[Cite as *State v. Yeager*, 2016-Ohio-4759.]

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

State of Ohio	Court of Appeals No. S-15-025
Appellee	Trial Court No. 15 CR 596
v.	
Matthew P. Yeager	**DECISION AND JUDGMENT**
Appellant	Decided: June 30, 2016

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Karin L. Coble, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from the judgment of the Sandusky County Court of Common Pleas, convicting appellant Matthew Yeager of one count of burglary in violation of R.C. 2911.12(A)(3), a felony of the third degree, and sentencing him to 36 months in prison. For the reasons that follow, we affirm.

{¶ 2} On July 7, 2015, the Sandusky County Grand Jury returned a three-count indictment charging appellant with burglary in violation of R.C. 2911.12(A)(2), a felony

of the second degree, theft in violation of R.C. 2913.02(A)(1), a misdemeanor of the first degree, and receiving stolen property in violation of R.C. 2913.51(A), a misdemeanor of the first degree.

{¶ 3} On September 1, 2015, appellant, pursuant to an agreement with the state, withdrew his initial plea of not guilty, and pleaded guilty to one count of burglary in violation of R.C. 2911.12(A)(3), a felony of the third degree. The record indicates that a plea to the lesser included offense of R.C. 2911.12(A)(3) was appropriate because there was reason to believe that appellant knew that the occupant of the house was not likely to be present. The state also agreed to dismiss the two misdemeanor charges. Following the Crim.R. 11 plea colloquy, the trial court accepted the plea and continued the matter for preparation of a presentence investigation report.

{¶ 4} On October 14, 2015, appellant appeared for sentencing. At the sentencing hearing, both appellant and his counsel pleaded for placement in Crosswaeh and its drug treatment program. Counsel noted that appellant had a long history of drug abuse, and had never been offered treatment before. Counsel stated that appellant had been accepted into Crosswaeh, where he would receive the treatment he needs. Counsel also pointed out that this was appellant's first felony and it was not an offense of violence, but rather was appellant merely breaking into a home that he knew was not occupied to steal some iron weights to scrap for a little bit of money.

{¶ 5} Following those statements, the trial court addressed appellant. The court indicated that it had reviewed the presentence investigation report, and noted that

appellant was 32 years old and had two teenage kids who had been neglected for the past 15 years. The court next recounted appellant's substance abuse history, including his use of marijuana and alcohol at the age of 14, then graduating to LSD, cocaine, crack cocaine, percocets, and, for the past nine years, heroin. The court also described appellant's criminal history, which includes burglary in 1998 as a juvenile, two domestic violence convictions in 2003, and drug paraphernalia and drug possession in 2013. Further, the court noted that appellant's ORAS score was 26, which indicates a high risk of reoffending. The court commented that appellant has had numerous opportunities to turn his life around, and at some point "society needs a break." The court continued that it did not doubt that appellant was a heroin addict, but posited that by removing appellant from the access to heroin it could help him reach his bottom quicker than if appellant went through a treatment program. The court stated that, based on appellant's record and what was in the presentence investigation report, it believed that the prison sentence to be imposed was consistent with the court's obligation to the community. Thereafter, the court sentenced appellant to serve three years in prison.

{¶ 6} Appellant has timely appealed his conviction and sentence, raising one assignment of error for our review:

> 1. A maximum sentence for a third degree, non-violent felony, where the offender has no significant criminal history, is clearly and convincingly unsupported by the record.

Analysis

{¶ 7} We review a felony sentence under the two-prong approach set forth in R.C. 2953.08(G)(2). *State v. Tammerine*, 6th Dist. Lucas No. L-13-1081, 2014-Ohio-425, ¶ 11. R.C. 2953.08(G)(2) provides that an appellate court may increase, reduce, modify, or vacate and remand a disputed sentence 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 (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

Here, none of the express findings under R.C. 2953.08(G)(2) apply. Thus, we must examine whether the sentence is otherwise contrary to law.

{¶ 8} In *Tammerine*, we recognized that *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, still can provide guidance for determining whether a sentence is clearly and convincingly contrary to law. *Tammerine* at ¶ 15. The Ohio Supreme Court in *Kalish* held that where the trial court expressly stated that it considered the purposes and principles of R.C. 2929.11 as well as the factors listed in R.C. 2929.12, properly applied postrelease control, and sentenced the defendant within the statutorily permissible range, the sentence was not clearly and convincingly contrary to law. *Kalish* at ¶ 18.

{¶ 9} In his assignment of error, appellant does not contend that the trial court improperly applied postrelease control or sentenced him to a term outside of the permissible range. Instead, appellant argues that the trial court failed to consider the purposes and principles of sentencing in R.C. 2929.11, and the seriousness and recidivism factors in R.C. 2929.12.

