

IN THE SUPREME COURT OF OHIO

|                      |   |                                      |
|----------------------|---|--------------------------------------|
| STATE OF OHIO,       | ) | Case No. 2015-1093                   |
|                      | ) |                                      |
| Plaintiff-Appellant, | ) | On Appeal from the                   |
|                      | ) | Lake County Court of Appeals,        |
| v.                   | ) | Eleventh Appellate District          |
|                      | ) |                                      |
| WILLIAM D. SERGENT   | ) |                                      |
|                      | ) | Court of Appeals Case No. 2013-L-125 |
| Defendant-Appellee.  | ) |                                      |

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MERIT BRIEF OF APPELLANT STATE OF OHIO

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## STATEMENT OF THE CASE AND FACTS

In *State v. Sergeant*, --- Ohio St.3d ----, 2015-Ohio-2603, 38 N.E.3d 461, the Eleventh District Court of Appeals succinctly set forth the following procedural posture and statement of facts relating to this case:

On May 8, 2013, [appellee], who was then 53 years old, pled guilty via information to three counts of rape committed against his minor biological daughter.

During the guilty plea hearing, the prosecutor provided the court with the following factual basis for [appellee]'s guilty plea: In November 2012, the Lake County Sheriff's Department was dispatched to The Freedom Assembly Church regarding a sex offense reported by a 14-year-old female. The responding deputies learned that B.S., [appellee]'s daughter, was a member of the church and had recently disclosed to the pastor's wife that she had been the victim of ongoing sexual abuse by her father. B.S. told the deputies that, beginning in June 2009, when she was 10 years old, her mother left her and her father began pressuring her to have sex with him. Her father threatened to send her away if she did not submit to him. At first B.S. said no, but [appellee] continued to pressure her and she eventually submitted. She said [appellee] had vaginal intercourse with her many times over a period of more than one year during three separate time periods-between June 1, 2009 and July 31, 2009; between August 1, 2009 and September 30, 2009; and between March 1, 2010 and August 31, 2010.

The deputies took B.S. to a sexual assault nurse examiner for an examination, which revealed physical evidence of penetration that supported B.S.' allegations.

[Appellee] admitted the facts recited by the prosecutor were true. When the trial court asked [appellee] what he had done to his daughter, he said he was ashamed to even say it. He admitted that he had vaginal intercourse with the child on multiple occasions and that he threatened to send her away unless she had sex with him. He said he used the child's Barbie dolls to teach her about sexual conduct.

On June 18, 2013, pursuant to the joint recommendation of counsel, the trial court sentenced [appellee] to three eight-year terms in prison, each to be served consecutively to the others, for a total of 24 years in prison.

[Appellee] did not file a timely direct appeal. Instead, some five months after his conviction, he filed a motion for leave to file a delayed appeal. The state filed a brief in opposition. This court granted [appellee]'s motion and appointed counsel to represent him on appeal.

Subsequently, appellate counsel filed an appellate brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). In his brief, counsel stated that, after reviewing the record, he found no prejudicial error committed by the trial court, but raised certain arguable issues. On the same date [appellee]'s counsel filed the *Anders* brief, counsel also filed a motion to withdraw as appellate counsel as he found the appeal wholly frivolous. In his motion to withdraw, counsel certified he sent a copy of his *Anders* brief and motion to withdraw to [appellee] with the instruction that he may file his own brief.

On June 11, 2014, [the appellate] court entered judgment granting leave to [appellee] to file a pro-se brief by July 11, 2014. In that entry, [the appellate] court also ordered that the motion to withdraw filed by [appellee]'s counsel be held in abeyance pending [the appellate] court's further review and determination pursuant to *Anders*. On June 25, 2014, [appellee] filed a pro-se motion requesting an extension to file his brief. [The appellate] court granted that motion and gave him leave to file his brief by August 11, 2014. However, [appellee] did not file a brief.

On November 3, 2014, after a full examination of the record, [the appellate] court entered judgment finding an arguable issue existed to support [appellee]'s appeal pursuant to *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659. In *Bonnell*, the Supreme Court of Ohio held that in order to impose consecutive sentences, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and to incorporate those findings in its sentencing entry. *Id.* at syllabus. In this case, the trial court included the findings required by R.C. 2929.14(C) in its sentencing entry, but did not make such findings at the sentencing hearing, as required by *Bonnell*. Thus, in [the appellate] court's November 3,

2014 judgment, [the appellate] court stated that [appellee]’s sentence arguably did not comply with *Bonnell* and was potentially contrary to law.

Pursuant to *Anders*, [the appellate] court appointed new appellate counsel to pursue the appeal, and directed new counsel to prepare an appellate brief discussing the arguable issue identified by [the appellate] court in its November 3, 2014 judgment entry; any arguable issues raised in the *Anders* brief previously filed on [appellee]’s behalf; and any additional arguable issues that may be found in the record.

Thereafter, [appellee]’s new counsel filed an appellate brief, asserting two assignments of error [relating to appellee’s plea and sentence].

*Id.* at ¶ 2-12.

The Eleventh District Court of Appeals reversed appellee’s conviction, holding that the trial court was required to make consecutive sentencing findings prior to imposing consecutive sentences, despite the fact that appellee’s sentence was jointly recommended.

*Id.* at ¶ 22-23. Noting conflicting cases from other appellate districts, the appellate court sua sponte certified a conflict to this Court on the following question: “In the context of a jointly-recommended sentence, is the trial court required to make consecutive-sentence findings under R.C. 2929.14(C) in order for its sentence to be authorized by law and thus not appealable?” *Id.* at ¶ 35-36.

The State now submits its response to this certified question.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

### PROPOSITION OF LAW

IN THE CONTEXT OF A JOINTLY-RECOMMENDED SENTENCE, THE TRIAL COURT IS NOT REQUIRED TO MAKE CONSECUTIVE-SENTENCE FINDINGS UNDER R.C. 2929.14(C) IN ORDER FOR ITS SENTENCE TO BE AUTHORIZED BY LAW AND THUS NOT APPEALABLE.

History repeats itself, and that's one of the things that's wrong with history.  
- Clarence Darrow

The question presented in this case, whether a trial court is required to make consecutive sentencing findings in the context of a jointly recommended sentence has already been answered by this Court. This case is simply one of history repeating itself.

In 2005, this Court answered the certified question of whether the language of R.C. 2953.08(D) prohibits appellate review of a trial court's sentence when a defendant is sentenced pursuant to a jointly recommended sentence and the trial court does not make the consecutive sentencing findings. *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690.<sup>1</sup> This Court answered the question in the affirmative and held that consecutive sentencing findings were not required in the context of a jointly recommended sentence that was imposed by a sentencing judge and was authorized by law. *Id.* at ¶ 25.<sup>2</sup>

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<sup>1</sup> Interestingly, *Porterfield* was also a case certified to this Court by the Eleventh District Court of Appeals.

