[Cite as *State v. Brewster*, 2016-Ohio-3070.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103789

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GREGORY B. BREWSTER, JR.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-15-593096-A and CR-15-596628-A

BEFORE: Kilbane, J., Jones, A.J., and Blackmon, J.

RELEASED AND JOURNALIZED: May 19, 2016

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Gregory B. Brewster, Jr. ("Brewster"), appeals from the consecutive sentences imposed for drug-related offenses in two different cases. For the reasons set forth below, we affirm.

{¶2} On March 2, 2015, Brewster and his wife, Cheryl Brewster ("Cheryl"), were indicted in Case No. CR-15-593096 in an eight-count indictment. Count 1 charged each of them with trafficking in 10-50 grams of heroin, in violation of R.C. 2925.03(A)(2), a first-degree felony, with schoolyard, juvenile, and forfeiture specifications. Count 2 charged each of them with possession of heroin, in violation of R.C. 2925.11(A), a second-degree felony, with forfeiture specifications. Count 3 charged Brewster with attempted tampering with evidence, in violation of R.C. 2921.12, a fourth-degree felony. Count 4 charged Brewster and Cheryl with possession of criminal tools, in violation of R.C. 2923.24(A), a fifth-degree felony, with forfeiture specifications. Counts 5-7 charged each of them with child endangering, a first-degree misdemeanor. Count 8 charged Brewster with resisting arrest, a second-degree misdemeanor.

{¶3} On July 2, 2015, Brewster and Cheryl were indicted on three counts in Case No. CR-15-596628. Count 1 charged each of them with trafficking in heroin, a first-degree felony, in violation of R.C. 2925.03(A)(2), with juvenile and forfeiture specifications. Count 2 charged them with possession of heroin, in violation of R.C. 2925.11(A), a second-degree felony, with forfeiture specifications. Count 3 charged

them with possessing criminal tools, in violation of R.C. 2923.24, a fifth-degree felony, with forfeiture specifications.

{¶4} On September 29, 2015, Brewster reached plea agreements with the state in both cases. In Case No. CR-15-593096, Count 1 was amended to a second-degree felony drug trafficking by deletion of the schoolyard and juvenile specifications, and Brewster pled guilty to the amended charge and the forfeiture specifications. Brewster also pled guilty to attempted tampering with evidence and one charge of child endangering. The remaining charges were dismissed. In Case No. CR-15-596628, Brewster pled guilty to first-degree felony drug trafficking as alleged in Count 1 and possession of criminal tools as charged in Count 3, and Count 2 was dismissed.

{¶5} The trial court ordered a presentence investigation prior to sentencing. At the October 26, 2015 sentencing, the trial court imposed a mandatory four-year term for the drug trafficking charge, to be served concurrently with 18 months for attempted tampering with evidence and 6 months for child endangering in Case No. CR- 15-593096. In Case No. CR-15-596628, the court imposed a mandatory four-year term for the drug trafficking charge, to be served concurrently with a one-year term for possession of criminal tools. The trial court noted Brewster's prior drug-related convictions, including a 1999 felony drug abuse conviction, 2002 convictions for drug trafficking and carrying concealed weapons, a 2006 misdemeanor conviction for drug abuse, a 2008 felony conviction for drug trafficking, and a 2014 misdemeanor conviction for attempted drug trafficking. The court also noted that during the time of the arrests in the instant cases,

Brewster was "already under supervision by some court or prison authority." The court then stated:

> That's a whopping criminal history, Mr. Brewster.
>
> Mr. Brewster * * * [has] daily drug use of things like alcohol, marijuana, phencyclidine and weekly use of cocaine and crack cocaine and mushrooms and monthly use of methamphetamines, and Ecstacy and daily heroin.
>
> [Y]ou have worked yourself into a position where you sorely deserve punishment and the community needs to be protected. * * *.
>
> I find that consecutive sentences are necessary to protect the public from future crime by you and also to punish you. The consecutive sentences that I'm about to announce are not disproportionate to the seriousness of your conduct and to the danger that you pose to the public. You have two factors that I can find that justify consecutive sentences. First of all, two of these multiple offenses were committed as part of a course of conduct; of course, that is the continuous drug trafficking that took place in your residence and other places. And the harm caused by two or more of these multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of this course of conduct adequately reflects the seriousness of your conduct. Then finally, the second finding I can make is that your history of criminal conduct demonstrates consecutive sentences are necessary to protect the public from future crime by you.

