

[Cite as *State v. Jackson*, 2016-Ohio-1063.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	CASE NO. 15 MA 93
)	
PLAINTIFF-APPELLEE,)	
)	
VS.)	OPINION
)	
SHERRICK JACKSON,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 11CR01359
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JUDGMENT:	Reversed and Remanded.
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APPEARANCES:

For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Ralph M. Rivera Assistant Prosecuting Attorney 21 West Boardman Street, 6 th Floor Youngstown, Ohio 44503
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For Defendant-Appellant:	Atty. James R. Wise P.O. Box 3388 Boardman, Ohio 44513
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JUDGES:

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

Dated: March 4, 2016

{¶1} Defendant-Appellant Sherrick Jackson appeals a resentencing decision entered in Mahoning County Common Pleas Court following a remand from this court. The issue in this appeal is whether the trial court made the consecutive sentence findings pursuant to R.C. 2929.14(C) at the May 15, 2015 resentencing hearing, and whether the findings were incorporated into the August 28, 2015 resentencing judgment entry.

{¶2} A review of the transcript reveals, the trial court made two of the three requisite R.C. 2929.14(C) findings. However, the trial court failed to make the disproportionality/seriousness of conduct finding. The judgment entry also does not contain any of the R.C. 2929.14(C) findings. As such, the trial court failed to comply with R.C. 2929.14(C), our previous rulings, and the Ohio Supreme Court's ruling in *Bonnell*. For the reasons set forth more fully below, the sentence is reversed and the matter is remanded for resentencing with instructions for the trial court to enter a concurrent sentence for the attempted murder convictions.

Statement of the Case

{¶3} This is the third time Appellant's direct appeal from his two attempted murder, two felonious assault, and attendant firearm specifications convictions has been before this court. *State v. Jackson*, 7th Dist. No. 12MA199, 2014-Ohio-777 (*Jackson I*); *State v. Jackson*, 7th Dist. No. 14MA99, 2015-Ohio-1365 (*Jackson II*). Both previous appeals dealt with the imposition of consecutive sentences and whether the trial court complied with the mandates of R.C. 2929.14(C).

{¶4} Appellant was indicted on December 15, 2011 on two counts of attempted murder and two counts of felonious assault. Firearm specifications accompanied each count. Appellant entered a guilty plea to all charges on August 20, 2012. At the first sentencing hearing, the trial court found that the two felonious assault counts merged with the two attempted murder counts and the felonious assault firearm specifications merged with the attempted murder firearm specifications. The court sentenced Appellant to ten years for each attempted murder conviction and three years for each attendant firearm specification. The court

ordered the sentences to be served consecutively. Appellant received an aggregate sentence of 26 years. *Jackson I* at ¶ 2-4.

{¶5} The trial court, however, did not make any of the required consecutive sentence findings at the sentencing hearing or in the judgment entry. *Id.* at ¶ 17. Thus, we found the consecutive sentences were contrary to law and remanded the matter to the trial court for resentencing. *Id.* at 19-20, 31.

{¶6} Resentencing occurred on July 1, 2014. The trial court imposed the same consecutive sentence, but again failed to make the necessary findings under R.C. 2929.14(C) at the resentencing hearing and in the judgment entry. *Jackson II* at ¶ 5, 11. Accordingly, we once again found the consecutive sentences were contrary to law, reversed the sentences, and remanded for resentencing. *Id.* at ¶ 15. This time, however, we instructed the trial court “to either (1) impose concurrent sentences, or (2) impose consecutive sentences with the findings required by R.C. 2929.14(C)(4) to be made at the sentencing hearing and incorporated into the judgement entry of sentence as dictated by the Ohio Supreme Court in *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659.” *Id.* at ¶ 17.

