

IN THE SUPREME COURT OF OHIO
2011

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

SHENCHEZ A. MARTIN,

Defendant-Appellee.

Case No.

11-0623

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 09AP-1073

MEMORANDUM OF PLAINTIFF-APPELLANT IN SUPPORT OF
JURISDICTION

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street-13th Fl.
Columbus, Ohio 43215
614-525-3555

and

JOHN H. COUSINS IV 0083498
(Counsel of Record)
Assistant Prosecuting Attorney
jhcousin@franklincountyohio.gov

COUNSEL FOR PLAINTIFF-APPELLANT

W. JOSEPH EDWARDS 0030048
(Counsel of Record)
Attorney at Law
523 S. Third Street
Columbus, OH 43215
614-228-0523

COUNSEL FOR DEFENDANT-APPELLEE

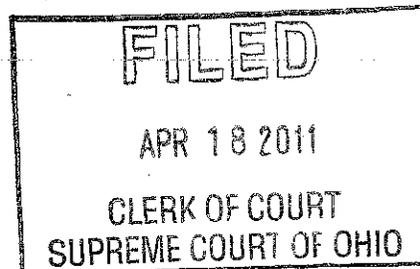


TABLE OF CONTENTS

EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION 1

STATEMENT OF THE CASE AND FACTS 4

ARGUMENT 10

Proposition of Law: Even when an appellate court concludes that the trial court sufficiently stated the findings necessary to justify the imposition of community control for a first-degree or second-degree felony, the appellate court’s work is not complete. It “shall review the record” to determine whether such findings are actually supported by the record. Absent record support for the necessary findings, the imposition of community control must be reversed. (R.C. 2953.08(G)(2), construed)..... 10

CONCLUSION 14

CERTIFICATE OF SERVICE 15

APPENDIX..... A

Judgment (filed 12-2-10) A-1

Opinion (rendered and filed 12-2-10) A-2

Judgment Denying Application for Reconsideration in Part (filed 3-3-11) A-13

Opinion Denying Application for Reconsideration in Part (rendered and filed 3-3-11) A-14

EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

In this case, the Tenth District has created a “one size fits all” standard of appellate review when examining a trial court’s departure from the presumption of prison afforded to first-degree and second-degree felonies. Because the holding arbitrarily eliminates the prosecution’s appellate remedies under R.C. 2953.08(G)(2) and creates a tension with the Eighth District, review is warranted in this Court.

The seriousness and recidivism factors could not rebut the presumption of prison for the savage and prolonged felonious assault that defendant committed against his girlfriend. In relation to seriousness, defendant’s attack on the victim resulted in a partially-severed ear, near-fatal cranial swelling, facial scarring, and lasting emotional distress. In terms of recidivism, defendant had a prior criminal history, had failed past community-control sanctions, and had a history of drug and alcohol abuse.

But when the State argued that the trial court did not make the statutory findings required by R.C. 2929.13(D) and, separately, that the record could not support such findings, the Tenth District overruled both assignments of error under the same standard of review. After two appeals, a splintered opinion, and a partial grant of reconsideration, the Tenth District held that the sentence was valid merely because “the trial court made the appropriate findings pursuant to R.C. 2929.13(D)(2)(a) and (b) and also set forth sufficient reasons under R.C. 2929.12.”

This holding is seriously flawed and worthy of review in this Court. In *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, this Court held that R.C. 2953.08(G)(1) allows a remand if the trial court fails to make the findings necessary to rebut the presumption of prison for a first- or second-degree felony. This Court did not, however, hold that R.C. 2953.08(G)(1) is the exclusive safeguard to the presumption of prison. R.C. 2953.08(G)(2) also permits the State to argue either that the record does not support the findings or that the sentence is otherwise

contrary to law. R.C. 2953.08(G)(2)(a) and (b). By reviewing both challenges for the mere existence of findings, without regard to the record beneath those findings, the Tenth District has held that R.C. 2953.08(G)(1) and 2953.08(G)(2) are one and the same.

In conflating these different standards of review, the Tenth District's holding empowers sentencing courts to override the will of the General Assembly based on unsupported findings alone. Here, the State, relying on R.C. 2953.08(G)(2), argued that 13 of the court's "findings" lacked evidentiary support. These unsupported findings included the trial court's claim that it was "unclear whether defendant genuinely expected to cause significant physical harm," even though defendant had pleaded guilty to "knowingly causing serious physical harm." The unsupported findings also included the trial court's claim that defendant "acted under some perceived strong provocation," even though the record contained no evidence of provocation. These were among several of the "findings" that defied the record. Indeed, one dissenting judge found that the trial court did not make either of the findings required by R.C. 2929.13(D)(2). Yet, the Tenth District, after avoiding the issue in successive appeals, held that the mere existence of the findings satisfied R.C. 2953.08(G)(1) *and* 2953.08(G)(2), whether or not the findings were justified.

This holding contrasts with the Eighth District's decision in *State v. Heath*, 170 Ohio App.3d 366, 2007-Ohio-536, which recognized that R.C. 2953.08(G)(1) is not the exclusive attack on the downward sentencing departure in R.C. 2929.13(D). "Under R.C. 2953.08(G)(2), an appellate court may increase, reduce or otherwise modify a sentence, or may vacate the sentence and remand the matter for resentencing, if it clearly and convincingly finds either that the record does not support the sentencing court's findings under R.C. 2929.13(D) or that the sentence is otherwise contrary to law." *Heath* at ¶28. Here, the State raised the same challenges

as the prosecution in *Heath* but received only half of the appellate review. The tension between the Eighth and Tenth Districts justifies review in this Court.

And this is not an isolated error. In at least four other decisions (including the first appeal in this case), the Tenth District has held that it was *prevented* from reviewing the record under R.C. 2953.08(G)(2)(a) when the trial court has not yet made the findings required by R.C. 2929.13(D). As stated by one panel:

In its second assignment of error, the State contends that any imposition of community control sanctions in this case would be contrary to law and that this court should remand the case to the trial court with instruction to impose a prison term. We disagree and remand the matter to the trial court to make whatever findings it deems appropriate and to enter a sentence based on those findings. *Martin* at ¶ 8 (citing R.C. 2953.08(G)(1) and *Mathis* at ¶ 35-36, 846 N.E.2d 1) (rejecting same argument); *State v. Wooden*, 10th Dist. No. 05AP-330, 2006-Ohio-212, ¶ 7 (rejecting same argument). The State's second assignment of error is overruled.

State v. Overmyer, 10th Dist. No. 09AP-945, 2010-Ohio-2072, ¶10; see, also, *State v. Atkinson*, 10th Dist. No. 06AP-497, 2007-Ohio-3789; *State v. Atkinson*, 10th Dist. No. 06AP-497, 2006-Ohio-6656. Essentially, the Tenth District has held that R.C. 2953.08(G)(2) is preempted by operation of R.C. 2953.08(G)(1). In cases, such as the present, where it is impossible to make the statutory findings, the Tenth District interpreted R.C. 2953.08(G)(1) to require an infinite series of remands for the trial court to make the necessary findings.

