

[Cite as *State v. Allen*, 2016-Ohio-706.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 103148

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JAMES D. ALLEN**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-12-558112-A

**BEFORE:** S. Gallagher, J., Jones, A.J., and Celebrezze, J.

**RELEASED AND JOURNALIZED:** February 25, 2016

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SEAN C. GALLAGHER, J.:

{¶1} Appellant James D. Allen appeals the sentence imposed upon resentencing.

Upon review, we affirm.

{¶2} In January 2012, appellant was indicted in Cuyahoga C.P. No. CR-12-558112-A under a 17-count indictment on one count of felonious assault in violation of R.C. 2903.11(A)(2); one count of failure to comply in violation of R.C. 2921.331(B); fourteen counts of aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a); and one count of driving while under the influence in violation of R.C. 4511.19(A)(1)(g). Appellant pleaded guilty to attempted felonious assault in violation of R.C. 2923.02/2903.11(A)(2), three counts of aggravated vehicular assault, and driving while under the influence. The remaining counts were nolle.

{¶3} Appellant was originally sentenced in June 2012 to a total prison term of 11 years. The sentence was run consecutive to a three-year prison sentence imposed in Cuyahoga C.P. No. CR-12-553522-A. The trial court reserved the issue of restitution until a later date. Because of issues relating to the unresolved determination of restitution, this court dismissed appellant's initial attempts to appeal from his sentence for a lack of a final appealable order. Eventually, the trial court issued a judgment indicating that the parties agreed no restitution would be ordered in the case. Thereafter, an appeal was filed with this court that resulted in appellant's sentence being vacated and the case was remanded for resentencing. *State v. Allen*, 8th Dist. Cuyahoga No. 101342, 2015-Ohio-1448.

{¶4} On May 29, 2015, appellant was resentenced to the same prison term originally imposed of 11 years to run consecutive to the three-year prison sentence imposed in Cuyahoga C.P. No. CR-12-553522-A.<sup>1</sup>

{¶5} Appellant timely filed this appeal. Under his sole assignment of error, appellant claims the trial court erred by imposing a sentence contrary to law and without considering the factors set forth under R.C. 2929.11 and 2929.12.

{¶6} We review appellant's sentence to determine whether it is contrary to law. R.C. 2953.08(G)(2). A trial court "has the full discretion to impose any term of imprisonment within the statutory range, but it must consider the sentencing purposes in R.C. 2929.11 and the guidelines contained in R.C. 2929.12." *State v. Hodges*, 8th Dist. Cuyahoga No. 99511, 2013-Ohio-5025, ¶ 7.

{¶7} Under R.C. 2929.11(A), a felony sentence shall be reasonably calculated to achieve the "overriding purposes" of felony sentencing: "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 without imposing an unnecessary burden on state or local government resources." In addition, the sentence

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<sup>1</sup> We note that appellant was not present at the resentencing hearing. The court stated on the record and in its journal entry that appellant refused to leave his holding cell. Crim.R. 43(A) mandates that "the defendant must be physically present at every stage of the criminal proceedings and trial, including \* \* \* the imposition of sentence" except when the rules provide otherwise or the defendant waives his right to be present. Although Crim.R. 43 instructs that in felony cases a defendant may waive his right to be physically present "in writing or on the record," the lack of an express waiver in this case amounted to an invited error by appellant's refusal to leave his holding cell.

imposed for a felony must be “commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.” R.C. 2929.11(B).

{¶8} Pursuant to R.C. 2929.12(A), a court sentencing a felony offender has discretion to determine the most effective way to comply with the purposes and principles of sentencing outlined in R.C. 2929.11. In exercising its discretion, however, the sentencing court must consider the seriousness, recidivism, and mitigating factors set forth in R.C. 2929.12.

{¶9} Although the trial court must consider the principles and purposes of sentencing as well as the seriousness, recidivism, and mitigating factors as outlined above, the court is not required to make any factual findings under R.C. 2929.11 or 2929.12. *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 set forth in R.C. 2929.11 and 2929.12 can be presumed unless the defendant affirmatively shows to the contrary. *Jones* at ¶ 13.

{¶10} Appellant argues in this case that the trial court failed to consider the mitigating factors that occurred between the time of his original sentencing hearing and his resentencing hearing. A review of the record reflects otherwise.

{¶11} At the resentencing hearing, the trial court heard from the prosecutor and defense counsel, each of whom had filed a sentencing memorandum. Defense counsel advocated for a reduced sentence and presented mitigating factors in the case. Defense

counsel argued that appellant's addiction problems had driven his criminal history and that over the past three years appellant had taken advantage of programs to address his issues and had obtained a number of certificates. The prosecutor applauded the defendant for engaging in programs while incarcerated, but advocated for the court to uphold the original sentence. The prosecutor discussed the serious nature of the offense, the 14 victims who were involved, and appellant's criminal history. The court also heard from appellant's mother.

{¶12} The trial court stated that it had reviewed the original sentence that had been imposed, the decision of the court of appeals, and the sentencing memoranda. In addition to hearing the mitigating factors presented by defense counsel, the court specifically stated that it had looked at and considered the certificates of achievement and completion of the programs in which appellant had engaged. The court considered the defendant's previous record and the serious nature of appellant's criminal conduct in this case, stating as follows:

[This] case was not simply this defendant simply driving casually that day, but he was intoxicated and committed a felonious assault at home for which the police were called. And then the defendant fleeing from the police in his vehicle, he crashed into a bus and a vehicle during his flight of intoxication. That's the matter that [the original sentencing judge] had before him.

{¶13} The court made the requisite findings for imposing consecutive sentences, and expressly stated that it had considered “all the required factors of the law” and found “prison is consistent with the purposes of [R.C.] 2929.11.” The court proceeded to impose the same sentence that had been originally imposed.

{¶14} The sentence imposed by the trial court is within the statutory range, and the record demonstrates that the trial court considered the purposes and principles of felony sentencing as outlined by R.C. 2929.11 and 2929.12. Upon our review, we find that the record does not demonstrate that the sentence is clearly and convincingly contrary to law. Appellant’s assignment of error is overruled.

{¶15} Judgment affirmed.

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 for execution of sentence.

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

SEAN C. GALLAGHER, JUDGE

LARRY A. JONES, SR., A.J., and  
FRANK D. CELEBREZZE, JR., J., CONCUR