

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellant,

-vs-

WALTER POLUS,
Defendant-Appellee.

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S.C. No. 14-1062

On Appeal from the
Lucas County Court of Appeals,
Sixth Appellate District
C.A. Case Nos. L-13-1119
L-13-1120

NOTICE OF CERTIFIED CONFLICT

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

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COUNSEL FOR APPELLANT, STATE OF OHIO

FILED
JUN 25 2014
CLERK OF COURT
SUPREME COURT OF OHIO

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COUNSEL FOR APPELLEE, WALTER POLUS

RECEIVED
JUN 25 2014
CLERK OF COURT
SUPREME COURT OF OHIO

Plaintiff-Appellant, the State of Ohio, pursuant to S. Ct. Prac. Rules 5.03 and 8.01, hereby gives notice of a certified-conflict. On May 30, 2014, the Sixth Appellate District Court found that its holding in this case conflicted with the holdings of the Fifth District and the Eighth District on the same question and certified the following question for determination by this Court:

“Whether a trial court may impose consecutive sentences for felony and misdemeanor convictions under R.C. 2929. 41(B)(1).”

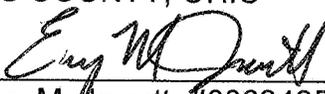
State v. Polus, 6th Dist. Nos. L-13-1119, L-13-1120, 2014-Ohio-2321, ¶19.

Attached to this notice are:

1. A copy of the certifying court's opinion, *State v. Polus*, 6th Dist. Nos. L-13-1119, L-13-1120, 2014-Ohio-2321, attached as Exhibit A;
2. A copy of the Court of Appeals order certifying a conflict, specifically, *State v. Polus*, 6th Dist. Nos. L-13-1119, L-13-1120, 2014-Ohio-2321, at ¶18, attached as Exhibit B; and
3. Copies of the conflicting Court opinions, *State v. Vanmeter*, 5th Dist. No. 2011-0032, 2011-Ohio-6110; *State v. Varney*, 5th Dist. No. 13 CA 00002, 2014-Ohio-193; and *State v. Barker*, 8th Dist. No. 99320, 2013-Ohio-4038, attached as Exhibits C, D and E, respectively.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: 
Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was sent via ordinary U.S. Mail this 24th day of June, 2014, to Tim A. Dugan, Groth & Associates, 416 N. Erie Street, Suite 100, Toledo, Ohio 43604, Attorney for Defendant-Appellee.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: 
Evg M. Jarrett, #0062485
Assistant Prosecuting Attorney

EXHIBIT A

FILED
COURT OF APPEALS

2014 MAY 30 A 8:04

COMMON PLEAS COURT
BERNIE GUILTER
CLERK OF COURTS

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

State of Ohio

Appellee

v.

Walter Polus

Appellant

Court of Appeals Nos. L-13-1119
L-13-1120

Trial Court Nos. CR0201301430
CR0201301275

DECISION AND JUDGMENT

Decided: MAY 30 2014

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brad A. Smith, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

JENSEN, J

{¶ 1} Following his convictions on two counts of receiving stolen property,
defendant-appellant, Walter Polus, appeals the sentences imposed by the Lucas County
Court of Common Pleas on June 3, 2013. For the reasons that follow, we find Polus'
assignment of error well-taken and reverse the trial court's judgment.

E-JOURNALIZED

MAY 30 2014

I. Background

{¶ 2} In Lucas County case No. CR0201301275 (“case No. CR13-1275”), Polus was charged with two counts of receiving stolen property, violations of R.C. 2913.51(A) and (C), fifth degree felonies, after selling allegedly stolen items to an undercover police officer. In a separate case, Lucas County case No. CR0201301430 (“case No. CR13-1430”), Polus was indicted and charged under R.C. 2911.12(A)(1) and (D) with three counts of burglary, all second-degree felonies, in connection with break-ins at several homes. Two additional counts were added by information charging Polus with receiving stolen property, violations of R.C. 2913.51(A) and (C), both fifth-degree felonies.

{¶ 3} Polus agreed to enter a plea of guilty to the receiving stolen property charges in case No. CR13-1275 in exchange for the state’s agreement (1) to dismiss the three burglary charges in case No. CR13-1430 and (2) to amend the second receiving stolen property charge to a first-degree misdemeanor. He entered guilty pleas under *North Carolina v. Alford* to the two receiving stolen property charges in case No. CR13-1430. The trial court accepted his pleas.

{¶ 4} In case No. CR13-1275, the court sentenced Polus to 11 months’ incarceration on the felony charge and six months’ incarceration on the misdemeanor charge, to be served consecutively. In case No. CR13-1430, it sentenced him to 11 months’ incarceration on each charge. The court ordered the sentences in case No. CR13-1430 to be served consecutively to each other and to the sentences in case No. CR13-1275.

{¶ 5} Polus now appeals the sentences imposed in case No. CR13-1275, assigning the following error for our review:

The Trial Court's sentence was contrary to law.

In connection with that assignment of error, Polus asks us to consider two issues:

Is the Trial Court's sentence contrary to law when it sentences a Defendant to a jail term for a misdemeanor, and runs that sentence consecutive to a felony prison term, contrary to what R.C. §2929.41(A) says?

Is the Trial Court's sentence contrary to law when the Trial Court sentences a Defendant to six months when the maximum sentence permitted is one hundred eighty days?

II. Law and Analysis

{¶ 6} The first issue posed by Polus is whether under R.C. 2929.41(A) the trial court was prohibited from ordering him to serve felony and misdemeanor sentences of incarceration consecutively. Polus argues that under R.C. 2929.41(A), the court was required to order concurrent sentences unless the circumstances described in (B)(3) applied. R.C. 2929.41 provides, in pertinent part:

(A) Except as provided in division (B) of this section, division (C) of section 2929.14, or division (D) or (E) of section 2971.03 of the Revised Code, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of

imprisonment imposed by a court of this state, another state, or the United States. *Except as provided in division (B)(3) of this section, a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution.*

(B)(1) *A jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, jail term, or sentence of imprisonment when the trial court specifies that it is to be served consecutively or when it is imposed for a misdemeanor violation of section 2907.322 , 2921.34 , or 2923.131 of the Revised Code.*

* * *

(3) A jail term or sentence of imprisonment imposed for a misdemeanor violation of section 4510.11, 4510.14, 4510.16, 4510.21, or 4511.19 of the Revised Code shall be served consecutively to a prison term that is imposed for a felony violation of section 2903.06, 2903.07, 2903.08, or 4511.19 of the Revised Code or a felony violation of section 2903.04 of the Revised Code involving the operation of a motor vehicle by the offender and that is served in a state correctional institution when the trial court specifies that it is to be served consecutively. * * * (Emphasis added.)

{¶ 7} There is no dispute that (B)(3) is inapplicable here. The question is whether provision (B)(1) vests the trial court with authority to impose consecutive sentences

despite the language in provision (A) which would appear to prohibit consecutive sentences for a felony and misdemeanor unless provision (B)(3) applies. Polus argues that (A) and (B)(1) contradict one another, thereby creating an ambiguity which must be construed against the state under R.C. 2901.04(A). The state argues simply that (B)(1) authorizes the court to impose consecutive sentences.

{¶ 8} The treatment of R.C. 2929.41 has evolved as it applies to the authority of a trial judge to sentence an offender to consecutive terms of imprisonment for misdemeanor and felony convictions. Before the Ohio Supreme Court decided *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, on February 27, 2006, most courts—including this court—interpreted R.C. 2929.41 as prohibiting the imposition of consecutive sentences. In *State v. Perry*, 6th Dist. Wood No. WD-99-026, 2000 WL 125807 (Feb. 4, 2000), when faced with the same question, we explained as follows:

R.C. 2929.41(A) clearly prohibits [a court from imposing consecutive sentences for felony and misdemeanor convictions]. R.C. 2929.41(B) does, however, create an ambiguity with respect to the issue. In a criminal context ambiguities in sentencing statutes must be strictly construed against the state. R.C. 2901.04. *Id.* at * 1.

