Supreme Court of Ohio Clerk of Court - Filed November 17, 2020 - Case No. 2020-0599

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	Case No. 2020-0599
	)	
Plaintiff-Appellee,	)	On Appeal from the
	)	Lake County Court of Appeals,
v.	)	Eleventh Appellate District
	)	
MANSON M. BRYANT	)	
	)	Court of Appeals Case No. 2019-L-024
Defendant-Appellant.	)	

MERIT BRIEF OF APPELLEE STATE OF OHIO

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STATEMENT OF THE CASE AND FACTS

The Eleventh District Court of Appeals set forth a thorough recitation of the case and facts in *State v. Bryant*, 11th Dist. Lake No. 2019-L-024, 2020-Ohio-438, appeal allowed, 159 Ohio St.3d 1468, 2020-Ohio-3884, 150 N.E.3d 125 (2020):

> In the early hours of July 6, 2018, appellant, with an accomplice, Jeffrey Bynes, broke into the trailer of Arturo Gonzalez ("the victim"), entering through an unlocked window. They proceeded to the victim's bedroom where he slept. The victim awoke and Mr. Bynes pointed a firearm to his head; the victim was instructed not to move as the men placed a blanket over his head and struck him. Appellant and Mr. Bynes left with cash, a laptop computer, a gold ring, and a cell phone. They then fled the scene in a silver BMW SUV owned by one, Kim Walter.
>
> In October 2018, the Lake County Grand Jury indicted appellant on seven counts: Count One, aggravated burglary, a felony of the first degree, in violation of R.C. 2911.11(A)(1); Count Two, aggravated burglary, a felony of the first degree, in violation of R.C. 2911.11(A)(2); Count Three, aggravated robbery, a felony of the first degree, in violation of R.C. 2911.01(A)(1); Count Four, kidnapping, a felony of the first degree, in violation of R.C. 2905.01(A)(2); Count Five, abduction, a felony of the third degree, in violation of R.C. 2905.02(A)(2); Count Six, having weapons while under disability, a felony of the third degree, in violation of R.C. 2923.13(A)(2); and Count Seven, carrying concealed weapons, a felony of the fourth degree, in violation of R.C. 2923.12(A)(2). Each count contained a forfeiture specification, pursuant to R.C. 2941.1417 and R.C. 2981.04; and Counts One through Five included either one-year or three-year firearm specifications, pursuant to R.C. 2941.141 and R.C. 2941.145.
>
> Appellant entered pleas of "not guilty" to all counts. The matter proceeded to a jury trial on Counts One through Five and a lesser included offense on Count Seven, carrying concealed weapons, a misdemeanor of the first degree, in violation of R.C. 2923.12(A)(2) ("Jury's Count Six"). Appellant waived his right to a jury trial on Counts Six and Seven, which were tried to the bench. The jury found appellant guilty on Counts One through Five and

> the court found appellant guilty on Counts Six and Seven. For the purpose of sentencing, the trial court merged the two counts of aggravated burglary (Counts One and Two), the abduction and kidnapping charges (Counts Four and Five), the two counts of carrying a concealed weapon (Jury's Count Six and Count Seven). The court also merged the abduction and kidnapping charges (Counts Four and Five) with the aggravated robbery conviction (Count Three) as well as the one-year and three-year associated firearm specifications in Counts One and Three.
>
> At sentencing, the trial court initially ordered appellant to serve terms of imprisonment of eight years on Count One; eight years on Count Three; 36 months on Count Six; and 18 months on Count Seven. The trial court also ordered a mandatory three-year term for the firearm specification on Count One and three years for the firearm specification on Count Three. Counts One and Three, with their associated firearm specifications, were ordered to be served consecutively to on[e] another. The sentences for Counts Six and Seven were ordered to run concurrently with Counts One and Three, for an aggregate term of 22 years.
>
> After imposing the above sentence, appellant verbally lashed out at the trial judge, using profanities and accusing the judge of racism. As a result, the court reconvened and increased the terms of imprisonment on Counts One and Three to the maximum, 11 years each. Appellant's aggregate prison term was accordingly increased to 28 years.

Id. at ¶¶ 2-6.

On appeal, Appellant, through counsel, raised the following assignments of error: (1) the trial court erred when it imposed an additional six years on Bryant's sentence after his outburst in court; (2) the convictions were against the manifest weight of the evidence and were not supported by sufficient evidence; and (3) the trial court erred when it failed to merge the aggravated robbery with aggravated burglary. *Id.* at ¶¶ 17, 27, 45.

