[Cite as *State v. Young*, 2015-Ohio-1347.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
		CASE NO. CA2014-05-074
Plaintiff-Appellee,	:	
		O P I N I O N
	:	4/6/2015
- vs -		
	:	
CHRISTOPHER WAYNE YOUNG,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 13CR29719

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Fowler, Demos & Stueve, William G. Fowler, 12 West South Street, Lebanon, Ohio 45036-1708, for defendant-appellant

M. POWELL, J.

{¶ 1} Defendant-appellant, Christopher Young, appeals a decision of the Warren County Court of Common Pleas denying his motion to suppress and sentencing him to 60 months in prison following his conviction for illegal assembly of chemicals for the manufacture of drugs.

{¶ 2} In September 2013, appellant and his wife Ashley lived in a duplex in Lebanon,

Ohio. Detective John Wetzel of the Lebanon Police Department knew appellant had previously been convicted of manufacturing methamphetamine. In September 2013, upon receiving "drug tips" that methamphetamine abuse and manufacturing was occurring at appellant's residence, Detective Wetzel entered appellant's name and that of his wife into the National Precursor Log Exchange (NPLEx), a nationwide real-time electronic logging system used by pharmacies and law enforcement to track sales of over-the-counter cold and allergy medications containing pseudoephedrine.[1] The detective testified that if either appellant or Ashley purchased pseudoephedrine anywhere in the United States, an alert would be emailed to the detective.[2]

{¶ 3} On September 18, 2013, Detective Wetzel received an alert that Ashley had purchased pseudoephedrine at a Walgreens in Lebanon, Ohio. A week later, on September 25, the detective received an alert that Ashley had unsuccessfully tried to purchase pseudoephedrine at a Kroger in Lebanon, Ohio. Minutes later, the detective received an alert that appellant had purchased pseudoephedrine at that Kroger. Believing that appellant and Ashley might try to manufacture methamphetamine that evening, Detective Wetzel and a police officer went to appellant's home to try to make contact with appellant and Ashley.

{¶ 4} Once at appellant's home, Detective Wetzel went to the front door. The detective testified it looked like appellant and Ashley were home as the front window of their home was "wide open, unsecured" and the television was "blaring really loud." The detective knocked on the front door. Nobody answered. "[Feeling] like somebody was home with the T.V. being on and the house being left open," the detective walked to the back of the house and onto a back patio and knocked "real loud" on the back door. Once again, nobody

1. *See State v. Dillard*, 4th Dist. Meigs No. 13CA9, 2014-Ohio-4974. We note that the state's brief and the transcript of the suppression hearing both incorrectly refer to NPLEx as MPLEx.

2. Pseudoephedrine is a decongestant ingredient in many cold and allergy medications and is a necessary ingredient in the manufacture of methamphetamine.

answered.

{¶ 5} Sitting outside the back door was a trash can with an open trash bag. The detective noticed a Mountain Dew bottle sitting on the very top of the trash bag. The two-liter bottle was crushed and had a milky white residue inside of it. The bottle cap had a hole punched in it. Detective Wetzel testified that, based on his training and experience in investigating methamphetamine manufacture, those characteristics indicated the bottle had been used to produce methamphetamine. As the detective took a photo of the bottle with his cell phone, appellant and Ashley came home carrying Kroger grocery bags. Inside one of the bags was the pseudoephedrine appellant had purchased earlier that afternoon.

{¶ 6} Appellant and Ashley were interviewed separately at the scene. Appellant was very cooperative and ultimately granted Detective Wetzel consent to search his home. During the search, police officers found camping fuel and lithium batteries stripped of their lithium strips. The detective testified the items were indicative of methamphetamine manufacturing. Appellant admitted the pseudoephedrine pills were going to be used to manufacture methamphetamine but adamantly denied he was going to manufacture methamphetamine. Rather, appellant told the detective he was going to trade or sell the pseudoephedrine pills to a drug dealer. Appellant was arrested but was subsequently released on electronic monitoring.

