[Cite as *State v. Wells*, 2019-Ohio-4109.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- ALEXANDER TRE MYKEL WELLS Defendant-Appellant	JUDGES: Hon. John W. Wise, P. J. Hon. Craig R. Baldwin, J. Hon. Earle E. Wise, Jr., J. Case No. 19 CA 06 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 18 CR 86
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 1, 2019

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JASON R. FARLEY ASSISTANT PROSECUTOR MELISSA R. BRIGHT ASSISTANT PROSECUTOR 627 Wheeling Avenue Cambridge, Ohio 43725	CHANDRA L. ONTKO 665 Southgate Parkway Cambridge, Ohio 43725

Wise, John, P. J.

{¶1} Appellant Alexander Tre Mykel Wells appeals from his conviction, in the Guernsey County Court of Common Pleas, on a single count pertaining to his duty to register. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} Appellant was previously convicted of a sexually-oriented offense and is required to register under R.C. Chapter 2950. On April 10, 2018, appellant was indicted on one count of failure to register (R.C. 2950.04(E)), a felony of the fourth degree, and one count of failure to provide a change of address (R.C. 2950.05(E)(1)), also a felony of the fourth degree. Under the second count, the indictment specifically alleged that between November 8, 2016 and March 28, 2018, appellant failed to provide the Guernsey County Sheriff's Office with written notice at least seven days prior to a change in residence address.

{¶3} At the time of his arraignment on April 23, 2018, appellant was serving a five-year period of post-release control. He had approximately four years left on said sanction, and he claimed he had been "typically" reporting on a monthly basis to his supervising officer. Tr. at 6. Furthermore, as a result of the aforesaid pending felony charges, appellant's supervising officer sanctioned him with two weeks in the county jail. Tr. at 5.

{¶4} At a plea hearing conducted on August 14, 2018, appellant pled guilty to the second count of the indictment, *i.e.*, the charge of failure to provide a change of address. The trial court postponed sentencing, ordering an updated presentence investigation

("PSI"). The trial court stated that under the parties' plea deal, the count of failure to register was to be dismissed at the sentencing hearing. Tr. at 10.

{¶5} The initial sentencing hearing was scheduled for November 5, 2018. Appellant appeared with counsel; however, the court noted that appellant had failed to report for his PSI and Ohio Risk Assessment interview that had been scheduled for October 18, 2018. It was also indicated that the probation department and defense counsel had been unable to get in touch with appellant in a timely manner. Appellant stated that he had been homeless, did not have a phone, and he just recently obtained a residential address. *See* Tr. at 25-26. As a result, the court granted defense counsel's request to continue the sentencing hearing.

{¶6} The sentencing hearing then took place on January 10, 2019. At that time, the trial court had received the current presentence investigation ("PSI"), a prior PSI, and a letter from Lieutenant Curtis Braniger of the Guernsey County Sheriff's Office to Chief Probation Officer Kevin Shipe. After defense counsel and appellant had reviewed the Braniger letter, they indicated they were prepared to proceed with the sentencing hearing.

{¶7} During said hearing, the State noted *inter alia* that appellant's ORAS score was 25, which is considered to be in the "high" category. Tr. at 32. The State also indicated that appellant had violated his supervision terms and that community control would not be appropriate in this case because his parole authority officer indicated he was not able to locate appellant. *Id.*

{¶8} In response, appellant's defense counsel argued that community control would be appropriate in his case, which "could include" a six-month jail sentence as an appropriate community control sanction. Tr. at 32. Appellant spoke to the court and

maintained that upon his jail release he had commenced making various employment applications. He also noted that he had worked at three successive jobs, including a fireworks retailer and a restaurant. Tr. at 39-40. Appellant conceded that there "has been a lot of obstacles that my record has created." Tr. at 33. He stated he had transportation issues and had been homeless, although he eventually moved in with a friend. Tr. at 34.

{¶9} The trial court, in addition to reviewing the PSI, indicated it gave "great weight" to Lieutenant Braniger's aforementioned letter. Tr. at 42. Appellant nonetheless claimed that the letter from Lieutenant Braniger was incorrect because he did do his six-month renewal of his registration at around the same time the letter was written. Tr. at 34. Appellant also insisted he was residing at the address he utilized for registration, and that he could prove it by showing his clothes at the location or having his friends provide verification. Tr. at 41. He suggested that he simply might not have been home when his parole authority officer showed up to see him. *Id.*

{¶10} The trial court observed that appellant had had his “intervention in lieu of conviction” revoked and thus went to prison November 16, 2016. Tr. at 38. His five years of postrelease control had then begun on December 8, 2017. *Id.* The court proceeded to find *inter alia* that appellant was not amenable to a community control sanction. Tr. at 46.

{¶11} The court then sentenced appellant to fourteen months in prison. He was also ordered to pay court costs. The court further indicated that it would have the probation department inquire as to whether appellant would be eligible for the “Quick Start” program through Zane State College if he were to be granted judicial release. Tr.

at 47. The trial court issued its written sentencing entry, including PRC notification, on January 11, 2019.[1]

{¶12} On February 8, 2019, appellant filed a notice of appeal. He herein raises the following two Assignments of Error:

{¶13} "I. THE APPELLANT ALLEGES THAT THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING THE DEFENDANT, AS SAID SENTENCE WAS UNREASONABLE.

