

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 102959**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**DEFRANCO ALLISON**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case Nos. CR-14-590927-A and CR-14-591245-A

**BEFORE:** Blackmon, P.J., Laster Mays, J., and Celebrezze, J.

**RELEASED AND JOURNALIZED:** July 14, 2016

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PATRICIA ANN BLACKMON, P.J.:

{¶1} Defranco Allison (“Allison”) appeals his six-and-a-half-year prison sentence for various felony convictions involving a firearm and assigns the following errors for our review:

I. The trial court erred by failing to distinctly and separately make all requisite statutory findings under R.C. 2929.14(C)(4) prior to imposing consecutive sentences in violation of the appellant’s right to due process under the Fifth and Fourteenth Amendment[s] of the United States [Constitution] and the Ohio Constitution.

II. The imposition of non-minimum, consecutive sentences is clear[ly] and convincingly contrary to law where the record does not support the factors in R.C. 2929.11 and 2929.12 were considered by the trial court, but instead the court expressly relied on consideration of prejudicial remarks made by the prosecutor in violation of the defendant’s right to due process under the Fifth and Fourteenth Amendments of the United States Constitution and the Ohio Constitution.

III. In the alternative, the appellant was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Article 10 [sic] of the Ohio Constitution when counsel failed to object to the prosecutor’s inflammatory remarks at sentencing or request a continuance to allow an opportunity for response.

{¶2} Having reviewed the record and pertinent law, we affirm the trial court’s decision. The apposite facts follow.

{¶3} On February 27, 2015, Allison pled guilty to two counts of attempted felonious assault with one firearm specification and one count of attempted discharge of firearm, all third-degree felonies, in Cuyahoga C.P. No. CR-14-590927-A. Allison also pled guilty to aggravated assault, a fourth-degree felony, and aggravated menacing, a first-degree misdemeanor, in Cuyahoga C.P. No. CR-14-591245-A. On March 26, 2015, the court sentenced Allison in both cases to an aggregate of six- and-one-half-years in prison as follows: 24 months on each attempted felonious assault and one year on the firearm specification, to run consecutively for a five-year sentence in Cuyahoga C.P. No. CR-14-590927-A; and 18 months on the aggravated assault to run concurrent to six months in the county jail on the aggravated menacing, for an 18-month sentence in Cuyahoga C.P. No. CR-14-591245-A. The trial court then ordered that these two sentences run consecutively, and this appeal followed.

### **Felony Sentencing Standard of Review**

{¶4} R.C. 2953.08(G)(2) provides, in part, that when reviewing felony sentences, the appellate court's standard of review is not whether the sentencing court abused its discretion; rather, if this court "clearly and convincingly" finds that (1) "the record does not support the sentencing court's findings under R.C. 2929.14(C)(4)," or that (2) "the sentence is otherwise contrary to law," then we may conclude that the court erred in sentencing. *See also State v. Marcum*, Slip Opinion No. 2016-Ohio-1002.

{¶5} A sentence is not clearly and convincingly contrary to law "where the trial court considers the purposes and principles of sentencing under R.C. 2929.11 as well as the seriousness and recidivism factors listed in R.C. 2929.12, properly applies

post-release control, and sentences a defendant within the permissible statutory range.”  
*State v. A.H.*, 8th Dist. Cuyahoga No. 98622, 2013-Ohio-2525, ¶ 10.

{¶6} Pursuant to R.C. 2929.11(A), the two overriding purposes of felony sentencing are “to protect the public from future crime by the offender and others,” and “to punish the offender using the minimum sanctions that the court determines accomplish those purposes \* \* \*.” Additionally, 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 committed by similar offenders.” R.C. 2929.11(B).

{¶7} Furthermore, in imposing a felony sentence, “the court shall consider the factors set forth in [R.C. 2929.12(B) and (C)] relating to the seriousness of the conduct [and] the factors provided in [R.C. 2929.12(D) and (E)] relating to the likelihood of the offender’s recidivism \* \* \*.” R.C. 2929.12. However, this court has held that “[a]lthough the trial court must consider the principles and purposes of sentencing as well as the mitigating factors, the court is not required to use particular language or make specific findings on the record regarding its consideration of those factors.” *State v. Carter*, 8th Dist. Cuyahoga No. 103279, 2016-Ohio-2725, ¶ 15.

