2014 WL 3732366

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Second District, Clark County.

STATE of Ohio, Plaintiff–Appellee
v.
Joseph WEESE, Defendant–Appellant.

No. 2013–CA–61. | Decided July 25, 2014.

Criminal Appeal from Common Pleas Court.

Attorneys and Law Firms

Ryan A. Saunders, Clark County Prosecutor's Office, Springfield, OH, for plaintiff-appellee.

Lucas W. Wilder, Dayton, OH, for defendant-appellant.

Opinion

HALL, J.

*1 {¶ 1} Joseph Weese appeals from his convictions for domestic violence and abduction, both felonies of the third degree, after he entered guilty pleas as part of a plea bargain with an agreed-upon sentence of twenty-four months in prison on the first charge to be served consecutively to eighteen months on the second. Appellant's assigned counsel has filed a brief under *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), indicating that he "has throughly examined the record and the law and has found no potentially meritorious issues for appeal." (Brief of Appellant at 3). Counsel also requests that he be permitted to withdraw as counsel.

{¶ 2} Counsel's brief indicates that he notified Weese in writing concerning counsel's intention to file an *Anders* brief. We independently notified Weese of the *Anders* filing, advising him of his right to file his own brief and the time limit for doing so. Weese has not filed anything, and the time for filing now has expired.

The Course of Proceedings

{¶ 3} Weese was indicted on November 19, 2012 for domestic violence, with two prior convictions, and for felonious assault and kidnapping. (Doc. 1) Trial was scheduled several times but continued at the request of the defendant. He also waived his right to a speedy trial. (Doc. 21) The last scheduled trial date was June 24, 2013. On that morning, Weese entered into a plea bargain with the State of Ohio. In exchange for guilty pleas to the charge of third-degree-felony domestic violence and a reduced third-degree-felony charge of abduction, the State agreed to dismiss the felonious-assault count. As part of the bargain, "[t]he parties would agree to a sentence of twenty-four months on count one [domestic violence, third degree felony] and eighteen months on count three [abduction] to run consecutive for a total of three-and-a-half years in the Ohio State Penitentiary." (Transcript at 3) The record reveals the trial court completed a Crim.R. 11 colloquy with the defendant. He voluntarily entered his pleas and agreed to the terms of the agreement, orally and in writing. (Transcript 4–8) (Doc. 24) In imposing the agreed sentence, the trial court properly advised him of mandatory post-release control of three years, imposed court costs, and advised him that he could be ordered to perform community service if he failed to pay court costs.

No Potential Assignments of Error

{¶ 4} In his brief, assigned counsel does not identify any potential assignments of error. He notes that there were no pretrial motions, there was no trial, and the trial court conducted a proper Crim.R. 11 plea. Counsel does mention two issues we will address: (1) that the trial court did not make findings to impose consecutive sentences and (2) that Weese's family apparently believes he was pressured into entering a plea but the appeal is limited to the appellate record. We observe that with an agreed consecutive sentence the trial court is not required to make any findings, and that the record before us contains no support whatsoever for an argument that the plea was coerced.

*2 {¶ 5} Ordinarily, R.C. 2929.14(C)(4) requires certain findings to be made before consecutive sentences can be imposed. However, the Ohio Supreme Court explicitly has held that "[a] sentence imposed upon a defendant is not subject to review under [R.C. 2953.08(D)] 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." *State v. Porterfield.* 106 Ohio St.3d 5, 2005–Ohio–3095, 829 N.E.2d 690, ¶ 25. In addition, the court

stated that "[t]he General Assembly intended a jointly agreed-upon sentence to be protected from review precisely because the parties agreed that the sentence is appropriate. Once a defendant stipulates that a particular sentence is justified, the sentencing judge no longer needs to independently justify the sentence." *Id.* Therefore, not only were findings unnecessary, but the agreed sentence is not subject to appellate review. Any argument to the contrary lacks arguable merit and would be frivolous.

{¶ 6} With regard to an implication that Weese's family believes his plea may have been coerced, we proceed only on the record presented to us. That includes all of the docket entries and the June 24, 2013 transcript of the "Plea and Disposition" before the trial court. There are no facts in this record to support any argument that Weese was coerced into making his pleas. Any argument about coercion lacks arguable merit and would be frivolous.

