

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 03CA2878
 :
 vs. :
 :
 STEPHANIE JORDAN, NKA TAYLOR, : DECISION AND JUDGMENT ENTRY
 :
 :
 Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Jason A. Macke, Frank Macke Co., L.P.A.,
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__CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 4-15-04

ABELE, J.

{¶1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. The trial court, after accepting a no contest plea from Stephanie Jordan,

defendant below and appellant herein, found appellant guilty of theft in violation of R.C. 2913.02, a fifth degree felony.

{¶2} Appellant assigns the following errors for review:

{¶3} FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY IMPOSING A TERM OF LOCAL INCARCERATION AS PART OF THE COMMUNITY CONTROL SENTENCE FOR THE DEFENDANT'S FELONY CONVICTION, WHERE THE TRIAL COURT'S JUDGMENT REGARDING THE PRESENCE OF AN AGGRAVATING FACTOR UNDER R.C. 2929.13(B) IS CLEARLY AND CONVINCINGLY CONTRARY TO LAW."

{¶4} SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY IMPOSING A TERM OF LOCAL INCARCERATION AS PART OF THE COMMUNITY CONTROL SENTENCE FOR THE DEFENDANT'S FELONY CONVICTION, WHERE THE TRIAL COURT IMPROPERLY FOUND THE PRESENCE OF AGGRAVATING FACTORS AND FAILED TO PROPERLY CONSIDER THE PRESENCE OF MITIGATING FACTORS UNDER R.C. 2929.12."

{¶5} THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY FAILING TO CONSIDER ON THE RECORD WHETHER A SANCTION OF COMMUNITY SERVICE OR A FINANCIAL SANCTION WAS APPROPRIATE AS THE SOLE SANCTION FOR THE OFFENSE."

{¶6} On August 20, 2002, the Scioto County Grand Jury returned an indictment charging appellant with a fourth degree felony theft offense. In particular, the prosecution alleged that appellant participated in a scheme to obtain, by deception, more than five thousand dollars from the appellant's employer, the Scioto County Department of Jobs and Family Services (SCDJFS).

{¶7} On December 11, 2002, appellant appeared in court and, pursuant to an agreement with the prosecution, entered a no contest plea to a fifth degree felony theft offense. The trial

court accepted appellant's plea and found appellant guilty of the theft offense. The court continued the matter for sentencing until a presentence investigation had been completed.

{¶8} On January 21, 2003, the trial court conducted a sentencing hearing. The court ordered appellant to pay a one hundred dollar fine and to serve five years of community control.

Under appellant's community control sanction, the court ordered appellant to: (1) pay \$6,700 in restitution; (2) serve sixty days in the Scioto County Jail; and (3) obtain employment after serving her term of incarceration. Appellant filed a timely notice of appeal.

I

{¶9} We will jointly consider appellant's first and second assignments of error. In the first assignment of error, appellant asserts that the trial court erred by imposing local incarceration under the community control sanction when its conclusion concerning a R.C. 2929.13(B) aggravating factor is contrary to law. In the second assignment of error, appellant again asserts that the trial court erred by imposing local incarceration under the community control sanction when it, under R.C. 2929.12, improperly found the presence of aggravating factors and failed to consider mitigating factors.

{¶10} Appellee notes that the instant case involves the imposition of a jail sentence under a community control sanction for a felony conviction, not the imposition of a prison term (as described in the case authority set forth in appellant's brief).

See R.C. 2929.16. Thus, appellee reasons, the presence of an aggravating factor under 2929.13(B) "is immaterial." Appellee maintains that the presence of an aggravating factor is relevant to the imposition of a prison term, but not relevant to the imposition of a community control sanction. See 2929.13(B)(2)(a) and (b). Thus, a community control sanction may be imposed when none of the statutory factors are applicable. Further, appellee contends that the record does not suggest that the trial court failed to consider R.C. 2929.12 mitigating factors.

