[Cite as *State v. Hoover*, 2021-Ohio-2485.]

# IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOHN WILLIAM HOOVER,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**
**Case No. 20 BE 0002**

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Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 17 CR 343

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

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**JUDGMENT:**
Affirmed.

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*Atty. Dan Fry*, Belmont County Prosecuting Attorney and *J. Kevin Flanagan*, Assistant Prosecuting Attorney, 147-A West Main Street, St. Clairsville, Ohio 43950, for Plaintiff-Appellee

*Atty. Brent A. Clyburn*, 604 Sixth Street, Moundsville, West Virginia 26041, for Defendant-Appellant.

Dated: July 6, 2021

**WAITE, J.**

**{¶1}** Appellant John William Hoover appeals his sentence entered following a resentencing hearing in Belmont County Common Pleas Court on remand from this Court for one count of felonious assault on his ex-wife. For the following reasons, we affirm the sentence of the trial court.

Factual and Procedural History

**{¶2}** Appellant and his ex-wife were married in 2012. His ex-wife ("the victim") had two teenage children from a previous relationship and the parties had twin daughters born of the marriage who were five years of age at the time of the incident. The parties divorced in 2013. Following the divorce, the parties remained romantically involved and in 2017 began living together again along with all four children.

**{¶3}** On the evening of November 25, 2017, Appellant and the victim went to a bar in Martins Ferry, Ohio. While at the bar, Appellant consumed several alcoholic beverages. Shortly after midnight on November 26, 2017, they left the bar and went to a local grocery store to buy food. The parties returned home, where Appellant wanted to have sex with the victim. When she declined, Appellant became angry. He began repeatedly punching her in the head and hitting her with his belt. The two teenagers attempted to stop Appellant and ultimately called the police. The victim sustained multiple injuries, primarily to the face and head. Officer Vincent West from the Martins Ferry Police Department arrived on the scene and arrested Appellant. Officer West transported Appellant to the Belmont County Jail. The victim obtained a protection order on

November 29, 2017. The order provided, among other things, that Appellant could not initiate contact with the victim and was to stay at least 500 feet away from her.

**{¶4}** On January 3, 2018, the Belmont County Grand Jury indicted Appellant on one count of felonious assault in violation of R.C. 2903.11(A)(1), a second-degree felony. Appellant was arraigned on January 11, 2018 and the court appointed counsel for Appellant from the Belmont County Public Defender's office. On February 15, 2018, Appellant filed a *pro se* motion for new counsel, arguing that the public defender's office did not receive adequate funding to "mount any type of believable offense" and that counsel told Appellant he was "pretty much guilty as charged" due to the victim's injuries and Appellant's prior criminal record. He also said counsel opposed Appellant's desire to call character witnesses to testify on his behalf.

**{¶5}** A hearing was held on February 20, 2018, to address Appellant's motion. Appellant's counsel stated that there had been a difference of opinion in trial strategy but not a total breakdown of communication between them. Counsel stated he believed he could adequately represent Appellant. The trial court denied Appellant's motion.

**{¶6}** Jury trial commenced on March 1, 2018. The state called five witnesses in its case-in-chief. The state's theory was that because the victim refused to have sex with Appellant he attacked her, stopping only when her two teenage sons intervened and called the police. The victim's injuries included a broken nose, missing teeth in her lower jaw, lacerations in and around her mouth, bleeding gums, and multiple head bruises including two black eyes.

**{¶7}** Once the state rested, Appellant took the stand in his own defense. He testified that he had two shots of whiskey and six beers over the course of the two and

one-half hours he and the victim were at the bar. Appellant testified that he did not remember leaving the bar, going to the grocery store, or returning home and assaulting the victim. His first recollection was on waking up in the Belmont County Jail. He testified that he believed someone had placed a drug in his drinks while he was at the bar.

**{¶8}** The jury found Appellant guilty of felonious assault. A sentencing hearing was set for March 19, 2018. On March 14, 2018, Appellant sent a letter to his counsel. In the letter Appellant indicated he had been speaking to the victim daily and had sex with her on three occasions while awaiting trial. Both of these were violations of the protection order. Appellant also providing his thoughts about matters he considered to be deficiencies in counsel's representation during trial.

