**[Cite as *State v. Layne*, 2021-Ohio-255.]**

**Released 1/21/21**

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

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| STATE OF OHIO, | : | |
| | : | |
| Plaintiff-Appellee, | : | Case No. 20CA1116 |
| | : | |
| v. | : | |
| | : | |
| BRANDON LAYNE, | : | DECISION AND JUDGMENT |
| | : | ENTRY |
| Defendant-Appellant. | : | |

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APPEARANCES:

Brian T. Goldberg, Cincinnati, Ohio, for Appellant.

David Kelley, Adams County Prosecutor, Kris D. Blanton, Assistant Adams County Prosecutor, West Union, Ohio, for Appellee.

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Smith, P. J.:

{¶1} Brandon Layne appeals the judgment entry on sentence filed May 14, 2020 in the Adams County Court of Common Pleas. Upon entering a plea of guilty to burglary, R.C. 2911.12(A)(3), a felony of the third degree, Layne was sentenced to a two-year prison term. Upon appeal, Layne asserts that his sentence is contrary to law. However, we find no merit to Layne's

argument. Accordingly, we overrule the sole assignment of error and affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} In its brief, Appellee State of Ohio acknowledges agreement with the statement of the case and statement of facts as set forth in Appellant's brief. On October 28, 2019, Appellant entered Cox's Laundromat in Manchester, Ohio during normal business hours, climbed a wall, and entered an office belonging to the owner of the laundromat. Appellant located keys used to open a change dispenser and stole $550.00 from the dispenser. The offense was captured on video.

{¶3} Thereafter, Appellant was indicted on one count of burglary, R.C. 2911.12(A)(3), a felony of the third degree, and breaking and entering, R.C. 2911.13(A), a felony of the fifth degree. Appellant admitted his involvement in the offense and on May 6, 2020, entered a plea of guilty to the burglary count. The other count was dismissed.

{¶4} Pursuant to the plea agreement, Appellant agreed to pay restitution of $550. During the trial court proceedings, Appellant twice tested positive for illicit drugs, thus violating the terms of his bond. Appellant also gave the bond supervisor a false name and was subsequently convicted of a misdemeanor obstruction of justice. At sentencing, Appellant

was sentenced to a stated prison term of two years. This timely appeal followed.

ASSIGNMENT OF ERROR

> "I. THE TRIAL COURT ERRED BY IMPOSING A TWO YEAR PRISON SENTENCE THAT WAS UNSUPPORTED BY THE RECORD."

A. STANDARD OF REVIEW

{¶5} R.C. 2953.08(G)(2) defines appellate review of felony sentences and provides, in relevant part, as follows:

> The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court. The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following: (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.

{¶6} " ' "[A]n 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." ' " *State v. Barnes*, 4th Dist. Ross No. 19CA3687, 2020-Ohio-3943, at ¶ 32, quoting *State v. Pierce*, 4th Dist. Pickaway No. 18CA4, 2018-Ohio-4458 ¶ 7, quoting *State v. Marcum,* 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23. This is a deferential standard. *Id.* at 23. Furthermore, "appellate courts may not apply the abuse-of-discretion standard in sentencing-term challenges." *Id*. at ¶ 23. Additionally, although R.C. 2953.08(G) does not mention R.C. 2929.11 or 2929.12, the Supreme Court of Ohio has determined that the same standard of review applies to findings made under those statutes. *Id*. at ¶ 23 (stating that "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," meaning that "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").

{¶7} " ' "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." ' " *Barnes, supra,* at ¶ 33, quoting *State v. Marcum* at ¶ 22, quoting *Cross v. Ledford,* 161 Ohio St. 469, 120 N.E.2d 118, paragraph three of the syllabus (1954).

{¶8} Further, as we observed in *State v. Pierce, supra,* the Eighth District Court of Appeals has noted as follows:

> It is important to understand that the "clear and convincing" standard applied in R.C. 2953.08(G)(2) is not discretionary. In fact, R.C. 2953.08(G)(2) makes it clear that "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." As a practical consideration, this means that appellate courts are prohibited from substituting their judgment for that of the trial judge. It is also important to understand that the clear and convincing standard 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 appeals that must clearly and convincingly find that the record does not support the court's findings. In other words, the restriction is on the appellate court, not the trial judge. This is an extremely deferential standard of review. *Pierce, supra,* at ¶ 8, quoting *State v. Venes,* 8th Dist. Cuyahoga No. 98682, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 20-21.

*Barnes, supra,* at ¶ 34.

{¶9} We are also mindful that an appellate court should not, however, substitute its judgment for that of the trial court because the trial court is in a better position to judge the defendant's chances of recidivism and determine the effects of the crime on the victim. *See*

*State v. Hill,* 3d Dist. Wyandot No. 16015006, 2015-Ohio-4724, at ¶ 11; *State v. Noble,* 3d Dist. Logan No. 8–14–06, 2014-Ohio-5485, ¶ 9, citing *State v. Watkins,* 3d Dist. Auglaize No. 2–04–08, 2004-Ohio-4809, ¶ 16, citing *State v. Jones,* 93 Ohio St. 3d 341, 400, 754 N.E.2d 1252 (20010) (abrogation recognized by *State v. Mathis,* 109 Ohio St. 3d 54, 2006-Ohio-855, 846 N.E.2d 1.)

B. LEGAL ANALYSIS

{¶10} The maximum penalty Appellant was facing for burglary, R.C. 2911.12(A)(3), was thirty-six months. R.C. 2929.14(A)(3)(b). Appellant concedes that the two-year prison sentence he received is statutorily authorized by law. However, Appellant argues that his prison sentence imposed by the trial court was not supported by the record in his case. Appellant's argument asserting his sentence is contrary to law focuses on (1) the strictly monetary type of harm his burglary offense caused; (2) the lesser sense of seriousness of his offense; and (3) Appellant's acceptance of responsibility and cooperation with law enforcement.

{¶11} Appellee responds that at sentencing, the trial court stated it considered the principles and purposes of sentencing, pursuant to R.C. 2929.11, and that it also considered the seriousness and recidivism factors

listed in R.C. 2929.12. Appellee also argues that there is nothing in the record indicating that the trial court neglected to follow the dictates of R.C. 2929.11 and R.C. 2929.12 and nothing to suggest that the imposition of the two-year sentence was clearly and convincingly contrary to law. We will jointly consider Appellant's arguments.

{¶12} " ' "[T]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, * * * or more than the minimum sentences." ' " *State v. Campell,* 4th Dist. Ross No. 19CA3683, 2020-Ohio-3146, at ¶17, quoting *State v. Davis,* 4th Dist. Highland No. 06CA21, 2007-Ohio-3944, at ¶ 41, quoting *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶ 100. "However, in exercising their discretion, trial courts must still consider R.C. 2929.11 and R.C. 2929.12 before imposing a sentence within the authorized statutory range." (Emphasis added.) *Id*., citing *Foste*r at ¶ 105. R.C. 2929.11 provides that a court "shall be guided by the overriding purposes of felony sentencing, which are to protect the public from future crime and to punish the offender using the minimum sanctions to accomplish those purposes without unnecessary" burdening of government resources. *State v. Watson* 4th Dist. Meigs Nos. 18CA20, 2019-Ohio-4385, at ¶ 12. " 'To

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.' " *Id.*, quoting R.C. 2929.11. "R.C. 2929.12 provides a non-exhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses." *Id.*, citing *State v. Sawyer,* 4th Dist. Meigs No. 16CA2, 2017-Ohio-1433, at ¶ 17.