On February 10, 2020, in an unanimous decision, the Eleventh District Court of

Appeals found Appellant's arguments to be without merit. *Id.* at ¶ 54. In upholding Appellant's sentence, the court noted that,

> [A]ppellant's sudden verbal eruption does not necessarily reflect a lack of remorse; after all, appellant could possess deep regret for the crimes he committed and the harm he caused and, at the same time, have a highly negative emotional reaction to the court's sentence. Still, the court could construe appellant's outburst as a sign that his previous statements of remorse and contrition were not genuine and were more a reflection of his desire to receive leniency. We accordingly hold that although the trial court could have held appellant in direct contempt for his paroxysm, the trial judge's action of increasing appellant's sentence by six years was not contrary to law.

Id. at ¶ 24.

In response to the court's decision, Appellant filed a motion with the appellate court requesting it certify a conflict with two cases decided in the First District Court of Appeals– *State v. Lowe*, 1st Dist. Hamilton No. C-170494, 2018-Ohio-3916 and *State v. Webster*, 1st Dist. Hamilton No. C-070027, 2008-Ohio-1636. (2019-L-024 T.d. 33). Appellant argued that a conflict existed among the districts due to the cases from the First District which upheld contempt convictions where a defendant verbally lashed out at the trial court during sentencing. (2019-L-024 T.d. 34). The Eleventh District denied Appellant's motion finding that because the First Appellate District did not specifically hold that a trial court's act of increasing a sentence prior to journalization of the same is legally invalid, there was no necessary conflict between the districts on that issue. (2019-L-024 T.d. 37).

On May 11, 2020, Appellant filed a *pro se* Notice of Appeal and Memorandum in

Support of Jurisdiction with this Court raising the same three issues that he raised on direct appeal. (Appellant's Memo 1-5). The State responded, arguing that Appellant's issues were fact specific and related to already well-established areas of the law. (Appellee's Memo in Response 1-15). On August 5, 2020, in a four-to-three decision, this Court accepted the appeal on Appellant's first proposition of law only: "The trial court erred when it imposed an additional six years on [Appellant's] sentence after his outburst in court." *State v. Bryant*, 159 Ohio St.3d 1468, 2020-Ohio-3884, 150 N.E.3d 125 (2020).

On October 20, 2020, through appointed counsel, Appellant filed a Merit Brief in support of the accepted proposition of law. (Appellant's Br. 1-17). Accordingly, the State now responds.

All other pertinent facts will be discussed below.

ARGUMENT IN RESPONSE TO PROPOSITION OF LAW

PROPOSITION OF LAW

A defendant's disrespect towards the trial court, when done in response to a judicial ruling, is punishable as contempt of court, but does not provide a lawful basis for increasing the defendant's sentence.[1]

In his sole proposition of law, Appellant argues his sentence is contrary to law. Initially, in his memorandum in support of jurisdiction and on direct appeal, Appellant

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[1] The proposition of law set forth in Appellant's Memorandum in Support of Jurisdiction that was accepted by this Court stated as follows: "The trial court erred when it imposed an additional six years on Bryant's sentence after his outburst in court." (Appellant's Memo 3).

averred that the trial court erred by increasing his sentence after Appellant's outburst in the courtroom, when the trial court could have held Appellant in contempt. Now, in his Merit Brief filed on October 20, 2020, Appellant argues that Ohio's statutory scheme does not allow a sentencing court to consider an offender's lack of respect towards the tribunal when fashioning a sentence. (Appellant's Br. 1). Specifically, Appellant contends that his behavior at sentencing had no relationship to his level of remorse for the instant offenses. (Appellant's Br. 1). The trial court, however, possessed the authority to change its previous sentence which was not yet final and, after noting Appellant's outburst indicated a lack of remorse, increase his penalty.

(1) Appellant's sentences are not clearly and convincingly contrary to law.

This Court clarified the standard of review for felony sentences on appeal in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231. The Court concluded that the test set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, no longer applies. Instead, pursuant to R.C. 2953.08(G)(2), "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Marcum* at ¶ 1. *Accord State v. Brown*, 11th Dist. Lake No. 2014-L-075, 2015-Ohio-2897, ¶ 30, citing *State v. Moore*, 11th Dist. Geauga No. 2014-G-3183, 2014-Ohio-5182, ¶ 29.

