[Cite as *State v. McElroy*, 2025-Ohio-1356.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

LANCE MCELROY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 24 BE 0034

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case Nos. 24 CR 80, 23 CR 302, 23 CR 313

BEFORE:
Carol Ann Robb, Cheryl L. Waite, Katelyn Dickey, Judges.

JUDGMENT:
Affirmed.

Atty. J. Kevin Flanagan, Belmont County Prosecutor*, Atty. Jacob A. Manning,* Assistant Prosecuting Attorney, for Plaintiff-Appellee and

Atty. Michael A. Partlow, for Defendant-Appellant.

Dated: April 2, 2025

Robb, P.J.

{¶1} Defendant-Appellant Lance McElroy appeals from the sentence imposed by the Belmont County Common Pleas Court after he pled guilty to three offenses in exchange for dismissal of multiple offenses in four cases. Appellant contends the record does not support the sentence. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} In 23 CR 302, Appellant was indicted on December 7, 2023 after firing a gun at a house in Martins Ferry on November 2, 2023. Three bullet holes were found in the house, including one just above the head of a sleeping thirteen-year-old child. The seven casings found in the alley behind the house matched the type Appellant named in an electronic communication when asked about the shooting. Appellant was charged with improperly discharging a firearm at or into a habitation (second-degree felony), felonious assault (second-degree felony), and having weapons while under disability as a result of a 2022 delinquency adjudication (third-degree felony).

{¶3} In 23 CR 313, reports about Appellant's video or photo collection prompted a search warrant for his phone, which was in police custody as Appellant was in jail for an arrest on an unrelated case. He was initially indicted on December 7, 2023 for six offenses against victim A. The March 7, 2024 superseding indictment in 23 CR 313 set forth the following thirteen counts: two counts of pandering obscenity with regard to fourteen-year-old victim A (on October 3 and 8, 2023); pandering obscenity with regard to fifteen-year-old victim B (on October 18, 2023); pandering obscenity with regard to fourteen-year-old victim C (between May and July 2023); two counts of intimidation (toward a detective and another individual on January 31, 2024); two counts of unlawful sexual conduct with victim A (on the same dates as the corresponding pandering charge); attempted retaliation and attempted intimidation (on November 17, 2023 against victim A); unlawful sexual conduct with thirteen-year-old victim D (in May 2023); unlawful sexual conduct with victim B (between May and July 2023); and unlawful sexual conduct with victim C (on the same date as the pandering charge corresponding to this victim).

{¶4} The four charges of pandering obscenity involving a minor were second-degree felonies. The two intimidation charges were third-degree felonies. The attempted retaliation and attempted intimidation charges were both fourth-degree felonies. As to the charges of unlawful sexual conduct with a minor, three of the counts were fourth-degree felonies (for offenders more than four, but less than ten, years older than the victims) and two of the counts were first-degree misdemeanors (for offenders less than four years older than the victims).

{¶5} On April 4, 2024, two additional indictments were filed. In 24 CR 79, Appellant was indicted on two counts of fifth-degree felony vandalism. This charge was based on conduct occurring on March 7, 2024 (while he was in jail) and not part of this appeal.

{¶6} In 24 CR 80, Appellant was indicted for breaking and entering, a fifth-degree felony. This charge was based on a recorded incident at a closed gas station on October 15, 2023.

{¶7} On June 3, 2024, Appellant signed a plea agreement related to all four cases, agreeing to plead guilty to three counts: the second-degree felony offense of improperly discharging a firearm at or into a habitation from 23 CR 302 (an offense of violence); the third-degree felony offense of intimidation (against the detective) from 23 CR 313; and the fifth-degree felony offense of breaking and entering from 24 CR 80 (with agreed restitution). In exchange, the state agreed to seek dismissal of the remaining charges. (Plea Tr. 3-6). The parties agreed to jointly recommend an indefinite sentence of 6 to 9 years for improperly discharging a firearm at or into a habitation, 18 months for intimidation, and 12 months for breaking and entering. The parties also agreed the sentences should be run consecutively, recommending an aggregate sentence of 8.5 to 11.5 years.

