

[Cite as *State v. Lee*, 2016-Ohio-8317.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 104190

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**DEXTER LEE**

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-15-601615-A

**BEFORE:** Celebrezze, J., Kilbane, P.J., and Boyle, J.

**RELEASED AND JOURNALIZED:** December 22, 2016

**ATTORNEYS FOR APPELLANT**

Robert L. Tobik  
Chief Public Defender  
BY: Cullen Sweeney  
Assistant Public Defender  
310 Lakeside Avenue, Suite 200  
Cleveland, Ohio 44113

**ATTORNEYS FOR APPELLEE**

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

FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendant-appellant, Dexter Lee (“Lee”), brings this appeal challenging the trial court’s sentence for burglary, theft, and criminal damaging. Specifically, Lee argues that the trial court’s sentence is contrary to law, the trial court lacked the authority to increase the sentence it originally pronounced in open court, and the trial court violated his due process rights by increasing his sentence. After a thorough review of the record and law, this court affirms.

### **I. Factual and Procedural History**

{¶2} In Cuyahoga C.P. No. CR-15-601615-A, the Cuyahoga County Grand Jury returned a three-count indictment charging Lee with (1) burglary, a second-degree felony in violation of R.C. 2911.12(A)(2), with notice of prior conviction and repeat violent offender specifications, (2) theft, in violation of R.C. 2913.02(A)(1), and (3) criminal damaging or endangering, in violation of R.C. 2909.06(A)(1).

{¶3} The parties reached a plea agreement. On January 27, 2016, Lee pled guilty to an amended burglary count, a felony of the third degree, in violation of R.C. 2911.12(A)(3). The state deleted the notice of prior conviction and repeat violent offender specifications. Furthermore, Lee pled guilty to the theft and criminal damaging counts as charged in the indictment. The trial court referred Lee to the probation department for a presentence investigation report and set the matter for sentencing.

{¶4} The trial court held a sentencing hearing on February 8, 2016.<sup>1</sup> The trial court heard from the prosecutor, Lee’s counsel, and Lee. The state conceded that the burglary and criminal damaging counts merged for sentencing purposes and elected to sentence Lee on the burglary count. Furthermore, the prosecutor informed the trial court that after speaking with the victims, the state would not be seeking restitution. The trial court sentenced Lee to an aggregate prison term of four years: four years on the burglary count and six months on the theft count, to be served concurrently. After the trial court pronounced Lee’s sentence, the following exchange took place:

The Court: That is the sentence of this Court. If there is nothing further, we’re in recess. Credit for time served.

\* \* \*

The Court: Thank you. We’re in recess. Best wishes to you, sir. I suggest that you do something about that addiction problem. You can do it while you’re in the penitentiary. Make a decision not to use, for starters.

[Lee]: You gave me the same time you’d give a rapist, though. I don’t understand it.

The Court: Come on back. Come on back.

[Lee]: That’s four years, though. Like for what though?

The Court: You know what — you know what. Sometimes I have more to take into consideration —

[Lee]: But that’s —

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<sup>1</sup> In addition to CR-15-601615-A, the trial court sentenced Lee in nine other criminal cases during the February 8, 2016 sentencing hearing. The trial court ordered Lee to serve his sentences in the nine other cases concurrently with his sentence in the instant matter.

The Court: — and you just helped me. The sentence in 601615, based on the totality of what I've heard today, in Count 1, the felony of the third degree, based on all sentencing factors that are applicable, is five years.

[Lee's Counsel]: Objection, Your Honor.

The Court: Based on what?

[Lee's Counsel]: The Court already passed sentence.

The Court: [Counselor,] I was done, but your client wasn't. He wanted to continue to address the Court, as is his right. I am required by law to let him speak. I'm taking into consideration what he has to say. He further demonstrated his lack of any amenability to any supervision. You tell on yourself, sir, and you just did it.

Your objection is noted. It's overruled. Five years. Goodbye.

You brought it on. Your [allocution] added to this Court's consideration. Goodbye. (Tr. 66-68.)