"As a practical consideration," under the R.C. 2953.08(G)(2) standard of review, "appellate courts are prohibited from substituting their judgment for that of the trial judge." *State v. Venes*, 8th Dist. Cuyahoga No. 98682, 2013-Ohio-1891, ¶ 20. "The foregoing standard is highly deferential as 'the "clear and convincing" standard is used by R.C. 2953.08(G)(2) is written in the negative. It does not say that the trial judge must have clear and convincing evidence to support its findings. Instead, it is the court of appeal that must clearly and convincingly find that the record does not support the court's findings.'" *State v. Taeusch*, 11th Dist. Lake No. 2016-L-047, 2017-Ohio-1105, ¶ 13, quoting *Venes* at ¶ 21. "Accordingly, this [C]ourt can only modify or vacate a sentence if the panel determines, by clear and convincing evidence, that the record does not support the trial court's decision or if the sentence is contrary to law." *Id.*, citing *Marcum* at ¶ 1.

Additionally, this Court has held that R.C. 2929.11 and R.C. 2929.12 do not mandate judicial fact-finding. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 42. Instead, "in sentencing a defendant for a felony, 'a court is merely required to "consider" the purposes and principles of sentencing in R.C. 2929.11 and the statutory * * * factors set forth in R.C. 2929.12.'" *Brown* at ¶ 34, quoting *State v. Lloyd*, 11th Dist. Lake No. 2006-L-185, 2007-Ohio-3013, ¶ 44. This obligation is satisfied by the trial court stating that it considered these factors. *Id*. Additionally, "[a] trial court is not required to give any particular weight or emphasis to a given set of circumstances; it is merely required to

consider the statutory factors in exercising its discretion." *State v. Delmanzo*, 11th Dist. Lake No. 2007-L-218, 2008-Ohio-5856, ¶ 23.

In the present case, the trial court considered the purposes and principles of sentencing as well as the felony sentencing factors before imposing Appellant's sentence:

> The Court has considered the record, the oral statements made, the victim impact statements, the trial testimony and evidence, the pre-sentence report from several years ago, the updated criminal history, my conference in chambers with counsel and probation, and the statements of the Defendant and the Defendant's counsel. The Court has also considered the overriding purposes of felony sentencing pursuant to Revised Code 2929.11 which are to protect the public from future crime by this offender and others similarly minded, and to punish the offender, and to promote the effective rehabilitation of the offender using the minimum sanctions that the Court determines accomplish those purposes, without imposing an unnecessary burden on state or local governmental resources. I have considered the need for incapacitation, deterrence, rehabilitation, and restitution. I've considered the recommendations of the parties, including the sentencing memoranda. I have reasonably calculated this sentence to achieve the two overriding purposes of felony sentencing, and to be commensurate with and not demeaning to the seriousness of this offender's conduct and its impact on society and the victims, and to be consistent with sentences imposed for similar crimes committed by similar offenders. In using my discretion to determine the most effective way to comply with the purposes and principles of sentencing, I have considered all relevant factors, including the seriousness and the recidivism factors set forth in divisions B through E of Revised Code 2929.12.

(Sent. T.p. 16-18). Thereafter, the trial court engaged in a detailed analysis of the R.C. 2929.12 seriousness and recidivism factors before imposing Appellant's sentence. (Sent. T.p. 18-20).

Specifically, the trial court found that Appellant's conduct was more serious because

the victim suffered serious psychological and economic harm as a result of Appellant's conduct. (Sent. T.p. 18). The trial court also noted that, in addition to Mr. Gonzalez, Ms. Marta Murillo also suffered severe psychological harm by arriving at the residence with her small child immediately after the robbery occurred. (Sent. T.p. 18). Further, the trial court determined that Appellant's conduct was part of an organized criminal activity. (Sent. T.p. 18).

The trial court found that there were no factors making the offense less serious. (Sent. T.p. 18).

Additionally, the trial court determined that recidivism was more likely due to Appellant's extensive criminal history which includes nine previous offenses of violence, 11 instances of probation violations, resisting arrest, obstructing justice, contempt of court, and numerous convictions. (Sent. T.p. 18). Despite being only 32 years old at the time of sentencing, Appellant had previously been to prison three times on four different cases. (Sent. T.p. 18). The trial court also noted that Appellant committed these offenses while on post release control from a previous offense of violence and committed the present offenses less than eight months after being released from prison for another armed robbery conviction. (Sent. T.p. 19). Appellant was arrested on four other crimes while on post release control. (Sent. T.p. 18). Moreover, the trial court found that while Appellant had a long history of substance abuse, he had refused to acknowledge the problem or accept

treatment. (Sent. T.p. 19).

