[Cite as *State v. Grimmette*, 2019-Ohio-3576.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	Case No. 18CA3830
vs.	:	
RANDY GRIMMETTE,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant/ Cross-Appellee.	:	

APPEARANCES:

Steven H. Eckstein, Washington Court House, Ohio, for appellant.[1]

Shane A. Tieman, Scioto County Prosecuting Attorney, and Joe Hale, Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 8-28-19
ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. Randy Grimmette, defendant below and appellant/cross-appellee (appellant) herein, pled no contest to one count of abuse of a corpse in violation of R.C. 2927.01(B), a fifth-degree felony. The court ordered appellant to serve a six-month prison term. Appellant assigns one error for review:

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[1] Different counsel represented appellant during the trial court proceedings.

APPELLANT'S ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY IMPOSING A DEFINITE PRISON SENTENCE UNDER R.C. 2929.14 FOR A FELONY OF THE FIFTH DEGREE THAT MET ALL OF THE REQUIREMENTS OF R.C. 2929.13(B)(1)(a) AND NONE OF THE EXCEPTIONS OF R.C. 2929.13(B)(1)(b)."

{¶ 2} Appellee/Cross-Appellant (Appellee) assigns seven errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN OVERRULING THE SCIOTO COUNTY PROSECUTOR'S MOTION CHALLENGING THE CONSTITUTIONALITY OF SEVERAL OF OHIO'S SENTENCING STATUTES, SPECIFICALLY IN THAT OHIO REVISED CODE SECTIONS 2929.13(B)(1)(a)/2929.13(B)(1)(b), CRIMINAL SENTENCING STATUTES WHICH MANDATE THE IMPOSITION OF A 'COMMUNITY CONTROL SANCTION' UPON CERTAIN FELONS CONVICTED OF A FELONY OF THE FOURTH OR FIFTH DEGREE THAT IS NOT AN 'OFFENSE OF VIOLENCE' OR THAT IS AN 'OFFENSE OF VIOLENCE' BUT IS A 'QUALIFYING ASSAULT OFFENSE,' IN THE ABSENCE OF CERTAIN FINDINGS, ARE UNCONSTITUTIONAL IN THAT SAID STATUTES INTERFERE WITH THE COMMON PLEAS COURT'S "FULL DISCRETION TO IMPOSE A PRISON SENTENCE WITHIN THE STATUTORY RANGE" BY REQUIRING THE COMMON PLEAS COURT TO MAKE FINDINGS BEFORE IMPOSING A PRISON TERM WITHIN THE STATUTORY RANGE UPON CERTAIN FELONS CONVICTED OF A FELONY OF THE FOURTH OR FIFTH DEGREE THAT IS NOT AN 'OFFENSE OF VIOLENCE' OR THAT IS AN 'OFFENSE OF VIOLENCE' BUT IS A 'QUALIFYING ASSAULT OFFENSE,' IN VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN OVERRULING THE SCIOTO COUNTY PROSECUTOR'S MOTION CHALLENGING THE CONSTITUTIONALITY OF SEVERAL OF OHIO'S SENTENCING STATUTES, SPECIFICALLY IN THAT OHIO REVISED CODE SECTIONS 2929.13(B)(1)(a)/2929.13(B)(1)(b), CRIMINAL SENTENCING STATUTES WHICH MANDATE THE IMPOSITION OF A 'COMMUNITY CONTROL SANCTION'

UPON CERTAIN FELONS CONVICTED OF A FELONY OF THE FOURTH OR FIFTH DEGREE THAT IS NOT AN OFFENSE OF VIOLENCE OR THAT IS AN OFFENSE OF VIOLENCE BUT IS A 'QUALIFYING ASSAULT OFFENSE,' IN THE ABSENCE OF CERTAIN FINDINGS, IS UNCONSTITUTIONAL IN THAT SAID STATUTES INTERFERE WITH THE FUNCTION OF THE COMMON PLEAS COURT RELATIVE TO THE COURT'S JURISDICTION OVER FELONY 'CRIMES AND OFFENSES,' BY UNCONSTITUTIONALLY USURPING THE COMMON PLEAS COURT OF ITS INHERENT POWER TO SENTENCE A FELON CONVICTED OF A FOURTH OR FIFTH DEGREE FELONY THAT IS NOT AN OFFENSE OF VIOLENCE OR THAT IS AN OFFENSE OF VIOLENCE BUT IS A 'QUALIFYING ASSAULT OFFENSE' TO A PRISON TERM WITHIN THE STATUTORY RANGE, IN VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN OVERRULING THE SCIOTO COUNTY PROSECUTOR'S MOTION CHALLENGING THE CONSTITUTIONALITY OF SEVERAL OF OHIO'S SENTENCING STATUTES, SPECIFICALLY IN THAT OHIO REVISED CODE 2929.13(B)(1)(a)(I)-(iv) AND 2929.13(B)(1)(b)(I)-(xi), AS AMENDED BY HB 86, AND AGAIN AMENDED BY HB 59 IN 2013, ARE UNCONSTITUTIONAL IN THAT SAID STATUTES UNREASONABLY AND ARBITRARILY LIMIT THE FACTORS WHICH MUST BE PRESENT BEFORE A COMMON PLEAS COURT CAN CONSIDER WHETHER TO IMPOSE A PRISON TERM OF UPON A FELON CONVICTED OF A FELONY OF THE FOURTH OR FIFTH DEGREE THAT IS NOT AN OFFENSE OF VIOLENCE OR THAT IS AN OFFENSE OF VIOLENCE BUT IS A 'QUALIFYING ASSAULT OFFENSE' TO SUCH EXTENT AS TO INTERFERE WITH AN INTRUDE UPON THE COMMON PLEAS COURT'S INHERENT POWER TO SENTENCE, IN VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN OVERRULING THE SCIOTO COUNTY PROSECUTOR'S MOTION CHALLENGING THE CONSTITUTIONALITY OF SEVERAL OF OHIO'S SENTENCING STATUTES, SPECIFICALLY IN THAT OHIO REVISED CODE

