

[Cite as *State v. Martin*, 2017-Ohio-99.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 104354

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**DANTE A. MARTIN**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
AFFIRMED IN PART, REVERSED IN PART,  
AND REMANDED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case Nos. CR-15-596938-A, CR-15-599310-A, and CR-15-601215-A

**BEFORE:** Celebrezze, J., Keough, A.J., and Kilbane, J.

**RELEASED AND JOURNALIZED:** January 12, 2017

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendant-appellant, Dante Martin (“Martin”), brings this appeal challenging the trial court’s sentence for drug trafficking, disrupting public services, domestic violence, improperly discharging a firearm into a habitation, and having weapons while under disability. Specifically, Martin argues that the trial court’s sentence is contrary to law and that the trial court erred by imposing court costs. After a thorough review of the record and law, this court affirms in part, reverses in part, and remands for further proceedings consistent with this opinion.

### **I. Factual and Procedural History**

{¶2} On November 18, 2016, in Cuyahoga C.P. No. CR-15-596938-A, Martin pled guilty to drug trafficking, in violation of R.C. 2925.03(A)(2), with forfeiture specifications for money and a scale.

{¶3} On April 5, 2016, Martin entered guilty pleas to charges in two cases. In Cuyahoga C.P. No. CR-15-599310-A, Martin pled guilty to disrupting public service, in violation of R.C. 2909.04(A)(3), and domestic violence, in violation of R.C. 2919.25(A).

In Cuyahoga C.P. No. CR-15-601215-A, Martin pled guilty to improperly discharging a firearm into a habitation (“improper discharge”), in violation of R.C. 2923.161(A)(1), with a one-year firearm specification, and having weapons while under disability, in violation of R.C. 2923.13(A)(2).

{¶4} The trial court held a sentencing hearing on April 7, 2016. In CR-15-596938-A, the trial court imposed a prison sentence of one year for the drug trafficking count. In CR-15-599310-A, the trial court imposed a prison sentence of one year for the disrupting public service count and a prison sentence of six months on the domestic violence count. The trial court ordered Martin to serve the disrupting public service and domestic violence counts concurrently. In CR-15-601215-A, the trial court imposed a prison sentence of five years on the improper discharge count to be served consecutively to the one-year firearm specification, and a prison sentence of two years on the having weapons while under disability count. The trial court ordered Martin to serve the improper discharge and having weapons while under disability counts concurrently. The trial court ordered Martin's sentences in CR-15-596938-A, CR-15-599310-A, and CR-15-601215-A to run concurrently, for an aggregate prison term of six years.

{¶5} Martin filed the instant appeal assigning three errors for review:

I. [Martin's] sentence is contrary to law because the trial court failed to comply with the purposes and principles of sentencing as set forth in R.C. 2929.11 and R.C. 2929.12.

II. The trial court erred by ordering [Martin] to pay [court] costs when it did not properly comply with [R.C. 2947.23].

III. The court costs imposed at the sentencing hearing infringes upon [Martin's] rights under the Eighth and Fourteenth [A]mendments to the United States Constitution, R.C. 2929.18, R.C. 2919[.19(B)](5), R.C. 2947.14, and related sections of the Ohio Constitution.

## II. Law and Analysis

### A. Trial Court's Sentence

{¶6} In his first assignment of error, Martin argues that the trial court's sentence is contrary to law because the trial court failed to comply with the purposes and principles of sentencing set forth in R.C. 2929.11 and 2929.12.

{¶7} Appellate review of felony sentences is governed by R.C. 2953.08. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 16. R.C. 2953.08(G)(2) provides that when reviewing felony sentences, a reviewing court may increase, reduce, or modify a sentence, or it may vacate and remand the matter for resentencing, only if we clearly and convincingly find that either the record does not support the sentencing court's statutory findings or the sentence is contrary to law. A sentence is contrary to law if the sentence falls outside the statutory range for the particular degree of offense or the trial court failed to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors in R.C. 2929.12. *State v. Hinton*, 8th Dist. Cuyahoga No. 102710, 2015-Ohio-4907, ¶ 10, citing *State v. Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, ¶ 13.

{¶8} The review provided for in R.C. 2953.08 is limited. In *Marcum*, the Ohio Supreme Court held that when a sentence is imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12, appellate courts "may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence." *Id.* at ¶

23.

{¶9} R.C. 2929.11(A), governing the purposes and principles of felony sentencing, provides that a sentence imposed for a felony shall be reasonably calculated to achieve two overriding purposes of felony sentencing: (1) to protect the public from future crime by the offender and others, and (2) to punish the offender using the minimum sanctions that the court determines will accomplish those purposes. Furthermore, the sentence imposed shall be “commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact on the victim, and consistent with sentences imposed for similar crimes by similar offenders.” R.C. 2929.11(B).

{¶10} R.C. 2929.12 delineates the seriousness and recidivism factors for the sentencing court to consider in determining the most effective way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11. The statute provides a non-exhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses.

{¶11} This court has held that a trial court “fulfills its duty under the statutes by indicating that it has considered the relevant sentencing factors.” *Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, at ¶ 14, citing *State v. Saunders*, 8th Dist. Cuyahoga No. 98379, 2013-Ohio-490, ¶ 4. The trial court “need not go through each factor on the record — it is sufficient that the court acknowledges that it has complied with its statutory duty to consider the factors without further elaboration.” *Id.*, citing *State v. Pickens*, 8th Dist. Cuyahoga No. 89658, 2008-Ohio-1407, ¶ 6. In fact,

consideration of the appropriate factors set forth in R.C. 2929.11 and 2929.12 can be presumed unless the defendant affirmatively shows to the contrary. *State v. Jones*, 8th Dist. Cuyahoga No. 99759, 2014-Ohio-29, ¶ 13.

{¶12} In the instant matter, Martin argues that his sentence is contrary to law because the trial court “did not make specific findings in accordance with R.C. 2929.11 and R.C. 2929.12” and “never specifically mentioned either R.C. 2929.11 or R.C. 2929.12 throughout the entire sentencing hearing.” Appellant’s brief at 8.

{¶13} Martin’s sentences for his felonies of the second, third, and fourth degree were within the statutory ranges under R.C. 2929.14(A). Furthermore, Martin’s sentence for domestic violence, a first-degree misdemeanor, was within the statutory range under R.C. 2929.24(A)(1).

{¶14} Martin directs this court to *State v. Wright*, 8th Dist. Cuyahoga No. 100433, 2014-Ohio-3230. There, this court held that the trial court fulfilled its obligations under R.C. 2929.11 and 2929.12 by stating on the record and in open court that it considered the statutory sentencing factors and also stating that it considered all required factors of the law in its journal entry. *Id.* at ¶ 16.

{¶15} Martin’s reliance on *Wright* is misplaced. *Wright* does not stand for the proposition that a trial court is required to do both — pronounce its consideration of sentencing factors in open court and state that it considered the factors in its sentencing journal entry — in order to fulfill its obligations under R.C. 2929.11 and 2929.12. The trial court is not required to affirmatively state on the record at sentencing that it

considered the R.C. 2929.11 and 2929.12 sentencing factors — consideration of the factors is presumed unless the defendant affirmatively shows otherwise. *State v. Keith*, 8th Dist. Cuyahoga Nos. 103413 and 103414, 2016-Ohio-5234, ¶ 11, citing *State v. Stevens*, 1st Dist. Hamilton No. C-130278, 2013-Ohio-5218, ¶ 12; see *State v. Gay*, 8th Dist. Cuyahoga No. 103641, 2016-Ohio-2946, ¶ 23 (a trial court is not required to make specific findings regarding R.C. 2929.11 and 2929.12 nor required to specifically mention or reference the sentencing statutes during the sentencing hearing). Furthermore, as noted above, a trial court’s statement in its journal entry that it considered the required statutory factors, *without more*, is sufficient to fulfill its obligations under the sentencing statutes. *State v. Clayton*, 8th Dist. Cuyahoga No. 99700, 2014-Ohio-112, ¶ 9.

{¶16} In the instant matter, the trial court’s sentencing journal entries provide, in relevant part, “[t]he court considered all required factors of the law. The court finds that prison is consistent with the purpose of R.C. 2929.11.” Aside from the trial court’s notation in its sentencing entries that it “considered all required factors of the law” including, specifically, R.C. 2929.11, the record in this case reflects that the trial court did, in fact, consider both R.C. 2929.11 and 2929.12 when sentencing Martin.

{¶17} The trial court heard statements from (1) the prosecution, (2) one of the victims in CR-15-601215-A (“Y.S.”), (3) the victim in CR-15-596938-A, (“T.E.”), (4) Martin’s counsel, and (5) Martin. Furthermore, the trial court heard statements from Martin’s family members, including his mother, sister, brother, cousin, and aunt.

