[Cite as *State v. Miller*, 2004-Ohio-4636.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

RYAN M. MILLER

Defendant-Appellant

JUDGES:
: Hon: W. Scott Gwin, P.J.
: Hon: Sheila G. Farmer, J.
: Hon: John F. Boggins, J.
:
:
: Case No. 04-COA-003
:
:
: O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Ashland County Court of Common Pleas, Case No. 03-CRI-070
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 2, 2004
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant

ROBERT P. DESANTO
Ashland County Prosecutor
Suite 307, Orange Tree Square
Ashland, OH 44805

DOUGLAS A. MILHOAN
610 Market Avenue N.
Canton, OH 44702

Gwin, P.J.

{¶1} Appellant Ryan M. Miller, appeals the sentence imposed by the Ashland County Court of Common Pleas. The appellee is the State of Ohio.

{¶2} On June 24, 2003, the Ashland County Grand Jury indicted appellant on two counts of felonious assault, felonies of the second degree, in violation of R.C. 2903.11. Count one of the indictment alleged that the appellant knowingly caused serious physical harm to Matthew Workman. Count two of the indictment was an alternative count in which it was alleged that appellant knowingly caused or attempted to cause physical harm to the victim by means of a deadly weapon.

{¶3} This case arose when the appellant shot 14 year old Matthew Workman in the back with an air rifle. Appellant pled not guilty and the case proceeded to a jury trial on November 4, and 5, 2003.

{¶4} The evidence at trial was that this was an intentional shooting not an accidental shooting. (1T. at 112-115). The victim was initially treated at a local hospital, but subsequently transferred to Akron Children's Hospital. (1T. at 132-133).

{¶5} Dr. John Crow of Akron Children's Hospital testified at trial that the pellet went through the victim's skin and the muscle. (1T. at 281). The pellet traversed the spleen and came to rest next to the right kidney. (Id.). The doctor further testified "***this injury was potentially a lethal injury because of the bleeding of the spleen, because of the close proximity to other vital structures. Bullets are unpredictable when they enter the body." (Id. at 282-283).

{¶6} The doctor further testified "***As Director of Trauma, I felt this was the kind of injury that could have easily killed Matthew." (Id. at 285).

{¶7} Evidence at trial indicated that the appellant either denied responsibility or attempted to minimize his responsibility for the shooting. (1T. at 138; 230;244.).

{¶8} On November 5, 2003, the jury returned a verdict of guilty on Count one of the indictment finding the appellant to have knowingly caused serious physical harm to Matthew Workman. The jury found appellant not guilty of Count two of the indictment. The trial court deferred sentencing and ordered a pre-sentence investigation report.

{¶9} The trial court reviewed the pre-sentence investigation report and also heard from the victim in the case. Matthew Workman indicated that he did not wish to see the appellant serve any prison time in this case. (2T. at 447).

{¶10} The court noted that the appellant was on probation from Municipal Court at the time of the instant offense. (2T. at 449).

{¶11} The court further noted that appellant has sought substance abuse treatment and anger management treatment. (Id.). The court found that the injury to victim was worsened by the age of the victim, in this case 14 years old, and that the victim did suffer serious physical harm. (Id. at 450).

{¶12} The court further found that "this was an intentional act with malice aforethought by the defendant, and certainly was no accident." (Id. at 450). The court further noted "the defendant's prior conduct at college, in which he was charged with a criminal offense and did face expulsion from Ohio University prior to leaving school, for setting fire to a bulletin board. This, again, indicates propensity to violence and a lack of concern for consequences of his criminal actions." (Id. at 451). The court concluded

that it could not find that non-prison sanctions would adequately protect the public from further harm. (Id. at 451-52).

{¶13} The court sentenced appellant to two years imprisonment. (Id.).

{¶14} Appellant timely filed a notice of appeal and set forth as his sole assignment of error:

{¶15} "I. THE IMPOSITION OF A PRISON SENTENCE IN THIS CASE IMPOSES AN UNNECESSARY BURDEN ON STATE RESOURCES."

I.

{¶16} In his sole assignment of error, appellant contends that the imposition of a prison sentence in this case is an unnecessary burden on the State resources. We disagree.

{¶17} After the enactment of Senate Bill 2 in 1996, an appellate court's review of an appeal from a felony sentence was modified. Pursuant to present R.C. 2953.08(G)(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 re-sentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion.

{¶18} The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

{¶19} "(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."

{¶20} 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.

{¶21} When reviewing a sentence imposed by the trial court, the applicable record to be examined by the appellate court includes the following: (1) the pre-sentence investigation report; (2) the trial court record in the case in which the sentence was imposed; and (3) any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed. R.C. 2953.08(F) (1) through (3). The sentence imposed, by the trial court, should be consistent with the overriding purposes of felony sentencing: “to protect the public from future crime by the offender” and “to punish the offender.”

{¶22} A question arises as to whether appellant has a right to appeal his sentence upon the grounds that it is an unnecessary burden on State resources. R.C. 2953.08 does not specify this as grounds for appealing a sentence in a criminal case as a matter of right. Appellant does not argue that the trial court failed to make the required findings pursuant to R.C. 2929.12. Nor does appellant argue the trial court erred in finding that appellant was not amenable to an available community control sanction. Appellant fails to support his argument that the imposition of prison sanction in this case, constitutes an “unnecessary burden on State or local resources.” *State v.*

Barton, 5th Dist. No. 03COA038, 2004-Ohio-977; *State v. Rostorfer*, 5th Dist. No. 03-COA-018, 2004-Ohio-975.