{¶8} After accepting the plea, the trial court ordered a presentence investigation (PSI). At the sentencing hearing, the court deviated from the agreed sentence by adding 6 months more than jointly recommended on the intimidation count, imposing a sentence of 6 to 9 years for improper discharge, 24 months for intimidation, and 12 months for breaking and entering to run consecutively, specifying an aggregate sentence of 9 to 12 years. The within appeal followed.

FELONY SENTENCING

{¶9} "The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others, to punish the offender, and to promote the effective rehabilitation of the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." R.C. 2929.11(A). "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." *Id.*

{¶10} The sentence shall be reasonably calculated to achieve the three overriding purposes "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." R.C. 2929.11(B). To determine the most effective way to comply with the purposes and principles of sentencing in R.C. 2929.11, the court shall consider the factors in R.C. 2929.12(B) through (E) dealing with seriousness and recidivism. R.C. 2929.12(A) (plus military service and any other factors relevant to achieving the purposes and principles of sentencing).

{¶11} As the Supreme Court emphasizes, R.C. 2929.11 does not require the trial court to specify its findings related to the purposes and principles of sentencing. *State v. Wilson*, 2011-Ohio-2669, ¶ 31. Likewise, R.C. 2929.12 does not require the trial court to "use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors." *State v. Arnett*, 88 Ohio St.3d 208, 215 (2000). Furthermore, the sentencing court is no longer required to make findings for deviating from the minimum or imposing the maximum sentence. *State v. Riley*, 2015-Ohio-94, ¶ 34 (7th Dist.) ("While the General Assembly has reenacted the judicial fact-finding requirement for consecutive sentences, it has not revived the requirement for maximum and more than minimum sentences.").

{¶12} Distinctly, a trial court must make consecutive sentence findings at the sentencing hearing and incorporate the findings into the sentencing entry. *State v. Bonnell*, 2014-Ohio-3177, ¶ 37. Consecutive sentences can be imposed 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 [R.C. 2929.16-18], 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 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. 2929.14(C)(4).

{¶13} The Supreme Court stresses the sentencing court is not required "to give a talismanic incantation of the words of the statute." *State v. Jones*, 2024-Ohio-1083, ¶ 11, quoting *Bonnell* at 37. Rather, if the appellate court can "glean from the record that the court" made the contested consecutive sentence finding, then the findings are not to be adjudged insufficient. *Bonnell* at ¶ 36. As further underscored by the Supreme Court, the trial court is no longer required to set forth reasons to support its consecutive sentence findings. *Id.* at ¶ 37.

{¶14} In reviewing a felony sentence subject to a defendant's appeal under R.C. 2953.08(A) or (C), the court shall review the record including the sentencing court's findings. R.C 2953.08(G)(2). In ascertaining if the sentence should be reduced, modified, or vacated and remanded for resentencing, "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." *Id.* Instead, the appellate court may take reversal action only 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;
>
> (b) That the sentence is otherwise contrary to law.

R.C 2953.08(G)(2). Notably, R.C. 2953.08 does not require the sentencing judge to possess clear and convincing evidence in support of the sentence but requires the appellate court to clearly and convincingly find that the record does not support the reviewable findings. *State v. Perez*, 2022-Ohio-1124, ¶ 28 (7th Dist.). Clear and convincing evidence is that which produces a firm belief regarding the items being evaluated as established facts. *State v. Marcum*, 2016-Ohio-1002, at ¶ 22, quoting *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

{¶15} In *Glover*, the Supreme Court reversed a First District case that found the trial court's proportionality finding under R.C. 2929.14(C)(4) was not supported by the record. *State v. Glover*, 2024-Ohio-5195, ¶ 31. In reinstating the trial court's sentence, the Court's lead opinion pointed out: "The proportionality requirement is phrased in the negative; R.C. 2929.14(C) does not require that the trial court find that consecutive sentences are proportionate to the seriousness of the defendant's conduct and the danger he poses to the public before it may impose consecutive sentences." *Id.* at ¶ 52 (DeWine J., lead opinion).

