[Cite as *State v. Martin*, 2010-Ohio-5863.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-1073 (C.P.C. No. 08CR-05-3489)
Shenchez A. Martin,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 2, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*, for appellant.

W. Joseph Edwards, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} The State of Ohio is appealing the decision of the Franklin County Court of Common Pleas which granted community control for Shenchez A. Martin ("Martin"). The State of Ohio assigns two errors for our consideration:

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.

{¶2} Because the two issues heavily overlap, we will address them jointly.

{¶3} Martin pled guilty to a single charge of felonious assault in October 2008. A sentencing hearing was held on November 20, 2008 at which time the trial court granted him community control after Martin served an additional 120 days of incarceration. Martin had already served 191 days in custody, so the total time of his incarceration was 311 days.

{¶4} Recognizing that Martin had serious mental health issues, the trial court ordered five years of intensive supervision on a mental health docket.

{¶5} The State of Ohio appealed Martin's sentence at that time, assigning two errors:

> 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.

{¶6} A panel of this court overruled the second assignment of error, which is identical to the second assignment of error the State alleges in this appeal. This issue has already been decided by this appellate court. The second assignment of error in this appeal is therefore overruled, based upon the doctrine of res judicata.

{¶7} In the first appeal, a panel of this court found that the trial court had not made all the findings required to overcome the legal presumption in favor of incarceration in a state prison for the offense of felonious assault. The trial court needed to find, under R.C. 2929.13(D)(2)(a) and (b):

> (a) A community control sanction * * * 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 * * * 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.

{¶8} Following a remand to the trial court, the trial judge took great pains to attempt to comply with our mandate. The trial court held an additional sentencing hearing and issued a detailed sentencing entry which included the following:

> The Court considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. The Court recognized, again, that there is a

presumption in favor of a prison term pursuant to R.C. 2929.13(D).

The court finds, for the reasons stated more fully on the record, that the presumption for a prison sentence is rebutted, and that all findings under R.C. 2929.13(D)(2) are fairly made on this record. The court notes that a period of 10 months local incarceration has already been served, representing over 40% of the minimum prison sentence that might otherwise be imposed. Additional intensive Community Control sanctions offer appropriate safeguards for the public and the victim and do not demean the seriousness of the offense. (In fact, the victim stated she had relocated and so far as the record shows the defendant has no knowledge where she lives.) Community control offers a greater likelihood that the victim will receive financial restitution. By providing mental health treatment and community supervision with family support, Mr. Martin is more likely to be rehabilitated successfully for the long-term, and ultimately to have a much lower likelihood of recidivism. The use of community control means those goals can be accomplished at the least financial cost to the public.

The court recognizes that the injuries inflicted on the victim were serious, but also finds that mental health issues involving the defendant more fully documented in the record mitigate this misconduct even though such issues were not enough to constitute a defense to the crime. The court believes that, within the limits of his mental health, defendant shows genuine remorse and that, with appropriate supervision and mental health care, comparable circumstances are unlikely to recur. The court further finds that, in committing the offense, it remains unclear whether defendant genuinely expected to cause physical harm to the victim, since they were residing together and, so far as the record shows, no domestic violence incidents ever occurred before. Thus, a combination of community control sanctions will adequately punish the defendant and protect the public from future crime, because the applicable factors under R.C. 2929.12 indicating a lower likelihood of recidivism (with supervision including community mental health care) outweigh the factors indicating a greater likelihood of recidivism. Further, a combination of future community control sanctions (given that defendant has been jailed for

more than 10 months) does not demean the seriousness of the offense, because factors under R.C. 2929.12 that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and outweigh the factors that indicate that defendant's conduct was more serious than conduct normally constituting the offense.

{¶9} In open court, the judge stated:

THE COURT: * * * I have given a lot of consideration to this case, not simply this morning but starting in the fall of '08, obviously.

I recognize that under 2929.13(D), there is a presumption for prison on a second degree felony. I also recognize that as of today, against the minimum prison sentence I could impose of two years, that Mr. Martin has given us 312 days of jail-time credit, or 10 months and 12 days, if my math is correct. So that's something in the range of 40 percent of the presumed low level -- lowest level prison sentences.

There was a serious injury to the victim. Whether it was life-threatening, we can't tell, but it was certainly very serious. I do not discount that for a moment.

Nevertheless, I make the findings in 2929.13(D) (2) (a) and (b) that a community control sanction is the best option to both adequately punish the defendant and to protect the public from future crime. And that incarceration, which would interrupt the modest rehabilitation that Mr. Martin has undertaken for himself and that Southeast has tried to guide him, consistent with the Netcare report from last year about the deep-seated psychological issues that he's got to grapple with from his childhood, that community control is far better and far less costly than using incarceration, which will at the end of the day of incarceration, even if it's the maximum of eight years, still leave Mr. Martin a fairly young man with the rest of his life in which he's going to have to conform his behavior to the law and overcome the psychological issues that have driven us to some degree here today.

> The factors in 2929.12 that indicate a lesser likelihood of recidivism if there is community control linked with mental health care that is actually given, and not merely promised, by society justify a community control sanction and outweigh the factors in 2929.12 that indicate a greater likelihood of recidivism, in my view.

(Tr. 32-33.)

{¶10} The trial court went on to explain its findings, including a detailed review of Martin's mental health challenges and states:

> In summary, the court finds that the presumption in favor of a term of imprisonment is rebutted on the evidence before it.

(Tr. 35.)

{¶11} We find that the trial court followed our mandate and made the appropriate findings necessary to grant community control in this case. We, therefore, overrule the first assignment of error.

