

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

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| STATE OF OHIO, | : | |
| | : | |
| Plaintiff-Appellee, | : | |
| | : | Case No. 14CA11 |
| v. | : | |
| | : | |
| GARY L. LOSEY II, | : | <u>DECISION AND</u> |
| | : | <u>JUDGMENT ENTRY</u> |
| | : | |
| Defendant-Appellant. | : | Released: 01/16/2015 |

APPEARANCES:¹

Steven H. Eckstein, Washington Court House, Ohio for Appellant.

Hoover, Presiding Judge

{¶ 1} Appellant Gary L. Losey (hereinafter “Losey”) appeals his judgment of conviction and sentence from the Washington County Court of Common Pleas. After admitting to five violations of the terms of his community control sanctions, the trial court sentenced him to 12 months in prison. Losey’s appellate attorney has filed a motion to withdraw pursuant *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), advising this Court that after a thorough review of the trial court record he could discern no meritorious claims on appeal. Losey’s attorney presents one potential assignment of error: “The trial court erred in imposing the maximum sentence allowable for a felony of the fifth degree.” After an independent review of the potential assignment of error and the proceedings below, we find no arguably meritorious

¹ The State of Ohio did not file an appellate brief or enter a notice of appearance. Appellant Losey also did not file a pro se brief or enter a personal appearance.

issues. Therefore, for the reasons set forth below, we grant the motion to withdraw and affirm the judgment of the trial court.

{¶ 2} In May 2013, appellant Losey entered a guilty plea to one count of Trafficking in Drugs, a fifth degree felony, in violation of R.C. 2925.03(A)(1)&(C)(2)(a). The trial court dismissed a remaining count in the indictment and set sentencing for a later date. At the sentencing hearing in July 2013, the trial court sentenced Losey to three (3) years of community control sanctions. The trial court orally advised Losey that if he violated the terms of his community control sanctions, it would impose a prison sentence of 12 months. This notification was also recorded in the sentencing journal entry.

{¶ 3} In February 2014, the Washington County Adult Probation Department filed a motion and complaint alleging Losey violated five conditions of his community control sanctions. Losey initially denied the allegations. At a second hearing on the violations, in March 2014, Losey admitted to the violations of community control as alleged in the motion and complaint. The trial court revoked Losey's community control and sentenced him to 12 months in the Ohio Correctional Reception Center.

{¶ 4} Losey timely filed this appeal. Appellate counsel then filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), advising this Court that after a thorough review of the trial court record he could discern no meritorious claims on appeal.

Appellate Counsel's Potential Assignment of Error:

THE TRIAL COURT ERRED IN IMPOSING THE MAXIMUM SENTENCE
ALLOWABLE FOR A FELONY OF THE FIFTH DEGREE

{¶ 5} The potential assignment of error suggests that the trial court erred when it imposed the maximum sentence for Losey’s violation of his community control conditions. Appellate counsel cites to the original sentencing hearing of July 2013 transcript and concludes that the trial court’s sentence of 12 months is not clearly and convincingly contrary to law.

{¶ 6} “Generally, when reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08(G)(2).” *State v. Baker*, Athens No. 13CA18, 2014–Ohio–1967, ¶ 25. *See also State v. Brewer*, Meigs No. 14CA1, 2014–Ohio–1903, ¶ 33 (“we join the growing number of appellate districts that have abandoned the *Kalish* plurality’s second-step abuse-of-discretion standard of review; when the General Assembly reenacted R.C. 2953.08(G)(2), it expressly stated that ‘[t]he appellate court’s standard of review is not whether the sentencing court abused its discretion’ ”).

{¶ 7} Under R.C. 2953.08(G)(2), we may only modify or vacate a defendant’s sentence if we find, clearly and convincingly, that (1) the record does not support the mandatory sentencing findings, or (2) that the sentence is “otherwise contrary to law.” We recognize that this is an “extremely deferential standard of review.” *Venes*, 2013–Ohio–1891, 992 N.E.2d 453, at ¶ 21. Although *Kalish* may not provide the standard of review framework for reviewing felony sentences, it does provide guidance for determining whether a sentence is clearly and convincingly contrary to law. *See State v. Lee*, 12th Dist. Butler No. CA2012–09–182, 2013–Ohio–3404, ¶ 10. According to *Kalish*, a sentence is not clearly and convincingly contrary to law when the trial court considered the purposes and principles set forth in 2929.11, as well as the factors listed in R.C. 2929.12, properly applies post release control, and sentences within the permissible statutory range. *Id.*; *See also Kalish*, 120 Ohio St.3d 23, 2008–Ohio–4912, 896 N.E.2d 124 at ¶ 18.