2929.13(A)/2929.13(B)(1)(a), AS AMENDED BY HB 86, IS UNCONSTITUTIONAL IN THAT SAID STATUTE BY MANDATING THAT, IN THE ABSENCE OF CERTAIN STATUTORY FINDINGS, A COMMON PLEAS COURT SHALL SENTENCE CERTAIN FELONS CONVICTED OF A FELONY OF THE FOURTH OR FIFTH DEGREE THAT IS NOT AN OFFENSE OF VIOLENCE OR THAT IS AN OFFENSE OF VIOLENCE BUT IS A 'QUALIFYING ASSAULT OFFENSE,' TO A 'COMMUNITY CONTROL SANCTION' AND NOT TO A TERM OF IMPRISONMENT WITHIN THE STATUTORY RANGE, MANDATES THAT THE COMMON PLEAS COURT EXERCISE A DISCRETIONARY POWER WITHIN THE COMMON PLEAS COURT'S INHERENT SENTENCING POWERS, IN VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS."

FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN OVERRULING THE SCIOTO COUNTY PROSECUTOR'S MOTION CHALLENGING THE CONSTITUTIONALITY OF SEVERAL OF OHIO'S SENTENCING STATUTES, SPECIFICALLY IN THAT OHIO REVISED CODE 2929.13(A)/2929.13(B)(1)(a)/2929.13(B)(1)(c), AS AMENDED BY HB 86, IS UNCONSTITUTIONAL IN THAT IT USURPS THE OHIO SUPREME COURT'S EXCLUSIVE POWER TO 'PRESCRIBE RULES GOVERNING PRACTICE AND PROCEDURE IN ALL COURTS OF THE STATE' BY LEGISLATIVELY ESTABLISHING A PROCEDURE TO BE FOLLOWED IN THE SENTENCING PROCESS INVOLVING CERTAIN FELONS CONVICTED OF A FOURTH OR FIFTH DEGREE FELONY THAT IS NOT AN OFFENSE OF VIOLENCE OR THAT IS AN OFFENSE OF VIOLENCE BUT IS A 'QUALIFYING ASSAULT OFFENSE, IN VIOLATION/DEROGATION OF ARTICLE IV, SECTION 5 OF THE OHIO CONSTITUTION, AND THE DOCTRINE OF SEPARATION OF POWERS."

SIXTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN OVERRULING THE SCIOTO COUNTY PROSECUTOR'S MOTION CHALLENGING THE CONSTITUTIONALITY OF SEVERAL OF OHIO'S SENTENCING STATUTES, SPECIFICALLY IN THAT OHIO REVISED CODE 2929.13(A)/2929.13(B)(1)(a)/2929.13(B)(1)(c), AS AMENDED BY

> HB 86, IS UNCONSTITUTIONAL IN THAT IT IS AN UNCONSTITUTIONAL DELEGATION OF THE POWER TO PARTICIPATE IN THE SENTENCING PROCESS INVOLVING CERTAIN FELONS CONVICTED OF A FOURTH OR FIFTH DEGREE FELONY, A JUDICIAL POWER, TO A STATE AGENCY UNDER CONTROL OF THE EXECUTIVE BRANCH, AND FURTHER SUBJECTS A FINDING MADE BY A COMMON PLEAS COURT DURING THE SENTENCING PROCESS INVOLVING CERTAIN FELONS CONVICTED OF A FOURTH OR FIFTH DEGREE FELONY TO REVIEW BY A STATE AGENCY OF THE EXECUTIVE BRANCH, IN VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS."
>
> SEVENTH ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED IN OVERRULING THE SCIOTO COUNTY PROSECUTOR'S MOTION CHALLENGING THE CONSTITUTIONALITY OF SEVERAL OF OHIO'S SENTENCING STATUTES, SPECIFICALLY IN THAT OHIO REVISED CODE 2929.13(A)/2929.13(B)(1)(a)/2929.13(B)(1)(c), AS AMENDED BY HB 86, IS UNCONSTITUTIONAL IN THAT THE PROCEDURE MANDATED ON THE COMMON PLEAS COURT TO BE FOLLOWED IN THE SENTENCING PROCESS INVOLVING A FELON CONVICTED OF A FOURTH OR FIFTH DEGREE FELONY THAT IS NOT AN OFFENSE OF VIOLENCE OR THAT IS AN OFFENSE OF VIOLENCE BUT IS A 'QUALIFYING ASSAULT OFFENSE' IS VOID BECAUSE IT IS VAGUE AND CONFUSING AS A CONSEQUENCE OF BEING POORLY DRAFTED AND, AS AMENDED BY HB 59, CONFLICTS WITH OTHER FELONY CRIMINAL STATUTES, IMPROPERLY DEFINES A CATEGORY OF OFFENSE, TO WIT, A 'QUALIFYING ASSAULT OFFENSE' BY REFERENCE ONLY TO A STATUTE DEFINING A DEGREE OF OFFENSE, AND CREATES A CATEGORY OF AN OFFENSE OF VIOLENCE REFERRED TO AS A 'QUALIFYING ASSAULT OFFENSE' AND DEFINES 'QUALIFYING ASSAULT OFFENSE' IN A MANNER THAT IS INSULTING AND DEMEANING TO A 'JUDGE, MAGISTRATE, PROSECUTOR, OR COURT OFFICIAL OR EMPLOYEE.'"

