[Cite as *State v. Shuler*, 2023-Ohio-2444.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 22CA8
	:	
v.	:	
	:	DECISION AND
DAVIS L. SHULER,	:	JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

K. Robert Toy, Toy Law Office, Athens, Ohio, for Appellant.

James K. Stanley, Meigs County Prosecuting Attorney, Pomeroy, Ohio, for Appellee.

Smith, P.J.

{¶1} Appellant, Davis L. Shuler, appeals the judgment of the Meigs County Court of Common Pleas convicting him of one count of attempted murder, a first-degree felony in violation of R.C. 2923.02(A), and sentencing him to a maximum sentence of 11 to 16 ½ years in prison. On appeal, Shuler raises a single assignment of error contending that the trial court erred by imposing the maximum sentence. Shuler argues that the record does not support the trial court's imposition of a maximum sentence and thus, Shuler essentially asks this Court to independently weigh the evidence in the record and substitute our judgment for

that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and R.C. 2929.12. However, because R.C. 2953.08(G)(2) does not permit this Court to conduct this type of review, we must overrule Shuler's sole assignment of error. Accordingly, the judgment of the trial court is affirmed.

FACTS

{¶2} Shuler was indicted on September 8, 2021, for one count of felonious assault, a first-degree felony in violation of R.C. 2903.11(A)(1), one count of attempted murder, a first-degree felony in violation of R.C. 2923.02(A)(1), one count of theft, a fourth-degree felony in violation of R.C. 2913.02(A)(1), and one count of kidnapping, a first-degree felony in violation of R.C. 2905.01(A)(3). The charges in the indictment stemmed from allegations that Shuler had shot his mother, Stephanie Jones, four times on August 25, 2021.

{¶3} Shuler was arraigned on the charges on September 9, 2021. Retained counsel advised the trial court of a plan to pursue the entry of a not guilty by reason of insanity plea and stated that a psychologist had already been retained. A written plea of not guilty by reason of insanity was entered on September 14, 2021, along with a request for the trial court to order an evaluation of Shuler to determine his mental condition at the time of the offense. The trial court filed an entry on October 4, 2021, granting Shuler's request for the evaluation and ordering that a certified forensic examiner designated by the Department of Mental Health

conduct the evaluation. Once the forensic diagnostic evaluation had been completed, Shuler moved the court to allow the report to be disclosed to Dr. Gregory Janson, the psychologist that had been privately retained by Shuler. The trial court granted the request for disclosure on November 23, 2021.

{¶4} Thereafter, on August 22, 2022, in response to Shuler entering into plea negotiations with the State, a combined plea and sentencing hearing was held. Shuler withdrew a pending request for a competency evaluation, withdrew his prior not guilty by reason of insanity plea, agreed he was competent to stand trial, and entered a plea of guilty to the attempted murder charge in exchange for the dismissal of the felonious assault, kidnapping, and theft charges. The State informed the trial court that the charges were based upon events that occurred the night of August 25, 2021, when Shuler woke his mother up, convinced her to leave their residence so the two could talk, and then drove her van to the Salem Center Cemetery in Meigs County, Ohio, where her grandparents were buried.

{¶5} After arriving at the cemetery, Shuler essentially informed Jones that he and his brother believed she had been an awful parent. The two hugged near the conclusion of the conversation, at which time Shuler shot his mother in the stomach and then proceeded to shoot her in the back when she fled. The State further informed the court that after Jones made it back to her van and attempted to drive away, Shuler got into the van and took the keys out of the ignition. When

Jones got out of the van, Shuler shot her in the back again, causing her to fall into a ditch, at which point she "played dead." Shuler then drove away, but returned as Jones was running to a nearby house, which happened to be Shuler's aunt's house. Shuler once again shot Jones in the stomach as his aunt was opening the door. Shuler was later located in the van on U.S. 33, with the firearm he used to shoot his mother. The State also informed the court that a video was later located indicating his mother was not the only target and that he also had intended to kill his step-mother and grandmothers. Finally, the State informed the court that Jones survived, but spent over 100 days in the hospital, required home care for an additional ten weeks, and suffered economic and psychological harm.

{¶6} At the hearing, all parties agreed that there was no agreed sentence as part of the plea deal. In open court and on the record, Shuler provided a factual basis for the plea, stating as follows:

> On August twenty-fifth (25th) at about two A.M. in the morning, um, me and my mother left her house in her vehicle, and we went to my great grandparent's graveyard and there on the way to wherever it was we were driving, she had been shot four times by me. And then I left.

{¶7} Shuler's mother, Stephanie Jones, was present at the hearing, where she testified and provided her victim impact statement. Her victim impact statement detailed her injuries, which were severe and extensive. She also denied ever abusing her children and stated that she had chaperoned field trips, done class

projects, gave class talks every Veterans Day as a military veteran, was at every football game, track meet, wrestling tournament, and that every kid on the team called her "mom." She claimed she believed her life was still in danger, stated that she lives in fear every day, questioned why her other son had not also been charged, asked the court not to be lenient on Shuler, said she couldn't live with a slap on the wrist, and stated both Shuler and his brother were "out of all the wills." Jones also stated that her younger daughter had been traumatized by the events and that she has "anxiety, fear, nightmares, so much confusion." Jones' father also provided a victim impact statement. He stated that while Jones was not a perfect parent, she was a wonderful parent and that he had never seen her abuse her children.

{¶8} Dr. Gregory K. Janson testified in mitigation of sentencing on behalf of Shuler at the hearing and his 60-page evaluation had already been made part of the record and was before the court. He testified regarding the testing methods that were used to evaluate Shuler. Of importance, he testified he spent a total of 14 hours interviewing Shuler and that in his expert opinion, Shuler was a credible historian. He testified that Shuler reported he had been abused by his mother and that the abuse had been confirmed with other people who had lived in the home, in particular Shuler's older brother, as well as Jones' former boyfriend and the boyfriend's daughter. He stated that his evaluation revealed that Jones would

regularly beat Shuler with a ping pong paddle, belt, and even a guitar strap, and that Jones would call Shuler stupid, a moron, an idiot, and "Meigs County trash." He testified that on top of this, Shuler battled cognitive issues from several prior concussions that included headaches and hallucinations, and that Shuler had developed a brain cyst as a result. He further testified that Shuler had also had a prior hip injury that required surgery and that Shuler suffered from gastrointestinal issues, likely related to stress and anxiety. The record reveals that at the time the offense was committed, Shuler's weight had dropped from 243 lbs. to 175 lbs.

{¶9} Dr. Janson testified that while the abuse by Shuler's mother did not justify his crimes against her, that the abuse he endured had affected his memory, his judgment, his ability to function, and that he was physically debilitated at the time he committed the offense. He testified that Shuler suffered from chronic and complex post traumatic stress disorder, which is highly treatable. He also testified that cases of parricide, or in this case matricide, are very rare and that they are "encapsulated," meaning that they only "happen within a very, very tight set of circumstances within the family[.]" He explained that such crimes almost always occur because of abuse that is hidden. As such, and because the abuse had now been brought to light, Dr. Janson testified that Shuler presented a very low risk for reoffending. He testified that the HARE test, which is a test used to evaluate factors involved in "violent recidivism," was administered on Shuler and resulted

in a score of only 7 out of 30, which indicates Shuler has a very low risk of recidivism. Thus, Dr. Janson testified that Shuler was in need of treatment and rehabilitation that an extended period of incarceration would not provide. Dr. Janson testified that in this particular case there will be an "after," referencing the fact that Shuler is a young man and will be released from prison in his thirties. Thus, he was essentially highlighting the fact that because there will be life after incarceration for both him and his victim, there is a need for treatment and rehabilitation.