{¶14} "II. THE APPELLANT HAS A CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL AS APPELLANT'S COUNSEL FAILED TO REQUEST A CONTINUANCE OF THE SENTENCING HEARING."

I.

{¶15} In his First Assignment of Error, appellant challenges his felony sentence in this matter.

{¶16} As an initial matter, we note appellant presents his challenge via an "abuse of discretion" approach. However, we no longer review sentences pursuant to the standard set forth in *State v. Kalish,* 120 Ohio St. 3d 23, 2008–Ohio–4912, 896 N.E.2d 124. *See State v. Cox*, 5th Dist. Licking No. 16–CA–80, 2017–Ohio–5550, ¶ 9. We now review felony sentences using the standard of review set forth in R.C. 2953.08. *See State v. Marcum*, 146 Ohio St.3d 516, 2016–Ohio–1002, 59 N.E.3d 1231, ¶ 22.

{¶17} R.C. 2953.08(G)(2) provides we may either increase, reduce, modify, or vacate a sentence and remand for resentencing where we clearly and convincingly find

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[1] Appellant's case thus predates March 22, 2019, the date on which Ohio's criminal sentencing statutes were extensively amended under 2017 S.B. No. 201. *See, e.g.*, *State v. Crawford*, 6th Dist. Lucas No. L-17-1296, 2019-Ohio-3123, f.n. 3.

that either the record does not support the sentencing court's findings under R.C. 2929.13(B) or (D), 2929.14(B)(2)(e) or (C)(4), or 2929.20(I), or the sentence is otherwise contrary to law. *See State v. Maurer*, 5th Dist. Muskingum No. CT2018-0042, 2019-Ohio-2388, ¶ 30.

{¶18} In the case *sub judice*, appellant essentially contends that it was unreasonable to sentence him to fourteen months in prison in lieu of community control sanctions. However, appellant's brief makes no references to the language of R.C. 2953.08(G)(2), *supra*. We emphasize it is not the duty of an Ohio appellate court to create arguments for the parties and search the record for evidence to support them. *State v. Trammell*, 5th Dist. Stark No. 2015 CA 00151, 2016-Ohio-1317, ¶ 15, citing *Sisson v. Ohio Department of Human Services,* 9th Dist. Medina No. 2949–M, 2000 WL 422396.

{¶19} In the interest of justice, we will treat appellant's challenge chiefly as a claim that his sentence is contrary to law. "An appellate court will not find a sentence clearly and convincingly contrary to law where the trial court considers the principles and purposes of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly imposes postrelease control, and sentences the defendant within the permissible statutory range." *State v. Daniels*, 5th Dist. Muskingum No. CT2016-0021, 2017-Ohio-1045, ¶ 13 (internal quotations and additional citations omitted).

{¶20} We note the trial court clearly articulated its review of the 2929.11 and 2929.12 factors in its sentencing entry, and appellant does not presently contend that his sentences are outside the statutory ranges of the Ohio Revised Code. Furthermore, during the pendency of the present appeal, this Court ordered the provision by the clerk of courts of a sealed copy of the January 7, 2019 PSI and the letter from Lieutenant

Braniger for our confidential review pursuant to R.C. 2951.03(D) and R.C. 2953.08(F)(1). The PSI confirms for us, among other things, the State's expressed concerns about appellant's ORAS score and his misdeeds during the last supervision attempt in 2016. The Braniger letter sheds light on appellant's non-compliance in "checking in" with his APA officer. As the trial court observed, appellant committed his offense of failure to provide a change of address while he was already on post release control. *See* Tr. at 43. Furthermore, appellant clearly has not responded to intervention programs and/or community control sanctions in the past. *See* Tr. at 44.

{¶21} Based on our review of the record and the sealed documents, we do not find by clear and convincing evidence that the record does not support the sentence or that the sentence is contrary to law.

{¶22} Appellant's First Assignment of Error is therefore overruled.

II.

{¶23} In his Second Assignment of Error, appellant contends his defense counsel at sentencing was ineffective for failing to seek a continuance of the hearing. We disagree.

{¶24} Our standard of review for ineffective assistance claims is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; *i.e.*, whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his or her essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not

the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.*

{¶25} However, trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 693 N.E.2d 267. Likewise, "[i]n Ohio, a properly licensed attorney is entitled to a strong presumption that his or her duties have been performed in an ethical, reasonable and competent manner." *State v. Weber*, 5th Dist. Stark No. 2007 CA 00334, 2009-Ohio-1344, ¶ 46 (additional citations omitted).

{¶26} Appellant in essence urges that a continuance would have provided a greater opportunity to counter Lieutenant Braniger's statements in his letter, particularly as to appellant's living arrangements at the time. However, upon review, notwithstanding appellant's prior history of disregarding court orders, we find his present arguments are far too speculative to overcome the strong presumption that his attorney competently represented him at sentencing.

{¶27} Appellant's Second Assignment of Error is therefore overruled.

{¶28} For the foregoing reasons, the judgment of the Court of Common Pleas, Guernsey County, Ohio, is hereby affirmed.

By: Wise, John, P. J.

Baldwin, J., and

Wise, Earle, J., concur.

JWW/d 0913