{¶5} Lee filed the instant appeal assigning three errors for review:

I. The trial court imposed a sentence contrary to law when it reopened the sentencing hearing to add one year in prison because [Lee] questioned the length of his sentence.

II. The trial court lacks the authority to increase a lawfully imposed prison sentence after pronouncing it in open court and recessing.

III. The trial court violated [Lee's] state and federal due process rights when it increased a lawfully imposed sentence.

## **II. Law and Analysis**

### **A. Trial Court's Sentence**

{¶6} Lee's three assignments of error pertain to the February 8, 2016 sentencing hearing. Specifically, Lee challenges the five-year sentence imposed by the trial court,

argues that the trial court did not have the authority to increase his sentence from four to five years, and claims that the one-year increase violated his due process rights.

### **1. Contrary to Law**

{¶7} In his first assignment of error, Lee argues that the trial court’s sentence is contrary to law. Specifically, Lee contends that the trial court was not justified in increasing his sentence from four to five years simply because he made a “post-sentencing proportionality argument” and questioned the length of the sentence imposed.

{¶8} Appellate review of felony sentences is governed by R.C. 2953.08. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 55 N.E.3d 516, ¶ 16. R.C. 2953.08(A) provides, in relevant part, that a defendant has the right to appeal any sentence consisting of the maximum prison term allowed for an offense or a sentence that is contrary to law. In the instant matter, Lee’s sentence may be subject to appellate review because he received the maximum sentence for the highest degree felony offense upon which he was convicted.

{¶9} R.C. 2953.08(G)(2) provides that when reviewing felony sentences, a reviewing court may increase, reduce, or modify a sentence, or it may vacate and remand the matter for resentencing, only if we clearly and convincingly find that either the record does not support the sentencing court’s statutory findings or the sentence is contrary to law. A sentence is contrary to law if the sentence falls outside the statutory range for the particular degree of offense or 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.

{¶10} The review provided for in R.C. 2953.08 is limited. In *Marcum*, 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.

{¶11} R.C. 2929.11(A), governing the purposes and principles of felony sentencing, provides that a sentence imposed for a felony shall be reasonably calculated to achieve 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. Furthermore, 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).

{¶12} R.C. 2929.12 delineates the seriousness and recidivism factors for the sentencing court to consider in determining the most effective way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11. The statute provides a nonexhaustive 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. “One of the factors a court may consider in sentencing an offender for a felony is *whether the defendant shows remorse for the offense.*” (Emphasis added.) *State v. Heineman*, 8th Dist. Cuyahoga No. 103184, 2016-Ohio-3058, ¶ 80, citing R.C. 2929.12(D)(5).

{¶13} This court has held that a trial court “fulfills its duty under the statutes by indicating that it has considered the relevant sentencing factors.” *Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, at ¶ 14, citing *State v. Saunders*, 8th Dist. Cuyahoga No. 98379, 2013-Ohio-490, ¶ 4. The trial court “need not go through each factor on the record — it is sufficient that the court acknowledges that it has complied with its statutory duty to consider the factors without further elaboration.” *Id.*, citing *State v. Pickens*, 8th Dist. Cuyahoga No. 89658, 2008-Ohio-1407, ¶ 6. In fact, 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. *State v. Jones*, 8th Dist. Cuyahoga No. 99759, 2014-Ohio-29, ¶ 13.

{¶14} In the instant matter, Lee’s sentence for his third-degree felony burglary count was within the statutory range under R.C. 2929.14(A).<sup>2</sup> Furthermore, during the sentencing hearing, the trial court stated that it imposed Lee’s five-year sentence “based on all sentencing factors that are applicable[.]” The trial court stated that it considered the recidivism factors, the seriousness of Lee’s conduct, and the mitigating factors

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<sup>2</sup> Lee’s sentence for his first-degree misdemeanor theft count was also within the statutory range under R.C. 2929.24(A).



presented by Lee's counsel. The trial court stated that "[t]he purposes of felony sentencing are to protect the public from future crime by you. \* \* \* [A]nd to punish you."