{¶ 3} On August 1, 2017, a Scioto County Grand Jury returned an indictment that charged appellant with one count of gross abuse of a corpse, a fifth-degree felony. Appellant entered a plea

of not guilty. On October 24, 2017, appellee filed a motion challenging the constitutionality of several statutory provisions included in 2011 Am.Sub.H.B. No.86 [HB 86]. The trial court overruled the motion. On February 23, 2018, after appellant changed his plea to no contest, the trial court found appellant guilty and sentenced him to serve six months in prison. Both appellant and appellee appealed.

I. Appellant's Appeal

{¶ 4} In his sole assignment of error, appellant asserts that the trial court erred by imposing a definite prison sentence under R.C. 2929.14 for a fifth-degree felony that met all of the requirements of R.C. 2929.13(B)(1)(a) and none of the exceptions of R.C. 2929.13(B)(1)(b).

{¶ 5} R.C. 2953.08 provides for appeals based on felony sentencing guidelines, and, pursuant to R.C. 2953.08(G)(2), an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either "that the record does not support the sentencing court's findings" under the specified statutory provisions, or "the sentence is otherwise contrary to law." *State v. Mitchell*, 4th Dist. Meigs No. 13CA13, 2015-Ohio-1132, ¶ 11; *State v. Brewer*, 2012-Ohio-1903, 11 N.E.3d 317, ¶ 37 (4th Dist.).

{¶ 6} Here, appellant was convicted of a R.C. 2927.01(B) violation, abuse of a corpse, which provides: (B) No person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities. R.C. 2927.01(C) states that "[w]hoever violates division (B) of this section is guilty of gross abuse of a corpse, a felony of the fifth degree." At the change of plea hearing, appellee indicated that "the nature of this offense was such that it requires prison time." Trial counsel replied: "[B]y the sentencing laws in the state of Ohio on a F5 such as this, he should just be sentenced to community control * * * and put on probation * * *, nothing

further than that."

{¶ 7} At that juncture, the trial court made the following statement:

> Well, you know I have known about this case for some time; it came for arraignment in this court August 29th, 2017. * * * the facts of the case bothered me as to what happened. I have reviewed the purposes of principles of the sentencing laws. I am going to state for the record that I have not called ODRC to * * * find out if they had any appropriate available community sanctions for them, I am going to assume for the record and probably stipulate that I would have been told by ODRC that there were appropriate available community sanctions. * * * I've also found that there are no prior records on the behalf of Mr. Grimmette, that under Ohio's current law the law provides that he should be placed on community control. I just in the facts of this case, I will currently disagree with that. Um, based upon what happened in this case I am going to find that there is no available community control sanctions that are appropriate under the facts of this case and as a result I am going to assess a fine in this case of zero, but I am going to order that Mr. Grimmette pay the cost of prosecution. I am going to sentence him to six months in the custody of the Ohio Department of Rehabilitation and Correction * * *. Based upon the fact that we have this outstanding motion that I have overruled, based upon the fact that I'm certainly aware that this goes against the current sentencing rules law in the state of Ohio and by accepting a plea of no contest I know this matter is going to be appealed.

{¶ 8} The trial court's judgment entry states that "after weighing the seriousness and recidivism factors, prison is consistent with the purposes and principles of sentencing, and the Defendant is not amenable to an available community control sanction." The court further found that the most serious charge is a fifth-degree felony and that appellant had no prior felony convictions.

{¶ 9} R.C. 2929.11 requires that courts sentencing felony offenders be guided by the overriding purposes of felony sentencing - 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." R.C. 2929.11. R.C. 2929.12(A) limits a trial court's discretion and states "[U]nless 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 has discretion to determine the most effective ways to comply with the purposes and principles set forth in section 2929.11 * * *." Thus, R.C. 2929.12 limits the discretion afforded the trial court in R.C. 2929.11. Additionally, R.C. 2929.13(A) also limits the trial court's sentencing discretion: "* * * unless a specific sanction is required to be imposed or is precluded from being imposed pursuant to law, a court * * * may impose any sanction * * * provided in sections 2929.14 to 2929.18 of the Revised Code."

