

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

JEFFERY BELEW,

DEFENDANT-APPELLANT.

:
: CASE No. 2013-0711
:
: ON DISCRETIONARY APPEAL FROM THE
: LUCAS COUNTY COURT OF APPEALS,
: SIXTH APPELLATE DISTRICT,
: CASE No. L-11-1279
:
:
:

MERIT BRIEF OF APPELLANT JEFFERY BELEW

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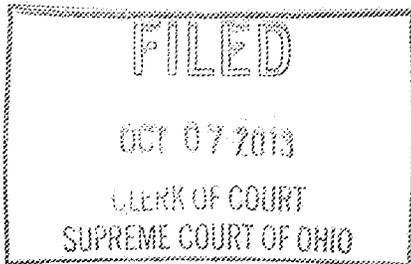


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INTRODUCTION

I. This case is about mitigation, not excuses.

This case is about how to hold veterans accountable for committing serious crimes while also considering how service-related mental illness should mitigate, but not eliminate, the punishment imposed for those misdeeds. This case is also about the need to consider service-related mental illness when that illness turns a reckless person into someone who is dangerous both to himself and to others. This case is not about *excusing* criminal behavior, as the trial court ruled. This case is about *mitigation*.

II. The trial court did not understand how to consider Mr. Belew's service-related mitigation when imposing his sentence.

Jeffery Belew had problems before he joined the Marine Corps. But his service, including a tour in Iraq, made those problems worse and more dangerous, and added a new one—combat-related post-traumatic stress disorder (PTSD). The trial court simply did not understand that PTSD could make a troubled person worse. Instead, in the trial court's view, Mr. Belew's pre-military problems meant that PTSD could not have been a contributing factor to his crime. But PTSD does not just affect model Marines. It affects troubled ones like Mr. Belew. And it makes those troubles worse.

III. Ohio trial courts need this Court's help to understand how to punish veterans while giving appropriate weight to service-related mitigation.

Unfortunately, Mr. Belew is not alone—large numbers of veterans work their way through Ohio's criminal justice system. According to the Ohio Department of

Rehabilitation and Correction, 4.7% of all new inmates are veterans.¹ Because the Department reports an annual intake of about 20,000 inmates, approximately 940 veterans a year enter Ohio's prisons. And that number does not include misdemeanor cases or felony cases resulting in nonprison sanctions, which are likely far, far more numerous.²

Lower courts have struggled with how to deal with combat-related injuries, particularly traumatic brain injuries or combat-induced psychological injuries. For example, the Fifth District affirmed a trial court's decision to prohibit a defendant from introducing papers stating that his discharge was related to post-traumatic stress disorder, but permitted documents that the discharge was due to a positive marijuana test (the defendant argued that he was self-medicating). *State v. Sellers*, 5th Dist. Delaware No. 12CAA020012, 2012-Ohio-5546, ¶ 44-52.

Service-related mental illness arises in all sorts of contexts, not just criminal sentencing. Lower courts have affirmed the permanent removal of children from veterans suffering from traumatic brain injury and post-traumatic stress disorder. *In re C.C.*, 12th Dist. Warren Nos. CA2011-11-113 and CA2011-11-127, 2012-Ohio-1291; *In re*

¹ Ohio Department of Rehabilitation & Correction, Bureau of Research, *Profile of Military Veteran Offenders- 2009, Intake*, <http://www.drc.state.oh.us/web/Reports/intake/Intake%202009%20-%20Profile%20of%20Vets%20vs.%20Non%20Vets.pdf> (accessed Oct. 7, 2013).

² Ohio Department of Rehabilitation & Correction, Bureau of Research, *Yearly Intake and Population on January 1, by Sex, with Percentage Change from Preceding Year, 1972-2013*, <http://www.drc.state.oh.us/web/Reports/intake/Calendar%20Year%20Intake%20and%20Population%20on%20January%201%201972%20-%202013.pdf>. (accessed Oct. 7, 2013).

Macey R., 6th Dist. Lucas No. L-08-1113, 2008-Ohio-4916; *In re Adoption of M.E.*, 6th Dist. Erie No. E-08-081, 2009-Ohio-2604. And this Court has noted that service-related depression, traumatic brain injury, and post-traumatic stress disorder can mitigate attorney misconduct. *Butler County Bar Ass'n v. Minamyers*, 129 Ohio St.3d 433, 2011-Ohio-3642, ¶ 24.

Mr. Belew, like many other veterans before Ohio courts, does not seek to excuse his criminal conduct. He wants only a fair sentencing hearing. Lower courts need this Court's guidance about how to punish veterans for their criminal conduct while properly considering how military service affected veterans' ability to cope with civilian life.

STATEMENT OF THE CASE AND THE FACTS

At sentencing, the trial judge misunderstands how PTSD relates to Mr. Belew's conduct.

At Jeffrey Belew's sentencing hearing, the prosecutor claimed it was shameful for a veteran to argue that combat-related post-traumatic stress disorder was mitigation:

I find his defense or mitigation of post-traumatic stress because of the things that he has seen or done in the military deplorable and I find it insulting to thousands and thousands of military members who returned who suffer from anxiety disorders and who do not carry guns and shoot at police officers.

T.p. 24.³ The trial court agreed:

Mr. Belew, you claim that you suffer from post-traumatic stress disorder as a result of being in the military and you provide that as an excuse for your actions. There is no excuse, Mr. Belew. I have to -- I feel that I'm compelled because of my concerns of why you entered the military, to weigh that. And your words to Dr. Charlene Cassel were, "I joined the Marines to see how many people I could kill."⁴ That's, generally -- if I'm not mistaken, people don't join the military to see how many people they can kill. You were continually in trouble and constantly drunk and under the influence of alcohol and drugs, and you received a bad conduct discharge after being court-martialed for stealing government property.

Id. at 25. As the trial court's explanation suggests, Mr. Belew struggled since early childhood. But the trial court did not understand that service in the Marine Corps, including combat in Iraq, turned his serious problems into something dangerous.

³ Unless otherwise designated, all transcript citations are to the Oct. 20, 2011 sentencing hearing.

⁴ Mr. Belew informs counsel that he understood Dr. Cassel's question to ask what the purpose of a Marine was, and he answered as he was trained to answer that question -- his purpose as a Marine was to kill people.

Mr. Belew's parents go to prison for drugs when he's three years old, and he begins to drink early.

Mr. Belew moved in with his grandparents when he was about three years old because his parents were in prison at the time. Dr. Robert Graves, Psychological Evaluation for Criminal Responsibility, (June 26, 2011) at 3. His parents were involved with multiple forms of drugs, including heroine, crack, pharmaceuticals, PCP, LSD, and mushrooms. *Id.* Mr. Belew doesn't remember exactly when his parents got out of prison, but he began to see them more when he was a teenager. *Id.*

He began to drink alcohol at age 10 or 12. Graves at 4, Dr. Charlene A. Cassel, Evaluation (May 12, 2011) at 5. He first got drunk at age 16 while drinking whiskey with his father and brother. Graves at 4. He had scrapes with the juvenile justice system—he was adjudicated delinquent of assault and disorderly conduct, and had several similar charges dismissed or closed “unofficial[ly].” Presentence Investigation Report (“PSI”) (Juvenile Priors).

Mr. Belew struggles in school, and then joins the Marine Corps.

In high school he was athletic, participating in track, cross country, basketball, and football. But he struggled academically—he failed ninth grade but managed to graduate with a “C” average. Cassel at 3. He then immediately joined the Marine Corps. Graves at 3.

After training, Mr. Belew was deployed to Iraq during “the Surge,” when combat was especially frequent. T.p. 18. While there, part of his duty as a member of a Quick

Reaction Force was to race to the assistance of Americans under attack or recently under attack. Report at 4. He saw many deaths, including at least one child. He said that the Iraqis would train "little kids to kill us[.]" Graves at 5. Sometimes, his job was to clean up after the fighting had stopped, including recovering the bodies. Graves at 4. Other times, he acted as security for convoys. Cassel at 3. He lived each day as if he had a "50/50" chance of dying—he called that "50/50ing it." Graves at 5, T.p. 8.

His on-again-off-again access to alcohol in Iraq deepened his alcoholism. He would go a week without access to alcohol, and then get enough to binge on. Graves at 5. He also began to use Percocet and Oxycontin. *Id.* And he tried alcohol combined with cocaine a "few times." Graves at 6.

He returned to stateside duty as a corporal, but, he was isolated from his combat unit, and his alcohol use "accelerated significantly[.]" T.p. 8-9; Special Court-Martial Action and Order No. D08-346, USMC, 5th Battalion, 10th Regiment, 2d Marine Division (Nov. 20, 2008). He got drunk at least a couple times a week, almost always with the same barracks mate. Graves at 5. He attended an alcohol program in the military, but he thought the other patients weren't serious because many of them abused drugs and continued to drink. T.p. 10; Graves at 6.

While drunk, Mr. Belew and a friend stole some material from another barracks and went "joy riding" in a government HumVee. T.p. 9. The officer of the day quickly caught up with them. Graves at 6. Corporal Belew was demoted to private and given a

bad conduct discharge after he pleaded guilty to attempting to wrongfully appropriate government property. PSI (Adult Record). After 3½ years in the Marines, including a year in Iraq, he left the service as an alcoholic with untreated post-traumatic stress disorder.

Mr. Belew returns to Ohio and treats his PTSD with alcohol, which only makes things worse.

He returned to Ohio, and he treated his PTSD with alcohol, which just made things worse. T.p. 16. "He came home and tried to reintegrate in some fashion into society." T.p. 10 (sentencing). But he "felt as if he had been discarded." Graves at 5. He tried to work. He'd get a job, feel that he didn't fit in, quit, and then spend the rest of the day drinking. *Id.* He drank extraordinarily large amounts every day to the point where he regularly passed out and had blackouts. T.p. 10; Graves at 6.

He had difficulty rejoining his family. He said that his family members think that he's "some fucking weirdo." Graves at 5. He felt that "anyone else trying to make things better for him" was just trying to "cover up." *Id.*

He had a particularly hard time sleeping, he was easily startled, and he had a handgun in a holster on his side at all times, including when he slept. T.p. 11. If someone approached him while sleeping, he would wake up startled and draw his gun. *Id.* He scared people, and his family called him "crazy" for not being able to let go of the gun, which he took off only to take a shower (and even then, not always). *Id.* He explained, "[I was] brainwashed to think the gun's a part of me, like a wedding ring."