<sup>2</sup> In 2005, at the time *Porterfield* was decided, the consecutive sentencing findings were found in R.C. 2929.14(E). In 2006, this Court held in *State v. Foster*, 109 Ohio St.3d 1, 2006-

What is the meaning of “authorized by law” under R.C. 2953.08(D)(1)?

R.C. 2953.08(D)(1) provides: “A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been jointly recommended by the defendant and the prosecution in the case, and is imposed by a sentencing judge.” But the meaning of the phrase “authorized by law” has been cause for controversy over the years.

In 2005, this Court decided *Porterfield*. In that case, Porterfield was sentenced to a term of 53 years to life in prison based on counts that were imposed consecutively after stipulating that consecutive sentences were appropriate. *Porterfield* at ¶ 2. His sentence was vacated by the Eleventh District Court of Appeals because the trial court had failed to make findings at the sentencing hearing before imposing consecutive sentences. *Id.* at ¶ 3. The appellate court then certified a conflict to this Court on the matter as it related to aggravated murder convictions. Upon review, this Court held that Porterfield’s sentence was not subject to review under R.C. 2953.08(D) as the sentence was authorized by law,

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Ohio-856, 845 N.E.2d 470, that judicial fact-finding prior to imposing consecutive sentences was unconstitutional and severed that section of the statute. In 2011, after a series of cases from this Court and the United States Supreme Court, H.B. 86 revived the former R.C. 2929.14(E) requirement of judicial findings prior to imposing consecutive sentences and renumbered it as R.C. 2929.14(C)(4). The State acknowledges that much has transpired in the area of sentencing law since *Porterfield*, but the state of the law post-H.B. 86 is in line with the law at the time *Porterfield* was decided.

jointly recommended, and imposed by a sentencing judge. *Id.* at ¶25. Specifically, this Court explained:

The General Assembly intended a jointly recommended 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. Pursuant to R.C. 2953.08(D), the trial court's compliance with [the consecutive sentencing statute] and [*State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473 (holding that when imposing consecutive sentences, a trial court is required to make its statutorily enumerated findings and give reasons supporting those findings at the sentencing hearing)] was not required.

*Id.*

In 2010, this Court revisited the issue of R.C. 2953.08(D)(1) and specifically addressed the meaning of "authorized by law." In *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, the defendant was sentenced to prison terms on offenses that the state recognized were allied offenses of similar import; no mention was made of the allied offenses at the sentencing hearing. The case was ultimately appealed to this Court to determine whether the sentence was "authorized by law" within the meaning of R.C. 2953.08(D)(1). This Court analyzed the meaning of "authorized by law":

The term is not defined in R.C. 2953.08. Several courts of appeals have held that a sentence is authorized by law within the meaning of the statute simply if the sentence falls within the statutory range for the offense. \* \* \* .

We do not agree with such a narrow interpretation of "authorized by law." Adopting this reasoning would mean that jointly recommended sentences imposed within the statutory range but missing mandatory provisions, such

as postrelease control \* \* \* or consecutive sentences \* \* \* would be unreviewable. Our recent cases illustrate that sentences that do not comport with mandatory provisions are subject to total resentencing. \* \* \*. Nor can agreement to such sentences insulate them from appellate review, for they are not authorized by law. We hold that a sentence is “authorized by law” and is not appealable within the meaning of R.C. 2953.08(D)(1) only if it comports with all mandatory sentencing provisions. A trial court does not have the discretion to exercise its jurisdiction in a manner that ignores mandatory statutory provisions.

(Citations omitted.) *Underwood* at ¶ 19-20. Despite listing consecutive sentences as a mandatory provision that, when missing, would cause a sentence to be not authorized by law, this Court then stated that the imposition of consecutive sentences in *Porterfield* was merely a discretionary decision, not a mandatory sentencing provision, distinguishing consecutive sentences from allied offenses of similar import:

We have acknowledged 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.” *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, ¶ 25. However, *Porterfield* did not involve a mandatory sentencing provision, but merely the discretionary decision to impose consecutive sentences. Both R.C. 2941.25 and the Double Jeopardy Clause prohibit multiple convictions for the same conduct. For this reason, a trial court is required to merge allied offenses of similar import at sentencing. Thus, when the issue of allied offenses is before the court, the question is not whether a particular sentence is justified, but whether the defendant may be sentenced upon all the offenses.

*Underwood* at ¶ 27. While it was clear that the improper imposition of sentences for allied offenses of similar import was not “authorized by law” and was therefore appealable, the issue of consecutive sentences became muddled.

**Caselaw post-*State v. Underwood***

In the years following *Underwood*, a conflict arose amongst the appellate districts in regard to the meaning of “authorized by law” in cases where consecutive sentencing findings were not made on the record; some courts applied *Porterfield*, while others used *Underwood*.

Pertinent to this case, the Eleventh District Court of Appeals recognized this conflict in *Sergent*. In this case, appellee was sentenced to 24 years in prison based on a joint recommendation of the parties. *Sergent* at ¶ 6. The sentence was comprised of three terms that were ordered to be served consecutively to each other. *Id.* The trial court did not make any findings on the record pursuant to R.C. 2929.14(C). The appellate court, citing *State v. Bell*, 11th Dist. Portage No. 2014-P-0017, 2015-Ohio-218, reversed and vacated appellee’s sentence because the trial “court did not make the necessary findings for consecutive sentences” at the sentencing hearing. *Id.* at ¶ 56.

In *Bell*, the Eleventh District Court of Appeals also considered the issue of whether the trial court must make consecutive sentencing findings in the context of a jointly recommended sentence. *Id.* at ¶ 6. The court found *Underwood* to be controlling and held

that even when a sentence is jointly recommended, the consecutive sentencing findings must be made. *Id.* at ¶ 12-16.

By relying on *Bell* in reaching its decision, the *Sergent* court implicitly endorsed the theory that *Underwood* should be expanded to also include consecutive sentences. However, the appellate court did note that *Underwood* is distinguishable from both *Bell* and *Sergent* as *Underwood* related to allied offenses of similar import and *Bell* and *Sergent* both related to consecutive sentences. *Sergent* at ¶ 24. The Eleventh District Court of Appeals then explored the theory condoned by other appellate districts that post-*Underwood*, *Porterfield* remained the controlling law regarding cases involving jointly recommended consecutive sentences. Specifically, the appellate court noted that both the Second and Fourth District Courts of Appeals have held that a jointly recommended consecutive sentence is authorized by law and not subject to appellate review where the trial court does not make statutory consecutive sentencing findings as long as the prison terms do not exceed the maximum term prescribed for each offense. *Sergent* at ¶25-31.

