[Cite as *State v. Wolfkill*, 2021-Ohio-1412.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 109544
v.	:	
JASON WOLFKILL,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 22, 2021

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-19-637352-A

Appearances:

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

John P. Parker, *for appellant.*

MICHELLE J. SHEEHAN, P.J.:

{¶ 1} Appellant Jason Wolfkill appeals from a judgment of the Cuyahoga County Court of Common Pleas that sentenced him to a prison term of 36 months

for a burglary offense after he pleaded guilty to the offense. On appeal, he raises the following two assignments of error for our review:

> I. The sentence imposed is contrary to law and/or not supported by the record and this court must take action *under State v. Jones*, 2018-Ohio-498 (En Banc).
>
> II. The trial judge during the sentencing hearing was biased or "probably biased" which violated appellant's right to a neutral and detached magistrate and Due Process under the Fourteenth Amendment of the federal Constitution and Article I, Section 10 of the Ohio Constitution.

{¶ 2} After a review of the record and applicable law, we find no merit to the appeal and affirm the judgment of the trial court.

Background

{¶ 3} On April 9, 2018, the police responded to a report that two men broke into an apartment and left with a safe and a bag. The police arrived to find a rear door broken in, the glass shattered, and the lock damaged. The police found a marijuana-grow operation inside the apartment, which turned out to be Wolfkill's brother's residence.

{¶ 4} Wolfkill and his codefendant were indicted for burglary, grand theft, and theft. Pursuant to a plea agreement, Wolfkill pleaded guilty to burglary, a third-degree felony, and his codefendant pleaded guilty to attempted burglary, a fourth-degree felony. The state nolled the remaining two charges.

{¶ 5} The transcript of the plea hearing reflects that Wolfkill's counsel asked that Wolfkill be evaluated for drug addiction. Counsel claimed that Wolfkill had

"never really been afforded the opportunity to have any meaningful inpatient drug treatment."

{¶ 6} At the sentencing hearing, the trial court reviewed Wolfkill's PSI, which indicated a history of crimes committed by Wolfkill, including the instant burglary offense. Wolfkill committed crimes to support his drug addiction, and he committed the burglary offense while on postrelease control. Wolfkill's probation officer reported that he was a constant violator — he would not stay at his halfway house and would continue to commit crimes while on supervision. Wolfkill also failed to report weekly as required; he had not reported for four months when he committed the instant burglary. In addition, Wolfkill failed to enter and complete a substance abuse treatment program and failed to attend weekly AA meetings. Wolfkill had tested positive for cocaine and made no payments toward the court costs on prior cases. The PSI also indicated Wolfkill had a long and extensive criminal history dating back to 2004. His offenses included burglary, forgery, passing bad checks, engaging in a pattern of corrupt activity, a federal offense of counterfeit private securities, aggravated robbery, complicity, receiving stolen property, drug possession, and escape.

{¶ 7} Wolfkill's counsel attributed Wolfkill's criminal history to his drug abuse and maintained that Wolfkill "never really had the opportunity to successfully complete an inpatient drug treatment program." His counsel pleaded for compassion and advocated for a placement in inpatient drug treatment in lieu of prison. Wolfkill also addressed the court. He stated he started abusing drugs and

committed crimes to support his drug use in 2004. When Wolfkill alleged that he had asked for help but did not receive any, the court inquired whether he had ever sought a sponsor, gone to an AA meeting outside of prison, or pursued treatment on his own from programs such as "Stella Maris," "Harbor Light," or "CATS." Wolfkill answered negatively to these questions and explained that he had asked his parole officer to set up a program for him but he turned to drugs again when he lost his parents in October 2018, and he was reluctant to turn himself in to the inpatient program because he was using drugs. The court then stated the following:

> It's the story of your life, Mr. Wolfkill, not taking any kind of responsibility, blaming other people for not giving you supposedly what you need.
>
> I've considered the seriousness and recidivism factors, and I find you deserve the full 36 months at Lorain Correctional Institute [sic] * * *.
>
> Whether it does Mr. Wolfkill any good or not is inconsequential to this Court. The Court's job is to protect the public. Mr. Wolfkill has demonstrated a nearly 20-year, two-decade career of committing crime[s], not complying with any conditions of community control, and not doing one iota of work to better himself.

{¶ 8} Wolfkill now appeals from his sentence, raising two assignments of error for our review. Under the first assignment of error, he claims his sentence is "contrary to law and/or not supported by the record" pursuant to R.C. 2929.11 and 2929.12.

R.C. 2929.11 and 2929.12

{¶ 9} In imposing a sentence for a felony, the trial court is to consider the sentencing purposes set forth in R.C. 2929.11. R.C. 2929.11 provides that a sentence

imposed for a felony shall be guided by the overriding purposes of "protect[ing] the public from future crime by the offender and others and punish[ing] the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." Furthermore, R.C. 2929.11(B) provides that a sentence shall be "reasonably calculated" to achieve those overriding purposes "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."

{¶ 10} In determining the most effective way to comply with the purposes and principles set forth in R.C. 2929.11, the sentencing court must consider the seriousness and recidivism factors enumerated in R.C. 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶ 38. The seriousness factors are enumerated in R.C. 2929.12(B) and (C), which include factors such as the physical or mental harm suffered by the victim. The recidivism factors are enumerated in R.C. 2929.12 (D) and (E), which include factors such as the defendant's criminal history.

{¶ 11} R.C. 2929.11 and 2929.12, however, do not require a trial court to make any specific factual findings on the record. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31. Moreover, consideration of R.C. 2929.11 and 2929.12 are presumed unless the defendant affirmatively shows the trial court fails to do so. *State v. White*, 8th Dist. Cuyahoga No. 103474, 2016-Ohio-2638, ¶ 8.

