[Cite as *State v. Tucker*, 2012-Ohio-50.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-04-067
- vs -	:	O P I N I O N
	:	1/9/2012
FRANK THOMAS TUCKER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-11-1790

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HENDRICKSON, J.

{¶1} Defendant-appellant, Frank Thomas Tucker, appeals his sentence in the Butler County Court of Common Pleas entered pursuant to his guilty plea.

{¶2} On January 19, 2011, appellant pleaded guilty to one count of burglary, a third-degree felony in violation of R.C. 2911.12(A)(3); one count of grand theft, a fourth-degree felony in violation of R.C. 2913.02(A)(1); one count of aggravated possession of drugs, a fifth-degree felony in violation of R.C. 2925.11; one count of possession of drugs, a first-

degree misdemeanor in violation of R.C. 2925.11; and one count of receiving stolen property, a first-degree misdemeanor in violation of R.C. 2913.51(A). The trial court sentenced appellant to an aggregate prison term of four years. In the sentencing entry, the trial court addressed transitional control and intensive program prison (IPP) as follows:

{¶3} "Transitional Control Prison[:]

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

{¶5} "Intensive Programs Prison[:]

{¶6} "Admission into an Intensive Prison Program is specifically objected to unless affirmative written permission is subsequently given by the sentencing judge."

{¶7} Appellant timely appeals his sentence, raising one assignment of error for review:

{¶8} "THE TRIAL COURT ERRED BY DISAPPROVING INTENSIVE PROGRAMS PRISON AND/OR TRANSITIONAL CONTROL[.]"

I. Transitional Control

{¶9} Appellant first argues the trial court's objection to transitional control in the sentencing entry rendered him "instantly" ineligible for the program and precluded his opportunity for rehabilitation.

{¶10} We previously addressed this issue in *State v. Toennisson*, Butler App. Nos. CA2010-11-307, CA2010-11-308, CA2010-11-309, 2011-Ohio-5869. In *Toennisson*, we found that in reserving the right to give written permission for transitional control, the trial court retained the power to reconsider and, if prudent, overturn its initial objection. Id. at ¶33. Thus, contrary to appellant's argument, he did not "instantly attain ineligible status" as a result of this language, since the trial court remained free to consider his eligibility at a later date. R.C. 2967.26(A)(2). Moreover, nothing in the language of R.C. 2967.26 would have

prevented the trial court from rendering appellant ineligible for transitional control during sentencing. *Toennisson* at ¶34.

{¶11} In *Toennisson*, we also noted the trial court's obligation to promote prisoner rehabilitation was far outweighed by its primary duties to protect the public and punish the offender. Id. at ¶35. See, also, R.C. 2929.11; R.C. 2929.12. Thus, we reject appellant's argument as it relates to the overriding significance of his rehabilitation.

{¶12} Appellant also appears to suggest the trial court was required to make findings of fact and conclusions of law to support its objection to transitional control and give appellant prior notice of its decision. These arguments are also without merit. First, R.C. 2967.26(A) does not require the trial court to give reasons for its decision. Secondly, the statute only requires the court to timely notify the adult parole authority of its disapproval in response to a transfer request. The statute does not require notice to the offender himself.

{¶13} Accordingly, we reject appellant's arguments as they relate to transitional control.

II. Intensive Program Prison

{¶14} Intensive Program Prison "includes institutions that have military-type regimen programs as described in R.C. 5120.031 and institutions that focus on 'educational achievement, vocational training, alcohol and other drug abuse treatment, community service and conservation work, and other intensive regimens or combinations of intensive regimens.'" *State v. Howard*, Montgomery App. No. 23815, 2010-Ohio-5283, ¶11, quoting R.C. 5120.032.

{¶15} At appellant's plea hearing, counsel requested a community control sanction, rather than a prison sentence, to address appellant's mental health and substance abuse issues. The trial court acknowledged the request and ordered appellant to be evaluated for a specific community-based treatment program. After an evaluation, appellant was recommended for treatment in an IPP known as "SAMI" (Substance Abuse Mental Illness

Court), where he could receive substance abuse and mental health treatment, as well as vocational and educational assistance.

{¶16} Despite the recommendation, the sentencing entry objected to IPP "unless affirmative written permission [was] subsequently given by the sentencing judge."

