[Cite as *State v. Rodgers*, 2001-Ohio-1381]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	**JUDGES:**
STATE OF OHIO	:	**Hon. Julie Edwards, P.J.**
	:	**Hon. William Hoffman, J.**
Plaintiff-Appellee	:	**Hon. Sheila Farmer, J.**
	:	
-vs-	:	
	:	**Case No. 2000CA00335**
VIRGINIA D. RODGERS	:	
	:	
Defendant-Appellant	:	
	:	**O P I N I O N**

CHARACTER OF PROCEEDING:	**Criminal Appeal from Stark County Court of Common Pleas Case 2000CR0196B**
JUDGMENT:	**Affirmed**
DATE OF JUDGMENT ENTRY:	**September 24, 2001**

APPEARANCES:

For Plaintiff-Appellee	**For Defendant-Appellant**
RONALD MARK CALDWELL **Stark County Prosecutor's Office** **P. O. Box 20049** **Canton, OH 44701**	**HERBERT J. MORELLO** **808 Courtyard Center** **116 Cleveland Ave., N.W.** **Canton, OH 44702**

Edwards, P.J.

Defendant-appellant Virginia D. Rodgers [hereinafter appellant] appeals the July 19, 2000, Judgment Entry of the Stark County Court of Common Pleas which sentenced appellant on 46 counts of forgery, 17 counts of theft, one count of complicity to forgery, and two counts of receiving stolen property. Appellee-plaintiff is the State of Ohio [hereinafter appellee].

STATEMENT OF THE FACTS AND CASE

On April 28, 2000, appellant was indicted on 46 counts of forgery, in violation of R.C. 2913.31(A), 17 counts of theft, in violation of R.C. 2913.02, one count of complicity to forgery, in violation of R. C. 2923.03 and two counts of receiving stolen property, in violation of R. C. 2913.51. All counts were felonies of the fifth degree.

Appellant was arraigned on May 5, 2000. At the arraignment, appellant pled not guilty to all charges.

Subsequently, on June 1, 2000, appellant withdrew her former plea of not guilty to all charges and entered a plea of guilty to each count, as indicted. The trial court ordered that a presentence investigation report [hereinafter PSI] be prepared and deferred sentencing pending the return of the PSI.

A sentencing hearing was conducted on July 13, 2000. By Judgment Entry filed July 19, 2000, appellant was sentenced to a stated prison term of 11 months on 25 counts of forgery (counts 17 through 41 of the indictment); a stated prison term of eight months on each of four counts of forgery (counts 42 through 45 of the

indictment); a stated prison term of 11 months on the 17 counts of forgery (counts 46 through 62 of the indictment); a stated prison term of 11 months on the charge of complicity to forgery (count 68 of the indictment); a stated prison term of 11 months on the 17 counts of theft (counts 78 through 94 of the indictment); and a stated prison term of 11 months on each of two counts of receiving stolen property (counts 96 and 97 of the indictment).

The trial court further ordered that appellant serve the sentences for Count 17 and 96 of the indictment concurrently for a total of 11 months; that appellant serve the sentences for counts 18 through 21 of the indictment concurrently for a total of 11 months; that appellant serve the sentences for counts 22 through 25 of the indictment concurrently for a total of 11 months; that appellant serve the sentences for counts 26 through 31 of the indictment concurrently for a total of 11 months; that appellants serve the sentences for counts 32 through 36 of the indictment concurrently for a total of 11 months; that appellant serve the sentences for counts 37 through 41 of the indictment concurrently for a total of 11 months, that appellant serve the sentences for counts 42 through 45 of the indictment concurrently for a total of eight months; and appellant serve the sentences for counts 46 through 62, counts 78 through 94 and count 68 of the indictment concurrently for a total of 11 months. The trial court then ordered that appellant serve the aforementioned sentences consecutive to each other. In conclusion, the trial court ordered appellant to serve a total of "96 months" in prison for the offenses, as was stated in the Judgment Entry.[1]

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[1] **In addition to the prison terms, appellant was ordered to make restitution.**

On November 3, 2000, appellant's counsel filed a Motion for Leave to File Delayed Appeal. On December 15, 2000, this court granted that motion.

