

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

State of Ohio

Court of Appeals No. S-13-028

Appellee

Trial Court No. 11 CR 402

v.

Jessica Davenport

DECISION AND JUDGMENT

Appellant

Decided: April 11, 2014

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Dean E. Ross, Special Assistant Prosecuting Attorney, for
appellee.

Timothy F. Braun, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of
Common Pleas that found appellant, Jessica Davenport, guilty of one count of felony
non-support in violation of R.C. 2919.21. For the reasons that follow, the judgment of
the trial court is affirmed.

{¶ 2} The undisputed facts relevant to the issues raised on appeal are as follows. On April 19, 2011, appellant was indicted on three counts of non-support of dependents. Appellant was arraigned on May 19, 2011, and the trial court granted her a recognizance bond. On August 12, 2011, appellant entered into a plea bargain with the state in which she pled no contest to the third count of the indictment with the understanding that the remaining two counts would be dismissed at sentencing. The trial court ordered a presentence investigation and set the sentencing hearing for October 17, 2011. Appellant failed to appear for sentencing and a bench warrant was issued for her arrest. She was served with the warrant on August 16, 2013, and sentencing was held on August 27, 2013. At that time, the trial court imposed a sentence of 12 months and ordered one day of jail-time credit.

{¶ 3} Appellant sets forth the following two assignments of error:

The trial court committed plain error by not granting the appellant the jail time credit she earned after she was arrested on the capias and was awaiting sentencing.

The trial court didn't comply with statutory requirements for felony sentencing.

{¶ 4} In support of her first assignment of error, appellant asserts that the matter must be remanded to the trial court for resentencing so that she may be awarded the appropriate amount of jail-time credit. However, appellant does not support her claim with any facts from the record indicating how much jail-time credit she should have been

awarded or how the trial court erred in computing the one day of credit. Appellee offers the response, undisputed by appellant, that appellant was arrested in Lucas County on August 7, 2013, and not transported to Sandusky County until twelve days later. Subsequently, according to appellee, appellant served five days in jail on an unrelated matter out of Sandusky County, after which she was held in custody awaiting sentencing on this case. While we acknowledge that appellee's statements of fact are not confirmed by the record before us, we note that a defendant is not entitled to jail-time credit for any period of incarceration which arises from facts separate and apart from those on which her current sentence is based. *State v. Goehring*, 6th Dist. Ottawa No. OT-03-035, 2004-Ohio-5240, ¶ 9. It is likely that the trial court herein had *Goehring* in mind when it imposed appellant's sentence and jail-time credit. However, because we do not have before us the trial court records from the other cases to which the trial court referred at appellant's sentencing, we cannot compute the jail-time credit to which appellant was entitled; we therefore must presume the regularity of the trial court proceedings. *See State v. Beachum*, 6th Dist. Erie No. E-10-003, 2011-Ohio-795, ¶ 6; *see also Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 19-20, 520 N.E.2d 564 (1988). Accordingly, appellant's first assignment of error is not well-taken.

{¶ 5} In support of her second assignment of error, appellant asserts that the trial court did not comply with the statutory requirements for felony sentencing. Appellant argues that the imposition of a 12-month sentence for this offense was an abuse of discretion and asks this court to remand this matter for resentencing.

{¶ 6} At the outset, we note that in recent years this court has adhered in its review of felony sentences to the two-step analysis delineated in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. Pursuant to *Kalish*, this court first determined whether the disputed sentence was clearly and convincingly contrary to law. If this first prong was satisfied, we then reviewed the record to determine whether the sentence constituted an abuse of discretion. *State v. Bratton*, 6th Dist. Lucas Nos. L-12-1219, L-12-1220, 2013-Ohio-3293, ¶ 10.

{¶ 7} Given recent legislative action in Ohio, however, culminating in the passage of a new statute directly addressing appellate court felony sentence review, and a growing body of recent appellate cases applying the new statutory parameters, we are no longer utilizing the former *Kalish* approach. R.C. 2953.08(G)(2), effective March 22, 2013, defines and establishes the proper appellate standard of review in felony sentencing cases and states that: “The appellate court’s standard for review is not whether the sentencing court abused its discretion.” R.C. 2953.08(G)(2) establishes that an appellate court may increase, reduce, modify, or vacate and remand a disputed sentence if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court’s findings under division (B) or (D) of section 2929.13(B) or (D), 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.

{¶ 8} Therefore, we will apply the statutory standard rather than the *Kalish* standard to our review of the disputed sentence in this case. (For a comprehensive discussion of the transition from the *Kalish* standard of review to the R.C. 2953.08(G)(2) based review, see our recent decision in *State v. Tammerine*, 6th Dist. Lucas No. L-13-1081, 2014-Ohio-425.)

{¶ 9} First, we note that the permissible statutory sentencing range for a felony of the fifth degree, such as the conviction underlying this case, is between six and twelve months. R.C. 2929.14(A)(5). Thus, appellant's term of incarceration falls within the permissible range.

{¶ 10} Next, we have considered the R.C. 2953.08(G)(2) statutory factors as they may apply to appellant's sentence. The only one which could potentially pertain to this case is R.C. 2929.13(B), which requires a community control sanction of at least one year's duration for certain felonies of the fifth degree that are not an offense of violence or that are a qualifying assault offense. However, pursuant to R.C. 2929.13(B)(1)(b)(iii), the trial court has discretion to impose a prison term upon an offender who is convicted of a felony of the fifth degree that is not an offense of violence or is a qualifying assault offense if the offender violated a term of the conditions of bond as set by the court. In this case, appellant was granted a recognizance bond at her arraignment on May 19, 2011. At appellant's plea hearing on August 12, 2011, the trial court continued the previously set bond until sentencing set for October 17, 2011. Appellant did not appear for sentencing, therefore violating her bond, and a warrant was issued for her arrest.

Accordingly, based on the exception to the community control requirement set forth in R.C. 2929.13(B), we find that appellant's sentence was not clearly and convincingly contrary to law and that the trial court properly sentenced appellant to a term of imprisonment. Appellant's second assignment of error is not well-taken.

{¶ 11} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal 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.

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, P.J.

JUDGE

James D. Jensen, 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:
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