{¶7} The second resentencing occurred on May 5, 2015. The assistant prosecuting attorney informed the trial court that the matter was back for resentencing and stated our instruction from *Jackson II*; the trial court was required to either impose a concurrent sentence or impose consecutive sentences with the applicable R.C. 2929.14(C)(4) findings. 5/15/15 Tr. 2. In asking the trial court to reimpose the consecutive sentences, the state referenced R.C. 2929.14(C)(4) and its mandated findings. 5/15/15 Tr. 2-4. Appellant asked for concurrent sentences. 5/15/15 Tr. 4-5.

{¶8} Upon considering each side's position, the trial court imposed the original consecutive sentence; Appellant received the non-maximum 10 year sentence for each attempted murder conviction and 3 years for each attendant firearm specification for an aggregate sentence of 26 years.

{¶9} Appellant timely appealed that decision and once again argues the trial court failed to comply with the mandates of R.C. 2929.14(C), our previous decision in *Jackson I* and *Jackson II*, and the Ohio Supreme Court's decision in *Bonnell*.

Assignment of Error

The Trial Court failed to follow the instructions of the Appellate Court when sentencing the Defendant to consecutive sentences.

{¶10} The state discusses at length felony sentencing standard of review and the conflict in this district as to whether we review felony sentences under the clearly and convincingly contrary to law standard and the abuse of discretion standard, or if we only review sentences under the clearly and convincingly contrary to law standard. *State v. Wellington*, 7th Dist. No. 14MA115, 2015-Ohio-1359, ¶ 10, 13; *State v. Stillabower*, 7th Dist. No. 14BE24, 2015-Ohio-2001, ¶ 8. Appellant solely argues the sentence is contrary to law because the trial court failed to comply with our mandates in *Jackson I*, *Jackson II*, and the consecutive sentencing statute, R.C. 2929.14(C)(4). No abuse of discretion argument is presented. Therefore, our review is confined to the argument presented – whether the sentence is clearly and convincingly contrary to law.

{¶11} Appellant contends the sentence is clearly and convincing contrary to law in two respects. First, he asserts the trial court failed to make all of the necessary consecutive sentence findings at the May 15, 2015 resentencing hearing. Second, he claims the trial court failed to put any of the consecutive sentence findings in the sentencing judgment entry. Each argument will be addressed in turn.

A. May 15, 2015 Resentencing Hearing

{¶12} In both *Jackson I* and *Jackson II*, this court quoted R.C. 2929.14(C). *Jackson I*, 2014-Ohio-777 at ¶ 12; *Jackson II*, 2015-Ohio-1365 at ¶ 9. That statute 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.

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

{¶13} Accordingly, the statute requires a sentencing court to find “that (1) 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 defendant's conduct and to the danger he poses to the public, and (3) one of the findings described in subsections (a), (b) or (c).” *Jackson II* at ¶ 10. See also *Jackson I* at ¶ 17.

{¶14} “However, 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.” *State v. Bonnell*,

140 Ohio St.3d 209, 218, 2014-Ohio-3177, 16 N.E.3d 659, 666, ¶ 29; *Jackson II* at ¶ 17 (sentencing court is not required to “recite any magic or talismanic words when imposing consecutive sentences but that it must be clear from the record that the trial court had engaged in the appropriate analysis”).

{¶15} The following statements were made by the trial court when it sentenced Appellant:

The court finds the defendant is not amenable to community control and prison is consistent with the purposes of sentencing. The court further finds that consecutive sentences are appropriate and, therefore, sentences the defendant to 10 years on Count One, 10 years on Count 2 to run consecutive to each other, and 3 years on each of the firearm specifications consecutive to each other and consecutive to Count One and Count Two. The court finds that Count Three merges into Count One, Court Four merges into Count Two. The court finds that consecutive sentences are necessary to protect the public from future crime of the defendant, punish the defendant, and that the defendant’s history of criminal conduct demonstrate that the consecutive sentences are necessary to protect the public.

5/15/15 Sentencing Tr. 6-7.

