

[Cite as *State v. Bennington*, 2015-Ohio-5439.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	CASE NO. 14 BE 48
)	
PLAINTIFF-APPELLEE,)	
)	
VS.)	OPINION
)	
DONALD JOSEPH BENNINGTON,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Belmont County, Ohio Case No. 14CR119
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiff-Appellee:

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Belmont County Prosecutor
Atty. Scott A. Lloyd
Assistant Prosecuting Attorney
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For Defendant-Appellant:

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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 10, 2015

[Cite as *State v. Bennington*, 2015-Ohio-5439.]
ROBB, J.

{¶1} Defendant-Appellant Donald Joseph Bennington appeals from Belmont County Common Pleas Court's imposition of maximum consecutive sentences for his third degree felony convictions of tampering with evidence and possession of a weapon while under disability. The trial court made all the required consecutive sentencing findings at the sentencing hearing and in the judgment entry; the sentence is hereby affirmed in all respects.

Statement of the Facts and Case

{¶2} The facts in this case are somewhat convoluted. On November 29, 2013, an incident occurred on Trough Run Road, Bellaire, Belmont County, Ohio. Appellant allegedly crashed his vehicle into his wife's vehicle. He then forcibly removed his wife and daughter from the vehicle and put them in his vehicle. He drove to their house and allegedly raped his wife at gun point. When his mother-in-law arrived at their home, he pushed her against the wall and fired a shot into the wall. He then took his daughter and left. The wife called the police.

{¶3} The police found Appellant; he was arrested and transported to the Belmont County Sheriff's Office. Appellant agreed to provide a statement after being advised of his Miranda rights. He executed a signed Miranda waiver. It appears the interview process was lengthy and during one of the breaks the officer left the interview room. While the officer was out of the room, Appellant retrieved his Miranda waiver from an unlocked desk drawer, ripped it up, and attempted to eat it.

{¶4} Additionally, when the officers searched Appellant's home, they found three guns. Appellant was under disability for having committed a prior felony.

{¶5} As a result of the described incidents, Appellant was indicted in two separate indictments. The first indictment was assigned case number 14CR112 and Appellant was charged with first-degree felony rape, with an attendant firearm specification; two counts of first-degree felony kidnapping, both with attendant firearm specifications; and second-degree felonious assault.

{¶6} The second indictment was assigned case number 14CR119, the case underlying this appeal. Appellant was indicted for tampering with evidence, a

violation of R.C. 2921.12(A)(1), a third-degree felony; and possession of a weapon while under disability, a violation of R.C. 2923.13(A)(2), a third-degree felony. 8/6/14 Indictment.

{¶7} Appellant entered a not guilty plea in case number 14CR119. After a plea agreement was reached, he changed his plea to guilty and the trial court accepted that plea. 8/21/14 Plea Agreement; 8/21/14 Plea Tr. 9; 8/26/14 J.E. Thereafter, case number 14CR112 was dismissed allegedly because the witnesses failed to cooperate.

{¶8} Sentencing occurred on September 18, 2014. The state recommended an aggregate term of six years - two three-year maximum sentences running consecutive to each other. 9/18/14 Sentencing Tr. 2. Appellant asked for community control or, in the alternative, the minimum term. 9/18/14 Sentencing Tr. 7. After considering Appellant's record and the facts of the case, the court followed the state's recommendation and ordered an aggregate six year prison term. 9/19/14 J.E. He received three years for tampering with evidence and three years for possession of a firearm while under disability. 9/19/14 J.E. The court ordered the three year sentences to be served consecutively. 9/19/14 J.E.

{¶9} Appellant timely appealed.

Assignment of Error

"Whether the trial court erred to the prejudice of Appellant in imposing maximum consecutive sentences for violation of R.C. 2921.12(A)(1), tampering with evidence, and R.C. 2923.13(A)(2), possession of a weapon while under disability."

{¶10} This court is currently split as to the standard of review to apply in felony sentencing cases. See *State v. Hill*, 7th Dist. No. 13 MA 1, 2014–Ohio–919 (Vukovich, J., Donofrio, J., majority with DeGenaro, J., concurring in judgment only with concurring in judgment only opinion); *State v. Wellington*, 7th Dist. No. 14 MA 115, 2015–Ohio–1359 (Robb, J., DeGenaro, J., majority with Donofrio, J. concurring in judgment only with concurring in judgment only opinion).

{¶11} One approach is to apply the test set forth in the plurality opinion in *State v. Kalish*, 120 Ohio St.3d 23, 2008–Ohio–4912, 896 N.E.2d 124, ¶ 26. *Hill* at ¶

7-20. Under the *Kalish* test, we must first examine the sentence to determine if it is “clearly and convincingly contrary to law.” *Kalish* at ¶ 26. Second, the court’s discretion in selecting the sentence within the permissible statutory range is reviewed for an abuse of discretion. *Id.* at ¶ 17.

{¶12} The other approach is to strictly follow R.C. 2953.08(G), which provides that appellate courts are only to review felony sentences to determine if they are contrary to law. R.C. 2953.08(G) specifically indicates appellate courts do not review felony sentences for an abuse of discretion. *Wellington* at ¶ 9-14.

{¶13} The issue of which felony sentencing standard of review is applicable is currently before the Ohio Supreme Court. *State v. Marcum*, 141 Ohio St.3d 1453, 2015–Ohio–239, 23 N.E.3d 1453. The certified question the Court has accepted is, “[D]oes the test outlined by the [c]ourt in *State v. Kalish* apply in reviewing felony sentences after the passage of R.C. 2953.08(G)?” *Id.*

{¶14} Regardless of what standard is employed, the result in this case will be the same. The sentence is affirmed because the required findings were made and the record supports the sentence ordered.

{¶15} Appellant argues the trial court incorrectly imposed a maximum consecutive sentence. Thus, this court must review whether the record supports the imposition of maximum sentences, and whether the trial court erred in ordering consecutive sentences.

Maximum Sentences

{¶16} In determining the appropriate sentence, the trial court is directed to consider the purposes and principles of sentencing as espoused in R.C. 2929.11, the seriousness and recidivism factors enumerated in R.C. 2929.12, and the permissible statutory ranges as set forth in R.C. 2929.14.

{¶17} Both tampering with evidence in violation of R.C. 2921.12(A)(1) and possession of a weapon while under disability in violation of R.C. 2923.13(A)(2) are third-degree felonies. The maximum prison term for each of these offenses is three years, which are the sentences that Appellant received. R.C. 2929.14(A)(3)(b).

{¶18} The trial court stated in its judgment entry that it considered both R.C. 2929.11 and 2929.12 when determining the appropriate sentence. The trial court went one step further and indicated which factors under R.C. 2929.12(B), (C), (D), and (E) made the offenses more serious and showed that recidivism was likely. 9/19/14 J.E.

Likewise, at the sentencing hearing, the trial court considered the statutes:

As indicated, this Court has studied Ohio Revised Code 2929.11 and 2929.12 at length. I've studied the files. Make sure we understand that's a plural word; not a singular word.

I want to commend the grandfather who spoke just now. I know that wasn't difficult – or it wasn't easy; it was very difficult. And I appreciate his words. I appreciate the words of all the parties. But if you just listen to these comments made by the individuals speaking on behalf of the defendant, we get the impression that this is an isolated event; just a fluke. Just some addiction problem and isolated situation. This stuff has been going on and problems for well over a decade.

Let me just give you a taste of it: Theft; possession or consumption; reckless operation; reckless operation; sale to underage person; possible escape; DUS; complicity to burglary; complicity to vandalism; theft; felonious assault; domestic violence with the lady who said it's just [sic] misunderstandings that they have. It's incredible misunderstanding they have, and I'm putting it mildly. Failure to even confine dogs, for goodness sakes.

I might add, back on the felonious assault for which he was convicted, which was a felony of the second degree. Murder is a felony of the first degree, so you see where we are. That was back in, let me see, 2007. He went to prison and he was granted judicial release. Shortly after judicial release, he violated community control sanctions in that very case.

So if you folks think that efforts haven't been made to rehabilitate this individual, you are dead wrong. You don't know what's been going on in these cases. This lasts more than a decade. This is not an isolated event. This is a series of problems and crimes and possible near-death situations for over a decade. This is not something that simply happened to arise.

He has not responded to sanctions. He has a clear pattern of criminal activity. I believe the population of Belmont County, Ohio is endangered by his past, continuing and probable future conduct.

Community control sanctions or a combination of community control sanctions will not adequately punish this offender and protect the public from future crimes. Actually, community control sanctions would demean the seriousness of this offense.

I think – I sympathize greatly for the grandfather who testified, but I think the wife is actually blind – and she just stepped back in the courtroom. She is blind to what is going on in this case; what has gone on in these events, and what has gone on in the domestic violence where she was a victim; the felonious assault where he then violated community control sanction and the problems that have gone on for over a decade. Over a decade.

9/18/14 Sentencing Tr. 17-20.

{¶19} Appellant argues the above reasoning demonstrates that the trial court only considered his criminal history. He contends that ripping up and trying to eat his executed Miranda form is not the worst form of tampering with the evidence and the sentence is not proportional to the crime. Likewise, having a weapon in his house that was registered to his wife, which was being used for their protection due to recent break-ins, is also not the worst form of the offense and the sentence is not proportional to that crime.

{¶20} The trial court's decision is based in part on Appellant's criminal and juvenile record. However, that is not all the court considered. It also considered the facts leading up to the crimes, including the charges in case number 14CR112. The trial court did not err in considering those facts and circumstances. We have previously explained that a trial judge may consider, at sentencing, charges that have been dismissed or reduced during the plea process. *State v. Parsons*, 7th Dist. 12 BE 11, 2013–Ohio–1281, ¶ 18, citing *State v. Cooley*, 46 Ohio St.3d 20, 35, 544 N.E.2d 895 (1989). See also, *State v. Clemons*, 2d Dist. Montgomery No. 26038, 2014–Ohio–4248, ¶ 8 (recognizing that a trial court at sentencing may consider a defendant's uncharged yet undisputed conduct as well as facts related to charges dismissed under a plea agreement.) In *Parsons*, we even stated that the fact that the charges were dramatically reduced is a factor in support of a court's decision to impose a maximum sentence. *Parsons*. Thus, although case number 14CR112 was dismissed, it could still be considered for purposes of sentencing in case number 14CR119.

{¶21} In addition to considering the facts and charges in case number 14CR112, the court also considered the unique facts pertaining to having a weapon while under disability conviction and the tampering with evidence conviction. As to the possession of a weapon while under disability conviction, a statement in the record indicates that there were three guns, not one, in the house. Furthermore, the guns did not just sit in the house. One was used to threaten and was discharged. As to the tampering with evidence conviction, while in the police interview room, Appellant actively looked for his executed Miranda warning, found it in a desk drawer and then proceeded to rip it up and try to eat it. These facts indicate the crimes were serious.

{¶22} Given the facts of this case, the law, and the trial court's reasoning, it is difficult to find that the trial court erred in imposing the maximum sentence allowed by law for each crime.

Consecutive Sentences

{¶23} The trial court ordered the three year sentence for tampering with evidence to be served consecutive to the three year sentence for having a weapon while under disability. Appellant finds fault with this determination for the same reasons he finds fault with the imposition of maximum sentences.

{¶24} R.C. 2929.14(C) mandates that certain findings must be made prior to ordering consecutive sentences:

(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.

R.C. 2929.14(C)(4).

{¶25} The Ohio Supreme Court has stated that when a trial court imposes a consecutive sentence, it must make the required findings at the sentencing hearing,

and it must incorporate those findings into the sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 654, ¶ 29.

{¶26} The trial court gave an almost verbatim recitation of R.C. 2929.14(C)(4)(c) in the judgment entry:

In accord with R.C. §2929.14(C)(4), the Court finds that consecutive sentence is necessary to protect the public from future crime and to punish the offender, and consecutive sentences are not disproportionate to the seriousness of the offender's conduct and the danger this offender poses to the public. The Court specifically finds that the imposition of consecutive sentences is reasonable and appropriate because the offender has an established pattern of criminal activity, evidenced by his prior convictions. Therefore, the Court finds that Defendant poses a great risk of committing future crimes and, when combined with his minimal expression of remorse, the Court finds that consecutive sentences are necessary to protect the public from future crimes. The Court further finds that the harm to the victim was so great that a single term does not adequately reflect the seriousness of his conduct, all of which demonstrate that consecutive sentences are necessary to protect the public from future crimes by this offender and by others.

9/19/14 J.E.

{¶27} At the sentencing hearing, the trial court did not give a verbatim recitation of R.C. 2929.14(C)(4). That said, in examining the sentencing transcript as a whole, the trial court made the required findings.

{¶28} The first finding in R.C. 2929.14(C)(4) is the necessity to protect the public or punish the offender finding. The trial court stated that consecutive terms are needed to protect the public. Tr. 20. Thus, the first finding was made.

{¶29} The second finding is that consecutive sentences are not disproportionate to the seriousness of the conduct and to the danger the offender

poses to the public. The trial court does not use the terms “disproportionate” and “danger the offender poses to the public.” The Ohio Supreme Court has indicated, “A word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld.” *Bonnell*, 2014-Ohio-3177, ¶ 29

{¶30} Although the trial court does not recite the second finding word for word, we can discern that the trial court engaged in the appropriate analysis. The trial court stated that “a single term does not adequately reflect the seriousness of the defendant’s continuing conduct.” Tr. 20. This is equivalent to a finding that the sentence is not disproportionate. Likewise, the trial court also made statements throughout the sentencing hearing that the public needed to be protected from his future crimes, which is an indication Appellant poses a danger to the public. The Eighth Appellate District has found that the statement “the danger you caused” was equivalent to danger that “he poses.” *State v. Dodson*, 8th Dist. No. 100347, 2014-Ohio-2272, ¶ 13. In making that determination, the court indicated that in order to determine the danger the offender “poses” to the public, the sentencing court necessarily looks at the danger he caused in the past. *Id.* In our case, the trial court clearly looked at the danger Appellant caused in the past. Given all of the above, the second finding was made.

{¶31} The third finding is that the offender’s criminal history demonstrates consecutive sentences are necessary. The trial court stated, “The offender’s criminal history shows that consecutive terms are needed to protect the public and the individuals that he claims are so near and dear to his heart and soul.” Tr. 20. Thus, the third finding was made.

{¶32} Accordingly, this court holds all consecutive sentencing findings were made by the trial court. This assignment of error is without merit. The sentence is hereby affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.