[Cite as *State v. Karsikas,* 2015-Ohio-2595.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-A-0065**
- vs -	:	
GARY A. KARSIKAS, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2014 CR 16.

Judgment: Affirmed.

Nicholas A. Iarocci, Ashtabula County Prosecutor, and *Shelley M. Pratt,* Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Edward M. Heindel, 450 Standard Building, 1370 Ontario Street, Cleveland, OH 44113 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Gary A. Karsikas, Jr., appeals from his conviction and sentence for Possession of Heroin in the Ashtabula County Court of Common Pleas. The issues to be determined by this court are whether a trial court improperly accepts an *Alford* plea when it does not directly inquire of the defendant his basis for entering the plea and whether a maximum sentence for a fifth degree felony is proper when the defendant is convicted of a drug charge and has repeatedly failed to remedy

his drug use problem. For the following reasons, we affirm the judgment of the trial court.

{¶2} On January 13, 2014, a Complaint was filed against Karsikas in the Ashtabula Municipal Court, asserting that he violated R.C. 2925.11(A), committing Possession of Heroin. Karsikas waived his preliminary hearing and the matter was bound over to the Ashtabula County Court of Common Pleas.

{¶3} On March 20, 2014, Karsikas was indicted by the Ashtabula County Grand Jury for one count of Possession of Heroin, a felony of the fifth degree, in violation of R.C. 2925.11(A).

{¶4} A pre-trial hearing was held on June 1, 2014, at which time the State offered to dismiss separate charges in Case No. 13 CR 659 in exchange for a plea to Possession of Heroin. Karsikas did not accept this offer.

{¶5} The matter was scheduled for a trial on July 21, 2014. On that date, Karsikas entered a plea of guilty to Possession of Heroin, as charged in the Indictment, by way of *Alford*. In exchange for that plea, the State recommended community control sanctions. The court reviewed Karsikas' rights and informed him that an *Alford* plea was not an admission that he committed the offense but "does tell the court that you have reasons that you do not wish to go through with the trial and so I can find you guilty." The court also reviewed the potential maximum prison term and fine with Karsikas.

{¶6} Karsikas entered a Written Plea of Guilty and Plea Agreement on that date. The trial court issued a Judgment Entry, accepting the written plea of guilty and referred the matter to the probation department for a presentence investigation.

{¶7} A sentencing hearing was held on September 30, 2014. At the beginning of that hearing, Karsikas made an oral motion to withdraw his guilty plea. Defense counsel noted that they had been awaiting DNA testing on the heroin but were told such testing would not be performed. Karsikas indicated he believed DNA testing could have been performed and, as such, wished to withdraw his plea. The court denied this request.

{¶8} The State confirmed that at the time of the plea, it recommended community control. The court explained that, regardless of assistance provided in past criminal cases, Karsikas had not been "able to get it under control," emphasizing his failure to report for pretrial services and to comply under supervision, as well as his continued drug use. The court determined that a prison term was necessary and imposed a one-year sentence.

{¶9} A Judgment Entry of Sentence was filed on October 6, 2014, memorializing the sentencing findings made at the hearing, noting that the court had considered the pertinent factors under R.C. 2929.11 and .12, and finding Karsikas was not amenable to community control sanctions.

{¶10} Karsikas timely appeals and raises the following assignments of error:

{¶11} "[1.] The trial court erred when it denied Karsikas's pre-sentence motion to withdraw his Alford guilty plea.

{¶12} "[2.]. The trial court erred when it sentenced Karsikas to the maximum possible prison sentence for a non-violent felony of the fifth degree."

{¶13} In his first assignment of error, Karsikas argues that the trial court did not inquire about the basis for his *Alford* plea or into the State's evidence "to determine * * *

if Karsikas was making an intelligent decision regarding the risks of a jury trial." Thus, "the trial court should have permitted Karsikas to withdraw his guilty plea."

{¶14} Crim.R. 32.1 provides that "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct a manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

{¶15} Presentence motions to withdraw a plea should be granted liberally. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). The Supreme Court has also recognized, however, that "[a] defendant does not have an absolute right to withdraw a guilty plea prior to sentencing," but, instead, "[a] trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Id*. at paragraph one of the syllabus.

