[Cite as *State v. Smith*, 2019-Ohio-275.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO,	:	
	:	Case No. 18CA13
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
AARON SMITH,	:	
	:	
Defendant-Appellant.	:	**Released: 01/16/19**

APPEARANCES:

Eric J. Allen, The Law Office of Eric J. Allen, Ltd., Gahanna, Ohio, for Appellant.

Anneka P. Collins, Highland County Prosecutor, Hillsboro, Ohio, for Appellee.

McFarland, J.

{¶1} This is an appeal from a Highland County Court of Common Pleas judgment entry convicting Appellant, Aaron Smith, of one count of burglary, a second-degree felony in violation of R.C. 2911.12(A)(2), and one count of theft, a first-degree misdemeanor in violation of R.C. 2913.02(A)(1). On appeal, Appellant contends that the trial court erred by sentencing him to a prison term that is unsupported by the record. Because we find no merit to the sole assignment of error raised by Appellant, it is overruled. Accordingly, the decision of the trial court is affirmed.

FACTS

{¶2} Appellant, Aaron Smith, was indicted for theft and burglary on March 6, 2018. Appellant denied the charges and the matter proceeded to a jury trial. Appellant was found guilty of both offenses, based upon evidence indicating that Appellant entered the home of Travis Ecton without permission on December 21, 2017, and stole Ecton's X-Box, Play Station Four, along with a headset and a controller. The evidence introduced at trial indicated Appellant visited the home of Melanie Gillenwater earlier in the evening on December 21, 2017, and asked to borrow a coat. Gillenwater's husband loaned him a camouflage coat and Appellant left the home wearing the coat. When Travis Ecton, the victim in this case, returned home from work a bit early later that evening, he noticed his screen door was open and his front door was cracked. When Ecton entered his home he saw someone exit the back door. Ecton chased the intruder, who was wearing dark jeans and a camouflage coat, and ordered him to drop the items. The intruder dropped an X-BOX, Play Station, headset and controller, along with a wallet containing Appellant's identification card. Evidence introduced at trial indicated Appellant is Ecton's wife's cousin.

{¶3} After collecting the items, including the wallet, Ecton called law enforcement. The evidence at trial further reveals that as a result, Sergeant

Shanks, who was familiar with Appellant and the places he was known to stay, responded to the Gillenwater home and arrested Appellant. Gillenwater advised Appellant had left her house in the borrowed coat about forty-five minutes prior, and had just returned a few minutes prior to the arrival of law enforcement. She further noted that when he returned, Appellant was sweating and out of breath, and had the coat balled up under his arm. The evidence introduced at trial further indicates that after Ecton returned to his home to check out his items that he had recovered, he heard a noise outside which turned out to be a cell phone, the owner of which was ultimately identified as Dena Dixon, Appellant's ex-girlfriend.

{¶4} Based upon this evidence, Appellant was found guilty by the jury of both counts of the indictment. The trial court thereafter sentenced Appellant to a five-year term of imprisonment on the burglary charge, along with three years of mandatory post-release control, to be served consecutively to a one-year term of imprisonment, which represented the time remaining on a current term of post-release control Appellant was serving at the time he committed the offenses. The trial court also sentenced Appellant to sixty days in jail for the misdemeanor theft charge, with fifty-eight days credit for time already served. It is from the trial court's

judgment and sentence that Appellant now brings his timely appeal, setting forth a single assignment of error for our review.

ASSIGNMENT OF ERROR

"I. THE TRIAL COURT ERRED BY SENTENCING DEFENDANT TO A PRISON TERM THAT IS UNSUPPORTED BY THE RECORD."

{¶5} In his sole assignment of error, Appellant contends that the trial court erred by sentencing him to a prison term that is not supported by the record. Appellant contends that he has a substance abuse problem which prison will not solve, and that prison sentences exist to address criminal actions by individuals who are a danger and/or a menace to society, which he claims he is not. Appellant further states that there was "scarcely sufficient evidence to convict" here, that no damage was done to the home that was burglarized and that only "unintentional damage" was done to the items stolen, when he dropped them. However, Appellant's only assigned error challenges the imposition of a prison sentence for the burglary charge, not the sufficiency of the evidence supporting the jury's finding of guilt on that charge. Additionally, damage is not an element of the offense of burglary. Thus, our only task is to examine the trial court's imposition of a five-year prison term on the second-degree felony burglary charge for which Appellant was found guilty by the jury.

{¶6} When reviewing felony sentences, appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, 22-23. Under R.C. 2953.08(G)(2), "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." Instead, R.C. 2953.08(G)(2) provides that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either:

> "(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law."

{¶7} Although R.C. 2953.08(G)(2)(a) does not mention R.C. 2929.11 and 2929.12, the Supreme Court of Ohio has determined that the same standard of review applies to those statutes. *Marcum* at ¶ 23 (although "some sentences do not require the findings that R.C. 2953.08(G)(2)(a) specifically addresses[,] * * * 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"); *State v. Butcher*, 4th Dist. Athens No. 15CA33, 2017-Ohio-1544, ¶ 84. Consequently, "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." *Marcum* at ¶ 23; *Butcher* at ¶ 84.

{¶8} "Once the trial court considers R.C. 2929.11 and 2929.12, the burden is on the defendant to demonstrate by clear and convincing evidence that the record does not support his sentence." *State v. Akins-Daniels*, 8th Dist. Cuyahoga No. 103817, 2016-Ohio-7048, ¶ 9; *State v. O'Neill*, 3rd Dist. Allen No. 1-09-27, 2009-Ohio-6156, fn. 1. "Clear and convincing evidence is 'that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.' " *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, ¶ 18; quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶9} We initially conclude that Appellant's sentence is not clearly and convincingly contrary to law. The trial court imposed a five-year term of imprisonment. The maximum prison term for a second-degree felony offense is eight years. Thus, the five-year prison term imposed upon

Appellant is well within the statutory range for the offense. Further, Appellant does not argue that his sentence is contrary to law, but rather that the record does not clearly and convincingly support his sentence.

{¶10} As referenced above, Appellant seems to contend that he should not have been sentenced to prison because he has a substance abuse problem. He argues that he had been "clean and doing well for himself for nearly two years" but had recently had a brief relapse. He argues that going to prison will not solve the underlying problem of his drug addiction. In making his arguments, however, Appellant concedes the five-year prison term imposed by the trial court is within the statutory range, but notes it is "over half the maximum time" of eight years for a second-degree felony. He further argues that one of the victims of the crime was a family member, who did not seek a prison sentence, but rather wanted him to simply get rehabilitated and pay restitution. We additionally observe, however, that the State requested a prison term of six-years be imposed upon Appellant, noting during the sentencing hearing that another defendant with no criminal history was recently sentenced to a five-year prison term for a second-degree burglary offense, compared to Appellant, who had three prior felony convictions, two of which were burglaries.

{¶11} Based upon the record before us, we cannot conclude that the trial court's imposition of a five-year prison term for Appellant's second-degree felony burglary charge, is not supported by the record. Prior to imposing sentence, the trial court noted, on the record, as follows:

> "THE COURT: Well, here's the situation, and actually I think it's . . . (one or two words unclear) . . . Mr. Wagoner [defense counsel], he does burglarize people, the record is extreme in that regard. This is the third home invasion type offense that he's committed in less than 10 years. And, uh, you know, the fact it might be family members or friends doesn't lessen the danger to the public, and even to you, Mr. Smith, because you ran into someone who was unarmed and chased you, but you know when somebody comes into someone's home and finds someone there if they have a weapon in the home there's, you know, they have every right to pick that up to defend themselves. And sometimes it goes beyond what it ought to, but the way the laws are anymore they are being construed in favor of those who wield the weapon in their home and offenders get, you know, sometimes harmed; and

sometimes the offenders get into fights with the home owner when they are detected and trying to get away and cause harm.

But, you had a previous burglary conviction, and was that out of this county in 2010?

MS. COLLINS: I believe it was, Your Honor.

* * *

THE COURT: All right. And then you have an attempted burglary in Miami County, and that's in 2015. You've been . . . Your record goes back to 2008, uh, endangering children, and unauthorized use; receiving property [sic] in '09 in Ross County, five years – and I don't know if that was a felony or not. – But this will be your third number, won't it?

DEFENDANT SMITH: This will be . . . . Yes, sir.

THE COURT: That's what I thought. And, you know, based on that, uh, you know I deal with people that are addicted and relapsing every day, uh, of my professional life. And I have 90% of them that (not sure if word was 'are' or aren't) . . . and undoubtedly you do have a problem; and undoubtedly you have relapsed; but, you know, the question as to your relapse

> doesn't justify breaking into people's homes. And particularly with your record.
>
> And based upon that, it's the Court's judgment that you be and are hereby sentenced to the Correction Reception Center at Orient, Ohio for a period of five (5) years."

Further, a prior colloquy between Appellant and the court during the sentencing hearing established that Appellant was actually on post-release control at the time he committed the current offenses and had previously been through rehabilitation.

{¶12} Thus, it appears from the record before us that Appellant was not a first-time offender, but rather had committed three prior felony offenses, that he was on post-release control at the time the burglary at issue was committed, and that the trial court took into consideration Appellant's substance abuse history and relapse, as well as the fact that he had previously been through drug rehabilitation. In light of these facts, and in consideration of the foregoing cited case law regarding felony sentencing and our standard of review, we cannot conclude that Appellant has established that his five-year term of imprisonment is clearly and convincingly not supported by the record. We further note, as mentioned above, the five-year prison term imposed upon Appellant was three years

short of the maximum sentence the trial court could have imposed, and was one year less than the six-year term requested by the State. As such, we find no merit to the sole assignment raised by Appellant. Accordingly, the decision of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.