{¶ 7} While out on bond, appellant was arrested in early November 2013 for stealing lithium batteries at a Walmart in Lebanon, Ohio. The record shows that appellant brought a couple, a man and a woman, with him to Walmart and gave them money to purchase pseudoephedrine at the store. At the time, appellant, Ashley, and the couple were all staying at the same motel. Appellant told Detective Wetzel that someone else was going to manufacture methamphetamine with the pseudoephedrine and the lithium batteries.

{¶ 8} In January 2014, appellant was indicted on two counts of illegal assembly of

chemicals for the manufacture of drugs in violation of R.C. 2924.041, both felonies of the third degree.[3] Both counts alleged that appellant, "two or more times previously, ha[d] been convicted of or pleaded guilty to a felony drug abuse offense and at least one of those convictions or guilty pleas was a violation of [R.C.] 2925.041(A)."

{¶ 9} Appellant moved to suppress the evidence seized in his home on the ground Detective Wetzel unlawfully invaded the curtilage of appellant's home when the detective entered the back patio without a warrant and knocked on the back door. In February 2014, a hearing on the motion was held during which Detective Wetzel and two other law enforcement officers testified. At appellant's request, the matter was set for a further hearing in March 2014. During that hearing, the property owner of the duplex occupied by appellant testified about the back patio. Photographs of the back patio were also admitted into evidence. Contrary to the testimony of Detective Wetzel and the other two officers, the testimony of the duplex property owner and the photographs of the back patio revealed that the patio was completely enclosed by a wooden fence. The fence was approximately six feet tall and had a gate through which to enter the patio. The gate was two-thirds the height of the fence. The property owner testified that the fence and the gate were built several years before 2013.

{¶ 10} On March 21, 2014, the trial court denied appellant's motion to suppress on the ground that Detective Wetzel's actions at appellant's home on September 25, 2013, did not violate appellant's Fourth Amendment rights. Specifically, the trial court found that Detective Wetzel's decision to proceed around the house to seek out a back door was a lawful "knock and talk." The trial court further found that the back patio was not part of the home's

3. Appellant was originally indicted on two counts of illegal assembly of chemicals for the manufacture of drugs in violation of R.C. 2925.04. However, on March 25, 2014, the trial court granted the state's motion to amend the indictment and "substitute[d] the correct statutory section of the violation, '[R.C.] 2925.041' in place of '[R.C.] 2925.04.'"

curtilage, and thus, the detective's "entry into this portion of the property and his observations [were] not barred by the Fourth Amendment." In support of its finding the patio was not part of the home's curtilage, the trial court noted that the gate was not closed or locked, and that appellant failed to protect the contents of the trash bag "from observation from people passing by." Finally, the trial court found that appellant "ultimately consented to a search of his home."

{¶ 11} Following the denial of his motion to suppress, appellant entered a plea of no contest to the two counts of illegal assembly of chemicals for the manufacture of drugs. Appellant subsequently filed a sentencing memorandum with the trial court in which he argued that the maximum allowed prison term for his offenses was 36 months. On May 1, 2014, the trial court sentenced appellant to 60 months in prison on each count of illegal assembly of chemicals for the manufacture of drugs, and ordered that the sentences be served concurrently, for an aggregate prison term of 60 months.

{¶ 12} Appellant appeals, raising two assignments of error.

{¶ 13} Assignment of Error No. 1:

{¶ 14} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT AND IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENT TO THE STATE AND FEDERAL CONSTITUTION BY DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE.

{¶ 15} Appellant argues the trial court erred in denying his motion to suppress. Appellant asserts that Detective Wetzel's presence on the back patio without a warrant or a legitimate basis for a warrantless search was a violation of the Fourth Amendment to the United States Constitution because the back patio was part of the home's curtilage.

{¶ 16} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8; *State v. Dean*, 12th Dist.