Finally, the trial court found that recidivism was less likely due to Appellant's purported remorse. (Sent. T.p. 19).

Considering the above factors, the trial court fashioned an appropriate sentence for Appellant–eight years on Count 1 plus three years on the firearm specification, eight years on Count 2 plus three years on the firearm specification, 36 months on Count 6, and 18 months on Count 7. (Sent. T.p. 20). The trial court ordered that the sentences on Counts 1, 3, and their associated firearm specifications be served consecutive to one another, but concurrently to Appellant's sentences on Counts 6 and 7, for an aggregate prison sentence of 22 years. (Sent. T.p. 20-21).

Immediately thereafter, the following outburst occurred:

> [APPELLANT]: Fuck your courtroom, you racist ass bitch. Fuck your courtroom, man. You racist as fuck. You racist as fuck. Twenty-two fucking years. Racist ass bitch. (CONTINUED OUTBURST BY [APPELLANT], SWEARING, YELLING, MUCH UNINTELLIGIBLE)
>
> [TRIAL JUDGE]: Remember when - -
>
> [APPELLANT]: You ain't shit.
>
> [TRIAL JUDGE]: Remember when I said that you had some remorse?
>
> [APPELLANT]: You ain't shit ...You never gave me probation.
>
> [TRIAL JUDGE]: Wait a minute.
>
> [APPELLANT]: You never gave me a chance.

> [TRIAL JUDGE]: When I said that you had a certain amount of remorse, I was mistaken. ([APPELLANT] CONTINUES YELLING) The Court determines- -
>
> [APPELLANT]: Fuck you.
>
> [TRIAL JUDGE]: The Court determines that maximum imprisonment is needed, so it's eleven years on Count 1 and eleven years on Count 3.
>
> [APPELLANT]: Fuck that courtroom. You racist bitch. You ain't shit. (MALE VOICE SAYING 'MANSON' REPEATEDLY) Let me out the courtroom, man. (MORE SHOUTING AND SWEARING)
>
> [TRIAL JUDGE]: So it's twenty-eight years with credit for two hundred and thirty-one days. Hold on. ([APPELLANT] STILL SHOUTING) Does counsel waive your client's presence for the remainder of the advisements I have to give?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> [TRIAL JUDGE]: Alright. You can take him. The Court determines that the Defendant has shown no remorse whatsoever. I was giving him remorse, a certain amount of remorse in mitigation of the sentence. The Defendant has shown me that he has no remorse whatsoever, and therefore the Court determines that maximum imprisonment is needed.

(Sent. T.p. 21-22). Consequently, in imposing maximum sentences, Appellant received an additional three years on both Counts 1 and 3 for a total aggregate prison sentence of 28 years. (Sent T.p. 20-22; 18CR000732 T.d. 96).

Given the foregoing, Appellant has failed to meet his burden to affirmatively show that the trial court did not consider the applicable sentencing criteria or that the sentence imposed is "strikingly inconsistent" with the applicable sentencing factors. *State v. Long*,

11th Dist. No. 2013-L-102, 2014-Ohio-4416, 19 N.E.3d 981, ¶ 79.

The issues surrounding Appellant's sentence were thoroughly reviewed by The Eleventh District Court of Appeals, and the court's holding was clear: although the trial court could have held Appellant in direct contempt for his paroxysm, the trial judge's action of increasing Appellant's sentence by six years was not contrary to law. *Bryant*, 11th Dist. Lake No. 2019-L-024, 2020-Ohio-438, ¶ 24. The appellate court reasoned that while a defendant's sudden verbal eruption does not necessarily reflect a lack of remorse, in this case, the trial court could construe Appellant's outburst as a sign that his previous statements of remorse and contrition were not genuine and were more a reflection of his desire to receive leniency. *Id*.

The Eleventh District considered a similar case in *State v. Thompson*, 11th Dist. No. 2016-L-036, 2017-Ohio-1001, 86 N.E.3d 608. In *Thompson*,

> [T]he trial court, after considering the felony sentencing factors, initially sentenced appellant to nine months on each count, to be served consecutively to each other, for a total of 18 months imprisonment. After court was adjourned and as appellant was exiting the courtroom, however, the trial judge overheard appellant make a vulgar, hostile comment to the prosecutor. The trial judge immediately went back on record and proceeded to reconsider appellant's level of remorse for his criminal acts. The court stated that appellant's outburst indicated he had "no remorse whatsoever" for his acts and increased appellant's sentence to 12–months imprisonment for each count, for a total of 24 months in prison.

