

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

State of Ohio

Court of Appeals No. OT-22-042
OT-22-043
OT-22-044
OT-22-045

Appellee

Trial Court No. 19CR178
20CR053
20CR100
22CR048

v.

Carleen Kleinhans

DECISION AND JUDGMENT

Appellant

Decided: July 28, 2023

* * * * *

James J. VanEerten, Ottawa County Prosecuting Attorney and
Davia S. Kasper, Chief Assistant Prosecuting Attorney, for appellee.

Brian A. Smith, for appellant.

* * * * *

ZMUDA, J.

I. Introduction

{¶ 1} This matter is before the court on appeal from the judgment of the Ottawa County Common Pleas Court, sentencing appellant, Carleen Kleinhans, for an aggregate

prison term of 24 months without any designation of jail-time credit. For the reasons that follow, we affirm in part, but remand for the limited purpose of an entry consistent with the mandate of R.C. 2929.19(B)(2)(g)(i), which requires the trial court to “include in the sentencing entry the total number of days” of jail-time credit under R.C. 2967.191.

II. Facts and Procedural Background

{¶ 2} Between August 1, 2019, and May 21, 2020, appellant was indicted on various drug offenses in case Nos. 2019-CR-0178, 2020-CR-0053, and 2020-CR-0100. On June 12, 2020, appellant entered a negotiated plea, entering guilty pleas to some counts with additional counts dismissed at sentencing. Appellant entered a guilty plea to two counts of trafficking in drugs in violation of R.C. 2925.03(A)(1) in case No. 2019-CR-0178, both felonies of the fifth degree; one count of possession of drugs in violation of R.C. 2925.11(A) in case No. 2020-CR-0178, a felony of the fifth degree; and one count of possession of drugs in violation of R.C. 2925.11(A) and (C)(4) in case No. 2020-CR-0100, a felony of the fifth degree.

{¶ 3} On July 23, 2020, the trial court sentenced appellant to community control in all three cases. In each case, the trial court imposed a three-year term of community control and reserved a 12-month prison term for both counts one and two in case No. 2019-CR-0178, reserved a 12-month prison term for count one in case No. 2020-CR-053, and reserved a 12-month prison term for count one in case No. 20-CR-0100. The trial court provided notice that “said sentences could be ordered to be served consecutively to each other for a total incarceration period of forty- eight (48) months.”

{¶ 4} On August 25, 2020, appellant's probation officer filed a motion and complaint of community control violation, alleging appellant used fentanyl as evidenced by a positive drug screen collected on August 14 and 19, 2020; failed to attend court-ordered outpatient treatment on August 3, 10, and 17, 2020; and failed to attend court-ordered individual counseling on July 29 and August 5, 12, and 19, 2020. A warrant issued, but appellant was not taken into custody for several months.

{¶ 5} On January 27, 2022, appellant was taken into custody on the community control violation. Appellant appeared for an initial appearance on January 31, 2022, and the trial court ordered appellant released on a supervised own recognizance bond. On February 14, 2022, appellant was released, but after a bond violation was filed, she was taken back into custody on February 23, 2022, and remained incarcerated until the hearing on March 31, 2022.

{¶ 6} On March 3, 2022, appellant was charged in case No. 2022-CR-048 with tampering with evidence in violation of R.C. 2921.12(A)(1), a felony of the third degree, and possessing criminal tools in violation of R.C. 2923.24(A), a felony of the fifth degree. Appellant appeared for arraignment in this new case on March 7, 2022, and entered not guilty pleas to both charges.

{¶ 7} On March 31, 2022, appellant appeared for hearing on the merits for the community control violation, for hearing on a bond violation, and also for a change of plea hearing in case No. 22-CR-048. Appellant admitted to the community control violation, and admitted the conduct that led to the bond violation. As to the new charges

in case No. 22-CR-048, appellant entered a guilty plea to amended count one, tampering with evidence in violation of R.C. 2923.02(A), a felony of the fourth degree, and a guilty plea to count two, possessing criminal tools in violation of R.C. 2923.24(A) and (C), a felony of the fifth degree. The trial court continued the matter for sentencing hearing on May 19, 2022, and released appellant on a supervised own recognizance bond in all four cases, pending sentencing.

{¶ 8} At hearing on May 19, 2022, the state noted that the three older cases involved drug-related offenses, and the most recent case arose from an incident during drug testing, as a condition of community control for the three older cases. The trial court imposed a three-year term of community control in the new case, and extended community control in the three, older cases for a period of three years, establishing a new termination date for community control in all four cases on May 19, 2025. Additionally, the trial court ordered appellant to serve 30 days in the Ottawa County Detention Facility, ordering those days to be served at the discretion of the probation department, with no credit for days previously served to satisfy this condition of community control.

