[Cite as *State v. Matthews*, 2015-Ohio-3388.]

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26405
	:	
v.	:	Trial Court Case No. 2009-CR-4100
	:	
LEONARD E. MATTHEWS	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 21st day of August, 2015.

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FAIN, J.

{¶ 1} Defendant-appellant Leonard Matthews appeals from that part of the

judgment of the trial court that disapproved of his placement in a program for shock incarceration or an intensive program prison. He contends that the trial court erred by failing to give its reasons for disapproving shock incarceration and intensive program prison at sentencing.

{¶ 2} We conclude that the trial court did fail to make a finding that gave its reasons for its recommendation or disapproval of Matthews's placement in a program of shock incarceration or an intensive program prison, as required by R.C. 2929.19(D). Therefore, that part of Matthews's sentence is Reversed; the judgment of the trial court is Affirmed in all other respects; and this cause is Remanded for resentencing.

I. Course of Proceedings

{¶ 3} In 2009, Matthews was indicted on nine felony charges and two misdemeanors. In 2010, Matthews agreed to plead guilty to one count of Kidnapping, a felony of the first degree, and all other charges were dismissed. Initially, the trial court adopted a plea agreement to sentence Matthews to community control sanctions, but he was allowed to vacate his plea when it was discovered that he was ineligible for community control based on a prior Burglary conviction. Matthews then agreed to plead guilty to one count of Abduction, a felony of the third degree, and the court sentenced him to five years of community control sanctions. Subsequently, Matthews admitted to two violations of his community control sanctions by absconding and by failing to report to his probation officer. In 2011, after the first violation, the trial court continued the community control sanctions, but added a requirement to successfully complete a program at MonDay, a community based correctional facility. In 2014, after the second violation, the trial court revoked his community control sanctions, and sentenced Matthews to serve

thirty months in prison.

{¶ 4} At the sentencing hearing, the trial court made the following statement:

> After reviewing Mr. Matthews' criminal history, the PSI and the facts and circumstances of the offense and any victim impact statement and for the reasons the court imposed the prison sentence, the Court expressly disapproves of his placement in a program of shock incarceration and intensive program prison finding those programs are inconsistent with the purposes, the principles of sentencing and the seriousness and recidivism factors of the Code.

Transcript at pg. 32.

{¶ 5} The judgment entry, Dkt. 182, states as follows:

> After reviewing Defendant's criminal history, the pre-sentence investigation, the facts and circumstances of the offense and any victim impact statement, the Court **DISAPPROVES** Defendant's placement in a program of shock incarceration under Section 5120.031 of the Revised Code or in the intensive program prison under Section 5120.032 of the Revised Code, for the following reasons: **REASONS STATED ON THE RECORD.**

II. The Trial Court Erred by Failing to Make Findings Setting Forth its Reasons for Disapproving Shock Incarceration and Intensive Program Prison

{¶ 6} Matthews's sole assignment of error is as follows:

> THE TRIAL COURT ERRED BY DISAPPROVING SHOCK PROBATION AND INTENSIVE PROGRAM PRISON WITHOUT

PROVIDING A SUFFICIENT FACTUAL BASIS FOR THE DISAPPROVAL

{¶ 7} Matthews contends that the trial court erred in failing to give sufficient, particularized reasons for disapproving placement in a program of shock incarceration or intensive program prison. The State urges us to reverse our established precedent and follow decisions from the Fifth, Eleventh and Twelfth District Courts of Appeals, which have allegedly held that specific findings are not required if reasons for the disapproval of shock incarceration or intensive program prison can be found from the record as a whole. Based upon the express language of the statute, we will continue to follow our own precedent, which has consistently applied the provision of the statute requiring findings that set forth the trial court's reasons for disapproval.

{¶ 8} The sentencing statute, R.C. 2929.19(D) provides as follows:

> The sentencing court, pursuant to division (I)(1) of section 2929.14 of the Revised Code, may recommend placement of the offender in a program of shock incarceration under section 5120.031 of the Revised Code or an intensive program prison under section 5120.032 of the Revised Code, disapprove placement of the offender in a program or prison of that nature, or make no recommendation. If the court recommends or disapproves placement, *it shall make a finding that gives its reasons for its recommendation or disapproval*. (Emphasis added).