{¶ 10} As the trial court acknowledged, at the time of sentencing R.C. 2929.13(B) mandated that the court impose a community control sanction. R.C. 2929.13 governs sentencing guidelines for various specific offenses and degrees of offenses. On September 30, 2011, H.B. 86 went into effect and amended R.C. 2929.13(B)(1) to prohibit prison sentences for certain fourth and fifth-degree felonies. If certain criteria are met in section (a) of the statute, the trial court is required to sentence the offender to community control sanctions. R.C. 2929.13(B)(1)(a), as amended by H.B. 86, reads:

> (a) Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence, the court *shall sentence the offender to a community control sanction of at least one year's duration if all of the following apply*:
>
> > (I) The offender previously has not been convicted of or pleaded guilty to a felony offense or to an offense.
> >
> > (ii) The most serious charge against the offender at the time of sentencing is a

> felony of the fourth or fifth degree.
>
> (iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty-five day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.
>
> (iv) The offender previously has not been convicted of or pleaded guilty to a misdemeanor offense of violence that the offender committed within two years prior to the offense for which sentence is being imposed.(Emphasis added.)

{¶ 11} Thus, R.C. 2929.13(B)(1)(a) includes a presumption for community control if an offender is convicted of, or pleads guilty to, a felony of the fourth or fifth degree that is not an offense of violence. *State v. Napier,* 12th Dist. Clermont No. CA2016-04-022, 2017-Ohio-246, ¶ 44, *State v. Lilly*, 12th Dist. Clermont Nos. CA2017-06-029, CA2017-06-030, 2018-Ohio-1014, ¶ 15. The presumption of a community control sanction, however, is subject to the exceptions listed in R.C. 2929.13(B)(1)(b). *See State v. Barnes,* 11th Dist. Trumbull No. 2012-T-0049, 2013-Ohio-1298, ¶ 16. R.C. 2929.13(B)(1) provides:

> (b) The court *has discretion to impose a prison term* upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense *if any of the following apply*:
>
> (I) The offender committed the offense while having a firearm on or about the offender's person or under the offender's control.
>
> (ii) If the offense is a qualifying assault offense, the offender caused serious physical harm to another person while committing the offense, and, if the offense is not a qualifying assault offense, the offender caused physical harm to another person while committing the offense.
>
> (iii) The offender violated a term of the conditions of bond as set by the court.

> (iv) The court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, and the department, within the forty-five-day period specified in that division, did not provide the court with the name of, contact information for, and program details of any community control sanction of at least one year's duration that is available for persons sentenced by the court.
>
> (v) The offense is a sex offense that is a fourth or fifth degree felony violation of any provision of Chapter 2907 of the Revised Code.
>
> (vi) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.
>
> (vii) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person, and the offender previously was convicted of an offense that caused physical harm to a person.
>
> (viii) The offender held a public office or position of trust, and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.
>
> (ix) The offender committed the offense for hire or as part of an organized criminal activity.
>
> (x) The offender at the time of the offense was serving, or the offender previously had served, a prison term.
>
> (xii) The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance. (Emphasis added.)

{¶ 12} In the case sub judice, it is undisputed that all of the R.C. 2929.13(B)(1)(a) criteria were satisfied, and none of the R.C. 2929.13(B)(1)(b) exceptions applied. Thus, the trial court was required to impose a community control sanction. We observe that appellee agrees that the trial court's imposition of a prison sentence is in "clear contravention" of the sentencing statutes as they are currently written. Accordingly, the trial court erred when it failed to comply with the applicable

statute and, instead, sentenced appellant to serve a six-month term of imprisonment. Therefore, we sustain appellant's assignment of error.

II. Appellee's Cross Appeal

{¶ 13} Appellee, State of Ohio, assigns seven errors that challenge R.C. 2929.13 as violating the Separation of Powers doctrine, and one assignment of error that asserts that the statute is void for vagueness.

{¶ 14} In general, a statute may be challenged as unconstitutional on the basis that it is invalid on its face or as applied to a particular set of facts. *State v. Fisher,* 4th Dist. Ross No. 16CA3553, 2017-Ohio-7260, ¶ 8, citing *State v. Lowe*, 112 Ohio St.3d 507, 2007–Ohio–606, 861 N.E.2d 512, ¶ 17. Here, appellee challenges R.C. 2929.13 on its face. Thus, we use a de novo standard of review to assess errors based upon violations of constitutional law. *State v. Sidam*, 2016-Ohio-7906, 74 N.E.3d 787, ¶ 19 (4th Dist.), citing *State v. Burgette*, 4th Dist. Athens No. 13CA50, 2014–Ohio–3483, ¶ 10; *see also State v. Coburn*, 4th Dist. Ross No. 08CA3062, 2009–Ohio–632, ¶ 6.

