[Cite as *State v. Griffin*, 2017-Ohio-6877.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	Case No. 16CA4
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
JASON LAMAR GRIFFIN,	:	**RELEASED: 6/30/2017**
Defendant-Appellant.	:	

APPEARANCES:

Stephen P. Hardwick, Assistant State Public Defender, Columbus, Ohio, for appellant.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Robert P. Driscoll, Assistant Prosecuting Attorney, Athens, Ohio, for appellee.

Harsha, J.

{¶1} Jason Griffin appeals the judgment of the trial court terminating his community control and sentencing him to prison for violating community control by committing federal drug-related crimes. The trial court imposed a nine-and-a-half-year sentence to run consecutively to the federal prison sentence of 15 years, 8 months that Griffin is currently serving.

{¶2} Initially, Griffin contends that the Adult Parole Authority (APA) independently terminated his community control responsibilities. Therefore, he argues that the trial court violated his constitutional rights to due process in finding that he violated a sanction that no longer exists due to the APA's failure to supervise him. However, the parole authority did not and could not unilaterally terminate Griffin's court ordered community control. Although he was not actively supervised by the parole authority, Griffin remained subject to the court's community control sanctions. His

constitutional due process argument on this ground fails, because his initial premise is false, i.e. that the community control sanction no longer existed.

{¶3} Griffin also contends that the terms and conditions of his community control were too vague to be enforceable because the APA failed to give him a form that identified those provisions. He argues that the trial court's enforcement of the vague terms violated his constitutional due process rights. However, the original sentencing order detailed the terms and conditions of Griffin's community control and was not vague. We reject Griffin's constitutional vagueness argument and overrule Griffin's first assignment of error.

{¶4} Next Griffin contends that the trial court erred when it punished him for violating community control conditions that it failed to include at his sentencing hearing. He argues that although the original sentencing order contains terms and conditions of community control, the trial court was also required under R.C. 2929.19(B)(4) to notify him of those terms/conditions at the sentencing hearing. However, the transcript from the original sentencing hearing shows that the trial court did notify Griffin of many terms and conditions of the community control sanctions it imposed, including at least one it found Griffin violated, i.e. possession of controlled substances without a prescription. We overrule his second assignment of error.

{¶5} Last Griffin argues that even if we find that he had notice of the terms of his community control, the trial court failed to inform him at the original sentencing hearing of the precise prison term it would impose for violating community control as required by R.C. 2929.19(B)(4). Therefore, he contends we must vacate the trial court's prison sentence and remand the case for a non-prison sanction. However, the

underlying sentencing order Griffin challenges is an agreed sentence that was jointly recommended, imposed by the sentencing judge, and is authorized by law. Therefore, it is not reviewable under R.C. 2953.08(D)(1). And even if the agreed sentence were reviewable, the trial court complied with the notification provisions at the combined plea and sentencing hearing. We overrule Griffin's third assignment of error and affirm the trial court's judgement.

I. FACTS

{¶6} As part of a plea and sentencing agreement Griffin pleaded guilty to two felony counts of trafficking in cocaine and one felony count of engaging in a pattern of corrupt activity. The plea agreement included the following jointly recommended sentence:

> Amended Counts I and II as stated on front; Guilty plea to all; $25,000 fine payable within first 54 months of Community Control; Restitution $140 Towing Fee, $1600.00 buy money payable w/i 6 months of release of incarceration; on Ct 1: 18 months prison, JR after 6 months if favorable Warden's Report; No IPP; 2 year license suspension concurrent with license suspension on Count II; on Cts II and III: 5 years Community Control, 9 year 6 month underlying sentence (8 years Ct 3, 18 months Ct 2 Consecutive) Consecutive to Count I; ∆ [Defendant] agrees if he violates Community Control that he should be sentenced to 9 years 6 months and time remaining on Count I; Ct I consecutive to current term of incarceration.

Thus, Griffin agreed to an 18-month prison term on count one, and five years of community control on counts two and three beginning after he had served the 18-month prison term on count one. He also agreed to fines and restitution as part of his sanctions, and that the trial court would sentence him to a nine-and-a-half-year prison term if he violated community control.

