

[Cite as *State v. Lopez*, 2015-Ohio-5269.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103032

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

AMOS LOPEZ, JR.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART;
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-579677-A

BEFORE: Celebrezze, A.J., McCormack, J., and Boyle, J.

RELEASED AND JOURNALIZED: December 17, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Defendant-appellant, Amos Lopez (“Lopez”), brings this appeal challenging the trial court’s sentence for drug possession. Lopez argues that the trial court denied him the right to due process at the violation hearing regarding his intervention in lieu of conviction program. After a thorough review of the record and law, we affirm in part, reverse in part, and remand the matter to the trial court for a limited resentencing.

I. Factual and Procedural History

{¶2} Cleveland police officers recovered a bag containing 0.11 grams of cocaine from Lopez’s vehicle during a traffic stop. The Cuyahoga County Grand Jury returned a one-count indictment charging Lopez with one count of drug possession, a felony of the fifth degree, in violation of R.C. 2925.11(A). Lopez pled guilty to the drug possession charge and was accepted into the intervention in lieu of conviction program (“ILC”).

{¶3} On March 4, 2014, the trial court set forth the conditions of Lopez’s participation in the program and informed him that any violation of the program’s terms could result in a finding of guilt for the drug possession charge and a prison sentence of up to 12 months. The trial court, in advising Lopez, stated:

This is such a great program, such a huge offering to the defendants. If you violate this program, I’ll send you to prison. Sometimes when I put people on probation, I give them more than one chance. When I put somebody in the [Treatment in Lieu of Conviction] program, I only give one chance. Do you understand that?

{¶4} Furthermore, the trial court advised Lopez that his driver's license would be suspended for one year, and that work privileges would be given after six months.

{¶5} The trial court advised Lopez that he must abstain from alcohol and drugs, and that he could go to prison if he failed to do so. The trial court ordered Lopez to undergo chemical dependency treatment:

You will complete an intensive outpatient chemical dependency treatment program. The probation department will help you set up that. You will complete an aftercare program. You will have regular drug testing. You will attend regular and documented substance abuse programs such as the 12-step program. You will be monitored by the Court of Common Pleas. You should maintain your employment. If you cannot maintain that employment, you will have to get another job. You will attend a meeting every day for 90 days. After 90 days, you will have Sundays off and you will go every other day.

{¶6} The trial court ordered Lopez to work the program with a sponsor, and informed him that he was forbidden from associating with "anyone who has a known criminal record." The trial court further advised Lopez of the following conditions:

Part of this program is you're not allowed to go anywhere where drugs or alcohol are sold, served or used. That includes family weddings, backyard barbecues, sports venues, restaurants, Progressive Field, all of those places. If you violate this program, you will go to prison for 12 months.

Lopez acknowledged that he understood the ILC conditions imposed by the trial court.

{¶7} On February 19, 2015, Lopez was arrested for driving under the influence of alcohol and/or drugs ("DUI") and failure to stop after an accident. The trial court postponed the ILC violation hearing until Lopez's DUI case was resolved in the Cleveland Municipal Court. On April 14, 2015, Lopez was convicted of DUI, placed on inactive community control, and sentenced to 180 days of incarceration with 150 days suspended.

{¶8} On May 5, 2015, Lopez returned to the trial court for a violation hearing. Lopez's probation officer informed the trial court that Lopez violated the terms of his ILC program three times: (1) he tested positive for alcohol on January 28, 2015, (2) he failed to consistently verify his attendance at 12-step meetings, and (3) he was convicted of DUI in the Cleveland Municipal Court on April 14, 2015. There was some discussion at the hearing regarding Lopez's 12-step program. Lopez's probation officer informed the trial court that Lopez attended 90 12-step meetings in 90 days. However, the trial court determined that after the 90-day period, Lopez failed to attend a meeting every other day.

{¶9} Following the hearing, the trial court found that Lopez had violated the terms and conditions of ILC. Thus, the trial court found Lopez guilty of one count of drug possession and sentenced him to 11 months of incarceration, crediting him with 72 days of time served.

{¶10} Lopez filed the instant appeal assigning six errors for review:

I. Lopez was denied due process of law when the court failed to consider a community based sentence.

II. Lopez was denied due process of law when the court conducted a probation revocation hearing without a preliminary hearing as to the alleged violation.

III. Lopez was denied due process of law when the court questioned him without advising him of his rights.

IV. Lopez was denied due process of law when the court used its purported undisclosed knowledge of another event in finding a violation.

V. Lopez was denied due process of law when the court failed to identify what the alleged violation was which authorized the court to impose an almost maximum sentence.

VI. Lopez was denied due process of law when he was sentenced to prison instead of ordering treatment for a fifth-degree felony.

II. Law and Analysis

{¶11} Lopez's assignments of error pertain to: (1) trial court's ILC violation hearing, and (2) the sentence the trial court imposed after finding that he violated his ILC program. In *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, 926 N.E.2d 1282, ___, 9, the Ohio Supreme Court explained ILC:

ILC is a statutory creation that allows a trial court to stay a criminal proceeding and order an offender to a period of rehabilitation if the court has reason to believe that drug or alcohol usage was a factor leading to the offense. R.C. 2951.041(A)(1). If, after a hearing, the trial court determines that an offender is eligible for ILC, then it shall accept the offender's guilty plea, place the offender under the general control and supervision of the appropriate probation or other qualified agency, and establish an intervention plan for the offender. R.C. 2951.041(_____) and (D). The intervention plan shall last at least one year, during which the offender is ordered to abstain from alcohol and illegal drug use, to participate in treatment and recovery-support services, and to submit to regular random testing for drug and alcohol use. R.C. 2951.041(D). If the offender successfully completes the intervention plan, the trial court shall dismiss proceedings against the offender without an

adjudication of guilt and may order the sealing of records related to the offense. R.C. 2951.041(E). If the offender fails to comply with any term or condition imposed as part of the intervention plan, the court shall enter a finding of guilt and impose the appropriate sanction. R.C. 2951.041(F).

{¶12} R.C. 2951.041 allows courts to “treat the cause rather than punish the crime.” *Id.* at ¶ 10, quoting *State v. Shoaf*, 140 Ohio App.3d 75, 77, 746 N.E.2d 674 (10th Dist.2000). This court has previously concluded that the ILC program is not a form of community control or probation. *State v. Ingram*, 8th Dist. Cuyahoga No. 84925, 2005-Ohio-1967, _ 13. Furthermore, this court recognized that ILC was not created as a punishment, but rather to provide an opportunity for first-time offenders to receive help with their addiction without the ramifications of a felony conviction. *Id.*

A. Due Process

1. Preliminary Hearing

{¶13} Lopez argues that the trial court denied him due process of law when it conducted a probation revocation hearing without holding a preliminary hearing regarding the violation.

{¶14} We first note that the trial court’s May 5, 2015 hearing pertained to Lopez’s violation of the conditions of the treatment in lieu of conviction program. The hearing was not, as Lopez contends, a probation violation hearing. As we determined in *Ingram*, ILC is not probation. *Ingram* at _ 13.

{¶15} When an offender fails to comply with the conditions of an ILC program, R.C. 2951.041(F) governs. R.C. 2951.041(F) states in relevant part:

If the court grants an offender’s request for intervention in lieu of conviction and the offender fails to comply with any term or condition imposed as part of the intervention plan for the offender, the supervising authority for the offender promptly shall advise the court of this failure, and the court shall hold a hearing to determine whether the offender failed to comply with any term or condition imposed as part of the plan. If the court determines that the offender has failed to comply with any of those terms and conditions, it shall enter a finding of guilty and shall impose an appropriate sanction under Chapter 2929 of the Revised Code.

{¶16} Here, after learning that Lopez was convicted of DUI, the trial court held a hearing to determine whether he failed to comply with any term or condition imposed as part of his ILC program. Thus, the trial court complied with the R.C. 2951.041(F) requirements.

{¶17} Furthermore, Lopez waived any right to a preliminary hearing. In *State v. Delaney*, 11 Ohio St.3d 231, 233, 465 N.E.2d 72 (1984), the Ohio Supreme Court held that “failing to object to a lack of a preliminary hearing waived any right to that hearing.” In *Ingram*, the defendant was charged with drug possession, trafficking in drugs, and possession of criminal tools. *Ingram*, 8th Dist. Cuyahoga No. 84925, 2005-Ohio-1967, at _ 2. Pursuant to R.C. 2951.041, the trial court granted defendant’s motion for ILC and ordered the defendant to complete a one-year treatment plan. *Id.* at _ 3. After the probation department alleged that defendant failed to report — as required by the program — the trial court held a violation hearing. *Id.* at _ 4. The defendant argued that “the trial court violated his constitutional rights when it failed to have a preliminary probation

violation hearing, citing *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 36 L.Ed.2d 656, 93 S.Ct. 1756 and *State v. Williams* (1988), 43 Ohio App.3d 184, 540 N.E.2d 300.” *Id.* at _ 24. This court held that defendant, by not requesting a preliminary hearing and failing to object when the trial court did not hold a preliminary hearing, waived any right to a preliminary hearing. *Id.* at _ 28.

{¶18} In the instant matter, Lopez neither requested a preliminary hearing nor objected when one was not held. Thus, Lopez waived any right to a preliminary hearing on the violation of his ILC program.

{¶19} Lopez’s second assignment of error is overruled.

2. Questioning Lopez During the Violation Hearing

{¶20} Lopez argues that the trial court denied him due process of law when it questioned him without advising him of his constitutional rights. The Fifth Amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself.

{¶21} The record shows that the trial court fully explained Lopez’s constitutional rights, in compliance with Crim.R. 11(), prior to his guilty plea. The trial court engaged Lopez in a lengthy colloquy concerning whether he understood his rights, including the following:

The Court: [Do you understand you have] the right to require the State of Ohio to prove your guilt beyond a reasonable doubt at a trial at which it cannot be forced [sic] to testify against yourself?

Defendant Lopez: Yes.

Furthermore, Lopez's counsel notified the trial court that she advised Lopez of his constitutional rights:

I have fully discussed this case with Mr. Lopez. I have also advised him of his Constitutional rights. I do believe that his forthcoming plea will be made knowingly, intelligently and voluntarily.

{¶22} The trial court thereafter accepted Lopez's guilty plea and found that he made the plea knowingly, voluntarily, and intelligently. The record clearly shows that the trial court instructed Lopez, prior to his guilty plea, that he had a right not to testify against himself and that this right would be waived by pleading guilty.

{¶23} In *State v. Mason*, 8th Dist. Cuyahoga No. 69280, 1996 Ohio App. LEXIS 1872, *5 (May 9, 1996), this court held that the Fifth Amendment right against self-incrimination, although extensive, is not applicable at a sentencing hearing: "[d]efendant had already been found guilty and, therefore, could not subsequently 'incriminate' himself when he made statements during his sentencing hearing." In *Ingram*, this court stated that there was "no reason to require the same colloquy at a violation hearing or sentencing hearing as required prior to the defendant's plea of guilt." *Ingram*, 8th Dist. Cuyahoga No. 84925, 2005-Ohio-1967, at _ 33.

{¶24} During the violation hearing in the instant matter, Lopez's probation officer and attorney addressed the trial court. Thereafter, the trial court asked Lopez "what do you do at U-Haul?" After Lopez addressed the trial court's question, the court asked, "is

there anything else that you would like to say about this probation violation?” At this point, Lopez proceeded to discuss his participation in the treatment program and the violations outlined by the probation department.

{¶25} After reviewing the record, we cannot say that the trial court compelled Lopez to testify against himself at the violation hearing. The record clearly shows that Lopez willingly chose to address the court.

{¶26} Lopez argues that the trial court violated his constitutional rights by questioning him about his February 19, 2015 accident — an “unrelated matter.” Furthermore, Lopez argues that his statements about the accident could be used against him.

{¶27} We find no merit to this argument. During the violation hearing, Lopez’s probation officer stated, “[o]n February 19, 2015, Mr. Lopez was arrested for DUI and failure to stop after an accident in Cleveland, Ohio.” It was this accident that prompted the trial court and probation department to hold a violation hearing. Thus, we cannot say that the accident was an “unrelated matter” that the trial court improperly inquired about. Furthermore, in the Cleveland Municipal Court: (1) Lopez was found guilty of DUI, (2) the prosecutor nolleed the failure to stop after an accident charge, and (3) the municipal court sentenced Lopez on April 14, 2015. At the time of Lopez’s May 5, 2015 violation hearing, there was nothing left for the Cleveland Municipal Court to do regarding the February 19, 2015 incident. Thus, Lopez’s argument that his statements regarding the incident could be used against him fails.

{¶28} Lopez’s third assignment of error is overruled.

3. Undisclosed Knowledge

{¶29} Lopez argues that the trial court denied him due process of law when it found a violation based on undisclosed knowledge. Specifically, Lopez argues that the trial court, based upon undisclosed knowledge, claimed that he did not stop after the February 19, 2015 accident.

{¶30} During the violation hearing, the trial court inquired as to why Lopez did not stop after the accident. Lopez claimed that he was unable to stop because his car was still in motion after the accident. The trial court stated:

I know exactly where this happened, sir. I know exactly how far 56th is from 52nd and Storer. If your car was still in motion all of that time, you had to be going over 100 miles an hour, and I don’t think that you were.

{¶31} In *State v. Ross*, 8th Dist. Cuyahoga No. 100708, 2014-Ohio-4566, this court explained that “[w]hen a trier of facts relies upon personal knowledge, he necessarily deprives the litigant of the right of confrontation, cross-examination and an impartial tribunal.” *Id.* at _ 15, quoting *State v. Mattox*, 8 Ohio App.2d 65, 68, 220 N.E.2d 708 (10th Dist.1966).

{¶32} In the instant matter, the trial court did rely on “personal” or “undisclosed” knowledge in questioning Lopez’s explanation of the February 19, 2015 accident. However, Lopez’s failure to stop after the accident was neither a disputed fact nor relevant in determining whether he violated the conditions of his ILC program. Furthermore, the

trial court relied on the testimony of Lopez's probation officer — rather than personal or undisclosed knowledge — in finding that Lopez violated the program's conditions.

{¶33} Lopez's probation officer informed the trial court that Lopez: (1) was arrested for DUI and failure to stop after an accident on February 19, 2015, (2) was found guilty of DUI on April 14, 2015, (3) tested positive for alcohol on January 28, 2015, and (4) failed to consistently verify his attendance at 12-step meetings. Furthermore, although the trial court gave Lopez driving privileges for work only, he was not working at the time the accident occurred. The trial court relied on the record, rather than personal knowledge of the area where the accident occurred, in finding that Lopez violated the ILC program. We therefore find no due process violation.

{¶34} Lopez's fourth assignment of error is overruled.

4. Failure to Identify Violation

{¶35} Fourth, Lopez argues that the trial court denied him due process of law when it sentenced him to 11 months of incarceration without identifying the violation on which the sentence was based.

{¶36} During the violation hearing, the trial court learned of Lopez's positive alcohol test, failure to verify attendance at 12-step meetings, and DUI from Lopez's probation officer. The trial court also learned that Lopez had been driving for purposes other than work at the time of his DUI and accident. The trial court stated:

This Court does not allow anyone to drive while on probation for any kind of substance abuse, okay?

This Court does not allow drunk drivers to be in our community. I'm violating you on your intervention in lieu of conviction program.

Furthermore, when Lopez's counsel asked the trial court to reconsider the sentence, the court stated, "he went in my community, drove against my orders, and drove drunk."

{¶37} After reviewing the record, we cannot say that the trial court failed to identify Lopez's violation of his ILC program.

{¶38} Lopez's fifth assignment of error is overruled.

B. Trial Court's Sentence

{¶39} In his first assignment of error, Lopez argues he was denied due process of law when the trial court failed to consider a community based sentence. Furthermore, in his sixth assignment of error, Lopez argues that he was denied due process of law when the trial court imposed a prison sentence, rather than ordering treatment, for a fifth-degree felony. As both assignments of error challenge the trial court's sentence and involve the same facts and standard of review, we will analyze them contemporaneously.