{¶ 9} In *State v. Howard,* 190 Ohio App. 3d 734, 2010-Ohio-5283, 944 N.E. 2d 258 (2d Dist.), we acknowledged that the statute does not require the trial court to address the issue of shock incarceration or an intensive program prison during the sentencing hearing, but if the trial court makes a recommendation, the court is required to

"make a finding that gives its reasons for its recommendation or disapproval." *Id.* at ¶ 33. The trial court in *Howard* failed to make any findings giving its reasons for disapproval when imposing sentence, other than stating that it had considered the "purposes and principles of sentencing in R.C. 2929.11 and the seriousness and recidivism factors of R.C. 2929.12." *Id.* at ¶ 36. Therefore, we reversed the judgment and remanded the cause for resentencing. We have subsequently followed this precedent in several cases. In *State v. Allender*, 2d Dist. Montgomery No. 24864, 2012-Ohio-2963, we reversed the judgment and remanded the cause for resentencing when the trial court had simply stated in its judgment entry that it had reviewed the criminal history of the defendant, the pre-sentence investigation, the facts and circumstances of the offense, and the victim impact statement. *Id*. at ¶ 14.

{¶ 10} In *State v Blessing*, 2d Dist. Clark No. 2011 CA 56, 2013-Ohio-392, we remanded the cause for resentencing when the trial court simply stated, "in the interest of justice and truth in sentencing, it is hereby Ordered that the defendant serve her entire stated prison term in the Ohio State Penitentiary. The Ohio Department of Corrections shall not place this defendant in an IPP (Intensive Prison Program), transitional control, a half-way house, or any other program or institution unless this Court upon reconsideration, expressly and in writing authorizes the same." *Id.* at ¶ 45. We concluded that:

> "R.C. 2929.19(D) requires more than that reasons can be found in the record to support the trial court's disapproval of the programs; the statute requires that the trial court, if it shall make a recommendation, must 'make a finding that gives its reasons for its recommendation or

> disapproval.' This statutory requirement, imposed on the trial court, is not satisfied by an appellate court finding in the record reasons that the trial court could have given, or might have given, for disapproval." *State v. Allender,* 2d Dist. Montgomery No. 24864, 2012-Ohio-2963, ¶ 22. "The statute requires that the trial court provide its reasons for disapproving shock incarceration or the intensive program prison, not merely that the record supports reasons for disapproval that the trial court might have had, but did not express." *Id.* at ¶ 26.

State v. Blessing, at ¶ 47

{¶ 11} In *State v. Berry*, 2d Dist. Greene No. 2013-CA-34, 2014-Ohio-132, we reversed a judgment disapproving intensive program prison when the trial court did not discuss it at the sentencing hearing, and the sentencing entry simply stated, "IPP ~~is approved~~ (not approved), sentence given is appropriate."[1] We concluded that this statement was not a factual finding and commented, "[t]here may be facts in the record justifying disapproval of IPP, but the trial court did not refer to them when deciding to disapprove Berry for placement in IPP. Accordingly, the judgment of the trial court will be reversed, insofar as the designation of IPP status is concerned, and will be remanded to the trial court for further proceedings on this issue." *Id*. at ¶ 49.

{¶ 12} In *State v. Swayne*, 4th Dist. Adams Nos. 12CA952, 12 CA953, 12CA 954, 2013-Ohio-3747, the Fourth District followed our precedent, when the trial court failed to make any oral or written findings to identify reasons for its disapproval of an intensive program prison, even though the sentencing transcript showed factual support based on

[1] On the entry, the trial court crossed off "is approved" and circled "not approved."

the defendant's drug-induced crime spree, which violated his community control sanctions. Several other cases have distinguished our precedent in cases where the defendant was ineligible for shock incarceration or intensive program prison, as a result of which findings for disapproval were unnecessary. *See e.g*. *State v. Snyder*, 3d Dist. Seneca No. 13-12-38, 2013-Ohio-2046.

{¶ 13} In *Allender*, *supra*, we reviewed and rejected as distinguishable or inapplicable the allegedly conflicting decisions of the Fifth, Eleventh and Twelfth District Court of Appeals. *State v. Jackson*, 5th Dist. Knox Nos. 05 CA 46, 05 CA 47, 2006-Ohio-3994; *State v. Tucker*, 12th Dist. Butler No. CA2011-04-067, 2012-Ohio-50; *State v. Lowery*, 11th Dist. Trumbull No. 2007-T-0039, 2007-Ohio-6734. *See Allender* at ¶ 23-25. The only other case cited by the State as conflicting with our precedent is *State v. Daniels*, 12th Dist. Fayette No. CA2014-05-010, 2015-Ohio-1346. The court in *Daniels* followed the reasoning in *Tucker,* which did not find any error when the court recited numerous facts on the record for its sentencing decision. As we stated in *Allender*, the facts are distinguishable when the trial court refers to various general principles that it considered, and to various sources of information that it reviewed, but does not make any specific factual findings to explain its disapproval of shock incarceration or the intensive program prison. "[T]he statute requires that the trial court give its reasons for disapproval, not merely that reasons for disapproval exist." *Allender* at ¶ 23

{¶ 14} In the case before us, there is no dispute that Matthews was eligible for shock incarceration or intensive program prison, and the trial court failed to make findings identifying its reasons for disapproving placement in a program of shock incarceration or intensive program prison. The trial court's summary conclusion that the disapproval is

based on the court's review of Mr. Matthews' criminal history, the PSI and the facts and circumstances of the offense and any victim impact statement and for the reasons the court imposed the prison sentence, does not constitute a "finding that gives its reasons for * * * disapproval" within the contemplation of R.C. 2929.19(D). Without that finding, we conclude that the judgment of the trial court does not satisfy the requirement of the statute. Matthews's sole assignment of error is sustained.

III. Conclusion

{¶ 15} Matthews's sole assignment of error having been sustained, that part of the judgment entry disapproving Matthews for shock incarceration or intensive program prison is Reversed, the judgment of the trial court is Affirmed in all other respects, and this cause is Remanded for resentencing in accordance with this opinion.

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FROELICH, P.J., concurs.

WELBAUM, J., dissenting:

{¶ 16} I respectfully dissent from the majority's opinion holding that the trial court did not make a finding giving its reasons for disapproving of Matthews's placement in a program of shock incarceration or intensive program prison as required by R.C. 2929.19(D). In my opinion, the record establishes that the trial court did make an adequate finding to satisfy the statutory requirement. Accordingly, I would affirm the judgment of the trial court.

{¶ 17} During the sentencing hearing in this case, the trial court indicated that it disapproved of shock incarceration and intensive program prison as a result of reviewing Matthews's criminal history, the presentence investigation report, and the facts and

circumstances surrounding Matthews's offense. The trial court also specifically stated that it disapproved of the programs "for the reasons the Court imposed the prison sentence[,]" which included the purposes and principles of sentencing, avoiding an unnecessary burden on government resources, the seriousness and recidivism factors in the Ohio Revised Code, and Matthews's present and future ability to pay financial sanctions. Trans. (Sept. 3, 2014), p. 31-32. The trial court further noted that the "programs are inconsistent with the purposes, the principles of sentencing and the seriousness and recidivism factors of the Code." *Id*. at 32. I believe the foregoing reasons are adequate to satisfy the finding requirement in R.C. 2929.19(D).

{¶ 18} The majority's reliance on *State v. Allender*, 2d Dist. Montgomery No. 24864, 2012-Ohio-2963 is misplaced, as that case is distinguishable in that the trial court did not state that it disapproved of the programs for the reasons the Court imposed the prison sentence. The present case is also distinguishable from our decisions in *State v. Berry*, 2d Dist. Greene No. 2013-CA-34, 2014-Ohio-132; *State v. Blessing*, 2d Dist. Clark No. 2011 CA 56, 2013-Ohio-392; and *State v. Howard*, 190 Ohio App.3d 734, 2010-Ohio-5283, 944 N.E.2d 258 (2d Dist.). In those cases, the trial court did not mention shock incarceration or intensive program prison at the sentencing hearing nor did the trial court give any reason at all for disapproving of the programs at the sentencing hearing or in the sentencing entry.

{¶ 19} In reaching its decision in this case, the majority relies on the principle that R.C. 2929.19(D) requires the trial court to "give its reasons for disapproval, not merely [indicate] that reasons for disapproval exist." *Allender* at ¶ 23. However, as noted above, the trial court did express its reasons for disapproving Matthews's placement in

the programs, and therefore, complied with the statute. Nevertheless, the majority interprets compliance as requiring the trial court to not only state the reasons for its disapproval, but to state the specific facts underlying those reasons. There is, however, no such requirement in the statute. Rather, the trial court is merely required to "make a finding that gives its reasons for its recommendation or disapproval." R.C. 2929.19(D). As a result, the majority's decision in this case mandates more than what is required by the statute and ultimately interferes with the trial court's discretion to either recommend or disapprove shock incarceration and intensive program prison.

{¶ 20} It should also be noted that the majority failed to consider the fact that Matthews did not object to the trial court's disapproval of shock incarceration and intensive program prison, thus forfeiting all but plain error. Plain error is an error or defect at trial, not brought to the attention of the court that affects a substantial right of the defendant. Crim.R. 52(B). The standard for plain error is whether, but for the error, the outcome of the proceeding clearly would have been otherwise. *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978). Notice of plain error is to be taken with the utmost of caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *Id*. Here, Matthews cannot demonstrate that the outcome of his proceeding would have been any different had the trial court provided the specific facts underlying its reasons for disapproving shock incarceration and intensive program prison. Furthermore, any such error is not a manifest miscarriage of justice warranting a reversal of that portion of Matthews's sentence.

{¶ 21} Accordingly, for the reasons stated above, I respectfully dissent from the majority's decision to reverse the trial court's disapproval of shock incarceration and

intensive program prison and I would not remand the matter for resentencing.

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