

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

STATE OF OHIO,	:	APPEAL NOS. C-250003
		C-250004
Plaintiff-Appellee,	:	TRIAL NOS. B-2402593
		B-2404316
vs.	:	
BRIAN HODGE,	:	
		<i>JUDGMENT ENTRY</i>
Defendant-Appellant.	:	

This court sua sponte removes this cause from the regular calendar and places it on the court’s accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); Loc.R. 11.1.

The Case Below

On June 6, 2024, defendant-appellant Brian Hodge was indicted for one fifth-degree felony count of breaking and entering, in violation of R.C. 22911.13, in the case numbered B-2402593. Hodge was on bond on September 19, 2024, when he was indicted for one count each of breaking and entering and possession of criminal tools in the case numbered B-2404316. Hodge pleaded guilty as charged in both cases.

At the sentencing hearing, Hodge explained to the court that he stole the items from the places he broke into to support his drug habit, and he had engaged in treatment while in jail and he was taking Suboxon.

In response, the State raised Hodge’s six prior convictions for breaking and entering and prior convictions for theft and receiving stolen property and noted that Hodge was out on bond when he was indicted in the case numbered B-2404316. One

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of the victims and a City of Norwood detective also made statements at the sentencing hearing.

During the trial court's Crim.R. 11 plea colloquy, it explained that Hodge faced a maximum sentence of 12 months in prison and could be given a maximum fine of \$2,500 on each count. It then explained the overriding purposes of felony sentencing under R.C. 2929.12, particularly as they pertain to protecting the public from future crimes that Hodge might commit. The court stated that it considered the following factors that in determining Hodge's sentence: "the need for incapacitation, [deterrence], rehabilitation, and restitution," the seriousness of Hodge's conduct as it impacted the victims and society, needing to impose sentences consistent with those imposed for similar crimes committed by similar offenders, and the seriousness and recidivism factors set forth in R.C. 2929.12.

The Sentence

Hodge was sentenced to the maximum sentence of 12 months in the Ohio Department of Rehabilitation and Correction ("ODRC") in the case numbered B-2402593, with jail-time credit of 144 days, and was ordered to pay \$500 in restitution. Costs and fines were remitted. In the case numbered B-2404316, Hodge was also sentenced to the maximum sentence of 12 months in ODRC, with jail-time credit for 94 days. This sentence was to be served consecutively to the sentence imposed in the case numbered B-2402593. Costs were remitted. The court advised Hodge he may be on postrelease control for up to two years for each sentence.

The trial court's sentencing entries reflected that imposing consecutive sentences was "necessary to protect the public and punish [Hodge]" and they were "not disproportionate to [the] seriousness of [Hodge's] conduct and the danger

[he]poses to the public.” The court further found that Hodge’s criminal history showed a need to protect the public from future crimes Hodge might commit.

The trial court’s “Felony Sentencing Findings” entered in both cases reflected that, although Hodge showed remorse for his actions, he had a likelihood of recidivism based on his prior delinquency or convictions, and he was previously incarcerated. Both entries reflected that Hodge was not amenable to community control, and a prison term was consistent with the sentencing purposes in R.C. 2929.11 and 2929.12.

The Instant Appeal

In his sole assignment of error, Hodge argues the trial court erred by imposing the maximum prison sentences instead of community control for fifth-degree felonies. He asserts the trial court failed to consider his history of addiction and need for substance-abuse treatment. He further asserts the trial court could not have considered recidivism factors where his criminal record “is unknown from the record.”

*On appeal, this court cannot substitute its review of the record for that of the trial court.*

Pursuant to R.C. 2953.08(G)(2), an appellate court may only modify or vacate a felony sentence if it clearly and convincingly finds that the record does not support the trial court’s sentencing findings under certain specified divisions, including R.C. 2929.13(B) or (D), R.C. 2929.14(B)(2)(e) or (C)(4), or R.C. 2929.20(I), or if it finds that the sentence is otherwise contrary to law. *See State v. Poveda*, 2025-Ohio-1075, ¶ 9 (1st Dist.). An appellate court, however, cannot vacate or modify a sentence under R.C. 2953.08 (G)(2) based simply on its view that the sentence is not supported by the record under R.C. 2929.11 and 2929.12. *Poveda* at ¶ 10. In other words, this court cannot vacate or modify the sentence below based merely on its own review of the record and determination that it would have imposed a different sentence.

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Clear and convincing evidence is the degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. *State v. Dickey*, 2023-Ohio-705, ¶ 10 (1st Dist.), quoting *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

*Hodge's sentence is supported by clear and convincing evidence.*

R.C. 2929.13(B)(1)(a) creates a presumption against imposing prison time and in favor of community control where the defendant is convicted or pleads guilty to a fourth or fifth-degree felony that meets certain criteria. *State v. Grace*, 2019-Ohio-3812, ¶ 14 (6th Dist.). Ohio courts have held that the plain language of R.C. 2929.13(B)(1)(a) provides that this community control presumption applies only where the defendant pleads guilty to a singular, nonviolent felony of the fourth or fifth degree. *Grace* at ¶ 16; see *State v. Durant*, 2016-Ohio-8173, ¶ 9 (7th Dist.); *State v. Parrado*, 2016-Ohio-1313, ¶ 23 (11th Dist.).

Further, R.C. 2953.08(A)(2) provides that a defendant may not appeal a prison term imposed for a felony of the fourth or fifth degree as a matter of right if the trial court has specified that it has found that one or more of the factors in R.C. 2929.13(B)(1)(b) apply.

Here, the trial court has satisfied the requirements of R.C. 2953.08(A)(2) by specifying that it found that Hodge had previously served a prison term in the case numbered B-2402593. The record also shows Hodge committed the offense in the case numbered B-2404316 while on bond in the case numbered B-2402593. The review of the imposition of imprisonment instead of community control, therefore, is precluded. See R.C. 2929.13(B)(1)(b)(iii) and (ix).

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Hodge argues that the trial court did not consider that he had an addiction.<sup>1</sup> His argument, however, is misplaced. Hodge, like the appellant in *State v. Walker*, 2024-Ohio-6079 (1st Dist.), suggests that the trial court gave too much or too little weight to one or more statutory factors or pieces of evidence. *Id.* at ¶ 47. Such weight-and-sufficiency arguments, however, are prohibited. *See State v. Jones*, 2020-Ohio-6729, ¶ 42 (“Nothing in R.C. 2953.08(G)(2) permits an appellate court to independently weigh the evidence in the record and substitute its judgment for that of the trial court . . .”). As in *Walker*, Hodge is arguing that this court should infer a failure to consider certain mitigating factors because the trial court did not address them on the record. *Walker* at ¶ 47. Mere silence, however, does not rebut the presumption that the trial court considered all relevant factors. *See id.*; *State v. Hart*, 2024-Ohio-4552, at ¶ 12 (1st Dist.).

*The trial court’s imposition of maximum sentences was supported by the record.*

In its review of the imposition of a maximum sentence, R.C. 2953.08(F) requires an appellate court to review the entire trial court record, including any oral or written statements made to or by the trial court at the sentencing hearing.

A maximum sentence is not contrary to law when it is within the statutory range, and the trial court considered the statutory principles and purposes of sentencing as well as the statutory seriousness and recidivism factors. *State v. Martin* 2015-Ohio-697, ¶ 8 (2d Dist.). A review of the record shows that, in this case, these

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<sup>1</sup> Hodge also argues that because his record is unknown from the record, the court could not have considered the recidivism factors. This is incorrect. As mentioned, the trial court found from the record before it that Hodge had previously served a prison term and had also committed the offense while released on bond.

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requirements were met, and the imposition of maximum sentences was not contrary to law under R.C. 2953.08(G)(2). *See Martin* at ¶ 8.<sup>2</sup>

Thus, for the reasons set forth above, the assignment of error is overruled, and the judgments of the trial court are affirmed.

The court further orders that 1) a copy of this Judgment constitutes the mandate, 2) the mandate be sent to the trial court for execution under App.R. 27, and 3) costs shall be taxed under App.R. 24.

**KINSLEY, P.J., BOCK and MOORE, JJ.**

**To the clerk:**

**Enter upon the journal of the court on 8/22/2025 per order of the court.**

By:   
**Administrative Judge**

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<sup>2</sup> Although Hodge mentions in his merit brief that his sentences were also consecutive, he failed to raise an assignment of error or assert any argument with respect to this aspect of his sentence. This court, therefore, will not address the trial court's imposition of consecutive sentences. *See State v. Deloney*, 2023-Ohio-1013, ¶ 21 (1st Dist.) (Citations omitted.) (finding that “[a]n appellate court is not obliged to construct or develop arguments to support [an] assignment of error and ‘will not guess at undeveloped claims on appeal.’”)