{¶11} A court that imposes a felony sentence may impose any sanction or combination of sanctions provided in R.C. 2929.14 to 2929.18. See R.C. 2929.13(A). In sentencing a fourth or fifth degree felony offender, a sentencing court must determine whether any of the R.C. 2929.13(B)(1)(a)-(i) factors apply. If a court does not make a R.C. 2929.13(B)(1)(a)-(i) finding, however, and the court, after it considers the R.C. 2929.12 factors, finds that a community control sanction or a combination of community control sanctions is consistent with the purposes and principles of sentencing, as set forth in R.C. 2929.11, the court shall impose a community control sanction or a combination of sanctions upon the offender. See R.C. 2929.13(B)(2)(b). R.C. 2929.12 sets forth various factors that a sentencing court must consider in order to evaluate the seriousness of the offenders conduct and the likelihood of recidivism, in addition to any other "factors that are relevant to achieving those purposes and principles of sentencing." R.C. 2929.12 (A), (B), (C), (D) and (E).

{¶12} If a sentencing court determines that a community control sanction, or combination of community control sanctions, is appropriate, the court is vested with broad discretion to decide which sanctions may be imposed. R.C. 2929.13(A) and 2929.15. R.C. 2929.16 and 2929.17 provide seventeen different nonprison sanctions that can be used to impair an offender's freedom, and R.C. 2929.18 provides four types of financial sanctions. State v. LeMaster, Union App. No. 14-03-04, 2003-Ohio-4415.

{¶13} One community control sanction is a jail sentence. R.C. 2929.16(A)(2) authorizes a felony offender who is eligible for a community control sanction to be incarcerated for a jail term of up to six months. A jail sentence may be followed by other community control sanctions. R.C. 2929.15(A)(1).

{¶14} In State v. Knight, Warren App. No. CA2001-12-111, 2002-Ohio-4129, the defendant asserted that the trial court erred by imposing a thirty day jail sentence for a fifth degree felony offense. The court of appeals rejected the defendant's argument and wrote:

"Appellant was convicted * * * of a felony of the fifth degree. See R.C. 2911.13(C). Appellant correctly contends that because the trial court did not make any of the prerequisite statutory findings under R.C. 2929.13(B) (2929.13(B) sets forth the applicable determinations a trial court must make before it may impose a prison term when sentencing an offender for the commission of a fourth or fifth degree offense) * * * . In the case at bar, the trial court did not sentence appellant to a prison term. When sentencing a defendant for a crime that does not require the imposition of a prison term, the court may impose one or more community control sanctions authorized under R.C. 2929.16, 2929.17, or 2929.18. See R.C. 2929.15(A)(1). Authorized community

control sanctions include a term of up to six months in jail. R.C. 2929.16(A)(2). The trial court ordered appellant to serve 30 days in the Warren County Jail as part of his community control sanctions. Unlike a prison, which is operated by the state of Ohio, a 'jail' is a residential facility operated by a political subdivision or combination of political subdivisions of the state. R.C. 2929.-019(U). Warren County operates the Warren County Jail, and counties are clearly political subdivisions of the state of Ohio. State ex rel. Seidita v. Philomena (Aug. 24, 1990), Mahoning App. No. 89 C.A. 48. See, also, Schaffer v. Bd. of Trustees of Franklin Cty. Veterans Memorial (1960), 171 Ohio St. 228, 168 N.E.2d 547; Satzger v. Clermonte Cty. Bd. of Comms. (1973), 40 Ohio App.2d 125, 318 N.E.2d 421. Thus, a jail sentence is not the equivalent of, or part of, a prison term."

{¶15} Thus, a jail sentence is not the equivalent of prison term and the R.C. 2929.13 findings do not apply. Accordingly, we disagree with the appellant that in the case sub judice the trial court erred by not making the R.C. 2929.13(B) findings. The trial court did not sentence appellant to a "prison" term.

{¶16} In State v. Dunigan, Madison App. No. CA2001-11-025, CA2001-11-026, 2002-Ohio-5885, the court held that if a trial court does not make the R.C. 2929.13(B)(1) findings, and after considering the R.C. 2929.12 factors, the court finds that a community control sanction is consistent with the R.C. 2929.11 purposes and principles of sentencing, the court shall impose a community control sanction or a combination of sanctions. Thus, a court must consider the R.C. 2929.12 seriousness and recidivism factors before sentencing an offender as required under R.C. 2929.13(B)(2)(b) and that a community control sanction is consistent with the R.C. 2929.11 purposes and principles of sentencing. In Dunigan, the court wrote:

