[Cite as *State v. Poling*, 2015-Ohio-1236.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 14AP-666 (C.P.C. No. 10CR-6891)
v.	:	(REGULAR CALENDAR)
George H. Poling, II,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 31, 2015

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Hoague Law Office, and *Michael C. Hoague*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Defendant-appellant, George H. Poling, II, appeals from an entry of the Franklin County Court of Common Pleas revoking his community control and sentencing him to a term of imprisonment. For the following reasons, we affirm in part and reverse in part.

I. Facts and Procedural History

{¶ 2} By indictment filed November 24, 2010, plaintiff-appellee, the State of Ohio, charged Poling with one count of aggravated burglary, in violation of R.C. 2911.11, a first-degree felony, and one count of kidnapping, in violation of R.C. 2905.01, a first-degree felony. Poling ultimately entered a guilty plea to the stipulated-lesser included offense of vandalism, in violation of R.C. 2909.05, a third-degree felony.

{¶ 3} Pursuant to the plea agreement, the state and Poling jointly recommended to the trial court a sentence of four years incarceration suspended and three years of community control. At a June 22, 2011 sentencing hearing, the trial court imposed a four-year period of community control. The trial court journalized Poling's conviction and sentence in a June 27, 2011 judgment entry. After a restitution hearing, the trial court ordered Poling to pay $1,808 to the victim as a condition of his probation at the rate of $200 per month.

{¶ 4} On July 2, 2014, Poling's probation officer filed a request with the trial court for a revocation of Poling's community control. Following a July 25, 2014 hearing, the trial court revoked Poling's community control and imposed the originally recommended sentence of four years imprisonment. The trial court journalized its decision in a July 25, 2014 revocation entry. Poling timely appeals.

II. Assignments of Error

{¶ 5} Poling assigns the following three errors for our review:

> [1.] The trial court committed reversible error when it imposed a four-year prison sentence, in violation of Ohio sentencing law and appellant's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 of the Ohio Constitution.
>
> [2.] The trial court committed reversible error when it sentenced appellant for a third-degree-felony vandalism offense rather than a fourth-degree felony vandalism offense in violation of Ohio sentencing law and appellant's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 of the Ohio Constitution.
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> [3.] The trial court committed reversible error when it sentenced appellant to a prison term for a fourth-degree-felony vandalism offense rather than to a one to five-year period of community control for a de facto fourth-degree felony vandalism offense in violation of Ohio sentencing law and appellant's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 of the Ohio Constitution.

III. Standard of Review

{¶ 6} An appellate court will not reverse a trial court's sentencing decision unless the evidence is clear and convincing that either the record does not support the sentence or that the sentence is contrary to law. *State v. Chandler*, 10th Dist. No. 04AP-895, 2005-Ohio-1961, ¶ 10, citing *State v. Maxwell*, 10th Dist. No. 02AP-1271, 2004-Ohio-5660, ¶ 27, citing *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, ¶ 10. "In determining whether a sentence is contrary to law, an appellate court reviews the record to determine whether the trial court considered the appropriate factors, made the required findings, gave the necessary reasons for its findings, and properly applied the statutory guidelines." *Id*. "We are also cognizant of the two-step standard of review set forth by a plurality of the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, which asks (1) whether the trial court adhered to all applicable rules and statutes in imposing the sentence, and (2) whether a sentence within the permissible statutory range constitutes an abuse of discretion." *State v. Murphy*, 10th Dist. No. 12AP-952, 2013-Ohio-5599, ¶ 12.

IV. First Assignment of Error – Maximum Permissible Sentence

{¶ 7} In his first assignment of error, Poling argues the trial court committed reversible error when it sentenced him to a prison term greater than the statutory maximum.

{¶ 8} As Poling's counsel noted at the sentencing hearing, the unique timeline of this case is important in regards to changes made in the applicable sentencing law. When the trial court initially sentenced Poling to a period of community control in 2011, the maximum sentence for a felony of the third degree was five years imprisonment. Prior R.C. 2929.14. 2011 Am. Sub. H.B. No. 86 ("H.B. 86") amended R.C. 2929.14 and reduced the maximum term of imprisonment for most third-degree felonies from five years to 36 months. R.C. 2929.14(A)(3)(b). Thus, under the current version of R.C. 2929.14(A)(3)(b) in effect at the time the trial court revoked Poling's community control, the maximum sentence for a conviction of third-degree felony vandalism was three years in prison.

