

[Cite as *State v. Penwell*, 2020-Ohio-6727.]

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

STATE OF OHIO,	:
Plaintiff-Appellee,	: CASE NO. 20CA3713
vs.	:
BILLY PENWELL,	: DECISION & JUDGMENT ENTRY
Defendant-Appellant.	:

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APPEARANCES:

Timothy Young, Ohio Public Defender, and Peter Galyardt, Assistant Ohio Public Defender, Columbus, Ohio, for appellant

Jeffrey C. Marks, Ross County Prosecuting Attorney, and Carrie Charles, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for appellee.

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CRIMINAL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED: 12-8-20

ABELE, J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court judgment of conviction and sentence. Billy Penwell, defendant below and appellant herein, pleaded guilty to failure to comply and aggravated possession of drugs and the trial court-imposed sentence. Appellant raises three assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL ERRED WHEN IT SENTENCED BILLY PENWELL TO A LUMP-SUM OF COMMUNITY CONTROL FOR MULTIPLE COUNTS.” (CITATIONS OMITTED)

## SECOND ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED WHEN IT FAILED - AT THE TIME OF IMPOSING COMMUNITY CONTROL - TO NOTIFY BILLY PENWELL OF THE CONSECUTIVE NATURE OF THE RESERVED PRISON TERMS.” (CITATIONS OMITTED)

## THIRD ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED WHEN IT SENTENCED BILLY PENWELL TO CONSECUTIVE PRISON TERMS FOR VIOLATING HIS COMMUNITY CONTROL WITHOUT MAKING THE FINDINGS REQUIRED BY R.C. 2929.14(C)(4) DURING THE SENTENCING HEARING.” (CITATIONS OMITTED)

{¶ 2} On March 1, 2019, appellant pleaded guilty to: (1) failure to comply, a third-degree felony; and (2) aggravated possession of drugs, a fifth-degree felony. The trial court sentenced appellant to serve a three year “lump sum” community control sanction for the two offenses, along with thirty- and twelve-month prison sentences for the offenses, respectively. Also, the court did not speak to whether the sentences should be served consecutively or concurrently.

{¶ 3} Subsequently, appellant admitted that he violated his community control requirements and the trial court imposed consecutive thirty and twelve month prison terms.

## I.

{¶ 4} In his first assignment of error, appellant asserts that the trial court erred when it imposed a “lump sum” community control sanction for multiple counts. In support of his argument, appellant cites *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824; *State v. Park*, 4<sup>th</sup> Dist. Jackson No. 18-CA-7, 2019-Ohio-2683; *State v. Powell*, 4<sup>th</sup> Dist. Athens No. 13-CA-31, 2017-Ohio-1068; *State v. Price*, 4<sup>th</sup> Dist. Athens Nos. 17-CA-30, 17-CA-31, 2018-Ohio-2896; and

*State v. Wheatley*, 4<sup>th</sup> Dist. Hocking No. 17-CA-3, 2018-Ohio-464.

{¶ 5} Appellee concedes appellant's assertion and acknowledges that appellant's sentence must be reversed and the matter remanded for a re-sentencing. We appreciate appellee's candor.

{¶ 6} Accordingly, we hereby sustain appellant's assignment of error, reverse the trial court's sentence and remand this matter for re-sentencing.

## II.

{¶ 7} In his second assignment of error, appellant asserts that the trial court erred when it failed to notify appellant of the consecutive prison terms when it imposed the community control sanctions. In support of his argument, appellant cites R.C. 2929.19(B); *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837; *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995; *State v. Ashworth*, 2<sup>nd</sup> Dist. Champaign No. 2011-CA-1, 2012-Ohio-108; and *State v. Thompson*, 5<sup>th</sup> Dist. Fairfield No. 01-CA-62, 2002-Ohio-4714.

{¶ 8} Appellee, citing *State v. Jones* (5<sup>th</sup> Dist.) Harrison No. 19-HA3, 2020-Ohio-762, argues that a court need not notify a defendant, at the time it imposes a community control sanction, of the consecutive nature of the sentences. We also appreciate the fact that both parties have informed us that this issue is currently awaiting resolution in the Ohio Supreme Court.

{¶ 9} Nevertheless, in light of our disposition of appellant's first assignment of error, we find this issue to be moot. At this juncture, we need not resolve this assignment of error because this issue may be addressed at re-sentencing.

## III.

{¶ 10} In his third assignment of error, appellant asserts that the trial court erred when it imposed consecutive sentences for a community control violation without making the R.C.

2929.14(C)(4) consecutive sentence findings at the community control violation dispositional hearing. In support of his argument, appellant cites *State v. Howard*, Slip Opinion No. 2020-Ohio-3195; *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995; *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659; and *State v. Duncan*, 12<sup>th</sup> Dist. Butler Nos. CA2015–05-086, CA2015-06-108, 2016-Ohio-5559.

{¶ 11} Appellee, however, argues that the trial court sentenced appellant pursuant to R.C. 2929.331(B) and had no discretion in imposing consecutive sentences. Thus, appellee reasons, because the court had no discretion, it need not make the R.C. 2929.14(C)(4) findings.

{¶ 12} Once again, in light of our disposition of appellant’s first assignment of error, we find this issue to be moot. We need not resolve this assignment of error because this issue may be addressed at re-sentencing.

{¶ 13} We also again extend our sympathy to trial courts for their unenviable daily task of attempting to navigate Ohio’s convoluted web of felony sentencing statutes and issues. Prior to 1996, Ohio felony sentences involved simple, straight-forward statutes that the bench, bar, and most importantly, the general public could easily understand. Since that time, Ohio’s complex sentencing scheme does not promote judicial economy and diminishes the general public’s understanding of this very important aspect of the criminal justice system. All laws should be clear, precise and uniform. Unfortunately, Ohio’s felony sentence statutes fall short of that important goal.

JUDGMENT REVERSED AND CAUSE  
REMANDED FOR FURTHER  
PROCEEDINGS CONSISTENT WITH THIS  
OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and cause remanded for further proceedings consistent with this opinion. Appellant and appellee shall equally share 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 Ross 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 the 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 that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hess, J. & Wilkin, 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.