

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 12AP-61
	:	(C.P.C. No. 11CR-01-20)
Ryan L. Milhoan,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on September 28, 2012

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*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

*Dennis C. Belli*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Plaintiff-appellant, the State of Ohio ("the State"), appeals from a judgment entered by the Franklin County Court of Common Pleas placing defendant-appellee, Ryan L. Milhoan, on community control. Because the trial court failed to make the necessary factual findings required to impose such a sentence, we vacate the judgment and remand the matter for resentencing.

{¶ 2} On January 3, 2011, the Franklin County Grand Jury indicted Milhoan on 12 counts of pandering sexually oriented material involving a minor, felonies of the second degree, and 12 counts of pandering sexually oriented material involving a minor, felonies of the fourth degree. The charges arose following an investigation with the Internet Crimes Against Children Task Force. Milhoan's IP address was associated with numerous files containing child pornography. Following a complete forensics exam conducted on

three different computers seized from Milhoan, 960 images and 75 videos of child pornography were found.

{¶ 3} Milhoan pled guilty to pandering sexually oriented material involving a minor, Counts 1, 2, 3, and 4 of the indictment, felonies of the second degree, and to Counts 21, 22, 23, and 24 of the indictment, felonies of the fourth degree. As part of the plea agreement, the State agreed not to prosecute Milhoan on Counts 5 through 20 of the indictment. Also, as part of the plea agreement, the State agreed that they would not present the matter to the United States Attorney for potential federal prosecution. The trial court ordered a pre-sentence investigation and continued the case for sentencing. Ultimately, the trial court placed Milhoan on community control for a period of four years, and ordered that he be placed on intensive sex offender supervision, as well as ordering him to maintain employment, submit to urine screens, pay costs, and to have no use of the internet. Milhoan was classified as a Tier II sex offender.

{¶ 4} The State appeals and assigns the following two assignments of error for our review:

#### FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN IMPOSING COMMUNITY CONTROL WHEN IT FAILED TO MAKE THE REQUIRED FINDINGS AND FAILED TO GIVE ADEQUATE REASONS FOR OVERCOMING THE PRESUMPTION IN FAVOR OF A PRISON TERM.

#### SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT'S IMPOSITION OF COMMUNITY CONTROL IS CONTRARY TO LAW, AS DEFENDANT CANNOT OVERCOME THE PRESUMPTION IN FAVOR OF A PRISON TERM.

{¶ 5} The trial court placed Milhoan on community control after finding him guilty of several felonies of the second degree. Under R.C. 2929.13(D)(2), it is presumed that a prison term is the appropriate sentence for a felony of the first or second degree. Notwithstanding that presumption, community control may be imposed if the trial court makes both of the following findings:

(a) 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.

(b) 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.

{¶ 6} The sentencing court must make both of these findings before it may deviate from the presumption that a prison term should be imposed. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, paragraph one of the syllabus.

{¶ 7} In this case, the trial court failed to make the findings required by R.C. 2929.13(D)(2) to overcome the presumption for prison and to impose community control on Milhoan. To the extent that Milhoan contends that the failure of the State to object during the sentencing hearing forfeits error for purposes of appellate rule, this court disagrees. At the plea hearing, the State indicated that there was a presumption of prison and five years mandatory post-release control on the pandering charges. At the sentencing hearing, the State reiterated that there was a presumption for prison on the second degree felony offenses to which Milhoan had pled guilty. Further, in its judgment entry, the trial court acknowledged that there was a presumption in favor of prison pursuant to R.C. 2929.13(D). This court finds, that under the statutory provisions, the State was not required to advise the court further. As provided in Crim.R. 51:

An exception, at any stage or step of the case or matter, is unnecessary to lay a foundation for review, whenever a matter has been called to the attention of the court by objection, motion, or otherwise, and the court has ruled thereon.

Accordingly, we find that the issue was preserved for review.

{¶ 8} Accordingly, the State's first assignment of error is sustained.

{¶ 9} In its second assignment of error, the State argues that the trial court's imposition of community control is contrary to law because Milhoan cannot overcome the presumption in favor of a prison term. Therefore, the State asks this court to remand this

matter and instruct the trial court to impose a prison sentence. Because this is a decision that should be made by the trial court on remand when it considers the statutory requirements in R.C. 2929.13(D), this court overrules the State's second assignment of error.

{¶ 10} In this case, the trial court failed to make the findings required by R.C. 2929.13(D) to overcome the presumption for prison and to impose community control. Therefore, the State's first assignment of error is sustained, and we vacate the sentence and remand this matter for resentencing. Consequently, the State's second assignment of error is overruled. Therefore, we vacate the judgment and remand this matter for resentencing.

*Judgment vacated;  
cause remanded.*

KLATT and SADLER, JJ., concur.

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