{¶ 15} A successful facial challenge requires the party challenging the statute to demonstrate that there is no set of facts under which the statute would be valid, i.e., that the law is unconstitutional in all of its applications. *State v. Romage*, 138 Ohio St.3d 390, 2014-Ohio-783, 7 N.E.3d 1156, ¶ 7, citing *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*, 123 Ohio St.3d 278, 2009-Ohio-5030, 915 N.E.2d 1205, ¶ 13 ("for a statute to be facially unconstitutional, it must be unconstitutional in all applications"); *accord United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (explaining that law facially unconstitutional if "no set of circumstances exists under which the [law] would be valid"). "[A] facial challenge permits a statute

to be attacked for its effect on conduct other than the conduct for which the defendant is charged." *State v. Wheatley,* 2018-Ohio-464, 94 N.E.3d 578, ¶ 7 (4th Dist.), citing *State v. White*, 2013-Ohio-51, 988 N.E.2d 595 (6th Dist.), ¶ 151, citing *Brockett v. Spokane Arcades, Inc*., 472 U.S. 491, 503, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985); accord *State v. Colon*, 2017-Ohio-8478, 99 N.E.3d 1197, ¶ 12 (8th Dist.)

{¶ 16} We begin our analysis by observing that the statutes enacted by the General Assembly are entitled to a "strong presumption of constitutionality." *Fisher* at ¶ 9, citing *Romage* at ¶ 7. Thus, "if at all possible, statutes must be construed in conformity with the Ohio and the United States Constitutions." *State v. Collier*, 62 Ohio St.3d 267, 269, 581 N.E.2d 552 (1991). Further, the Supreme Court of Ohio has held that a court is only permitted to declare a statute unconstitutional if it " 'appear[s] beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.' " *State v. Cook*, 83 Ohio St.3d 404, 409, 700 N.E.2d 570 (1998), quoting *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955).

A. Appellee's Assignments of Error I-V

{¶ 17} Appellee's first, second, third, fourth, and fifth assignments of error assert that R.C. 2929.13, as applied to a felony of the fourth and fifth degree, violate the separation of powers doctrine under Ohio's Constitution because they: (1) interfere with a trial court's full discretion to impose sentence within a statutory range; (2) interfere with a trial court's function; (3) mandate a certain sentence and thereby violate a trial court's inherent power; (4) mandate the trial court exercise a discretionary power within the court's inherent sentencing powers; and (5) usurp the Supreme Court of Ohio's power to prescribe rules and procedures in all courts. Because these assignments of error raise related issues, we address them together.

{¶ 18} Although not explicitly stated in Ohio's Constitution, "[t]he separation-of-powers doctrine implicitly arises from our tripartite democratic form of government and recognizes that the executive, legislative, and judicial branches of our government have their own unique powers and duties that are separate and apart from the others." *Fisher, supra,* at ¶ 28, citing *State v. Thompson*, 92 Ohio St.3d 584, 586, 752 N.E.2d 276 (2001), citing *City of Zanesville v. Zanesville Tel. & Tel. Co.*, 63 Ohio St. 442, 59 N.E. 109 (1900), paragraph one of the syllabus. "It has long been recognized in this state that the General Assembly has the plenary power to prescribe crimes and affix penalties." *State v. Morris*, 55 Ohio St.2d 101, 112, 378 N.E.2d 708 (1978). Further, "[t]he essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others.'" *State v. Dingus,* 2017-Ohio-2619, 81 N.E.3d 513, ¶ 22 (4th Dist.), quoting *State ex rel. Bryant v. Akron Metro. Park Dist.*, 120 Ohio St. 464, 473, 166 N.E. 407 (1929).

{¶ 19} Our primary concern when construing statutes is legislative intent. *State v. South,* 144 Ohio St.3d 295, 2015-Ohio-3930, 42 N.E.3d 734, ¶ 8, citing *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996). Thus, when construing statutes that relate to the same subject matter, we consider them together to determine the General Assembly's intent — even when the various provisions were enacted separately and make no reference to each other. *D.A.B.E., Inc. v. Toledo–Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002–Ohio–4172, 773 N.E.2d 536, ¶ 20, citing *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph two of the syllabus.

{¶ 20} In examining legislative intent in the case sub judice, H.B 86 incorporated several sentencing reform initiatives from a study and report of the Council of State Governments' Justice Reinvestment; Ohio Legislative Serv. Comm., Final Analysis for Am.Sub.H.B. 86, at 4, 34-40. The Ohio General Assembly, via H.B. 86, "provides, in certain felony cases, a preference for one or more community control sanctions rather than the imposition of a prison sentence. * * * The bill's numerous criminal sentencing changes are generally designed to reduce the size of the state's prison population and related institutional operating expenses by: (1) diverting otherwise prison-bound nonviolent offenders into less expensive community-based alternative sanctions, and (2) reducing the lengths of stay for certain offenders that are sentenced to a prison term from what those lengths of stay might otherwise have been under current law and practice." Ohio Legislative Service Commission, Fiscal Note & Local Impact Statement to Am.Sub.H.B. 86, at 2-3 (Sept. 30, 2011). *See State v. Osborne*, 2d Dist. Clark No. 2014-CA-107, 2015-Ohio-3058, ¶ 13 (Frolic, PJ, dissenting).

{¶ 21} In addition to the separation of powers doctrine, appellee also asserts that the statutes in question violate the Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470 (abrogated by *Oregon v. Ice,* 555 U.S. 160, 129 S.Ct. 711, 172 LED.2d 517 (2009)(Sixth Amendment does not inhibit states from assigning to judges, rather than to juries, finding of facts necessary to imposition of consecutive, rather than concurrent, sentences for multiple felonies)).