{¶16} "The decision to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court." (Citation omitted.) *State v. Holin*, 174 Ohio App.3d 1, 2007-Ohio-6255, 880 N.E.2d 515, ¶ 15 (11th Dist.).

{¶17} Generally, this court has applied the four-factor test set forth in *State v. Peterseim* to determine whether a trial court has abused its discretion in denying a pre-sentence motion to withdraw a plea. *State v. Parham*, 11th Dist. Portage No. 2011-P-0017, 2012-Ohio-2833, ¶ 19. Under *Peterseim*, a trial court does not abuse its discretion in denying a motion to withdraw a plea: "(1) where the accused is represented by highly competent counsel, (2) where the accused was afforded a full hearing, pursuant to Crim. R. 11, before he entered the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion,

and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request." 68 Ohio App.2d 211, 428 N.E.2d 863 (8th Dist.1980), paragraph three of the syllabus.

{¶18} In the present matter, Karsikas entered his plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). "An *Alford* plea is a plea of guilty with a contemporaneous protestation of innocence." *State v. White*, 11th Dist. Lake No. 2002-L-146, 2004-Ohio-6474, ¶ 44. "[T]he *Alford* decision requires a factual basis when a defendant pleads guilty at the same time as he is protesting his innocence, so that the trial court can assure itself that the defendant is entering his guilty plea voluntarily and intelligently." (Citations omitted.) *Parham* at ¶ 32; *Alford* at 38, fn. 10 ("pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea * * *; and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence").

{¶19} Under *State v. Piacella*, 27 Ohio St.2d 92, 271 N.E.2d 852 (1971), in an *Alford* plea, "[w]here the record affirmatively discloses that: (1) defendant's guilty plea was not the result of coercion, deception or intimidation; (2) counsel was present at the time of the plea; (3) counsel's advice was competent in light of the circumstances surrounding the indictment; (4) the plea was made with the understanding of the nature of the charges; and, (5) defendant was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both, the guilty plea has been voluntarily and intelligently made." *Id.* at the syllabus.

{¶20} Karsikas' basis for requesting to withdraw his plea below was that he incorrectly believed DNA testing of the heroin could not be completed. He does not advance this ground in the present matter, but argues only that the court improperly accepted his *Alford* plea without inquiring of his basis for the plea, a contention with which we disagree.

{¶21} While it is correct that the court did not inquire of Karsikas personally regarding his reasons for entering the plea, the record contains sufficient evidence of the basis for such a plea, i.e., that he was "motivated * * * by a desire to seek a lesser penalty." *Piacella* at syllabus.

{¶22} At the plea hearing, the prosecutor indicated that Karsikas would enter a plea by way of *Alford*, and, in exchange, the State would recommend only community control as a sentence, to which defense counsel agreed. Defense counsel stated the following: "[I]t's our understanding that the state would have no objection to recognizing that the sentencing recommendation provides a significant enough chance in the likelihood of a lesser sentence or alternative plead community control, that would satisfy the requirements of *Alford* to allow this plea to go forward." This statement indicates the intent to enter an *Alford* plea, since it provided Karsikas with a chance to receive a lesser sentence than he would if he proceeded to trial.

{¶23} This court has held on several occasions that, when a defendant is not explicitly questioned about his reasons for entering an *Alford* plea, other evidence of his intentions is sufficient to meet the requirement for a showing that he was motivated by a desire to seek a lesser penalty. For example, in *State v. Kennedy*, 11th Dist. Ashtabula No. 2013-A-0002, 2013-Ohio-4553, an *Alford* plea was properly accepted when the

defendant was not directly questioned about his reasons for entering the plea, but counsel represented the basis, including considerations regarding judicial release and civil liability. *Id.* at ¶ 16. *Also State v. Prinkey*, 11th Dist. Ashtabula No. 2010-A-0029, 2011-Ohio-2583, ¶ 12-16 (the defendant's motive for entering an *Alford* plea was "evident from the record" when he received the benefit of reducing the mandatory sentence from five to two years in the indictment). In the present case, it was evident from defense counsel's statements that the benefit to be received from the *Alford* plea, a potential reduced sentence, was the justification for the plea.

