

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

STATE OF OHIO,	:	
	:	CASE NO. CA2014-02-028
Plaintiff-Appellee,	:	
	:	<u>OPINION</u>
	:	3/23/2015
- VS -	:	
	:	
JOHN BURKHEAD,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case No. CR2013-08-1239

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamdawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

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**M. POWELL, J.**

{¶ 1} Defendant-appellant, John Burkhead, appeals his sentence in the Butler County Court of Common Pleas for operating a vehicle while under the influence of alcohol with an accompanying habitual offender specification. For the reasons stated below, we affirm in part and reverse in part the decision of the trial court.

{¶ 2} On July 10, 2013, appellant was arrested for operating a vehicle while under the influence of alcohol (OVI). Appellant was indicted by a grand jury of OVI in violation of

R.C. 4511.19(A)(2), a third-degree felony, because appellant refused to submit to a chemical test and was previously convicted of a felony OVI offense within the past 20 years. The indictment included a habitual offender specification pursuant to R.C. 2941.1413 because appellant had 5 or more prior OVI convictions within the past 20 years.

{¶ 3} The case proceeded to a jury trial. Appellant stipulated that he had 5 or more prior OVI convictions within the past 20 years. The jury found appellant guilty of OVI and the habitual offender specification. The trial court then sentenced appellant to five years for the OVI conviction and an additional four years for the specification and ordered the sentences to be served consecutively. The trial court later journalized its findings in the judgment of conviction entry which stated that appellant was found guilty of R.C. 4511.19(A)(2), a third-degree felony and is sentenced to "[p]rison for a period of 5 years, which is a mandatory prison term pursuant to Revised Code Section 2929.13(F). An additional term of 4 years is imposed as a mandatory and consecutive term pursuant to [R.C.] 4511.19(G)(1)(c)(ii)."

{¶ 4} Appellant now appeals, asserting three assignments of error. For ease of discussion, we will address the first and second assignments of error together.

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE TRIAL COURT'S SENTENCE OF APPELLANT IS CLEARLY AND CONVINCINGLY CONTRARY TO LAW.

{¶ 7} Assignment of Error No. 2:

{¶ 8} THE TRIAL COURT FAILED TO COMPLY WITH THE REQUIREMENTS OF [R.C. 2929.14(C)] WHEN IT SENTENCED APPELLANT.

{¶ 9} Appellant alleges the court erred in imposing (1) a mandatory sentence for his OVI conviction, (2) a five-year sentence for the OVI as the pertinent sentencing statutes conflict, (3) a mandatory four-year sentence for the habitual offender specification, and (4) consecutive sentences for the OVI offense and habitual offender specification without making

the required findings under R.C. 2929.14(C).

{¶ 10} We review felony sentences pursuant to the standard of review set forth in R.C. 2953.08(G)(2) to determine whether the imposition of those sentences is clearly and convincingly contrary to law. *State v. Stamper*, 12th Dist. Butler No. CA2012-08-166, 2013-Ohio-5669, ¶ 9. A sentence is not clearly and convincingly contrary to law where the record supports the trial court's findings under R.C. 2929.14(C)(4) and where the trial court considers the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible statutory range. *Id.*

### **INTRODUCTION AND STATE v. STURGILL**

{¶ 11} Appellant argues the sentencing court made multiple errors in his sentence and points to various provisions of the pertinent statutes, R.C. 4511.19, 2941.1413, 2929.13, and 2929.14, to support his argument. Appellant also argues that this court should reconsider its decision in *State v. Sturgill*, 12th Dist. Clermont Nos. CA2013-01-002 and CA2013-01-003, 2013-Ohio-4648.

{¶ 12} In *Sturgill*, we held that when an offender is convicted of a third-degree felony OVI and an accompanying habitual offender specification, R.C. 2929.13(G)(2), 2929.14(B)(4), and 4511.19(G)(1)(e)(i) "permit a maximum mandatory five-year prison term" for the third-degree OVI offense and R.C. 2941.1413 authorizes "a mandatory additional prison term of one, two, three, four or five years" for conviction of the habitual offender specification." *Id.* at ¶ 42-44. In *Sturgill*, we addressed whether there was a conflict between R.C. 4511.19(G)(1)(e) and 2929.14(A)(3)(b) regarding the maximum sentence for a third-degree OVI felony when an offender has also been convicted of a habitual offender specification. Ultimately, we held the maximum sentence of five years as provided in R.C. 4511.19(G)(1)(e) is not in conflict with the three-year maximum sentence in R.C.

2929.14(A)(3)(b) because these statutes can be read together to ascertain the General Assembly's intent to permit a five-year maximum sentence for a third-degree felony OVI conviction. *Id.* at ¶ 40. We reiterated this analysis in *State v. Hensley*, 12th Dist. Warren No. CA2014-01-011, 2014-Ohio-5012, ¶ 29-32. *But see State v. Hartsook*, 12th Dist. Warren No. CA2014-01-020, 2014-Ohio-4528, ¶ 21-24 (R.C. 2929.13(G)(2) governs specification sentence and R.C. 2929.14(B)(4) addresses sentence for underlying OVI offense).<sup>1</sup>

{¶ 13} Upon further reflection, we find that *Sturgill* was misguided and we hereby overrule *Sturgill* and its progeny to the extent it held that when an offender is convicted of a third-degree felony OVI and an accompanying habitual offender specification, R.C. 2929.13(G)(2), 2929.14(B)(4), and 4511.19(G)(1)(e) permit a maximum five-year mandatory prison term for the OVI conviction and that R.C. 2941.1413 governs the sentence for conviction of the habitual offender specification. Although *Sturgill* concerned R.C. 4511.10(G)(1)(e)(i) and this case concerns R.C. 4511.19(G)(1)(e)(ii), the pertinent language of each of those divisions is substantially similar in terms of sentencing for a third-degree felony OVI offender who is also convicted of the habitual offender specification. Instead, we find that when an offender is convicted of a third-degree felony OVI in violation of R.C. 4511.19(A)(2) and an accompanying habitual offender specification, R.C. 4511.19(G)(1)(e) and 2929.13(G)(2) provides that a mandatory prison sentence of one, two, three, four, or five years shall be imposed for the specification and the additional sentence for the underlying OVI offense is governed under R.C. 2929.14(A)(3) and (B)(4), which provide for a non-mandatory sentence of 9, 12, 18, 24, 30, or 36 months. This view is in accord with several other appellate districts. *E.g.*, *South* at ¶ 17-18; *State v. Eckles*, 173 Ohio App.3d 606, 2007-Ohio-6220 (7th Dist.), ¶ 64-66; *State v. Smaltz*, 6th Dist. Ottawa No. OT-08-008, 2013-Ohio-

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1. This court's decision in *Sturgill* has been certified to the Ohio Supreme Court as conflicting with *State v. South*, 9th Dist. Summit No. 26967, 2014-Ohio-374. See *State v. South*, 139 Ohio St.3d 1402, 2014-Ohio-2245.

5350, ¶ 9-11; *State v. Weideman*, 11th Dist. Portage No. 2013-P-0100, 2014-Ohio-5768.

### **ANALYSIS**

{¶ 14} R.C. 4511.19(G)(1) provides, in pertinent part:

Whoever violates \* \* \* (A)(2) of this section is guilty of operating a vehicle under the influence of alcohol \* \* \*. The court shall sentence the offender \* \* \* under Chapter 2929. of the Revised Code, except as otherwise authorized or required by divisions (G)(1)(a) to (e) of this section.

There are two items of significance in R.C. 4511.19(G)(1) for purposes of sentencing. First, the statute makes it clear that OVI sentencing is subject to the general sentencing provisions of R.C. Chapter 2929. Second, reference is made to additional sentencing provisions in divisions (G)(1)(a) to (e).

{¶ 15} R.C. 4511.19(G)(1)(e)(ii) applies here as appellant had previously been convicted of a felony OVI and was charged under R.C. 4511.19(A)(2) for refusing to submit to the chemical test. R.C. 4511.19(G)(1)(e)(ii) refers to two classes of third-degree felony OVI offenders: those convicted of the habitual offender specification and those not convicted of the habitual offender specification. As appellant was convicted of the habitual offender specification, we will only discuss the provision of the R.C. 4511.19(G)(1)(e)(ii) relating to an offender convicted of the specification. R.C. 4511.19(G)(1)(e)(ii) provides as follows:

If the sentence is being imposed for a violation of division \* \* \* (A)(2) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code \* \* \*. The court may impose a prison term in addition to the mandatory prison term. \* \* \*

Therefore, R.C. 4511.19(G)(1)(e)(ii) incorporates by reference the prison sentence set forth in R.C. 2929.13(G)(2) for the habitual offender specification and provides the sentencing court with the discretion to impose an additional prison term pursuant to Chapter 2929 of the

Revised Code.

{¶ 16} R.C. 2941.1413 is the habitual offender specification statute and provides in pertinent part:

Imposition of a mandatory additional prison term of one, two, three, four, or five years upon an offender under division (G)(2) of section 2929.13 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging a felony violation of division (A) of section 4511.19 of the Revised Code specifies that the offender, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more equivalent offenses.

Similar to R.C. 4511.19(G)(1)(e)(ii), the habitual offender specification statute also incorporates by reference the sentencing provisions of R.C. 2929.13(G)(2) and precludes imposition of that sentence if the indictment does not contain the specification.

{¶ 17} R.C. 2929.13(G)(2), as relates to an offender convicted of a third-degree felony OVI offense and the habitual offender specification, provides that "the court shall impose upon the offender a mandatory term of local incarceration or a mandatory prison term \* \* \* of one, two, three, four, or five years." The offender shall serve this mandatory prison term *"consecutively to and prior to the prison term imposed for the underlying offense and consecutively to any other mandatory prison term imposed in relation to the offense."* (Emphasis added.) R.C. 2929.13(G)(2). The emphasized language of this statute clearly provides that the one, two, three, four, or five-year mandatory sentence referred to is the sentence for the habitual offender specification and not the underlying OVI offense.

{¶ 18} In *Sturgill*, this court found that the defendant's sentence for the R.C. 2941.1413 habitual offender specification was authorized under R.C. 2941.1413 and must be a mandatory prison term of one, two, three, four, or five years. *Sturgill*, 2013-Ohio-4648 at ¶ 44. This court then reasoned that the reference in R.C. 4511.19(G)(1)(e)(i) to the "mandatory prison term of one, two, three, four or five years" was relating to the sentence for the

underlying OVI offense and not the specification. *Id.* at ¶ 43. As discussed above, the references in R.C. 4511.19(G)(1)(e)(ii) and 2941.1413 to the one, two, three, four, or five-year mandatory prison term are not references to different sentences (i.e., a sentence for the underlying OVI offense and a sentence for the habitual offender specification, respectively) as we held in *Sturgill*, but rather references the same sentence (i.e., the sentence for the habitual offender specification established by R.C. 2929.13(G)(2)).

{¶ 19} R.C. 4511.19(G)(1)(e)(ii) also provides discretion to the sentencing court to impose a prison term in addition to the mandatory prison term for conviction of the habitual offender specification. The additional prison term is governed under the general sentencing statute, R.C. 2929.14. See R.C. 4511.19(G)(1) (sentence for an OVI offense shall be under R.C. Chapter 2929). R.C. 2929.14(B)(4) provides that if an offender is being sentenced for a third-degree OVI felony under R.C. 2929.13(G)(2), "the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division."

{¶ 20} The statute goes on to provide,

In addition to the mandatory prison term, \* \* \* and if the offender is being sentenced for a third-degree felony OVI offense, *the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section.* The total of the additional prison term imposed under division (B)(4) \* \* \* shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense.

(Emphasis added.) R.C. 2929.14(B)(4). OVI is not a specified third-degree felony in R.C. 2929.14(A)(3)(a) and therefore any additional term for a third-degree OVI felony must be for 9, 12, 18, 24, 30 or 36 months. R.C. 2929.14(A)(3)(b).

