

[Cite as *State v. Davis*, 2016-Ohio-1127.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103348

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TIMOTHY E. DAVIS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-13-580150-B and CR-14-584240-A

BEFORE: Keough, P.J., Kilbane, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: March 17, 2016

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1. “The purpose of an accelerated appeal is to allow this court to render a brief and conclusory opinion.” *State v. Priest*, 8th Dist. Cuyahoga No. 100614, 2014-Ohio-1735, ¶ 1.

{¶2} Defendant-appellant Timothy E. Davis appeals from the trial court’s imposition of consecutive sentences upon resentencing in Cuyahoga C.P. Nos. CR-13-580150-B and CR-14-584240-A. The cases have been consolidated for our review on appeal.

{¶3} In January 2014, Davis was charged in CR-13-580150-B with five counts of burglary and five counts of theft. In April 2014, he was charged in CR-14-584240-A with three counts of theft. After negotiations with the state, Davis pleaded guilty to five counts of burglary in CR-13-580150-B and one count of theft in CR-14-584240-A. The remaining counts in both cases were dismissed.

{¶4} In June 2014, Davis was sentenced to 15 years in prison in CR-13-580150-B; the sentence consisted of three years consecutive on each of the five counts of burglary. He was also sentenced to one year in prison on the theft charge in CR-14-584240-A, to be served consecutive to the 15-year sentence in CR-13-580150-B.

{¶5} On appeal, this court reversed Davis’s sentence, finding, as the state conceded, that at the sentencing hearing, the trial court had not made the statutory findings required by R.C. 2929.14(C)(4) in order to impose consecutive sentences, nor had the court incorporated those findings into its sentencing entry. *State v. Davis*, 8th Dist. Cuyahoga Nos. 102130 and 102132, 2015-Ohio-1037, ¶ 7 (“*Davis I*”). This court remanded for resentencing.

{¶6} At resentencing on CR-13-580150-B, the trial judge stated that he would modify Davis’s sentence in light of his cooperation with law enforcement, which the judge had learned of only recently. The judge then stated, “It’s going to be three years on each count, except the last two counts will be one year.” The judge stated that the sentence in CR-14-584240-A would “stay the same, one year,” and then said, “So in this case, you originally got 15 years, but you’re going to get 12 years.” Then the judge stated, “So figure out the math. It will be consecutive to each. A total sentence in both cases of 12 years.” The judge then asked defense counsel, “Are you going to waive the findings on the record for consecutive sentences?” and defense counsel responded affirmatively.

{¶7} The subsequent journal entry of resentencing in CR-13-580150-B states, “The court imposes a prison sentence * * * of 12 years.” The entry states that Davis was sentenced to three years on Counts 1, 3, and 5; two years on Count 7; and one year on Count 9. The entry orders that the sentences are to run consecutive to each other and to the sentence in CR-14-584240-A, for a total sentence of 13 years. The entry does not incorporate the statutory findings for consecutive sentences mandated by R.C. 2929.14(C)(4).

{¶8} The journal entry of resentencing in CR-14-584240-A states that Davis earlier pleaded guilty to the three counts of the indictment, and sentences him to one year on each count, to run concurrent but consecutive to the sentence in CR-13-580150-B, for a total sentence of 13 years. The journal entry makes no mention of the statutory factors contained in R.C. 2929.14(C)(4) for imposing consecutive sentences.

{¶9} Davis raises three assignments of error on appeal.

{¶10} In his first assignment, he argues that the journal entry of the plea hearing in CR-14-584240-A incorrectly reflects that he pleaded guilty to three counts of theft, when he

actually pleaded guilty to only one count, and the other two counts were dismissed as part of the plea. He argues further that the journal entry of resentencing also incorrectly reflects that he pleaded guilty to and was sentenced on three counts.

{¶11} The state concedes the error. Our review of the record confirms that in CR-14-584240-A, Davis pleaded guilty to Count 1, grand theft of a motor vehicle, a fourth-degree felony, and Counts 2 and 3 were dismissed. Accordingly, pursuant to Crim.R. 36, we remand to the trial court to correct the errors in the judgment entries nunc pro tunc to make the judgment entries conform to the plea. The first assignment of error is sustained.

{¶12} In his second assignment of error, Davis contends that the trial court erred in imposing consecutive sentences without making the necessary statutory findings on the record at resentencing and in the journal entries. In response, the state contends that Davis waived any error and thus cannot raise this issue on appeal.

{¶13} We cannot find that Davis waived the right to have the judge impose a lawful sentence. “A failure to make the findings required by R.C. 2929.14(C)(4) renders a consecutive sentence contrary to law.” *State v. Nia*, 8th Dist. Cuyahoga No. 99387, 2013-Ohio-5424, ¶ 22. “Every judge has a duty to impose lawful sentences.” *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 27. “A trial court does not have discretion to exercise jurisdiction in a manner that ignores mandatory statutory provisions.” *State v. Bell*, 11th Dist. Portage No. 2014-P-0017, 2015-Ohio-218, ¶ 15. Accordingly, as this court instructed in *Davis I*, the trial court was required upon resentencing to make the statutory findings for consecutive sentences mandated under R.C. 2929.14(C)(4) and incorporate those findings into its sentencing entry. The trial court could not ignore this statutory requirement at resentencing despite Davis’s

apparent waiver. The trial court's failure to make the statutory findings and to incorporate those findings into its journal entry renders the sentences contrary to law.

{¶14} Davis asserts that this court should modify his sentences to be served concurrently because the trial court failed a second time in its duty to make the statutory findings. The record in this case requires us to remand to the trial court, however, instead of modifying Davis's sentence, because it is not clear whether the trial court sentenced Davis to 11 or 12 years in CR-13-580150-B, and thus, whether his consecutive sentence in both cases is 12 or 13 years.

{¶15} During resentencing, the court advised Davis at one point that it was sentencing him to "12 years in this case," but at another point it advised him that it was sentencing him to "a total in both cases of 12 years." The 12-year total sentence in both cases appears to be what the judge intended because he told Davis, "It's going to be three years on each count, except the last two counts will be one year," which would total 11 years for the five counts in CR-13-580150-B.

The judge then told him, "You're going to get three 3's and three 1's," which would total 12 years in both cases. However, the journal entries in both cases state that the court imposed a total sentence of 13 years.

{¶16} Where a clerical or mathematical error exists in a sentencing entry, a nunc pro tunc entry may be properly used to correct the sentencing entry to reflect the sentence the trial court actually imposed upon the defendant at the sentencing hearing. *State v. Thompson*, 8th Dist. Cuyahoga No. 102326, 2015-Ohio-3882, ¶ 16. In this case, however, it is not clear what sentence the trial court actually imposed, so the matter must be remanded for resentencing for the trial court to orally advise Davis of his specific prison sentence on each of the counts to which he pleaded guilty, and to make the statutory findings mandated by R.C. 2929.14(C) for imposing consecutive sentences and to include those findings in the journal entry of sentencing.

{¶17} In his third assignment of error, Davis contends that the trial court did not follow this court's mandate in *Davis I* by not making the statutory findings to impose consecutive sentences upon resentencing. In light of our resolution of the first and second assignments of error, this assignment of error is moot and we need not consider it. App.R. 12(A)(1)(c).

{¶18} Judgment reversed and remanded.

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.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR