

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-04-1322

Appellee

Trial Court No. CR-2004-2393

v.

Johnathan Byrd

DECISION AND JUDGMENT ENTRY

Appellant

Decided: December 2, 2005

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Eric A. Baum, Assistant Prosecuting Attorney, for appellee.

Stacey Burns, for appellant.

* * * * *

SKOW, J.

{¶ 1} Appellant, Johnathan Byrd, appeals the judgment of the Lucas County Court of Common Pleas by asserting that the imposition of consecutive sentences was contrary to law.

{¶ 2} On September 21, 2004, appellant entered pleas pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25, to charges of attempted burglary, a violation of R.C.

2923.02 and R.C. 2911.12(A)(2) and a felony of the third degree, and abduction, a violation of R.C. 2905.02(A)(2) and a felony of the third degree.

{¶ 3} On October 5, 2004, the trial court held a sentencing hearing, at the conclusion of which appellant was sentenced to three years for each count with the sentences to run consecutively for a total term of six years incarceration. Pursuant to the plea agreement, a nolle prosequi was entered for a charge of robbery.

{¶ 4} Appellant challenges only the imposition of sentence and presents one assignment of error for our review:

{¶ 5} "Whether the trial court's sentence imposition was contrary to law since it did not give its reasoning for imposing consecutive sentences?"

{¶ 6} A trial court's sentence will not be disturbed unless there is clear and convincing evidence that the sentence is contrary to law. R.C. 2953.08(G)(2)(b); *State v. Stern* (2000), 137 Ohio App.3d 110, 114. Clear and convincing evidence must "produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *State v. Bay* (2001), 145 Ohio App.3d 402, 405, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, 477.

{¶ 7} We look to the record to determine whether the sentencing court: (1) considered the statutory factors; (2) made the required findings; (3) relied on substantial evidence in the record supporting those findings; and (4) properly applied the statutory guidelines. See *State v. Comer* (2003), 99 Ohio St.3d 463. The record to be examined by a reviewing court includes the presentence investigative report, the trial court record, and

any sentencing hearing statement. R.C. 2953.08(F)(1)-(3). See, also, *State v. Boshko* (2000), 139 Ohio App.3d 827, 835. "Where the proof required must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *In re Mental Illness of Thomas* (1996), 108 Ohio App.3d 697, 700.

{¶ 8} In order to impose consecutive sentences for multiple offenses, a trial court must find three factors pursuant to R.C. 2929.14(E)(4). "First, the court must find that consecutive sentences are necessary to protect the public from future crime or to punish the offender. Second, the court 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. Third, the court must find the existence of one of the enumerated circumstances in R.C. 2929.14(E)(4)(a) through (c)." *State v. Comer* (2003) 99 Ohio St.3d 463, 466, 793 N.E.2d 473 (internal citations omitted). Those circumstances are listed as follows:

{¶ 9} "(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.

{¶ 10} "(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.

{¶ 11} "(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. 2929.14(E)(4).

{¶ 12} A trial court must also comply with R.C. 2929.19(B) in order to impose consecutive sentences. *Comer*, 99 Ohio St.3d at 467. This statute governs requirements for sentencing hearings. A trial court must orally state the findings and its reasons on the record at the sentencing hearing; the duty to make the findings is separate and distinct from the duty to give reasons for selecting consecutive sentences. *Id.* at paragraph one of the syllabus.

At appellant's sentencing hearing, the trial court stated that it had read appellant's presentence investigation report; it orally reviewed appellant's juvenile and adult criminal history; it orally reviewed the factual basis for the charges; and it noted that these charges constituted parole violations for which appellant would be separately sentenced. In pronouncing sentence on the instant charges, it then stated:

{¶ 13} "I'll make a finding here that the defendant is able to pay the fees and costs associated with the prosecution. I further find that he is not amenable to community control. I further find that consecutive sentences are necessary because the defendant was under community control when the offense was committed and that his criminal history requires consecutive sentences.

{¶ 14} "I further find that consecutive sentences are necessary to fulfill the purposes of Revised Code Section 2929.11 and that they are not disproportionate to the seriousness of the offender's conduct or danger he poses.

{¶ 15} "So it will therefore be the order of the court as to count one that the defendant be sentenced to three years in the Ohio Department of Rehabilitation and Correction. The sentence as to count three will be three years, the Ohio Department of Rehabilitation and Correction. These sentences will be ordered served consecutively with each other. It is my intention that the defendant serve a period of incarceration of six years, with credit for 95 days time served."

{¶ 16} The trial court then notified appellant of his right to appeal and the consequences for violating post-release control or a failure to pay financial sanctions.

{¶ 17} The trial court only found two factors supporting the imposition of consecutive sentences: That it was not disproportionate to the seriousness of appellant's conduct and to the danger he poses to the public, and the factor of R.C. 2929.14(E)(4)(a), that he was under post-release control for a prior offense when the instant offenses were committed. Clearly, the trial court erred in failing to find the statutorily required factor that a consecutive sentence is "necessary to protect the public from future crime" or that it is to "punish the offender." A sentence is contrary to law if not imposed pursuant to the sentencing scheme and *Comer's* requirements. On this point, we find it worthwhile to recite this court's statement in *State v. Townsend*, 6th Dist. No. L-04-1158, 2005-Ohio-3209:

{¶ 18} "As this court has stated before, while a remand under these circumstances for what most likely will be a rote recitation of the omitted words appears to serve no real purpose, especially since the missing statutory language as cited above can arguably be inferred from the trial court's statements at sentencing, unless the General Assembly acts to amend the language of R.C. 2929.14(E)(4) or otherwise clarify the sentencing guidelines, trial judges must follow the technical and strict requirements of the relevant statutes by reciting certain language at each sentencing hearing pursuant to *Comer*, supra." Id. at ¶ 23. See, also, *State v. Butch*, 6th Dist. No. L-03-1328, 2005-Ohio-4878; *State v. Bittner*, 6th Dist. No. L-04-1240, 2005-Ohio-5251.

{¶ 19} Appellant argues that, pursuant to *Comer*, the trial court was also required to "clearly align" its reasoning in support of its findings with those findings, and that such reasoning as was stated was insufficient to support the imposition of consecutive sentences. Since we find that the trial court failed to complete the basic requirement of finding all necessary statutory factors, we need not reach this argument. Accordingly, appellant's sole assignment of error is found well-taken.

{¶ 20} This matter is hereby reversed and remanded for resentencing in accordance with this decision and for compliance with the sentencing statutes and *Comer*, supra. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

William J. Skow, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.