{¶ 9} We considered the issue again in *State v. Garrett*, 6th Dist. Erie No. E-02-015, 2003-Ohio-5185. We recognized that “[a]s to the issue of [a] misdemeanor sentence being served consecutively to [a] felony sentence[], the Supreme Court of Ohio has held that R.C. 2929.41(A) requires that a sentence imposed for a misdemeanor conviction

must be served concurrently with any felony sentence.” *Id.* at ¶ 27, citing *State v. Butts*, 58 Ohio St.3d 250, 569 N.E.2d 885 (1991).¹ See also *State v. Elchert*, 3d Dist. Seneca No. 1-04-42, 2005-Ohio-2250, ¶ 9 (“[T]he trial court’s order that Elchert’s misdemeanor sentence run consecutively to the felony prison sentence is error.”); *State v. McCauley*, 8th Dist. Cuyahoga No. 86946, 2006-Ohio-4587, ¶ 8 (“R.C. 2929.41(A) clearly states that a misdemeanor sentence of imprisonment must run concurrently with a sentence of imprisonment for a felony.”); *State v. Gatewood*, 1st Dist. Hamilton No. C-000157, 2000 WL 1867374, * 9 (Dec. 22, 2000).

{¶ 10} After *Perry* and *Garrett*, the Ohio Supreme Court decided *Foster*. In that decision, the court excised provision (A) from R.C. 2929.41, holding that it was unconstitutional because it required the trial judge to make findings of facts not proven to a jury beyond a reasonable doubt before imposing consecutive sentences. While provision (A) was excised, the remainder of the statute remained intact. *Foster* at paragraph three of the syllabus.

{¶ 11} With provision (A) excised from the statute, courts presented with the question of the propriety of imposing consecutive sentences for misdemeanors and

¹ We acknowledge that the version of R.C. 2929.41(A) that existed at the time we decided *Perry* provided: “In any case, a sentence of imprisonment for misdemeanor shall be served concurrently with a sentence of imprisonment for felony served in a state or federal correctional institution.” It was revised effective May 17, 2000, to state “Except as provided in division (B)(2) of this section, a sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution.” It appears that the revisions to the statute did not change our interpretation given our holding in *Garrett*.

felonies reached a different conclusion. In *State v. Hughley*, 8th Dist. Cuyahoga No. 92588, 93070, 2009-Ohio-5824, ¶ 12, for instance, the court held that because *Foster* excised provision (A) from R.C. 2929.41, “post-*Foster*, * * * R.C. 2929.41(B)(1) authorizes a trial court to order a misdemeanor sentence to be served consecutively to a felony sentence.” See also *State v. Walters*, 6th Dist. Lucas No. L-08-1238, 2009-Ohio-3198, ¶ 30-31; *State v. Trainer*, 2d Dist. Champagne No. 08-CA-04, 2009-Ohio-906, ¶ 13; *State v. Farley*, 5th Dist. Ashland No. 11-COA-042, 2012-Ohio-3620, ¶ 30-34; *State v. Stevens*, 10th Dist. Franklin No. 10AP-207 and 208, 2010-Ohio-4747, ¶ 2-4.

{¶ 12} Approximately three years after *Foster*, the United States Supreme Court decided *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009). In *Ice*, the court concluded that states are not prohibited from assigning to judges the findings of fact necessary to the imposition of consecutive sentences. *Id.* at (a) of the syllabus. In response, the Ohio legislature revived provision (A) of R.C. 2929.41 via 2011 Am.H.B. No. 86 (“H.B. 86”), which became effective on September 30, 2011. Since then, two appellate districts have been presented with the issue posed by *Polus*. The Fifth District Court of Appeals is one of them.

{¶ 13} The Fifth District has twice decided the issue and without resolving the conflict in the language in R.C. 2929.41(A) and (B)(1), it concluded that “a trial court is authorized to make a misdemeanor jail sentence consecutive to a felony prison sentence.” *State v. Vanmeter*, 5th Dist. Fairfield No. 2011-0032, 2011-Ohio-6110, ¶ 24. See also *State v. Varney*, 5th Dist. Perry No. 13 CA 00002, 2014-Ohio-193, ¶ 21 (“Pursuant to

R.C. § 2929.41(B)(1), we find that the trial court had the authority to specify that the misdemeanor and felony sentences herein run consecutively.”); *State v. Farley*, 5th Dist. Ashland No. 11-COA-042, 2012-Ohio-3620, ¶ 30-34.²

{¶ 14} The Eighth District held similarly in *State v. Barker*, 8th Dist. Cuyahoga No. 99320, 2013-Ohio-4038, ¶ 18-22, however, the issue was presented less directly. There the trial court sentenced the defendant in connection with his convictions for two felonies and one misdemeanor. It ordered the two felony sentences to run consecutively and with respect to the misdemeanor conviction, the trial court sentenced defendant to “time served” instead of crediting the days he had already spent in jail against his felony sentences. The effect of this was that defendant would serve a misdemeanor sentence consecutive to his felony sentences. The court of appeals affirmed and in reaching its conclusion, the court relied on *Hughley*, which, as explained above, was decided after *Foster* but before H.B. 86 took effect.

{¶ 15} We believe that the legislature, through H.B. 86, has evidenced its intent to vest trial judges with discretion in fashioning appropriate criminal sentences. To that end, we see no reason that the trial courts should have any less discretion when imposing sentences for offenders who commit both felonies and misdemeanors. But because H.B. 86 revived the provision of the statute that *Foster* excised, we believe that pre-*Foster* precedent must be applied. Consistent with *Perry*, 6th Dist. Wood No. WD-99-026,

² The Fifth District’s decision and reasoning in *Farley* suggests to us that the court did not take into account that R.C. 2929.41(A) had been revived by H.B. 86.

2000 WL 125807 and *Garrett*, 6th Dist. Erie No. E-02-015, 2003-Ohio-5185, we, therefore, hold that the ambiguity created by provisions (A) and (B)(1) of R.C. 2929.41 must be construed against the state and that the trial court should have ordered that Polus' felony and misdemeanor sentences be served concurrently.³ We further find that our decision is in conflict with the Fifth District's decision in *Vanmeter* and *Varney* and the Eighth District's decision in *Barker*.

{¶ 16} Article IV, Section 3(B)(4) of the Ohio Constitution states that “[w]henever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.”

{¶ 17} In order to qualify for certification to the Supreme Court of Ohio pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, a case must meet the following three conditions:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be “upon the same question.” Second, the alleged conflict

³ It is worth noting that in *State v. Leach, infra*, discussed below, the appellant appealed a sentence where the court ordered him to serve a term of incarceration “in prison” for a misdemeanor offense. Although the appellant did not present the issue of the court’s authority to impose consecutive sentences for felony and misdemeanor convictions, the state noted in its brief that the trial court had authority to order consecutive sentences under R.C. 2929.41(B). As it was not pertinent to the issue appealed, we did not address that contention.

must be on a rule of law-not facts. Third, the journal entry or opinion of the certifying court must clearly set forth the rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

{¶ 18} We find that our holding today is in conflict with the Fifth District Court of Appeals' decisions in *State v. Vanmeter*, 5th Dist. Fairfield No. 2011-0032, 2011-Ohio-6110 and *State v. Varney*, 5th Dist. Perry No. 13 CA 00002, 2014-Ohio-193. It is also in conflict with the Eighth District's decision in *State v. Barker*, 8th Dist. Cuyahoga No. 99320, 2013-Ohio-4038. Accordingly we certify the record in this case for review and final determination to the Supreme Court of Ohio on the following issue:

Whether a trial court may impose consecutive sentences for felony and misdemeanor convictions under R.C. 2929.41(B)(1).

{¶ 19} The parties are directed to S.Ct.Prac.R. 5.03 and S.Ct.Prac.R. 8.01 for guidance.

