

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

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| STATE OF OHIO, | : | OPINION |
| Plaintiff-Appellee, | : | |
| - vs - | : | CASE NO. 2015-T-0069 |
| BRIAN PARRADO, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2014 CR 00810.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Rhys Brendan Cartwright-Jones, 42 North Phelps Street, Youngstown, OH 44503-1130 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Brian Parrado, pleaded guilty to an amended indictment charging him with five counts of receiving stolen property, four counts of identity fraud, and one count of possession of a fictitious driver’s license. The Trumbull County Court of Common Pleas sentenced him to an aggregate term of 11 months imprisonment. On appeal, appellant challenges the judgment on sentence. We affirm the trial court’s judgment.

{¶2} On March 31, 2015, the Trumbull County Grand Jury issued a 33-count indictment charging appellant with sixteen counts of receiving stolen property, in violation of R.C. 2913.51(A) and (C), felonies of the fifth degree; sixteen counts of identity fraud, in violation of R.C. 2913.49(B)(2) and (I)(1) and (2), felonies of the fifth degree; and one count of possession of a fictitious driver's license, in violation of R.C. 4507.30(A) and (F), a misdemeanor of the first degree. Appellant entered a plea of not guilty to all charges.

{¶3} On April 15, 2015, appellant entered a plea of guilty to an amended indictment charging him with five counts of receiving stolen property, four counts of identity fraud, and one count of possession of a fictitious driver's license. The trial court ordered a pre-sentence investigation report ("PSI") and the matter was set for sentencing.

{¶4} On June 29, 2015, appellant appeared for sentencing. Defense counsel argued for community control sanctions; the prosecutor did not recommend a sentence. The trial court subsequently imposed an aggregate 11-month prison sentence. Appellant now appeals assigning the following error:

{¶5} "The trial court erred in imposing a term of prison as a penalty for a first-time fifth-degree felony."

{¶6} In reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08(G)(2). That section directs the appellate court "to review the record, including the findings underlying the sentence" and to modify or vacate the sentence "if it clearly and convincingly finds * * * (a) [t]hat the record does not support the sentencing court's findings under division * * * (B) * * * of section 2929.13 * * * of the Revised Code * * * [or] (b) [t]hat the sentence is otherwise contrary to law."

{¶7} Appellant argues that because he was a first-time felony-five offender, the trial court was required to follow the statutory mandates set forth under R.C. 2929.13(B). Under R.C. 2929.13(B), appellant maintains, he is presumptively entitled to community control as a first-time felony-five offender. Because the trial court failed to mention or analyze the factors under the statute, he concludes the trial court's sentence is contrary to law.

{¶8} The state, citing this court's opinion in *State v. Painter*, 11th Dist. Ashtabula No. 2000-A-0093, 2002 Ohio App. LEXIS 1492 (Mar. 29, 2002), contends the trial court committed no error because there is no statutory presumption that a first-time fifth-degree felony offender is entitled to community control. *Id.* at *5-*6. Instead, "R.C. 2929.13(B) gives general guidance and a 'disposition against imprisonment' for fourth and fifth degree felonies." *Id.*, quoting *State v. Powell*, 2d Dist. Greene No. 98 CA 33, 1999 Ohio App. LEXIS 115 (Jan. 22, 1999). Moreover, the state emphasizes a trial court may impose a prison term, pursuant to R.C. 2929.13(B)(2)(a), if it makes a finding under R.C. 2929.13(B)(1) and also finds, after considering the R.C. 2929.12 factors, that a prison term is consistent with the purposes and principles of sentencing and that the offender is not amenable to community control sanctions. *See State v. Caldwell*, 11th Dist. Lake No. 2002-L-142, 2003-Ohio-6964, ¶12. Thus, the state asserts, appellant enjoys no presumption in favor of community control and the trial court did not err in sentencing him to 11-months imprisonment.

{¶9} We first point out that the state's position does not reflect the current statutory sentencing scheme. Although the state's assertions represent an accurate reading of law at the time the *Painter* and *Caldwell* opinions were issued, Ohio's felony-sentencing scheme has undergone various revisions since their release. The current

version of R.C. 2929.13(B) is significantly different from the version construed in *Painter* and *Caldwell*. In this respect, the state's reliance is misplaced.

{¶10} Current R.C. 2929.13(B)(1)(a) provides that, for a nonviolent fourth- or fifth-degree felony, a trial court shall impose a community-control sanction of at least a year's duration if all of the following are met: (1) the offender has not previously been convicted of or pleaded guilty to a felony offense; (2) the most serious charge at the time of sentencing is a fourth- or fifth-degree felony; (3) if, in a case where the court believes that no acceptable community-control sanctions are available, the court requests a community-control option from the department of rehabilitation and correction, and the department identifies a program of at least one year; and (4) the offender has not previously been convicted of or pleaded guilty to a misdemeanor offense of violence committed during the two years before the commission of the instant offense. See e.g. *State v. Jones*, 1st Dist. Hamilton No. C-130625, 2014-Ohio-3345, ¶8.

{¶11} The presumption of a community-control sanction, however, is subject to the exceptions listed in R.C. 2929.13(B)(1)(b). See *State v. Barnes*, 11th Dist. Trumbull No. 2012-T-0049, 2013-Ohio-1298, ¶16. That section provides:

{¶12} (b) The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense if any of the following apply:

{¶13} (i) The offender committed the offense while having a firearm on or about the offender's person or under the offender's control.

{¶14} (ii) If the offense is a qualifying assault offense, the offender caused serious physical harm to another person while committing the offense, and, if the offense is not a qualifying assault offense, the offender caused physical harm to another person while committing the offense.

{¶15} (iii) The offender violated a term of the conditions of bond as set by the court.

{¶16} (iv) The court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, and the department, within the forty-five-day period specified in that division, did not provide the court with the name of, contact information for, and program details of any community control sanction of at least one year's duration that is available for persons sentenced by the court.

{¶17} (v) The offense is a sex offense that is a fourth or fifth degree felony violation of any provision of Chapter 2907. of the Revised Code.

{¶18} (vi) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.

{¶19} (vii) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person, and the offender previously was convicted of an offense that caused physical harm to a person.

{¶20} (viii) The offender held a public office or position of trust, and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.

{¶21} (ix) The offender committed the offense for hire or as part of an organized criminal activity.

{¶22} (x) The offender at the time of the offense was serving, or the offender previously had served, a prison term.

{¶23} In this case, although appellant pleaded guilty to nonviolent fifth-degree felonies, his plea was to 12 nonviolent fifth-degree felonies. The plain language of R.C. 2929.13(B)(1)(a) states, "if an offender is convicted of or pleads guilty to a *felony of the fourth or fifth degree* that is not an offense of violence or that is a qualifying assault offense, the court shall sentence the offender to a community control sanction" if each listed factor applies. (Emphasis added.) If the legislature intended the presumption

pertaining to community control to apply to situations in which an offender was convicted of or pleaded guilty to multiple felonies of the fourth or fifth degree, it could have pluralized these terms. It did not do so. As such, we construe the statute to envelop only those situations in which a qualifying offender has been convicted of or pleaded guilty to a singular, nonviolent felony of the fourth or fifth degree. Because appellant's plea was not to a fifth-degree felony, but to numerous fifth-degree felonies involving multiple victims, we therefore hold appellant was not entitled to the presumption favoring community control, codified under R.C. 2929.13(B)(1)(a).

{¶24} With this in mind, the record reflects the trial court considered the purposes and principles of felony sentencing, pursuant to R.C. 2929.11, and also weighed the seriousness and recidivism factors set forth under R.C. 2929.12. These findings were supported by the record. We therefore affirm the trial court's judgment.

{¶25} Appellant's assignment of error lacks merit.

{¶26} For the reasons discussed in this opinion, the judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J.,

THOMAS R. WRIGHT, J.,

concur.