Therefore, this felony case highlights tension between the Eighth and Tenth Districts over an important issue of public and great general interest. The bench and bar need guidance as to whether R.C. 2953.08(G)(1) prescribes the same standard of review as R.C. 2953.08(G)(2). Review is also warranted upon leave granted in a felony case. The State respectfully requests that this Court accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

I. After inflicting near-fatal injuries to his girlfriend, defendant pleaded guilty to felonious assault, a second-degree felony.

On October 20, 2008, defendant pleaded guilty to felonious assault, a second-degree felony. The prosecutor recited the facts at the plea hearing, indicating that defendant left a bar with his girlfriend R.T., and the two began arguing while defendant was driving. Defendant began hitting R.T. in the head with his fists and cell phone, causing her blood to spatter throughout the interior. When R.T. realized that her ear became partially detached from her head, she attempted to throw herself out of the moving car. However, defendant pulled her back inside and continued the beating. Eventually, R.T. slid out of her pants and fell to the pavement. Three eyewitnesses watched her screaming as defendant attempted to pull her back inside.

R.T. was taken to Riverside Hospital, where she was treated for her injuries and doctors successfully worked to reattach her ear. She suffered multiple facial lacerations and contusions along with numerous bruises across her body. Her cranium was severely swollen, and her medical treatment included plastic surgery. Defendant's attorney took no exception with the State's recitation of the facts. The trial court ordered a pre-sentence investigation ("PSI") and continued the case for sentencing.

II. The trial court imposed community control.

Defendant lied in the PSI, claiming that someone else caused R.T.'s injuries. After noting the savageness of the attack and defendant's refusal to admit guilt, defendant's own attorney described defendant as "a time bomb" at the sentencing hearing and said, "it's almost offensive that he doesn't acknowledge his responsibility in this action." Then, in a vague, sham apology, defendant remarked, "if the things that occurred that night, if I did those things, I apologize for putting her through that."

R.T. personally addressed the trial court and explained how her mother was unable to recognize her in the hospital after the attack. R.T. told the trial court that the consistent medical appointments caused her to miss work and that the scars on her face will forever remind her of the attack. R.T. asked that the trial court impose a prison sentence and stated, “[h]e could do this to someone else. I mean if he does it to someone else, how do you know they’re going to be able to survive the way I did?”

The State asked for a prison sentence and argued that the presumptive prison term required by R.C. 2929.13(D) could not be overridden based on the seriousness of the offense and defendant’s high recidivism risk. Defendant had a prior conviction for a sex offense in Guernsey County, in which he already received a sentence of probation.

After hearing arguments from both parties, the trial court stated the following:

All right. I find the presumption of prison in this case because of the combination of factors that we’ve discussed rather fully and that are reviewed in the Netcare assessment and the PSI is overcome, and that the opportunity for community control is the best way to protect the public long term.

* * *

Notwithstanding the one brush with the law that he had in Guernsey County, we otherwise have a man with no criminal record who did a terrible crime. He’s bright. He’s got at least a year plus of college. I’m not ready to just throw away the keys and put him in the prison system.

(Sent. T. 17, 18) The trial court imposed a five-year term of community control on the mental health docket. Concluding the hearing, the trial court stated that psychiatric care was necessary for “the ongoing prevention of the time bomb.”

III. A panel of Tenth District reversed and remanded the matter for resentencing.

The State appealed the community-control sentence. *State v. Martin*, 10th Dist. No. 08AP-1103, 2009-Ohio-3485 (“*Martin I*”). In its first assignment of error, the State argued that

the trial court failed to give the findings required to rebut the presumption of prison under R.C. 2929.13(D)(1) and (2). The State's second assignment of error argued that the trial court's findings were not supported by the record.

The Tenth District held that this Court's decision in *State v. Mathis* prohibited review of the second assignment of error because the trial court failed to make the required findings. The panel sustained the first assignment of error and held that "the trial court contravened R.C. 2929.13(D)(2) and 2929.19(B)(2)(b) when it imposed community control without providing the required findings and supporting reasons at the sentencing hearing." *Id.*, at ¶7. The Tenth District reversed and remanded the case for resentencing. *Id.*, at ¶9.

IV. On remand, the trial court imposed community control again, despite learning that defendant was not complying with any of his community control sanctions.

At a resentencing hearing held in October 2009, the trial court learned that defendant skipped his drug tests, stopped taking his medications, and missed the last two months of his mental-treatment sessions. The probation department reported that defendant was noncompliant with treatment, did not have a consistent job, and made only one \$20 payment towards restitution.

After defendant gave a statement to the court, the State indicated that the statement did not appear to be an apology and that defendant "still kind of makes it sound like he's somehow not culpable." The State requested a prison sentence based on its earlier arguments and defendant's failure to comply with the existing sanctions. R.T. also repeated her plea for prison.

The trial court reimposed community control and, again, failed to make the findings required by R.C. 2929.13(D).

There was a serious injury to the victim. Whether it was life-threatening, we can't tell, but it was certainly very serious. I do not discount that for a moment.

Nevertheless, I make the findings in 2929.13(D)(2)(a) and (b) that a community control sanction is the best option to both adequately punish the defendant and to protect the public from future crime. And that incarceration, which would interrupt the modest rehabilitation that Mr. Martin has undertaken for himself and that Southeast has tried to guide him, consistent with the Netcare report from last year about the deep-seated psychological issues that he's got to grapple with from his childhood, that community control is far better and less costly than using incarceration, which will at the end of the day of incarceration, even if it's the maximum of eight years, still leave Mr. Martin a fairly young man with the rest of his life in which he's going to have to conform his behavior to the law and overcome the psychological issues that have driven us to some degree here today.

The factors in 2929.12 that indicate a lesser likelihood of recidivism if there is community control linked with mental health care that is actually given, and not merely promised, by society justify a community control sanction and outweigh the factors in 2929.12 that indicate a greater likelihood of recidivism, in my view.

The poor mental health of the defendant was a significant factor at the time of the crime based upon the psychological information we have available, rather than this being purely a case of criminality.

In committing the offense, it appears the defendant acted under some perceived strong provocation. Now that may be totally fallacious, and he did enter a guilty plea to the crime, but he does claim, as has been pointed out, not remembering assaulting the victim, and that gives some ground to mitigate the offender's conduct, although it is surely not a defense.

The defendant, according to psychological evidence, suffers from PTSD, bipolar issues, and at least, normally, requires psychological medication to function. I take very seriously Mr. Edwards' comment that he's not on his meds now, but I still think that is a factor that can be addressed more swiftly and more accurately on a continuing basis using community control rather than tossing him into the prison system.

I won't reiterate all the facts in the Netcare report of September 24th, '08, that produced the PTSD, anxiety, and deep psychological trauma, but at the same time, it's a man who is able to get through one year of college at Muskingum and who has the ability, I believe, in a proper structure in the community to be a productive member of society.

The court is concerned with a man who has done the crimes like Mr. Martin of the ultimate protection, long term, of the public, and I think given that

focus, that the findings under 2929.13(D)(2)(b) can be made. That community control with that long-term focus will not demean the seriousness of the offense.

I do not believe the facts show that the facts suggesting the defendant's conduct was more serious than normally constituting the offense is fair, given the psychological background. And as I've already said, we've already incarcerated Mr. Martin for 10 months and 12 days on this thing.