{¶ 20} We now turn to the second argument raised by Polus in this appeal. Under R.C. 2929.24(A)(1), a trial court may impose a jail sentence of not more than 180 days for an offense constituting a first-degree misdemeanor. The trial court sentenced Polus to six months' incarceration—in excess of the 180 days permitted under the statute. *See, e.g., State v. Pierce*, 4th Dist. Meigs No. 10CA10, 2011-Ohio-5353, ¶ 10 (recognizing that “six months is not the same as one hundred eighty days because each month has a

different number of days.”); *see also State v. Pippen*, 4th Dist. Scioto No. 12CA3526, 2013-Ohio-2239, ¶ 20.

{¶ 21} The state does not appear to disagree that the sentence should have been “180 days” instead of “six months.” The disagreement between Polus and the state is whether the matter should be remanded to the lower court for resentencing or whether this court should simply correct the sentence under App.R. 12(B).

{¶ 22} Polus argues that remand is necessary. He cites *Pierce*. In that case, the Fourth District vacated the sentence and remanded the matter to the trial court for resentencing. The state cites our decision in *State v. Leach*, 6th Dist. Lucas No. L-09-1327, 2011-Ohio-866, where rather than remanding the matter to the trial court for resentencing, we corrected a judgment entry under the authority of App.R. 12(B) in order to clarify that the term of the defendant’s sentence was to be served “in jail” as opposed to “in prison.”

{¶ 23} Because a term of 6 months exceeds 180 days, we can reasonably assume that the trial court intended to impose the maximum sentence permitted under R.C. 2929.24(A)(1). Thus, under the circumstances of this case, where the trial court’s intent is clear, it is appropriate and is in the interest of judicial economy for us simply to modify the judgment entry in case No. CR13-1275 to substitute “180 days” for “six months.” In light of our ruling on the first issue raised by Polus, we must also modify the judgment entry insofar as it imposes consecutive sentences for Polus’ felony and misdemeanor convictions. The entry should now read:

It is ORDERED that defendant serve a term of 11 months in prison as to count 1 and serve a term of 180 days in the Corrections Center of Northwest Ohio as to count 2. The sentences imposed in count 1 and count 2 are ordered served concurrently to each other. * * *

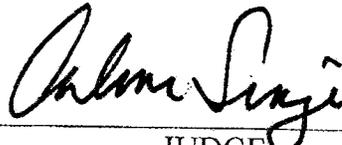
III. Conclusion

{¶ 24} We find that Polus was improperly ordered to serve consecutive sentences for his felony and misdemeanor convictions. Insofar as our decision is in conflict with the Fifth and Eighth District Courts of Appeals, we certify the conflict to the Ohio Supreme Court. We also find that Polus was improperly sentenced to a 6-month sentence instead of a 180-day sentence. We, therefore, reverse the trial court's judgment and modify the June 3, 2013 judgment of the Lucas County Court of Common Pleas as specified above. The costs of this appeal are assessed to the state pursuant to App.R. 24.

Judgment reversed.

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

Arlene Singer, J.



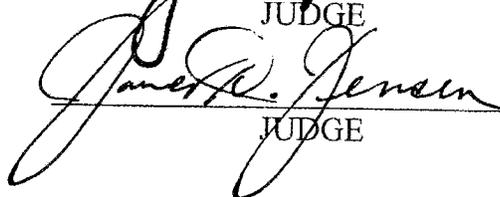
JUDGE

Stephen A. Yarbrough, P.J.



JUDGE

James D. Jensen, J.
CONCUR.



JUDGE

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

EXHIBIT B

must be on a rule of law-not facts. Third, the journal entry or opinion of the certifying court must clearly set forth the rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

¶ 18} We find that our holding today is in conflict with the Fifth District Court of Appeals' decisions in *State v. Vanmeter*, 5th Dist. Fairfield No. 2011-0032, 2011-Ohio-6110 and *State v. Varney*, 5th Dist. Perry No. 13 CA 00002, 2014-Ohio-193. It is also in conflict with the Eighth District's decision in *State v. Barker*, 8th Dist. Cuyahoga No. 99320, 2013-Ohio-4038. Accordingly we certify the record in this case for review and final determination to the Supreme Court of Ohio on the following issue:

Whether a trial court may impose consecutive sentences for felony and misdemeanor convictions under R.C. 2929.41(B)(1).

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¶ 20} We now turn to the second argument raised by Polus in this appeal. Under R.C. 2929.24(A)(1), a trial court may impose a jail sentence of not more than 180 days for an offense constituting a first-degree misdemeanor. The trial court sentenced Polus to six months' incarceration—in excess of the 180 days permitted under the statute. *See, e.g., State v. Pierce*, 4th Dist. Meigs No. 10CA10, 2011-Ohio-5353, ¶ 10 (recognizing that “six months is not the same as one hundred eighty days because each month has a

EXHIBIT C

2011-Ohio-6110, *; 2011 Ohio App. LEXIS 4992, **

STATE OF OHIO, Plaintiff-Appellee -vs- ANDREW J. VANMETER, Defendant-Appellant

Case No. 2011-CA-0032

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, FAIRFIELD COUNTY

2011-Ohio-6110; 2011 Ohio App. LEXIS 4992

November 21, 2011, DATE OF JUDGMENT ENTRY

PRIOR HISTORY: [1]**

CHARACTER OF PROCEEDING: Criminal appeal from the Fairfield County Court of Common Pleas, Case No. 2006-CR-0197.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant challenged a decision from the Fairfield County Court of Common Pleas, Ohio, which revoked his community control following judicial release and re-imposed his sentence.

OVERVIEW: Defendant entered a guilty plea to several offenses. The felony and misdemeanors were ordered to be served consecutively to each other. Defendant did not file a notice of appeal from this judgment entry. Defendant was granted judicial release and placed on community control for 5 years. Later, the State filed a motion seeking to revoke defendant's community control. The trial court granted the motion and imposed the balance of defendant's sentence. An appeal followed with defendant arguing that the trial court failed to give him the proper amount of credit for the time served on his misdemeanor conviction. In affirming, the appellate court noted that defendant failed to challenge the trial court's original failure to run his misdemeanor conviction concurrently with his felony sentence or the trial court's statement that the jail time credit was to be granted against his jail sentence. The trial court was authorized to make a misdemeanor jail sentence consecutive to a felony prison sentence, pursuant to R.C. 2929.41(B)(1). The trial court here specifically ordered that the sentence were to be served consecutively by agreement of the parties.

OUTCOME: The judgment was affirmed.

CORE TERMS: sentence, misdemeanor, offender, prison sentence, jail, jail sentence, felony, revoke, original sentences, felony charges, felony sentence, misdemeanor convictions, jail time, served consecutively, abduction, eligible, prison, probable cause, plea agreement, assignment of error, domestic violence, served consecutive, concurrently, consecutive, completion, sentenced, revocation hearing, sentence of imprisonment, parties agreed, prison term

LEXISNEXIS(R) HEADNOTES

Criminal Law & Procedure > Sentencing > Alternatives > General Overview

Criminal Law & Procedure > Sentencing > Alternatives > Probation > General Overview

HNI The rules dealing with a violation of an original sentence of community control (R.C.

2929.15) should not be confused with the sections of the Ohio Revised Code regarding early judicial release (R.C. 2929.20) even though the language of R.C. 2929.20(I) contains the term "community control" in reference to the status of an offender when granted early judicial release.

Criminal Law & Procedure > Sentencing > Alternatives > General Overview

Criminal Law & Procedure > Sentencing > Alternatives > Probation > Conditions

HN2 R.C. 2929.15(B) only applies to offenders who were initially sentenced to community control sanctions and permits a trial court to newly impose a prison term upon an offender who later violates the community control sanctions. In contrast, an offender who has been granted early judicial release has already been ordered to serve a term of incarceration as part of the original sentence but, upon motion by the "eligible offender," is released early from prison. If a trial court chooses to grant early judicial release to an eligible offender, R.C. 2929.20(I) conditionally reduces the already imposed term of incarceration, and the trial court is required to place the eligible offender under appropriate community control sanctions and conditions. The result is that the eligible offender's original prison sentence is then conditionally reduced until the offender either successfully completes the mandatory conditions of community control or violates the conditions of community control. When an offender violates his community control requirements, the trial court may re-impose the original prison sentence and require the offender to serve the balance remaining on the original term.