It is from the sentence of the trial court that appellant appeals, raising the following assignment of error:

> **THE COURT ERRED IN SENTENCING THE APPELLANT TO PRISON IN LIGHT OF SECTION 2929.13 OF THE OHIO REVISED CODE IN SENTENCING THE APPELLANT [SIC].**

I

In appellant's sole assignment of error, appellant contends that the trial court erred when it sentenced her to a term of imprisonment. Appellant contends that the record does not support the trial court's finding that appellant held a position of trust to which the offense was related or that appellant committed the offenses as part of an "organized criminal activity." See R.C. 2929.13(B)(d)&(e).

First we note that appellee argues that, pursuant to R.C. 2953.08(C), appellant was required to seek leave of this court prior to bringing this appeal. We will address whether appellant has a right to bring this appeal and/or has properly invoked the jurisdiction of this court. Revised Code 2953.08(C) states:

> **(C) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed**

However, only the imposition of a term of imprisonment is appealed.

> **upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (E)(3) or (4) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.**

However, a review of appellant's assignment of error reveals that appellant has not brought this appeal pursuant to R.C. 2953.08(C). Appellant does not appeal the imposition of consecutive sentences but rather appeals the imposition of terms of imprisonment for the commission of felonies of the fifth degree . These sentences were imposed pursuant to R.C. 2929.13(B), not R.C. 2929.14. Therefore, the requirements of R.C. 2953.08(C) are inapplicable to the appeal *sub judice*. Rather, appellant is exercising her right to appeal under R.C. 2953.08(A).[2] Appellant claims that the trial court's findings pursuant to R.C. 2929.13(B)(1)(d) and (e) are not supported by the record. Under R.C. 2953.08(A)(4), *supra*, a defendant may appeal,

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[2] **In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:**

. . .

(4) The sentence is contrary to law.

R.C. 2953.08(A), in relevant part.

as a matter of right, a prison term imposed for a felony of the fifth degree if it is contrary to law. Furthermore, R.C. 2953.08(G)(2)(a) indicates that a sentencing court's finding of a R. C. 2929.13(B)(1) factor is appealable when the factual basis is insufficient in the record.[3] In accord, *State v. Shyrock* (Aug. 1, 1997), Hamilton App.

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[3] **(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.**

The 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. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) 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;

(b) That the sentence is *otherwise* contrary to law.

No. C-961111, unreported. "The essence of the test for sufficiency is adequacy - - which is a question of law." *Id.* (citing *State v. Thompkins* (1997), 78 Ohio St.3d 380). In conclusion, we hold that a sentence based upon a finding not supported by the record is appealable pursuant to R.C. 2953.08(A)(4) as contrary to law. Therefore, this court has jurisdiction to consider appellant's assignment of error.

As stated previously, appellant contends that the trial court erred when it sentenced appellant to a term of imprisonment based on findings that (1) appellant held a position of trust and that these offenses were related to that position of trust and that (2) appellant was involved in organized criminal activity.

R.C. 2953.08(G)(2)(a)&(b) (emphasis added).

As alluded to previously, an appellate court may not disturb a sentence unless it finds by clear and convincing evidence that the sentence is not supported by the record or is otherwise contrary to law. R.C. 2953.08(G)(2).[4] Clear and convincing evidence is that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

Appellant was convicted of 66 felonies of the fifth degree. Revised Code 2929.13(B) provides sentencing guidelines for fifth degree felonies:

> **(B)(1) . . . [I]n sentencing an offender for a felony of the fourth or fifth degree, the sentencing court shall determine whether any of the following apply:**
>
> **. . .**
>
> **(d) 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.**
>
> **(e) The offender committed the offense for hire or as part of an organized criminal activity.**

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[4] **The 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. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:**

(a) 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;

(b) That the sentence is otherwise contrary to law.

R.C. 2953.08(G)(2).