In summary, the court finds that the presumption in favor of a term of imprisonment is rebutted on the evidence before it.

The court further concludes that over 10 months' local incarceration followed by intensive community control with appropriate safeguards for the public and the victim does not demean the seriousness of the offense.

The court further finds that by providing the opportunity for community control there is a higher likelihood that the victim will receive the financial restitution that was requested and is being ordered again.

And that by providing mental health treatment and community supervision, Mr. Martin is more likely to be rehabilitated successfully and have a much lower likelihood of recidivism. Using community control, those goals can be accomplished at far less financial cost to the public than tossing Mr. Martin in ODRC.

The court further finds that although the injuries inflicted on the victim were serious, that the mental health issues of the defendant at the time mitigate his misconduct, even though they were not a defense and even though they don't excuse him.

The court further believes and finds that the defendant shows genuine remorse, and with appropriate community supervision and mental health care, this criminal conduct is unlikely to recur.

The court further finds in committing the offense, it remains unclear whether the defendant genuinely expected to cause significant physical harm to the victim since they were residing together and, as far as the record shows, there was no domestic violence instances that ever occurred before.

Accordingly, I impose community control for four years on intensive supervision on the mental health docket. I would put five on, except that we've already used effectively a year, and I don't think under the statute, that I can put more than five years on Mr. Martin.

(Resent. T. 32-37) The trial court filed a sentencing entry on October 30, 2009. (R. 83)

V. A divided panel of the Tenth District affirmed.

The State appealed, and a divided panel of the Tenth District affirmed. *State v. Martin*, 10th Dist. No. 09AP-1073, 2010-Ohio-5863 (“*Martin II*”). The assignments of error raised similar legal challenges but were based on new findings given at a new sentencing hearing. In the State’s second assignment of error, the State relied on R.C. 2953.08(G)(2) and argued that the “lower court’s sentence is contrary to law, and its findings were unsupported by the record.”

Relying heavily on the resentencing entry, a divided panel of the Tenth District held that the trial court “made the appropriate findings necessary to grant community control.” *Id.* at ¶11. The majority overruled the State’s second assignment of error, which claimed that the findings were unsupported by the record, stating that an “identical” challenge was “decided” in *Martin I*, the majority held that the issue was barred by res judicata. *Id.* at ¶6. Res judicata was never briefed by either party, nor was the State given an opportunity to brief the issue.

Dissenting for several reasons, Judge McGrath concluded that the trial court failed to make both findings required by R.C. 2929.13(D)(2)(a) and (b). Judge McGrath also agreed with the State’s argument that the trial court’s findings were not supported by the record and disagreed with the majority’s res judicata holding.

VI. The Tenth District agreed to reconsider its flawed res judicata holding but overruled the State’s second assignment of error nevertheless.

The State sought reconsideration on several grounds, one of which was the Tenth District’s res judicata conclusion. See *State v. Martin*, 10th Dist. No. 09AP-1073, 2011-Ohio-951 (“*Martin II* on Reconsideration”). The Tenth District, without the now-retired Judge McGrath, agreed that res judicata did not bar review of the State’s second assignment of error but stated, “this does not alter the majority’s ultimate determination regarding the outcome of this appeal * * * .” *Id.* at ¶12.

In purporting to examine the State's second assignment of error, the Tenth District did not review whether the record supported the trial court's findings. *Id.* at ¶¶18, 28. The only inquiry answered by the Tenth District was whether the trial court made the statutory findings required by R.C. 2929.13(D). *Id.* at ¶18. Then, after reviewing the various statements made by the trial court at the sentencing hearing, the Tenth District concluded:

It is clear from the trial court's findings made at the resentencing hearing that it did in fact fulfill the overriding purposes of felony sentencing pursuant to R.C. 2929.11(A).

In short, it is evident the trial court made the appropriate findings pursuant to R.C. 2929.13(D)(2)(a) and (b) and also set forth sufficient reasons under R.C. 2929.12, and as a result, the trial court overcame the presumption for a prison sentence. Therefore, we cannot find that the trial court's resentencing determination was clearly and convincingly contrary to law. Instead, we find it is in accordance with law and in accordance with the overriding purposes of felony sentencing.

Id. at ¶¶29-30. The Tenth District's reconsideration decision was decided and entered on March 3, 2011.

ARGUMENT

Proposition of Law: Even when an appellate court concludes that the trial court sufficiently stated the findings necessary to justify the imposition of community control for a first-degree or second-degree felony, the appellate court's work is not complete. It "shall review the record" to determine whether such findings are actually supported by the record. Absent record support for the necessary findings, the imposition of community control must be reversed. (R.C. 2953.08(G)(2), construed)

For a first- or second-degree felony, "it is presumed that a prison term is necessary in order to comply with the purposes and principles of felony sentencing under [R.C. 2929.11]." R.C. 2929.13(D)(1). R.C. 2929.13(D)(2) prohibits a sentencing court from imposing community control unless it can override this presumption by making 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 [R.C. 2929.12] 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 [R.C. 2929.12] 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 the offender's conduct was more serious than conduct normally constituting the offense.

R.C. 2929.13(D)(2)(a) and (b). If either of these findings, supported by sufficient reasons, is missing from the record, R.C. 2953.08(G)(1) requires a remand for the sentencing court to satisfy this duty. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, paragraph two of the syllabus.

However, R.C. 2953.08(G)(1) is not the exclusive means to appeal from this downward departure in sentencing. Unaffected by this Court's ruling in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the State's right to review under R.C. 2953.08(B)(1) includes the right to argue that "the record does not support the sentencing court's findings * * *" or that "the sentence is otherwise contrary to law." R.C. 2953.08(G)(2)(a) and (b). Whether or not the trial court stated the required statutory findings, a court hearing an appeal under R.C. 2953.08(G)(2) "shall review the record, including the findings underlying the sentence * * * ." R.C. 2953.08(G)(2).

In *State v. Heath*, 170 Ohio App.3d 366, 2007-Ohio-536, the Eighth District recognized that R.C. 2953.08(G)(1) is not the only standard of review when examining downward sentencing departures under R.C. 2929.13(D). After overruling the prosecution's first assignment of error, which argued that the trial court failed to make the necessary findings, the Eighth District reviewed the prosecution's second assignment of error under R.C. 2953.08(G)(2). *Id.* at ¶28. The Eighth District explained:

Under R.C. 2953.08(G)(2), an appellate court may increase, reduce or otherwise modify a sentence, or may vacate the sentence and remand the matter for resentencing, if it clearly and convincingly finds either that the record does not support the sentencing court's findings under R.C. 2929.13(D) or that the sentence is otherwise contrary to law.

Id. Concluding that three of the trial court's "less serious" findings were not supported by the record, the Tenth District vacated the sentence "pursuant to R.C. 2953.08(G)(2)(a)" and remanded "the cause for resentencing because the sentence is contrary to law. The record does not clearly and convincingly support the imposition of community-control sanctions in place of incarceration." Id. at ¶42.

Here, the State's two assignments of error presented the same legal challenges as the assignments of error at issue in *Heath* (the first challenging whether the trial court made the required findings and the second challenging whether the record supported such findings). In its second assignment of error, the State relied on R.C. 2953.08(G)(2)(a)—and the *Heath* decision—but the Tenth District refused to review the record to determine whether the trial court's "findings" satisfied the requirements set forth in R.C. 2929.13(D). Instead, the Tenth District held that both assignments of error were governed by the same inquiry: whether the trial court made findings—not whether the findings were supported by the record.

In short, it is evident the trial court made the appropriate findings pursuant to R.C. 2929.13(D)(2)(a) and (b) and also set forth sufficient reasons under R.C. 2929.12, and as a result, the trial court overcame the presumption for a prison sentence. Therefore, we cannot find that the trial court's resentencing determination was clearly and convincingly contrary to law. Instead, we find it is in accordance with law and in accordance with the overriding purposes of felony sentencing.

Martin II (on reconsideration) at ¶30.

The Tenth District has not conducted an independent review of the record. At one point, the Tenth District held that the trial court "did in fact fulfill the overriding purposes of felony

sentencing pursuant to R.C. 2929.11.” Id. at ¶29. However, this is not the inquiry required by R.C. 2953.08(G)(2). That statute expressly permits the prosecution to appeal from a downward sentencing departure even when the trial court purports to make the requisite findings.

The effect of the Tenth District’s ruling is to read part of the State’s sentencing appeal rights out of the statute. The State is entitled to more than just a review of the sufficiency of the findings; it is entitled to a substantive review of the underlying record to determine whether the findings are supported by the record. Even when the trial court *says* the right things, the appellate court is charged with the determination of whether the record actually supports what the trial court said.

Despite two State’s appeals, the State has yet to receive even one substantive review of the record. Reading the State’s substantive-appeal provision out of the statute in this way violates fundamental canons of statutory interpretation.

Every part of the statutory scheme is presumed to be effective, see R.C. 1.47(B), and so the provisions for the State’s substantive appeal under R.C. 2953.08(G)(2) cannot be disregarded. “A basic rule of statutory construction requires that ‘words in statutes should not be construed to be redundant, nor should any words be ignored.’” *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health* (2002), 96 Ohio St.3d 250, 2002-Ohio-4172, ¶ 26 (quoting another case). The statute “must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.” *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.* (1917), 95 Ohio St. 367, 372-73. “In determining legislative intent it is the duty of this court to give effect to the

words used, not to delete words used or to insert words not used." *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127.

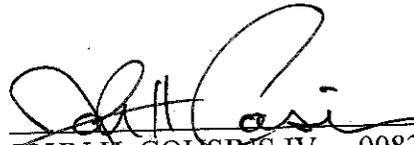
Accordingly, the State's proposition of law warrants this Court's review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal presents questions of public or great general interest as would warrant further review by this Court. Review is also warranted upon leave granted in a felony case. It is respectfully submitted that jurisdiction should be accepted.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney

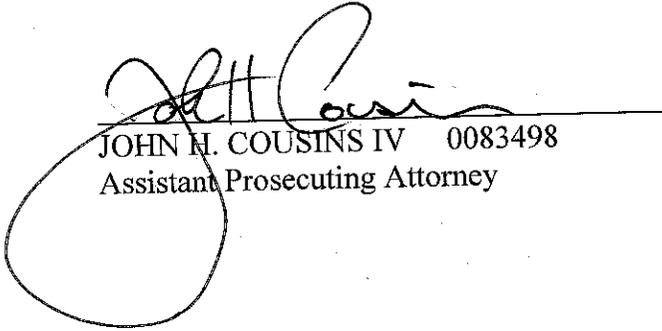


JOHN H. COUSINS IV 0083498
Assistant Prosecuting Attorney
373 South High Street-13th Fl.
Columbus, Ohio 43215
614/525-3555
jhcousin@franklincountyohio.gov

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, April 18, 2011, to W. JOSEPH EDWARDS, 523 S. Third Street, Columbus, OH 43215; Counsel for Defendant-Appellee.



JOHN H. COUSINS IV 0083498
Assistant Prosecuting Attorney

APPENDIX

Judgment (filed 12-2-10) A-1
Opinion (rendered and filed 12-2-10) A-2
Judgment Denying Application for Reconsideration in Part (filed 3-3-11) A-13
Opinion Denying Application for Reconsideration in Part (rendered and filed 3-3-11) A-14

WY

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

DEC 3
7:00 DEC-2 PM 4:24
CLERK OF COURTS

State of Ohio,

Plaintiff-Appellant,

v.

Shenchez A. Martin,

Defendant-Appellee

No. 09AP-1073
(C.P.C. No 08CR-05-3489)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 2, 2010, appellant's assignments of error are overruled. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

TYACK, P.J., & CONNOR, J.

By



Judge G. Gary Tyack, P.J.

m

Frye, J
COURT OF APPEALS
10/10

10

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT
7:00 DEC -2 PM 2:44
CLERK OF COURTS

State of Ohio, :
Plaintiff-Appellant, :
v. :
Shenchez A. Martin, :
Defendant-Appellee. :

No. 09AP-1073
(C.P.C. No. 08CR-05-3489)
(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 2, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*,
for appellant.

W. Joseph Edwards, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{1} The State of Ohio is appealing the decision of the Franklin County Court of
Common Pleas which granted community control for Shenchez A. Martin ("Martin"). The
State of Ohio assigns two errors for our consideration:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN IMPOSING COMMUNITY
CONTROL WHEN IT FAILED TO MAKE THE REQUIRED
FINDINGS AND FAILED TO GIVE ADEQUATE REASONS

FOR OVERCOMING THE PRESUMPTION IN FAVOR OF A PRISON TERM.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT'S IMPOSITION OF COMMUNITY CONTROL IS CONTRARY TO LAW, AS DEFENDANT CANNOT OVERCOME THE PRESUMPTION IN FAVOR OF A PRISON TERM.

{¶2} Because the two issues heavily overlap, we will address them jointly.

{¶3} Martin pled guilty to a single charge of felonious assault in October 2008. A sentencing hearing was held on November 20, 2008 at which time the trial court granted him community control after Martin served an additional 120 days of incarceration. Martin had already served 191 days in custody, so the total time of his incarceration was 311 days.

{¶4} Recognizing that Martin had serious mental health issues, the trial court ordered five years of intensive supervision on a mental health docket.

{¶5} The State of Ohio appealed Martin's sentence at that time, assigning two errors:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN IMPOSING COMMUNITY CONTROL WHEN IT FAILED TO MAKE THE REQUIRED FINDINGS AND FAILED TO GIVE ADEQUATE REASONS FOR OVERCOMING THE PRESUMPTION IN FAVOR OF A PRISON TERM.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT'S IMPOSITION OF COMMUNITY CONTROL IS CONTRARY TO LAW, AS DEFENDANT CANNOT OVERCOME THE PRESUMPTION IN FAVOR OF A PRISON TERM.

{¶6} A panel of this court overruled the second assignment of error, which is identical to the second assignment of error the State alleges in this appeal. This issue has already been decided by this appellate court. The second assignment of error in this appeal is therefore overruled, based upon the doctrine of res judicata.

