[Cite as *State v. Bell*, 2015-Ohio-2420.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 14AP-618
v.	:	(C.P.C. No. 13CR-6027)
Ernesto L. Bell,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 18, 2015

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Yeura R. Venters, Public Defender, and *Timothy E. Pierce*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

HORTON, J.

{¶ 1} Defendant-appellant, Ernesto L. Bell, appeals from a judgment of the Franklin County Court of Common Pleas, finding him guilty, pursuant to guilty plea, of one count of possession of cocaine, in violation of R.C. 2925.11. Defendant appeals, assigning the following sole assignment of error for our review:

> The lower court abused its discretion and imposed a sentence contrary to law when it ordered Appellant to serve a term of incarceration in the Ohio Department of Rehabilitation and Correction in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 1 and 16 of the Ohio Constitution and R.C. 2953.08(A)(4) and (G).

{¶ 2} Because defendant's sentence is not contrary to law and the trial court did not abuse its discretion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 3} The state indicted defendant on November 14, 2013 on one count of possession of cocaine, a felony of the fifth degree. Defendant entered a plea of not guilty to the charged crime, and the court released him on a $1,000 recognizance bond. The bond was expressly conditioned on defendant being fingerprinted and photographed by the Franklin County Sheriff, appearing as required before the court, and keeping the court apprised of his address.

{¶ 4} The parties continued the matter several times, and the case was eventually set for trial on July 28, 2014. On that date, the court stated that it had been "advised that we would have to postpone the trial for several reasons, but out of an abundance of caution due to the nature of the charges, the court ordered that Mr. Bell give us a urine screen before he left court and not leave court until he was advised." (July 28, 2014 Tr. 2.) The court noted that the "court lab advised us today, over and above the marijuana that [defendant] apparently told [defense counsel] was going to be in [his] system, that you were positive for cocaine and Oxycodone." (July 28, 2014 Tr. 2.) Accordingly, the state moved to have defendant's bond revoked. The court revoked defendant's bond and set a new bond of $100,000 surety and $1,000 recognizance, with the added condition that defendant submit to drug screens. The court set a bond hearing date for July 31, 2014 and scheduled trial for September 15, 2014.

{¶ 5} On July 31, 2014, defendant changed his plea and entered a plea of guilty to the charged crime. The prosecutor read the facts into the record, and defense counsel did not object to the state's version of the facts. The prosecutor noted that on October 9, 2012, detectives observed a narcotics transaction occur between defendant and a confidential informant. The detectives observed defendant "take a plastic bag from his buttocks area and hand the CI three small unit doses of crack cocaine." (July 31, 2014 Tr. 3.) The officers then approached defendant, told defendant they knew he had additional crack cocaine on his person, and defendant "then retrieved a small bag of crack cocaine from his buttocks area, handed it to the detectives." (July 31, 2014 Tr. 3.) The court engaged in a plea colloquy with defendant, and determined that defendant was knowingly, intelligently, and voluntarily pleading guilty to the charged crime.

{¶ 6} The court proceeded directly to sentencing. Defense counsel noted that there was a "short-form presentence investigation for Mr. Bell," and noted that "[w]hile there is a bit of a record and he's had some run-ins with the law, this is the most serious

thing he's ever been charged with and convicted of." (July 31, 2014 Tr. 10.) Defense counsel stated that defendant was employed with a cleaning company, and asked that the court place defendant on community control. Defendant personally addressed the court, and stated that he wanted to get on with his life and do better.

{¶ 7} The court then explained that, "[g]iven the history, I'm imposing six months in the Ohio Department of Rehabilitation and Corrections; three years optional post-release control; waive costs, waive fines; six-month drivers license suspension." (July 31, 2014 Tr. 12.) The court addressed defendant, stating that "[s]howing up for your trial date with a jury trial scheduled that we had all planned for with Oxycodone, cocaine, and marijuana on Monday was the dumbest thing you ever did perhaps, other than to break the law and get caught carrying around a bunch of cocaine." (July 31, 2014 Tr. 12.) The court said, "I think you need some time out. That's the sentence." (July 31, 2014 Tr. 12.) Defense counsel objected to the sentence, asserting that, as defendant had no prior felony record, "the law dictates in this situation that absent extraordinary circumstances, he be granted community control." (July 31, 2014 Tr. 12.) The court responded that defendant "violated bond. That makes prison available on a felony 5. And he did it rather flagrantly." (July 31, 2014 Tr. 12-13.)