{¶24} It is also relevant that the court explained the *Alford* plea and noted defense counsel's belief that "there are enough considerations * * * that would warrant [Karsikas'] decision to plead guilty under this *Alford* case" even though he was not admitting guilt. Karsikas indicated that he had no questions about this. Essentially, Karsikas, through counsel and this response, conceded that there were sentencing considerations justifying his *Alford* plea. The jointly recommended sentence to which Karsikas agreed further solidifies the conclusion that the court had sufficient information to determine that the *Alford* plea was entered to avoid a greater sentence. *Kennedy* at ¶ 13.

{¶25} Karsikas asserts that the trial court "should have made some inquiry into the State's evidence" to determine if he was "making an intelligent decision regarding the risks of a jury trial." At the plea hearing, the trial court stated that, "since it is an Alford Plea * * * I'll ask the state just to summarize * * * what we would expect their evidence to be." The prosecutor described the incident leading to the charges, including that police received a call reporting drug use and approached a vehicle from

which Karsikas exited and fled. Along the pathway on which he fled was a syringe full of blood and heroin, which appeared, from the weather conditions, to have been on the ground for a short amount of time. Other syringes were found near the car. This description was more than sufficient for the court to be aware of the basis for the charges. *See Prinkey* at ¶ 24-25 (a short description of evidence by the State was sufficient to establish that the *Alford* plea was intelligently entered).

{¶26} Karsikas also argues that "there was basically nothing offered to [him] in exchange for [his] plea." This is not the case. In exchange for the plea, the State recommended that Karsikas receive community control rather than a prison sentence. While Karsikas ultimately did receive the maximum sentence from the court, this occurred after the entry of the plea and is unrelated to the incentive he received at the time of the plea. The law is clear that "the court is not required to impose a jointly recommended sentence" and may order a term that exceeds the recommendation. *State v. Cisternino*, 11th Dist. Lake No. 2010-L-031, 2011-Ohio-2453, ¶ 30.

{¶27} Regarding the withdrawal of the plea in general, there appears to be no question or dispute that the other elements for the proper denial of a motion to withdraw a plea were satisfied under *Peterseim*, as counsel was competent, Karsikas had a proper hearing on both his plea and his motion, which was given full and fair consideration. Similarly, the other elements of *Piacella* were met, since counsel was present, and the plea was not the result of coercion and was made with an understanding of the charges.

{¶28} The first assignment of error is without merit.

{¶29} In his second assignment of error, Karsikas argues that the trial court erred in sentencing him to the maximum possible prison sentence. He concedes that his sentence was within the statutory guidelines for a fifth-degree felony but argues that it "does not conform with the purposes and principles of sentencing" and was not made in accordance with applicable sentencing law, noting that there should have been a presumption of community control sanctions.

{¶30} The overriding purposes of felony sentencing in Ohio "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(A). "A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(B).

{¶31} It is well-recognized that a sentencing court "has discretion to determine the most effective way to comply with the purposes and principles of sentencing." R.C. 2929.12(A).

> In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct, the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism, * * * and,

> in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

Id.

{¶32} The Ohio Supreme Court has described a sentencing court's discretion as "full discretion to impose a prison sentence within the statutory range." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. "[T]he trial court is not obligated, in the exercise of its discretion, to give any particular weight or consideration to any sentencing factor." *Holin*, 2007-Ohio-6255, at ¶ 34.

{¶33} "The court hearing an appeal [of a felony sentence] shall review the record, including the findings underlying the sentence or modification given by the sentencing court." R.C. 2953.08(G)(2). "The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing * * * if it clearly and convincingly finds * * * [t]hat the record does not support the sentencing court's findings under [various sections of the Ohio Revised Code] [or] * * * [t]hat the sentence is otherwise contrary to law." R.C. 2953.08(G)(2)(a) and (b).

