[Cite as *State v. Bazar*, 2021-Ohio-3305.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

HEYWARD BAZAR,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 BE 0019

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 20-CR-79

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

JUDGMENT:
Affirmed

Atty. J. Kevin Flanagan, Prosecutor and *Atty. Daniel P. Fry,* Assistant Prosecutor, Belmont County Prosecutor's Office, 147 W. Main Street, St. Clairsville, Ohio 43950, for Plaintiff-Appellee and

Atty. Robert T. McDowall, Jr., Robert T. McDowall Co., LLC, 415 Wyndclift Place, Youngstown, Ohio 44515, for Defendant-Appellant.

Dated:
September 16, 2021

Donofrio, J.

{¶1} Defendant-appellant, Heyward Bazar, appeals from a Belmont County Common Pleas Court judgment sentencing him to the maximum term of 36 months in prison.

{¶2} A bill of information was filed against appellant in the Belmont County Common Pleas Court for the aggravated possession of drugs in violation of R.C. 2925.11(A)(C)(1)(b). A plea hearing was scheduled, but was rescheduled after appellant failed to appear and a warrant was issued for his arrest.

{¶3} At the rescheduled plea hearing, appellant appeared and showed cause for his previous failure to appear. He signed the plea agreement, which outlined the maximum term of imprisonment of 36 months for the offense. The court conducted the plea colloquy and informed appellant of his rights and the maximum possible term of imprisonment. The court also informed appellant that the offense did not carry a mandatory prison sentence and he was eligible for a community control sentence. (May 18, 2020 Tr. at 11). The court ordered a presentence investigation (PSI) and evaluation for appellant's acceptance at Eastern Ohio Correction Center (EOCC).

{¶4} The court's May 19, 2020 judgment entry reflected that at the plea hearing, appellant understood that the maximum prison term for the crime was 36 months in prison. It also stated that appellant understood that a prison sentence was not mandatory and he was eligible for a community control sentence for up to 5 years. The case was scheduled for a sentencing hearing.

{¶5} On May 21, 2020, the intake coordinator for EOCC issued a report and found that appellant was an appropriate candidate for placement there.

{¶6} On March 26, 2020, appellant failed to appear for his sentencing hearing. His bond was revoked and an arrest warrant was issued. Appellant was arrested on June 12, 2020 and his sentencing hearing was rescheduled to June 15, 2020.

{¶7} At the sentencing hearing, the prosecution took no position on sentencing. Appellant's counsel requested that the court impose community control since a prison sentence was not mandatory for appellant's crime and he was conditionally accepted for placement at EOCC. (June 15, 2020 Tr. at 4). Counsel also noted that it was uncertain whether appellant had a prior opportunity to seriously address his drug problem. (June 15, 2020 Tr. at 4). Appellant also addressed the court and apologized for disrespecting the court by his prior failure to appear. (June 15, 2020 Tr. at 5).

{¶8} The trial court reviewed appellant's criminal history on the record, noting his extensive criminal history of misdemeanors, his juvenile adjudications, and the findings that appellant was currently using five substances and was not capable of dealing with his substance use or showing remorse.

{¶9} The court concluded that more than a minimum sentence was necessary, otherwise appropriate, and reasonable, because a short or community control sentence would not adequately punish appellant or protect the community, and would demean the seriousness of the offense. (June 15, 2020 Tr. at 7). The court reasoned that the factors that decreased the seriousness of the offense were greatly outweighed by those that increased seriousness. (June 15, 2020 Tr. at 7). The court further found that a short or community control sentence like appellant had in the past did not help him learn. (June 15, 2020 Tr. at 7). The court concluded that a sentence of 36 months in prison was therefore appropriate. (June 15, 2020 Tr. at 7).

{¶10} On June 16, 2020, the trial court issued its sentencing judgment entry and outlined the factors that it considered under R.C. 2929.12(B) and (D) and R.C. 2929.13(B)(2) and applied those factors as outlined at the sentencing hearing. The court sentenced appellant to 36 months in prison.

