

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

STATE OF OHIO, : Case No. 17CA1046
Plaintiff-Appellee, :
v. : DECISION AND
MYRIA GRAHAM, : JUDGMENT ENTRY
Defendant-Appellant. : RELEASED 03/28/2018

APPEARANCES:

Timothy Young, Ohio Public Defender, and Katherine Ross-Kinzie, Ohio Assistant Public Defender, Columbus, Ohio, for appellant.

David Kelley, Adams County Prosecuting Attorney, and Kris D. Blanton, Adams County Assistant Prosecuting Attorney, West Union, Ohio, for appellee.

Hoover, P.J.

{¶1} Defendant-appellant, Myria Graham, appeals from the sentence she received in the Adams County Court of Common Pleas after she pleaded guilty to one count of illegal manufacture of methamphetamine in the vicinity of juveniles and one count of endangering children. Because she has not established by clear and convincing evidence that her sentence is either contrary to law or that the record does not support it, we affirm her sentence.

I. Facts and Procedural Posture

{¶2} In March 2017, the Adams County Grand Jury returned an indictment charging Myria Graham with one count of illegal manufacture of methamphetamine in violation of R.C. 2925.04(A), with a specification that the offense occurred in the vicinity of juveniles, a felony of the first degree, one count of illegal assembly or possession of one or more chemicals that may

be used to manufacture methamphetamine in violation of R.C. 2925.041(A), with a specification that the offense occurred in the vicinity of juveniles, a felony of the second degree, and three counts of endangering children in violation of R.C. 2919.22(B)(6), felonies of the third degree. Graham initially pleaded not guilty to the charges.

{¶3} Graham subsequently withdrew her not guilty plea and entered a plea of guilty to illegal manufacture of methamphetamine and the specification that the offense occurred within the vicinity of juveniles as well as one of the charges of endangering children in return for the dismissal of the remaining charges. The trial court held a hearing at which it accepted Graham's plea.

{¶4} At the plea hearing, Graham stated that she had completed high school and had taken some college courses. She testified that on March 24, 2017, she knowingly decided to manufacture methamphetamine. She assembled Sudafed, lithium, cold packs, and a bottle but was waiting for her sister-in-law to arrive to help her with the "gassing part" of the manufacturing process. Graham was using a building right next to the home. Her husband and their three children—ages 2, 5, and 11—were inside that house, within 100 feet of where she was manufacturing the methamphetamine.

{¶5} After the trial court accepted Graham's plea and found her guilty of the offenses, it then proceeded to sentencing. At the sentencing portion of the hearing, the State gave no recommendation, instead submitting it "to the discretion of the court." Graham's counsel requested that she be given the minimum sentence because she was remorseful, was a few weeks away from giving birth to her fourth child, and had no criminal history other than a speeding ticket. He noted that Graham was arrested only because her brother and sister-in-law contacted a deputy sheriff to try and get her help through treatment, not a prison sentence. Graham's counsel

read a statement on her behalf in which she expressed regret for her decisions, which affected her as well as her children and husband. Graham also stated that she realized that she put her children “in serious danger” and that she knew that she needed to “face the consequences of [her] actions.” Graham’s brother provided a statement that he had contacted a deputy sheriff. This statement discussed the brother removing the children from the home and having an intervention in which they could save Graham’s life through treatment. Instead, law enforcement arrested Graham and incarcerated her.

{¶6} Graham’s mother and husband appeared and requested that the trial court place her in a chemical-dependency treatment program at a community based correctional facility in lieu of prison. They stated that Graham had left her family for about a year and a half, moved in with a man who taught her how to make methamphetamine, and developed a drug problem. About a month before her arrest, Graham had decided to return home as she was pregnant with her fourth child.

{¶7} In its sentencing decision, the trial court emphasized that it had “considered the princip[le]s and purposes of sentencing under Ohio Revised Code Section 2929.11” and “balance[d] the seriousness or recidivism factors under [R.C.] 2929.12.” The court first observed that it could not grant Graham’s mother’s and husband’s request to sentence her to the program at the community based correctional facility because it was required to impose mandatory prison terms for her crimes. The court then noted other cases with dismal outcomes. When the trial court had sentenced defendants to lower prison terms, the defendants would be released and would continue to illegally manufacture drugs. In addition, the court discussed cases in which illegal drugs had resulted in the deaths of children or the births of drug-addicted babies.

{¶8} The trial court placed particular emphasis on safeguarding Graham’s three existing children as well as the fourth unborn child she was expecting from her dangerous behavior:

* * * I just keep thinking at some point it has to reverse. Now when I’m telling about this to other people, I’ll be adding we had a mom, pregnant, eleven, five, and two-year old[’s], making Meth. You’re going to have that baby in prison, I think we’ve had three in prison this year. I can’t let you go home, I have to ensure that that baby is born drug free, and you give me [no] reason to believe that you would. If you[’]r[e] making these kind of decisions.

