

SUPREME COURT OF OHIO

State v. Comer, 99 Ohio St. 3d 463

793 N.E.2d 473 (Ohio 2003) · Decided August 27, 2003

SUMMARY

The Ohio Supreme Court held that, when imposing consecutive sentences, a trial court must make the required statutory findings and state supporting reasons at the sentencing hearing rather than solely in the sentencing entry. The court also held that a trial court imposing a nonminimum sentence on a first-time offender must make the required findings on the record at the sentencing hearing. The court vacated the consecutive sentences and the aggravated-robbery sentence and remanded for resentencing.

CASE DETAILS

COURT	Supreme Court of Ohio
WRITING FOR THE COURT	Francis E. Sweeney, Sr., J.; Moyer, C.J.; Sweeney, J.; Carr, J.; Pfeifer, J.; Resnick, J.; Grady, J.; Lundberg Stratton, J.; O'Connor, J.
JURISDICTION	Ohio
DECIDED	August 27, 2003
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	After his appeal was reopened under Ohio Appellate Rule 26(B), appellant challenged the effectiveness of appellate counsel for failing to raise sentencing errors. The Supreme Court of Ohio accepted the certified conflict and discretionary appeal.
STANDARD OF REVIEW	The court construed the applicable felony-sentencing statutes and reviewed whether the trial court complied with statutory sentencing requirements. Appellate sentencing review could modify or vacate a sentence and remand when the record did not support it or the sentence was otherwise contrary to law.
PRECEDENTIAL VALUE	published precedential opinion of the Supreme Court of Ohio
PARTIES	Jerry Comer Jr. v. State of Ohio

TOPICS

sentencing

sentencing guidelines

statutory interpretation

ineffective assistance

appellate procedure

PRACTICE AREAS

criminal law

criminal sentencing

appellate advocacy

ineffective assistance of appellate counsel

QUESTIONS PRESENTED

1. Whether a trial court imposing consecutive felony sentences must make the required statutory findings and state the reasons supporting those findings orally at the sentencing hearing, rather than only in the sentencing journal entry.
2. Whether a trial court imposing a nonminimum sentence on a first-time felony offender must make the statutory findings on the record at the sentencing hearing.
3. Whether appellate counsel was ineffective for failing to raise these sentencing issues in Comer's initial appeal.

HOLDINGS

1. When imposing consecutive sentences, a trial court must make the statutorily enumerated findings and give the reasons supporting those findings at the sentencing hearing; a later journal entry cannot substitute for the required oral findings and reasons.
2. When imposing a nonminimum sentence on a first-time felony offender, the trial court must make the statutorily authorized findings on the record at the sentencing hearing.
3. Appellate counsel was not ineffective for failing to raise the sentencing issues because Ohio law was unsettled and the sentences were consistent with then-existing case law in the relevant appellate district.

KEY QUOTATIONS

“Thus, we hold that pursuant to R.C. 2929.14(E)(4) and 2929.19(B)(2)(c), when imposing consecutive sentences, a trial court is required to make the statutorily enumerated findings and give reasons supporting those findings at the sentencing hearing.” (468)

“Accordingly, we hold that pursuant to R.C. 2929.14(B); when imposing a nonminimum sentence on a first offender, a trial court is required to make its statutorily sanctioned findings on the record at the sentencing hearing.” (469)

FACTUAL BACKGROUND

In July 1999, a jury convicted Jerry Comer Jr. of murder and aggravated robbery arising from offenses committed in November 1997. The trial court imposed consecutive terms of fifteen years to life for murder and seven years for aggravated robbery. At the sentencing hearing, the court did not orally state the required findings or reasons; it later included findings in the sentencing journal entry. Comer was a first-time offender for purposes of the aggravated-robbery sentence.

PROCEDURAL HISTORY

A jury convicted Comer of murder and aggravated robbery, and the trial court imposed consecutive sentences, including a nonminimum sentence for aggravated robbery. The court of appeals affirmed the convictions in the

initial appeal, and the Supreme Court of Ohio denied jurisdiction. The court of appeals later granted reopening under App.R. 26(B), rejected the sentencing arguments, and certified a conflict concerning whether required sentencing findings could be supplied in the sentencing journal entry rather than orally at the sentencing hearing. The Supreme Court reversed and remanded for resentencing, while holding that appellate counsel was not ineffective because Ohio law was unsettled when the original appeal was litigated.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The appellate judgment was reversed, the consecutive sentences and the aggravated-robbery sentence were vacated, and the matter was remanded to the trial court for resentencing in compliance with the statutory findings and oral-reasons requirements.

