[Cite as *State v. Dotson*, 2019-Ohio-4045.]

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

STATE OF OHIO,	:	
	:	Case No. 19CA1089
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
MARTY DOTSON,	:	
	:	
Defendant-Appellant.	:	**Released: 09/19/19**

APPEARANCES:

Brian T. Goldberg, Cincinnati, Ohio, for Appellant.

C. David Kelly, Adams County Prosecutor, and Kris D. Blanton, Assistant Adams County Prosecutor, West Union, Ohio, for Appellee.

McFarland, J.

{¶1} This is an appeal from an Adams County Court of Common Pleas judgment entry sentencing Appellant, Marty Dotson, to 11 months in prison for possession of drugs, a fifth degree felony.

{¶2} On appeal, Appellant asserts "[t]he trial court erred by including in the sentencing entry that Mr. Dotson shall be reserved for denial for transitional control, [intensive program prisons], and shall be denied for the program for community-based substance use disorder treatment."

{¶3} Based upon our review of the law and the record, we affirm in part, and vacate in part, the judgment of the trial court.

PROCEDURAL HISTORY

{¶4} Appellant pleaded guilty to one count of possession of heroin, a fifth degree felony. After the sentencing hearing, the trial court issued a sentencing entry stating that it considered the record, oral statements, any victim impact statements, and the presentence investigation, which stated that Appellant had been convicted of two prior drug offenses. The entry also stated that the court considered the principles and purposes of sentencing under R.C. 2929.11(A). Finally, the entry stated that the court considered the need to incapacitate the offender, rehabilitate the offender, make the offender pay restitution, and had balanced the seriousness and recidivism factors in R.C. 2929.12.

{¶5} The trial court found that Appellant was not amenable to available community control sanctions. In pertinent part, the court's sentencing entry ordered that: (1) Appellant serve an 11-month prison term; (2) Appellant's transfer to a transitional control program under R.C. 2967.26 was "reserved for denial upon notification that the [Ohio Department of Rehabilitation and Corrections – hereinafter ODRC] desires consideration of the [Appellant] for transitional control;" (3) Appellant's transfer to an

intensive program prison under R.C. 5120.032 was "reserved for denial upon notification that ODRC desires consideration of the [Appellant] for [intensive program prison];" and (4) Appellant's eligibility for the Program for Community Based Substance Disorder Treatment under R.C. 5120.035 was "denied" based on the following: (a) it was unconstitutional in violation of the separation of powers doctrine; (b) legal counsel for ODRC asserted that assessments for Community Based Substance Disorder Treatment and its results are not public record; (c) ODRC had previously misapplied the statutory requirements of the program; (d) the program was an "unadulterated failure;" and, (e) and the program was "[n]ot a prison under R.C. 2929.01(AA), not a prison term under R.C. 2929.11(BB)(2), and not part of a sentence under R.C. 2929.01(EE)."

{¶6} It is from this sentencing entry that Appellant appeals, asserting a single assignment of error.

ASSIGNMENT OF ERROR

" I. THE TRIAL COURT ERRED BY INCLUDING IN THE SENTENCING ENTRY THAT MR. DOTSON SHALL BE RESERVED FOR DENIAL FOR TRANSITIONAL CONTROL, IPP [INTENSIVE PROGRAM PRISON] AND SHALL BE DENIED FOR THE PROGRAM FOR COMMUNITY BASED SUBSTANCE USE DISORDER TREATMENT."

{¶7} "An appellate court may reverse a sentence only if it is clearly and convincingly not supported by the sentencing court's findings, or it is

otherwise contrary to law." *State v. Fisher*, 2019-Ohio-2420, ¶ 23, citing *State v. Abner*, 4th Dist. Adams Nos. 18CA1061, 18CA1062, 2018-Ohio-4506, ¶ 10, *State v. Marcum*, 2016-Ohio-1002, 146 Ohio St.3d 516, 59 N.E.3d 1231, ¶ 23. " 'Clear and convincing evidence has been defined as "[t]he measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." ' " *Id*., quoting *In re I.M.*, 4th Dist. Athens No. 10CA35, 2011-Ohio-560, ¶ 6, quoting *In re McCain*, 4th Dist. Vinton No. 06CA654, 2007-Ohio-1429, at ¶ 8.

{¶8} Appellant makes three separate arguments in support of his assignment of error. We address each argument separately.

R.C. 2967.26 (Transitional Control Program)

{¶9} Appellant first argues that the trial court erred by automatically making him ineligible for transitional control under R.C. 2967.26 at the time of sentencing.

{¶10} Under R.C. 2967.26(A)(1), the Department of Rehabilitation and Correction may "transfer eligible prisoners to transitional control status

during the last 180 days of their confinement." In pertinent part, R.C. 2967.26(A)(2) continues:

> "[T]he department of rehabilitation and correction *shall give notice of the pendency of the transfer* to transitional control *to the court of common pleas* of the county in which the indictment against the prisoner was found and of the fact that *the court may disapprove the transfer*. * * * If the court disapproves of the transfer of the prisoner to transitional control, *the court shall notify the division of the disapproval within thirty days after receipt of the notice.* If the court timely disapproves the transfer of the prisoner to transitional control, the division shall not proceed with the transfer. If the court does not timely disapprove the transfer of the prisoner to transitional control, the division may transfer the prisoner to transitional control." (Emphasis added)

{¶11} Pursuant to the plain language of R.C. 2967, near the end of an inmate's sentence, ODRC has authority to transfer an inmate to transitional control, but must notify the court of its intention to do so. The trial court may disapprove the transfer by notifying ODRC within 30 days after receiving ODRC's notice of intent to transfer the inmate into the program.

{¶12} In support of Appellant's argument that a trial court cannot deny an inmate's eligibility for transfer into a transitional program in the inmate's sentencing entry, Appellant cites *State v. Spears*, 5th Dist. Licking No. 10-CA-95 and *State v. Toennisson*, 12th Dist. Butler Nos. CA2010-11-307, CA2010-11-308, CA2010-11-309, 2011-Ohio-5869.

{¶13} In *Spears*, the appellant argued that the trial court "erred in including as part of Appellant's sentencing a provision not to consider transitional control." *Id*., at ¶ 34. The court stated:

> "While the statute does not specifically prohibit the court from denying the transitional control prior to notice, we find to do so clearly thwarts the design and purpose of the statute. The statute is designed to promote prisoner rehabilitation effort and good behavior while incarcerated. To prematurely *deny the possibility* of transitional control runs contra to those purposes. While the trial court retains discretion to disapprove the transitional control, we find to do so in the sentencing entry prior to notice from the adult parole authority is premature." *Id*., at ¶ 37.

{¶14} We find *Spears* distinguishable because the sentencing entry in *Spears* instructed ODRC to *not* consider transitional control, thereby

preemptively precluding the defendant in that case from being eligible for transitional control. In Appellant's case, the trial court's sentencing entry stated that Appellant's placement into the transitional control program under R.C. 2967.26 was "*reserved for denial* upon notification that ODRC desires consideration of the [Appellant] for transitional control." (Emphasis added.) The trial court's use of the word "reserved" to modify the word "denial" indicates that the trial court did not deny Appellant transitional control in the sentencing entry, but instead held its denial in abeyance, if, and until, ODRC notified the trial court of its intent to transfer Appellant into the program. And, pursuant to R.C. 2967.26(A)(2), if and when ODRC notified the trial court of its decision to transfer Appellant to transitional control, within thirty days the trial court must then notify ODRC of its desire to deny that inmate entry into the program. We find *Spears* is not supportive of Appellant's argument.

{¶15} In *Toennisson*, the trial court's sentencing entry stated that "Admission into a Transitional Control Prison Program is specifically objected to unless affirmative written permission is subsequently given by the sentencing judge." The appellant argue[d] this language preemptively prohibited his admission into transitional control and therefore divested the trial court of all future discretion in the matter. The appellant also argue[d]

the parole authority could no longer determine a prisoner's eligibility for transitional control or submit its recommendation to the court for approval. *Toennisson*, 12th Dist. Butler Nos. CA2010-11-307, CA-2-10-11-308, CA-2010-11-309, 2011-Ohio-5869, at ¶ 31.

{¶16} The court of appeals disagreed, finding that the following language from the trial court's sentencing entry - "*unless affirmative written permission is subsequently given by the sentencing judge*" - indicated that the trial court actually "retained power to reconsider and, if prudent, overturn its initial objection to transitional control." *Id*., at ¶ 33. The court further stated that "even without this language, we fail to see how R.C. 2967.26 prohibits the trial court from predetermining that transitional control is inapplicable during sentencing." *Id*., at ¶ 34.

{¶17} We agree with *Toennisson* and find that it actually supports the trial court's sentencing entry herein. Similar to the entry in *Toennisson*, the trial court's act of reserving its denial of Appellant's eligibility for the program in R.C. 2967.26 until ODRC acted to transfer Appellant into that program means that the trial court could have reconsidered its anticipated denial of transitional control any time until ODRC acted to transfer Appellant into the program.

{¶18} Accordingly, we find the trial court's reservation of its denial of ODRC's transfer of Appellant to transitional control until ORDC acted to make that transfer was not clearly and convincingly contrary to law.

R.C. 5120.032 (Intensive Program Prisons)

{¶19} Appellant next argues that the trial court erred by automatically denying Appellant placement into an intensive program prison in violation of R.C. 5120.032.

{¶20} Pursuant to R.C. 5120.032, the Department of Rehabilitation and Correction has created intensive program prisons "that focus on educational achievement, vocational training, alcohol and other drug abuse treatment, community service and conservation work, and other intensive regimens or combinations of intensive regimens." R.C. 5120.032(A). This statute provides that the "sentencing court may recommend the prisoner for placement, make no recommendation, or *disapprove placement*. R.C. 5120.032(B)(1)(a). If the sentencing court "disapproves placement of the prisoner in an intensive program prison, the department shall not place the prisoner in any intensive program prison." *Id*.

{¶21} There is no language in this provision instructing the court as to when it may disapprove intensive program prisons. Therefore, we find the trial court's sentence reserving denial of Appellant to be eligible for

intensive program prisons under R.C. 5120.032 until ODRC decided to enter Appellant into such a program was not contrary to law.

R.C. 5120.035 (Community-Based Substance Use Disorder Treatment)

{¶22} Appellant argues that "the court has no discretion to deny [Appellant] placement into a community-based substance treatment program pursuant to R.C. 5120.035." In pertinent part, R.C. 5120.035 provides that "[t]he *department* [*of rehabilitation and correction*] shall determine which qualified prisoners in its custody should be placed in the substance use disorder treatment program." (Emphasis added.) However, the trial court sua sponte held that R.C. 5120.035 was unconstitutional under the separation of powers doctrine, thereby rendering that provision void. *State v. Snyder*, 474 N.E.2d 702, 705 (M.C. 1984).

{¶23} "The general rule is that an appellate court will not consider any [constitutional] error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Ireson*, 72 Ohio App.3d 235, 240, 594 N.E.2d 165, 168 (1991), *State v. Williams*, 51 Ohio St.2d 112, 117, 364 N.E.2d. 1367 (1977), *State v. Lancaster*, 25 Ohio St.2d 83, 267 N.E.2d 291 (1971), paragraph one of the syllabus. "Another aspect of the doctrine of the

avoidance of constitutional issues is that courts should not raise constitutional issues sua sponte." *First Merchants Bank v. Gower*, 2nd Dist. Darke No. 2011-CA-11, 2012-Ohio-833, ¶ 18, *see also State v. Graham*, 6th Dist. Wood No. WD-18-021, 2019-Ohio-1485, ¶ 22-26, *City of Cleveland v. Williams*, 8th Dist. Cuyahoga No. 106454, 2018-Ohio-2937, ¶ 12-26. By sua sponte raising a constitutional issue, the court improperly becomes an advocate for one of the parties contrary to its role as arbiter. *Graham* at ¶ 23. Further, a court's action sua sponte striking down a statute on constitutional grounds amounts to a declaratory judgment, which in Ohio requires "(1) that a real controversy between adverse parties exists; (2) which is justiciable in character; and (3) that speedy relief is necessary to the preservation of rights which may be otherwise impaired or lost." *Graham*, quoting *Quality Care Transport v. Ohio Dept. of Job & Family Servs.*, 2nd Dist. Clark Nos. 2009 CA 113, 2009 CA 121, 2010-Ohio-4763; *see also First Merchants Bank v. Gower*, 2nd Dist. Darke No. 2011-CA-11, 2012-Ohio-833, ¶ 20. No controversy exists when neither party raised the issue in the trial court, and courts have no authority to decide such advisory decisions. *Id.* Finally, the failure to sufficiently develop a constitutional issue in the trial court is another reason for an appellate court to refuse

review of that issue on appeal. *Howard v. Seidler*, 116 Ohio App.3d 800, 815, 689 N.E.2d 572, 581, 582 (7th Dist. 1996).

{¶24} In this case, neither party raised the constitutionality of R.C. 5120.035 in the trial court. Rather, the trial court acted sua sponte in holding that R.C. 5120.035 violated the separation of powers doctrine, and did so without any analysis or explanation. By so holding, the court improperly acted as an advocate finding a controversy regarding the constitutionality of R.C. 5120.035 between the parties where none existed. Further, because the constitutional infirmity of R.C. 5120.035 was raised sua sponte, there was no development of the issue in the record, thereby making appellate review virtually impossible. Therefore, we find that the trial court erred when it sua sponte held that R.C. 5120.035 violated the Separation of Powers Doctrine. It is important to note that we make no judgment whatsoever regarding the constitutionality of R.C. 5120.035, we merely hold that it was error for the trial court to raise that issue sua sponte in this case.

{¶25} In addition to holding that R.C. 5120.035 was unconstitutional, the trial court listed other "factors" as to why it denied Appellant's eligibility for a community-based substance use disorder treatment program including, (1) ODRC's legal counsel "declared position that assessments for said program, and the results thereof "ARE NOT PUBLIC RECORD," citing AR

5120-17-01 and AR 5120-17-02 for screening and selection criteria, (2) Prior mis-application by ODRC of statutory requirements, (3) unadulterated failure of the program, and (4) Not a prison, per R.C. 2929.01(BB)(2); Not a part of a Sentence, per R.C. 2929.01(EE).

{¶26} R.C. 5120.035 provides that "[t]he *department* [*of rehabilitation and correction*] shall determine which qualified prisoners in its custody should be placed in the substance use disorder treatment program established under division (B) of this section." (Emphasis added.) In reviewing the remaining language of R.C. 5120.035, courts have no role in determining the eligibility for placing an inmate in a community-based substance use disorder treatment program. Finally, even if any of these factors, which were raised sua sponte by the trial court, are based on law that could undermine ODRC's legal authority to place inmates in a community-based substance abuse treatment program, none were developed in the trial court and consequently cannot be reviewed on appeal. *See Seidler*, 116 Ohio App.3d at 815, 689 N.E.2d 572 (7th Dist. 1996). Therefore, we find that the trial court's order denying Appellant's eligibility for a community-based substance use disorder treatment program under R.C. 5120.035 based on the additional factors was contrary to law.

{¶27} Because the trial court erred in sua sponte holding that R.C. 5120.035 was unconstitutional, and because its other reasons for denying Appellant eligibility for a community-based substance use disorder treatment program under R.C. 5120.035 were contrary to law, we vacate the trial court's sentencing entry to the extent that it held R.C. 5120.035 unconstitutional and otherwise denied Appellant to be eligible for that program.

Conclusion

{¶28} Accordingly, we affirm the trial court's sentencing entry, except for the holding that R.C. 5120.035 was unconstitutional and otherwise denied Appellant from being eligible for the program in R.C. 5120.035 based the court's additional factors, which we vacate.

JUDGMENT AFFIRMED IN PART AND VACATED IN PART.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART AND VACATED IN PART. Costs shall be divided between Appellant and Appellee.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams 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.

Smith, P.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.