

[Cite as *State v. T.M.B.*, 2015-Ohio-893.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 26241
Plaintiff-Appellee	:	
	:	Trial Court Case No. 13-CR-538
v.	:	
	:	(Criminal Appeal from
[T.M.B.]	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 13th day of March, 2015.

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HALL, J.

{¶ 1} [T.M.B.] appeals from his conviction and sentence on one count of pandering sexually-oriented material involving a minor in violation of R.C. 2907.322(A)(5).

{¶ 2} In two related assignments of error, [T.M.B.] contends the trial court erred in denying his motion for intervention in lieu of conviction (ILC). First, he challenges the trial court's finding that he was statutorily ineligible for ILC because his offense was a fourth-degree felony sex offense. Second, he challenges the trial court's finding that ILC would demean the seriousness of his offense, which also made him statutorily ineligible.

{¶ 3} The charge against [T.M.B.] stemmed from the discovery of a single video on his I-Pod depicting sexual activity between an adult and a thirteen-year-old boy. Although [T.M.B.] admitted downloading pornographic files, he professed not to know one of them contained child pornography. He also claimed he did not know how to delete the child pornography without returning his I-Pod to its factory settings, which he did not do. (See ILC Report at 2).

{¶ 4} Following his indictment, [T.M.B.] moved for ILC, asserting that drug and alcohol abuse and mental illness were factors in his offense. Following an ILC evaluation and a hearing, the trial court overruled his motion. The trial court found him ineligible for ILC for two reasons: (1) his conviction for a fourth-degree felony sex offense was a statutory factor giving it discretion to impose a prison sentence, thereby making ILC unavailable, and (2) granting ILC would demean the seriousness of his offense. (Doc. #36). [T.M.B.] then entered a no-contest plea, and the trial court found him guilty. It imposed a community-control sanction. This appeal followed.

{¶ 5} In his first assignment of error, [T.M.B.] contends the trial court erred in

finding him ineligible for ILC on the basis that his sex offense gave it discretion to impose a prison term. The State has conceded the trial court's error on this issue, and we agree.

{¶ 6} The trial court found that the presence of one or more of the sentencing factors in R.C. 2929.13(B)(1)(b)(i)-(xi) constitutes a bar to ILC eligibility. One of those factors is that "[t]he offense is a sex offense that is a fourth or fifth degree felony[.]" R.C. 2929.13(B)(1)(b)(v). Because this factor exists in [T.M.B.]'s case, the trial court concluded that he is ineligible for ILC.

{¶ 7} Notably, however, the trial court's ruling predated *State v. Taylor*, 15 N.E.3d 900, 2014-Ohio-2821 (2d Dist.). In *Taylor*, we held that the existence of an R.C. 2929.13(B)(1)(b) factor, which gives a trial court discretion to impose either community control or a prison sentence, *does not* make an offender ineligible for ILC. In fact, we reached the opposite conclusion, holding that the presence of an R.C. 2929.13(B)(1)(b) factor means any community-control sanction imposed necessarily would be imposed "under R.C. 2929.13(B)(2)." Therefore, we found that the defendant in *Taylor* was eligible for ILC pursuant to R.C. 2951.041(B)(1), which authorizes ILC where, among other things, an offender "is charged with a felony for which the court, upon conviction, would impose a community control sanction on the offender under division (B)(2) of section 2929.13 of the Revised Code * * *." *Id.* at ¶ 7-14. This court has applied and followed *Taylor* in four recent cases. See *State v. Washington*, 2d Dist. Montgomery No. 26173, 2015-Ohio-37; *State v. Browning*, 2d Dist. Montgomery No. 26174, 2014-Ohio-4857; *State v. Crawford*, 2d Dist. Montgomery No. 26073, 2014-Ohio-4599; *State v. Ward*, 2d Dist. Montgomery

No. 25988, 2014-Ohio-3505.

{¶ 8} Based on the foregoing authority, we agree with the parties that the trial court erred in finding [T.M.B.] statutorily ineligible for ILC based on the presence of an R.C. 2929.13(B)(1)(b) factor, namely his commission of a fourth-degree felony sex offense. The first assignment of error is sustained.

{¶ 9} In his second assignment of error, [T.M.B.] contends the trial court erred in also finding him ineligible for ILC because it would demean the seriousness of his offense. In support, the trial court reasoned:

Further, the Court finds that, under O.R.C. 2951.041(B)(6), ILC would demean the seriousness of the offense charged. The Legislature has determined that a person convicted of Pandering Sexually Oriented Material Involving a Minor must be classified as a Tier II sex offender. To grant ILC for such a charge would thereby negate the reporting requirements and restrictions on living within 1,000 feet of a school and would demean the seriousness of the offense.

(Doc. #36 at 3).