{¶ 8} On August 4, 2014, defendant filed a motion to reconsider sentence. Defendant asserted that his lack of a felony record, the fact that he took responsibility for his actions by entering the guilty plea, and the fact that he was employed, all pointed to a presumption of community control instead of prison. However, defendant acknowledged in the motion that, pursuant to R.C. 2929.13(B)(1)(a), the trial court was not obligated to sentence defendant to a term of community control, because "[i]n 2012 [defendant] was convicted of Domestic Violence * * *. The offense was on August 9th, 2012." (Motion to Reconsider Sentence, 3.) Defendant also asserted that, as the drug screen was only presumptively positive for the three substances detected, it seemed "that the court would need more than just the presumptive test" to overcome a presumption in favor of community control. (Motion to Reconsider Sentence, 5.)

{¶ 9} The trial court denied defendant's motion to reconsider sentence, noting that defendant was not amenable to community control for reasons "over and above" his dirty urine screen on his scheduled trial date. (Journal Entry Denying Motion to Reconsider, 1.) The court noted that, prior to submitting to the drug screen, defendant

told his attorney that he would be positive for marijuana only, and noted that pursuant to the state's recitation of the facts, the instant charge arose after defendant first trafficked cocaine. The court also observed that in the two years following this charge, defendant did not avail himself of drug treatment and instead continued using illegal drugs, even up until his trial date. As such, the court stated that defendant "needed some stimulus to refocus his life and stop all illegal, self-destructive drug activity." (Journal Entry Denying Motion to Reconsider, 2.) The court noted that it "followed the sentencing code and imposed only the shortest prison term possible because this was Bell's first felony conviction," and observed that "[n]either defendant nor the community would be well-served by a lesser sanction." (Journal Entry Denying Motion to Reconsider, 2.) Finally, the court noted that the preliminary drug test results had been confirmed in writing.

{¶ 10} On September 17, 2014, defendant filed a motion for judicial release, which the court denied. In the entry denying the motion for judicial release, the court noted that, on September 9, 2014, the Ohio Department of Rehabilitation and Corrections ("ODRC") asked the court to grant defendant the opportunity to participate in a transitional control program. The court approved of defendant's placement in that program. The court attached a letter from ODRC regarding the program to its entry. The letter explained that, through the transitional control program, defendant would be "placed in a licensed halfway house and then may be stepped down to electronic monitoring." (Sept. 9, 2014 ODRC Letter.) The letter further explained that offenders in the program "are required to either obtain employment or continue their education," and stated that "[a]ll offenders are supervised while participating in the program." (Sept. 9, 2014 ODRC Letter.)

II. SENTENCE NOT CONTRARY TO LAW

{¶ 11} Defendant asserts that his sentence is contrary to law because it violates the conservation of resources principles in R.C. 2929.11(A), and because it was not consistent or proportional under the principles in R.C. 2929.11(B). (Appellant's Brief, 16.) For the reasons that follow, we find that defendant's sentence complied with R.C. 2929.11 and was not contrary to law.

A. *Standard of Review*

{¶ 12} Under R.C. 2953.08(G), an appellate court may modify a sentence or remand a case for resentencing if the court "clearly and convincingly" determines either that the record does not support the sentence or that the sentence is contrary to law. R.C. 2953.08(G)(2); *State v. Webb,* 10th Dist. No. 06AP-147, 2006-Ohio-4462, ¶ 11; *State v. Vaughn,* 10th Dist. No. 09AP-73, 2009-Ohio-4970; *State v. Russell,* 10th Dist. No. 09AP-428, 2009-Ohio-6420. We have held that R.C. 2953.08(G) requires us to continue to review felony sentences under the clearly and convincingly contrary to law standard, and thus determine whether "clear and convincing evidence establishes that a felony sentence is contrary to law pursuant to R.C. 2953.08(G)(2)(b)." *State v. Burton,* 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶ 19; *Vaughn* at ¶ 12. " '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.' " *State v. Chandler,* 10th Dist. No. 04AP-895, 2005-Ohio-1961, ¶ 10, quoting *State v. Maxwell,* 10th Dist. No. 02AP-1271, 2004-Ohio-5660, ¶ 27.

{¶ 13} "We are also cognizant of the two-step standard of review set forth by a plurality [opinion] 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. Thus, under the plurality opinion in *Kalish,* once an appellate court has determined the sentence is not contrary to law, it then must consider the sentencing court's application of R.C. 2929.11 and 2929.12. *Vaughn* at ¶ 14; *Russell* at ¶ 13. Under either the two-step analysis set forth in *Kalish,* or simply under the contrary to law standard set forth in *Burton,* we find that the trial court herein committed no error in sentencing defendant to a six-month period of incarceration.

B. *R.C. 2929.13*

{¶ 14} Defendant pled guilty to a fifth degree felony possession of cocaine charge. For such a conviction, "division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender." R.C. 2925.11(C)(4)(b). If a prison term is appropriate for a "felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months." R.C. 2929.14(A)(5). *See also Kalish* at

¶ 15 (noting that, "[i]f * * * the trial court's sentence is, for example, outside the permissible statutory range, the sentence is clearly and convincingly contrary to law").