CASES CITED

- State v. Murnahan, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992)
- State v. Comer, 91 Ohio St. 3d 1428, 741 N.E.2d 892 (2001)
- State v. Perkins, Cuyahoga App. No. 81547, 2003-Ohio-656, 2003 WL 303090
- State v. Martin, 136 Ohio App. 3d 355, 362, 736 N.E.2d 907 (1999)
- State v. Williams, 136 Ohio App. 3d 570, 737 N.E.2d 139 (2000)
- State v. Blackman, Lucas App. No. L-01-1349, 2003-Ohio-2216, 2003 WL 2007105
- State v. Koch, Lake App. No. 97-L-142, 2001 WL 1647214 (Dec. 21, 2001)
- State v. Grider, 144 Ohio App. 3d 323, 326-327, 760 N.E.2d 40 (2001)
- State v. Zwiebel, Franklin App. No. 00AP-61, 2000 WL 1221017 (Aug. 29, 2000)
- State v. Winland, Wayne App. No. 99CA0029, 2000 WL 113052 (Jan. 26, 2000)
- State v. Riggs, Summit App. No. 19846, 2000 WL 1507914 (Oct. 11, 2000)
- State v. Boland, 147 Ohio App. 3d 151, 162, 768 N.E.2d 1250 (2002)
- State v. Edmonson, 86 Ohio St. 3d 324, 326, 715 N.E.2d 131 (1999)

OPINION

SWEENEY, J.

Francis E. Sweeney, Sr., J. {¶ 1} In July 1999, a jury convicted appellant, Jerry Comer Jr., for murder and aggravated robbery, both committed in November 1997. The trial court imposed consecutive sentences of 15 years to life for the murder and 7 years for the aggravated robbery. Rather than state its findings or reasons for the sentences at the sentencing hearing, the court later explained in a journal entry: {¶ 2} “The Court finds pursuant to R.C.

2929.14(B) that the shortest prison term possible will demean the seriousness of the offense AND will not adequately protect the public and therefore imposes a greater term. {¶ 3} “* * * {¶ 4} “Being necessary to fulfill the purposes of R.C. 2929.11, and not disproportionate to the seriousness of the offender’s conduct or the danger the offender poses and the Court FURTHER FINDS: the harm caused was great or unusual.” (Capitalization sic.) {¶ 5} Initially, appellant filed an appeal from his convictions, raising a single issue concerning jury instructions.

The appellate court rejected his argument and affirmed his convictions. This court denied jurisdiction. *State v. Comer* (2001), 91 Ohio St.3d 1428, 741 N.E.2d 892. Thereafter, appellant filed a motion in the court of appeals to reopen his appeal pursuant to App.R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204.

The appellate court granted appellant’s application for reopening. *465{¶ 6} On appeal, appellant argued that appellate counsel was ineffective for failing to raise the trial court’s error in sentencing him to consecutive and nonminimum prison terms without making the necessary findings on the record at the sentencing hearing.

The court of appeals rejected appellant’s argument, finding that a trial court may make the requisite findings either at the sentencing hearing or in its judgment entry on sentencing. {¶ 7} The court of appeals considered the oral statements made by the trial court at the sentencing hearing and the written journal entry. Taking these statements together, the appellate court concluded that the trial court had made the appropriate findings to justify the imposition of consecutive sentences and a nonminimum prison term.

Therefore, the appellate court found that appellate counsel was not deficient in the performance of her duties. However, the court certified its decision as being in conflict with *State v. Williams* (2000), 136 Ohio App.3d 570, 737 N.E.2d 139. {¶ 8} This cause is now before the court upon our determination that a conflict exists and pursuant to the allowance of a discretionary appeal. {¶ 9} This appeal presents two separate issues concerning appellant’s sentences.

Appellant challenges (1) the imposition of consecutive sentences and (2) the imposition of a nonminimum sentence for the aggravated robbery count. Appellant further asserts that his appellate counsel was ineffective because of her failure to raise these issues in his first appeal.

We decline to hold that appellate counsel was deficient in the performance of her duties. The law in Ohio was unsettled on these issues, and the sentences pronounced by the trial court were in line with case law in the appellate district at the time this appeal was argued. Counsel cannot be faulted for failing to predict that the law would change.

However, we find appellant’s arguments concerning his sentences meritorious. Therefore, we reverse the judgment of the court of appeals and remand the matter to the trial court for resentencing. {¶ 10} R.C. 2929.14 and 2929.19 are the statutes we are asked to construe. These

laws were originally enacted as part of Am.Sub.S.B. No. 2 in 1996. S.B. 2, which represents the first major criminal reform bill since 1974, was signed into law on August 10, 1995, and became effective in 1996.

Griffin & Katz, Ohio Felony Sentencing Law (2002) 1. This comprehensive bill changed the definitions of crimes and the sentencing system. *Id.* The law now provides precise guidance for criminal sentencing within clearly defined constraints. Painter, Appellate Review Under the New Felony Sentencing Guidelines: Where Do We Stand?