{¶7} In the first appeal, a panel of this court found that the trial court had not made all the findings required to overcome the legal presumption in favor of incarceration in a state prison for the offense of felonious assault. The trial court needed to find, under R.C. 2929.13(D)(2)(a) and (b):

(a) A community control sanction * * * 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 * * * 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.

{¶8} Following a remand to the trial court, the trial judge took great pains to attempt to comply with our mandate. The trial court held an additional sentencing hearing and issued a detailed sentencing entry which included the following:

The Court considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. The Court recognized, again, that there is a

presumption in favor of a prison term pursuant to R.C. 2929.13(D).

The court finds, for the reasons stated more fully on the record, that the presumption for a prison sentence is rebutted, and that all findings under R.C. 2929.13(D)(2) are fairly made on this record. The court notes that a period of 10 months local incarceration has already been served, representing over 40% of the minimum prison sentence that might otherwise be imposed. Additional intensive Community Control sanctions offer appropriate safeguards for the public and the victim and do not demean the seriousness of the offense. (In fact, the victim stated she had relocated and so far as the record shows the defendant has no knowledge where she lives.) Community control offers a greater likelihood that the victim will receive financial restitution. By providing mental health treatment and community supervision with family support, Mr. Martin is more likely to be rehabilitated successfully for the long-term, and ultimately to have a much lower likelihood of recidivism. The use of community control means those goals can be accomplished at the least financial cost to the public.

The court recognizes that the injuries inflicted on the victim were serious, but also finds that mental health issues involving the defendant more fully documented in the record mitigate this misconduct even though such issues were not enough to constitute a defense to the crime. The court believes that, within the limits of his mental health, defendant shows genuine remorse and that, with appropriate supervision and mental health care, comparable circumstances are unlikely to recur. The court further finds that, in committing the offense, it remains unclear whether defendant genuinely expected to cause physical harm to the victim, since they were residing together and, so far as the record shows, no domestic violence incidents ever occurred before. Thus, a combination of community control sanctions will adequately punish the defendant and protect the public from future crime, because the applicable factors under R.C. 2929.12 indicating a lower likelihood of recidivism (with supervision including community mental health care) outweigh the factors indicating a greater likelihood of recidivism. Further, a combination of future community control sanctions (given that defendant has been jailed for

more than 10 months) does not demean the seriousness of the offense, because factors under R.C. 2929.12 that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and outweigh the factors that indicate that defendant's conduct was more serious than conduct normally constituting the offense.

(99) In open court, the judge stated:

THE COURT: * * * I have given a lot of consideration to this case, not simply this morning but starting in the fall of '08, obviously.

I recognize that under 2929.13(D), there is a presumption for prison on a second degree felony. I also recognize that as of today, against the minimum prison sentence I could impose of two years, that Mr. Martin has given us 312 days of jail-time credit, or 10 months and 12 days, if my math is correct. So that's something in the range of 40 percent of the presumed low level -- lowest level prison sentences.

There was a serious injury to the victim. Whether it was life-threatening, we can't tell, but it was certainly very serious. I do not discount that for a moment.

Nevertheless, I make the findings in 2929.13(D) (2) (a) and (b) that a community control sanction is the best option to both adequately punish the defendant and to protect the public from future crime. And that incarceration, which would interrupt the modest rehabilitation that Mr. Martin has undertaken for himself and that Southeast has tried to guide him, consistent with the Netcare report from last year about the deep-seated psychological issues that he's got to grapple with from his childhood, that community control is far better and far less costly than using incarceration, which will at the end of the day of incarceration, even if it's the maximum of eight years, still leave Mr. Martin a fairly young man with the rest of his life in which he's going to have to conform his behavior to the law and overcome the psychological issues that have driven us to some degree here today.

The factors in 2929.12 that indicate a lesser likelihood of recidivism if there is community control linked with mental health care that is actually given, and not merely promised, by society justify a community control sanction and outweigh the factors in 2929.12 that indicate a greater likelihood of recidivism, in my view.

(Tr. 32-33.)

{¶10} The trial court went on to explain its findings, including a detailed review of Martin's mental health challenges and states:

In summary, the court finds that the presumption in favor of a term of imprisonment is rebutted on the evidence before it.

(Tr. 35.)

{¶11} We find that the trial court followed our mandate and made the appropriate findings necessary to grant community control in this case. We, therefore, overrule the first assignment of error.

{¶12} Having overruled both assignments of error, the judgment and sentence of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

CONNOR, J., concurs
McGRATH, J., dissents.

McGRATH, J., dissenting.

{¶13} Because I am unable to agree with the majority's conclusion, I hereby dissent.

{¶14} In the first sentencing hearing, the trial court attempted to provide the requisite findings and reasons in its sentencing entry, but, upon appeal, another panel of

this court found that the trial court failed to do so. Here, at appellee's resentencing hearing, the trial court attempted once more to provide the requisite findings and reasons as required by R.C. 2929.13(D)(2)(a) and (b), and I would find that again the trial court failed to do so. Moreover, the trial court must provide its findings and reasons at the sentencing hearing as opposed to any later developed judgment entry. See *State v. Wooden*, 10th Dist. No. 05AP-330, 2006-Ohio-212.

{¶15} Although the trial court stated at the resentencing hearing that community control "is the best option to both adequately punish the [appellee] and to protect the public from future crime" and that community control is "far better and far less costly than using incarceration," the presumption of prison must first be rebutted and overcome before rehabilitation and cost of prison can be considered. Here, the court did not adequately rebut the presumption of prison. The trial court did not find that, *under the factors set forth in R.C. 2929.12*, a community control sanction would adequately punish defendant and protect the public from future crime. The trial court made such a statement but did not make the findings in terms of that particular Revised Code section. Likewise, the trial court failed to find at the resentencing hearing that, *under the R.C. 2929.12 factors*, a community control sanction would not demean the seriousness of defendant's offense.

{¶16} Without these findings, the trial court failed to provide the required findings to rebut the presumption of prison and support a community control sanction. I would agree with the state's analysis of the sentencing as set forth in its brief to the effect that the statute requires that the defendant be found less likely to recidivate at the moment of

sentencing, not after a period of treatment or rehabilitation. Yet, at the resentencing hearing, the trial court states: "[B]y providing mental health treatment and community supervision, Mr. Martin is more likely to be rehabilitated successfully and have a much lower likelihood of recidivism," and concludes that "with appropriate community supervision and mental health care, this criminal conduct is unlikely to recur." (Resentencing Tr. 36.) However, the statute requires that the offender must present a lesser risk of recidivism *at the time of sentencing*, not after treatment. The retrospective factors under R.C. 2929.12(D) and (E) must be used to assess whether the defendant is less likely to reoffend as he sits today, not to speculate as to whether community control would someday lower defendant's risk of recidivism. Rehabilitation is not a "factor" under R.C. 2929.12, let alone a conjecture as to its future effects.

{¶17} Moreover, I would agree with the state's position that the trial court's stated reasons for finding that the "less serious" factors "outweigh" the "more serious" factors were not in terms of R.C. 2929.12 or, in actuality, supported by the record. The trial court stated:

The court is concerned with a man who has done the crimes like Mr. Martin of the ultimate protection, long term, of the public, and I think given that focus, that the findings under 2929.13 (D) (2) (b) can be made. That community control with that long-term focus will not demean the seriousness of the offense.