Id. As a result of his military training, he believed he was less of a man if he didn't have a weapon with him.⁵ *Id.*

It was hard to sleep because nightmares that began in the service continued almost every night. Graves at 5. The nightmares were about being in places that were dangerous or where attacks had occurred. *Id.* Describing the fear, he said that “[y]our asshole puckers up and everything goes blank.” Then for about two or three minutes, things are simply frozen in time, before “it all comes back.” *Id.*

The same thoughts would come back during the day, but it was easier to distract himself then. *Id.* at 5. He solved most of these issues like he did many things – “drinking until I passed out.” *Id.* at 6.

Mr. Belew went through periods of what he called, “ass-puckering fear.” T.p. 13. He tried to avoid crowds. T.p. 14. He would feel the fear when someone would drive near him or when he heard a foreign language. Graves at 5. He told Dr. Graves that, “I always remembered, you’re expendable no matter if you die because somebody is going to take your place.” *Id.*

⁵ The Marine Corps’ Rifleman’s Creed, which all Marines must memorize, states, “My rifle is my best friend. It is my life. * * * My rifle, without me, is useless. Without my rifle, I am useless. * * * My rifle is human, even as I, because it is my life. Thus, I will learn it as a brother. * * *” Major General William H. Rupertus. “My Rifle: The Creed of a U.S. Marine.” United States Marine Corps. Archived from the original on 2007-03-10, <http://web.archive.org/web/20070310183121/http://www.lejeune.usmc.mil/2dmardiv/aa/bn/Rifleman.htm> (accessed Aug. 21, 2013).

He had several run-ins with the law that did not result in convictions. He was charged with simple assault, felonious assault, tampering with evidence, and burglary, but the charges were dismissed. PSI (Adult Record). More significantly, he was convicted of misdemeanor charges often associated with alcoholism—open container in a moving vehicle, lack of automobile insurance, and disorderly conduct. *Id.*

He spirals down to confronting two police officers with a gun and firing at them.

Early in the morning in April 2011, Mr. Belew's two brothers got into a fight with each other after the three had been heavily drinking for three hours. Cassel at 7. Mr. Belew, who had roughly 15-20 drinks by then, tried to intervene, and the two turned against him. Graves at 7-8, T.p. 12. "When he learned the police had been called, he said, "It doesn't matter. I'm gonna fucking kill myself and shoot the cops." Graves at 7. He then went outside with a handgun and fired at the cars of two officers as they arrived, "hoping that he would be killed." T.p. 12. Dr. Graves testified that, in his professional opinion, Mr. Belew was trying to commit "[s]uicide by cop." T.p. 12. The State introduced no evidence to the contrary. The officers then shot Belew in the chest and arrested him. Cassel at 4. No officer was hurt. PSI (Victim Impact Statement).

Two evaluations, one building on the other, and both finding serious mental health issues.

Initially, Mr. Belew pleaded not guilty by reason of insanity. T.p. 3 (May 18, 2011). He was interviewed by two psychologists, the first assigned by the Court Diagnostic and Treatment Center, the second chosen by the trial judge. Order (Apr. 27, 2011); T.p. 6 (May 18, 2011). Dr. Charlene Cassel conducted the initial interview. She wrote a report, but never testified. The trial court then selected Dr. Wayne Graves to conduct a follow up interview. T.p. 6 (May 18, 2011). Both parties accepted the trial court's choice. *Id.* Dr. Graves wrote a report building on Dr. Cassel's work. He also testified at sentencing.

Dr. Cassel, who interviewed Mr. Belew one month after his crime, found that Mr. Belew was depressed and that there was evidence of malingering and a personality disorder. Cassel at 1, 9. She did not specify what that evidence was or which personality disorder she suspected. She also did not address the possibility that Mr. Belew suffered from post-traumatic stress disorder connected to his military service.

Two and a half months later, at the trial court's direction, Dr. Graves conducted a follow up interview and built on Dr. Cassel's initial report. Dr. Graves reported that Mr. Belew had an "overall demeanor is that of a quiet, frightened, significantly depressed individual who has a positive attitude and a chagrin and worry at his own lack of memory of the events in questions." Graves at 2.

Dr. Graves, whose testimony was uncontroverted, testified about Mr. Belew's "persistent" major depression, post-traumatic stress disorder, and alcohol dependence. T.p. 13. The PTSD had been "going on for several years." T.p. 14. Dr. Graves explained that post-traumatic stress disorder was more common among Iraq war veterans than veterans of previous wars:

[T]he level of post-traumatic stress disorder in Iraq Veterans appears to be higher than we've documented in other conflict military situations before, and it appears to be in great part because of the lack of certainty of the environment. That is, the inability to identify danger. So you live in a kind of constant state of danger, highlighted by – he observed – he observed death, he observed people blowing themselves up, he observed the aftermath of that, he saw children die in front of him, he saw what would have been crimes if there had been somebody watching, by US military, he was exposed to a lot of difficult things.

T.p. 15.

Mr. Belew wanted to die, but he didn't want to kill himself.

As to suicide, Dr. Graves testified that Mr. Belew had considered dying "for quite a while" before this incident. T.p. 12. Further, Mr. Belew "did not want to take his own life, but he did want to die." *Id.* Dr. Cassel made a similar finding, explaining that Mr. Belew had thought about suicide, but believed that's "a coward's way out." Cassel at 8. Dr. Graves testified that he believed Mr. Belew was trying to commit "suicide by cop." *Id.*

An illness that required “very active” outreach to treat.

Dr. Graves testified that people who, like Mr. Belew, are depressed and feel rejected by their family and their former comrades, require “very active” outreach and strong “local support systems” to treat—they cannot simply be offered treatment. T.p. 16. Dr. Cassel did not testify, and her report did not opine about what treatment Mr. Belew required. Dr. Graves wrote that Mr. Belew’s “actions are in many ways, in my opinion, in the consequence of a young man, thrown into the horrors of war[,] ill[] equipped and unable to cope.” Report at 10. The State presented no evidence to contradict the testimony of Dr. Graves.

Mr. Belew accepts responsibility and does not try to excuse his crime.

Mr. Belew pleaded guilty to two counts of felonious assault on a police officer with seven-year specifications for firing a gun at a peace officer, R.C. 2903.11(D)(1)(a); 2929.14(B)(1)(f). An expert chosen by the trial judge and accepted by both sides agreed that Mr. Belew had service-related post-traumatic stress disorder, and verified that he was trying to commit “suicide by cop.” T.p. 6 (May 18, 2011); T.p. 12 (sentencing). The State presented no evidence to the contrary and chose not to cross examine Dr. Graves. T.p. 17.

Although Dr. Cassel’s early report stated that “Mr. Belew appears to have difficulty accepting responsibility for his behavior,” Cassel at 9, she also wrote that “Mr. Belew said it was irresponsible to drink and carry a gun and that it was wrong to

shoot at police officers.” *Id.* at 9. When the trial judge asked Mr. Belew if he had anything to say at sentence, he said only, “Yes, ma’am. I would just like to apologize to the officers involved in the situation. That’s it.” T.p. 22.

The trial court imposes the maximum sentence permitted by the plea agreement.

The trial court sentenced Mr. Belew to consecutive sentences totaling twenty-seven years in prison—nine years for each felonious assault charge, and seven years for the merged firearm specification, which was the most permitted by the plea agreement. T.p. 5 (Sept. 14, 2011); T.p. 27-8 (Sentencing).

On appeal, his counsel argued that the trial court failed to properly consider Mr. Belew’s mitigation. Brief (Apr. 5, 2012), at 7-19. The court of appeals affirmed. *State v. Belew*, 6th Dist. Lucas No. L-11-1279, 2013-Ohio-1078. This Court accepted Mr. Belew’s timely appeal. *State v. Belew*, 136 Ohio St.3d 1449, 2013-Ohio-32.

ARGUMENT

Proposition of Law:

When credibly diagnosed, a trial court must consider combat-related post-traumatic stress disorder and other service-related disabilities as mitigation when imposing sentence on a military veteran.

A. Introduction

[Jeffery Belew's] actions are in many ways, in my opinion, [the] consequence of a young man, thrown into the horrors of war[, ill] equipped and unable to cope.

Wayne J. Graves, PhD, a clinical and forensic psychologist selected by the trial court to evaluate Mr. Belew. Report at 7.

B. Standard of Review

The standard of review is whether this Court "clearly and convincingly finds either of the following: (a) That the record does not support the sentencing court's findings under . . . division (B)(2)(e) or (C)(4) of section 2929.14 (consecutive sentences)[; or] (b) That the sentence is otherwise contrary to law." R.C. 2953.08(G)(2).

The Eighth, Tenth, and Twelfth Districts no longer follow the two-step process outlined in the lead opinion of *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. Those districts correctly hold that House Bill 86 revived the clear and convincing standard in R.C. 2953.08(G)(2):

[T]he "post-Foster era ended with the enactment of [2011 Am.Sub.H.B. No. 86, effective September 30, 2011,] and the revival of statutory findings necessary for imposing consecutive sentences under R.C. 2929.14(C)(4)." *Id.* Therefore, from this day forward, rather than continue to apply the two-step approach as provided by *Kalish*, we find "the standard of review

set forth in R.C. 2953.08(G)(2) shall govern all felony sentences.” *State v. A.H.*, 8th Dist. Cuyahoga No. 98622, 2013-Ohio-2525, ¶ 7; *see also State v. Cochran*, 10th Dist. Franklin No. 11AP-408, 2012-Ohio-5899, ¶ 52, 983 N.E.2d 903; *State v. Martin*, 11th Dist. Portage No. 2012-P-0114, 2013-Ohio-2833, ¶ 31 (OToole, J., dissenting); *see, e.g., State v. May*, 8th Dist. Cuyahoga No. 99064, 2013-Ohio-2697, ¶ 20 (applying the standard outlined in R.C. 2953.08(G)(2) in reviewing the imposition of a maximum sentence).

