

[Cite as *State v. Muhleka*, 2005-Ohio-6447.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 05 BE 4
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
LEONARD A. MUHLEKA	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Belmont County, Ohio Case No. 04 CR 271
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiff-Appellee:	Atty. Christopher Berhalter Belmont County Prosecutor Atty. Helen Yonak Assistant County Prosecutor 147-A West Main Street St. Clairsville, Ohio 43950
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For Defendant-Appellant:	Atty. Grace L. Hoffman Hoffman Law Office 160 East Main Street P.O. Box 310 Barnesville, Ohio 43713
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JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: December 1, 2005

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WAITE, J.

{¶1} Defendant-Appellant, Leonard A. Muhleka, appeals his ten-month prison sentence, which was imposed by the Belmont County Court of Common Pleas after he pleaded guilty to receiving stolen property. Appellant alleges that his sentence was contrary to the statutory sentencing factors. Our review reveals that Appellant's sentence is not contrary to the law and is supported by the record. For the following reasons, the judgment of the trial court is affirmed.

{¶2} On November 10, 2004, Appellant was indicted for receiving a stolen motor vehicle in violation of R.C. §2913.51(A), a fourth degree felony. On December 3, 2004, Appellant entered a plea of not guilty by reason of insanity and was required to undergo a psychiatric evaluation. On December 13, 2004, the evaluation determined that the Appellant was competent to stand trial.

{¶3} Appellant's co-defendant had already pleaded guilty and received a six-month sentence, while awaiting extradition back to Nebraska. Appellant was offered the same six-month sentence and extradition in exchange for a plea of guilty. Subsequently, it was discovered that Appellant was not subject to extradition and had an extensive criminal record. On January 21, 2005, Appellant withdrew his not guilty by reason of insanity plea and entered a plea of guilty to the receiving stolen property charge.

{¶4} On January 27, 2005, the common pleas court held a sentencing hearing. The court sentenced Appellant to ten months in prison. On January 28, 2005, a docket and journal entry was entered setting forth the sentence. Appellant filed this timely appeal on the same date.

{¶5} Appellant's sole assignment of error alleges:

{¶6} "The Court erred as the sentencing was contrary to the sentencing factors."

{¶7} In support of his assignment of error, Appellant asserts four main arguments: (1) that he did not commit the worst form of the offense; (2) that, in accordance with R.C. §2929.12(B), his conduct was not more serious than conduct normally constituting the offense; (3) that in accordance with R.C. §2929.12(C), the court failed to properly consider all the applicable mitigating factors; and (4) that the court did not consider the recommendation of the prosecuting attorney.

{¶8} An appellate court will not reverse a sentence unless there is clear and convincing evidence that the sentence is unsupported by the record or contrary to the law. R.C. §2953.08(G)(2)(b). The overriding purposes of felony sentencing are to protect the public from future crime by the offender and to punish the offender. R.C. §2929.11(A). In order for the trial court to properly sentence an offender, it must consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim for the offense. *Id.* A trial court is given considerable discretion when imposing a sentence in order to determine the most effective way to comply with the overriding purposes and principles of felony sentencing. R.C. §2929.12(A).

{¶9} In exercising its discretion, the court will look at certain factors relating to the seriousness of the conduct, the likelihood of the offender's recidivism and any other factors that are relevant in achieving the purposes and principles of felony sentencing. *Id.* Among those factors, a court must consider whether there are

substantial grounds to mitigate the offender's conduct in determining if the conduct is less serious than the conduct normally constituting the offense. R.C. §2929.12(C)(4). When reviewing the likelihood that the offender will commit future crimes, a court may consider whether the offender has a history of criminal convictions. R.C. §2929.12(D)(2).

{¶10} When a court sentences an offender for a fourth degree felony, it must decide whether certain factors apply as set forth in R.C. §2929.13(B)(1). A court must decide if the offender, at the time of the offense, was serving or had previously served a prison term. R.C. §2929.13(B)(1)(g). If the court desires to impose a prison term, it must also find that imposing a prison term is consistent with the purposes and principles of R.C. §2929.11, and find that the offender is not amenable to community control sanctions.

{¶11} In addition, the court must state its findings on the record, and give reasons to support these findings. R.C. §2929.19(B)(2)(a).