. . .

(2)(a) If the court makes 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 prison term is consistent with the purposes and principles of sentencing set forth in section 2929.11[5] of the Revised

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[5] **The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. 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(A), in pertinent part.

> **Code and finds that the offender is not amenable to an available community control sanction, the court shall impose a prison term upon the offender.**
>
> **(b) [I]f 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.**
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> **R.C. 2929.13(B)(in relevant part).**

In this case, the trial court found R.C. 2929.13(B)(d) and (e) applicable. Specifically, after considering the factors of R.C. 2929.12 concerning seriousness and recidivism factors, the trial court made the following findings, in pertinent part:

> **[T]hat the defendant held a position of trust and the, at least some of these offenses related to the position of trust....**
>
> **And, finally, with respect to all of the charges, the Court finds that the offenses were committed as part of an organized criminal activity with the other co-defendants, either together as a group or, some of them, in pairs.**
>
> **Court [sic] further finds that you are not amenable to community control and that prison is consistent with the purposes of Revised Code 2929.11.**

Transcript of Proceedings (Sentencing) at 9-10.

Thus, after considering the factors set forth in R.C. 2929.12, and finding R.C. 2929.13(B)(d) and (e) to be applicable, the trial court imposed a term of imprisonment. The issue before this court is whether the findings pursuant to R.C. 2929.13(B)(d) and (e) were supported by the record. We will consider each finding in turn.

1. Position of Trust

The trial court found that appellant was in a position of trust in regard to some

of the counts to which appellant pled guilty. See R.C. 2929.13(B)(d). The record, including the PSI, indicates that appellant was a home health care worker, or in some instances, posing as a home health care worker, when the offenses in question were committed. We find that such a position places a person in a position of trust and facilitated the offenses. Therefore, we find the record supports the trial court's finding as to counts 17, 18 - 41, 96 and 97. Therefore, the trial court's imposition of a term of imprisonment for those counts was not contrary to law.

2. Organized Criminal Activity

As to all counts, the trial court found that appellant was involved in "organized criminal activity."[6] The record indicates that appellant and two co-defendants engaged in a crime spree that lasted approximately six months. In committing these crimes, the three co-defendants involved as many as four other individuals. The participants in these offenses cashed stolen checks, including some stolen from the elderly, including a 100-year old woman and an 85-year old woman. They stole cash, a checkbook and driver's license and a personal check from a 37 - 38-year old victim who was disabled and confined to a wheelchair. And they cashed false payroll checks. Appellant participated in schemes in which the checks were cashed, sometimes using aliases and disguises, and the proceeds used to purchase crack cocaine and other items. In addition, the co-defendants obtained phony payroll

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[6] **Since we have previously held that the trial court's imposition of a prison term on counts 17, 18 - 41, 96 and 97 was not contrary to law, the analysis of whether appellant's conduct was organized criminal activity is relevant only to the remaining counts, counts 42- 62, 68, 78-94. Regardless of our finding as to whether appellant was engaged in organized criminal activity, the prison sentence as to those counts relating to a position of trust stand.**

checks from a person who reportedly travels the country with a computer making bogus payroll checks.

Revised Code 2929.13(B) does not define "organized criminal activity." Recognizing this lack of definition, the Court of Appeals, First Appellate District, has held that "the determination of whether conduct constitutes "organized criminal activity" must be made on a case-by-case basis." *State v. Shyrock* (Aug. 1, 1997), Hamilton App. No. C-961111, unreported. In making that determination, the *Shyrock* court considered whether the conduct was part of a larger, well-organized conspiracy and whether it was committed for hire or profit.

We have looked to other portions of the Revised Code for insight and guidance as to the Legislature's meaning of "organized criminal activity." Upon review and consideration, we find appellant's conduct constituted organized criminal activity so as to justify the trial court's finding.

In Title I, State Government, Chapter 177, Investigation and Prosecution of Organized Criminal Activity, the term "organized criminal activity" is defined as "any combination or conspiracy to engage in activity that constitutes engaging in a pattern of corrupt activity. . . ." R.C. 177.01(E)(1) (Emphasis added.). Revised Code 177.01(E)(2) provides the following definitions regarding a "pattern of corrupt activity":

> **(2) A person is engaging in an activity that constitutes "engaging in a pattern of corrupt activity" if any of the following apply:**
>
> **(a) The person is or was employed by, or associated with, an enterprise and the person conducts or participates in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity .... (Emphasis added.)**

An "enterprise" is defined as "any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity." R.C. 2923.31(C). "Enterprise" includes both illicit and licit enterprises. *Id*. In this case, appellant acted with others, numbering as many as seven individuals, as an organized group to commit these offenses.

Further, we find appellant participated in this enterprise through a pattern of corrupt activity. A pattern of corrupt activity:

> **two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event. At least one of the incidents forming the pattern shall occur on or after September 3, 1986. Unless any incident was an aggravated murder or murder, the most recent of the incidents forming the pattern shall occur within six years after the commission of any prior incident forming the pattern, excluding any period of imprisonment served by any person engaging in the corrupt activity.**

R.C. 177.01(E)(3).

Corrupt activity is defined as "engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in any . . . violation of . . . 2913.02 [theft], . . . 2913.31 [forgery], . . . 2913.51 [receiving stolen property]." R.C. 2923.31(I) Appellant was convicted of 17 counts of theft, 46 counts of forgery, 2 counts of complicity to forgery and 2 counts of receiving stolen property. Thus, appellant engaged in a pattern of corrupt activity.

Therefore, based upon the guidance and definitions provided in the Ohio Revised Code, we find appellant's conduct constituted organized crime.

However, even if appellant's activities do not constitute organized criminal

activity, we find the trial court had the discretion to sentence appellant to prison. In situations in which a trial court fails to find a factor delineated in R.C. 2929.13(B)(1), a trial court is to consider R.C. 2929.12 and must impose a community control sanction or combination of community control sanctions if it finds that a community control sanction or combination of community control sanctions is consistent with the purposes and principles of sentencing, as stated in R.C. 2929.11.[7] In situations in which a trial court finds a factor or factors delineated in R. C. 2929.13(B)(1), a trial court is to consider R. C. 2929.12 and must impose prison if prison is consistent with the purposes and principles of sentencing as stated in R. C. 2929.11 and if the court finds that the offender is not amenable to available community control sanctions.[8] The situation that is not covered under 2929.13(B)(2) is the situation in which the court does not find any of the factors set forth in R. C. 2929.13(B)(1) but finds, after considering R. C. 2929.12 factors, that the offender is not amenable to community control sanctions and prison is consistent with R. C. 2929.11. It would appear that in that situation a trial court may impose a term of imprisonment.

In the case *sub judice*, after considering the factors of R.C. 2929.12, the trial court imposed a term of imprisonment, finding: "prison is consistent with the purposes of Revised Code section 2929.11 and the defendant is not amenable to an available community control sanction." Even if the crimes of appellant do not fit the technical definition of organized criminal activity found elsewhere in the code, the deliberate, organized and abundant nature of appellant's criminal activity may

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[7] **See R. C. 2929.13(B)(2)(b)**

[8] **See R. C. 2929.13(B)(2)(a)**

certainly be used by the trial court in assessing recidivism and seriousness issues. We find that the trial court's findings were sufficient to impose a prison term even if none of the factors of R.C. 2929.13(B)(1) applied.

Therefore, we find that the trial court made sufficient findings in the case *sub judice* to impose incarceration upon appellant.

Appellant's sole assignment of error is overruled.

The judgment of the Stark County Court of Common Pleas is affirmed.

By Edwards, P.J.

Hoffman, J. and

Farmer, J. concurs

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JUDGES

JAE/0809

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
	:	
-vs-	:	**JUDGMENT ENTRY**
	:	
	:	
VIRGINIA D. RODGERS	:	
	:	
Defendant-Appellant	:	**CASE NO. 2000CA00335**

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs to appellant.

JUDGES