[Cite as *State v. Harris*, 2019-Ohio-3102.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 107897
v.	:	
WENDALL HARRIS,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART AND DISMISSED IN PART
RELEASED AND JOURNALIZED: August 1, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-624340-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anthony M. Stevenson, Assistant Prosecuting Attorney, *for appellee*.

Paul W. Flowers Co., L.P.A., and Louis E. Grube, *for appellant*.

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Wendall Harris ("Harris") appeals from his theft conviction and associated suspended prison sentence and assigns the following errors for our review:

I. The trial court erred by failing to grant the motion for judgment of acquittal because the state presented insufficient evidence to sustain a guilty verdict for the crime of theft.

II. The trial court erred by imposing both a prison term and community control sanctions.

III. The trial court erred by imposing a prison term despite making a factual finding that community control sanctions were appropriate.

IV. The record clearly and convincingly does not support the considerations that are required in support of a prison sentence pursuant to R.C. 2929.11 and 2929.12.

{¶ 2} Having reviewed the record and pertinent law, we affirm Harris's conviction and dismiss as moot his appeal in relation to his sentence. The apposite facts follow.

{¶ 3} On February 23, 2017, Harris opened an account in the name of World Five Star Auto Sales ("WFSAS") at Dollar Bank. On April 4, 2017, Harris deposited a check for $41,000 made payable to WFSAS into this account. The check was from Atlanta Biz Noir, Inc., a company in Detroit, Michigan. In the memo section of the check "2014 Cadillac Escalade Luxury" was written.

{¶ 4} The next day, April 5, 2017, Harris cashed a check from WFSAS for $4,800 at Dollar Bank. The check was made payable to Harris, and he signed the back of the check as the payee. He also signed the front of the check on behalf of WFSAS as the payor.

{¶ 5} On April 10, 2017, the $41,000 check was returned for insufficient funds, which left WFSAS's account with a negative balance of $4,758.26. Dollar Bank sent correspondence to WFSAS, and Harris personally, demanding return of the

money. Neither WFSAS nor Harris returned the money to the bank, and eventually, Dollar Bank closed the account and sustained the loss. On December 29, 2017, Harris was charged with one count of theft in violation of R.C. 2913.02(A)(2), a fifth-degree felony. On May 10, 2018, this case was tried to the bench, and the court found Harris guilty as charged. On June 12, 2018, the court sentenced Harris to six months in prison, suspended this sentence, and further sentenced Harris to one year of community control sanctions. It is from this conviction and sentence that Harris appeals.

Sufficiency of the Evidence

{¶ 6} Crim.R. 29 mandates that the trial court issue a judgment of acquittal where the prosecution=s evidence is insufficient to sustain a conviction for the offense. Crim.R. 29(A) and sufficiency of the evidence require the same analysis. *State v. Taylor*, 8th Dist. Cuyahoga No. 100315, 2014-Ohio-3134. "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Driggins*, 8th Dist. Cuyahoga No. 98073, 2012-Ohio-5287, & 101, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶ 7} The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Vickers*,

8th Dist. Cuyahoga No. 97365, 2013-Ohio-1337, citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991).

{¶ 8} In the case at hand, Harris was convicted of theft in violation of R.C. 2913.02(A)(2), which states, in part, as follows: "No person, with purpose to deprive the owner of property * * *, shall knowingly obtain or exert control over * * * the property * * * [b]eyond the scope of the express or implied consent of the owner or person authorized to give consent * * *."

{¶ 9} Prior to the bench trial in the case at hand, Harris stipulated to various exhibits including: "the check that was written from Atlanta Biz Noir for $41,000"; the "check that was cashed by Mr. Harris for World Five Star Auto Sales for $4,800"; the "initial notice that the checks were returned insufficient"; and notice "that the account is going to be closed and the payments were not made."

{¶ 10} Debbie Smith, a security investigator for Dollar Bank, testified that the opening deposit of the WFSAS account was $100. Over the next several weeks, deposits and withdrawals were made on this account, leaving a balance of $41.74 on March 31, 2017.

{¶ 11} According to Smith, Harris deposited the $41,000 check from Atlanta Biz Noir on April 4, 2017. Smith further testified that the bank's "funds availability policy states that, generally, for larger checks you get $5,000 available to you the next business day. So that was how [Harris] was able to get the $4,800" on April 5, 2017. Smith testified that the $41,000 check "came back insufficient funds" on April 10, 2017, and Dollar Bank resubmitted it according to procedure. The check came back

a second time with insufficient funds, which put WFSAS's "account in the negative due to the $4,800 check."

{¶ 12} On April 17, 2017, Dollar Bank sent a letter to WFSAS notifying it of the returned check and negative balance. On April 25, 2017 Dollar Bank closed WFSAS's account with a "charge-off" and sustained a loss of $4,758.26. That same day, Dollar Bank sent correspondence to WFSAS notifying it that the account had been closed and that "[i]f repayment of this liability is not made within ten (10) days, further action may be taken."