I do not believe the facts show that the facts suggesting the defendant's conduct was more serious than normally constituting the offenses fair, given the psychological background. As I have already said, we've already incarcerated Mr. Martin for 10 months and 12 days on this thing.

(Resentencing Tr. 35.)

{¶18} However, long-term protection of the public is not one of the four "less serious" factors mitigating against prison. If anything, it would seem that the court's concern for the ultimate protection, long-term, of the public weighs in favor of prison. And there is no explanation as to how the defendant's psychological issues demonstrate that the victim's injuries were any less serious. The trial court appropriately described this crime as "terrible," and the victim was not only left unrecognizable by her family but suffered a totally severed ear. The trial court mentioned that there was some perceived strong provocation; but yet went on to state that such strong provocation may be totally fallacious, and there is nothing in the record to indicate provocation. The trial court noted that the defendant lacked memory of the event; however, that has no relevance in terms of assessing the seriousness of the conduct. Therefore, I would find that the court has not made an appropriate analysis as required by the statute.

{¶19} It should also be remembered that, at the resentencing hearing, facts were brought out demonstrating that, in the time period between the first sentencing and the case having been to the Tenth District Court of Appeals and remanded back to the trial court for resentencing, the defendant had been noncompliant with the treatment ordered in his first sentencing. Appellee skipped his drug test, stopped taking his medications, and, for two months prior to the resentencing, missed his mental health treatment sessions. Moreover, the probation department reported appellee to be noncompliant with treatment, not consistently employed, and having made only \$20 in payments toward restitution. It was not confirmed that defendant had secured a job.

{¶20} In the second assignment of error, the state has again requested this court to review the record and order the trial court to impose a sentence of incarceration. We declined that invitation in the first appeal and simply remanded the matter for resentencing. The majority believes such a declination by the first appellate panel to be res judicata with respect to the second assignment of error. Although I would once again remand the matter for resentencing and decline the invitation that the state has set forth in the second assignment of error, I would disagree with the majority that our declination constitutes res judicata for two reasons. First of all, before us now is a totally new sentencing based upon new arguments and additional facts that were not present at the first sentencing hearing and which include stated reasons by the trial court not set forth in the first sentencing. Also included are facts concerning the defendant's interim behavior. Secondly, the prior panel of this court simply declined to order a sentence and did not go through an analysis of the facts and make a stated determination that a certain sentence was or was not required under the law. Rather, the court simply remanded for resentencing in view of the error as to the first assignment of error. Because of that, I do not believe that res judicata would be appropriate, and I believe the second assignment of error should be rendered moot until appellee is resentenced by the trial court.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FILED
APPEALS
2011 MAR -3 PM 12: 58
CLERK OF COURTS

State of Ohio,

Plaintiff-Appellant,

v.

Shenchez A. Martin,

Defendant-Appellee.

No 09AP-1073
(C P C No 08CR-05-3489)

(REGULAR CALENDAR)

JOURNAL ENTRY

For the reasons stated in the decision of this court rendered herein on March 3, 2011, it is the judgment and order of this court that appellant's application for reconsideration is granted in part and denied in part, and appellant's application for en banc consideration is denied. Costs assessed equally between the parties.

CONNOR, TYACK & DORRIAN, JJ.

By 

Judge John A. Connor

10754 - G37

J Frye

✓13

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
APPEALS
2011 MAR -3 PM 12:53
CLERK OF COURTS

State of Ohio,

Plaintiff-Appellant,

v.

Shenchez A. Martin,

Defendant-Appellee.

No. 09AP-1073
(C.P.C. No. 08CR-05-3489)
(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 3, 2011

Ron O'Brien, Prosecuting Attorney, and John H. Cousins, IV,
for appellant.

W. Joseph Edwards, for appellee

ON APPLICATIONS FOR RECONSIDERATION AND
FOR EN BANC CONSIDERATION

CONNOR, J

{¶1} This case is before the court upon applications for reconsideration and for en banc consideration filed by appellant, the State of Ohio, regarding our decision to affirm the trial court's resentencing of the defendant to a period of community control. These applications arise out of a second appeal filed by the State of Ohio.

{¶2} In its first appeal, the State of Ohio presented the following two assignments of error:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN IMPOSING COMMUNITY CONTROL WHEN IT FAILED TO MAKE THE REQUIRED FINDINGS AND FAILED TO GIVE ADEQUATE REASONS FOR OVERCOMING THE PRESUMPTION IN FAVOR OF A PRISON TERM.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT'S IMPOSITION OF COMMUNITY CONTROL IS CONTRARY TO LAW, AS DEFENDANT CANNOT OVERCOME THE PRESUMPTION IN FAVOR OF A PRISON TERM.

State v. Martin, 10th Dist. No. 08AP-1103, 2009-Ohio-3485, ¶4 ("*Martin I*")

¶3) With respect to the first assignment of error, Judge French wrote for the majority.

Here, the trial court attempted to provide the requisite findings and reasons in its sentencing entry. Nevertheless, a trial court must provide the findings and reasons at the sentencing hearing. See *State v. Wooden*, 10th Dist. No. 05AP-330, 2006-Ohio-212, ¶5. Although the trial court said at the sentencing hearing that community control "is the best way to protect the public," the court did not find that, under the R.C. 2929.12 factors, a community control sanction would adequately punish appellee and protect the public from future crime. Likewise, the trial court failed to find at the sentencing hearing that, under the R.C. 2929.12 factors, a community control sanction would not demean the seriousness of appellee's offense. Without these findings, the court failed to provide the required reasons to support a community control sanction. Therefore, we conclude that the trial court contravened R.C. 2929.13(D)(2) and 2929.19(B)(2)(b) when it imposed community control without providing the required findings and supporting reasons at the sentencing hearing. Accordingly, we sustain appellant's first assignment of error.

Martin I at ¶7.

{¶4} With respect to the State's second assignment of error, Judge French wrote:

In its second assignment of error, appellant asks us to review the record and determine that appellee must be sentenced to prison because the statutory findings and supporting reasons for a community control sanction cannot be made. We decline. Because the trial court sentenced appellee to community control without providing the required statutory findings and supporting reasons at the sentencing hearing, the sentencing laws mandate that we remand this case to give the trial court the opportunity to do so. R.C. 2953.08(G)(1); *State v. Mathis*, 109 Ohio St.3d 54, 846 N.E.2d 1, 2006-Ohio-855, ¶¶35-36. Therefore, we overrule appellant's second assignment of error.

Martin I at ¶8. The case was then remanded and the trial court held a resentencing hearing on October 22, 2009. After the resentencing hearing, the trial court again found the presumption in favor of prison had been overcome and sentenced the defendant to community control. By this time, the defendant had been incarcerated 312 days

{¶5} The State of Ohio appealed the trial court's sentencing a second time and again raised the same two assignments of error as were raised in the first appeal.

{¶6} On December 2, 2010, Judge Tyack, writing for the majority, found.

