Supreme Court of Ohio Clerk of Court - Filed August 08, 2023 - Case No. 2022-1049

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2022-1049
	:	
Appellee,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
JAMES JONES,	:	
	:	Court of Appeals
Appellant.	:	Case Nos. 110833, 111020

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

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INTRODUCTION

In *State v. Gwynne*, — Ohio St. 3d —, 2022-Ohio-4607, this Court considered the rules for imposing and reviewing consecutive criminal sentences. It first held that trial courts "must consider the overall aggregate prison term to be imposed when making the consecutive-sentence findings under R.C. 2929.14(C)(4)." *Id*. at ¶1. The Court further held that, in reviewing the trial court's determination to impose an aggregate prison term, appellate courts must "review the record de novo and decide whether the record clearly and convincingly does not support the consecutive-sentence finding." *Id*.

James W. Jones asks the Court to vacate his pre-*Gwynne* criminal sentence so that the lower courts can reassess in light of *Gwynne*. But *Gwynne* does not affect Jones's case.

Begin with *Gwynne's* first holding, which requires a court, in determining whether to impose consecutive sentences, to consider whether R.C. 2929.14(C)(4) justifies each consecutive sentence *and also* the overall aggregate sentence. Here, the trial court sentenced Jones on multiple counts. But nearly all of his sentences run concurrently—only one runs consecutively. That proves critical. Where the defendant is made to serve only one term consecutive to one other sentence, the considerations relevant to imposing the one consecutive sentence will be identical to those that inform the appropriateness of the "overall aggregate prison term." *Id*. For example, the question whether R.C. 2929.14(C)(4) justifies making one 30-month sentence run consecutively with another 30-month sentence is identical to the question whether the overall 60-month sentence is

supported by R.C. 2929.14(C)(4). Thus, *Gwynne*'s first holding is not implicated—or perhaps more accurately, *Gwynne* is necessarily satisfied—when the trial court orders only one sentence to run consecutively to the others.

The Eighth District, for its part, complied with *Gwynne*'s second holding. That Court applied the clear-and-convincing standard and reviewed the record independently. *Gwynne* requires nothing more.

In sum, the Court should affirm the Eighth District's judgment. In the alternative, the Court should dismiss this case as improvidently allowed if *Gwynne*'s holdings are modified, whether in *Gwynne* itself (a reconsideration motion is still pending) or in *State v. Glover*, Case. No. 2023-0654. In that event, any dispute about *Gwynne*'s application will be moot.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. The State is directly interested here in seeing justice done throughout Ohio, and in seeing valid sentences upheld, especially against serial offenders like Jones.

STATEMENT OF THE CASE AND FACTS

1. Crime "was his habit." *United States v. Alvarez*, 567 U.S. 709, 713 (2012). In just thirty-seven years on Earth, James W. Jones ran up an impressive tally of arrests. Thirty-

six, to be precise. *State v. Jones*, 2022-Ohio-2133 ¶7 ("App.Op."). This appeal arises from three arrests that led to three separate criminal cases. *Id*. at ¶¶2–6.

In the first, Jones pleaded guilty to various drug-trafficking, criminal-tools, and weapons offenses. *Id*. at ¶3.

The second arose after police found Jones "asleep in the driver's seat of his vehicle"; Jones had the car in drive, with his "foot was on the brakes." *Id.* at ¶4. In the car, police found a loaded gun, drug paraphernalia, and over $5,000 in cash. *Id*. Jones pleaded guilty to "attempted having weapons while under disability, in violation of R.C. 2923.13(A)(3), a felony of the fourth degree, with forfeiture specifications." *Id.* at ¶5.

While Jones's first two cases were still pending, police again found him passed out in his car. *Id.* at ¶6. This led to a third case, in which the State indicted Jones on multiple felonies. But he ultimately pleaded guilty to "one amended count of physical control of a vehicle while under the influence." *Id*. at ¶6.

2. The trial court sentenced Jones on all three cases simultaneously. The court imposed no additional prison time in connection with the second and third cases: it sentenced Jones in the second case to a term to run concurrent with the sentence in the first case, and in the third case to time served. *See* Journal Entries of Sept. 19, 2021, in Cuyahoga Cty. Com. Pl. Case Nos. CR-20-649028, 652379, and 657235. It then sentenced Jones to 60 months' imprisonment in connection with the first case. App.Op.¶7. This 60-month total resulted from two consecutive 30-month sentences, the first for one of two drug-

trafficking offenses and the second for the weapons-under-disability offense. *See id.* at ¶¶3, 7; Journal Entry in CR-20-649028. The court decided that the sentences for Jones's other crimes—18 months for another trafficking offense and 12 months for the criminal tools-offense—would run concurrently with his other sentences. *See* Journal Entry in CR-20-649028

Before imposing consecutive sentences, R.C. 2919.14(C)(4) requires courts to make certain findings. It states, in relevant part:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> …
>
> (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.

R.C. 2919.14(C)(4). The trial conducted the required analysis. It decided to impose consecutive sentences based on its determination that such a sentence was "necessary to protect the public from future crime by" Jones, who had committed "36 arrest cycles in 37 years of life." App.Op.¶7. Jones had committed "the same crimes over and over again."

Id. "And 60 months," the court determined, was "not disproportionate to the crimes" Jones "committed in this case," especially since Jones "committed one or more of these offenses while" he was "already under arrest on a previous case." *Id*. Further, "at least two or more of the multiple offenses were committed as part of one or more courses of conduct." *Id.* Thus, "60 months" was "not too much for the crimes committed and it adequately reflect[ed] the seriousness of [Jones's] conduct," which had "been atrocious." *Id*.

The court concluded by reiterating that consecutive sentences were "necessary to protect the public from future crime or to punish" Jones and "not disproportionate to the seriousness of [Jones's] conduct" or "to the danger" he "pose[d] to the public." *Id*. at ¶8. Further, it stressed that Jones "committed one or more of the multiple offenses while the defendant was awaiting trial or sentencing or was under a community control or was under post-release control for a prior offense." *Id*.

The trial court's judgment entry restates its findings of the statutory factors. *Id.*

3. Jones appealed, and the Eighth District affirmed. It rejected Jones's argument that the trial court's imposition of the two consecutive sentences was both contrary to law and unsupported by the record. *Id.* at ¶¶9, 23. The Eighth District recognized that, under R.C. 2953.08(G)(2), an appellate court must "'review the record, including the findings underlying the sentence' and … modify or vacate the sentence 'if it clearly and convincingly finds … [t]hat the record does not support the sentencing court's findings under"

R.C. 2929.14(C)(4). App.Op.¶19 (quoting *State v. Bonnell*, 140 Ohio St. 3d 209, 2014-Ohio-3177 ¶28). After recognizing the standard, the court discussed several factual points from the record, including Jones's submission of letters of support and photographs of his positive community activity. *Id.* at ¶20. The court also looked at his lifetime of criminal activity; it noted his "36 arrest cycles in 37 years," many involving drugs; it observed that the present case involved large amounts of drugs, suggestive of commercial use rather than personal use; it commented that many of Jones's cases involved guns; and it stated that Jones's present case again involved a gun. *Id.* at ¶21. Looking at all that, the court said that it could not "clearly and convincingly conclude that the record does not support the trial court's R.C. 2929.14(C)(4) findings." *Id.* at ¶21. Thus, it found no error and affirmed.

4. After the appeals court ruled, this Court issued its decision in *Gwynne*. As detailed above (and again below), *Gwynne* held that a trial court considering consecutive sentences under R.C. 2929.14(C)(4) must look at the *aggregate* sentence resulting from multiple consecutive sentences. 2022-Ohio-4607 at ¶1. That is, even if every consecutive sentence is justified by R.C. 2929.14(C)(4) when considered in isolation, the total sentence that results from the "consecutively stacked individual sentences" may be inappropriate nonetheless. *Id.* *Gwynne* also held that "appellate review of consecutive sentences under R.C. 2953.08(G)(2) does not require appellate courts to defer to the sentencing court's findings in any manner." *Id.* Instead, the Court said, appellate courts must "review the

record de novo and decide whether the record clearly and convincingly does not support the consecutive-sentence findings." *Id.*

As of this filing, a motion for reconsideration remains pending in *Gwynne*. *See* Docket, No. 2021-1033. The Court also granted review in *State v. Glover*, No. 2023-0654. There, the State of Ohio urges this Court to overrule *Gwynne*.

5. Jones petitioned this Court for review of his case. It granted just one of his propositions of law, in which Jones argues that the trial court and the Eighth District ran afoul of *Gwynne* when they imposed and affirmed his consecutive sentences.