{¶ 15} R.C. 2929.13(B)(1)(a) provides that, "if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence * * * the court shall sentence the offender to a community control sanction," if all of the following apply:

> (i) The offender previously has not been convicted of or pleaded guilty to a felony offense.
>
> (ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.
>
> (iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty-five-day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.
>
> (iv) The offender previously has not been convicted of or pleaded guilty to a misdemeanor offense of violence that the offender committed within two years prior to the offense for which sentence is being imposed.

{¶ 16} Accordingly, the trial court was not obligated to sentence defendant to community control sanction under R.C. 2929.13(B)(1)(a), because defendant could not satisfy R.C. 2929.13(B)(1)(a)(iv). Defendant was convicted of domestic violence in 2012; the offense occurred on August 9, 2012. (*See* Motion to Reconsider Sentence, 2.) Thus, when defendant was sentenced on the instant charge on July 31, 2014, he had been convicted of a misdemeanor offense of violence which was committed within two years prior to the offense for which the instant sentence was being imposed.

{¶ 17} Additionally, R.C. 2929.13(B)(1)(b) provided the trial court with discretion to sentence defendant to a term of imprisonment rather than to community control. That section provides the trial court with discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a non-violent felony of the fourth or fifth degree, "if any of the following apply: * * * (iii) [t]he offender violated a term of the

conditions of bond as set by the court." R.C. 2929.13(B)(1)(b)(iii). In the judgment entry of conviction, the trial court stated that, although "a prison term [was] not mandatory" in this case, the court found that defendant was "eligible for a prison sentence because he violated bond by using multiple illegal substances, uncovered in a drug screen at court on July 28, his last scheduled jury trial date." (Judgment Entry, 1.) Pursuant to Crim.R. 46(E), "[a] court, at any time, may order additional or different types, amounts, or conditions of bail." Crim.R. 46(E).[1] *See also* Ohio Constitution, Article I, Section 9 (stating that "[w]here a person is charged with any offense for which the person may be incarcerated, the court may determine *at any time* the type, amount, and conditions of bail")(Emphasis added).

{¶ 18} Defendant asserts that, although "the court found him in violation of a condition of bond added that same day * * *, that new requirement consisted of Appellant submitting 'to urine screening today and must not leave court without permission.' " (Appellant's Brief, 13-14.) Defendant contends that he "complied fully with this by submitting to the urine test on July 28, 2014 and returning to court." (Appellant's Brief, 14.) Defendant thus contends that he never violated a condition of his bond. We disagree.

{¶ 19} In *State v. Hughey*, 10th Dist. No. 13AP-135, 2013-Ohio-4155, this court held that, "[b]y requiring appellant to undergo drug screenings while on bond, the trial court clearly expressed its intention that appellant refrain from using illegal substances, including heroin, during that timeframe." *Id.* at ¶ 13. Thus, even though the stated condition of bond was only that defendant submit to drug screens, relying on *In re Mason*, 116 Ohio App.3d 451 (7th Dist.1996), we held that "refraining from the use of such substances was an inherent condition of appellant's bond." *Id.*

{¶ 20} Regardless of whether refraining from using illegal substances was a stated condition of defendant's bond, it was, at the very least, an implied condition of bond. As stated in *In re Mason* with respect to bail revocation:

---

[1] *See Dept. of Liquor Control v. Calvert*, 195 Ohio App.3d 627, 2011-Ohio-4735, ¶ 10-11 (6th Dist.) (explaining the difference between "bail" and "bond," as follows: bail is a form of security that can be in the form of cash or a recognizance to ensure that the accused appears as required before the court; Crim.R. 46(A)(3) allows a court to accept a surety bond, a form of recognizance, as bail: a surety bond is a contract whereby the surety promises the court that it will pay a monetary penalty if the accused who is released on bond posted by the surety fails to appear in court as ordered).

> The fact that the court did not expressly state as conditions to bail that petitioner may not violate criminal provisions of the Revised Code is immaterial. These inherent conditions exist for every issuance of bail. Any conditions that a court may attach to the issuance of bail are not granted in lieu of the criminal provisions of the Revised Code, but in addition to them. These are conditions by which all citizens of the state are bound, regardless of status. * * * Where an accused is free on bail, however, and the court determines that the accused has violated conditions of bail, whether the conditions be expres
> s or implied, the accused is subject to the court's sanctioning authority for violation of the conditions, including revocation of bail.[2]

Id. at 454.

