IN THE SUPREME COURT OF OHIO

19-0443

STATE OF OHIO,

Plaintiff-Appellee,

v.

KEVIN MICHAELS,

Defendant-Appellant.

Appealing from the Common Pleas Court of Mahoning County, Case No. 2016-CR-1146, and from the Seventh Appellate District of Mahoning County of Ohio Case No. 17-MA-0122.

MOTION TO LEAVE TO FILE NOTICE OF DELAYED APPEAL.

Appellant, hereby gives notice to this Supreme Court of Ohio, that he is appealing from the judgment of the Seventh Appellate District court of Mahoning County of Ohio, in Case No. 17-MA-0122; of the order of Febuary 04, 2019.

Appellant comes by way of "Ohio Supreme Court" Rules of practice 7.01(4)(a) in a felony case, as held: when the time exspired for filling a notice of appeal in the Supreme court, the appellant may file a delayed appeal by filling a notice of appeal and a motion for delayed appeal that complies with the following:

1) The motions shall state the date of entry of judgment being appealed and reasons for the delay.

2) Facts supporting the motions shall be made in an affidavit.

3) A copy of the court of appeals opinion and judgment entry being appealed shall be filed to the motion.

Appellant states that his delay is because his appellate attorney did not mail him nor did the court mail him his copy of denial in time for appellant to file in the 45 days issued for this court.

Respectfully, appellant states that his delay is built on due deligience and request to enter this court.

IN THE SUPREME COURT OF OHIO

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DECLARATION AND VERITY IN SUPPORT OF DELAYED APPEAL

AND

DECLARATION OF STATEMENT FOR DELAY

I Kevin Michaels, verify or certify; under the penalty of perjury that everything is stated upon information and belief and that the argument and supporting cause for show to proceed in this court is stated and argued as true so help me GOD, and those that is stated upon belief and information I believe is true. Which are I had no time to research and prepare to acess the courts timely.

Affiant

Kevin Michaels

Kevin Michaels #701-900
Belmont Correctional Institution
P.O. Box 540
St. Clairsville, Ohio 43950

Sworn to, or affirmed, and subscribed in my presence this 20 day of March, 2019

Notary Public

MICHELLE LYNN THEIL
Notary Public, State of Ohio
My Commission Expires April 29, 2022

My Commission Expires:

CERTIFICATE OF SERVICE

I certify that a copy of the forgoing Notice of Appellant Delayed appeal was sent by First Class mail, Pre Paid, by the U.S. postal service to the Prosecutor at: 373 South High Street 14th, Floor; Columbus, Ohio 43215 on this 20 day of March, 2019.

This copy was also sent to all adjoining parties to such styled case.

Respectfully submitted,

Kevin Michaels #701-9000
Belmont Correctional Institution
P.O. Box 540
St. Clairsville, Ohio 43950

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

KEVIN MICHAELS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0122

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2016 CR 1146

BEFORE:
Kathleen Bartlett, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
AFFIRMED

Atty. Edward Czopur, 42 North Phelps Street, Youngstown, Ohio 44503, for Appellant and

Atty. Ralph Rivera, 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503, for Appellee.

Dated: February 4, 2019

BARTLETT, J.

{¶1} Appellant Kevin Michaels appeals the judgment entry of sentence of the Mahoning County Court of Common Pleas, in which the trial court imposed concurrent sentences for one count of robbery, a violation of R.C. 2911.02(A)(3), a felony of the second degree; one count of breaking and entering, in violation of R.C. 2911.13(A)(C), a felony of the fifth degree; one count of possession of criminal tools, in violation of 2923.24(A)(C), a felony of the fifth degree; and one count of robbery, a felony of the third degree. Because the trial court did not state that it considered the contents of the presentence investigation report ("PSI") prior to imposing sentence, Appellant contends that his seven-year sentence is contrary to law. As there is no evidence in the record to show that the trial court did not consider the contents of the PSI prior to the imposition of sentence, the judgment entry of sentence is affirmed.

{¶2} Review of felony sentences is governed by R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1. Pursuant to R.C. 2953.08(G)(2), an "appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id.* at ¶ 1, 23.

{¶3} R.C. 2929.19(B)(1) reads, in pertinent part, "[a]t the sentencing hearing, the court, before imposing sentence, shall consider * * * if one was prepared, the [PSI] made pursuant to section 2951.03 of the Revised Code or Criminal Rule 32.2 * * *." Although the trial court's consideration of the PSI is memorialized in the judgment entry of sentence, the trial court did not refer to its contents at the sentencing hearing.

