[Cite as *State v. Drake*, 2007-Ohio-6586.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 21939
Plaintiff-Appellee	:	
	:	Trial Court Case No. 04-CRB-2978
v.	:	
	:	(Criminal Appeal from
CHRISTOPHER L. DRAKE	:	County Area One Court)
	:	
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 7th day of December, 2007.

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RAYMOND J. DUNDES, Atty. Reg. #0041515, Area One Prosecutor's Office, 195 South Clayton Road, New Lebanon, Ohio 45345
Attorney for Plaintiff-Appellee

GLEN H. DEWAR, Atty. Reg. #0042077, Law Office of the Public Defender, 117 South Main Street, Suite 400, Dayton, Ohio 45422
Attorney for Defendant-Appellant

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FAIN, J.

{¶ 1} Defendant-appellant Christopher Drake appeals from an order finding that Drake violated community control conditions, and imposing a sixty-one day jail sentence that had previously been suspended. Drake contends that the trial court erred by continuing his term of community control after finding a violation of community control and imposing a jail sentence.

{¶ 2} We agree with Drake that R.C. 2929.25(C)(2) requires courts to choose between imposing a longer term of community control sanctions and imposing a more restrictive sanction. However, continuation of the previously imposed term of community control sanctions is not prohibited and is consistent with the court's ability to impose a more restrictive sanction or combination of sanctions, including a jail term. The trial court complied with R.C. 2929.25(C)(2), because it did not impose a longer term for the community control sanctions. Instead, the court chose more restrictive sanctions that included a jail term. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} In November 2004, a complaint was filed in Montgomery County Area One Court, alleging that Drake had recklessly violated the terms of a protection order. The charge was a first-degree misdemeanor. Drake pled guilty in January 2005, and was sentenced to 180 days in jail and court costs. The trial court ordered Drake to serve 90 days, with credit for 30 days previously served. The court suspended 90 days and placed Drake on community control for five years, based on Drake's compliance with various conditions, including that he would commit no other crimes for five years, comply with mental health providers, have no contact with the complaining witness, and pay fines and court costs.

{¶ 4} Subsequently, a notice of revocation hearing and order was filed, and the court held a hearing on the charges in December 2005. Drake admitted at the hearing that he had violated the conditions that had been imposed. The trial court noted that 90 days of the sentence had already been served and that the remaining time could be

imposed. The court then imposed nine days, and gave Drake credit for nine days that he served after being arrested for failing to appear for the revocation hearing. A revocation order filed on December 7, 2005, noted these facts. The order also extended Drake's probation five years from the date of the citation, and stated that all prior non-conflicting conditions were to continue.[1]

{¶ 5} A second notice of revocation hearing and order was filed in February 2006. At a hearing in March 2006, Drake again admitted the violations. Noting that 81 days remained on the sentence, the court imposed 20 days, with credit given for seven days that Drake had already spent in jail. An order filed on March 22, 2006, reiterated these findings. This time, the order extended Drake's "probation" five years from the date of the conviction. The court again continued all prior non-conflicting conditions.

{¶ 6} In September 2006, a third notice of revocation was filed, and a hearing on that charge was held in November 2006. At the hearing, the trial court noted that 29 days of the 90 day sentence had been served, leaving 61 days that could be imposed. Drake admitted a violation, and the court imposed the remaining 61 days, with credit for three days served. The court ordered that the jail time would be suspended if Drake

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[1]We presume that the order was intended to refer to the date of the conviction, which occurred on January 12, 2005, rather than the date of the citation for the offense, which was November 16, 2004. At the revocation hearing, the court stated that it was continuing "probation" for five years from the date of conviction. However, the order that was subsequently filed states that "Probation is extended 5 years from date of citation." Doc. #25, p. 2. Although the law in Ohio is well-settled that "a trial court speaks only through its journal entries and not by oral pronouncement," *State v. Scovil* 127 Ohio App.3d 505, 510, 713 N.E.2d 452, we assume the reference to the "citation" is a typographical error, and that the court meant that probation would be extended five years from the date of the conviction. We also note that the references to "revocation" and "probation" are inaccurate, because community control (which is used now, rather than probation) was never revoked.

were admitted to an inpatient mental health program. In contrast to the two prior hearings, the court did not state that it was continuing Drake's period of community control. An entry was then filed on November 8, 2006, reflecting the above disposition. Unlike prior entries, this entry did not extend the community control period for five years from the date of conviction. Instead, the entry simply imposed the 61-day sentence, with credit for time served, and ordered suspension of the jail time if Drake were admitted to an in-patient program.