{¶ 21} Thus, refraining from using illegal substances was an inherent or implied condition of defendant's bond. As such, when defendant's drug screen revealed that he had used marijuana, cocaine, and Oxycodone while out on bond, the use of those substances constituted a violation of defendant's bond. Accordingly, pursuant to R.C. 2929.13(B)(1)(b)(iii), the trial court had discretion to sentence defendant to a term of imprisonment. *See State v. Hughes*, 12th Dist. No. CA2013-05-081, 2014-Ohio-1320, ¶ 13 (finding that the "trial court had the discretion to sentence appellant to a term of imprisonment due to her violation of the condition of her Franklin County bond").

C. *Conservation of Resources*

{¶ 22} Defendant asserts that, although a prison sentence was legally possible in this case, it was "unreasonable, disproportionate, and a strain on government resources for the lower court to have imposed a prison sentence." (Appellant's Brief, 14.) Defendant asserts that his six-month prison sentence violated the conservation of resources principles in R.C. 2929.11(A), because he had only three misdemeanor convictions on his record and the instant conviction was for a non-violent felony of the fifth degree. R.C. 2929.11(A) provides as follows:

> A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the

[2] In *Hughey*, this court relied on the above noted quote from *In re Mason* to hold that "refraining from use of heroin and other illegal substances was, at the very least, either an inherent or implied condition of appellant's bond," such that the appellant's "use of heroin while on bond * * * violated the conditions" of his bond. *Id*. at ¶ 14.

> public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

{¶ 23} The conservation of resources principle in R.C. 2929.11(A) requires a court to use the minimum sanctions possible to accomplish the purposes of felony sentencing, without imposing an unnecessary burden on government resources. "Although resource burdens are relevant sentencing consideration under" R.C. 2929.11(A), "trial courts need not elevate resource conservation above seriousness and recidivism factors." *Burton* at ¶ 39, citing *State v. Wolfe*, 7th Dist. No. 03 CO 45, 2004-Ohio-3044, ¶ 15. Indeed, courts must consider " 'the benefit to society in assuring that an offender will not be free to reoffend. Many people sleep better at night knowing that certain offenders are incarcerated. They would no doubt consider a lengthy incarceration worth the cost of housing those offenders.' " *Id.* at ¶ 17, quoting *State v. Vlahopoulos*, 154 Ohio App.3d 450, 2003-Ohio-5070, ¶ 5 (8th Dist.) "Where the interests of public protection and punishment are well served by a prison sentence, the claim is difficult to make that the prison sentence imposes an unnecessary burden on government resources.' " *State v. Wilson*, 2d Dist. No. 24978, 2012-Ohio-4756, ¶ 6, quoting *State v. Bowshier*, 2d Dist. No. 08-CA-58, 2009-Ohio-3429, ¶ 14.

{¶ 24} Defendant contends that, according to a 2012 study "by the Vera Institute of Justice * * * the average annual cost of an Ohio prison inmate is $25,814." (Appellant's Brief, 15.) Thus, defendant asserts that his six-month prison sentence will cost the state $12,907, and that accordingly his prison sentence constitutes an unnecessary burden on government resources. Defendant's argument regarding the monetary burden of incarceration is not relevant in the instant action, however, as defendant is not incarcerated in the traditional sense. As noted above, one month after sentencing defendant to prison, the trial court approved of defendant's placement in a transitional control program, whereby defendant will reside in a licensed halfway house.

{¶ 25} Regardless, the seriousness and recidivism factors present in the instant action support the trial court's decision to impose the six-month prison term. The facts of the case, as recited by the prosecutor, indicated that defendant actually trafficked cocaine to a confidential informant, although he was only charged with possession of cocaine. Regarding recidivism, defendant used cocaine while he was out on bond awaiting trial on a possession of cocaine charge. Indeed, the trial court observed that if defendant were placed on community control and permitted to go home instead of going to prison, he would likely go "out after court and get[] more Oxycodone and more cocaine and more marijuana." (July 31, 2014 Tr. 16.) Thus, the trial court found the likelihood of recidivism to be quite high in the instant case. Accordingly, based on the seriousness and recidivism factors, we cannot find the trial court's six-month prison term to be an unnecessary burden on government resources.

D. *Consistency and Proportionality*

{¶ 26} Defendant asserts that the "gravamen of this appeal is whether Appellant's prison sentence for a conviction on the sole count of possession of cocaine was consistent with or proportional to the alleged facts of the crime and other cases involving cocaine possession offenses under R.C. 2929.11(B)." (Appellant's Brief, 16.) R.C. 2929.11(B) provides that a felony sentence "shall be reasonably calculated to achieve the two overriding purposes of felony sentencing" set forth in R.C. 2929.11(A), and must be "consistent with sentences imposed for similar crimes committed by similar offenders."