In *State v. Weese*, 2nd Dist. Clark No. 2013-CA-61, 2014-Ohio-3267, the Second District Court of Appeals, quoting *Porterfield*, held that the defendant's jointly recommended sentence was not subject to appellate review:

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.* at ¶ 5. Relying on *Weese*, the Fourth District Court of Appeals also followed the *Porterfield* holding in *State v. Pulliam*, 4th Dist. Scioto No. 14CA3609, 2015-Ohio-759, at ¶ 8.

In addition to the Second and Fourth District Courts of Appeals referenced by the Eleventh District Court of Appeals, other appellate districts have also weighed in on the issue of whether *Porterfield* or *Underwood* is controlling in a situation where a trial court does not make consecutive sentencing findings in the context of a jointly recommended sentence. As of the time of the writing of this brief, the Eighth, Ninth, Tenth, and Twelfth District Courts of Appeals have found *Porterfield* to be controlling. *See, e.g., State v. Miller*, 8th Dist. Cuyahoga No. 101086, 2014-Ohio-5685; *State. Rue*, 9th Dist. Summit No. 27622, 2015-Ohio-4008; *State v. Jefferson*, 10th Dist. Franklin No. 12AP-238, 2014-Ohio-1; *State v. Savage*, 12th Dist. Madison Nos. CA2014-02-002, CA2014-02-003, CA2014-03-006, CA2014-03-007, 2015-Ohio-574. Conversely, the First District Court of Appeals (while not specifically addressing this issue) and the Sixth District Court of Appeals seem to follow the reasoning from *Underwood*. *See, e.g., State v. Davis*, 1st Dist. Hamilton No. C-140351,

2015-Ohio-775; and *State v. Deeb*, 6th Dist. Erie No. E-12-052, 2013-Ohio-5175. A conflict certainly exists among the appellate districts.

**Porterfield is controlling precedent; trial courts should not be required to make consecutive sentencing findings in the context of a jointly recommended sentence.**

This Court should reaffirm its holding in *Porterfield*: a defendant's sentence is not appealable if it is jointly recommended, imposed by a sentencing judge, and authorized by law, and the lack of consecutive sentencing findings on the record does not change whether a sentence is authorized by law. *Porterfield* was a unanimous decision by this Court; confusion only arose after *Underwood*, a 4-3 decision.<sup>3</sup> The decision in *Underwood* should be limited to cases where a constitutional violation arises such as the imposition of sentences for allied offenses of similar import.

In *Sergent*, the Eleventh District Court of Appeals also raised an arguable issue regarding the impact of the post-*Underwood* case *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659. In *Bonnell*, this Court held that "[i]n order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing

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<sup>3</sup> The dissent in *Underwood* would have extended R.C. 2953.08(D)'s bar on appellate review to those cases where sentences are imposed for allied offenses of similar import. *Underwood* at ¶ 66 (O'Donnell, J., dissenting).

entry." *Id.* at syllabus. But as *Bonnell* is distinguishable, it should not alter this Court's ruling in *Porterfield*. Indeed,

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. \*\*\*. Thus, *Bonnell* is factually distinguishable and does not control the outcome of the present case.

*Pulliam* at ¶ 10. See also, e.g., *Rue* at ¶ 6; and *Savage* at ¶ 34. Therefore, *Bonnell* should not affect this Court's analysis of this issue.

This case is simply one of history repeating itself; in 2005, this Court addressed the very issue presented today: In the context of a jointly-recommended sentence, is the trial court required to make consecutive sentencing findings under R.C. 2929.14(C) in order for its sentence to be authorized by law and thus not appealable? Under *Porterfield*, the answer is no. While appellate courts have answered this question by relying on the dicta in *Underwood*, that case is distinguishable. Therefore, this Court should hold that post-*Underwood*, *Porterfield* remains good law and is controlling precedent for this issue.

CONCLUSION

For the reasons discussed above, the State respectfully requests that this Honorable Court hold that *State v. Porterfield* is controlling, and thus, in the context of a jointly recommended sentence, a trial court is not required to make consecutive sentencing findings under R.C. 2929.14(C) in order for its sentence to be authorized by law and not appealable.

Respectfully submitted,

By: Charles E. Coulson, Prosecuting Attorney

By: /s/ Teri R. Daniel  
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**PROOF OF SERVICE**

A copy of the foregoing Merit Brief of Appellee, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellee, Michael A. Partlow, Esquire, 112 South Water Street, Suite C, Kent, OH 44240, and, pursuant to S.Ct.R. XIV, Section 2, the Ohio Public Defender, Timothy Young, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, on this 6th day of November, 2015.

/s Teri R. Daniel  
Teri R. Daniel (0082157)  
Assistant Prosecuting Attorney

TRD/klb

**APPENDIX**

The Supreme Court of Ohio

FILED

SEP 30 2015

CLERK OF COURT  
SUPREME COURT OF OHIO

State of Ohio

Case No. 2015-1093

v.

ENTRY

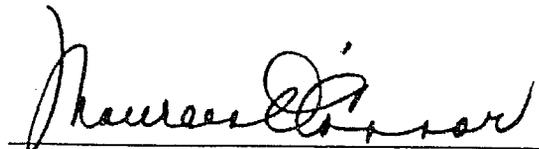
William D. Sergent

This cause is pending before the court on the certification of a conflict by the Court of Appeals for Lake County. On review of the order certifying a conflict, it is determined that a conflict exists. The parties are to brief the issue stated at page 10 of the court of appeals' opinion filed June 30, 2015, as follows:

"In the context of a jointly-recommended sentence, is the trial court required to make consecutive-sentence findings under R.C. 2929.14(C) in order for its sentence to be authorized by law and thus not appealable?"

It is ordered by the court that the clerk shall issue an order for the transmittal of the record from the Court of Appeals for Lake County.

(Lake County Court of Appeals; No. 2013-L-125)



Maureen O'Connor  
Chief Justice

IN THE SUPREME COURT OF OHIO

|                      |   |                                      |
|----------------------|---|--------------------------------------|
| STATE OF OHIO,       | ) | Case No. _____                       |
|                      | ) |                                      |
| Plaintiff-Appellant, | ) | On Appeal from the                   |
|                      | ) | Lake County Court of Appeals,        |
| v.                   | ) | Eleventh Appellate District          |
|                      | ) |                                      |
| WILLIAM D. SERGENT,  | ) |                                      |
|                      | ) | Court of Appeals Case No. 2013-L-125 |
| Defendant-Appellee.  | ) |                                      |

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NOTICE OF CERTIFIED CONFLICT OF APPELLANT  
STATE OF OHIO

---

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Now comes the State of Ohio, by and through Charles E. Coulson, Lake County Prosecuting Attorney, and Teri R. Daniel, Assistant Prosecuting Attorney, and respectfully gives notice to this Honorable Court pursuant to S.Ct.Prac.R. 8.01(B) that the Eleventh District Court of Appeals has certified a conflict in *State v. Sergeant*, 11th Dist. Lake No. 2013-L-125, 2015-Ohio-2603.