{¶34} Karsikas essentially argues that the court did not properly apply the factors under R.C. 2929.11 and .12, especially given his lack of a serious violent record and his showing of genuine remorse. He does not dispute that the length of the sentence was within the range permissible for a fifth-degree felony. R.C. 2929.14(A)(5).

{¶35} The trial court clearly stated that it considered the necessary factors under R.C. 2929.11 and .12. While Karsikas may have expressed remorse and willingness to discontinue his drug use, "a reviewing court must defer to the trial court as to whether a

defendant's remarks are indicative of genuine remorse because it is in the best position to make that determination." (Citation omitted.) *State v. Davis*, 11th Dist. Lake No. 2010-L-148, 2011-Ohio-5435, ¶ 15.

{¶36} Further, the court considered the fact that, in past criminal cases, Karsikas failed under supervision, did not report to pretrial services, and continued to use drugs. Other factors under R.C. 2929.12 also applied, including Karsikas' extensive past criminal record and juvenile record, with which the court expressed concern. Based on this, we find no grounds to second-guess the lower court's determination as to this issue, since it was entitled to weigh any degree of remorse expressed and any other potential mitigating factors against the other factors in favor of granting a prison term. "Even the demonstration of genuine remorse" does not "mandate a lesser sentence where the judge determines * * * that the maximum * * * sentence is necessary to achieve the purposes of felony sentencing, i.e., protecting the public from future crime by the offender and punishing the offender." *Davis*, at ¶ 17, citing *Holin*, 2007-Ohio-6255, at ¶ 34.

{¶37} Karsikas cites *Warrensville Heights v. Shaffer*, 8th Dist. Cuyahoga No. 80482, 2002-Ohio-3269, in support of his contention that a maximum term should not be imposed without considering the factors in R.C. 2929.12. In that case, however, the court found that the record did "not indicate that the court considered any of the requisite statutory factors before imposing the maximum penalty" and the record was "devoid of any information relative to the factors that must be considered as weighing against imposition of a prison term." *Id.* at ¶ 52. Here, there was evidence under section (E) regarding Karsikas' past criminal history in the PSI report and his statement

regarding his remorse. There was plenty of evidence before the court to consider the necessary factors, and it stated that it considered them in the Judgment Entry of Sentence.

{¶38} Karsikas also argues that there should have been a presumption of community control. 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 of at least one year's duration if all of the following apply:

{¶39} "(i) The offender previously has not been convicted of or pleaded guilty to a felony offense.

{¶40} "(ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.

{¶41} "(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 * * * provided the court with the names of, contact information for, and program details of one or more community control sanctions * * *.

{¶42} "(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."

{¶43} Both Karsikas and the State improperly cite the applicable law in this case, citing a version of the statute that was in effect until March 22, 2013.[1] As of that date, the statutory language cited above applies. Karsikas' offense date was on December

1. Under that version of the statute, (B)(1)(a)(i) provided: "The offender previously has not been convicted of or pleaded guilty to a felony offense or to an offense of violence that is a misdemeanor and that the offender committed within two years prior to the offense for which sentence is being imposed."

19, 2013. Thus, pursuant to the statute applicable in this case, the court was not required to sentence Karsikas to community control, since it is clear from the presentence investigation report that he had previously been convicted of a felony offense. R.C. 2929.13(B)(1)(a)(i). In determining that a prison term was appropriate, the court was permitted to consider various factors under R.C. 2929.13(B)(1)(b), including that Karsikas had previously served a prison term. The trial court, then, did not err in ordering Karsikas to serve a prison term rather than complete community control.

{¶44} The second assignment of error is without merit.

{¶45} For the foregoing reasons, Karsikas' conviction and sentence for Possession of Heroin in the Ashtabula County Court of Common Pleas, are affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶46} I respectfully dissent.

{¶47} In his first assignment of error, appellant argues the trial court did not engage in the proper *Alford* inquiry prior to accepting his plea and erred in subsequently denying his pre-sentence motion to withdraw his *Alford* plea. I agree.

