

[Cite as *State v. Blake*, 2018-Ohio-5413.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 18CA6
vs.	:	
LASHAWNA J. BLAKE,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Ryan Shepler, Logan, Ohio, for appellant.

Benjamin Fickel, Hocking County Prosecutor, Logan, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:12-26-18
ABELE, J.

{¶ 1} Lashawna Blake, defendant below and appellant herein, appeals the Hocking County Common Pleas Court judgment that revoked her community control and sentenced her to serve the remainder of her 24 month prison sentence.

{¶ 2} Appellant assigns two errors for review:

FIRST ASSIGNMENT OF ERROR:

“PURSUANT TO STATUTORY PLAIN LANGUAGE, ONLY A NEW FELONY CONSTITUTES A NON-TECHNICAL VIOLATION OF COMMUNITY CONTROL, AND MS. BLAKE COMMITTED NO NEW FELONY.”

SECOND ASSIGNMENT OF ERROR:

“MS. BLAKE SHOULD HAVE RECEIVED CREDIT FOR ALL TIME SERVED UNDER HER CASE AND DISCHARGED FROM COMMUNITY CONTROL.”

{¶ 3} On July 23, 2013, appellant entered guilty pleas to (1) trafficking in heroin in violation of R.C. 2925.03(A)(1) & 2941.1417, and (2) possession of cocaine in violation of R.C. 2925.11(A) & 2941.1417. Both offenses are fifth-degree felonies. On September 5, 2013, the trial court granted intervention in lieu of conviction (ILC), pursuant to R.C. 2951.041, and placed appellant under the supervision and control of the adult parole authority for 3 years. As part of the terms and conditions of her ILC, the trial court ordered appellant to: (1) attend GED classes, (2) pay court costs, (3) complete the treatment in lieu program, (4) forfeit money seized, (5) have no contact with felons, and (6) abstain from using or possessing illegal drugs or alcohol.

{¶ 4} On September 18, 2015, the state filed a motion to revoke appellant’s community control supervision and alleged that she violated two conditions: (1) appellant associated with at least two people with a criminal background, and (2) appellant admitted that she consumed alcohol and drank beer and whiskey at her residence. On October 20, 2015, the trial court revoked appellant’s treatment in lieu of conviction and sentenced her to serve 12 months on Count I and 12 months on Count III, with the sentences to be served consecutively. The court then suspended appellant’s prison term and placed her on standard community control conditions for five years with the following special conditions: (1) supervision for the first year on community control, (2) substance abuse counseling, (3) no alcohol or illegal drug use, (4) pay court costs, and (5) no association with criminals without APA permission. The court also indicated that should appellant be sent to prison, she may be eligible for earned credits of one to five days for each completed month of programming while in prison toward the satisfaction of her stated prison term. Finally, the court notified appellant

that postrelease control is optional in this case up to a maximum of three years, as well as the consequences of violating conditions of postrelease control imposed by the Parole Board, which includes re-imprisonment for up to a maximum of one-half of her originally stated term.

{¶ 5} On September 12, 2017, the state asked to revoke appellant's supervision and impose her previously suspended sentence. Apparently, appellant's probation officer alleged that appellant violated the conditions and rules of her supervision by using non-prescribed opiates (Percocet). At the October 24, 2017 hearing, appellant admitted to the violation and the trial court ordered appellant to continue on community control for a term of five years, minus credit, on the charges of Count I and Count III. The court also ordered appellant to comply with the following conditions of community control: "(1) Defendant to obtain substance abuse health counseling through an appropriate agency, costs to defendant, successfully complete said program and follow through with the recommendations made. (2) Defendant not to use or possess any alcohol, illegal drugs, drug paraphernalia and pseudoephedrine whatsoever. (3) Defendant to have no contact whatsoever with persons with a criminal record without permission of the Adult Parole Authority. (4) Defendant is further ordered to enter the STAR Program and Aftercare Program, successfully complete said programs and follow through with the recommendations made. Successful completion of said programs will result in termination of probation."

{¶ 6} On January 25, 2018, the state once again requested that appellant's supervision be revoked and alleged that she violated two conditions of supervision. First, the state alleged that appellant failed to obey all laws when, on January 19, 2018, appellant "knowingly caused STAR staff members to believe that you would cause serious physical harm to them or their family members." Second, the state alleged that appellant failed to complete the STAR program, when, on

January 19, 2018, appellant was unsuccessfully terminated from the STAR program. On March 12, 2018, the trial court revoked appellant's probation, imposed sentence, and ordered appellant to serve the remainder of her 12 month term on Count I and the remainder of her term on Count III, with the sentences to be served consecutively for a total of 24 months.¹

{¶ 7} On March 29, 2018, appellant filed a motion to vacate a void sentence, or, alternatively, to stay execution of sentence pending appeal. On April 3, 2018, the trial court stayed execution of the sentence pending appeal. This appeal followed.

{¶ 8} Appellant asserts that the trial court's 24-month prison sentence is clearly and convincingly contrary to law because it exceeds the 90-day cap for technical violations of community-control sanctions included in the newly enacted R.C. 2929.15(B)(1)(c)(I). The statute provides in pertinent part:

(1) If the conditions of a community control sanction are violated * * *, the sentencing court may impose upon the violator one or more of the following penalties: * * *

(c) A prison term on the offender pursuant to section 2929.14 of the Revised Code and division (B)(3) of this section, provided that a prison term imposed under this division is subject to the following limitations, as applicable:

(I) If the prison term is imposed for any technical violation of the conditions of a community control sanction imposed for a felony of the fifth degree or for any violation of law committed while under a community control sanction imposed for such a felony that constitutes of a new criminal offense and that is not a felony, the prison term shall not exceed ninety days.

Appellant asserts that, pursuant to the statutes plain language, only a new felony will constitute a non-technical violation of community control, and, because she committed no new felony, she argues

¹ The trial court filed a nunc pro tunc revocation of probation and imposition of sentence entry on March 29, 2018 and changed the credit from 138 days to 145 days.

that her community control violation constituted technical violations. Surprisingly, the term “technical violation” is not defined in R.C. 2929.15(B)(1), but as this court recognized in *State v. Abner*, 4th Dist. Adams Nos. 18CA1061 & 18CA1062, 2018-Ohio-4506, the Supreme Court of Ohio adopted the definition of “technical violation” for comparable parole-revocation proceedings adopted by the United States Court of Appeals for the Sixth Circuit in *Inmates’ Councilmatic Voice v. Rogers*, 541 F.2d 633 (6th Cir.1976). *Abner* at ¶ 12. The Sixth Circuit held “technical violations” are “those violations of the terms and conditions of the parole agreement which are not criminal in nature [,] such as failure to report to the parole officer, association with known criminals, leaving employment, leaving the State, etc.” *Inmates’ Councilmatic Voice*, *supra*, 541 F.2d at 635, fn.2. Thus, technical violations means those violations of the terms and conditions of parole that are not criminal in nature.

{¶ 9} Both the Eleventh and Twelfth District Courts of Appeals have also applied this definition to determine the applicability of the sentencing caps in R.C. 2929.15 community-control revocation cases. In *State v. Cozzone*, 11th Dist. Geauga No. 2017-G-0141, 2018-Ohio-2249, the court held that Cozzone violated her community control when she overdosed on heroin. “Although appellant was not charged or convicted for this conduct, overdosing on drugs is criminal in nature and cannot be considered a ‘technical’ violation of the terms and conditions of community control.” *Cozzone* at ¶ 39.

{¶ 10} In *State v. Davis*, 12th Dist. Warren No. CA2017-11-156, 2018-Ohio-2672, ¶ 16-18, the Twelfth District cited *Cozzone*, but applied a narrower definition of “technical violation.” In *Davis*, the defendant voluntarily signed himself out of a community based correctional facility (CBCF) to which he had been sentenced as part of his community control. The Twelfth District,

however, declined appellant's request to conclude that his violation was technical in nature. "As stated above, appellant's community control sanctions included standard rules and conditions as well as several 'special conditions.' One such condition required appellant to complete treatment at a CBCF. Appellant's voluntary discharge from the CBCF's program and thus his failure to complete treatment there was not a violation of a standard term of community control, but rather, were a violation of a special condition of community control directly imposed by the trial court and specifically tailored to address and treat appellant's substance abuse issues." *Davis* at ¶ 17. Thus, the court held that the violation of a special, non-criminal condition that constituted a substantive rehabilitative requirement should not be deemed a technical violation.

{¶ 11} In a similar case, the Fifth District in *State v. Mannah*, 5th Dist. Fairfield No. 17-CA-54, 2018-Ohio-4219, cited a condition of community control that Mannah successfully complete all CBCF program requirements. When Mannah asked to be unsuccessfully terminated from the program, the trial court found the violation to be non-technical in nature and imposed the original ten month sentence for heroin possession. The Fifth District agreed with the Twelfth District and concluded the trial court properly found the violation to be non-technical in nature. "Appellant was required to successfully complete treatment at CBCF as a substantive rehabilitative requirement to address a factor contributing to her drug convictions. Appellant willfully checked herself out of the program, requesting to be unsuccessfully terminated from the program. Although not criminal, we agree with the trial court the violation was non-technical in nature. Therefore, R.C. 2929.15(B)(1)(c)(I) does not apply, and the court did not err in sentencing appellant to ten months incarceration." *Mannah* at ¶ 15. In the case sub judice, the only difference between *Cozzone*, *Mannah* and the case at bar is that appellant was discharged from the CBCF; she did not voluntarily

sign herself out. Nevertheless, the end result is the same - appellant failed to complete the STAR program, which constitutes a violation of community control. Therefore, consistent with *Cozzone, Davis, and Mannah*, we conclude that the requirement for appellant to complete a CBCF is a special condition of community control and, thus, a non-technical violation. Consequently, because appellant's violation is non-technical in nature, the trial court properly sentenced appellant to serve a 24 month prison term, with credit for all time served up to that point. Here, the record supports the sentencing court's findings and the sentence is not contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231; *State v. Mullins*, 4th Dist. Scioto No. 15CA3716, 2016-Ohio-5486, ¶ 25. Therefore, we overrule appellant's first assignment of error.

{¶ 12} In her second assignment of error, appellant asserts that she should have received credit for all time served under her case and discharged from community control. However, our resolution of appellant's first assignment of error renders appellant's second assignment of error moot. See App.R. 12.

{¶ 13} Accordingly, based upon the foregoing reasons, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

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JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Common Pleas Court 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. 1 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 that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____

Peter B. Abele, 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.