{¶ 10} “In order for an offender to be statutorily eligible for ILC, the trial court must find that all ten of the criteria set forth in R.C. 2951.041(B) are met.” *State v. Branch*, 2d Dist. Montgomery No. 25261, 2013-Ohio-2350, ¶ 15. One of those prerequisites is that “[t]he offender’s drug usage, alcohol usage, mental illness, or intellectual disability, whichever is applicable, was a factor leading to the criminal offense with which the offender is charged, *intervention in lieu of conviction would not demean the seriousness*

of the offense, and intervention would substantially reduce the likelihood of any future criminal activity.” (Emphasis added.) R.C. 2951.041(B)(6). ““Eligibility determinations are matters of law subject to de novo review.”” *Branch* at ¶ 15, quoting *State v. Baker*, 2d Dist. Montgomery No. 24510, 2012-Ohio-729, ¶ 8. Therefore, we conduct a de novo review of the trial court’s finding that ILC would demean the seriousness of [T.M.B.]’s offense. *Id.*

{¶ 11} The trial court reached its conclusion based on the fact that being convicted of a Tier II sex offense triggers certain sex-offender reporting and residence requirements. The trial court reasoned that circumventing those requirements by avoiding a conviction would demean the seriousness of [T.M.B.]’s offense. We note, however, that the requirements cited by the trial court apply to *all* convicted felony sex offenders. Thus, the trial court’s stated reason for denying ILC would necessarily preclude ILC eligibility for anyone convicted of a fourth or fifth-degree felony sex offense. This result would be in tension with our determination above that committing a fourth or fifth-degree felony sex offense does not automatically make an offender ineligible for ILC.

{¶ 12} In our view, an offender cannot be categorically excluded from ILC eligibility for a lower-level felony sex offense when the legislature otherwise has created eligibility. We agree with [T.M.B.] that the trial court’s decision effectively adopts a blanket policy to deny ILC in all cases involving felony sex offenses. This is so because the trial court’s reason would apply in all such cases. When determining whether ILC would demean the seriousness of a particular offense under R.C. 2951.041(B)(6), however, courts should take a case-specific approach rather than make a broad policy-based decision, which is the function of the General Assembly. In this regard, we note that R.C. 2951.041(B)

precludes ILC eligibility for offenses specified there. If the General Assembly intended to withhold ILC eligibility for fourth and fifth-degree felony sex offenses, it presumably would have included them there.

{¶ 13} In *State v. Rice*, 180 Ohio App.3d 599, 2009-Ohio-162, 906 N.E.2d 506 (2d Dist.), this court cautioned against adopting a blanket policy of denying all ILC requests without a hearing and without regard to the facts and circumstances of the particular case. *Id.* at ¶ 20. Here, of course, the trial court *did* hold a hearing, but the reason given for denial was only the nature of the charge and associated reporting requirements. In finding that ILC would demean the seriousness of [T.M.B.]’s offense, the trial court did not mention any of the case-specific evidentiary materials he submitted. Instead, it reasoned that granting ILC “for such a charge” as his would negate the sex-offender reporting and residence requirements, thereby demeaning the seriousness of his offense.

{¶ 14} The State nevertheless insists that the trial court did not rely on an improper “blanket policy” to deny ILC to *all offenders* because its ruling only denies ILC eligibility to *all sex offenders*. (Appellee’s brief at 6). We recognize that the trial court’s rationale extends only to sex offenders, not all offenders generally. The result, however, is the same. For the same reason that it is improper for a court to adopt a blanket policy denying ILC in all cases, we believe it is improper to adopt a blanket policy denying ILC eligibility in all cases involving sex offenders where, as here, the General Assembly otherwise has provided eligibility. Doing so effectively adds an eligibility condition not found in the ILC statute.

{¶ 15} For the foregoing reasons, we conclude that the trial court erred in finding

[T.M.B.] statutorily ineligible for ILC because we do not believe his commission of a fourth-degree felony sex offense per se precludes eligibility, although [T.M.B.]’s commission of a sex offense may be relevant to whether he should be placed on ILC. Accordingly, the second assignment of error is sustained.

{¶ 16} Having sustained [T.M.B.]’s two assignments of error, we reverse the trial court’s judgment and remand the cause for further proceedings consistent with this opinion. On remand, the trial court remains free to determine, based on the case-specific evidence before it, whether ILC would demean the seriousness of [T.M.B.]’s offense. If the trial court determines that ILC would not demean the seriousness of his offense, then [T.M.B.] will be eligible for ILC. If the trial court reaches that conclusion, it then will need to determine, in the first instance and in the exercise of its sound discretion, whether to grant him ILC. See, e.g., *Branch* at ¶ 20 (“Even when an offender satisfies all of the statutory eligibility requirements for ILC, the trial court has discretion to determine whether a particular offender is a good candidate for intervention.”).

{¶ 17} Judgment reversed and cause remanded.

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FROELICH, P.J., and WELBAUM, J., concur.

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