{¶ 27} " 'Consistency, however, does not necessarily mean uniformity. Instead, consistency aims at similar sentences. Accordingly, consistency accepts divergence within a range of sentences and takes into consideration a trial court's discretion to weigh relevant statutory factors. * * * Although offenses may be similar, distinguishing factors may justify dissimilar sentences.' " *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100, ¶ 8, quoting *State v. Battle*, 10th Dist. No. 06AP-863, 2007-Ohio-1845, ¶ 24.

{¶ 28} A sentencing court is not required to make a comparison of the current case to previous cases, but is required to appropriately apply the statutory sentencing guidelines in order to maintain consistency. *State v. Holloman*, 10th Dist. No. 07AP-875, 2008-Ohio-2650, ¶ 19, citing *State v. Kalish*, 11th Dist. No. 2006-L-093, 2007-

Ohio-3850, ¶ 18. Consistency in sentencing is thus achieved by the trial court's proper application of the statutory sentencing guidelines. *Hayes* at ¶ 9, citing *State v. Hall,* 179 Ohio App.3d 727, 2008-Ohio-6228, ¶ 10 (10th Dist.) Thus, in order to demonstrate that a sentence is inconsistent, an offender must show that the trial court failed to properly consider the statutory sentencing factors and guidelines in R.C. 2929.11 and 2929.12. *Hayes* at ¶ 10; *Holloman* at ¶ 19. Notably, R.C. 2929.11 and 2929.12 "are not factfinding statutes. They serve as an 'overarching guide' for a trial judge to consider in imposing an appropriate sentence." *State v. Saur*, 10th Dist. No. 10AP-1195, 2011-Ohio-6662, ¶ 19, citing *Kalish* at ¶ 17. R.C. 2929.12 "allows the trial court to 'exercise its discretion in considering whether its sentence complies with the purposes of sentencing.' " *Id.*, quoting *Kalish* at ¶ 17.

{¶ 29} In its sentencing entry, the trial court stated that it had "considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12," and stated that it had "weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14." (Judgment Entry, 1.) This court has concluded that "[s]uch language in the judgment entry belies a claim that the trial court failed to consider the purposes and principles of sentencing." *State v. Ganguly*, 10th Dist. No. 14AP-383, 2015-Ohio-845, ¶ 45, citing *State v. Murphy*, 10th Dist. No. 12AP-952, 2013-Ohio-5599, ¶ 12; *State v. Reeves*, 10th Dist. No. 09AP-493, 2010-Ohio-4018, ¶ 16; *State v. Peterson*, 10th Dist. No. 12AP-646, 2013-Ohio-1807, ¶ 31. Thus, this statement satisfies the consistency requirement under R.C. 2929.11(B). *See State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶ 14 (10th Dist.)

{¶ 30} Defendant contends that the record belies the court's statement in its judgment entry, as the record from the sentencing hearing "fails to indicate that the lower court bothered to consider the consistency and proportionality milieu with respect to felony sentencing." (Appellant's Brief, 20.) However, even "[w]hen the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes." *State v. Reed*, 9th Dist. No. 09AP-1163, 2010-Ohio-5819, ¶ 8, citing *Kalish* at ¶ 18, fn. 4. Indeed, "[a] trial court's rote recitation that it has considered applicable factors satisfies the court's duty to follow the relevant statutes in sentencing an offender." *State v. Easley*, 10th Dist. No. 08AP-755, 2009-Ohio-2984, ¶ 19. Accordingly, as the trial court stated that it had considered the

principles and purposes of sentencing in R.C. 2929.11 and 2929.12, the record demonstrates that the court did consider the statutory sentencing factors and guidelines.

{¶ 31} Additionally, based on the facts and circumstances at issue in this case, the trial court's sentence was not an abuse of discretion. The six-month prison sentence fell well within the applicable range of sentences for a felony of the fifth degree. The court had both the authority and the discretion to impose a prison sentence, and the court imposed the minimum prison sentence available. The record demonstrates that the court considered the short-form presentence investigation, statements from the prosecution and from the defense, and considered defendant's own statement. Furthermore, the trial court explained its reasoning for the prison sentence during the sentencing hearing, noting defendant's history, the fact that defendant violated bond by using illegal substances, and the fact that defendant told his attorney that he would test positive for marijuana only. *Compare State v. Bailey*, 2d Dist. No. 14-CA-2, 2014-Ohio-3749, ¶ 15 (noting that, in deciding to impose a prison sentence for a fifth degree felony possession of heroin charge, "[i]t was significant to the court that Bailey failed to comply with the ILC process, violated the conditions of her bond, and that while she was subject to community control sanctions in Highland County, she tested positive for drugs").