{¶ 9} Although Poling's counsel notified the trial court of the changes in the applicable sentencing law under H.B. 86, the trial court nonetheless imposed a four-year term of imprisonment consistent with the version of R.C. 2929.14 in effect at the time Poling was originally convicted. Poling argues on appeal that, because the trial court had

not imposed his penalty before the effective date of H.B. 86, he is entitled to the benefit of the change in the sentencing law. The state concedes that Poling's argument is correct and that the trial court erred in sentencing Poling under the prior version of R.C. 2929.14.

{¶ 10} R.C. 1.58(B) states that "[i]f the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended." When an offender is placed on community control and is notified that a term of imprisonment may be imposed upon revocation of his community control, then the prison term is "not already imposed" for purposes of R.C. 1.58(B) at the time the offender is placed on community control. *State v. Nistelbeck*, 10th Dist. No. 11AP-874, 2012-Ohio-1765, ¶ 10, citing *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, paragraph two of the syllabus. Thus, even when the trial court announces an intended sentence should the offender have his community control revoked, the prison term is not actually "imposed" until the date of revocation, and the offender is entitled to the legislature's reduction of his potential sentence. *Id*. at ¶ 10-11.

{¶ 11} Here, the prison term was not imposed until the community control revocation and sentencing hearing on July 25, 2014, after the effective date of H.B. 86. Accordingly, Poling was entitled to the benefit of the reduction to the maximum allowable sentence for a third-degree felony vandalism conviction. Because Poling's sentence was outside the maximum allowable statutory range, his sentence is clearly and convincingly contrary to law. We sustain Poling's first assignment of error.

V. Second Assignment of Error – Degree of Offense

{¶ 12} In his second assignment of error, Poling argues the trial court erred when it sentenced him for a third-degree felony rather than a fourth-degree felony. More specifically, Poling argues that when he entered his guilty plea to third-degree felony vandalism, the law required the value of the property or the amount of physical harm involved to be $100,000 or more. After the General Assembly amended the law in H.B. 86, the threshold amount for a third-degree felony vandalism offense increased to $150,000. Because of the change, Poling argues his conviction is more properly construed as a fourth-degree felony and the trial should sentence him based on the change of the threshold in the statute.

{¶ 13} As the state notes, Poling did not object to the degree of the offense for which he would be sentenced at the sentencing hearing, so our review is limited to plain error. Crim.R. 52(B); *State v. Price*, 10th Dist. No. 13AP-1085, 2014-Ohio-4065, ¶ 7. An appellate court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice. *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357, ¶ 58 (10th Dist.), citing *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶ 68.

{¶ 14} For an error to be a "plain error" under Crim.R. 52(B), it must satisfy three prongs: (1) there must be an error, meaning a deviation from a legal rule, (2) the error must be "plain," meaning an "obvious" defect in the trial proceedings, and (3) the error must have affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002).

{¶ 15} When Poling entered his plea, he did not stipulate to a value of the property involved or the physical harm caused. Instead, Poling stipulated that "he would plead guilty to the stipulated agreed lesser included offense of count one of vandalism, a felony of the third degree under [R.C.] 2909.05." (May 10, 2011 Tr. 2.) Moreover, there was no mention at the plea hearing of the $100,000 threshold contained in the vandalism statute, nor was there any mention of a specific amount of damage Poling caused. As part of the specifically negotiated plea, Poling further waived "any forms of defects or re-indictment or any defect in any way that vandalism may or may not be a lesser-included offense of aggravated burglary for purpose of this plea." (May 10, 2011 Tr. 3.)