As the three-vote dissent in *Kalish* explained, under the R.C. 2953.08(G) standard, a court of appeals, in deciding whether a sentence was clearly and convincingly contrary to law under R.C. 2953.08(G)(2)(b), must “look to the record to determine whether the sentencing court considered and properly applied the [non-excised] statutory guidelines and whether the sentence is otherwise contrary to law.” (Brackets sic.) *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 65 (Lanzinger, J., dissenting); *quoting State v. Burton*, 10th Dist. Franklin No. 06AP-690, 2007-Ohio-1941, ¶ 19, *quoting State v. Vickroy*, 4th Dist. Hocking No. 06CA4, 2006-Ohio-5461, ¶ 16.⁶

C. The record clearly and convincingly shows that that the trial court did not properly weigh the mitigating and aggravating factors, and the sentence is therefore contrary to law.

The trial court record clearly and convincingly shows that Jeffery Belew’s crime was tied to the post-traumatic stress disorder he suffered as a result of his combat military service. The record also clearly and convincingly shows that Jeffery Belew was

⁶ Because plurality opinions don’t create binding law for anyone except the parties, the three-vote dissenting opinion carries as much persuasive authority as the three-vote lead opinion. *See, e.g., Kraly v. Vannewkirk*, 69 Ohio St.3d 627, 633 (1994) (plurality decision “of questionable precedential value inasmuch as it was a plurality opinion which failed to receive the requisite support of four justices of this court in order to constitute controlling law”).

not trying to excuse his criminal behavior. He pleaded guilty, both psychologists who interviewed him explained that he showed remorse, and he apologized at the sentencing hearing.

1. **The record clearly and convincingly demonstrates that Jeffery Belew's military service exacerbated his alcoholism and left him with post-traumatic stress disorder.**
 - a) **Mr. Belew suffered from combat-related post-traumatic stress disorder.**

The United States Supreme Court has noted that "PTSD is not uncommon among veterans returning from combat [and] that approximately 23% of the Iraq and Afghanistan war veterans seeking treatment at a VA medical facility had been preliminarily diagnosed with PTSD[.]" *Porter v. McCollum*, 558 U.S. 30, 35 n.4 (2009), citing, Hearing on Fiscal Year 2010 Budget for Veterans' Programs before the Senate Committee on Veterans' Affairs, 111th Cong., 1st Sess., 63 (2009) (uncorrected copy) (testimony of Eric K. Shinseki, Secretary of Veterans Affairs (VA)). That Court has also held that "Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines[.]" *Porter* at 43.

As Dr. Graves explained in this case, post-traumatic stress disorder is a "reaction to a traumatic event or series of events where there is real fear of loss of life or where there is real fear of someone very near to you or close to you dying" and you re-experience it, having the same "intense sensations." T.p. 13. He further explained that

PTSD “is the reliving of that event in a . . . disturbing” fashion. T.p. 14. It’s a set of heightened responses, including startle response, irritability and anger, periods of difficulties with sleep pattern and inability to sleep, bad dreams, anything that causes rushes of intensity in his feeling situation.” *Id.* The State did not contest this description.

Here, the record clearly and convincingly shows that Mr. Belew suffered from service-related PTSD. Among other duties, he protected convoys in Iraq and served on a team that responded when other Americans were attacked. He was shot at and lived each day as if he had a fifty percent chance of dying. Part of this duty also involved caring for the bodies after a firefight. Graves at 4-5. When he returned, he didn’t feel safe without a gun, so he slept with it. T.p. 11. Nightmares of attacks or dangerous places he had been caused “ass-puckering fear” and made it difficult to sleep at night. Graves at 5. If someone woke him up, he would startle and point the gun. T.p. 11, 13. Hearing foreign languages brought back the fear of attack, as would crowds or when someone would drive near him. Graves at 5. That fits precisely the definition of post-traumatic stress disorder as explained by Dr. Graves.

- b) The record clearly and convincingly shows that military service exacerbated Mr. Belew’s alcoholism and caused him to develop post-traumatic stress disorder.**

The trial court held that the problems Mr. Belew had before and during his military service demonstrate that his service did not influence his actions. T.p. 25. But mitigation isn’t only for model citizens. Combat service can turn manageable problems

into dangerous ones. It's true that Mr. Belew had alcohol-related problems before he was deployed as part of the Surge, but the cycle of military training exacerbated his binge drinking. When a young man who has been drinking since age 10 or 11 is introduced to prolonged, intense training with intermittent short breaks, and then into the horrors of war, it's not surprising that a moderate alcohol problem turns into something more serious.

It's true that he was offered treatment on several occasions, but Dr. Graves testified that mere *offers* of treatment were not sufficient. Instead, treating a person with Mr. Belew's problems required, "very active" outreach and strong "local support systems[.]" T.p. 16. Nothing in the record shows that Mr. Belew had either.

His service exacerbated his pre-existing alcoholism. Before the service, Mr. Belew would occasionally get drunk, but his life was more-or-less under control. In the service, the ebb and flow of alcohol and prescription drugs combined with the stress of his work, worsening his alcoholism. He used alcohol to self-medicate for his PTSD while still in the Marines, and that continued upon his discharge.

The trial court also showed a misunderstanding of service-related mental illness when it held that Mr. Belew's guilty plea at a special court martial shows his problems were not created by his service. T.p. 25 ("You were continually in trouble and constantly drunk and under the influence of alcohol and drugs, and you received a bad conduct discharge after being court martialed for stealing government property.") As

Dr. Graves explained, post-traumatic stress disorder is triggered by real life-threatening fear, not discharge from the service. A Marine with PTSD will suffer the effects while still a Marine.

2. The trial court misunderstood the job of a Marine.

The trial court also misunderstood Mr. Belew's description of the nature of the job of a Marine. Dr. Cassel's report indicated that Mr. Belew told her that he joined the Marines, "to see how many people I could kill." Cassel at 4. The trial court said that it was odd to join the Marines to kill people, but added the caveat, "if I'm not mistaken[.]" T.p. 25. The court was mistaken. Individual Marines have frequently described their purpose as killing people.⁷ And, as previously explained, Mr. Belew believes that Dr. Cassel misunderstood him, and that he told her that a Marine's job was to kill people. But setting that aside, the reality is that one task we demand of our Marines is to kill people. Anyone not willing to have that job should not enlist in the Marine Corps.

⁷ Columbia Center for Oral History, Columbia University, *The Rule of Law Oral History Project, The Reminiscences of V. Stuart Couch*, at 21, (2012) http://www.columbia.edu/cu/libraries/inside/ccoh_assets/ccoh_10100507_transcript.pdf (viewed Oct. 7, 2013) ("In the Marine Corps we had this saying, 'Our job is to kill people and break things.' That's why a lot of people want to join the Marine Corps. It's just as blunt as that. We train really hard, and we kind of live for a fight.") Lt. Col. Couch also served as a military prosecutor at Guantanamo Bay and was currently a federal immigration judge at the time of the interview. *Id.* at 2.

3. **The record clearly and convincingly shows that Mr. Belew did not use his military service as an excuse for his criminal conduct.**

The record clearly and convincingly shows that the trial court was wrong when it found that Mr. Belew was trying use his military service as an “excuse[.]” Neither Mr. Belew nor his counsel argued that Mr. Belew post-traumatic stress disorder excused his actions. To the contrary, his counsel pointed out that Mr. Belew at first tried to deny that he had served in combat. T.p. 18. It was only after counsel learned the truth from Mr. Belew’s former gunnery sergeant that Mr. Belew conceded he had combat experience. *Id.* His counsel argued that the trial court should consider PTSD and sentence Mr. Belew to the minimum ten-year sentence. T.p. 22. Counsel did not argue that PTSD justified or excused Mr. Belew’s conduct.

Instead, Mr. Belew argued that PTSD and the related alcoholism *mitigated* his crime. And this Court has recognized that service-related mental disorders are relevant mitigating factors. In *State v. Lawrence*, 44 Ohio St.3d 24, 32 (1989), this Court held that while the defendant’s “mental disorders [including post-traumatic stress disorder] do not excuse his conduct, they are certainly relevant as mitigating factors.” The United States Supreme Court later made the same finding. *Porter v. McCollum*, 558 U.S. 30, 35 n.4 (2009).

The minimum sentence for the offenses Mr. Belew pleaded guilty to having committed is ten years in prison—three years of concurrent time for the two felonious

assaults plus seven years of concurrent time for the firearm specifications. R.C. 2903.11(D)(1)(a), 2929.14(A)(1), 2929.14(B)(1)(f). Pleading guilty to a non-homicide crime with a ten-year minimum sentence is not an attempt to excuse your conduct.

D. The record clearly and convincingly does not support the trial court's findings for consecutive sentences.

The trial court imposed consecutive sentences based on a rote recitation of the R.C. 2929.14 findings. Under R.C. 2929.12(C)(4), a defendant's crime is less serious when "[t]here are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense." And that is precisely what happened in this case. Mr. Belew's service-related posttraumatic stress disorder and his alcoholism that service made worse create "substantial grounds to mitigate" his conduct. And, contrary to the trial judge's statement at sentencing, Mr. Belew did not claim that his service-related mental illness excused his conduct. T.p. 25.

E. Mr. Belew prevails under the abuse of discretion standard.

The trial court abused its discretion because it based its sentence on fundamental misunderstandings of how military service and combat affect people with pre-existing problems. As this Court recently held, a "trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary [or when] a trial court did not engage in a 'sound reasoning process.'" *State v. Darmond*, Slip Op. No. 2013-Ohio-966, ¶34, citing, *State v. Adams*, 62 Ohio St.2d 151, 157 (1980), and *State v. Morris*, 132

Ohio St.3d 337, 2012-Ohio-2407, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

Here, the trial court did not engage in a sound reasoning process because it did not understand the nature of military service or its effect on Mr. Belew. The trial court believed Mr. Belew was using PTSD as an excuse, when he always accepted responsibility for his actions. The trial court believed that people don't join the Marine Corps to kill, but they do. The trial court did not recognize that PTSD does not only affect model Marines, but that the disorder can turn manageable problems into dangerous problems.

