[Cite as *State v. Ford*, 2009-Ohio-3864.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24286
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
SAMMY CAREY FORD	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CR 05 08 3093

DECISION AND JOURNAL ENTRY

Dated: August 5, 2009

CARR, Judge.

{¶1} The State of Ohio appeals the judgment of the Summit County Court of Common Pleas. This Court reverses.

I.

{¶2} On May 9, 2006, Appellee, Sammy Carey Ford, entered a plea of guilty on charges of felonious assault, a felony of the second degree; domestic violence, a felony of the fifth degree; and violation of a protection order, a misdemeanor of the first degree. On May 10, 2006, the trial court sentenced Ford to a prison term of one year on the count of domestic violence and a term of six months in jail for the count of violating a protection order. With regard to the felonious assault charge, however, the trial court held sentencing "in abeyance." On May 18, 2006, the State filed a motion to reconsider Ford's plea or, in the alternative, to sentence Ford on the felonious assault conviction. The trial court denied the motion. The State appealed the trial court's order to this Court pursuant to R.C. 2945.67. In *State v. Ford*, 9th Dist.

No. 23269, 2006-Ohio-6961, at ¶6 ("*Ford I*"), this Court ruled that the trial court's order was interlocutory and reversed, holding that the trial court did not have the authority to refuse to sentence Ford pursuant to Crim.R. 32(C).

{¶3} On March 26, 2007, Ford once again appeared before the trial court for a sentencing hearing. Counsel for Ford stated on the record that his client had completed his sentence for domestic violence and violating a protection order. At the conclusion of the hearing, the trial court imposed a two-year sentence on Ford for the offense of felonious assault, but noted the presumption of incarceration was rebutted. The trial court made no findings on the record as to why the presumption had been rebutted. The State formally objected to the sentence. On March 28, the trial court ordered the following:

> "IT IS HEREBY ORDERED that the Defendant be sentenced to 2 years of incarceration, however, the presumption for incarceration is rebutted. A prior sentence was imposed on the companion offenses of DOMESTIC VIOLENCE, as contained in Count 3, and VIOLATING A PROTECTION ORDER, as contained in Count 4. The Defendant is given credit for all time served as of the date of sentencing, March 26, 2007, and the balance of his sentence is suspended for good behavior demonstrated."

{¶4} The State appealed the sentencing judgment dated March 28, 2007, on the basis that the trial court erred as a matter of law in disregarding both R.C. 2929.13(D) and R.C. 2929.19(B)(2)(b). On November 11, 2007, this Court dismissed the appeal for lack of jurisdiction as the judgment entry did not dispose of all charges. *State v. Ford*, 9th Dist. No. 23678, 2007-Ohio-5935 ("*Ford II*").

{¶5} On January 14, 2008, the State filed a motion for re-sentencing. In that motion, the State noted that Ford was not properly sentenced for felonious assault given the presumption for incarceration and requested that a final order be issued. The State also reiterated that Ford had prior convictions resulting in prison terms.

{¶6} The trial court held a hearing on the motion on June 20, 2008. At the hearing, the judge permitted counsel for Ford to state on the record that Ford had not been properly advised of a purported mandatory prison term prior to his plea. The judge then noted that the court of appeals had remanded the case because the trial court's previous attempt at sentencing was not a final, appealable order. The judge went on to say that even if he were to agree with the State concerning the mandatory sentence, "the Court would not feel comfortable at all sentencing any defendant who the Court knows was not properly advised on a plea to a mandatory prison term." The Judge then stated the most appropriate way to resolve the matter would be for counsel to argue the case in the court of appeals after a final order was entered.

{¶7} The sentencing entry dated June 25, 2008, stated, in part:

> "IT IS HEREBY ORDERED that Defendant be sentenced to 2 years of incarceration, however, the presumption of incarceration is rebutted.
>
> "Heretofore on May 9, 2006, a prior sentence was imposed on the companion offenses of DOMESTIC VIOLENCE, as contained in Count 3, and VIOLATING A PROTECTION ORDER, as contained in Count 4, to-wit:
>
> "IT IS THEREFORE ORDERED AND ADJUDGED BY THIS COURT that the Defendant, SAMMY CAREY FORD, be committed to the Ohio Department of Rehabilitation and Corrections for a definite term of One (1) Year, which is not a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, for punishment of the crime of DOMESTIC VIOLENCE, Ohio Revised Code Section 2919.25(A), a felony of the fifth (5th) degree; and that he serve Six (6) Months in the Summit County Jail for punishment of the crime of VIOLATING A PROTECTION ORDER, Ohio Revised Code Section 2919.27, a misdemeanor of the first (1st) degree to be served at the appropriate penal institution.
>
> "The Defendant is given credit for all time served as of the date of sentencing, March 26, 2007, and the balance of his sentence is suspended for good behavior demonstrated."

{¶8} The State now appeals the June 25, 2008 judgment entry of the trial court. The State raises one assignment of error.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED AS A MATTER OF LAW AND ENTERED A SENTENCE ON FELONIOUS ASSAULT THAT IS CONTRARY TO LAW BY FAILING TO COMPLY WITH R.C. 2929.13(D) AND R.C. 2929.19(B)(2)(b)."