{¶7} The trial court held a combined plea and sentencing hearing where Griffin asked the court to accept the jointly recommended agreement. The trial court discussed terms of the plea agreement and asked Griffin specific questions to ensure he understood it. The trial court also went over the terms of the jointly recommended sentence to make sure Griffin understood it. The court explained the penalty for violating a term or condition of community control:

> Judge: Now with regard to the sentence uh, do you understand that if you are sentenced to community control that could last up to five years?
>
> Griffin: Yes sir.
>
> Judge: Do you understand that you if you violate and [sic] terms or conditions of community control the Court could increase the time period you are on community control, the Court could impose additional terms and conditions while you are on community control or the Court could sentence you to a specific term of nine years and six months in prison uh, to be served consecutively to any time remaining on a sentence for which you are on judicial release? Do you understand that?
>
> Griffin: Yes sir.

{¶8} The trial court determined that Griffin knowingly, voluntarily and intelligently pled guilty, accepted his guilty plea and stated "Now we will move into the sentencing phase." The trial court informed Griffin that it would accept the terms of Griffin's jointly recommended sentence: The court "is going to adopt the plea agreement that you've entered into with the State of Ohio." The court reiterated the sentencing terms set forth in the jointly recommended sentencing agreement and included several specific community control conditions related to drug possession, alcohol consumption, curfew and employment:

> With regard to the sentence on Count One, trafficking in cocaine, the Court will sentence you to eighteen months in prison uh, and order that you pay a $5,000 fine. And the prison sentence will be served

> consecutively to the sentence that your [sic] serving at this time. With regard to Count two, trafficking in cocaine and Count three, engaging in a pattern of corrupt activity, second degree felony. With regard to the second degree felony the Court will accept the stipulation that the factors of [sic] to overcome a prison uh, have been agreed upon and therefore I'm going to sentence you on those two counts to five years of community control to be served consecutively to your prison sentence on Count one. Now I'm also going to order that you pay a $5,000 fine in Count two and a $15,000.00 fine on Count three. The fines will be payable within the first fifty-four months of your community control. You are to pay the restitution of $140.00 for the towing fee and $1,600.00 for the buy money for the drugs uh, both of those within six months from your release of incarceration. The Court is going to order that you have a two year driver license's suspension uh, on the first two counts to be concurrent so that it's two years to begin upon your release from prison. Uh, and of course ***you are to pay the court cost herein as part of your community control*** and the Court will, and the court costs will be ***payable within nine months of uh, release from prison***. You are to have a substance abuse evaluation, follow all recommendations, be subject to random monitoring. Sign all releases that are required by the Probation Department. You are to have a curfew from 8:00 p.m. to 7:00 a.m. o [sic] a daily basis * * * ***You're*** not to consume alcoholic beverages. Not to enter places that sell alcohol by the drink. ***Not to uh, possess any drugs for which you don't have a prescription***. * * * You're to obtain employment and maintain employment. Anything else you would recommend on the conditions of community control Mr. Driscoll?" (Emphasis added.)

{¶9} The trial court did not repeat prior statements about the penalties for community control violations it had made minutes earlier to Griffin. Instead the trial court asked Griffin if he needed the court to go over what could happen if he violated the terms of community and post release control or if Griffin remembered the court's advisements from just minutes ago. Griffin said he remembered them:

> Judge: And also then with regard to counts two and three. * * * and what could happen if you violate any terms and conditions of your community, uh, post release control in that regard. Do you need me to do that in more detail or do you remember my advisements from about five to ten minutes ago?
>
> Griffin: I remember.

After the plea and sentencing hearing the trial court journalized an entry that set forth the sentence imposed, enumerated the community control sanctions and stated that Griffin would be sentenced to a nine-and-a-half-year prison term if he violated them. Several years later, in response to motions by both Griffin and the state, the trial court issued a nunc pro tunc sentencing entry correcting several scrivener's errors.

