[Cite as *State v. Point*, 2010-Ohio-3032.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-1162
v.	:	(C.P.C. No. 04CR05-3346)
Shawn Point,	:	(ACCELERATED CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 30, 2010

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

Shaw & Miller, and *Mark J. Miller*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Shawn Point, appeals from a judgment entered by the Franklin County Court of Common Pleas imposing a prison sentence for his community control violation. Because the trial court notified appellant at sentencing of a specific prison term that it could impose if appellant violated community control as required by R.C. 2929.19(B)(5), we affirm that judgment.

{¶2} In 2005, a Franklin County Grand Jury indicted appellant with one count of aggravated robbery with a firearm specification, two counts of robbery with a firearm specification, one count of carrying a concealed weapon, and one count of tampering with

evidence. Appellant eventually entered a guilty plea to one count of robbery without a firearm specification. The trial court accepted appellant's guilty plea, found him guilty, and placed him on community control for a period of five years.

{¶3} In 2007, appellant admitted to violating the terms and conditions of his community control.[1] As a result, the trial court revoked appellant's community control and imposed a four-year prison sentence.

{¶4} Appellant appeals and assigns the following error:

> THE TRIAL COURT ERRED IN REVOKING THE APPELLANT'S COMMUNITY CONTROL AND IMPOSING A PRISON SENTENCE BECAUSE THE TRIAL COURT FAILED TO ADEQUATELY NOTIFY THE APPELLANT AT HIS SENTENCING HEARING OF THE SPECIFIC CONSEQUENCES FOR VIOLATING COMMUNITY CONTROL, AS REQUIRED BY * * * *STATE V. BROOKS* (2004), 103 OHIO ST.3D 134.

{¶5} Appellant contends the trial court could not impose a prison term for his community control violation because the trial court, at his original sentencing, did not notify him of the specific prison term that it would impose if he violated community control. We disagree.

{¶6} R.C. 2929.15(A)(1) authorizes trial courts to place certain felony offenders on community control. R.C. 2929.19(B)(5) provides that if a sentencing court decides to place an offender on community control, that court "shall notify the offender that, if the conditions of the sanction are violated * * * [the court] may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation * * *." A trial court sentencing an offender to a community control sanction must, at the time of the sentencing, notify the offender of the specific prison term that may

[1] This was appellant's second violation. After the first violation, the trial court kept appellant on community control.

be imposed for a violation of the conditions of the sanction, as a prerequisite to imposing a prison term on the offender for a subsequent violation. *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, paragraph two of the syllabus.

{¶7} A trial court has options if an offender violates the terms of community control. One of those options is to impose a prison term. R.C. 2929.15(B). If a trial court chooses this option, the trial court may impose a lesser term of imprisonment than the term it notified the offender of at sentencing under R.C. 2929.19(B)(5). *Brooks* at ¶22. The trial court may not, however, impose a prison term greater than the term it notified the offender of at sentencing. R.C. 2929.15(B). Thus, the specific prison term stated by the trial court at sentencing when imposing community control becomes the maximum prison term that the offender could receive upon a community control violation. See *Brooks* at ¶23 (noting that from a trial court perspective, the notice "does little more than set a ceiling on the potential prison term, leaving the court with the discretion to impose a lesser term * * * when a lesser term is appropriate.").

{¶8} In *Brooks*, the Supreme Court of Ohio interpreted the meaning of the notification requirement set forth in R.C. 2929.19(B)(5) when a trial court imposes community control on an offender. The court, noting the statute's use of the word "specific" to modify "prison term," held that to strictly comply with the statute,[2] a trial court could not simply notify an offender that he or she will receive "the maximum" or a range, such as "six to twelve months," or some other indefinite term, such as "up to 12 months." *Brooks* at ¶19, 26-27. Instead, the *Brooks* court held that judges had to "notify the offender of the specific prison term that may be imposed" for violating community control. Id. at paragraph two of the syllabus.

[2] The court rejected the state's argument that substantial compliance with R.C. 2929.19(B)(5) is sufficient.

{¶9} In the present case, the trial court placed appellant on community control and warned him that if he violated the terms of his community control:

> you will be back in front of me * * * [and you could be sent to] the residential facility and Alvis House or Maryhaven. If we thought the problem was drugs or alcohol or if there was some other, like, I can't get a job, we could put you in the daily reporting program where you report every day. The idea there is to get you a job and the ultimate sentence could be your four-year prison sentence that I impose.

(May 26, 2005 Tr. 7-8).

{¶10} Appellant contends that the trial court's notification did not comply with *Brooks* and R.C. 2929.19(B)(5). Appellant argues that the trial court did not satisfy *Brooks* because it did not specifically inform him "that it would impose a 4-year prison term if the Appellant violated his community control." (Appellant's Brief at 3). We disagree.

{¶11} First, both *Brooks* and R.C. 2929.19(B)(5) describe the prison term that an offender must be notified of as the term that "may be imposed" for a violation of community control. Neither *Brooks* nor R.C. 2929.19(B)(5) require the trial court to inform the offender of the prison term the trial court "will" impose upon a community control violation. Indeed, it would be pure speculation for a trial court to advise an offender, without knowing the facts and circumstances of the future violation, what prison term, if any, it would impose. The *Brooks* court expressly noted this concern and stated that the specific prison term, if any, the offender is advised of "is not necessarily what the offender will receive if a violation occurs." Id. at ¶21.

{¶12} Second, requiring a trial court to notify an offender of the specific term it may impose for a community control violation is consistent with the dominant purpose of current sentencing procedures: truth in sentencing. *Brooks* at ¶25. A trial court has the

discretion to impose a prison term less than the term it notified the offender of at sentencing. The *Brooks* notification requirement sets the maximum prison term a trial court may impose for a community control violation. A trial court could choose a lesser term, or no prison term at all, depending on the facts and circumstances involved. R.C. 2929.19(B)(5). As noted, this is consistent with the use of the permissive term "may" in R.C. 2929.19(B)(5) and in *Brooks* when describing a trial court's power to impose a prison term.[3] Thus, it is more accurate to notify offenders of the specific prison term that the offender could receive, which informs the offender of the maximum prison term the trial court could impose.

{¶13} Appellant emphasizes one sentence in *Brooks* that indicates a trial court must inform the offender that it "will impose a definite term of imprisonment of a fixed number of months or years * * *." Id. at ¶19. Appellant contends that this language supports his position that a trial court must inform the offender of *the* specific prison term that he or she *will* receive for a community control violation. However, the syllabus in *Brooks* requires trial courts to "notify the offender of the specific prison term that may be imposed for a violation" of community control. *Brooks* at paragraph two of the syllabus. The syllabus in *Brooks*, coupled with a reasonable reading of the entire *Brooks*' decision, indicates that the court was emphasizing the need to notify the offender at sentencing of a specific prison term, not that the trial court would necessarily impose that specific prison term if the offender violated community control. Here, the trial court did notify appellant of a specific prison term that it could impose if appellant violated the terms of his community

[3] "The statutory use of the word 'may' is generally construed to make the provision in which it is contained optional, permissive, or discretionary * * *, at least where there is nothing in the language or in the sense or policy of the provision to require an unusual interpretation." *Dorrian v. Scioto Conserv. Dist.* (1971), 27 Ohio St.2d 102, 107 (citations omitted).

control. To the extent that any language in the *Brooks* opinion conflicts with the rule of law established in the syllabus of *Brooks*, the syllabus controls. *State v. Terry*, 171 Ohio App.3d 473, 2007-Ohio-1096, ¶9; *Azbell v. The Newark Group*, 5th Dist. No. 07 CA 00001, 2008-Ohio-2639, ¶58.

{¶14} Lastly, we note that other appellate courts in this state have rejected appellant's interpretation of *Brooks*. *State v. Reed*, 3d Dist. No. 4-05-22, 2005-Ohio-5614, ¶9 (rejecting argument that trial court had to notify defendant of specific prison term that will be imposed for a community control violation); *State v. Hall*, 5th Dist. No. 07CA40, 2007-Ohio-6471, ¶19 (rejecting argument that trial court had to use "will" or "would" in reference to prison term as opposed to "can" or "could"). For all these reasons, we conclude that the trial court's notification to appellant that it could impose a four-year prison sentence if he violated community control satisfied the requirement in *Brooks* and in R.C. 2929.19(B)(5). Accordingly, we overrule appellant's lone assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and FRENCH, JJ., concur.