ARGUMENT

In *Gwynne*, this Court held that R.C. 2929.14(C)(4) requires trial courts, before imposing consecutive sentences, to consider the appropriateness of each individual sentence to be added after the first one, along with the "aggregate prison term" that results from consecutively stacked sentences. 2022-Ohio-4607 at ¶1 (citing R.C. 2929.14(C)(4)). It also held that R.C. 2953.08(G)(2) requires appellate courts "to review the record de novo and decide whether the record clearly and convincingly does not support the consecutive-sentence findings." *Id*. In this case, the trial court complied with the first holding, and the Eighth District's decision comports with the second. For that reason, the Court should reject Jones's proposition of law and affirm the Eighth District.

Amicus **Attorney General's Proposition of Law No. 1:**

> *When a trial court imposes a single consecutive sentence after considering the factors under R.C. 2929.14(C)(4)), it thereby satisfies R.C. 2929.14(C)(4)'s requirement to consider the appropriateness of the overall aggregate sentence.*

Ohio law—in particular, R.C. 2929.14(C)(4)—lists the determinations that sentencing courts must make before requiring a sentence for one crime to run consecutively to another. In *Gwynne*, this Court held that the statute also requires trial courts to "consider the overall aggregate prison term to the imposed" as a result of the consecutively stacked sentences. 2022-Ohio-4607 at ¶1. This case presents the following question: when a trial court properly considers the R.C. 2929.14(C)(4) factors in requiring a defendant to serve just one of his sentences consecutively with the others, does it necessarily satisfy the requirement to "consider the overall aggregate prison term to be imposed"? Yes, it does.

1. Ohio law presumes that a defendant convicted of multiple crimes will serve his sentences concurrently. R.C. 2929.41(A). A court may impose consecutive sentences only when some law specifically permits it to do so. And R.C. 2929.14(C)(4) is one such law. It authorizes a court to impose consecutive sentence after making several findings. First, a court must find that "the consecutive service is necessary to protect the public from future crime or to punish the offender." *Id.* Second, it must find that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." *Id.* Third, it must find that at least one of these three alternatives is met:

> (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 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.

Id.

In *Gwynne*, the court considered how R.C. 2929.14(C)(4) applies to cases in which the sentencing court requires a defendant to serve multiple sentences consecutively. The trial court in that case required the defendant, Susan Gwynne, to serve consecutively 46 separate prison terms, resulting in an aggregate sentence of 65 years. *Gwynne,* 2022-Ohio-4607 ¶5. The trial court in *Gwynne* determined that R.C. 2919.14(C)(4) justified each individual sentence. Did it need also to determine that the statute justified imposing the aggregate 65-year term? According to this Court, it did. The appropriateness of requiring a defendant to consecutively serve a *particular* sentence, the Court reasoned, did not "permit any amount of consecutively stacked individual sentences." *Id.* at ¶1. Instead, the total aggregate sentence must be justified based on "findings" under R.C. 2929.14(C)(4) "made in consideration of the aggregate term to be imposed." *Id.*

2. In this case, unlike in *Gwynne*, the trial court did not require the defendant to serve multiple consecutive sentences. Instead, it required the defendant to serve just one of his sentences consecutively to another. Specifically, the trial court sentenced Jones to 30 months' imprisonment on the first drug-trafficking charge. It required him to serve consecutively *only* his 30-month sentence for having weapons under a disability. It ordered all other sentences to run concurrently with the original 30-month sentence. *See* App.Op.¶¶3, 7.

Gwynne has no bearing on this situation. The trial court considered the R.C. 2929.14(C)(4) factors when it determined the propriety of requiring Jones to serve one of his 30-month sentences consecutively to the other sentence. Because that was the *only* sentence the trial court ordered Jones to serve consecutively, the trial court's application of the R.C. 2929.14(C)(4) factors to that sentence necessarily discharged the requirement to consider those factors in connection with the overall aggregate sentence. After all, when a court requires a defendant to serve just one of his sentences consecutively to another, the question whether R.C. 2929.14(C)(4) justifies that one consecutive sentence cannot be distinguished from the question whether the same statute justifies the overall aggregate sentence. Here, for example, the question whether R.C. 2929.14(C)(4) justifies requiring Jones to serve an additional 30 months on top of the other 30-month sentence is the same as the question whether R.C. 2929.14(C)(4) justifies a 60-month sentence.

Because the trial court necessarily "consider[ed] the overall aggregate prison term to be imposed" when it considered the justification for imposing a single consecutive term, it discharged its obligations under *Gwynne*. 2022-Ohio-4607 at ¶1.