Fayette No. CA2013-03-007, 2014-Ohio-448, ¶ 8. When considering a motion to suppress, the trial court assumes the role of the trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *Burnside* at *id*. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Id.* Accepting these facts as true, the appellate court must then independently determine, as a matter of law, and without deference to the trial court's conclusions, whether the trial court applied the proper legal standard. *Id*.; *Dean* at *id.*

{¶ 17} The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their * * * houses * * * against unreasonable searches and seizures." A presumption of unreasonableness attaches to all warrantless home entries. *Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S.Ct. 2091 (1984). The Fourth Amendment's protection against warrantless home entries extends to the curtilage of an individual's home. *United States v. Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134 (1987); *State v. Williamson*, 12th Dist. Butler No. CA2003-02-047, 2004-Ohio-2209, ¶ 16. A house's curtilage is an area "[s]o intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *State v. Payne*, 104 Ohio App.3d 364, 368 (12th Dist.1995), quoting *Dunn* at 301.

{¶ 18} In *Dunn*, the United States Supreme Court set forth four factors to consider in determining whether a certain area outside the home itself should be treated as curtilage: (1) the proximity of the area claimed to be curtilage to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the steps taken by the resident to protect the area from observation by people passing by. *Dunn* at 301. These factors are not to be applied mechanically, but are simply "useful analytical tools" in determining "whether the area in question is so intimately tied to

the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.*

{¶ 19} Applying these factors to appellant's back patio, we find, unlike the trial court, that the patio was part of the home's curtilage for Fourth Amendment purposes. The first factor supports a finding that the back patio is part of the home's curtilage. The parties agree that the patio is immediately adjacent to the back of the home. In addition, the record shows that the patio is connected to the home by a back door such that residents of the home can walk directly onto the patio from inside the home. *United States v. Conrad*, 578 F.Supp.2d 1016, 1027-1028 (N.D.Ill.2008).

{¶ 20} Likewise, the second factor supports a finding that the back patio is part of the home's curtilage. As stated earlier, the testimony of the duplex property owner and photographs of the back patio show that the back patio was completely enclosed by a six-foot sight-obscuring wooden fence on September 25, 2013. The fence marked the back patio as a contiguous part of the home. Ingress into the patio, other than through the back door of the home, was only possible by entering through the four-foot tall gate. While not conclusive, "fencing configurations are important factors in defining the curtilage." *Dunn*, 480 U.S. at 301, fn. 4.

{¶ 21} The third factor is less clear. The physical arrangement of the patio suggests it is an extension of the home. Photographs of the patio show that it extends out from the main floor of the home and is connected by the back door, such that residents can walk directly onto the patio from the home. *Conrad*, 578 F.Supp.2d at 1028. Moreover, patios are traditionally associated with domestic use and activities. The state argues this factor favors excluding the patio from the home's curtilage because there is no evidence the patio was used for anything other than to store trash in a trash can. The state is correct that the record does not indicate whether other items were on the patio or how appellant and his wife used

the back patio. However, the lack of evidence on this issue must be construed against the state. Once a warrantless search is established, the state bears the burden of proof, including the burden of going forward with evidence, to show the validity of the search. *Xenia v. Wallace*, 37 Ohio St.3d 216, 218 (1988).

{¶ 22} Finally, the fourth factor supports a finding that the back patio is part of the home's curtilage. The placement of the fenced patio directly behind the home protects the patio from being visible to people passing by. *See Hardesty v. Hamburg Twp*., 461 F.3d 646, 653 (6th Cir.2006). In addition, there is no evidence that the back patio was an entrance point for members of the public. *See Conrad*. Contrary to the state's assertion, the fact that the fence surrounding the back patio was built by the duplex property owner and not by appellant is not determinative. Moreover, while the property owner testified it was possible to see between the slats of the fence, the photographs show that the patio is partially shielded from the public view. The fence limits the visibility into the interior of the patio, provides privacy, and along with the gate, defines an area with restricted access. *See Conrad* at 1028 (fencing which obscures visibility from the public can turn an area into curtilage).

{¶ 23} In light of the foregoing, we find that appellant's back patio was part of the home's curtilage. The trial court, therefore, erred in finding that the patio "[did] not constitute curtilage."

