

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-140348
Plaintiff-Appellee,	:	TRIAL NO. B-1301120
vs.	:	<i>OPINION.</i>
REMIR RICE,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Judgment Affirmed in Part, Sentences Vacated in Part,
and Cause Remanded.

Date of Judgment Entry on Appeal: December 31, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Melynda J. Machol*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Raymond T. Faller, Hamilton County Public Defender, and *Marguerite Slagle*,
Assistant Public Defender, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

STAUTBERG, Judge.

{¶1} Defendant-appellant Remir Rice appeals the sentences imposed after he was found guilty of violating the terms of his community control. He asserts two assignments of error. In his first assignment of error, Rice claims that the trial court failed to exercise discretion in sentencing him for his community control violation. In his second assignment of error, Rice contends that the trial court failed to make the required statutory findings to support the imposition of consecutive sentences. We overrule the first assignment of error because the record shows that the trial court exercised its discretion in sentencing Rice. But we sustain the second assignment of error, because the trial court failed to state its statutory findings in open court and failed to incorporate those findings into its sentencing entry. We therefore vacate the sentences and remand the cause for resentencing.

Facts and Procedural Posture

{¶2} On February 27, 2013, a Hamilton County grand jury indicted Rice for two counts of second-degree burglary. On April 15, 2013, Rice pleaded guilty to two counts of third-degree burglary after agreeing to the state's recommended sentence. The agreed sentence stipulated that Rice receive three years of community control, complete the River City program, and pay restitution. Additionally, the agreed sentence specified that if Rice violated the terms of his community control, he would be sentenced to two years' imprisonment on each count to be served consecutively. At the 2013 sentencing hearing, the trial court explained to Rice that this was an "Agreed Sentence Plea Agreement." The trial court explicitly told Rice that if he should be found guilty of violating his community control, the trial court would send him to prison for two years on each count, to be served consecutively for

a total of four years' imprisonment. Rice stated that he understood. After engaging in the proper colloquy, the trial court accepted Rice's guilty pleas. On May 14, 2013, the trial court sentenced Rice in accordance with the terms of the agreed sentence.

{¶3} Rice violated the terms of his community control, and on April 8, 2014, he pleaded guilty to several community control violations. His supervising probation officer recommended that the trial court restore Rice to community control and order him to attend treatment at the Talbert House Spring Grove Program. In response, the trial court stated, "by way of the agreed sentence plea agreement, if violated [Rice] has four years" imprisonment. The trial court further noted that unless there was another agreement between Rice and the state, his sentence would be four years' imprisonment. Rice admitted that he understood, and the trial court accepted his guilty pleas for the several community control violations. To allow defense counsel time to inquire as to whether Rice's violations would be withdrawn, the trial court did not make a finding as to Rice's guilt at that time.

{¶4} At the sentencing hearing on May 1, 2014, the trial court found Rice guilty of violating his community control. During mitigation, Rice explained that he had a crack cocaine addiction and was trying to seek help. The court stated, "This is the sentence that you brought to me saying, Judge, this is what I want you to do. This is what I have agreed to do." The trial court elaborated further that Rice's sentence differed from that of other defendants, because Rice had entered into an agreed sentence where Rice agreed to the sentence imposed should he violate the terms of his community control. The trial court stated, "[Rice] entered into a plea agreement with the State of Ohio. They held up their end. Now, [Rice] has to hold up his end." The trial court then sentenced Rice to two years' imprisonment on both counts to be served consecutively.

Assignments of Error

{¶5} Rice asserts two assignments of error challenging the sentences imposed by the trial court for his community control violation.

{¶6} Under R.C. 2953.08(G)(2), we may modify or vacate a sentence if we clearly and convincingly find that either the record does not support the sentencing court's findings or if the sentence is otherwise contrary to law. *See State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, ¶ 11 (1st Dist.). A sentence is not subject to review if the sentence is authorized by law, has been jointly recommended by the defendant and the prosecution, and is imposed by the sentencing court. R.C. 2953.08(D); *see State v. Gray*, 1st Dist. Hamilton No. C-030132, 2003-Ohio-5837, ¶ 6. However, "the sentencing hearing conducted upon finding a community-control violation constitutes 'a second sentencing hearing [, at which] the court sentences the offender anew and must comply with the relevant sentencing statutes.'" *See State v. McAfee*, 1st Dist. Hamilton No. C-130567, 2014-Ohio-1639, ¶ 14, quoting *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, ¶ 17.

I. Discretion of the Trial Court

{¶7} In his first assignment of error, Rice contends that the trial court failed to exercise discretion in sentencing him for his community control violation as required by R.C. 2929.15(B). We disagree.

{¶8} Upon a violation of community control, R.C. 2929.15(B) provides the sentencing court with the discretion to impose upon the violator a prison term within the statutory range. *See State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837. "R.C. 2929.15(B) requires the court to consider both the seriousness of the original offense leading to the imposition of community control and the gravity of the community control violation." *Id.* at ¶ 20. "Recognizing that [the conditions

imposed on] community control violations can * * * vary greatly depending upon the facts of each case, R.C. 2929.15(B) gives the trial judge wide discretion when sentencing a violator.” *Id* at ¶ 21.