{¶48} "'Crim.R. 32.1 governs the withdrawal of a guilty plea prior to sentencing and provides: '(a) motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.' 'However, the rule itself gives no guidelines for a trial court to use when ruling on a presentence motion to withdraw a guilty plea.' *State v. Xie*, 62 Ohio St.3d 521, 526 * * * (1992).

{¶49} "A motion to withdraw a guilty plea filed before sentencing should be freely and liberally granted. *Xie* at 526. However, there is no absolute right to withdraw a guilty plea. *Id*. 'Appellate review of a trial court's denial of a motion to withdraw is limited to a determination of abuse of discretion, regardless whether the motion to withdraw is filed before or after sentencing.' *State v. Peterseim*, 68 Ohio App.2d 211, * * *, paragraph two of the syllabus (8th Dist. 1980)." *State v. Field*, 11th Dist. Geauga No. 2011-G-3010, 2012-Ohio-5221, ¶9-10. (Parallel citations omitted.)

{¶50} The term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.).

{¶51} "'An *Alford* plea is a plea "whereby the defendant pleads guilty yet maintains actual innocence of the charges."' [*State v. Anderson*, 11th Dist. Lake No. 2005-L-178, 2006-Ohio-5167,] at ¶8, citing [*State v.*] *Griggs*, 103 Ohio St.3d 85, 2004-

Ohio-4415, at ¶13, * * *. 'Although an Alford plea allows the defendant to maintain his factual innocence, the plea has the same legal effect as a plea of "guilty," and upon acceptance by the trial court, the defendant stands convicted as though he had been found guilty by a trier of fact.' Id. (citations omitted). 'Before accepting an *Alford* plea, "(t)he trial judge must ascertain that notwithstanding the defendant's protestations of innocence, he has made a rational calculation that it is in his best interest to accept the plea bargain offered by the prosecutor."' Id. (citations omitted).

{¶52} "'In the context of an *Alford* plea, the Ohio Supreme Court has held: "Where the record affirmatively discloses that: (1) defendant's guilty plea was not the result of coercion, deception or intimidation; (2) counsel was present at the time of the plea; (3) counsel's advice was competent in light of the circumstances surrounding the indictment; (4) the plea was made with the understanding of the nature of the charges; and, (5) defendant was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both, the guilty plea has been voluntarily and intelligently made."' Id. at ¶9, citing *State v. Piacella* (1971), 27 Ohio St.2d 92, * * *, at syllabus." *State v. Johnson*, 11th Dist. Lake No. 2005-L-211, 2007-Ohio-781, ¶15-17. (Parallel citations omitted.)

{¶53} All guilty pleas, including *Alford* pleas, must meet the general requirement that the defendant knowingly, voluntarily, and intelligently waives his right to trial. *See State v. Padgett*, 67 Ohio App.3d 332, 338 (2d Dist.1990). Because guilty pleas accompanied by a protestation of innocence gives rise to an inherent suspicion that a knowing, voluntary, and intelligent waiver has not occurred, *Alford* pleas place a heightened duty upon the trial court to ensure that the defendant's rights are protected

and that entering the plea was a rational decision on the part of the defendant. When a defendant protests his innocence, the rational calculation differs significantly than that made by a defendant who admits he is guilty; accordingly, the trial court's obligation with regard to taking an *Alford* plea is correspondingly different. *Id*.

{¶54} The *Padgett* court explained the trial court's duty in taking an *Alford* plea, as follows:

{¶55} "The trial judge must ascertain that notwithstanding the defendant's protestations of innocence, he has made a rational calculation that it is in his best interest to accept the plea bargain offered by the prosecutor. * * *

{¶56} "* * *

{¶57} "* * * This requires more than a routine litany. Where the defendant interjects protestations of innocence into the plea proceedings, and fails to recant those protestations of innocence, the trial court must determine that the defendant has made a rational calculation to plead guilty notwithstanding his belief that he is innocent. This requires, at a minimum, inquiry of the defendant concerning his reasons for deciding to plead guilty notwithstanding his protestations of innocence * * *[.]