{¶9} The trial court then observed that hearing her family speak on her behalf had “softened” it “a little bit” and that it would impose a seven-year mandatory prison term for the illegal manufacture and specification offense and a concurrent two-year mandatory prison term for the endangering children offense, leaving an aggregate seven-year mandatory prison term. The court also imposed a mandatory five-year term of post-release control; it waived the \$10,000 minimum mandatory fine based on her affidavit of indigency, and instead fined her \$1,250. The court noted that it had given her “a gift” in the seven-year term, and that her brother and sister-in-law who called the police about her decision to manufacture methamphetamine were heroes who stopped her from killing or deforming her unborn child and from killing her husband and the rest of her children. The trial court entered a judgment entry reflecting the sentence on the same day.

{¶10} In its judgment entry, the court noted that it had “considered the record, oral statements, any victim impact statements and presentence report prepared, as well as the principle[s] and purposes of sentencing under [R.C.] 2929.11(A)” and that “[t]o achieve those

purposes, the sentencing 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, and has balanced the seriousness and recidivism factors of [R.C.] 2929.12.”

{¶11} Graham timely appealed.

II. Assignment of Error

{¶12} Graham assigns the following error for our review:

Myria Graham’s sentence is not supported by competent, credible evidence in the record. Fifth, Sixth, and Fourteenth Amendments, United States Constitution; Article I, Sections 10 and 16, Ohio Constitution. R.C. 2953.08; R.C. 2929.11.

III. Standard of Review

{¶13} Graham’s assignment of error contests her mandatory prison sentence for the first-degree felony offense of illegal manufacture of methamphetamine in the vicinity of juveniles. 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) specifies 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.

{¶14} Moreover, 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; *see also State v. Jones*, 2018-Ohio-498, --N.E.3d— (8th Dist.) (court of appeals recently resolved intradistrict conflict by applying *Marcum* at ¶ 23 to hold that appellate courts can review the record to determine whether the considerations set forth in R.C. 2929.11 and 2929.12 support a sentence).

{¶15} “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, ¶ 9, fn. 1 (“The defendant bears the burden to demonstrate, by clear and convincing evidence, that the sentence is not supported by the record, that the sentencing statutes’ procedure was not followed, or there was not a sufficient basis for the imposition of a prison term; or that the sentence is contrary to law”); *State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014-Ohio-5601, ¶ 5 (“because [appellant] failed to establish by clear and convincing evidence either that the record does not support the trial court’s findings or that the sentence is otherwise contrary to law, these assignments of error are

meritless”). “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

A. The Sentence is Not Contrary to Law

{¶16} “ [A] sentence is generally not contrary to law if the trial court considered the R.C. 2929.11 purposes and principles of sentencing as well as the R.C. 2929.12 seriousness and recidivism factors, properly applied post[-]release control, and imposed a sentence within the statutory range.’ ” *State v. Perry*, 4th Dist. Pike No. 16CA863, 2017-Ohio-69, ¶ 21, quoting *State v. Brewer*, 2014-Ohio-1903, 11 N.E.3d 317, ¶ 38 (4th Dist.).

{¶17} At both the sentencing hearing and in its judgment entry, the trial court stated that it considered the R.C. 2929.11 purposes and principles of sentencing and the R.C. 2929.12 seriousness and recidivism factors, properly applied post-release control, and imposed a seven-year mandatory prison sentence on Graham for illegal manufacture of methamphetamine in the vicinity of juveniles, which is within the statutory range. *See* R.C. 2925.04(C)(3)(b) (“If the drug involved in the violation is methamphetamine and if the offense was committed in the vicinity of a juvenile, * * * the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree that is not less than four years”); R.C. 2929.14(A)(1) (providing that generally, “[f]or a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, ten, or eleven years”).

{¶18} Therefore, as Graham appears to concede, her sentence is not clearly and convincingly contrary to law.

B. Appellant Has Not Met Her Burden to Establish that Her Sentence is Clearly and Convincingly Not Supported by the Record

{¶19} Instead of arguing that her sentence is contrary to law, in her sole assignment of error, Graham asserts that the seven-year mandatory prison sentence for illegal manufacture of methamphetamine in the vicinity of juveniles is not supported by competent, credible evidence in the record. She contends that the evidence at the sentencing hearing supports only the imposition of the statutory minimum for her conviction—a four-year mandatory prison sentence. R.C. 2925.04(C)(3)(b).

{¶20} The Supreme Court of Ohio summarized the applicability of R.C. 2929.11 and 2929.12 in sentencing decisions:

In Ohio, two statutory sections serve as a general guide for every sentencing. First, R.C. 2929.11(A) provides that the overriding purposes of felony sentencing “are to protect the public from future crime by the offender and others and to punish the offender.” To achieve these purposes, the trial court “shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution.” *Id.* The sentence must be “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). * * *

Second, R.C. 2929.12 specifically provides that in exercising its discretion, a trial court must consider certain factors that make the offense more or less serious and that indicate whether the offender is more or less likely to commit future offenses. * * * [A]n offender’s conduct is considered less serious when there are “substantial grounds to mitigate the offender’s conduct, although the grounds are not enough to constitute a defense.” R.C. 2929.12(C)(4). R.C. 2929.12(C) and (E) also permit a trial court to consider “any other relevant factors” to determine that an offense is less serious or that an offender is less likely to recidivate. * * *

State v. Long, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶¶ 17-18.

{¶21} Graham argues that although the trial court claimed that it balanced the seriousness and recidivism factors under R.C. 2929.12, a balancing of these factors weighs in favor of the minimum four-year mandatory prison sentence for Graham’s illegal manufacture conviction. 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.

{¶22} Graham contends that none of the nine factors in R.C. 2929.12(B) that would indicate that her conduct was more serious than conduct normally constituting the offense while one of the factors in R.C. 2929.12(C) making her conduct less serious than normal applied—the R.C. 2929.12(C)(3) factor that in committing the offense, Graham did not cause or expect to cause physical harm to any person or property. She further claims that none of the factors listed in R.C. 2929.12(D) making her more likely to commit future crimes was present whereas all of

the factors listed in R.C. 2929.12(E) making her less likely to commit future crimes were present, i.e., prior to the crime, she had not been adjudicated a delinquent child, had not been convicted of or pleaded guilty to a criminal offense, and had led a law-abiding life for a significant number of years, the offense was committed under circumstances not likely to recur, and she showed genuine remorse for the offense. R.C. 2929.12(E)(1)-(5).

{¶23} However, when Graham manufactured methamphetamine within the vicinity of her husband, her three children, and her unborn child, she put them in “serious danger.” Graham knew that the manufacturing process for methamphetamine was dangerous, but proceeded anyway, evidently due to her drug addiction. The trial court properly considered the relevant fact that Graham’s behavior had the potential to kill her husband, her three young children, and her unborn child. Without the intervention of her brother and sister-in-law contacting a deputy sheriff, her offense could have escalated into something catastrophic:

They stopped you from killing this baby or disforming [sic] this baby. No different than if you took a gun and shot it, but you just grazed its head. No different. Attempted Murder. So, I hope that the family that’s here realizes that those folks are heroes. Flat out heroes. And the police don’t have an opportunity to stand back and say oh, you know, well we’ll take our time, we’[ll] come up with some more. Those things blow up. And you could’ve killed a good man in your husband, and the rest of your children. So the brother and sister in law, kudos to them. I meant to say that earlier.

{¶24} This case was more serious than the normal illegal manufacture of methamphetamine case in the vicinity of a juvenile because there were *three* young children, ages 2, 5, and 11, a *husband*, and an *unborn child* within the vicinity of the crime. This factor

alone justified the trial court’s imposition of three years more than the minimum four-year mandatory prison sentence for Graham’s illegal manufacturing conviction. *See, e.g., State v. Grundy*, 12th Dist. Warren No. CA2011-09-099, 2012-Ohio-3133, ¶ 53 (“[T]he seriousness of the crime was compounded by the fact that a minor was residing in the home at the time the manufacturing and sales [of methamphetamine] occurred. * * * [Appellant] placed the minor in danger every time he manufactured methamphetamine[.]”); *State v. Parsons*, 3d Dist. Auglaize No. 2-10-27, 2011-Ohio-168, ¶ 16 (imposition of more than the minimum sentence for the illegal manufacturing of methamphetamine was appropriate because appellant “was engaging in a highly dangerous and unstable activity in his home when three young children were present” and “manufacturing methamphetamines in one’s home places anyone in the home in grave danger as any action that would have disturbed this volatile process had the potential to be catastrophic”).

{¶25} Graham also argues that because each of the “delineated [statutory] factors are [mandatory] considerations, * * * each is entitled to equal weight on balance.” She cites no authority for this proposition, and precedent refutes its viability. *See 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’ ”); *State v. Kuykendall*, 2017-Ohio-7280, __ N.E.3d __, ¶ 17 (12th Dist.), quoting *State v. Steger*, 12th Dist. Butler No. CA2016-03-059, 2016-Ohio-7908, ¶ 18 (“Although appellant disagrees with the trial court’s analysis and its balancing of the seriousness and recidivism factors in R.C. 2929.12, it is ‘[t]he trial court [that], in imposing a sentence, determines the weight afforded to any particular statutory factors, mitigating grounds, or other relevant circumstances’ ”); *State v. Reeves*, 10th Dist. Franklin No. 14AP-856, 2015-Ohio-3251, ¶ 10, quoting *State v. Todd*, 10th Dist. Franklin

No. 06AP-1208, 2007-Ohio-4307, ¶ 23 (“ ‘the trial court, in exercising its sentencing discretion, determines the weight afforded to any particular statutory factors, mitigating grounds, or other relevant circumstances’ ”).

{¶26} Graham has failed to meet her burden to establish that the trial court’s mandatory prison sentence 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.” *Butcher*, 2017-Ohio-1544, at ¶ 87.

{¶27} Therefore, we overrule Graham’s assignment of error.

V. Conclusion

{¶28} 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 Adams 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.

Harsha, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

By: _____
Marie Hoover, Presiding 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.