

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

State of Ohio

Court of Appeals No. S-17-020

Appellee

Trial Court No. 16CR440

v.

Gage Villarreal

DECISION AND JUDGMENT

Appellant

Decided: March 9, 2018

* * * * *

Timothy F. Braun, Sandusky County Prosecuting Attorney, and
Mark E. Mulligan, Assistant Prosecuting Attorney, for appellee.

Karin L. Coble, for appellant.

* * * * *

MAYLE, P.J.

{¶ 1} Appellant, Gage Villarreal, appeals the May 18, 2017 judgment of the Sandusky County Court of Common Pleas sentencing him to 18 months in prison. For the following reasons, we affirm.

I. Background and Facts

{¶ 2} On May 20, 2016, Villarreal was indicted on two counts of theft in violation of R.C. 2913.02(A)(1), both fifth-degree felonies; one count of telecommunications fraud in violation of R.C. 2913.05(A), a fourth-degree felony; and one count of attempted theft in violation of R.C. 2913.02(A)(1) and 2923.02, a fifth-degree felony.

{¶ 3} On January 11, 2017, Villarreal pleaded guilty to the telecommunications fraud charge. The state agreed to dismiss the remaining charges at sentencing.

{¶ 4} During the plea hearing, Villarreal told the court that he had been involved in an online banking scheme to take money from a credit union. The scheme involved initiating online transfers with a bank account, causing overdrafts, and keeping the money the bank supplied to cover the overdrafts. Although the transactions Villarreal initiated totaled \$39,999.97, the bank only lost \$7,287.79, which Villarreal agreed to pay as restitution.

{¶ 5} After engaging in a colloquy with Villarreal, the trial court accepted his plea, found that he had been advised of the consequences of his plea, and determined that he entered the plea and waived his rights knowingly, voluntarily, and intelligently.

{¶ 6} On May 18, 2017, the court held Villarreal's sentencing hearing. First, Villarreal's attorney addressed the court and asked it to consider several mitigating factors. Counsel explained that Villarreal is a heroin addict and needs treatment; counsel

believed that time in a community-based correctional facility would allow Villarreal to receive that treatment. Counsel said that this was Villarreal's first felony case, but admitted that Villarreal had misdemeanor and juvenile criminal records. Counsel also pointed out that Villarreal was a trustee at the jail, which showed that Villarreal was following the rules. Counsel asked the court to sentence Villarreal to community control.

{¶ 7} Next, Villarreal addressed the court. He apologized for the crime, took full responsibility for his actions, and said "I need help bad. I'm asking for help. I really do need it."

{¶ 8} Finally, the state addressed the court. The prosecutor noted that Villarreal's presentence investigation ("PSI") said that Villarreal was not doing well on community control for a misdemeanor case, which the state believed was indicative of what the court could expect if it sentenced Villarreal to community control in this case. Accordingly, the state requested a prison sentence.

{¶ 9} After hearing from counsel and Villarreal, the court reviewed the PSI. The PSI noted that several other people were involved in Villarreal's fraud scheme. The police searched Villarreal's cellphone during their investigation and found pictures of credit cards stolen from Villarreal's neighbor, which was the basis of one of the theft charges. Villarreal later contacted his neighbor on Facebook to try to get her to drop the charge. Villarreal admitted to both the bank scheme and the theft from his neighbor.

{¶ 10} Villarreal was 19 years old at the time of sentencing. Although this was his first felony case, he had already been convicted of six misdemeanors as an adult, including domestic violence, theft, aggravated menacing, and drug possession. As a juvenile, Villarreal was adjudicated delinquent for domestic violence and theft. Additionally, he had a history of stealing, breaking property, fighting, and injuring family members when he was a child. Villarreal also attended special education classes in high school and was suspended numerous times.

{¶ 11} Villarreal had several mental health diagnoses, but he was not taking any medications at the time the PSI was completed. Villarreal had previously received treatment from several different agencies and had a history of failing to follow through with treatment recommendations.