"Finally, appellants argue that the trial court failed to provide its reasons when sentencing appellants in violation of R.C. 2929.19(B)(2)(a). That provision requires a trial court, when imposing 'a prison term for a felony of the fourth or fifth degree[,] to state 'its reasons for imposing the prison term * * *.' Appellants were sentenced to 15 days in jail, not a prison term. '[A] jail sentence is not the equivalent of, or part of, a prison term.' State v. Knight, Warren App. No. CA2001-12-111, 2002-Ohio-4129, at ¶6. R.C. 2929.19(B)(2)(a) is therefore not applicable to the case at bar. Applicable, however, is R.C. 2929.13(B). That provision requires a trial court, when sentencing an offender for a fourth or fifth degree felony, to determine the applicability of certain factors. R.C. 2929.13(B)(1)(a)-(i). Revised Code 2929.13(B)(2)(b), in turn, provides that if the trial court does not make R.C. 2929.13(B)(1) findings, and if, after considering the seriousness and recidivism factors set forth in R.C. 2929.12, the court finds that a community control sanction is consistent with the purposes and principles of sentencing set forth in R.C. 2929.11, the court shall impose a community control or combination of community control sanctions upon the offender.

In the case at bar, there is no evidence that the trial court considered the seriousness and recidivism factors of R.C. 2929.12 before sentencing appellants as required under R.C. 2929.13(B)(2)(b). Likewise, the trial court failed to find that a community control sanction was consistent with the purposes and principles of sentencing under R.C. 2929.11. Accordingly, appellants' second assignment of error is sustained to the extent that the trial court failed to comply with R.C. 2929.13(B) before sentencing appellants. We reverse the judgment of the trial court pertaining to appellants' respective sentences and remand the case to the trial court for resentencing with instructions to follow the statutory mandates of R.C. 2929.13(B)."

{¶17} Again, even though the R.C. 2929.13 findings do not apply, when a court sentences a felony offender to serve a jail sentence under a community control sanction, prior to imposing a community control sanction a sentencing court must consider the R.C. 2929.12 factors and the R.C. 2929.11 purposes and principles

of sentence. See R.C. 2929.13(B)(2)(b).¹

{¶18} R.C. 2929.12 provides:

{¶19} Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in sections 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

{¶20} The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

{¶21} The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

{¶22} The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

{¶23} The offender held a public office or position of trust in the community, and the offense related to that office or position.

{¶24} The offender's occupation, elected office, or

{¶a} ¹2929.13(B)(2)(b) provides:

{¶b} Except as provided in division (E), (F) or (G) of this section, if the court does not make a finding described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a community control sanction or combination of community control sanctions is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code, the court shall impose a community control sanction or combination of community control sanctions upon the offender.

profession obliged the offender to prevent the offense or bring others committing it to justice.

{¶25} The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

{¶26} The offender's relationship with the victim facilitated the offense.

{¶27} The offender committed the offense for hire or as part of an organized criminal activity.

{¶28} In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

{¶29} If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

{¶30} The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

{¶31} The victim induced or facilitated the offense.

{¶32} In committing the offense, the offender acted under strong provocation.

{¶33} In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

{¶34} There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

{¶35} The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

{¶36} At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to section 2929.16, 2929.17, 2929.18 of the Revised Code, or under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of section 2967.16 or section 2929.141 of the Revised Code.

{¶37} The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

{¶38} The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the

{¶39} Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

{¶40} (4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

{¶41} (5) The offender shows no genuine remorse for the offense.

{¶42} (E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

{¶43} Prior to committing the offense, the offender had not been adjudicated a delinquent child.

{¶44} Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

{¶45} Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

{¶46} The offense was committed under circumstances not

likely to recur.

{¶47} The offender shows genuine remorse for the offense.

{¶48} At the sentencing hearing in the instant case, the trial court found the existence of one factor to rebut the presumption that appellant should not be confined in prison (a presumption exists that a fifth degree felony offender should not be confined in prison). The court noted that appellant occupied a position of trust with her employer, the Scioto County Department of Jobs and Family Services. At the hearing, a SCDJFS representative stated that appellant's employment included a duty and responsibility to report any theft of federal or state funds for which she had knowledge. Appellant, however, participated in the commission of the theft of those funds. Nevertheless, the trial court concluded that the appellant is amenable to a community control sanction.

