[Cite as *State v. Osborne*, 2015-Ohio-3058.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2014-CA-107
	:	
v.	:	T.C. NO. 14CR283
	:	
JEREME S. OSBORNE	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the ___31st___ day of ____July___, 2015.

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DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Jereme S. Osborne, filed September 26, 2014. Osborne appeals from his September 4, 2014 Judgment Entry of Conviction, following a guilty plea, to one count of possession of cocaine, in violation of R.C. 2925.11(A), a felony of the fifth degree. The trial court imposed a one-year term of imprisonment.

{¶ 2} At sentencing, the defense counsel advised the court that "my client came back as moderate on the risk assessment," that he accepted responsibility for his actions, and that while he does have a felony conviction from 2005 and a misdemeanor offense from 2007, he has remained out of trouble for the last seven years. Counsel stated that Osborne has a substance abuse problem, and that Osborne has never received substance abuse treatment. Defense counsel requested that Osborne be placed in a drug treatment program as part of a community control sanction. Osborne advised the court as follows: "* * * There is no excuse for my behavior. I am here today to accept full responsibility. I'd like to apologize to the Court and more important I'd like to apologize to my family. I am sorry for putting you through this. You deserve better than that, and I am sorry. And that will be all."

{¶ 3} The court indicated as follows: "The defendant does have a prior conviction for possession of crack cocaine. He served a six-month prison sentence for that offense. The court is going to order that the defendant be sentenced to one year in the Ohio State Penitentiary, three years optional post-release control."

{¶ 4} Osborne's Judgment Entry of Conviction provides in part as follows:

> * * *
>
> Upon review of the pre-sentence investigation report, the Court found that it has discretion, pursuant to Ohio Revised Code Section 2929.13(B)(1)(x), to impose a prison term upon the defendant because, at the time of the offense, the defendant previously had served a prison term.
>
> The court considered the record, oral statements of counsel, the defendant's statement, and principles and purposes of sentencing under

Ohio Revised Code Section 2929.11, and then balanced the seriousness and recidivism factors under Ohio Revised Code Section 2929.12.

* * *

{¶ 5} Osborne asserts the following assignment of error:

THE TRIAL COURT'S SENTENCE IS CONTRARY TO LAW AND A LESSER SENTENCE IS COMMENSURATE WITH AND WOULD NOT DEMEAN THE SERIOUSNESS OF THE OFFENSE.

{¶ 6} Osborne asserts that the trial court "ignored the requirements of Ohio Revised Code Section 2929.11 and 2929.12. In doing so, the [t]rial [c]ourt's sentence was contrary to law."

{¶ 7} As this Court previously noted:

In *State v. Rodefer*, 2013-Ohio-5759, 5 N.E.3d 1069 (2d Dist.), we held that we would no longer use an abuse-of-discretion standard in reviewing a felony sentence, but would apply the standard of review set forth in R.C. 2953.08(G)(2).[] Under this statute, an appellate court may increase, reduce, or modify a sentence, or it may vacate the sentence and remand for resentencing, only if it "clearly and convincingly" finds either (1) that the record does not support certain specified findings or (2) that the sentence imposed is contrary to law. *Rodeffer* stated that "[a]lthough [*State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124] no longer provides the framework for reviewing felony sentences, it does provide * * * adequate guidance for determining whether a sentence is clearly and convincingly contrary to law. * * * According to *Kalish*, a

> sentence is not contrary to law when the trial court imposes a sentence within the statutory range, after expressly stating that it had considered the purposes and principles of sentencing set forth in R.C. 2929.11, as well as the factors in R .C. 2929.12." (Citations omitted.) *Rodeffer* at ¶ 32.

State v. Battle, 2d Dist. Clark No. 2014 CA 5, 2014-Ohio-4502, ¶ 7.

{¶ 8} R.C. 2929.13(B)(1)(b)(x) provides that the "court has discretion to impose a prison term upon an offender who * * * pleads guilty to a felony * * * of the fifth degree that is not an offense of violence * * * if * * * the offender previously has served, a prison term." Where prison is imposed for a felony of the fifth degree, the available prison terms are "six, seven, eight, nine ten, eleven, or twelve months." R.C. 2929.14(A)(5).

{¶ 9} As this Court further noted in *Battle*:

> "The trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum or more than minimum sentences." *State v. King*, 2013-Ohio-2021, 992 N.E.2d 491, ¶ 45 (2d Dist.). However, in exercising its discretion, a trial court must consider the statutory policies that apply to every felony offense, including those set out in R.C. 2929.11 and R.C. 2929.12. *State v. Leopard*, 194 Ohio App.3d 500, 2011-Ohio-3864, 957 N.E.2d 55, ¶ 11 (2d Dist.), citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶ 38.
>
> R.C. 2929.11 requires trial courts to be guided by the overriding principles of felony sentencing. Those purposes are "to protect the public from future crime by the offender and others and to punish the offender

using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." R.C. 2929.11(A). The court must "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.* R.C. 2929.11(B) further provides that "[a] sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing * * *, 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. 2929.12(B) sets forth nine factors indicating an offender's conduct is more serious than conduct normally constituting the offense; R.C. 2929.12(C) sets forth four factors indicating that an offender's conduct is less serious. R.C. 2929.12(D) and (E) each list five factors that trial courts are to consider regarding the offender's likelihood of committing future crimes. Finally, R.C. 2929.12(F) requires the sentencing court to consider the offender's military service record and "whether the offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces of the United States and that was a contributing factor in the offender's commission of the offense or offenses."

Battle at ¶ 9-11.

{¶ 10} As this Court noted in *Battle*, in "*State v. Miller*, 2d Dist. Clark No.

09-CA-28, 2010-Ohio-2138, we held that a defendant's sentence was not contrary to law when the trial court expressly stated in its sentencing entry that it had considered R.C. 2929.11 and R.C. 2929.12, but did not mention those statutes at the sentencing hearing." *Battle* at ¶ 15.

{¶ 11} Osborne's sentence is within the authorized range, and the trial court indicated in its Judgment Entry of Conviction that it considered R.C. 2929.11 and R.C. 2929.12 when imposing sentence. Further, the pre-sentence investigation report and Osborne's record support the court's considerations. While Osborne's "sentence constituted a maximum sentence, we cannot conclude that it was clearly and convincingly unsupported by the record or contrary to law or constituted an abuse of discretion." *Battle* at ¶ 16. Accordingly, Osborne's sole assignment of error is overruled. The judgment of the trial court is affirmed.

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WELBAUM, J., concurs.

FROELICH, P.J., dissenting:

{¶ 12} The legislature, via H.B. 86, decided that individuals convicted of possession of small amounts of drugs should be sentenced to community control and, where available, receive drug treatment so as to lessen the chances of their reoffending and to increase their opportunities to become contributing members of society. *See* Am.Sub.H.B. 86; Ohio Legislative Serv. Comm., Fiscal Note & Local Impact Statement to Am.Sub.H.B. 86, at 8-9 (Sept. 30, 2011), noting that H.B. 86 incorporated several sentencing reform initiatives from a study and report of the Council of State Governments' Justice Reinvestment; Ohio Legislative Serv. Comm., Final Analysis for Am.Sub.H.B. 86,

at 4, 34-40.

{¶ 13} H.B. 86 "provides, in certain felony cases, a preference for one or more community control sanctions rather than the imposition of a prison sentence. * * * The bill's numerous criminal sentencing changes are generally designed to reduce the size of the state's prison population and related institutional operating expenses by: (1) diverting otherwise prison-bound nonviolent offenders into less expensive community-based alternative sanctions, and (2) reducing the lengths of stay for certain offenders that are sentenced to a prison term from what those lengths of stay might otherwise have been under current law and practice." Ohio Legislative Service Commission, Fiscal Note & Local Impact Statement to Am.Sub.H.B. 86, at 2-3 (Sept. 30, 2011). *See also State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 20 ("The General Assembly * * * enacted Am.Sub.H.B. No. 86 ("H.B. 86") * * * with a legislative purpose to reduce the state's prison population and to save the associated costs of incarceration by diverting certain offenders from prison and by shortening the terms of other offenders sentenced to prison.").

{¶ 14} Appellant, age 27, had one prior felony, possession of crack cocaine nine years ago, and was sentenced to six months imprisonment. He is employed part-time on an on-call basis, still never had drug treatment, and pled guilty to having 0.3 grams of cocaine in his pocket for which he paid $10 while drunk at a bar.

{¶ 15} The judgment that he serve the maximum penalty of 12 months in prison will cost the taxpayers tens of thousands of dollars,[1] and all but guarantees that he will never

[1] As of July 2014, the average annual cost to incarcerate an inmate in an Ohio prison was $22,836. Ohio Legislative Serv. Comm., Ohio Facts 2014, *Prison Population Continues to Hover Around 50,000*, http://www.lsc.ohio.gov/fiscal/ohiofacts/sept2012/

receive treatment or be a contributing member of society. The law does not require an affirmance merely because the judgment entry contains the copy-and-paste mantra that the trial court considered the statutory purposes and principles of sentencing. The common sense medical axiom primum non nocere, "first, do no harm," is certainly implicitly incorporated in those purposes and principles.[2]

{¶ 16} R.C. 2929.13(B)(1)(a)'s mandate for community control does not apply since Appellant was previously convicted of a felony. R.C. 2929.13(B)(1)(a)(i). Rather, R.C. 2929.13(B)(1)(b) grants the trial court "discretion to impose a prison term" upon Appellant, since he had previously served a prison term. R.C. 2929.13(B)(1)(b)(x).

{¶ 17} I would clearly and convincingly find that the record does not support the trial court's findings under R.C. 2929.13(B) and that the trial court abused its discretion in sentencing Appellant to the maximum 12 months in prison. To the extent this latter conclusion appears inconsistent with R.C. 2953.08's language that the standard of review is not abuse of discretion, I would find the specific granting of discretion in R.C. 2929.13(B)(1)(b)(x), which was passed after R.C. 2953.08, prevails over the provisions of R.C. 2953.08, a general statute having to do with "[a]ppeals based on felony sentencing guidelines."

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Copies mailed to:

Ryan A. Saunders
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justice&publicsafety.pdf (accessed July 9, 2015).

[2] *See, e.g.,* Judge Richard Nygaard, *Crime, Pain, and Punishment: A Skeptic's View*, 102 Dick.L.Rev. 355 (1998), and Judge Richard Nygaard, *Is Prison an Appropriate Response to Crime?*, 40 St.Louis U.L.J. 677 (1996).