The following question was sua sponte certified by the Eleventh District Court of Appeals to this Court for review and final determination:

In the context of a jointly-recommended sentence, is the trial court required to make consecutive-sentence findings under R.C. 2929.14(C) in order for its sentence to be authorized by law and thus not appealable?

The appellate court found that the following decisions were in conflict with the above-captioned case:

*State v. Weese*, 2nd Dist. Clark No. 2013-CA-61, 2014-Ohio-3267;  
*State v. Pulliam*, 4th Dist. Scioto No. 14CA3609, 2015-Ohio-759.

Copies of these opinions have been provided to this Court as required by S.Ct.Prac.R. 8.01(B)(3).

Respectfully submitted,

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PROSECUTING ATTORNEY

/s/ Teri R. Daniel

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PROOF OF SERVICE

A copy of the foregoing Notice of Certified Conflict was sent by regular U.S. Mail, postage prepaid, to counsel for the Appellee, Michael P. Maloney, Esquire, 24441 Detroit Road, Suite 300, Westlake, OH 44145, and, pursuant to S.Ct.R. XIV, Section 2, the Ohio Public Defender, Timothy Young, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, on this 30th day of June, 2015.

/s/ Teri R. Daniel  
Teri R. Daniel (0082157)  
Assistant Prosecuting Attorney

TRD/klb

STATE OF OHIO IN THE COURT OF APPEALS  
COUNTY OF LAKE COURT OF APPEALS  
STATE OF OHIO, MAUREEN G. KELLY  
CLERK OF COURT  
LAKE COUNTY, OHIO

Plaintiff-Appellee,

JUDGMENT ENTRY  
CASE NO. 2013-L-125

- VS -

WILLIAM D. SERGENT,

Defendant-Appellant.

Pursuant to the analysis set forth in this court's opinion, this court finds that the judgments entered in this case and in *State v. Bell*, 11th Dist. Portage No. 2014-P-0017, 2015-Ohio-218, are in conflict with the judgments pronounced on the same question by the Second District Court of Appeals in *State v. Weese*, 2d Dist. Clark No. 2013-CA-61, 2014-Ohio-3267, and the Fourth District Court of Appeals in *State v. Pulliam*, 4th Dist. Scioto No. 14CA3609, 2015-Ohio-759.

Ohio Constitution, Article IV, Section 3(B)(4) provides:

Whenever 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.

Pursuant to the foregoing constitutional provision, we sua sponte certify a conflict on the following question to the Supreme Court for review and final determination:

06/30 Jun. 30. 2015 3:13PM\*  
Jun. 30. 2015 2:52PM

-ELEVEN DISTRICT COURT OF APPEALS  
ELEVEN DISTRICT COURT OF APPEALS

No. 1914 P. 3003/003  
No. 1911 P. 3

In the context of a jointly-recommended sentence, is the trial court required to make consecutive-sentence findings under R.C. 2929.14(C) in order for its sentence to be authorized by law and thus not appealable?

The attention of counsel for both appellant and appellee is called to the Rules of Practice of the Supreme Court, Section 8, Certified-Conflict Cases, for further proceedings.

IT IS SO ORDERED.

  
JUDGE CYNTHIA WESTCOTT RICE

FOR THE COURT

IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO

FILED  
COURT OF APPEALS  
JUN 30 2015  
MAUREEN G. KELLY  
CLERK OF COURT  
LAKE COUNTY, OHIO

STATE OF OHIO, : OPINION  
Plaintiff-Appellee, :  
- VS - : CASE NO. 2013-L-125  
WILLIAM D. SERGENT, :  
Defendant-Appellant. :

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 12 CR 000825.

Judgment: Affirmed in part, reversed in part, and remanded.

*Charles E. Coulson*, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*Michael P. Maloney*, 24441 Detroit Road, #300, Westlake, OH 44145-1543 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, William D. Sergent, appeals the judgment of the Lake County Court of Common Pleas finding him guilty of three counts of rape, following his guilty plea, and sentencing him to consecutive prison terms. At issue is whether the trial court properly made the findings mandated by R.C. 2929.14(C)(4) to support appellant's consecutive sentences and whether appellant's guilty plea was voluntary. For the reasons that follow, we affirm in part, reverse in part, and remand.

{¶2} On May 8, 2013, appellant, who was then 53 years old, pled guilty via information to three counts of rape committed against his minor biological daughter.

{¶3} During the guilty plea hearing, the prosecutor provided the court with the following factual basis for appellant's guilty plea: In November 2012, the Lake County Sheriff's Department was dispatched to The Freedom Assembly Church regarding a sex offense reported by a 14-year-old female. The responding deputies learned that B.S., appellant's daughter, was a member of the church and had recently disclosed to the pastor's wife that she had been the victim of ongoing sexual abuse by her father. B.S. told the deputies that, beginning in June 2009, when she was 10 years old, her mother left her and her father began pressuring her to have sex with him. Her father threatened to send her away if she did not submit to him. At first B.S. said no, but appellant continued to pressure her and she eventually submitted. She said appellant had vaginal intercourse with her many times over a period of more than one year during three separate time periods - between June 1, 2009 and July 31, 2009; between August 1, 2009 and September 30, 2009; and between March 1, 2010 and August 31, 2010.

{¶4} The deputies took B.S. to a sexual assault nurse examiner for an examination, which revealed physical evidence of penetration that supported B.S.' allegations.

{¶5} Appellant admitted the facts recited by the prosecutor were true. When the trial court asked appellant what he had done to his daughter, he said he was ashamed to even say it. He admitted that he had vaginal intercourse with the child on multiple occasions and that he threatened to send her away unless she had sex with him. He said he used the child's Barbie dolls to teach her about sexual conduct.

{¶16} On June 18, 2013, pursuant to the joint recommendation of counsel, the trial court sentenced appellant to three eight-year terms in prison, each to be served consecutively to the others, for a total of 24 years in prison.

{¶17} Appellant did not file a timely direct appeal. Instead, some five months after his conviction, he filed a motion for leave to file a delayed appeal. The state filed a brief in opposition. This court granted appellant's motion and appointed counsel to represent him on appeal.

{¶18} Subsequently, appellate counsel filed an appellate brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). In his brief, counsel stated that, after reviewing the record, he found no prejudicial error committed by the trial court, but raised certain arguable issues. On the same date appellant's counsel filed the *Anders* brief, counsel also filed a motion to withdraw as appellate counsel as he found the appeal wholly frivolous. In his motion to withdraw, counsel certified he sent a copy of his *Anders* brief and motion to withdraw to appellant with the instruction that he may file his own brief.