{¶ 21} Consequently, when an offender is convicted of a third-degree felony OVI offense under R.C. 4511.19(A)(2) and the habitual offender specification pursuant to R.C. 2941.1413, 4511.19(G)(1)(e) provides the offender's sentence for the habitual offender

specification must be a mandatory term of one, two, three, four, or five years pursuant to R.C. 2929.13(G)(2). The court may also impose an additional non-mandatory prison term for the underlying OVI offense of 9, 12, 18, 24, 30, or 36 months under R.C. 2929.14(A)(3)(b) and (B)(4). The mandatory prison term must be served consecutively to and prior to the additional non-mandatory prison term pursuant to R.C. 2929.13(G)(2).

{¶ 22} In this case, appellant was sentenced to a mandatory prison term of four years for the habitual offender specification and a mandatory prison term of five years in regards to his underlying OVI conviction and was ordered to serve the sentences consecutively. Appellant's sentence to a mandatory prison term of four years for the R.C. 2941.1413 specification is within the permissible statutory range. However, appellant's sentence to a mandatory five-year prison term for the OVI offense is not within the permissible statutory range and is contrary to law. When an offender has been convicted of a third-degree felony OVI offense and also has been convicted of the habitual offender specification, the trial court may only impose an additional prison term of 9, 12, 18, 24, 30, or 36 months. Furthermore, the additional term is not a mandatory prison term.<sup>2</sup>

{¶ 23} However, we find the trial court properly ordered appellant to serve the sentence for the OVI offense and the habitual offender specification consecutively. Pursuant to R.C. 2929.13(G)(2) the trial court was required to sentence appellant to serve consecutively the prison term for the specification and OVI offense. Therefore, the trial court was not required to make the findings under R.C. 2929.14(C) before imposing consecutive sentences. See *Smaltz*, 2013-Ohio-5350 at ¶ 9.

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2. In his brief, appellant characterizes the term "mandatory" as relating as to whether a court may impose a prison term. While the trial court does have the discretion to impose an additional prison term on top of the mandatory term, the meaning of "mandatory" as used in R.C. 2941.1413, 4511.19(G)(1)(e)(ii), 2929.13(G)(2), and 2929.14(B)(4) refers to not whether the trial court is required to impose the sentence but rather that the sentence is not subject to reduction pursuant to R.C. 2929.20, 2967.19, 2967.193, or any other provision of the Revised Code. See R.C. 2929.13(G)(2).



{¶ 24} Additionally, we are not persuaded by appellant's argument that there is a conflict between R.C. 2929.14(A)(3), 2929.13(G)(2), and 4511.19(G)(1)(e)(ii) regarding the sentence for a third-degree OVI felony when an offender is also convicted of a R.C. 2941.1413 specification. Our decision in *Sturgill* incorrectly stated that the five-year mandatory prison term in R.C. 4511.19(G)(1)(e)(ii) referenced the sentence for the underlying OVI offense. Instead, "mandatory prison term" in R.C. 4511.19(G)(1)(e)(ii) refers to the sentence for the R.C. 2941.1413 specification. As stated above, the statutes provide that an offender can be sentenced for a maximum of 36 months for the OVI offense pursuant to R.C. 2929.14(A)(3)(b) and (B)(4) and a maximum of five years for the habitual offender specification pursuant to R.C. 2929.13(G)(2). See *South*, 2014-Ohio-374 at ¶ 17-18; *but see Weideman*, 2014-Ohio-5768 at ¶ 21-22. Therefore, there is no conflict between R.C. 4511.19(G)(1)(e)(ii) or 2929.13(G)(2) which refer to the maximum mandatory term of five years for the specification and the allowance in R.C. 2929.14(A)(3)(b) and (B)(4) for a maximum additional prison term of 36 months for the underlying OVI offense as they refer to different sentences.

{¶ 25} Appellant also complains that the sentences he received were contrary to law because the trial court referenced R.C. 4511.19(G)(1)(c)(ii) in sentencing appellant to a four-year mandatory prison term for conviction of the habitual offender specification and referenced R.C. 2929.13(F) in sentencing appellant to a five-year mandatory prison term on the underlying OVI offense. Appellant is correct that neither of those statutes is applicable for sentencing purposes in this case. However, any error in the trial court's reference to these incorrect statutes is a clerical mistake and "may be corrected by the court at any time." Crim.R. 36. Upon remand, the sentencing entry shall reflect that appellant is being sentenced for the habitual offender specification pursuant to R.C. 4511.19(G)(1)(e)(ii) and 2929.13(G)(2), and upon the underlying OVI offense pursuant to R.C. 4511.19(G)(1)(e)(ii)

and 2929.14(A)(3)(b) and (B)(4).

{¶ 26} Finally, appellant claims the sentence is contrary to law because the aggregate sentence for the habitual offender specification and the underlying OVI offense exceeded five years in violation of R.C. 4511.19(G)(1)(e)(ii) and because the additional prison term for the underlying OVI offense was not reduced by the mandatory prison term of 60 days or 120 days as provided by R.C. 2929.14(B)(4).

{¶ 27} As mentioned above, R.C. 4511.19(G)(1)(e)(ii) refers to two separate classes of third-degree felony OVI offenders who have violated R.C. 4511.19(A)(2), those also convicted of a habitual offender specification and those not convicted of a habitual offender specification. Offenders also convicted of a habitual offender specification are subject to a mandatory prison term of one, two, three, four, or five years for the specification and an additional prison term for the underlying OVI offense. Those not convicted of a habitual offender specification are subject only to a mandatory prison term of 120 days plus an additional prison term. R.C. 4511.19(G)(1)(e)(ii) provides in part that, "[t]he cumulative total of a one hundred twenty-day mandatory prison term and the additional prison term for the offense shall not exceed five years."<sup>3</sup>

{¶ 28} The five years cumulative total expressed in R.C. 4511.19(G)(1)(e)(ii) only applies when an offender's mandatory sentence is 120 days. In this case, because appellant was convicted of the habitual offender specification, his mandatory prison term was one to five years. Therefore, appellant's aggregate prison term is not subject to the five-year limit.

{¶ 29} For the same reason set forth in the preceding paragraph, appellant's additional prison term for the underlying OVI offense is not subject to reduction by 120 days as

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3. We note that HB 86 reduced the maximum sentence for a third-degree felony OVI from 5 years to 36 months and that there may be some conflict between R.C. 4511.19(G)(1)(e)(ii) and R.C. 2929.13A)(3)(b) in this regard when an offender has not been convicted of a habitual offender specification. But, as appellant was convicted of the habitual offender specification, we are not called upon here to address any such conflict in this appeal.

provided in R.C. 2929.14(B)(4). R.C. 2929.14(B)(4) provides, in part,

\* \* \* if the offender is being sentenced for a third-degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, *the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term.*

(Emphasis added.) Appellant was not subject to the mandatory 120-day prison term but rather to a separate mandatory prison term of one, two, three, four, or five years for having been convicted of the habitual offender specification.

{¶ 30} Therefore, appellant's sentence to a four-year mandatory prison term for the habitual offender specification is within the permissible statutory range and not contrary to law. However, appellant's five-year mandatory prison sentence for the underlying OVI offense is not within the permissible statutory range and is contrary to law. Appellant's first assignment of error is sustained. Appellant's second assignment of error is overruled.

{¶ 31} Assignment of Error No. 3:

{¶ 32} THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS AND EQUAL PROTECTION RIGHTS WHEN IT SENTENCED HIM FOR BOTH THE OVI OFFENSE AND THE REPEAT OFFENDER SPECIFICATION.

{¶ 33} Appellant argues that the sentence he received for the specification under R.C. 2941.1413 was a denial of his due process and equal protection rights. Appellant maintains that the R.C. 2941.1413 specification gives the state unfettered discretion to choose between two significantly different punishments when charging similarly situated repeat OVI offenders.

{¶ 34} Appellant did not raise the issue of the constitutionality of R.C. 2941.1413 to the trial court and therefore he has waived this issue. "Failure to raise the issue of the constitutionality of a statute or its application at the trial court level generally constitutes waiver of that issue and need not be heard for the first time on appeal." *State v. Myers*, 12th

Dist. Madison No. CA2012-12-027, 2014-Ohio-3384, ¶ 12, citing *State v. Golden*, 10th Dist. Franklin No. 13AP-927, 2014-Ohio-2148, ¶ 11.

{¶ 35} Even if we were to consider appellant's constitutional arguments, this court has already determined that the habitual offender specification found in R.C. 2941.1413 does not violate the due process and equal protection clauses of the United States and Ohio Constitutions. *Hartsook*, 2014-Ohio-4528. In *Hartsook*, the defendant argued that the habitual offender specification was unconstitutional on its face because a prosecutor can chose to include or omit the specification in the indictment and subject similarly situated defendants to different punishments. *Id.* at ¶ 39. If a prosecutor choses to include the specification in the indictment under R.C. 2941.1413, an offender must be sentenced to a mandatory one, two, three, four, or five-year prison term. However, when an offender is not charged and convicted of the specification the only mandatory time facing a repeat offender is either a 60 or 120-day term of local incarceration or a 60 or 120-day prison term. *Id.*; see R.C. 4511.19(G)(1)(e); R.C. 2929.13(G)(2).

{¶ 36} We reasoned that R.C. 2941.1413 does not deny equal protection of the laws to repeat OVI offenders:

We disagree with [defendant's] contention that R.C. 2941.1413 denies equal protection of the laws to repeat OVI offenders simply because the law leaves it to the prosecutor's discretion to insert—or not insert—the specification into the indictment. It is axiomatic that the decision about what charge to file or bring before the grand jury generally rests within the discretion of the prosecutor. It will not be presumed that a prosecutor's decision to prosecute has been invidious or in bad faith, and [the defendant] has offered no argument that would call into question the rationale for the discretion that our legal system traditionally affords the prosecutor.

(Citations omitted.) *Hartsook* at ¶ 47.

{¶ 37} Additionally, we found the cumulative punishment the legislature sought to impose under R.C. 4511.19 and 2941.1413 serves a legitimate government interest and

"absent proof to the contrary, we are inclined to agree with the United States Supreme Court that the reasoning behind a sentencing regime that finds the latest offense for repeat OVI offenders to be an aggravated offense because it is a repetitive one is perfectly sound." *Hartsook* at ¶ 48, citing *United States v. Rodriguez*, 553 U.S. 377, 386, 128 S.Ct. 1783 (2008). Consequently, the specification in R.C. 2941.1413 passed rational basis review and did not violate due process or equal protection. *Id.* at ¶ 53.

{¶ 38} Therefore, we find that the habitual offender specification in R.C. 2941.1413 does not violate equal protection and due process of law. Further, we are unpersuaded by appellant's citation to *State v. Wilson*, 58 Ohio St.2d 52 (1979) and *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227, as this court has already found "the *Wilson* analysis, and therefore the *Klembus* conclusion inapposite \* \* \*." *Hartsook* at ¶ 52. Consequently, appellant has failed to show that there is no rational basis which justifies the challenged statutes and therefore an equal protection challenge cannot be upheld.

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

{¶ 40} Accordingly, appellant's sentence related to his underlying OVI conviction is contrary to law. We vacate appellant's sentence for his underlying OVI conviction and remand this matter to the trial court for resentencing for the underlying OVI conviction in accordance with R.C. 4511.19(G)(1)(e)(ii) and 2929.14(A)(3) and (B)(4). Appellant's sentence related to the habitual offender specification is not contrary to law. Additionally, upon remand, the trial court is directed to correct the sentencing entry to reflect that the sentence for appellant's habitual offender specification is in accordance with R.C. 4511.19(G)(1)(e)(ii) and 2929.13(G)(2).

{¶ 41} Judgment affirmed in part, reversed in part and remanded.

PIPER, P.J., and HENDRICKSON, J., concur.