Anders Review

{¶ 7} We also have performed our duty under *Anders* to conduct an independent review of the record. We thoroughly have reviewed the various filings, the written transcript of the plea colloquy, and the sentencing disposition. We have found no non-frivolous issues for review. Accordingly, appellate counsel's request to withdraw is sustained, and the judgment of the Clark County Common Pleas Court is affirmed.

FROELICH, P.J., and DONOVAN, J., concur.

All Citations

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2015 WL 914823

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Fourth District, Scioto County.

STATE of Ohio, Plaintiff–Appellee,
v.
Lenward W. PULLIAM, JR., Defendant–Appellant.

No. 14CA3609. | Decided March 2, 2015.

Attorneys and Law Firms

Angela Wilson Miller, Jupiter, FL, for Appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Pat Apel, Assistant Prosecuting Attorney, Portsmouth, OH, for Appellee.

Opinion

McFARLAND, A.J.

*1 {¶ } This is an appeal from a Scioto County Common Pleas Court judgment convicting and sentencing Appellant after he pled guilty pursuant to a negotiated plea agreement and agreed sentence. Specifically, Appellant pled guilty to two felony drug offenses, which included trafficking in heroin and trafficking in oxycodone, with a major drug offender specification, both first degree felonies, in exchange for the dismissal of the remaining eleven felony counts contained in the multi-count felony indictment. On appeal, Appellant contends that 1) the trial court erred when it imposed consecutive sentences without making the required findings pursuant to R.C. 2929.14; and 2) trial counsel provided constitutionally ineffective assistance when he failed to argue strong, mitigating factors at sentencing, in violation of Appellant's rights under the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution and Article I, §§ 5, 10 and 16 of the Ohio Constitution.

{¶ 2} Because Appellant's sentence was imposed pursuant to a negotiated plea agreement which included an agreed sentence, it is not subject to appellate review under R.C. 2953.08(D). Thus, Appellant's assignments of error, both of which involve the trial court's imposition of consecutive sentences, are overruled. Accordingly, the decision of the trial court is affirmed.

FACTS

{¶ 3} Appellant, Lenward W. Pulliam, Jr., was indicted on February 1, 2013, on a multi-count felony indictment containing thirteen felony counts involving possession and trafficking in drugs (cocaine, heroin, oxycodone, oxymorphone, hydrocodone, and alprazolam), as well as one count of tampering with evidence. As a result of plea negotiations, Appellant entered into a plea agreement that included an agreed sentence of eighteen years, which required Appellant to plead guilty to two of the first-degree felony counts (trafficking in heroin and trafficking in oxycodone, with a major drug offender specification), in exchange for the State's dismissal of the remaining eleven counts contained in the indictment. Upon the acceptance of Appellant's guilty pleas, the trial court sentenced Appellant, as recommended and agreed, to eighteen years in prison, which consisted of an eleven-year term and a seven-year term, to be served consecutively. It is from the trial court's sentencing entry that Appellant now brings his delayed appeal, assigning the following errors for our review.

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED WHEN IT IMPOSED CONSECUTIVE SENTENCES WITHOUT MAKING THE REQUIRED FINDINGS PURSUANT TO R.C. 2929.14.

II. TRIAL COUNSEL PROVIDED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE WHEN HE FAILED TO ARGUE STRONG, MITIGATING FACTORS AT SENTENCING, IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I §§ 5, 10, 16[SIC] OF THE OHIO CONSTITUTION."

LEGAL ANALYSIS

{¶ 4} Because Appellant's assignments of error are interrelated in that they both involve the trial court's imposition of consecutive sentences, we address them in

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conjunction with one another. In his first assignment of error, Appellant contends that the trial court erred when it imposed consecutive sentences without making the required findings pursuant to R.C. 2929.14. In his second assignment of error, Appellant contends that his trial counsel was ineffective for failing to argue mitigating factors with regard to the imposition of consecutive sentences. For the reasons that follow, we reject both arguments raised by Appellant and accordingly, both assignments of error are overruled.

*2 {¶ 5} In *State v. Brewer*, 2014–Ohio–1903, 11 N.E.3d 317, we recently held that when reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08(G)(2). Brewer at ¶ 33 ("we join the growing number of appellate districts that have abandoned the *Kalish* plurality's two step abuse-of-discretion standard of review; when the General Assembly reenacted R.C. 2953.08(G)(2), it expressly stated '[t]he appellate court's standard of review is not whether the sentencing court abused its discretion' "). See also *State v. Graham*, 4th Dist. Highland No. 13CA11, 2014–Ohio–3149, ¶ 31. R.C. 2953.08(G)(2) specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either that "the record does not support the sentencing court's findings" under the specified statutory provisions or "the sentence is otherwise contrary to law."

