[Cite as *State v. Spann*, 2016-Ohio-1061.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO, PLAINTIFF-APPELLEE, V. DEVIN V. SPANN, DEFENDANT-APPELLANT.	)))))))))	CASE NO. 15 MA 0047 OPINION

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 13 CR 749
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellee	Paul Gains Prosecutor Ralph Rivera Assistant Prosecutor 21 W. Boardman St. Youngstown, Ohio 44503
For Defendant-Appellant	Attorney Donna Jewell McCollum 3695 Stutz Drive, Suite 100 Canfield, Ohio 44406

JUDGES:

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

Dated: March 11, 2016

[Cite as *State v. Spann*, 2016-Ohio-1061.]
DONOFRIO, P.J.

{¶1} Defendant-appellant, Devin Spann, appeals from a Mahoning County Common Pleas Court judgment resentencing him on four counts of felonious assault and a firearm specification. Appointed counsel has filed a no-merit brief and request to withdraw.

{¶2} This matter was previously before this court in *State v. Spann*, 7th Dist. No. 14 MA 22, 2015-Ohio-743. The facts giving rise to this appeal are as follows.

{¶3} On July 20, 2013, Spann got into an argument with a relative who would not loan him money to purchase a firearm. After Spann was denied the money, he shot several relatives present at the location, and then attempted to burn the house down. Spann was seen leaving the home and was arrested shortly after.

{¶4} A Mahoning County Grand Jury issued a 12-count indictment against Spann on July 25, 2013, as follows: four counts of felonious assault in violation of R.C. 2903.11(A)(2)(D), second-degree felonies; firearm specifications attendant to each of those counts in violation of R.C. 2941.145(A); seven counts of aggravated arson in violation of R.C. 2909.02(A)(1)(1)(2), first-degree felonies; and aggravated arson in violation of 2909.02(A)(2)(B)(1)(3), a second-degree felony.

{¶5} Spann pleaded not guilty by reason of insanity on August 8, 2013. Following a psychological evaluation based on his insanity plea, Spann entered into a Crim.R. 11 agreement on October 31, 2013, in which he withdrew his plea. Pursuant to the agreement, the state moved to dismiss all of the aggravated arson counts and all but one of the firearm specifications (those attendant to counts 2, 3, and 4). The court sustained the motion and Spann pleaded guilty to count 1 (felonious assault) and its firearm specification, and counts 2, 3, and 4 (felonious assault).

{¶6} The trial court sentenced Spann to three years in prison for each of the four felonious assault counts and three years for the firearm specification. The trial court ordered that all of the sentences be served consecutively for an aggregate sentence of 15 years in prison. Appellant appealed arguing the trial court should have sentenced him to concurrent, rather than consecutive, sentences.

{¶7} On appeal, we found that the trial court failed at the sentencing hearing to make two of the three findings required to impose consecutive sentences. *Spann*, 2015-Ohio-743 at ¶17. Therefore, we found appellant's sentence was contrary to law. *Id*. at ¶19. Accordingly, we reversed the matter and remanded it for resentencing.

{¶8} Pursuant to our directive, the trial court held a resentencing hearing on February 27, 2015. Appellant's grandmother, who was one of the victims, made a statement to the court pleading for leniency for appellant. Defense counsel presented testimony from appellant's former counselor who testified as to appellant's mental illness. And appellant addressed the court.

{¶9} The trial court then sentenced appellant to two years in prison for each of the four felonious assault counts and three years for the firearm specification. The court ordered all of the sentences to be served consecutively, for a total prison term of 11 years. Appellant filed a timely notice of appeal on March 25, 2015.

{¶10} Appellant's appointed counsel has filed a no merit brief and request to withdraw pursuant to *State v. Toney*, 23 Ohio App.2d 203, 262 N.E.2d 419 (7th Dist.1970). In *Toney*, this court set out the procedure to be used when appointed counsel finds that an indigent criminal defendant's appeal is frivolous.

{¶11} The procedure set out in *Toney*, at the syllabus, is as follows:

> 3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.
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> 4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, pro se.

> 5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments pro se of the indigent, and then determine whether or not the appeal is wholly frivolous.
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> * * *
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> 7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed.

{¶12} This court informed appellant that his counsel filed a *Toney* brief. Appellant did not file a pro se brief.

{¶13} Given that this was a resentencing case, the only possible matter to review is appellant's sentence.

{¶14} This court is currently split as to the standard of review to apply in felony sentencing cases.[1] One approach is to examine the sentence to determine if it is contrary to law and, if it is not, move on to determine whether the trial court abused its discretion in selecting the sentence. *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), citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124 (O'Conner, J., plurality opinion). The other approach is to simply review the sentence to determine if it is contrary to law. *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), citing R.C. 2953.08(G). As will be seen in this case, regardless of which test we apply here, appellant's sentence must be upheld.

{¶15} Appellant pleaded guilty to four second-degree felonies. The possible

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[1] {¶1} The issue of which felony sentencing standard of review to apply is currently pending before the Ohio Supreme Court. The Court has accepted the certified question: "[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)?" *State v. Marcum*, 141 Ohio St.3d 1453, 2015-Ohio-239, 23 N.E.3d 1453.

prison sentences for a second-degree felony are two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2). The trial court sentenced appellant to two years for each of the four second-degree felonies. These prison terms are within the statutory range and in fact are the minimum possible sentences.

{¶16} Appellant also pleaded guilty to a firearm specification in violation of R.C. 2941.45(A). A firearm specification pursuant to R.C. 2941.45(A) carries with it a three-year mandatory prison term. The trial court sentenced appellant to a three-year mandatory prison term for the firearm specification.

{¶17} In sentencing a felony offender, the court must consider the overriding principles and purposes set out in R.C. 2929 .11, which are to protect the public from future crime by the offender and others and to punish the offender. The court did so in this case. The court stated that it had to protect the public and that appellant's sentence had to comply with principles and purposes of R.C. 2929.11, which are to punish the offender and to protect the public from future crime by this offender and others. (Tr. 35).

{¶18} The trial court shall also consider various seriousness and recidivism factors as set out in R.C. 2929.12(B)(C)(D)(E).

{¶19} In this case, the record demonstrates that the trial court considered the statutory seriousness and recidivism factors. The court stated that it considered all of the seriousness factors under R.C. 2929.12(B) and (C). (Tr. 36). The court found that all four victims suffered serious physical harm as a result of appellant's conduct. (Tr. 36). It found appellant's relationship with the victims facilitated the offense. (Tr. 36). It found appellant committed the offenses in the vicinity of three young children who were not victims of the offenses and the offender or victim of the offense was a parent, guardian, custodian, or person in loco parentis of one or more of those children. (Tr. 36-37). These factors all indicated that appellant's conduct was more serious than conduct normally constituting the offense. The trial court also stated that it found appellant's mental illness to be a mitigating factor. (Tr. 37). This factor indicated appellant's conduct was less serious than conduct normally constituting the

offense.

{¶20} The court also stated that it had to consider the recidivism factors. (Tr. 35). It found appellant had a history of prior criminal convictions. (Tr. 35). It found appellant was on a community control sanction at the time he committed the offenses. (Tr. 36). And it found appellant has not responded favorably to sanctions previously imposed. (Tr. 36). These factors made recidivism more likely. The court also found appellant had no juvenile record, which was a factor making recidivism less likely. (Tr. 36). The court concluded recidivism was "far more likely than less likely." (Tr. 36).

{¶21} Thus, the court considered R.C. 2929.12's seriousness and recidivism factors at the sentencing hearing. It also stated in its judgment entry of sentence that it considered the purposes and principles of sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12. (Mar. 4, 2015 Judgment Entry). Given the above, appellant's sentence was not contrary to law. Likewise, the trial court did not abuse its discretion in selecting appellant's sentence.

{¶22} Next, we must consider the consecutive nature of appellant's sentences. The trial court ordered appellant to serve his sentences consecutively. Therefore, we must examine whether the court made the necessary consecutive-sentence findings.

{¶23} 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.

{¶24} 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. However, the court need not give its reasons for making those findings. *State v. Power*, 7th Dist. No. 12 CO 14, 2013-Ohio-4254, ¶38.

{¶25} 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. The trial court should also incorporate its statutory findings into the sentencing entry. *Id*. at ¶30.

{¶26} 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.

{¶27} In this case, the trial court made the necessary findings both at the sentencing hearing and in the judgment entry of sentence.

{¶28} At the hearing, the court made the following findings. It found that consecutive sentences were necessary to protect the public and punish appellant. (Tr. 39). Therefore, it made the first required finding. The court also found consecutive sentences were not disproportionate to the harm caused because four people were shot in this case. (Tr. 39). Thus, the court made the second required finding. The court went on to find that appellant committed these crimes while he was under a community control sanction, specifically probation for the crime of carrying a concealed weapon. (Tr. 39). Next, the court found that the harm done was so great or unusual that a single prison term did not adequately reflect the seriousness of the offender's conduct. (Tr. 39). Finally, the court found that consecutive sentences were not disproportionate to the harm caused or to the seriousness of appellant's conduct and to the danger that he posed to the public. (Tr. 40). Thus, the court made the third required finding.

{¶29} The court also incorporated these findings into its judgment entry. In its judgment entry, the court stated that consecutive sentences were necessary to protect the public from future crime or to punish the offender and that consecutive sentences were not disproportionate to the seriousness of the offender's conduct and to the danger he posed to the public. (Mar. 4, 2015 Judgment Entry). The court also stated that pursuant to R.C. 2929.14(C)(4)(a), the offender committed one or more of

the multiple offenses while he was awaiting trial or sentencing, was under a sanction imposed pursuant to R.C. 2929.16, R.C. 2929.17, or R.C. 2929.18, or was under post-release control. (Mar. 4, 2015 Judgment Entry). Next, the court stated that pursuant to R.C. 2929.14(C)(4)(b), at least two of the offenses were committed as part of one or more courses of conduct and the harm caused by two or more of these multiple offenses was so great or unusual that no single prison term adequately reflected the seriousness of the offender's conduct. (Mar. 4, 2015 Judgment Entry). Finally, the court stated that pursuant to R.C 2929.14(C)(4)(c), the offender's history of criminal conduct demonstrated that consecutive sentences were necessary to protect the public from future crime by the offender. (Mar. 4, 2015 Judgment Entry).

{¶30} Because the record demonstrates that the trial court made the required findings at the sentencing hearing and incorporated them into the judgment entry of sentence, the trial court did not err in imposing consecutive sentences.

{¶31} In sum, upon review of the case file and appellate filings, there are no appealable issues.

{¶32} For the reasons stated above, the trial court's judgment is hereby affirmed and counsel's motion to withdraw is granted.

Waite, J., concurs.

Robb, J., concurs.