{¶ 7} Drake did not file a notice of appeal from the revocation orders filed in December 2005, and March 2006. However, Drake did file a notice of appeal following the November 2006 order. Drake also requested a suspension or stay of execution of the sentence from both the trial court and our court, but his requests were denied.

{¶ 8} As a final procedural note, we filed a show cause order in May 2007, due to the State's failure to file a brief. The State did not respond to the show cause order, nor has the State filed a brief.

II

{¶ 9} Drake's sole assignment of error is as follows:

{¶ 10} "THE TRIAL COURT ERRED WHEN IT CONTINUED APPELLANT'S TERM OF COMMUNITY CONTROL AFTER THE COURT HAD FOUND APPELLANT IN VIOLATION OF COMMUNITY CONTROL AND IMPOSED A JAIL SENTENCE."

{¶ 11} Under this assignment of error, Drake contends that the trial court violated R.C. 2929.25(C)(2) by simultaneously extending the term of community control and imposing a more restrictive community control sanction, including a jail term.

{¶ 12} As a procedural point, we note that an order revoking probation and requiring the defendant to serve a jail sentence is a final appealable order. *State v. Parsons*, Franklin App. No. 03AP-1176, 2005-Ohio-457, at ¶ 7. Consequently, if the trial court committed error with regard to the November 2005, and March 2006 orders, Drake should have appealed. Since Drake failed to do so, issues as to those orders are not properly before us. We will consider the alleged error, therefore, only insofar as it relates to the November 2006 revocation hearing and order. However, we will consider the events of the prior revocation hearings as background information, where pertinent.

{¶ 13} Effective January 1, 2004, R.C. 2929.25 was rewritten and several provisions governing community control sanctions were added. R.C. 2929.25(A)(1) now provides that in sentencing for misdemeanors, a court may do *either* of the following:

{¶ 14} "(a) Directly impose a sentence that consists of one or more community control sanctions authorized by section 2929.26, 2929.27, or 2929.28 of the Revised Code. The court may impose any other conditions of release under a community control sanction that the court considers appropriate. If the court imposes a jail term upon the offender, the court may impose any community control sanction or combination of community control sanctions in addition to the jail term.

{¶ 15} "(b) Impose a jail term under section 2929.24 of the Revised Code from the range of jail terms authorized under that section for the offense, suspend all or a portion of the jail term imposed, and place the offender under a community control sanction or combination of community control sanctions authorized under section 2929.26, 2929.27, or 2929.28 of the Revised Code."

{¶ 16} Thus, under the statute, a court has two choices: (1) the court may

impose community control sanctions without necessarily sentencing the defendant to a jail term; or (2) the court may impose a jail term within the limits of those authorized for the offense, suspend all or part of the sentence, and impose community control sanctions. Regardless of the choice that is made, R.C. 2929.25(A)(2) provides that the duration of all community control sanctions imposed and in effect at any time cannot exceed five years.

{¶ 17} R.C. 2929.25(A)(3) goes on to require that the court provide certain information to the defendant if the court chooses the option in R.C. 2929.25(A)(1)(a) of directly imposing community control sanctions, rather than imposing a jail term from among the ranges specified in R.C. 2929.24. Specifically, R.C. 2929.25(A)(3) states that:

{¶ 18} "At sentencing, *if a court directly imposes a community control sanction or combination of community control sanctions pursuant to division (A)(1)(a)* of this section, the court shall state the duration of the community control sanctions imposed and shall notify the offender that if any of the conditions of the community control sanctions are violated the court may do any of the following:

{¶ 19} "(a) Impose a longer time under the same community control sanction if the total time under all of the offender's community control sanctions does not exceed the five-year limit specified in division (A)(2) of this section;

{¶ 20} "(b) Impose a more restrictive community control sanction under section 2929.26, 2929.27, or 2929.28 of the Revised Code, but the court is not required to impose any particular sanction or sanctions;

{¶ 21} "(c) Impose a definite jail term from the range of jail terms authorized for

the offense under section 2929.24 of the Revised Code." (Emphasis added.)

{¶ 22} By its own terms, R.C. 2929.25(A)(3) does not apply to situations where the court has chosen to impose a definite jail term under R.C. 2929.25(A)(1)(b). This is logical, because if the court has already chosen the alternative in R.C. 2929.25(A)(1)(b) of imposing a definite term and suspending all or part of the term, the court would not need to impose a definite term if the offender violates the community control sanctions – a definite term has already been imposed. As a sanction for the violation, the court could simply require the offender to serve all or part of the definite term that had been suspended.