Criminal Law & Procedure > Criminal Offenses > Classifications > Misdemeanors

Criminal Law & Procedure > Sentencing > Consecutive Sentences

HN3 See R.C. 2929.41(B)(1).

COUNSEL: For Plaintiff-Appellee: GREG MARX, Fairfield County Prosecutor, Lancaster, OH.

For Defendant-Appellant: SCOTT P. WOOD, DAGGER, JOHNSTON, MILLER, OGILVIE & HAMPTON, Lancaster, OH.

JUDGES: Hon. W. Scott Gwin, P.J., Hon. John W. Wise, J., Hon. Patricia A. Delaney, J. Wise, J., and Delaney, J., concur.

OPINION BY: W. Scott Gwin

OPINION

Gwin, P.J.

[*P1] Defendant-appellant, Andrew J. Vanmeter, appeals the June 10, 2011 judgment entry of the Fairfield County Court of Common Pleas that revoked his community control following judicial release and re-imposed his sentence. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE¹

FOOTNOTES

¹ A Statement of the Facts underlying Appellant's original conviction is unnecessary to our disposition of this appeal. Any facts needed to clarify the issues addressed in Appellant's assignment of error shall be contained therein.

[*P2] On May 26, 2006, appellant was indicted on two counts of kidnapping, one count of abduction, one count of rape, all felony charges, and one count of domestic violence, a first-degree misdemeanor.

[*P3] As part of the negotiated plea agreement, the State **[**2]** dismissed Counts 1, 2, and 4 when appellant pled guilty to Counts 3 and 5, with a joint recommendation for a total sentence of 4 1/2 years. The parties jointly agreed to a prison sentence of 4 years on Count 3, consecutive to a 6-month sentence on Count 5.

[*P4] On September 28, 2006, appellant entered guilty pleas and was convicted of one count of abduction, in violation of R.C. 2905.02(A)(2), a felony of the third degree, and one count of domestic violence, in violation of R.C. 2919.25(A), a misdemeanor of the first degree. The trial court sentenced appellant to four years in prison on the felony abduction and six months in jail on the misdemeanor domestic violence. The trial court ordered that the sentences be served consecutive to each other. The trial court noted that appellant's sentence was a joint plea agreement in accordance with Revised Code 2953.08(D). Further, the trial court noted that the parties agreed that appellant would begin his jail sentence on the misdemeanor upon completion of his prison sentence for the felony charge. [Judgment Entry of Sentence, October 5, 2006 at 3]. Appellant did not file an appeal from the October 5, 2006 Judgment Entry²

FOOTNOTES

² The transcript from the **[**3]** original sentencing, which took place on September 28, 2006, was not made a part of the record for purposes of this appeal.

[*P5] Appellant was sent to a state penal institution and, by Judgment Entry filed December 10, 2007, appellant was granted judicial release and placed on community control for a period of five years.

[*P6] On March 19, 2008, the appellant was sentenced to fifteen days in jail upon a stipulation that he had violated the conditions of his community control.

[*P7] On March 30, 2010, the State filed a motion to revoke appellant's community control sanctions citing a variety of alleged violations of conditions. A Probable Cause hearing was held on April 1, 2010, and upon finding probable cause, the trial court scheduled a revocation hearing for May 3, 2010. On April 30, 2010 appellant's trial counsel filed a motion to continue the revocation hearing. By Judgment Entry filed May 13, 2010, the trial court continued the hearing to May 27, 2010.

[*P8] A hearing to revoke appellant community control sanctions took place on May 27, 2010. By Judgment Entry filed June 14, 2010 the trial court modified appellant's community control sanctions to include successful completion of the "EOCC program and **[**4]** follow all recommendations of that program..." The court noted in this Judgment Entry that the original sentences had been ordered to be served consecutively. Appellant did not appeal the June 14, 2010 Judgment Entry of the trial court modifying the terms of his community control sanctions.

[*P9] On March 31, 2011, the State filed a motion to revoke appellant's community control sanctions citing a variety of alleged violations of conditions. A Probable Cause hearing was held on May 3, 2011, and upon finding probable cause, the trial court scheduled a revocation hearing for June 6, 2011.

[*P10] On June 6, 2011, a hearing was held on the State's motion to revoke appellant's community control. At that hearing, appellant stipulated to the violations and requested the trial court to allow appellant to remain on community control. Appellant also argued that if the

trial court were to order into execution the balance of his sentence, appellant should be given credit for all time served toward the four-year sentence on the felony charge since the felony sentence and misdemeanor sentence should have been ordered concurrently with each other. The trial court took the matter under advisement.

[*P11] The trial court **[**5]** conducted the sentencing hearing on June 8, 2011. The trial court revoked appellant's community control and imposed the balance of appellant's sentence. During that hearing the trial court noted,

[*P12] "After reviewing the file, which is the written record in the case, considering the statements made by everybody who spoke on June the 6th and applying the law, the court finds, Mr. VanMeter, with respect to count five - that's the domestic violence that there was a six-month jail sentence in that case. The court finds that that sentence has been served. In other words, you've already served more than 180 days in the Fairfield County Jail. A six-month sentence is a 180-day sentence, actually. And that time has been served.

[*P13] "With respect to count three, the abduction with the four-year felony sentence, the court finds that you are not amenable to community control and revokes your community control and orders the balance of that sentence into effect.

[*P14] "At the hearing we had the other day, there were some calculations put out there about the amount of credit. And the court grants the credit. There was a total of 870 days up to or through May 27th. And so what I did -- and if you apply 180 days **[**6]** of those 870 days, that left--to the misdemeanor count, that leaves 690 days as of May the 27th to give you credit for. And what I did, I brought it through today, June the 8th, which is a total of 702 days credit through today, June the 8th, against that sentence.

[*P15] "And the court finds, after reviewing the law, Section 2929.41, specifically Sections (A) and (B)(1), but that entire section of 2929.41, that it is lawful to order both misdemeanor and felony sentences to be served consecutively to each other. And the court finds that it did that...." (Sent. T. June 8, 2011 at 4 5).

[*P16] Appellant has timely appealed raising as his sole assignment of error:

[*P17] "I. THE TRIAL COURT FAILED TO GIVE APPELLANT THE PROPER AMOUNT OF JAIL TIME CREDIT AS A RESULT OF A SENTENCE THAT WAS CONTRARY TO LAW."

I.

[*P18] Appellant argues that the trial court erred by ordering appellant to serve his felony prison sentence consecutively to his jail sentences for his misdemeanor convictions. According to appellant, Ohio law requires that the sentences for his misdemeanor convictions be served concurrently with his sentence based on his felony conviction. Therefore, appellant argues, the trial court should have credited the **[**7]** 180 days appellant served in jail for his misdemeanor convictions toward the four-year prison sentence he received for violating the community control imposed by the trial court. We disagree.

[*P19] Prior to considering appellant's assignments of error, we begin by noting that ^{HN1} the rules dealing with a violation of an original sentence of community control (R.C. 2929.15) should not be confused with the sections of the Revised Code regarding early judicial release (R.C. 2929.20) even though the language of R.C. 2929.20(I) contains the term "community control" in reference to the status of an offender when granted early judicial release. *State v. Mann*, 3rd Dist. No. 3 03 42, 2004 Ohio 4703 at ¶16; *State v. Durant*, Stark App. No. 2005 CA 00314, 2006 Ohio 4067.