{¶11} On July 20, 2020, appellant filed his notice of appeal. In his brief, appellant asserts the sole assignment of error through counsel:

Defendant-Appellant's maximum sentence was unduly harsh.

{¶12} Appellant asserts that no mandatory prison sentence is required for his third-degree felony under R.C. 2953.08. Citing *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, he submits that this Court may vacate or modify his

felony sentence if it determines by clear and convincing evidence that (1) the record does not support the sentencing court's findings under 2929.13 (B) or (D) or (2) that the sentence is otherwise contrary to law.

{¶13} Appellant sets forth the sentencing factors that a trial court must consider as to the seriousness of the conduct and the likelihood of recidivism under R.C. 2929.12. He contends that the court failed to exercise its discretion by more appropriately balancing the sentencing factors, including the facts that: this was his first felony offense; his expression of remorse for his conduct; the nonviolent nature of the offense; his documented substance abuse; the lack of prior court-ordered intervention or treatment; there was no victim involved in his crime; and he complied with law enforcement when he was stopped. He elaborates on these factors, emphasizing that all of his prior criminal offenses were misdemeanors and he did express remorse in court and accepted responsibility for his actions. Appellant also asserts that the maximum statutory sentence is usually reserved for extreme or the "worst" of offenders, such as those who commit violent acts.

{¶14} Appellant further cites the purposes and objectives of felony sentencing under R.C. 2929.11 to balance the protection of the public from future crimes using minimum sanctions, to punish the offender, and to promote the offender's rehabilitation using the minimum sanctions that meet those purposes without unnecessarily burdening the government's resources. Appellant contends that the trial court did not adequately balance the need to rehabilitate him by dealing with his underlying substance abuse with the other objectives of felony sentences. He asserts that the court should have included rehabilitation in his sentence and drug/alcohol testing and monitoring because he lacks the ability to control his addictions and desperately needs treatment.

{¶15} Appellee cites to our decision in *State v. Hudson*, where we held that the standard of review for felony sentencing is a determination by clear and convincing evidence that the record does not support the trial court's findings under relevant statues or that the sentence is otherwise contrary to law. 2017-Ohio-645, 85 N.E.3d 371, ¶ 33 (7th Dist.). Appellee notes that in *Hudson*, we also held that when considering the purposes of sentencing under R.C. 2929.11, a trial court is not required to place a specific finding on the record or use specific language in order to show that it adequately

considered the required seriousness and recidivism factors. Appellee points to the record of the trial court's sentencing hearing and judgment entry in this case, which shows that the trial court did make specific findings even though it was not required to do so. Appellee submits that the basis of appellant's brief is essentially that he believes that his sentence is too harsh and the court had other options that it could have ordered.

{¶16} Appellant entered a guilty plea to aggravated possession of drugs under R.C. 2925.11(A)(C)(1)(b), a felony of the third degree. This felony carried a rebuttable presumption in favor of a prison term, contrary to the plea agreement and defense counsel's statement that there was no presumption in favor of or against a prison term.[1] However, this does not constitute reversible error because appellant does not raise the issue, the trial court considered the entire record and proper sentencing factors, and sentenced appellant within the statutory range. Further, the trial court did not apply the presumption, which actually benefitted appellant.

{¶17} In any event, it appears that appellant's specific assignment of error lacks merit. We have held that, "[a] defendant has the right to appeal a felony sentence if it

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1. R.C. 2925.11(A) and (C)(1)(b), under which appellant was charged and to which he pled guilty, specifically state that:

> (A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.
> * * *
> (C) Whoever violates division (A) of this section is guilty of one of the following:
> (1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, any fentanyl-related compound, hashish, and any controlled substance analog, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows:
> * * *
> (b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

R.C. 2925.11(A)(C)(1)(b). Under R.C. 2929.13(D)(1):

> any felony drug offense that is a violation of any provision of Chapter 2925 * * * of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, * * * it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code.