{¶17} Appellant argues this language eliminated his opportunity for rehabilitation and arbitrarily denied his entry into IPP "without mentioning any findings of fact or conclusions of law in support of the denial on the record and without any prior form of notice to the offender."

{¶18} As an initial matter, we reject appellant's contention that the language eliminated his opportunity for rehabilitation where, as with transitional control, the trial court had a far more pressing duty to uphold the purposes and principles of felony sentencing, including punishing the offender and protecting society. See R.C. 2929.11; R.C. 2929.12.

{¶19} We also reject appellant's contention that he was entitled to prior notice of the court's decision to object to IPP in the sentencing entry. There is "no requirement that the court address a defendant during the sentencing hearing in regard to its recommendation of approval or disapproval for either placement in a shock incarceration program or an intensive prison program. Indeed, the court is not even required to make a recommendation at all." *State v. Lowery*, Trumbull App. No. 2007-T-0039, 2007-Ohio-6734, ¶10. See, also, R.C. 2929.14(I)(1); R.C. 2929.19(D). However, if the trial court does recommend or disapprove of IPP placement, R.C. 2929.19(D) requires it to make a finding "that gives its reasons for its recommendation or disapproval."

{¶20} Because the trial court chose not to disturb its objection to IPP, we must determine whether it gave sufficient reasons for its decision to comply with the findings requirement of R.C. 2929.19(D). While this court has not yet addressed the issue, the Fifth and Eleventh District Courts of Appeal have looked to the record as a whole to determine

whether the trial court gave specific reasons for disapproving or recommending IPP in compliance with R.C. 2929.19(D). See *Lowery*; *State v. Jackson*, Knox App. Nos. 05 CA 46, 05 CA 47, 2006-Ohio-3994.

{¶21} In *Jackson*, the Fifth District Court of Appeals found the trial court complied with R.C. 2929.19(D) during the sentencing hearing, where it noted defendant had a history of criminal convictions and had served prior prison terms. The Fifth District also found it significant that the trial court noted "the shortest prison term would demean the seriousness of [defendant's] conduct." *Jackson*, 2006-Ohio-3994 at ¶14.

{¶22} In *Lowery*, the trial court disapproved of defendant's placement into IPP and included its determination in the sentencing entry. To determine whether the trial court gave sufficient reasons for its disapproval, the Eleventh District Court of Appeals looked to the record as a whole, chiefly, the sentencing hearing transcript. The Eleventh District found the sentencing transcript established sufficient reasons for the trial court's disapproval, where the court noted appellant's "extensive" criminal history and various probation violations. Id. at ¶15-16. See also, R.C. 2929.19(D).

{¶23} We have examined both the plea hearing and the sentencing hearing transcripts and find the trial court was explicit in its decision. During the plea hearing, the trial court explained all options to appellant and the sentence was deferred because appellant requested a presentence investigation (PSI). The trial court ordered the PSI report to include an evaluation for placement in a community-based treatment program. As requested, the PSI recommended that appellant complete the SAMI program for mental health and substance abuse treatment.

{¶24} Additionally, while the court did not specifically mention "IPP" during the sentencing hearing, the transcript contains findings that could constitute its "implied reasons for disapproval[.]" *Howard*, 2010-Ohio-5283 at ¶39. First, the court considered the principles

and purposes of felony sentencing, as well as the need for "incapacitation, deterrents, rehabilitation, and restitution." The court also reviewed the victim impact statement, the PSI, and the pretrial services progress report, and found appellant "continue[d] to struggle with drug addiction and being substance free." The court continued, noting appellant failed four out of seven urine tests from December 2010 through February 2011, while these charges were pending, testing positive for various drugs including THC and Vicodin.

{¶25} In sum, we find the record as a whole provides sufficient reasons for the trial court's disapproval of IPP to comply with the findings requirement of R.C. 2929.19(D). See *Jackson*, 2006-Ohio-3994 at ¶15 (record provided sufficient reasons to support IPP disapproval, "even if such reasons were also applicable to other sentencing requirements under R.C. Chapter 2929"). See, also, *State v. Morris*, Knox App. No. 05CA35, 2006-Ohio-3248. Thus, the judgment entry language, as applied to these specific facts, did not arbitrarily or erroneously disapprove of appellant's transfer to IPP. Instead, the judgment entry simply reiterated the court's valid disapproval rendered during the sentencing hearing.

{¶26} Appellant's single assignment of error is overruled.

{¶27} Judgment affirmed.

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