[Cite as *State v. Raypole*, 2019-Ohio-3019.]

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

State of Ohio — Court of Appeals No. S-18-045

Appellee — Trial Court No. 18 CR 76

v.

Billy J. Raypole — **DECISION AND JUDGMENT**

Appellant — Decided: July 12, 2019

* * * * *

Timothy Braun, Sandusky County Prosecuting Attorney, and
Joseph H. Gerber, Assistant Prosecuting Attorney, for appellee.

Brett A. Klimkowsky, for appellant.

* * * * *

MAYLE, P.J.

{¶ 1} Defendant-appellant, Billy J. Raypole, appeals the October 16, 2018 judgment of the Sandusky Court of Common Pleas, sentencing him to 180 days in jail following his conviction of possession of cocaine. For the following reasons, we affirm the trial court's judgment.

I. Background

{¶ 2} On August 28, 2018, Billy J. Raypole entered a plea of guilty to possession of cocaine, a violation of R.C. 2925.11(A) and (C)(4)(a), a fifth-degree felony. The trial court accepted Raypole's plea, found him guilty, ordered a presentence investigation report ("PSI"), and continued the matter for sentencing. On October 12, 2018, the court sentenced Raypole to 180 days in the Sandusky County jail and imposed the costs of prosecution and court-appointed counsel. His conviction and sentence were memorialized in a judgment journalized on October 16, 2018. Raypole appealed and assigns a single error for our review:

> The Trial Court's sentence of Billy J. Raypole ("Appellant") is excessive and violates the law concerning the purpose of felony sentencing.

II. Law and Analysis

{¶ 3} Raypole challenges the length of his sentence. He argues that his sentence should be reduced or vacated because the trial court did not consider the minimum sanction necessary to punish him and protect the public, as required by R.C. 2929.11, and because the record is devoid of any indication that the court considered the seriousness and recidivism factors under R.C. 2929.12. Raypole claims that the court fashioned his sentence based upon its impression that Raypole suffers from an ongoing substance abuse problem when it should instead have considered community-control sanctions and available rehabilitative options. He maintains that the trial court imposed the sentence based on his history of "a lot of minor offenses," but he insists that he has already been

punished for those offenses. Finally, Raypole points out that the state recommended community control as part of the plea agreement (which he acknowledges the court was not bound to follow), and he argues that there was a presumption against imprisonment under R.C. 2929.13(B)(1)(a), which the court ignored.

{¶ 4} We review a challenge to a felony sentence under R.C. 2953.08(G)(2). R.C. 2953.08(G)(2) provides that an appellate court may increase, reduce, or otherwise modify a sentence or may vacate the sentence and remand the matter to the sentencing court for resentencing 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, 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.

{¶ 5} In *State v. Tammerine,* 6th Dist. Lucas No. L-13-1081, 2014-Ohio- 425, ¶ 15, we recognized that *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, provides guidance in determining whether a sentence is clearly and convincingly contrary to law for purposes of R.C. 2953.08(G)(2)(b). In *Kalish*, the Ohio Supreme Court held that where the trial court expressly states that it considered the purposes and principles of sentencing in R.C. 2929.11 and the seriousness and recidivism factors listed in R.C. 2929.12, properly applies postrelease control, and sentences the defendant within

the statutorily-permissible range, the sentence is not clearly and convincingly contrary to law. *Kalish* at ¶ 18.

{¶ 6} We begin by noting that under certain circumstances, there is a presumption of community control for fifth-degree felonies under R.C. 2929.13(B)(1)(a):

> [I]if an offender is convicted of or pleads guilty to a felony of the * * * fifth degree that is not an offense of violence or that is a qualifying assault offense, the court shall sentence the offender to a community control sanction or combination of community control sanctions if all of the following apply:
>
> (i) The offender previously has not been convicted of or pleaded guilty to a felony offense.
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> (ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.
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> (iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty-five-day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions that are available for persons sentenced by the court.

(iv) The offender previously has not been convicted of or pleaded guilty to a misdemeanor offense of violence that the offender committed within two years prior to the offense for which sentence is being imposed.

{¶ 7} Here, Raypole's PSI indicates that he has previously been convicted of a felony offense, therefore, this presumption is inapplicable. Moreover, R.C. 2929.13(B)(1)(b) sets forth a number of circumstances under which a court may impose a prison term for a fifth-degree felony rather than community control:

The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense if any of the following apply:

* * *

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

(xi) 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.

{¶ 8} Here, Raypole has previously served a prison sentence, and he was on probation when he committed the offense. The trial court, therefore, had discretion to impose a prison sentence and was not limited to imposing community control sanctions.

Under R.C. 2929.14(A)(5), the court was authorized to impose a prison term of six, seven, eight, nine, ten, eleven, or twelve months.

{¶ 9} Having said this, we note that the trial court sentenced Raypole to a *jail* term—not a prison term. Under R.C. 2929.15(A)(1), "[i]f in sentencing an offender for a felony the court is not required to impose a prison term, a mandatory prison term, or a term of life imprisonment upon the offender, the court may directly impose a sentence that consists of one or more community control sanctions authorized pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code." Among those sanctions, R.C. 2929.16(A)(2) allows for imposition of a community residential sanction that may include "a term of up to six months in a *jail*." (Emphasis added.) Given that the trial court sentenced Raypole to 180 days in the Sandusky County *jail*, we conclude that the sentence imposed here was a community residential sanction—a type of community control.[1]

{¶ 10} Having concluded that the trial court actually imposed a type of community-control sanction in this case, we next consider Raypole's claim that the trial court failed to consider the principles and purposes of felony sentencing under R.C. 2929.11, and the seriousness and recidivism factors under R.C. 2929.12.