{¶ 24} Although appellant's back patio was part of the home's curtilage, "[a] law enforcement officer may enter a home's curtilage without a warrant if he has a legitimate law-enforcement objective, and the intrusion is limited." *Turk v. Comerford*, 488 Fed.Appx. 933, 947 (6th Cir.2012). One such permissible warrantless intrusion is the investigative technique known as "knock and talk," where a police officer knocks on the front door of a home for purposes of speaking to the occupants or asking for consent to search the premises. *Pritchard v. Hamilton Twp. Bd. of Trustees*, 424 Fed.Appx. 492, 499 (6th Cir.2011); *see also*

Kentucky v. King, 131 S.Ct. 1849 (2011). "An officer may initiate a knock and talk without any objective level of suspicion." *Pritchard* at *id*; *State v. Miller*, 2d Dist. Montgomery No. 24609, 2012-Ohio-5206, ¶ 16.

{¶ 25} "[W]here knocking at the front door is unsuccessful in spite of indications that someone is in or around the house, an officer may take reasonable steps to speak with the person being sought out even where such steps require an intrusion into the curtilage." *Hardesty*, 461 F.3d at 653. In *Hardesty*, the United States Sixth Circuit Court of Appeals held that although the homeowners' back deck was part of the home's curtilage, police officers did not violate the Fourth Amendment when they went onto the back deck to knock at the back door after no one answered when the officers knocked on the front door:

> In this case, there were indications that someone was present within the Hardesty home [the officers observed lights go off inside the house as they approached the house], knocking at the front door proved unsuccessful, proceeding around the house and onto the back deck was a reasonable step, and that step was directed towards initiating a conversation with the person or persons in the house. Therefore, the Hamburg officers' entry into the curtilage in order to effectuate the knock and talk investigative technique did not violate Plaintiffs' Fourth Amendment rights.

Hardesty at 654.

{¶ 26} In the case at bar, we find that Detective Wetzel's entry onto the back patio to effectuate the knock and talk did not violate appellant's Fourth Amendment rights. Detective Wetzel testified he went to appellant's home on September 25, 2013, to make contact with appellant and his wife, talk to them, and gather evidence. The detective testified "it looked like [appellant and his wife] were home" as the front window was "wide opened, unsecured" and "the T.V. was blaring really loud." After knocking on the front door proved unsuccessful, and "[feeling] like somebody was home with the T.V. being on and the house being left open," the detective walked to the back of the house and onto the fenced back patio and

knocked on the back door.

{¶ 27} We agree with the trial court that it was reasonable for Detective Wetzel to conclude, upon seeing the window open and the television on, that appellant or possibly another occupant was home, and after unsuccessful attempts to summon the occupants of the house, to go around to the back of the home for the purpose of determining whether someone was home. In light of the foregoing circumstances, the knock and talk exception justified the detective's decision to walk to the back door of the house and onto the fenced back patio.

{¶ 28} While he was on the back patio, the detective noticed the Mountain Dew bottle atop a trash can outside the back door. It is well-established that under the plain view doctrine, a police officer lawfully on a person's property may seize evidence in plain view without a warrant. *King*, 131 S.Ct. at 1858. Similarly, if a police officer is lawfully on a person's property, the "mere observation of an object in plain view does not constitute a search[.]" *State v. Buzzard*, 112 Ohio St.3d 451, 2007-Ohio-373, ¶ 16-17.

{¶ 29} With regard to contraband, the plain view doctrine authorizes the warrantless seizure of evidence if the initial intrusion leading to the discovery of the evidence was lawful and the incriminating or illegal nature of the items was immediately apparent. *State v. Simmons*, 12th Dist. Butler No. CA2012-11-229, 2013-Ohio-5088, ¶ 18. The "immediately apparent" requirement is satisfied when police have probable cause to associate an object with criminal activity. *State v. Halczyszak*, 25 Ohio St.3d 301 (1986), paragraph three of the syllabus. The requisite probable cause may arise from the character of the property itself or the circumstances in which it is discovered, and police officers may rely on their specialized knowledge, training, and experience in establishing probable cause to identify items as contraband. *Id.* at 304-305; *State v. Dennis*, 12th Dist. Warren No. CA2012-01-004, 2012-Ohio-4877, ¶ 18.