{¶10} The trial court ultimately sentenced Shuler to the maximum prison term of 11 to 16 1/2 years. In imposing the maximum sentence, the trial court expressly stated that it had considered the principles and purposes of felony sentencing and it went through each of the R.C. 2929.11 and R.C. 2929.12 factors individually. Further, although the trial court expressly found that "there were substantial grounds to mitigate * * * [the] offender's conduct[,]" the court did "not find that the circumstances in [Dr. Janson's report] amount to full mitigation or in any way justifies a reduction in the sentence." The trial court described Shuler's conduct as an "extreme act of domestic violence," and stated that the offense was "among the more serious offenses that we've ever seen in this Court."

{¶11} The trial court issued a judgment entry August 25, 2022, convicting and sentencing Shuler on the attempted murder charge and dismissing the

remaining counts of the indictment. It is from this judgment entry that Shuler now brings his timely appeal, setting forth a single assignment of error for our review.

ASSIGNMENT OF ERROR

I. THE TRIAL COURT ERRED BY IMPOSING THE MAXIMUM SENTENCE ON APPELLANT.

LEGAL ANALYSIS

{¶12} In his sole assignment of error, Shuler contends that the trial court erred by imposing the maximum sentence for attempted murder. More specifically, Shuler argues that the record does not support the maximum sentence imposed by the trial court. In making this argument, Shuler acknowledges that the trial court considered the required factors before imposing a maximum sentence, but he argues that the imposition of a maximum sentence here was directly contradictory to the overriding principles and purposes of felony sentencing in that it provided no rehabilitation. He contends that the denial of appropriate treatment will increase the risk of recidivism in this case. Shuler also argues that the lifetime of abuse that he endured, which was detailed in Dr. Janson's 60-page report, should have weighed in favor of mitigating the seriousness of his conduct. He argues that the "act would not have occurred but for the lifelong abuse" he endured "at the hands of his mother" and that although the abuse does not justify the conduct, "the trial court failed to consider and weight [sic] this factor based upon the evidence submitted into the record and presented to the Court." The State

counters by arguing that the trial court did not err in imposing the maximum sentence and that the imposition of the maximum sentence was not contrary to law. The State argues that because the trial court appropriately considered the statutory principles and purposes of felony sentencing, as well as the statutory seriousness and recidivism factors, and because the sentence imposed was within the statutory range and was not contrary to law, the trial court did not err when it sentenced Shuler to a maximum sentence.

Standard of Review

{¶13} When reviewing felony sentences, appellate courts apply the standard of review outlined in R.C. 2953.08(G)(2). *State v. Prater*, 4th Dist. Adams No. 18CA1069, 2019-Ohio-2745, ¶ 12, citing *State v. Graham*, 4th Dist. Adams No. 17CA1046, 2018-Ohio-1277, ¶ 13. Under R.C. 2953.08(G)(2), "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." Instead, R.C. 2953.08(G)(2) specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either:

> (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.

{¶14} A defendant bears the burden to establish, by clear and convincing evidence, 1) that a sentence is either contrary to law or 2) that the record does not support the specified findings under R.C. 2929.13(B), R.C. 2929.13(D), R.C. 2929.14(B)(2)(e), 2929.14(C)(4), or R.C. 2929.20(I). *State v. Behrle*, 4th Dist. Adams No. 20CA1110, 2021-Ohio-1386, ¶ 48; *State v. Shankland*, 4th Dist. Washington Nos. 18CA11 and 18CA12, 2019-Ohio-404, ¶ 20.

> [C]lear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.

Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118, paragraph three of the syllabus (1954).

{¶15} "A court reviewing a criminal sentence is required by R.C. 2953.08(F) to review the entire trial-court record, including any oral or written statements and presentence-investigation reports." *State v. Bryant*, 168 Ohio St.3d 250, 2022-Ohio-1878, 198 N.E.3d 68, ¶ 20, citing R.C. 2953.08(F)(1) through (4). However, we additionally observe that "[n]othing in R.C. 2953.08(G)(2) permits an appellate court to independently weigh the evidence in the record and substitute its judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and 2929.12." *State v. Jones*, 163 Ohio St.3d 242, 2020-Ohio-6729, 169 N.E.3d 649, ¶ 42. In other words, "R.C. 2953.08(G)(2) does

not allow an appellate court to modify or vacate a sentence based on its view that the sentence is not supported by the record under R.C. 2929.11 and 2929.12." *Bryant* at ¶ 22.