Id. at ¶ 3.

In affirming the trial court's decision in *Thompson*, the Eleventh District held that

"[b]ecause the trial court was not required to enter a contempt order and the sentence was not final when the court increased appellant's sentence, * * * the trial court's actions are consistent with the law." *Id*. at ¶ 12. The appellate court further noted that,

> [A] lack of remorse is an enhancing factor in felony sentencing. R.C. 2929.12(D)(5). In light of appellant's history of committing crimes similar to those before us as well as the aggressive and offensive nature of the statement he cast at the prosecutor, the trial court could reasonably conclude the outburst demonstrated a lack of remorse.

Id. at ¶ 19.

Here, like *Thompson*, Appellant's sentence was not final when the court increased his sentence. Crim.R. 32(C). "A criminal sentence is final upon issuance of a final order." *State v. Carlisle*, 131 Ohio St.3d 127, 2011-Ohio-6553, 961 N.E.2d 671, ¶ 11. "A judgment of conviction is final when the order sets forth (1) the fact of the conviction; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court." *State v. Thompson*, 11th Dist. No. 2016-L-036, 2017-Ohio-1001, 86 N.E.3d 608, ¶ 13, quoting *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, syllabus, as modified by *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, syllabus (internal quotations omitted).

On review below, the appellate court found that the "the trial court's initial order was not final upon the court's pronouncement; the court, therefore, possessed the authority to revisit the order and increase the same." *Bryant* at ¶ 24. The trial court adjusted

Appellant's sentence, as it explained, based on revising its initial finding that Appellant was genuinely remorseful for the offenses, not to punish Appellant for his lack of respect towards the trial court. (Sent. T.p. 19, 21-22, 26). Further, the adjustment occurred before the sentencing hearing had concluded or a written entry was journalized. (Sent. T.p. 19, 21-22, 26).

"[A]ny oral pronouncements by [the court are] subject to revision before journalization," inasmuch as a "court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum." (Citation omitted.) *State ex rel. Marshall v. Glavas*, 98 Ohio St.3d 297, 2003–Ohio–857, 784 N.E.2d 97, ¶ 5. Given that "oral pronouncements by a trial court judge are subject to revision before journalization[,] * * * [c]ourts may increase sentences when the sentence does not constitute a final order." *State v. Fought*, 6th Dist. Lucas No. L–10–1348, 2011–Ohio–4047, ¶ 13; *State v. Singfield*, 9th Dist. Summit No. 24576, 2009–Ohio–5945, ¶ 22 (citation omitted). Accordingly, there was no error in the trial court's adjustment of Appellant's sentences for Aggravated Burglary and Aggravated Robbery upon the discovery that Appellant's initial showing of remorse was not genuine.

Moreover, Appellant has a history of committing crimes similar to the offenses committed in the case currently before this Court. (T.p. 939; Sent. T.p. 18-20; 18CR000732 T.d. 82; PSR 3-12). Further, Appellant's comments were both aggressive and offensive, as

well as, in complete contrast to the statements he had previously made to the trial court when expressing remorse. (Compare Sent. T.p. 9-10 and Sent. T.p. 21-22). Accordingly, the trial court possessed the authority to change its previous sentence and, after noting Appellant's outburst reflected a lack of remorse, increase Appellant's penalty. (Sent. T.p. 21-22).

Appellant argues that rather than increase his sentence, the trial court should have charged him with contempt. Appellant's conduct at sentencing was certainly contumacious, however, the trial court was not required to hold Appellant in contempt for his behavior. While the defendant in *State v. Webster*, 1st Dist. Hamilton No. C-070027, 2008-Ohio-1636, was charged with contempt for his outburst in the courtroom, the case cited by Appellant does not stand for the proposition that a sentence is contrary to law when a trial court increases an Appellant's sentence prior to a final order after finding that an explicative ridden outburst indicated a lack of remorse.

Here, although the trial court could have held Appellant in contempt for his conduct in the courtroom, Appellant's sentence is not contrary to law when there is no evidence that the increase in Appellant's sentence was anything other than a result of his lack of genuine remorse. Appellant's claims to the contrary on appeal rely on mere speculation and conjecture.