{¶ 8} Although Losey has appealed his conviction and sentence, his appellate counsel has filed both a motion to withdraw and an *Anders* brief.

In *Anders*, the United States Supreme Court held that if counsel determines after a conscientious examination of the record that the case is wholly frivolous, counsel should so advise the court and request permission to withdraw. Counsel must accompany the request with a brief identifying anything in the record that could arguably support the appeal. [*Anders*, 386 U.S. at 744, 87 S.Ct. 1396, 18 L.Ed.2d 493]. The client should be furnished with a copy of the brief and be given time to raise any matters the client chooses. *Id.* Once these requirements are met, we must fully examine the proceedings below to determine if an arguably meritorious issue exists. *Id.* If so, we must appoint new counsel and decide the merits of the appeal. *Id.* If we find the appeal frivolous, we may grant the request to withdraw and dismiss the appeal without violating federal constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id.*

State v. Lester, 4th Dist. Vinton No. 12CA689, 2013-Ohio-2485, ¶ 3.

{¶ 9} Losey's sentence is the result of a violation of the conditions of his community control. Under Ohio law, the trial court has three options for punishing offenders who violate community control sanctions. The court may (1) lengthen the term of the community control sanction, (2) impose a more restrictive community control sanction, or (3) impose a prison term on the offender. *State v. McClintock*, 4th Dist. Meigs No. 13CA4, 2013-Ohio-5598, ¶ 5. "If the court elects to impose a prison sentence upon a violator of community control sanctions, it 'shall be within the range of prison terms available for the offense for which the sanction that was violated was imposed and shall not exceed the prison term specified in the notice provided to the

offender at the sentencing hearing pursuant to division (B)(2) of section 2929.19 of the Revised Code.’ ” *Id.* quoting R.C. 2929.15(B)(2).

{¶ 10} “[A] trial court sentencing an offender to a community control sanction must, at the time of the sentencing, notify the offender of the specific prison term that may be imposed for a violation of the conditions of the sanction, as a prerequisite to imposing a prison term on the offender for a subsequent violation .” *Id.* quoting *State v. Brooks*, 103 Ohio St.3d 134, 2004–Ohio–4746, 814 N.E.2d 837, at paragraph two of the syllabus.

{¶ 11} At the original sentencing hearing in July 2013 the trial court stated:

THE COURT: ***There are standard orders of -- of community control, Mr. Losey. You violate any of these orders, it’s my intention if you’re found guilty of violating these conditions, to send you to prison for 12 months. You understand me?

THE DEFENDANT [Losey]: Yes, Your Honor.

The corresponding sentencing journal entry, time stamped August 1, 2013, also states: “The Court notified the Defendant that, if he violates the terms and conditions of Community Control, the Court will impose a prison sentence of twelve (12) months.”

{¶ 12} At sentencing for the violations of conditions of Losey’s community control, the trial court stated:

THE COURT: Okay. Okay. Let the record reflect the Court is holding this sentencing pursuant to the dictates of 2929.19. Mr. Losey has been afforded all of his rights, pursuant to Criminal Rule 32. The Court has considered the record, the oral statements made in open court this date, the pre-sentence investigation report that was originally provided and the updated one that was done today, and the

principles and purposes of sentencing set forth in 2929.11 and the seriousness and recidivism factors set forth in 2929.12.

Mr. Losey has violated the terms and conditions of supervision. The presumption of community control is overridden thereby. I told you at your sentencing to get yourself into L&P. From what I understand, they were not contacted till very recently on this matter by you. Gave you a chance to start counseling and turn your life around. I also told you it'd be 12 months in prison if you violated. So, the Court finds that you're no longer amenable to community control and prison is consistent with the purposes of 2929.11. You are sentenced to 12 months at the Correction Reception Center at Orient, Ohio.