{¶ 30} Detective Wetzel was lawfully on appellant's back patio when he observed, in plain view, the Mountain Dew bottle atop an open trash bag in a trash can outside the back door. The two-liter bottle was crushed and had a milky white residue inside of it. The bottle cap had a hole punched in it. Detective Wetzel testified that, based on his training and experience in investigating methamphetamine manufacture, those characteristics indicated the bottle had been used to manufacture methamphetamine. The incriminating nature of the Mountain Dew bottle was therefore immediately apparent.

{¶ 31} In light of the foregoing, we find that although appellant's back patio was part of the home's curtilage, Detective Wetzel was lawfully on the back patio under the knock and talk investigative technique when he observed, in plain view, the Mountain Dew bottle and its immediately apparent incriminating nature. Consequently, appellant's Fourth Amendment rights were not violated. The trial court, therefore, did not err in denying appellant's motion to suppress.

{¶ 32} Appellant's first assignment of error is overruled.

{¶ 33} Assignment of Error No. 2:

{¶ 34} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT AND IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTION BY SENTENCING APPELLANT TO A TERM OF SIXTY MONTHS IN PRISON IN VIOLATION OF O.R.C. 2925.04. [sic]

{¶ 35} Appellant argues the trial court erred in sentencing him to 60 months in prison under R.C. 2925.041(C)(1), and not to 36 months in prison under R.C. 2929.14(A)(3). Both R.C. 2929.14 and 2925.041 were amended by H.B. 86, effective September 30, 2011. R.C. 2929.14 was, however, amended again in 2012.[4] As a result, appellant asserts that R.C.

4. The 2012 amendment did not affect or modify R.C. 2929.14(A)(3).

2929.14, as the later enacted statute, prevails over R.C. 2925.041. Appellant cites *State v. Dunning*, 12th Dist. Warren Nos. CA2013-05-048 and CA2013-06-058, 2014-Ohio-253, a decision from this court, in support of his argument.

{¶ 36} The state argues that when an irreconcilable conflict exists between two statutes that address the same subject, the special statute generally prevails as an exception to the general statute. As a result, the state argues appellant was properly sentenced under R.C. 2925.041, and not R.C. 2929.14. The state cites *State v. Shaffer*, 9th Dist. Medina Nos. 12CA0071-M and 12CA0077-M, 2014-Ohio-2461, in support of its argument.

{¶ 37} We review felony sentences pursuant to the standard of review set forth in R.C. 2953.08(G)(2) to determine whether the imposition of those sentences is clearly and convincingly contrary to law. *State v. Crawford*, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶ 6-7. A sentence is not clearly and convincingly contrary to law where the trial court considers the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible statutory range. *Id.* at ¶ 9.

{¶ 38} R.C. 2929.14(A)(3), which governs prison terms for third-degree felonies, states:

> (a) For a felony of the third degree that is a violation of [R.C.] 2903.06, 2903.08, 2907.03, 2907.04, or 2907.05 or that is a violation of [R.C.] 2911.02 or 2911.12 if the offender previously has been convicted of or pleaded guilty in two or more separate proceedings to two or more violations of [R.C.] 2911.01, 2911.02, 2911.11, or 2911.12, the prison term shall be twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months.
>
> (b) For a felony of the third degree that is not an offense for which division (A)(3)(a) of this section applies, the prison term shall be nine, twelve, eighteen, twenty-four, thirty, or thirty-six months.

{¶ 39} The statutory provisions listed in R.C. 2929.14(A)(3)(a) refer to certain vehicular

offenses, certain sexual offenses, and robbery and burglary. Importantly, illegal assembly of chemicals for the manufacture of drugs in not an offense listed in R.C. 2929.14(A)(3)(a). Thus, pursuant to R.C. 2929.14(A)(3)(a) and (b), appellant's maximum sentence for violating R.C. 2925.041 would be 36 months in prison.