The trial court's action of increasing Appellant's sentence by six years was not

contrary to law. Given the facts of this case, the trial court properly construed Appellant's outburst as an indication that his previous statements of remorse and contrition were not genuine, but rather, a reflection of Appellant's desire to receive leniency from the court at sentencing. Because Appellant's sentence was not a final order at the time his paroxysm occurred, the trial court possessed the authority to revise Appellant's penalty and increase Appellant's sentence based on his lack of genuine remorse.

<u>(2) The record establishes that the trial court based Appellant's sentence on his personal history and the facts of this case, rather than as a punishment for his disrespect to the trial court.</u>

Appellant argues that Ohio's statutory scheme does not permit the trial court to consider his lack of respect towards the court when fashioning his sentence and that the trial court erred in finding that Appellant's behavior in court demonstrated a lack of remorse. (Appellant's Br. 10-16). For the following reasons, Appellant's claims are without merit.

(A) Ohio's statutory scheme required the trial court to consider Appellant's statements at sentencing.

Pursuant to R.C. 2929.19(B)(1), a trial court, before imposing sentence, is required to "consider the record, any information presented at the hearing by any person pursuant to division (A) of this section, and, if one was prepared, the presentence investigation report made pursuant to section 2951.03 of the Revised Code or Criminal Rule 32.2, and any victim impact statement made pursuant to section 2947.051 of the Revised Code." R.C.

2929.19(A) requires that "the offender, the prosecuting attorney, the victim or the victim's representative * * *, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case."

Given the foregoing, the trial court was required to consider Appellant's statements at his sentencing hearing when fashioning Appellant's sentence, and thus, there was no error in the trial court doing so. Consequently, the trial court properly considered Appellant's allocution at sentencing when he feigned remorse for his behavior. (Sent. T.p. 16; 18CR000732 T.d. 96). Likewise, the trial court properly considered Appellant's statements in response to the trial court's oral pronouncement of Appellant's 22-year sentence which indicated Appellant's initial expression of remorse was disingenuous. (Sent. T.p. 21-22; 18CR000732 T.d. 96). Given the requirements of R.C. 2929.19(B)(1), the trial court properly considered Appellant's statements at sentencing when fashioning his sentences in this case.

Additionally, the trial court was required to consider whether Appellant showed genuine remorse for the offenses, which is relevant to Appellant's proclivity to reoffend. R.C. 2929.12(D)(5). This factor is particularly important in the present case as Appellant's showing of remorse was the only mitigating factor noted by the trial court at sentencing. (Sent. T.p. 17-20). Specifically, in regard to recidivism, the trial court found the following:

> In terms of recidivism, the offenses were committed while on post release control from the previous time that I sent the Defendant to prison for a crime

> of violence. The Defendant has an extensive previous criminal history, and history of juvenile delinquency. He's been to prison three times on four cases. He's got nine prior crimes of violence before this case. He's got eleven instances of probation violations, resisting arrest, obstructing justice, and contempt of court, and numerous convictions. He's been arrested on four other crimes plus this case while on post release control. The Defendant was placed on PRC on November 15th of 2017, a three year period, and yet committed this offense less than eight months later. There's a pattern of drug or alcohol abuse, and the offender refuses to acknowledge a problem or accept treatment. There's been a rehabilitation failure after previous convictions and delinquency adjudications, and a failure to respond in the past to probation or post release control. The Court determines that the offenses were committed under circumstances very likely to recur, and the Court determines to make recidivism less likely that the offender shows a certain amount of remorse. The Court determines though that the Defendant poses the greatest likelihood of committing future crimes.

(Sent. T.p. 18-19). Notably, Appellant's presentence report prepared by the Lake County Probation Department details a history of criminal convictions that spans almost 20 years and includes multiple juvenile adjudications and several offenses of violence. (PSR 3-12). The report confirms several probation violations and terminations, as well as, multiple failed treatment attempts, and a demonstrated pattern of drug abuse related to Appellant's offenses. (PSR 3-12).

When revising Appellant's sentences after his outburst in court, the trial court confirmed that Appellant's purported remorse was the only factor mitigating his sentence:

> The Court determines that the Defendant has shown no remorse whatsoever. I was giving him remorse, a certain amount of remorse in mitigation of the sentence. The Defendant has shown me that he has no remorse whatsoever, and therefore the Court determines that maximum imprisonment is needed. He poses the greatest likelihood of recidivism.

(Sent. T.p. 22). Consequently, a review of the record reveals that the trial court properly considered Appellant's lack of genuine remorse for the offenses as required by R.C. 2929.12(D)(5).