{¶ 13} Smith further testified about correspondence Dollar Bank sent to Harris at his home in Cleveland via certified mail on May 16, 2017, regarding the amount owed to the bank. This letter demanded "full reimbursement in the amount of $4,758.26 * * *." On May 17, 2017, Harris signed for this certified mail.

{¶ 14} Smith also testified about the business signature card and the revocable proxy listing Harris as the owner of WFSAS's account with Dollar Bank. Harris signed these documents on February 23, 2017. According to Smith, another security officer with Dollar Bank put a note in Harris's file stating that she spoke with Harris on May 16, 2017, and he said "he understood that he needed to pay Dollar Bank the funds." Smith testified that the $4,800 was never returned to the bank and neither Harris nor WFSAS reported any fraud or mistake on the account to Dollar Bank.

{¶ 15} On appeal, Harris argues that "mere evidence of nonpayment of a debt is insufficient to prove the purpose to deprive, and such evidence will not sustain a

conviction for theft in violation of R.C. 2913.02(A)(2)." To support this argument, Harris cites *State v. Metheney*, 87 Ohio App.3d 562, 567, 622 N.E.2d 730 (9th Dist.1993), in which the court held the following: "While evidence that appellant did not pay the bills is some evidence that she intended not to pay them when she received the electricity, the state cites no authority for the proposition that nonpayment alone is sufficient to prove intent at the time of receipt."

{¶ 16} The 1974 committee comments to H.B. 511, which is codified at R.C. 2913.02(A)(2), state that this statute covers common law embezzlement.

> Formerly, * * * embezzlement could not constitute [theft], since the intent to deprive was formed after the property came into the offender's possession. * * * Under the new section, * * * embezzlement now constitutes theft, since the section defines theft as exerting control (as opposed to initially gaining control over property * * *) beyond the scope of the owner's consent, and with purpose to deprive the owner of the same.

{¶ 17} In *State v. Marshall*, 2d Dist. Montgomery No. 20744, 2005-Ohio-5585, ¶ 26, the court upheld the defendant's conviction of theft beyond the scope of consent:

> Simply put, Defendant kept rental property belonging to Rent-A-Center for nearly one year beyond the expiration of the rental period. Defendant exerted control over that property beyond the scope of consent given by Rent-A-Center, as specified in their contract. Defendant's intent to deprive the owner, Rent-A-Center, of its property can reasonably be inferred from his retention of the rental property without making any payments for its use and his explicit refusal to return the property to Rent-A-Center. This evidence is sufficient to demonstrate a violation of R.C. 2913.02(A)(2).

{¶ 18} Harris further argues on appeal that Dollar Bank did not retain a property interest in the $4,800 paid to Harris; therefore, the state failed to present

sufficient evidence that "Harris exerted control over Dollar Bank's property beyond the scope of the bank's consent." Harris cites no law for this proposition, other than "it does not make any sense * * *." Harris additionally argues that the state failed to "define the scope of express or implied consent given by the bank for [Harris] to receive or retain the funds he was paid."

{¶ 19} It is a long-standing law in Ohio that money deposited into a bank becomes the property of the bank. "Unless there is some agreement to the contrary, deposits received by the bank become its property; they belong to it, and can be loaned or otherwise disposed of by it, as any other money belonging to the bank." *Bank v. Brewing Co.*, 50 Ohio St. 151, 157, 33 N.E. 1054 (1893). Harris's argument that the bank did not "retain" its property interest in the money is misguided, because nothing in R.C. 2913.02(A)(2) requires proof of retention. Harris exerted control of the bank's property beyond the scope of consent when he withdrew and failed to return $4,800 despite having an account balance of $41.74.

{¶ 20} Upon review, we find that the state presented sufficient evidence to constitute theft under R.C. 2913.02(A)(2). Accordingly, Harris's first assigned error is overruled.

Felony Sentencing

{¶ 21} R.C. 2953.08(G)(2) provides, in part, that when reviewing felony sentences, the appellate court's standard is not whether the sentencing court abused its discretion; rather, if this court "clearly and convincingly" finds that (1) Athe record does not support the sentencing court's findings under@ R.C. Chapter 2929 or (2)

"the sentence is otherwise contrary to law," then we may conclude that the court erred in sentencing. *See also State v. Marcum*, 146 Ohio St. 3d 516, 2016-Ohio-1002, 59 N.E.3d 1231.

{¶ 22} A sentence is not clearly and convincingly contrary to law "where the trial court considers the purposes and principles of sentencing under R.C. 2929.11 as well as the seriousness and recidivism factors listed in R.C. 2929.12, properly applies post-release control, and sentences a defendant within the permissible statutory range." *State v. A.H.*, 8th Dist. Cuyahoga No. 98622, 2013-Ohio-2525, & 10.

{¶ 23} Pursuant to R.C. 2929.11(A), the two 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 * * *." Additionally, the sentence imposed shall be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(B).

{¶ 24} Furthermore, in imposing a felony sentence, "the court shall consider the factors set forth in [R.C. 2929.12(B) and (C)] relating to the seriousness of the conduct [and] the factors provided in [R.C. 2929.12(D) and (E)] relating to the likelihood of the offender's recidivism * * *." R.C. 2929.12. However, this court has held that "[a]lthough the trial court must consider the principles and purposes of sentencing as well as the mitigating factors, the court is not required to use

particular language or make specific findings on the record regarding its consideration of those factors." *State v. Carter*, 8th Dist. Cuyahoga No. 103279, 2016-Ohio-2725, & 15.

> In the case at hand, the court's sentencing journal entry reads, in part, as follows: "The court finds that prison is consistent with the purpose of R.C. 2929.11. The court imposes a prison sentence at the Lorain Correctional Institution of 6 month(s). * * * Execution of sentence suspended. The court finds that a community control sanction will adequately protect the public and will not demean the seriousness of the offense. It is therefore ordered that the defendant is sentenced to one year of community control on each count * * *."

The court also ordered restitution in the amount of $4,758.26.

{¶ 25} In *State v. Anderson*, 143 Ohio St.3d 173, 2015-Ohio-2089, 35 N.E.3d 512, ¶ 31, the Ohio Supreme Court held the following: "the General Assembly intended prison and community-control sanctions as alternative sentences for a felony offense. Therefore, we hold as a general rule, when a prison term and community control are possible sentences for a particular felony offense, absent an express exception, the court must impose either a prison term or a community-control sanction or sanctions." *See also State v. Paige*, 153 Ohio St.3d 214, 2018-Ohio-813, 103 N.E.3d 800, ¶ 6 ("Split sentences are prohibited in Ohio. [A] court must impose either a prison term or a community-control sanction as a sentence for a particular felony offense — a court cannot impose both for a single offense").

{¶ 26} Accordingly, upon review, we find that Harris's sentence is contrary to law.

{¶ 27} Pursuant to R.C. 2929.13(B)(1)(a), "if an offender is convicted of * * * a felony of the * * * fifth degree that is not an offense of violence * * *, the court shall

sentence the offender to a community control sanction" if various conditions apply. However, pursuant to R.C. 2929.13(B)(1)(b), the "court has discretion to impose a prison term upon an offender who is convicted of * * * a felony of the * * * fifth degree that is not an offense of violence * * * if * * * the offender previously had served * * * a prison term."

{¶ 28} At Harris's sentencing hearing, defense counsel stated that Harris "was sentenced to 30 months' imprisonment" for a 1996 felony conviction in federal court and that Harris "has been to jail before." Therefore, it was within the court's discretion to impose a prison term for Harris's theft conviction in the instant case. However, this court has held that trial courts lack jurisdiction to resentence offenders after their prison sentence expires. *See State v. Dresser*, 8th Dist. Cuyahoga No. 92105, 2009-Ohio-2888, ¶ 11 ("it is the expiration of the prisoner's journalized sentence * * * that is determinative of the trial court's authority to resentence"). *Compare State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 10 ("once Holdcroft completed his prison term for aggravated arson, the trial court lost the authority to resentence him for that offense").

{¶ 29} In the case at hand, the court sentenced Harris on June 12, 2018, albeit improperly, to a six-month suspended prison term and one year of community control sanctions. These penalties expired December 12, 2018, and June 12, 2019, respectfully.

{¶ 30} "An appeal of a sentence already served is moot." *State v. Bostic*, 8th Dist. Cuyahoga No. 84842, 2005-Ohio-2184, ¶ 21.

> If an individual has already served his sentence, there is no collateral disability or loss of civil rights that can be remedied by a modification of the length of the sentence in the absence of a reversal of the underlying conviction. Therefore, appellant's assertion that the trial court erred in determining the length of that sentence is a moot issue because appellant has already served his sentence, and no relief can be granted by this court subsequent to the completion of the sentence if the underlying conviction itself is not at issue

State v. Beamon, 11th Dist. Lake No. 2000-L-160, 2001 Ohio App. LEXIS 5655 (Dec. 13, 2001).

{¶ 31} Accordingly, we hold that, although Harris's sentence is contrary to law, his sentence has also expired; therefore, his argument is moot, and his appeal is dismissed as to his second, third, and fourth assigned errors.

{¶ 32} Conviction affirmed; appeal of sentence dismissed as moot.

It is ordered that appellee recover from appellant 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.

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

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PATRICIA ANN BLACKMON, PRESIDING JUDGE

RAYMOND C. HEADEN, J., CONCURS;
LARRY A. JONES, SR., J., CONCURS IN
JUDGMENT ONLY