{¶ 12} Here, before imposing a maximum prison term of 36 months for Wolfkill's third-degree felony offense, the trial court recited Wolfkill's lengthy criminal history dating back to 2004. Wolfkill committed the instant burglary offense while on postrelease control for a prior offense. Wolfkill acknowledged he committed crimes to feed his drug habit yet the PSI indicates he did not take any affirmative steps to address his substance abuse problems. While he blamed his criminal behaviors on a lack of opportunity for completing a drug treatment program, under an inquiry from the trial court, he admitted he never sought a sponsor to help him with his drug abuse, never went to an AA meeting outside of prison, and never pursued a drug treatment program on his own.

{¶ 13} Wolfkill argues that his sentence should be reversed because the record does not support the maximum sentence he received, citing this court's en banc opinion in *State v. Jones*, 2018-Ohio-498, 105 N.E.3d 702 (8th Dist.) ("*Jones I*"). In *Jones I*, the en banc court held that R.C. 2953.08(G)(2)(a) permits an appellate court to modify or vacate a sentence if it finds that the record does not support the sentencing court's findings under R.C. 2929.11 and 2929.12. *Id*. at ¶ 5-6, 21. Citing *Jones I*, Wolfkill argues his sentence was "contrary to law and/or not supported by the record."

{¶ 14} After Wolfkill's brief was filed in this case, the Supreme Court of Ohio reversed *Jones I*, in *State v. Jones*, Slip Opinion No. 2020-Ohio-6729 ("*Jones II*"). The court held that R.C. 2953.08(G)(2)(a) does not permit the appellate court to modify or vacate a sentence based on the lack of support in the record for the trial

court's findings under R.C. 2929.11 and 2929.12. *Jones II* at ¶ 29. The court also explained that R.C. 2953.08(G)(2)(a) does not provide a basis for an appellate court to modify or vacate a sentence if it concludes that the record as a whole does not support the sentence under R.C. 2929.11 and 2929.12. *Jones II* at ¶ 30-31. The court in addition rejected the notion that an appellate court's determination that the record does not support a sentence can be "equate[d] to a determination that the sentence is 'otherwise contrary to law' as that term is used in R.C. 2953.08(G)(2)(b)." *Jones II* at ¶ 32.

{¶ 15} Unaware that *Jones I* would be ultimately reversed by the Supreme Court of Ohio, Wolfkill asks us to apply the felony sentencing principles and weigh the sentencing factors. He asks us to consider the following: his codefendant received a shorter prison term; the victim, who is his brother, operated an illegal marijuana-grow operation in the apartment; he was highly addicted to drugs; the harm he did to the marijuana operation was "de minimis"; he had requested drug treatment; and he showed genuine remorse and pleaded guilty.

{¶ 16} However, as the Supreme Court of Ohio explained in *Jones II*, "[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 II* at ¶ 42. R.C. 2953.08(G)(2) does not permit a reviewing court to conduct a "freestanding inquiry." *Id.*

{¶ 17} Rather, when reviewing a felony sentence that is imposed after a consideration of R.C. 2929.11 and 2929.12, our review is limited to the question of whether the sentence is contrary to law; a sentence is contrary to law if (1) the sentence falls outside the statutory range for the particular degree of offense, or (2) the trial court failed to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12. *See e.g., State v. Smith,* 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, ¶ 13-14. Wolfkill's sentence for his third-degree felony offense is within the statutory range. Furthermore, the record reflects the trial court had considered the purposes and principles of felony sentencing in R.C. 2929.11 and the sentencing factors in R.C. 2929.12.

{¶ 18} While Wolfkill argues his maximum sentence is not supported by the record and/or contrary to law, we note that under the current sentencing provision, the trial court need not make any findings or analyze specific factors to support a maximum sentence. *State v. Holly*, 8th Dist. Cuyahoga No. 102764, 2015-Ohio-4771, ¶ 12. Under a very limited review as we have described above, we have no authority to reverse or modify Wolfkill's sentence. The first assignment of error is without merit.

Claim of Judicial Bias

{¶ 19} Under the second assignment of error, Wolfkill claims the trial court was biased "or probably biased" as reflected in its postsentence statement

"[w]hether it does Mr. Wolfkill any good or not is inconsequential to this Court. The Court's job is to protect the public."

{¶ 20} The term "judicial bias" has been taken to "'impl[y] 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.'" *In re Disqualification of O'Neill*, 100 Ohio St.3d 1232, 2002-Ohio-7479, 798 N.E.2d 17, ¶ 14, quoting *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 469, 132 N.E.2d 191 (1956).

{¶ 21} Our review of the sentencing hearing in its entirety indicates that the trial court had reviewed Wolfkill's lengthy criminal record, which reflected Wolfkill repeatedly committed crimes to support his drug addiction and the frequent incarceration did not appear to change his behavior or propensity to commit crimes as he continued to rely on criminal activities to fund his drug use. In addition, according to his probation officer, Wolfkill was a constant violator while on postrelease control. Therefore, the trial court's remark "[w]hether it does Mr. Wolfkill any good or not is inconsequential," read in the context of the entire hearing, does not necessarily appear to reflect judicial bias but rather a recognition that, while rehabilitation has not been achieved by Wolfkill's repeated incarceration, the court nonetheless has a duty to protect the public from Wolfkill's future criminal offenses. In claiming the trial court's remark revealed a lack of "open mind,"

Wolfkill appears to have taken the remark out of context. Accordingly, we find the second assignment of error to be without merit.

{¶ 22} Judgment affirmed.

It is ordered that appellee recover of 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. 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.

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MICHELLE J. SHEEHAN, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
LISA B. FORBES, J., CONCUR