{¶8} Additionally, “to impose consecutive terms of imprisonment, 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 \* \* \*.” *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. Pursuant to R.C. 2929.14(C)(4), the court must find consecutive sentences are “necessary to protect the public from future

crime or to punish the offender”; “not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public”; and at least one of the following three factors:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction \* \* \*, or was under post-release 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.

{¶9} In the case at hand, Allison was sentenced to consecutive 24-month prison terms in Cuyahoga C.P. No. CR-14-590927, and this four-year sentence was ordered to run consecutive to the 18-month sentence in Cuyahoga C.P. No. CR-14-591245. It is undisputed that this sentence is within the statutory range for the offenses to which Allison pled guilty.

{¶10} In imposing this sentence, the court stated that Allison had “a criminal history in juvenile court that is all violent. Assault, attempted robbery, riot, discharging a firearm in a prohibited premises, \* \* \* felonious assault, another assault, another riot.” The court viewed a social media picture of Allison pointing a firearm at the camera with a group of young males allegedly “throwing up gang signs.” The court noted that the cases for which Allison was being sentenced involved Allison firing a gun at one victim with

the bullet hitting the vehicle of a second victim and, on a subsequent day, assaulting a third victim with a firearm. The court stated that it did not “see any excuse for any of this activity,” noting that Allison was diagnosed with antisocial personality disorder and showed no remorse. The court found that Allison was “someone who needs to be separated from society to protect our society” and that the street on which these offenses occurred was now “quiet,” because Allison was “not around anymore.”

{¶11} In addition to making the findings noted above, the court reviewed Allison’s presentence investigation report, as well as a mitigation report from the psychiatric clinic, and Allison’s mother made a statement to the court during the sentencing hearing.

{¶12} At oral argument, defense counsel stated that the trial court failed to find on the record that consecutive sentences were “not disproportionate” to the seriousness of Allison’s conduct. However, on page 36 of the sentencing hearing transcript, the court concluded that “consecutive sentences are necessary to punish this offender based on his criminal history, based on the actions in this case as I delineated here on the record. They would not be disproportionate to his action in this matter, and that it’s necessary to punish him and protect our community.”

{¶13} Upon review, we find that the record supports the trial court’s findings at the sentencing hearing, and the resulting sentence is not contrary to law. Accordingly, Allison’s first and second assigned errors are overruled.

### **Effective Assistance of Counsel**

{¶14} To succeed on a claim of ineffective assistance of counsel, a defendant must establish that his or her attorney’s performance was deficient and that the defendant was

prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, “a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel’s performance.” *Id.* at 697. *See also State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 3743 (1989).

{¶15} Allison argues that his counsel was ineffective by failing to object to the following: “the presentation of an inflammatory photo referencing gang affiliation as prejudicial and not relevant to the sentencing hearing, and the unsupported, inflammatory hearsay statement presented suggesting [the street] was more quiet as a direct result of [Allison’s] arrest.”

{¶16} In *State v. Williams*, 8th Dist. Cuyahoga No. 98934, 2013-Ohio-2201, ¶ 18, this court held the following:

The rules of evidence do not apply in sentencing hearings. The trial judge may consider “any reliable evidence in the record” in sentencing a defendant. Further, R.C. 2929.19 provides that “[a]t the [sentencing] hearing, the offender, the prosecuting attorney, the victim or the victim’s representative \* \* \* and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case” and that the trial court shall consider such information along with the record, and any presentence report or victim impact statement, prior to imposing a sentence. In sentencing a defendant, a trial court may consider



any factors that are relevant to achieve the purposes and principles of sentencing and any factors that are relevant to determine the seriousness of the offender's conduct and whether the offender is likely to commit future crimes. (Citations omitted.)

{¶17} Allison's counsel advocated for the minimum sentence noting Allison's mental health and substance abuse issues, as well as his high school diploma and history of compliance within the juvenile court system. On appeal, Allison fails to show that, but for his counsel's performance, his sentence would have been different. Given all the evidence that the court considered in sentencing Allison, we cannot say that Allison was prejudiced by his counsel's failure to object to the social media picture or the hearsay statement, nor can we say that counsel's performance was deficient. Accordingly, Allison's third and final assigned error is overruled.

{¶18} 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 be sent to the Cuyahoga County Court of Common Pleas 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.

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PATRICIA ANN BLACKMON, PRESIDING JUDGE

ANITA LASTER MAYS, J., and  
FRANK D. CELEBREZZE, JR., J., CONCUR