CONCLUSION

The trial court made several fundamental mistakes in this case. The sentencing explanation shows a misunderstanding of the nature of military service, particularly in the Marine Corps. The trial court also did not understand that military service can make a reckless person dangerous. And finally, the trial court mistook an argument to consider mitigation as an assertion that the underlying conduct was excusable.

The trial court in this case is not alone—many other courts have struggled with how to hold veterans accountable while properly considering service-related mitigation. This Court should provide the guidance those courts need.

This Court should reverse the decision of the court of appeals and remand for resentencing. This Court should direct the trial court to properly consider Mr. Belew's military service as mitigation when determining how much prison time he should serve for his crime.

Respectfully submitted,

Office of the Ohio Public Defender



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Assistant Public Defender
(Counsel of Record)

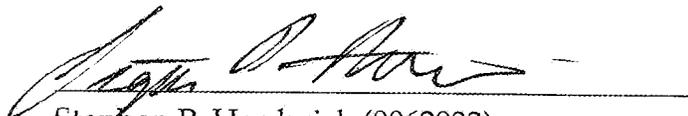
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Counsel for Appellant Jeffery Belew

Certificate of Service

I hereby certify that a true copy of the foregoing was forwarded by electronic mail to, Assistant Prosecuting Attorney David Cooper, dcooper@co.lucas.oh.us, on this 7th of October 2013.



Stephen P. Hardwick (0062932)
Assistant Public Defender

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	13-0711
PLAINTIFF-APPELLEE,	:	CASE NO.
	:	
V.	:	ON DISCRETIONARY APPEAL FROM THE
	:	LUCAS COUNTY COURT OF APPEALS,
JEFFREY BELEW,	:	SIXTH APPELLATE DISTRICT,
	:	CASE NO. L-11-1279
DEFENDANT-APPELLANT.	:	

NOTICE OF APPEAL OF APPELLANT JEFFREY BELEW

Lucas County Prosecutor's Office

Office of the Ohio Public Defender

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State of Ohio

Counsel for Appellant,
Jeffrey Belew

FILED
MAY 08 2013
CLERK OF COURT
SUPREME COURT OF OHIO

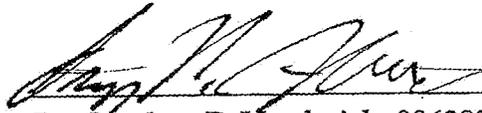
NOTICE OF APPEAL OF APPELLANT JEFFREY BELEW

Appellant Jeffrey Belew, hereby gives notice of appeal to the Supreme Court of Ohio from the Journal Entry of the Lucas County Court of Appeals, Sixth Appellate District, entered in Court of Appeals Case No. L-11-1279 on March 22, 2013.

This case raises a substantial constitutional question, involves a felony, and is of public or great general interest.

Respectfully submitted,

Office of the Ohio Public Defender



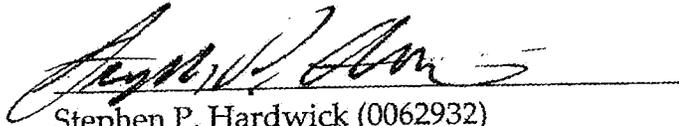
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CERTIFICATION OF SERVICE

I hereby certify that a true copy of the foregoing was forwarded by regular U.S. Mail, postage pre-paid to the office of Michael D. Bahner, Assistant Prosecuting Attorney, Lucas County Prosecutor's Office, Courthouse, 700 Adams Street, Toledo, Ohio 43604 on this 6th of May, 2013.



Stephen P. Hardwick (0062932)
Assistant Public Defender

Counsel for Appellant Jeffrey Belew

#392870



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COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

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

State of Ohio

Court of Appeals No. L-11-1279

Appellee

Trial Court No. CR0201101593

v.

Jeffery D. Belew

DECISION AND JUDGMENT

Appellant

Decided: MAR 22 2013

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael D. Bahner, Assistant Prosecuting Attorney, for appellee.

Karin L. Coble, for appellant.

PIETRYKOWSKI, J.

{¶ 1} Jeffery D. Belew appeals an October 25, 2011 judgment of the Lucas County Court of Common Pleas. The judgment convicted appellant on two counts of felonious assault on a police officer (violations of R.C. 2903.11(A)(2) and first degree felonies pursuant to R.C. 2903.11(D)(1)(a)) with firearm specifications under both R.C.

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2941.1412 (discharged firearm at peace officer or corrections officer) and 2941.145 (displayed, brandished, indicated possession of or used firearm) on each count. The convictions are based upon guilty pleas.

{¶ 2} In the judgment, the trial court also imposed sentence. The sentence ordered appellant to serve a ten-year prison term on each felonious assault count with the sentences to be served consecutively. It also ordered appellant to serve seven-year prison terms on the firearm specifications on both counts, to be served concurrently to each other, but consecutively to the sentences for felonious assault. Taken together, the court imposed an aggregate sentence of imprisonment for 27 years.

{¶ 3} The original indictment included two additional counts. In addition to the two counts of felonious assault with firearm specifications, the indictment charged appellant with two counts of attempted aggravated murder, violations of R.C. 2903.01(E) and (F) and 2923.02, and felonies in the first degree. Both attempted aggravated murder counts also included R.C. 2941.145 and 2941.1412 firearm specifications.

{¶ 4} The criminal charges relate to an incident that occurred on April 10, 2011, at approximately 5:12 a.m. What occurred is not in dispute. Three Oregon police officers responded to a domestic disturbance call at an apartment complex located on Pickle Road. A caller reported that one person had a gun and provided a physical description of the suspect.

{¶ 5} A police sergeant was first to arrive at the scene and stopped his vehicle in front of a person wearing clothing fitting the description of the suspect, now known to be

appellant. As the sergeant prepared to exit his vehicle, he saw appellant raise his gun and begin firing in his direction. Two of the shots hit his police car.

{¶ 6} The sergeant immediately put his car in reverse and backed up to where two other responding police officers were located in the parking lot. Appellant ignored subsequent orders to stop and stand down. He proceeded to advance in the direction of the officers and fired his gun in their direction. Appellant was incapacitated and subdued after police shot him in the chest. Police assured appellant received emergency medical treatment.

{¶ 7} At the hearing where appellant pled guilty to the felonious assault charges and associated firearm specifications, the prosecutor also stated that the evidence at trial would have established that four shell casings from the firearm fired by appellant were discovered at the scene in an investigation after the incident. A dash camera made a video recording of the incident.

{¶ 8} Appellant initially pled not guilty by reason of insanity to the charges in the indictment. After separate psychological evaluations by Dr. Charlene Cassel, Ph.D. and by Dr. Wayne Graves, Ph.D., appellant changed his plea. Under the plea agreement, appellant pled guilty to the two felony assault counts, including firearm specifications, with an agreement that the state, at sentencing, would nolle the attempted aggravated murder counts and associated firearm specifications.

{¶ 9} Appellant asserts four assignments of error on appeal:

Assignment of Error No. 1: The sentence imposed upon appellant constitutes an abuse of discretion due to “extraordinary circumstances” and is a manifest injustice.

Assignment of Error No. 2: Appellant’s counsel rendered ineffective assistance at sentencing.

Assignment of Error No. 3: The trial court erred when it failed to ask appellant if he wished to make a statement on his own behalf or present any information in mitigation of punishment, in violation of Crim.R. 32(A).

Assignment of Error No. 4: The trial court erred in rejecting appellant’s plea of not guilty by reason of insanity.

{¶ 10} We consider the assignments of error out of turn. Under Assignment of Error No. 4, appellant contends that the trial court erred with respect to his not guilty by reason of insanity plea (“NGRI”). Appellant contends that the trial court rejected the plea and denied him his right to assert the defense at trial.

{¶ 11} The state denies that the trial court struck the NGRI affirmative defense. It argues that appellant retained the right to assert the defense of NGRI at trial until he pled guilty. The state also argues that any trial court error with respect to the court’s rulings on appellant’s pleas of NGRI was waived by appellant’s guilty pleas.

{¶ 12} At arraignment, appellant entered pleas of not guilty and NGRI. Appellant requested the trial court refer the case to the Court Diagnostic and Treatment Center for an evaluation and report pursuant to R.C. 2945.371(G)(4). The court made the referral.

{¶ 13} The trial court conducted a hearing on May 18, 2011, concerning the plea. The court stated that it had received a report by Dr. Charlene Cassel of the Court Diagnostic and Treatment Center. The report was reviewed at the hearing. Counsel for appellant requested a short continuance to determine whether appellant would seek a second evaluation. The trial court stated:

All right, I would first indicate that based on Dr. Cassel's evaluation she finds that the Defendant does not meet the criteria to raise the defense of not guilty by reason of insanity. I'm going to continue this matter for one week * * * so that the Defendant has a chance to explore whether or not a second evaluation will be requested.

The court issued an order after the hearing. The order provided in pertinent part:

Report received from Court Diagnostic and Treatment Center, by Dr. Charlene Cassel, Ph.D., and was admitted. *Pursuant to the report, the Defendant does not meet the criteria for a plea of Not Guilty by Reason of Insanity.* Pursuant to the request of Defendant, matter rescheduled for hearing on * * *. (Emphasis added.)

{¶ 14} On May 26, 2011, the court conducted another hearing concerning the NGRI plea. In the interim, appellant filed a motion requesting a second evaluation, by

another expert, Dr. Jolie Brahms, Ph.D. Appellant indicated that he was indigent. He requested public funds be used to pay for the cost of the evaluation, and estimated the cost.

{¶ 15} At the hearing, the court stated that the estimated cost of an evaluation by Dr. Brahms was excessive. The court stated that it would order a second evaluation but would not appoint Dr. Brahms to conduct it. The court stated: "If you have no objection, I would appoint Dr. Wayne Graves to conduct the evaluation." Counsel agreed stating: "Wayne Graves I like as well." The court ordered a second evaluation by Dr. Graves.

{¶ 16} Dr. Graves completed his evaluation and submitted a report. The report was reviewed at a hearing on July 13, 2011. A copy of the report was admitted into evidence. The report does not support a claim of NGRI. After counsel for appellant stated he had reviewed the report, the court asked how he wished to proceed. Counsel stated, "I would move that it be entered into evidence, Your honor, and ask for a trial date."

