

[Cite as State v. Yancey, 2004-Ohio-2725.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 20130

vs. : T.C. CASE NO. 03CR1305

KENNETH A. YANCEY : (Criminal Appeal from
Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 28th day of May, 2004.

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GRADY, J.

{¶1} Defendant, Kenneth Yancey, appeals from concurrent sentences of four years imprisonment which the trial court imposed upon Defendant's conviction for aggravated burglary, R.C. 2911.11(A)(1), and kidnaping, R.C. 2905.01(A)(2). Those convictions were entered on pleas of guilty in exchange for the State's dismissal of a charge of robbery. R.C. 2911.02 (A)(2).

{¶2} Defendant presents a single assignment of error:

"APPELLANT'S SENTENCE IS OVERLY HARSH, CONTRARY TO LAW,

UNSUPPORTED BY THE RECORD, AND BASED ON ERRONEOUS FINDINGS
OF FACT.”

{¶3} Defendant claims that the trial court erred in sentencing him to a term of imprisonment because the Probation Department had recommended community control sanctions with several conditions, and compelling mitigation exists which justifies community control. We are not persuaded.

{¶4} Absent maximum or consecutive sentences, and absent any claim that the trial court failed to make required statutory findings, we may grant relief only if we find from clear and convincing evidence that the record does not support the trial court’s findings or that the sentence is otherwise contrary to law. R.C. 2953.08(G)(2); *State v. Stevens* (Feb. 7, 2003), Montgomery App. No. 19285, 2003-Ohio-617.

{¶5} Defendant was convicted of aggravated burglary and kidnapping, both felonies of the first degree, for which the permissible sentencing range is three, four, five, six, seven, eight, nine or ten years. R.C. 2929.14(A)(1). The trial court sentenced Defendant to concurrent prison terms of four years for each offense.

{¶6} For felonies of the first degree, R.C. 2929.13(D) creates a presumption that a prison term is necessary in order to comply with the purposes and principles of felony sentencing in R.C. 2929.11. R.C. 2929.14(B)(2) requires the trial court to impose the minimum available sentence upon offenders unless, inter alia, [t]he court finds on the record that the shortest prison term will demean the seriousness of the offender’s conduct or will

not adequately protect the public from future crime by the offender or others."

{¶7} At the sentencing hearing the trial court acknowledged that the Probation Department had recommended community control with six months local incarceration. The trial court stated that it could not adopt that recommendation given the nature of this offense: a home invasion which involved accosting, grabbing and holding Defendant's hand over the mouth of the eighty-five year old woman who was the victim.

{¶8} The court stated that it had considered the minimum sentence, but found it would not be appropriate because the minimum sentence would demean the seriousness of this offense. Accordingly, because the trial court imposed a sentence within the permissible range and made the necessary statutory finding to exceed the minimum sentence, Defendant's sentence is not contrary to law.

{¶9} Defendant additionally argues that his sentence is not supported by the record because he presented mitigating evidence sufficient to overcome the presumption in favor of a prison term. We disagree.

{¶10} Before a court can overcome the presumption in favor of a prison term that applies to a felony of the first degree and instead impose community control sanctions for that offense, the court must make both of the following findings:

{¶11} "(1) A community control sanction or a combination of community control sanctions would adequately punish the offender

and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.

{¶12} "(2) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense." R.C. 2929.13(D).

{¶13} In discussing the evidence which he claims overcomes the presumption in favor of a prison term, Defendant points out that he has no prior felony record, that the offense was committed under circumstances not likely to reoccur because he was under the influence of crack cocaine at the time and Defendant has now acknowledged his addiction and is presently seeking treatment, that he expressed genuine remorse for his conduct, that he has never previously been placed on community control, and that he has no history of mental disorders or violent behavior.

{¶14} These factors pertain to Defendant's likelihood of recidivism, R.C. 2929.12(E), which is only one of two important considerations for the trial court when determining if the presumption in favor of a prison term has been overcome. The recidivism factors have little or no relevance to the seriousness of the particular offense and whether a community control sanction

would demean the seriousness of the offense.

{¶15} With respect to the R.C. 2929.13(D) presumptions which can overcome the presumption in favor of a prison term, the court stated:

{¶16} "The Court would also find that the presumption of imprisonment in this case can only be overcome if I find that you are an appropriate candidate for Community Control. At this point I don't believe you are.

{¶17} "Furthermore, I - if - if I were to sentence you to Community Control or Probation, I need to find that it would not demean the seriousness of the offense to do so. I believe it would demean the seriousness of the offense not to send you to prison, so I will send you to prison as I've indicated." (Sentencing Tr. at 17-18).

{¶18} Because the trial court did not make both of the findings required by R.C. 2929.13(D), the presumption in favor of a prison term was not overcome and the court had no option but to impose a term of imprisonment. Furthermore, the trial court's conclusion that community control would demean the seriousness of this offense is amply supported by the record.

{¶19} This case involved a home invasion during which Defendant grabbed and held his hand over the mouth of an eighty-five year old woman. The victim spoke at the sentencing hearing and told the trial court about the daily backaches she suffers as a result of this assault. In addition, the quality of the victim's life has deteriorated due to her constant state of fear:

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she cannot eat, sleep, go outside her home or be left alone. The victim's age and the physical and psychological harm she has suffered as a result of this offense makes the offense a more serious one which justifies more onerous punishment. R.C. 2929.12(B); *State v. Stevens, supra*.

{¶20} Finally, Defendant complains that the trial court should not have reviewed a videotape as part of the victim impact statement. The tape depicts the home that was burglarized and the elderly victim. Defendant had not been provided notice of the tape or that it would be used. He objected, and the trial court indicated that the videotape had not affected its sentencing decision. Any error is therefore harmless.

{¶21} The assignment of error is overruled. The judgment of the trial court will be affirmed.

FAIN, P.J. and WOLFF, J., concur.

Copies mailed to:

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Hon. Michael T. Hall