{¶19} On June 11, 2014, this court entered judgment granting leave to appellant to file a pro-se brief by July 11, 2014. In that entry, this court also ordered that the motion to withdraw filed by appellant's counsel be held in abeyance pending this court's further review and determination pursuant to *Anders*. On June 25, 2014, appellant filed a pro-se motion requesting an extension to file his brief. This court granted that motion and gave him leave to file his brief by August 11, 2014. However, appellant did not file a brief.

{¶10} On November 3, 2014, after a full examination of the record, this court entered judgment finding an arguable issue existed to support appellant's appeal

pursuant to *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177. In *Bonnell*, the Supreme Court of Ohio held that in order to impose consecutive sentences, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and to incorporate those findings in its sentencing entry. *Id.* at syllabus. In this case, the trial court included the findings required by R.C. 2929.14(C) in its sentencing entry, but did not make such findings at the sentencing hearing, as required by *Bonnell*. Thus, in this court's November 3, 2014 judgment, this court stated that appellant's sentence arguably did not comply with *Bonnell* and was potentially contrary to law.

{¶11} Pursuant to *Anders*, this court appointed new appellate counsel to pursue the appeal, and directed new counsel to prepare an appellate brief discussing the arguable issue identified by this court in its November 3, 2014 judgment entry; any arguable issues raised in the *Anders* brief previously filed on appellant's behalf; and any additional arguable issues that may be found in the record.

{¶12} Thereafter, appellant's new counsel filed an appellate brief, asserting two assignments of error, which we now address. For his first, he alleges:

{¶13} "The trial court erred in failing to make the required findings under O.R.C. 2929.14(C)(4) at appellant's sentencing hearing prior to imposing consecutive sentences of imprisonment."

{¶14} In reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08(G)(2). That section directs the appellate court "to review the record, including the findings underlying the sentence" and to modify or vacate the sentence "if it clearly and convincingly finds \* \* \* (a) [t]hat the record does not support the sentencing court's findings under division \* \* \* (C)(4) of section 2929.14 \* \* \* of the Revised Code \* \* \* [or] (b) [t]hat the sentence is otherwise contrary to law."

{¶15} R.C. 2929.14(C)(4), effective September 30, 2011, provides in pertinent part:

{¶16} 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:

{¶17} (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction \* \* \*, or was under post-release control for a prior offense.

{¶18} (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.

{¶19} (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶20} The Supreme Court in *Bonnell, supra*, stated that a trial court's failure to incorporate the findings required by R.C. 2929.14(C) in the sentencing entry after

making those findings at the sentencing hearing does not render the sentence contrary to law. *Id.* at ¶30. Rather, such clerical mistake can be corrected via a nunc pro tunc entry. *Id.* However, the Court said that a trial court's failure to make the findings required by R.C. 2929.14(C)(4) for consecutive sentences at the sentencing hearing makes the sentence contrary to law, requiring the vacation of the sentence and a remand to the trial court for resentencing. *Id.* at ¶36-37.

{¶21} Here, appellant was sentenced to consecutive prison terms pursuant to the parties' joint sentencing recommendation. R.C. 2953.08(D) provides: "A sentence imposed upon a defendant is *not subject to review* \* \* \* 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." (Emphasis added.) However, while the court included the findings required by R.C. 2929.14(C) in its sentencing entry, it did not make such findings at the sentencing hearing, as required by *Bonnell*.

{¶22} This court addressed similar facts in *State v. Bell*, 11th Dist. Portage No. 2014-P-0017, 2015-Ohio-218. In *Bell*, the defendant pled guilty to multiple offenses and the parties jointly recommended consecutive sentences, but the court did not make the statutory findings necessary for consecutive sentences. This court held: "[B]ecause 'a sentence is only authorized by law if it comports with all mandatory sentencing provisions[,] this court and the Ohio Supreme Court have held that an agreed sentence between the state and the defendant does not relieve the trial court of its obligation to make the statutorily required findings to impose consecutive sentences.'" *Id.* at ¶12, quoting *State v. McFarland*, 11th Dist. Lake No. 2013-L-061, 2014-Ohio-2883, ¶13-14, quoting *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶19-22. Although the

defendant's consecutive sentence in *Bell* was jointly recommended, this court vacated the sentence because the trial court failed to make the statutory findings. *Id.* at ¶16.

{¶23} Based on this court's precedent in *Bell*, we hold that appellant's first assignment of error has merit and that his sentence must be vacated.

{¶24} However, we note that *Underwood, supra* (the Supreme Court case on which this court based its holding in *Bell*), is distinguishable from *Bell* and the instant case because the issue in *Underwood* was different. The issue before the Supreme Court in *Underwood* was whether a jointly-recommended sentence is authorized by law and thus not reviewable *when the sentence was imposed for offenses that are allied offenses*. The Court in *Underwood* held that such a sentence is not authorized by law and is appealable. *Id.* at ¶1. In contrast, neither *Bell* nor the present case involved allied offenses.

{¶25} We also note that two other Ohio Appellate Districts have reached decisions that conflict with *Bell*. In *State v. Weese*, 2d Dist. Clark No. 2013-CA-61, 2014-Ohio-3267, which was decided post-*Underwood*, the defendant pled guilty to multiple offenses (not allied offenses) and agreed to a consecutive sentence, but the trial court did not make the statutory findings required by R.C. 2929.14(C) for consecutive sentences. The Second District held that in these circumstances, the trial court was not required to make the statutory findings. *Weese* at ¶4. In support, the Second District stated:

{¶26} 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, ¶25. In addition, the Court [in *Porterfield*] 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. *Weese, supra*, at ¶5.

{¶27} Likewise, post-*Underwood*, the Fourth District reached the same conclusion the Second District reached in *Weese*, but the opposite conclusion from that which we reached in *Bell*, in *State v. Pulliam*, 4th Dist. Scioto No. 14CA3609, 2015-Ohio-759. In *Pulliam*, the defendant pled guilty to two offenses (not allied offenses), pursuant to a plea bargain and agreed sentence. On appeal, the defendant argued that the trial court erred when it imposed consecutive sentences without making the required findings pursuant to R.C. 2929.14. The Fourth District disagreed, holding that “[b]ecause [the defendant’s] sentence was imposed pursuant to a negotiated plea agreement which included an agreed sentence, it [was] not subject to appellate review under R.C. 2953.08(D).” *Pulliam* at ¶2.

{¶28} The Fourth District in *Pulliam* stated that, while a failure to make the findings required by R.C. 2929.14(C)(4) renders a consecutive sentence contrary to law,

in the context of an agreed sentence, consecutive-sentence findings are unnecessary and the agreed sentence is not subject to appellate review. *Pulliam* at ¶7-8

{¶29} In addressing the effect of *Bonnell, supra*, on its holding, the Fourth District in *Pulliam, supra*, stated:

{¶30} 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. *Pulliam* at ¶10.

