[Cite as *State v. Gilliam*, 2009-Ohio-5914.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 08 MA 96
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
JENNIFER ANN GILLIAM	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 07 CR 1563

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant:

Atty. Lynn Maro
7081 West Boulevard, Suite 4
Youngstown, Ohio 44512

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: October 28, 2009

WAITE, J.

{¶1} Appellant Jennifer Ann Gilliam appeals her sentence after pleading guilty to three counts of theft and three counts of forgery in the Mahoning County Court of Common Pleas. The charges were fourth and fifth degree felonies. The indictment arose from allegations that Appellant stole at least $80,000 from a family business in Youngstown called D'Amico Agency, Inc. The prosecutor recommended a three-year prison term as part of the plea agreement. The court disregarded the prosecutor's recommendation and imposed the maximum prison sentence for the crimes, which was eight years in prison. Appellant argues that the court abused its discretion in imposing the maximum sentence. The record demonstrates that the trial judge considered a number of factors before imposing the sentence, including the factors found in R.C. 2929.11 and 2929.12, and that there was no abuse of discretion in the sentence that was imposed. Appellant's conviction and sentence are affirmed.

CASE HISTORY

{¶2} Appellant was indicted on December 13, 2007, and counsel was appointed. Appellant entered into a written Crim.R. 11 plea agreement on March 10, 2008. She agreed to plead guilty to two counts of theft, R.C. 2913.02(A)(1), as fourth degree felonies; one count of theft as a fifth degree felony; two counts of forgery, R.C. 2913.31(A)(3), as fourth degree felonies; and one count of forgery as a fifth degree felony. The maximum combined prison term for the six counts was eight years. The change of plea hearing took place on March 5, 2008. The prosecutor noted at the hearing that the state would be recommending a sentence of three years

in prison and restitution of $80,000. The court accepted the guilty plea and set a sentencing hearing for May 1, 2008.

{¶3} At the sentencing hearing, a number of D'Amico family members and employees of D'Amico Agency gave statements. They told the court that Appellant had been hired in the small real estate agency business from a work employment program run by Mahoning County Jobs and Family Services. The D'Amicos were not told that Appellant had a prior criminal record, including a theft conviction for a crime very similar to this one. Appellant gained the trust of the D'Amico family, to the point of attending family functions and celebrations.

{¶4} Almost immediately after beginning to work for the D'Amicos, Appellant forged checks, changed bank statements and modified company records to cover her crimes. Tom D'Amico, the president and owner of the company, stated that it took 500-700 hours of work to correct his business records after Appellant's crimes had been discovered. He stated that Appellant had stolen over $115,000, not including all the costs associated with the aftermath of the crimes. Appellant altered bank statements, checks, and numerous other business records prior to fleeing to Florida. He thought it was remarkable that Appellant could steal over $100,000 and only get three years of imprisonment. He asked the court to punish Appellant severely enough to deter her from committing such crimes in the future. He implored the court to order full restitution of the money she stole.

{¶5} Sherre Nemenz, the daughter of Tom and Peggy D'Amico, stated that she had a child who died in infancy, and that Appellant attended the funeral along

with the rest of the family and co-workers of D'Amico Agency. Sherre stated that Appellant left the church early so that she could withdraw the money she had stolen while the family was preoccupied at the funeral. Appellant immediately fled to Florida after the stolen funds were withdrawn from various local banks. Sherre stated that neither she nor her parents had been able to draw a salary from the business after the crime was discovered in October of 2007 because they were attempting to restore the money that had been stolen. Sherre asked that the maximum punishment be imposed, as well as restitution of the stolen funds.

{¶6} At sentencing, the court stated that Appellant violated a position of trust and that she showed no remorse for the crimes. He noted that Appellant's drug addiction may have contributed to her behavior but was not an excuse for the crimes. The court noted Appellant's prior criminal history and the calculated and premeditated nature of the crimes. The court noted that non-prison sanctions would not be adequate to punish Appellant or protect the public, and that she committed the worst form of the offense. The court stated that Appellant posed the greatest risk of recidivism. The court stated that consecutive prison terms were necessary due to her prior criminal history. The court imposed 18 months of imprisonment on counts one, three, five and six, and one year on counts two and five, to be served consecutively for a total of eight years in prison. The court ordered restitution of $80,000. The sentencing entry was filed on May 2, 2008.

{¶7} This appeal was filed on May 13, 2008. During the pendency of the appeal, we sua sponte determined that the trial court's sentencing entry was not a

final appealable order as defined by the holding of *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163. *Baker* held that, "[a] judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court." Id. at the syllabus. The *Baker* decision interpreted Crim.R. 32(C), which requires that a judgment of conviction shall set forth the plea, the verdict or findings, and the sentence. *Baker* held that Crim.R. 32(C) requires a trial court, "to sign and journalize a document memorializing the sentence and the manner of the conviction: a guilty plea, a no contest plea upon which the court has made a finding of guilt, a finding of guilt based upon a bench trial, or a guilty verdict resulting from a jury trial." Id. at ¶14.

{¶8} The judgment entry in this case did not explain the manner of conviction and thus, did not satisfy the requirements of *Baker*. We remanded the case to the trial court so that a proper final, appealable order could be prepared and filed. A nunc pro tunc entry was filed on August 31, 2009. The new judgment entry explains the manner of conviction and is now a final appealable order.

ASSIGNMENT OF ERROR

{¶9} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO THE MAXIMUM CONSECUTIVE PRISON SENTENCE."

{¶10} Appellant argues that her sentence is contrary to law and constitutes an abuse of discretion because she was sentenced to the maximum consecutive prison

term rather than community control. R.C. 2953.08(A)(4) provides a right to an appeal of a sentence that is contrary to law. Under R.C. 2953.08(G)(2)(b), appellate courts must use a two-step approach in reviewing felony sentences. "First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶26. An abuse of discretion is, " 'more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144.

{¶11} Appellant argues that the trial court should have followed R.C. 2929.13(B), which states, in pertinent part:

{¶12} "(B)(1) Except as provided in division (B)(2), (E), (F), or (G) of this section, *in sentencing an offender for a felony of the fourth or fifth degree, the sentencing court shall determine whether any of the following apply*:

{¶13} "(a) In committing the offense, the offender caused physical harm to a person.

{¶14} "(b) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.

{¶15} "(c) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person, and the offender previously was convicted of an offense that caused physical harm to a person.

{¶16} "(d) The offender held a public office or position of trust and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.

{¶17} "(e) The offender committed the offense for hire or as part of an organized criminal activity.

{¶18} "(f) The offense is a sex offense that is a fourth or fifth degree felony violation of section 2907.03, 2907.04, 2907.05, 2907.22, 2907.31, 2907.321, 2907.322, 2907.323, or 2907.34 of the Revised Code.

{¶19} "(g) The offender at the time of the offense was serving, or the offender previously had served, a prison term.

{¶20} "(h) The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance.

{¶21} "(i) The offender committed the offense while in possession of a firearm.

{¶22} "(2)(a) If the court makes a finding described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a prison term is

consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code and finds that the offender is not amenable to an available community control sanction, the court shall impose a prison term upon the offender.

{¶23} "(b) Except as provided in division (E), (F), or (G) of this section, *if the court does not make a finding described in division* (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section *and if the court, after considering the factors set forth in section 2929.12* of the Revised Code, *finds that a community control sanction or combination of community control sanctions is consistent with the purposes and principles of sentencing* set forth in section 2929.11 of the Revised Code, *the court shall impose a community control sanction* or combination of community control sanctions upon the offender." (Emphasis added.)

{¶24} Appellant contends that the trial court should have treated R.C. 2929.13(B) as a preference for imposing community control sanctions on defendants convicted of fourth and fifth degree felonies. We recently reviewed R.C. 2929.13(B) to determine if it requires the trial court to follow any specific procedure for fourth and fifth degree felons when considering whether to impose a prison term or community control sanctions. In *State v. Mayor*, 7th Dist. No. 07 MA 177, 2008-Ohio-7011, we held that:

{¶25} "[T]he plain language of this statute does not require findings before sentencing a fourth degree felon to prison. Rather, it merely requires prison if the court decides to make certain findings and requires community control if the court

decides to make other findings. If the court makes no findings, it can in fact sentence a fourth degree felon to prison." Id. at ¶51.

{¶26} *Mayor* also cited *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, which held: "If the appropriate [R.C. 2929.13(B)] findings are made, the court has no discretion and must impose a prison term; however, the statute does not prevent a court from imposing a prison term without these findings. There is no presumption in favor of community control, in other words." Id. at ¶69. *Foster* rendered a variety of felony sentencing statutes unconstitutional because the statutes required judicial (rather than jury) factfinding as a prerequisite to imposing a sentence, but the *Foster* Court did not find R.C. 2929.13(B) was unconstitutional. R.C. 2929.13(B) continues to be valid as part of the felony sentencing code. We reaffirm our prior holding in *Mayor* that R.C. 2929.13(B) does not establish any preference for community control sanctions.

{¶27} The trial court's judgment entry makes no specific findings regarding community control sanctions, and it was within the court's discretion whether or not to impose a prison term or community control sanctions. The court's judgment entry does explain why the prison term was imposed. The court stated that it considered the principles and purposes of felony sentencing found in R.C. 2929.11, as well as the seriousness and recidivism factors found in R.C. 2929.12. The court noted that the shortest prison term would not be imposed due to the seriousness of Appellant's conduct and because such a prison term would not adequately protect the public. The court also noted the likelihood that Appellant would commit future crimes. It is

axiomatic that a trial court may deviate from the prosecutor's recommenced sentence in a case involving a Crim.R. 11 negotiated plea agreement. *State v. Brown*, 7th Dist. No. 08 MA 13, 2009-Ohio-1172, ¶17. The trial court's judgment entry meets the requirements of the felony sentencing statutes, as well as the holding of *Foster*, and there was no abuse of discretion in imposing the maximum consecutive sentence. Appellant's assignment of error is overruled, and the judgment of conviction and sentence are affirmed in full.

Donofrio, J., concurs.

Vukovich, P.J., concurs.