[Cite as *State v. Burkhart*, 2019-Ohio-2711.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ANTHONY JAMES BURKHART,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 BE 0020

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 18 CR 41

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Dan Fry, Belmont County Prosecuting Attorney and *Scott A. Lloyd*, Assistant Prosecuting Attorney, 147-A West Main Street, St. Clairsville, Ohio 43950, for Plaintiff-Appellee, No Brief Filed.

Atty. Brian A. Smith, Brian A. Smith Law Firm, LLC, 755 White Pond Drive, Suite 403, Akron, Ohio 44320, for Defendant-Appellant.

Dated: June 24, 2019

WAITE, P.J.

{¶1} Appellant Anthony James Burkhart appeals the March 27, 2018, decision of the Belmont County Common Pleas Court sentencing him to a maximum term of 18 months of incarceration after he entered a plea of guilty to one count of attempted failure to comply with an order or signal of a police officer. Appellant argues that the record does not support the imposition of the maximum sentence. Based on the foregoing, Appellant's argument is without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On December 6, 2017 Patrolman Nicholas Jessee ("Officer Jessee") of the Martins Ferry Police Department activated his lights and sirens after noticing Appellant driving erratically in Pease Township in Belmont County. The facts of the instant matter can be found in the police report, read by the trial court at sentencing:

> Burkhart failed to stop when lights and siren were activated. Burkhart crossed the double-yellow line while traveling at approximately 40 miles per hour in an aggressive attempt to swerve around cars in his behalf [sic]. He again crossed the double-yellow line to avoid cars in his path. Several vehicles in the imposing [sic] lane of travel that were endangered by Mr. Burkhart's aggressive actions. Finally ordered out of the vehicle by officers, but refused to exit or unlock the door. The [sic] Officer Ney and [Officer Jessee] were then able to unlock the doors -- driver's door and pull Mr. Burkhart from the vehicle. Mr. Burkhart was uncompliant even then, even then [sic], and was taken to the ground and placed in handcuffs.

(3/26/18 Tr., pp. 4-5.)

{¶3} On December 7, 2017 Officer Jessee filed a complaint in the Belmont County Court, Northern Division for failure to comply with an order or signal of a police officer, a violation of R.C. 2921.331(B) a third-degree felony. Bond was set and a preliminary hearing was scheduled for December 20, 2017. Appellant filed two motions for continuance which were both granted by the trial court. On February 14, 2018, Appellant appeared with counsel and waived his preliminary hearing in writing. The matter was bound over to the Belmont County Grand Jury. A bill of information was filed with the Belmont County Common Pleas Court on March 1, 2018 pursuant to Crim.R. 7(B), charging Appellant with attempted failure to comply with an order or signal of a police officer, in violation of R.C. 2923.02(A) and R.C. 2921.331(B), (C)(5)(a)(ii), a fourth degree felony.

{¶4} On March 12, 2018, Appellant appeared with counsel for a waiver of indictment and plea to a bill of information hearing. Appellant was served with a copy of the bill of information, waived the statutory 24-hour waiting period from service, and consented to arraignment. Appellant also waived a formal reading of the bill of information and his right to have the charges presented to the Belmont County Grand Jury. (3/12/18, Tr., p. 2.) Appellant executed a written plea of guilty to the charge of attempted failure to comply with an order or signal of a police officer as charged in the bill of information. Pursuant to the written plea agreement, the state agreed to remain silent at sentencing. The trial court conducted a plea colloquy during which Appellant verbally entered a guilty plea and affirmatively acknowledged at that hearing that the plea was made knowingly, voluntarily and intelligently. (3/12/18, Tr., pp. 3-6.)

{¶5} On March 26, 2018 a sentencing hearing was held. As agreed, the prosecution remained silent regarding sentencing. (3/26/18 Tr., p. 2.) Defense counsel informed the court that Appellant did not have a juvenile record and, although he had committed a number of offenses as an adult, they were predominantly misdemeanors. He had only one prior felony. (3/26/18 Tr., p. 2.) Defense counsel also said that the presentence investigation rated Appellant's final risk level score as an 11, which was considered low, warranting community control sanctions over incarceration. (3/26/18 Tr., p. 2.) Appellant indicated at the sentencing hearing that he could not remember much about the evening in question. (3/26/18 Tr., p. 3.)

{¶6} The trial court stated that it had "undertaken a complete comprehensive review of the situation" and as earlier discussed read into the record specific details from the police report. The court also recited the list of Appellant's previous convictions. (3/26/18 Tr., pp. 4-6.) Following this recitation, the judge announced:

> It is this Court's specific finding that though [sic] none of the nine factors of the Revised Code may be present as applicable, mere community control sanctions are not consistent with the principles and purposes of the sentencing statutes.

(3/26/18 Tr., p. 6.)

{¶7} However, the judge then stated he was imposing the maximum sentence because Appellant "put the whole community at risk. You put the average family driving to McDonald's at risk of getting killed." (3/26/18 Tr., p. 6.) The trial court sentenced

Appellant to a maximum term of 18 months of incarceration with 16 days of credit for time served.

{¶8} Appellant filed this timely appeal.

ASSIGNMENT OF ERROR

THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S SENTENCE OF APPELLANT.

{¶9} Appellant claims imposition of the maximum sentence is not supported by the record, especially since the trial court acknowledged that "none of the nine factors of the Revised Code may be present as applicable[.]" (3/26/18 Tr., p. 6.)

{¶10} Pursuant to the Ohio Supreme Court's holding in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id.*

{¶11} Clear and convincing evidence "is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Id* at ¶ 22, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph one of the syllabus.

{¶12} A sentence is considered to be contrary to law if it falls outside of the statutory range for the particular degree of offense; if the trial court failed to properly

consider the purposes and principles of felony sentencing as enumerated in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12; or if the trial court orders consecutive sentences and does not make the necessary consecutive sentence finding. See *State v. Collins,* 7th Dist. Noble No. 15 NO 0429, 2017-Ohio-1264, ¶ 9; *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 30.

{¶13} Pursuant to R.C. 2929.11, when sentencing a defendant for a felony the trial court should be guided by the overall purposes and principles of sentencing including: (1) protecting the public from future crime by the offender; and (2) punishing the offender using the minimum sanctions that are determined necessary to accomplish those purposes without placing an unnecessary burden on state or local government resources. R.C. 2929.11(A). The felony sentence should also be commensurate with, and not demeaning to, the seriousness of the conduct and the impact on any victim, and consistent with sentences imposed for similar crimes by similar offenders. R.C. 2929.11(B).

{¶14} R.C. 2929.12(B) provides:

> (B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:
>
> (1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a

parent, guardian, custodian, or person in loco parentis of one or more of those children.

{¶15} The sentencing court has discretion in determining the most effective method to comply with the purposes and principles of sentencing. *State v. Rahab,* 150 Ohio St.3d 152, 2017-Ohio-1401, 80 N.E.3d 431, ¶ 10. In so doing, the court must consider the statutory factors regarding seriousness and recidivism enumerated in R.C. 2929.12(B), (C), (D), and (E) as well as any other relevant factor.

{¶16} "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.). "In exercising that discretion a trial court must consider the statutory principles that apply in felony cases, including R.C. 2929.11 and R.C. 2929.12." *State v. McCourt,* 7th Dist. Mahoning No. 16 MA 0144, 2017-Ohio-9371, ¶ 9 citing *State v. Mathis,* 109 Ohio St.3d 54, 2006-Ohio-855, 845 N.E.2d 1, ¶ 38. Moreover, although the trial court must consider the recidivism and seriousness factors set forth in R.C. 2929.11 and R.C. 2929.12, it is not required to discuss the statutory factors on the record. *McCourt,* at ¶ 9.

{¶17} Appellant was sentenced for attempted failure to comply with a signal or order from a police officer, a fourth-degree felony, in violation of R.C. 2921.331(B), (C)(5)(a)(ii) and R.C. 2923.02(A). R.C. 2921.331(B), (C)(5)(a)(ii) provides:

(B) No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.

(C)(1) Whoever violates this section is guilty of failure to comply with an order or signal of a police officer.

* * *

(5)(a) A violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt:

* * *

(ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

{¶18} R.C. 2923.02(A) reads, "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶19} The statutory range of prison terms for a fourth-degree felony is six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen or eighteen months. R.C. 2929.14 (A)(4). Appellant was sentenced to the maximum term of eighteen months.

{¶20} At both the sentencing hearing and in the judgment entry the trial court noted that it considered R.C. 2929.11 and R.C. 2929.12 as well as the overriding purposes, principles and factors of sentencing in determining the appropriate sentence. (3/26/18 Tr., p. 4.); (3/27/18 J.E.) As discussed, these statutes set forth the purposes and principles of sentencing as well as provide a nonexhaustive list of recidivism and seriousness factors. Appellant contends that since the trial court stated at the hearing that "[i]t is this Court's specific finding that though none of the nine factors of the Revised Code may be present as applicable" and reiterated in the written judgment entry of sentence that "none of the nine factors of R.C. §2929.13(b)(2) [sic] are present," this record does support a maximum sentence. (Emphasis deleted.) (3/27/18 J.E.)

{¶21} The record reveals that the trial court determined at the hearing that "mere community control sanctions are not consistent with the principles and purposes of the sentencing statutes." (3/26/18 Tr., p. 6.) As a basis for this finding, the trial court reviewed all of Appellant's previous convictions, including his felony conviction. Further, the trial court discussed the risk Appellant posed to the community by his conduct. "What we have here is a situation where we're damn lucky that you and your family and your kids and your grandchildren weren't killed that night by this defendant's incredible actions." (3/26/18 Tr., p. 5.) After reading into the record Appellant's extensive list of past convictions, including a felony conviction, the court said, "[s]o we hardly have a peace-loving individual. We've got an individual with a situation that, again, we are extremely lucky bystanders were not absolutely killed and the officers were not seriously injured." (3/26/18 Tr., pp. 5-6.) Moreover, the trial court observed, "quite frankly, you put the whole

community at risk. You put the average family driving to McDonald's at risk of getting killed." (3/26/18 Tr., p. 6.)

{¶22} In the written judgment entry the trial court specifically stated that it was guided by the principles and purposes of sentencing in R.C. 2929.11 and R.C. 2929.12 and decided:

> In light of such guidance, the Court finds that the factors contained in R.C. §2929.12 (B) and (D) include the following:
>
> - Defendant has a history of adult criminal convictions including two (2) separate convictions of Theft (M1); DUS; Fraud with Access Device; and Domestic Violence.
> - Defendant has an established pattern of criminal activity without "good faith" treatment and/or an effort to change his lifestyle.
>
> In accord with R.C. §2929.12 (C) and (E), which suggests that recidivism is less likely, the Court finds:
>
> - The Court finds that no additional mitigating factors that exist which suggest that recidivism is less likely.
> - The Court further finds that the Defendant has not previously served time in prison for criminal offenses.

(3/27/18 J.E.)

{¶23} Although the trial court did say at the sentencing hearing and reiterated in the written judgment entry that it appeared none of the specific statutory factors may apply

in this case, it is clear from the record that the trial court conducted a meaningful consideration of the requisite issues and factors prior to imposing the maximum sentence. The earlier language employed by the court can be described as "inartful," at best, and while the better practice would be for the trial court to avoid such confusing statements, we cannot conclude from the entire record in this case that Appellant's sentence is contrary to law. Considering the crime to which Appellant pleaded guilty, Appellant's lengthy record (which includes a felony conviction) and the facts surrounding this incident as stated on the record, the sentence imposed for Appellant's crime is supported by the record and is not contrary to law. Appellant's assignment of error is without merit and is overruled.

Conclusion

{¶24} Appellant alleged in his assignment of error that the imposition of a maximum sentence for his conviction was not supported by the record. A review of the record indicates that the trial court considered the principles and purposes of sentencing including factors relative to seriousness and recidivism prior to imposing the maximum sentence. Accordingly, Appellant's assignment of error is without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.