{¶31} We note that *Weese* and *Pulliam* are consistent with the precedent of this court and other Ohio Appellate Districts prior to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Those pre-*Foster* cases consistently held that a jointly-recommended consecutive sentence is authorized by law and not subject to appellate review where the court does not make statutory findings if the consecutive prison terms do not exceed the maximum term prescribed for each offense. *State v. Rivers*, 11th Dist. Trumbull No. 2003-T-0170, 2005-Ohio-1100, ¶9, 16; *State v. Owens*, 2d Dist. Montgomery No. 19546, 2003-Ohio-5736, ¶8; *State v. Byerly*, 3d Dist. Hancock Nos. 5-99-26, 5-99-27, 1999 Ohio App. LEXIS 5165, \*5-\*6 (Nov. 4, 1999).

{¶32} This court finds that the judgments entered in this case and in *Bell, supra*, are in conflict with the judgments pronounced on the same question by the Second

District Court of Appeals in *Weese, supra*, and the Fourth District Court of Appeals in *Pulliam, supra*.

{¶33} Ohio Constitution, Article IV, Section 3(B)(4) provides:

{¶34} Whenever 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.

{¶35} Pursuant to the foregoing constitutional provision, we sua sponte certify a conflict on the following question to the Supreme Court for review and final determination:

{¶36} In the context of a jointly-recommended sentence, is the trial court required to make consecutive-sentence findings under R.C. 2929.14(C) in order for its sentence to be authorized by law and thus not appealable?

{¶37} The attention of counsel for both appellant and appellee is called to the Rules of Practice of the Supreme Court, Section 8, Certified-Conflict Cases, for further proceedings.

{¶38} Appellant's first assignment of error is sustained.

{¶39} For appellant's second and final assignment of error, he alleges:

{¶40} "Appellant's guilty plea was not knowingly and voluntarily entered."

{¶41} The underlying purpose of Crim.R. 11(C) is to convey certain information to a defendant so that he can make a voluntary and intelligent decision regarding whether to plead guilty. *State v. Ballard*, 66 Ohio St.2d 473, 479-480 (1981). "The standard for reviewing whether the trial court accepted a plea in compliance with

Crim.R. 11(C) is a de novo standard of review.” *State v. Cardwell*, 8th Dist. Cuyahoga No. 92796, 2009-Ohio-6827, ¶26, citing *State v. Stewart*, 51 Ohio St.2d 86 (1977). This standard “requires an appellate court to review the totality of the circumstances and determine whether the plea hearing was in compliance with Crim.R. 11(C).” *Cardwell, supra*.

{¶42} Before accepting a guilty plea, the trial court must personally address the defendant and determine that the plea is being made voluntarily with an understanding of the nature of the charges and the maximum penalty (Crim.R. 11(C)(2)(a)); determine that the defendant understands the effect of the plea and that upon acceptance of the plea, the court may proceed with sentence (Crim.R. 11(C)(2)(b)); and determine that the defendant understands his constitutional rights (Crim.R. 11(C)(2)(c)).

{¶43} Appellant argues that his plea was not knowing and voluntary because, prior to pleading guilty, the trial court did not advise him that his sentence of 24 years in prison was jointly recommended by counsel.

{¶44} When determining whether the trial court has met its obligations under Crim.R. 11 in accepting a plea, appellate courts have distinguished between constitutional and non-constitutional rights. *State v. Montgomery*, 11th Dist. Ashtabula No. 2009-A-0057, 2010-Ohio-4555, ¶13. A trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of the constitutional rights set forth in that rule and the failure to do so invalidates the plea. *Id.* “Strict compliance” does not require a verbatim recitation of the rights being waived; rather, the standard requires the court to explain or refer to the rights in a manner reasonably intelligible to the defendant entering the plea. *Id.* Alternatively, while literal compliance with Crim. R. 11 with respect to the non-constitutional rights set forth in that rule is preferred, substantial compliance

with the rule will suffice. *Id.* at ¶14. A court substantially complies where the record demonstrates the defendant, under the totality of the circumstances, subjectively understood the implications of the plea and the rights waived. *Id.*

{¶45} Further, a trial court's failure to substantially comply with the non-constitutional requirements of Crim.R. 11(C) alone will not constitute a basis for an automatic reversal. *Montgomery, supra*, at ¶15. To rise to the level of reversible error, a defendant must demonstrate he or she was prejudiced by the lack of compliance. *Id.* The test for prejudice is "whether the plea would have otherwise been made." *Id.* In other words, the defendant must show that, but for the alleged error, he would not have pled guilty and instead would have insisted on going to trial.

{¶46} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily." *State v. McKenna*, 11th Dist. Trumbull No. 2009-T-0034, 2009-Ohio-6154, ¶51, quoting *State v. Engle*, 74 Ohio St.3d 525, 527 (1996). "In order for a plea to be knowingly, intelligently, and voluntarily entered, a defendant must be 'informed in a reasonable manner at the time of entering his guilty plea of his rights to a [1.] trial by jury and to [2.] confront his accusers, and his [3.] privilege against self-incrimination, and his [4.] right of compulsory process for obtaining witnesses in his behalf.'" *McKenna, supra*, quoting *State v. Ballard*, 66 Ohio St.2d 473, 478 (1981).

{¶47} "Generally, a guilty plea is deemed to have been entered knowingly and voluntarily if the record demonstrates that the trial court advised a defendant of (1) the nature of the charge and the maximum penalty involved, (2) the effect of entering a plea to the charge, and (3) that the defendant will be waiving certain constitutional rights by entering his plea." *State v. Strong*, 11th Dist. Ashtabula No. 2013-A-0003, 2013-Ohio-

5189, ¶17, quoting *State v. Madeline*, 11th Dist. Trumbull No. 2000-T-0156, 2002 Ohio App. LEXIS 1348, \*11 (Mar. 22, 2002). Where the record shows the trial court complied with these three requirements, appellant's guilty plea is entered knowingly and voluntarily. *Id.*

{¶48} Here, the record reveals that, before accepting appellant's guilty plea, the trial court complied with these requirements. First, the trial court advised appellant of the nature of the charges and the maximum penalty involved. The court read to appellant each of the three counts of rape as charged in the information. The court advised him that each of the three counts of rape is a first-degree felony with a potential prison term of three to ten years; that the sentences can be imposed consecutively; that his total exposure was 30 years in prison; and that a prison term in this case was mandatory.

