[Cite as *State v. Bingham*, 2010-Ohio-608.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 08 MA 182
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
JEREMY BINGHAM	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 08 CR 406A

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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

For Defendant-Appellant:

Atty. W. Leo Keating
Keating, Keating & Kuzman
170 Monroe Street, N.W.
Warren, Ohio 44483

JUDGES:

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

Dated: February 18, 2010

WAITE, J.

{¶1} Appellant, Jeremy E. Bingham, appeals the 180-day sentence he was given on one count of breaking and entering, in violation of R.C. 2911.13, a felony of the fifth degree. In his sole assignment of error, Appellant contends that the trial court violated R.C. 2929.13 because there was no finding on the record that he was not amenable to community control.

{¶2} A presentence investigation report was ordered by the trial court. The report listed a 2007 misdemeanor conviction for breaking and entering in Boardman, Ohio, and a 2008 conviction for possessing criminal tools in Sebring, Ohio. The trial court observed at the sentencing hearing that Appellant had been sentenced to probation in the past, but the sanction had not achieved the goals of rehabilitation or protecting the public, because Appellant continued to commit similar crimes while he was on probation. Accordingly, the record reflects that the trial court found that Appellant was not amenable to a sentence of community control. Thus, Appellant's sole assignment of error is overruled and the judgment of the trial court is affirmed.

{¶3} Appellant was indicted on May 8, 2008, and entered into a Crim.R. 11 plea agreement on July 18, 2008. In exchange for Appellant's guilty plea on the sole count of the indictment, the state agreed to recommend a sentence of community control. At the sentencing hearing held on September 3, 2008, the trial court rejected the state's sentencing recommendation, and chose instead to sentence Appellant to a 180-day prison term. The trial court provided the following explanation for the

sentence based upon the information provided in the presentence investigation report:

{¶4} "I'm aware of the state's recommendation. I've heard from the defense counsel and the defendant, consider [sic] the degree of felony, consider [sic] the purposes and principles of sentencing under 2929.11 to punish the offender and protect the public from future crimes from this offender and others. Consider the need for incarceration, deterrence, rehabilitation, and restitution. The sentence will be commensurate and not demeaning to the seriousness of the offender's conduct, its impact on the victim, and consistent with sentences for similar crimes by similar defendants. Sentencing will not be based on race, gender, ethnicity, or religion.

{¶5} "I don't think the seriousness factors apply, nor do the less serious factors apply. However, the recidivism factors do apply since you were on community probation when you committed this offense and you have a prior record which seem [sic] to be all the same thing, B&Es, breaking and entering in Boardman, possession of criminal tools which means you didn't get to the place in Sebring. Okay. Make him less likely, you have no prior delinquencies. And, according to the people who did the report, there's genuine remorse.

{¶6} "Seems you're breaking into places and you're not paying attention to probation. So what I'm going to do is kind of split the difference. I sentence you to be taken from here to the Mahoning County Justice Center, there to serve a term of incarceration of 180 days. You'll get credit for time served. I have 3 days. Maybe if you spend some time in the county you'll get the point. But then once you're done

with the county, you're done. There is no community control. There's nothing else. But what it will tell the next judge is if you don't get that point, to send you to the pen." Sentencing Hrg., pp. 3-5.) This timely appeal followed.

ASSIGNMENT OF ERROR

{¶7} "The Trial Court erred in failing to consider and make a finding, supported by evidence, as to whether the Defendant-Appellant is amenable to an available community control sanction, as required by O.R.C. 2929.13(B)(2)(a)."

{¶8} In reviewing felony sentences, appellate courts must use a two-step approach. "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 (plurality). 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." (Internal citations omitted). Id. at ¶19.

{¶9} In the case sub judice, Appellant contends that his sentence was contrary to law. For a fifth-degree felony, the sentencing court may impose a term of imprisonment of six, seven, eight, nine, ten, eleven, or twelve months. R.C. 2929.14(A)(5). R.C. 2929.13(B)(1), governs sentences for felonies of the fifth degree, and reads, in its entirety:

{¶10} "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:

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

{¶12} "(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.

{¶13} "(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.

{¶14} "(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.

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

{¶16} "(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.

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

{¶18} "(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.

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

{¶20} R.C. 2929.13(B)(2)(a) states:

{¶21} "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."

{¶22} The trial court reasoned that community control sanctions had failed in the past to accomplish the goals set forth in R.C. 2929.12, because Appellant continued to commit theft during his period of probation. In other words, based upon R.C. 2929.13(B)(1)(h), the trial court found on the record that Appellant was not amenable to community control sanctions.

{¶23} Admittedly, the trial court did not specifically invoke the words of the statute. However, the language of a sentencing statute is not "talismanic," and, therefore, a trial court need not recite the exact language of R.C. 2929.13(B)(2), as if it amounted to the "magic words" necessary to impose a prison term on an offender. See *State v. Graham*, 7th Dist. No. 04 BE 54, 2005-Ohio-2700, at ¶20.

{¶24} Having called into question the efficacy of the state's recommended sentence, the trial court imposed a six-month prison sentence. The sentence imposed in this case is authorized by R.C. 2929.13(B)(2)(a). Therefore, Appellant's sole assignment of error is overruled and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Vukovich, P.J., concurs.