{¶ 17} With respect to the report, the trial court stated at the hearing:

Based on the information contained in the report of Dr. Wayne Graves, he does state that the Defendant was not suffering under a mental defect at the time the offense was committed, therefore, he's not eligible for the Defense of not guilty by reason of insanity. That report will be admitted into evidence.

{¶ 18} The trial court issued an order on July 15, 2011. Appellant argues, for the first time on appeal, that by the order the trial court rejected his NGRI plea and denied him his right to proceed to trial on the affirmative defense. The order provided in pertinent part:

Matter called for hearing regarding Defendant's plea of Not Guilty by Reason of Insanity. Report received from Dr. Wayne Graves, Central Behavioral Healthcare, Inc., dated July 6, 2011, and admitted into evidence. *Based upon Dr. Graves' findings, Defendant does not meet the criteria for a plea of Not Guilty by Reason of Insanity.*

At the Defendant's request, matter set for Trial on Monday, September 12, 2011, at 9:00 a.m. * * * (Emphasis added.)

{¶ 19} Appellant pled NGRI at arraignment and, therefore, did not require leave of court to make the plea. See Crim.R. 11(H). NGRI is an affirmative defense that the defendant must prove by a preponderance of the evidence at trial. *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72, ¶ 64; R.C. 2901.05(A). No jury instruction is required on NGRI at trial if the evidence is insufficient to raise the defense. *State v. Monford*, 190 Ohio App.3d 35, 2010-Ohio-4732, 940 N.E.2d 634, ¶ 70 (10th Dist.); *State v. Austin*, 1st Dist. No. C-110359, 2012-Ohio-3053, ¶ 10; see *State v. Melchior*, 56 Ohio St.2d 15, 20-21, 381 N.E.2d 195 (1978).

{¶ 20} Although perhaps inartfully expressed, we view the trial court's orders referring to the findings made by Dr. Cassel and Dr. Graves in their R.C. 2945.371(G)(4)

reports as doing no more than providing notice that the psychologists did not support a defense of NGRI. The court did not issue an order striking the NGRI pleas or otherwise removing the affirmative defense from consideration at trial.

{¶ 21} We also agree with the state that appellant waived any claimed error with respect to his NGRI pleas when he entered his guilty pleas. A valid guilty plea is a “complete admission of the defendant’s guilt.” Crim.R. 11(B)(1). By pleading guilty to the two counts of felonious assault with specifications, appellant waived claimed trial court error with respect to his insanity defense. *State v. Jackson*, 8th Dist. No. 80299, 2002-Ohio-2711, ¶ 14; *State v. McQueeney*, 148 Ohio App.3d 606, 2002-Ohio-3731, 774 N.E.2d 1228, ¶ 34 (12th Dist.).

{¶ 22} We conclude appellant’s claim of error with respect to the July 15, 2011 order is without merit. No plain error is presented by the order.

{¶ 23} We find Appellant’s Assignment of Error No. 4 not well-taken.

{¶ 24} Under Assignment of Error No. 3, appellant contends that the trial court failed to comply with the requirements of Crim.R. 32(A)(1) with respect to his right of allocution at sentencing. At sentencing, the trial court addressed appellant directly and asked “Mr. Belew, is there anything you would like to say.” Appellant contends that the trial court’s question was too general and did not inform appellant of his right to discuss matters in mitigation of punishment.

{¶ 25} Crim.R. 32(A)(1) provides:

Sentence shall be imposed without unnecessary delay. * * * At the time of imposing sentence, the court shall do all of the following:

(1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

{¶ 26} The state argues, that placed in context, there was no need to advise appellant that his statement could address issues in mitigation of punishment.

{¶ 27} The sentencing hearing began with the testimony of Dr. Wayne Graves, Ph.D. Dr. Graves was called as a defense witness and testified as to matters in mitigation of sentence. Dr. Graves testified that appellant suffered from post-traumatic stress disorder that is severe, major depression without psychosis, and alcohol dependence. Dr. Graves also testified that it was his opinion that appellant was attempting to commit "suicide by cop" when he approached police, firing a weapon at the time of the incident in this case.

{¶ 28} A statement by appellant's counsel to the court followed the testimony by Dr. Graves. Counsel argued that the court should consider the fact that appellant was a veteran who served in Iraq and suffers from war related post-traumatic stress syndrome, depression, and substance abuse in determining sentence. Counsel also argued that the court should consider the fact that the conduct on which the prosecution is based was, in

fact, an attempt by appellant to commit suicide. Once defense counsel concluded, the trial court addressed appellant directly and asked “is there anything you would like to say.”

{¶ 29} To that point, the entire hearing had been focused on the issue of matters offered in mitigation of punishment. We agree with the state that under these circumstances it was unnecessary for the trial court to explain to appellant that any statement he made could include matters offered in mitigation of sentence. The hearing had considered nothing else.

{¶ 30} Furthermore, Ohio appellate courts have recognized that sentencing courts are not required to use the exact language of the rule and have upheld similar general invitations to a defendant to make a statement. *State v. Boyd*, 8th Dist. No. 98342, 2013-Ohio-30, ¶ 7; *State v. Massey*, 5th Dist. No. 2006-CA-00370, 2007-Ohio-3637, ¶ 30-31; *State v. Crable*, 7th Dist. No. 04 BE 17, 2004-Ohio-6812, ¶ 19-20;

{¶ 31} We find Appellant’s Assignment of Error No. 3 not well-taken.

{¶ 32} Under Assignment of Error No. 1, appellant challenges his sentences. He argues that extraordinary circumstances demonstrate the trial court abused its discretion as to sentence.

{¶ 33} The Ohio Supreme Court has identified a two-step analysis in reviewing felony sentencing on appeal. First, appellate courts are required to “examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law.”

State v. Kalish, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 26. If this first prong is satisfied, then an abuse of discretion standard is applied by the reviewing court.

Id.

{¶ 34} Appellant acknowledges that the two step analysis under *Kalish* applies to appellate review of the sentences in this case and that appellant's sentences are not contrary to law. Appellant also agrees that his sentences are within the statutory range of sentences authorized for his convictions.

{¶ 35} This court has held that where a trial court's sentence is within the range of sentences authorized by statute, "the trial court's sentence cannot be considered an abuse of discretion, absent some extraordinary circumstances." *State v. Rehard*, 6th Dist. No. L-08-1194, 2010-Ohio-470, ¶ 11; *State v. Clark*, 6th Dist. No. L-10-1092, 2011-Ohio-4681, ¶ 14-15.

{¶ 36} Appellant argues that extraordinary circumstances are presented in this case, first, by matters to be considered in mitigation of sentence and, second, application of the purposes of felony sentencing under R.C. 2929.11 and sentencing factors under R.C. 2929.12 in determining sentence. Appellant centers his argument on the fact that he suffers from mental illness—severe post-traumatic stress syndrome and severe depression, both related to his military service in Iraq. Appellant also argues in mitigation that the incident on which prosecution is based was an attempt by him to commit suicide.

{¶ 37} The state responds that the trial court specifically stated that it had reviewed the presentence investigative report, the reports by both psychologists (Dr. Cassel and Dr. Graves), and letters from appellant's mother. The court also stated that it listened carefully to the testimony by Dr. Graves at sentencing and arguments by counsel offered in mitigation of sentence. The court also stated that it had considered the principles and purposes of sentencing under R.C. 2929.11 and seriousness and recidivism factors under R.C. 2929.12 in imposing sentence.

{¶ 38} The trial court stated at sentencing that appellant was continually in trouble in the military. The record reflects that appellant, while in the service, stole and wrecked his roommate's car for which he was "busted in rank." He was discharged from the service after he was court martialed for stealing government property.

{¶ 39} Evaluations by Dr. Cassel and Dr. Graves concluded that appellant knew the wrongful nature of his conduct when he chose to shoot a firearm at police. Physical evidence demonstrates that he discharged his weapon four times. In two of those instances, he hit a police car as a police sergeant exited the vehicle upon arriving at the scene.

{¶ 40} The court stated at sentencing that the crimes were extremely serious and that appellant could have killed police officers who had responded to the scene in performance of their duties. The court concluded that appellant was a danger to the community despite having a minimal criminal history. The record supports these conclusions. The record also demonstrates that the trial court considered the principles

and purposes of felony sentencing under R.C. 2929.11 and seriousness and recidivism factors in felony sentencing under R.C. 2929.12 in determining sentence.

{¶ 41} In our view the trial court acted within its discretion with respect to the weight it gave, in mitigation of punishment, to evidence that appellant suffered from war related post-traumatic stress syndrome and depression and had a history of substance abuse in determining sentence. The trial court imposed sentences within the authorized statutory range of sentences for the offenses committed by appellant. In our view, no extraordinary circumstances are presented in this case to make the trial court's decision as to sentence an abuse of discretion.

{¶ 42} We find appellant's Assignment of Error No. 1 not well-taken.

{¶ 43} Under Assignment of Error No. 2, appellant argues ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 44} Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different.” *Id.* at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

{¶ 45} Additionally, a court must be “highly deferential” and “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance” in reviewing a claim of ineffective assistance of counsel. *Id.* at 689. A properly licensed attorney in Ohio is presumed to execute his or her duties in an ethical and competent manner. *State v. Hamblin*, 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476 (1988). Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995).

{¶ 46} Appellant argues first that trial counsel was deficient in failing to argue that appellant needed treatment for his mental illness and substance abuse and that sentencing appellant to community control would increase his access to treatment and likelihood of successful rehabilitation. Appellant also argues that trial counsel was deficient for failing to introduce evidence of sentences imposed upon other similarly-situated offenders for similar offenses.

Failure to Argue for a Sentence to Community Control

{¶ 47} Appellant was convicted of two counts of felonious assault of a police officer in violation of R.C. 2903.11(A)(2), and, pursuant to 2903.11(D)(1)(a), both felonies of the first degree. Both felonious assault convictions included firearm specifications under R.C. 2941.1412. We agree with the state that a sentence to

community control was not available to appellant because, by statute, appellant faced a mandatory term of imprisonment due to his convictions.

{¶ 48} Both R.C. 2941.1412 firearm specifications require a sentencing court to impose a mandatory seven-year prison term and that the sentences under the specifications run consecutively to sentences imposed for the underlying felony offenses. R.C. 2929.14(B)(1)(f). Assuming the court ordered the sentences for firearm specifications to run concurrently to each other, appellant faced a minimum mandatory sentence of imprisonment for seven years.

