

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-13-010

Appellee

Trial Court No. 2009CR0292

v.

William Miller

**DECISION AND JUDGMENT**

Appellant

Decided: December 30, 2013

\* \* \* \* \*

Paul A. Dobson, Wood County Prosecuting Attorney,  
Gwen Howe-Gebbers, Chief Assistant Prosecuting Attorney,  
and David E. Romaker, Jr., Assistant Prosecuting Attorney,  
for appellee.

William V. Stephenson, for appellant.

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**PIETRYKOWSKI, J.**

{¶ 1} Defendant-appellant, William Miller, appeals the January 30, 2013 judgment of the Wood County Court of Common Pleas which, following a guilty plea to one count of nonsupport of dependents, sentenced appellant to 11 months of imprisonment.

Because we find that the sentence was neither an abuse of discretion nor contrary to law, we affirm.

{¶ 2} On June 18, 2009, appellant was indicted on one count of nonsupport of dependents, in violation of R.C. 2919.21(A)(2)(G)(1), a fifth degree felony. An arrest warrant was issued and in September 2012, appellant was arrested and arraigned on the charge. He entered a not guilty plea. Following negotiations with the state and an agreement to recommend community control, on November 6, 2012, appellant withdrew his not guilty plea and entered a guilty plea to the charge. The matter was referred for a presentence investigation report.

{¶ 3} On January 30, 2013, the trial court sentenced appellant to 11 months of imprisonment. This appeal followed. Appellant raises the following three assignments of error for our review:

- I. The trial court lacked discretion to impose a prison sentence.
- II. The trial court abused its discretion by ignoring the purposes and principles of Ohio sentencing law, ignoring the plea agreement of probation/community control and instead imposing the effective maximum sentence rather than the minimum sanction necessary.
- III. The trial court committed reversible error because it failed to establish that the defendant was not amenable to an available community control sanction, failed to weigh the factors mandatory in every case, and

failed to impose the minimum sanction necessary consistent with the purposes and principles of Ohio sentencing law.

{¶ 4} Appellant's assignments of error are related and will be jointly addressed. Appellant contends that the trial court failed to make the necessary statutory findings prior to sentencing him to an imprisonment term for a fifth degree felony. Appellant further argues that the court abused its discretion when it rejected the state's sentencing recommendation of community control.

{¶ 5} At the outset we note that a plea agreement between the state and a defendant is generally not binding on the court and the ultimate sentencing authority rests with the trial judge. *State v. Burks*, 10th Dist. Franklin App. No. 04AP-531, 2005-Ohio-1262, ¶ 18, citing *State v. Mathews*, 8 Ohio App.3d 145, 146, 456 N.E.2d 539 (10th Dist.1982).

{¶ 6} The Ohio Supreme Court has set forth a two-step analysis to be employed in reviewing felony sentences on appeal. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. First, appellate courts are required to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Id.* at ¶ 26. Second, if the first prong is satisfied, the appellate court reviews the decision imposing sentence under an abuse-of-discretion standard. *Id.*

{¶ 7} The version of R.C. 2929.13 effective on the date of sentencing sets forth the sentencing guidelines for fourth and fifth degree felonies, in relevant part, as follows:

(B)(1)(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 of violence that is a misdemeanor and that the offender committed within two years prior to the offense for which sentence is being imposed.

{¶ 8} It is undisputed that appellant was previously convicted of felony nonsupport; thus, the court was not limited to a non-prison sanction. The maximum term of imprisonment for a fifth degree felony is 12 months. R.C. 2929.14(A)(5). Appellant received an 11-month sentence. Accordingly, because the sentence was within the statutory range and not contrary to law we will now consider whether the trial court abused its discretion in sentencing appellant. R.C. 2929.11(A) provides:

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

To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

{¶ 9} R.C. 2929.12 sets forth a non-exhaustive list of “factors to consider in felony sentencing” including factors relating to the seriousness of the conduct and factors relating to the likelihood of recidivism. R.C. 2929.12(A). Under the statute, a sentencing court may consider factors not listed in the statute where relevant to the principles and purposes of felony sentencing. *Id.* A sentencing court is not required to use any specific language to demonstrate that it considered the applicable seriousness and recidivism factors. *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000); *State v. Warren*, 6th Dist. Lucas No. L-07-1057, 2008-Ohio-970, ¶ 9.

{¶ 10} In the present case, in sentencing appellant to prison the court noted appellant’s prior felony nonsupport conviction which, after two community control violations, resulted in appellant being sentenced to a year in prison. The court further noted that the 1999 sentence ordered appellant to pay \$27,000 restitution for unpaid child support; at the time of sentencing for the present charge, appellant owed \$57,000. Finally, the court noted appellant’s failure to attend the presentence investigation interview (though appellant denied receiving notice of the interview).

{¶ 11} Based on the foregoing, we find that the trial court did not abuse its discretion when it sentenced appellant to 11 months of imprisonment. Appellant's first, second and third assignments of error are found not well-taken.

{¶ 12} On consideration whereof, we find that appellant was not denied a fair proceeding and the judgment of the Wood County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

Stephen A. Yarbrough, J.

James D. Jensen, J.  
CONCUR.

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JUDGE

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| <p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:<br/><a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p> |
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