

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 2014-CA-67
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2014-CR-4
v.	:	
	:	(Criminal Appeal from
DONTAY YARBROUGH	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 1st day of May, 2015.

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FAIN, J.

{¶ 1} Defendant-appellant Dontay Yarbrough appeals from his sentence for

Failure to Comply in violation of R.C. 2921.331(B). Yarbrough contends that the trial court erred by imposing the maximum sentence. He further contends that the trial court erred by failing to consider the factors set forth in R.C. 2921.331(C)(5)(b).

{¶ 2} We conclude that there is nothing in the record to support the claim that the trial court erred in sentencing, or that it failed to consider the factors set forth in R.C. 2921.331(C)(5)(b). Accordingly, the judgment of the trial court is Affirmed.

I. Yarbrough Leads State Troopers on a Motor Vehicle Chase

{¶ 3} In late December 2013, Ohio State Troopers responded to a call regarding a reckless driver operating a black Chevy Tahoe with license plate number EKU7992. Upon spotting the vehicle, a trooper pulled behind it. After verifying the license plate number, the trooper activated his overhead lights and siren. The vehicle did not stop, and instead continued on Columbia Avenue traveling at an average speed of 73 miles per hour for over a mile. The car reached speeds of 80 miles per hour. The driver, later identified as Yarbrough, drove across the grass median, and began driving east on the westbound side of the roadway, into oncoming traffic. After traveling about 0.2 miles, the car crossed back over the grass median, and continued on Columbia Avenue. The vehicle turned onto Fountain Avenue, and the trooper lost sight of it.

{¶ 4} The trooper terminated the pursuit, but later spotted the car at a red light at John Street and Limestone Street. At that point, the trooper attempted to drive through a parking lot to get to the vehicle, but Yarbrough drove through the same lot. He almost struck the trooper's cruiser, before heading north on South Limestone Street.

{¶ 5} The chase continued with Yarbrough reaching speeds in excess of 90 miles

per hour, while weaving through traffic. When Yarbrough attempted to make a left turn onto North Street, he struck the sidewalk curb, went onto the sidewalk and traveled into a fence. Yarbrough exited the car and ran away. He was observed throwing a bag of marijuana away from him. The bag was later recovered.

II. The Course of Proceedings

{¶ 6} Yarbrough was indicted on one count of Failure to Comply, a felony of the third degree. He ultimately pled guilty. At the sentencing hearing, trial court sentenced Yarbrough to a prison term of three years. The trial court also imposed a ten-year driver's license suspension. Yarbrough appeals.

III. The Sentencing Entry Reflects that the Trial Court Considered the Purposes and Principles of Sentencing, as well as the Statutory Factors, and the Trial Court Did Not Err in Imposing Sentence

{¶ 7} Yarbrough's First Assignment of Error states:

THE TRIAL COURT'S SENTENCE IS CONTRARY TO LAW AND A
LESSER SENTENCE IS COMMENSURATE WITH AND WOULD NOT
DEMEAN THE SERIOUSNESS OF THE OFFENSE.

{¶ 8} Yarbrough claims that the trial court erred in sentencing by imposing the maximum sentence without considering either the principles and purposes of sentencing under R.C. 2929.11 or the seriousness and recidivism factors set forth in R.C. 2929.12. He further contends that there is no indication in the record that the trial court considered the record, oral statements, victim statements or the presentence report.

{¶ 9} In *State v. Miller*, 2d Dist. Clark No. 09CA28, 2010-Ohio-2138, at ¶ 43, we held that a sentence is not improper merely because the trial court does not mention either R.C. 2929.11 or 2929.12 at the sentencing hearing. We noted that the trial court, in its journal entry, stated that it had considered “the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and [had] balanced the seriousness and recidivism factors [under] Ohio Revised Code Section 2929.12.” *Id.* We further stated that “[b]ecause a trial court speaks only through its journal entries, [a] sentence is not contrary to law merely because the trial court failed to cite either statute during the sentencing hearing.” *Id.*, citing *State v. Cave*, 2d Dist. Clark No. 09–CA–6, 2010-Ohio-1237, ¶ 10. “Furthermore, even if there is no specific mention of those statutes in the record, ‘it is presumed that the trial court gave proper consideration to those statutes.’ ” *Id.*, quoting *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at n. 4.

