

[Cite as *State v. Gay*, 2016-Ohio-2946.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103641

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TIMOTHY GAY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-580276-B

BEFORE: Celebrezze, J., Keough, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: May 12, 2016

ATTORNEY FOR APPELLANT

Thomas A. Rein
820 West Superior Avenue
Suite 800
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Anthony T. Miranda
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendant-appellant, Timothy Gay (“appellant”), brings this appeal challenging the trial court’s sentence for aggravated robbery and felonious assault. Specifically, appellant argues that his sentence is contrary to law because the trial court failed to comply with the purposes and principles of sentencing set forth in R.C. 2929.11 and 2929.12. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} In CR-13-580276-B, the Cuyahoga County Grand Jury returned a five-count indictment charging appellant with: (1) aggravated robbery, in violation of R.C. 2911.01(A)(3), (2) aggravated robbery, in violation of R.C. 2911.01(A)(1), (3) felonious assault, in violation of R.C. 2903.11(A)(2), (4) felonious assault, in violation of R.C. 2903.11(A)(1), and (5) having weapons while under disability, in violation of R.C. 2923.13(A)(2).

{¶3} The parties reached a plea agreement. Appellant pled guilty to an amended Count 1, aggravated robbery, a felony of the first degree, and an amended Count 2, felonious assault, a felony of the second degree. The remaining counts were nolle. The trial court ordered a presentence investigation report (“PSI”).

{¶4} At appellant’s sentencing hearing, the trial court did not merge the aggravated robbery and felonious assault counts. The trial court sentenced appellant to a five-year prison term. However, the trial court did not specify which count it imposed the five-year prison term on. The trial court ordered five years of postrelease control for the

aggravated robbery count and three years of postrelease control for the felonious assault count.

{¶5} The trial court's sentencing journal entry provides, in relevant part, "[t]he court imposes a prison sentence at the Lorain Correctional Institution of 5 year(s). No merger of Counts 1 and 3; concurrent with Count 3, also 5 years in prison."

{¶6} In *State v. Gay*, 8th Dist. Cuyahoga No. 101749, 2015-Ohio-1832, appellant challenged the trial court's sentence. Appellant argued that (1) the trial court failed to comply with the purposes and principles of sentencing, as set forth in R.C. 2929.11 and 2929.12, and (2) the trial court erred by ordering convictions and a sentence for separate counts because the trial court failed to make a proper determination as to whether those offenses are allied offenses pursuant to R.C. 2941.25, and whether they are part of the same transaction under R.C. 2929.14. *Id.* at _ 1. This court affirmed the trial court's refusal to merge the sentences, but remanded the matter to the trial court, finding that it was unclear whether the trial court intended to impose a five-year sentence on each count.

Id. at _ 26. This court noted that the trial court simply stated that it was "imposing for the conduct in this case a period of five years," without stating the sentence for each count. *Id.* On remand, this court instructed the trial court to "conduct a hearing to clarify on the record the sentence imposed." *Id.* at _ 27.

{¶7} The trial court resentenced appellant to a prison term of five years on the aggravated robbery count and a prison term of five years on the felonious assault count. The trial court ordered the counts to run concurrently.

{¶8} Appellant filed the instant appeal assigning one error for review:
I. Appellant’s sentence is contrary to law because the trial court failed to
comply with the purposes and principles of sentencing as set forth in R.C.
2929.11 and R.C. 2929.12.

II. Law and Analysis

{¶9} In his sole assignment of error, appellant argues that the trial court’s sentence is erroneous because “the trial court did not make specific findings in accordance with R.C. 2929.11 and R.C. 2929.12.” Appellant further contends that the trial court failed to specifically mention R.C. 2929.11 and 2929.12 during the resentencing hearing.

{¶10} We initially note that this court held that the trial court properly considered R.C. 2929.11 and 2929.12 prior to sentencing appellant. *Gay*, 2015-Ohio-1832, at _ 12.

Furthermore, we note that the scope of appellant’s resentencing hearing was limited. On remand, this court instructed the trial court to “conduct a hearing to clarify on the record the sentence imposed.” *Id.* at _ 27.

{¶11} Under the mandate rule, when a case is remanded, a lower court must “‘carry the mandate of the upper court into execution and not consider the questions which the mandate laid at rest.’” *State v. Falkenstein*, 8th Dist. Cuyahoga No. 99670, 2013-Ohio-5315, ¶ 12, quoting *State v. Carlisle*, 8th Dist. Cuyahoga No. 93266, 2010-Ohio-3407, ¶ 16; see *Sprague v. Ticonic Natl. Bank*, 307 U.S. 161, 168, 59 S.Ct. 777, 83 L.Ed. 1184 (1939). In the instant matter, the issue of whether the trial court considered the factors in R.C. 2929.11 and 2929.12 had already been resolved, and all

that was left for the trial court to do was clarify on the record the sentence it was imposing.

