

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, : Nos. 108101 and 108102  
 v. :  
 :  
 KEITH WILKINS, :  
 :  
 Defendant-Appellant. :

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**JOURNAL ENTRY AND OPINION**

**JUDGMENT:** AFFIRMED IN PART, REVERSED IN PART,  
AND REMANDED  
**RELEASED AND JOURNALIZED:** November 14, 2019

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Criminal Appeal from the Cuyahoga County Court of Common Pleas  
Case Nos. CR-18-627781-A and CR-629561-A

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***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting  
Attorney, and Jonathan Block, Assistant Prosecuting  
Attorney, *for appellee*.

Rick L. Ferrara, *for appellant*.

SEAN C. GALLAGHER, J.:

{¶ 1} Appellant Keith Wilkins appeals the sentences imposed in Cuyahoga C.P. Nos. CR-18-627781-A and CR-18-629561-A. The cases have been consolidated for review. Upon review, we affirm in part, reverse in part, and remand the matter to the trial court.

## **CR-18-629561-A and CR-18-627781-A Sentences**

{¶ 2} Appellant was charged with a number of offenses in each of the underlying cases. He pled guilty to several offenses in each case and remaining charges were nolle.

{¶ 3} In CR-18-629561, the trial court sentenced appellant to an aggregate term of 36 months in prison, including the following:

Counts 1, 3: 24 months each, concurrent;

Counts 4, 9: 24 months each, concurrent with each other and consecutive to Counts 2 and 8;

Count 5: 18 months, concurrent;

Counts 2, 8: 12 months each, concurrent with each other and consecutive to Counts 4 and 9.

{¶ 4} In CR-18-627781, the trial court sentenced appellant as follows:

Counts 1, 3: 60 months community control, which included 180 days of GPS home detention monitoring;

Count 2: 180 days jail with credit for 178 days served.

The court ordered the sentence in CR-18-627781 to run consecutive to the sentence imposed in CR-18-629561.

## **Law and Analysis**

{¶ 5} On appeal, appellant raises two assignments of error for review. Under his first assignment of error, appellant claims the trial court erred in ordering the sentence imposed in CR-18-627781 to run consecutive to the sentence imposed in CR-18-629561. He argues that the jail term, as well as community control, which

included 180 days of GPS home-detention monitoring, in CR-18-627781 was unlawfully imposed consecutive to the prison term imposed in CR-18-629561. In support of his argument, he cites to R.C. 2929.41(A) and *State v. Paige*, 153 Ohio St.3d 214, 2018-Ohio-813, 103 N.E.2d 800.

{¶ 6} R.C. 2929.41(A) provides as follows:

Except as provided in division (B) of this section, division (C) of section 2929.14, or division (D) or (E) of section 2971.03 of the Revised Code, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States. Except as provided in division (B)(3) of this section, a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution.

{¶ 7} In *State v. Polus*, 145 Ohio St.3d 266, 2016-Ohio-655, 48 N.E.3d 553, the Supreme Court of Ohio recognized in construing R.C. 2929.41(A) that “[t]he first sentence of R.C. 2929.41(A) enacts the general rule requiring concurrent sentencing with only clearly delineated exceptions[.]” *Id.* at ¶ 10. “The second sentence of R.C. 2929.41(A) creates a more specific rule that \* \* \* subject only to the exceptions stated in R.C. 2929.41(B)(3), a trial court must impose concurrent sentences for felony and misdemeanor convictions.” *Id.* The court held that a trial court may not impose consecutive sentences for any set of felony and misdemeanor convictions under R.C. 2929.41(B)(1) because R.C. 2929.41(B)(3) more narrowly circumscribes the authority of the trial courts. *Id.* at ¶ 12. In *Polus*, the defendant had been ordered to serve felony and misdemeanor sentences consecutively to one another within the same case, as well as consecutively to a felony-prison term imposed in a subsequent

case. *Id.* at ¶ 3-5. Because neither party had raised any issue with the consecutive-sentence order in the subsequent case, the court did not address that order. *Id.* at ¶ 5.

{¶ 8} In *Paige*, 153 Ohio St.3d 214, 2018-Ohio-813, 103 N.E.3d 800, the Supreme Court of Ohio recognized that “[s]plit sentences are prohibited in Ohio” and that “[g]enerally, pursuant to the felony-sentencing statutes, a court must impose either a prison term or a community-control sanction as a sentence for a particular felony offense—a court cannot impose both for a single offense.” *Paige*, at ¶ 6, citing *State v. Anderson*, 143 Ohio St.3d 173, 2015-Ohio-2089, 35 N.E.3d 512, ¶ 31. However, the court noted that “nothing in the sentencing statutes requires the duration of a community-control sanction [imposed on one count] to match that of a concurrent prison term [imposed on another count].” *Id.* at ¶ 10. “The only applicable requirement is that ‘[t]he duration of all community control sanctions imposed upon an offender under this division shall not exceed five years.’” *Id.*, quoting R.C. 2929.15(A)(1).

{¶ 9} Nevertheless, under the circumstances in *Paige*, the Supreme Court of Ohio found that the trial court improperly imposed, as part of the defendant's community-control sanction imposed on the domestic-violence count, that he be placed in a community-based correctional facility (“CBCF”) after his completion of the prison term imposed on the sexual-battery count. *Id.* at ¶ 13. The court reasoned that “none of the statutory exceptions in R.C. 2929.41(A) apply to permit the CBCF term to run consecutively to the prison term imposed on the sexual-battery count.”