{¶49} Second, the court advised appellant of the effect of entering a guilty plea. To satisfy this requirement, a trial court, before accepting a guilty plea, is required to inform the defendant that a guilty plea is a complete admission of guilt and that when the plea is accepted, the court may proceed with sentencing. *State v. Giovanni*, 7th Dist. Mahoning No. 07 MA 60, 2008-Ohio-2924, ¶45. Here, the court advised appellant that his guilty plea was a complete admission of his guilt and that once his plea was accepted, he could be sentenced immediately.

{¶50} Third, the court advised appellant that by pleading guilty, he would be waiving his right to a trial by jury, his privilege against self-incrimination, his right to have the state prove the charges against him beyond a reasonable doubt, the right to confront and cross-examine the state's witnesses against him, and the right of compulsory process to obtain witnesses in his behalf. Appellant said he understood

these rights and waived them. Further, in his written guilty plea, appellant stated he understood that by pleading guilty he waives each of the foregoing rights, which were listed on the written plea.

{¶51} As a result, the record shows the trial court advised appellant of (1) the nature of the charges and the maximum penalty involved, (2) the effect of entering a guilty plea to the charges, and (3) that, by pleading guilty, appellant would be waiving the foregoing constitutional rights. For this reason alone, the record shows that appellant knowingly and voluntarily entered his guilty plea. *Strong, supra*.

{¶52} Moreover, appellant stated that he was entering his guilty plea freely and voluntarily and that it was his own decision and voluntary act to plead guilty. He said that no one had made any promises or threats to him to induce him to plead guilty. In addition, before accepting appellant's guilty plea, the trial court found on the record that appellant had been informed of all of his constitutional rights and that he made a knowing, intelligent, and voluntary waiver of those rights.

{¶53} Appellant has not cited any case law, and we have not located any, holding that in order for a guilty plea to be voluntary, the trial court must advise the defendant regarding any sentencing recommendations. In fact, Crim.R. 11 does not require a trial court to advise the defendant regarding a sentencing recommendation, joint or otherwise, prior to accepting a guilty plea. Thus, pursuant to Crim.R. 11, appellant did not have a right to be advised by the trial court that counsel jointly recommended a sentence of 24 years in prison. In any event, the trial court did reference the effect of a joint sentencing recommendation. After the trial court advised appellant of his potential sentence, but before appellant plead guilty, the trial court advised him that at sentencing, the court was "not bound by and [did] not have to follow

the recommendation of the prosecutor, [appellant's] attorney, or *even a joint recommendation as to the sentence.*" (Emphasis added.) Further, the court told appellant that it did not yet know what the attorneys' sentencing recommendations were going to be, but that, "even if [the prosecutor and appellant's attorney] recommend a low sentence,' the court could sentence him to 30 years in prison. In addition, before appellant pled guilty, *the prosecutor and appellant's trial counsel advised the court in the presence of appellant that there was a joint recommendation of 24 years in prison.* Thus, appellant was fully aware of this joint recommendation before he pled guilty, and we do not accept appellant's argument that because the court did not personally advise him that counsel had jointly recommended a sentence of 24 years, appellant could have reasonably expected a combined sentence of three years in prison. Moreover, there is no evidence in the record showing that if the court had personally advised appellant that there was a joint recommendation by counsel of 24 years in prison, appellant would not have pled guilty and instead would have insisted on going to trial. Thus, even if appellant was entitled to be advised by the court of counsel's joint sentencing recommendation, there is no evidence he was prejudiced as a result of the trial court not advising him of the sentencing recommendation.

{¶54} We thus hold the trial court did not err in accepting appellant's guilty plea.

{¶55} Appellant's second assignment of error is overruled.

{¶56} In summary, the trial court did not err in accepting appellant's guilty plea and his conviction is affirmed. However, because the court did not make the necessary findings for consecutive sentences at appellant's sentencing hearing, the imposition of consecutive sentences is contrary to law. Thus, we reverse and vacate appellant's sentence and remand the matter to the trial court for resentencing.

{¶57} For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed in part and reversed in part; and this case is remanded for further proceedings consistent with the opinion.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.

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 thoroughly 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

Slip Copy, 2014 WL 3732366, 2014 -Ohio- 3267

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

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.”<sup>1</sup> 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. Rummel*, 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

Slip Copy, 2015 WL 914823, 2015 -Ohio- 759

Footnotes

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

Baldwin's Ohio Revised Code Annotated  
Title XXIX. Crimes--Procedure (Refs & Annos)  
Chapter 2929. Penalties and Sentencing (Refs & Annos)  
Felony Sentencing

R.C. § 2929.14

2929.14 Prison terms

Effective: March 23, 2015

Currentness

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.1411 of the Revised Code that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed, subject to divisions (C) to (I) of section 2967.19 of the Revised Code, shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (B)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (B)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (B)(1)(a) of this section or any of the additional prison terms described in division (B)(1)(c) of this section upon an offender for a violation of section 2923.12 or 2923.123 of the Revised Code. The court shall not impose any of the prison terms described in division (B)(1)(a) or (b) of this section upon

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

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

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

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

(g) If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

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

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

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court

does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

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

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

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

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

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

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

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

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

(d) A sentence imposed under division (B)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20, section 2967.19, or section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender

shall serve an additional prison term imposed under this section consecutively to and prior to the prison term imposed for the underlying offense.

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

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

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (B)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (B)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (B)(4) of this section, the court also may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

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

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1414 of the Revised Code that

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

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

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

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

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

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

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

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

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

(b) If a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (B)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

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

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

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

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

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from

future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

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

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

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

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

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

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

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

(2) A person is convicted of or pleads guilty to a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after January 2, 2007, and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of section 2907.02 of the Revised Code, or division (B) of section 2907.02 of the Revised Code provides that the court shall not sentence the offender pursuant to section 2971.03 of the Revised Code.

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

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

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

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

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

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

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

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

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

(ii) If the offender previously has been convicted of or pleaded guilty to one or more felony or misdemeanor violations of section 2907.22, 2907.23, 2907.24, 2907.241, or 2907.25 of the Revised Code and also was convicted of or pleaded guilty to a specification of the type described in section 2941.1421 of the Revised Code regarding one or more of those violations, an additional prison term of one, two, three, four, five, six, seven, eight, nine, ten, eleven, or twelve months.