{¶ 22} In 2014, the Supreme Court of Ohio chronicled the history of recent sentencing reform in *State v. Donnell, supra,* at ¶ 2-4:

In 1996, the General Assembly limited trial court discretion to impose consecutive

> sentences by directing courts to make statutorily enumerated findings and to give supporting reasons for doing so at the time of sentencing. Am.Sub.H.B. No. 2, 146 Ohio Laws, Part IV, 7136. However, in accordance with decisions from the United States Supreme Court, this court held in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, that requiring judicial fact-finding prior to imposing consecutive sentences violated the Sixth Amendment guarantee of trial by jury. We therefore severed the requirement of judicial fact-finding from the statute, struck the presumption in favor of concurrent sentences, and held that judges had discretion to impose consecutive sentences.
>
> Subsequent to our decision in Foster, however, the United States Supreme Court issued *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 LED.2d 517 (2009), holding that a statutory requirement for judges in a jury trial to find certain facts before imposing consecutive sentences is constitutional. Accordingly, in *State v. Hedge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, we held that *Ice* did not automatically revive the consecutive-sentencing provisions held unconstitutional and severed from the statute in *Foster*, and as a result, we stated that judicial fact- finding would not be required prior to imposing consecutive sentences unless the General Assembly enacted new legislation requiring the court to make findings when imposing consecutive sentences.
>
> Subsequent to *Hedge*, the General Assembly enacted Am.Sub.H.B. No. 86, effective September 30, 2011, reviving some of the statutory language we severed in *Foster*. That legislation created a statutory presumption in favor of concurrent sentences and further directed courts to make statutorily enumerated findings prior to imposing consecutive sentences, but it did not require courts to give reasons in support of its findings.
> *Donnell* at ¶ 2-4.
>
> The General Assembly subsequently enacted Am.Sub.H.B. No. 86 ("H.B. 86"), effective September 30, 2011, with a legislative purpose to reduce the state's prison population and to save the associated costs of incarceration by diverting certain offenders from prison and by shortening the terms of other offenders sentenced to prison. See Ohio Legislative Service Commission, Fiscal Note & Local Impact Statement to Am.Sub.H.B. 86, at 3 (Sept. 30, 2011), available at www.legislature.state.oh.us/fiscalnotes.cfm?ID=129_HB_86&ACT=As% 20Enrolled (accessed July 18, 2014).
> *Donnell* at ¶ 20.

{¶ 23} Appellee argues that the sentencing scheme set forth in R.C. 2929.13(B)(1)(a) mandates that the trial court sentence a felon convicted of a fourth or fifth degree felony to a

"community control sanction" if the court finds that certain factors are present and if the court fails to make certain other findings. In this regard, appellee asserts that R.C. 2929.13(B)(1)(a) violates the doctrine of Separation of Powers and *Foster*. We, however, disagree. As indicated by the Ohio Supreme Court in *Donnell,* and the General Assembly itself, Am.Sub.H.B. 86 evidences the legislature's intent to avoid judicial fact-finding with respect to sentence enhancement, but require community control sanctions for certain fourth and fifth degree felonies in order to reduce prison populations. Thus, we find no separation of powers violation.

{¶ 24} Moreover, since H.B. 86 was enacted multiple appellate districts have issued decisions that involve R.C. 2929.13(B) and none have found that it violates separation of powers or other constitutional principles. For example, the Twelfth District held that "R.C. 2929.13(B)(1)(a) sets forth a presumption for community control if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence." *Napier*, *supra,* at ¶ 44. The Eleventh District has agreed, but noted, as we have above, that the presumption is subject to the exceptions listed in R.C. 2929.13(B)(1)(b). *State v. Parrado,* 11th Dist. Trumbull No. 2015-T-0069, 2016-Ohio-1313, ¶ 16. The Second District has observed: "Courts use various language in describing the requirements and interplay of R.C. 2929.13(B)(1)(a) and (b). Some courts have referred to R.C. 2929.13(B)(1)(a)'s requirement that community control be imposed if all of the qualifying conditions are met and none of the exceptions set forth in R.C. 2929.13(B)(1)(b) applies as a 'presumption' of community control, whereas others refer to community control as 'mandatory,' subject to certain conditions and exceptions. The bottom line is that the statutory requirement to impose community control for qualifying fourth and fifth degree non-violent offenses is subject to certain fact-finding by the trial court." *State v. Castle*, 2016-Ohio-4974, 67 N.E.3d

1283, ¶ 12 (2d Dist.).

{¶ 25} Consequently, in light of the foregoing, we cannot find that the statute is unconstitutional in all applications. Thus, we overrule appellee's first, second, third, fourth, and fifth assignments of error.

