[Cite as *State v. Seaman*, 2019-Ohio-2709.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOEY SEAMAN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0103

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2017 CR 233

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, Atty. *Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

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

Dated: June 26, 2019

Robb, J.

{¶1} Defendant-Appellant Joey Seaman appeals the decision of the Mahoning County Common Pleas Court sentencing him to prison due to his violation of community control. He contends the court violated R.C. 2929.13(E)(2), which requires the sentencing court to "determine on the record" one of two statutory criteria before imposing a prison term for a community control violation if the violation is "solely by reason of producing positive results on a drug test." Appellant also believes the court failed to consider R.C. 2929.11 and R.C. 2929.12 before sentencing him and the sentence was not supported by the record. For the following reasons, the trial court's judgment is affirmed

STATEMENT OF THE CASE

{¶2} On March 30, 2017, Appellant was indicted for aggravated burglary, attempted rape, two counts of menacing by stalking, assault, and intimidation of a witness. The victim in all charges was his former girlfriend, except for the intimidation charge which involved another witness. His bond was revoked in June 2017, when his former girlfriend reported a new burglary. That charge was dismissed when she failed to appear at the preliminary hearing, and bond was reinstated with orders to obtain a particular mental health assessment within three days, have no contact with the victim, and refrain from drug use. Bond was revoked again in August 2017, after the state reported Appellant tested positive for drugs and failed to report for the mental health assessment.

{¶3} On April 11, 2018, Appellant pled guilty to: an amended charge of burglary (a third-degree felony with a maximum sentence of 36 months); menacing by stalking (a fourth-degree felony with a maximum sentence of 18 months); and assault (a first-degree misdemeanor with maximum sentence of 180 days). After disclosing the plea agreement was based upon the victim's wishes, the state agreed to dismiss the other charges and recommend five years of community control with an order for a mental health assessment and participation in all treatment recommendations. The court accepted the plea and

ordered a mental health assessment and a pre-sentence investigation. (4/12/18 J.E.; 4/19/18 J.E.).

{¶4} Subsequently, the court sentenced Appellant to five years of community control. Appellant was also ordered to complete 250 hours of community service, follow all recommendations in a mental health assessment, and follow all recommendations after obtaining an assessment from a certain drug treatment agency. (6/15/18 J.E.).

{¶5} On August 6, 2018, the state filed a motion to revoke Appellant's community control. The notice provided to Appellant alleged he violated the first condition of his community control (obeying all laws, including those related to illegal drug use) by: (A) admitting to drug use on July 30, 2018; (B) having contact with the victim; (C) testing positive for cocaine on August 2, 2018; and (D) testing positive for marijuana on August 2, 2018. The notice also alleged he violated the second condition of his community control (requiring Appellant to follow all orders of supervising officers, including submitting to drug testing) by: (A) failing to report to the supervising officer as ordered on or about August 1, 2018.

{¶6} At the September 10, 2018 revocation hearing, the prosecutor explained that Appellant would be stipulating to certain facts involving his violation of community control and the state would not be proceeding on the allegation of contact with the victim. (Tr. 2-3). After defense counsel spoke about the stipulation, Appellant voiced his understanding that he was waiving the right to have the state prove he violated community control at a hearing by stipulating to the violation and that the court would proceed with judgment and sentence. (Tr. 4-5).

{¶7} As a sentencing recommendation, the state asked the court to impose a prison term. The prosecutor disclosed the difficulty in making the earlier recommendation of community control due to Appellant's criminal history (but noted the state was faced with an "extremely uncooperative victim"). (Tr. 6-7). Defense counsel said: on July 30, 2018, Appellant followed instructions to sign up with the drug treatment agency; Appellant admitted to drug use prior to the August 2, 2018 arrest and drug testing; and the drug violations required treatment rather than prison. (Tr. 8-9). Appellant asked the court for help with his habit. (Tr. 10).

{¶8} The court revoked Appellant's community control and imposed a prison sentence. In the September 25, 2018 entry, the court imposed 36 months for burglary, 18 months for menacing by stalking, and 180 days for assault, all running concurrently. Appellant received 263 days of credit for time served. Appellant filed a timely notice of appeal.