{¶ 10} Initially, as evidence of the court's failure, appellant notes that the trial court did not expressly state at sentencing or in its judgment entry of conviction that it considered R.C. 2929.11 and 2929.12. Thus, appellant concludes that we should presume that the trial court failed to consider them.

{¶ 11} Furthermore, appellant specifically argues that the court failed to consider R.C. 2929.11(A), which requires a court to be guided by the overriding purposes of felony sentencing, which 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.

Appellant asserts that the court failed to consider that a less than maximum sentence would impose less of a burden on the state than a maximum sentence, that appellant would only be incapacitated for three years (less with good behavior) and would be released without drug addiction treatment, that a three-year prison sentence would not deter other drug addicts from stealing, and that appellant has a need for drug treatment and "lock-down" drug treatment was available at Crosswaeh.

{¶ 12} Appellant also argues in detail that the trial court failed to consider R.C. 2929.12. Appellant has enumerated each seriousness and recidivism factor, and asserts that only two of the 14 "more serious" and "more likely to reoffend" factors apply. In contrast, he argues that five of the nine "less serious" and "less likely to reoffend" factors apply. Accordingly, appellant concludes that the scales of justice do not weigh in favor of a maximum sentence, and appellant entreats us to hold that "where heroin addiction is explicitly found to be the primary cause of the offenses, neither the defendant nor the community is served by imposing a maximum prison term."

{¶ 13} Upon review, we do not clearly and convincingly find that the trial court failed to consider R.C. 2929.11 and 2929.12. First, we note that where the record is silent, "it is presumed that the trial court gave proper consideration to [R.C. 2929.11 and 2929.12]," not the opposite presumption as advocated by appellant. *State v. Sims*, 6th Dist. Sandusky No. S-13-037, 2014-Ohio-3515, ¶ 10, quoting *Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at ¶ 18, fn. 4. The burden is on appellant to rebut that presumption. *State v. Smith*, 6th Dist. Sandusky No. S-14-037, 2015-Ohio-1867, ¶ 11,

citing *State v. Rutherford*, 2d Dist. Champaign No. 08CA11, 2009-Ohio-2071, ¶ 34-35. Second, it is up to the discretion of the individual decision-maker "to determine the weight to assign a particular statutory factor." *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000). When making such judgments, "the sentencing court 'is not required to divorce itself from all personal experiences and make [its] decision in a vacuum.'" *Id.* at 215-216, quoting *State v. Cook*, 65 Ohio St.3d 516, 529, 605 N.E.2d 70 (1992).

{¶ 14} Here, the record indicates that the trial court considered the "very thorough" presentence investigation report. Based on the information contained in the report, including appellant's lengthy history of substance abuse and his "not stellar" criminal history, the court recognized the need to give society "a break" from appellant. The court also noted that there are many programs in prison that can help appellant develop an appreciation for his body and mind. Further, the court considered appellant's ORAS score, which indicated a high risk to reoffend, and determined that by removing appellant's access to heroin perhaps it can help appellant reach bottom quicker than through treatment. Finally, the court referenced its experience in sentencing criminal defendants, and concluded that the prison sentence "is consistent with my obligation to the community."

{¶ 15} In light of the trial court's statements at sentencing and the material contained in the presentence investigation report, we hold that appellant has not demonstrated that the trial court failed to comply with R.C. 2929.11 and 2929.12 prior to

imposing the prison sentence. Although appellant argues that a lesser sanction may achieve the purposes of sentencing, the trial court clearly considered the need for incapacitating the offender, deterring the offender, and rehabilitating the offender, and came to a different conclusion. Furthermore, as it pertains to the seriousness and recidivism factors contained in R.C. 2929.12, we note that this is not the case where all of the factors weigh in favor of the crime being less serious or the risk of reoffending being lower. Indeed, while it appears that none of the "more serious" factors apply to this particular crime, appellant concedes that two of the factors indicating that appellant is likely to commit future crimes do apply. R.C. 2929.12 requires consideration of the factors; it is left to the discretion of the sentencing judge to determine the weight to be given to those factors. Therefore, because appellant has not demonstrated that the trial court failed to consider R.C. 2929.11 and 2929.12, we conclude that the sentence is not clearly and convincingly contrary to law.

{¶ 16} Accordingly, appellant's assignment of error is not well-taken.

Conclusion

{¶ 17} For the foregoing reasons, we find that substantial justice has been done the party complaining, and the judgment of the Sandusky 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, J. _____
JUDGE

James D. Jensen, P.J. _____
CONCUR.
JUDGE