B. Unconstitutional Delegation to a State Agency

{¶ 26} In appellee's sixth assignment of error, appellee challenges R.C. 2929.13(A)/ 2929.13(B)(1)(a)/ R.C. 2929.13(B)(1)(c) as an unconstitutional delegation of the power to participate in the sentencing process to a state agency under the control of the executive branch in violation of the doctrine of Separation of Powers. Thus, appellee contends that R.C. 2929.13(B)(1)(a) and (B)(1)(c) are unconstitutional. R.C. 2929.13(B)(1)(a) requires a court to sentence a fifth-degree felony offender to a community control sanction, of at least one year's duration, if certain criteria outlined above apply. R.C. 2929.13(B)(1)(c) provides:

> If a court that is sentencing an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense believes that no community control sanctions are available for its use that, if imposed on the offender, will adequately fulfill the overriding principles and purposes of sentencing, the court *shall contact the department of rehabilitation and correction and ask the department to provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.* * * *

{¶ 27} Appellee argues that R.C. 2929.13(B)(1)(c) delegates to the Ohio Department of Rehabilitation and Corrections (ODRC) the power to review a finding by the common pleas court and make a decision that impacts the court's sentencing powers. Appellee cites *State ex rel. Bray v. Russell,* 89 Ohio St.3d 132, 2000-Ohio-119, 729 N.E.2d 359 (2000) for the proposition that the court

asking for a list of community control programs gives ODRC the power to sentence the defendant. In *Bray,* the Supreme Court of Ohio reviewed the constitutionality of R.C. 2967.11, a statute that provided for administrative extension of a prison term for offenses committed during the prison term, and concluded that the statute violated the constitutional doctrine of separation of powers. The court observed that although prison discipline is an exercise of executive power, trying, convicting and sentencing inmates for crimes committed while in prison is not. *Id.* at 136. By comparison, R.C. 2929.13 does not give ODRC the power to try, convict and sentence the defendant; rather, R.C. 2929.13 simply directs the court to inquire of the department and to obtain current information regarding available community control programs. Thus, *Bray* is inapplicable to this analysis.

{¶ 28} This court recently found a separation of powers violation in *State v. Dingus, supra,* where we considered a challenge to R.C. 2909.15(D)(2)(b), a statute that limited a trial court's discretion to reduce arson offenders' mandatory lifetime registration period only upon the request of the prosecutor and law enforcement agency. We found a portion of that statute unconstitutional:

> Under R.C. 2909.15(D)(2)(b), the trial court has discretion to impose a reduced reporting period of not less than ten years only if it receives a request from the prosecutor and the investigating law enforcement agency. If the prosecutor of the investigating law enforcement agency does not make such a request, then the trial court cannot consider imposing a reduced reporting period; and the arson offender must register for life.
>
> By depriving the trial court of the ability to act without the request of the prosecutor and the investigating law enforcement agency, the trial court's independence is compromised. The prosecutor and the investigating law enforcement agency effectively decide which registration periods can be reviewed by the trial court; thus, the prosecutor and the investigating law enforcement agency have an 'overruling influence' over the trial court.

> *Dingus,* ¶ 30-31, (McFarland, dissenting), citing *State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790, 864 N.E.2d 630, ¶ 23.

{¶ 29} Unlike *Dingus,* however, the case at bar does not involve the delegation of decision-making to another governmental branch. Rather, this matter involves consulting with an executive branch agency regarding contact information and program details for available community control sanctions. The statute does not require the trial court to heed the program recommendation of ODRC.

{¶ 30} In general, the United States Supreme Court "leave[s] to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Ford v. Wainwright*, 477 U.S. 399, 416, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (plurality opinion). It is well settled that "[t]he power to define and classify and prescribe punishment for felonies committed within the state is lodged in the General Assembly of the state." *State v. O'Mara*, 105 Ohio St. 94, 136 N.E. 885 (1922), paragraph one of the syllabus, overruled in part on other grounds, *Steele v. State*, 121 Ohio St. 332, 333, 168 N.E. 846 (1929). While "[t]he determination of guilt in a criminal matter and the sentencing of a defendant convicted of a crime are solely the province of the judiciary," *see Bray*, *supra,* at 136, judges have no inherent power to create sentences. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 22, citing Griffin & Katz, *Ohio Felony Sentencing Law* (2008) 4, Section 1:3, fn. 1; *see also South*, 144 Ohio St.3d 295, 2015-Ohio-3930, 42 N.E.3d 734 at ¶ 32 (C.J. O'Connor, concurring).

{¶ 31} Accordingly, based upon the foregoing reasons, we find no separation of powers violation and we overrule appellant's sixth assignment of error.

C. Void for Vagueness

{¶ 32} In their final assignment of error, appellee asserts that R.C. 2929.13(A), 2929.13(B)(1)(a), and 2929.13(B)(1)(c) violate the void-for-vagueness doctrine and conflict with other criminal statutes. Appellee contends that the statute in question violates the void-for-vagueness doctrine for a number of reasons, including (1) R.C. 2929.13(B)(1)(a) uses the phrase "a felony of the fourth or fifth degree," where R.C. 2929.13(B)(1)(a)(ii) uses the phrase that the "most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree," (2) "most serious" implies the possible existence of more than one charge" in contrast to the "a felony," (3) the word "charge" is an inexact reference to either the "most serious" indictment against the defendant or the most serious count of an indictment against the defendant, and (4) R.C. 2929.13(B)(1)(a) and R.C. 2929.13(K)(2) improperly define a category of offense - a "qualifying assault offense" by reference to statutes that only set the degree of and penalty for an "assault" against either a medical or hospital employee (R.C. 2903.13(C)(8)) or a judge, magistrate, prosecutor, or court official or employee (R.C. 2903.13(C)(9)).