{¶ 49} The state contends that appellant faced mandatory prison terms for the felonious assaults as well. We disagree. Appellant was convicted of felonious assault of a police officer in violation R.C. 2903.11(A)(2). An R.C. 2903.11(A)(2) offense does not include as an element a showing that the officer/victim suffered serious physical harm as a result of commission of the offense. *Id.*

{¶ 50} The provisions of R.C. 2903.11(D)(1)(b) imposing a mandatory term of imprisonment for felonious assault on a police officer applies only where the victim police officer suffered serious physical harm as a result of the commission of the offense. *State v. Fredericy*, 8th Dist. No. 95677, 2011-Ohio-3834, ¶ 26; R.C. 2903.11(D)(1)(b). As the trial court was required to impose a mandatory seven year term of imprisonment as part of appellant's sentence, trial counsel was not deficient in failing to argue for a sentence of community control. Such a sentence was unavailable.

**Failure to Assert Sentences are Inconsistent and Disproportionate to
Sentences Imposed on Similar Offenders for Similar Crimes**

{¶ 51} Appellant next argues that trial counsel was deficient in failing to introduce evidence of sentences imposed for similarly-situated offenders and similar offenses. R.C. 2929.11 sets forth the overriding purposes of felony sentencing in Ohio. R.C. 2929.11(B) instructs:

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, 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.* (Emphasis added.)

{¶ 52} In *State v. Dahms*, 6th Dist. No. S-11-028, 2012-Ohio-3181, this court recently considered consistency and proportionality requirements under R.C. 2929.11(B):

The consistency and proportionality requirements of R.C. 2929.11(B) require that sentencing courts impose punishment and sentence “consistent with the sentences imposed for similar crimes committed by similar offenders.” Consistency does not necessarily mean uniformity; rather, consistency has a goal of similar sentences for similar offenses. *See State v. Battle*, 10th Dist. No. 06AP-863, 2007-Ohio-1845. As a result, consistency includes a range of sentences, taking into consideration a trial

court's discretion to weigh the relevant statutory factors. *Id.* Even though offenses may be similar, "distinguishing factors may justify dissimilar sentences." *Id.* at ¶ 24; *State v. King*, 5th Dist. No. CT06-0020, 2006-Ohio-6566, ¶ 23.

In addition, consistency in sentencing does not result from a case-by-case comparison, but by the trial court's proper application of the statutory sentencing guidelines. *State v. Hall*, 179 Ohio App.3d 727, 2008-Ohio-6228, 903 N.E.2d 676, ¶ 10 (10th Dist.). An offender cannot simply present other cases in which an individual convicted of the same offense received a lesser sentence to demonstrate that his sentence is disproportionate. *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100, ¶ 10, citing *State v. Battle*, 10th Dist. No. 06AP-863, 2007-Ohio-1845, ¶ 23. Rather, to demonstrate that a sentence is inconsistent, an offender must show that the trial court did not properly consider applicable sentencing criteria found in R.C. 2929.11 and 2929.12. *State v. Holloman*, 10th Dist. No. 07AP-875, 2008-Ohio-2650, ¶ 19. *Id.* at ¶ 21-22.

{¶ 53} In our view, appellant's arguments as to sentence fail to recognize the distinguishing nature and seriousness of the offenses he committed. He shot a firearm at police who were acting in performance of their duties. The trial court recognized that appellant could have killed police officers by his conduct.

{¶ 54} Appellant argues that counsel was deficient for failing to raise a list of cases allegedly showing that his sentences were disproportionate and inconsistent with sentences for similar offenders for similar crimes. The listed cases were dissimilar. No Ohio case cited by appellant involved assaults on police with a firearm.

{¶ 55} We reviewed appellant's sentences under Assignment of Error No. 1. It is agreed that the sentences are not contrary to law. We have determined that they were not an abuse of discretion. In our view, the trial court applied the proper sentencing criteria found in R.C. 2929.11 and 2929.12 in determining sentence.

{¶ 56} We find that trial court was not deficient in failing to assert that his sentences were

{¶ 57} inconsistent and disproportionate to sentences imposed for similar crimes committed by

{¶ 58} similar offenders.

{¶ 59} We find appellant's Assignment of Error No. 2 not well-taken.

{¶ 60} We conclude that appellant was not denied a fair trial and affirm the judgment of the Lucas County Court of Common Pleas. We order appellant to pay the costs of this appeal pursuant to App.R. 24.

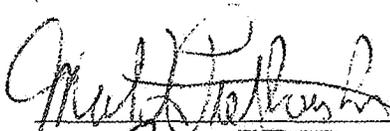
Judgment affirmed.

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

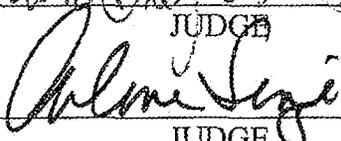
Mark L. Pietrykowski, J.

Arlene Singer, P.J.

Stephen A. Yarbrough, J.
CONCUR.



JUDGE



JUDGE



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>.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2903. HOMICIDE AND ASSAULT
ASSAULT

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ORC Ann. 2903.11 (2013)

§ 2903.11. Felonious assault

(A) No person shall knowingly do either of the following:

- (1) Cause serious physical harm to another or to another's unborn;
- (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

- (1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;
- (2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;
- (3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under *section 2907.02 of the Revised Code*.

(D) (1) (a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads guilty to a specification as described in *section 2941.1423 of the Revised Code* that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law, the court shall sentence the offender to a mandatory prison term as provided in division (B)(8) of *section 2929.14 of the Revised Code*. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of *section 2929.13 of the Revised Code*, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of *section 4510.02 of the Revised Code*.

(E) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in *section 2923.11 of the Revised Code*.

(2) "Motor vehicle" has the same meaning as in *section 4501.01 of the Revised Code*.

(3) "Peace officer" has the same meaning as in *section 2935.01 of the Revised Code*.

(4) "Sexual conduct" has the same meaning as in *section 2907.01 of the Revised Code*, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under *section 109.541 of the Revised Code*.

(6) "Investigator" has the same meaning as in *section 109.541 of the Revised Code*.

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 7-1-83); 139 v H 269 (Eff 7-1-83); 140 v S 210 (Eff 7-1-83); 146 v S 2 (Eff 7-1-96); 146 v S 239 (Eff 9-6-96); 148 v S 142 (Eff 2-3-2000); 148 v H 100. Eff 3-23-2000; 151 v H 95, § 1, eff. 8-3-06; 151 v H 347, § 1, eff. 3-14-07; 151 v H 461, § 1, eff. 4-4-07; 152 v H 280, § 1, eff. 4-7-09; 2011 HB 86, § 1, eff. Sept. 30, 2011.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR FELONY

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ORC Ann. 2929.12 (2013)

§ 2929.12. Seriousness and recidivism factors

(A) Unless otherwise required by *section 2929.13* or *2929.14 of the Revised Code*, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in *section 2929.11 of the Revised Code*. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct, the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism, and the factors set forth in division (F) of this section pertaining to the offender's service in the armed forces of the United States and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2919.25 or a violation of *section 2903.11, 2903.12, or 2903.13 of the Revised Code* involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong provocation.

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to *section 2929.16, 2929.17, or 2929.18 of the Revised Code*, or under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of *section 2967.16 or section 2929.141 of the Revised Code*.

(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

- (1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.
- (2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.
- (3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.
- (4) The offense was committed under circumstances not likely to recur.
- (5) The offender shows genuine remorse for the offense.

(F) The sentencing court shall consider the offender's military service record and whether the offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces of the United States and that was a contributing factor in the offender's commission of the offense or offenses.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 148 v S 9 (Eff 3-8-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 179, § 3 (Eff 1-1-2002); 149 v H 327. Eff 7-8-2002; 2012 HB 197, § 1, eff. Mar. 22, 2013.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR FELONY

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ORC Ann. 2929.14 (2013)

§ 2929.14. Basic prison terms

(A) Except as provided in division (B)(1), (B)(2), (B)(3), (B)(4), (B)(5), (B)(6), (B)(7), (B)(8), (E), (G), (H), or (J) of this section or in division (D)(6) of *section 2919.25 of the Revised Code* and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, ten, or eleven years.

(2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.

(3) (a) For a felony of the third degree that is a violation of *section 2903.06, 2903.08, 2907.03, 2907.04, or 2907.05 of the Revised Code* or that is a violation of *section 2911.02 or 2911.12 of the Revised Code* if the offender previously has been convicted of or pleaded guilty in two or more separate proceedings to two or more violations of *section 2911.01, 2911.02, 2911.11, or 2911.12 of the Revised Code*, the prison term shall be twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months.

(b) For a felony of the third degree that is not an offense for which division (A)(3)(a) of this section applies, the prison term shall be nine, twelve, eighteen, twenty-four, thirty, or thirty-six months.

(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

(5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

(B) (1) (a) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in *section 2941.141, 2941.144, or 2941.145 of the Revised Code*, the court shall impose on the offender one of the following prison terms:

(i) A prison term of six years if the specification is of the type described in *section 2941.144 of the Revised Code* that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or silencer on or about the offender's person or under the offender's control while committing the felony;

(ii) A prison term of three years if the specification is of the type described in *section 2941.145 of the Revised Code* that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;

(iii) A prison term of one year if the specification is of the type described in *section 2941.141 of the Revised Code* that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony.

(b) If a court imposes a prison term on an offender under division (B)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2967.19, section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. Except as provided in division (B)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (B)(1)(a) of this section for felonies committed as part of the same act or transaction.

