[Cite as *State v. Filous*, 2016-Ohio-8312.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104287

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

NEIL E. FILOUS III

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-602579-A

BEFORE: Boyle, J., Keough, P.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: December 22, 2016

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Neil Filous III, pleaded guilty to an amended charge of attempted domestic violence in violation of R.C. 2923.02 and 2919.25, a fifth-degree felony. The trial court sentenced him to the maximum sentence of 12 months in prison on the charge. Filous appeals, raising the following two assignments of error:

> I. The maximum sentence imposed by the trial court for the attempted domestic violence conviction is not supported by the record and is contrary to the law.
>
> II. The trial court denied the defendant of his right to due process of law to fair and impartial sentencing.

{¶2} Finding no merit to the appeal, we affirm.

A. Maximum Sentence

{¶3} In his first assignment of error, Filous argues that the trial court failed to properly consider the felony sentencing guidelines in imposing the maximum sentence of 12 months in prison. According to Filous, the trial court (1) ignored the wishes of the victim who did not want Filous to be sent to prison, (2) ignored the mitigating factors weighing against prison, and (3) "should have sentenced [him] to community control sanctions or a minimum term of imprisonment." We disagree.

{¶4} Our review of felony sentences is governed by R.C. 2953.08. Under the plain language of R.C. 2953.08(G)(2), "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. Further, as explained by the Ohio Supreme Court:

> We note that some sentences do not require the findings that R.C. 2953.08(G) specifically addresses. Nevertheless, it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court. That is, an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence.

Id. at ¶ 23.

{¶5} Although the trial court has full discretion to impose any term of imprisonment within the statutory range, it must consider the sentencing purposes in R.C. 2929.11 and the guidelines contained in R.C. 2929.12. Further, in accordance with R.C. 2953.08 and *Marcum*, an appellate court may increase, reduce, or otherwise modify a sentence or vacate the sentence and remand the matter to the sentencing court for resentencing if the record does not support the sentencing court's application of R.C. 2929.11 and 2929.12.

{¶6} R.C. 2929.11(A) provides that the "overriding purposes of felony sentencing are 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." R.C. 2929.11(B) requires that, in addition to achieving these goals, a sentence must be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim."

{¶7} R.C. 2929.12 provides a nonexhaustive list of factors the court must consider

in determining the relative seriousness of the underlying crime and the likelihood that the defendant will commit another offense in the future. *State v. Wright*, 8th Dist. Cuyahoga No. 100283, 2014-Ohio-3321, ¶ 9, citing *State v. Townsend*, 8th Dist. Cuyahoga No. 99896, 2014-Ohio-924, ¶ 11. The factors include: (1) the physical, psychological, and economic harm suffered by the victim, (2) the defendant's prior criminal record, (3) whether the defendant shows any remorse, and (4) any other relevant factors. R.C. 2929.12(B), (D), and (E).

{¶8} Prior to sentencing Filous, the trial court obtained a presentence investigation report ("PSI"), which detailed, among other things, Filous's lengthy criminal record. At sentencing, the trial court first heard from defense counsel, who urged the trial court to impose community controlled sanctions. Filous next addressed the court, expressing remorse for his actions and promised to engage in law-abiding conduct in the future. Filous pleaded with the trial court to give him another chance, at which point, the trial court inquired as to many of Filous's past convictions, focusing only on those offenses involving victims and discounting the drug and alcohol-related offenses. Specifically, the trial court highlighted the following offenses:

September 2013: Domestic Violence
March 2012: Domestic Violence
2007: Domestic Violence
2003: Felonious Assault

2001: Domestic Violence
1999: Hit Skip and Reckless Operation
November 1996: Assault
June 1996: Assault
March 1996: Domestic Violence

{¶9} The trial judge further asked Filous why she should give him another chance given his repeated failure to change his behavior. Filous responded that many of the offenses arose during the time that he was doing drugs or abusing alcohol. The trial court, however, pointed out that some of Filous's prior criminal offenses occurred while he was "sober," thereby discrediting his excuse. The record further reflects that Filous was on judicial release from the September 2013 domestic violence offense at the time that he committed the underlying offense.