{¶16} "Instead, it requires that the trial court find that consecutive sentences 'are not disproportionate' to the defendant's conduct and the danger he poses." *Id.* Because R.C. 2953.08 "then adds another negative," reversal is permitted only if the appellate court finds the record clearly and convincingly "does not support" the trial court's finding that consecutive sentences "are not disproportionate." *Id.* "The negative constructions in both statutes combined with the clear-and-convincing standard constrain the appellate court's review of a trial court's proportionality finding." *Id.*

{¶17} A fourth justice agreed the appellate court improperly substituted its judgment for the trial court and the analysis in support, but this justice believed the proportionality prong required the court to additionally consider the aggregate prison term.

Id. at ¶ 62, 66-69, 70-72 (Fisher, J., concurring in judgment and concurring in part) (voting with the lead opinion to reverse the appellate court and thereby uphold the trial court's imposition of consecutive sentences). The fourth justice's consideration of the aggregate sentence resulted in a majority of the Court ruling that the reviewing court must consider "whether the aggregate sentence imposed is disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." *Id.* at ¶ 73 (Stewart, J., dissenting) (with two other justices joining the dissent) (reviewing the aggregate sentence but voting to uphold the appellate court's downward sentencing modification). Thus, we consider the aggregate sentence in our review.

ASSIGNMENT OF ERROR

{¶18} Appellant's sole assignment of error contends:

"THE TRIAL COURT ERRED BY SENTENCING APPELLANT TO THREE TERMS OF INCARCERATION, TO BE SERVED CONSECUTIVELY TO ONE ANOTHER, AS THE RECORD DOES NOT SUPPORT SUCH A SENTENCE."

{¶19} Appellant's arguments are set forth in the context of R.C. 2929.11 and 2929.12. He does not dispute the sufficiency of the language used by the trial court in making consecutive sentence findings. *See Jones*, 2024-Ohio-1083, at ¶ 16 (where the Supreme Court opined the trial court's detailed statement about the defendant's criminal history "evinces a finding" under R.C. 2929.14(C)(4)(c) that said history of criminal conduct demonstrated consecutive sentences were necessary to protect the public from future crime by the defendant).[1] Rather, Appellant broadly challenges the failure to impose concurrent sentences while alternatively challenging the decision to impose six months beyond the joint recommendation in 23 CR 313 (24 months instead of 18 months) and/or the decision to impose a maximum sentence in 24 CR 80 (12 months as jointly recommended).

{¶20} Appellant requests a "more proportionate and appropriate" sentence, which arguably touches upon the question of whether the record supports the finding related to proportionality (although the consecutive sentencing statute is not cited). Appellant points

[1] We also note Appellant committed the intimidation offense while awaiting trial on the three offenses in 23 CR 302 and on six of the original offenses in 23 CR 313, which separately would have warranted the imposition of consecutive sentences under R.C. 2929.14(C)(4)(a).

to his young age of 18 at the time of the offenses. He urges he was amenable to rehabilitation during a shorter prison term despite his record of past and recent charges, noting defense counsel at sentencing referred to improved behavior after the receipt of counseling in jail. Regarding some of the dismissed counts, defense counsel also mentioned at sentencing that the minor victims consented to the recordings and were not interested in pursuing the charges. He additionally claimed at the sentencing hearing that the conduct of shooting into a house was not likely to recur, while noting not all of shots hit the house and Appellant could have but did not empty the entire clip during the shooting.

{¶21} In making his sentencing argument, Appellant's brief seemingly proposes the reinstatement of a former category of review utilizing dicta in the Supreme Court's *Marcum* decision, while generally complaining a defendant has a right to a more meaningful appellate review of a sentence. In *Marcum*, the Supreme Court held the plain language of R.C. 2953.08(G)(2) prohibited appellate courts from applying an abuse of discretion standard of review to sentencing term challenges, but the Court then suggested in dicta that it would be consistent with R.C. 2953.08(G) for an appellate court to modify a sentence if the record does not support the sentence under R.C. 2929.11 or 2929.12. *Marcum*, 2016-Ohio-1002, at ¶ 23. Nevertheless, Appellant recognizes the limitations imposed in subsequent cases, including the Supreme Court's 2020 *Jones* decision.