**{¶9}** At the sentencing hearing, defense counsel gave this letter to the trial court. On the record, the trial court referred to the letter when discussing the factors considered by the court in sentencing. The judge stated that the information in the letter coupled with Appellant's past criminal record demonstrated that "he will not comply with the rules." (3/20/21 Sentencing J.E.) The trial court sentenced Appellant to seven years in prison, less than the maximum but not the minimum penalty for the offense.

**{¶10}** Appellant filed a timely appeal. Appellant raised four assignments of error, challenging both his conviction and sentence. We affirmed the trial court in part and reversed in part, affirming Appellant's conviction but concluding Appellant had been provided ineffective assistance of counsel when counsel violated the attorney-client privilege by submitting Appellant's letter to the trial court without obtaining, on the record, Appellant's waiver of privilege. The matter was remanded for resentencing. *State v. Hoover,* 7th Dist. Belmont No. 18 BE 0019, 2019-Ohio-4229 ("*Hoover I*.")

**{¶11}** On remand the case was assigned to a different trial court judge. A resentencing hearing was held on December 18, 2019. Appellant was represented by new court-appointed counsel. Three witnesses were present and each read prepared statements regarding Appellant's character. The witnesses included Appellant's older sister, Appellant's adult daughter from a previous relationship, and a close female friend. In addition, one day prior to the resentencing hearing, Appellant's new counsel filed eleven letters from various other character witnesses for the court to consider during Appellant's resentencing. At the hearing, defense counsel discussed the sentencing factors set forth in R.C. 2929.12. (12/18/19 Tr., pp. 5-11.) Counsel stated that, at the time of resentencing, Appellant had been incarcerated for 21 months and had attended several courses, including anger management and drug and alcohol abuse awareness. Counsel also informed the court that contrary to the trial court's assertion at his original sentencing, Appellant had attended a drug and alcohol treatment program in the past.

**{¶12}** Appellant also spoke at his resentencing hearing. He informed the court that he worked as a facilitator at the Noble Correctional Institution where he assisted other inmates who had been involved in similar incidents. Lastly, Appellant discussed the incidents surrounding his prior arrests for domestic violence. (12/18/19 Tr., pp. 20-22.)

**{¶13}** At sentencing, the trial court judge stated that the pre-sentence report, including comments related to the incident, had been reviewed. The court stated that it also reviewed the overriding purposes and principles of sentencing set forth in R.C. 2929.11 and R.C. 2929.12 as well as this Court's opinion in *Hoover I*. The court discussed the police report from the night of the incident, noting that when the arresting officer arrived the victim was sitting on the bed bleeding from her face while Appellant stood near

her on his phone. When the officer asked Appellant to put down his phone and Appellant responded "[i]n a minute," the officer interpreted his failure to immediately comply as resisting arrest. Appellant reached into his front pocket, which the officer also interpreted as resisting. The trial court highlighted that Appellant's twin five-year-old daughters were also present in the room when the officer arrived. The court then reviewed all of Appellant's past convictions beginning in 1992, which included breaking and entering, for which he served a prison term; driving under a suspended license; multiple DUIs; several charges of domestic battery; domestic violence; child abuse; felonious assault; receiving stolen property; child endangerment; and driving without a license. The court noted that many of the domestic violence charges resulted in a finding of guilt and stated that the current incident was not a "fluke." (12/18/19 Tr., pp. 26-28.)

**{¶14}** The court discussed the letters submitted by character witnesses. Some of the letters indicated that the individuals were not aware of Appellant's prior criminal record. The court noted that the victim submitted two letters to the court where she stated that she was "constantly scared" and that she suffers from PTSD and is "always looking over her back." (12/18/19 Tr., p. 30.) The court opined that based on his multiple convictions, including domestic violence and felonious assault, Appellant had, "multiple, multiple, multiple chances" and the court had "a career criminal in front of me." (12/18/19 Tr., pp. 28-29.)

**{¶15}** The court sentenced Appellant to the maximum sentence of eight years as well as three years of post-release control.

**{¶16}** Appellant filed this timely appeal. Appellant's merit brief was filed on August 24, 2020 and raised a single assignment of error. The state's brief was filed on January

4, 2021. On March 24, 2021, substitute appellate counsel was appointed and filed a motion for leave to file a supplemental brief and a request for oral argument. Appellant's supplemental merit brief was filed on April 19, 2021, now raising three assignments of error. The state did not file a reply to the supplemental brief.

Appellate Review of Felony Sentence

**{¶17}** 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.*

**{¶18}** Thus, under *Marcum,* the standard of review applied to the findings required under particular statutory provisions including consecutive sentencing, as well as to the trial court's consideration of the sentencing factors set forth in R.C. 2929.11 and R.C. 2929.12, is that they be supported in the record by clear and convincing evidence. 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.

**{¶19}** A sentence is considered to be clearly and convincingly 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 findings. 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.

**{¶20}** Recently, in *State v. Jones,* Slip Opinion No. 2020-Ohio-6729, the Ohio Supreme Court addressed review of felony sentences. The Court clarified the standard of review for felony sentences under *Marcum. Marcum* held that "R.C. 2953.08(G)(2)(a) compels appellate courts to modify or vacate sentences if they find by clear and convincing evidence that the record does not support any relevant findings under 'division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code.' " *Id*. at ¶ 22. *Jones* did not directly overrule *Marcum*, but clarified that "[n]othing in R.C. 2953.08(G)(2) permits an appellate court to independently weigh the evidence in the record and substitute its judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and 2929.12." *Jones, supra,* ¶ 42.

**{¶21}** Pursuant to R.C. 2121.11, in sentencing a felony defendant a court shall be guided by the three overriding sentencing purposes and principles, which are: (1) protecting the public from future crime by the offender and others; (2) to punish the offender; (3) using the minimum sanctions the court determines will accomplish those purposes without imposing an unnecessary burden on state or local government resources. R.C. 2929.11(A). To achieve these purposes the trial court must consider the need for incapacitating the offender, deterring the offender and others from future crime,

and rehabilitating the offender. The court also must consider restitution to the victim, the public, or both. R.C. 2929.11(A). Further, R.C. 2929.11(B) provides:

> A sentence imposed for a felony shall be reasonably calculated to achieve the three overriding purposes of felony sentencing set forth in division (A) of this section, 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.

**{¶22}** Finally, a sentencing court has the discretion to determine the most effective way to comply with the principles and purposes of sentencing and, in so doing, shall consider the statutory seriousness and recidivism factors set forth in R.C. 2929.12(B), (C), (D) and (E) as well as any other relevant factors. The trial court is not required to set forth its findings regarding the principles and purposes of sentencing found in R.C. 2929.11 or the seriousness or recidivism factors of R.C. 2929.12, nor is it required to state these findings on the record. *State v. Henry,* 7th Dist. Belmont No. 14 BE 40, 2015-Ohio-4145, ¶ 22-24.

ASSIGNMENT OF ERROR NO. 1

> Hoover's sentence is contrary to law because it was vindictive. Fifth, Eighth, and Fourteenth Amendments, United States Constitution; Sections 2, 9 and 16, Article I, Ohio Constitution. (Tr. 2-33).

**{¶23}** Appellant argues the trial court violated his due process by imposing an increased prison sentence following remand. Appellant contends the trial court acted in

a vindictive fashion by sentencing him to eight years, the maximum penalty for the offense and an increase of one year from the original sentence imposed by the original trial court. Appellant presents two bases for his claim. First, he contends that no additional harmful evidence was presented, and that the trial court actually had additional mitigating evidence at the time of resentencing. He also alleges that the record contains evidence that the trial judge exhibited actual vindictiveness toward Appellant.

**{¶24}** Citing *North Carolina v. Pearce,* 395 U.S. 711, 723-724, 89 S.Ct. 2072, 23 L.Ed.2d. 656 (1969), Appellant contends the trial court imposed a greater sentence on him simply because he prevailed in his appeal to this Court. In *Pearce,* the United States Supreme Court held that when a trial court imposes a longer sentence on the defendant in resentencing after a successful appeal there exists a presumption of vindictiveness which impacts the defendant's constitutional right to appeal, unless the increase is justified by events that transpired subsequent to the first trial. *Id*., 723-724. Appellant concedes, however, that this presumption of vindictiveness set forth in *Pearce* has been "narrowed." (Appellant's Brf., p. 11.) In *Alabama v. Smith,* 490 U.S. 794, 802, 109 S.Ct. 2201, 104 L.Ed.2d. 865 (1989), the Court held that there is no presumption of vindictiveness when a greater sentence is imposed on remand and that a presumption only exists when there is a reasonable likelihood that an unexplained increase in a defendant's sentence on remand is the product of actual vindictiveness on the part of the sentencing court. *Id.,* syllabus.

**{¶25}** In his supplemental brief, Appellant contends that if we determine that Appellant cannot rely on the presumption of vindictiveness even as explained in *Alabama,* the record here supports a finding of actual vindictiveness on the part of the sentencing

court. Citing *State v. Johnson,* 2d Dist. Montgomery No. 23297, 2010-Ohio-2010, Appellant contends the court wrongfully increased Appellant's sentence to the maximum penalty despite the fact that no additional harmful evidence was raised and additional mitigating evidence was offered. In *Johnson,* the Second District held that where, as here, a different judge presides over a resentencing hearing, there is no presumption of vindictiveness pursuant to *North Carolina v. Pearce,* 395 U.S. 711, 723-724, 89 S.Ct. 2072, 23 L.Ed.2d. 656 (1969). The *Johnson* court concluded that it is possible on appeal to establish that a harsher sentence was the result of actual vindictiveness, but it must be supported by evidence in the record. In *Johnson*, the resentencing judge had an updated presentencing report that revealed defendant's misconduct during incarceration pending resentencing, and the defendant failed to cite to sufficient evidence in the record supporting a finding of actual vindictiveness.

**{¶26}** Appellant argues that the circumstances in this case are the exact opposite of *Johnson*, and that where the resentencing judge had no new harmful information on resentencing the record demonstrates actual vindictiveness. Appellant argues his new defense counsel presented a substantial amount of evidence of Appellant's efforts at rehabilitation occurring both before and after the incident and which was not before the trial court at his original sentencing. Appellant asserts the court ignored this evidence on resentencing and that the state presented "no new damning evidence" beyond what was presented at trial and in his original sentencing hearing. (Appellant's Brf., p. 9.) Appellant contends the resentencing court "harped on" Appellant's criminal record and disregarded the mitigating evidence. (Appellant's Supp. Brf., p. 2.) Appellant also claims that the resentencing court had made up its mind prior to the sentencing hearing, as evidenced

by its comment that "at least the two prior attorneys have withdrawn representation of this defendant." (12/18/19 Tr., p. 4.) Appellant also cites the trial court's inquiry into the offense leading to Appellant's prior incarceration in West Virginia. Appellant claims the trial court interrupted both witnesses who testified on his behalf at resentencing. Specifically, when Appellant's sister testified, "I have been through an awful lot with him" the trial court interrupted her, stating, "I understand that. I do have his prior record in front of me." (12/18/19 Tr., p. 12.) When Appellant's daughter testified, "I believe my father is being wrongfully accused," the trial court said, "[i]f I may interrupt you, and I hate to do that, but do understand whether he's wrongfully accused or not, a jury trial was had. He was convicted. That conviction was affirmed by the Court of Appeals. That's not what we're here for today, but go ahead, ma'am." (12/18/19 Tr., p. 15.) We note that the above statements do not demonstrate vindictiveness by the trial court. Referring to Appellant's extensive prior criminal record and informing Appellant's daughter that the resentencing hearing could not be used to challenge Appellant's conviction are perfectly permissible statements by the court. The statements were not inflammatory, accurately reflected the record and the law, and do not reveal any animus directed toward Appellant.

**{¶27}** Appellant claims that during his statement made prior to sentencing, the trial court interrupted multiple times to inquire about his criminal record. Additionally, Appellant argues that out of the eleven letters of support presented, the trial court focused on only four, criticized the supporters' comments, and was generally "dismissive" of the letters of support. Lastly, Appellant takes issue with the trial court spending "just as much, if not more time" on the victim's statements than on the eleven letters of support. (Appellant's Supp. Brf., p. 3.)

**{¶28}** The trial court had read excerpts from the victim's two written statements at resentencing:

> I am constantly scared. I'm jumpy. I'm unable to be in a public place without my back against the wall. I have nightmares and daymares.
>
> I was never this way before the attack. PTSD. I live it. I'm able to wear makeup to cover the scar on my broken smile, but the scar remains as a reminder.
>
> Therapy twice a month, as well as on medication. I fear for my children's safety. I'm always looking over my back.

(12/18/19 Tr., p. 30.)

**{¶29}** The resentencing court did not err in referring to the victim's statements at sentencing. "A victim-impact statement is a traditional source of sentencing information" and the extent of the harm suffered by the victim is certainly a relevant sentencing consideration. *Johnson,* ¶ 15; R.C. 2947.051(B). A trial court is permitted to rely on the victim impact statement when taking into consideration the purposes and principles of sentencing. *State v. Kinney,* 7th Dist. Monroe No. 18 MO 0013, 2019-Ohio-2726, ¶ 16.

**{¶30}** Appellant has not demonstrated this record contains any evidence of actual vindictiveness by the trial court. Instead, he concludes that because he presented additional mitigation evidence at resentencing consisting of the programs he attended while incarcerated and his role as a facilitator to other inmates, his increased sentence can only be the result of actual vindictiveness on the part of the court. Appellant concedes

that his reliance on the *Pearce* line of cases is "questionable" because a new trial judge conducted his resentencing hearing. However, he asserts that because the resentencing judgment entry was similar to his original sentencing entry, absent only a reference to his letter to counsel, this similarity reveals actual vindictiveness. A review of the entire record, including the sentencing transcript, reveals that despite Appellant's attendance in several rehabilitative programs while incarcerated, Appellant's long history of felonies which included domestic violence, child abuse and another felonious assault for which he was imprisoned, were the decisive factors used by the resentencing court. Additionally, the court read from the police report which demonstrated Appellant resisted arrest twice, that his five-year-old daughters were present and that the victim's injuries were very extensive. (12/18/19 Tr., pp. 26-27.) The court also noted: "It appears as those [sic] there is problem with domestic battery. We've got several charges of that nature." (12/18/19 Tr., pp. 27-28.) The court also highlighted: "And that - - many of these domestic violence are guilty ones[.] * * * So we don't have a fluke is what I'm saying." (12/18/19 Tr., p. 28.) Finally, the court relied on Appellant's history of multiple violent offenses dating back to 1992 and stated that, "[y]ou can't beat the hell out of anyone and expect nothing to occur to you, especially with a lifetime career criminal record." (12/18/19 Tr., p. 33.) The record reflects that the trial court was heavily influenced by Appellant's extensive prior criminal history of violent offenses, including domestic violence, and this outweighed the mitigating evidence presented by defense counsel at resentencing. Appellant has not cited to any evidence of actual vindictiveness by the trial court on resentencing and the trial court's sentence, even though slightly greater than his original sentence, is supported by the record. *Alabama,* pp. 723-724; see also *State v. Adams,* 26 N.E.3d 1283, 2014-Ohio-5854, ¶ 23

(7th Dist.). On resentencing, the court is not bound to the original sentencing considerations. The resentencing court retains the discretion to review the entire record before imposing sentence. Appellant's record was reviewed for a second time by a second judge who independently weighed the appropriate principles and purposes of sentencing and ultimately concluded that an eight-year term of incarceration was the appropriate sentence. There is no error in the trial court's decision to impose this sentence.

**{¶31}** Appellant's sentence is supported by the principles and purposes of sentencing as enumerated in R.C. 2929.11 and R.C. 2929.12 and was not the product of actual vindictiveness or otherwise contrary to law. Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> A maximum sentence must be reviewable by analyzing the findings made by the sentencer under R.C. 2929.11 and R.C. 2929.12, therefore, Hoover's maximum sentence was contrary to law. Fifth, Eighth, and Fourteenth Amendments, United States Constitution; Sections 2, 9 and 16, Article I, Ohio Constitution. (Tr. 26-33).

**{¶32}** As noted above, "An appellate court is permitted to review a felony sentence to determine if it is contrary to law." *Marcum,* ¶ 1. Moreover, *Jones* clarified that we may not modify or vacate a sentence if we reach a different factual conclusion pursuant to R.C. 2929.11 and R.C. 2929.12.

**{¶33}** Appellant acknowledges the *Jones* holding and yet raises a challenge based on R.C. 2929.11 and 2929.12 factors. To that extent, Appellant's arguments are not reviewable by this Court. The trial court expressly stated that it considered the R.C. 2929.11 and 2929.12 factors. Appellant was sentenced to the maximum penalty on resentencing, which is within the statutory range for the offense. The trial court stated in its sentencing entry that it considered the relevant sentencing statutes. The court specifically found that community control sanctions were inconsistent with the principles and purposes of the sentencing statutes. The judgment entry also refers to R.C. 2929.13(B)(2)and to R.C. 2929.12 and 2929.11, which Appellant points out is not relevant to Appellant's conviction. However, as the trial court stated that it properly considered the relevant statutes, the inaccurate statutory reference amounts to harmless error. This record is clear that, at the sentencing hearing, the trial court appropriately focused on Appellant's conduct and criminal record:

> This Court has reviewed the entire file in this matter. I've reviewed the statutes specifically as related to this case, being Ohio Revised Code 2929.11 and 2929.12, the overriding purposes, principles and factors of sentencing.
>
> I've reviewed The Court of Appeals decision, which I've already highlighted its bottom-line conclusion.
>
> I've reviewed the presentence report and let me read some of the comments regarding the incident of that night.

Female sitting on the bed, bleeding bad from the mouth and looked to have injuries to her face. Standing was a man, who the female said did this to her.

When asked to put down the phone and put his hands behind his back, he said, “In a minute.”

The officer felt as though he was resisting, again, with something, which appeared reaching from the front of his pants. Again resisting.

The twin five-year old daughters, who were both present observed all this.

She was treated for a cut on the side of her mouth, two teeth knocked out and a broken nose.

Repeatedly punched her in the face, threw objects at her and hit her with a belt.

Now, the issue becomes: Was this an isolated event or was this a series of issues?

It appears as though, despite the correspondence that I’ve received, which I’m going to highlight in a moment, we have in front of us a career criminal.

Let me go through some of the charges.

* * *

In 1992, convicted of battery. '94, breaking and entering, three counts. That's his first prison term.

Domestic battery, driving while revoked, disorderly conduct, DUI, domestic battery.

It appears as those [sic] there is problem with domestic battery. We've got several charges of that nature.

Receiving stolen property, loitering and prowling at night, felonious assault, criminal mischief, criminal damaging, domestic violence, child abuse injury, domestic violence, domestic battery, burglary, DUS, speed, DUS, no child restraints, driving while revoked, driving while revoked, driving under suspension, speed, driving under suspicion, a judgment suspension driving, multiple driver's license offenses, no operator's license, driving under reinstatement suspension, endangering children, DUS, OVI, DUS, fleeing while DUI, domestic violence again.

And that - - many of these domestic violence are guilty ones, DUS, DUS, DUS, felonious assault, for which we're here on the sentencing today. After the felonious assault, driving under reinstatement suspension.

So we don't have a fluke is what I'm saying.

(12/18/19 Tr., pp. 26-28.)

**{¶34}** Appellant claims that the trial court's reference to this Court's opinion in *Hoover I* is evidence that the court was tainted by the information contained in Appellant's privileged letter to his original defense counsel, which resulted in overturning his original sentence and lead to this resentencing. However, a mere mention that the court read this Court's opinion (which is to be expected) does not demonstrate the trial court was in any way improperly influenced by anything contained in Appellant's letter to counsel. Again, the trial court retains its discretion to review the entire record prior to resentencing. The record shows that the trial court properly considered the relevant factors before imposing the maximum penalty.

**{¶35}** Pursuant to *Marcum* as clarified by *Jones,* the trial court did not err in imposing the maximum prison term allowed by law. Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

> Hoover's right to due process was violated when the victim impact statements were not disclosed to him or his counsel prior to sentencing. Fifth and Fourteenth Amendments, United States Constitution; Sections 2 and 16, Article I, Ohio Constitution. (Tr. 4, 30-31).

**{¶36}** Appellant contends the trial court erred in failing to disclose the victim impact statements to him prior to sentencing.

**{¶37}** Because defense counsel did not object to the victim impact evidence, this assignment must be examined under the plain error standard. Crim.R. 52(B); *State v. Smith,* 97 Ohio St.3d 367, 2002-Ohio-6659, 780 N.E.2d 221, ¶ 64. Plain error does not

exist unless it is determined that, but for the error, the outcome of the trial or proceeding would clearly have been different. *State v. Long,* 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978).

**{¶38}** R.C. 2930.14 governs victim impact evidence and provides:

> (A) Before imposing sentence upon, or entering an order of disposition for, a defendant or alleged juvenile offender for the commission of a crime or specified delinquent act, the court shall permit the victim of the crime or specified delinquent act to make a statement. The court may give copies of any written statement made by a victim to the defendant or alleged juvenile offender and defendant's or alleged juvenile offender's counsel and may give any written statement made by the defendant or alleged juvenile offender to the victim and the prosecutor. The court may redact any information contained in a written statement that the court determines is not relevant to and will not be relied upon in the sentencing or disposition decision. The written statement of the victim or of the defendant or alleged juvenile offender is confidential and is not a public record as used in section 149.43 of the Revised Code. Any person to whom a copy of a written statement was released by the court shall return it to the court immediately following sentencing or disposition.
>
> (B) The court shall consider a victim's statement made under division (A) of this section along with other factors that the court is required to consider in imposing sentence or in determining the order of disposition. If the

> statement includes new material facts, the court shall not rely on the new material facts unless it continues the sentencing or dispositional proceeding or takes other appropriate action to allow the defendant or alleged juvenile offender an adequate opportunity to respond to the new material facts.

**{¶39}** A review of the record reveals that the excerpts of the victim's letters read by the trial court were accurate. The letters were included in an envelope labeled, "Judge's Notes – Confidential." The portion read by the trial court was the victim's explanation of the nature and extent of the physical, psychological and emotional harm she suffered as a result of the crime, which is permissible. R.C. 2930.13(C)(1).

**{¶40}** Appellant contends the victim's statements should have been fully disclosed to him. A defendant does not have an automatic right to obtain and respond to a victim's statement. The statute states the court "may give copies of any written statement made by the victim." R.C. 2930.14(A). If the statement contains new material facts, the court cannot rely on those facts for sentencing unless the court provides the defendant with an opportunity to respond. R.C. 2930.14(B). The statements at issue here do not contain any new information. They are simply accounts of the physical and emotional suffering the victim endured as well as the effect the incident had on her children, who witnessed the assault. The Sixth Circuit Court of Appeals had held that where the victim statements contain "heart-wrenching descriptions of * * * emotional distress" disclosure of the statements to the defendant would be unnecessary as a victim's suffering is "essentially irrebuttable." *U.S. v. Meeker,* 411 F.3d 736, 742 (6th Cir. 2005.)

**{¶41}** Hence, where the victim impact statement contains the physical, emotional and psychological suffering the victim has endured as a result of the crime but no new

material facts, an appellant's due process is not in question. Consequently, the result of the resentencing hearing would not have been different and there is no plain error. Appellant's third assignment of error is without merit and is overruled.

**{¶42}** Based on the foregoing, Appellant's assignments of error are without merit and are overruled. The judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

D'Apolito, J., concurs.

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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 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.**