{¶ 32} Defendant asserts that "[n]either the State nor the court offered evidence that Mr. Bell understood that his just-ordered drug test results would include substances other than marijuana." (Appellant's Brief, 23.) During the sentencing hearing, however, the court noted that defense counsel had told the judge in chambers after the court ordered the drug screen that defendant was going to test positive for marijuana only; "[h]e didn't mention Oxycodone, he didn't mention cocaine." (July 31, 2014 Tr. 13.) Defense counsel stated that defendant had told defense counsel that he "was going to be positive" before he took the test. (July 31, 2014 Tr. 14.) The court noted, "[y]ou said marijuana, though, as I recall." (July 31, 2014 Tr. 14.) Defense counsel responded, "[t]hat is what I told the court." (July 31, 2014 Tr. 14.)

{¶ 33} Defendant contends, citing *State v. Gephart*, 11th Dist. No. 94-G-1861 (May 5, 1995), that the trial court impermissibly increased defendant's sentence based on the court's unsubstantiated belief that defendant lied to the court. In *Gephart*, the court held that a sentencing court "may not increase the sanction based upon a belief

that the defendant lied at either trial or the plea exercise." *Id*. There, the court assumed, based on the quantity of marijuana the defendant had been growing, that defendant was also selling marijuana. There was no evidence in the record, however, to support the court's assumption that defendant was selling the marijuana he was growing.

{¶ 34} In contrast, here, the court simply stated the fact, which is supported by the record, that defense counsel told the court that defendant would test positive for marijuana only. The drug test then revealed that defendant was also positive for cocaine and Oxycodone. At the sentencing hearing, the court addressed defense counsel and said, "[e]ither [defendant] lied to you or you misled me," but the court expressly stated that it was "not punishing [defendant] for that." (July 31, 2014 Tr. 13.) The court noted, while he was not punishing defendant for misleading the court, "doggone it, showing up and using drugs two years now after this other thing I think is pretty flagrant." (July 31, 2014 Tr. 13.) Thus, unlike *Gephart*, the court herein did not increase defendant's sentence based on an unfounded assumption that defendant had lied to the court. The record demonstrates that defendant was not forthcoming regarding all of the illegal substances which the drug test would reveal to be present in his system. Indeed, considering that defendant was less than forthcoming with the court and considering that defendant "rather flagrantly" used illegal substances while out on bond, defendant should be grateful that the trial court did not impose more than the minimum prison sentence possible. (July 31, 2014 Tr. 13.)

{¶ 35} We further find that the trial court fully considered the possibility of a community control sanction, and determined that a prison sentence was more appropriate in this case, as the court was entitled to do. Defense counsel asked the court to place defendant on community control, noting that it seemed wrong on defendant's "first felony from two years ago, [that] we are going to fill up the prison system with somebody like this." (July 31, 2014 Tr. 14.) Counsel asked the court to reconsider the six-month prison sentence, and to instead "put [defendant] through a series of tests of what he's going to have to do on community control." (July 31, 2014 Tr. 15.) The court responded stating, "[t]hank you for your thoughts. I've thought about all of that. I think this is the appropriate sentence." (July 31, 2014 Tr. 15.)

{¶ 36} Reviewing the court's consideration of the principles and purposes of felony sentencing and the court's stated reasons for imposing a prison term, we find that

the court properly applied the statutory sentencing guidelines, and accordingly determine that defendant's sentence was neither contrary to law nor an abuse of discretion as it relates to the proportionality and consistency requirement set forth in R.C. 2929.11(B).

III. DISPOSITION

{¶ 37} Based on the foregoing, we conclude that the record supports the trial court's determination that a minimum prison sentence of six months was appropriate, as a community control sanction would not accomplish the purposes and principles of felony sentencing. Since we cannot clearly and convincingly find that defendant's sentence is contrary to law under either *Kalish* or *Burton*, and we find no abuse of discretion in the sentence imposed, we overrule defendant's sole assignment of error. Having overruled defendant's assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

LUPER SCHUSTER, J., concurs separately.
DORRIAN, J., dissents.

LUPER SCHUSTER, J., concurring.

{¶ 38} I concur in the judgment overruling Bell's assignment of error and affirming the sentence entered by the court below. However, I write separately because I reach that result on narrower grounds than expressed in the lead decision.

{¶ 39} In this appeal, Bell does not argue the trial court did not have the statutory authority to sentence him to prison pursuant to R.C. 2929.13(B)(1)(a), which mandates a community control sanction for fourth and fifth-degree felonies if certain requirements are met. Rather, Bell argues his sentence was improper because the trial court did not comply with the purposes and principles of sentencing under R.C. 2929.11 and 2929.12. Specifically, Bell alleges the following: (1) the sentence violated the conservation of resources principles of R.C. 2929.11(A); (2) the sentence was neither proportional nor consistent under R.C. 2929.11; and (3) the court did not properly consider or weigh the factors in R.C. 2929.12.