R.C. 2919.13(D)(1).

was the maximum definite prison term allowed, the maximum was not required, and the sentence was imposed for only one offense. R.C. 2953.08(A)(1)(a)." *State v. Johnson*, 7th Dist. Mahoning No. 20 MA 0008, 2020-Ohio-7025, ¶ 9. The statute requires that we "shall review the record, including the findings underlying the sentence * * * given by the sentencing court." *Johnson, supra*, quoting R.C. 2953.08(G)(2). The same division of the statute further provides:

> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under [R.C. 2929.13(B),(D), R.C. 2929.14(B)(2)(e),(C)(4), or R.C. 2929.20(I)], whichever, if any, is relevant;
> (b) That the sentence is otherwise contrary to law.

R.C. 2953.08(G)(2)

{¶18} In other words, when reviewing a felony sentence, an appellate court must uphold the sentence unless the evidence clearly and convincingly does not support the trial court's findings under the applicable sentencing statutes or the sentence is otherwise contrary to law. *Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231 ¶ 46. In *State v. Jones*, 2020-Ohio-6729, --N.E.3d--, ¶ 42, the Ohio Supreme Court clarified the dicta regarding felony sentencing in *Marcum*, holding 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." *Id*.

{¶19} Here, appellant contends that the trial court erred "by failing to exercise its discretion by more appropriately balancing the seriousness and recidivism factors" set

forth in R.C. 2929.12. He emphasizes that his underlying offense did not involve violence, he expressed remorse at the hearing and accepted responsibility, drug treatment was available as EOCC accepted him for placement, and he desperately needs drug treatment as it had never been court-ordered before. He also cites *State v. Rose,* 8th Dist. Cuyahoga No. 82635, 2004-Ohio-2151 and asserts that maximum sentences are usually reserved for the "worst" of offenders which usually involves those who have committed or threatened violence against others.

{¶20} The trial court informed appellant before accepting his guilty plea that prison was not mandatory and his maximum potential sentence was 36 months in prison. The plea agreement stated the same. Appellant indicated at that hearing that he understood these statements and his plea was made voluntarily, knowingly, and intelligently. Thus, he was aware of the maximum penalty that he was facing.

{¶21} At the sentencing hearing, the court stated that it considered the entire record, including the presentence investigation and the EOCC reports, and it would consider any comments presented before the actual sentencing. Defense counsel requested that the court sentence appellant to community control at EOCC since he was conditionally accepted there. (June 15, 2020 Tr. at 4). He also noted that appellant had not had a serious opportunity to address his drug problems. The court asked if appellant wished to make a statement, and appellant apologized to the court. (June 15, 2020 Tr. at 4-5).

{¶22} The court then indicated that it had considered "the purposes and principles of sentencing, and we'll attempt to balance the seriousness and recidivism factors." (June 15, 2020 Tr. at 3). This corresponds to R.C. 2929.11, which provides in relevant part that the court that sentences a felony offender must evaluate the overriding purposes of felony sentencing, which are to protect the public from future crime, to punish the offender, and to provide for the effective rehabilitation of the offender by employing minimum sanctions that accomplish that purpose without an unnecessary burden on government resources. R.C. 2929.11(A). Division B of the statute provides that the court should impose a sentence that is "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." R.C. 2929.11(A)(B).

{¶23} In determining the most effective way to comply with the purposes and principles of sentencing, R.C. 2929.12(A) instructs the court to consider the seriousness factors set forth in divisions (B) and (C) and the recidivism factors set forth in divisions (D) and (E). More specifically, R.C. 2929.12 provides the factors for the court to consider in determining how to comply with R.C. 2929.11 in the most effective way.

{¶24} We have repeatedly held that R.C. 2929.12 does not require the sentencing court to make specific findings regarding the seriousness and recidivism factors at the sentencing hearing or in the sentencing judgment entry. *See State v. Hudson*, 2017-Ohio-645, 85 N.E.3d 371, ¶ 36 (7th Dist.); *State v. Taylor*, 7th Dist. Mahoning No. 15 MA 0078, 2016-Ohio-1065, 2016 WL 1051580, ¶ 14; *State v. Henry*, 7th Dist. Belmont No. 14 BE 40, 2015-Ohio-4145, 2015 WL 5813874, ¶ 22. *See also State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 42 (R.C. 2929.12 instructs the court to "consider" the statutory factors; there is no mandate for judicial fact-finding within this general guidance statute); *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000) ("The Code does not specify that the sentencing judge must use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors.").