{¶16} Consequently, appellate courts cannot review a felony sentence when "the appellant's sole contention is that the trial court improperly considered the factors of R.C. 2929.11 or 2929.12 when fashioning that sentence." *State v. Stenson*, 6th Dist. Lucas No. L-20-1074, 2021-Ohio-2256, ¶ 9 (reversed on other grounds by *State v. Maddox*, 168 Ohio St.3d 292, 2022-Ohio-764, 198 N.E.3d 797), citing *Jones* at ¶ 42. *Accord State v. Orzechowski*, 6th Dist. Wood No. WD-20-029, 2021-Ohio-985, ¶ 13 ("In light of Jones, assigning error to the trial court's imposition of sentence as contrary to law based solely on its consideration of R.C. 2929.11 and 2929.12 factors is no longer grounds for this court to find reversible error."); *State v. Loy*, 4th Dist. Washington No. 19CA21, 2021-Ohio-403, ¶ 30. We also observe that "neither R.C. 2929.11 nor 2929.12 requires a trial court to make any specific factual findings on the record." *Jones* at ¶ 20.

{¶17} Furthermore, "an appellate court's determination that the record does not support a sentence does not equate to a determination that the sentence is 'otherwise contrary to law' as that term is used in R.C. 2953.08(G)(2)(b)." *Jones* at ¶ 32. "[O]therwise contrary to law" means " 'in violation of statute or legal regulations at a given time.' " *Id.* at ¶ 34, quoting Black's Law Dictionary 328 (6th

Ed.1990), cited with approval in *Bryant* at ¶ 22. Thus, for example, "when a trial court imposes a sentence based on factors or considerations that are extraneous to those that are permitted by R.C. 2929.11 and 2929.12, that sentence is contrary to law." *Bryant* at ¶ 22.

Legal Analysis

{¶18} Here, Shuler has not argued that the record fails to support the findings under R.C. 2929.13(B), R.C. 2929.13(D), R.C. 2929.14(B)(2)(e), R.C. 2929.14(C)(4), or R.C. 2929.20(I). Further, Shuler has not argued that the sentence is outside the statutory range or that it is otherwise contrary law. Instead, as set forth above, Shuler argues that "the trial court failed to consider and weight [sic]" several factors found under R.C. 2929.11 and 2929.12, primarily factors related to the relationship between Shuler and his victim, the existence of provocation as well as mitigating circumstances, and also expert evidence indicating Shuler had a very low risk of recidivism and that he was in need of treatment and rehabilitation instead of lengthy incarceration.

{¶19} As noted above, however, R.C. 2953.08(G)(2) does not allow this Court to independently review the record to determine whether the trial court chose an appropriate sentence based on the R.C. 2929.11 and R.C. 2929.12 factors. *See Jones*, *supra*; *State v. Hughes*, 4th Dist. Adams No. 21CA1127, 2021-Ohio-3127, ¶ 41 ("R.C. 2953.08(G)(2) does not give appellate courts broad authority to review

sentences to determine if they are supported by the record.") Therefore, we may not consider the issue of whether the trial court properly considered the purposes and principles of felony sentencing listed in R.C. 2929.11 and the seriousness and recidivism factors listed in R.C. 2929.12. We note, however, that the trial court did, in fact, indicate that it had fully considered the factors listed in each section, and it went through each and every factor on the record during the sentencing hearing. Furthermore, we find nothing in the record to suggest that the sentence imposed by the trial court is contrary to law.

{¶20} Accordingly, in light of the foregoing, Shuler's sole assignment of error is overruled and the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

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

Abele, J. and Wilkin, J. concur in Judgment and Opinion.

For the Court,

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Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.