

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 13AP-236 (C.P.C. No. 12CR-3224)
Daniel J. Fisher,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 19, 2013

Ron O'Brien, Prosecuting Attorney, *Valerie B. Swanson* and *Michael P. Walton*, for appellant.

R. William Meeks Co., LPA, and *David H. Thomas*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

T. BRYANT, J.

{¶ 1} Plaintiff-appellant, State of Ohio, appeals from a judgment entered by the Franklin County Court of Common Pleas placing defendant-appellee, Daniel J. Fisher, on community control. Because the trial court did not make the findings required to impose that sentence, we reverse the judgment and remand the cause for resentencing.

I. BACKGROUND

{¶ 2} In July 2012, a Franklin County Grand Jury indicted defendant on one count of felonious assault, a felony of the second degree. Defendant originally entered a plea of not guilty, but later withdrew it and entered a guilty plea to the charge. The trial court accepted defendant's guilty plea, found him guilty, placed him on community control for three years, and ordered him to pay restitution and a fine. The trial court also

sentenced defendant to 90 days in the county jail to run concurrently with a jail sentence in a separate case.

II. ASSIGNMENTS OF ERROR

{¶ 3} The state appeals from the court's imposition of community control in lieu of a prison term and assigns the following errors:

[I.] THE TRIAL COURT ERRED IN IMPOSING COMMUNITY CONTROL WHEN IT FAILED TO MAKE THE FULL REQUIRED FINDINGS FOR OVERCOMING THE PRESUMPTION OF PRISON.

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

III. DISCUSSION

{¶ 4} In its first assignment of error, the state asserts the trial court erred in imposing community control when it failed to make the full required findings for overcoming the presumption of prison.

{¶ 5} The trial court placed defendant on community control after finding him guilty of a felony of the second degree. Under R.C. 2929.13(D)(1), "for a felony of the first or second degree, * * * it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code." Notwithstanding this presumption, community control may be imposed instead of a prison term if the trial court makes both of the following findings:

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.

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

R.C. 2929.13(D)(2)(a) and (b).

{¶ 6} Prior to 2011 Am.Sub.H.B. No. 86 ("H.B. No. 86"), which became effective September 30, 2011, the trial court also had to state its reasons for making these findings. *See* former R.C. 2929.19(B)(2)(b). Although that requirement has been legislatively abolished, the findings requirement of R.C. 2929.13(D)(2) remains. *See State v. Sherman*, 8th Dist. No. 97840, 2012-Ohio-3958, ¶ 28 ("The removal of [former R.C. 2929.19(B)(2) by H.B. No. 86] means the court must make the required findings under R.C. 2929.13(D)(2), but does not need to give reasons supporting those findings."); *compare State v. Hubbard*, 10th Dist. No. 11AP-945, 2013-Ohio-2735, ¶ 85-86 (under H.B. No. 86, which revived the requirement that trial judges make certain findings before imposing consecutive sentences, the trial court was not required to give reasons explaining its findings, but "the record must reflect that the court made the findings required by the statute").

{¶ 7} The sentencing court must make both of the findings specified in R.C. 2929.13(D)(2) before it may deviate from the R.C. 2929.13(D)(1) presumption that a prison term should be imposed. *State v. Milhoan*, 10th Dist. No. 12AP-61, 2012-Ohio-4507, ¶ 6, citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, paragraph one of the syllabus. These findings must be made at the sentencing hearing. *State v. Martin*, 10th Dist. No. 08AP-1103, 2009-Ohio-3485, ¶ 7; *State v. Wooden*, 10th Dist. No. 05AP-330, 2006-Ohio-212, ¶ 5.

{¶ 8} In this case, at the sentencing hearing, 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 defendant. Although the trial court found that defendant has "a low risk of potentially reoffending," which indicates the court considered he had a lesser likelihood of recidivism, the court did not make the finding required by R.C. 2929.13(D)(2)(a) that the community control sanction would adequately punish the offender and protect the public from future crime. (Tr. 27.) Nor did the trial court make the finding required by R.C. 2929.13(D)(2)(b) that the community control sanction would not demean the seriousness of the offense of felonious assault that defendant was convicted of in the case. To the contrary, at the sentencing hearing, the trial court

determined that the seriousness of defendant's brutal attack on the victim of his crime required a "presumption of prison" and "certainly warrants incarceration." (Tr. 27-28.)

{¶ 9} Therefore, the state's first assignment of error is sustained.

{¶ 10} In its second assignment of error, the state claims that the trial court's imposition of community control is contrary to law because defendant cannot overcome the statutory presumption in favor of a prison term. The state requests that we remand the cause with an instruction that the trial court impose a prison sentence on defendant. We have consistently rejected similar arguments by the state, and we do so here by remanding the matter to the trial court to make whatever findings it deems appropriate and to enter a sentence based on those findings. *See State v. Overmyer*, 10th Dist. No. 09AP-945, 2010-Ohio-2072, ¶ 10; *Martin* at ¶ 8, citing R.C. 2953.08(G)(1) ("Because the trial court sentenced [defendant] to community control without providing the required statutory findings * * *, we remand this case to give the trial court the opportunity to do so."); *Milhoan* at ¶ 9; *see also Mathis* at paragraph two of the syllabus ("When findings under R.C. 2929.13(D) * * * are missing from the appellate record, the appellate court shall remand the case to the sentencing court to state on the record the required findings."). The state's second assignment of error is overruled.

IV. CONCLUSION

{¶ 11} Having sustained the state's first assignment of error and overruled its second assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand the matter to that court for resentencing in compliance with the applicable statutory sentencing guidelines.

*Judgment reversed
and cause remanded.*

BROWN and SADLER, JJ., concur.

T. BRYANT, J., retired, formerly of the Third Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).