(B) The trial court properly construed Appellant's outburst as a sign that his previous statements of remorse and contrition were not genuine and were more a reflection of Appellant's desire to receive leniency.

While Appellant argues that the trial court incorrectly determined that Appellant's outburst in the courtroom indicated that his previous expression of remorse was disingenuous, it is the sentencing court that was in the best position to determine whether Appellant's statements indicated a lack of genuine remorse. *State v. Eckliffe*, 11th Dist. Lake No. 2001-L-105, 2002-Ohio-7136, ¶ 32. A trial court is not required to accept an offender's last hour showing of remorse, when applying recidivism factors at sentencing. *State v. Anderson*, 11th Dist. No. 2006-L-264, 172 Ohio App.3d 603, 2007-Ohio-3849, 876 N.E.2d 632, ¶ 14. It is difficult to second-guess a trial court when the magnitude of any given situation is never adequately portrayed by the written transcript. *See, e.g., State v. McDew*, 5th Dist. Stark No. 2010CA0270, 2011-Ohio-1196, ¶ 31 (upholding a trial court's finding that appellant was guilty of contempt for her outburst at arraignment).

Here, the record establishes that the trial court based Appellant's sentence on his personal history and the facts of this case rather than as punishment for his outburst in the courtroom. Appellant's criminal history includes multiple violations of court orders and

conditions of release, as well as, several convictions for obstruction of justice, contempt, and resisting arrest. (PSR 3-12). Consequently, Appellant's criminal history displays a pattern of being disobedient to or disrespectful toward a court of law and its officers. (PSR 3-12). Further, Appellant and his character in the courtroom was well known to the trial court as Appellant had appeared before the trial judge on multiple occasions prior to the trial proceedings for the present offenses. (PSR 3-12).

A review of the sentencing transcript also reveals that Appellant generally displayed a pattern of disrespect to the trial court prior to his sentencing hearing on March 1, 2019. (Sent. T.p. 26). At Appellant's sentencing, the trial court noted that "it wasn't on the record, but the last time as he was walking out of the court he said 'suck my dick, Judge'. So this seems to be a repeat pattern with him." (Sent. T.p. 26). This is particularly relevant to Appellant's allocution at sentencing, and the trial court's initial finding that Appellant had expressed genuine remorse.

At sentencing, Appellant did not apologize to the victims for his conduct which traumatized multiple people and caused physical, economic, and psychological harm. (Sent. T.p. 9-10, 11-12). Notably, the victim in this case had to move after Appellant and his accomplice broke into his home in the early morning hours while the victim slept in order to beat and rob him at gunpoint. (Sent. T.p. 12). Rather, during his allocution, Appellant stated the following:

> Your Honor, I know you very well aware of my history. I made a lifetime of bad decisions. And those bad decisions has caused pain to a lot of people in my family. For that I am truly sorry. Most of my bad decisions have been driven by my addiction to drugs, and to do whatever I can to continue to get high. My ability to stay clean has me to spend most of my life in prison. There's no way for a person to live –- that's no way for a person to live. And it's not how I want to finish my life. Despite the circumstances of my upbringing, I understand that I can't continue to blame others for my actions and my behaviors. I have become jaded towards the legal system. By having this trial, was honest and open eye for me. I have never gone through trial before. I have a new found respect for the efforts of the attorneys, judges, jurors, and goal in living as an, as giving an accused person a opportunity to have a case heard. That's all anyone can ask. I am thankful for the opportunity afforded by the court, by the day in court, and I respect the decision that the juries has made. I alone have the power to end the cycle of incarceration, and all I ask is for you to give me an opportunity to still make something out of my life, sir. I don't want to die in prison, sir. I'm not a bad person, sir. I do have a drug problem. I've been in front of you multiple times. I respect you. And I respect your decision that you make today.

(Sent. T.p. 9-10).

The record reflects that Appellant's allocution and showing of remorse was directly related to his attitude and respect towards the trial court and its actors. (Sent. T.p. 9-10). The trial court, being familiar with Appellant and his propensity to show disrespect to the tribunal, found Appellant's allocution credible and credited him for his expression of contrition and new-found respect for the court by determining that Appellant had showed "a certain amount of remorse" in mitigation of Appellant's sentence. (Sent. T.p. 19, 22, 26).