{¶12} If the court finds that the offender had previously served a prison term at the time of the offense, or that imposing the shortest prison term would demean the seriousness of the offender's conduct or will not adequately protect the public from future crimes by the offender, the court may impose more than the minimum prison term authorized. R.C. §2929.14(B). The court is not required to give reasons to support its findings for imposing a sentence above the minimum prison term. *State v. Edmonson* (1999), 86 Ohio St.3d 324, 715 N.E.2d 131, syllabus. A court may also impose the longest prison term authorized upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing

future crimes, and upon major drug offenders and repeat violent offenders. R.C. §2929.14(C).

{¶13} Appellant offers nothing from the record in support of his first three arguments. He merely lists the factors set forth in the sentencing statutes that he believes do not apply to him. Simply because some factors may not apply to his situation does not lead to the conclusion that other factors do not apply which justify a ten-month prison term.

{¶14} Appellant offers no support from the record for his fourth argument, either. He merely asserts that the court did not take into consideration the recommendation of the prosecuting attorney.

{¶15} The record reflects that the trial court properly sentenced Appellant to ten months in prison. The court found that Appellant had a prior criminal record. Appellant admits to this fact in his brief on appeal. The court did not err in setting out the sentencing factors at the hearing and it complied with all the statutory guidelines. The court properly considered the purposes and principles of sentencing under R.C. §2929.11. (Tr., p. 11.) The court also properly considered the factors under R.C. §2929.13(B) and found that the Appellant served a prior prison term in the state of Nebraska. (Tr., p. 11.) The court listed several factors relating to its discretion. (Tr., p. 11.) The court found that the victim of the offense suffered serious economic harm and determined that the offender's conduct is not less serious than the offense. (Tr., p. 11.) The court also found that the Appellant committed a more serious form of the offense. (Tr., p. 12.) In viewing the likelihood that the offender will commit future crimes the court found that Appellant had served a prior prison term. (Tr., p. 11.) The

court found that community control sanctions would demean the seriousness of the crime. (Tr., p. 12.) Furthermore, all of the court's findings at the sentencing hearing are in compliance with the law.

{¶16} Although Appellant contends that he did not commit the worst form of the offense, the trial court did not make such a finding and was not required to make this finding to impose a ten-month prison sentence. The "worst form of the offense" finding is one of three findings a trial court may use to support the imposition of a maximum prison term. R.C. §2929.14(C). In this case, the court did not impose the maximum prison term, and thus, was not required to make findings to support a maximum prison term.

{¶17} Appellant's final supporting argument was that the trial court failed to take into consideration the prosecuting attorney's recommendation relating to sentencing. It is well-established, though, that a trial court is not bound by a prosecutor's recommendations at sentencing. *State v. Rink*, 6th Dist. No. L-02-1307, 2003-Ohio-4097, at ¶5. When a trial court imposes a greater sentence than recommended in the plea agreement, and when the defendant is forewarned of the applicable maximum penalties, there is no error on behalf of the trial court if it imposes a more severe sentence than was recommended by the prosecutor. *State v. Darmour* (1987), 38 Ohio App.3d 160, 160-161, 529 N.E.2d 208.

{¶18} Furthermore, Appellant cites nothing in the record that would indicate that the trial court failed to consider the prosecutor's recommendation. When there is a lack of evidence from the record, this Court will use a presumption of regularity in which all assumptions will be made in favor of the judgment. *In re Sublett* (1959), 169

Ohio St. 19, 20, 157 N.E.2d 324. Since Appellant offers nothing in support of this argument, we will presume that the trial court considered the recommendation of the prosecutor.

{¶19} It is clear from the record that Appellant had an extensive criminal record, and this fact played an important part in the sentence imposed by the trial court. Appellant's prior criminal record was a proper factor for the trial court to consider, and in light of that prior record, the trial court properly imposed a ten-month prison term on Appellant for a fourth-degree felony crime. A ten-month sentence for receiving stolen property for a defendant with an extensive prior prison record will not be reversed on appeal without a proper showing from the record that the sentence is clearly and convincingly contrary to the law. For the reasons stated in this Opinion, Appellant's assignment of error is without merit and the judgment of the trial court is affirmed.

Vukovich, J., concurs.

DeGenaro, J., concurs.