{¶ 16} Poling argues that the Supreme Court of Ohio's decision in *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, required the trial court to reclassify his offense as a felony of the fourth degree. In *Taylor*, the defendant shoplifted $550 worth of cologne and was indicted, before the effective date of H.B. 86, on a fifth-degree felony theft offense in which the terms of his indictment specified that the property was valued at $500 or more but less than $5,000. *Id.* at ¶ 5. H.B. 86 decreased theft of property valued at less than $1,000 to a first-degree misdemeanor. *Id.* at ¶ 6. The reduction in classification correspondingly reduced the punishment for the offense. *Id.* The defendant entered a no contest plea and, after the effective date of H.B. 86, the trial court convicted and sentenced him for a first-degree misdemeanor. *Id* at ¶ 7. The Ninth District reversed, determining the trial court properly convicted the defendant of a first-degree

misdemeanor but should have sentenced him for a fifth-degree felony. *Id*. at ¶ 8. On appeal, the Supreme Court reversed the Ninth District, holding that, because the defendant had not been convicted or sentenced until after the effective date of H.B. 86, R.C. 1.58(B) required the trial court to impose a sentence in accord with the amended statutes. *Id*. at ¶ 20.

{¶ 17} *Taylor* is distinguishable from the present case. In *Taylor*, the defendant was specifically indicted for a theft offense in an amount more than $500 but less than $5,000. By virtue of his no contest plea, the defendant in *Taylor* admitted to the specific facts as stated in the indictment. Here, Poling's indictment did not contain a charge of vandalism. Instead, Poling entered into a specifically negotiated plea for third-degree felony vandalism; the monetary threshold was not mentioned at his plea hearing or his original sentencing hearing. Additionally, the defendant in *Taylor* had not yet entered his plea or been convicted at the time H.B. 86 became effective. Here, Poling had already entered his guilty plea to and been convicted of third-degree felony vandalism prior to the enactment of H.B. 86.

{¶ 18} Though Poling argues the evidence from his revocation hearing showed the actual harm caused was only $17,000, and thus does not fall within the range for a third-degree felony in the now-current version of R.C. 2909.05(E), by his same argument, the amount of actual harm would not have satisfied the threshold for third-degree vandalism in the prior version of R.C. 2909.05(E). If Poling intended the actual amount of harm caused to have been included in his stipulated plea, the proper time to raise that issue would have been when Poling negotiated his plea. Poling does not argue that his plea was invalid and there is nothing in the record suggesting Poling did not understand he was entering into a specifically negotiated third-degree felony vandalism plea. *See State v. Smith*, 11th Dist. No. 2014-G-3185, 2014-Ohio-5076, ¶ 35-36 (where the trial court did not specify a particular dollar amount during the plea hearing and defendant voluntarily and knowingly entered his plea to a fifth-degree felony theft offense, H.B. 86 does not apply retroactively to reduce the degree of his offense).

{¶ 19} Because Poling did not stipulate to a certain monetary amount in entering his plea, his plea was knowing and voluntary, and he was convicted of a third-degree vandalism offense before the effective date of H.B. 86, we conclude the trial court did not

err, let alone commit plain error, in sentencing Poling on a third-degree vandalism offense. As we explained in our resolution of Poling's first assignment of error, Poling was entitled to the benefit of the changes enacted by H.B. 86 in terms of the maximum permissible sentence for a third-degree felony, but those benefits do not apply to retroactively reduce the degree of the offense to which he knowingly entered a guilty plea and was convicted. We overrule Poling's second assignment of error.

VI. Third Assignment of Error – Imposition of Term of Imprisonment

{¶ 20} In his third and final assignment of error, Poling argues the trial court erred in imposing a term of imprisonment when it revoked his community control. More specifically, Poling argues, assuming his second assignment of error has merit, that because the trial court should have sentenced him for a fourth-degree felony instead of a third-degree felony, the trial court erred by imposing a prison term. (Poling's Brief, 10.) Having determined in our resolution of Poling's second assignment of error that the trial court did not err in sentencing Poling for a third-degree felony, our resolution of Poling's second assignment of error renders his third assignment of error moot.

VII. Disposition

{¶ 21} Based on the forgoing reasons, the trial court erred when it sentenced Poling to a term of imprisonment outside the maximum permissible range for a third-degree felony vandalism offense. However, the trial court did not err when it construed Poling's offense as a third-degree felony offense rather than a fourth-degree felony offense. Having sustained Poling's first assignment of error and having overruled Poling's second assignment of error which rendered moot Poling's third assignment of error, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for resentencing consistent with this decision.

Judgment affirmed in part and reversed in part; cause remanded.

DORRIAN and HORTON, JJ., concur.