

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

STATE OF OHIO,	:	Case No. 17CA10
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
PAULENA YOST,	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellant.	:	RELEASED: 06/28/2018

APPEARANCES:

Michael R. Huff, Athens, Ohio, for appellant.

James K. Stanley, Meigs County Prosecuting Attorney, Pomeroy, Ohio, for appellee.

Harsha, J.

{¶1} Paulena Yost pleaded guilty to aggravated assault and received a maximum 18-month prison sentence. Yost asserts that the trial court’s imposition of the maximum term for her crime was not clearly and convincingly supported by the record.

{¶2} However, the trial court could rely on the facts that Yost stabbed her live-in boyfriend in the back with a kitchen knife as he was packing his belongings to leave, that he suffered a wound requiring stitches, that the event occurred in front of children, and Yost’s apparent lack of remorse to conclude that the crime was more serious than the normal aggravated assault and warranted the imposition of the maximum prison term. We reject Yost’s assertion and affirm her sentence.

I. FACTS

{¶3} In March 2017, the Meigs County Grand Jury returned an indictment charging Paulena Yost with one count of felonious assault and one count of domestic violence. Yost initially entered a not-guilty plea to the charges and later entered a plea

of not guilty by reason of insanity. But she subsequently withdrew those pleas and entered a guilty plea to an amended charge of aggravated assault in violation of R.C. 2903.12(A), a fourth-degree felony, in return for the dismissal of the domestic-violence charge. The parties' plea agreement did not include an agreed sentencing recommendation. The trial court accepted Yost's plea, found her guilty of aggravated assault, and ordered a presentence investigation.

{¶4} At the sentencing hearing the state argued that the trial court should impose the maximum 18-month prison term. In support it noted Yost stabbed the victim, her boyfriend, Paul Byus, with a kitchen knife in his back when he was bent over in their bedroom as he packed his belongings to move out of their shared residence. This resulted in him being treated for a wound at the hospital for a few stitches. The state also noted that Yost was not acting in self-defense, and that although the victim did not suffer the "most severe wound," the only thing that prevented him from suffering a more serious injury was the thick jacket he was wearing when the stabbing occurred. The victim's advocate submitted an impact statement containing Byus's request that Yost be sentenced to the maximum term of 18 months in prison rather than community control and that she have no contact with him.

{¶5} Yost's counsel argued that under the applicable statutory sentencing factors, her offense was less serious than the normal aggravated assault offense because the victim induced or facilitated the offense and she acted under strong provocation—her 15-year-old sister heard her cries for help just before the victim was stabbed and she claimed that she had been abused by the victim on previous occasions. Yost's counsel further argued that her offense was not likely to reoccur

because before the offense, she had not committed any criminal offense and had led a law-abiding life for a significant number of years. Yost's counsel cited the report of Dr. Jaime Adkins, who concluded that although Yost was not insane at the time she committed the offense, she suffered from a severe mental disease and that the offense "appears to have been the result of a complex myriad of emotions resulting from trauma and anxiety about the situation." Yost's counsel argued that instead of a prison sentence, community control was the appropriate sentence.

{¶6} The county's presentence investigation report ("PSI") found that three of the factors indicating that Yost's offense was more serious than most aggravated assault offenses, and that one of the factors making her more likely to commit future crimes were present, but did not note the presence of any of the factors making the offense less serious. Nevertheless, the PSI report concluded that Yost was amenable to community control following a nine-month term in a community-based correctional facility.

{¶7} The trial court stated that it considered the information contained in the PSI, the statements of counsel, the victim-impact statement, the sworn testimony of record, other relevant information, as well as the overriding purposes and principles of sentencing and the seriousness and recidivism factors in R.C. 2929.11, 2929.12, and 2929.13. Based on these factors the trial court concluded that Yost was not amenable to community control and that a prison sentence was consistent with the purposes and principles of felony sentencing. The trial court then determined that the fact that Yost stabbed the victim in his back justified the imposition of a maximum 18-month prison sentence notwithstanding the spontaneous nature of her act:

Uh, I want to say what a good job defense counsel has done uh in the argument here today. However, I look at this knife, and I'm somewhat familiar with Carhart jackets and I know they're kind of thick and that sort of thing and while I think it was a, and I think this was the much more appropriate charge, which is Aggravated Assault, uh you take a knife like this to somebody it's terribly, terribly serious. I think it was a spontaneous act. When I was prosecuting, we had a guy that shot a gun, and as soon as he pulled the trigger, half a second after he said it, said, "oh my God, what have I done?" The problem is, he already did it. And uh, we can't take back what already was done. So the court is going to sentence the defendant to eighteen months in prison.

{¶8} The trial court then issued an entry reflecting Yost's 18-month prison sentence for aggravated assault.

II. ASSIGNMENT OF ERROR

{¶9} Yost assigns the following error for our review:

THE TRIAL COURT COMMITTED ERROR BY IMPOSING A MAXIMUM SENTENCE IN VIOLATION OF OHIO'S SENTENCING LAWS.