{¶18} Regarding the improper discharge and having weapons while under



disability offenses, the state asserted that Y.S. moved after the incident because her family no longer felt safe in the house at which the incident took place. The state requested that the trial court impose a prison sentence. Regarding the domestic violence and disrupting public service offenses, the state asserted that the victim, T.E., was the mother of Martin's children. The state provided the following description of the incident: "[Martin and the victim] got into an argument at their home, and [Martin] proceeded to pull out [the victim's] extension from her head, and grabbed her out of the house and dragged her down the street where he then kicked her in the stomach. [The victim] was about 11 weeks pregnant at that time."<sup>1</sup> (Tr. 56.) Regarding the drug trafficking offense, the state informed the trial court that the police found heroin in Martin's possession after responding to his house for a domestic violence disturbance.

{¶19} Y.S. stated that she still considers Martin to be a family member and that she loves him. Y.S. asserted that she did not want to see Martin spend "a lifetime" in jail. T.E. stated that she did not want Martin to go to jail and that she wants him to be home with their kids.

{¶20} Martin's counsel stated that Martin has never been to prison before and that he has no juvenile record. Martin's counsel suggested that Martin's prior offenses primarily involve alcohol or marijuana abuse. Martin's counsel informed the trial court that Martin successfully completed probation when he pled guilty to attempted drug

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<sup>1</sup> Both Martin and T.E. denied that she was pregnant during the incident.

trafficking in 2006.<sup>2</sup> Martin's counsel asserted that Martin was a high school graduate, worked in construction, and has two children that he takes care of. Martin's counsel stated that Martin does not have mental health issues. Martin's counsel suggested that Martin's drug use is limited to marijuana and that he does not use "hard drugs." (Tr. 63.)

Finally, Martin's counsel emphasized that Martin has a lot of support from his family and requested that the trial court impose the minimum prison sentence.

{¶21} Martin apologized to his children and his family. Martin asserted that the incident resulting in the improper discharge and having weapons while under disability charges "was just like a retaliation." (Tr. 89.) Martin explained that he opened fire into the house because his mother's house had been shot at earlier in the day. Martin claimed that he was unaware that there were children in the house into which he opened fire, and stated that he was glad that nobody was hurt. Martin apologized to Y.S.

{¶22} Regarding the incident resulting in the domestic violence and disrupting public service charges, Martin alleged that T.E. lied to the police about what transpired. Martin asserted that he was fighting with T.E. but that he neither beat nor kicked her. Martin acknowledged that he and T.E. get into arguments but insisted that they do not physically fight. Martin did not apologize to T.E.

{¶23} Regarding the incident resulting in the drug trafficking charge, Martin acknowledged that he was in possession of the drugs. Martin stated that he has a drug problem with heroin and marijuana. Martin explained that he had been using heroin for

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<sup>2</sup> Cuyahoga C.P. No. CR-06-485506-A.

roughly one year, and using marijuana since he was 18 years old. Martin requested that the trial court impose the minimum sentence.

{¶24} The trial court considered Martin's improper discharge and having weapons while under disability offenses to be the most serious of the three cases. The trial court emphasized that Martin could easily have injured or even killed the individuals inside the house into which he opened fire:

I think we all know that if the weapon had been moved a foot here or a foot there — down a little bit, up a little bit, we would be talking about a very different situation. We would be talking about EMS trucks, people being carried out, maybe survive, maybe not. It's fortunate that they're not doing that and none of that happened.

But if you think of where he was, where the rounds went, the type of weapon, not talking about a lot of — a lot of opportunity to make this kind of go away [without a prison sentence]. This could have been turned into a horrible situation. (Tr. 79.)

{¶25} The trial court considered that there were five victims present during the incident, including an elderly woman and two young children, and that Martin placed all of the victims at serious risk of injury or death. The trial court considered that Martin was motivated by retaliation, and that he chose to deliver the statement “you come at me, I'm coming at you.” (Tr. 103.) The trial court emphasized that Martin jeopardized the lives of innocent people in delivering his statement. The trial court reiterated that Martin “should be very fortunate that [he] didn't kill anyone or seriously hurt or maim anyone[.]” (Tr. 106.)