(c) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of *section 2923.161 of the Revised Code* or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in *section 2941.146 of the Revised Code* that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of *section 2923.161 of the Revised Code* or for the other felony offense under division (A), (B)(2), or (B)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (B)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (B)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (B)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in *section 2941.1411 of the Revised Code* that charges the offender with wearing or carrying body armor while

committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed, subject to divisions (C) to (I) of *section 2967.19 of the Revised Code*, shall not be reduced pursuant to *section 2929.20*, *section 2967.19*, *section 2967.193*, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (B)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (B)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (B)(1)(a) of this section or any of the additional prison terms described in division (B)(1)(c) of this section upon an offender for a violation of *section 2923.12* or *2923.123 of the Revised Code*. The court shall not impose any of the prison terms described in division (B)(1)(a) or (b) of this section upon an offender for a violation of *section 2923.122* that involves a deadly weapon that is a firearm other than a dangerous ordnance, *section 2923.16*, or *section 2923.121 of the Revised Code*. The court shall not impose any of the prison terms described in division (B)(1)(a) of this section or any of the additional prison terms described in division (B)(1)(c) of this section upon an offender for a violation of *section 2923.13 of the Revised Code* unless all of the following apply:

(i) The offender previously has been convicted of aggravated murder, murder, or any felony of the first or second degree.

(ii) Less than five years have passed since the offender was released from prison or post-release control, whichever is later, for the prior offense.

(f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1412 of the Revised Code* that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in *section 2935.01 of the Revised Code* or a corrections officer, as defined in *section 2941.1412 of the Revised Code*, the court, after imposing a prison term on the offender for the felony offense under division (A), (B)(2), or (B)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to *section 2929.20*, *section 2967.19*, *section 2967.193*, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. If an offender is convicted of or pleads guilty to two or more felonies that include, as an essential element, causing or attempting to cause the death or physical harm to another and also is convicted of or pleads guilty to a specification of the type described under division (B)(1)(f) of this section in connection with two or more of the felonies of which the offender is convicted or to which the offender pleads guilty, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(f) of this section for each of two of the specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications. If a court imposes an additional prison term on an offender under division (B)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (B)(1)(a) or (c) of this section relative to the same offense.

(g) If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to

a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

(2) (a) If division (B)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in *section 2941.149 of the Revised Code* that the offender is a repeat violent offender.

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

(iv) The court finds that the prison terms imposed pursuant to division (B)(2)(a)(iii) of this section and, if applicable, division (B)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under *section 2929.12 of the Revised Code* indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(v) The court finds that the prison terms imposed pursuant to division (B)(2)(a)(iii) of this section and, if applicable, division (B)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under *section 2929.12 of the Revised Code* indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

(b) The court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in *section 2941.149 of the Revised Code* that the offender is a repeat violent offender.

(ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (CC)(1) of *section 2929.01 of the Revised Code*, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that divi-

sion of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

(iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(c) For purposes of division (B)(2)(b) of this section, two or more offenses committed at the same time or as part of the same act or event shall be considered one offense, and that one offense shall be the offense with the greatest penalty.

(d) A sentence imposed under division (B)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20, section 2967.19, or section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under this section consecutively to and prior to the prison term imposed for the underlying offense.

(e) When imposing a sentence pursuant to division (B)(2)(a) or (b) of this section, the court shall state its findings explaining the imposed sentence.

(3) Except when an offender commits a violation of *section 2903.01* or *2907.02 of the Revised Code* and the penalty imposed for the violation is life imprisonment or commits a violation of *section 2903.02 of the Revised Code*, if the offender commits a violation of *section 2925.03* or *2925.11 of the Revised Code* and that section classifies the offender as a major drug offender, if the offender commits a felony violation of *section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161, 4729.37, or 4729.61, division (C) or (D) of section 3719.172, division (C) of section 4729.51, or division (J) of section 4729.54 of the Revised Code* that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marijuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in *section 2941.1410 of the Revised Code* charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of *section 2907.02 of the Revised Code* and, had the offender completed the violation of *section 2907.02 of the Revised Code* that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of *section 2907.02 of the Revised Code*, the court shall impose upon the offender for the felony violation a mandatory prison term of the maximum prison term prescribed for a felony of the first degree that, subject to divisions (C) to (I) of *section 2967.19 of the Revised Code*, cannot be reduced pursuant to section 2929.20, section 2967.19, or any other provision of Chapter 2967. or 5120. of the Revised Code.

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of *section 2929.13 of the Revised Code*, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory

prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (B)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (B)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (B)(4) of this section, the court also may sentence the offender to a community control sanction under *section 2929.16 or 2929.17 of the Revised Code*, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of *section 2929.13 of the Revised Code* and the court imposes a mandatory term of local incarceration, the court may impose a prison term as described in division (A)(1) of that section.

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1414 of the Revised Code* that charges that the victim of the offense is a peace officer, as defined in *section 2935.01 of the Revised Code*, or an investigator of the bureau of criminal identification and investigation, as defined in *section 2903.11 of the Revised Code*, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (B)(5) of this section, the prison term, subject to divisions (C) to (I) of *section 2967.19 of the Revised Code*, shall not be reduced pursuant to *section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code*. A court shall not impose more than one prison term on an offender under division (B)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1415 of the Revised Code* that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of *section 4511.19 of the Revised Code* or an equivalent offense, as defined in *section 2941.1415 of the Revised Code*, or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (B)(6) of this section, the prison term, subject to divisions (C) to (I) of *section 2967.19 of the Revised Code*, shall not be reduced pursuant to *section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code*. A court shall not impose more than one prison term on an offender under division (B)(6) of this section for felonies committed as part of the same act.

(7) (a) If an offender is convicted of or pleads guilty to a felony violation of section 2905.01, 2905.02, 2907.21, 2907.22, or 2923.32, division (A)(1) or (2) of section 2907.323, or division (B)(1), (2), (3), (4), or (5) of *section 2919.22 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1422 of the Revised Code* that charges that the offender knowingly committed the offense in furtherance of human trafficking, the court shall impose on the offender a mandatory prison term that is one of the following:

(i) If the offense is a felony of the first degree, a definite prison term of not less than five years and not greater than ten years;

(ii) If the offense is a felony of the second or third degree, a definite prison term of not less than three years and not greater than the maximum prison term allowed for the offense by division (A) of *section 2929.14 of the Revised Code*;

(iii) If the offense is a felony of the fourth or fifth degree, a definite prison term that is the maximum prison term allowed for the offense by division (A) of *section 2929.14 of the Revised Code*.

(b) Subject to divisions (C) to (I) of *section 2967.19 of the Revised Code*, the prison term imposed under division (B)(7)(a) of this section shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(7)(a) of this section for felonies committed as part of the same act, scheme, or plan.

(8) If an offender is convicted of or pleads guilty to a felony violation of *section 2903.11, 2903.12, or 2903.13 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1423 of the Revised Code* that charges that the victim of the violation was a woman whom the offender knew was pregnant at the time of the violation, notwithstanding the range of prison terms prescribed in division (A) of this section for felonies of the same degree as the violation, the court shall impose on the offender a mandatory prison term that is either a definite prison term of six months or one of the prison terms prescribed in *section 2929.14 of the Revised Code* for felonies of the same degree as the violation.

(C) (1) (a) Subject to division (C)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (B)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(b) If a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (B)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A),

(B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(c) If a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(f) of this section, the offender shall serve the mandatory prison term so imposed consecutively to and prior to any prison term imposed for the underlying felony under division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(d) If a mandatory prison term is imposed upon an offender pursuant to division (B)(7) or (8) of this section, the offender shall serve the mandatory prison term so imposed consecutively to any other mandatory prison term imposed under that division or under any other provision of law and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates *section 2917.02, 2917.03, or 2921.35 of the Revised Code* or division (A)(1) or (2) of *section 2921.34 of the Revised Code*, if an offender who is under detention at a detention facility commits a felony violation of *section 2923.131 of the Revised Code*, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of division (A)(1) or (2) of *section 2921.34 of the Revised Code*, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

(3) If a prison term is imposed for a violation of division (B) of *section 2911.01 of the Revised Code*, a violation of division (A) of *section 2913.02 of the Revised Code* in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of *section 2921.331 of the Revised Code*, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(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.

(5) If a mandatory prison term is imposed upon an offender pursuant to division (B)(5) or (6) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 of the Revised Code*. If a mandatory prison term is imposed upon an offender pursuant to division (B)(5) of this section, and if a mandatory prison term also is imposed upon the offender pursuant to division (B)(6) of this section in relation to the same violation, the offender shall serve the mandatory prison term imposed pursuant to division (B)(5) of this section consecutively to and prior to the mandatory prison term imposed pursuant to division (B)(6) of this section and consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 of the Revised Code*.

(6) When consecutive prison terms are imposed pursuant to division (C)(1), (2), (3), (4), or (5) or division (H)(1) or (2) of this section, the term to be served is the aggregate of all of the terms so imposed.

(D) (1) If a court imposes a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of *section 2967.28 of the Revised Code*. *Section 2929.191 of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (D)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. *Section 2929.191 of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(E) The court shall impose sentence upon the offender in accordance with *section 2971.03 of the Revised Code*, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment if any of the following apply:

(1) A person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, and, in relation to that offense, the offender is adjudicated a sexually violent predator.

(2) A person is convicted of or pleads guilty to a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* committed on or after January 2, 2007, and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of *section*

2907.02 of the Revised Code, or division (B) of section 2907.02 of the Revised Code provides that the court shall not sentence the offender pursuant to section 2971.03 of the Revised Code.

(3) A person is convicted of or pleads guilty to attempted rape committed on or after January 2, 2007, and a specification of the type described in section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code.

(4) A person is convicted of or pleads guilty to a violation of section 2905.01 of the Revised Code committed on or after January 1, 2008, and that section requires the court to sentence the offender pursuant to section 2971.03 of the Revised Code.

(5) A person is convicted of or pleads guilty to aggravated murder committed on or after January 1, 2008, and division (A)(2)(b)(ii) of section 2929.022, division (A)(1)(e), (C)(1)(a)(v), (C)(2)(a)(ii), (D)(2)(b), (D)(3)(a)(iv), or (E)(1)(d) of section 2929.03, or division (A) or (B) of section 2929.06 of the Revised Code requires the court to sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code.

(6) A person is convicted of or pleads guilty to murder committed on or after January 1, 2008, and division (B)(2) of section 2929.02 of the Revised Code requires the court to sentence the offender pursuant to section 2971.03 of the Revised Code.

(F) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a prison term or term of imprisonment under this section, sections 2929.02 to 2929.06 of the Revised Code, section 2929.142 of the Revised Code, section 2971.03 of the Revised Code, or any other provision of law, section 5120.163 of the Revised Code applies regarding the person while the person is confined in a state correctional institution.