{¶16} The trial court’s statement demonstrates that it clearly made two of the three findings. It found the consecutive sentences were necessary to protect the public from future crime or to punish the offender as espoused in R.C. 2929.14(C)(4). It also found Appellant’s criminal history demonstrated that consecutive sentences were necessary as espoused in R.C. 2929.14(C)(4)(c).

{¶17} The one finding that was not explicitly made is “that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public.” R.C. 2929.14(C)(4). This finding is referred to as the proportionality/seriousness of conduct finding.

{¶18} Appellant contends that the statement by the trial court does not constitute a proportionality/seriousness of conduct finding. The state disagrees. It contends the colloquy in this case is similar to a colloquy in an Eighth Appellate District case where the appellate court found it could discern that the trial court engaged in the appropriate consecutive sentencing analysis – *State v. Gray*, 8th Dist. No. 98970, 2014-Ohio-4668. In *Gray*, the trial court stated:

Anyway, here's what we're going to do. I'm going to elect to hand out consecutive sentences today and it may well be justified by the statute we're operating under, 2921.331, but independent of that, I have the power to hand out consecutive sentences and I've consulted R.C. 2929.14 relative to when I can hand out consecutive sentences and those findings have always suggested that this is necessary to protect the public and punish the offender, and that without going to consecutive sentences, there just isn't sufficient punishment. So all the things we've been talking about today are part of the findings that I have to justify consecutive sentences.

Gray at ¶ 8.

{¶19} That colloquy might be considered somewhat similar to what the trial court stated in the matter at hand. However, the Eighth Appellate District did not solely consider that colloquy in finding the trial court engaged in the appropriate analysis. In reaching its ruling the Eighth Appellate District further explained:

The trial court also considered the arguments of counsel, the victims' oral statements, Gray's statement, and Gray's criminal record. The trial court then described the circumstances surrounding the incident, and quoted statistics about the devastation caused by heroin. The trial court noted that, by trafficking in heroin, Gray had “become a person who helps murder people” with it. Referring to “assault on peace officers,” “not obeying police orders,” and “major heroin trafficking,” the court

asked Gray if he had ever thought about “the number of caskets [he was] filling from this type of behavior?”

* * *

The trial court made its proportionality finding by asking Gray rhetorically if he had “ever thought about * * * the number of caskets [he was] filling from this kind of behavior?” The court then stated Gray was selling heroin, which “people * * * are dying from,” and Gray also disobeyed the police officers' orders to stop and, instead, operated his heavy vehicle, thus endangering “the innocent little toddler and the 86-year old gentleman walking with a walker who can't get out of the way.” A review of the trial court's comments also leads to the conclusion that the court found both R.C. 2929.14(C)(4)(b) and (c) applied to this case. *State v. Evans*, 8th Dist. Cuyahoga No. 100151, 2014–Ohio–3584.

Id. at ¶ 7, 17.

{¶20} In *Gray*, the comments made by the trial court enabled the appellate court to discern that the trial court engaged in the appropriate analysis. We are unable to reach this conclusion in the matter at hand. *Gray* is distinguishable because of the comments made by the trial court. In the case sub judice, the sentencing transcript is eight pages long and the record and the oral statements made on the last three pages, the trial court pronounced the sentence. The trial court did state that it considered R.C. 2929.11 and 2929.12, the PSI, and our previous decision. It then imposed the sentence (quoted above) and instructed on post-release control. However, the trial court did not make any statements about the seriousness of Appellant's conduct. Thus, this case is not akin to *Gray*.

{¶21} In examining the language used by the trial court to impose consecutive sentences, we cannot conclude the trial court made a finding equivalent to the sentence not being “disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public.” This case is similar to other cases where appellate courts were unable to find equivalent language used by the trial

court to make a proportionality/seriousness of conduct finding. *State v. Marneros*, 2015-Ohio-2156, 35 N.E.3d 925, 932-33, ¶ 35 (8th Dist.) (trial court never addressed the proportionality of consecutive sentences to the seriousness of Marneros's conduct and the danger he posed to the public); *State v. Santiago*, 8th Dist. No. 102280, 2015-Ohio-4073, ¶ 9 (8th Dist. Cuyahoga) (record does not contain any language that could reasonably be construed to satisfy the requirement that “consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public”).)

