[Cite as *State v. Lumpkin*, 2013-Ohio-840.]

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

State of Ohio — Court of Appeals No. L-11-1294

Appellee — Trial Court No. CR0201101058

v.

Jessie Lumpkin, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: March 8, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael D. Bahner, Assistant Prosecuting Attorney, for appellee.

Jayson A. Taylor, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals from a judgment of the Lucas County Court of Common Pleas finding him guilty of attempted aggravated possession of drugs, a felony of the fourth degree. For the reasons that follow, we affirm.

{¶ 2} Appellant is Jessie Lumpkin. On October 19, 2010, a search warrant was executed at his residence, during which police officers discovered a bottle containing 62 pills (11.83 grams) of Oxycontin and 32 pills (5 grams) of morphine. Appellant was charged with three counts of aggravated possession of drugs and three counts of aggravated drug trafficking. Pursuant to a plea agreement, he entered a no contest plea to one charge of attempted aggravated possession of drugs. The remaining charges were dismissed. The trial court sentenced appellant to a 16-month prison sentence. He now appeals setting forth the following assignments of error:

I. The trial court committed plain error at sentencing.

II. Defense counsel's assistance was ineffective.

{¶ 3} In his first assignment of error, appellant asserts that the trial court committed plain error by sentencing him to a 16-month prison sentence when R.C. 2929.13(B)(1)(a) mandates that at least one year of community control sanctions must be served.

{¶ 4} "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." For an error to affect a substantial right, it must affect the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240.

{¶ 5} Appellant contends that, pursuant to R.C. 2929.13(B)(1)(a), he could only be sentenced to community control. We disagree.

{¶ 6} R.C. 2929.13(B)(1)(a) states:

> 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.
>
> (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. (Emphasis added.)

{¶ 7} The record in this case shows that appellant was convicted of three prior felonies. Therefore, given these convictions, the mandatory community control sanctions found in R.C. 2929.13(B)(1)(b) do not apply to appellant. The trial court's sentencing

was lawful, as appellant was sentenced in accordance with R.C. 2929.13(E)(1). This section gives the court authority to institute a sole sentence of imprisonment, and even has a presumption of incarceration, where any violation of Chapter 2925 occurs. In the present case, appellant violated R.C. 2925.11(C)(1)(b) and therefore a presumption of a prison term exists. Appellant's first assignment of error is found not well-taken.

{¶ 8} In his second assignment of error, appellant contends that his trial counsel was ineffective for failing to object to the imposed sentence.

{¶ 9} In order to establish an ineffective assistance of counsel claim in violation of the Sixth Amendment, appellant must show that his trial attorney's performance was both deficient and prejudicial. *Strickland v. Washi*ngton, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 10} Having already determined that appellant's sentence was lawful, it cannot be said that counsel was ineffective for failing to object to appellant's sentence. Accordingly, appellant's second assignment of error is found not well-taken.

{¶ 11} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R.24.

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. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE