[Cite as *State v. Jones*, 2015-Ohio-1189.]

IN THE COURT OF APPEALS FIRST APPELLATE DISTRICT OF OHIO HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-140299 TRIAL NO. B-1305640
Plaintiff-Appellee,	:	
vs.	:	*O P I N I O N.*
LATONYA JONES,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas Court

Judgment Appealed From Is: Affirmed in Part and Reversed in Part, Sentence Vacated, and Cause Remanded

Date of Judgment Entry on Appeal: March 31, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Michael J. Trapp, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

CUNNINGHAM, Presiding Judge.

{¶1} Defendant-appellant Latonya Jones appeals the trial court's imposition of a prison sentence for the conviction of a single count of failure to stop or to exchange information after an accident, punishable as a fifth-degree felony. *See* R.C. 4549.02. A sport utility vehicle driven by Jones struck a motorcycle on Spring Grove Avenue, seriously injuring the rider. Jones fled from the accident scene and hid her vehicle from discovery. After accepting her guilty plea and finding Jones guilty of the offense, the trial court sentenced Jones to the maximum prison term of 12 months' incarceration. Because there was no evidence in the record that Jones' commission of the punished offense—failure to stop after the collision—had caused any physical harm to her victim beyond the injuries inflicted in the actual collision, her sentence was contrary to law.

{¶2} Jones was indicted for failure to stop and to exchange information after the accident, and for tampering with evidence, punishable as a third-degree felony. In exchange for her plea of guilty to the failure-to-stop offense, the state dismissed the other charge. At the plea hearing, neither Jones nor the state chose to add additional facts to those alleged in the indictment. The trial court accepted Jones' plea, and continued the matter for the preparation of a presentence-investigation report.

{¶3} At the sentencing hearing, Jones stated that she had fled from the scene of the accident because she did not have a valid driver's license and lacked insurance. She apologized for her actions. The trial court stated that "after working in the courthouse for 30 years and being a judge for 15 years, [the court knew] a lot of people leave the scene of an accident because they're on drugs or they're under the influence of alcohol." Because Jones was not apprehended until long after the accident, there was no evidence that she had been impaired at the time of the collision.

{¶4} The trial court noted that Jones had caused severe injuries to the victim, including a fractured hip, a dislocated knee, and a ruptured spleen. Then, it informed Jones that courts "generally cannot send somebody [without a prior felony record, like Jones,] to prison on a Felony 5 anymore," but that because Jones had "caused physical harm to another person while committing the offense," under R.C. 2929.13(B)(1)(b)(ii), Jones was "qualified to be sent to prison. My hands are not tied by the Legislative Branch of government." Accordingly, the trial court imposed the 12-month prison term. It also imposed a three-year license suspension, and ordered Jones to pay costs, plus restitution to the victim in the amount of $2,000. Jones appealed.

{¶5} In her sole assignment of error, Jones contends that the trial court erred by imposing a prison term for the commission of a nonviolent fifth-degree felony. Jones argues that the record does not support the trial court's basis for imposing a prison term: that she had caused physical harm to her victim "while committing" the failure-to-stop offense.

{¶6} We review Jones' sentence under the standard of review set forth in R.C. 2953.08(G)(2): we may modify or vacate Jones' sentence only if we "clearly and convincingly find" that the record does not support the trial court's findings or that the sentence is contrary to law. *See State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, ¶ 9 (1st Dist.); *see also State v. Hamilton*, 1st Dist. Hamilton No. C-140290, 2015-Ohio-334, ¶ 6.

{¶7} Under R.C. 4549.02(A), a driver involved in an accident is required to remain on the scene until she has given her name and identifying information to the driver of the other vehicle or to a police officer. The statute is designed to facilitate the investigation of accidents, and is "aimed at prohibiting a driver from 'failing to stop and give his name and address after operating a vehicle that is involved in a

collision on a public road.' " *State v. Hundley*, 1st Dist. Hamilton No. C-060374, 2007-Ohio-3556, ¶ 15.

{¶8} Generally, a driver who violates this section is guilty of committing a first-degree misdemeanor. When, as here, however, "*the accident or collision results in* serious physical harm" to the victim, the offense is punishable as a fifth-degree felony. (Emphasis added.) R.C. 4549.02(B). Elevating the penalty to a felony offense advances "the legitimate governmental interest in punishing more severely those who flee the scene of a grave and serious accident versus those who may flee from striking a parked, unoccupied car." *See State v. Presley*, 2013-Ohio-3762, 995 N.E.2d 256, ¶ 13 (2d Dist.).

{¶9} R.C. 2929.13(B)(1)(a) provides that for a nonviolent fifth-degree felony, like failure to stop, a trial court must impose a community-control sanction of a 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; (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 an appropriate program; and (4) the offender has not been convicted of or pleaded guilty to a misdemeanor offense of violence committed during the two years before the commission of the offense for which the court is imposing sentence. *See State v. Jones*, 1st Dist. Hamilton No. C-130625, 2014-Ohio-3345, ¶ 8.

{¶10} The presumption of a community-control sanction, however, is subject to the exceptions listed in R.C. 2929.13(B)(1)(b). The exception that the trial court found applicable in this case, R.C. 2929.13(B)(1)(b)(ii), permits a court, in its discretion, to impose a term of imprisonment for a nonviolent fifth-degree felony after finding that "the offender caused physical harm to the victim *while committing*

the offense." (Emphasis added.) *See State v. Barnes*, 11th Dist. Trumbull No. 2012-T-0049, 2013-Ohio-1298, ¶ 16; *see also Hamilton*, 1st Dist. Hamilton No. C-140290, 2015-Ohio-334, at ¶ 10-11.

{¶11} Jones contends that her sentence was contrary to law because the record before the trial court failed to demonstrate that Jones had caused any physical harm, beyond the injuries inflicted in the actual collision, while committing the punished offense of failure to stop or to exchange information. Jones argues that the victim's serious injuries were inflicted by the collision itself, and that there was no evidence in the record that anything she did or failed to do after the accident caused physical harm to the victim.

{¶12} The state asserts that every moment that Jones' victim lay on the street caused more and more physical harm to the victim. While that might be true, the record here is devoid of any testimony supporting that inference. Jones' plea was accepted on very limited facts. In the victim statement, prepared as part of the presentence investigation, the victim recounted the devastating impact of the collision. He described the horrific injuries resulting from the accident. He further told of the demoralizing impact of the lengthy rehabilitation on him and his family. There was no testimony from a bystander, emergency personnel, or hospital staff on the state of the victim's injuries, or on the impact that delaying treatment might have had.

{¶13} Only when the victim stated that he could not forgive Jones for leaving "not knowing if [he was] dead or dying," does the record come close to describing a harmful impact "caused" by Jones "while" failing to stop and exchange information. The undoubted psychological terror experienced by the victim, however, does not satisfy the definition of "physical harm" provided by the General Assembly and employed in R.C. 2929.13(B)(1)(b)(ii). *See* R.C. 2901.01(A)(3) (defining "physical harm" as "any injury, illness, or other physiological

impairment"); *see also State v. Stout*, 2014-Ohio-1094, 6 N.E.3d 1263, ¶ 34 and ¶ 37 (7th Dist.) (holding that a psychological effect on the victim does not fall within the statutory definition of "physical harm" for purposes of R.C. 2929.13(B)(1)(b)(ii)).

{¶14} In this case, the requirements of R.C. 2929.13(B)(1)(a) were met. Jones was presumptively ineligible for a prison term for the fifth-degree felony of failure to stop, which was not an offense of violence or a qualifying assault offense. On the state of the record before us, however, we clearly and convincingly find that the record does not support the trial court's determination that Jones had caused physical harm to the victim while committing the offense of failure to stop. There is no evidence to support a finding that the exception in R.C. 2929.13(B)(1)(b)(ii) applied to Jones. Thus, the sentence was contrary to law. *See Hamilton*, 1st Dist. Hamilton No. C-140290, 2015-Ohio-334, at ¶ 16. Jones' assignment of error is sustained.

{¶15} Because the trial court imposed a prison term in contravention of R.C. 2929.13(B)(1), we vacate the sentence, and remand for resentencing. *See* R.C. 2953.08(G)(2); *see also Hamilton*, 1st Dist. Hamilton No. C-140290, 2015-Ohio-334, at ¶ 20. On remand, the trial court should conduct a de novo sentencing hearing consistent with law and this opinion. *See State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 14-15; *see also Hamilton*, 1st Dist. Hamilton No. C-140290, 2015-Ohio-334, at ¶ 18. The trial court's judgment is affirmed in all other respects.

Judgment accordingly.

FISCHER, J., concurs.
HENDON, J., concurs in judgment only.

Please note:

The court has recorded its own entry on the date of the release of this opinion.