{¶ 10} We note here that Yarbrough's three-year sentence is within the statutory range for a third-degree felony. See R.C. 2929.14(A)(3). In its journalized judgment entry of conviction, the trial court specifically stated that it had considered the record, oral statements of counsel, the defendant's statement, the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and then balanced the seriousness and recidivism factors under Ohio Revised Code Section 2929.12. The court informed Yarbrough during sentencing about postrelease-control requirements.

The court noted the PSI indicated that Yarbrough had been convicted previously of Trafficking in Heroin, also a felony offense, for which he was sentenced to five years of community control sanctions. That sentence was in effect at the time of the current offense. Furthermore, the PSI shows that Yarbrough had an extensive juvenile record

{¶ 11} We have no basis for clearly and convincingly concluding that Yarbrough's sentence is either contrary to law or an abuse of discretion. Accordingly, the First Assignment of Error is overruled.

IV. A Trial Court Is Not Required to Make Reference to R.C.

2921.331(C)(5)(b) Factors at Sentencing or in its Sentencing Entry

{¶ 12} Yarbrough's Second Assignment of Error is as follows:

THE TRIAL COURT FAILED TO CONSIDER THE FACTORS
ENUMERATED IN 2921.331.

{¶ 13} Yarbrough argues that the trial court erred in sentencing because it failed to consider the factors contained in R.C. 2921.331(C)(5)(b). He appears to base this claim upon the fact that the trial court did not mention the factors at sentencing or in its termination entry.

{¶ 14} R.C. 2921.331(C)(5)(b) states as follows:

If a police officer pursues an offender who is violating division (B) of this section and division (C)(5)(a) of this section applies, the sentencing court, in determining the seriousness of an offender's conduct for purposes of sentencing the offender for a violation of division (B) of this section, shall consider, along with the factors set forth in sections 2929.12 and 2929.13 of

the Revised Code that are required to be considered, all of the following: (i) The duration of the pursuit; (ii) The distance of the pursuit; (iii) The rate of speed at which the offender operated the motor vehicle during the pursuit; (iv) Whether the offender failed to stop for traffic lights or stop signs during the pursuit; (v) The number of traffic lights or stop signs for which the offender failed to stop during the pursuit; (vi) Whether the offender operated the motor vehicle during the pursuit without lighted lights during a time when lighted lights are required; (vii) Whether the offender committed a moving violation during the pursuit; (viii) The number of moving violations the offender committed during the pursuit; (ix) Any other relevant factors indicating that the offender's conduct is more serious than conduct normally constituting the offense.

{¶ 15} Yarbrough has not cited, and we have not found, authority for the proposition that a trial court must include reference to R.C. 2921.331(C)(5)(b) factors in its judgment entry or during the sentencing hearing. Indeed, case law holds to the contrary -- there is no requirement for the court to make any specific finding in relation to R.C. 2921.331(C)(5)(b). *State v. Owen*, 8th Dist. Cuyahoga No. 89948, 2008-Ohio-3555. *Accord State v. Reed*, 10th Dist. Franklin No. 08AP-20, 2008-Ohio-6082.

{¶ 16} Furthermore, we find nothing in the record to support the claim that the trial court failed to consider these factors when imposing sentence. At both the plea and sentencing hearings, the facts regarding the length of the chase, the speeds, and Yarbrough's traffic violations during the chase were recited by the State. This afforded the trial court the opportunity to assess the seriousness of Yarbrough's conduct. Again,

the trial court is not required to state its findings on the record. And absent any indication that the trial court did not consider these factors, we presume that the trial court acted properly. *State v. Adams*, 37 Ohio St.3d 295, 525 N.E.2d 1361 (1988).

{¶ 17} Yarbrough's Second Assignment of Error is overruled.

V. Conclusion

{¶ 18} Both of Yarbrough's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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WELBAUM, J., concurs.

FROELICH, P.J., concurring:

{¶ 19} I would not presume that a sentencing court gives proper consideration to all the sentencing statutes if there is nothing in the record for the court to consider. I concur based on the record in this case which includes uncontradicted facts in the PSI and the plea and sentencing hearings.

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