The trial court's sentencing journal entry provides, in relevant part, that "the court considered all required factors of the law. The court finds that prison is consistent with the purpose of R.C. 2929.11." Aside from the trial court's notation in the sentencing entry that it "considered all required factors of the law" including, specifically, R.C. 2929.11, the record reflects that the trial court did, in fact, consider both R.C. 2929.11 and 2929.12 when sentencing Lee.

{¶15} The trial court considered that Lee's criminal history "goes way, way back" and that he has "dozens of cases" in his record. While Lee claimed that he has been struggling with a drug problem for "years," the trial court emphasized that Lee has done nothing whatsoever to address the problem. The trial court considered that when Lee was given a chance to complete the community-based correctional facility ("CBCF") program,<sup>3</sup> he failed to take advantage of the program's resources, failed to address his drug problem, and was kicked out of the program for fighting.

{¶16} The trial court emphasized that after getting out of prison in October 2014, Lee carried out a "one-man crime spree" during which he picked up nine cases. The trial court found that Lee's pattern of criminal conduct — particularly his transition from breaking into homes to breaking into businesses — demonstrated that Lee is "committed to a life of crime." The trial court concluded that Lee's recidivism factors are "very,

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<sup>3</sup> Cuyahoga C.P. No. CR-12-567602-A.

very high” and that Lee is “likely to reoffend.”

{¶17} Lee’s counsel argued in mitigation that Lee “has taken these matters most seriously,” “is flat-out ashamed of what he’s done,” and that he was “extremely remorseful.” Furthermore, Lee’s counsel stated that when Lee got out of prison in October 2014, he decided that he was no longer going to break into people’s homes. The trial court did not consider the fact that Lee broke into businesses, rather than homes, to be a mitigating factor. Nevertheless, the trial court stated, “I’m going to consider what [Lee’s counsel] offered here that’s mitigatory, although \* \* \* it’s pretty thin.”

{¶18} Lee stated that if the victims were present at the sentencing hearing, he would apologize to them. Lee acknowledged that he had not previously attempted to apologize to the victims. Lee suggested that he was not in his “right mind” when he committed the offenses because he was on drugs. Lee did not accept responsibility for getting kicked out of the CBCF program. Instead, he stated, “[i]t wasn’t my fault that somebody put their hands on me[.]” Lee claimed that he was “learning just to be more humble about things[.]”

{¶19} Finally, the trial court considered the comments that Lee made after the court pronounced the four-year sentence. First, Lee claimed that he did not understand why the trial court imposed a four-year sentence. Lee suggested that the sentence was too long, and compared his circumstances to those of a defendant being sentenced for a rape conviction. Lee’s reference to the sentence that a “rapist” would receive demonstrates that he minimized the seriousness of his conduct. Furthermore, Lee

inquired about why — or “for what” — he received the four-year sentence. These statements clearly contradict Lee’s counsel’s assertion that Lee was taking the matter seriously, ashamed of his conduct, and remorseful.

{¶20} In light of the foregoing analysis, the trial court concluded, contrary to the statements made by Lee’s counsel and Lee, that Lee did not take responsibility for his actions, show any remorse, or appreciate the seriousness of his conduct. After reviewing the record, we find that Lee’s sentence was not contrary to law. Lee’s sentence was within the permissible statutory range and the trial court considered the required factors of law.

{¶21} Accordingly, Lee’s first assignment of error is overruled.

## **2. Authority to Increase Sentence**

{¶22} Lee suggests that the trial court’s four-year sentence became final when the trial court orally pronounced the sentence and then called for a recess, and that the trial court could not increase that four-year sentence thereafter. In support of his argument, Lee directs this court to *State v. Carlisle*, 131 Ohio St.3d 127, 2011-Ohio-6553, 961 N.E.2d 671.

{¶23} In *Carlisle*, the Ohio Supreme Court considered whether a trial court had authority to modify a defendant-appellant’s sentence by reconsidering its own final judgment. The court explained

A criminal sentence is final upon issuance of a final order. *See, e.g., State ex rel. White v. Junkin* (1997), 80 Ohio St.3d 335, 337, 1997-Ohio-340, 686 N.E.2d 267 (a trial court had authority to vacate a finding of guilt and imposition of sentence and order the defendant to face trial on a more

serious charge because the judgment had never been journalized by the clerk pursuant to Crim.R. 32); *see also State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, syllabus, as modified by *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, at syllabus (a judgment of conviction is final when the order sets forth (1) the fact of the conviction; “(2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court”).

