

[Cite as *State v. Jones*, 2004-Ohio-4519.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 20162

vs. : T.C. CASE NO. 02CR3103

DAVID E. JONES : (Criminal Appeal from  
Common Pleas Court)

Defendant-Appellant :

. . . . .

O P I N I O N

Rendered on the 27<sup>th</sup> day of August, 2004.

. . . . .

Mathias H. Heck, Jr., Pros. Attorney; Jennifer D. Brumby,  
Asst. Pros. Attorney, P.O. Box 972, Dayton, Ohio 45422,  
Atty. Reg. No. 0076440

Attorney for Plaintiff-Appellee

Arvin S. Miller, Asst. Public Defender, 117 S. Main Street,  
Suite 400, Dayton, Ohio 45422, Atty. Reg. No. 0016355

Attorney for Defendant-Appellant

. . . . .

GRADY, J.

{¶1} Defendant, David E. Jones, was convicted upon  
verdicts of guilty after a trial by jury of two counts of  
non-support, failure to provide support as established by a  
court order to another person whom the offender is obligated  
by law to support, in violation of R.C. 2919.21(B). The  
court subsequently sentenced Jones to two six month terms of

2

incarceration, to be served concurrently. Jones filed a timely notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶2} "THE TRIAL COURT ERRED IN SENTENCING MR. JONES TO PRISON ON TWO FELONY FIVE NON-SUPPORT CONVICTIONS."

{¶3} Defendant's two offenses are felonies of the fifth degree. R.C. 2919.21(G)(1). The six-month sentence the court imposed for each is within the available statutory range of prison terms for that class of offense. R.C. 2929.14(A)(5).

{¶4} Defendant is a first-offender. He was eligible for community control sanctions in lieu of imprisonment. He argues that the trial court erred when it instead imposed terms of imprisonment absent the findings required by R.C. 2929.13(B)(1). Defendant relies on our holding in *State v. Cochran* (June 1, 2001), Montgomery App. No. 18424.

{¶5} A term of imprisonment is mandated by R.C. 2929.13(B)(2)(a) when, after considering the seriousness and recidivism factors in R.C. 2929.12, the court makes three findings. First, that a prison term is consistent with the purposes and principles of sentencing set forth in R.C. 2929.11. Second, that the offender is not amenable to available community control sanctions. And, third, that one or more of the findings described in R.C. 2929.12(B)(1)(a)-(i) apply to the offender. In *Cochran*, we held that imposition of a prison term is nevertheless discretionary when the court makes the findings in the first and second of

those categories but not the third

{¶6} R.C. 2929.19(B)(2)(a) imposes a further requirement when a term of imprisonment, whether mandatory or discretionary, is imposed. That section requires the court then to state the reasons for the findings it makes in the first and third of the three R.C. 2929.13(B)(2)(a) categories discussed above. The reasons requirement doesn't apply to the finding that the defendant is not amendable to community control.

{¶7} In *State v. Foster* (December 6, 2002), Montgomery App. No. 19197, we held that the R.C. 2929.19(B)(2)(a) reasons requirement doesn't apply to the R.C. 2929.13(B)(1)(a)-(i) findings when the court makes none, and as a result a prison term is then discretionary per *Cochran*. In *Foster*, the court made no findings of that kind. However, it did make findings in the other two categories: that a prison term is consistent with the purposes and principles of sentencing in R.C. 2929.11, and that the defendant was not amendable to community control. Further the trial court in *Foster* stated its reasons for the findings it made concerning R.C. 2929.11, as R.C. 2929.19(B)(2)(a) requires.

{¶8} R.C.2929.11 states, in pertinent part:

{¶9} "(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. 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 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.

{¶10} "(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, 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."

{¶11} A sentencing court is required to pronounce any of the findings and reasons it is required to make and state at the sentencing hearing. *State v. Comer*, 99 Ohio St. 3d 463, 2003-Ohio-4165. Here, the court made the following pronouncements:

{¶12} "THE COURT: \* \* \* My problem is that you have made up your mind that you're not-this is not your child and you're not going to pay child support. That's the bottom line of where you're coming from on this thing. And all the way along (indiscernible-background noise) courtroom was where you were in. And I remember that when I walked in at that period of time.

{¶13} "The other thing I remember is during this period of time you have not gone out to get a job. You live with

your aunt; she pays your expenses. It's true you go to food banks and you pick up your food there, because you don't have a job and you're not going to get a job.

{¶14} "And the situation I see is we got to call a stop to it. And I told her that to your lawyer, you know. Your lawyer told you what I've said, I'm sure. The fact that, you know. I'm going to put a stop to it. And number one, the only thing you're doing is nothing. You're not supporting your child, and you've got this continuing battle going on.