[1] We reach this conclusion despite the fact that the judgment entry states that Raypole "is not amenable to community control." Rather, we interpret this statement to mean that in the trial court's estimation, some type of confinement was necessary here.

{¶ 11} R.C. 2929.11 explains that "[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." It instructs that "[t]o achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

{¶ 12} R.C. 2929.12 provides discretion to the trial court "to determine the most effective way to comply with the purposes and principles of sentencing * * *." It requires that "[i]n exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) * * * relating to the seriousness of the conduct, the factors provided in divisions (D) and (E) * * * relating to the likelihood of the offender's recidivism, and the factors set forth in division (F) * * * pertaining to the offender's service in the armed forces of the United States," in addition to any other factors relevant to achieving the purposes and principles of sentencing. R.C. 2929.12(A).

{¶ 13} It is well-recognized that where the record is silent, there is a presumption that the trial court gave proper consideration to R.C. 2929.11 and 2929.12. *State v. Carlton*, 2d Dist. Montgomery No. 26086, 2014-Ohio-3835, ¶ 18; *State v. Rutherford*, 2d Dist. Champaign No. 08CA11, 2009-Ohio-2071, ¶ 34-35. *See also State v. Seele*, 6th Dist. Sandusky No. S-13-025, 2014-Ohio-1455, ¶ 19 ("While it is true that the trial court

did not expressly state in either its judgment entry or during the sentencing hearing that it had balanced the principles and purposes of sentencing against the seriousness of the offense and the likelihood of recidivism under R.C. 2929.11 and 2929.12, we must presume that the trial court gave those statutes proper consideration."). It is up to the defendant to rebut this presumption. *Rutherford* at ¶ 34-35. "Thus, the issue before us is whether the record demonstrates that the trial court considered R.C. 2929.11 and 2929.12 in imposing its sentence, not whether the trial court expressly indicated that it did so." *State v. Sims*, 6th Dist. Sandusky No. S-13-037, 2014-Ohio-3515, ¶ 10.

{¶ 14} Here, the trial court did not specifically cite R.C. 2929.11 or 2929.12, but it explained at length its rationale for Raypole's sentence:

> Oh, my. Well, you're—while we have a lot of minor offenses here, I'm going to estimate that you are the award winner for number of convictions in Sandusky County. In my experience as a Judge, you—count about 75 entries, 14 separate incidents of drug or alcohol violations. Defendant reported that he last smoked crack cane—crack cocaine on August 27th, which was the day before you changed your plea to guilty. I've got a 13 page report here.
>
> * * *
>
> Just is—it's just so frustrating that you—I mean, it's your life, but you do impact the community.
>
> * * *

This offense did occur while you were on probation out of the Fremont Municipal Court; also, that you were on—operating your motor vehicle while your license was under a suspension. You were violating your driving privileges. I mean, it's your life, and I don't know that our Probation Department would have any influence one way or the other, so I'm not going to place you on Community Control, and I'm not going to send you to prison. I am, however, going to impose six months in the County jail; impose court costs.

Upon your release from County jail, you'll have no obligation to this Court or our Probation Department. If you are sincere about helping yourself, you'll get yourself into a program, but—and if you don't—if you continue to abuse yourself with drugs, it's my guess that it's just a matter of time before you run a—run across some tainted drug that will result in your death, and it doesn't have to be this way. I mean, I thought we had a talk last time that—I mean, you were a good athlete in high school, correct?

* * *

You learned—you should have learned that discipline of how to maintain your body and how to play by the rules, and you've done everything exactly opposite to that. I don't know what happened that—for whatever reason you don't want to accept any supervision, so I guess you're just going to have to figure it out by yourself, but I'm not going to

waste our Probation Department's time on attempting to direct your life. You're a big boy, and I hope you'll take on the responsibility of—of being a—an asset to the community instead of taking every opportunity to do something in violation of the law.

{¶ 15} It is clear from the court's remarks at sentencing that it did consider options other than confinement, but Raypole's criminal history—which included numerous drug offenses, various jail and prison terms, periods of probation, and probation violations—convinced it that a drug rehabilitation program or forced supervision by the county's probation department would not prompt a change in Raypole's criminal behavior. It is also clear that the court believed that Raypole's criminal behavior negatively impacted the community and that he would continue to reoffend.

{¶ 16} When sentencing an offender, it is up to the trial court's discretion to determine the weight to assign any particular statutory factor. *State v. Yeager*, 6th Dist. Sandusky No. S-15-025, 2016-Ohio-4759, ¶ 13. Here, the court may have weighed certain factors more heavily than others, but we cannot say that it did not consider the principles and purposes of sentencing or the seriousness and recidivism factors as it was required to do under R.C. 2929.11 and 2929.12.

{¶ 17} Accordingly, we find Raypole's sole assignment of error not well-taken.

III. Conclusion

{¶ 18} We find Raypole's assignment of error not well-taken. The court imposed a community residential sanction—a type of community control—when it sentenced

Raypole to a jail term, and it provided a lengthy rationale in support of its sentence. The court's rationale reflected that it had considered the principles and purposes of sentencing and the seriousness and recidivism factors as it was required to do under R.C. 2929.11 and 2929.12. We, therefore, affirm the October 16, 2018 judgment of the Sandusky Court of Common Pleas. Raypole is ordered to pay the costs of this appeal under 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.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Christine E. Mayle, P.J. _____
CONCUR.
JUDGE