

IN THE SUPREME COURT OF OHIO

State of Ohio,)	On Appeal from the
)	Cuyahoga County Court of
Appellee)	Appeals, Eighth Appellate
)	District
v.)	
)	
Dalante Allison, Jr.)	Court of Appeals
)	Case No. CA 16 105152
)	
Appellant)	

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT DALANTE ALLISON, JR.

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents an opportunity for the Court to answer the question of whether a criminal sentence is “contrary to law” when the trial court applies the old version of the purposes and principles of felony sentencing contained in R.C. 2929.11. The Eighth District Court of Appeals upheld the sentence.

The General Assembly enacted Am.Sub.H.B. No. 86 (" H.B. 86"), effective September 30, 2011, with a legislative purpose to reduce the state's prison population and to save the associated costs of incarceration by diverting certain offenders from prison and by shortening the terms of other offenders sentenced to prison. State v. Bonnell, 140 Ohio St.3d 209, 16 N.E.3d 659, 2014-Ohio-3177 (2014), at paragraph 20.

One of the noteworthy changes to the felony sentencing laws concerned the purposes of felony sentencing, as stated in R.C. 2929.11(A). State v. Walker, 8th Dist. Cuyahoga No. 97648, 2012-Ohio-4274, ¶ 80. The two primary purposes of felony sentencing remained — "to protect the public from future crime by the offender and others and to punish the offender * * *." R.C. 2929.11(A). However, H.B. 86 added that these goals are to be realized "using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." Id.

STATEMENT OF THE CASE AND FACTS

In August, 2015, Appellant pleaded guilty in five separate cases regarding the sale of heroin, including the sale to individuals who suffered non-fatal overdoses. The State contended Appellant had committed many of the crimes while awaiting trial on the others. After a full sentencing hearing, the trial court imposed a total prison sentence of nine years and nine months, which included consecutive sentences on each case. At the sentencing hearing, the trial court stated as follows: “The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender.” (Tr. at 35) The trial court did not mention the remaining language in the current version of R.C. 2929.11.

On appeal, Appellant raised two assignments of error in regards to his sentence. The first dealt with the trial courts failure to make proper statutory findings prior to imposing consecutive sentences. See State v. Bonnell, 140 Ohio St.3d 209, 16 N.E.3d 659, 2014-Ohio-3177 (2014). The Court of Appeals sustained this assignment of error in part, and remanded the matter for the trial court to make appropriate statutory findings and to incorporate those findings into its journal entries.

In the second assignment of error, Appellant argued that the trial court erred when it used an old version of the principles and purposes of sentencing as set forth in R.C. 2929.11. Appellant argued that his sentence was contrary to the current law. The Court of Appeals disagreed, noting that “the trial court was not required to use any particular language or make any specific findings on the record.” Id at P.32 It is from this decision that Appellant seeks review.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Although a recitation of R.C. 2929.11 is not required at sentencing, it is contrary to law to apply the old version of the statute.

R.C. 2929.11 presently provides as follows:

2929.11. Purposes of felony sentencing

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The 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 without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, 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. (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

A sentencing court must consider the principles and purposes of sentencing espoused in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12. State v. Mathis, 109 Ohio St .3d 54, 2006-Ohio-855, ¶ 38. The Ohio Revised Code does not mandate that the sentencing judge use specific language or make specific findings on the record when considering these statutes. State v. Arnett, 88 Ohio St.3d 208, 215 (2000).

This Court has "reflected a fundamental understanding of constitutional democracy" that the power to define criminal offenses and prescribe punishment is vested in the legislative branch of government, and that courts may impose sentences only as provided by statute. State v. Fischer, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 21-22. "[N]o court has the authority to impose a sentence that is contrary to law, " Id. at ¶ 23. State v. Williams, 148 Ohio St.3d 403, 71 N.E.3d 234, 2016-Ohio-7658 (2016).

In State v. Bonnell, 140 Ohio St.3d 209, 16 N.E.3d 659, 2014-Ohio-3177 (2014), this Court stated in regards to R.C. 2929.14 that "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." The same should be required for R.C. 2929.11. An reviewing court should be able to discern that the lower court is using the correct version of the statute.

This Court has also noted that "(a) trial court does not have the discretion to exercise its jurisdiction in a manner that ignores mandatory statutory provisions. See State v. Simpkins, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 27 (" Every judge has a duty to impose lawful sentences"). State v. Underwood, 124 Ohio St.3d 365, 922 N.E.2d 923, 2010-Ohio-1 (2010)

Sentences that do not comport with mandatory provisions are subject to total resentencing. See, e.g., State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961.

This Court has concluded, in the context of allied offenses, that when a sentence fails to include a mandatory provision, it may be appealed because such a

sentence is " contrary to law" and is also not " authorized by law."

In State v. Marcum, 146 Ohio St.3d 516, 59 N.E.3d 1231, 2016-Ohio-1002 (2016), this Court held that R.C. 2953.08(G)(2) allows an appellate court to increase, reduce, or otherwise modify a sentence only when it clearly and convincingly finds that the sentence is (1) contrary to law or (2) unsupported by the record. This Court noted that the "primary concern when construing statutes is legislative intent. State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn., 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996). In determining that intent, the Court first looks to the plain language of the statute. Summerville v. Forest Park, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 18, citing Hubbell v. Xenia, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 11. When the language is unambiguous and definite, we apply it as written." Id.

Appellant contends that a sentence is contrary to law, when it specifically applies an old version of the statute, and does not take into account the General Assembly's intention to revise the statute.

Appellant does not argue that a trial court is required to recite R.C. 2929.11 at sentencing, nor is it required to give a "talismanic incantation of the words of the statute." Bonnell, supra at P.37 However, if a trial court recites the purposes and principles of sentencing, it should recite the correct version of the statute and enable the reviewing to ascertain that it has engaged in the correct analysis.

CONCLUSION

For the reasons discussed above, this case involves both a felony and matters of public and great general interest. The appellant requests that this court accept

jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,
Edward M. Heindel, Counsel of Record

/s/ Edward M. Heindel
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CERTIFICATE OF SERVICE

A copy of the foregoing was sent by regular U.S. mail to Marc Bullard, Asst Prosecuting Attorney, 1200 Ontario Street, 9th Floor, Cleveland, OH 44113, this 16th day of August, 2017.

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