{¶ 12} After reviewing Villarreal's history, the court determined that he was not amenable to community control. Thereafter, the court sentenced him to 18 months in prison. In support of the sentence, the court said that Villarreal had exhausted all community resources, but continued to engage in criminal activities. He had been on probation and failed. He also harassed the victim of one of the theft counts in an attempt to get her to drop the charge. The court ordered Villarreal to pay restitution in the amount of \$7,287.79. Additionally, the court found that Villarreal "is able to pay all fees and cost [sic] associated with the case" and ordered him to pay the costs of prosecution.

{¶ 13} Villarreal now appeals the trial court's decision, raising two assignments of error:

Assignment of Error One: Appellant's sentence is contrary to law as it violates appellant's Due Process rights; alternatively, the record does not clearly and convincingly support the trial court's findings regarding appellant's sentence.

Assignment of Error Two: The trial court erred in imposing the costs of confinement and of court-appointed counsel, by failing to find appellant had the ability to pay.

II. Law and Analysis

A. Villarreal's Sentence is not Contrary to Law

{¶ 14} In his first assignment of error, Villarreal argues that his sentence is contrary to law because the trial court improperly considered his juvenile record to support the imposition of the maximum sentence and failed to state that it considered the seriousness and recidivism factors in R.C. 2929.12. The state contends that the trial court correctly considered Villarreal's juvenile record and complied with all applicable sentencing statutes.

{¶ 15} We review sentencing challenges under R.C. 2953.08(G)(2). The statute allows an appellate court to increase, reduce, or otherwise modify a sentence or vacate

the sentence and remand the matter for resentencing only 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. R.C. 2953.08(G)(2).

{¶ 16} We note that Villarreal does not challenge the trial court’s compliance with any of the sentencing statutes in R.C. 2953.08(G)(2)(a). Rather, he claims that his sentence is contrary to law for two reasons: (1) the trial court violated his due process rights by considering his juvenile adjudications and behavior to enhance his sentence and (2) the trial court failed to consider the seriousness and recidivism factors in R.C. 2929.12 before sentencing him. We address each argument in turn.

1. Consideration of Villarreal’s Juvenile Record did not Violate Due Process

{¶ 17} Villarreal first argues that the trial court’s use of his juvenile record and other acts he committed as a juvenile to “enhance” his sentence was a violation of his due process rights. In support, Villarreal cites *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448.

{¶ 18} At issue in *Hand* was the interplay of R.C. 2929.13(F)(6)—which requires a mandatory prison sentence for any person who is convicted of a first- or second-degree felony and was previously convicted of a first- or second-degree felony—and R.C. 2901.08(A)—which classifies a juvenile adjudication as “a conviction * * * for purposes of determining the offense with which the person should be charged and * * * the sentence to be imposed upon the person * * *.” Applying these two statutes, the trial court sentenced Hand to a mandatory prison term for his first- and second-degree felony convictions because he was previously adjudicated delinquent of an act that would have been a first-degree felony if committed by an adult. *Hand* at ¶ 2-4.

{¶ 19} After reviewing the constitutional protections afforded to juveniles and noting that the right to a jury trial is not one of them, the Ohio Supreme Court found that it is fundamentally unfair to treat a juvenile adjudication like a prior conviction for purposes of enhancing the penalty for a subsequent conviction. *Id.* at ¶ 37. Accordingly, the court found that R.C. 2901.08(A) is unconstitutional because it violates due process. *Id.* at paragraph one of the syllabus. The court also held that a juvenile adjudication “cannot be used to increase a sentence beyond a statutory maximum or mandatory minimum” because a juvenile has no right to a jury trial. *Id.* at paragraph two of the syllabus, citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

{¶ 20} Villarreal interprets the court’s holding in *Hand* to mean that a trial court cannot consider an offender’s juvenile adjudications when weighing the seriousness and recidivism factors in R.C. 2929.12. We disagree because, as the Supreme Court noted, “there is a significant difference between allowing a trial judge to consider an adjudication during adult sentencing and requiring a mandatory prison term to be imposed because of it.” *Hand* at ¶ 20.