{¶ 40} R.C. 2925.041 governs illegal assembly of chemicals for the manufacture of drugs and states, in relevant part:

> (C) Whoever violates this section is guilty of illegal assembly or possession of chemicals for the manufacture of drugs. Except as otherwise provided in this division, illegal assembly or possession of chemicals for the manufacture of drugs is a felony of the third degree, and * * * the court shall impose a mandatory prison term * * * as follows:
>
> (1) Except as otherwise provided in this division, there is a presumption for a prison term for the offense. * * * If the offender two or more times previously has been convicted of or pleaded guilty to a felony drug abuse offense and if at least one of those previous convictions or guilty pleas was to a violation of division (A) of this section, a violation of [R.C.] 2919.22(B)(6), or a violation of [R.C.] 2925.04(A), the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than five years.

{¶ 41} The record shows that appellant was previously convicted of "illegal manufacture of drugs, aggravated possession of drugs" and has a prior conviction for illegal assembly of chemicals for the manufacture of drugs under R.C. 2925.041(A). As a result, pursuant to R.C. 2925.041(C)(1), appellant's mandatory sentence for violating R.C. 2925.041 would be 60 months (5 years) in prison.

{¶ 42} In *Shaffer*, the decision cited by the state, the defendant entered a plea of no contest to illegal assembly of chemicals for the manufacture of drugs and was sentenced to five years in prison under R.C. 2925.041(C)(1). The Ninth Appellate District upheld the sentence on the ground that "the General Assembly intended R.C. 2925.041(C)(1) to be a specific exception to the general felony sentencing scheme set forth in R.C. 2929.14," and

thus, R.C. 2925.041(C)(1) prevailed over R.C. 2929.14:

> Here, similar to the facts in *Sturgill*, Ms. Shaffer's sentence for a felony of the third degree was increased from thirty-six months to five-years because R.C. 2925.041(C)(1) *specifically* mandates imprisonment of "not less than five-years" if certain conditions precedent are met. Additionally, as indicated above, both R.C. 2929.14 and R.C. 2925.041 were amended by H.B. 86 on September 30, 2011. As a result, we conclude that if the General Assembly wished to amend R.C. 2925.041(C)(1), in order to remove the penalty enhancement language, it would have done so at that time. Instead, the General Assembly amended R.C. 2925.041(C)(1) to state that the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than five years if "*two or more times previously [the offender] has been convicted of or pleaded guilty to a felony drug abuse offense and if at least one of those previous convictions or guilty pleas* was to a violation of division (A) of this section, a violation of division (B)(6) of section 2919.22 of the Revised Code, or a violation of division (A) of section 2925.04 of the Revised Code[.]" CA0077-M (Emphasis added.) (Italicized words indicate changes made to R.C. 2925.041(C)(1) in H.B. 86.)

Shaffer, 2014-Ohio-2461 at ¶ 14.

{¶ 43} In addressing the conflict between R.C. 2929.14 and 2925.041(C)(1), and seeking guidance with this matter, the Ninth Appellate District relied on this court's decision in *State v. Sturgill*, 12th Dist. Clermont Nos. CA2013-01-002 and CA2013-01-003, 2013-Ohio-4648. However, on March 23, 2015, this court explicitly overruled *Sturgill* and its progeny. *State v. Burkhead*, 12th Dist. Butler No. CA2014-02-028, 2015-Ohio-1085. The holding and analysis in *Sturgill* are therefore no longer good law in the Twelfth Appellate District.

