

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2010-12-336 |
| - vs - | : | <u>OPINION</u> |
| | : | 8/8/2011 |
| CHARLES J. MILLER, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-08-1413

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkanhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011-6057, for plaintiff-appellee

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HUTZEL, J.

{¶1} Defendant-appellant, Charles J. Miller, appeals the sentence imposed by the Butler County Court of Common Pleas following his guilty plea to attempted domestic violence.

{¶2} On September 29, 2010, appellant was indicted on one count of domestic violence. After initially pleading not guilty to the charge, appellant pled guilty to one count

of attempted domestic violence, in violation of R.C. 2923.02 and 2919.25, a fifth-degree felony. The trial court subsequently held a sentencing hearing on December 14, 2010.

{¶3} At the sentencing hearing, appellant's counsel acknowledged that appellant had battled an alcohol issue for years, but claimed he was improving notwithstanding the situation that resulted in the case at bar. Facing a maximum 12-month prison sentence, appellant noted that he had already served approximately four months in jail. Appellant's counsel then implored the trial court to, "consider putting him on probation, let that balance be over his head, and it would be a great incentive for him to maintain his sobriety as opposed to just sending him to prison * * *."

{¶4} The victim then addressed the court and expressed that she feared for her life in the event appellant was released. She told the court that, "I'm very much in fear of him. He's right, when he drinks, he comes after me. He told me he would kill me. I'm very much in fear of my life. My daughter is afraid of what he'll do to me." The victim further stated that while she obtained a restraining order against appellant, she had no confidence in its ability to deter him. Following this, appellant's counsel reiterated that placing appellant on probation with the threat of prison would provide incentive for him not to violate the protection order.

{¶5} The trial court found that appellant showed "[n]o remorse whatsoever" and sentenced him to 12 months in prison, with credit for 123 days of time served. In addition, the court ordered appellant to have no contact with the victim following his release.

{¶6} Appellant now appeals his sentence, advancing two assignments of error for review.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ISSUED A SENTENCE CONTRARY TO LAW, TO THE PREJUDICE OF THE APPELLANT, BY IMPOSING A MAXIMUM PRISON TERM."

{¶9} Appellant argues that the trial court erred in imposing the maximum sentence when the record did not support that appellant committed one of the worst forms of the offense or posed the greatest likelihood of committing future crimes.

{¶10} "When an appellate court reviews a trial court's sentence, it must first 'examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law.' If the sentence meets the first prong, then 'the trial court's decision shall be reviewed under an abuse-of-discretion standard.'" *State v. Bishop*, Clermont App. No. CA2010-08-054, 2011-Ohio-3429, ¶14, quoting *State v. Kalish*, 120 Ohio St.3d 23, 2008–Ohio–4912, ¶4.

{¶11} "In applying the first prong of the test outlined in *Kalish*, a trial court must consider statutes specific to the case itself to ensure the sentence falls within the proper range. The trial court must also impose the correct term of postrelease control and consider the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12. However, the trial court still 'has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure.' If a trial court complies with the applicable statutes and rules, an abuse of discretion analysis follows." (Internal citations omitted.) *Bishop*, 2011-Ohio-3429 at ¶15, quoting *Kalish*, 2008-Ohio-4912 at ¶17.

{¶12} An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. Regarding sentencing, a trial court does not abuse its discretion as long as the trial court gave careful and substantial deliberation to the relevant statutory considerations. *Bishop* at ¶15.

{¶13} In applying the first prong of this test, the trial court imposed the maximum sentence of 12 months in prison. This prison sentence falls within the statutory range for

attempted domestic violence, a fifth-degree felony charge. R.C. 2929.14(A)(5). The trial court made clear in its judgment entry that it, "considered * * * the principles and purposes of sentencing under [R.C.] 2929.11, and has balanced the seriousness and recidivism factors of [R.C.] 2929.12 and whether or not community control is appropriate pursuant to [R.C.] 2929.13 * * *." As the first prong of the test is met, an abuse of discretion analysis is applied to our review of the trial court's sentence.

{¶14} "Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster*, 109 Ohio St.3d 1, 2006–Ohio–856, ¶100. As we have noted, the trial court made clear in its judgment entry that the seriousness and recidivism factors of the relevant statutes were considered in determining appellant's sentence. Furthermore, the trial court stated that it, "considered the record, the charges, [appellant's] Guilty Plea, and findings as set forth on the record and herein, oral statements, any victim impact statement and pre-sentence report," as well as the statutes discussed above. In turn, we find that the trial court gave careful and substantial deliberation to the relevant statutory considerations in imposing appellant's sentence and therefore did not abuse its discretion.

{¶15} Accordingly, appellant's first assignment of error is overruled.

{¶16} Assignment of Error No. 2:

{¶17} "THE TRIAL COURT ERRED IN IMPOSING BOTH A PRISON TERM AND COMMUNITY CONTROL SANCTIONS FOR A SINGLE OFFENSE."

{¶18} Appellant argues that the trial court erred by sentencing him to a prison term in addition to a subsequent no contact order.

{¶19} "Ohio's felony sentencing statutes were completely revised by Am.Sub.S.B. No. 2, effective July 1, 1996. Previous to Am.Sub.S.B. No. 2, it was a regular practice in

felony sentencing to impose a prison sentence, suspend the sentence, and then impose terms of probation. That option was by and large removed by the felony sentencing statutes adopted as part of S.B. 2. The current felony sentencing statutes, contained primarily in R.C. 2929.11 to 2929.19, require a judge either to impose a prison term or impose community-control sanctions." *State v. Baker*, 152 Ohio App.3d 138, 2002-Ohio-7295, ¶12.

{¶20} Based on this, Ohio courts have held that, "the sentencing statute does not allow a trial court to impose both a prison sentence and community control for the same offense." *State v. Jacobs*, 189 Ohio App.3d 283, 2010-Ohio-4010, ¶5. Instead, "the trial courts need to decide which sentence is most appropriate-prison or community control sanctions-and impose whichever option is deemed to be necessary." *State v. Vlad*, 153 Ohio App.3d 74, 2003-Ohio-2930, ¶16.

{¶21} In the present case, the trial court imposed both a prison sentence and a no contact order on appellant. This court has acknowledged that a no contact order is a form of community control. See *State v. Simms*, Clermont App. No. CA2009-02-005, 2009-Ohio-5440, ¶25. The state argues that the no contact order was merely a reinforcement of the already existing restraining order rather than a new community control sanction. The judgment entry, however, makes no reference to this restraining order. In addition, the trial court made numerous statements during the sentencing hearing that indicate that the order was intended to operate separately from the restraining order. The sentencing hearing and judgment entry make clear that the trial court intended to issue a new no contact order rather than simply reinforce the existence of a restraining order. As such, the trial court improperly imposed both a prison sentence and a community control sanction on appellant for the same offense.

{¶22} Accordingly, appellant's second assignment of error is sustained.

{¶23} Judgment affirmed as to the prison term, but reversed and vacated as to the no contact order.

POWELL, P.J., and RINGLAND, J., concur.