{¶22} In the latter case, the Court explained that because R.C. 2929.11 and 2929.12 are not among the statutes cited in subdivision (a) of R.C. 2953.08(G)(2), the reviewing court cannot use (G)(2)(a) to evaluate whether the record supports the principles or factors in R.C. 2929.11 or 2929.12. *State v. Jones*, 2020-Ohio-6729, ¶ 27-28. The Court rejected dicta to the contrary previously declared in ¶ 23 of its *Marcum* case. *Id.* Furthermore, the Court said the "otherwise contrary to law" language in subdivision (b) of R.C. 2953.08(G)(2) does not allow the appellate court to reverse by finding "the record does not support the sentence." *Id.* at ¶ 38. "Nothing in R.C. 2953.08(G)(2) permits an appellate court to independently weigh the evidence in the record and substitute its judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and 2929.12." *Id.* at ¶ 42.

{¶23} Although this state's felony sentencing laws limit appellate review, the sentencing court must consider the applicable sentencing laws, such as those evaluating the aggravating and mitigating factors, and is thus not merely guided by the statutory range. *See State v. Chappell*, 2024-Ohio-1541, ¶ 37 (7th Dist.) (where a defendant similarly complained about the limited scope of review, we pointed out "the Ohio Supreme Court has repeatedly addressed the standard of review and upheld the sentencing structure"). Moreover, the limitation on appellate review discussed in *Jones* does not prohibit appellate review of a sentence based on impermissible considerations, which could render a sentence contrary to law. *State v. Bryant*, 2022-Ohio-1878, ¶ 22, 31-32 (where the Supreme Court stated the reviewing court can evaluate whether the sentencing court improperly considered facts outside of those in the sentencing statutes, such as the defendant's outburst or attitude toward the court).

{¶24} It has also been observed that a sentence may be adjudged contrary to law if an appellate court ascertains the trial court *failed to consider* the principles and purposes of sentencing or the seriousness and recidivism factors. *See, e.g., State v. Duley*, 2023-Ohio-4722, ¶ 9 (7th Dist.) (while pointing out a silent record raises a rebuttable presumption the sentencing court considered R.C. 2929.11 and R.C. 2929.12); *State v. Scott*, 2023-Ohio-2640, ¶ 15 (7th Dist.), citing *State v. Burkhart*, 2019-Ohio-2711, ¶ 16 (7th Dist.). Still, as often pointed out by the Supreme Court, "neither R.C. 2929.11 nor 2929.12 requires a trial court to make any specific factual findings on the record." *Jones*, 2020-Ohio-6729, at ¶ 20.

{¶25} At sentencing and in the sentencing entry, the trial court said it considered the purposes and principles of sentencing under R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12. The court noted its consideration of the record, the oral statements, and the PSI. Moreover, the court discussed certain principles and certain factors, none of which are alleged to fall outside the proper bounds of R.C. 2929.11 and R.C. 2929.12. The court considered and made findings on Appellant's history of criminal conduct (opining it was "horrific" for his age). The court listed felony adjudications for menacing by stalking (in 2022), escape (in 2021), and obstructing official business (in 2020). The court also pointed to a misdemeanor conviction for menacing (for conduct occurring on August 7, 2023); his sentencing on that offense occurred on November 16,

2023 (a week after a complaint was filed against him for improperly discharging a firearm at or into a habitation). The trial court additionally listed multiple misdemeanor juvenile adjudications.

{¶26} Notably, the PSI also showed various recently dismissed or amended adult charges. For instance, Appellant was charged with: first-degree misdemeanor violation of a protection order and two other misdemeanors for conduct occurring on May 19, 2023; first-degree misdemeanors of aggravated menacing and inducing panic for conduct on May 30, 2023; two first-degree misdemeanor assault charges for conduct occurring on August 24, 2023; and three other misdemeanors for conduct on October 22, 2023. All of these charges were dismissed at or around the time of his November 2023 menacing conviction. It is well established that the sentencing court can consider prior allegations or arrests even if no conviction resulted. *State v. Hutton*, 53 Ohio St.3d 36, 43 (1990); *State v. Prieto*, 2007-Ohio-7204, ¶ 55 (7th Dist.), citing *State v. Burton*, 52 Ohio St.2d 21, 23 (1977).