{¶ 21} *Hand* forbids the use of a juvenile adjudication in a way that *requires* the trial court to impose a harsher sentence on the defendant because of the prior adjudication’s existence. But R.C. 2929.12 does not demand that the trial court impose a harsher sentence because the defendant was previously found delinquent. Rather, the statute requires the trial court to consider the fact of the prior adjudication—along with a host of other facts—to determine the punishment that best fulfills the principles and purposes of sentencing in R.C. 2929.11. In our view, nothing in *Hand* prohibits a trial court from *considering* a defendant’s prior criminal history, including his juvenile adjudications, when weighing the factors in R.C. 2929.12. We note that our interpretation is in accord with the two other appellate districts that have examined this issue. *State v. McBride*, 11th Dist. Trumbull No. 2017-T-0050, 2017-Ohio-9349, ¶ 11-12; *State v. Delp*, 8th Dist. Cuyahoga No. 105467, 2017-Ohio-8879, ¶ 37-39.

{¶ 22} Because considering the fact of a juvenile adjudication is not equivalent to using the adjudication to enhance a sentence, we find that *Hand* is inapplicable to the trial

court's duty under R.C. 2929.12 to consider juvenile adjudications when weighing seriousness and recidivism factors. Accordingly, the trial court did not err when it considered Villarreal's juvenile record.

2. The Trial Court Complied with R.C. 2929.12

{¶ 23} Villarreal also argues that he is entitled to a new sentencing hearing because the trial court failed to consider the seriousness and recidivism factors in R.C. 2929.12. The state counters that the trial court was not required to specifically say that it considered R.C. 2929.12 as long as the record reflects that the trial court did, in fact, consider the statutory factors.

{¶ 24} A sentencing court "is not obligated to give a detailed explanation of how it algebraically applied each seriousness and recidivism factor to the offender." *State v. Brimacombe*, 195 Ohio App.3d 524, 2011-Ohio-5032, 960 N.E.2d 1042, ¶ 11 (6th Dist.). Nor is it required to use any specific language to demonstrate that it considered the applicable factors in R.C. 2929.12. *State v. Williams*, 6th Dist. Sandusky No. S-12-039, 2014-Ohio-2693, ¶ 8, citing *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000). Indeed, when the trial court does not put its consideration of R.C. 2929.12 on the record, the appellate court presumes that the trial court gave proper consideration to the statute. *State v. Scott*, 6th Dist. Sandusky No. S-15-012, 2016-Ohio-1480, ¶ 49, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 18, fn. 4. To be entitled to a new sentencing hearing, the defendant must point to information in the

record to rebut that presumption. *State v. Smith*, 6th Dist. Sandusky No. S-14-037, 2015-Ohio-1867, ¶ 11.

{¶ 25} In this case, the trial court neither said on the record nor wrote in its judgment entry that it considered R.C. 2929.12. A review of the sentencing hearing transcript, however, shows that the trial court did, in fact, consider the applicable seriousness and recidivism factors. For example, R.C. 2929.12(D)(2) and (3) require the court to look at whether the defendant has a history of criminal convictions and whether the defendant has responded poorly to previous criminal sanctions. Before sentencing Villarreal, the court noted that Villarreal—a 19-year-old man—had six adult criminal convictions, tested positive for cocaine while on community control for a misdemeanor conviction, and threatened court staff while on bond in a misdemeanor case. After imposing the sentence, the court also said that “probation isn’t going to do it. Probation has been tried, it hasn’t worked.”

{¶ 26} Based on the trial court’s comments at the sentencing hearing, we conclude that the court considered the applicable seriousness and recidivism factors, even if it never specifically said that it considered the factors in R.C. 2929.12. Even assuming that the statements were insufficient, Villarreal has not pointed to any evidence in the record—apart from the absence of an affirmative statement about the court’s consideration of R.C. 2929.12—showing that the court did not consider the factors in R.C. 2929.12. This argument is without merit.

{¶ 27} In sum, the record shows that the trial court properly considered Villarreal's juvenile record and complied with all applicable sentencing requirements when it sentenced Villarreal to prison. We therefore find that Villarreal's sentence is not clearly and convincingly contrary to law under R.C. 2953.08(G)(2). Accordingly, Villarreal's first assignment of error is not well-taken.

B. The Trial Court Properly Imposed Costs

{¶ 28} Villarreal's second assignment of error challenges the trial court's imposition of the costs of prosecution and appointed counsel. He contends that the trial court did not make a finding that he has or will have the ability to pay before it ordered him to pay costs. The state argues that the trial court made a specific finding that Villarreal "is able to pay all fees and cost [sic] associated with the case" after reading the PSI, which supports the imposition of costs.

{¶ 29} Our standard of review on this issue is whether the imposition of costs and financial sanctions was contrary to law. R.C. 2953.08(A)(4) and (G)(2)(b); *State v. Farless*, 6th Dist. Lucas Nos. L-15-1060 and L-15-1061, 2016-Ohio-1571, ¶ 4, citing *State v. Collins*, 2015-Ohio-3710, 41 N.E.3d 899, ¶ 30 (12th Dist.) ("An appellate court may not modify a financial sanction unless it finds by clear and convincing evidence that it is not supported by the record or is contrary to law.").

{¶ 30} With regard to the costs of prosecution, R.C. 2947.23(A)(1)(a) provides that the trial court shall render a judgment for the costs of prosecution without

consideration of whether the defendant has the ability to pay such costs. *State v. Rohda*, 6th Dist. Fulton No. F-06-007, 2006-Ohio-6291, ¶ 13.

{¶ 31} Prior to imposing the costs of confinement and assigned counsel, the trial court must first find that the defendant has, or will have, the ability to pay. That is, R.C. 2929.18(A)(5)(a)(ii) requires that the trial court impose against all convicted defendants a financial sanction for the costs of confinement in a state institution to the extent he “is able to pay.” Likewise, R.C. 2941.51(D) provides that the cost of appointed counsel must be paid by the county as approved by the court. The court can order the defendant to pay all or a part of the cost of appointed counsel, but only if the court determines that the offender “has, or reasonably may be expected to have, the means to meet some part of the costs of the services rendered * * *.” *Id.* Although the court is not required to conduct a hearing on a defendant’s ability to pay before imposing the costs of confinement or appointed counsel, the record must contain some evidence that the court considered the defendant’s ability to pay. *State v. Maloy*, 6th Dist. Lucas No. L-10-1350, 2011-Ohio-6919, ¶ 13.

{¶ 32} The record here shows that the trial court considered Villarreal’s ability to pay. The court read the PSI, which includes information about Villarreal’s employment history and financial situation. The PSI notes that Villarreal had held jobs off-and-on since he was 16. Although he has been fired from two jobs, both terminations happened because he was arrested. At the time the PSI was completed, Villarreal did not have any

financial obligations or living expenses other than municipal court costs and the forthcoming restitution order from this case. The court also noted that Villarreal is young. Considered together, this information is sufficient to support the court's finding that Villarreal can pay the costs of appointed counsel and confinement.

{¶ 33} Accordingly, we find that the trial court's imposition of costs was not contrary to law. Villarreal's second assignment of error is, therefore, not well-taken.

III. Conclusion

{¶ 34} Based on the foregoing, the May 18, 2017 judgment of the Sandusky County Court of Common Pleas is affirmed. Villarreal 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

James D. Jensen, J.

JUDGE

Christine E. Mayle, P.J.
CONCUR.

JUDGE