*Id.* at ¶ 11. The court held that the trial court improperly purported to modify appellant’s sentence nearly two years after journalizing the valid judgment of conviction. *Id.* at ¶ 12.

{¶24} Lee argues that the *Carlisle* rationale should be extended to the present matter where the trial court modified his sentence after imposing it in open court and calling a recess. We disagree.

{¶25} In *State v. Houston*, 8th Dist. Cuyahoga Nos. 103252 and 103254, 2016-Ohio-3319, this court explained that a trial court may amend or increase an orally pronounced sentence that has not been journalized “where there has been some new information introduced that alters the trial court’s calculus in arriving at an appropriate sentence.” *Id.* at ¶ 11. In the instant matter, the record reflects that the statements Lee made after the trial court orally pronounced the four-year sentence altered the court’s determination of an appropriate sentence. The trial court had not journalized the orally pronounced four-year sentence. Thus, the four-year sentence was not a final order, and the trial court had authority to modify it.

{¶26} Accordingly, Lee’s second assignment of error is overruled.

### **3. Due Process**

{¶27} In his third assignment of error, Lee argues that the trial court violated his due process rights by increasing his sentence from four to five years. In support of his argument, Lee relies on *State v. Stradford*, 8th Dist. Cuyahoga No. 95116, 2011-Ohio-1566, and *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

{¶28} In *Stradford*, this court recognized that “[i]t is improper to sentence a defendant more severely simply because he exercised his right to trial” rather than entering a plea agreement. *Id.* at ¶ 23, citing *Columbus v. Bee*, 67 Ohio App.2d 65, 75, 425 N.E.2d 404 (10th Dist.1979). Furthermore, in *Pearce*, the United States Supreme Court held that “a trial court violates the due process clause of the Fourteenth Amendment when, motivated by retaliation for a defendant’s successful appeal, it resents a defendant to a harsher sentence.” *Id.* at 724.

{¶29} In the instant matter, Lee contends that the trial court vindictively and unjustifiably increased his sentence merely because he questioned the length of the four-year sentence originally pronounced. We disagree and find Lee’s reliance on *Stradford* and *Pearce* to be misplaced.

{¶30} After reviewing the record, we cannot say that the trial court’s decision to increase Lee’s sentence was motivated by vindictive retaliation nor that the court had no justification for the increase. “Pursuant to R.C. 2929.12(D)(5), a defendant’s lack of remorse is a factor that indicates a likelihood that he or she will commit future crimes.” *State v. Nutter*, 3d Dist. Wyandot No. 16-01-06, 2001 Ohio App. LEXIS 3752, 4 (Aug.

24, 2001).

{¶31} Lee's comments provided the trial court with new information regarding remorse, recidivism, and the need to protect the public — all relevant factors under R.C. 2929.11 and 2929.12. As noted above, Lee's comments demonstrated a lack of accountability and remorse, and that Lee did not recognize the seriousness of his conduct.

Furthermore, Lee's remarks contradicted the mitigating factors, which the trial court found to be minimal, presented by Lee's counsel. The new information altered the trial court's calculation of the appropriate sentence. *See Houston*, 8th Dist. Cuyahoga Nos. 103252 and 103254, 2016-Ohio-3319, at ¶ 11.

{¶32} Accordingly, the trial court did not violate Lee's due process rights by increasing his sentence from four to five years. Lee's third assignment of error is overruled.

### **III. Conclusion**

{¶33} After thoroughly reviewing the record, we find that Lee's sentence is not contrary to law. The trial court had authority to modify the four-year sentence originally pronounced because it had not been journalized, and, thus, was not a final order. The trial court did not violate Lee's due process rights by increasing his sentence.

{¶34} 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 convictions 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

MARY EILEEN KILBANE, P.J., and  
MARY J. BOYLE, J., CONCUR