{¶9} Rice relies solely on the transcripts of his community control violation plea and sentencing hearings, where the trial court made several statements that, when taken out of context, might be said to demonstrate that the trial court did not understand that it had discretion and was not bound by the “Agreed Sentence Plea Agreement.” However, when evaluating the record in its entirety, it is clear that the trial court understood that it had discretion when sentencing Rice, yet, it was adamant about holding Rice to his agreement.

{¶10} At the original plea hearing in April 2013, the trial court thoroughly explained the nature of this plea agreement and told the defendant, “[I]f there is a violation of community control and you are found guilty, by virtue of this plea agreement you will be sentenced to four years Department of Corrections.” The defendant responded that he understood and still wanted to plead guilty to the charges. Then, at the sentencing hearing in May 2013, the trial court again informed the defendant “[I]f you are found guilty of violating any of the terms and conditions of community control, I will impose a prison sentence of two years on Count 1, and two years on Count 2, with the sentences imposed to be served consecutively to each other for a total period of four years Ohio Department of Corrections.”

{¶11} After finding Rice guilty of violating his community control, the trial court agreed to hear mitigation and stated that it would listen to anyone who wanted the opportunity to address the court. During mitigation, the trial court explained that Rice had entered into a plea agreement and that he had to hold up his end of the

agreement. The trial court further explained that it was Rice, in conjunction with the state, who had recommended these sentences to the trial court.

{¶12} We do not find that Rice's sentences were clearly and convincingly contrary to law, as the record reflects that the trial court understood that it had sentencing discretion, yet chose to hold Rice to his agreement. Rice's first assignment of error is overruled.

II. Consecutive Sentences

{¶13} In his second assignment of error, Rice argues that the imposition of consecutive sentences was contrary to law, because the trial court failed to make the required statutory findings. We agree.

{¶14} R.C. 2929.14(C)(4) provides as follows:

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) requires the trial court to make statutory findings prior to imposing consecutive sentences, and Crim.R. 32(A)(4) therefore directs the court to state those findings at the time of imposing sentence." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 26. "When imposing consecutive sentences, a trial court must state the required findings as part of the sentencing hearing, and by doing so it affords notice to the offender and to defense counsel." *Id.* at ¶ 29. The court must also incorporate its statutory findings into the sentencing entry. *Id.*

{¶15} At Rice's sentencing hearing for the violation of community control, the trial court did not discuss or mention its findings to support the consecutive sentences. The agreement reached in 2013 for the imposition of community control with two consecutive two-year sentences in the event of a violation was not binding upon the trial court when it sentenced Rice for violating his community control. *See McAfee*, 1st Dist. Hamilton No. C-130567, 2014-Ohio-1639, at ¶ 14. We do note that the trial court did complete a sentencing findings worksheet, whereby the trial court made the appropriate findings. However, the trial court did not make the findings in

open court, and did not incorporate the findings into Rice's sentencing entry. Therefore, we sustain Rice's second assignment of error.

Conclusion

{¶16} We vacate the imposition of consecutive sentences and remand the matter to the trial court to resentence Rice consistent with *Bonnell* and this opinion. In all other respects, we affirm the judgment of the trial court below.

Judgment affirmed in part, sentences vacated in part, and cause remanded.

CUNNINGHAM, P.J., concurs.

DEWINE, J., concurs separately.

DEWINE, J., concurring separately.

{¶17} I concur in the result reached by the majority but arrive there by a different path. In my view, this matter ought to be analyzed under R.C. 2953.08(D)(1), the provision that governs our review of an "agreed sentence."

{¶18} Mr. Rice worked out a deal with the state whereby he agreed to plead guilty to two counts of burglary and receive a sentence of three years' community control for each count. In the plea agreement, Mr. Rice also agreed that if he violated the conditions of community control, he would be sentenced to consecutive two-year terms. The court imposed the agreed sentence of community control, and when Rice violated his community control it imposed the agreed prison sentence.

{¶19} R.C. 2953.08(D)(1) provides that "[a] sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." Mr. Rice does not dispute that the sentence imposed by the court was recommended jointly by him and the state. Under the plain language of the statute, then, the sentence should be subject to review only if it was not authorized by law.