{¶ 23} The next subsection of R.C. 2929.25 – subsection (B) – deals with general procedures that are followed after an offender is sentenced to community control sanctions, and is not pertinent for purposes of the present case. Similarly, R.C. 2929.25(C)(1) is not relevant – it merely contains provisions requiring violations to be reported to the sentencing court.

{¶ 24} R.C. 2929.25(C)(2) is relevant, and provides as follows:

{¶ 25} "If an offender violates any condition of a community control sanction, the sentencing court may impose upon the violator a longer time under the same community control sanction if the total time under all of the community control sanctions imposed on the violator does not exceed the five-year limit specified in division (A)(2) of this section or may impose on the violator a more restrictive community control sanction or combination of community control sanctions, including a jail term. If the court imposes a jail term upon a violator pursuant to this division, the total time spent in jail for the misdemeanor offense and the violation of a condition of the community control sanction

shall not exceed the maximum jail term available for the offense for which the sanction that was violated was imposed. The court may reduce the longer period of time that the violator is required to spend under the longer sanction or the more restrictive sanction by all or part of the time the violator successfully spent under the sanction that was initially imposed."

{¶ 26} The first sentence of R.C. 2929.25(C)(2) is written in the disjunctive and again gives courts a choice of two options. The first option is that the court may impose a longer time under the existing community control sanctions, if the total time under all these sanctions does not exceed the five-year limit in R.C. 2929.25(A)(2).

{¶ 27} The second option is that the court may impose a more restrictive community control sanction or combination of sanctions, including a jail term. However, if a jail term is imposed, the total time spent in jail for the sanction and the misdemeanor offense cannot exceed the maximum term available for the underlying offense.

{¶ 28} In the context of the present case, this means that when Drake returned to the trial court on a violation, the court had the option of increasing the length of Drake's existing community control sanctions, which included matters like complying with mental health providers and paying fines. Alternatively, the court could have imposed more restrictive community control sanctions, including a jail term, but the total length of any jail term, including time already served, could not exceed the maximum sentence of 180 days for Drake's first-degree misdemeanor conviction.

{¶ 29} Drake contends, however, that once the trial court elected to impose a jail term, the court could not extend the period of community control. For this proposition, Drake relies on *State v. Redmond*, Montgomery App. No. 21500, 2007-Ohio-441, which

mentioned this concept in dicta.

{¶ 30} *Redmond* involved the issue of whether the trial court had complied with the requirements of R.C. 2929.25(A)(3). We concluded that the court had substantially complied with R.C. 2929.25(A)(3)(c) by warning the defendant that a community control violation could result in jail time. 2007-Ohio-441, at ¶ 15-16. However, we vacated the imposition of a five-year period of community control because the court had not warned the defendant of this possibility at sentencing. Id. at ¶ 19-20. We also agreed with the defendant's assertion that trial courts cannot use both options -- lengthening the term of community control and imposing jail terms -- because R.C. 2929.25(C)(2) refers to these options in the disjunctive. Id. at ¶ 26. We classified our comments as dicta, however, because the disposition of the other assignments of error had mooted the assignment of error in question. Id. at ¶ 23-27.

{¶ 31} We continue to adhere to the view that the options in R.C. 2929.25(C)(2) are disjunctive. Consequently, the trial court would have erred if it had lengthened Drake's term of community control and had also imposed a jail term. However, this is not what the trial court did.

{¶ 32} In the first two violation hearings, the trial court did not lengthen the term of the community control sanctions. Although the court used language indicating that the term was being "extended," the court simply continued the five-year term of community control that had already been imposed. The court also imposed a jail term of a certain amount of days. R.C. 2929.25(C)(2) does not prohibit these actions.[2]

[2]As we noted earlier, the actions taken on the first two community control violations are not before us, since Drake failed to appeal from those actions.

{¶ 33} Likewise, the trial court did not extend the length of the community control sanctions when it ruled on Drake's third community control violation. In fact, the court order of November 8, 2006, says nothing about the term of any community control sanctions. The court simply imposed the 61 days remaining from the original suspended sentence and ordered that the term would be suspended if Drake were admitted to an in-patient program. Assuming that Drake served this time in full, his total jail time would have been 180 days, which complies with the requirement in R.C. 2929.25(C)(2) that the time served for the misdemeanor and any community control violations may not exceed the maximum term allowed for the defendant's offense.

{¶ 34} In contrast, the trial court in *Redmond* originally imposed only two years of community control. Subsequently, the court lengthened that term by an additional five years, while also imposing jail time. This was erroneous under R.C. 2929.25(C)(2) and would have required reversal, if we had not vacated the additional five years of community control. 2007-Ohio-441, at ¶ 18-27.