{¶ 9} On March 31, 2022, appellant was again released on her own recognizance, with prior conditions reimposed.

{¶ 10} On June 21, 2022, appellant's probation officer filed a complaint of community control violation, alleging appellant admitted to taking and testing positive for fentanyl and cocaine on June 1, 2022, missed meetings with probation, and missed appointments for receiving her Vivitrol doses since April 26, 2022. Appellant appeared

for an initial hearing on June 23, 2022 and denied the violation. The trial court scheduled the matter for hearing on the merits on July 22, 2022, and the trial court ordered appellant held without bond until the date of hearing.

{¶ 11} On July 22, 2022, appellant appeared and admitted to a community control violation.¹ The trial court found appellant in violation of her community control in all four cases, and continued the matter for dispositional hearing on August 11, 2022. The trial court released appellant on a supervised own recognizance bond until the dispositional hearing.

{¶ 12} On August 11, 2022, appellant appeared for the dispositional hearing. The trial court noted that appellant was placed on community control in case Nos. 19-CR-178, 20-CR-043, and 20-CR-100, and continued on community control in new case No. 22-CR-048. The trial court further noted:

Defendant has violated the terms of her community control and was found to be a community control violator on July 22nd.

The Defendant has credit for 93 days previously served in Jail and the CBCF, and this is the Defendant's third community control violation. The trial court determined that appellant was not amenable to continued community control and imposed a prison term as follows:

¹ Appellant admitted to two of the allegations, but denied a third allegation. The trial court found community control violations based on all three allegations.

So as to 19-CR-178, you're sentenced to a prison term of six months.

As to Case 20-CR-53, you're sentenced to a prison term of six months.

As to 20-CR-100, again, you're sentenced to a prison term of six months.

And in 22-CR-48, you're sentenced to a prison term of six months.

Those sentences shall be run consecutively for a total of 24 months in prison.

{¶ 13} In imposing consecutive sentences, the trial court addressed its consideration of the statutory factors under R.C. 2929.14(C)(4). The trial court then incorporated its findings in the sentencing entry, as follows:

The Court finds that the Defendant's violation was a substantive rehabilitative requirement to address a significant factor contributing to her criminal conduct.

The Court finds that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and the danger the offender poses to the public.

The Court further finds that the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 14} On August 18, 2022, the trial court filed its sentencing entry, followed by a nunc pro tunc entry on September 30, 2022, to correct a clerical error in the judgment regarding case No. 22-CR-048, in which the trial court sentenced appellant to two, concurrent six-month terms as to amended count one and count two in that case, ordering the sentence in case No. 22-CR-048 to run consecutively to the sentence imposed in the other cases. Neither the August 18, nor the September 30, 2022 entries provided any calculation of credit for time served in any of the four cases.

{¶ 15} On September 12, 2022, appellant filed a timely appeal of the judgment.²

III. Assignments of Error

{¶ 16} Appellant asserts the following assignments of error:

1. The trial court's sentence of Appellant was contrary to law for failing to award Appellant jail-time credit, in violation of R.C. 2967.191 and Appellant's right to Equal Protection under the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Ohio Constitution.
2. The trial court's imposition of consecutive sentences was not supported by the record.

{¶ 17} We address the assignments of error in order.

² On December 12, 2022, appellant filed a motion for jail-time credit in all four cases in the trial court, which the trial court denied, finding a lack of subject matter jurisdiction.

IV. Analysis

A. Jail Time Credit

{¶ 18} In her first assignment of error, appellant argues the trial court erred by failing to calculate her jail-time credit and omitting that calculation in her sentencing entry, arguing both application of R.C. 2967.191 and the Equal Protection Clauses of the Ohio and United States Constitutions. The state acknowledges that appellant was entitled to jail-time credit, pursuant to Ohio statute, and that the trial court failed to incorporate jail-time credit in the trial court’s sentencing entry.

{¶ 19} We review an error in the computation of jail-time credit under R.C. 2953.08(G)(2). *State v. Ragland*, 2023-Ohio-31, 205 N.E.3d 683, ¶ 9 (6th Dist.), citing *State v. Hearn*, 6th Dist. Erie Nos. E-19-067, E-19-076, E-19-077, E-19-078, 2021-Ohio-86, ¶ 6. Pursuant to R.C. 2953.08(G)(2), an appellate court may increase, decrease, modify, or vacate and remand a disputed sentence if it is demonstrated that either the record does not support the statutory findings or the sentence is otherwise contrary to law. In this case, the trial court made no calculation of jail-time credit in the sentencing entry, but instead omitted the calculation entirely.

