

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
WYANDOT COUNTY**

STATE OF OHIO

CASE NUMBER 16-03-06

PLAINTIFF-APPELLEE

v.

O P I N I O N

RYAN KAIL

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: November 24, 2003

ATTORNEYS:

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Shaw, J.

{¶1} This is an appeal from the judgment of the Wyandot Court of Common Pleas which sentenced Defendant-appellant, Ryan Kail (“Kail”) to six years in prison.

{¶2} On October 20, 2001, an Upper Sandusky Police Officer was attempting to pull Kail over when he sped away at a high rate of speed and later led police on a foot chase. Upon further investigation, the Upper Sandusky Police found cocaine and marijuana in Kail’s vehicle.

{¶3} On October 25, 2001, Kail was indicted on two counts of Possession of Cocaine pursuant to R.C. 2925.11(A), felonies of the second degree; one count of Possession of Cocaine with a major drug offender specification pursuant to R.C. 2925.11(A), a felony of the first degree; two counts of Tampering with Evidence pursuant to R.C. 2921.12(A)(1), felonies of the third degree; and one count of Possession of Marijuana pursuant to R.C. 2925.11(A), a felony of the third degree. On February 8, 2002, the state dismissed the major drug specification.

{¶4} Kail pled guilty to one count of possession of cocaine and one count of tampering with evidence. Thereafter, Kail filed a motion to withdraw his guilty plea stating that he did not understand that he would not be eligible for judicial release. On May 29, 2002, the trial court granted Kail’s motion and upon motion by the State reinstated the original six counts. The case was set for jury trial, however, Kail again plead guilty to one count of possession of cocaine and one

count of tampering with evidence. On March 14, 2003, the trial court sentenced Kail to three years on each count to be served concurrently.

{¶5} Kail now appeals, asserting three assignments of error, which will be discussed together.

The defendant’s sentencing is contrary to law, in derogation of the principles of sentencing, and imposes an unnecessary burden on state resources.

The sentence of the court is unlawful because the court imposed a “basic” prison term of 3 years, without giving all or part of that term as a mandatory term.

The sentencing of the trial court is unlawful because the sentence does not comport with all the requirements of section 2929.19 R.C. pertaining to sentencing an offender to prison.

{¶6} In reviewing a felony sentence, an “appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing” if it finds by clear and convincing evidence:

**That the record does not support the sentencing court’s findings under division (B) or (D) of section 2929.13, division E(4) of section 2929.14, or division (H) of section 2929.20 of the revised code, whichever if any is relevant; [or]
(2)That the sentence is otherwise contrary to law.**

{¶7} R.C. 2953.08(G)(2). Moreover, the trial court is in the best position to make the fact-intensive evaluations required by the sentencing statutes as the trial court has the best opportunity to examine the demeanor of the defendant and evaluate the impact of the crime on the victim and society. *State v. Martin* (1999), 136 Ohio App.3d 355, 361.

{¶8} The general purpose of sentencing is to punish the offender and to protect the public from future offenses. R.C. 2929.11. “To achieve these purposes, a court "shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.” *State v. Comer*, 99 Ohio St.3d 463, 466. Furthermore, the sentence should not be demeaning to the seriousness of the offender’s conduct and its impact on the victim and consistent with that given to similar crimes committed by similar offenders. R.C. 2929.11. Accordingly, when sentencing a defendant who has been convicted of a felony, the trial court must evaluate the factors set forth in 2929.12(B) and (C) relating to the "seriousness of the conduct" and the factors set forth in 2929.12(D) and (E) relating to the "likelihood of the offender's recidivism." To determine whether these factors are present, the trial court may examine the record, the testimony from any witnesses at the hearing and a PSI, if one is prepared. R.C. 2929.19(B)(1).