[*P20] The Court of Appeals for the Third District further explained, in *Mann*, the differences between the rules dealing with a violation of an original sentence of community control and the

rules dealing with judicial release. In doing so, the court stated:

[*P21] ^{HN2} R.C. 2929.15(B) only applies to offenders who were initially sentenced to community control sanctions and permits a trial court to newly impose a prison term upon an offender who later violates **[**8]** the community control sanctions. [Citations omitted.]

[*P22] "In contrast, an offender who has been granted early judicial release has already been ordered to serve a term of incarceration as part of the original sentence but, upon motion by the "eligible offender," is released early from prison. * * * If a trial court chooses to grant early judicial release to an eligible offender, R.C. 2929.20(I) conditionally reduces the already imposed term of incarceration, and the trial court is required to place the eligible offender under appropriate community control sanctions and conditions. * * * The result is that the eligible offender's original prison sentence is then conditionally reduced until the offender either successfully completes the mandatory conditions of community control or violates the conditions of community control. When an offender violates his community control requirements, the trial court may re-impose the original prison sentence and require the offender to serve the balance remaining on the original term. [Citations omitted.] *Mann* at ¶ 7, ¶ 8.

[*P23] In the case at bar, the trial court ordered that the sentences be served consecutive to each other. The trial court noted that appellant's **[**9]** sentence was a joint plea agreement in accordance with Revised Code 2953.08(D). Further, the trial court noted that the parties agreed that appellant would begin his jail sentence on the misdemeanor upon completion of his prison sentence for the felony charge. The trial court further ordered that the jail time credits "should be applied to the jail sentence imposed herein..." [Judgment Entry of Sentence, October 5, 2006 at 3]. Appellant was sent to prison. Appellant did not appeal this sentence, which he could have, and challenged the trial court's failure to run misdemeanor conviction concurrently with his felony sentence or the trial court's order that jail time credit be granted against appellant's jail as opposed to prison, sentence.³

FOOTNOTES

³ We note again that the record before this Court indicates that appellant agreed to both the consecutive nature of the sentences and the grant of jail time credit.

[*P24] A trial court is authorized to make a misdemeanor jail sentence consecutive to a felony prison sentence. R. C. 2929.41 states in pertinent part as follows.

[*P25] ^{HN3} "(B)(1) A jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, jail term, **[**10]** or sentence of imprisonment when the trial court specifies that it is to be served consecutively or when it is imposed for a misdemeanor violation of section 2907.322, 2921.34, or 2923.131 of the Revised Code." (Emphasis added).

[*P26] In the case at bar, the trial court specifically ordered the sentences to be served consecutive to one another by agreement of the parties.

[*P27] Accordingly, appellant's sole Assignment of Error is overruled.

[*P28] The judgment of the Fairfield County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Fairfield County Court of Common Pleas is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY

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EXHIBIT D

2014-Ohio-193, *; 2014 Ohio App. LEXIS 176, **

STATE OF OHIO, Plaintiff-Appellee -vs- FRANKLIN T. VARNEY, JR., Defendant-Appellant

Case No. 13 CA 00002

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, PERRY COUNTY

2014-Ohio-193; 2014 Ohio App. LEXIS 176

January 21, 2014, Date of Judgment Entry

PRIOR HISTORY: [1]**

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 12 CR 0049.

DISPOSITION: Reversed and Remanded.

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-The trial court committed plain error as a matter of law when it imposed consecutive sentences because, while it had authority under R.C. §2929.41(B)(1) to specify that defendant's misdemeanor and felony sentences run consecutively, it did not set forth any findings to support the imposition of consecutive sentencing as required by R.C. 2929.14(C)(4).

OUTCOME: Judgment reversed and remanded.

CORE TERMS: offender's, consecutive sentences, misdemeanor, multiple offenses, prison term, sentence, consecutive, felony, necessary to protect, courses of conduct, seriousness, sentencing, sentence of imprisonment, jail term, pickup truck, aggregate, barn, felony sentence, offenses committed, served consecutively, consecutive sentencing, awaiting trial, sanction imposed, prior offense, criminal conduct, disproportionate, consecutively, post-release, convinced, specify

LEXISNEXIS(R) HEADNOTES

Criminal Law & Procedure > Criminal Offenses > Classifications > Misdemeanors
Criminal Law & Procedure > Sentencing > Consecutive Sentences

HN1 See R.C. 2929.41(B)(1), (3).

Criminal Law & Procedure > Sentencing > Imposition > Findings

HN2 The revisions to the felony sentencing statutes require a trial court to make specific findings when imposing consecutive sentences. Nonetheless, although Am. Sub. H.B. 86, Gen. Assem. (2011) requires the trial court to make findings before imposing a consecutive sentence, it does not require the trial court to give its reasons for imposing the sentence.

Criminal Law & Procedure > Sentencing > Consecutive Sentences

HN3 The record must clearly demonstrate that consecutive sentences are not only

appropriate, but are also clearly supported by the record.

Criminal Law & Procedure > Sentencing > Consecutive Sentences
HN4 See R.C. 2929.14(C)(4).

Criminal Law & Procedure > Sentencing > Consecutive Sentences
Criminal Law & Procedure > Sentencing > Imposition > Findings
HN5 In reviewing the record an appellate court must be convinced that the trial court imposed consecutive sentences because it had found consecutive sentences were necessary to protect the public or to punish the offender, they are not disproportionate to the seriousness of the offender's conduct and the danger the offender poses to the public.

Criminal Law & Procedure > Sentencing > Consecutive Sentences
Criminal Law & Procedure > Sentencing > Imposition > Findings
HN6 In reviewing the record an appellate court must be convinced that the trial court found an offender's history of criminal conduct demonstrated consecutive sentences were necessary to protect the public from future crime, or the offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to R.C. 2929.16, 2929.17, or 2929.18, was under post-release control for a prior offense, or 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. R.C. 2929.14(C)(4).

COUNSEL: For Plaintiff-Appellee: JOSEPH FLAUTT, PROSECUTING ATTORNEY, New Lexington, Ohio.

For Defendant-Appellant: STEVEN P. SCHNITTKKE, SCHNITTKKE & SMITH, New Lexington, Ohio.

JUDGES: Hon. Sheila G. Farmer, P. J., Hon. John W. Wise, J., Hon. Craig R. Baldwin, J. Farmer, P. J., and Baldwin, J., concur.

OPINION BY: John W. Wise

OPINION

Wise, J.

[*P1] Defendant-Appellant Franklin T. Varney, Jr. appeals his March 29, 2013, sentence and conviction entered in the Perry County Court of Common Pleas following a jury trial on one count of Breaking and Entering and one count of Attempted Theft.

[*P2] Appellee State of Ohio has not filed a brief in this matter.

STATEMENT OF THE FACTS AND CASE

[*P3] The facts as set forth by Appellee are as follows:

[*P4] On January 17, 2012, at approximately 2:00 pm., Robert Ford observed a pickup truck near his barn at his residence located at 4728 Jackson Township Road, Junction City, Ohio. (T.

at 67-69). Mr. Ford drove down to his shed and observed two people with "stuff" in their pickup truck. (T. at 70). The barn had been padlocked. (T. at 70). Mr. Ford recognized Appellant Franklin T. Varney, Jr. as one **[**2]** of the individuals standing outside the barn. (T. at 71-73). Two roto-tillers and a cast iron pot belonging to Mr. Ford had been loaded into the back of the pickup truck. (T. at 73). After some discussion between Mr. Ford and Appellant, Appellant threw the ******* on the ground. (T at 74-75). Mr. Ford then called the Perry County Sheriff's Office.

[*P5] Deputy Brent Tysinger, now Chief of Police of Crooksville, Ohio, and Sergeant Keith Peck of the Perry County Sheriff's Office responded to the call. Photographs were taken of the scene, which were later introduced into evidence at trial.

[*P6] Robert Ford identified Appellant Varney by a photo lineup. (T. at 58, 62, 112).

[*P7] On June 15, 2012, Appellant was indicted by the Perry County Grand Jury on one count of Breaking and Entering, in violation of R.C. §2911.13, a fifth degree felony, and one count of Attempted Theft, in violation of R.C. §2923.02, a second degree misdemeanor.

