

[Cite as *State v. Day*, 2010-Ohio-125.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 09AP-40
 : (C.P.C. No. 06CR-03-1525)
 Jarel Day, : (REGULAR CALENDAR)
 :
 Defendant-Appellee. :

D E C I S I O N

Rendered on January 19, 2010

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellant.

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, the State of Ohio ("State"), appeals the decision of the Franklin County Court of Common Pleas to grant judicial release to defendant-appellee, Jarel Day ("defendant"). For the reasons that follow, we reverse the trial court's decision to grant judicial release.

{¶2} The facts underlying this matter concern defendant's participation in a robbery that occurred shortly after midnight on Christmas Eve 2005. At the time of the

offense, defendant was 17 years old. However, after conducting a hearing in accordance with R.C. 2152.12, the juvenile court transferred the matter to the General Division of the Franklin County Court of Common Pleas, so defendant could be criminally prosecuted as an adult.

{¶3} On March 10, 2006, a grand jury indicted defendant on one count of aggravated robbery with a firearm specification, a violation of R.C. 2911.01 constituting a felony of the first degree, one count of robbery with a firearm specification, a violation of R.C. 2911.02 constituting a felony of the second degree, and one count of robbery with a firearm specification, a violation of R.C. 2911.02 constituting a felony of the third degree.

{¶4} On September 26, 2006, defendant entered a guilty plea to Count 2 of the indictment, to wit: robbery with a firearm specification in violation of R.C. 2911.02, a felony of the second degree. The State dismissed all other counts. At the sentencing hearing, the trial court imposed a three-year prison term for the robbery conviction to be served consecutively with the one-year prison term for the firearm specification. During the hearing, the trial court indicated it would consider judicial release.

{¶5} On June 20, 2008, defendant filed his first motion for judicial release, which the State opposed. The trial court denied defendant's first motion by entry on August 15, 2008.

{¶6} On October 28, 2008, defendant filed his second motion for judicial release. The State opposed the motion due to the defendant's lack of remorse, the cruel nature of the offense, the impact the crime had on the victim, and defendant's misconduct while in prison.

{¶7} On December 29, 2008, the trial court conducted a hearing on defendant's motion and chose to grant judicial release. The State filed this timely appeal and presents the following assignments of error:

FIRST ASSIGNMENT OF ERROR:

The trial court erred when it granted the motion for judicial release without articulating the requisite factors supporting its decision. R.C. 2929.20(H).

SECOND ASSIGNMENT OF ERROR:

The trial court abused its discretion when it granted the defendant's motion for judicial release.

THIRD ASSIGNMENT OF ERROR:

The trial court erred when it failed to make the defendant's institutional summary report part of the record of the judicial release hearing, in contravention of R.C. 2929.20(E) and (G).

{¶8} Because assignments of error one and three present the issue of whether the trial court properly complied with the statutory requirements before granting judicial release, we will analyze these assignments of error together.

{¶9} With regard to the statutory requirements, former R.C. 2929.20 provides in relevant part:¹

(E) Prior to the date of the hearing on a motion for judicial release under this section, the head of the state correctional institution in which the eligible offender in question is confined shall send to the court a report on the eligible offender's conduct in the institution and in any institution from which the eligible offender may have been transferred. The report shall cover the eligible offender's participation in school, vocational training, work, treatment, and other rehabilitative activities and any disciplinary action taken against the eligible offender. The report shall be made part of the record of the hearing.

¹ The current, recodified version of R.C. 2929.20 became effective on April 7, 2009.

* * *

(H)(1) A court shall not grant a judicial release under this section to an eligible offender who is imprisoned for a felony of the first or second degree * * * unless the court, with reference to factors under section 2929.12 of the Revised Code, finds both of the following:

(a) That a sanction other than a prison term would adequately punish the offender and protect the public from future criminal violations by the eligible offender because the applicable factors indicating a lesser likelihood of recidivism outweigh the applicable factors indicating a greater likelihood of recidivism;

(b) That a sanction other than a prison term would not demean the seriousness of the offense because factors indicating that the eligible offender's conduct in committing the offense was less serious than conduct normally constituting the offense outweigh factors indicating that the eligible offender's conduct was more serious than conduct normally constituting the offense.

(2) A court that grants a judicial release to an eligible offender under division (H)(1) of this section shall specify on the record both findings required in that division and also shall list all the factors described in that division that were presented at the hearing.

{¶10} The State argues that the trial court failed to comply with former R.C. 2929.20(E) and (H) before granting defendant's motion for judicial release. After reviewing the record in the instant matter, we agree.

{¶11} Regarding former R.C. 2929.20(E), attached to defendant's motions were certificates of completion for courses dealing with anger management, victim awareness, and substance abuse. Further, the State made a brief reference to defendant's institutional summary report during the December 29, 2008 hearing. Apparently, defendant had five conduct reports during his period of incarceration. (December 29,

2008 hearing, Tr. 7.) Therefore, presumably, the institutional summary report was available at the hearing. However, the report was never made a part of the record.

{¶12} Regarding the requirements of former R.C. 2929.20(H)(1)(a), the trial court read the section aloud before referencing defendant's age and lack of any prior criminal record. (December 29, 2008 hearing, Tr. 12.) Nowhere in the record is there a finding on the adequacy of the punishment. Nor is there an analysis of the applicable factors in R.C. 2929.12 regarding defendant's likelihood of recidivism.

{¶13} Regarding the requirements of former R.C. 2929.20(H)(1)(b), the trial court read the section aloud before again referencing defendant's age and the fact that he had already served two years in prison. (December 29, 2008 hearing, Tr. 13.) Nowhere in the record is there any finding regarding the seriousness of the offense. Nor is there any consideration of defendant's conduct versus the conduct normally constituting such an offense.

{¶14} When presented with similar cases, this court has consistently reversed and remanded cases for further clarification and statutory findings. See *State v. Hunt*, 10th Dist. No. 04AP-1177, 2005-Ohio-3144; see also *State v. Triplett*, 176 Ohio App.3d 603, 2008-Ohio-397; see also *State v. Kelley*, 10th Dist. No. 08AP-118, 2008-Ohio-3828. We find these decisions to be particularly directive.

{¶15} In the instant matter, we have no way of knowing whether the trial court engaged in the appropriate analysis and considered the applicable factors before granting judicial release. Because there are no specific findings in the record, we must reverse and remand this matter "to allow the trial court to make the necessary findings if supported by the facts of the case." *Hunt* at ¶13, citing *State v. Peoples*, 151 Ohio

App.3d 446, 2003-Ohio-151, ¶35; see also *Kelley* at ¶10. As a result, we sustain the State's first and third assignments of error. Having found that the trial court must be afforded with the opportunity to make findings, we overrule the State's second assignment of error. We will not impede upon the trial court's discretion to determine if judicial release is appropriate in this matter.

{¶16} Based upon the foregoing, we sustain the State's first and third assignments of error and overrule the State's second assignment of error. Accordingly, we reverse in part and remand this matter for further proceedings consistent with this decision.

Judgment reversed in part; cause remanded.

KLATT and FRENCH, JJ., concur.
