[Cite as *State v. Johnson*, 2019-Ohio-376.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Earle E. Wise, Jr., P. J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
CHRISTINE JOHNSON	:	Case No. 18-CA-37
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from Court of Common Pleas of Licking County Case No. 17 CR 825
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	February 1, 2019

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
HAWKEN FLANAGAN 20th South Second Street 4th Floor Newark, OH 43055	KEVIN J. GALL 33 West Main Street Suite 106 Newark, OH 43055

Wise, Earle, P.J.

{¶ 1} Defendant-Appellant Christine Johnson appeals the May 8, 2018 judgment of the Court of Common Pleas of Licking County, Ohio revoking her community control. Plaintiff-Appellee is the state of Ohio.

Facts and Procedural History

{¶ 2} On January 24, 2018, appellant pled guilty to one count of breaking and entering, a felony of the fifth degree. The trial court suspended a 12-month prison term and placed appellant on two years community control.

{¶ 3} On March 23, 2018, the state filed a motion to revoke appellant's community control. Alleged violations of community control included five urine screens positive for methamphetamine, the discovery of methamphetamine in appellant's home, and appellant's lack of cooperation with law enforcement and the Adult Court Services Department.

{¶ 4} On May 8, 2018, appellant entered an admission to the allegations. Counsel for appellant advised the court of his belief that the violations were technical violations and that therefore the trial court was limited to sentencing appellant to 90 days pursuant to R.C. 2929.15(B)(1)(c)(i). The trial court disagreed citing appellant's ongoing use of methamphetamine and imposed a 12-month sentence. The trial court granted appellant's motion to stay the sentence pending this appeal.

{¶ 5} Appellant raises one assignment of error as follows:

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{¶ 6} THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT-APPELLANT TO A PRISON TERM IN EXCESS OF WHAT IS ALLOWED UNDER 2929.15(B)(1)(c)(i).

{¶ 7} In her sole assignment of error, appellant argues the trial court erred in imposing a 12-month sentence because she only committed technical violations of her community control which warrant a maximum 90-day prison term pursuant to R.C. 2929.15(B)(1)(c)(i). We disagree.

{¶ 8} We review felony sentences using the standard of review set forth in R.C. 2953.08. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 22. R.C. 2953.08(G)(2) provides we may either increase, reduce, modify, or vacate a sentence and remand for resentencing where we clearly and convincingly find the sentence is contrary to law.

{¶ 9} Clear and convincing evidence is that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. "Where the degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Cross*, 161 Ohio St. at 477, 120 N.E.2d 118.

{¶ 10} The recently enacted R.C 2929.15(B)(1)(c)(i) provides:

> 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 consists of a new criminal offense and that is not a felony, **the prison term shall not exceed ninety days.**
>
> (Emphasis added.)

{¶ 11} The dispute here centers on what constitutes a "technical violation," a term which is not defined in R.C. 2929.15(B)(1). In *Inmates Councilmatic Voice v. Rogers*, 541 F.2d 633 (6th Cir.1976) the United States Court of Appeals for the Sixth Circuit defined the term as it pertained to a parole revocation:

> Petitioner also invokes the sixty-day rule mentioned in a January 21, 1992 contempt order in the *Inmates' Councilmatic Voice* case. *Inmates' Councilmatic Voice v. Wilkinson* (Jan. 21, 1992), N.D.Ohio

> No. C72-1052, unreported. The order does require certain parole revocation hearings to be held within sixty days after the date on which the parolee is arrested or held by means of a detainer. However, it plainly states that "[t]he sixty-day rule is applicable to all Ohio parolees charged by Defendants with a *technical violation* of a term or condition of their parole." (Emphasis added.) *Id*. at 2. In *Inmates' Councilmatic Voice, supra*, 541 F.2d at 635, fn. 2, the Sixth Circuit Court of Appeals defined "technical violations" as "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."

{¶ 12} In *State ex rel. Taylor v. Ohio Adult Parole Auth*., 66 Ohio St.3d 121, 124, 609 N.E.2d 546 (1993), the Supreme Court of Ohio adopted the definition of technical violation set forth in *Inmates Councilmatic Voice v. Rodgers*. Courts of appeal have subsequently applied this definition to sentencing determinations under R.C 2929.15. See e.g., *State v. Abner,* 4th Dist. Adams Nos. 18CA1061, 18CA1062, 2018-Ohio-4506; *State v. Cozzone,* 11th Dist. Geauga No. 2017-G-0141, 2018-Ohio-2249; *State v. Pino*, 11th Dist. Lake No. 2017-L-171, 2018-Ohio-2825.

{¶ 13} Appellants in *Abner* and *Cozzone*, supra both violated their community control by using/testing positive for heroin. In each case, the trial court found use of illicit substances, even without a subsequent felony charge, was not a technical violation, but

rather a violation "criminal in nature," and thus not subject to the 90-day cap set forth in R.C. 2929.15(B)(1)(c)(i).

{¶ 14} Similarly here, appellant admitted to the basis of her community control violations - her continued use of methamphetamine. Appellant argues, however, that because she was not charged with a new crime prior to her admission to the community control violations, her violations can only be construed as technical in nature. We disagree.

{¶ 15} R.C. 2925.11(A) provides that "[n]o person shall knowingly obtain, possess or use a controlled substance or a controlled substance analog." R.C. 3719.41(C)(2) classifies methamphetamine is a Schedule II controlled substance. Appellant's use of methamphetamine therefore constituted a felony offense rather than a technical offense and the trial court was not required to cap her prison sentence at 90 days. Appellant fails therefore to establish that her sentence was contrary to law.

{¶ 16} Appellant's assignment of error is overruled.

{¶ 17} The judgment of the Licking County Court of Common Pleas is affirmed.

By Wise, Earle, P.J.
Wise, John, J. and
Delaney, J. concur.

EEW/rw