{¶ 40} To be sure, conservation of resources, proportionality, and consistency are some of the purposes and principles the court is guided by in determining an appropriate sentence. Pursuant to R.C. 2929.11(A), a sentencing court "shall be guided by the overriding purposes of felony sentencing," which are "to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." R.C. 2929.11(B) requires that felony sentences not demean "the seriousness of the offender's conduct and its impact upon the victim" and be consistent with sentences imposed in similar cases. *State v. J.H.S.*, 10th Dist. No. 14AP-399, 2015-Ohio-254. In determining a sentence, a trial court is also required to consider seriousness and recidivism factors as set forth under R.C. 2929.12. In considering the factors set forth in R.C. 2929.12, the trial court has the discretion "to determine the weight to assign a particular statutory factor." *State v. Arnett*, 88 Ohio St.3d 208, 215 (2000), citing *State v. Fox*, 69 Ohio St.3d 183, 193 (1994).

{¶ 41} We review a trial court's imposed sentence to determine whether clear and convincing evidence establishes that the sentence is contrary to law; the sentence is not reviewed under the abuse of discretion standard. *State v. Stubbs*, 10th Dist. No. 13AP-810, 2014-Ohio-3696, ¶ 15, citing *State v. Mercier*, 10th Dist. No. 13AP-906, 2014-Ohio-2910, ¶ 4. Applying the contrary to law standard, we look to the record to determine whether the sentencing court considered and properly applied the statutory guidelines and whether the sentence is otherwise contrary to law. *Id.*, citing *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶ 19.

{¶ 42} Here, the trial court demonstrated its compliance with R.C. 2929.11 and 2929.12 by noting, in its August 1, 2014 judgment entry, it "considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12." *See Stubbs* at ¶ 14 (noting that such language in a judgment entry belies a claim that the trial court failed to comply with the requirement that it consider the purposes and principles of sentencing, pursuant to R.C. 2929.11(A), and the R.C. 2929.12 factors regarding recidivism and the seriousness of the offense); *see also State v. McMichael*, 10th Dist. No. 11AP-1042, 2012-Ohio-3166, ¶ 42 (noting that this court has stated that to demonstrate a sentence is inconsistent or disproportionate under R.C.

2929.11(B), a defendant "must demonstrate the trial court failed to properly consider the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12"). Bell fails to point to anything in the record demonstrating the trial court, despite what is stated in the judgment entry, failed to make the necessary considerations before sentencing him.

{¶ 43} Bell also argues the trial court improperly weighed and considered the sentencing factors because it erroneously believed that he violated his bond conditions based on a positive drug screen. This argument fails. The " 'trial court, in exercising its sentencing discretion, determines the weight afforded to any particular statutory factors, mitigating grounds, or other relevant circumstances.' " *Stubbs*, at ¶ 16, quoting *State v. Todd*, 10th Dist. No. 06AP-1208, 2007-Ohio-4307, ¶ 23. Mere disagreement with a court's balancing of the sentencing factors and mitigation evidence does not make a sentence that falls within the applicable statutory range contrary to law. *Id*. Furthermore, Bell does not dispute that he tested positive for marijuana, Oxycodone, and cocaine the day his trial was scheduled to begin on the underlying charge of cocaine possession. The trial court had the authority to impose the drug screen and did not err in considering the results of the drug screen as part of its sentencing analysis. *See* Crim.R. 46(B)(7) (authorizing a court to impose a condition of bail "considered reasonably necessary to ensure appearance or public safety"); Crim.R. 46(E) ("[a] court, at any time, may order additional or different types, amounts, or conditions of bail."); R.C. 2929.12; *Stubbs*.

{¶ 44} For these reasons, I concur in affirming the judgment of the trial court.

DORRIAN, J., dissenting.

{¶ 45} I agree that, pursuant to R.C. 2929.13(B)(1)(a)(iv), the trial court was not required to impose community control. However, the court clearly stated that it was imposing prison time because defendant "violated bond," thereby relying on R.C. 2929.13(B)(1)(b)(iii), which states: "The court has discretion to impose a prison term upon an offender * * * [if] [t]he offender violated a term of the conditions of bond as set by the court." The majority relies on *State v. Hughey*, 10th Dist. No. 13AP-135, 2013-Ohio-4155, and *In re Mason*, 116 Ohio App.3d 451 (7th Dist.1996), to support its

conclusion that the trial court had discretion to sentence defendant to a term of imprisonment.

