

[Cite as *State v. Peterson*, 2015-Ohio-1152.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101727

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

DAMIEN PETERSON

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-05-471307-A

BEFORE: McCormack, J., Jones, P.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: March 26, 2015

ATTORNEYS FOR APPELLANT

Timothy J. McGinty
Cuyahoga County Prosecutor

By: Mary McGrath
Assistant County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

Robert L. Tobik
Cuyahoga County Public Defender

By: John T. Martin
Assistant Public Defender
310 Lakeside Ave., Suite 200
Cleveland, OH 44113

TIM McCORMACK, J.:

{¶1} The state of Ohio appeals from a judgment of the Cuyahoga County Common Pleas Court that granted Damien Peterson judicial release. The record reflects the trial court failed to make the necessary statutory findings before granting judicial release. For that reason, we reverse and remand the matter to the trial court for further proceedings consistent with this opinion.

{¶2} In 2006, Peterson was convicted of aggravated robbery and felonious assault. He was also found guilty of having a weapon while under disability, firearm specifications and repeat violent offender specifications. He received a 12-year term for his offenses.¹

{¶3} After serving nine years of his prison term, in 2014, Peterson applied for judicial release. After a hearing, the trial court granted judicial release. The state now appeals the trial court's decision.

{¶4} The state does not dispute Peterson's eligibility to apply for judicial release but argues that the trial court's decision granting judicial release was contrary to law because the trial court failed to make certain findings on the record as required by the statute.

{¶5} As an initial matter, we note that the state is authorized under R.C. 2953.08(B)(3) to appeal a granting of judicial release. Section (B)(3) of R.C. 2953.08 states:

(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

¹The trial court originally sentenced him to 15 years in prison. On his direct appeal, this court determined that the trial court erred in imposing three additional years for the repeat violent offender specification. This court reduced his sentence to 12 years. *State v. Peterson*, 8th Dist. Cuyahoga No. 88248, 2007-Ohio-1837.

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:

* * *

(3) The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was imposed for a felony of the first or second degree.

{¶6} Citing R.C. 2953.08(B)(3), this court has acknowledged that a judgment granting judicial release is a modification of a sentence, which the state has the right to appeal. *State v. Costlow*, 8th Dist. Cuyahoga No. 89501, 2008-Ohio-1097, ¶ 9. Because Peterson's sentence was imposed for aggravated robbery, a first-degree felony, and felonious assault, a second-degree felony, the state is authorized to appeal the trial court's granting of judicial release pursuant to R.C. 2953.08(B)(3).

{¶7} R.C. 2929.20 governs the procedure for judicial release. R.C. 2929.20(J) requires certain findings to be made by the trial court before granting judicial release. It states:

(J) (1) A court shall not grant a judicial release under this section to an eligible offender who is imprisoned for a felony of the first or second degree, or to an eligible offender who committed an offense under Chapter 2925. or 3719. of the Revised Code and for whom there was a presumption under section 2929.13 of the Revised Code in favor of a prison term, unless the court, with reference to factors under section 2929.12 of the Revised Code, finds both of the following:

(a) That a sanction other than a prison term would adequately punish the offender and protect the public from future criminal violations by the eligible offender because the applicable factors indicating a lesser likelihood of recidivism outweigh the applicable factors indicating a greater likelihood of recidivism;

(b) That a sanction other than a prison term would not demean the seriousness of the offense because factors indicating that the eligible offender's conduct in committing the offense was less serious than conduct normally constituting the offense outweigh factors indicating that the eligible offender's conduct was more serious than conduct normally constituting the offense.

(2) A court that grants a judicial release to an eligible offender under division (J)(1) of this section shall specify on the record both findings required in that division and also shall list all the factors described in that division that were presented at the hearing.

(Emphasis added.)

{¶8} Here, the record reflects that at the hearing, argument in favor and against the granting of judicial release was made by Peterson and the prosecutor, respectively. Peterson's counsel pointed out that Peterson had matured since his commission of the robbery offenses and has been remorseful. Peterson had taken full advantage of his time in the prison by participating in many educational programs and obtaining various certificates. He had progressed from level-three security to level-one in prison. His mother had been supportive and was willing to provide lodging upon his release from prison. Peterson also desired to develop a relationship with his son, for whom he had sent child support money from the prison. Peterson hoped to put his criminal past behind him and reach his goal of becoming a truck driver or a paralegal.

{¶9} Arguing against judicial release, the prosecutor pointed out that Peterson committed the 2006 aggravated robbery while on parole for a prior aggravated robbery he committed in 2000. The prosecutor argued Peterson had neither shown any remorse nor accepted his responsibility, noting that after his direct appeal, he filed numerous appeals challenging his 2006 conviction and sentence.

{¶10} The transcript reflects that, before granting judicial release, the trial court, addressing Peterson, stated the following: "You have had a good record this time. You have

shown an interest in doing a variety of things, all of which would suggest to me the maturity you're talking about. I am going to take a chance on you. You better not make me look bad."

{¶11} While the trial court's reasons may have supported the findings required by the statute, these statements by the trial court do not meet the requirement of R.C. 2929.20(J). Although the record reflects factors weighing in favor of judicial release, unless the trial court makes the requisite findings in Peterson's favor on the two specific statutory factors, a granting of judicial release is not authorized under the law. *See, e.g., State v. Kelly*, 10th Dist. Franklin No. 08AP-118, 2008-Ohio-3828 (the trial judge may well have had all the appropriate considerations in mind when granting judicial release, but the statute requires the findings to be on the record).

{¶12} The state's assignment of error is well taken.² The trial court's judgment is reversed, and the matter is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIM McCORMACK, JUDGE

LARRY A. JONES, SR., P.J., and
EILEEN A. GALLAGHER, J., CONCUR

² Peterson's counsel concedes the error.