[*P8] On January 31, 2013, this matter proceeded to a jury trial. The State of Ohio presented the testimony of Chief Brent Tysinger of the Village of Crooksville, Ohio, a former Deputy of the Perry County Sheriff's Office; Robert Ford, the victim; and, Sergeant Keith Peck of the Perry **[**3]** County Sheriff's Office.

[*P9] Appellant did not present any witnesses.

[*P10] The Jury found Appellant guilty of Breaking and Entering and Attempted Theft.

[*P11] On March 22, 2013, the trial court sentenced Appellant to a definite term of eleven (11) months in prison and imposed a fine of One Thousand Dollars (\$1,000.00) on the charge of Breaking and Entering. The trial court also imposed a sentence of fifty-one (51) days in the Southeastern Ohio Regional Jail on the offense of Attempted Theft, with said period of incarceration to be served consecutive to the sentence imposed for Breaking and Entering. The Sentencing Entry was filed on March 29, 2013.

[*P12] Appellant now raises the following Assignment of Error on appeal:

ASSIGNMENT OF ERROR

[*P13] "I. DEFENDANT/APPELLANT WAS ERRONEOUSLY SENTENCED TO CONSECUTIVE SENTENCES ON A FIFTH DEGREE FELONY AND SECOND DEGREE MISDEMEANOR WHICH CONSTITUTES AN ABUSE OF DISCRETION BY THE COURT."

I.

[*P14] Appellant, in his sole Assignment of Error, argues that the trial court's imposition of consecutive sentences was an abuse of discretion.

[*P15] More **[**4]** specifically, Appellant argues that the trial court was required to run the misdemeanor sentence and the felony sentence in this matter concurrently.

[*P16] Revise Code §2929.41, Multiple sentences, provides in relevant part:

[*P17] *HN13* (B)(1) A jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, jail term, or sentence of imprisonment when the trial court specifies that it is to be served consecutively or when it is imposed for a misdemeanor violation of section 2907.322, 2921.34, or 2923.131 of the Revised Code.

[*P18] "When consecutive sentences are imposed for misdemeanors under this division, the term to be served is the aggregate of the consecutive terms imposed, except that the aggregate term to be served shall not exceed eighteen months."

[*P19] "* * *

[*P20] "(3) * * * When consecutive jail terms or sentences of imprisonment and prison terms are imposed for one or more misdemeanors and one or more felonies under this division, the term to be served is the aggregate of the consecutive terms imposed, and the offender shall serve all terms imposed for a felony before serving any term imposed for a misdemeanor."

[*P21] Pursuant to R.C. §2929.41(B)(1), we find that **[**5]** the trial court had the authority to specify that the misdemeanor and felony sentences herein run consecutively.

[*P22] Appellant also argues that the trial court failed to state its reasons why consecutive sentences should be imposed in this case.

[*P23] 2011 Am.Sub.H.B. No. 86, which became effective on September 30, 2011, revived language provided in former R.C. 2929.14(E) and moved it to R.C. 2929.14(C)(4). The General Assembly has thus expressed its intent to revive the statutory fact-finding provisions pertaining to the imposition of consecutive sentences that were effective pre-Foster. See *State v. Wells*, 8th Dist. Cuyahoga No. 98428, 2013-Ohio-1179, ¶ 11. ^{HN2} These revisions to the felony sentencing statutes now require a trial court to make specific findings when imposing consecutive sentences. Nonetheless, "[a]lthough H.B. 86 requires the trial court to make findings before imposing a consecutive sentence, it does not require the trial court to give its reasons for imposing the sentence." *State v. Bentley*, 3rd Dist. Marion No. 9-12-31, 2013-Ohio-852, ¶ 12, citing *State v. Frasca*, 11th Dist. Trumbull No. 2011-T-0108, 2012-Ohio-3746, ¶ 57. ^{HN3} The record must clearly demonstrate that consecutive **[**6]** sentences are not only appropriate, but are also clearly supported by the record. See *State v. Queer*, 5th Dist. Ashland No. 12-COA-041, 2013-Ohio-3585, ¶ 21.

[*P24] R.C. §2929.14(C)(4) provides, in relevant part:

[*P25] ^{HN4} "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:

[*P26] "(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.

[*P27] "(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 **[**7]** any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

[*P28] "(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

[*P29] We have consistently stated the record must clearly demonstrate consecutive sentences are not only appropriate, but are also clearly supported by the record. See, *State v. Fautleroy*, 5th Dist. No. CT2012-0001, 2012-Ohio-4955; *State v. Bonnell*, 5th Dist. No. 12CAA030022, 2012-Ohio-5150.

[*P30] In other words, ^{HN5} in reviewing the record we must be convinced the trial court imposed consecutive sentences because it had found consecutive sentences were necessary to protect the public or to punish the offender, they are not disproportionate to the seriousness of his conduct and the danger the offender poses to the public. In addition, ^{HN6} in reviewing the record we must be convinced that the trial court found the offender's history of criminal conduct demonstrated consecutive sentences were necessary to protect the public from future crime, or the offender committed one or more of the multiple offenses while the offender **[**8]** 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, or 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. R.C. §2929.14(C)(4).

[*P31] Here, the trial court did not set forth any findings to support the imposition of consecutive sentencing as required by R.C. §2929.14(C)(4). The trial court is required to make the appropriate statutory findings prior to imposing consecutive sentences. We therefore hold the trial court committed plain error as a matter of law when it imposed consecutive sentences in this case.

[*P32] Appellant's sole Assignment of Error is sustained.

[*P33] For the foregoing reasons, the judgment of the Court of Common Pleas, Perry County, Ohio, is reversed and remanded to the trial court for resentencing due to the trial court's failure set forth proper **[**9]** findings to support the imposition of consecutive sentencing as required by R.C. §2929.14(C)(4).

By: Wise, J.

Farmer, P. J., and

Baldwin, J., concur.

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EXHIBIT E

2013-Ohio-4038, *; 2013 Ohio App. LEXIS 4225, **

STATE OF OHIO, PLAINTIFF-APPELLEE vs. SIMMIE BARKER, III, DEFENDANT-APPELLANT

No. 99320

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2013-Ohio-4038; 2013 Ohio App. LEXIS 4225

September 19, 2013, Released and Journalized

PRIOR HISTORY: [1]**

Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case Nos. CR-565370 and CR-565507.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-The trial court properly imposed consecutive sentences, because although it did not follow the language of R.C. 2929.14(C)(4) precisely, it made each of the required individual findings, and specifically stated that it had considered the application of R.C. 2929.11; [2]-Because the trial court had the authority under R.C. 2929.24 (A)(1) to sentence defendant to a consecutive term for his misdemeanor conviction, and application of the jail-time credit to defendant's consecutive terms reduced the length of his entire sentence, the trial court properly sentenced defendant for his misdemeanor conviction to the days he had already spent in jail; [3]-Defendant's offenses were not allied offenses under R.C. 2941.25(A), as one offense involved a different victim and defendant prevented the other victim from trying to enter an apartment after the physical assault had taken place.

OUTCOME: Judgment affirmed.

CORE TERMS: sentence, offender, consecutive sentences, prison terms, consecutive, assault, assignments of error, sentenced, jail, misdemeanor, sentencing, jail-time, consecutive terms, prosecutor, time served, seriousness, allied, punish, video, attempted burglary, misdemeanor convictions, courses of conduct, abduction, sentence of imprisonment, necessary to protect, served consecutively, record reflects, multiple offenses, rehabilitation, prisoner

LEXISNEXIS(R) HEADNOTES

Criminal Law & Procedure > Sentencing > Consecutive Sentences

Criminal Law & Procedure > Sentencing > Imposition > Findings

HN1 The statutory language directs that the trial court must "find" the relevant sentencing factors before imposing consecutive sentences.