{¶ 33} The void-for-vagueness doctrine is premised on the Fourteenth Amendment Due Process requirement a "law give fair notice of offending conduct." *Cincinnati v. Thompson,* 96 Ohio App.3d 7, 24, 643 N.E.2d 1157 (1st Dist.1994). A statute may be found to be void-for-vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *Papachristou v. Jacksonville,* 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed. 2d 110 (1972), quoting *United States v. Harris,* 347 U.S. 612, 627, 74 S.Ct. 808, 98 L.Ed. 989 (1954). "A law will survive a void-for-vagueness challenge if it is written so that a person of common intelligence is able to ascertain what conduct is prohibited and if the law

provides sufficient standards to prevent arbitrary and discriminatory enforcement." *Chicago v. Morales*, 527 U.S. 41, 56–57, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). When a statute is alleged to be void under the void-for-vagueness doctrine, all doubts are to be resolved in favor of the constitutionality of the statute. *State v. Harrington*, 159 Ohio App.3d 451, 2004-Ohio-7140, 824 N.E.2d 153, ¶ 20 (12th Dist.).

{¶ 34} A legislative enactment does not violate the void-for-vagueness doctrine because it could have been worded more precisely, nor does every word in the enactment need a definition, because an undefined term can be given its common, everyday meaning. *State v. Dorso*, 4 Ohio St.3d 60, 446 N.E.2d 449 (1983), *City of Blue Ash v. Price,* 2018-Ohio-1062, 98 N.E.3d 345, ¶ 16 (1st Dist.). Moreover, the void-for-vagueness doctrine does not require statutes to be drafted with scientific precision. *State v. Anderson*, 57 Ohio St.3d 168, 174, 566 N.E.2d 1224 (1991).

{¶ 35} When examining a statute for vagueness, the statute's language should be measured against three values: 1) to provide fair warning to the ordinary citizen so their behavior may comport with the statute, 2) to preclude arbitrary, capricious, and generally discriminatory enforcement by officials, and 3) to ensure fundamental constitutionally protected freedoms are not unreasonably impinged or inhibited. *State v. Tanner*, 15 Ohio St.3d 1, 3, 472 N.E.2d 689 (1984). The Supreme Court of Ohio recently addressed the void-for-vagueness doctrine in *State v. Williams,* 88 Ohio St.3d 513, 2000-Ohio-428, 728 N.E.2d 342. In *Williams*, the court held that R.C. Chapter 2950, the sexual offender classification statute, did not violate the void-for-vagueness doctrine. The Supreme Court noted R.C. Chapter 2950 does not prohibit any conduct and reasoned: Its provisions merely establish remedial registration and notification requirements for those sex offenders adjudicated to be a habitual sex offender or a sexual predator. The Court cited *Morales, supra,* 27 U.S. 41, 119 S.Ct.

1849, 144 L.Ed.2d 67 (1999), where the United States Supreme Court declared an ordinance that gave police discretion to disperse groups of people if they are in a place without an apparent purpose, without defining what is an 'apparent purpose,' to be unconstitutionally vague. *Morales,* 527 U.S. at 56–57, 119 S.Ct. 1849, 144 L.Ed.2d 67. The *Williams* court held that, by comparison, R.C. Chapter 2950 is far different and noted that R.C. Chapter 2950 provides factors to help define when an offender is "'likely to engage in the future in one or more sexually oriented offenses,' R.C. 2950.01(E), and is more specific than the Morales ordinance." *Williams,* 88 Ohio St.3d at 534, 728 N.E.2d 342.

{¶ 36} To the extent that appellee asserts R.C.2929.13(A),(B)(1)(a) and (B)(1)(c) are void under the void-for-vagueness doctrine, we disagree. We believe that the statute provides a person of ordinary intelligence a standard by which to determine what conduct is prohibited, provides sufficient standards to prevent arbitrary and discriminatory enforcement, and ensures fundamental constitutionally protected freedoms are not unreasonably impinged or inhibited. We, however, hasten to add that we are not unsympathetic with the plight of Ohio trial courts in their attempt to impose sentences for criminal offenders. Since 1996, various Ohio statutory enactments have severely limited trial courts in the exercise of their discretion to determine appropriate felony sentences. Although we may prefer a system in which a court may choose from a broad array of sentencing options, the General Assembly has taken a contrary view. Moreover, although we agree with appellee that the statutes in question are inartfully drafted and add to the convoluted and complex maze of Ohio felony sentencing statutes, we nevertheless overrule appellant's seventh assignment of error.

III. Conclusion

{¶ 37} Accordingly, based upon the reasons set forth above, we hereby sustain appellant's sole assignment of error, overrule appellee's seven assignments of error, reverse the trial court's judgment and remand this matter for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR FURTHER PROCEEDINGS
CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and this cause remanded for further proceedings consistent with this opinion. Appellant shall recover of appellee the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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.

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 earlier 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 expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Smith, P.J. & Hess, J.: Concur in Judgment & Opinion

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.