IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 13-0167
	:	
Plaintiff-Appellee,	:	On Appeal from the Delaware
	:	County Court of Appeals
v.	:	Fifth Appellate District
	:	
RANDALL L. BONNELL, JR.,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 12 CAA 03 0022

REPLY BRIEF OF APPELLANT RANDALL L. BONNELL, JR.

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STATEMENT OF THE CASE AND FACTS

Mr. Bonnell relies upon the statement of the case and facts contained in his merit brief.

ARGUMENT

Proposition of Law: A trial court must expressly make the findings required in R.C. 2929.14, give the reasons supporting those findings at the time of sentencing, and include said findings in its subsequent judgment entry.

I. Introduction

In its brief, the State acknowledges that R.C. 2929.41(A) requires findings. But it asserts that this statute does not "require the trial judge make the level of findings" posited by Mr. Bonnell. (Appellee Br. 6, Aug. 27, 2013). The State also contends that trial courts do not need to set forth reasons for their findings, and further, that a conflict exists between R.C. 2929.14(C)(4) and Crim.R. 32(A)(4). *Id.* at 7. Finally, the State posits that the trial court made the required findings. The State is mistaken on all counts.

II. There is no conflict, and providing supporting reasons is still required.

The State takes issue with trial courts being required to give reasons to support their findings when imposing consecutive sentences. Specifically, the State alleges that a substantive conflict exists between R.C. 2929.14(C)(4) and Crim.R. 32(A). And that the statute supersedes the rule; thus, eliminating the requirement to provide reasons. But there is no conflict.

The State's conflict is illusory because the statute and rule are complementary. Indeed, Crim.R. 32(A)(4) specifically provides that a trial court must "state its statutory findings and give reasons supporting those findings[.]" And R.C. 2929.14(C)(4) requires the court to make findings. There is no instance where a trial court will be unable to fulfill the mandates of both the statute and the rule.

The State also incorrectly states that Crim.R. 32(A)(4) improperly enlarges or modifies the substantive rights set forth in R.C. 2929.14(C)(4). The statute creates an underlying substantive right to certain, specific findings, such that a meaningful appeal may be had. The rule sets forth the application of that underlying right, speaking to the course and manner in which it is carried out. *See generally State v. Greer*, 39 Ohio St. 3d 236, 245-246, 530 N.E.2d 382 (1988). The right is neither modified, nor enlarged.

III. The "level of findings" required is making actual findings.

The State argues that Mr. Bonnell asks too much of trial courts. In doing so, the State relies heavily on case law rejecting the need for magic, talismanic words, or the verbatim statutory language for findings to be made. (Appellee Br. 8-9). But Mr. Bonnell, and others similarly situated, aren't simply asking for "magic words." He is simply requesting that trial courts make the statutorily-required findings before restraining his liberty for consecutive years.

A court that seeks to overcome the statutory presumption for concurrent sentences can do so when it finds the following:

- Consecutive sentences are needed to protect the public from future crime <u>or</u> to punish the offender; <u>and</u>,

- Consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger posed to the public; and,

- Either (1) one or more offense was committed while awaiting a trial or sentencing, or under a statutory sanction, or under post-release control; or (2) at least two offenses were committed as a part of one course of conduct and that the harm caused is so great or unusual that a single prison term would reflect the seriousness of the conduct; or (3) the offender's history of criminal conduct demonstrates consecutive sentences are needed to protect the public from future crimes.

R.C. 2929.14(C)(4). Mr. Bonnell acknowledges that the exact language found in the statute does not need to be parroted to an offender. Nor are there magic words that will constitute findings. But findings must actually be made. The statute does not allow for findings to be hinted at or sufficiently implied. The statute requires that there be enough discussion that court of appeals can conduct a meaningful review ensuring that the required findings were made.

In Mr. Bonnell's case, before sentencing him to an additional five years and nearly eleven months in prison, the trial court stated: "Going through all of the sentencing factors I can not [sic] overlook the fact that your record is atrocious. The courts have given you opportunities. * * * It's pretty clear that at this point in time you've shown very little respect for society and the rules of society." (Sentencing Hearing Tr. 15-16, Jan. 6, 2012). Despite the State's assertion that the "Trial Court took pains to acknowledge the PSI, the number of prison terms served, [Mr. Bonnell's] atrocious criminal history, coupled with the serious of the offense" these are not proper findings, because the court's admonishment fails to comport with R.C. 2929.14(C)(4) and Crim.R. 32(A) in three critical respects. (Appellee Br. 9).

The first required finding is that consecutive sentences are needed to protect the public from future crime or to punish the offender. Here, the State asks that one of two assumptions be made: either this Court should assume that issuing a consecutive sentence equates to a finding that punishing the offender requires consecutive sentences, or that the references to Mr. Bonnell's *past* misdeeds equates to consecutive sentences being needed to protect the public from future crimes. If this Court deems these assumptions proper, the trial court made the first required finding.

The second required finding is that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger posed to the public. Here, the State and the trial court's silence speaks volumes. Proportionality and Mr. Bonnell's danger to the public were never addressed, explicitly or implicitly. Thus, the State is asking this Court to assume that silence equates to a proportionality finding and a public danger finding sufficient to necessitate nearly six years of additional incarceration.