The trial court also recited Losey's past criminal record. Losey received 27 days credit, for time already served.

{¶ 13} Here, it is clear the trial court reserved a 12-month sentence if Losey violated the conditions of his community control sanctions. "If the conditions of a community control sanction are violated * * * the sentencing court may * * * impose a prison term of [sic] the offender pursuant to section 2929.14 of the Revised Code. The prison term, if any, imposed upon the violator pursuant to this division shall be *within the range of prison terms* available for the offense for which the sanction that was violated was imposed and *shall not exceed the prison term specified* in the notice provided to the offender at the sentencing hearing * * *." [Emphasis added.] *State v. Jaworski*, 6th Dist. Ottawa No. OT-03-047, 2004-Ohio-5242. Under 2929.14(A)(5), the statutory range for prison terms for a fifth degree felony is six to twelve months. Thus, the trial court sentenced Losey within the statutory range. The trial court clearly

gave Losey notice of a specific prison term that could be imposed as a penalty for a community control violation.

{¶ 14} With respect to the Losey's sentence for the violation of community control being the maximum sentence for a felony of the fifth degree, maximum sentences do not require specific findings. *State v. Lister*, 4th Dist. Pickaway No. 13CA15, 2014–Ohio–1405, ¶ 10, citing *State v. White*, 2013–Ohio–4225, 997 N.E.2d 629, (1st. Dist.), ¶ 7. Although trial courts have full discretion to impose any term of imprisonment within the statutory range, they must consider the sentencing purposes in R.C. 2929.11 and the guidelines contained in R.C. 2929.12. *Lister, supra*, at ¶ 14. H.B. 86 amended R.C. 2929.11, which states:

“(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing 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.”

{¶ 15} R.C. 2929.12 also provides a non-exhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses. *Lister, supra*, at ¶ 15. In analyzing whether a sentence is contrary to law, “[t]he only specific guideline is that the sentence must be within the statutory range[.]” *State v. Sims*, 4th Dist. Gallia No. 10CA17, 2012–Ohio–238, quoting *State v. Welch*, 4th Dist. No.

08CA29, 2009–Ohio–2655, ¶ 7, quoting *State v. Ross*, 4th Dist. No. 08CA872, 2009–Ohio–877, ¶ 10. Additionally, courts must consider the general guidance factors set forth in R.C. 2929.11 and 2929.12. *Sims*, *supra* at ¶ 12; *State v. Foster*, 109 Ohio St.3d 1, 2006–Ohio–856, 845 N.E.2d 470, ¶ 42; *Kalish*, at ¶ 13; *Davis*, at ¶ 33.

{¶ 16} In addition to Losey's sentence being within the statutory range, the trial court stated on the record that it considered the “principles and purposes of sentencing set forth in 2929.11 and the seriousness and recidivism factors set forth in 2929.12.” We find that the trial court complied with all applicable rules and statutes. Therefore, the trial court's sentence is not clearly and convincingly contrary to law.

{¶ 17} Finally, our independent record uncovers no arguably meritorious issues for appeal.

{¶ 18} Therefore, because the potential assignment of error lacks arguable merit and having independently discovered no arguably meritorious issues for appeal, we find this appeal to be wholly frivolous, grant counsel's motion to withdraw, and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

Harsha, J.: Dissenting.

{¶ 19} I believe the following potential assignments of error have arguable merit and should be addressed by newly appointed counsel:

- I. The trial court erred as a matter of law by failing to notify Mr. Losey at the original sentencing hearing of the three options available to the court under R.C. 2929.19 for a violation of the terms of community control.
- II. The trial court erred as a matter of law by predetermining the sanction for a violation of the terms of community control, resulting in a failure to exercise the discretion the statutes afford the court for punishing a violator of the terms of community control.

{¶ 20} Thus, I dissent.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and the Appellant shall pay the costs.

The Court finds that there were reasonable grounds for the appeal.

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

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earliest of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to the expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to [Rule 27 of the Rules of Appellate Procedure](#).

McFarland, A.J.: Concurs in Judgment Only.
Harsha, J.: Dissents with Dissenting Opinion.

For the Court

By: _____
Marie Hoover, Presiding 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.