{¶9} R.C. 2929.14 provides that an offender who commits a felony of the third degree may be sentenced from one to five years in prison. Possession of Cocaine as a third degree felony carries a mandatory prison term. R.C. 2925.11(B)(4)(C). Accordingly, the court may sentence the offender to more than the minimum prison term if it finds at the sentencing hearing that the seriousness of the offender's conduct would be demeaned or that the public would not be adequately protected. R.C. 2929.14(B)(2); *Comer, supra*. In evaluating whether

R.C. 2929.14 has been satisfied, the trial court should look to the factors laid out in R.C. 2929.12. *Martin*, 136 Ohio App.3d at 362.

{¶10} In this case, the trial court stated that it considered the seriousness of the offenses and whether Kail was likely to recidivate.

The Court is further cognizant of the many juveniles and adults that come before it every week whose lives and families are ruined by the drug trade. The defendant here was found to possess large quantities of drugs and money. He minimized his actions saying if he didn't do what he did, somebody would just take his place.

Defendant also stated, and I paraphrase, "he never thought of the potential consequences to others by what he was engaged in," but he did think of the consequences to himself because he ran from police on the initial stop.

Ironically, the defendant's arrogance that he was above the law, smarter or luckier than others, allowed him to chance operating his vehicle without a license on the night he was apprehended, and his disregard for the law on a relatively minor matter, not having a valid operator's license, led to his arrest because of good police work on the current charges.

The seriousness of the defendant's conduct and his apparent lack of concern for others and his arrogance all give rise to concern to this court.

{¶11} The trial court also found on the record at the sentencing hearing that the seriousness of the offender's conduct would be demeaned "given the large quantity of drugs possessed and the money also possessed which suggests this was a significant crime and it should have some significant consequences" and that the public would not be adequately protected because "the sentence must be significant enough to deter the next guy who might be considering, in your words, "of taking your place." As the trial court made findings to sentence Kail to more

than the minimum sentence, which were supported by the record, we cannot find that the sentence imposed by the trial court was contrary to law. Consequently, Kail's first assignment of error is overruled.

{¶12} Kail also argues that in sentencing him, the trial court was unclear as to whether he is amenable to any judicial release. However, in the plea agreement, Kail agreed that he understood that the sentence for Possession of Cocaine is mandatory and that he would not be eligible for judicial release for that charge. Furthermore, any misunderstanding as to Kail's eligibility for judicial release should have been addressed in a motion to withdraw his guilty plea, not in an appeal of his sentence. Consequently, Kail's second assignment of error is overruled.

{¶13} Finally, Kail argues that the trial court did not comply with R.C. 2929.19(B)(3)(f) which provides:

[I]f the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following: * * *

Require that the offender not ingest or be injected with a drug of abuse and submit to random drug testing as provided in section 341.26, 753.33, or 5120.63 of the Revised Code, whichever is applicable to the offender who is serving a prison term, and require that the results of the drug test administered under any of those sections indicate that the offender did not ingest or was not injected with a drug of abuse.

{¶14} In this case, the trial court did not mention the requirements of R.C. 2929.19(B)(3)(f) at the sentencing hearing. Kail argues that this omission by the trial court requires that this court remand for resentencing. We disagree. The

Second District Court of Appeals has recently addressed whether a sentence must be reversed when a trial court fails to admonish the defendant of the above drug testing stating,

R.C. 5120.63 requires the Department of Rehabilitation and Correction to administer a statewide random drug testing program in state correctional institutions. The requirements which R.C. 2929.19(B)(3)(f) impose on the trial court were not intended to benefit a defendant, but to facilitate drug testing of prisoners in state institutions by discouraging defendants who are sentenced to prison from using drugs. Therefore, the trial court's failure to comply with this statutory requirement is harmless error because Defendant suffered no prejudice as a result.

{¶15} *State v. Arnold*, 2nd Dist. No. 02CA00002, 2002-Ohio-4977, ¶ 37; see, also, *State v. Dixon*, 2nd Dist. No. 01CA17, 2001-Ohio-7075.

{¶16} Likewise, Kail did not suffer any prejudice by the trial court's failure to advise him of possible drug-testing. Consequently, Kail's third assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

WALTERS and CUPP, JJ., concur.