[Cite as *State v. Krause*, 2005-Ohio-1058.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon: John F. Boggins, P.J.
	:	Hon: W. Scott Gwin, J.
Plaintiff-Appellant	:	Hon: Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 2004-CA-74
KYLE P. KRAUSE	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case No. 2003-CR-483H
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	March 4, 2005

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
JAMES J. MAYER, JR. JAMES A. SCHOREN 38 South Park Street Mansfield, OH 44902	RANDALL E. FRY 10 West Newlon Place Mansfield, OH 44902

Gwin, J.

{¶1} The State of Ohio appeals a judgment of the Court of Common Pleas of Richland County, Ohio, which sentenced appellee Kyle P. Krause to five years community control and a fine of $2,500. The State assigns a single error:

{¶2} "I. THE SENTENCE IMPOSED BY THE TRIAL COURT SHOULD BE REVERSED AND INCREASED PURSUANT TO REVISED CODE 2953.08 (B)(1) AND 2953.08 (B)(2) AS IT WAS CONTRARY TO LAW, AND NOT SUPPORTED BY THE RECORD."

{¶3} Appellee was charged with two counts of assault on a peace officer, felonies of the fourth degree; one count of failure to comply with the order or signal of a police officer, a felony of the third degree; two counts of aggravated robbery, first degree felonies; and three counts of kidnapping, also first degree felonies. The charges all arose out of an incident at Malabar State Park in Richland County, Ohio. Appellee pled guilty to all charges, and the court merged the two counts of aggravated robbery into a single count, the three counts of kidnapping into one count, and the two counts of assaulting a police officer into the aggravated robbery charge. This resulted in sentencing on one count of aggravated robbery, one count of kidnapping, and one count of failure to comply. The court informed the appellee before he entered his guilty plea, that if he were tried and convicted on all charges, the maximum penalty would be 25 years in prison and a $500,000 fine.

{¶4} The State submits the facts underlying the charges were that appellee kidnapped his three-year old daughter, Molly and drove to Mt. Jeez in Malabar Farm State Park. State Troopers Shane Morrow and J. M. Thompson stopped appellee's vehicle for questioning and noticed Molly was in the backseat, unrestrained. The

troopers' dialogue with the appellee made them suspicious, and they asked him to accompany them to their post. Appellee, however, fled from the troopers, and eventually lost control of his vehicle and crashed into a tree. The appellee then took Molly and attempted to flee on foot. The officers ordered appellee to stop, but he did not. Trooper Thompson used his Taser, which caused appellee to drop Molly. Appellee continued to resist, and a physical struggle ensued between appellee and the officers. At some point during the struggle, appellee grabbed Trooper Thompson's service weapon and attempted to pull it from the holster. The troopers used mace, the Taser, and physical force to regain control of the weapon, but as they attempted to handcuff appellee, he grabbed the Taser and attempted to stun Trooper Morrow. Both troopers were treated at the scene for minor injuries.

{¶5} At the sentencing hearing, the court took statements from appellee and from his therapist, who indicated appellee had been undergoing treatment for post-traumatic stress disorder and generalized anxiety disorder. The court conducted a dialogue with appellee, in which the court noted appellee's actions were foolish and stupid and could have resulted in injury or death. The court also noted appellee had a long history of abusing woman, including two previous convictions for domestic violence.

{¶6} The court further noted it did not agree with the recommendations of the probation officer and the pre-sentence investigation, which suggested appellee be sentenced to probation. The court indicated it did not believe this sentence was appropriate, but because it was the recommendation, the court would give appellee "a big break". The court told appellee it was apprehensive about not institutionalizing him,

because it was unconvinced appellee had changed and was no longer likely to re-offend.

{¶7} The State raises two issues in its assignment of error. First, the State submits five years community control is insufficient given the severity of the crimes and the appellee's history. R.C. 2953.08 permits the State to take an appeal of right from a sentence which does not include a prison term, if there is a presumption favoring a prison term for the offense.

{¶8} Pursuant to R.C. 2929.13, there is a presumption in favor of a prison term for a first or second degree felony. In order to overcome the presumption and impose a community control sanction, the court must make both of the following findings: (1) A community control sanction or combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors listed in R.C. 2929.12 indicating a lesser likelihood of recidivism outweigh the applicable factors which indicate a greater likelihood of recidivism. (2) The court must find a community control sanction or combination of community control sanctions would not demean the seriousness of the offense because the factors under R.C. 2929.12 indicate the offender's conduct was less serious than conduct normally constituting the offense, and outweigh the applicable factors which indicate the offender's conduct was more serious than conduct which normally constitutes the offense.

{¶9} Additionally, the State argues the court did not make the appropriate findings as required by the statute, and did not state its reasoning on the record for the sentence it imposed. In *State v. Edmonson* (1999), 86 Ohio St. 3d 324, the Ohio

Supreme Court held a trial court is required to make the statutory findings indicating the court's reason for the sentence it imposes. Subsequently, in *State v. Comer,* 99 Ohio St. 3d 463, 2003-Ohio-4165, 793 N.E. 2d 473, the Supreme Court held the trial court must make its findings orally and state its reasons on the record at the sentencing hearing. R.C. 2929.19 provides if a trial court does not impose a prison term for a felony of the first or second degree, it must state its reasons for not imposing a prison term, and its findings which override the presumption of a prison term.

{¶10} This court has reviewed the transcript of the change of plea hearing held on April 29, 2004, and the transcript of the sentencing hearing, held on August 10, 2004. No where in either transcript does the trial court make the findings which would support the imposition of the community control sanction rather than imprisonment.

{¶11} The State also raises a second issue with regard to the assignment of error, namely, the court was mistaken as to the weight it should give to the pre-sentence investigation and recommendations. The State cites us to *State v. Scovil* (1998), 127 Ohio App. 3d 505, 713 N.E. 2d 452, wherein the Eighth Dist. Court of Appeals found a court has discretion to determine the most effective way to achieve the purposes and principles of felony sentencing as set forth in the Revised Code. In *State v. Hamilton* (May 14, 1999), Darke Appellate No. 1474, the Court of Appeals for the Second District held the trial court is not bound by a probation officer's recommendations, but should consider it a factor, along with all the other factors before the court. We agree the trial court has discretion to determine the weight to give the various factors it considers in coming to its own independent conclusions.

{¶12} The State of Ohio asks us to increase the appellee's sentence or to remand the case to the sentencing court with instructions to re-sentence. We find, however, we must vacate the sentence and remand the cause to trial court to make whatever findings it deems appropriate and to enter a sentence consistent with the findings. Until the court has made its findings on the record, this court cannot pass on the appropriateness of the sentence.

{¶13} The assignment of error is sustained.

{¶14} For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County, Ohio, is vacated, and the cause is remanded to that court for further proceedings in accord with law and consistent with this opinion.

By Gwin, J.,

Boggins, P.J., and

Edwards J., concur

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JUDGES

WSG:clw 0217

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
KYLE P. KRAUSE	:	
Defendant-Appellee	:	CASE NO. 2004-CA-74

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio, is vacated, and the cause is remanded to that court for further proceedings in accord with law and consistent with this opinion. Costs to appellee.

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JUDGES