1. Standard of Review

{¶40} When reviewing a felony sentence, this court no longer applies the abuse of discretion standard of *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. *State v. A.H.*, 8th Dist. Cuyahoga No. 98622, 2013-Ohio-2525, ¶ 7. Instead, we follow the standard of review set forth in R.C. 2953.08(G)(2), which provides in relevant part:

The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division 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.

A sentence is not clearly and convincingly contrary to law where the trial court considers the purposes and principles of sentencing under R.C. 2929.11 as well as the seriousness and recidivism factors listed in R.C. 2929.12, properly applies postrelease control and sentences a defendant within the permissible statutory range. *In re A.H.* at ¶ 10, citing *Kalish*.

2. Review of Sentence for Errors of Law

{¶41} In the instant matter, Lopez pled guilty to drug possession, R.C. 2929.11(A), a felony of the fifth degree. The trial court accepted Lopez into the ILC program, and explicitly advised him “[i]f you violate this program, you will go to prison for 12 months.”

When Lopez violated the conditions of his ILC program, the trial court, pursuant to R.C. 2951.041(F), found him guilty of the drug possession charge.

{¶42} R.C. 2951.041(F) states “[i]f the court determines that the offender has failed to comply with any of [the ILC] terms and conditions, it shall enter a finding of guilty and shall impose an appropriate sanction under Chapter 2929 of the Revised Code.”

Furthermore, R.C. 2929.14(A)(5) states that “[f]or a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.”

{¶43} After finding Lopez guilty of drug possession, the trial court sentenced him to 11 months at the Lorain Correctional Institution and gave him credit for 72 days of time served. Thus, the trial court complied with R.C. 2951.041(F), and the trial court’s sentence was clearly within the statutory range under R.C. 2929.14(A)(5).

{¶44} Lopez argues that the trial court failed to consider alternative sanctions, such as treatment, and directs this court to R.C. 2929.13(E).

{¶45} R.C. 2929.13(E) states:

(1) Except as provided in division (F) of this section, for any drug offense that is a violation of any provision of Chapter 2925. of the Revised Code and that is a felony of the third, fourth, or fifth degree, the applicability of a presumption under division (D) of this section in favor of a prison term or of division (B) or (C) of this section in determining whether to impose a prison term for the offense shall be determined as specified in section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, or 2925.37 of the Revised Code, whichever is applicable regarding the violation.

(2) If an offender who was convicted of or pleaded guilty to a felony violates the conditions of a community control sanction imposed for the offense solely by reason of producing positive results on a drug test, the court, as punishment for the violation of the sanction, shall not order that the offender be imprisoned unless the court determines on the record either of the following:

(a) The offender had been ordered as a sanction for the felony to participate in a drug treatment program, in a drug education program, or in

narcotics anonymous or a similar program, and the offender continued to use illegal drugs after a reasonable period of participation in the program.

(b) The imprisonment of the offender for the violation is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code.

{¶46} Here, in addition to testing positive for alcohol on January 28, 2015, Lopez (1) was arrested for DUI and failure to stop after an accident on February 19, 2015, (2) was found guilty of DUI on April 14, 2015, (3) failed to consistently verify his 12-step meetings, and (4) exceeded the scope of his work-related driving privileges. Thus, because Lopez’s violation of the ILC program was not based solely on his positive alcohol test, R.C. 2929.13(E)(2) was not implicated.

3. Community Control Sanctions

{¶47} Although the trial court’s sentence was clearly within the statutory range, we find that the sentence was contrary to law under R.C. 2929.13(B)(1)(a).

{¶48} R.C. 2929.13(B)(1)(a), which creates a presumption in favor of community control sanctions for nonviolent fourth- or fifth-degree felonies meeting certain criteria, 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 or that is a qualifying assault offense, 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.
- (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.

(iv) The offender previously has not been convicted of or pleaded guilty to a misdemeanor offense of violence that the offender committed within two years prior to the offense for which sentence is being imposed.

(Emphasis added.) *See State v. Coleman*, 8th Dist. Cuyahoga Nos. 98557 and 98558, 2013-Ohio-1658, _ 5.

{¶49} Despite the presumption in favor of community control sanctions for nonviolent fourth- or fifth-degree felonies, a trial court may sentence an offender to prison if it makes certain findings under R.C. 2929.13(B)(1)(b). R.C. 2929.13(B)(1)(b) states:

The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense if any of the following apply:

(i) The offender committed the offense while having a firearm on or about the offender's person or under the offender's control.

