

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO**

|                      |   |                            |
|----------------------|---|----------------------------|
| STATE OF OHIO,       | : | <b>O P I N I O N</b>       |
| Plaintiff-Appellee,  | : |                            |
| - vs -               | : | <b>CASE NO. 2010-L-138</b> |
| MARK A. KISH,        | : | 8-19-11                    |
| Defendant-Appellant. | : |                            |

Criminal Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2009 SE 01634.

Judgment: Affirmed.

*Charles E. Coulson*, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*Kenneth J. Lewis*, Kenneth J. Lewis Co., L.P.A., P.O. Box 250, Hinckley, OH 44233 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Mark A. Kish, appeals the judgment entry of the Lake County Court of Common Pleas, Juvenile Division, in which the court sentenced him to a jail term of 180 days for one count of nonsupport of dependents, and 180 days suspended for a second count, both misdemeanors of the first degree in violation of R.C. 2919.21(B).

{¶2} On August 27, 2009, the complaint containing both charges was filed by the state of Ohio. After failing to appear for arraignment, a bench warrant was issued for appellant. On December 17, 2009, appellant entered not guilty pleas on both charges. After failing to appear for a pre-trial, a bench warrant was issued for appellant. On July 26, 2010, appellant changed his pleas on both charges from not guilty to no contest. The trial court then found appellant guilty on both counts.

{¶3} During the sentencing hearing on October 28, 2010, the state of Ohio established that appellant owes over \$64,000 in back support and has not made a voluntary payment since July 2008; appellant did not dispute either point during the hearing. On November 23, 2010, appellant's motion for appellate bond was granted since the 180-day sentence may expire before his appellate claims can be considered.

{¶4} Appellant timely appeals and raises a sole assignment of error:

{¶5} "The trial court erred and abused its discretion in sentencing the appellant too harshly."

{¶6} Specifically, appellant contends that the trial court erred in failing to consider the sentencing factors set forth in R.C. 2929.22. "Misdemeanor sentencing is within the discretion of the trial court and will not be disturbed absent an abuse of discretion." *State v. Rogers*, 11th Dist. Nos. 2009-T-0051 and 2009-T-0052, 2010-Ohio-197, at ¶9, quoting *Conneaut v. Peaspanen*, 11th Dist. No. 2004-A-0053, 2005-Ohio-4658, at ¶18. (Citation omitted.) "An abuse of discretion is the trial court's 'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11. When reviewing the sentence, the presumption is that the trial court's findings were correct. *Rogers*, supra, at ¶9.

{¶7} R.C. 2929.22 requires the trial court to consider criteria listed in the statute before sentencing a defendant on a misdemeanor. These factors include: the “nature and circumstances of the offense”; whether the offender has a “history of persistent criminal activity”; whether there is a “substantial risk that the offender will commit another offense”; whether the offender’s conduct shows a “pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences”; whether the victim’s age or other disability “made the victim particularly vulnerable to the offense or made the impact of the offense more serious”; and also “any other factors that are relevant to achieving” the purpose of misdemeanor sentencing—to protect the public from criminal conduct by the offender in the future and to punish the offender. R.C. 2929.22(B) & R.C. 2929.21(A).

{¶8} Failure to consider these criteria is an abuse of discretion. *Rogers*, supra, at ¶11. In the absence of a demonstration that a trial court did not consider the sentencing criteria, the presumption is that the trial court considered the appropriate factors set forth in R.C. 2929.22. *State v. Frazier*, 158 Ohio App.3d 407, 2004-Ohio-4506, at ¶15. “[A] silent record raises the presumption that the trial court correctly considered the appropriate sentencing criteria.” *Rogers*, supra, at ¶13, quoting *Peaspanen*, 2005-Ohio-4658, at ¶29. Further, there is no requirement that the court state on the record it considered the statutory sentencing criteria. *Peaspanen*, supra, at ¶29.

{¶9} Appellant was convicted on two counts of nonsupport of dependants, first-degree misdemeanors, in violation of R.C. 2919.21(B). Pursuant to R.C. 2929.24(A)(1), the maximum sentence for a first-degree misdemeanor is 180 days. Thus, it was in the trial court’s discretion to impose 180-day sentences for both counts.

{¶10} The sentencing entry indicates that the court considered the statutory factors. The court considered appellant's past, repetitive failures to pay and his overall lack of effort to provide support. The court looked to the enormity of the outstanding sum, continually mentioning the \$64,000 amount on the record. The court investigated appellant's current income against his support payments, concluding that appellant, since last before the court in July 2008, had earned \$2,800 and, even though he was able, had not sent any money towards his support obligations. The court inquired into the ages of the children (9 and 13) and spoke to the children's mother in an effort to gauge an impact on both the children and the mother who must provide for them.

{¶11} Similar findings in past child support cases have withstood abuse of discretion challenges. *State v. Bacon* (1996), 109 Ohio App.3d 877, 879 (defendant's jail term for violation of nonsupport was not an abuse of discretion where the defendant had repeatedly failed to pay); *State v. Joseph* (1996), 109 Ohio. App.3d 880, 882 (defendant's jail term for violation of nonsupport was not an abuse of discretion where the defendant had made little effort to provide support to his children).

{¶12} Appellant's assignment of error is without merit.

{¶13} For the foregoing reasons, the judgment entry of the Lake County Court of Common Pleas, Juvenile Division, is affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.