{¶12} Although the trial court's consideration of R.C. 2929.11 and 2929.12 was not at issue, appellant cannot affirmatively show that the trial court failed to consider the statutory sentencing factors at resentencing. After review, we find that the record reflects that the trial court properly considered R.C. 2929.11 and 2929.12 prior to resentencing appellant.

{¶13} When reviewing felony sentences, this court may increase, reduce, modify a sentence, or vacate and remand for resentencing if we clearly and convincingly find that the record does not support the sentencing court's statutory findings, if applicable, or the sentence is contrary to law. R.C. 2953.08(G)(2). A sentence is contrary to law if (1) the sentence falls outside the statutory range for the particular degree of offense, or (2) the trial court failed to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors in R.C. 2929.12. *State v. Hinton*, 8th Dist. Cuyahoga No. 102710, 2015-Ohio-4907, ¶ 10, citing *State v. Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, ¶ 13. In *State v. Marcum*, Slip Opinion No. 2016-Ohio-1002, the Ohio Supreme Court held that when a sentence is imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12, appellate courts "may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence." *Id.* at ¶ 23.

{¶14} When sentencing a defendant, the court must consider the sentencing purposes and principles set forth in R.C. 2929.11, and the sentencing factors set forth in R.C. 2929.12. *State v. Hodges*, 8th Dist. Cuyahoga No. 99511, 2013-Ohio-5025, ¶ 7. R.C. 2929.11(A) provides that 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 will accomplish those purposes. The sentence imposed shall be “commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact on the victim, and consistent with sentences imposed for similar crimes by similar offenders.” R.C. 2929.11(B).

{¶15} The sentencing court must consider the seriousness and recidivism factors set forth in R.C. 2929.12 in determining the most effective way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11. *Hodges* at ¶ 9. R.C. 2929.12 provides a non-exhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses. *Id.*

{¶16} R.C. 2929.11 and 2929.12 are not fact-finding statutes. Accordingly, although the trial court must consider the principles and purposes of sentencing as well as the mitigating factors as outlined above, the court is not required to use particular language or make specific findings on the record regarding its consideration of those factors. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31;

State v. Jones, 8th Dist. Cuyahoga No. 99759, 2014-Ohio-29, ¶ 13. Consideration of the appropriate factors can be presumed unless the defendant affirmatively shows otherwise. *Id.*, citing *State v. Stevens*, 1st Dist. Hamilton No. C-130278, 2013-Ohio-5218, ¶ 12. Moreover, a trial court's statement in its sentencing journal entry that it considered the required statutory factors is sufficient to fulfill a trial court's obligations under R.C. 2929.11 and 2929.12. *State v. Sutton*, 8th Dist. Cuyahoga Nos. 102300 and 102302, 2015-Ohio-4074, ¶ 72, citing *State v. Clayton*, 8th Dist. Cuyahoga No. 99700, 2014-Ohio-112, ¶ 9.

{¶17} In the instant matter, the trial court's five-year sentence for aggravated robbery, a felony of the first degree, was within the statutory range. R.C. 2929.14(A)(1) provides, "[f]or a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, ten, or eleven years." Furthermore, the trial court's five-year sentence for felonious assault, a felony of the second degree, was within the statutory range. R.C. 2929.14(A)(2) provides, "[f]or a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years."

{¶18} Appellant argues that the trial court failed to consider the relevant statutory factors under R.C. 2929.11 and 2929.12 at resentencing. After review, we disagree.

{¶19} The trial court's journal entry from the resentencing hearing provides, in relevant part, "the court considered all required factors of the law. The court finds that prison is consistent with the purposes of R.C. 2929.11." Aside from the trial court's notation in the sentencing entry that it "considered all required factors of law" including,

specifically, R.C. 2929.11, the record in this case reflects that the trial court did, in fact, consider both R.C. 2929.11 and 2929.12 when resentencing appellant.

{¶20} During the resentencing hearing, the prosecutor argued that the trial court should impose a concurrent five-year sentence on both the aggravated robbery and felonious assault counts, as indicated in the trial court's journal entry from the original sentencing hearing. The prosecutor's recommendation was based on the following facts: "this was a beating over a stolen phone. The victim required stitches. There was [a] concussion. And the court did note at the previous sentencing, that [appellant] was under [postrelease] control at the time that the crime occurred and there was an extensive criminal history."