{¶10} Griffin served his 18-month prison term and was released.[1] After his release a federal court convicted Griffin for possession with intent to distribute more than 28 grams of cocaine base and possession of a firearm by a convicted felon. The state filed a notice of violation of community control in this case in January 2013 and an amended notice in November 2015. The notice alleged that Griffin committed five community control violations: (1) failure to report to the adult parole authority; (2) possession of firearm and controlled substances; (3) failure to pay fines and court costs; (4) federal drug conviction for possession of cocaine; and (5) federal conviction for firearm possession under disability. The notice read:

> Violation One: On or about May 5, 2009, Defendant was ordered to report to Adult Parole Authority once he had completed 18 months in prison. Defendant has failed to report. As of November 6, 2014, Defendant is incarcerated in Federal Prison.
>
> Violation Two: On or about October 26, 2012, a search warrant was executed by Columbus Police on the residence of Defendant where a loaded firearm and controlled substances were found.
>
> Violation Three: As of November 5, 2015, Defendant has failed to pay fines and court costs, totaling $25,969.50.
>
> Violation One (Supplemental): On or about October 24, 2013, Defendant was convicted in the United States District Court for the Southern District of Ohio Eastern Division for Count One, Possession with Intent to

[1] The record contains conflicting references to Griffin's release date. However, the release date is not relevant to our analysis of the issues.

> Distribute More than 28 grams of Cocaine Base, in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(B)(iii), CASE NO. 2:13-CR-241.
>
> Violation Two (Supplemental): On or about October 24, 2013, Defendant was convicted in the United States District Court for the Southern District of Ohio Eastern Division for Count Two, Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. §922(g)(1), CASE NO. 2:13-CR-241.

{¶11} The trial court held a "first stage" hearing on February 1, 2016 to determine if there was substantial proof that Griffin violated community control. Griffin stipulated to the federal convictions, the state dismissed violation two, and the hearing proceeded on whether Griffin failed to report and pay fines and court costs.

{¶12} Griffin's counsel argued that Griffin could not be found in violation of community control because the parole authority had terminated it, and did not give him the standard APA form containing the relevant terms and conditions of community control. The trial court rejected those arguments, finding: (1) the sentencing entry set forth the terms and conditions of community control so it was immaterial that he did not receive the standard APA form containing them and (2) the parole authority has no power to terminate community control and did not do so here. Rather, the court found that the parole authority had simply failed to actively supervise Griffin. The trial court concluded that Griffin was not "magically relieved from his responsibilities of being placed on community control" by the parole authority's failure to perform its duty. The trial court ultimately found Griffin violated community control by failing to pay fines and court costs as alleged in violation three, and based on Griffin's stipulation concerning the federal convictions, violations of supplemental counts one and two. The trial court did not find a violation for failure to report to the parole authority.

{¶13} The trial court held a "second stage" hearing later in the month to determine the sanctions to impose for Griffin's community control violations. The trial court imposed the sanction Griffin had previously agreed to in the original sentencing order: a nine-and-a-half-year prison term to run consecutive to his federal prison sentence.

II. ASSIGNMENTS OF ERROR

{¶14} Griffin assigns the following errors for our review:

> I. THE TRIAL COURT ERRED WHEN IT HELD MR. GRIFFIN COULD BE PUNISHED FOR VIOLATING HIS COMMUNITY CONTROL CONDITIONS AFTER THE PAROLE OFFICE EXPRESSLY TOLD HIM HE HAD NO COMMUINTY CONTROL RESPONSIBILITIES. T. P. 12-27 (FEB. 1, 2016), JUDGMENT ENTRY (MAY 5, 2009); FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
>
> 2. THE TRIAL COURT ERRED WHEN IT HELD MR. GRIFFIN COULD BE PUNISHED FOR VIOLATING HIS COMMUNITY CONTROL CONDITIONS EVEN THOUGH HE WAS NOT NOTIFIED OF THOSE TERMS AT HIS SENTENCING HEARING. T.P. 14-23 (APR. 30, 2009); R.C. 2929.19(B)(4).
>
> 3. THE TRIAL COURT ERRED WHEN IT SENTENCED MR. GRIFFIN TO PRISON FOR VIOLATING HIS COMMUNITY CONTROL WHEN THE COURT HAD NOT RESERVED A PRISON TERM AT THE ORIGINAL SENTENCING HEARING. T.P. 12-21 (APR. 30, 2009); R.C. 2929.19(B)(4).