{¶9} The State contends Ford's sentence is contrary to law because the trial court has again failed to comply with R.C. 2929.13(D) and R.C. 2929.19(B)(2)(b) which require the trial court make certain findings in order to justify a downward departure from a prison sentence. This Court agrees.

{¶10} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶97, the Supreme Court of Ohio held that R.C. 2929.19(B)(2) is unconstitutional. However, even after the Supreme Court's ruling in *Foster*, a trial court is still required to make judicial findings to justify a downward departure pursuant to R.C. 2929.13(D). *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, paragraph one of the syllabus.

{¶11} R.C. 2929.13(D) states:

"(D)(1) Except as provided in division (E) or (F) of this section, for a felony of the first or second degree, for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, and for a violation of division (A)(4) or (B) of section 2907.05 of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code. Division (D)(2) of this section does not apply to a presumption established under this division for a violation of division (A)(4) of section 2907.05 of the Revised Code.

"(2) Notwithstanding the presumption established under division (D)(1) of this section for the offenses listed in that division other than a violation of division (A)(4) or (B) of section 2907.05 of the Revised Code, the sentencing court may impose a community control sanction or a combination of community control sanctions instead of a prison term on an offender for a felony of the first or second degree or for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a

> prison term is specified as being applicable if it makes both of the following findings:
>
> "(a) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.
>
> "(b) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense."

{¶12} Here, Ford pled guilty to felonious assault, a felony of the second degree. Under R.C. 2929.13(D)(1), there exists a presumption in favor of a prison term for defendants who are convicted of second degree felonies. Notwithstanding that presumption, a trial court may impose a community control sanction, or a combination of community control sanctions, instead of a prison term upon making certain findings under R.C. 2929.13(D)(2)(a)-(b). The trial court has had multiple opportunities to sentence Ford to a prison term on the felonious assault charge and has declined to do so. It seems clear that the trial court is of the position that it would be inappropriate to impose a prison term on Ford for that offense. However, the trial court did not, in the alternative, impose a community control sanction after making the requisite findings. Instead, the trial court ordered that Ford "be sentenced to 2 years of incarceration, however, the presumption of incarceration is rebutted." A suspended sentence of this nature is unlawful under R.C. 2929.13(D).

{¶13} The Supreme Court of Ohio has consistently held that no court has the authority to substitute a different sentence for that which is required by law. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶20, citing *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438.

"Therefore, in circumstances in which the judge disregards what the law clearly commands, such as when a judge fails to impose a nondiscretionary sanction required by a sentencing statute, the judge acts without authority." *Simpkins* at ¶21, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 75.

{¶14} The sentence imposed on Ford is contrary to law under R.C. 2929.13(D). It follows that Ford's sentence must be reversed and this case must be remanded to the trial court for re-sentencing in compliance with the law.

{¶15} In his filings with this Court, Ford pointed to the Supreme Court's decision in *Simpkins* to support his contention that the doctrines of res judicata, double jeopardy and the due process clause render a legitimate expectation of finality in sentencing. In *Simpkins,* the High Court noted that, "[i]n some circumstances, including the completion of a sentence, it may be reasonable to find that a defendant's expectation of finality in his sentence has become legitimate and must be respected." *Simpkins* at ¶38. The Supreme Court has since clarified this statement by holdings that once an offender has completed the prison term imposed in an original sentence, the offender cannot be subjected to another sentencing to correct the trial court's flawed imposition of post-release control. *State v. Bloomer*, Slip Opinion No. 2009-Ohio-2462, at ¶70.

{¶16} This Court notes that the unique history of this case has resulted in more than three years passing since Ford was originally sentenced on May 10, 2006. However, in deciding *Simpkins*, the Supreme Court of Ohio cited a United States Supreme Court case which held that the Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for a defendant. *Simpkins* at ¶29, citing *Bozza v. United States* (1947), 330 U.S. 160, 166-167. This case is unlike the aforementioned cases where the State moved to re-sentence a defendant who was not properly given post-release control. This case

presents a situation where a defendant effectively evaded a sentence all together for a second degree felony as he was not initially sentenced for a felony he pled to and then he was eventually given an improper sentence by the trial court. Since the time Ford was originally sentenced on May 10, 2006, the State has persistently sought to ensure that Ford be lawfully re-sentenced by filing multiple motions for re-sentencing and appealing the case on three separate occasions. While this Court acknowledges that the delay in rendering a lawful sentence has been an inconvenience for Ford, this Court cannot say that having completed the sentence he served concurrently for domestic violence and violating a protection order renders an expectation that he cannot be lawfully sentenced for felonious assault. To make such a holding would subvert the people's interest in imposing lawful sentences on offenders and, furthermore, would limit the ability to use the appellate process to seek correction of unlawful sentences.

{¶17} This Court concludes that the sentence imposed on Ford for a felony of the second degree, wherein the trial court did not impose either a prison term or community control with findings as required under R.C. 2929(D)(2)(a)-(b), but instead simply suspended the sentence without making findings in support, is contrary to law. The sentence must be reversed and the matter must be remanded for re-sentencing. The State's sole assignment of error is sustained.

III.

{¶18} The State's assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed and the cause remanded for further proceedings consistent with this decision.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellant.

DONALD J. MALARCIK, JR., Attorney at Law, for Appellee.