{¶23} In disposing of similar claims, most courts quote the following passage from *State v. Ober* (Oct. 10, 1997), 2d Dist. No. 97CA0019:

{¶24} "Ober is correct that the 'sentence shall not impose an unnecessary burden on state or local government resources.' R.C. 2929.13(A). According to criminal law experts, this resource principle 'impacts on the application of the presumptions also contained in this section and upon the exercise of discretion.' Griffin and Katz, Ohio Felony Sentencing Law (1996-97), 62. Courts may consider whether a criminal sanction would unduly burden resources when deciding whether a second degree felony offender has overcome the presumption in favor of imprisonment because the resource principle is consistent with the overriding purposes and principles of felony sentencing set forth in R.C. 2929.11. Id.

{¶25} "Although resource burdens may be a relevant sentencing criterion, R.C. 2929.13[A] does not require trial courts to elevate resource conservation above the seriousness and recidivism factors. Imposing a community control sanction on Ober may have saved state and local government funds; however, this factor alone would not usually overcome the presumption in favor of imprisonment." Id. See, also, *State v. Wolfe*, 7th Dist. No. 03 COA 045, 2004-Ohio-3044 at ¶14-15; *State v. Stewart* (Mar. 4, 1999), 8th Dist. No. 74691; *State v. Brooks* (Aug. 18, 1998), 10th Dist. No. 97APA-11-1543.

{¶26} It would appear that what the appellant is really arguing is that the trial court erred by not overcoming the presumption of imprisonment contained in R.C. 2929.13(D).

{¶27} In the case at bar, appellant was convicted of one count of felonious assault, R.C. 2903.11(A) (1), second degree felony. For a violation of a felony of the second degree the court must impose a definite prison term of two, three, four, five, six, seven, or eight years. R.C. 2929.14(A) (2). Appellant, having never previously served a prison sentence, was sentenced to the minimum two years within the statutory sentencing range for his offense.

{¶28} R.C. 2929.13(D) provides:

{¶29} "(D) Except as provided in division (E) or (F) of this section, for a felony of the first or second degree and for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729, of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code. Notwithstanding the presumption established under this division, the sentencing court may impose a community control sanction or a combination of community control sanctions instead of a prison term on an offender for a felony of the first or second degree or for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable if it makes both of the following findings:

{¶30} “(1) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.

{¶31} “(2) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense.”

{¶32} Thus, in order to impose a community control sanction in the instant case the trial court would have been required to find that such a sanction would adequately punish appellant, that appellant was less likely to re-offend, and that such a sanction would not demean the seriousness of the offense, because appellant's conduct was less serious than conduct normally constituting the offense.

{¶33} R.C. 2953.08(B) provides:

{¶34} “(B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the

circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:

{¶35} "(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925. of the Revised Code."

{¶36} The Legislature has expressly provided that the prosecution can appeal a trial court's decision overcoming the presumption of imprisonment contained in R.C. 2929.13. No such provision has been made for a defendant to appeal a sentence on the basis that the trial court refused to supersede the presumption for a prison term on a second degree felony. As this Court has previously held:

{¶37} "Appellant seeks to appeal his sentence as of right based upon the trial court's refusal to supersede the presumption for a prison term on a second degree felony. R.C. Section 2953.08 sets forth the circumstances under which a defendant may appeal a felony sentence as of right. The statute does not provide an appeal as of right in this circumstance, nor does the "contrary to law" provision require each and every sentence be subjected to review under the guidelines. *State v. Untied*, March 5, 1998, Muskingum App. No. CT97-18; *State v. Taylor*, August 8, 2003, Tuscarawas App. No. 2002CA78. Here, appellant was convicted of a second degree felony and was not given the maximum sentence; therefore, his appeal is not permitted by R.C. 2953.08. Id." *State v. Barton*, 5th Dist. No. 2003CA00064, 2004-Ohio-3058 at ¶74.

{¶38} Appellant's contention, therefore, is that the trial court abused the discretion conferred on it, which is not a matter for which R.C. 2953.08(G) permits appellate review. See *State v. Cochran*, 2nd Dist. No. 20049, 2004-Ohio-4121; *State v.*

Alvarez (2003), 154 Ohio App.3d 526, 2003-Ohio-5094, 797 N.E.2d 1043, ***State v. Kennedy*** **(Sept. 12, 2003), Montgomery App. No. 19635, 2003-Ohio-4844.**

{¶39} We are not disposed to review the statutory requirements the appellant's sentence implicates to determine whether they were satisfied, absent some specific contention in that regard in appellant's brief, reasons in support of the contentions, and citations to "the authorities, statutes, and parts of the record on which appellant relies." App.R.16 (A) (7). None is presented here.

{¶40} According to App. R. 12(A) (2): "The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App. R. 16(A)."

{¶41} An appellate court may rely upon App.R. 12(A) in overruling or disregarding an assignment of error because of "the lack of briefing" on the assignment of error. *Hawley v. Ritley* (1988), 35 Ohio St.3d 157, 159, 519 N.E.2d 390, 392-393. "Errors not treated in the brief will be regarded as having been abandoned by the party who gave them birth." *Uncapher v. Baltimore & Ohio Rd. Co.* (1933), 127 Ohio St. 351, 356, 188 N.E. 553, 555.

{¶42} Accordingly, appellant's sole assignment of error is overruled.

{¶43} For the foregoing reasons, the judgment of the Ashland County Court of Common Pleas, Ohio, is affirmed.

By Gwin, P.J.,

Farmer, J., and

Boggins, J., concur

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JUDGES

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IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RYAN M. MILLER	:	
Defendant-Appellant	:	CASE NO. 04-COA-003

{¶44} For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Ashland County Court of Common Pleas, Ohio, is affirmed. Costs to appellant.

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JUDGES