

[Cite as *State v. Sword*, 2017-Ohio-295.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104477

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSHUA A. SWORD

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-576795-A

BEFORE: Blackmon, J., E.T. Gallagher, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: January 26, 2017

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PATRICIA A. BLACKMON, J.:

{¶1} Joshua Sword (“Sword”) appeals from the consecutive 12-month sentences for receiving stolen property and theft that were imposed after he violated the terms of community control. Sword assigns the following errors for our review:

I. By failing to incorporate the presentence investigation report into the specific hearing where [Sword] was sentenced, or the sentencing journal entry, the trial court erred in imposing consecutive sentences.

II. The trial court abused its discretion in giving consecutive sentences.

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

{¶3} On August 2013, Sword and Destiny Miller (“Miller”) were indicted in a five-count indictment, in connection with improper withdrawals from Sword’s grandmother’s bank account. Count 1 charged Sword with receiving stolen property, a fifth-degree felony in violation of R.C. 2913.51. Count 2 charged Sword with fourth-degree felony theft, in violation of R.C. 2913.02, with a furthermore clause alleging that the victim is elderly. Count 3 charged him with fifth-degree felony theft in violation of R.C. 2913.02. Count 4 charged Sword with misuse of a credit card, a fourth-degree felony in violation of R.C. 2913.21, with a furthermore clause alleging that the victim is elderly.

{¶4} Sword pled not guilty to the charges. On October 17, 2013, Sword entered into a plea agreement with the state. Sword pled guilty to receiving stolen property in Count 1 and theft in Count 3, both third-degree felonies. The remaining charges were

dismissed. The state and the defense also acknowledged that the offenses were not allied offenses of similar import, and Sword agreed to pay his grandmother \$800 in restitution. The trial court ordered a presentence investigation and report, which were completed on November 14, 2013.

{¶5} At the sentencing hearing on November 15, 2013, the trial court noted that Sword violated the terms of community control in an unrelated matter, *State v. Sword*, Cuyahoga C.P. No. CR-07-495645. The probation officer advised the court that Sword has a “history of failure to report.” The court terminated community control in that matter. Proceeding to sentence in the instant matter, the trial court stated:

Prior to coming onto the bench, I had the opportunity to review the entire case file; the presentence investigation report [and R.C. 2929.11, R.C. 2929.12, and other statutory provisions].

{¶6} The court then sentenced Sword to 36 months of community control, including six months of inpatient drug treatment at a Community Based Correctional Facility (“CBCF”). The court further ordered that if Sword violates the terms of community control, he would be sentenced to two consecutive 12-month terms of imprisonment for the receiving stolen property and theft convictions.

{¶7} By June 2014, Sword completed the 6-month CBCF portion of his community control sanction. Two months later, however, the trial court found that Sword violated the terms of community control by failing to report. The trial court then continued community control.

{¶8} Later, in April 2016, Sword was engaged in an altercation with his mother. At a hearing on April 26, 2016, the trial court noted that Sword has a “long history” of criminal offenses, including community control violations. At that point, the trial court terminated community control and imposed the sentence that the court announced on November 15, 2014. The court sentenced Sword to two 12-month terms for the receiving stolen property and theft convictions, the maximum penalty, and ordered them to be served consecutively.

Consideration of Presentence Report

{¶9} Sword argues that the trial court erred by failing to set forth the findings of the presentence investigation report during the sentencing hearing and failed to incorporate the presentence investigation findings into the sentencing journal entry.

{¶10} In reviewing felony sentences, appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2), rather than an abuse of discretion standard. *See State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 9. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce, or modify a sentence, or it may vacate the sentence and remand for resentencing, only if it clearly and convincingly finds either (1) the record does not support certain specified findings or (2) the sentence imposed is contrary to law. An appellate court does not review a trial court’s sentence for an abuse of discretion. *Marcum* at ¶ 10. Rather, an appellate court may vacate or modify any sentence that is 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. In accordance with R.C. 2953.08(A)(1), Sword may appeal as of right maximum and consecutive sentences.

{¶11} A trial court's imposition of a maximum prison term for a felony conviction is not contrary to law as long as the sentence is within the statutory range for the offense, and the court considers both the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors set forth R.C. 2929.12. *State v. Keith*, 8th Dist. Cuyahoga Nos. 103413 and 103414, 2016-Ohio-5234, ¶ 10, 16. Although a trial court must consider the factors in R.C. 2929.11 and 2929.12, they are not fact-finding statutes. *Keith* at ¶ 11. The court is not required to make specific findings on the record regarding its consideration of those factors or state its reasons for imposing a maximum sentence, or for imposing a particular sentence within the statutory range. *Id.* Consideration of the factors in R.C. 2929.11 and 2929.12 is presumed unless the defendant affirmatively shows otherwise. *Id.* Moreover, a trial court's statement in its sentencing journal entry that it considered the required statutory factors alone is enough to fulfill its obligations under R.C. 2929.11 and 2929.12. *Id.*, citing *State v. Sutton*, 8th Dist. Cuyahoga Nos. 102300 and 102302, 2015-Ohio-4074 and *State v. Clayton*, 8th Dist. Cuyahoga No. 99700, 2014-Ohio-112.

{¶12} Further, in *State v. Williams*, 8th Dist. Cuyahoga No. 98934, 2013-Ohio-2201, ¶ 18, this court noted that under R.C. 2929.11, 2929.12, and 2929.19, the 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 and

recidivism factors, and shall also consider any presentence report or victim impact statement, prior to imposing a sentence.

{¶13} In *State v. Robinson*, 8th Dist. Cuyahgoa No. 99080, 2013-Ohio-2613, this court held that the trial court’s statement on the record that it considered the presentence investigation report and the sentencing statutes, together with its statement in the sentencing journal entry that it considered “all factors of the law,” sufficiently demonstrated that the court considered the applicable factors and principles contained in R.C. 2929.11 and 2929.12, including recidivism factors and the need to punish the offender.

{¶14} In this case, Sword was convicted of two fifth-degree felonies. The trial court’s 12-month sentence for this offense is within the statutory range of six-to-twelve months. *See* R.C. 2929.14(A)(5). Additionally, the trial court ordered a presentence investigation and prior to announcing its sentence, the trial court stated that it had considered the presentence investigation report. In the court’s sentencing journal entry, the court stated that it “considered all required factors of law.” The court’s statement in its journal entry is enough to find that the court considered the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12. *See Keith* at ¶ 11. The trial court was not required to set forth the findings of the presentence investigation report and was not required to incorporate them into the sentencing journal entry. Therefore, the trial court did not err in imposing the 12-month terms herein.

{¶15} The first assigned error is without merit.

Consecutive Sentences

{¶16} Sword next argues that the trial court erred in imposing consecutive sentences. He complains that the sentence is too long in light of Sword's substance abuse issues.

{¶17} Before a trial court may impose consecutive sentences, the court must first make specific findings mandated by R.C. 2929.14(C)(4) and incorporate those findings in the sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. Under R.C. 2929.14(C)(4), the court must find that consecutive sentences are: (1) necessary to protect the public from future crime or to punish the offender; and (2) are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. R.C. 2929.14(C)(4). In addition to making those findings, the court must also find one of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under postrelease 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.

Id.

{¶18} Trial courts are required to make the necessary statutory findings when imposing consecutive sentences, but they have no duty to give reasons in support of those findings. *Bonnell* at ¶ 24. An appellate court may vacate an order of consecutive sentences if it clearly and convincingly finds that the record does support consecutive sentences under R.C. 2929.14(C)(4). *See* R.C. 2953.08(G)(2)(a).

{¶19} At the sentencing hearing in this matter, the trial court stated:

The defendant, as the probation officer indicated, has had a long history dating back to 2003 for trafficking in drugs or drug usage. The court, on two other occasions, has attempted to use community control — I’m sorry — three other occasions attempted to use community control — I’m sorry — two other occasions attempted to use community control to address the issues that this defendant has and also this case, and it dragged on, and I don’t believe that the defendant is interested in actually doing anything. You can pay lip service, but he doesn’t do anything.

The defendant will be sentenced to 12 months in each of the two counts, each of the felony of the fifth degree. Those will run consecutive. That’s 24 months total. It’s necessary to punish the offender and protect the public, not disproportionate, and the defendant’s prior criminal history shows consecutive terms are necessary to protect the public.

{¶20} The court’s remarks during sentencing clearly demonstrate that the trial court found that the consecutive sentences are necessary to protect the public from future crime or to punish the offender and are not disproportionate to the seriousness of the offender’s conduct. The court also found, and the record demonstrates, that Sword committed the instant offense while on community control. Further, the sentencing journal entries set forth all of the findings required under R.C. 2929.14(C)(4).

Therefore, we conclude that the trial court made all of the required R.C. 2929.14(C)(4) findings before imposing consecutive sentences in this matter.

{¶21} As to Sword's further contention that the sentence is too long in light of his substance abuse issues, this court rejected a similar claim in *State v. Norris*, 8th Dist. Cuyahoga No. 102104, 2015-Ohio-2857, ¶ 18, stating:

Insofar as Norris complains that his overall sentence is too long and "seems punitive and out of bounds," we note that in *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, syllabus, the Ohio Supreme Court held that "[w]here none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment."

{¶22} Likewise, in this matter, we cannot conclude that the aggregate prison term imposed in this matter was erroneous. The second assignment of error is not well-taken.

{¶23} 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.

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

PATRICIA ANN BLACKMON, JUDGE

EILEEN T. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR