[Cite as *State v. Best*, 2009-Ohio-6806.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 260
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
BRIAN BEST,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Youngstown Municipal Court, Case No. 08CRB3358.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Attorney Joseph Macejko
Prosecuting Attorney
Attorney John Marsh, Jr.
Assistant Prosecuting Attorney
26 South Phelps Street, 4th Floor
Youngstown, Ohio 44503

For Defendant-Appellant:

Attorney Douglas King
91 West Taggart Street
P.O. Box 85
East Palestine, Ohio 44413

JUDGES:

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

Dated: December 18, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Brian Best appeals the sentence entered in the Youngstown Municipal Court after he pled no contest to two counts of assault. He contends that the court failed to properly consider the statutory sentencing criteria, that a maximum jail sentence on one of the offenses was improper, that the sentence will not serve the overriding purposes and principles of misdemeanor sentencing and are not proportionate to his conduct, that the court failed to consider whether community control was appropriate, and that the maximum jail sentence is unnecessarily burdensome to government resources. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} After an incident occurring at the residence of appellant's cousin on November 14, 2008, a complaint was filed charging appellant with four counts: (1) domestic violence against his cousin, Kelly Patrick; (2) domestic violence against her four-year-old son; (3) aggravated trespass; and (4) criminal damaging. On December 15, 2008, the state agreed to dismiss the trespass and criminal damaging charges in return for appellant's no contest pleas to two assault charges. (Because appellant had never lived with his cousin, the state amended the domestic violence charges to assault charges.) The state also agreed to recommend thirty days in jail, which time had already been served.

¶{3} At the plea hearing, the state placed the basis for the charges on the record. It was stated that appellant went to his cousin's house to apologize for an incident occurring the prior day. An argument ensued. When appellant began kicking the bottom out of his cousin's screen door, she slapped him. Appellant then proceeded to repeatedly punch her about her face and body. (Tr. 5-6). When her four-year-old son attempted to intervene, appellant grabbed him and threw him onto the couch. (Tr. 6).

¶{4} The victim asked the court to sentence appellant to maximum, consecutive sentences totaling one year. (Tr. 6-7). The victim pointed out that at the time appellant beat her, he was aware that she had just had a total abdominal hysterectomy two weeks prior. She also noted that her seven-year-old daughter has been traumatized by the incident and that this child is now in counseling. (Tr. 8). The

victim disclosed that appellant has acted violently toward her numerous times in the past and opined that this was due to his alcohol use. For instance, she related that appellant once punched her boyfriend in the face and that he once threatened to beat her with a club that he was holding. (Tr. 7).

¶{5} Appellant then tried to explain the event. He said that while he was drinking, his cousin stated that he owed her a pain pill. (Tr. 8-9). He claimed that when he denied this, she started smacking his head; although, he acknowledged that she did not deserve the beating he inflicted. (Tr. 8-9). Appellant admitted to being dependent on alcohol for the last five years, noting that he drinks whiskey every day. (Tr. 11-12).

¶{6} The court sentenced appellant to a maximum sentence of one hundred eighty days in jail on the first count of assault. No jail time was imposed on the second count, but two years of intensive supervised probation were imposed. Appellant was also fined $250 on each count. Appellant filed timely notice of appeal.

ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO

¶{7} Appellant's first and second assignments of error provide;

¶{8} "DEFENDANT/APPELLANT'S SENTENCES ARE CONTRARY TO LAW AS THEY DO NOT SERVE THE OVERRIDING PURPOSES AND PRINCIPLES OF SENTENCING AS EXPRESSED IN ORC 2929.21."

¶{9} "THE MAXIMUM SENTENCE IMPOSED BY THE TRIAL COURT AS TO COUNT I IS CONTRARY TO LAW AS IT VIOLATES THE PRINCIPLES AND PURPOSES OF OHIO'S SENTENCING STATUTES."

¶{10} There are three main issues presented here: (1) whether the sentencing court must provide an analysis of the misdemeanor sentencing factors; (2) whether a maximum jail sentence is reserved for only the worst cases and whether this is such a case; and (3) whether the total sentence is consistent with the purposes and principles of sentencing.

¶{11} In general, the sentencing court shall be guided by the overriding purposes of misdemeanor sentencing, which are to protect the public from future crime by the offender and others and to punish the offender. R.C. 2929.21(A). In order to achieve those purposes, the sentencing court shall consider the impact of the offense upon the victim and the need for changing the offender's behavior, rehabilitating the offender, and making restitution to the victim of the offense, the public, and/or both. Id.

¶{12} The sentence shall be reasonably calculated to achieve the two overriding purposes of misdemeanor sentencing set forth in R.C. 2929.21(A), commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar offenses committed by similar offenders. R.C. 2929.21(B). The sentencing court has discretion to determine the most effective way to achieve the purposes and principles of sentencing set forth in section 2929.21 of the Revised Code. R.C. 2929.22(A).

¶{13} In determining the appropriate sentence for a misdemeanor, the court shall consider all of the following factors: (a) the nature and circumstances of the offense; (b) whether the circumstances indicate a history of persistent criminal activity and whether there is a substantial risk that the offender will commit another offense; (c) whether the circumstances indicate that the offender's history, character, and condition reveal a substantial risk that the offender will be a danger to others and that the offender's conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences; (d) whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious; (e) whether the offender is likely to commit future crimes in general; and (f) any other relevant factor. R.C. 2929.22(B)(1)(a)-(e) and (B)(2).

¶{14} First, there is nothing in the misdemeanor sentencing statute that requires the court to set forth its analysis regarding the purposes and principles of sentencing. See R.C. 2929.21; 2929.22. Rather, we presume the court considered the factors unless the record affirmatively shows that the court failed to consider the principles and purposes of sentencing or the sentence is strikingly inconsistent with the relevant considerations. *State v. James*, 7th Dist. No.07CO47, 2009-Ohio-4392, ¶50 (in a felony case), relying on *State v. Adams* (1988), 37 Ohio St.3d 295. Thus, a silent record raises the rebuttable presumption that the sentencing court considered the statutory sentencing criteria. Id.

¶{15} In fact, contrary to appellant’s argument, the sentencing court here did make many statements voicing its analysis of the purposes and principles of sentencing as relevant to the facts presented to the court here. That is, the court expressed outrage that appellant assaulted his cousin in front of two children while his cousin was recuperating from a total abdominal hysterectomy. (Tr. 8-9). The court

made reference to the trauma suffered by the children. (Tr. 12-13). The court found that appellant's version of events was untrue and opined that he did not seem to be remorseful. (Tr. 9, 14). The court criticized him for failing to seek help for his alcohol problem, and the court justified the intensive supervised probation as a way to ensure that he will overcome his problem. (Tr. 11-13). The court expressed that appellant had a pattern of beating people when he became intoxicated. (Tr. 12).

¶{16} Second, there is a misdemeanor statute providing that the court may only impose a maximum sentence "on those offenders who commit the worst forms of the offense or upon offenders whose conduct and response to prior sanctions for prior offenses demonstrate that the imposition of the longest jail term is necessary to deter the offender from committing a future crime." R.C. 2929.22(C). However, just as *Foster* invalidated the felony sentencing statute regarding the criteria for imposing a maximum sentence, this court has invalidated the aforecited portion of R.C. 2929.22(C), which we found required similar unconstitutional judicial fact-finding. *State v. Brooks*, 7th Dist. No. 05MA31, 2006-Ohio-4610, ¶27-28, 34-38, extending *State v. Foster*, 109 Ohio St.3d 1. Thus, the court was not required to abide by these guidelines for imposing a maximum sentence. In any event, the assault on his cousin could rationally be considered one of the worst forms of misdemeanor assault as the attack involved multiple blows and was inflicted upon an injured victim as will be discussed further below.

¶{17} Third, the sentence here is not inconsistent with the relevant sentencing considerations. The contact here was much more than one isolated action. Appellant *repeatedly punched* his cousin about the head and body. The police officers observed the bruises left on her face. He inflicted this beating in front of two young children. One child was traumatized by the event resulting in her need for counseling. As is discussed more below, the other child had been roughly handled by appellant when the child tried to rescue his mother.

¶{18} Moreover, appellant knew that the victim was recovering from a total abdominal hysterectomy, which she had undergone just two weeks prior. This condition made the victim particularly vulnerable to the offense and made the impact of the offense more serious. See R.C. 2929.22(B)(1)(d). The victim revealed that appellant had acted violently around her in the past. For instance, once, he punched her boyfriend in the face, and another time, he threatened to beat her with a club he

was holding. Considering all of the circumstances known to the court, imposition of a maximum jail term of one hundred and eighty days is considered a reasonable application of the purposes and principles of misdemeanor sentencing.

¶{19} Imposition of two years of intensive supervised probation is also consistent with the relevant statutory considerations. On count two, appellant pled no contest to assaulting a four-year-old child. This child had been attempting to defend his mother whom he witnessed being beaten. It was stated that appellant was intoxicated at the time, and he admitted to having an alcohol problem which included drinking whiskey every day. He damaged the victim's door during this attack. He apparently did not seem remorseful about the incident. It was rational for the court to predict that without further supervision, appellant would continue his problem-drinking and his bouts of violence caused thereby. As such, the trial court's sentence on this offense was consistent with the purposes and principles of misdemeanor sentencing as well.

¶{20} This conclusion also disposes of one of appellant's arguments relocated here from the next assignment of error. That is, he contends that the sentences are not proportionate to his conduct. See R.C. 2929.22(B) (commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim). In applying the above analysis, the sentences can be viewed as proportionate to his behavior; this proportionality is also bolstered by his past acts of violence, which can lead a rational person to discern that recidivism is likely.

ASSIGNMENT OF ERROR NUMBER THREE

¶{21} Appellant's third assignment of error provides:

¶{22} "THE DEFENDANT/APPELLANT'S SENTENCES WERE NOT PROPORTIONAL RELATIVE TO THE DEFENDANT'S CONDUCT LEADING TO THE CHARGES AND THEREFORE THE SENTENCES ARE CONTRARY TO LAW."

¶{23} Besides arguing that his sentences were not proportional to his conduct, which was addressed supra, appellant contends here that the following principle was violated:

¶{24} "Before imposing a jail term as a sentence for a misdemeanor, a court shall consider the appropriateness of imposing a community control sanction * * *." R.C. 2929.22(C).

¶{25} Appellant urges that the court failed to consider community control as an alternative to jail. He also argues that the court's decision is not subject to meaningful appellate review where the court fails to provide reasons for the jail sentence; although, he acknowledges that findings are not required.

¶{26} Just as consideration of the principles and purposes of sentencing are presumed from a silent record, consideration of the appropriateness of a community control sanction is also presumed from a silent record as nothing in R.C. 2929.22(C) requires the court to evince its consideration on the record. *State v. Cossack*, 7th Dist. No. 08MA161, 2009-Ohio-3327, ¶21-22, 29. See, also, *State v. Friesen*, 3d Dist. No. 3-05-06, 2005-Ohio-5769, ¶23-24.

¶{27} Moreover, it is apparent here that the court did consider community control sanctions. This is clear because the court imposed two years of intensive supervised probation. See *State v. Robenolt*, 7th Dist. No. 04MA104, 2005-Ohio-6450, ¶30.

¶{28} In any event, appellant asked the court to adopt the state's recommendation of a thirty-day jail sentence. (Tr. 11). Although, he had already served this time, this could be seen as essentially a waiver of the principle requiring consideration of community control before imposing a jail term. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FOUR

¶{29} Appellant's fourth and final assignment of error alleges:

¶{30} "THE TRIAL COURT'S IMPOSITION OF A JAIL SENTENCE IN THE PRESENT CASE IS CONTRARY TO LAW AND/OR VIOLATES THE MANDATES OF ORC 2929.13(A) AND 2929.22(A)."

¶{31} Appellant believes that the six-month jail sentence (of which only five months remained due to time served) violates the following premise: "The court shall not impose a sentence that imposes an unnecessary burden on local government resources." R.C. 2929.22(A). See, also, R.C. 2929.13(A) (a similar provision relating to felonies). He also contends that the sentencing court was required to make a finding that the sentence did not impose an unnecessary burden on resources.

¶{32} However, there is no requirement that the court make findings regarding the burden to government resources. *State v. Clay*, 7th Dist. No. 08MA2, 2009-Ohio-1204, ¶182, citing *State v. Wolfe*, 7th Dist. No. 03CO45, 2004-Ohio-3044, ¶15.

Furthermore, a sentencing court need not elevate resource conservation above the principles and purposes of sentencing. See id. The relevant premise in R.C. 2929.22(A) entails weighing the cost to the government against the benefit that society derives from an offender's incarceration. See *State v. Johnson*, 7th Dist. No. 08MA118, 2009-Ohio-2959, ¶27 (noting that incarcerating an elderly or sick individual may entail more than normal costs).

¶{33} Notably, this is a crime of violence. It was an assault that did not entail a mere slap or two. Rather, it was the repeated punching of a woman recuperating from major surgery. It was also done in front of the woman's young children, one of whom was also assaulted and the other of whom now requires counseling.

¶{34} Considering the circumstances here, the victim and society in general would benefit from appellant's incarceration in jail for five months and the cost of such incarceration is not unnecessarily burdensome to government resources. As such, this assignment of error is overruled.

¶{35} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
Waite, J., concurs.