Supreme Court of Ohio Clerk of Court - Filed December 23, 2015 - Case No. 2015-1093

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	**CASE NO. 2015-1093**
	)	
Appellant,	)	**On appeal from the Lake County**
	)	**Court of Appeals,**
-vs-	)	**Eleventh Appellate District**
	)	**Case No. 2013 – L – 125**
WILLIAM D. SERGENT	)	
	)	
Appellee,	)	

MERIT BRIEF OF APPELLEE, WILLIAM D. SERGENT

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STATEMENT OF FACTS

Since the Appellant has essentially adopted the facts as found by the Eleventh District Court of Appeals and contained in that Court's Opinion, the Appellee has no quarrel therewith. The facts, as cited by the Appellant, which are actually material to the question now presented indicate: (1) that the Appellee entered a plea agreement which included consecutive sentencing recommendations by both sides; (2) the Trial Court did not make the requisite findings to impose consecutive sentences at the sentencing hearing; and (3) the Trial Court did include such findings in its Judgment Entry imposing the sentences now in question and filed with the Clerk of Courts. These facts are all recognized by the Eleventh District Court of Appeals and are not in dispute. With respect, the Appellee submits that these facts are sufficient for this Court to reach a disposition of this cause and affirm the Eleventh District.

Such other facts as may be relevant to the issues raised herein, will be more fully addressed in the "Argument" portion of this Merit Brief.

ARGUMENT

CERTIFIED CONFLICT 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?

APPELLEE'S PROPOSITION OF LAW: A TRIAL COURT IS 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, EVEN IN THE CONTEXT OF A JOINTLY-RECOMMENDED SENTENCE.

The question in this cause is very straightforward and concerns the interplay between two separate and distinct statutory provisions, R.C. 2929.14(C)(4) and R.C. 2953.08(D)(1). R.C. 2929.14(C)(4) provides:

> "(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

With regard to appellate review, R.C. 2953.08(D)(1) provides:

"(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."

Reviewing these two code sections *in pari materi*, the question becomes whether or not appellate review may be conducted of a criminal defendant's sentence, if the sentence is jointly recommended to the trial court by the defendant and the prosecution and involves consecutive sentences. As agreed to by the Appellant in its Merit Brief, the question can be crystallized as follows: if jointly recommended consecutive sentences are imposed by a trial court and no findings are made pursuant to R.C. 2929.14(C)(4), is such a sentence "authorized by law." The Appellant appears to agree that if such a sentence is not authorized by law, then appellate review of such may be pursued. If the consecutive sentences are authorized by law, despite the lack of these findings, then appellate review is not permitted. While the Appellee agrees with the Appellant's contention that this is truly the question involved in the case at bar, the Appellee disagrees with the conclusion reached by the Appellant. With respect, consecutive sentences being imposed without discussion of the findings enumerated in R.C. 2929.14(C)(4) by the trial court is not authorized by law and, therefore, is subject to reversal on appeal. The question of whether or not the consecutive sentences were agreed to by both sides is essentially irrelevant.

The Appellant essentially seeks for this Court to re-impose its prior ruling in the case of **State v. Porterfield**, 2005-Ohio-3095. With respect, the Appellee submits that the holding in that case is outdated, outmoded, and against the public policy established by the legislature with regard to Ohio's current sentencing structure.

In **Porterfield**, **supra**, this Court determined that under a prior system of sentencing in Ohio, a trial court need not make the findings required by the relevant statutory provisions at that

time, so long as both sides recommended that consecutive sentences be imposed. In fact, Appellee agrees that is the holding in that case. However, this Court in **Porterfield** was analyzing an entirely separate and distinct statutory scheme concerning sentencing than that which exists today. As noted by the Eleventh District below, more recent cases such as **State v. Underwood**, 2010-Ohio-1, reveal that this Court's current position is that appellate review of sentencing may occur, even where the sentences in question are recommended by both parties, where the sentences actually imposed are not "authorized by law." Certainly, the Appellee is correct in that **Underwood** did not involve the question of consecutive sentencing, but rather sentencing of crimes involving allied offenses of similar import. However, that case did involve a question of a sentence being imposed which was recommended by both sides. Thus, a trial court may not impose separate and distinct sentences for crimes which are allied offenses of similar import, even if both sides recommend such. The reasoning behind that is separate sentences on allied offenses of similar import are not "authorized by law."

More telling, is this Court's more recent decision in **State v. Bonnell**, 2014-Ohio-3177.

In **Bonnell**, **supra**, this Court was confronted with the question of whether a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and, subsequently, incorporate those findings into its sentencing entry. This Court answered that question in the affirmative, but also found that a trial court is under no obligation to state reasons to support its findings. In so holding, this Court engaged in a historical analysis of the rather troublesome question of judicial fact finding in the sentencing process. A prior version of R.C. 2929.14 had required that a trial court make similar findings to those now in question under the current statute and, further, state its reasons in support of those findings. However, that portion of the sentencing statute was found to be unconstitutional and severed in **State v. Foster**, 2006-

Ohio-856. Subsequently, based upon a holding by the United States Supreme Court in **Oregon v. Ice**, 555 U.S. 160 (2009), the legislature enacted the current version of R.C. 2929.14(C)(4), which requires certain findings to be made in support of consecutive sentencing, but does not require any sort of analysis by a trial court with regard to those findings.

In rendering its decision in **Bonnell**, **supra**, this Court made a distinction between a trial court's failure to make the requisite findings at the sentencing hearing and a trial court's failure to subsequently incorporate those findings into a sentencing entry. This Court found that an inadvertent failure to incorporate the statutory findings in the sentencing entry "does not render the sentence contrary to law" and that such clerical mistake may be subsequently corrected through a *nunc pro tunc* entry to reflect what actually occurred. **Bonnell**, **supra**, at Paragraph 30. In that regard, this Court quite specifically held that such an error "does not render the sentence contrary to law..." **Id**. Conversely, this Court found that failure to state the findings at the sentencing hearing effectively does render the sentence contrary to law and cannot be cured through a *nunc pro tunc* order. **Id**. A new sentencing hearing must be conducted under those circumstances.

Although the Appellant provided a rather lengthy and detailed analysis of other Ohio appellate cases addressing this issue, with all due respect, the Appellee submits that those cases do nothing more than illustrate the conflict now existing between the districts. The real analysis involved in the question now at bar centers upon the **Porterfield** and **Bonnell** cases, as well as the provisions now contained in R.C. 2929.14(C)(4) and R.C. 2953.08(D)(1).

In the case at bar, the Trial Court clearly recognized the necessity of making the findings in question, as the Trial Judge included those findings in its Sentencing Entry. However, it is undisputed that no such findings were made at the sentencing hearing. Based upon this Court's

holding in **Bonnell**, the sentence imposed was therefore "contrary to law." The decision in **Bonnell** was both thorough and dispositive. No exception was made in **Bonnell** for situations where consecutive sentences are recommended by both parties. Furthermore, the provisions contained in R.C. 2929.14(C)(4) do not contain any such exception. As noted in **Bonnell**, the Ohio legislature was very thoughtful and careful in revising and passing 2929.14, including Section (C)(4) and could easily have provided an exception to the requisite statutory findings being made if it desired to do so. It did not.

In **Bonnell**, this Court noted the intent of the Ohio legislature in enacting the current provisions of R.C. 2929.14(C)(4) and stated that the statute was enacted "with a legislative purpose to reduce the state's prison population and to save the associated costs of incarceration by diverting certain offenders from prison and by shortening the terms of other offenders sentenced to prison." **Bonnell**, **supra**, at Paragraph 20. Requiring trial courts to make these findings, even in situations where consecutive sentences are recommended by both sides pursuant to a plea agreement, serves that legislative purpose. It is axiomatic that the ultimate arbiter of the sentence to be imposed is a trial court under Ohio law. In fact, the Trial Court in the case at bar inarguably advised the Appellee of such at the time that the Appellee's change of pleas was taken. The Appellee respectfully submits that this is in perfect accord with the intent of the Ohio legislature in enacting the statutory provisions in question. A trial court is always free to impose a sentence other than that recommended by either side, or both. Even where both sides recommend the same sentence, and that sentence includes consecutive terms, the purpose of the Ohio legislature is served by requiring trial courts to conduct the analysis and make the requisite findings. A trial court might not agree that consecutive sentences are appropriate and is perfectly free to order otherwise at sentencing if that is the case. By requiring trial courts to

make the requisite findings, even in situations where consecutive sentences are jointly recommended, Ohio law would simply be enforcing one of the layers of the various protections provided in R.C. 2929.14 to ensure that offenders are not sentenced to terms which are harsher than those necessary under the particular facts of the case.

CONCLUSION

In light of the above, the Appellee respectfully submits that this Court should answer the certified question in the affirmative and require Ohio trial courts to make consecutive-sentence findings under R.C. 2929.14(C). The judgment of the Eleventh District Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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