8th Dist. Cuyahoga No. 101640, 2015-Ohio-1824, supports his claim that we should vacate his sentence and impose a prison term of three and one-half years. But the facts in *Santiago* are distinguishable from the instant case. In *Santiago*, we explained:

[T]he trial court originally sentenced Santiago to 11 years each for rape,

kidnapping, and aggravated robbery, three years for the grand theft felony of the third degree, 18 months each for the grand theft felony of the fourth degree and the improper handling of a firearm in a motor vehicle. All of the counts were ordered to be served consecutively with each other. This totals 39 years; however, the trial court stated it was 37 1/2 years and Santiago's attorney stated it was 33 years.

Santiago's attorney immediately objected to the sentence arguing that it was disproportionate to the crimes committed. The trial court and Santiago's counsel then engaged in a lengthy conversation regarding what sentence would be proportional. Santiago's attorney's argument can be summarized by his following statements:

"Attorney: I'm suggesting to you, your Honor, give him the 15 and a half, which is all consecutive. It's the 11 [years], the three-and-a-half [years] and the 18 [months]. Or the three [years] and the one and a half [years]. That's 15 and a half. That's ample opportunity for him. And if he violates, he goes back for another seven and a half. He's going to be on post control for five years. He'll have a great opportunity for the system to supervise him. If he makes a mistake, he'll go back again."

The state argued that the original consecutive sentence was proportionate given Santiago's voluminous criminal history and the fact this was a "stranger rape." The state stressed that the community needed protection from Santiago. The court then stated:

"Court: What I will reduce it to is 22 [years], but I'm not going to reduce it to 15 [years]. So I will run two of them concurrent. But I can't do any more than that."

In its sentencing entry, the trial court then imposed a sentence of 28 years, consisting of a concurrent sentence of 11 years for the rape and kidnapping counts, with the remaining counts running consecutively as follows: 11 years for the aggravated robbery, 36 months for the grand theft felony of the third degree, 18 months for the grand theft felony of the fourth degree, and 18 months for the improper handling of a firearm in a motor vehicle.

Id. at ¶ 14-17.

{¶31} It was not clear from the record of the sentencing hearing in *Santiago* how much prison time the trial court actually imposed. First, the trial court miscalculated the original sentence imposed, stating that it was imposing 37 and one-half years when it actually totaled 39 years based upon the individual prison terms. We note that if the sentencing entry then would have reflected a total prison term of 39 years, that would be akin the facts in this case — with the

trial court making a simple miscalculation. But the facts in *Santiago* go way beyond the simple miscalculation made in the present case.

{¶32} First, the defense attorney continued to argue that 33 years (not 37 and one-half or 39 years) was too much prison time to give the defendant. Then, in response to the defense attorney's arguments in *Santiago*, the trial court actually reduced the defendant's prison time, stating "I will reduce it to 22 years. So I will run two of them concurrent." The trial court did not state anything else regarding the sentence at the sentencing hearing. But then in the sentencing entry, the trial court sentenced him to 28 years. "Because of this confusion," it was entirely unclear from the transcript of the sentencing hearing what the actual sentence was. *Id.* at ¶ 18. Thus, this court remanded to the trial court "to conduct a hearing to clarify on the record the sentence imposed." *Id.* at ¶ 19.

{¶33} The facts in this case are wholly distinguishable from *Santiago*. The trial court made a simple miscalculation when adding the prison terms together after stating the prison term for each individual offense. Indeed, the trial court stated the prison terms for each individual offense two times: first when the court imposed the sentence for each offense and then again when the court was adding the prison terms together ("12 and 12 is 24 and 30 months"). The sentencing entry reflects the sentence actually given for each prison term and the proper aggregate prison sentence.

{¶34} Caldero's second assignment of error is overruled.

{¶35} Judgment affirmed. Case remanded for the court to issue a new sentencing journal entry nunc pro tunc to include the consecutive sentence findings pursuant to *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus.

It is ordered that appellee recover from appellant 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. 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.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR