[Cite as *State v. Nistelbeck*, 2012-Ohio-1765.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-874 (C.P.C. No. 08CR-8521)
Zachary M. Nistelbeck,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 19, 2012

Ron O'Brien, Prosecuting Attorney, and *Laura Swisher*, for appellee.

Scott & Nemann Co., LPA, and *Adam Lee Nemann*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Zachary M. Nistelbeck is appealing from the sentence he received following revocation of his community control. He assigns a single error for our consideration:

> The trial court abused its discretion by imposing a sentence that was clearly and convincingly contrary to law.

{¶ 2} Nistelbeck was convicted of abduction in 2009. He was sentenced to a prison term of five years, but the sentence was stayed and he was placed on two years of community control conditioned upon him serving a six-month period of incarceration in the Franklin County Corrections Center and his complying with various other conditions.

{¶ 3} Nistelbeck did not comply with some of the terms of his community control, so his probation officer filed for revocation. Specifically, Nistelbeck tested positive for

opiates, failed to submit required urine samples on other occasions, and failed to attend an assessment to ascertain whether or not he needed mental health treatment.

{¶ 4} Nistelbeck and his counsel stipulated to the alleged violations. The trial court judge then ordered revocation of the community control and ordered that Nistelbeck serve a four-year term of incarceration, as opposed to the five-year sentence originally ordered.

{¶ 5} At the second sentencing hearing, counsel for Nistelbeck argued that Nistelbeck could only receive a sentence of three years of incarceration because the Ohio legislature had changed the maximum penalty for abduction to three years. The trial court judge rejected the argument because Nistelbeck had been convicted and sentenced originally before the effective date for the modification enacted by the legislature.

{¶ 6} At issue here is the effect of R.C. 1.58(B) on this situation. R.C. 1.58(B) reads:

> If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

{¶ 7} The key phrase in R.C. 1.58(B) is "if not already imposed." We must determine if a sentence is actually imposed at the time of the original sentencing or if the sentence is not actually imposed. To make this determination, we consult both Ohio statutes, specifically R.C. 2929.19(B)(5) and the decision of the Ohio Supreme Court in *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746.

{¶ 8} R.C. 2929.19(B)(5) reads:

> If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a more restrictive sanction, or 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, as selected by the court from the

> range of prison terms for the offense pursuant to section 2929.14 of the Revised Code.

{¶ 9} The syllabus for *Brooks* reads:

> 1. Pursuant to R.C. 2929.19(B)(5), a trial court sentencing an offender to a community control sanction is required to deliver the statutorily detailed notifications at the sentencing hearing. (State v. Comer, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473, applied and followed.)
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> 2. Pursuant to R.C. 2929.19(B)(5) and 2929.15(B), 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 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.

{¶ 10} Both *Brooks* and R.C. 2929.19(B)(5) refer to "the specific prison term that may be imposed." This choice of words implies that the prison term has not actually been imposed yet, but will be imposed upon revocation of community control. If the prison term has not been imposed yet, this is "not already imposed" for purposes of R.C. 1.58(B).

{¶ 11} Because the prison term had not already been imposed at the time of Nistelbeck's revocation hearing, he is entitled to the benefit of the legislature's reduction of his potential sentence for abduction.

{¶ 12} We sustain the sole assignment of error and reverse the judgment of the Franklin County Court of Common Pleas. We remand the case to the Franklin County Court of Common Pleas for a new sentencing hearing which complies with R.C. 1.58(B) and imposes a sentence no greater than three years of incarceration.

Judgment reversed and remanded with instructions.

FRENCH and DORRIAN, JJ., concur.