After the trial court orally proclaimed its decision to impose an aggregate prison sentence of 22 years, Appellant lashed out at the trial judge despite telling the trial court,

just moments prior, that he respected the court and the decision made regarding sentencing. (Sent. T.p. 9-10, 21-22). Notably, Appellant's statements were in stark contrast to the statements Appellant made when expressing remorse. (Compare Sent. T.p. 9-10 and Sent. T.p. 21-22).

The State does not disagree that an outburst in the courtroom does not necessarily reflect a lack of remorse. However, in this case, it does. Appellant's allocution was directly related to his expression of a new-found respect for the trial court and its actors. (Sent. T.p. 10). Appellant proved these statements to be disingenuous when he lashed out after hearing his initial sentence and displayed unbridled disrespect for the trial court. (Sent. T.p. 21-22). Given the specific facts of this case, the trial court, in exercising its discretion, properly determined that Appellant's initial showing of remorse was not genuine, but rather, just "a line of bull."(Sent. T.p. 26). As remorse was the only factor mitigating Appellant's sentence, and the trial court ultimately found that Appellant's remorse was not genuine, the trial court properly increased Appellant's sentences for Aggravated Burglary and Aggravated Robbery resulting in six additional years to his aggregate sentence. (Sent. T.p. 20-22).

Absent from the record, is any indication that the trial court's increase in sentence was vindictive, or that the trial court was punishing Appellant for his disrespect to the court, rather than revising the court's initial finding that Appellant's last hour showing of

remorse was genuine. Notably, defense counsel never objected to the trial court's findings regarding the seriousness and recidivism factors applicable to Appellant's sentencing. (Sent. T.p. 21-27). Further, defense counsel did not object when the trial court revised its finding regarding Appellant's lack of remorse or when the trial court increased Appellant's initial sentences. (Sent. T.p. 21-27). Rather, defense counsel waived Appellant's right to be present in the courtroom so that Appellant could be removed. (Sent. T.p. 22). Thereafter, the trial court made advisements regarding Appellant's duties on post release control and appointed counsel for Appellant to pursue his appeal. (Sent. T.p. 22-26).

It is well-recognized that a sentencing court "has discretion to determine the most effective way to comply with the purposes and principles of sentencing." R.C. 2929.12(A). This Court has described a sentencing court's discretion as "full discretion to impose a prison sentence within the statutory range." *State v. Mathis*, 109 Ohio St.3d 54, 2006–Ohio–855, 846 N.E.2d 1, paragraph three of the syllabus; *State v. Ries*, 11th Dist. Portage No.2008–P–0064, 2009–Ohio–1316, ¶ 13 ("[s]uch discretion is plenary"). "[T]he trial court is not obligated, in the exercise of its discretion, to give any particular weight or consideration to any sentencing factor." *State v. Holin*, 11th Dist. No. 2007-L-028, 174 Ohio App.3d 1, 2007-Ohio-6255, 880 N.E.2d 515, ¶ 34.

It is therefore worth noting that the trial court, in its discretion, could have imposed an additional 54 months to Appellant's aggregate prison term. (Sent. T.p. 20-21). Rather,

the trial court ordered Appellant serve his sentences for Weapons Under Disability and Carrying a Concealed Weapon concurrent to his sentences for Aggravated Burglary, Aggravated Robbery, and their included firearm specifications. (Sent. T.p. 20-22). When finding Appellant's purported remorse was disingenuous, the trial court increased Appellant's sentences for burglary and robbery, but did not revise its order as it pertained to allowing Appellant to serve the weapons charges concurrent to his other sentences. (Sent. T.p. 20-22).

There is nothing in the record which indicates that the increase in Appellant's sentence was to punish Appellant for his outburst in the courtroom. Rather, the trial court was appropriately applying the required sentencing factors while considering the required information–the record, the presentence report, and any information presented at the hearing by the offender, the State, and the victim. R.C. 2929.11; R.C. 2929.12; R.C. 2929.19(B)(1). Given the foregoing, Appellant's sentences for Aggravated Burglary and Aggravated Robbery are not clearly and convincingly contrary to law. Thus, his proposition of law is without merit and should be denied.

CONCLUSION

For the reasons discussed above, the State of Ohio, Plaintiff-Appellee respectfully requests that this Honorable Court affirm the decision of the appellate court.

Respectfully submitted,

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PROOF OF SERVICE

A copy of the foregoing Merit Brief of Appellee, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellee, Max Hersch , Esquire, Assistant State Public Defender, Office of Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, OH 43215, on this 17th day of November, 2020.

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