[Cite as *State v. Toennisson*, 2011-Ohio-5869.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2010-11-307
	:	CA2010-11-308
	:	CA2010-11-309
- vs -		
	:	
		O P I N I O N
JONATHAN TOENNISSON,	:	11/14/2011
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-03-0464

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

Brian K. Harrison, P.O. Box 80, Monroe, Ohio 45050, for defendant-appellant

POWELL, P.J.

{¶1} Defendant-appellant, Jonathan Hayden Toennisson, appeals from three judgments of the Butler County Court of Common Pleas entered pursuant to his guilty pleas. We have consolidated the judgments for review.

{¶2} On September 14, 2010, appellant pleaded guilty to one count of attempted robbery, a fourth-degree felony in violation of R.C. 2923.02 and R.C. 2911.02(A)(3); one count of attempted failure to appear, a fourth-degree felony in violation of R.C. 2923.02

and R.C. 2937.29; and one count of failure to comply with an order or signal of a police officer, a third-degree felony in violation of R.C. 2921.331(B).[1] The trial court sentenced appellant to concurrent 12-month prison terms for the attempted robbery and attempted failure to appear charges. The trial court also imposed a mandatory two-year prison term for the failure to comply charge to run consecutively to appellant's other sentences.

{¶3} Appellant timely appeals his sentence, raising two assignments of error for review.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ERRED WHEN IT IMPOSED SENTENCES THAT ARE CONTRARY TO LAW."

{¶6} In his first assignment of error, appellant argues the trial court erroneously assumed prison was mandatory for the failure to comply charge. According to appellant, "[h]ad the trial court correctly recognized that it had discretion whether or not to impose a prison term * * * then the trial court, upon applying the factors enumerated in R.C. 2921.331(C)(5)(b), may have elected instead to impose community control."

{¶7} When reviewing felony sentences, appellate courts must apply a two-step procedure. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶4. "[T]his court must (1) 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, and, if the first prong is satisfied, (2) review the sentencing court's decision for an abuse of discretion." *State v. Wiggins*, Warren App. No. CA2009-09-119, 2010-Ohio-5959, ¶7, citing *Kalish* at ¶4.

1. A detailed rendition of the facts underlying appellant's convictions is unnecessary for the purposes of this appeal.

{¶8} In addition to two fourth-degree felonies, appellant pleaded guilty to failure to comply with a police order, a third-degree felony in violation of R.C. 2921.331(B). The judgment entry pertaining to the failure to comply conviction stated:

{¶9} "Prison for a period of 2 years, which is a *mandatory* prison term pursuant to Revised Code Section 2929.13(F)." (Emphasis added.)

{¶10} R.C. 2929.14(A) provides that the sentencing range for a third-degree felony is one, two, three, four, or five years' imprisonment. The sentencing guidelines in R.C. 2929.12(C), however, do not provide a presumption in favor of either a prison sentence or community control for third-degree felonies. See, e.g., *State v. Little*, Butler App. No. CA2002-06-138, 2003-Ohio-1612, ¶6. That said, the sentencing guidelines in R.C. 2929.13(F) require a mandatory prison term for specific offenses, including some third-degree felonies. While unclear from the judgment entry, it appears the trial court relied on R.C. 2929.13(F)(7) in determining that appellant's sentence for failure to comply was "mandatory."[2]

{¶11} R.C. 2929.13 states, in pertinent part:

{¶12} "(F) Notwithstanding divisions (A) to (E) of this section, the court shall impose a prison term or terms under sections 2929.02 to 2929.06, section 2929.14, section 2929.142, or section 2971.03 of the Revised Code and except as specifically provided in section 2929.20, divisions (C) to (I) of section 2967.19, or section 2967.191 of the Revised Code or when parole is authorized for the offense under section 2967.13 of the Revised Code shall not reduce the term or terms pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code for any of the following offenses:

2. R.C. 2929.13(F)(1)-(6) and (8)-(18) do not pertain to the facts underlying appellant's convictions.

{¶13} "* * *

{¶14} "(7) Any offense that is a third degree felony and either is a violation of section 2903.04 of the Revised Code or an attempt to commit a felony of the second degree that is an offense of violence and involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person if the offender previously was convicted of or pleaded guilty to any of the following offenses:

{¶15} "(a) Aggravated murder, murder, involuntary manslaughter, rape, felonious sexual penetration as it existed under section 2907.12 of the Revised Code prior to September 3, 1996, a felony of the first or second degree that resulted in the death of a person or in physical harm to a person, or complicity in or an attempt to commit any of those offenses[.]"

{¶16} Upon review, we find no evidence to support the trial court's conclusion that appellant's sentence was mandatory within the meaning of R.C. 2929.13(F). Although the record reflects the facts underlying each charge, there is no mention of an attempted second-degree felony that would comport with R.C. 2929.13(F)(7), or what the facts surrounding that offense might have been.

{¶17} From the record before us, it appears the trial court mistakenly determined appellant's sentence was mandatory, which effectively precluded consideration of relevant statutory factors, such as available community control sanctions under R.C. 2929.13. See, also, R.C. 2929.11; R.C. 2929.12; R.C. 2921.331(C)(5)(b). Cf. *State v. Miller*, Butler App. No. CA2010-12-336, 2011-Ohio-3909, ¶13. Absent additional information supporting the trial court's decision, we have no choice but to conclude the trial court failed to comply with all applicable rules and statutes in imposing the sentence. *Kalish*, 2008-Ohio-4912, ¶4.

{¶18} Accordingly, we find appellant's sentence for the failure to comply charge is contrary to law. Pursuant to this finding, our review is at an end, and the mandatory portion of appellant's sentence cannot stand, based upon the record before us. See id. at ¶15.