A panel of this court overruled the second assignment of error, which is identical to the second assignment of error the State alleges in this appeal. This issue has already been decided by this appellate court. The second assignment of error in this appeal is therefore overruled, based upon the doctrine of res judicata.

In the first appeal, a panel of this court found that the trial court had not made all the findings required to overcome the legal presumption in favor of incarceration in a state prison for the offense of felonious assault. The trial court needed to find, under R.C. 2929.13(D)(2)(a) and (b):

(a) A community control sanction * * * 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 * * * 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.

Following a remand to the trial court, the trial judge took great pains to attempt to comply with our mandate. The trial court held an additional sentencing hearing and issued a detailed sentencing entry which included the following[]

State v Martin, 10th Dist No. 09AP-1073, 2010-Ohio-5863, ¶6-8 ("*Martin II*")

{¶7} Judge Tyack also went on to quote the trial judge's findings made in open court, writing:

The trial court went on to explain its findings, including a detailed review of Martin's mental health challenges and states:

In summary, the court finds that the presumption in favor of a term of imprisonment is rebutted on the evidence before it

We find that the trial court followed our mandate and made the appropriate findings necessary to grant community control in this case. We, therefore, overrule the first assignment of error.

Martin II at ¶10-11.

{¶8} The State alleges several errors in its applications for reconsideration and en banc consideration. When presented with an application for reconsideration, an appellate court must determine whether the application calls to the court's attention an obvious error in its decision, or raises an issue for consideration that was either not considered at all or not fully considered by the court when it should have been *State v*

Rowe (Feb. 10, 1994), 10th Dist. No. 92AP-1763, citing *Matthews v. Matthews* (1981), 5 Ohio App.3d 140. However, "[a]n application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *State v. Owens* (1996), 112 Ohio App.3d 334, 338. "App.R 26 does not provide specific guidelines to be used by an appellate court when determining whether a decision should be reconsidered or modified." *Id.* at 335. Furthermore, if two or more appellate court decisions from the same district are in conflict, that appellate court must convene en banc to resolve the conflict. *Fleisher v. Ford Motor Co.*, 10th Dist. No. 09AP-139, 2009-Ohio-4847, ¶6.

{¶9} The first two alleged errors address the State's second assignment of error and the majority's determination that the second assignment of error was barred by res judicata. We shall address those alleged errors first

{¶10} Upon reconsideration, we find there is merit to the State's contention that res judicata is not applicable here. Although we declined to review the record in the first appeal and to determine that a prison sentence was required because the statutory findings and supporting reasons for a community control sanction could not be made, a subsequent assignment of error on this same issue following a new hearing upon remand is not barred by res judicata. Because the issue before us on the second appeal involved a new sentencing hearing with new arguments, new information, and additional facts not previously available, and because the trial court made new findings as a result of that, the doctrine of res judicata is not applicable.

{¶11} "The doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and their privies, in all

other actions in the same or any other judicial tribunal of concurrent jurisdiction." *Quality Ready Mix, Inc. v Mamone* (1988), 35 Ohio St.3d 224, 227, quoting 30 American Jurisprudence, 908, Section 161.

{¶12} After remand, there was no final judgment of conviction and the defendant's conviction upon resentencing was based upon new and additional information. Therefore, we find *res judicata* is not applicable to the State's second assignment of error and we grant the State's application for reconsideration on that limited issue and to that limited extent. However, this does not alter the majority's ultimate determination regarding the outcome of this appeal, as will be explained more fully below when we address the State's fourth and fifth alleged errors.

{¶13} In its third assertion of error, the State argues the majority erred by relying on the written sentencing entry to conclude that the trial court satisfied the requirement to make findings under R.C. 2929.13(D)(2) and 2929.19(B)(2)(b) at the sentencing hearing.

{¶14} The State is correct in arguing that a court's reliance upon findings set forth in a sentencing entry in order to meet the requirement for establishing the necessary findings and providing applicable reasoning *at the sentencing hearing* is improper. See *State v. Wooden*, 10th Dist No. 05AP-330, 2006-Ohio-212, ¶5 (a trial court must make its findings and also give its reasons for those findings at the sentencing hearing). See also *Martin I* at ¶7 (the trial court must provide its findings and reasons at the sentencing hearing).

{¶15} However, we disagree with the State's characterization that the majority here relied upon the written sentencing entry, which was journalized several days after the sentencing hearing, in order to determine that the proper findings and the corresponding reasons were established at the sentencing hearing. Although the majority may have

cited to the sentencing entry in demonstrating the ways in which the trial court set forth its findings and reasons, we did not rely upon the sentencing entry as a substitute to make up for findings not made at the hearing in order to determine that the appropriate findings and corresponding reasons had been set forth. While it could possibly be inferred that we relied upon the sentencing entry, we now clarify, as set forth in the analysis below, that we find the trial court satisfied the requirements set forth in R.C. 2929.13(D) and cited to the factors in R.C. 2929.12 at the sentencing hearing itself, independently from any findings set forth in the sentencing entry. As a result, and because there is no conflict, we deny the State's application for en banc consideration, as well as its application for reconsideration on this issue.

{¶16} In making its fourth and fifth assertions of error, the State alleges that upon reimposing community control, the trial court again failed to make the findings required by R.C. 2929.13(D) on the record at the sentencing hearing. Specifically, the State argues the majority erred in determining the trial court sufficiently explained how community control would protect the public and punish the offender and would not demean the seriousness of the offense, using the factors set forth in R.C. 2929.12.

{¶17} For the reasons set forth below, we find the trial court made the required findings and gave adequate reasons for overcoming the presumption in favor of a prison term. We also find the imposition of community control was not contrary to law.

{¶18} Upon review of the record of the resentencing hearing, we find the court made the following findings.

[THE COURT:] Nevertheless, I make the findings in 2929.13 (D)(2)(a) and (b) that a community control sanction is the best option to both adequately punish the defendant and to protect

the public from future crime.¹ And that incarceration, which would interrupt the modest rehabilitation that Mr. Martin has undertaken for himself and that Southeast has tried to guide him, consistent with the Netcare report from last year about the deep-seated psychological issues that he's got to grapple with from his childhood, that community control is far better and far less costly than using incarceration, which will at the end of the day of incarceration, even if it's the maximum of eight years, still leave Mr. Martin a fairly young man with the rest of his life in which he's going to have to conform his behavior to the law and overcome the psychological issues that have driven us to some degree here today.

The factors in 2929.12 that indicate a lesser likelihood of recidivism if there is community control linked with mental health care that is actually given, and not merely promised, by society justify a community control sanction and outweigh the factors in 2929.12 that indicate a greater likelihood of recidivism, in my view.²

The poor mental health of the defendant was a significant factor at the time of the crime based upon the psychological information we have available, *rather than this being purely a case of criminality.*³

In committing the offense, it appears the defendant acted under some perceived *strong provocation*⁴ Now that may be totally fallacious, and he did enter a guilty plea to the crime, but he does claim, as has been pointed out, *not remembering assaulting the victim, and that gives some ground to mitigate the offender's conduct, although it is surely not a defense*⁵

The defendant, according to psychological evidence, suffers from PTSD, bipolar issues, and at least, normally, requires psychological medication to function. I take very seriously Mr. Edwards' comment that he's not on his meds now, but I still think that is a factor that can be addressed more swiftly and more accurately on a continuing basis using community control rather than tossing him in to the prison system.