{¶ 6} R.C. 2929.14(C)(4) sets forth certain findings that a trial court must make prior to imposing consecutive sentences. *Id.*; citing *State v. Black*, 4th Dist. Ross No. 12CA3327, 2013–Ohio–2105, ¶¶ 56–57. That is, under Ohio law, unless the sentencing court makes the required findings set forth in R.C. 2929.14(C)(4), there is a presumption that sentences are to run concurrently. *State v. Bever*, 4th Dist. Washington No. 13CA21, 2014–Ohio–600, ¶ 15; citing *Black* at ¶ 56; R.C. 2929.41(A). Under R.C. 2929.14(C)(4), a sentencing court must engage in a three-step analysis and make certain findings before imposing consecutive sentences. *Bever* at ¶ 16; Black, at ¶ 57; *State v. Clay*, 4th Dist. Lawrence No. 11CA23, 2013–Ohio–4649, ¶ 64; *State v. Howze*, 10th Dist. Franklin Nos. 13AP–386 & 13AP–387, 2013–Ohio–4800, ¶ 18. Specifically, the sentencing court must find that (1) "the consecutive service is necessary to protect the public from future crime or to punish the offender"; (2) "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public"; and (3) one 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." *Bever*, supra, at ¶ 16; R.C. 2929.14(C)(4).

*3 {¶ 7} While the sentencing court is required to make these findings, it is not required to give reasons explaining the findings. *Bever*, supra, at ¶ 16; *Howze* at ¶ 18; *State v. Stamper*, 12th Dist. Butler No. CA2012–08–166, 2013–Ohio–5669, ¶ 23. R.C. 2929.14 clearly states the trial court may impose a consecutive sentence if it "finds the statutorily enumerated factors." *State v. Williams*, 5th Dist. Licking No. 11–CA–115, 2012–Ohio–3211, ¶ 47. Furthermore, the sentencing court is not required to recite any "magic" or "talismanic words" when imposing consecutive sentences. *Bever*, supra, at ¶ 17; *Clay* at ¶ 64; *Howze* at ¶ 18; *Stamper* at ¶ 23. However, it must be clear from the record that the sentencing court actually made the required statutory findings. *Bever* at ¶ 17; *Clay* at ¶ 64; *Howze* at ¶ 18; *Stamper* at ¶ 23. A failure to make the findings required by R.C. 2929.14(C)(4) renders a consecutive sentence contrary to law. *Bever* at ¶ 17; *Stamper* at ¶ 23; *State v. Nia*, 8th Dist. Cuyahoga No. 99387, 2013–Ohio–5424, ¶ 22. The findings required by the statute must be separate and distinct findings; in addition to any findings relating to the purposes and goals of criminal sentencing. *Bever* at ¶ 17; *Nia* at ¶ 22.

{¶ 8} Nonetheless, in the context of an agreed sentence, which is presently at issue, it has been held that consecutive sentence findings are unnecessary and that the agreed sentence is not subject to appellate review. *State v. Weese*, Clark No.2013–CA–61, 2014–Ohio–3267, ¶ 5. The *Weese* court explained as follows:

> "Ordinarily, R.C. 2929.14(C)(4) requires certain findings to be made before consecutive sentences can be imposed. However, the Ohio Supreme Court explicitly has held that '[a] sentence imposed upon a defendant is not subject

to review under [R.C. 2953.08(D)] 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.' *State v. Porterfield,* 106 Ohio St.3d 5, 2005–Ohio–3095, 829 N.E.2d 690, ¶ 25. In addition, the court stated that '[t]he General Assembly intended a jointly agreed-upon sentence to be protected from review precisely because the parties agreed that the sentence is appropriate. Once a defendant stipulates that a particular sentence is justified, the sentencing judge no longer needs to independently justify the sentence.' *Id.* Therefore, not only were findings unnecessary, but the agreed sentence is not subject to appellate review. Any argument to the contrary lacks arguable merit and would be frivolous." *Id.*

This court recently agreed with this approach in *State v. Davis,* 4th Dist. Scioto Nos. 13CA3589 and Scioto13CA3593, 2014–Ohio–5371, at ¶ 25. See also *State v. Deeb,* 6th Dist. Erie No. E–15–052, 2013–Ohio–5175 and *State v. Jefferson,* 10th Dist. Franklin No. 12AP–238, 2014–Ohio–11.