{¶ 46} I concurred with the decision in *Hughey* that, "[b]y requiring [defendant] to undergo drug screenings while on bond, the trial court clearly expressed its intent that [defendant] refrain from using illegal substances, including heroin, during that timeframe." *Hughey* at ¶ 13. But the facts in *Hughey* differ from the facts here. First, *Hughey* was considered pursuant to the plain-error standard because defendant did not object at the sentencing; whereas, in this case, defendant objected at sentencing and thereafter in a motion to reconsider. Second, and more significantly, in *Hughey*, the defendant was advised of the drug screen condition two weeks prior to when he admitted to using heroin and was found to have violated the condition. Therefore, he was on notice about what action could violate his conditions of bond. In this case, defendant had no notice. The condition of bond that defendant submit to a drug screen was imposed "on the spot" the date the trial was postponed. Defendant was advised that he could not leave the courtroom until he submitted to a drug screen. Consequently, defendant violated the condition of bond *before* he was even aware it was a condition of bond.

{¶ 47} In *Hughey*, after having determined that the drug screen condition clearly expressed an intention to refrain from drug use, we then referred to *In re Mason*:

> "The fact that the court did not expressly state as conditions to bail that petitioner may not violate criminal provisions of the Revised Code is immaterial. These inherent conditions exist for every issuance of bail. Any conditions that a court may attach to the issuance of bail are not granted in lieu of the criminal provisions of the Revised Code, but in addition to them. These are conditions by which all citizens of the state are bound, regardless of status. * * * Where an accused is free on bail, however, and the court determines that the accused has violated conditions of bail, whether the conditions be express or implied, the accused is subject to the court's sanctioning authority for violation of the conditions, including revocation of bail bond."

Id. at ¶ 13, quoting *In re Mason* at 454.

{¶ 48} The facts in *In re Mason* also differ from the facts here, as well as the facts in *Hughey*. In that case, the defendant filed a petition in habeas corpus in response to

the trial court's revocation of his bail. The trial court revoked bail upon becoming aware that the defendant had been indicted on new charges of attempted murder and witness intimidation and that he also had an outstanding warrant from the city of Youngstown. In affirming the trial court, the Seventh District discussed the general purpose of bond as preserving the integrity of the judiciary or maintaining the proper functioning of the judiciary, which includes (1) ensuring future appearance, and (2) protecting witnesses. The court reasoned:

> In the present matter, the trial court became aware of information subsequent to the allowance of bail that reasonably warranted the action taken to revoke bail under the court's inherent authority to ensure the integrity of the judicial process. It is reasonable that once a judge becomes aware of charges of attempted murder and witness intimidation, one of the most reasonable ways that the persons in these actions pending before a court can be protected is by revoking bail and detaining the person attempting to thwart the proper functioning of the criminal justice system. It would almost seem that the court could be abusing its discretion if it did not revoke bail under such serious circumstances.

In re Mason at 453-54. The court concluded that the defendant "breached inherent conditions of bail so as to jeopardize the proper functioning of the judiciary in the trial process and is thus subject to sanctions of the trial court commensurate with the violation of conditions of bail." *Id.* at 455. The court denied the habeas corpus petition.

{¶ 49} Although the court *In re Mason* found the revocation of bond to be consistent with the general purpose of preserving the integrity of the judiciary by ensuring future appearance and protecting witnesses, the court further noted that not violating criminal provisions is an inherent condition of bail. As noted above, and although the defendant had only been indicted but not yet convicted of new charges, the court stated that, "[w]here an accused is free on bail, however, and the court determines that the accused has violated conditions of bail, whether the conditions be express or implied [such as inherent condition to not violate the law], the accused is subject to the court's sanctioning authority for violation of the conditions, including revocation of bail." *Id.* at 454. The sanction imposed for the violation in *In re Mason* was revocation

of bond. In this case, however, the sanction was to impose prison, rather than community control, on the original violation of the criminal code.

{¶ 50} Finally, I note that R.C. 2929.13(B)(1)(b) lists eleven circumstances in which a trial court judge has discretion to impose a prison term upon a non-violent fourth or fifth degree felony offender. R.C. 2929.13(B)(1)(b)(i)-(xi). The General Assembly did not include among those circumstances – the offender commits a separate violation of the law while the original offense is pending.

{¶ 51} It certainly would have been appropriate for the prosecutor to consider charging appellant with a new drug offense upon appellant's testing positive for drugs and for the court to impose an additional sentence as a result thereof. However, I do not find it to be appropriate or consistent with the law for the court to impose prison time on the original offense on the grounds that appellant violated a condition of bond – a condition of which he had no notice.[3]

{¶ 52} Considering the circumstances of this case, I would find that the sentence imposed by the trial court was contrary to law. For these reasons, I respectfully dissent.

---

[3] The boilerplate Bail or Recognizance of the Accused form filed in the trial court on November 27, 2013 includes the following conditions: (1) defendant shall know and appear in court on the date of all scheduled appearances; (2) defendant shall keep the court apprised of his address; (3) defendant shall agree to be fingerprinted and photographed by the Sheriff. The section of the form which provides space for additional conditions was left blank.