(1999), 47 Cleve.St.L.Rev. 533, 537-538. Pursuant to R.C. 2929.11 through 2929.19, the trial court must follow an articulated process when determining a sentence. The individual provisions of the sentencing scheme may not be read alone. Painter, *supra*, 47 Cleve.St.L.Rev. at 538. Additionally, the law accords *466meaningful review of these sentencing decisions by the appellate courts. “Meaningful review” means that an appellate court hearing an appeal of a felony sentence may modify or vacate the sentence and remand the matter to the trial court for resentencing if the court clearly and convincingly finds that the record does not support the sentence or that the sentence is otherwise contrary to law.

R.C. 2953.08; Griffin & Katz, Ohio Felony Sentencing Law, *supra*, 791-796, Sections 9.19-9.20. {¶ 11} When imposing a felony sentence, the trial court must consider the overriding purposes of felony sentencing, which are to protect the public from future crime and to punish the offender. R.C. 2929.11(A).

To achieve these purposes, a court “shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.” *Id.* {¶ 12} Additionally, the law requires that a sentence imposed for a felony shall be reasonably calculated to achieve the purposes of felony sentencing, “commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.” R.C.

2929.11(B). Finally, a trial court shall not impose a sentence based on the race, ethnicity, gender, or religion of the offender. R.C. 2929.11(C). {¶ 13} The trial court must consider the factors found in R.C. 2929.12(B) and (C) to determine how to accomplish the purposes embraced in R.C. 2929.11. A court may not impose consecutive sentences for multiple offenses unless it “finds” three statutory factors.

R.C. 2929.14(E)(4). First, the court must find that consecutive sentences are necessary to protect the public from future crime or to punish the offender. *Id.* Second, the court must find that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to

the danger the offender poses to the public. *Id.* Third, the court must find the existence of one of the enumerated circumstances in R.C.

2929.14(E)(4)(a) through (c).¹ *467{¶ 14} A trial court must also comply with R.C. 2929.19(B) when imposing consecutive sentences. R.C. 2929.19 is the statute governing the sentencing hearing. R.C. 2929.19(B)(2) provides that the sentencing court “shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances: {¶ 15} “* * * {¶ 16} “(c) If it imposes consecutive sentences under [R.C.]

2929.14 * * *.” (Emphasis added.) {¶ 17} Appellant contends that according to R.C. 2929.14(E)(4) and 2929.19(B)(2)(c), the trial court’s findings and reasons for consecutive sentences must be given at the sentencing hearing.

The state contends, and the court of appeals found, that the findings and reasons can be made orally at the sentencing hearing or in written form in the journal entry. {¶ 18} There is a split of authority in the lower courts on this issue. See *State v. Perkins*, Cuyahoga App. No. 81547, 2003-Ohio-656, 2003 WL 303090; *State v. Martin* (1999), 136 Ohio App.3d 355, 362, 736 N.E.2d 907; *State v. Williams*, 136 Ohio App.3d 570, 737 N.E.2d 139 (findings and reasons must be stated on the record at the sentencing hearing).

Compare *State v. Blackman*, Lucas App. No. L-01-1349, 2003-Ohio-2216, 2003 WL 2007105; *State v. Koch* (Dec. 21, 2001), Lake App. No. 97-L-142, 2001 WL 1647214 (findings and reasons can be made at the sentencing hearing or in the journal entry).

For the following reasons, we adhere to those decisions which hold that the court must orally make its findings and state its reasons on the record at the sentencing hearing. {¶ 19} Lower courts have correctly and consistently found that the requirement that a court give its reasons for selecting consecutive sentences is separate and distinct from the duty to make the findings.

State v. Grider (2001), 144 Ohio App.3d 323, 326-327, 760 N.E.2d 40; *State v. Zwiebel* (Aug. 29, 2000), Franklin App. No. 00AP-61, 2000 WL 1221017; *State v. Winland* (Jan. 26, 2000), Wayne App. No. 99CA0029, 2000 WL 113052. {¶ 20} Turning now to the statutes at issue, we hold that R.C. 2929.19 clearly prescribes what a trial judge must do and say at a felony sentencing hearing.

The statute specifies what can be considered at a hearing and what a trial court must do before sentencing the defendant. Moreover, it is at the sentencing hearing that the court “shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed” for consecutive sentences under R.C. 2929.14. R.C. 2929.19(B)(2) and (B)(2)(c).

We find the intent of the *468statute to be clear. Thus, we hold that pursuant to R.C. 2929.14(E)(4) and 2929.19(B)(2)(c), when imposing consecutive sentences, a trial court is required to make the statutorily enumerated findings and give reasons supporting those findings at the sentencing

hearing. {¶ 21} Moreover, requiring the court to make these findings and give its reasons at the sentencing hearing comports with case law and with the purposes and intent of S.B.