{¶22} For those reasons, we hold the imposition of consecutive sentences at the resentencing hearing for the attempted murder convictions is contrary to law.

B. August 28, 2015 Resentencing Judgment Entry

{¶23} In *Jackson II*, we explained that the recent Ohio Supreme Court decision in *Bonnell* clarified that consecutive sentencing findings “must be made at the sentencing hearing *and* included in the sentencing entry.” *Jackson II*, 2015-Ohio-1365 at ¶ 12, citing *Bonnell*, 2014-Ohio-2177 at the syllabus.

{¶24} The sentencing judgment entry reviewed in *Jackson II* did not contain any consecutive sentence findings. In reversing the sentence and remanding for a new sentencing hearing, we specifically instructed the trial court to make any consecutive sentence findings at the hearing and to incorporate those findings “into the judgment entry as dictated by the Ohio Supreme Court in *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659.” *Jackson II* at ¶ 17.

{¶25} The August 28, 2015 resentencing judgment entry does not remotely comply with that mandate. There are no consecutive sentence findings in that judgment entry.

{¶26} In comparing the August 28, 2015 judgment entry to the August 11, 2014 judgment entry (the entry reviewed in *Jackson II*), they are nearly identical. There are two slight differences between the judgment entries. The first is the August 11, 2014 judgment entry refers to the July 1, 2014 resentencing hearing, while the August 28, 2015 judgment entry refers to the May 15, 2015 resentencing hearing. The second difference is the August 28, 2015 judgment entry contains two

extra sentences concerning post-release control. This comparison indicates there was no attempt to comply with our mandate in *Jackson II* concerning the judgment entry.

{¶27} For those reasons, we hold the judgment entry imposing consecutive sentences was deficient.

Conclusion

{¶28} The trial court has failed for a third time to make the consecutive sentence findings at the sentencing hearing and in the judgment entry. The matter is remanded once again to the trial court for resentencing. Upon remand, the trial court is ordered to sentence Appellant to concurrent sentences. We recognize that such an instruction is a drastic measure. However, Appellant has been sentenced by the trial court three times. Each sentence has the same deficiency – failure to make consecutive sentence findings at the sentencing hearing and in the judgment entry. Our prior decisions, *Jackson I* and *Jackson II*, succinctly set forth what was required for a valid consecutive sentence to be imposed. Furthermore, in *Jackson II* we specifically instructed the trial court to impose consecutive sentences with the applicable R.C. 2929.14(C)(4) **or** impose concurrent sentences. The trial court failed to comply with *Jackson I* or *Jackson II*.

{¶29} Basic principles of due process require cases to become final and for a legal sentence to be entered. The trial court has had three attempts to enter that sentence, but has failed to do so. While the offenses in this case may warrant consecutive sentences, it is fundamentally unfair to give the trial court unlimited attempts to enter a legal sentence. Therefore, on remand, the aggregate sentence would be 16 years – 10 years for the attempted murder convictions with two consecutive 3 year gun specifications. R.C. 2929.14(B)(1)(g); *State v. Brown*, 8th Dist. No. 102549, 2015-Ohio-4764, ¶ 19 (“because the statute requires the imposition of consecutive sentences for firearm specifications under R.C. 2929.14(B)(1)(g), the trial court is not required to make R.C. 2929.14(C)(4) findings before imposing the multiple and consecutive firearm specifications sentence”).

{¶30} For the above stated reasons, the sentence is reversed and the matter is remanded for resentencing to impose concurrent sentences for Appellant's two attempted murder convictions in accordance with the instructions in this opinion.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.