{¶27} "Accordingly, a sentencing court may consider the circumstances of other offenses in the charging instrument even if the negotiated plea does not encompass (or is at odds with) the charged elements." *State v. Ice*, 2024-Ohio-5341, ¶ 15 (7th Dist.), citing *State v. Martin*, 2018-Ohio-862, ¶ 7 (7th Dist.), citing *State v. Starkey*, 2007-Ohio-6702, ¶ 17 (7th Dist.). The charges dismissed as part of the current plea deal are thus relevant to sentencing as well.

{¶28} The PSI detailed the facts of the current offenses including the offenses dismissed under the negotiated plea agreement. *See Jones*, 2024-Ohio-1083, at ¶ 12 (where the Supreme Court pointed out in reviewing the record, the court considers any investigative report submitted to the trial court before the imposition of sentence), citing R.C. 2953.08(F). Reading the PSI, it is evident the shooting offense involved significant risks of serious physical harm to multiple individuals, including a close call involving a sleeping thirteen-year-old child. The intimidation offense occurred in the context of an investigation of unlawful sexual conduct with three minors and the pandering of obscenity regarding those minors and one other minor. The breaking and entering charge was based on an event with additional facts related to the theft of various regulated items (and the charge did not require a completed theft as an element). In sum, Appellant was

fortunate to have negotiated the dismissal of a myriad of charges through the plea deal (and agreed to consecutive sentences totaling a mere six months less than the sentence he received).

{¶29} After imposing the jointly recommended sentence for the highest level offense (6-9 years for the second-degree felony), the decision to impose the jointly requested maximum sentence of 12 months for breaking and entering while increasing the jointly recommended sentence on a higher level offense by six months was not concerning under the facts of this case. The addition of six months more than jointly recommended on the third-degree felony offense of intimidation (and thus six months more than recommended as an aggregate sentence) was lawful and supported by the record. It was also still less than the maximum sentence available for that offense. The trial court's statements on recidivism, criminal history, remorse, proportionality, seriousness, and dangers to the public were not "clearly and convincingly" unsupported by the record.

{¶30} We reviewed the imposition of the 24-month sentence, the 12-month sentence, and the 6-year bottom range of the indefinite sentence, and we considered the decision to run these sentences consecutively resulting in an aggregate sentence of 9 to 12 years. Upon doing so, we cannot clearly and convincingly find that the record "does not support the sentencing court's findings or that the sentence is otherwise contrary to law." *Jones*, 2024-Ohio-1083, at ¶ 13, 16 (where the Supreme Court ruled the trial court's review of the criminal history evinced a consecutive sentence finding); *Glover*, 2024-Ohio-5195, at ¶ 31 (where the Supreme Court pointed out the appellate court must clearly and convincingly find "consecutive sentences 'are not disproportionate' to the defendant's conduct and the danger he poses").

{¶31} Even if we were to review the consistency of the sentence with R.C. 2929.11 and 2929.12 under our former use of the *Marcum* dicta (as suggested by Appellant), we would not find "by clear and convincing evidence that the record does not support the sentence." *See Marcum*, 146 Ohio St.3d 516 at ¶ 23. Furthermore, if for the sake of argument we employed an even earlier abuse of discretion alternative review, we would not find the sentence unreasonable, arbitrary, or unconscionable. *See State v. Kalish*, 2008-Ohio-4912, ¶ 19 (where a Supreme Court plurality used a two-step felony

sentencing review with abuse of discretion as the second stage), *abrogated by Marcum*. Appellant's assignment of error is overruled.

{¶32} For the foregoing reasons, the trial court's sentencing judgment is affirmed.

Waite, J., concurs.

Dickey, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.