{¶13} In support of his position that his sentence is contrary to law, Appellant first argues that he entered a business that was opened to the public and trespassed into a private area of the business to commit a theft offense. He argues that these actions likely caused less serious emotional harm to the victim as compared to the emotional harm caused a homeowner in his or her private residence. Next, Appellant concedes that legally his conduct constitutes burglary. However, he argues his conduct is not as serious as conduct that would normally constitute an offense of burglary. Finally, Appellant emphasizes that he accepted full responsibility by entering a plea of guilty and was cooperative with law enforcement. Despite the merits of these considerations, we are not persuaded that Appellant's sentence is contrary to law.

{¶14} Appellant points to the evidence in the record which demonstrates that at the time of sentencing he was 28 years of age and married (but separated) with two children. He had been temporarily laid off from his job at a car wash due to the coronavirus pandemic. Appellant acknowledged his prior felony history dating back to 2011 and prior misdemeanor convictions. Appellant also acknowledged having a severe drug problem. He acknowledged he had twice failed to successfully complete drug treatment at STAR when given that opportunity in conjunction with the prior felony convictions.

{¶15} Our review of these proceedings demonstrates that in this case, Appellant entered a plea of guilty to burglary on May 6, 2020. The transcript of the change of plea hearing demonstrates that the trial court began by confirming that Appellant had completed the 10th grade, was able to read and write English, and was not under the influence of alcohol, drugs, prescription medications or illegal substances which would cause him to be confused. The prosecutor explained the plea negotiations which Appellant's counsel confirmed. Appellant confirmed that he understood the plea agreement. The trial court explained the maximum penalty and fine and other statutorily required notifications.

{¶16} The trial court also explained Appellant's constitutional rights. Appellant confirmed his understanding of those and his satisfaction with his attorney. The trial court then gave the prosecutor and Appellant's attorney the opportunity to argue for Appellant's sentence. The court explained to Appellant that it was not bound by the arguments and that the sentence was solely in the court's discretion. Appellant further acknowledged his understanding of the above. The trial court accepted Appellant's change of plea and ordered a pre-sentence investigation report prior to sentencing.

{¶17} Appellant's counsel requested a recognizance bond while awaiting sentencing. Appellant indicated he would pursue job and drug rehabilitation opportunities if released. Appellant was completing a misdemeanor sentence. The trial court agreed to set a recognizance bond and Appellant would be released from jail after completing the misdemeanor sentence. Sentencing was scheduled for July 1, 2020.

{¶18} Appellant instead found himself back in court for sentencing on May 14, 2020, after violating the terms and conditions of his bond by testing positive for methamphetamine, amphetamine, and marijuana on May 12th. His attorney argued as follows:

> [O]bviously Mr. Layne is back in jail.* * * He had to finish a sentence for Judge Gabbert * * *. He says he was out, uh, less than 24 hours. While he was out he did try to contact FRD about getting in there. Um, but obviously there's the positive drug test. Um, upon entering back into jail, he feels that, um, the whole problem, uh in his life was, is an addiction to methamphetamine. Um, he hasn't been able to get into treatment with [sic] 24 hours that he was out. Um, he did do STAR previously, but it has been, I think he told me 10 years ago. Um, so he's just asking the Court to consider, you know, letting them do STAR again, or, um placing him on probation and letting him get into an inpatient facility. * * * [W]e're asking the Court to consider placing him on probation will [sic] STAR as a condition of probation.

{¶19} Appellant also asked the court as follows:

> I want to get myself into treatment or rehab, even if it's outpatient, I don't care just something. And I honestly think that I would be fine at that point because, uh, that's my only problem is it's just a drug addiction. I honestly believe that.

{¶20} The prosecutor declined to make a recommendation or argument as to sentencing. The trial court began by stating it had considered the record, the oral arguments, and the presentence investigation report prepared, along with considering the principles and purposes of sentencing of R.C. 2929.11 and balancing the seriousness and recidivism factors of 2929.12. The trial court further discussed Appellant's pre-sentence investigation report (PSI).

{¶21} According to the PSI, Appellant had a prior adult criminal history, which included breaking and entering, grand theft, and grand theft auto felony convictions from 2011. The court observed that he was placed on community control and ordered to complete STAR. Sometime later, Appellant violated community control and was sent back to STAR. Subsequent to that, due to another community control violation, community control was terminated and Appellant was given credit for time served. The trial court also discussed Appellant's record of misdemeanor convictions and observed that Appellant had a charge pending in Clermont County Municipal Court since 2018.