{¶ 35} Drake argues, however, that a trial court cannot "continue" community control sanctions and also impose a jail term. In this regard, Drake relies on *State v. Ham*, 170 Ohio App.3d 38, 2007-Ohio-133, 865 N.E.2d 953, and R.C. 2951.09, which governed revocation of probation prior to the enactment of R.C. 2929.25.

{¶ 36} Before addressing the cited case, we should note that R.C. 2929.25(C)(2) does not prohibit the continuation of community control sanctions that have already been imposed. Instead, R.C. 2929.25(C)(2) offers a choice between two methods of punishment for violations: (1) lengthening the term of the existing community control sanctions; or (2) applying more restrictive sanctions, including a jail term. Notably, R.C.

2929.25(C)(2) states that " the court * * * may impose * * * a more restrictive community control sanction or *combination of community control sanctions, including a jail term*."

{¶ 37} As an example, suppose that an offender is originally sentenced to 90 days in a half-way house, two years of random alcohol testing, two years of basic probation supervision, and a fine. These are all permissible community control sanctions under R.C. 2929.26, R.C. 2929.27, and R.C. 2929.28. If the offender fails an alcohol test, the court could lengthen the period of alcohol testing and basic supervision to three years. This would be a choice of the first method of punishment in R.C. 2929.25(C)(2).

{¶ 38} The court could also choose to impose a more restrictive community control sanction or combination of sanctions, like a jail term of three days, intensive probation supervision, and random alcohol testing for the remainder of the original community control period. In this situation, including a jail term would not preclude the court from continuing the community control sanctions, because R.C. 2929.25(C)(2) specifically provides for a combination of sanctions, including a jail term. What the court cannot do in this situation is lengthen the term of community control.

{¶ 39} We have previously noted that " '[m]ost of the case law examining probation revocations is equally applicable to the revocation of community control sanctions.' " *State v. Whitaker*, Montgomery App. Nos. 21003, 21034, 2006-Ohio-998, at ¶ 10. However, we have also stressed that probation and community control sanctions are similar in operational effect, but are based on different philosophies. Probation is an " 'expression of leniency in place of a deserved prison sentence' while community control sanctions are imposed as 'the sentence that is deserved and which

the court has deemed to be most reasonably calculated to protect the public from future crime.' " Id., quoting from *State v. Wolfson,* Lawrence App. No. 03CA25, 2004-Ohio-2750, ¶ 6. As a result, even though we continue to apply case law pertaining to probation revocation, there are instances where statutory changes compel a different approach.

{¶ 40} In *Ham*, we considered R.C. 2951.09, which was repealed in January 2004. We noted that after a court inquires into a defendant's conduct, R.C. 2951.09 allows the court to " 'terminate the probation and impose any sentence that originally could have been imposed or continue the probation and remand the defendant to the custody of the probationary authority.' " 2007-Ohio-133 at ¶ 10, quoting from R.C. 2951.09. We agreed with other Ohio courts that R.C. 2951.09 is written in the disjunctive and allows trial courts to either impose the original sentence or continue probation, but not both. Id. at ¶ 11-15. We held, therefore, that trial courts lacked authority to continue probation and did not have jurisdiction to impose further sentences on defendants, where the court chose the option of imposing sentence.

{¶ 41} Based on the wording of R.C. 2951.09, this was a correct interpretation and remains correct. Specifically, the statute states that the court "may terminate probation and impose any sentence * * * or continue the probation * * * ." However, R.C. 2951.09 and R.C. 2929.25(C)(2) are worded differently. Both statutes are admittedly written in the disjunctive, but that is where the similarity ends. R.C. 2929.25(C)(2) does not give trial courts a choice between terminating probation and imposing sentence, or continuing probation. Instead, trial courts may lengthen the term of the existing community control sanctions, or they may impose a more restrictive

community control sanction or combination of sanctions, including a jail term. As we have already discussed, choosing the latter alternative does not mean that community control is terminated just because a jail term is imposed. The statute specifically gives courts the ability to impose a combination of sanctions, including a jail term. If sanctions other than a jail term are imposed, the defendant's compliance would need to be monitored.

{¶ 42} Accordingly, the trial court did not commit error or lose jurisdiction when it imposed a jail term for Drake's community control violation. Drake's sole assignment of error is overruled.

III

{¶ 43} Drake's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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WOLFF, P.J., and DONOVAN, J., concur.

Copies mailed to:

Raymond J. Dundes
Glen H. Dewar
Hon. James L. Manning