I won't reiterate all the facts in the Netcare report of September 24th, '08, that produced the PTSD, anxiety, and

¹ See R C 2929 13(D)(2)(a)

² See R C 2929 13(D)(2)(a)

³ See R C 2929 13(D)(2)(b)

⁴ See R C 2929 12(C)(2)

⁵ See R C 2929 12(C)(4).

deep psychological trauma, but at the same time, it's a man who is able to get through one year of college at Muskingum and who has the ability, I believe, in a *proper structure in the community to be a productive member of society*

The court is concerned with a man who has done the crime like Mr. Martin of the ultimate protection, long term, of the public, and I think *given that focus, that the findings under 2929.13(D)(2)(b) can be made. That community control with that long-term focus will not demean the seriousness of the offense.*⁶

(Emphasis added.) (Tr. 32-34.)

The trial court further found:

*I do not believe the facts show that the [factors] suggesting the defendant's conduct was more serious than normally constituting the offense is fair, given the psychological background. And as I've already said, we've already incarcerated Mr. Martin for 10 months and 12 days on this thing.*⁷

In summary, the court finds that the presumption in favor of a term of imprisonment is rebutted on the evidence before it.

(Emphasis added) (Tr. 35.)

{¶19} Based upon the statement above, it is obvious that the court considered the 312 days of incarceration in the Franklin County Corrections Facility as part of the combined community control sanctions he was about to impose.⁸

{¶20} The trial court went on to find:

The court further finds that by providing the opportunity for community control there is a *higher likelihood* that the victim will receive the financial restitution that was requested and is being ordered again

And that by providing mental health treatment and community supervision, Mr Martin is more likely to be rehabilitated

⁶ See R C 2929 13(D)(2)(b)

⁷ See R C 2929 13(D)(2)(b)

⁸ See R C 2929 13(D)(2)(a)

successfully and have a much lower likelihood of recidivism.⁹ Using community control, those goals can be accomplished at a far less financial cost to the public than tossing Mr. Martin in ODRC.

The court further finds that although the injuries inflicted on the victim were serious, that the mental health issues of the defendant at the time mitigate his misconduct, even though they were not a defense * * *¹⁰

The court further believes and finds that the defendant shows *genuine remorse*,¹¹ and with appropriate community supervision and mental health care, this criminal conduct is *unlikely to recur*.¹²

*The court further finds in committing the offense, it remains unclear whether the defendant genuinely expected to cause significant physical harm to the victim since they were residing together and, as far as the record shows, there was no domestic violence instances that ever occurred before.*¹³

(Emphasis added.) (Tr. 35-36.)

{¶21} The record further reflects that the defendant's prior criminal record consists of two minor violations: a misdemeanor attempted importuning, for which he received a suspended sentence, and a disorderly conduct¹⁴

{¶22} During the sentencing hearing, the trial court referred to the defendant's Netcare evaluation and made the following findings:

And then the question, of course, under this Netcare report from last year, which I'm considering again, which is dated September 24th, that talks about Mr. Martin's rather abysmal background and that he was deeply affected by his early life experiences, has had a difficult time recovering from deep trauma-related psychological and emotional pain that he continuously experiences and is in need of long-term

⁹ See R.C. 2929.13(D)(2)(a)

¹⁰ See R.C. 2929.12(C)(4)

¹¹ See R.C. 2929.12(E)(5)

¹² See R.C. 2929.12(E)(4)

¹³ See R.C. 2929.12(C)(3)

¹⁴ Neither of the defendant's two prior convictions are related to any kind of physical abuse and thus the court had no instance of prior criminality with respect to the type of crime at issue in this appeal

psychological treatment with a consistent provider. Those are the other facts that I think inform what I'm supposed to do here today.¹⁵

(Tr. 20.)

{¶23} The trial court asked the defendant if he had anything that he wanted to say to the victim.

THE DEFENDANT: I do have remorse. I apologize for the things that happened to you. I really, really am sorry for the things you went through. That person wasn't me. That's not the person I am.

(Tr. 32)

{¶24} It is clear from a review of the entire record at the resentencing hearing that the trial judge complied with the applicable provisions of R.C. 2929.13(D)(2)(a) and (b) and gave the appropriate findings and his reasons pursuant to R.C. 2929.12. The court imposed a combination of community control sanctions, which consisted of intensive community control, combined with 312 days incarceration, and also found that combination of sanctions adequately punished the offender and protected the public from future crime, because the applicable factors under R.C. 2929.12 which indicated a lesser likelihood of recidivism outweighed the applicable factors under that section which indicated a greater likelihood of recidivism.

{¶25} Importantly, the trial court clearly and unequivocally found that the offense was committed under circumstances not likely to recur and cited its reasons for so finding. In addition, the court made no specific findings under R.C. 2929.12(D)(1) through (4). As previously stated, the record reflects the defendant's criminal history consisted of an attempted importuning, a misdemeanor for which he received a suspended sentence, and

¹⁵ The State of Ohio did not supplement the record with the Netcare report. However, it is part of the record.

a disorderly conduct. However, as the trial court generally inferred, these two misdemeanors do not constitute a significant history of criminal convictions that outweigh the factors set forth in R.C. 2929.12(E)

{¶26} The trial court also found that 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 R.C. 2929.12 indicating the offender's conduct was less serious than conduct normally constituting the offense are applicable, and those factors outweigh the applicable factors indicating that the offender's conduct was more serious than conduct normally constituting the offense.

{¶27} Furthermore, the court found under R.C. 2929.12(C)(2) that, in committing the offense, the offender acted under perceived strong provocation. The court further found under R.C. 2929.12(C)(4), there are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense. And finally, the court found under R.C. 2929.12(C)(3), in committing the offense, the offender did not cause or expect to cause physical harm to any person.

{¶28} We find the trial court also complied with the purposes and principals of felony sentencing, which are set forth in R.C. 2929.11, which provides, in relevant part:

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, 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

which the trial judge considered and reviewed. It supports the findings of the court.



{¶29} It is clear from the trial court's findings made at the resentencing hearing that it did in fact fulfill the overriding purposes of felony sentencing pursuant to R.C. 2929.11(A).

{¶30} In short, it is evident the trial court made the appropriate findings pursuant to R.C. 2929.13(D)(2)(a) and (b) and also set forth sufficient reasons under R.C. 2929.12, and as a result, the trial court overcame the presumption for a prison sentence. Therefore, we cannot find that the trial court's resentencing determination was clearly and convincingly contrary to law. Instead, we find it is in accordance with law and in accordance with the overriding purposes of felony sentencing.

{¶31} In conclusion, although we agree the majority's prior decision overruling the second assignment of error on res judicata grounds was improper, and thus we grant the State's application for reconsideration on that very limited issue, we deny the State's applications in all other respects, as we find the State's first and second assignments of error were without merit.

Application for reconsideration granted in part and denied in part, application for en banc consideration denied.

TYACK and DORRIAN, JJ., concur.