*4 {¶ 9} In his reply brief, Appellant urges this Court to disregard the reasoning in *Weese,* and instead argues that the issue of whether a trial court must make the consecutive sentencing findings contained in R.C. 2929.14(C)(4) in the context of an agreed sentence is controlled by a recent decision issued by the Supreme Court of Ohio, *State v. Bonnell,* 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.3d 659. Appellant also notes that our recent decision in *State v. Miller,* 4th Dist. Pickaway No. 13CA5, 2014–Ohio–1803, was overruled by the *Bonnell* decision. However, we reject Appellant's argument.

{¶ 10} While *Bonnell* reaffirmed that trial courts are required to make the findings mandated by R.C. 2929.14(C)(4) prior to imposing consecutive terms of imprisonment, *Bonnell* only involved a negotiated plea agreement, not an agreed sentence. *Id.* at ¶ 9 (arguments were made at the sentencing hearing "but no one addressed whether the sentences should be served concurrently or consecutively[.]"). Thus, *Bonnell* is factually distinguishable and does not control the outcome of the present case. Likewise, while *Miller* involved a negotiated plea agreement, we noted in *Miller* that it was unclear whether there was an agreed sentence and assumed arguendo that the sentence was not agreed. Miller at ¶¶ 7–8. Thus, although *Miller* fell under the purview of *Bonnell,* the present case does not.

{¶ 11} As indicated above, Appellant entered into a negotiated plea agreement with the State which included an agreed sentence of eighteen years. In exchange for pleading guilty to two felony drug offenses, one with a major drug offender specification, the State agreed to dismiss the remaining eleven felony counts in the indictment. Further, it was stipulated that an eighteen-year sentence would be imposed. The transcript of the sentencing hearing provides as follows:

"THE COURT: * * * We're dealing with multiple count indictments. It's my understanding today that through negotiations that both gentlemen are going to enter pleas to the same counts. * * * The sentences on both of these counts being F1 level, a major drug offender, are mandatory sentences." [1] The hearing transcript later states as follows:

"THE COURT: It's my understanding that there is an agreement today where in (sic) I will sentence you both to 18 years in the custody of the Ohio Department of Rehabilitation. Eleven of those years will be given on Count 5, the trafficking in Oxycodone, the major drug offender specification. And then seven years on Count 3, the trafficking in heroin.

* * *

THE COURT: Mr. Pulliam, do you understand that?

DEFENDANT PULLIAM: Yeah."

{¶ 12} In light of the foregoing and adopting and adhering to our prior reasoning in *State v. Davis,* as set forth above, we conclude that a trial court is not required to make the consecutive sentence findings mandated by R.C. 2929.14(C)(4) when a defendant is being sentenced as part of a negotiated plea agreement which includes an agreed sentence. Because Appellant's sentence was an agreed sentence, it is not reviewable on appeal. R.C. 2953.08(D)(1); see also, *State v. Walz,* 2nd Dist. Montgomery No. 26131, 2014–Ohio–4712, FN2; citing *State v. Rammel,* 2nd Dist. Montgomery Nos. 25899 and 25900, 2014–Ohio–1281, ¶ 10. Thus, we find no merit in Appellant's assignment of error and it is therefore overruled.

*5 {¶ 13} Further, because Appellant's sentence was an agreed sentence which was part of a negotiated plea agreement, Appellant's counsel's argument of mitigating factors would have been pointless and, as argued by the State,

"could have been interpreted as an effort to breach the plea and sentencing agreement." As such, it cannot be concluded that trial counsel's failure to make such arguments constituted deficient performance which prejudiced Appellant. Thus, we find no merit in Appellant's second assignment of error and it is also overruled. Accordingly, having found no merit in the assignments of error raised by Appellant, the decision of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

HARSHA, J. & ABELE, J.: Concur in Judgment and Opinion.

All Citations

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Footnotes

1 "Gentlemen" refers to Appellant and his co-defendant, Harold Chappel, who were sentenced at the same time.

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