{¶10} The record here clearly supports the trial court's decision to impose the maximum sentence. Contrary to Filous's assertion on appeal, the record does not show that Filous was suffering from depression and anxiety at the time of the offenses to constitute a mitigating factor in his favor. Instead, the PSI only reflects that Filous was treated for these conditions in 2013. Additionally, the mere fact that the trial court did not find Filous's stated reasons, such as his recent employment, his ability to obtain a driver's license, and his diagnosis of carpel tunnel syndrome, as compelling reasons for a

lower sentence does not render the sentence imposed contrary to law. Nor can we say that the trial court failed to consider R.C. 2929.11 and 2929.12 simply because it did not agree with the victim's recommended sentence.

{¶11} Accordingly, based on the record before us, we find no merit to Filous's first assignment of error and overrule it.

B. Due Process

{¶12} In his second assignment of error, Filous argues that his due process rights were violated because the trial court failed to afford him a fair and impartial sentence. In support of this argument, Filous relies on two grounds: (1) certain comments made by the trial court at sentencing, and (2) the trial court's failure to advise him of his right to appeal and appoint him appellate counsel. Filous contends that these grounds collectively demonstrate that the trial judge was biased against him. We disagree.

{¶13} Judicial bias has been described as

> "a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts."

State v. Dean, 127 Ohio St.3d 140, 2010-Ohio-5070, 937 N.E.2d 97, ¶ 48, quoting *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph four of the syllabus. "If the trial judge forms an opinion based on facts introduced or events occurring during the course of the current or prior proceedings, this does not rise to the level of judicial bias, 'unless [the opinions] display a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *State v. Hough*, 8th Dist. Cuyahoga Nos.

98480 and 98482, 2013-Ohio-1543, ¶ 11, citing *Dean* at ¶ 49, quoting *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994).

{¶14} The law presumes that a judge is unbiased and unprejudiced in the matters over which he or she presides, and the appearance of bias or prejudice must be compelling in order to overcome the presumption. *State v. Power*, 7th Dist. Columbiana No. 12 CO 14, 2013-Ohio-4254, ¶ 23, citing *In re Disqualification of Olivito*, 74 Ohio St.3d 1261, 1262, 657 N.E.2d 1361 (1994).

{¶15} Filous argues that the trial court mocked his efforts to rehabilitate himself by discrediting Filous's sobriety and his obtainment of both a driver's license and a job. He further contends that the trial court "baselessly" called his mother a "liar" and mocked his "expression of remorse" during the following exchange:

THE DEFENDANT:	I just ask that, your Honor, you could give me the chance to prove that I have changed.
THE COURT:	And what should I do for these victims?
THE DEFENDANT:	I take full responsibility for that.
THE COURT:	Oh, what does that mean, sir? I take full responsibility. Tell me what that means to you. Say it. Tell me what you mean by it.
THE DEFENDANT:	I feel horrible about it.
THE COURT:	Oh, so what. So you feel bad. You're 39.
THE DEFENDANT:	Yes, your honor.
THE COURT:	And you feel bad? What does, I take full responsibility for this, tell me what that means. Are you going to pay for their mental health

appointments at probably $150 a crack? Are you going to do that for all these victims?

THE DEFENDANT: Whatever the Court seems — feels is necessary.

THE COURT: No, I want to know what you meant by saying, I'm going to take full responsibility. Tell me what you meant.

THE DEFENDANT: In my heart feel.

THE COURT: Did you mean you were going to pay for their mental health counseling? Because these people probably need to go to mental health counseling, and it ain't cheap.

THE DEFENDANT: I understand that.

THE COURT: So what did you mean?

THE DEFENDANT: I feel horrible in my heart that I've done this. And I know that, the Lord will charge me with this.

THE COURT: Oh, that sounds like President Carter, I feel horrible in my heart. Right? Oh, his was lust in his heart. Okay. Yours is feeling horrible in your heart. What else does it mean to say, I'm going to take full responsibility.

THE DEFENDANT: I can only show in my future actions what —

THE COURT: I've seen your future actions here, sir. So have too many victims. Like I said, I only picked up the ones where there were victims. I didn't pick up all the other crimes. I mean, they're here, I just didn't mention them. And somehow, you think — you can't point to me anything that tells me what you mean when you say, I'm going to take full responsibility.

THE DEFENDANT: By living right and not letting anything like this

ever happen again.

THE COURT: Uh-huh. Again, let me ask you, on what evidence should I believe you? Give me any evidence at all, that I should believe you.

THE DEFENDANT: I can only offer my word.

THE COURT: And that's been really good over the years, hasn't it. And, the last six years, have been sober years. And —

THE DEFENDANT: Four years.

{¶16} We cannot agree that this exchange evidences judicial bias on behalf of the trial judge. While the trial judge clearly did not believe that Filous was entitled to another chance to prove himself, the judge's opinion was not based on bias but Filous's criminal history. Further, "[i]t is not reversible error for a sentencing judge, in explaining his sentence, to make critical statements about a defendant's conduct based upon the facts of the case presented to the court." *Power* at ¶ 27. Nor do we find any error in a trial court's challenge of a defendant's sincerity or credibility when a defendant makes blanket promises that contradict his past track record. Additionally, although the trial court called Filous's mother a liar based on her assertion in a letter to the court that Filous "has suffered so much physically," the trial court made that comment only after Filous acknowledged that he had not suffered any physical injuries during the offense and was not sure of the basis for his mother's remark. Thus, while the trial court's characterization of Filous's mother may have been unduly harsh, we do not find that criticism evidences judicial bias. *See State v. Clay*, 8th Dist. Cuyahoga No. 89763,

2008-Ohio-1415, ¶ 22-23 (sentencing court's criticism of defendant's mother was not reversible).

{¶17} Filous next argues that the trial court's failure to advise him of his appellate rights as required under Crim.R. 32(B) evidences "the trial court's prejudice for a specific result" — a maximum sentence. Specifically, Filous contends that "the court was biased in favor of Filous receiving the maximum sentence and the trial court made it difficult if not impossible for Filous to appeal his sentence." He points to the following exchange in support of this argument:

DEFENSE COUNSEL:	Your Honor, he's asking the Court to appoint counsel for appeal.
THE COURT:	For appeal?
DEFENSE COUNSEL:	Yes.
THE COURT:	Was this a trial?
DEFENSE COUNSEL:	No, but you gave him the maximum sentence.
THE COURT:	Oh. Oh, well, that's because he's very much of a repeat offender.

{¶18} Crim.R. 32(B) provides as follows:

> (1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.
>
> (2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.
>
> (3) If a right to appeal or a right to seek leave to appeal applies under

> division (B)(1) or (B)(2) of this rule, the court also shall advise the defendant of all of the following:
>
> (a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;
>
> (b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;
> (c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;
>
> (d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.
>
> Upon defendant's request, the court shall forthwith appoint counsel for appeal.

{¶19} The state counters that Crim.R. 32 does not apply because Filous pleaded guilty and the matter did not go to trial. This argument, however, is not correct. Crim.R. 32(B)(2) applied in this case, requiring the trial court to advise Filous of his appellate rights. Nonetheless, although we agree with Filous that the trial court failed to comply with Crim.R. 32(B), we cannot say that the trial court's failure is evidence of judicial bias. Our review of the record reveals an erroneous application of the rule — not judicial bias. Moreover, the trial court's failure to comply with Crim.R. 32(B) is not grounds for reversal in this case because Filous filed a timely direct appeal with the benefit of appellate counsel. *See State v. Thomas*, 8th Dist. Cuyahoga No. 94788, 2011-Ohio-214, ¶ 38 (recognizing that any argument as to trial court's failure to comply with Crim.R. 32 was moot because appellant was granted delayed appeal and appointed counsel to represent him).

{¶20} Accordingly, having found no judicial bias on the part of the trial court in

imposing a maximum sentence, we overrule the second assignment of error.

{¶21} Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
EILEEN A. GALLAGHER, J., CONCUR