III. STANDARD OF REVIEW

{¶10} When reviewing felony sentences, appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, 22-23. Under R.C. 2953.08(G)(2), "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." Instead, R.C. 2953.08(G)(2) provides that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either:

- (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
- (b) That the sentence is otherwise contrary to law.

{¶11} Although R.C. 2953.08(G)(2)(a) does not mention R.C. 2929.11 and 2929.12, the Supreme Court of Ohio has determined that the same standard of review applies to those statutes. *Marcum* at ¶ 23 (although “some sentences do not require the findings that R.C. 2953.08(G)[2][a] specifically addresses[,] * * * it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court”); *State v. Butcher*, 4th Dist. Athens No. 15CA33, 2017-Ohio-1544, ¶ 84. Consequently, “an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence.” *Marcum* at ¶ 23; *Butcher* at ¶ 84.

{¶12} “Once the trial court considers R.C. 2929.11 and 2929.12, the burden is on the defendant to demonstrate by clear and convincing evidence that the record does not support his sentence.” *State v. Akins-Daniels*, 8th Dist. Cuyahoga No. 103817, 2016-Ohio-7048, ¶ 9; *State v. O’Neill*, 3d Dist. Allen No. 1-09-27, 2009-Ohio-6156, fn. 1

{¶13} “Clear and convincing evidence is ‘that measure or degree of proof which is more than a mere “preponderance of the evidence,” but not to the extent of such certainty as is required “beyond a reasonable doubt” in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.’” *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, ¶ 18, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

IV. LAW AND ANALYSIS

{¶14} Yost asserts that the trial court committed error by imposing a maximum sentence in violation of sentencing laws.

{¶15} Initially, we conclude that the trial court's imposition of the 18-month maximum sentence for aggravated assault is not contrary to law. In fact Yost concedes her 18-month maximum sentence was not clearly and convincingly contrary to law.

{¶16} Instead, Yost argues that her 18-month prison sentence is not clearly and convincingly supported by the record. She claims that although the trial court stated that it balanced the seriousness and recidivism factors under R.C. 2929.12, a balancing of these factors weighs in favor of community control or a lesser prison term for her aggravated-assault conviction.

{¶17} More specifically, Yost contends that “[t]he result the court should have reached in analyzing the R.C. 2929.12 factors is that the recidivism unlikely factors far outweigh the recidivism likely factors and that the more serious factors were equally balanced by the less serious factors.” R.C. 2929.12(A) provides that the trial court must consider the factors set forth in divisions (B) and (C) relating to the seriousness of the defendant's conduct, as well as the factors set forth in divisions (D) and (E) relating to the likelihood of recidivism, along with any other relevant factors.

{¶18} Yost concedes that three of the factors indicating that her criminal conduct was more serious than the normal conduct resulting in aggravated assault were present: (1) the victim suffered serious physical harm; (2) the offender's relationship with the victim facilitated the offense; and (3) the offense was a violation of R.C. 2903.12 involving a family or household member and the offense was committed in the vicinity of one or more children who were not victims of the offense. R.C.

2929.12(B)(2), (6), and (9). The PSI also found that she was not genuinely remorseful, which is a factor making it more likely for her to commit a future crime. R.C.

2929.12(D)(5).

{¶19} Although other factors cited by Yost’s counsel at the sentencing hearing supported a finding that the offense was less serious or that she would be less likely to commit a future crime, see R.C. 2929.12(C) and (E), the trial court did not need to—as Yost appears to implicitly claim—assign equal weight to each applicable factor. Instead, precedent refutes any contention that each statutory or other relevant factor is entitled to equal or a certain weight in the balancing process. See *State v. Graham*, 4th Dist. Adams No. 17CA1046, 2018-Ohio-1277, ¶ 25, rejecting the argument that because each of the statutory sentencing factors are mandatory, each is entitled to equal weight on balance, citing *State v. Bailey*, 4th Dist. Highland No. 11CA7, 2011-Ohio-6526, ¶ 34, quoting *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000) (“in considering the factors set forth in R.C. 2929.12, the trial court has ‘the discretion to determine the weight to assign a particular statutory factor’ ”).

{¶20} The trial court was free to credit the state’s and victim’s version of the facts and to place additional weight on the facts that Yost apparently lacked remorse, she stabbed Byus in the back with a kitchen knife, Byus was a household member and thus Yost’s relationship with Byus facilitated the offense, and that he suffered serious physical harm and escaped more serious physical harm only because he was wearing a thick jacket. Under these circumstances, Yost has failed to meet her burden to establish that the trial court’s imposition of a mandatory 18-month prison sentence for her aggravated-assault conviction was clearly and convincingly not supported by the

record. “ ‘Simply because the court did not balance the factors in the manner appellant desires does not mean that the court failed to consider them, or that clear and convincing evidence shows that the court’s findings are not supported by the record.’ ” *Graham*, 2018-Ohio-1277, at ¶ 26, quoting *Butcher*, 2017-Ohio-1544, at ¶ 87.

{¶21} Therefore, we overrule Yost’s assignment of error.

V. CONCLUSION

{¶22} Yost has not established that her 18-month prison sentence is clearly and convincingly not supported by the record. Having overruled her assignment of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.