***Amicus* Attorney General's Proposition of Law No. 2:**

> *An appeals court's affirmance of two consecutive criminal sentences satisfies R.C. 2953.08(G)(2) and* State v. Gwynne *when the court reviews the record and explains that it "cannot clearly and convincingly conclude that the record does not support the trial court's R.C. 2929.14(C)(4) findings."*

Jones further argues that the Eighth District, because it issued its decision before this Court issued *Gwynne*, must not have performed the *de novo* review *Gwynne* interpreted R.C. 2953.08(G)(2) to require. Jones is wrong.

1. R.C. 2953.08(G)(2) tells courts of appeals how to review a trial court's decision to impose consecutive sentences. It says that courts hearing appeals of decisions imposing consecutive sentences "shall review the record, including the findings underlying the sentence or modification given by the sentencing court." *Id*. "The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing." *Id*. Critically, "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." Instead, the "appellate court may" increase, reduce, or otherwise modify the sentence "if it clearly and convincingly finds either of the following: (a) That the record does not support the sentencing court's findings under

division … (C)(4) of section 2929.14," or "(b) That the sentence is otherwise contrary to law." *Id*.

In *Gwynne*, this Court recognized that "R.C. 2953.08(G)(2) gives some amount of deference to a trial court's decision concerning consecutive sentences." 2022-Ohio-4607 at ¶18. But the deference required differs from the well-known *legal* review standards, such as the abuse-of-discretion standard. *Id.* Instead, the "deference" arises from the "legislature's determination that an appellate court must use a higher evidentiary standard" than the one the trial court applies when making findings in the first place "when it reviews the record and determines" whether to "modify the trial court's order of consecutive sentences." *Id.* This "higher evidentiary standard" stems from three aspects of appellate review under the statute: its limiting review to the findings the trial court "actually made," its using the clear-and-convincing standard rather than the preponderance-of-the-evidence standard that applies in trial courts, and the "inversion of the ultimate question" so that the burden is to show that the consecutive sentences are *not* warranted. *Id.* at ¶¶21–23. The Court described this review of the record as *de novo* review. The label matters less than the function: the standard requires the appellate court to review the record and to reverse if it "clearly and convincingly finds that the record does not support the findings" the trial court made regarding consecutive sentences. *Id.* at ¶23.

2. The Eighth District already did what *Gwynne* requires. First, it independently reviewed the record. The court cited multiple facts that *it* saw in the record—the "36

arrest cycles in 37 years," for example, and the many drug and gun cases reflected in the charges. App.Op.¶21. Then, based on its independent review, the Eighth District decided that it could not "say that the record clearly and convincingly does not support the trial court's findings under" R.C. 2929.14(C)(4). *Id.* at ¶16. "After a thorough review of the applicable law and facts," the court "affirm[ed] the judgment." *Id.* at ¶1.

This perfectly tracks the requirements of *Gwynne*. True, the court did not cite *Gwynne*, since its opinion predated that decision. But it did not need to. Also true, the Eighth District did not expressly declare that it was reviewing the record "de novo." But again, it did not need to. The court performed the *de novo* review that *Gwynne* requires. The label (or absence thereof) that it used to describe its review is irrelevant.

This focus on substance over form points to a critical, related issue. "Appeals are from judgments, not the opinions explaining them." *Couchot v. State Lottery Comm'n*, 74 Ohio St. 3d 417, 423 (1996). The Eighth District's *judgment* is undoubtedly correct. Nothing in the record clearly and convincingly establishes that the R.C. 2929.14(C)(4) factors preclude sentencing Jones—a habitual criminal who poses a constant threat to public safety, *see* App.Op.¶¶7, 21—to serve his 30-month sentence for drug trafficking consecutively to his 30-month sentence for having weapons under a disability. Thus, even if the Eighth District failed to conduct the *de novo* review *Gwynne* requires, this Court can do so itself and affirm. *State v. Boaston*, 160 Ohio St. 3d 46, 2020-Ohio-1061 ¶71.

*

While all of the above is reason enough to affirm here, the Court may also wish to dismiss this appeal as improvidently allowed. If *Gwynne* remains as-is, a decision here may help clarify *Gwynne*'s reach. But if the Court is inclined to revisit *Gwynne*, both the pending reconsideration motion in *Gwynne* and *State v. Glover,* Case No. 2023-0654, provide better vehicles for addressing and modifying *Gwynne*'s rule that trial courts must justify, and appellate courts must review *de novo*, the aggregate sentences resulting from multiple stacked consecutive sentences. If the Court modifies *Gwynne*'s holding, Jones's arguments concerning the Eighth District's supposed misapplication of that holding will be irrelevant and there will be no need for this Court's review.

CONCLUSION

The Court should affirm the judgment of the Eighth District.

Respectfully submitted,

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