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

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

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

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

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

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

program of shock incarceration or an intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is suited, the department shall notify the court of the proposed placement of the offender as specified in section 5120.031 or 5120.032 of the Revised Code and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

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

**CREDIT(S)**

(2014 H 234, eff. 3-23-15; 2012 S 337, eff. 9-28-12; 2011 H 86, eff. 9-30-11; 2008 H 130, eff. 4-7-09; 2008 H 280, eff. 4-7-09; 2008 S 220, eff. 9-30-08; 2008 S 184, eff. 9-9-08; 2007 S 10, eff. 1-1-08; 2006 S 281, eff. 4-5-07; 2006 H 461, eff. 4-4-07; 2006 S 260, eff. 1-2-07; 2006 H 137, § 3, eff. 8-3-06; 2006 H 137, § 1, eff. 7-11-06; 2006 H 95, eff. 8-3-06; 2004 H 473, eff. 4-29-05; 2004 H 163, eff. 9-23-04; 2004 H 52, eff. 6-1-04; 2004 H 12, § 3, eff. 4-8-04; 2004 H 12, § 1, eff. 4-8-04; 2002 H 130, eff. 4-7-03; 2002 S 123, eff. 1-1-04; 2002 H 485, eff. 6-13-02; 2002 H 327, eff. 7-8-02; 2000 S 222, eff. 3-22-01; 1999 S 22, eff. 5-17-00; 1999 S 107, eff. 3-23-00; 1999 H 29, eff. 10-29-99; 1999 S 1, eff. 8-6-99; 1998 H 2, eff. 1-1-99; 1997 S 111, eff. 3-17-98; 1997 H 32, eff. 3-10-98; 1997 H 151, eff. 9-16-97; 1996 H 180, eff. 1-1-97; 1996 S 166, eff. 10-17-96; 1996 H 154, eff. 10-4-96; 1996 S 269, eff. 7-1-96; 1996 H 445, eff. 9-3-96; 1996 H 88, eff. 9-3-96; 1995 S 2, eff. 7-1-96)

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**Former R.C. 2929.14 – Basic prison terms**

**Effective date April 29, 2005**

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

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

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

(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years.

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

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

(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), or (G) of this section, in section 2907.02 of the Revised Code, or in Chapter 2925. of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.

(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

(C) Except as provided in division (G) of this section or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest

prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

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

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

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

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

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

(c) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of section 2923.161 of the Revised Code or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in section 2941.146 of the Revised Code that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of section 2923.161 of the Revised Code or for the other felony offense under

division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (D)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (D)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.1411 of the Revised Code that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (D)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (D)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of section 2923.12 or 2923.123 of the Revised Code. The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of section 2923.13 of the Revised Code unless all of the following apply:

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

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

(f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in section 2941.1412

of the Revised Code that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in section 2935.01 of the Revised Code or a corrections officer as defined in section 2941.1412 of the Revised Code, the court, after imposing a prison term on the offender for the felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(f) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (D)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (D)(1)(a) or (c) of this section relative to the same offense. ...

(2)(a) If an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender, the court shall impose a prison term from the range of terms authorized for the offense under division (A) of this section that may be the longest term in the range and that shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. If the court finds that the repeat violent offender, in committing the offense, caused any physical harm that carried a substantial risk of death to a person or that involved substantial permanent incapacity or substantial permanent disfigurement of a person, the court shall impose the longest prison term from the range of terms authorized for the offense under division (A) of this section.

(b) If the court imposing a prison term on a repeat violent offender imposes the longest prison term from the range of terms authorized for the offense under division (A) of this section, the court may impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if the court finds that both of the following apply with respect to the prison terms imposed on the offender pursuant to division (D)(2)(a) of this section and, if applicable, divisions (D)(1) and (3) of this section:

(i) The terms so imposed are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(ii) The terms so imposed are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and

they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

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

(b) The court imposing a prison term on an offender under division (D)(3)(a) of this section may impose an additional prison term of one, two, three, four, five, six, seven, eight, nine, or ten years, if the court, with respect to the term imposed under division (D)(3)(a) of this section and, if applicable, divisions (D)(1) and (2) of this section, makes both of the findings set forth in divisions (D)(2)(b)(i) and (ii) of this section.

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed

shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (D)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (D)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (D)(4) of this section, the court also may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

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

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

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

Code. A court shall not impose more than one prison term on an offender under division (D)(6) of this section for felonies committed as part of the same act.

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

(b) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (D)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

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

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

the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

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

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

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

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

division (A)(1) or (2) of section 2903.06 of the Revised Code pursuant to division (A) of this section.

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

(F) If a court imposes a prison term of a type described in division (B) of section 2967.28 of the Revised Code, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a prison term of a type described in division (C) of that section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary.

(G) If a person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense and, in relation to that offense, the offender is adjudicated a sexually violent predator, the court shall impose sentence upon the offender in accordance with section 2971.03 of the Revised Code, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment.

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

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

(J) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.143 of the Revised Code that charges the offender with having committed the offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an

additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

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

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

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

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

If the court does not make a recommendation under this division with respect to an offender and if the department determines as specified in section 5120.031 or 5120.032 of the Revised Code, whichever is applicable, that the offender is eligible for placement in a program or prison of that nature, the department shall screen the offender and determine if there is an available program of shock incarceration or an intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is suited, the department shall notify the court of the proposed placement of the offender as specified in section 5120.031 or 5120.032 of the Revised Code and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

Baldwin's Ohio Revised Code Annotated  
Title XXIX. Crimes--Procedure (Refs & Annos)  
Chapter 2953. Appeals; Other Postconviction Remedies (Refs & Annos)  
Supreme Court

R.C. § 2953.08

2953.08 Appeals based on felony sentencing guidelines

Effective: March 22, 2013

Currentness

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

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

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

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

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

(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of section 2971.03 of the Revised Code, if the minimum term of the indefinite term imposed pursuant to division (A)(3) of section 2971.03 of the Revised Code is the longest term available for the offense from among the range of terms listed in section 2929.14 of the Revised Code. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in section 2971.01 of the Revised Code. As used in this division, "adjudicated a sexually violent predator" has the same meaning as in section 2929.01 of the Revised Code, and a person is "adjudicated a sexually violent predator" in the same manner and the same circumstances as are described in that section.

(4) The sentence is contrary to law.

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

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

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

(2) The sentence is contrary to law.

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

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

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

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

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

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

(E) A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall file an appeal of a sentence under this section to a court of appeals within the time limits specified in Rule 4(B) of the Rules of Appellate

Procedure, provided that if the appeal is pursuant to division (B)(3) of this section, the time limits specified in that rule shall not commence running until the court grants the motion that makes the sentence modification in question. A sentence appeal under this section shall be consolidated with any other appeal in the case. If no other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to sentencing.

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

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

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

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

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

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

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

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

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

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

**CREDIT(S)**

(2012 H 247, eff. 3-22-13; 2012 S 160, eff. 3-22-13; 2012 S 337, eff. 9-28-12; 2011 H 86, eff. 9-30-11; 2008 H 130, eff. 4-7-09; 2006 H 461, eff. 4-4-07; 2006 H 95, eff. 8-3-06; 2004 H 473, eff. 4-29-05; 2000 H 331, eff. 10-10-00; 1999 S 107, eff. 3-23-00; 1997 H 151, eff. 9-16-97; 1996 H 180, eff. 1-1-97; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96)

R.C. § 2953.08, OH ST § 2953.08

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