{¶49} The trial court then reviewed the applicable R.C. 2929.12 factors. The court noted that (1) recidivism is unlikely; (2) appellant has no prior convictions, including juvenile convictions; (3) appellant's offense constitutes serious economic harm (see R.C. 2929.12[B][2]); and (4) appellant held a position of trust and that the offense related to that position (see R.C. 2929.12[B][3]).

{¶50} We believe that the trial court adequately reviewed and enumerated the appropriate R.C. 2929.12 factors. Appellant participated in the theft of \$6,700 from her employer, SCDJFS. Appellant's employment at a governmental agency and the resulting

theft from that agency's coffers constitutes a violation of trust related to her position. Additionally, we agree with the trial court that the theft of \$6,700 constitutes serious economic harm.

Therefore, we believe that the imposition of a 60 day jail sentence in this case is entirely appropriate and supported by the record.² Accordingly, based upon the foregoing reasons we hereby overrule appellant's first and second assignments of error.

II

{¶51} In her third assignment of error, appellant asserts that the trial court erred by failing to consider on the record whether a community service sanction or a financial sanction was appropriate as the sole sanction for the offense.

{¶52} Appellee contends that the appellant cites no authority to support its argument that a court's consideration of whether a community service sanction or a financial sanction as the sole sanction must be specifically made on the record.

{¶53} R. C. 2929.13(A) provides:

If the offender is eligible to be sentenced to community control sanctions, the court shall consider the appropriateness of imposing a financial sanction pursuant to section 2929.18 of the Revised Code or a sanction of community service pursuant to section 2929.17 of the Revised Code as the sole sanction for the offense.

²In fact, we believe that the foregoing analysis and myriad requirements that the Ohio General Assembly has imposed when sentencing a felony offender to serve a county jail sentence borders on the absurd. Nevertheless, we are required to abide by the pertinent statutes to the best of our understanding (which is, admittedly, very difficult when attempting to decipher and cross-reference the onerous sentencing statutes and requirements).

{¶54} This provision, among other potential sanctions for criminal conduct, suggests that court's "should give special consideration to fashioning community control sanctions which take their toll from the defendant's money and time rather than from his or her freedom of movement." Ohio Felony Sentencing Law, Griffin and Katz, 2003, Section 6:21, page 699.

{¶55} Although a sentencing court is required to consider imposing either a financial sanction or a community service sanction as a sole sanction for a defendant eligible for a community control sanction, the court is not obligated to impose a financial or a community service sanction. Moreover, a sentencing court is not required to explicitly state on the record that it considered a financial sanction or a community service sanction as the sole sanction. In State v. Tiger, 148 Ohio App.3d 61, 70, 2002-Ohio-320, 772 N.E.2d 144, 151, the court held:

"Appellant has argued that the trial court abused its discretion in imposing a severe combination of sanctions rather than simply imposing one. He has asserted that the lower court failed to indicate on the record that it considered imposing a financial or community service sanction as the sole sanction, and state its reasons for 'denying Appellant the benefit of such a limited sanction.' He has cited no law to support this contention.

Appellant correctly points out that R.C. 2929.13(A) requires the court to consider imposing either a financial sanction or community service as the sole sanction upon a defendant eligible for a community control sanction. The statute, however, does not require the court to expressly state on the record that it considered such options, and set forth its reasons for imposing greater penalties. Compare with R.C. 2929.14(B) (requiring a trial court to make specific findings on the record when imposing more

than the minimum prison sentence for first-time imprisonment), and R.C. 2929.19(B)(2)(d) (demanding a court to make a finding that gives its reasons for selecting the maximum allowable sentence). R.C. 2929.13(A) permits a court to 'impose any sanction or combination of sanctions * * * provided in sections 2929.14 to 2929.18 of the Revised Code[,] unless a specific sanction is required."

{¶56} Thus, in the case sub judice the trial court was not required to explicitly state on the record that it considered a financial sanction or a community service sanction as the sole sanction for the offense. Rather, the burden is on a defendant to suggest and persuade a sentencing court to levy a financial or community service sanction.

{¶57} Accordingly, based upon the foregoing reasons we overrule appellant's third assignment of error and affirm the trial court's judgment.

Judgment affirmed.

Kline, P.J., and Harsha, J., concur in judgment and opinion.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

For the Court

BY:
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.