Criminal Law & Procedure > Sentencing > Consecutive Sentences

Criminal Law & Procedure > Sentencing > Imposition > Findings

HN2 R.C. 2929.14(C)(4) requires that a trial court engage in a three-step analysis in order to impose consecutive sentences. First, the trial court must find that consecutive service is necessary to protect the public from future crime or to punish

the offender. Next, the trial court must find that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. Finally, the trial court must find that at least one of the following applies: (1) the offender committed one or more of the multiple offenses while awaiting trial or sentencing, while under a sanction, or while under postrelease control for a prior offense; (2) 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 offenses 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; or (3) the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. In making these findings, a trial court is not required to use "talismanic words," however, it must be clear from the record that the trial court actually made the findings required by statute.

Criminal Law & Procedure > Sentencing > Credits

HN3 See R.C. 2967.191.

Criminal Law & Procedure > Sentencing > Consecutive Sentences

HN4 See R.C. 2929.41(B).

Criminal Law & Procedure > Sentencing > Consecutive Sentences

Criminal Law & Procedure > Sentencing > Credits

HN5 Under R.C. 2967.191, the department of rehabilitation and correction credits jail time served; however, it is the trial court that is to make the factual determination as to the number of days that can constitute jail-time credit. When a defendant is sentenced to consecutive terms, the terms of imprisonment are served one after another, jail-time credit applied to one prison term gives full credit that is due, because the credit reduces the entire length of the prison sentence.

Criminal Law & Procedure > Sentencing > Merger

HN6 When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered.

COUNSEL: FOR APPELLANT: Joseph Vincent Pagano, Rocky River, Ohio.

FOR APPELLEE: Timothy J. McGinty, Cuyahoga County Prosecutor, Edward Fadel, Assistant Prosecuting Attorney, Cleveland, Ohio.

JUDGES: BEFORE: Rocco, J., Boyle, P.J., and E.A. Gallagher, J. MARY J. BOYLE, P.J., and EILEEN A. GALLAGHER, J., CONCUR.

OPINION BY: KENNETH A. ROCCO

OPINION

JOURNAL ENTRY AND OPINION

KENNETH A. ROCCO, J.:

[*P1] After entering guilty pleas in two underlying cases to a charge of drug possession, attempted burglary, assault, and abduction, defendant-appellant Simmie Barker, III, appeals from the sentences he received.

[*P2] Barker presents three assignments of error. He asserts that his sentences are contrary to law because the trial court failed to make the findings necessary to impose consecutive sentences. He also asserts that the trial court improperly stated that he could not receive credit for time served because those days constituted his sentence for the assault conviction. Finally, he asserts that the sentences imposed violated R.C. 2941.25(A) because his convictions in one case were for allied offenses.

[*P3] Following a review of the record, **[**2]** this court concludes that the trial court complied with R.C. 2929.14(C)(4) when imposing consecutive terms and also that his sentences are otherwise in accordance with law. Thus, Barker's assignments of error are overruled, and his sentences are affirmed.

[*P4] Barker originally was indicted in case number CR-565370 on one count of drug possession and in case number CR-565507 on one count of burglary, one count of felonious assault, and one count of kidnapping. After several pretrial hearings, the parties notified the trial court that a plea agreement had been reached.

[*P5] As outlined by the prosecutor, in exchange for Barker's guilty pleas, the charges in CR-565507 would be amended to one count of attempted burglary, one count of misdemeanor assault, and one count of abduction. The trial court conducted a careful colloquy with Barker before accepting his guilty pleas. A subsequent discussion with Barker led the trial court to order both a presentence report and a psychological assessment for potential "mitigation" ¹ purposes.

FOOTNOTES

¹ This is the trial court's word.

[*P6] When Barker's cases were called for sentencing, on November 21, 2012, the trial court noted that it had received the presentence report. **[**3]** ² The record reflects that the prosecutor then showed the trial court a video of the incident that led to Barker's conviction in CR-565507; the video came from a neighbor who had recorded what she observed and posted it on "YouTube." ³ The trial judge invited Barker to view the video with him, and, as they watched, Barker attempted to explain his actions.

FOOTNOTES

² None of the parties referred to a report resulting from a psychological assessment of Barker.

³ The prosecutor did not request of the trial court that the video be admitted as an exhibit; therefore, it does not appear in the appellate record.

[*P7] The trial court then turned to the prosecutor for his comments. The prosecutor argued that none of the offenses Barker committed in CR-565507 were allied offenses pursuant to R.C. 2941.25(A), because each occurred at a separate time.

[*P8] After listening to the assault victim, defense counsel, and Barker himself, the trial court reviewed Barker's history of misdemeanor convictions for a "weapons violation," a theft, and a "drug abuse," the trial court stated that Barker had committed "separate" offenses and that a consecutive sentence was "appropriate."

[*P9] The trial court imposed on Barker prison terms **[**4]** that totaled five years, i.e., one year in CR-565370, to be served consecutively with consecutive terms in CR-565507 of 12

months for attempted burglary and 36 months for abduction. As to the misdemeanor assault conviction in CR-565507, the trial court sentenced Barker to "time served." On this basis, the trial court declared that Barker was ineligible to receive "jail-time" credit.

[*P10] Barker appeals from his sentence with three assignments of error.

I. The trial court erred when it sentenced Barker to maximum, consecutive prison terms.

II. The trial court erred by not calculating and awarding Barker jail time credit in this case.

III. The court erred when it sentenced Barker to consecutive prison terms for allied offenses of similar import.

[*P11] Barker argues in his first assignment of error that the trial court neither made the necessary findings in imposing consecutive sentences in his underlying cases, nor engaged in any analysis regarding the sentences' proportionality and consistency. Because the record reflects otherwise, Barker's argument is unpersuasive.

[*P12] This court has set forth the current law relating to consecutive sentences in *State v. Venes*, 8th Dist. Cuyahoga No. 98682, 2013-Ohio-1891, 992 N.E.2d 453. **[**5]** ^{HN1} The statutory language directs that the trial court must "find" the relevant sentencing factors before imposing consecutive sentences.

[*P13] ^{HN2} R.C. 2929.14(C)(4), as revived, now requires that a trial court engage in a three-step analysis in order to impose consecutive sentences. First, the trial court must find that "consecutive service is necessary to protect the public from future crime or to punish the offender." *Id.* Next, the trial court must find that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." *Id.* Finally, the trial court must find that at least one of the following applies:

(1) the offender committed one or more of the multiple offenses while awaiting trial or sentencing, while under a sanction, or while under postrelease control for a prior offense;

(2) 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 offenses 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; **[**6]** or

(3) the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. *Id.*

[*P14] In making these findings, a trial court is not required to use "talismanic words," however, it must be clear from the record that the trial court actually made the findings required by statute. *Venes*, 8th Dist. Cuyahoga No. 98682, 2013-Ohio-1891, at ¶ 14, 17, 992 N.E.2d 453; see also *State v. Pierson*, 1st Dist. Hamilton No. C-970935, 1998 Ohio App. LEXIS 3812 (Aug. 21, 1998).

[*P15] In pertinent part, the trial court made the following comments when imposing the sentences for Barker's convictions in these two cases:

THE COURT: Your behavior is disgusting, obscene, unlawful, degrading, obnoxious. It must be met with a penalty that is commensurate with the act. You destabilize the entire community with this type of behavior that took place in full view, in broad daylight, for anybody that was willing to even stop and look. And, in fact, people did videotape it. You seem to enjoy the punishment and the pain and the suffering that you were inflicting upon the victim in this case, and you seem to actually turn to the camera

* * *

So I'm taking into **[**7]** consideration the principles found in 2929.11, and the overriding principle is *to punish the offender and to protect the public from future crimes* * * * . * * * *[W]e're not going to impose a minimum sanction here.* [Finding: "consecutive service is necessary to protect the public from future crime or to punish the offender."] I'm considering the need for incapacitation, deterrence, and rehabilitation, but I'm, under 2929.12(B), indicating that there was injury that was inflicted upon this victim * * * . * * * I am distressed that you would shout these racist terms as you assault this man. * * * [T]he victim here is 62 years old. * * * .

