[Cite as *State v. Buchanan*, 2020-Ohio-4542.]

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

State of Ohio — Court of Appeals No. L-19-1231

Appellee — Trial Court No. CR0201702281

v.

Marteese Buchanan — **DECISION AND JUDGMENT**

Appellant — Decided: September 11, 2020

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Lauren Carpenter, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Marteese Buchanan, appeals the judgment of the Lucas County Court of Common Pleas, revoking the terms of his community control, and sentencing him to a six-year prison sentence on his conviction for burglary in violation of R.C.

2911.12(A)(2) and (D), a felony of the second degree. For the reasons that follow, we affirm.

I. Facts and Procedural Background

{¶ 2} On October 26, 2017, appellant entered an *Alford* plea to one count of burglary in violation of R.C. 2911.12(A)(2) and (D), a felony of the second degree. At the plea hearing, the state described the offense as follows:

> [T]his defendant did trespass in an occupied structure when any person other than an accomplice of the offender is present or likely to be present with the purpose to commit in that habitation any criminal offense.
>
> Specifically, Judge, the State would have shown that on or about July 19th, 2017, that this defendant was in the area of 722 Champlain, Apartment C4, which is here in Lucas County, Ohio. The State would have shown that he, along with others, went to the apartment of one Todd Hadley. State would have shown that they knocked on the door at approximately 0213 in the morning, and Mr. Hadley cracked the door. At that time the State would have shown they forced their way into the apartment, and ultimately that this defendant caused physical harm to Mr. Hadley before fleeing the apartment. State would have shown that they did not have permission to actually enter the apartment. Obviously they did not have permission to commit the assault on Mr. Hadley. Mr. Hadley called 911. Toledo Police responded to the scene. Pictures were taken and

treatment was rendered for the injuries sustained by Mr. Hadley. Mr. Hadley would have reported that while items in his apartment were broken, additionally a box fan was ultimately missing after the attack took place.

{¶ 3} Sentencing was continued for the preparation of a presentence investigation report, and on January 16, 2018, the trial court sentenced appellant to serve three years of community control, notifying him that violation of the terms of his community control would lead to a longer or more restrictive sanction, including a prison term of six years.

{¶ 4} On February 26, 2019, a notice of community control violation was entered, alleging that appellant failed to keep scheduled appointments with probation, failed to submit drug screens, and failed to complete drug and alcohol programming. On April 30, 2019, appellant waived an oral hearing, and admitted to committing the community control violations. The court continued sentencing for 30 days for appellant to come into compliance with community control, warning him that if he failed to comply with the terms of his community control he faced six years in prison. At the May 28, 2019 sentencing hearing, the trial court ordered that appellant continue on community control with the added condition that he be placed on electronic monitoring and have no violations for 90 days.

{¶ 5} On August 16, 2019, a capias was issued for appellant for violation of the terms of his community control by failing to comply with the rules of the electronic monitoring program. On September 6, 2019, the matter was called for a community control violation hearing. The state presented evidence that on June 3, 2019, appellant

went to a residence that was not on his schedule, and remained there for three hours. Appellant received a warning from the electronic monitoring supervisor for that behavior. Then, on August 14, 2019, appellant allowed the battery on his electronic monitoring bracelet to discharge, resulting in appellant being unable to be monitored for six hours. Appellant testified that the battery died while he was sleeping.

{¶ 6} Following the testimony, the trial court found that appellant violated the terms of his community control. The court then recounted the several opportunities that appellant had to come into compliance with community control and yet failed to do so. Thus, the trial court revoked the previously imposed community control and sentenced appellant to serve six years in prison.

II. Assignment of Error

{¶ 7} Appellant has timely appealed the trial court's September 6, 2019 judgment entry, and now asserts one assignment of error for our review:

> 1. The trial court did not comply with R.C. 2929.11 and 2929.12 in sentencing Appellant to six years in the Ohio Department of Rehabilitation and Corrections instead of ordering community control sanctions.

III. Analysis

{¶ 8} We review the imposition of a felony sentence in accordance with R.C. 2953.08. *State v. Tammerine*, 6th Dist. Lucas No. L-13-1081, 2014-Ohio-425, ¶ 16. Relevant here, R.C. 2953.08(G)(2)(b) provides that an appellate court may increase,

reduce, or otherwise modify a sentence if it clearly and convincingly finds "[t]hat the sentence is otherwise contrary to law."

{¶ 9} In *Tammerine*, we recognized that *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, *abrogated by State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, still can provide guidance for determining whether a sentence is clearly and convincingly contrary to law. *Tammerine* at ¶ 15. The Ohio Supreme Court in *Kalish* held that where the trial court expressly stated that it considered the purposes and principles of sentencing in R.C. 2929.11 as well as the factors listed in R.C. 2929.12, properly applied postrelease control, and sentenced the defendant within the statutorily permissible range, the sentence was not clearly and convincingly contrary to law. *Kalish* at ¶ 18.

{¶ 10} Here, the record reflects, and appellant does not dispute, that the trial court considered R.C. 2929.11 and 2929.12, properly applied postrelease control, and sentenced appellant within the statutorily permissible range. Thus, we hold that appellant's sentence is not clearly and convincingly contrary to law.

{¶ 11} This, however, does not end our analysis because the Ohio Supreme Court has held that even where the sentence is not otherwise contrary to law, we may vacate or modify the term if we find by "clear and convincing evidence that the record does not support the sentence" upon consideration of R.C. 2929.11 and 2929.12. *Marcum* at ¶ 23. Indeed, the gravamen of appellant's argument is that the trial court erred in its application

of the principles and purposes of sentencing, and its consideration of the seriousness and recidivism factors, when sentencing appellant to a six-year prison term.

{¶ 12} Specifically, appellant argues that although the electronic monitoring violation was his second violation of community control, it was not a new offense. In addition, there was no testimony that appellant was somewhere he was not supposed to be while on electronic monitoring, only that he had allowed his electronic monitoring bracelet to fully discharge. Further, appellant cites the testimony of his parole officer that he had been "doing okay" on community control, and that he was providing clean drug screens, had employment, and was attending meetings at New Concepts and TASC. Finally, appellant concludes that the six-year prison sentence was not the minimum sanction necessary to punish him, and that other community control sanctions would have been more appropriate.

{¶ 13} Upon our review of the record, we find that there is not clear and convincing evidence that the sentence is unsupported. Appellant pled guilty to a felony of the second degree for forcing his way into the victim's apartment and physically harming the victim. The court recounted that at the time of his original sentencing, appellant had 18 misdemeanor convictions as an adult, and three felony adjudications as a juvenile. Nonetheless, the trial court sentenced appellant to community control. Approximately a year later, appellant violated the terms of his community control by failing to keep his scheduled appointments, failing to provide drug screens, and failing to complete drug and alcohol programming. Appellant was given a second chance, and

three months later violated his community control again by failing to comply with the terms of his electronic monitoring. Based upon appellant's multiple violations of community control, we hold that the trial court was justified in revoking community control and sentencing appellant to prison for his commission of the burglary offense. Furthermore, we hold that the six-year prison term is not clearly and convincingly unsupported by the record in light of the facts of the crime, appellant's prior criminal history, and appellant's inability to comply with the terms of community control.

{¶ 14} Accordingly, appellant's assignment of error is not well-taken.

IV. Conclusion

{¶ 15} For the foregoing reasons, we find that substantial justice has been done the party complaining, and the judgment of the Lucas 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Christine E. Mayle, J.
CONCUR.

JUDGE