

[Cite as *State v. White*, 2015-Ohio-5455.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	
PLAINTIFF-APPELLEE,)	
)	CASE NO. 14 MA 184
V.)	
)	OPINION
ANTHONY J. WHITE,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 2011-CR-1210
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JUDGMENT:	Affirmed in part Reversed and Remanded in part
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APPEARANCES:	
For Plaintiff-Appellee	Paul Gains Prosecutor Ralph M. Rivera Assistant Prosecutor 21 W. Boardman St., 6 th Floor Youngstown, Ohio 44503

For Defendant-Appellant	Attorney Richard J. Hura 9 East Park Avenue Columbiana, Ohio 44408
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JUDGES:

Hon. Gene Donofrio
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: December 16, 2015

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DONOFRIO, P.J.

{¶1} Defendant-appellant, Anthony White, appeals from a Mahoning County Common Pleas Court judgment sentencing him on one count of involuntary manslaughter, five counts of felonious assault, and merged firearm specifications. This was a result of appellant entering guilty pleas to these charges.

{¶2} On November 10, 2011, a Mahoning County Grand Jury indicted appellant on the following charges: Count One, murder; Count Two, attempted murder; Counts Three through Seven, felonious assault; and Count Eight, having weapons while under a disability. Counts One through Seven contained accompanying firearm specifications. Appellant entered a not guilty plea.

{¶3} On September 15, 2014, appellant entered into a plea agreement with plaintiff-appellee, the State of Ohio. Pursuant to the terms of the plea agreement, the state amended Count One of the indictment from murder to involuntary manslaughter. It also dismissed Count Two, attempted murder, and Count Eight, having weapons while under a disability. In exchange, appellant entered a guilty plea to the amended Count One and to Counts Three through Seven, and the accompanying specifications. The trial court accepted appellant's plea and set the matter for sentencing.

{¶4} The trial court sentenced appellant to ten years in prison on Count One with an additional three years on the accompanying firearm specification and five years each on Counts Three through Seven with an additional three years on the accompanying firearm specifications. The court merged the firearm specifications. The court ordered the sentences on Counts Three, Four, Five, Six, and Seven to run consecutive to each other and consecutive to the firearm specification sentence, but concurrent with the sentence on Count One, for a total sentence of 28 years in prison.

{¶5} Appellant filed a timely notice of appeal on December 30, 2014. He now raises two assignments of error.

{¶6} Appellant's first assignment of error states:

THE SENTENCING COURT FAILED TO COMPLETELY AND

PROPERLY SET OUT THE REQUIRED FINDINGS PURSUANT TO ORC 2929.14(C)(4) PRIOR TO ISSUING CONSECUTIVE SENTENCES CONSTITUTING PLAIN ERROR.

{¶7} Appellant argues that the trial court failed to make the statutorily-required findings before sentencing him to consecutive sentences. He asserts that the court did not make the findings at the sentencing hearing nor did it make them in the sentencing judgment entry. The state concedes that the trial court failed to make the required findings for imposing consecutive sentences.

{¶8} The court ordered appellant to serve his sentences on the five felonious assault counts consecutively. In ordering an offender to serve consecutive sentences, the trial court must comply with R.C. 2929.14(C)(4).

{¶9} R.C. 2929.14(C)(4) requires a trial court to make specific findings when imposing 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.

{¶10} It has been held that although the trial court is not required to recite the statute verbatim or utter “magic” or “talismanic” words, there must be an indication that the court found (1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger posed to the public, and (3) one of the findings described in R.C. 2929.14(C)(4)(a), (b), or (c). *State v. Bellard*, 7th Dist. No. 12-MA-97, 2013-Ohio-2956, ¶17. The court need not give its reasons for making those findings however. *State v. Power*, 7th Dist. No. 12 CO 14, 2013-Ohio-4254, ¶38.

{¶11} The Ohio Supreme Court has held that the trial court must make its findings at the sentencing hearing and not simply in the sentencing judgment entry:

In 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 entry, but it has no obligation to state reasons to support its findings.