{¶58} "* * * [I]f a guilty plea is to be accepted, the trial court must determine, in a meaningful way, that the defendant's decision to tender the plea is knowing and intelligent. If it becomes impossible for the trial court to satisfy itself that the defendant's decision is knowing and intelligent, the trial court has the alternative of declining to accept the plea. * * *." *Id*. at 338-339.

{¶59} In this case, appellant's oral motion to withdraw his *Alford* plea was made prior to his actual sentencing. Thus, such motion should be freely and liberally granted.

Xie, supra, at 526. However, the trial court denied appellant's motion. Based on the facts presented, this writer agrees with appellant that the trial court abused its discretion in this regard.

{¶60} The record establishes and appellant concedes that the trial court complied with the textbook requirements of Crim.R. 11 at the July 21, 2014 hearing, where appellant entered his oral and written guilty plea. However, this matter involves *Alford* which is treated differently than an average plea. *Alford* presents the trial court with another more in-depth level of inquiry regarding appellant's assertion of innocence. *Piacella, supra,* at syllabus; *Johnson, supra,* at ¶15-17. Although required, a review of the transcript reveals that the court did not question appellant regarding his reasons for entering an *Alford* plea prior to its approval and acceptance. *Id. Padgett, supra,* at 337-339. In fact, when asked by the trial judge what plea appellant personally wished to enter he stated, "I plead no contest. I plead guilty." Only through further questioning by the trial court did appellant acknowledge that he wished to plead guilty by way of *Alford.* The state even concedes in its brief that "the trial court did not specifically question appellant about his motivation for the plea."

{¶61} Appellant subsequently moved to withdraw his *Alford* plea prior to the start of the September 30, 2014 sentencing hearing. Appellant continued to express his innocence at that time. Specifically, as two other individuals were also apprehended at the scene, appellant claimed that he in fact did not possess or use heroin and stressed that no DNA testing was done on the syringe found in the alleyway. Appellant further claimed he was advised by BCI that DNA testing could be performed on liquid heroin

found in a syringe. Defense counsel indicated, however, that BCI would not perform that test. The trial court denied his pre-sentence motion.

{¶62} The record establishes that appellant's plea was insufficient under *Alford.* The trial judge did not inquire as to why appellant wanted to plead guilty while asserting his innocence. For example, appellant never stated, "I am pleading guilty because I am innocent and here is why." Also, appellant pleaded guilty to the indictment as charged. There was no reduction in the potential sentence he could have received had he gone to trial. The state alleges that "one can conclude that appellant entered this plea in order to receive a more lenient sentence." However, this writer stresses that the trial court did not follow the jointly recommended sentence of community control but rather handed down the maximum sentence.

{¶63} I determine the trial court erred by not engaging in the proper *Alford* inquiry prior to accepting appellant's plea and further abused its discretion in subsequently denying his pre-sentence motion to withdraw his *Alford* plea.

{¶64} Thus, this writer believes appellant's first assignment of error is with merit.

{¶65} In his second assignment of error, appellant contends the trial court erred in sentencing him to the maximum prison term for a non-violent felony of the fifth degree. I agree.

{¶66} R.C. 2953.08(G) and the clear and convincing standard should be applied to determine whether a felony sentence is contrary to law. *See, e.g., State v. Venes*, 8th Dist. Cuyahoga No. 98682, 2013-Ohio-1891, ¶10; *State v. Drobny*, 8th Dist. Cuyahoga No. 98404, 2013-Ohio-937, ¶5, fn.2; *State v. Kinstle*, 3rd Dist. Allen No. 1-

11-45, 2012-Ohio-5952, ¶47; *State v. Cochran*, 10th Dist. Franklin No. 11AP-408, 2012-Ohio-5899, ¶52.

{¶67} In reviewing a felony sentence, R.C. 2953.08(G) provides:

{¶68} "(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

{¶69} "The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

{¶70} "(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

{¶71} "(b) That the sentence is otherwise contrary to law."

