

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-190009
	:	TRIAL NO. B-1803316
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
ERROL CARR,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Errol Carr appeals the Hamilton County Common Pleas Court’s judgment convicting him for trafficking in heroin, aggravated possession of drugs, and having weapons while under a disability. Prior to entering a plea deal, Mr. Carr moved to dismiss the weapons-under-disability charge, asserting the state’s use of his prior juvenile adjudication to prove the “disability” element violated due process. Because this court already answered this question in *State v. Carnes*, 2016-Ohio-8019, 75 N.E.3d 774 (1st Dist.), and the Ohio Supreme Court accepted discretionary review of *Carnes*, the trial court denied Mr. Carr’s motion to dismiss. *See State v. Carnes*, 150 Ohio St.3d 1429, 2017-Ohio-7567, 81 N.E.3d 1271.

A few months later, Mr. Carr entered into a plea deal, ultimately pleading guilty to trafficking in heroin and aggravated possession of drugs and no contest to having weapons while under a disability. After accepting his pleas, the trial court postponed sentencing to allow completion of a presentence investigation (“PSI”) report. At the

sentencing hearing, a different judge sentenced Mr. Carr to 12 months on both the drug offenses and 24 months on the disability offense, running all three sentences concurrently for a total of 24 months. In his two assignments of error, Mr. Carr challenges the denial of his motion to dismiss and the 24-month sentence imposed for his weapons-under-disability offense.

Turning to his first assignment of error, we review a trial court's order denying a motion to dismiss de novo. See *State v. Thompson*, 1st Dist. Hamilton No. C-130053, 2013-Ohio-2647, ¶ 4; *State v. Lowe*, 7th Dist. Columbiana No. 08 CO 37, 2010-Ohio-2788, ¶ 15 ("Pursuant to Crim.R. 12(I), a plea of no contest 'does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion[.]' "). As noted above, during the lower court proceedings, Mr. Carr moved to dismiss his disability charge, asserting the same due process argument this court rejected in *Carnes*, presumably in the hopes that the Ohio Supreme Court might reach a different result. However, subsequent to Mr. Carr filing his motion to dismiss, the Supreme Court affirmed our decision in *Carnes*, holding that a "prior juvenile adjudication may be an element of the weapons-under-disability offense set forth in R.C. 2923.13(A)(2) without violating due process under the Ohio or United States Constitution." *State v. Carnes*, 154 Ohio St.3d 527, 2018-Ohio-3256, 116 N.E.3d 138, ¶ 21.

On appeal, Mr. Carr reshapes his argument, presumably because *Carnes* was dispositive of his due process argument below, contending now that R.C. 2923.13 violates due process and the Second Amendment because it strips individuals adjudicated a delinquent child of their right to bear arms without sufficient due process in the juvenile proceedings. Mr. Carr also maintains R.C. 2923.13 violates the Equal Protection Clause of both the Ohio and United States Constitution. However, Mr. Carr

did not present either of these arguments to the trial court below, and therefore waived his right to raise it now for the first time on appeal. *See State v. Lattimore*, 1st Dist. Hamilton No. C-100675, 2011-Ohio-2863, ¶ 6 (“But because [the defendant] did not raise this issue before the trial court, he has waived it on appeal.”). Thus, we decline to reach the merits of Mr. Carr’s newly-minted arguments and accordingly overrule his first assignment of error.

Turning to his second assignment of error, Mr. Carr challenges his 24-month sentence imposed for having weapons while under a disability, asserting the trial court failed to consider the principles and purposes of sentencing under R.C. 2929.11 and the seriousness and recidivism factors listed in R.C. 2929.12. As provided by R.C. 2953.08(G)(2), we may modify or vacate Mr. Carr’s sentence only if we clearly and convincingly find that the record does not support the mandatory sentencing findings or that the sentence is contrary to law. *See State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1. Although the trial court must consider R.C. 2929.11 and 2929.12 when sentencing, the court need not note its consideration, and we may presume that the trial court did so unless the defendant demonstrates otherwise. *See State v. Ward*, 1st Dist. Hamilton No. C-180573, 2019-Ohio-3111, ¶ 8 (“In fact, this court has held that where the record is silent regarding the court’s consideration of R.C. 2929.11 or R.C. 2929.12, we presume the trial judge properly considered those statutes, and it is the defendant’s burden to demonstrate otherwise.”).

To demonstrate the court failed to consider the appropriate sentencing factors here, Mr. Carr emphasizes the absence of any facts or mitigation evidence presented to the trial court prior to his sentencing, as well as the fact that the trial judge who accepted his pleas was a different judge than the one who sentenced him. However, Mr. Carr overlooks the fact that, at sentencing, the new judge had before him a PSI report (as he

confirmed on the record). “When a presentence investigation report is ordered, [w]e presume that the court utilized the information in the report when issuing its sentence.’ ” *State v. Pope*, 9th Dist. Medina No. 13CA0031-M, 2014-Ohio-2864, ¶ 14, quoting *State v. Coryell*, 9th Dist. Summit No. 24338, 2009-Ohio-1984, ¶ 19. Accordingly, we presume the new sentencing judge here employed the information within the report, regarding Mr. Carr and his case, when evaluating the purposes and principles of sentencing under R.C. 2929.11 and the seriousness and recidivism factors listed within R.C. 2929.12.

Further, generally, “[w]here a criminal sentence is within statutory limits, an appellate court should accord the trial court the presumption that it considered the statutory mitigating criteria in the absence of an affirmative showing that it failed to do so.” *State v. Clayton*, 8th Dist. Cuyahoga No. 99700, 2014-Ohio-112, ¶ 7. In Mr. Carr’s case, he faced a maximum of 36 months on the weapons-under-disability charge. See R.C. 2929.14(A)(3)(b). Nevertheless, the court elected to sentence him to only 24 months. Therefore, because Mr. Carr’s sentence fits comfortably within the statutory limits, and in the absence of countervailing evidence, we must presume that the court considered the relevant sentencing principles and factors under R.C. 2929.11 and 2929.12.

Although the court was silent regarding its consideration of R.C. 2929.11 and 2929.12, we find the presumption that the court considered those statutes undisturbed in light of the PSI report before the court and Mr. Carr’s favorable sentence. Accordingly, we similarly overrule his second assignment of error.

Based on our review of the record, we find that the court did not err in denying Mr. Carr’s motion to dismiss and properly considered R.C. 2929.11 and 2929.12 when

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imposing his 24-month sentence. We overrule both of Mr. Carr's assignments of error and affirm the judgment of the trial court.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

ZAYAS, P.J., BERGERON and CROUSE, JJ.

To the clerk:

Enter upon the journal of the court on February 7, 2020,
per order of the court_____.

Presiding Judge