{¶21} Both appellant and his counsel had an opportunity to address the trial court at the resentencing hearing. First, appellant's counsel argued that the trial court should impose a sentence that is less than the five years previously imposed because appellant learned a lesson and is participating in self-improvement programs. Appellant's counsel explained that appellant is taking "GED classes in order to get his high school diploma," and is "taking masonry classes so he can have gainful employment when he gets out." Furthermore, appellant's counsel stated, "[appellant] has two children as he's age 25, and his kids are two and four and he's] missing them and he's remorseful." Second, appellant asked the trial court for another chance:

I have children now and they're going through so much. I miss my kids. I'm sorry that I put myself in and victimized by going through this case for going through the crime trying to help. I just want to get another chance to be with my kids and my mother.

Appellant described the self-help programs that he has been involved in at the Mansfield Correctional Institution: “I’m in GED now, trying to get my GED, my high school diploma. But mason, I’m trying to get a trade so when I come home I can get in plumbing or HVAC.” Finally, appellant apologized for his actions in the instant matter.

{¶22} The trial court stated that it reviewed the transcript of the original sentencing hearing and that it took the statements of the prosecutor, appellant’s counsel, and appellant into consideration. The trial court reimposed its original sentence, sentencing appellant to five years of imprisonment on the aggravated robbery count and five years of imprisonment on the felonious assault count. The trial court ordered appellant to serve the counts concurrently, for a total of five years of imprisonment. Finally, the trial court stated that it “considered all the factors relevant in making the decision in this case, as required by the sentencing statute.”

{¶23} After reviewing the record, appellant’s argument that the trial court failed to consider the relevant statutory factors under R.C. 2929.11 and 2929.12 at resentencing is without merit. The record reflects that the trial court considered both R.C. 2929.11 and 2929.12 when resentencing appellant. The trial court was neither required to make specific findings regarding R.C. 2929.11 and 2929.12 nor required to specifically mention R.C. 2929.11 and 2929.12 during the resentencing hearing. Furthermore, appellant cannot affirmatively show that the trial court failed to consider R.C. 2929.11 and 2929.12.

{¶24} Accordingly, appellant’s sole assignment of error is overruled.

III. Conclusion

{¶25} On direct appeal, this court affirmed the trial court's sentence, finding that the trial court properly considered R.C. 2929.11 and 2929.12 prior to sentencing appellant. *Gay*, 2015-Ohio-1832, at _ 12. However, this court remanded the matter and instructed the trial court to clarify appellant's sentence. *Id.* at _ 27. Thus, the trial court's consideration of R.C. 2929.11 and 2929.12 was not at issue at resentencing. Furthermore, appellant cannot affirmatively show that the trial court failed to consider the statutory sentencing factors at resentencing. The record reflects that the trial court properly considered R.C. 2929.11 and 2929.12 prior to resentencing appellant, and the trial court's journal entry from the resentencing hearing states that "the court considered all required factors of the law."

{¶26} Accordingly, the trial court's sentence is not contrary to law, and appellant's sole assignment of error is overruled.

{¶27} Judgment affirmed.

It is ordered that appellee recover of 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 for execution of sentence.

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

FRANK D. CELEBREZZE, JR., JUDGE

KATHLEEN ANN KEOUGH, P.J., CONCURS;
SEAN C. GALLAGHER, J., CONCURS IN JUDGMENT ONLY (WITH SEPARATE
OPINION ATTACHED).

SEAN C. GALLAGHER, J., CONCURRING IN JUDGMENT ONLY:

{¶28} I concur in judgment only with the majority decision. In *State v. Gay*, 8th Dist. Cuyahoga No. 101749, 2015-Ohio-1832, ¶ 27, a panel of this court, after affirming the conviction in all respects, concluded that the court did not clearly notify the defendant at the sentencing hearing that he would be serving five years concurrently on both counts as indicated in the sentencing entry. The remand was limited to notifying the defendant of the fact that the trial court imposed two five-year prison terms. The sentence was not vacated, and the trial court complied with the remand order. The current appeal must only be limited to the issue on remand: whether the trial court conducted “a hearing to clarify on the record the sentence imposed.” Having complied with this directive, the trial court did not err. A remand does not entitle the defendant to rechallenge the issues that were already addressed in his direct appeal.

{¶29} The first panel already addressed Gay’s current argument that the trial court failed to consider the sentencing factors pursuant to R.C. 2929.11 and 2929.12, and affirmed the conviction, holding that the trial court considered all that is required by law.

For this reason, this current appeal is unnecessary. The law of the case doctrine precludes us from reviewing the assigned error as presented. For the foregoing reasons, I can only concur with the majority's conclusion to affirm.