

[Cite as *State v. Voisard*, 2004-Ohio-4675.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 20265

vs. : T.C. CASE NO. 03CR2092

ANDREW J. VOISARD : (Criminal Appeal from
Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 3rd day of September, 2004.

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GRADY, J.

Defendant, Andrew Voisard, appeals from his conviction
and sentence for forgery.

{¶1} On July 22, 2003, the Montgomery County grand jury
indicted Defendant in Case No. 2003-CR-2092 on three counts
of forgery in violation of R.C. 2913.31(A)(3). On August

21, 2003, a second indictment was returned under the same case number charging Defendant with two additional counts of forgery per R.C. 2913.31(A)(3). On October 1, 2003, Defendant entered pleas of guilty to the first count of forgery in each indictment. In exchange, the State dismissed the remaining charges. The trial court sentenced Defendant to concurrent prison terms of eleven months on each count.

{¶2} Defendant has timely appealed to this court from his conviction and sentence. He challenges only his sentence.

ASSIGNMENT OF ERROR

{¶3} "APPELLANT'S SENTENCE WAS CONTRARY TO THE OVERRIDING PURPOSES OF FELONY SENTENCING."

{¶4} Defendant argues that his sentence to a term of imprisonment is contrary to law because it contravenes the purposes and principles of felony sentencing. This is so, Defendant claims, because prior to his arrest and incarceration he was working full time which would enable him to make restitution to the victim of his offense. A term of imprisonment, on the other hand, hampers his ability to make restitution and is contrary to the purposes and principles of felony sentencing.

{¶5} When sentencing a felony offender, the trial court must be guided by the overriding purposes of felony sentencing which are (1) to protect the public from future crime by the offender and (2) to punish the offender. R.C.

2929.11(A). To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender from future crime, rehabilitating the offender, and making restitution to the victim of the offense. *Id.* Unless otherwise required by R.C. 2929.13 or 2929.14, a court has broad discretion to determine the most effective way to comply with the purposes and principles of sentencing set out in R.C. 2929.11. See: R.C. 2929.12(A). In exercising that discretion the court must consider the seriousness and recidivism factors in R.C. 2929.12. *Id.*

{¶6} At the sentencing hearing the trial court stated that it had considered the presentence investigation report and the required statutory sentencing factors, and was incorporating the findings in the presentence report into its sentencing decision.

{¶7} Under certain circumstances a prison term is mandatory for a felony of the fourth or fifth degree. In that regard R.C. 2929.13(B)(2)(a) provides:

{¶8} "If the court makes a finding described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a prison term is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code and finds that the offender is not amenable to an available community control sanction, the court shall impose a prison term upon the offender."

{¶9} The trial court found that a prison term was mandatory in this case. In that regard this record demonstrates that at the time Defendant committed this offense he was already under community control sanctions in two previous cases, 2001-CR-3000 and 2001-CR-3420, which the trial court administratively terminated at the time of sentencing in this case. Thus, this record supports the finding in R.C. 2929.13(B)(1)(h), which is a matter of objective fact.

{¶10} Moreover, after weighing the seriousness and recidivism factors in R.C. 2929.12, the court found that a prison term is consistent with the purposes and principles of felony sentencing set out in R.C. 2929.11(A), and that Defendant is not amenable to any community control sanctions. The record in this case supports those findings. A review of the factors in R.C. 2929.12(B) which make an offense "more serious" reveals that two apply here: the victim of the offense suffered serious economic harm, (B)(2), and Defendant's relationship with the victim facilitated the offense, (B)(6). In that regard we note that Defendant took advantage of his friendship with his girlfriend in order to gain access to her mother's home. Once inside, Defendant stole checks and used them to withdraw an estimated \$8,500 from the mother's bank account. The only factor showing that Defendant's offense was "less serious" is that he did not cause physical harm. R.C. 2929.12(C)(3).

{¶11} As for the factors in R.C. 2929.12(D) demonstrating that recidivism is "likely," four apply here: at the time of committing this offense Defendant was already under community control sanctions in two previous cases, (D)(1), Defendant has a history of convictions for theft offenses, (D)(2), Defendant has not responded favorably to sanctions previously imposed, (D)(3), and Defendant shows no genuine remorse for the offense, (D)(5). The only factor showing that recidivism is "not likely" is that prior to committing this offense Defendant had not been adjudicated a delinquent child.

{¶12} The record in this case, which demonstrates the existence of one of the factors in R.C. 2929.13(B)(1), and that Defendant's conduct is a more serious form of the offense and recidivism is likely, supports the trial court's findings that a prison term is consistent with the purposes and principles of felony sentencing, and that Defendant is not amenable to any community control sanctions. Thus, the trial court made all of the necessary findings in R.C. 2929.13(B)(2)(a) which would make imposition of a prison term mandatory. In imposing more than the minimum authorized sentence for this offense, the trial court also made the required finding that the shortest prison term would not adequately protect the public from future crime by Defendant. R.C. 2929.14(B)(2).

{¶13} However, R.C. 2929.19(B)(2)(a) requires that when the court imposes a term of imprisonment for a fourth or

fifth degree felony that is subject to the sentencing provisions in R.C. 2929.13(B), which is the case here, the court must give its reasons for imposing the prison term. Concerning the findings in R.C. 2929.13(B)(2)(a) that a court must make in order for a prison term to be mandatory for a fourth or fifth degree felony, the requirement that one of the factors listed in R.C. 2929.13(B)(1)(a)-(i) apply to Defendant is satisfied because Defendant committed this offense while under a community control sanction. R.C. 2929.13(B)(1)(h). That finding is of an objective, verifiable fact for which the court need not give any "reason" per R.C. 2929.19(B)(2).

{¶14} The other two findings required by R.C. 2929.13(B)(2)(a), that a prison term is consistent with the purposes and principles of felony sentencing set out in R.C. 2929.11, and that the offender is not amenable to any community control sanctions, are subjective judgments on the part of the trial court. If the court makes the former finding, it must give reasons supporting that finding. R.C. 2929.19(B)(2)(a). The court must state why imprisonment is consistent with the purposes and principles of felony sentencing. *State v. Foster*, 150 Ohio App.3d 669, 2002-Ohio-6783. Moreover, the court must state its required findings and its reasons supporting those findings, when reasons are required by R.C. 2929.19(B)(2), at the sentencing hearing. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165.

{¶15} The trial court in this case did not give any

explicit reasons for the sentence it imposed or the findings that it made. The finding the court made at the sentencing hearing do not satisfy its duty to give reasons supporting those findings because they are separate and distinct duties. *Comer, supra*. Moreover, the court's general statement made at the sentencing hearing, "There's a history, a pattern here, that I simply cannot overlook in making my determination regarding sentencing," is insufficient to meet its burden of giving reasons that support the specific findings that it made. Lastly, we note that the court's statement that it was incorporating the findings in the presentence report into its sentencing decision does not satisfy its obligation to give its own reasons for the findings that it makes, where reasons are required by R.C. 2929.19(B)(2).

{¶16} R.C. 2953.08(G)(1) requires an appellate court, when the sentencing court has failed to make statutorily required findings, to "remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings." The section doesn't speak to a failure to state the reasons supporting the court's findings which are mandated by R.C. 2929.19(B). However, because a sentence lacking required findings and/or reasons is one that is "contrary to law," which is the effect of the holdings in *Comer and State v. Edmonson* (1999), 86 Ohio St.3d 324, R.C. 2953.08(G)(2)(b) requires us to "vacate the sentence and remand the matter to the sentencing court for

resentencing.”

{¶17} The assignment of error is sustained. The sentence of the trial court will be reversed and vacated, and this matter remanded for resentencing consistent with this opinion.

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

Copies mailed to:

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Hon. Michael L. Tucker