III. LAW AND ANALYSIS

A. Imposition of Sanctions for Violating Community Control

{¶15} A community control revocation hearing is not a criminal trial, so the state is not required to establish a violation of the terms of community control "beyond a reasonable doubt." Instead, the state must present "substantial" proof that a defendant violated the terms of his community control sanctions. Because this standard is akin to

the preponderance of evidence burden of proof, we apply the "some competent, credible evidence" standard set forth in *C.E. Morris Co. v. Foley Constr. Co*., 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), to determine whether a court's finding of a violation is supported by the evidence. *See State v. Wells*, 4th Dist. Athens No. 06CA30, 2007-Ohio-906, ¶ 8; *State v. Wolfson*, 4th Dist. Lawrence No. 03CA25, 2004-Ohio-2750, ¶ 7. We review the court's subsequent decision on the appropriate sanction under an abuse of discretion standard. *Wells*, at ¶ 9; *Wolfson*, at ¶ 8. An abuse of discretion connotes more than an error in law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Wolfson, supra*.

{¶16} A trial court has three options for punishing offenders who violate community control sanctions. The court may (1) lengthen the term of the community control sanction, (2) impose a more restrictive community control sanction, or (3) impose a prison term on the offender. *See* R.C. 2929.15(B)(1); *State v. Guilkey,* 4th Dist. Scioto No. 04CA2932, 2005-Ohio-3501, ¶5. R.C. 2929.15(B)(3) states that, if the court opts to impose a prison sentence upon an offender who violates the conditions of his community control sanction, the prison term "shall be within the range of prison terms available for the offense for which the sanction that was violated was imposed and shall not exceed the term specified in the notice provided to the offender at the sentencing hearing pursuant to division (B)(2) of section 2929.19."

{¶17} R.C. 2929.19(B)(4)[2] states:

> (4) If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a

[2] Prior to statutory amendments, this section was set out in R.C. 2929.19(B)(5).

> violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to section 2929.14 of the Revised Code.

{¶18} Thus, at a sentencing hearing where the court intends to impose community control for an offense but wishes to reserve the option of imprisonment upon a violation of community control, the court must select a specific prison term from the range of potential prison terms available for the offense. *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837; *State v. Rosser*, 4th Dist. Athens No. 04CA8, 2004-Ohio-6159. If the offender violates the terms of community control and the court deems it appropriate, the court may impose that sentence, or a lesser but not a greater sentence, on the offender. *Brooks* at ¶ 22.

B. The Adult Parole Authority's Failure to Actively Supervise Griffin

{¶19} Griffin argues that the trial court breached his constitutional rights to due process when it found him in violation of the community control sanction after it no longer existed because the parole office had terminated it. He argues that the parole authority is cloaked with apparent authority and has the ability as agent for the court to independently terminate court ordered community control. He contends that occurred when the parole authority told him they did not have him "on paper."

{¶20} Griffin argues the trial court gave the parole authority apparent authority to terminate court orders in the APA form, which states that a supervised person agrees "to follow all orders verbal or written given to me by my supervising officer or other authorized representatives of the Court or the Department of Rehabilitation and

Correction." However, this statement does not create apparent authority necessary to terminate court orders.

> "In order for a principal to be bound by the acts of his agent under the theory of apparent agency, evidence must affirmatively show: (1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of those facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority." *Master Consol. Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570, 575 N.E.2d 817 (1991), syllabus.

Primmer v. Healthcare Industries Corp., 2015-Ohio-4104, 43 N.E.3d 788, ¶ 23 (4th Dist.). There is nothing in the APA form giving the parole authority sufficient authority to terminate, reverse, revoke or otherwise modify court orders. Moreover, Griffin claims he never saw the APA form which he argues confers this authority, so he was not aware of the statement and could not infer anything from it. Even if he had knowledge of the APA form, he could not have a good faith belief that it gave the parole authority the power to terminate court orders. Although the parole authority told Griffin he was not "on paper" and they had no record of him – this is not the same as terminating his community control sanctions.

{¶21} Griffin was neither charged with, nor found to be in violation of, any of the community control provisions related to the parole authority's failure to supervise him, such as the drug and alcohol assessment that should have been requested by his community control officer, the random drug and alcohol monitoring that should have been done by his community control officer, curfew monitoring, or leaving the state without his community control officer's consent. Griffin's due process rights were not triggered by the parole authority's statements or inaction because he was not found in

violation of any of the conditions related to APA supervision. Nor was he found to have violated the duty to report to the APA.

{¶22} Griffin also argues that the trial court violated his constitutional rights because there was no record that Griffin received or signed the APA form containing additional terms and conditions of community control. Griffin contends that he is being held responsible for violating terms and conditions about which he had no notice. He argues that without this form, the court's terms and conditions of his community control sanctions were "so vague" that he did not have fair notice of the conduct it punishes in violation of his Fifth Amendment right to due process.

{¶23} The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." The government violates this guarantee by taking away someone's life, liberty, or property "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, ___ U.S.___, 135 S.Ct. 2551, 2556-2557, 192 L.Ed.2d 569 (2015) citing *Kolender v. Lawson*, 461 U.S. 352, 357–358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

{¶24} The void for vagueness doctrine addresses two primary concerns: 1) providing a person of ordinary intelligence with an understanding of what conduct is prohibited and 2) prevention of arbitrary or discriminatory enforcement that arises where no standard of conduct is discernable. Griffin raises only the former aspect. *See* Katz, Martin, and Giannelli, *Baldwin's Ohio Practice Criminal Law*, Section 83.2 (3d Ed. Dec. 2016 update). "The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of

law,' and a statute that flouts it 'violates the first essential of due process.' " *Johnson* at 2557, quoting *Connally v. General Constr. Co*., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). "These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." *Id.* The void for vagueness doctrine clearly applies to criminal statutes and ordinances. *Greyned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."). And, the void for vagueness doctrine has also been extended to certain civil statutes. *See Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 87 (holding that the void for vagueness doctrine extends to civil statutes that regulate the use of eminent-domain powers).

{¶25} Griffin is not arguing that an Ohio statute or ordinance is too vague. Instead, he premises his constitutional vagueness argument on the fact that he did not receive a copy of the APA form and therefore he argues the terms and conditions of his community control were too vague to be enforced. Griffin cites *In re Gardner, infra,* to support his constitutional vagueness argument. There the appellate court held that a court order restraining a party from contacting an ex-spouse was too vague to form the basis of a contempt charge and ten-day jail term because it failed to give the contemnor fair notice of what was forbidden. *In re Gardner*, 12th Dist. Butler No. 92-02-026, 1992 WL 333648, *3 (Nov. 16, 1992). Under Civ.R. 65(D), temporary restraining orders and preliminary injunctions must set forth the reasons for its issuance, be specific in terms, and describe in reasonable detail the acts sought to be restrained. In civil cases a contempt finding may be overturned for noncompliance with the specificity requirements

of Civ.R. 65. *See also Cleveland v. Abrams,* 8th Dist. Cuyahoga Nos. 89904, 89929, 2008-Ohio-4589, ¶ 38-39 (preliminary injunction order was not specific as required by Civ.R. 65(D) and contempt finding was invalidated).

{¶26} In applying the constitutional vagueness prohibition beyond statutes and ordinances, we conclude the original sentencing order is not vague. It explicitly sets forth the terms and conditions of Griffin's community control in detail and is part of the record. *State v. Littlefield*, 4th Dist. Washington No. 02CA19, 2003-Ohio-863, ¶ 11 ("It is well settled that a court speaks through its journal entries"). Because Griffin's community control obligations are clearly set out in the sentencing order in terms that a person of ordinary intelligence would understand, he cannot claim that they are too vague to be enforced.

{¶27} Griffin cites *State v. Belcher*, *infra,* to support his argument that receipt of the APA form is a constitutional due process requirement. There the appellant raised an assignment of error contending that his community control terms "were never admitted into the record." *State v. Belcher*, 4th Dist. Lawrence No. 06CA32, 2007-Ohio-4256, ¶10. We overruled the assignment of error because a copy of the terms and conditions were filed with the lower court and were part of the record. It is not clear from the decision whether the terms and conditions document was an APA form or one the trial court issued. *Id.* at ¶ 17-18. Even if the terms and conditions document was an APA form and not the trial court's form, *Belcher* cannot be interpreted as making receipt of an APA form a constitutional requirement. Here the terms and conditions of Griffin's community control were made part of the record when they were expressly identified in the sentencing order and filed as part of the docket entries.

{¶28} We conclude that the parole authority did not terminate Griffin's community control, and the terms and conditions of his community control sanctions were not too vague to be enforced. Thus, the trial court did not violate Griffin's constitutional rights to due process when it terminated his community control and imposed a prison term. We overrule Griffin's first assignment of error.

C. Trial Court's Notification of Terms and Conditions of Community Control at the Original Sentencing Hearing

{¶29} Griffin argues the trial court erred by sentencing him to prison for violating community control because it failed to notify him of those terms at the original sentencing hearing. He contends that the only term or condition the court informed him of at the original sentencing hearing was the payment of court costs. He claims that the trial court did not tell him that fines and restitution were part of his community control and it did not tell him that following the law was a condition of community control. Therefore, he argues, the trial court could not find that his failure to pay fines and restitution and his possession of cocaine violated community control.

{¶30} The first sentence of R.C. 2929.19(B)(4) states that "If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed * * * the court shall impose a community control sanction * * *." At the sentencing hearing the trial court imposed community control for five years and the community control sanctions of fines and restitution as specified in R.C. 2929.18. Fines and restitution are statutorily defined as community control sanctions under R.C. 2929.15(A)(1), which states that "the court may directly impose a sentence that consists of one or more community control sanctions authorized pursuant to * * * 2929.18 of the

Revised Code." R.C. 2929.18(A)(1) and (3) provide for the financial sanctions of restitution and fines. Griffin's characterization of fines and restitution as "conditions" of community control is incorrect. They are community control sanctions. Thus, at the sentencing hearing the trial court imposed five years of community control, fines, and restitution as community control sanctions in accordance with R.C. 2929.19(B)(4) when it stated:

> With regard to the second degree felony the Court will accept the stipulation that the factors of [sic] to overcome a prison uh, have been agreed upon and therefore I'm going to sentence you on those two counts to five years of community control to be served consecutively to your prison sentence on Count one. Now I'm also going to order that you pay a $5,000 fine in Count two and a $15,000.00 fine on Count three. * * * You are to pay the restitution of $140.00 for the towing fee and $1,600.00 for the buy money for the drugs * * *.

{¶31} Moreover, the trial court went on to establish conditions (i.e. deadlines) for the payment of the fines and restitution: "the fines will be payable within the first fifty-four months of your community control." And, after imposing five years of community control, the trial court immediately imposed a list of additional conditions such as "to pay court costs as part of your community control," sign "releases that are required by the Probation Department," "have a curfew from 8 p.m. to 7:00 a.m. [on] a daily basis" "not to enter places that sell alcohol by the drink," and "not to possess any drugs for which you don't have a prescription."

{¶32} Griffin argues that the transcript is not clear and we should interpret these as separate additional sentences. We conclude that the only reasonable interpretation of these provisions is that they are terms and conditions of his community control sanctions. In addition to the provisions we list above, the trial court required Griffin to "have a substance evaluation," "be subject to random monitoring," and "obtain

employment and maintain employment." We cannot reasonably interpret these provisions as separate sentences – a life sentence of an 8 p.m. curfew, for example.

{¶33} The trial court notified Griffin at the sentencing hearing of the terms and conditions of community control that he was later found to have violated (non-payment of fines/restitution, and possession of cocaine, a Schedule II drug for which he had no prescription, which was conclusively established by virtue of his federal drug conviction). We overrule Griffin's second assignment of error.

D. The Trial Court's Notification of the Specific Prison Term for Violating Community Control at Original Sentencing Hearing for a Jointly Recommended Sentence

{¶34} Griffin argues that the trial court could not sentence him to prison as punishment for his community control violations because the court did not reserve a specific prison term at the original sentencing hearing as required by R.C. 2929.19(B)(4). The state argues that the original sentence, which included a nine-and-a-half year prison term for community control violations, was an agreed sentence and is not reviewable under R.C. 2953.08(D)(1). In response Griffin does not dispute that the sentence was recommended jointly and imposed by the sentencing judge. He argues that it is reviewable because it was not "authorized by law" because the trial court did not notify him of a specific term for each violation at the original sentencing hearing as required under R.C. 2929.19(B)(4). Griffin argues without that notification a prison term is not an option. The state argues because Griffin agreed to the nine-and-a-half year term, the trial court was not required to notify him of any of the potential prison terms at the sentencing hearing. Alternatively, if it is reviewable, the state argues that the trial

court complied with the notice provision in R.C. 2929.19(B)(4) at the original sentencing hearing.

{¶35} A felony sentence is not reviewable under R.C. 2953.08(D)(1) "if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." "[A] sentence is 'authorized by law' and is not appealable within the meaning of R.C. 2953.08(D)(1) only if it comports with all the mandatory sentencing provisions." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 21 (because a court's duty to merge allied counts at sentencing is mandatory, not discretionary, a sentence imposed on multiple allied counts that were not merged is not authorized by law and is reviewable). Thus, we must determine in the context of a jointly recommended sentence, if the requirement in R.C. 2929.19(B)(4) that the trial court reserve a specific prison term is a "mandatory sentencing provision."

{¶36} Outside the context of a jointly recommended sentence, R.C. 2929.19(B)(4) does require a court sentencing an offender to a community control sanction to notify the offender at the sentencing hearing of the specific prison term it may impose for a violation of such sanction as a prerequisite to imposing a prison term for such a violation. *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, syllabus ¶1-2. But this requirement alone does not make it a "mandatory sentencing provision." Although *Brooks* involved a "plea bargained sentence" it appears the sanction to be imposed for violation of community control was not part of the agreement and was left to the trial court's discretion. *See Brooks* at ¶ 1. Thus, the

Court's analysis was not in the context of a jointly recommended sentence, nor was there an analysis of reviewability under R.C. 2953.08(D)(1).

{¶37} Recently the Supreme Court of Ohio clarified the meaning of the phrase "mandatory sentencing provision" in *State v. Sergent*, 148 Ohio St.3d 94, 2016-Ohio-2696, 69 N.E.3d 627. The Court recognized that where "a trial judge exercises his or her discretion to impose consecutive sentences, he or she must make the consecutive-sentence findings set out in R.C. 2929.14(C)(4), and those findings must be made at the sentencing hearing and incorporated into the sentencing entry." *Id.* at ¶ 17, citing *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659. But where a jointly recommended sentence includes consecutive sentences, "a trial court is not required to make the consecutive-sentence findings set out in R.C. 2929.14(C)(4)." *Sergent* at ¶ 43 (finding *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, ¶ 25 controlling). "[W]here a trial judge imposes such an agreed sentence without making those findings, the sentence is nevertheless 'authorized by law' and not reviewable on appeal pursuant to R.C. 2953.08(D)(1)." *Id.; see also State v. Pulliam,* 4th Dist. Scioto No. 14CA3609, 2015-Ohio-759.

{¶38} The Court explained why the findings requirement in the consecutive sentencing statute is not a "mandatory sentencing provision" for purposes of determining if an agreed sentence is "authorized by law" under R.C. 2953.08(D)(1). The determining factor is whether the provision in the sentence is mandatory or discretionary – imposition of consecutive sentences is discretionary. The Court distinguished the consecutive sentencing statute as discussed in *Porterfield*, *supra*, from the merger-for-allied-offenses statute as discussed in *Underwood, supra*, on the basis that a court has

discretion to impose consecutive sentence under R.C. 2929.14(C)(4), but is *required* to merge allied offenses under R.C. 2941.25(A). *Sergent* at ¶ 27-29. Because a trial court has the discretion to impose consecutive sentences, the statutory requirement that the trial court set out its findings at the sentencing hearing is not a "mandatory sentencing provision" in the context of a jointly recommended sentence. *Id.* at ¶42-43.

{¶39} Here, the community control sanctions statute is similarly discretionary. R.C. 2929.15(A)(1) provides, "If in sentencing an offender for a felony the court is not required to impose a prison term * * * the court *may* directly impose a sentence that consist of one or more community control sanctions authorized * * *." (Emphasis added.) If an offender violates community control, R.C. 2929.15(B)(1) gives the court discretion to impose penalties: "If the conditions of community control sanction are violated * * *, the sentencing court *may* impose upon the violator one or more of the following penalties * * * (c) a prison term * * *." (Emphasis added.) Because community control sanctions and any subsequent prison term imposed for a violation of them are discretionary, the notice requirement in R.C. 2929.19(B)(4) is not a "mandatory sentencing provision" for purposes of determining whether the jointly recommended sentence is "authorized by law" under R.C. 2953.08(D)(1). We conclude that the community control notice in R.C. 2929.19(B)(4) is like the consecutive sentencing findings under R.C. 2929.14(C)(4) and the rationale in *Sergent* applies here.

