

[Cite as *State v. Vasquez*, 2015-Ohio-5426.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102890

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSUE A. VASQUEZ

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-590178-A

BEFORE: S. Gallagher, J., Stewart, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: December 24, 2015

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SEAN C. GALLAGHER, J.:

{¶1} Appellant Josue A. Vasquez appeals the trial court's imposition of a consecutive sentence. Upon review, we affirm appellant's sentence, but remand for the trial court to issue a nunc pro tunc sentencing entry to incorporate the findings made at the sentencing hearing.

{¶2} Appellant was charged under multicount indictments in Cuyahoga C.P. Nos. CR-14-587143 and CR-14-590178. The cases arose from two separate and distinct incidents and involved separate victims.

{¶3} A change of plea hearing was held in the two cases on February 25, 2015. The prosecutor outlined the term of the proposed plea bargain agreement in the two cases. The trial court personally addressed appellant and advised him of his rights in compliance with Crim.R. 11.

{¶4} In CR-14-587143, appellant entered a plea of guilty to one count of burglary, a second-degree felony; one count of robbery, a second-degree felony with a one-year firearm specification; and one count of aggravated assault, a fourth-degree felony.

{¶5} In CR-14-590178, appellant entered a plea of guilty to one count of felonious assault, a second-degree felony with a one-year firearm specification; and one count of having a weapon while under disability, a third-degree felony.

{¶6} A sentencing hearing was held in the two cases on March 25, 2015. The assistant prosecutor set forth the facts of each case.

{¶7} The offenses in CR-14-587143 arose from an incident that occurred on May 31, 2014. Appellant and a codefendant broke into the victim's home in the middle of the night. Appellant, armed with a gun, climbed on top of the victim and woke him up. A struggle ensued, and appellant pistol-whipped the victim twice over the head. The victim was knocked unconscious and tied up with a telephone cord. He suffered significant injuries to his head and face. A victim statement was read to the court.

{¶8} The offenses in CR-14-590178 arose from a separate incident that occurred several months later and while appellant was under indictment in the previous case. During the incident, the victim was arguing with another individual on the street when appellant approached with a gun pointed at the victim. As the victim ran, appellant fired five shots, one of which struck the victim in his shoulder, causing serious physical injury.

{¶9} Defense counsel spoke on behalf of appellant and presented mitigating factors, such as appellant's young age and lack of an adult criminal history.

{¶10} In sentencing appellant, the trial court stated as follows:

You know, I want to recognize that you did take responsibility in these pleas. I guess the only comment I can make, especially on the first case, is that the victim wasn't killed. In that sense though, he apparently thought he was going to be.

I had the opportunity to review the photos that were submitted on behalf of the victim in [CR-14-587143]. I would note that this second case [CR-14-590178] was committed while you were awaiting trial in [CR-14-587143] * * *.

I do find, after hearing the statement of the prosecutor and the letter in effect from the victim in the first case, that there was harm so great and unusual that a single term does not adequately reflect the seriousness of what you did. I recognize that your record is just these two cases, but it's

partly because they were committed within months of each other, but I do feel in order to protect the public there should be consecutive sentences.

Clearly the victim in the first case had to leave the place where he lived, because he no longer felt safe there.

{¶11} In CR-14-587143, the trial court sentenced appellant to a prison term of seven years on the burglary count, to run concurrent to seven years on the robbery count plus one year on the firearm specification, to run concurrent to 15 months on the aggravated assault count, for a total prison term of eight years. The court ordered restitution in the amount of \$500.

{¶12} In CR-14-590178, the trial court sentenced appellant to a prison term of three years on the felonious assault count plus one year on the firearm specification, to run concurrent to 24 months on the count of having a weapon while under disability, for a total prison term of four years.

{¶13} The court elected to run the eight-year sentence in CR-14-587143 consecutive to the four-year sentence in CR-14-590178. The court also imposed five years of postrelease control.