(ii) If the offense is a qualifying assault offense, the offender caused serious physical harm to another person while committing the offense, and, if the offense is not a qualifying assault offense, the offender caused physical harm to another person while committing the offense.

(iii) The offender violated a term of the conditions of bond as set by the court.

(iv) The court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, and the department, within the forty-five-day period specified in that division, did not provide the court with the name of, contact information for, and program details of any community control sanction of at least one year's duration that is available for persons sentenced by the court.

(v) The offense is a sex offense that is a fourth or fifth degree felony violation of any provision of Chapter 2907. of the Revised Code.

(vi) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.

(vii) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person, and the offender previously was convicted of an offense that caused physical harm to a person.

(viii) The offender held a public office or position of trust, and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.

(ix) The offender committed the offense for hire or as part of an organized criminal activity.

(x) The offender at the time of the offense was serving, or the offender previously had served, a prison term.

(xi) The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance.

{¶50} In *State v. Ogle*, 2012-Ohio-3693, 975 N.E.2d 563, _ 8 (8th Dist.), the

defendant pled guilty to breaking and entering — a fifth-degree felony and nonviolent

offense — and the trial court sentenced defendant to 20 days in jail. The defendant did not have a prior criminal history. *Id.* This court reversed the trial court’s sentence, holding that R.C. 2929.13(B)(1)(a) applied and that “the trial court was therefore required to sentence [defendant] to a community control sanction of at least one year.” *Id.* In *State v. Cox*, 8th Dist. Cuyahoga No. 97924, 2012-Ohio-3158, the defendant pled guilty to drug possession, a felony of the fifth degree. *Id.* at _ 2. The trial court sentenced defendant to two days in jail. *Id.* This court reversed the trial court’s sentence, holding that all of the R.C. 2929.13(B)(1)(a) elements applied and that accordingly, “the trial court was bound by R.C. 2929.13(B)(1)(a) to sentence [defendant] to at least a one-year term of community control sanctions.” *Id.* at _ 5.

{¶51} In *State v. Kelley*, 5th Dist. Delaware No. 13-CAA-04-0028, 2014-Ohio-464, _ 3, the defendant pled guilty to three counts of drug trafficking, all felonies of the fifth degree, and was ordered to complete an ILC program. According to the terms of the ILC program, defendant was required “to refrain from any misconduct or violation of the law; not to consume or possess any controlled or intoxicating substances; and to have no direct or indirect contact with felons, drug users, or drug sellers.” *Id.* During a violation hearing, the trial court learned that defendant continued to traffic in drugs, tested positive for cocaine on two occasions, and maintained contact with known drug users. *Id.* at _ 13.

After finding him to be in violation of the terms and conditions of his ILC program, the trial court found defendant guilty of three counts of drug trafficking, and sentenced him to three consecutive 10-month prison terms. *Id.* at _ 14. The Fifth District Court of Appeals upheld the trial court’s sentence, finding that two of the 2929.13(B)(1)(b) factors applied:

In this case, the trial court specifically found appellant was in violation of conditions of bond and committed the offenses as part of organized criminal activity. We find the sentence is not clearly and convincingly contrary to law. Furthermore, having thoroughly reviewed the record of this case, we are unwilling to find the trial court abused its discretion in sentencing appellant to a prison term in light of his repeated violations of the terms of ILC.

Id. at _ 41.

{¶52} In *State v. Holt*, 2d Dist. Montgomery No. 26031, 2014-Ohio-2204, _ 1, the defendant was charged with drug possession, a felony of the fifth degree. The defendant pled guilty to drug possession and entered the ILC program. *Id.* at _ 2. The trial court found that defendant violated the terms of the ILC program by failing to report to the probation department and failing to attend drug court. *Id.* at _ 6. As a result, the trial court convicted defendant of drug possession, and sentenced defendant to a prison term of 11 months. *Id.* In reversing the trial court’s sentence, the Second District Court of Appeals stated:

The only reason provided by the trial court for imposing a term of incarceration was that Holt had “violated a rule of his supervision.” This reason, standing alone, is, pursuant to R.C. 2929.13(B)(1), insufficient to support the trial court’s decision to sentence Holt to a term of incarceration. The circumstances surrounding Holt’s offense of possession of crack cocaine, a felony of the fifth degree, meet all of the requirements listed in R.C. 2929.13(B)(1)(a). Moreover, none of the exceptions enumerated in R.C. 2929.13(B)(1)(b) are applicable to the facts of the instant case. Accordingly, the trial court had no discretion to sentence Holt to a term of incarceration.

Id. at _ 17. Furthermore, the court distinguished *Kelley* — where the trial court specifically found that defendant violated the conditions of his bond while on ILC — because the trial court “only found that [defendant] violated the terms of his supervision, not the conditions of his bond.” *Id.* at _ 15.

{¶53} In the instant matter, it is undisputed that Lopez’s drug possession conviction was a felony of the fifth degree and not an offense of violence. Lopez has not been

previously convicted of, or pled guilty to, a felony offense. The drug possession felony of the fifth degree, to which Lopez pled guilty to and received ILC, was his first and only felony offense. Furthermore, Lopez has never been convicted of, or pled guilty to, a misdemeanor offense of violence. The record also establishes that the trial court has made no request to the department of rehabilitation and correction pursuant to R.C. 2929.13(B)(1)(c).

{¶54} Upon review, the trial court did not explicitly make any of the R.C. 2929.13(B)(1)(b)(i)-(xi) findings to overcome the presumption of community control sanctions on the record. Furthermore, Lopez was a first offender and his drug possession conviction was not an offense of violence. The only reason provided by the trial court for imposing a term of incarceration was that Lopez had violated the terms of his ILC program.

{¶55} The instant matter is indistinguishable from *Holt*. Lopez's violation of his ILC program, standing alone, is insufficient under R.C. 2929.13(B)(1) to support the trial court's decision to sentence him to a term of incarceration. Although the trial court found that Lopez violated the conditions of his ILC program, the court, like *Holt*, did not specifically find that Lopez violated the conditions of his bond. *Holt* at _ 15. The circumstances surrounding Lopez's offense of possession of cocaine, a felony of the fifth degree, meet all of the requirements listed in R.C. 2929.13(B)(1)(a). Furthermore, and unlike *Kelley*, where the trial court specifically found that the defendant: (1) violated the conditions of his bond while on ILC, and (2) committed the offenses as part of organized

criminal activity, none of the exceptions enumerated in R.C. 2929.13(B)(1)(b) are applicable to the facts of the instant case. *Kelley* at _ 41. Thus, the trial court — without making any of the R.C. 2929.13(B)(1)(b)(i)-(xi) findings — had no discretion to sentence Lopez to a term of incarceration.

{¶56} If the trial court did not believe that any available community control sanctions imposed on Lopez would adequately fulfill the overriding principles and purposes of sentencing, then under R.C. 2929.13(B)(1)(_), it was required to contact the department of rehabilitation and correction to “ask the department to provide 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.”

{¶57} Accordingly, under R.C. 2929.13(B)(1)(a), the trial court’s 11-month prison sentence was contrary to law. Lopez’s first and sixth assignments of error are sustained.

III. Conclusion

{¶58} Lopez’s assignments of error regarding alleged due process violations at the trial court’s ILC violation hearing are overruled for the reasons stated in the foregoing analysis.

{¶59} Lopez’s assignments of error regarding the trial court’s sentence are sustained. Under R.C. 2929.13(B)(1)(a), the trial court’s 11-month prison sentence was contrary to law. The circumstances surrounding Lopez’s drug possession offense — a nonviolent felony of the fifth degree — meet all of the requirements listed in R.C.

2929.13(B)(1)(a). Furthermore, the trial court did not make any of the R.C. 2929.13(B)(1)(b) findings to overcome the presumption of community control sanctions. Accordingly, we reverse the trial court's sentence, and remand the matter to the trial court for resentencing consistent with this opinion.

{¶60} This cause is affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the 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. The defendant's conviction having been affirmed in part, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

TIM McCORMACK, J., and
MARY J. BOYLE, J., CONCUR