State v. Bonnell, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. The court stressed the importance of making the findings at the sentencing hearing, noting this gives notice to the offender and to defense counsel. *Id.* at ¶29. And while the trial court should also incorporate its statutory findings into the sentencing entry, the court's inadvertent failure to do so is merely a clerical mistake and does not render the sentence contrary to law. *Id.* at ¶30. The proper remedy then is for the trial court to issue a nunc pro tunc judgment entry to reflect what actually occurred in open court. *Id.*

{¶12} The transcript of the sentencing hearing must make it “clear from the record that the trial court engaged in the appropriate analysis.” *State v. Hill*, 7th Dist. No. 13 CA 82, 2014-Ohio-1965, ¶27.

{¶13} At the sentencing hearing, the trial court did not make any comments suggesting that consecutive sentences were necessary to protect the public from future crime or to punish appellant. Likewise, it did not make any statements to the effect that consecutive sentences were not disproportionate to the seriousness of appellant's conduct or to the danger appellant posed to the public. Moreover, the court did not make any of the findings described in R.C. 2929.14(C)(4)(a), (b), or (c).

{¶14} The trial court did not make any of the required findings in the judgment entry of sentence either. The court never mentioned R.C. 2929.14(C)(4) or the fact that certain findings are required to impose consecutive sentences.

{¶15} Because the trial court failed to comply with R.C. 2929.14(C)(4)'s requirements in imposing consecutive sentences, appellant's sentence is hereby vacated and he is entitled to a new sentencing hearing.

{¶16} Accordingly, appellant's first assignment of error has merit.

{¶17} Appellant's second assignment of error states:

THE COURT FAILED TO MERGE THE ALLIED OFFENSES
CONSTITUTING PLAIN ERROR.

{¶18} Here appellant contends the trial court failed to conduct an inquiry into whether his involuntary manslaughter conviction should have merged with one of his five felonious assault convictions or whether the felonious assault convictions should have merged with each other because they were crimes of similar import.

{¶19} The Ohio Supreme Court recently addressed the issue of offenses of similar import requiring merger in *State v. Ruff*, 143 Ohio St. 3d 114, 2015-Ohio-995, 34 N.E.3d 892. The Court held that if a defendant's conduct supports multiple offenses, the defendant can be convicted of all of the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows the offenses were committed separately, or (3) the conduct shows the

offenses were committed with separate animus. *Id.* at paragraph three of the syllabus, citing R.C. 2941.25(B). Two or more offenses are of dissimilar import within the meaning of R.C. 2941.25(B) “when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.” *Id.* at paragraph two of the syllabus.

{¶20} In this case, the record is clear that appellant’s conduct constituted offenses involving six separate victims. The indictment names the victim of each count appellant was convicted of: Count One, Theresa Stillwagon; Count Three, Dearris Howell; Count Four, Clarissa Luckey; Count Five, Terry Luckey; Count Six, Alaunte Rhodes; and Count Seven, Corey Johnson. Because each offense had a separate victim, the six offenses were of dissimilar import.

{¶21} The *Ruff* Court found, “[w]hen a defendant's conduct victimizes more than one person, the harm for each person is separate and distinct, and therefore, the defendant can be convicted of multiple counts.” *Id.* at ¶26. Likewise it found, when a defendant's conduct constitutes two or more offenses against a single victim and the harm that results from each offense is separate and identifiable from the harm of the other offense, the defendant can be convicted of multiple counts. *Id.* Therefore, the *Ruff* Court held that two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable. *Id.*

{¶22} Pursuant to *Ruff*, appellant could be convicted of all six offenses in this case because each of the six counts involved a separate victim.

{¶23} Accordingly, appellant’s second assignment of error is without merit.

{¶24} For the reasons stated above, appellant’s conviction is hereby affirmed. Appellant’s sentence is reversed and the matter is remanded for a new sentencing hearing.

DeGenaro, J., concurs.

Robb, J., concurs.