{¶12} Having overruled both assignments of error, the judgment and sentence of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

CONNOR, J., concurs
McGRATH, J., dissents.

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McGRATH, J., dissenting.

{¶13} Because I am unable to agree with the majority's conclusion, I hereby dissent.

{¶14} In the first sentencing hearing, the trial court attempted to provide the requisite findings and reasons in its sentencing entry, but, upon appeal, another panel of

this court found that the trial court failed to do so. Here, at appellee's resentencing hearing, the trial court attempted once more to provide the requisite findings and reasons as required by R.C. 2929.13(D)(2)(a) and (b), and I would find that again the trial court failed to do so. Moreover, the trial court must provide its findings and reasons at the sentencing hearing as opposed to any later developed judgment entry. See *State v. Wooden*, 10th Dist. No. 05AP-330, 2006-Ohio-212.

{¶15} Although the trial court stated at the resentencing hearing that community control "is the best option to both adequately punish the [appellee] and to protect the public from future crime" and that community control is "far better and far less costly than using incarceration," the presumption of prison must first be rebutted and overcome before rehabilitation and cost of prison can be considered. Here, the court did not adequately rebut the presumption of prison. The trial court did not find that, *under the factors set forth in R.C. 2929.12*, a community control sanction would adequately punish defendant and protect the public from future crime. The trial court made such a statement but did not make the findings in terms of that particular Revised Code section. Likewise, the trial court failed to find at the resentencing hearing that, *under the R.C. 2929.12 factors***,** a community control sanction would not demean the seriousness of defendant's offense.

{¶16} Without these findings, the trial court failed to provide the required findings to rebut the presumption of prison and support a community control sanction. I would agree with the state's analysis of the sentencing as set forth in its brief to the effect that the statute requires that the defendant be found less likely to recidivate at the moment of

sentencing, not after a period of treatment or rehabilitation. Yet, at the resentencing hearing, the trial court states: "[B]y providing mental health treatment and community supervision, Mr. Martin is more likely to be rehabilitated successfully and have a much lower likelihood of recidivism," and concludes that "with appropriate community supervision and mental health care, this criminal conduct is unlikely to recur." (Resentencing Tr. 36.) However, the statute requires that the offender must present a lesser risk of recidivism *at the time of sentencing*, not after treatment. The retrospective factors under R.C. 2929.12(D) and (E) must be used to assess whether the defendant is less likely to reoffend as he sits today, not to speculate as to whether community control would someday lower defendant's risk of recidivism. Rehabilitation is not a "factor" under R.C. 2929.12, let alone a conjecture as to its future effects.

{¶17} Moreover, I would agree with the state's position that the trial court's stated reasons for finding that the "less serious" factors "outweigh" the "more serious" factors were not in terms of R.C. 2929.12 or, in actuality, supported by the record. The trial court stated:

> The court is concerned with a man who has done the crimes like Mr. Martin of the ultimate protection, long term, of the public, and I think given that focus, that the findings under 2929.13 (D) (2) (b) can be made. That community control with that long-term focus will not demean the seriousness of the offense.
>
> I do not believe the facts show that the facts suggesting the defendant's conduct was more serious than normally constituting the offenses fair, given the psychological background. As I have already said, we've already incarcerated Mr. Martin for 10 months and 12 days on this thing.

(Resentencing Tr. 35.)

{¶18} However, long-term protection of the public is not one of the four "less serious" factors mitigating against prison. If anything, it would seem that the court's concern for the ultimate protection, long-term, of the public weighs in favor of prison. And there is no explanation as to how the defendant's psychological issues demonstrate that the victim's injuries were any less serious. The trial court appropriately described this crime as "terrible," and the victim was not only left unrecognizable by her family but suffered a totally severed ear. The trial court mentioned that there was some perceived strong provocation; but yet went on to state that such strong provocation may be totally fallacious, and there is nothing in the record to indicate provocation. The trial court noted that the defendant lacked memory of the event; however, that has no relevance in terms of assessing the seriousness of the conduct. Therefore, I would find that the court has not made an appropriate analysis as required by the statute.

{¶19} It should also be remembered that, at the resentencing hearing, facts were brought out demonstrating that, in the time period between the first sentencing and the case having been to the Tenth District Court of Appeals and remanded back to the trial court for resentencing, the defendant had been noncompliant with the treatment ordered in his first sentencing. Appellee skipped his drug test, stopped taking his medications, and, for two months prior to the resentencing, missed his mental health treatment sessions. Moreover, the probation department reported appellee to be noncompliant with treatment, not consistently employed, and having made only $20 in payments toward restitution. It was not confirmed that defendant had secured a job.

{¶20} In the second assignment of error, the state has again requested this court to review the record and order the trial court to impose a sentence of incarceration. We declined that invitation in the first appeal and simply remanded the matter for resentencing. The majority believes such a declination by the first appellate panel to be res judicata with respect to the second assignment of error. Although I would once again remand the matter for resentencing and decline the invitation that the state has set forth in the second assignment of error, I would disagree with the majority that our declination constitutes res judicata for two reasons. First of all, before us now is a totally new sentencing based upon new arguments and additional facts that were not present at the first sentencing hearing and which include stated reasons by the trial court not set forth in the first sentencing. Also included are facts concerning the defendant's interim behavior. Secondly, the prior panel of this court simply declined to order a sentence and did not go through an analysis of the facts and make a stated determination that a certain sentence was or was not required under the law. Rather, the court simply remanded for resentencing in view of the error as to the first assignment of error. Because of that, I do not believe that res judicata would be appropriate, and I believe the second assignment of error should be rendered moot until appellee is resentenced by the trial court.

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