[Cite as *State v. Arbogast*, 2021-Ohio-484.]

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

State of Ohio,	:	Case No. 20CA1119
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
Janie Arbogast,	:	**RELEASED 2/05/2021**
Defendant-Appellant.	:	

APPEARANCES:

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

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

Hess, J.

{¶1} Janie Arbogast pleaded guilty to grand theft, and the Adams County Common Pleas Court sentenced her to 15 months in prison. In her sole assignment of error, Arbogast asserts that her sentence is not supported by the record and that the court should have imposed a term of community control. Arbogast asks us to review her sentence under the standard of review set forth in R.C. 2953.08(G)(2). However, she essentially asks this court to independently weigh the evidence in the record and substitute our judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11, which sets forth the purposes and principles of felony sentencing, and R.C. 2929.12, which addresses factors to be taken into account when imposing a sentence under R.C. 2929.11. R.C. 2953.08(G)(2) does not permit us

to conduct this type of review. Accordingly, we overrule the assignment of error and affirm the trial court's judgment.

I. FACTS AND PROCEDURAL HISTORY

{¶2} In October 2019, the Adams County grand jury indicted Arbogast on one count of illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A), a third-degree felony; one count of arson in violation of R.C. 2909.03(A)(1), a fourth-degree felony; and one count of grand theft in violation of R.C. 2913.02(A)(1), a fourth-degree felony. The trial court dismissed the illegal assembly count with prejudice on the state's motion, and Arbogast pleaded guilty to the grand theft count in exchange for dismissal of the arson count. During the change of plea hearing, Arbogast told the court that she had gotten "extremely high" on methamphetamine, taken a vehicle she believed belonged to a friend of hers, and when she learned it did not, she burned the vehicle.

{¶3} At the sentencing hearing, the trial court noted that Arbogast was 40 years old, had a ninth-grade education, and had been employed at Crossroads Dairy Bar. Defense counsel represented to the court that the business shut down due to the COVID-19 pandemic, and Arbogast was scheduled to start a new job at Driveline Merchandising the day after the sentencing hearing. The court noted that Arbogast had been enrolled in mental health services through Shawnee Mental Health for a year but wanted to discontinue services due to a disagreement with staff and had been referred to Family Recovery Services ("F.R.S.") in March 2020. Defense counsel told the court that Arbogast enrolled with F.R.S. in June 2020 for mental health and drug and alcohol counseling. Arbogast reported that she had not used alcohol since 2012, completed

drug and alcohol treatment at STAR in 2018, and had not used drugs since September 2019. Defense counsel represented that Arbogast remained drug free after her release from county jail in December 2019 and had checked in with the probation department as required. The trial court observed that Arbogast's criminal history spanned over 20 years and included four prior felony convictions and five misdemeanor convictions. She had community control revoked in 1999 and 2000 and was on community control in two cases when she committed the grand theft offense. The court noted her score on the Ohio Risk Assessment System indicated she was "at a moderate risk of re-offending without structured programming." The court found that she was not amenable to available community control sanctions, highlighting the fact that she had been placed on community control before but "the same thing keeps happening"—new violations with new victims. The court sentenced Arbogast to 15 months in the Ohio Department of Rehabilitation and Corrections and ordered her to pay $1,277 in restitution.

II. ASSIGNMENT OF ERROR

{¶4} Arbogast assigns the following error for our review: "The trial court erred by imposing a fifteen-month prison sentence that was not supported by the record."

III. LAW AND ANALYSIS

{¶5} In her sole assignment of error, Arbogast asserts that her sentence is not supported by the record. She maintains that her sentence is excessive and that the court should have imposed a term of community control instead of a prison term. Citing *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, she asserts that we must apply the standard of review in R.C. 2953.08(G)(2) and conclude that her sentence is invalid because the trial court "did not adequately consider the statutory

sentencing factors." Arbogast maintains that a prison term will not benefit her or society. She notes that she has some history of employment. She admits that she was on community control when she committed the grand theft offense but states that she "has never been to the Ohio Department of Corrections." Arbogast asserts that she has a severe drug problem, which likely caused her to commit the grand theft offense, and she has mental health issues. She claims that she needs treatment, not incarceration, and notes that she previously completed treatment at STAR, abstained from using drugs and alcohol after her release from jail in December 2019, and has "started the treatment process" by enrolling in F.R.S. Arbogast also notes that she checked in with the probation department while out on bond.

{¶6} R.C. 2953.08(G)(2) provides:

> 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.

{¶7} In *Marcum*, the Supreme Court of Ohio stated:

> We note that some sentences do not require the findings that R.C. 2953.08(G) specifically addresses. Nevertheless, 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. That is, 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. However, in *State v. Jones*, Slip Opinion No. 2020-Ohio-6729, at ¶ 27, the court recently clarified that the statements in *Marcum* at ¶ 23 are dicta. The court held that R.C. 2953.08(G)(2) does not permit an appellate court to review whether the record supports a sentence as a whole under R.C. 2929.11 and 2929.12. *Id.* at ¶ 30. The court stated:

> Nothing in R.C. 2953.08(G)(2) permits an appellate court to independently weigh the evidence in the record and substitute its judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and 2929.12. In particular, R.C. 2953.08(G)(2) does not permit an appellate court to conduct a freestanding inquiry like the independent sentence evaluation this court must conduct under R.C. 2929.05(A) when reviewing a death penalty-sentence. *See State v. Hundley*, ___ Ohio St.3d ___, 2020-Ohio-3775, ___ N.E.3d ___, ¶ 128 (recognizing that R.C. 2929.05(A) requires de novo review of findings and other issues within its scope).

Id. at ¶ 42.

{¶8} Arbogast essentially asks this court to independently weigh the evidence in the record and substitute our judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11, which sets forth the purposes and principles of felony sentencing, and R.C. 2929.12, which addresses factors to be taken into account when imposing a sentence under R.C. 2929.11. Based on *Jones*, we conclude that R.C. 2953.08(G)(2) does not permit us to conduct this type of review. We observe that in *State v. Patrick*, Slip Opinion No. 2020-Ohio-6803, ¶ 15, the Supreme Court of Ohio explained that "R.C. 2953.08 does not prescribe the sole right to appeal a criminal sentence." However, we are unaware of any other statutory provision

that permits the type of sentencing review Arbogast seeks. Accordingly, we overrule the sole assignment of error and affirm the trial court's judgment.

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 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.

Smith, P.J. & Wilkin, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Michael D. Hess, 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.