2. Consecutive sentences are reserved for the worst offenses and offenders. *State v. Boland* (2002), 147 Ohio App.3d 151, 162, 768 N.E.2d 1250. Consistency and proportionality are hallmarks of the new sentencing law. Griffin & Katz, *Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan* (2002), 53 *Case W.Res.L.Rev.* 1, 12. While consecutive sentences are permissible under the law, a trial court must clearly align each rationale with the specific finding to support its decision to impose consecutive sentences.

These findings and reasons must be articulated by the trial court so an appellate court can conduct a meaningful review of the sentencing decision. Griffin & Katz, *Ohio Felony Sentencing Law*, supra, at 458-459, Section 1.21. {¶ 22} Finally, our holding has a practical application as well. All interested parties are present at the hearing.

Thus, an in-court explanation gives counsel the opportunity to correct obvious errors. Moreover, an in-court explanation encourages judges to decide how the statutory factors apply to the facts of the case. If these important findings and reasons were not given until the journal entry there is the danger that they might be viewed as after-the-fact justifications.

See, e.g., *State v. Riggs* (Oct. 11, 2000), Summit App. No. 19846, 2000 WL 1507914 (Whitmore, J., concurring in part and dissenting in part). {¶ 23} Our review of the record reveals that the trial court neither made its mandatory findings nor gave its reasons for imposing the consecutive sentences on the record at the sentencing hearing.

Therefore, we reverse the court of appeals' decision, vacate the consecutive sentences, and remand this cause to the trial court for resentencing. {¶ 24} Appellant also contends that the sentence imposed by the trial court for the aggravated robbery count did not accord with R.C. 2929.14(B) regarding minimum sentences. {¶ 25} The offense of aggravated robbery, a felony of the first degree (R.C.

2911.01(C)) calls for a range of sentences. With certain exceptions not relevant here, R.C. 2929.14(A)(1) mandates a definite term of imprisonment of three, four, five, six, seven, eight, nine, or ten years for a felony of the first degree. At the time of the offense, R.C. 2929.14(B) provided that "if the offender previously has not served a prison term, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless the court finds on the record that the shortest prison term will demean the seriousness of *469the offender's conduct or will not adequately protect the public from future crime by the offender or others." 147 Ohio Laws, Part I, 465. {¶ 26} Here, appellant, a first-time offender, was given a seven-year sentence; clearly, this is not the minimum sentence for aggravated robbery.

While this term fit within the range of sentences permissible under the law, R.C. 2929.14(B), now (B)(2), required the court to make certain findings “on the record.” Appellant argues that “on the record” means that the trial court was required to make its findings at the sentencing hearing.² We agree.

In *State v. Edmonson* (1999), 86 Ohio St.3d 324, 326, 715 N.E.2d 131, we interpreted this phrase “to mean that unless a court imposes the shortest term authorized on a felony offender who has never served a prison term, the record of the sentencing hearing must reflect that the court found that either or both of the two statutorily sanctioned reasons for exceeding the minimum term warranted the longer sentence.” (Emphasis added.)

Also, we hold that the rationale supporting our holding that findings and reasons must be given by the court before imposing consecutive sentences at the sentencing hearing applies with equal force to the length of sentences.

Therefore, we construe “on the record” to mean that oral findings must be made at the sentencing hearing. Accordingly, we hold that pursuant to R.C. 2929.14(B); when imposing a nonminimum sentence on a first offender, a trial court is required to make its statutorily sanctioned findings on the record at the sentencing hearing. ' ¶ 27 } Here, the trial court did not make its statutory findings on the record at the sentencing hearing.

We reverse the judgment of the appellate court, vacate the sentence for aggravated robbery, and remand the cause to the trial court for resentencing. Judgment reversed and cause remanded. Moyer, C.J., Carr and Pfeifer, JJ., concur. Grady, Lundberg Stratton and O'Connor, JJ., dissent. Donna J. Carr, J., of the Ninth Appellate District, sitting for Resnick, J. Thomas J. Grady, J., of the Second Appellate District, sitting for Cook, J.. ¶ a } The criteria to be considered by a sentencing court before imposing consecutive prison terms are listed in R.C.

2929.14. In 1997, when the crimes were committed, R.C. 2929.14(E)(4) provided: ¶ b } “(a) The offender committed the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to * * * [R.C.] 2929.16, 2929.17, or 2929.18 * * *, or was under post-release control for a prior offense. ¶ c } “(b) The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender’s conduct. *467{¶ d} “(c) The offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.” 147 Ohio Laws, Part I, 468-469..

R.C. 2929.14(B) does not require that the court give its reasons for finding that the seriousness of the offense will be demeaned or the public not adequately protected if a minimum sentence is imposed. *State v. Edmonson* (1999), 86 Ohio St.3d 324, 715 N.E.2d 131, syllabus.