* * *

THE COURT: So, therefore, I believe that *the only appropriate sentence to punish this defendant is with a consecutive period of incarceration.* * * * *[H]e has prior cases, has a record of drug abuse, had prior opportunities to clean up his act and he has not done so. These are separate incidents.* [Finding: "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public."] * * *

* * *

THE COURT: On Count 1 he's sentenced to 12 months. How much time have you spent in county **[**8]** jail?

[BARKER]: Since August 1st, sir.

THE COURT: On Count 2, * * * we'll sentence him to time served.

On Count 3, the abduction, I sentence him to 36 months. Count[s] 1 and 3 are consecutive for a period of four years going forward. On the drug case, 565370, a separate offense, you are sentenced to one year consecutive. That's five years * * *

* * *

THE COURT: * * * I don't think that one sentence in this case is appropriate to punish the offender. * * *

* * *

THE COURT: * * * And I guess the magic word, I am searching for it off the top of my head, *I don't think one prison term is appropriate for these acts. I believe it demeans the seriousness of the offense. I believe it is necessary to sentence a person [who] acts in the fashion that I described to a consecutive period of incarceration considering all of the factors that I have placed on the record* and his prior criminal history. [Finding: the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the offenses 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

[9]** offender's conduct.] * * * (Emphasis added.)

[*P16] The foregoing italicized portions of the trial court's comments demonstrates that, while not following the language of R.C. 2929.14(C)(4) precisely, the trial court made each of the required individual findings in order to impose maximum and consecutive sentences in Barker's two cases. ⁴ *State v. Richmond*, 8th Dist. Cuyahoga No. 98915, 2013-Ohio-2887, ¶ 13-14; *State v. Bonness*, 8th Dist. Cuyahoga No. 99129, 2013-Ohio-2699, ¶ 13-16; *State v. Grier*, 8th Dist. Cuyahoga No. 98637, 2013-Ohio-1661. Similarly, the trial court specifically stated it had considered the application of R.C. 2929.11 to the sentences. *Bonness* at ¶ 18-21.

FOOTNOTES

⁴ Although the record indicates the trial court made the necessary findings, it is also evident that the state did little in this case to assist the trial court in determining whether a consecutive sentence was appropriate. If the state has such a belief, the best practice would be to provide a sentencing memorandum to the court that includes the required R.C. 2929.14(C)(4) statutory findings along with citations to the record that support each finding. Alternatively, the state could orally articulate at the sentencing **[**10]** hearing the R.C. 2929.14(C)(4) findings that find support in the record. All too often, the state merely argues on appeal that the trial court's use of "talismanic words" is unnecessary, when it is the state's responsibility to provide the trial court with a sentencing memorandum in the first place. If the state did more at the proper time, however, trial courts would announce clear findings, the need for "interpretation" would be eliminated, and this court would most likely see a significant reduction in the number of cases having to be remanded (at great expense to the public).

[*P17] Consequently, Barker's first assignment of error is overruled.

[*P18] Barker also argues that the trial court improperly sentenced him to "time served" for his misdemeanor conviction rather than giving him credit toward his prison term for the time he spent in jail awaiting resolution of these cases. In support of his argument, he cites *State v. Fugate*, 117 Ohio St.3d 261, 2008 Ohio 856, 883 N.E.2d 440, but *Fugate* is inapposite.

[*P19] The applicable portion of R.C. 2967.191 states:

HN3 The department of rehabilitation and correction shall reduce the stated prison term of a prisoner * * * by the total number of days that the **[**11]** prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced

* * *

[*P20] However, R.C. 2929.41(B) provides in relevant part:

HN4 (1) A jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, jail term, or sentence of imprisonment when the trial court specifies that it is to be served consecutively * * * .

* * *

(3) * * * When consecutive jail terms or sentences of imprisonment and prison

terms are imposed for one or more misdemeanors and one or more felonies under this division, the term to be served is the aggregate of the consecutive terms imposed, and the offender shall serve all terms imposed for a felony before serving any term imposed for a misdemeanor.

[*P21] In *State v. Hughley*, 8th Dist. Cuyahoga Nos. 92588 and 93070, 2009 Ohio 5824, at ¶ 35 (*discretionary appeal not allowed, State v. Hughley*, 124 Ohio St.3d 1477, 2010 Ohio 354, 921 N.E.2d 247), this court observed:

We note that ^{HN5} under R.C. 2967.191, the department of rehabilitation and correction credits jail time served; however, it is "the trial court that is to make the factual determination as to the number of days that can constitute **[**12]** jail-time credit." *State v. Frazier*, Cuyahoga App. No. 86984, 2006 Ohio 3023, P9, citing *State v. Morgan* (Mar. 27, 1996), Wayne County App. No. 95CA0055, 1996 Ohio App. LEXIS 1239. * * * [I]n *State v. Fugate*, 117 Ohio St.3d. 261, 2008 Ohio 856, 883 N.E.2d 440, the Ohio Supreme Court noted that: "[w]hen a defendant is sentenced to consecutive terms, the terms of imprisonment are served one after another, *jail-time credit applied to one prison term gives full credit that is due*, because the credit reduces the entire length of the prison sentence."

* * * Because the trial court *could* run the misdemeanor sentence consecutive to the felony sentence, and the trial court must specify the number of days that constitute jail-time credit, we find that *it was within the trial court's discretion to direct that the jail-time credit be applied to the misdemeanor sentence* in the instant case. This is especially true when his sentences are consecutive and the *jail-time credit reduces the entire length of his sentence*. (Emphasis added.)

[*P22] The identical situation exists in this case. The trial court had the authority to sentence Barker to a consecutive term of up to 180 days for his misdemeanor conviction. **[**13]** R.C. 2929.24(A)(1); *Maple Hts. v. Sweeney*, 8th Dist. Cuyahoga No. 85415, 2005 Ohio 2820, ¶ 9. Application of the jail-time credit to Barker's consecutive terms reduced the length of his entire sentence. Therefore, the trial court acted within its discretion to sentence Barker for his misdemeanor conviction to the days he had already spent in jail. Consequently, Barker's second assignment of error is also overruled.

[*P23] In his third assignment of error, Barker asserts that his convictions in CR-565507 were allied offenses pursuant to R.C. 2941.25(A); therefore, the trial court improperly imposed sentence for each of the convictions. The record fails to support his assertion.

[*P24] The Ohio Supreme Court set forth the following requirement in *State v. Johnson*, 128 Ohio St.3d 153, 2010 Ohio 6314, 942 N.E.2d 1061, at paragraph one of the syllabus:

^{HN6} When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered. (*State v. Rance* (1999), 85 Ohio St.3d 632, 1999 Ohio 291, 710 N.E.2d 699, overruled.)

[*P25] The record of this case demonstrates the trial court considered Barker's conduct when the court determined at **[**14]** the sentencing hearing that the CR-565507 offenses were "separate." First, the trial court was aware from the indictment itself that the attempted burglary

was committed against a victim different from the victim set forth in the other two counts. *See, e.g., State v. Blackford*, 5th Dist. Perry No. 12 CA 3, 2012 Ohio 4956, ¶ 15.

[*P26] Second, as the *Johnson* court stated at ¶ 51, if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge. The record reflects that the trial court had observed the state's video, which, as the prosecutor explained, showed that "after the [physical] assault had taken place, [Barker] then prevented the victim from trying to enter the apartment" to escape from Barker's subsequent verbal assault. *See, e.g., State v. Martin*, 8th Dist. Cuyahoga No. 95281, 2011 Ohio 222, ¶ 12.

[*P27] Based on the foregoing, Barker's third assignment of error also is overruled.

[*P28] Barker's sentences are affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of **[**15]** this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

MARY J. BOYLE, P.J., and
EILEEN A. GALLAGHER, J., CONCUR

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