

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-10-067

Appellee

Trial Court No. 09-CR-613

v.

Justin Tyus

DECISION AND JUDGMENT

Appellant

Decided: September 30, 2011

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Melissa Schiffel, Assistant Prosecuting Attorney, for appellee.

William V. Stephenson, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas, following a plea of guilty, in which the trial court found appellant, Justin Tyus, guilty of one count of breaking and entering, and ordered him to serve a six-month prison

sentence. The trial court also found appellant guilty of one count of menacing by stalking, for which the trial court imposed a three-year term of community control.

{¶ 2} The relevant facts are as follows. On November 15, 2009, appellant had an argument with his then-girlfriend (the "victim"), followed her into her college dorm room at Bowling Green State University ("BGSU") without her permission, threatened her, and used a knife to cut up one of her stuffed animals. Appellant then pursued the victim as she went down the hall to another dorm room, entered that room, and told its occupants that he would "break their legs" if they told anyone what he had done.

{¶ 3} On January 21, 2010, the Wood County Grand Jury indicted appellant on one count of burglary in violation of R.C. 2911.12(A)(3), and one count of abduction in violation of R.C. 2905.02(A)(2). On July 15, 2010, pursuant to a plea bargain, appellant pled guilty to one count of breaking and entering, in violation of R.C. 2911.13(B), a fifth degree felony, and one count of menacing by stalking, in violation of R.C. 2903.211(A)(1)(B)(1)(b), a fourth degree felony.

{¶ 4} A sentencing hearing was held on September 10, 2010, at which testimony was presented by appellant's friend, Katrina Cardosa, appellant's mother, Barbara Tyus, and the victim. Cardosa testified that appellant was a good person and that, in the past, he helped her overcome an eating disorder. Barbara Tyus ("Barbara") testified that appellant received mental health counseling in New York after threatening another ex-girlfriend in a manner similar to his actions in this case, and that appellant completed treatment with a private therapist in that state. However, when questioned by the trial

court, Barbara admitted that appellant did not complete an anger management course ordered by the trial court in New York. After his mother testified, appellant made a statement to the court in which he attempted to explain his behavior both in the past and in this case. By way of apology, appellant said that:

{¶ 5} "I just – like I said before I let my anger get the best of me. It was dumb knowing my past, knowing I should have handled it in a better way than what happened."

{¶ 6} After appellant made his statement, the victim made a statement as to the emotional harm she suffered due to appellant's actions in this case, which include depression, anxiety, and lack of concentration. Before pronouncing appellant's sentence, the trial court stated that it was "struck * * * by the divergent descriptions of what happened on [November 15, 2009]." The trial court further stated that appellant apparently did not learn from the consequences of his actions in New York, and refused to admit the severity of the effects his actions have on others. The court expressed concern that appellant's use of a weapon would escalate in the future, and stated that, in addition to having her stuffed animal eviscerated by appellant, police noted red marks and bruising on the victim's neck after the encounter with appellant.

{¶ 7} Before sentencing appellant, the trial court stated that it had considered the sentencing factors set forth in R.C. 2929.11 and 2929.12, including that appellant caused physical harm to his victim, which "would overcome the presumption against a prison sentence." The court also found that appellant's actions were made more serious because of the harm inflicted on the victim, and that appellant's relationship with the victim

facilitated the offense. The trial court noted that "there are no factors conversely making the offense less serious." As to recidivism factors, the trial court stated that appellant's crime was "strikingly similar" to the one he committed in New York, and that appellant had not responded favorably to court-imposed sanctions in that instance.

{¶ 8} After making the above statements, the trial court found appellant guilty and sentenced him to three years of community control sanctions for the crime of menacing by stalking and required appellant to complete the SEARCH program, as well as "any and all requirements of the Youthful Offender Program," all at appellant's costs.

Appellant was also ordered to abstain from alcohol, to maintain lawful employment, complete 125 hours of community service, and have no contact with his victim or BGSU. The trial court informed appellant that, as a convicted felon, he is required to submit a DNA sample and pay court costs and a one-time supervision fee of \$50. The trial court also found appellant guilty of breaking and entering and sentenced him to serve six months in prison. The trial court informed appellant that, upon completion of his prison sentence, he could be ordered to complete an optional postrelease control period of three years. Thereafter, the trial court informed appellant as to his limited rights on appeal.

{¶ 9} Appellant filed a timely notice of appeal on October 15, 2010. On appeal, appellant sets forth the following as his sole assignment of error:

{¶ 10} "The trial court erred in imposing a prison sentence on a count of breaking and entering by failing to find that the defendant was not amenable to community control, pursuant to the authority of Revised Code 2923.13(B)(2)(a)."

{¶ 11} In support of his assignment of error, appellant argues that R.C. 2929.13(B)(2)(a) requires the trial court to find that a defendant is not amenable to community control before imposing a prison sentence for a fifth degree, non-drug related, nonviolent offense. Appellant also argues that the trial court implicitly found that he was amenable to community control by imposing a community control sanction pursuant to his conviction for menacing by stalking. Finally, appellant argues that the finding of physical harm pursuant to R.C. 2929.13(B)(1)(a) was improper in this case because it was not made in reference to a particular offense.

{¶ 12} Generally, "trial courts have full discretion to impose a prison sentence within the statutory range." *State v. Lippert*, 6th Dist. Nos. S-04-021, S-05-002, S-05-003, S-06-004, S-06-006, 2006-Ohio-5905, ¶ 39, quoting *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, paragraph three of the syllabus. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. However, in exercising that discretion, the trial court must first comply with all of the applicable "rules and statutes in imposing the sentence * * *." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4.

{¶ 13} We note at the outset that, contrary to appellant's assertion, the trial court's imposition of a prison sentence for one offense does not preclude the imposition of community control for a separate offense. See *State v. O'Connor*, 5th Dist. No. 04CAA04-028, 2004-Ohio-6752, ¶ 28. ("[T]he trial court has discretion to find

community controls sanctions appropriate for one offense, while finding a prison term appropriate for a separate offense * * *.) Accordingly, appellant's argument that the trial court could not send him to prison because it imposed community control for another offense is without merit.

{¶ 14} As to appellant's remaining arguments, "[i]n *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, the Ohio Supreme Court explained the felony-sentencing considerations for fourth and fifth degree felonies, stating:

{¶ 15} "'Consistent with the sentencing principles set forth in R.C. 2929.11, R.C. 2929.13(B)(1)(a) through (i) sets forth nine factors¹ that a trial court must consider in

¹Those nine factors are:

"(a) In committing the offense, the offender caused physical harm to a person.

"(b) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.

"(c) 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.

"(d) 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.

"(e) The offender committed the offense for hire or as part of an organized criminal activity.

"(f) The offense is a sex offense that is a fourth or fifth degree felony violation [of certain enumerated statutes].

sentencing an offender for fourth- and fifth-degree felonies. If a trial court does not make any of the findings in R.C. 2929.13(B)(1)(a) through (i), then an offender is sentenced pursuant to R.C. 2929.13(B)(2)(b), and if the court considers it appropriate, community control is the default sentence (except for those offenses identified as mandatory-prison offenses). *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 68. R.C. 2929.13(B) creates a preference for (but not a presumption in favor of) community control (formerly probation) for lower-level felonies. [*Foster*] at ¶ 43. However, if the trial court makes any of the findings set forth in R.C. 2929.13(B)(1)(a) through (i), then an offender is sentenced under R.C. 2929.13(B)(2)(a). After considering the seriousness and recidivism factors set forth in R.C. 2929.12, if the court finds that prison term is consistent with the principles and purposes of felony sentencing and that an offender is not amenable to community control, then the court shall impose a prison term upon the offender. Thus, although it does not preclude the imposition of community-control sanctions, a finding of any of the factors set forth in R.C. 2929.13(B)(1)(a) through (i) weighs against the preference for community control and may justify incarceration.' *Id.* at ¶ 8." See, also, *State v. Siber*, 8th Dist. No. 94882, 2011-Ohio-109, ¶ 9.

"(g) The offender at the time of the offense was serving, or the offender previously had served, a prison term.

"(h) The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance.

"(i) The offender committed the offense while in possession of a firearm."

{¶ 16} In addition to the above, in *Foster*, supra, the Ohio Supreme Court stated that "a judge who does not make one of the [R.C. 2929.13](B)(1) findings and does not find that community control is a sufficient sanction could still impose a prison term." *Foster*, supra, at ¶ 69. In other words, "[i]f the particular combinations [in R.C. 2929.13(B)] are not found, the judge is simply guided by the general principles of sentencing * * *." *Id.*, at fn. 91, quoting 1 Griffin & Katz, Ohio Felony Sentencing Law (2005), 761, Section 7:11.

{¶ 17} In its sentencing judgment entry, under the heading "DETERMINATION OF WHETHER A PRISON SENTENCE SHOULD BE IMPOSED," the trial court made a finding, pursuant to R.C. 2929.13(B)(1)(a), that appellant "caused physical harm to a person." Under that same heading, the trial court found that "a prison term is consistent, based upon the overriding purposes and principles of sentencing set forth in R.C. 2929.11." Following that determination, the trial court sentenced appellant to serve six months in prison for breaking and entering. In a separate section of the judgment entry, the trial court imposed three years of community control, and the additional conditions set forth above, for the crime of menacing by stalking, without making any further findings pursuant to either R.C. 2929.13(B)(1)(a) or 2929.11.

{¶ 18} On consideration of the foregoing, we find that the trial court complied with the applicable rules and statutes governing sentencing for a fifth-degree felony. In addition, it is undisputed that appellant's prison sentence was within the statutory range of

six to eighteen months, as prescribed by R.C. 2929.14(A)(5).² Accordingly, we cannot say that the trial court abused its discretion by ordering appellant to serve a six-month prison sentence in this instance. Appellant's sole assignment of error is, therefore, not well-taken.

{¶ 19} The judgment of the Wood County Court of Common Pleas is affirmed.

Court costs are assessed to appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

²Appellant has not challenged his community control sentence on appeal.