{¶20} Nonetheless, without considering whether the sentence was authorized by law, the majority reviews the court’s imposition of the jointly recommended sentence. In doing so, it relies on *State v. McAfee*, 1st Dist. Hamilton No. C-130567, 2014-Ohio-1639, as an exception to R.C. 2953.08(D)(1). Its reliance is misplaced. In *McAfee*, we looked to the Ohio Supreme Court’s decision in *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, ¶ 17, to find that, upon a community-control violation, the trial court “sentences a defendant anew and must comply with the relevant sentencing statutes.” *McAfee* at ¶ 14. But there is nothing in *McAfee* or *Fraley* that would suggest that the plain terms of R.C. 2953.08(D)(1) do not apply when an agreed sentence is imposed following a community-control violation. While *McAfee* and *Fraley* imply that the defendant is entitled to a full new sentencing hearing, nothing in those cases alters the procedures for review established by R.C. 2953.08(D)(1) once an agreed sentence is imposed. Thus, review of Rice’s assignments of error should not be undertaken without consideration of whether the sentence was “authorized by law.”

{¶21} In the first assignment of error, Mr. Rice argues that his sentence was contrary to law because the trial court misunderstood that it had discretion to impose a different sentence when it sentenced him for violating the conditions of community control. I agree with the majority that the court understood its discretion. But we should not even reach that issue. An agreed sentence is appealable only when it is not authorized by law—that is, when the trial court fails to comply with mandatory sentencing provisions. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 20. Rice’s first assignment of error does not claim that the trial court failed to comply with any mandatory sentencing provision. Indeed, Mr. Rice does not even argue that the sentence was unauthorized by law. Because the sentence agreed to

by Rice and the state was authorized by law and imposed by the trial court, I would overrule the first assignment of error.

{¶22} Having concluded that the court’s imposition of the agreed sentence was reviewable, the majority goes on to consider the second assignment of error in which Rice insists that the sentences were contrary to law because the trial court failed to make consecutive findings. Relying on its earlier conclusion that *McAfee* provides an exception to the R.C. 2953.08(D)(1) limitation on review, the majority does not address whether jointly recommended consecutive sentences imposed without the requisite findings are not “authorized by law.”

{¶23} In *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, the Ohio Supreme Court held that an earlier version of R.C. 2953.08(D) precluded review of a jointly recommended sentence of consecutive terms. The court explained, “[t]he General Assembly intended a jointly agreed upon sentence to be protected from review precisely because the parties agreed that the sentence is appropriate. Once a defendant stipulates that a particular sentence is justified, the sentencing judge no longer needs to independently justify the sentence.” *Id.* at 26.

{¶24} In *State v. Davis*, 1st Dist. Hamilton No. C-140351, 2015-Ohio-775, we considered the current, similarly worded version of R.C. 2953.08(D)(1) in the context of a challenge to a trial court’s consecutive findings and the court’s failure to include its findings in its sentencing entry. We held that while the statute did prevent review of the consecutive nature of the defendant’s sentence, it did not prevent review of the trial court’s failure to include its sentencing findings in the sentencing entry. The *Davis* court reasoned that the inclusion of the sentencing findings in the sentencing entry was a mandatory sentencing term, and therefore, a sentence that did not include such findings was contrary to law. *Id.* at ¶ 8, citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-

3177, 16 N.E.3d 659, syllabus. Presumably then, according to *Davis*'s reasoning, any findings—even inaccurate or unsupported by the record—would suffice as long as they were announced during the hearing and incorporated into the sentencing entry. Otherwise, to allow review of the findings would vitiate that part of *Davis* that holds the consecutive nature of an agreed sentence is unreviewable.

{¶25} A majority of the districts in Ohio would seem to disagree with *Davis*. See *State v. Weese*, 2d Dist. Clark No. 2013-CA-61, 2014-Ohio-3267; *State v. Pulliam*, 4th Dist. Scioto No. 14CA3609, 2015-Ohio-759; *State v. Miller*, 8th Dist. Cuyahoga No. 101086, 2014-Ohio-5685; *State v. Rue*, 9th Dist. Summit No. 27622, 2015-Ohio-4008; *State v. Jefferson*, 10th Dist. Franklin No. 12AP-238, 2014-Ohio-411; *State v. Savage*, 12th Dist. Madison Nos. CA2014-02-002, CA2-02-003, CA2014-03-006 and CA2014-03-007, 2015-Ohio-574. But see *State v. Sergent*, 11th Dist. Lake No. 2013-L-125, 2015-Ohio-2603 (concluding the imposition of jointly recommended consecutive sentences is reviewable where the court failed to make findings at the sentencing hearing but incorporated findings into its sentencing entry). The Ohio Supreme Court has certified a conflict among the districts and will hear *State v. Sergent*. See *State v. Sergent*, 143 Ohio St.3d 1476, 2015-Ohio-3958, 38 N.E.3d 898.

{¶26} *Davis* is difficult to reconcile with the plain language of R.C. 2953.08(D)(1) and the Ohio Supreme Court's decision in *State v. Porterfield*. Nevertheless, I reluctantly concur in the court's disposition of the second assignment of error based on the principle of stare decisis. There is little reason for this court to reverse its own precedent here when the Supreme Court will shortly be considering the issue.

{¶27} Accordingly, I concur in the court's judgment as to both assignments of error but for different reasons than those articulated by the majority.

Please note:

This court has recorded its own entry this date.