{¶ 20} The statute governing jail-time credit, R.C. 2967.191, requires the “department of rehabilitation and correction” to “reduce the prison term of a prisoner * * * by the total number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced, including confinement in lieu of bail while awaiting trial.” *Hearn* at ¶ 7, quoting R.C. 2967.191(A). Pursuant to

R.C. 2929.19(B)(2)(g)(i), the trial court must calculate the number of days to be credited against the sentence, and include the total number of days in the sentencing entry.

{¶ 21} Here, the trial court noted at the dispositional hearing that appellant had served 93 days, but failed to include the total number of days in the sentencing entry as required by R.C. 2929.19(B)(2)(g)(i). As such, the sentencing entry is contrary to law.³ We therefore need not reach appellant’s constitutional argument regarding equal protection, as we find the trial court failed to comply with R.C. 2929.19(B)(2)(g)(i).

{¶ 22} Accordingly, we find appellant’s first assignment of error well-taken, requiring remand for the limited purpose of complying with R.C. 2929.19(B)(2)(g)(i) and entering an amended sentencing entry that complies with the statute.

B. Consecutive Sentences

{¶ 23} In her second assignment of error, appellant argues that the trial court erred in imposing consecutive sentences under R.C. 2929.14(C)(4) without sufficient support in the record for the trial court’s statutory findings.

³ While not an issue on appeal, a trial court “retains continuing jurisdiction to correct any error not previously raised at sentencing in making a determination” regarding jail-time credit, as provided by R.C. 2929.19(B)(2)(g)(iii). The statute, furthermore, permits an offender to file a motion “at any time after sentencing” to request the sentencing court “correct any error made in making a determination under [R.C. 2929.19(B)(2)(g)(i)].” *State v. Thompson*, 147 Ohio St.3d 29, 2016-Ohio-2769, 59 N.E.3d 1264, ¶ 5, quoting R.C. 2929.19(B)(2)(g)(iii). Finally, the ruling on a motion for jail-time credit constitutes a final, appealable order. *Thompson* at ¶ 13.

{¶ 24} The review of felony sentences is governed under R.C. 2953.08(G)(2).

Under R.C. 2953.08(G)(2), an 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.”

{¶ 25} The appellant court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant; or

(b) That the sentence is otherwise contrary to law.

R.C. 2953.08(G)(2).

{¶ 26} Appellant does not dispute that the trial court made the statutory findings required under R.C. 2929.14(C)(4), which permits consecutive sentences as follows:

(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:

(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.

{¶ 27} In addressing the factors under R.C. 2929.14(C)(4), appellant challenges the weight the trial court attributed to each of the factors rather than the absence of supporting evidence for the trial court's findings. She argues she was in compliance with the conditions of her bond at the time of sentencing, weighing heavily against a finding that consecutive sentences were necessary to protect the public from future crime. She further argues that she demonstrated remorse at sentencing, a factor relevant in determining the need for consecutive sentences to protect the public from future crime. While acknowledging her past criminal history, appellant argues the trial court was

required to place greater weight on her recent compliance with the conditions for release, while awaiting sentence in all four cases.

{¶ 28} Recently, the Ohio Supreme Court addressed the proper review of consecutive sentences under R.C. 2929.14(C)(4) in *State v. Gwynne*, Slip Opinion No. 2022-Ohio-4607. The Court reiterated that the trial court must engage in a three-step analysis before imposing a consecutive sentence under R.C. 2929.14(C)(4). *Gwynne* at ¶ 21; *see also State v. Gonzales*, 6th Dist. Wood No. WD-19-068, 2020-Ohio-4495, ¶ 44, citing *State v. Banks*, 6th Dist. Lucas No. L-13-1095, 2014-Ohio-1000, ¶ 11. The Court further addressed the standard for reversing a consecutive sentence:

A trial court makes its consecutive-sentencing findings using a preponderance-of-the-evidence standard – i.e., a more-likely-than-not standard. But pursuant to R.C. 2943.08(G)(2), the appellate court can reverse or modify the trial court’s order of consecutive sentences if it clearly and convincingly finds that the record does not support the findings. The evidentiary standard for *changing* the trial court’s order of consecutive sentences is not deference to the trial court; the evidentiary standard is that the appellate court, upon a de novo review of the record and the findings, has a “firm belief” or “conviction” that the findings – the criteria mandated by the legislature to be met before the exception to concurrent sentences can apply – are not supported by the evidence in the record.