{¶15} "So at this period of time the only way I can get your attention is consider - that I tell you that I consider this a serious offense. And you're \$15, 192 in arrears in child support.

{¶16} "And this period of time, considering the seriousness factors involved in this under the Ohio Revised Code and considering the fact that I do not think you're amenable to community control sanctions at this time, the Court will sentence you to six months at the Ohio Department of Rehabilitation and Correction. It's imposing a fine of \$2,500. It's suspending the fine because of your indigency, and it's ordered that you make restitution in this matter. This is a 5th degree felony. You have no prior record in this matter. You have a right to, after you get into prison, to file a Notice of Appeal to appeal the sentence." (Sentencing Transcript, p. 5-6).

{¶17} The court made none of the R.C. 292913(B)(1)(a) -

(i) findings. Therefore, per *Cochran* the court retained discretion to impose a prison term if it made the other two findings required by R.C. 2929.13(B)(2)(a): that the defendant isn't amenable to community control and that a prison term is consistent with the purposes and principles of sentencing set out in R.C. 2929.11. Additionally, with respect to the latter finding, the court was required to state its reasons for making the finding. R.C. 2929.19(B)(2)(a).

{¶18} The court expressly found that Defendant Jones is not amenable to community control sanctions. However, the court made no reference to the purposes and principles of sentencing set out in R.C. 2929.11, its findings in that regard, or any reason for its findings. Therefore, the court was not authorized to impose a prison term, as it did.

{¶19} The purpose of the several statutory findings and reasons requirements imposed by the adoption of Am. Sub. S.B. No. 2 in 1995 was to achieve more uniformity and fairness in felony sentencing statewide. To that end, the courts are required to perform these exercises as a regimen. Because of that, we are loath to adopt a more relaxed rule of substantial compliance, by which the sentencing court's findings and reasons may be gleaned from its pronouncements. They may be strong, and they may be sound, and here we do not question whether they were. However, they must also be stated by the court, and here they were not.

{¶20} The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

{¶21} "THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY OF THE AFFIRMATIVE DEFENSE TO THE (SIC) ON SUPPORT CHARGES."

{¶22} R.C. 2919.21(D) provides an affirmative offense to a charge of non-support, stating:

{¶23} "It is an affirmative defense to a charge of failure to provide adequate support under division (A) of this section or a charge of failure to provide support established by a court order under division (B) of this section that the accused was unable to provide adequate support or the established support but did provide the support that was within the accused's ability and means."

{¶24} Defendant requested a jury instruction on the R.C. 2929.21(D) affirmative defense. The trial court refused to give the instruction, citing the insufficiency of the evidence required to prove it.

{¶25} An affirmative defense operates to relieve an accused of criminal liability. "The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, is upon the accused." R.C. 2901.05(A).

{¶26} Defendant Jones argues that the trial court abused its discretion when it refused to instruct the jury on the R.C. 2929.21(D) affirmative defense because it was warranted by the evidence in two respects. First, the evidence

demonstrates that he is destitute. Second, the evidence demonstrates that his health condition leaves him unable to work.

{¶27} There is evidence that Defendant is destitute. There is also evidence, in the form of Defendant's own testimony, that a claimed gastrointestinal infection prevents him from working. The State argues that Defendant's claim is insufficient. It might be rejected by a jury as self-serving and inadequate, but that is not a basis to deny the instruction requested.

{¶28} Nevertheless, we agree with the trial court that, on this record, the instruction was not warranted. By its terms, R.C. 2929.21(D) requires some evidence from which the jury could reasonably find that Defendant "did provide the support that was within the accused's ability and means." That requires some evidence that a modicum of support was provided. Here, none was, at all, of any kind, at least within the relevant period of time. Therefore, no evidence on that point having been put before the jury, Defendant was not entitled to the instruction he requested.

{¶29} This may seem harsh. It denies an obligor who is so utterly and profoundly destitute that he can provide no support of any kind a benefit that's extended to one who is sufficiently less destitute, if only a little, and can as a result provide some modicum of support. However, an obligor can if he is destitute seek relief from the court ordered support obligation he is accused of failing to pay, avoiding

potential criminal liability for not paying support. Defendant failed to do that. Therefore, he is not unfairly denied an opportunity to rely on his destitution as grounds for relief.

{¶30} The second assignment of error is overruled.

{¶31} Having sustained the first assignment of error, we will vacate Defendant-Appellant's sentence and remand the matter for resentencing.

FAIN, P.J. and BROGAN, J., concur.

Copies mailed to:

Jennifer D. Brumby, Esq.  
Arvin S. Miller, Esq.  
Hon. G. Jack Davis