*Id.*, citing *State v. Anderson*, 2016-Ohio-7044, 62 N.E.3d 229, ¶ 16 (8th Dist.); *State v. Barnhouse*, 102 Ohio St.3d 221, 2004-Ohio-2492, 808 N.E.2d 874 (concluding that because the General Assembly expressly provided statutory exceptions to the general rule that sentences of imprisonment must be run concurrently and because jail sentences did not qualify as an exception under R.C. 2929.41(A), jail sentences may not be imposed consecutively).

**{¶ 10}** In *State v. Hitchcock*, Slip Opinion No. 2019-Ohio-3246, the Supreme Court of Ohio held that a trial court has no authority to impose community-control sanctions on one felony count to be served consecutively to a prison term imposed on another felony count. *Id.* at ¶ 1. Additionally, the court determined that “[b]ecause a term of confinement in a CBCF is not a prison term, R.C. 2929.14(C)(4) does not permit a court to impose a CBCF term consecutively to a prison term. 2929.14.” *Id.* at ¶ 12.

**{¶ 11}** Upon review of the underlying cases in this matter, we recognize that a split sentence is not involved. The sentences herein were imposed in different cases and on separate counts. Nevertheless, the trial court lacked statutory authority to order the community-control sanctions and the jail term imposed in CR-18-627781 to run consecutively to the prison term imposed in CR-18-629561. *See Hitchcock*.

**{¶ 12}** We recognize that at the time of sentencing, *Hitchcock* had not been decided and the trial court did not have the benefit of that decision. Nevertheless, we are bound to follow the above decisions and must find that the sentence that was

imposed is not authorized by law. As stated in *Paige*, “[j]udges must impose only those sentences provided for by statute.” *Id.*, 153 Ohio St.3d 214, 2018-Ohio-813, 103 N.E.3d 800, at ¶ 13, citing *Anderson*, 143 Ohio St.3d 173, 2015-Ohio-2089, 35 N.E.3d 512, at ¶ 12. Accordingly, we find that the trial court erred by ordering the sentence imposed in CR-18-627781 to run consecutively to the sentence imposed in CR-18-629561.

{¶ 13} Although appellant is entitled to jail-time credit against the concurrent prison term, insofar as appellant claims that GPS home detention should be construed as a sentence of imprisonment, we reject this argument. As this court has previously determined, “[t]he imposition of house arrest with electronic monitoring does not constitute a term of imprisonment[.]” *State v. Curry*, 8th Dist. Cuyahoga No. 105203, 2018-Ohio-4771, ¶ 64; *see also State v. Krouskoupf*, 5th Dist. Muskingum No. CT2005-0024, 2006-Ohio-783, ¶ 11-12 (appellant was not entitled to jail-time credit because the imposition of house arrest as a term of community control does not constitute confinement). Thus, because appellant’s GPS home detention does not constitute confinement, he is not entitled to jail-time credit against the prison sentence for time served on home detention.

{¶ 14} Appellant’s first assignment of error is sustained in part.

{¶ 15} Under his second assignment of error, appellant claims that in CR-18-629561, the trial court failed to properly journalize the sentence imposed in that the concurrent and consecutive terms are inadequately described. Specifically, he claims that the verbiage describing Counts 4 and 9 (24 months on each) must “run

consecutive with Counts 2 & 8” (12 months on each) could be interpreted as a consecutive term totaling 48 months. Our review reflects that the trial court’s sentencing entry is clear with regard to the sentence imposed. The entry indicates that “Counts 1 and 3 to run concurrent with each other. Counts 4 and 9 to run concurrent with each other but consecutive with Counts 2 and 8.” The parties do not dispute that the trial court imposed an aggregate term of 36 months, which also is reflected in the journal entry. The second assignment of error is overruled.

### **Conclusion**

{¶ 16} We find that the trial court erred by ordering the sentence imposed in CR-18-627781 to run consecutively to the sentence imposed in CR-18-629561. We vacate this order and modify the sentence imposed in CR-18-627781 to run concurrent to the sentence imposed in CR-18-629561 with jail-time credit of 178 days against the concurrent sentences. Upon remand, the trial court shall issue journal entries in each case reflecting this modification.

{¶ 17} Judgment affirmed in part, reversed in part. Case remanded.

It is ordered that appellant and appellee share 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 common pleas court to carry this judgment into execution. The defendant’s convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

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SEAN C. GALLAGHER, JUDGE

LARRY A. JONES, SR., J., CONCURS;  
MARY J. BOYLE, P.J., CONCURS WITH SEPARATE CONCURRING OPINION

MARY J. BOYLE, P.J., SEPARATE CONCURRING OPINION:

{¶ 18} I fully concur with the majority opinion. I write separately to emphasize that although the trial court could not order the 60 months of community control sanctions in CR-18-627781 to be served consecutively to the 36-month prison sentence in CR-18-629561, it could have ordered them to be served concurrently, which is exactly the sentence that Wilkins now has with our modification. Thus, when Wilkins gets out of prison after 36 months, he will still have 24 months of community control sanctions remaining. And while those 24 months cannot include a residential sanction, it can include any number of nonresidential sanctions. *See State v. Paige*, 153 Ohio St.3d 214, 2018-Ohio-813, 103 N.E.3d 800, ¶ 14 (when defendant completes his 42-month prison sentence, he will have 18 months of nonresidential community control sanctions remaining).