(G) If an offender who is convicted of or pleads guilty to a felony that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.142 of the Revised Code that charges the offender with having committed the felony while participating in a criminal gang, the court shall impose upon the offender an additional prison term of one, two, or three years.

(H) (1) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.143 of the Revised Code that charges the offender with having committed the offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

(2) (a) If an offender is convicted of or pleads guilty to a felony violation of section 2907.22, 2907.24, 2907.241, or 2907.25 of the Revised Code and to a specification of the type described in section 2941.1421 of the Revised Code and if the court imposes a prison term on the offender for the felony violation, the court may impose upon the offender an additional prison term as follows:

(i) Subject to division (H)(2)(a)(ii) of this section, an additional prison term of one, two, three, four, five, or six months;

(ii) If the offender previously has been convicted of or pleaded guilty to one or more felony or misdemeanor violations of section 2907.22, 2907.23, 2907.24, 2907.241, or 2907.25 of the Revised Code and also was convicted of or pleaded guilty to a specification of the type de-

scribed in *section 2941.1421 of the Revised Code* regarding one or more of those violations, an additional prison term of one, two, three, four, five, six, seven, eight, nine, ten, eleven, or twelve months.

(b) In lieu of imposing an additional prison term under division (H)(2)(a) of this section, the court may directly impose on the offender a sanction that requires the offender to wear a real-time processing, continual tracking electronic monitoring device during the period of time specified by the court. The period of time specified by the court shall equal the duration of an additional prison term that the court could have imposed upon the offender under division (H)(2)(a) of this section. A sanction imposed under this division shall commence on the date specified by the court, provided that the sanction shall not commence until after the offender has served the prison term imposed for the felony violation of *section 2907.22, 2907.24, 2907.241, or 2907.25 of the Revised Code* and any residential sanction imposed for the violation under *section 2929.16 of the Revised Code*. A sanction imposed under this division shall be considered to be a community control sanction for purposes of *section 2929.15 of the Revised Code*, and all provisions of the Revised Code that pertain to community control sanctions shall apply to a sanction imposed under this division, except to the extent that they would by their nature be clearly inapplicable. The offender shall pay all costs associated with a sanction imposed under this division, including the cost of the use of the monitoring device.

(I) At the time of sentencing, the court may recommend the offender for placement in a program of shock incarceration under *section 5120.031 of the Revised Code* or for placement in an intensive program prison under *section 5120.032 of the Revised Code*, disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no recommendation on placement of the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in *section 5120.031 or 5120.032 of the Revised Code*, whichever is applicable, that the offender is eligible for the placement.

If the court disapproves placement of the offender in a program or prison of that nature, the department of rehabilitation and correction shall not place the offender in any program of shock incarceration or intensive program prison.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison, and if the offender is subsequently placed in the recommended program or prison, the department shall notify the court of the placement and shall include with the notice a brief description of the placement.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison and the department does not subsequently place the offender in the recommended program or prison, the department shall send a notice to the court indicating why the offender was not placed in the recommended program or prison.

If the court does not make a recommendation under this division with respect to an offender and if the department determines as specified in *section 5120.031 or 5120.032 of the Revised Code*, whichever is applicable, that the offender is eligible for placement in a program or prison of that nature, the department shall screen the offender and determine if there is an available program of shock incarceration or an intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is

suited, the department shall notify the court of the proposed placement of the offender as specified in *section 5120.031 or 5120.032 of the Revised Code* and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

(J) If a person is convicted of or pleads guilty to aggravated vehicular homicide in violation of division (A)(1) of *section 2903.06 of the Revised Code* and division (B)(2)(c) of that section applies, the person shall be sentenced pursuant to *section 2929.142 of the Revised Code*.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 88 (Eff 9-3-96); 146 v H 445 (Eff 9-3-96); 146 v H 154 (Eff 10-4-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 147 v H 151 (Eff 9-16-97); 147 v H 32 (Eff 3-10-98); 147 v S 111 (Eff 3-17-98); 147 v H 2 (Eff 1-1-99); 148 v S 1 (Eff 8-6-99); 148 v H 29 (Eff 10-29-99); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v S 222 (Eff 3-22-2001); 149 v H 485 (Eff 6-13-2002); 149 v H 327 (Eff 7-8-2002); 149 v H 130. Eff 4-7-2003; 149 v S 123, § 1, eff. 1-1-04; 150 v H 12, §§ 1, 3, eff. 4-8-04*; 150 v H 52, § 1, eff. 6-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v H 137, § 1, eff. 7-11-06; 151 v H 137, § 3, eff. 8-3-06; 151 v S 260, § 1, eff. 1-2-07; 151 v S 281, § 1, eff. 1-4-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08; 152 v S 184, § 1, eff. 9-9-08; 152 v S 220, § 1, eff. 9-30-08; 152 v H 280, § 1, eff. 4-7-09; 152 v H 130, § 1, eff. 4-7-09; 2011 HB 86, § 1, eff. Sept. 30, 2011; 2012 SB 337, § 1, eff. Sept. 28, 2012.

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*** Annotations current through August 16, 2013 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES

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ORC Ann. 2953.08 (2013)

§ 2953.08. Grounds for appeal by defendant or prosecutor of sentence for felony; appeal cost oversight committee

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

(1) The sentence consisted of or included the maximum prison term allowed for the offense by division (A) of *section 2929.14* or *section 2929.142 of the Revised Code*, the maximum prison term was not required for the offense pursuant to Chapter 2925. or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:

(a) The sentence was imposed for only one offense.

(b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum prison term for the offense of the highest degree.

(2) The sentence consisted of or included a prison term and the offense for which it was imposed is a felony of the fourth or fifth degree or is a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of *section 2929.13 of the Revised Code* for purposes of sentencing. If the court specifies that it found one or more of the factors in division (B)(1)(b) of *section 2929.13 of the Revised Code* to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender.

(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of *section 2971.03 of the Revised Code*, if the minimum term of the indefinite term imposed pursuant to division (A)(3) of *section 2971.03 of the Revised Code* is the longest term available for the offense from among the range of terms

listed in *section 2929.14 of the Revised Code*. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in *section 2971.01 of the Revised Code*. As used in this division, "adjudicated a sexually violent predator" has the same meaning as in *section 2929.01 of the Revised Code*, and a person is "adjudicated a sexually violent predator" in the same manner and the same circumstances as are described in that section.

(4) The sentence is contrary to law.

(5) The sentence consisted of an additional prison term of ten years imposed pursuant to division (B)(2)(a) of *section 2929.14 of the Revised Code*.

(B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:

(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in *section 2929.13* or *Chapter 2925*, of the Revised Code.

(2) The sentence is contrary to law.

(3) The sentence is a modification under *section 2929.20 of the Revised Code* of a sentence that was imposed for a felony of the first or second degree.

(C) (1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (C)(3) of *section 2929.14 of the Revised Code* and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.

(2) A defendant may seek leave to appeal an additional sentence imposed upon the defendant pursuant to division (B)(2)(a) or (b) of *section 2929.14 of the Revised Code* if the additional sentence is for a definite prison term that is longer than five years.

(D) (1) A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.

(2) Except as provided in division (C)(2) of this section, a sentence imposed upon a defendant is not subject to review under this section if the sentence is imposed pursuant to division (B)(2)(b) of *section 2929.14 of the Revised Code*. Except as otherwise provided in this division, a defendant retains all rights to appeal as provided under this chapter or any other provision of the Revised Code. A defendant has the right to appeal under this chapter or any other provision of the Revised Code the court's application of division (B)(2)(c) of *section 2929.14 of the Revised Code*.

(3) A sentence imposed for aggravated murder or murder pursuant to *sections 2929.02 to 2929.06 of the Revised Code* is not subject to review under this section.

(E) A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall file an appeal of a sentence under this section to a court of appeals within the time limits specified in *Rule 4(B) of the Rules of Appellate Procedure*, provided that if the appeal is pursuant to division (B)(3) of this section, the time limits specified in that rule shall not commence running until the court grants the motion that makes the sentence modification in question. A sentence appeal under this section shall be consolidated with any other appeal in the case. If no other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to sentencing.

(F) On the appeal of a sentence under this section, the record to be reviewed shall include all of the following, as applicable:

(1) Any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed. An appellate court that reviews a presentence investigation report prepared pursuant to *section 2947.06 or 2951.03 of the Revised Code or Criminal Rule 32.2* in connection with the appeal of a sentence under this section shall comply with division (D)(3) of *section 2951.03 of the Revised Code* when the appellate court is not using the presentence investigation report, and the appellate court's use of a presentence investigation report of that nature in connection with the appeal of a sentence under this section does not affect the otherwise confidential character of the contents of that report as described in division (D)(1) of *section 2951.03 of the Revised Code* and does not cause that report to become a public record, as defined in *section 149.43 of the Revised Code*, following the appellate court's use of the report.

(2) The trial record in the case in which the sentence was imposed;

(3) Any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed;

(4) Any written findings that the court was required to make in connection with the modification of the sentence pursuant to a judicial release under division (I) of *section 2929.20 of the Revised Code*.

(G) (1) If the sentencing court was required to make the findings required by division (B) or (D) of *section 2929.13* or division (I) of *section 2929.20 of the Revised Code*, or to state the findings of the trier of fact required by division (B)(2)(e) of *section 2929.14 of the Revised Code*, relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.

(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

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. The appellate court's standard for review is not whether the sentencing court abused its

discretion. The appellate 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;

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

(H) A judgment or final order of a court of appeals under this section may be appealed, by leave of court, to the supreme court.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 180 (Eff 1-1-97); 147 v H 151 (Eff 9-16-97); 148 v S 107 (Eff 3-23-2000); 148 v H 331. Eff 10-10-2000; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v H 461, § 1, eff. 4-4-07; 152 v H 130, § 1, eff. 4-7-09; 2011 HB 86, § 1, eff. Sept. 30, 2011; 2012 SB 337, § 1, eff. Sept. 28, 2012; 2012 HB 247, § 1, eff. Mar. 22, 2013; 2012 SB 160, § 1, eff. Mar. 22, 2013.