{¶6} Brewster now appeals, assigning the following error for our review:

Assignment of Error

> The trial court committed [an abuse of its] discretion when it imposed consecutive sentences without adequate justification.

{¶7} In the sole assignment of error, Brewster argues that the trial court failed to make the required findings before imposing consecutive sentences. He asserts that the court failed to find that his sentence was "consistent" and "proportionate" to Cheryl's sentence because she received a community control sanction in both cases.

{¶8} Pursuant to R.C. 2953.08(G)(2), we may modify or vacate a sentence if we find by clear and convincing evidence that the record does not support any relevant findings required under R.C. 2929.14(C)(4). *State v. Marcum*, Slip Opinion No. 2016-Ohio-1002, ¶ 22. *See also State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37; *State v. Caldero*, 8th Dist. Cuyahoga No. 102523, 2015-Ohio-4498, ¶ 20. The *Marcum* court stated:

> Clear and convincing evidence is that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.
>
> That is, an appellate court 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 ¶ 22-23.

{¶9} 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. R.C. 2929.14(C)(4); *Caldero* at ¶ 20.

{¶10} For purposes of R.C. 2929.11(B), "consistency" relates to the sentences in the context of sentences given to other offenders; "proportionality" relates solely to the punishment in the context of the offender's conduct (does the punishment fit the crime). *State v. Moore*, 2014-Ohio-5135, 24 N.E.3d 1197, ¶ 17 (8th Dist.).

{¶11} In complying with R.C. 2929.14(C)(4), however,

> 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.

Bonnell, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29; *Moore* at ¶ 29; *State v. Davila*, 8th Dist. Cuyahoga No. 99683, 2013-Ohio-4922, ¶ 9 (The use of "talismanic words" is not necessary, as long as it is clear from the record that the trial court actually made the required statutory findings.).

{¶12} Finally, when imposing consecutive terms of imprisonment, the trial court must make the statutory findings mandated for consecutive sentences under R.C. 2929.14(C)(4) at the sentencing hearing and incorporate those findings into its sentencing entry. *Bonnell* at ¶ 37.

{¶13} In this matter, we find that the record clearly and convincingly demonstrates that the trial court made the requisite R.C. 2929.14(C)(4) findings. The trial court found that "consecutive sentences are necessary to protect the public from future crime by [Brewster] and also to punish [Brewster]." The court also stated that the consecutive sentences "are not disproportionate to the seriousness of [his] conduct and to the danger [he poses] to the public." In addition, the court noted that the offenses were committed while Brewster was "already under supervision by some court or prison authority," and that he has an extensive criminal history. These findings satisfy the requirements of R.C. 2929.14(C).

{¶14} As to Brewster's argument that the court failed to find that his sentence was "consistent" and "proportionate" to Cheryl's sentence because she received a community control sanction in both cases, we note that Cheryl pled guilty to a fourth-degree felony charge of drug possession as the trafficking charge against her reflected 1-5 grams of heroin. Brewster, on the other hand, pled guilty to a second-degree felony trafficking charge based upon his plea involving 10-50 grams of heroin. Therefore, Brewster's sentence is not inconsistent with Cheryl's sentence and is not disproportionate to the sentence that Cheryl received.

{¶15} In addition, the trial court's sentencing entry states in relevant part:

> The court imposes prison terms consecutively finding that consecutive service is necessary to protect the public from future crime or to punish defendant; that the consecutive sentences are not disproportionate to the

seriousness of defendant's conduct and to the danger defendant poses to the public; and that, defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by defendant.

{¶16} Based on the foregoing, we find that the trial court fulfilled both of the *Bonnell* requirements: (1) making the requisite R.C. 2929.14(C)(4) findings on the record and (2) incorporating those findings into the sentencing journal entry.

{¶17} Therefore, the sole assignment of error is overruled.

{¶18} Judgment is 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

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

MARY EILEEN KILBANE, JUDGE

LARRY A. JONES, SR., A.J., and
PATRICIA A. BLACKMON, J., CONCUR