{¶22} In the underlying case, the trial court pointed out Appellant had given a false name with his bond supervisor and was convicted of obstructing official business. The court also pointed out Appellant admitted prior use of marijuana, cocaine, opiates, Oxycontin, methamphetamines, and alcohol. The court also noted during the underlying proceedings Appellant had twice violated the terms and conditions of his bond by testing positive for drugs including methamphetamine, marijuana, opiates, and fentanyl. The trial court also found Appellant had no genuine remorse for his actions.

{¶23} In concluding sentencing, the trial court expressed frustration and concern:

> I don't know what to do to try and shake your conscience * * *. I'm more in the mode of trying to save your life and I don't disagree with you that prison may not help you but I'm just trying to protect the public and save your life at this point. After due consideration, the Court finds that the defendant is no longer amenable to available community control options [sic] is therefore that the defendant shall serve a stated prison term of two years in the Ohio Department of Rehabilitation and Corrections.

{¶24} In light of the foregoing, we cannot conclude that Appellant has met his burden of demonstrating by clear and convincing evidence that the record does not support his two-year prison sentence for burglary of the laundromat. Nor can we conclude that the prison sentence is contrary to law. " ' "The weight to be given to any one sentencing factor is purely discretionary and rests with the trial court." ' " *State v. Franklin*, 8th Dist. Cuyahoga No. 107482, 2019-Ohio-3760, at ¶ 46, quoting *State v. Price*, 8th Dist. Cuyahoga No. 104341, 2017-Ohio533, ¶ 20, quoting *State v. Ongert,* 8th Dist. Cuyahoga No. 103208, 2016-Ohio-1543, ¶ 10, citing *State v. Torres,* 8th Dist. Cuyahoga No. 101769, 2015-Ohio-2038, ¶ 11. A lawful sentence " 'cannot be deemed contrary to law because a defendant disagrees with the trial court's discretion to individually weigh the sentencing factors. As long as the trial court considered all sentencing factors, the sentence is not contrary to law and the appellate inquiry ends.' " *Price*, *supra,* quoting

*Ongert* at ¶ 12. *See also State v. Bailey,* 8th Dist. Cuyahoga No. 107216, 2019-Ohio-1242, ¶ 15.

{¶25} In an effort to challenge the adequacy of the trial court's statutory considerations, Appellant is merely asking this court to substitute our judgment for that of the trial court, which, as stated, appellate courts are not permitted to do. *See Franklin, supra*, at ¶ 47, quoting *State v. McCoy,* 8th Dist. Cuyahoga No. 107029, 2019-Ohio-868, at ¶ 19 ("We cannot substitute our judgment for that of the sentencing judge."). As in *Franklin,* by asking this court to view the seriousness and scope of his conduct in light of the relevant mitigating factors, Appellant is encouraging this court to independently weigh the sentencing factors, which appellate courts are also not permitted to do. *See Franklin, supra*; *Ongert* at ¶ 14; *Price* at ¶ 20; *Bailey* at ¶ 15; *State v. Rahab,* 150 Ohio St.3d 152, 2017-Ohio-1401, 80 N.E.3d 431, ¶ 10, and *State v. Anderson*, 8th Dist. Cuyahoga No. 103490, 2016Ohio-3323, ¶ 9.

{¶26} Considering that the trial court considered the appropriate statutes, made the appropriate findings, and there was evidence in the record to support its findings, Appellant has failed to prove by clear and convincing evidence that his sentence is unsupported by the record or otherwise contrary

to law. We find no merit to Appellant's sole assignment of error. Accordingly, it is hereby overruled.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

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 Common Pleas Court 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. and Wilkin, J. concur in Judgment and Opinion.

For the Court,

____________________________________
Jason P. Smith
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.**