{¶19} Appellant next argues the sentence for the failure to comply charge is contrary to law because the trial court did not specifically indicate it considered the factors under R.C. 2921.331(C)(5)(b) prior to imposing sentence. However, our resolution of appellant's first argument renders this argument moot.

{¶20} Appellant's first assignment of error is sustained to the extent indicated.

{¶21} Assignment of Error No. 2:

{¶22} "THE TRIAL COURT ERRED BY INCLUDING IN THE SENTENCING ENTRIES PROVISIONS THAT APPELLANT IS NOT TO BE CONSIDERED FOR OR RELEASED ON TRANSITIONAL CONTROL."

{¶23} In his second assignment of error, appellant argues the judgment entries of conviction contained language that categorically prohibited his admission into a transitional control program.

{¶24} The judgment entries addressed transitional control as follows:

{¶25} "Transitional Control Prison[:]

{¶26} "Admission into a Transitional Control Prison program is specifically objected to unless affirmative written permission is subsequently given by the sentencing judge."

{¶27} Appellant argues this language ran contrary to the purposes of R.C. 2967.26, therefore his sentence must be reversed. We disagree.

{¶28} R.C. 2967.26 allows for the creation of a transitional control program for

those nearing the end of their prison sentence. The statute reads, in pertinent part:

{¶29} "(2) At least three weeks prior to transferring to transitional control under this section a prisoner who is serving a term of imprisonment or prison term for an offense committed on or after July 1, 1996, the adult parole authority shall give notice of the pendency of the transfer to transitional control to the court of common pleas of the county in which the indictment against the prisoner was found and of the fact that the court may disapprove the transfer of the prisoner to transitional control and shall include a report prepared by the head of the state correctional institution in which the prisoner is confined. The head of the state correctional institution in which the prisoner is confined, upon the request of the adult parole authority, shall provide to the authority for inclusion in the notice sent to the court under this division a report on the prisoner's conduct in the institution and in any institution from which the prisoner may have been transferred. The report shall cover the prisoner's participation in school, vocational training, work, treatment, and other rehabilitative activities and any disciplinary action taken against the prisoner. If the court disapproves of the transfer of the prisoner to transitional control, the court shall notify the authority of the disapproval within thirty days after receipt of the notice. If the court timely disapproves the transfer of the prisoner to transitional control, the authority shall not proceed with the transfer. If the court does not timely disapprove the transfer of the prisoner to transitional control, the authority may transfer the prisoner to transitional control."

{¶30} As previously mentioned, the judgment entries specifically objected to transitional control, unless "affirmative written permission [was] subsequently given by the sentencing judge."

{¶31} Appellant argues this language preemptively prohibited his admission into

transitional control and therefore divested the trial court of all future discretion in the matter. Appellant also argues the parole authority could no longer determine a prisoner's eligibility for transitional control or submit its recommendation to the court for approval.

{¶32} In support of his argument, appellant cites *State v. Spears*, Licking App. No. 10-CA-95, 2011-Ohio-1538. In *Spears*, the Fifth District Court of Appeals held that judgment entries denying the possibility of transitional control prior to notice from the adult parole authority were premature and contrary to the purpose of R.C. 2967.26. Although the Fifth District did not quote the language of the offending entry, the court has since decided another case on the "exact issue," wherein the judgment entry stated, in absolute terms, "[t]he Court does not approve the Intensive Prison Program or Transitional Control." *State v. Oliver*, Delaware App. No. 11CAA020021, 2011-Ohio-3950. See, also, *State v. Hamby*, Montgomery App. No. 24328, 2011-Ohio-4542 (erroneous entry stating "[the court] disapproves the transfer of the defendant to transitional control under Section 2967.26 of the Revised Code").

{¶33} The judgment entries in this case are readily distinguishable from those in *Spears* and its progeny. The key distinguishing factor is the phrase: "*unless affirmative written permission is subsequently given by the sentencing judge*." (Emphasis added.) Through this language, the trial court retained the power to reconsider and, if prudent, overturn its initial objection to transitional control. As a result, the trial court could still review appellant's conduct upon receiving notice and a report from the adult parole authority.

{¶34} However, even without this language, we fail to see how R.C. 2967.26 prohibits the trial court from predetermining that transitional control is inapplicable during sentencing. The statutory language does not require the trial court to await a decision by

the adult parole authority in order to pass on transitional control, or, for that matter, intensive prison programs. Instead, the statute simply grants an undecided court additional discretion to consider a prisoner's good behavior, if and when the adult parole authority files notice and a report. R.C. 2967.26(A)(2).

{¶35} Moreover, even when confronted with a prisoner's good behavior, the trial court cannot abandon its most important obligation to protect the public and punish the offender. R.C. 2929.11; R.C. 2929.12. These duties transcend the trial court's obligation toward prisoners. Prior to any notice from the parole authority, a trial court must consider the principles and purposes of sentencing under R.C. 2929.11, and balance the seriousness and recidivism factors under R.C. 2929.12. If, during sentencing, the trial court properly considers these factors in addition to the charges, the findings set forth in the record, any oral statements, victim impact statements or presentence investigation reports, etc., then it may clearly determine that the reasons for its sentence would be defeated by later granting transitional control.

{¶36} Under these circumstances, we reject appellant's argument that the parole authority was somehow precluded from determining appellant's eligibility for transitional control, or that the trial court relinquished its power to subsequently approve the transfer. Moreover, we reiterate our firm position that R.C. 2967.26 does not prohibit the absolute denial of transitional control during sentencing, and that such a decision would not be premature.

{¶37} Appellant's second assignment of error is overruled.

{¶38} Judgment affirmed in part, reversed in part, and remanded for resentencing.

RINGLAND and HUTZEL, JJ., concur.