{¶ 44} In *Dunning*, the case cited by appellant, the defendant was first sentenced to five years in prison following his 2013 guilty plea to illegal assembly of chemicals for the manufacture of drugs. While his appeal was pending, the trial court resentenced the defendant to three years in prison. On appeal, this court addressed sua sponte whether the trial court had jurisdiction to resentence the defendant while his original appeal was still pending, and held that the trial court did not. Thereafter, this court held that:

> That said, issues remain regarding the trial court's original decision sentencing Dunning to an aggregate five-year prison term. After a thorough review of the record, we find the trial court erred by sentencing Dunning to serve five years in prison resulting from his guilty plea to illegal possession or assembly of chemicals for the manufacture of drugs in violation of R .C. 2925.041(A), a third-degree felony. At the time of his original sentencing hearing, the maximum prison sentence for a third-degree felony was three years in prison. Therefore, the trial court's original sentencing decision in Case No. CA2013-05-048 is reversed and this matter is remanded for the sole purpose of resentencing Dunning according to law. Dunning's conviction is affirmed in all other respects. In making this decision, this court takes no position on whether the trial court may order Dunning to pay court costs upon remand for resentencing.

Dunning, 2014-Ohio-253 at ¶ 11.

{¶ 45} The defendant in *Dunning* was sentenced in 2013. Thus, the two statutory provisions at issue in the case at bar, to wit, R.C. 2929.14 and 2925.041(C)(1) as revised by H.B. 86, were also applicable in *Dunning*.

{¶ 46} R.C. 2925.041(C)(1) sets forth a specific sentencing scheme for third-degree felonies involving felony drug abuse offenses and is thus specific, rather than general, in nature. *See Shaffer*, 2014-Ohio-2461 at ¶ 14-15. Likewise, R.C. 2929.14(A)(3), which sets forth a specific, two-tiered sentencing scheme for third-degree felonies, is specific, rather than general, in nature. *See State v. Owen*, 11th Dist. Lake No. 2012-L-102, 2013-Ohio-2824, ¶ 27-28. The two statutes are clearly in conflict since the maximum sentence authorized for a third-degree felony drug offense under R.C. 2925.041(C)(1) is 60 months, while the maximum sentence allowed for third-degree felonies, other than those listed in R.C. 2929.14(A)(3)(a), is 36 months. Yet, R.C. 2925.041(C)(1) also incorporates by reference R.C. 2929.14 when the former states, "the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree * * *."

{¶ 47} In *Owen*, the Eleventh Appellate District emphasized the fact that one of the overriding purposes of felony sentencing under H.B. 86 is to "'punish the offender using the

minimum sanctions that the court determines accomplish those purposes.'" *Owen* at ¶ 30, quoting R.C. 2929.11. The appellate court found that the foregoing language "evinces the legislative intent that sentencing courts are to use the minimum sanctions available to accomplish the purposes of felony sentencing." *Id.*

{¶ 48} We must also be mindful of the rule of lenity which applies where there is an ambiguity in a statute or a conflict between statutes. *State v. Sheets*, 12th Dist. Clermont No. CA2006-04-032, 2007-Ohio-1799, ¶ 29. The rule of lenity is codified in R.C. 2901.04(A) which provides in relevant part that "sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." Under the rule of lenity, "a court will not interpret a criminal statute so as to increase the penalty it imposes on a defendant where the intended scope of the statute is ambiguous." *Sheets* at ¶ 28.

{¶ 49} In light of our decisions in *Dunning* and *Burkhead*, the fact this court overruled *Sturgill* and its progeny, and the rule of lenity, we find that appellant should have been sentenced under R.C. 2929.14(A)(3)(b), and not under R.C. 2925.041(C)(1). The trial court's decision to sentence appellant to 60 months in prison under R.C. 2925.041(C)(1) is therefore clearly and convincingly contrary to law and appellant's sentence must be vacated. *See* R.C. 2953.08(G)(2). On remand, the trial court should exercise its discretion in resentencing appellant to one of the prison terms set forth in R.C. 2929.14(A)(3)(b) up to 36 months in prison.

{¶ 50} Appellant's second assignment of error is sustained.

{¶ 51} Judgment affirmed in part, reversed in part, and cause remanded to the trial court with instructions to resentence appellant under R.C. 2929.14(A)(3)(b).

PIPER, P.J., and HENDRICKSON, J., concur.