(Citation omitted.) *Gwynne* at ¶ 23.

The Court further determined that “when a sentencing court makes the statutory findings under R.C. 2929.14(C)(4) for consecutive sentences, it must consider the number of sentences that it will impose consecutively along with the defendant's aggregate sentence that will result.” *Gwynne* at ¶ 12.

{¶ 29} In engaging in the three-part inquiry, the trial court must first find that consecutive sentences are necessary to protect the public from future crime or to punish the offender. Second, the trial court must determine that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and the danger posed to the public. Third, the trial court must find at least one factor under R.C. 2929.14(C)(4)(a)-(c) applies, including commission of an offense while on community control or while awaiting trial or sentencing; commission of multiple offenses causing great or unusual harm; or a history of criminal conduct necessitating consecutive sentences to protect the public and prevent future crime by the offender. *See Gonzales* at ¶ 44.

{¶ 30} Considering the record, the trial court engaged in the proper, three-step analysis, specifically finding that consecutive sentences were necessary to protect the public or punish the offender, that consecutive sentences were not disproportionate to the seriousness of the offender’s conduct or the danger the offender posed to the public, and that the offender’s criminal history demonstrated that consecutive sentences were necessary to protect the public from future crime. *See* R.C. 2929.14(C)(4). While appellant had a reserved, potential aggregate sentence of 48 months in her first three

cases, the trial court imposed consecutive sentences for an aggregate term of 24 months at sentencing.

{¶ 31} In challenging the trial court’s findings in support of the consecutive sentences, appellant argues her conduct at the time of sentencing should have weighed most heavily in the trial court’s consideration of consecutive sentences. We have previously noted, however, that a trial court properly considers current conduct “*in conjunction with* the defendant’s past conduct” in weighing the statutory factors. (Emphasis sic.) *State v. Mathis*, 6th Dist. Lucas No. L-21-1249, 2022-Ohio-4020, ¶ 19, citing *State v. Kelly*, 2d Dist. Clark No. 2020-CA-8, 2021-Ohio-325, ¶ 80 (additional citation omitted.). Appellant’s argument, moreover, does not reference a lack of evidence to support the statutory factors in favor of consecutive sentences, but instead posits that the trial court could have made a different choice based on her recent compliance with conditions of release, or that the record equally supported something other than consecutive sentences.

{¶ 32} In this case, the record demonstrates that appellant struggled with substance abuse and had numerous drug-offenses over the course of several years, with her latest criminal case arising from her attempt to submit another individual’s urine for testing, after she submitted a sample that tested positive for fentanyl. The record further indicated that appellant violated the terms of her community control or the terms of bond, repeatedly, including while she was on bond in her felony cases or while a separate

community control violation complaint was pending. Appellant admitted to these violations.

{¶ 33} “As long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld.” *State v. Monhollen*, 6th Dist. Ottawa No. OT-21-004, 2021-Ohio-3512, ¶ 21, quoting *State v. Smith*, 6th Dist. Wood No. WD-19-082, 2021-Ohio-150, ¶ 15, quoting *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 649, ¶ 29. Additionally, while the law permits an appellate court to vacate some, but not all, consecutive sentences, to do so, we must “find that the record does not support the trial court’s necessity or proportionality findings in light of the actual number of consecutive terms that it imposed and the resulting aggregate sentence.” *Gwynne* at ¶ 17; ¶ 27.

{¶ 34} In this case, the trial court correctly addressed the factors under R.C. 2929.14(C)(4), and the record fully supports the trial court’s finding that consecutive sentences and the resulting aggregate sentence were proper as necessary and proportionate. Accordingly, we find appellant’s second assignment of error not-well taken.

V. Conclusion

{¶ 35} For the forgoing reasons, we affirm the judgment of the Ottawa County Court of Common Pleas, in part, as to consecutive sentences, and reverse in part, based on the failure of the trial court to include a determination of jail-time credit within the

sentencing entry. We remand for the limited purpose of an amended sentencing entry that complies with R.C. 2929.19(B)(2)(g)(i). The parties are ordered to split the cost of this appeal pursuant to App.R. 24.

Judgment affirmed, in part,
reversed in part,
and remanded.

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

Thomas J. Osowik, J.

JUDGE

Christine E. Mayle, J.

JUDGE

Gene A. Zmuda, J.
CONCUR.

JUDGE

<p>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.supremecourt.ohio.gov/ROD/docs/.</p>