ASSIGNMENT OF ERROR ONE: VIOLATION BY DRUG TEST

{¶9} Appellant sets forth three assignments of error, the first of which provides:

"The trial court's sentence of Appellant was contrary to law because Appellant was sanctioned solely for the results of a positive drug test under R.C. 2929.13(E)(2)."

{¶10} Appellant contends his community control violation was solely due to positive drug test results. He therefore argues the trial court was required to make one of two determinations on the record in order to impose a prison sentence for the violation. As the trial court did not make either determination on the record at the revocation hearing,[1] Appellant concludes the sentence must be vacated and the case must be remanded for resentencing. Appellant relies on the following statutory provision:

> If an offender who was convicted of or pleaded guilty to a felony violates the conditions of a community control sanction imposed for the offense solely by reason of producing positive results on a drug test or by acting pursuant to division (B)(2)(b) of section 2925.11 of the Revised Code with respect to a minor drug possession offense, the court, as punishment for the violation of the sanction, shall not order that the offender be imprisoned unless the court determines on the record either of the following:
>
> (a) The offender had been ordered as a sanction for the felony to participate in a drug treatment program, in a drug education program, or in narcotics anonymous or a similar program, and the offender continued to use illegal drugs after a reasonable period of participation in the program.

[1] Where a statute requires certain sentencing findings to be made "on the record," the trial court must make the findings at the sentencing hearing. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473 (but need not provide reasons in support of findings). *See also State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 26-29 (where a statute prohibits consecutive sentencing unless the court "finds" certain criteria, these findings must be made at the sentencing hearing and in the sentencing entry). As Appellant points out, there was also no determination in the sentencing entry that one of the two statutory criteria in R.C. 2929.13(E)(2) existed.

> (b) The imprisonment of the offender for the violation is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code.

R.C. 2929.13(E)(2)(a)-(b). The aforecited R.C. 2925.11(B)(2)(b) is inapplicable as it provides immunity for a minor drug possession offense where the evidence was generated by the person seeking medical assistance or needing such assistance due to an overdose and the person obtained a screening and received a referral for treatment within 30 days.

{¶11} Under the plain language of R.C. 2929.13(E)(2), a court imposing a prison term for a community control violation need not make a determination on the record as to (a) or (b) unless the violation is "solely" due to positive drug test results (or due to the use of the immunity provision for minor drug possession). *State v. Lofton*, 8th Dist. No. 89572, 2008-Ohio-3015, ¶ 20 (finding R.C. 2929.13(E)(2) was not implicated where "community control sanctions were revoked on two grounds: his testing positive for drugs and his failure to appear"); *State v. Tesso*, 5th Dist. Richland No. 07 CA 23, 2007-Ohio-6450, ¶ 27 (holding the statute was inapplicable where the violation was not merely for drug use but was also for theft).

{¶12} Appellant notes the revocation and sentencing judgment entry states: "The Defendant stipulated to the violation of probation regarding # A, C and D" without specifying whether the reference to A related to the first condition, the second condition, or both conditions listed in the notice. Appellant contends he only stipulated to: admitting (on July 30, 2018) to the use of drugs and testing positive for cocaine and marijuana (on August 2, 2018). He claims he did not stipulate to the failure to report to his supervising officer (on August 1, 2018) as alleged in division A under the second condition of community control set forth in the notice.

{¶13} However, viewing his stipulation in context, it is clear Appellant stipulated to the failure to report as well as the drug use. The state did not present evidence on the drug test results or the failure to report because it was relying on Appellant's stipulations to all allegations except the contact with the victim. As the state points out, it was entitled to rely on the stipulations. *See State v. Pavlich*, 6th Dist. Erie No. E-10-011, 2011-Ohio-

802, ¶ 28 (the defendant may stipulate to facts at the probation revocation hearing which relieves the state from its burden of proving such facts).

{¶14} After explaining the state would not proceed on violation B (regarding contact with the victim), the prosecutor advised the court: "it is my understanding defendant will stipulate that he self admitted to using cocaine. He subsequently then, on August 2nd, did test positive for both cocaine and marijuana, and he failed to report to his supervising officer [name] on 8-1. He was supposed to come in on that date and drug test, and he did not actually show." (Tr. 2-3). Defense counsel did not dispute these statements and instead confirmed:

> We do stipulate that if an evidentiary hearing was held, you would find that he self admitted and did test positive for illicit drugs, and that those illicit drugs and testing positive do constitute a violation of the terms of community control. There is something that I will speak to on the issue of reporting to [the officer] on August 1st, but **he did not report to [the officer] on August 1st.** He was arrested the following day.

Emphasis added). (Tr. 4).

{¶15} After these stipulations, the court ensured Appellant understood he had the right to a hearing where the state would be required to prove he violated the terms and conditions of his community control. He said he wished to waive that right and stipulate to the violation of community control, after which the court would proceed with judgment and sentence. (Tr. 4-5). Clearly, Appellant admitted he failed to report on August 1, 2018. The additional notation that he was arrested the next day, August 2, 2018 (when he was tested for drugs), did not contest the admitted failure to report the prior day.

{¶16} Accordingly, Appellant's violation of community control was not solely for a positive drug test result (or for using the immunity statute). It was also for failing to report to his supervising officer. Therefore, R.C. 2929.13(E)(2) is not implicated, and the trial court was not required to determine on the record that one of the two statutory criteria existed before imposing a prison sentence. This assignment of error is overruled.

ASSIGNMENT OF ERROR TWO: SILENT RECORD

{¶17} Appellant's second assignment of error alleges:

"The trial court's sentence of Appellant was contrary to law because the trial court did not consider the principles and purposes of sentencing under R.C. 2929.11 or the seriousness and recidivism factors under R.C. 2929.12."

{¶18} Appellant states a sentence can be characterized as contrary to law for the failure to consider R.C. 2929.11 and R.C. 2929.12, citing *State v. Collins*, 7th Dist. Noble No. 15 NO 0429, 2017-Ohio-1264, ¶ 5. These statutes are further discussed in the third assignment of error where Appellant contends the record does not support the sentence to 36 months in prison for burglary. Under this assignment, Appellant complains the trial court did not evince its consideration of these statutes at the sentencing hearing or in the judgment entry.

{¶19} The revocation sentencing hearing is silent as to the trial court's consideration of the sentencing statutes. The court's resulting revocation and sentencing entry opined Appellant was not amenable to community control and explained the court listened to the mitigation arguments presented by the defense and the arguments presented by the prosecution. At the hearing, the prosecutor: asked the court to look through Appellant's long criminal history, pointing out it included burglary, trafficking, aggravated assault, and other offenses; noted the original reluctance to recommend community control; and described Appellant as not amenable to community control, pointing to the short amount of time between Appellant's release on community control and this violation and to the fact that he was on community control in another case when he committed the offenses at issue.

{¶20} R.C. 2929.11 and R.C. 2929.12 require a trial court to "consider" certain statutory items in imposing a felony sentence. This instruction within R.C. 2929.11 and R.C. 2929.12 is distinct from an instruction to "determine on the record" or to "find" the existence of certain statutory criteria before imposing a sentence. *Compare* R.C. 2929.13(E)(2) (community control violation solely due to positive drug test); R.C. 2929.14(C)(4) (consecutive sentencing). Even in the case of a completely silent record (where there is no mention of R.C. 2929.11, the purposes and principles of sentencing, R.C. 2929.12, or any seriousness or recidivism factor in the judgment entry or at the hearing), we do not presume the court failed to consider these items.

{¶21} Instead, it is well-established that a silent record raises a rebuttable presumption that the sentencing court considered the statutory factors in R.C. 2929.11 and R.C. 2929.12. *State v. Henry*, 7th Dist. Belmont No. 14 BE 40, 2015-Ohio-4145, ¶ 23. Consequently, the reviewing court presumes the trial court considered the relevant factors in the absence of an affirmative showing that it failed to do so, unless the sentence is strikingly inconsistent with the applicable factors. *State v. Mims*, 7th Dist. Jefferson No. 14 JE 0025, 2016-Ohio-3228, ¶ 47; *State v. Taylor*, 7th Dist. Mahoning No. 15 MA 0078, 2016-Ohio-1065, ¶ 14-15. (A review of the factors is conducted in the next assignment of error.)

{¶22} Appellant states we should not employ this presumption that the court considered the sentencing statutes because sentencing occurred immediately after the revocation hearing. Contrary to Appellant's suggestion, the fact that sentencing occurred immediately after the revocation hearing does not affirmatively show the court failed to consider the relevant contents of R.C. 2929.11 and R.C. 2929.12. *See State v. Rivers*, 7th Dist. Mahoning No. 18 MA 0051, 2018-Ohio-5425, ¶ 22 (sentencing immediately after plea does not show court failed to consider sentencing statutes). Moreover, in the case at bar, a pre-sentence investigation report and mental health examination had already been ordered for the original sentencing hearing (a mere three months prior to the revocation hearing), and the record indicated the PSI was being reviewed at the revocation hearing. *Compare id.*

{¶23} There is no affirmative showing the court failed to consider R.C. 2929.11 and R.C. 2929.12 in imposing the sentence. To the extent Appellant argues his sentence to 36 months in prison is inconsistent with purposes and principles of sentencing or the seriousness and recidivism factors set forth in these statutes, we proceed to address these arguments under the next assignment of error.

ASSIGNMENT OF ERROR THREE: SUPPORT FOR SENTENCE

{¶24} Appellant's final assignment of error alleges:

"The trial court's sentence of Appellant was not supported by the record."

{¶25} When reviewing a felony sentence, "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." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1. In addition to being the standard for reviewing the findings required by certain statutory sections identified in R.C. 2953.08(G), this is also the standard "to review those sentences imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12." *Id.* at ¶ 23-24 (and agreeing with the appellate court's conclusion that the record supported the sentence imposed for a first-degree felony); *State v. Hudson*, 2017-Ohio-645, 85 N.E.3d 371, ¶ 33 (7th Dist.).

{¶26} R.C. 2929.11(A) instructs the trial court to be directed by the overriding principles of felony sentencing, including "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." This requires a trial court to "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." R.C. 2929.11(A). Pursuant to division (B) of R.C. 2929.11, a felony sentence shall be reasonably calculated to achieve the purposes of felony sentencing in alignment with 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.

{¶27} R.C. 2929.12 speaks of the court's discretion to determine the most effective way to comply with the purposes and principles of sentencing and instructs the felony sentencing court to consider the seriousness factors in divisions (B) and (C), the recidivism factors in divisions (D) and (E), any pertinent military service factors in (F), and any other pertinent factors. R.C. 2929.12(A). Factors indicating an offender's conduct is less serious include: the victim induced or facilitated the offense; the offender acted under strong provocation; the offender did not cause or expect to cause physical harm to person or property; and substantial grounds mitigate the offender's conduct. R.C. 2929.12 (C).

{¶28} In contesting the 36-month sentence for burglary, Appellant does not argue any of these mitigating factors in division (C) apply here. As for the factors making his conduct more serious, Appellant's relationship with the victim facilitated the offense. R.C. 2929.12(B). We also note he was originally charged with more serious offenses.

{¶29} Concerning recidivism, the following factors tend to indicate an offender is more likely to commit future crimes: (1) the offense was committed while on certain forms of release; (2) the offender has prior convictions; (3) the offender failed to respond favorably to sanctions previously imposed for criminal convictions (or has not been rehabilitated to a satisfactory degree after a prior delinquency adjudication); (4) there is a demonstrated pattern of drug or alcohol abuse related to the offense with refusal to acknowledge or seek treatment; and (5) the offender shows no genuine remorse. R.C. 2929.12(D). The following factors indicate the offender is less likely to recidivate: no prior juvenile adjudications; no prior criminal convictions; the offender led a law-abiding life for a significant number of years before the subject offense; the offense was committed under circumstances not likely to recur; and a showing of genuine remorse. R.C. 2929.12(E).

{¶30} Appellant points out he sought drug treatment 6 weeks after his original sentence in this case and asked for treatment at the revocation hearing. He states that he expressed remorse for the community control violation (by saying "it was a terrible mistake, and it's a habit") and emphasizes that he admitted to drug use before being tested. (Tr. 10). He also failed to report to his supervising officer but provided no explanation for this failure. As mentioned above, Appellant committed the burglary offense while on community control for another offense and failed to respond favorably to community control in that case and this case. There is no indication the offense took place under circumstances not likely to recur. Finally, he has various prior convictions, including felonies.

{¶31} For the foregoing reasons, we cannot conclude the sentence of 36 months in prison for burglary is clearly and convincingly unsupported by the record when considering the purposes and principles of sentencing under R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12. This assignment of error is overruled. The trial court's judgment is hereby affirmed.

Donofrio, J.,concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning 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.