{¶25} In this case, although not required, the trial court expressly stated both at the sentencing hearing and in its sentencing entry the factors that it found indicated more serious conduct on appellant's part or a likelihood for recidivism. Those factors included his juvenile adjudications for escape, drug abuse, resisting arrest, underage consumptions, and violation of a court order. (June 15, 2020 Tr. at 5). The court also noted appellant's 57 misdemeanor convictions as an adult over the past 20 years, with the most serious including: seven convictions for operating a vehicle under the influence (OVI); six convictions for theft; four convictions for drug possession; four convictions for obstructing an officer; four convictions for drug possession; four convictions for trespass; three convictions for resisting arrest; two convictions for assault; two convictions for domestic violence; and one conviction each for escape; falsification; battery and criminal damaging. (June 15, 2020 Tr. at 5). The court questioned counsel about whether

appellant received any past treatment or offers for treatment emanating from his 7 prior OVI convictions. Counsel was uncertain whether treatment was offered, but this Court finds it hard to imagine that treatment was not offered or undertaken with any of those convictions.

{¶26} The court further indicated on the record and in its sentencing entry that appellant's record showed that he had not favorably responded to prior sanctions. (June 15, 2020 Tr. at 5). The court also noted that appellant began alcohol and drug abuse at age 7, with marijuana use beginning at age 12; hallucinogens at 14; Xanax at 19; cocaine at 21; methamphetamines and heroin at age 27; and an uncertain date for beginning to use opiates. (June 15, 2020 Tr. at 6).

{¶27} The court additionally indicated that appellant was currently using five of the illegal substances, he was incapable of dealing with his substance abuse, and he could not show genuine remorse. (June 15, 2020 Tr. at 6). The court further mentioned appellant's failure to appear for his first sentencing date, even though he gave a reason for doing so. The court found that this nevertheless showed a "discernment on his part not to be further engaged in these proceedings to try to help himself." (June 15, 2020 Tr. at 6). It appears that the court properly found that appellant was not at the point where he wanted to change his behavior, and therefore, treatment would not be effective. The failures to appear for court, even his own sentencing, show an indifference at minimum to the court and to treatment.

{¶28} The court found that the only factor indicating less serious conduct and less likelihood of recidivism was that appellant admitted his guilt early on in the case.

{¶29} A trial court's imposition of a maximum prison term is not contrary to law as long as the court sentences the offender within the statutory range for the offense, and in so doing, considers the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors set forth R.C. 2929.12. While not required to do so, the trial court in the instant case expressly considered the statutory factors at the sentencing hearing and in its sentencing entry. The court explained why it sentenced appellant to the maximum penalty, and that penalty was within the statutory range. The court specifically found that community control was inconsistent with the principles and purposes of the sentencing statutes.

{¶30} Further, while the state took no position on sentencing and defense counsel advocated for community control, the trial court informed appellant at the plea hearing that it was not bound by the sentencing recommendations of the prosecution or defense counsel. (5/18/20 Tr. at 10). The court repeated to appellant that while his offense did not require a mandatory prison sentence and he was eligible for community control, the maximum sentence for his offense was 36 months in prison. (5/18/20 Tr. at 11). While appellant stresses that his offense did not involve violence, he expressed remorse, and drug treatment was available, the trial court properly followed the sentencing statutes and the sentence was within the statutory range.

{¶31} Accordingly, we cannot clearly and convincingly find that the record does not support the trial court's findings or the sentence is otherwise contrary to law. Appellant's sole assignment of error is therefore without merit and is overruled.

Waite, J., concurs.
Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the sole 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 to be 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.