Finally, the third required finding requires a trial court to find one of three things. In Mr. Bonnell's case, it is unknown whether he was awaiting trial or sentencing in another case, or whether he was under a sanction or post-release control. Or, this Court is forced to assume that the trial court found that Mr. Bonnell's conduct was committed as one course of conduct. But then this Court would also have to assume that the trial court found Mr. Bonnell's property crimes

caused a harm so great that a single prison term would not reflect the seriousness of the conduct.

Alternatively, this Court must assume that the trial court's discussion about Mr. Bonnell's record equates to a finding that his criminal history demonstrates consecutive sentences are needed to protect the public from future crimes. This assumed finding would mirror the assumed finding sought to comply with the first required finding above. Notably, by the State's interpretation, a trial court's remarks on an offender's past record automatically satisfies the first and third findings, as required by R.C. 2929.14(C)(4).

The statute, however, requires a more explicit discussion, so appellate courts do not have to assume findings were made. Put simply, the statute requires the trial court make actual findings. R.C. 2929.14(C)(4). In its split decision, the Fifth District found that the trial court's pre-sentencing remarks constituted "findings" that "when coupled with the trial court's acknowledgement that it has read and considered the PSI are sufficient to satisfy the factual findings requirement under R.C. 2929.19(C)(4)." *State v. Bonnell*, 5th Dist. Delaware No. 12CAA030022, 2012-Ohio-5150, ¶ 10-11. Concluding, the Fifth District made the explicit findings the trial court should have made. *Id.* at ¶ 13.

The cases cited by the State to support its assertion that the trial court made findings are inapposite. In *Jones*, after reviewing the PSI and sentencing hearing transcript, the First District was "convinced" the trial court made the requisite findings. *State v. Jones*, 1st Dist. Hamilton No. C-110603, 2012-Ohio-1854, ¶ 22. In

Jones, however, the First District's discussion of the record demonstrates that the trial court, unlike in Mr. Bonnell's case, specifically addressed the harms caused by the offender, as well as the offender's past record. *Id.* at ¶ 23. Thus, to the extent the First District was willing to assume findings, these assumptions were grounded in the trial court's discussion of factors directly related to the consecutive sentencing statute. This is not the case here.

Similarly in *Davis*, the Eighth District discussed the trial court's inclusion of findings at the sentencing hearing as well as in the sentencing entry, and was able to point to the trial court's specific statements referencing the offender's criminal record, unsuccessful rehabilitation, the great harm caused to the victims, and the seriousness of his crimes. *State v. Davis*, 8th Dist. Cuyahoga Nos. 97689, 97691, 97692, 2012-Ohio-3951, ¶ 9-10. In her concurring opinion in *Davis*, Judge Patricia Ann Blackmon aptly noted that she "would go further and require the trial court to be more specific in terms of its findings, especially when it comes to the R.C. 2929.14(C)(4)(a), (b), or (c). We should not have to guess as to which of the three findings the court is referencing." *Id.* (Blackmon, A.J., concurring in judgment only).

IV. The statutory findings and accompanying reasons must be stated at the sentencing hearing *and* included in the sentencing entry.

Contrary to the State's assertion, Mr. Bonnell did not attempt to "piece together" case law to support his position that the required findings must be made at the sentencing hearing and in the court's sentencing entry. (Appellee Br. 10). Rather, Mr. Bonnell was demonstrating the considerable confusion throughout Ohio's courts regarding when and where to make the statutory findings.

This confusion illustrates that some courts demand the findings in the entry, while others demand the findings be made on the record, at the sentencing hearing. As such Mr. Bonnell requests this Court find that trial courts should be required to state their findings and reasons at both the sentencing hearing and in its sentencing entry. This is necessary to provide defendants with notice and assists appellate courts in their review of consecutive sentencing issues. The State asserts that appellate courts should review the entire record and piece together comments to locate the findings. In effect, the State suggests that reviewing courts should be left "combing through the trial record in a speculative attempt to discover what factors the trial court may have relied upon in determining the length of a prison term" *State v. Martin*, 136 Ohio App. 3d 355, 361, 736 N.E.2d 907 (3rd Dist. 1999). This stands contrary to judicial efficiency and economy, and does not protect a defendant's right to due process.

CONCLUSION

Mr. Bonnell is serving consecutive sentences that are clearly and convincingly contrary to law. The sentencing court ignored its duty to make statutorily-required findings under R.C. 2929.14(C)(4). The legislative intent behind R.C. 2929.14(C)(4) was to provide an offender, like Mr. Bonnell, the right to a meaningful appellate review of his sentence, as well as provide uniformity and consistency to sentencing in Ohio. The trial court's refusal to make those findings, and the court of appeals' permissiveness when faced with that refusal, have stripped Mr. Bonnell of his right to an appeal and resulted in a non-violent offender

serving nearly a decade in prison. This Court must reverse the judgment of the court of appeals, vacate Mr. Bonnell's sentence, and remand to the trial court for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Reply Brief of Appellant Randall L. Bonnell, Jr.* was sent by regular U.S. mail, postage prepaid to:

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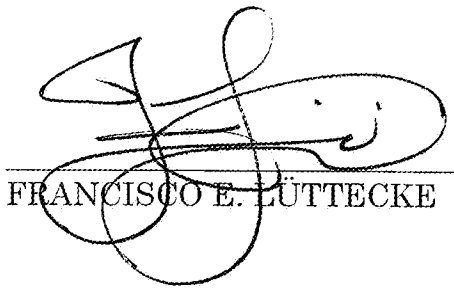
on this 16th day of September, 2013.



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