{¶40} We conclude if a jointly recommended sentence includes an agreed prison term for violations of community control, the trial judge need not provide a separate notification of a specific prison term at the sentencing hearing under R.C. 2929.19(B)(4). Such a sentence is "authorized by law" and under R.C. 2953.08(D)(1) the sentence is

not subject to review. Thus, we need not analyze the merits of Griffin's third assignment of error, which challenges the agreed sentencing order. *See State v. Rice,* 1st Dist. Hamilton No. C-140348, 2015-Ohio-5586, ¶ 17-21 (DeWine, J., concurring) (where defendant entered into an agreed sentence that included a two-year prison term if he violated community control, the appellate court should first determine if the sentence is reviewable under R.C. 2953.08(D)(1) before undertaking a review of the assignment of error challenging the agreed upon prison term).

{¶41} Moreover, even if the sentence were reviewable, the record shows that the trial court gave Griffin the required notification under R.C. 2929.19(B)(4) at the combination plea and sentencing hearing. Griffin's plea hearing and sentencing hearing were combined into one hearing. The trial court explained the penalty for violating a term or condition of community control during the plea portion of the hearing:

> Judge: Do you understand that you if you violate and [sic] terms or conditions of community control the Court could increase the time period you are on community control, the Court could impose additional terms and conditions while you are on community control or the Court could sentence you to a specific term of nine years and six months in prison uh, to be served consecutively to any time remaining on a sentence for which you are on judicial release? Do you understand that?
>
> Griffin: Yes sir. (4-30-16; Tr. 14)

Then during the sentencing portion of the hearing, the court asked Griffin if he remembered what he had told him about the penalty for violating community control or if he needed to repeat it again and Griffin said he remembered:

> Judge: And also then with regard to counts two and three. * * * and what could happen if you violate any terms and conditions of your community, uh, post release control in that regard. Do you need me to do that in more detail or do you remember my advisements from about five to ten minutes ago?

Griffin: I remember. (4-30-16; Tr. 21-22)

{¶42} Griffin argues that because the notice was given during the plea portion of the hearing and not repeated during the sentencing portion of the same hearing, the court failed to reserve the prison term. However, the Court in *Brooks, supra,* cautioned against an overly rigid notice requirement and expressly stated that where the plea and sentencing hearing are combined into one, there is no reason to see them as two separate hearings. *Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, at ¶32, fn. 1 ("In this situation, we see no reason to consider the plea hearing and the sentencing hearing to be two separate hearings for purposes of R.C. 2929.19(B)(5) [now (B)(4)]."). A trial court's notice during the plea portion of the hearing is equivalent of notice at the sentencing portion of the hearing. We find the trial court complied with the notification provision in R.C. 2929.19(B)(4) even though, in the context of a jointly recommended sentence, compliance was not required.

{¶43} Griffin also argues that the court never specifically informed him at the original sentencing hearing that committing "a violation of any law" would violate community control so he cannot be found in violation of community control based on his federal drug convictions. Because (1) the agreed sentence is not reviewable and (2) the federal conviction for cocaine possession also ipso facto violated the community control condition prohibiting possession of controlled drugs without a prescription, we find this argument meritless.

{¶44} The trial court did not abuse its discretion when it sentenced Griffin to his agreed upon prison term. We overrule Griffin's third assignment of error.

IV. CONCLUSION

{¶45} The Adult Parole Authority did not unilaterally terminate Griffin's community control, nor were the terms and conditions of his community control too vague to be enforced. And, the record shows that the trial court notified Griffin at the sentencing hearing of terms and conditions of the community control sanctions it imposed, including the ones Griffin violated. Finally, the agreed sentence was jointly recommended, imposed by the sentencing judge, and authorized by law. It is not reviewable under R.C. 2953.08(D)(1). Even if the agreed sentence were reviewable, the trial court complied with the notification provisions at the combined plea and sentencing hearing. Having overruled all three of Griffin's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.