{¶72} Although trial courts have full discretion to impose any term of imprisonment within the statutory range, they must consider the sentencing purposes in R.C. 2929.11 and the guidelines contained in R.C. 2929.12.

{¶73} Under H.B. 86, pursuant to the principles and purposes of sentencing, R.C. 2929.11 provides: "[t]he overriding purposes of felony sentencing 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(A). (Emphasis added.) Thus, the legislature has given us the tools as well as a mandate to address the issues of keeping dangerous criminals off the street, while balancing Ohio's financial deficits and an already overcrowded prison system.

{¶74} The guidelines contained in R.C. 2929.12, specifically at (E), state:

{¶75} "(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

{¶76} "(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

{¶77} "(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

{¶78} "(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

{¶79} "(4) The offense was committed under circumstances not likely to recur.

{¶80} "(5) The offender shows genuine remorse for the offense."

{¶81} The charge at issue involves a non-violent fifth degree felony. The trial court's sentence of 12 months in prison is within the statutory range for such an offense. *See* R.C. 2929.14(A)(5) ("[f]or a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.) In fact, appellant concedes that the 12-month sentence is within the statutory guidelines of possible prison terms for a fifth degree felony. However, appellant asserts that the 12-month maximum sentence does not conform with the principles and purposes of sentencing.

{¶82} Pursuant to H.B. 86, R.C. 2929.13 contains no prison requirement for fourth and fifth degree felonies. Rather, R.C. 2929.13(B)(1) creates a preference for community control sanctions unless the offender was previously convicted of or pleaded guilty to a felony offense.

{¶83} In the case at bar, after determining whether appellant was likely to re-offend, R.C. 2929.11 required the trial court to use the "minimum sanctions available" to protect the public and punish the offender. In choosing the maximum possible sentence, the trial court did not comply with R.C. 2929.11 based on the facts presented.

{¶84} Appellant began drinking alcohol on a regular basis at the age of 15. Appellant admitted he is an alcoholic. Appellant also has a history of drug addiction. Appellant admitted this fact at sentencing. Appellant suffers from depression. He was diagnosed with Bipolar Disorder. Appellant's physical health is poor due to his addictions. He was hospitalized after contemplating suicide by overdosing. He attended group sessions but declined individual therapy due to financial reasons.

{¶85} Appellant expressed remorse and acknowledged that he needs help. Appellant has had run-ins with the law from the time he was a juvenile due to his addictions. He has committed various misdemeanor and felony offenses. In fact, appellant was convicted on April 19, 2013 for another fifth degree felony offense involving possession of heroin.

{¶86} I agree with the trial court that appellant has undergone treatment options and yet continues to abuse illegal controlled substances. I am suspect, however, that a maximum prison sentence is justified in this case.

{¶87} As stated, appellant entered into a jointly recommended sentence with the state. The plea agreement indicated the prison term range was between six to 12 months. The plea agreement further indicated that appellant *did not face mandatory time in prison* for the offense.

{¶88} Specifically, the agreement stated: "I understand for this offens[e] that I *do not face mandatory time in prison*." (Emphasis added.) Such was signed by appellant on July 21, 2014. In addition, defense counsel stipulated and signed the agreement as follows: "I have, prior to these proceedings, advised my client that he *does not face mandatory prison term* as a consequence of this 'Guilty' by way of *Alford* plea." (Emphasis added.) The assistant prosecutor also agreed to those terms and signed the document.

{¶89} The state's position on sentencing in exchange for the *Alford* plea was a minimum license suspension and community control. Appellant and his defense counsel agreed to the recommended sentence. I am aware that the trial court was not *required* to impose the jointly recommended sentence. *See State v. Zenner*, 11th Dist. Lake No. 2004-L-008, 2005-Ohio-6070, ¶26. However, based on my position under appellant's first assignment of error, and based on the facts presented in this case as a whole, I find the trial court erred in imposing the maximum sentence upon appellant.

{¶90} Thus, I believe appellant's second assignment of error is with merit.

{¶91} Accordingly, as this writer would reverse and remand, I respectfully dissent.