{¶26} The trial court determined that Martin's conduct was intentional and that his drug use neither induced nor influenced his conduct. The trial court considered that

there did not appear to be any mitigating factors.

{¶27} Regarding the domestic violence and disrupting public service offenses, the trial court noted that Martin has “a lot of anger issues with regard to at least [T.E.], and the relationship that [he has] with her.” (Tr. 106.) Furthermore, the trial court maintained that Martin has “too many domestic violence cases[.]” The trial court encouraged Martin to address these issues in prison. Furthermore, regarding the drug trafficking offense, the trial court noted that Martin needs to address his “serious drug issues” and encouraged him to take advantage of the programs available to him in prison.

{¶28} The trial court reviewed Martin’s PSI from CR-15-596938-A. The trial court noted that Martin has had “a number of domestic violence charges” filed against him, two of which involved T.E. (Tr. 58.) The trial court considered that although Martin does not have a lot of convictions, he has been in a lot of situations that could have resulted in serious crimes. The trial court acknowledged that Martin had been “caught for a lot of things” in 2015. (Tr. 104.)

{¶29} Based on the foregoing statements and factors, the trial court concluded that an aggregate six-year prison sentence was “the absolute minimum time [Martin] should be spending [in prison].” (Tr. 105.)

{¶30} After reviewing the record, we find that Martin’s sentences are not contrary to law. Martin’s sentences are within the permissible statutory ranges and the trial court considered the required factors of law.

{¶31} Accordingly, Martin’s first assignment of error is overruled.

## **B. Court Costs**

{¶32} Martin's second and third assignments of error pertain to the trial court's imposition of court costs. Because Martin's second assignment of error is dispositive of the court costs issue, we need not address his third assignment of error.

{¶33} In his second assignment of error, Martin contends that the trial court erred by imposing court costs because it failed to advise him of court costs at sentencing. The state concedes Martin's second assignment of error, acknowledging that "the trial court did not advise [Martin] of the imposition of court costs on the record." Appellee's brief at 5.

{¶34} R.C. 2947.23(A)(1) governs the imposition of court costs and provides, in relevant part, "[i]n all criminal cases \* \* \* the judge \* \* \* shall include in the sentence the costs of prosecution \* \* \* and render a judgment against the defendant for such costs." Thus, a sentencing court must include in the sentence the costs of prosecution and render a judgment against the defendant for costs, even if the defendant is indigent. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8.

{¶35} In *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, the Ohio Supreme Court addressed the issue of whether a trial court may impose court costs under R.C. 2947.23 in its sentencing entry when the trial court did not impose those costs during the sentencing hearing. *Id.* at ¶ 1. The court held that it is reversible error under Crim.R. 43(A) for the trial court to impose court costs in its sentencing entry when it did not impose those costs in open court at the sentencing hearing. *Id.* at ¶ 22. The court

reasoned that the defendant was harmed by the trial court's error, as he "was denied the opportunity to claim indigency and to seek a waiver of the payment of court costs before the trial court." *Id.* Furthermore, the court found that the remedy in such a situation is a limited remand to the trial court, allowing the defendant to seek a waiver of court costs. *Id.* at ¶ 23.

{¶36} In the instant matter, after sentencing Martin, the trial court found Martin to be indigent and appointed appellate counsel. The record reflects that the trial court did not impose court costs at sentencing. Nevertheless, the trial court imposed court costs in its sentencing journal entries "in an amount equal to the costs of this prosecution." Accordingly, we reverse the portion of the trial court's judgment imposing court costs and remand the matter for the limited purpose to allow Martin the opportunity to move the trial court for a waiver of payment of court costs. *See State v. Thompson*, 8th Dist. Cuyahoga No. 99467, 2013-Ohio-4793, ¶ 26.

{¶37} Martin's second assignment of error is sustained.

### **III. Conclusion**

{¶38} After thoroughly reviewing the record, we find that the trial court's sentence is not contrary to law. The trial court sentenced Martin within the permissible statutory ranges and considered the required factors of law. However, the trial court erred in imposing court costs in its sentencing journal entry because it did not impose court costs in open court during the sentencing hearing.

{¶39} This cause is affirmed in part, reversed in part, and remanded for the limited

purpose of allowing Martin to seek a waiver of court costs.

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.

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

FRANK D. CELEBREZZE, JR., JUDGE

KATHLEEN ANN KEOUGH, A.J., and  
MARY EILEEN KILBANE, J., CONCUR