{¶14} Appellant filed a notice of appeal in CR-14-590178.

{¶15} Under his first assignment of error, appellant claims the trial court erred by imposing a consecutive sentence without making the appropriate findings required by R.C. 2929.14 and 2011 Am.Sub.H.B. No. 86.

{¶16} R.C. 2929.14(C)(4) permits the court to order consecutive service of sentences if

[T]he 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 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.

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

{¶17} Pursuant to R.C. 2953.08(G)(2), we may modify or vacate a sentence only if we clearly and convincingly find that the record does not support the mandatory sentencing findings, or that the sentence is otherwise contrary to law. A sentence is “contrary to law” if the sentencing court failed to make the findings required to order consecutive service of sentences under R.C. 2929.14(C)(4). *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37.

{¶18} Our review in this case reflects that the trial court made the requisite R.C. 2929.14(C) findings for imposing consecutive sentences. Although the term disproportionate was not used in the trial court's colloquy, it was implicit in its findings.

{¶19} Specifically, the trial court found that the offenses in the second case were committed while appellant was awaiting trial in the first case. Also, the court found that the harm was so great or unusual that a single term would not adequately reflect the seriousness of the conduct. Lastly, the court found the proximity of the two cases in terms of time established that consecutive sentences were necessary to protect the public. Taken together, these findings reflect the court’s reasoning and its implicit finding that consecutive sentences were not “disproportionate” to the seriousness of the offender’s conduct and to the danger the offender poses to the public, even in the absence of the court expressly using the term “disproportionate.” As held in *Bonnell*, “a word-for-word recitation of the language of the statute is not required, and 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.” *Id.* at ¶ 29.

{¶20} Here, the record, taken as a whole, demonstrates the trial court considered all the statutory requirements and made the required findings for imposing a consecutive sentence. Further, the record contains evidence that supports the trial court’s findings. Both this case and the prior case for which appellant was under indictment involved violent offenses with the use of a weapon that resulted in serious physical harm. Upon our review, we find that the sentence is not contrary to law.

{¶21} We do, however, agree with appellant that the court’s sentencing entry did not include the required findings. In *Bonnell*, the court held that “a trial court is required

to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings.” *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at syllabus. In this case, the trial court made the statutory findings at the sentencing hearing, but did not include those findings in the sentencing entry. We therefore sustain this assignment of error in part and remand with instructions for the court to issue a nunc pro tunc sentencing entry that incorporates its consecutive sentence findings. *See Bonnell* at ¶ 30. Appellant’s first assignment of error is sustained in part.

{¶22} Under his second assignment of error, appellant claims the trial court failed to inquire or determine whether the offenses were allied offenses of similar import. Because appellant failed to raise the issue of allied offenses in the trial court, he has forfeited all but plain error. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3. The Ohio Supreme Court recently held as follows:

An accused’s failure to raise the issue of allied offenses of similar import in the trial court forfeits all but plain error, and a forfeited error is not reversible error unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice. Accordingly, an accused has the burden to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus; and, absent that showing, the accused cannot demonstrate that the trial court’s

failure to inquire whether the convictions merge for purposes of sentencing was plain error.

Id.

{¶23} Appellant has failed to set forth any argument to show that his convictions are for allied offenses of similar import. Because he has failed to demonstrate that he has, in fact, been sentenced for allied offenses of similar import committed with the same conduct and without separate animus, he has failed to demonstrate the trial court committed plain error. *See id.* at ¶ 5. Appellant's second assignment of error is overruled.

{¶24} Judgment affirmed. However, this case is remanded to the trial court solely for the court to issue a nunc pro tunc sentencing entry that incorporates its consecutive sentence findings.

{¶25} 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court to issue a nunc pro tunc sentencing entry that incorporates its consecutive sentence findings.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

MELODY J. STEWART, P.J., and
MARY J. BOYLE, J., CONCUR