

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

STATE OF OHIO	:	
Plaintiff-Appellee,	:	Case No. 16CA12
v.	:	
TRAVIS KLEIN,	:	<u>DECISION AND</u>
Defendant-Appellant.	:	<u>JUDGMENT ENTRY</u>
	:	RELEASED: 01/16/2019

APPEARANCES:

Brian A. Smith, Brian A. Smith Law Firm LLC, Akron, Ohio, for appellant.

James K. Stanley, Meigs County Prosecuting Attorney, Pomeroy, Ohio, for appellee.

Hoover, J.

{¶1} Defendant-appellant, Travis Klein (“Klein”), appeals the judgment of the Meigs County Court of Common Pleas, which revoked Klein’s community control and sentenced him to 18 months of incarceration for the underlying attempted tampering with evidence charge. However, after careful review it appears that the trial court failed to follow our mandate on remand.

{¶2} Therefore, we reverse and remand to the trial court for another resentencing hearing.

I. Facts and Procedural History

{¶3} In August 2013, Klein pleaded guilty to (1) non-support of dependents, a violation of R.C. 2929.21, a felony of the fifth degree, and (2) attempted tampering with evidence, in violation of R.C. 2921.12(A)(1), a felony of the fourth degree. The trial court accepted the guilty

pleas and sentenced Klein to 60 months of community control, with an underlying sentence of 18 months, on the attempted tampering with evidence charge. Klein was also sentenced to 12 months imprisonment for the non-support of dependents charge. The trial court ordered that the community control sentence run consecutively to the 12-month prison term.

{¶4} In the summer of 2014, Klein was released from prison after serving his 12 months on the non-support charge. On July 17, 2015, the State filed a motion to revoke Klein's community control. In its motion, the State alleged that: (1) on or about July 10, 2015, the Meigs County Sheriff's Officer arrested Klein for Illegal Assembly or Possession of Chemicals for Manufacture of Methamphetamine, and (2) on or about July 10, 2015, Klein failed to report to his probation officer.

{¶5} On July 23, 2015, a probable cause and final hearing was held on the motion to revoke community control. Klein's counsel told the trial court that, "[i]t [was Klein's] intention to admit to the allegations contained in the [State's] motion."¹ The trial court sentenced Klein to 18 months in the custody of the Ohio Department of Rehabilitation and Correction on the revocation of community control for the original attempted tampering with evidence charge.

{¶6} Thereafter, Klein timely appealed to this court. Despite the trial court stating that it had considered the presentence investigation report prior to sentencing Klein to community control and despite the judgment entry reflecting that the presentence report was prepared, the parties stipulated during the appellate proceedings that no presentence investigation report had been prepared in the case. Since the trial court violated R.C. 2951.03(A)(3) by placing Klein under a community control sanction without considering a presentence investigation report, we

¹ Klein failed to supplement the record with a copy of the transcript from the July 23, 2015 probable cause and final hearing. The information contained in this paragraph is taken from our opinion in *State v. Klein*, 4th Dist. Meigs No. 15CA12, 2016-Ohio-5315, ¶ 10 ("*Klein I*").

found that the community control sentence on the attempted tampering with evidence conviction was void and vacated. We remanded the matter for resentencing consistent with our opinion.

{¶7} The trial court held a resentencing hearing on August 29, 2016. Ultimately, the trial court ordered the following:

BY THE JUDGE: * * * The Court is going to make a finding that the Defendant is not amenable to Community Control and that a finding of prison term is consistent with the purposes and principles of felony sentencing. The Court is going to order eighteen (18) months in jail. * * *

Tr. 10 (Aug. 29, 2016). Thereafter, Klein indicated that he wished to withdraw his guilty plea, but the trial court overruled his request. *Id.* at 10.

{¶8} Once again, Klein has timely appealed to this court.

II. Assignments of Error

{¶9} On appeal, Klein assigns the following assignments of error for our review:

FIRST ASSIGNMENT OF ERROR:

The trial court violated Due Process during Appellant's community control revocation proceedings by finding Appellant to be in violation of his community control, without an admission from Appellant.

SECOND ASSIGNMENT OF ERROR:

The trial court's denial of Appellant's motion to withdraw guilty plea was an abuse of discretion.

III. Law and Analysis

{¶10} This court cannot ignore the fact that the trial court disregarded our mandate and thus acted outside of its authority on remand. Our decision instructed the trial court to consider

the presentence investigation report and to resentence Klein with regard to the attempted tampering with evidence charge. We recognized at the time that “upon remand, Klein will simply be re-sentenced after considering a presentence investigation report[,]” but that does not excuse the trial court’s failure to resentence Klein altogether. *Klein I* at ¶ 25. Instead of following the instructions of this court, the trial court chose instead to re-impose its judgment without first re-imposing a sentence or sanction on the attempted tampering with evidence conviction.

{¶11} The trial court did not have the discretion to ignore the mandate of this court. “Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.” (Citations omitted.) *Nolan v. Nolan*, 11 Ohio St.3d 1, 462 N.E.2d 410, syllabus (1984). Further, by failing to follow our mandate, the trial court has reached an absurd result: it found that Klein violated a non-existent sanction.

{¶12} Although we are reluctant to cause further delay in this case, we cannot review Klein’s assignments of error without a proper judgment by the trial court that first resentsences Klein to community control and then finds that Klein violated said community control.

IV. Conclusion

{¶13} Due to the reasons outlined above, Klein’s assignments of error will not be addressed. Because the trial court failed to follow the mandate from this court, this case is reversed and remanded for another resentencing hearing.

JUDGMENT REVERSED AND REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED AND REMANDED. Appellee shall pay the costs.

The Court finds that reasonable grounds existed for this appeal.

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

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

Harsha, J. and Abele, P.J.: Concur in Judgment and Opinion.

For the Court,

By: _____
Marie Hoover, 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.