{¶4} Appellant asserts a single assignment of error:

> The trial court did not comply with R.C. 2929.19(B)(1) in that it failed to state orally that it considered the presentence investigation report prior to imposing sentence making the sentence contrary to law.

{¶5} Appellant argues that R.C. 2929.19(B)(1) should be read to impose the

same legal requirement as R.C. 2929.11 and 2929.12, as the General Assembly employs the obligatory term "shall" in all three of the statutes. R.C. 2929.11 reads, in pertinent part, "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." R.C. 2929.12, which sets forth aggravating and mitigating factors to be considered by the trial court prefaces the respective factors with the phrase "[t]he sentencing court shall consider * * * ."

{¶6} In this District, a silent record raises a rebuttable presumption that the sentencing court considered the statutory factors in R.C. 2929.11 and R.C. 2929.12. *State v. Henry*, 7th Dist. No. 14 BE 40, 2015-Ohio-4145, ¶ 23, citing *State v. Grillon*, 7th Dist. No. 10CO30, 2012-Ohio-893, ¶ 131; *State v. James*, 7th Dist. No. 07CO47, 2009-Ohio-4392, ¶ 38-51. In other words, we presume that the trial court considered the relevant factors in the absence of an affirmative showing that it failed to do so. *State v. Taylor*, 7th Dist. No. 15 MA 0078, 2016-Ohio-1065, ¶ 15, citing State v. Hardy, 7th Dist. No. 14 MA 30, 2015-Ohio-2206, ¶ 13 and *State v. Pyles*, 7th Dist. No. 13 BE 11, 2014-Ohio-4146, ¶ 6 (trial court is not required to discuss the R.C. 2929.12 factors on the record or to state that the factors were considered, so long as the record allows the reviewing court to determine that the proper consideration occurred.).

{¶7} Other intermediate appellate courts in Ohio have reached the same conclusion. *State v. Bohannon*, 1st Dist. No. C-130014, 2013-Ohio-5101, ¶ 7; *State v. Rutherford*, 2d Dist. No. 08CA11, 2009-Ohio-2071, ¶ 34; *State v. Jackson*, 3d Dist. No. 1-06-26, 2006-Ohio-5146, ¶ 5; *State v. Picklesimer*, 4th Dist. No. 11CA9, 2012-Ohio-1282, ¶ 30; *State v. Hannah*, 5th Dist. No. 15-CA-1, 2015-Ohio-4438, ¶ 13; *State v. Brimacombe*, 195 Ohio App.3d 524, 2011-Ohio-5032, 960 N.E.2d 1042, ¶ 11 (6th Dist.); *State v. Sutton*, 8th Dist. No. 102300, 2015-Ohio-4074, ¶ 72; *State v. Cobb*, 9th Dist. No. 13CA0087-M, 2014-Ohio-3530, ¶ 12; *State v. Reed*, 10th Dist. No. 08AP-20, 2008-Ohio-6082, ¶ 64; *State v. Dickerson*, 11th Dist. No.2013-A-0046, 2015-Ohio-938, ¶ 66.

{¶8} We find that the same rebuttable presumption should apply with respect to R.C. 2929.19(B)(1). There is no affirmative showing in the record that the trial court did not consider the contents of the PSI. Although the trial court did not state that it

reviewed the PSI at the sentencing hearing, the trial court memorialized its consideration of the PSI in the judgment entry. Further, defense counsel cited to the contents of the PSI directly prior to the imposition of sentence:

> Your Honor, I have had an opportunity to review the [PSI] with my client. And at the time of the change of plea, as the court is aware, there was no agreement or consensus on what we thought would be an appropriate sentence. It was my position that I would ask for a [PSI]. The reason in doing so is that I thought that it would, and I believe that it does, indicate that [Appellant], although he certainly did a fine job in this matter, has a very minimal criminal record * * *.

(8/11/17 Sent. Hrg., p. 4).

{¶9} Based on the record in this case, we find that the trial court's failure to mention its consideration of the PSI at the sentencing hearing does not constitute a violation of R.C. 2929.19(B)(1). Without evidence to the contrary, we presume that the trail court considered the PSI prior to the imposition of sentence. Accordingly, the judgment entry of sentence is affirmed.

Donofrio, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs are waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

JUDGE KATHLEEN BARTLETT

JUDGE GENE DONOFRIO

JUDGE CAROL ANN ROBB

2-8, 2019
This is a true copy of the original OPINION & JE
Filed in Case No. 17MA122
ANTHONY VIVO, Clerk of Courts
By _____ Deputy

NOTICE TO COUNSEL

This document constitutes a final judgment entry.