[Cite as *State v. Coon*, 2014-Ohio-5521.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 14CA2
	:	
vs.	:	
	:	DECISION AND JUDGMENT
JEFFREY A. COON,	:	ENTRY
	:	
Defendant-Appellant.	:	**Released: 12/05/14**

APPEARANCES:

Timothy Young, Ohio Public Defender, and Eric M. Hedrick, Assistant State Public Defender, Columbus, Ohio, for Appellant.

Colleen S. Williams, Meigs County Prosecutor, and Jeremy L. Fisher, Pomeroy, Ohio, for Appellee.

McFarland, J.

{¶1} This is an appeal from a Meigs County Court of Common Pleas judgment entry revoking Appellant, Jeffrey Coon's, community control and sentencing him to the balance of his original suspended terms of imprisonment. On appeal, Appellant contends that the trial court committed reversible error when it imposed a five-year prison term for third-degree felony passing bad checks, in violation of Ohio's sentencing laws, as well as in violation of his state and federal constitutional rights. Because we conclude that the trial court actually imposed Appellant's prison terms at his

original sentencing hearing in 2008, which was prior to the enactment of H.B. 86, Appellant's sentence is not contrary to law. As such, we find no merit in Appellant' sole assignment of error and it is overruled. Accordingly, the decision of the trial court is affirmed.

FACTS

{¶2} On February 29, 2008, Appellant, Jeffrey Coon, pled guilty to four felony counts as follows: count one, theft, a fourth degree felony in violation of R.C. 2913.02; count two, passing bad checks, a fourth degree felony in violation of R.C. 2913.11; count three, theft, a fourth degree felony in violation of R.C. 2913.02; and count four, passing bad checks, a third degree felony of R.C. 2913.11. A sentencing hearing was held on March 3, 2008, in which the trial court sentenced Appellant on counts one and two only, to consecutive eighteen month terms of imprisonment. The sentencing entry provided that sentencing as to counts three and four would be continued to a later date, to be set by a separate entry.

{¶3} The sentencing hearing as to counts three and four was held on September 22, 2008. Although the transcript from that sentencing hearing is not included in the record before us, the sentencing entry filed by the trial court indicates that the trial court sentenced Appellant to a term of eighteen months imprisonment on count three and a five-year term of imprisonment

on count four, to be served consecutively for a total aggregate sentence of six and one-half years. The sentencing entry further indicates that the trial court suspended those sentences and placed Appellant on community control for a period of five years, to commence upon completion of his sentences for counts one and two. The entry further provided that Appellant was informed that the trial court reserved the right to impose the maximum sentences if he should violate a term or condition of his community control.

{¶4} On June 25, 2013, the State filed a motion to revoke community control alleging Appellant violated his community control by telling his caseworker that "he had bought a 9mm pistol and was going to take care of people." It was further alleged that Appellant was in possession of a pellet gun that resembled a 9mm pistol at the time. The trial court held a probable cause hearing on July 22, 2013, and then a final hearing on August 8, 2013. The trial court ultimately revoked Appellant's community control and during the final hearing informed Appellant that he was being sentenced "to the balance of [his] term, terms." A judgment entry was filed on August 12, 2013, stating Appellant's community control had been revoked and sentencing Appellant to an eighteen-month term of imprisonment on count three and a five-year term of imprisonment on count four, to be served consecutively for an aggregate term of six and one-half years.

{¶5} Although Appellant did not immediately file an appeal from that decision, he filed a motion for leave to file a delayed appeal on March 6, 2014, which this Court granted on April 4, 2014. The matter is now before us, Appellant having raised only one assignment of error, as follows.

ASSIGNMENT OF ERROR

"I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT IMPOSED A FIVE-YEAR PRISON TERM FOR THIRD-DEGREE FELONY PASSING BAD CHECKS, IN VIOLATION OF OHIO SENTENCING LAW AND IN VIOLATION OF MR. COON'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION."

ASSIGNMENT OF ERROR I

{¶6} In his first assignment of error, Appellant contends that the trial court erred in imposing a five-year prison term for third-degree felony passing bad checks in violation of Ohio's sentencing laws, as well as his state and federal constitutional rights. Appellant argues that the passage of H.B. 86, which occurred after his original sentencing in 2008, amended the sentencing laws and reduced the maximum term of imprisonment for a third degree felony such as the one committed by Appellant from five years to thirty-six months. The State appears to concede Appellant's argument and asks this Court to remand this matter for resentencing. For the following

reasons, however, we reject the arguments raised by both parties and instead affirm the decision of the trial court.

{¶7} In *State v. Brewer*, 4th Dist. Meigs No. 14CA1, 2014-Ohio-1903, ¶ 33, we recently held that when reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08(G)(2). Id. ("we join the growing number of appellate districts that have abandoned the *Kalish* plurality's second-step abuse-of-discretion standard of review; when the General Assembly reenacted R.C. 2953.08(G)(2), it expressly stated '[t]he appellate court's standard of review is not whether the sentencing court abused its discretion' "). R.C. 2953.08(G)(2) specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either that "the record does not support the sentencing court's findings" under the specified statutory provisions or "the sentence is otherwise contrary to law." Therefore, in order to find merit in Appellant's argument, it must be demonstrated that Appellant's sentence is contrary to law.

{¶8} R.C. 2929.14 governs felony prison terms and at the time Appellant was originally sentenced in 2008 provided that the maximum term of imprisonment for Appellant's third degree offense of passing bad checks was five years. However, the passage of H.B. 86, effective September 30,

2011, reduced the maximum possible prison term for third degree felony passing bad checks in violation of R.C. 2913.11 from five years to thirty-six months. Further, R.C. 1.58(B) states that:

> "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." (Emphasis added).

Thus, as recently noted by the Supreme Court of Ohio in *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612, "the determining factor on whether the provisions of H.B. 86 apply to an offender is not the date of the commission of the offense but rather whether sentence has been imposed."

{¶9} Here, there is no dispute that Appellant committed his offense prior to the effective date of amended R.C. 2929.14(A). As such, if the prison term was actually imposed at the 2008 sentencing hearing, the maximum prison term of five years on count four would have been proper. The issue that must be resolved, in our view, is whether the five year prison term was imposed on Appellant at his 2008 sentencing hearing, or at his 2013 revocation hearing, at which time the maximum allowable sentence was thirty-six months.

{¶10} In order to resolve this question, Appellant urges us to apply the reasoning set forth in our recent decision, *State v. Tolliver*, 4th Dist. Athens No. 12CA36, 2013-Ohio-3861. In *Tolliver,* we held that the amendments to R.C. 2929.14(A) were applicable where the trial court did not actually impose a prison term upon Tolliver when it sentenced him in 2009 and instead simply notified Tolliver that a violation of community control could result in a stated prison term. Id. at ¶ 2. In reaching our decision in *Tolliver*, we relied upon reasoning from other districts which determined that "a prison term applicable only upon a defendant's violation of community control is not actually imposed until community control is revoked." Id. at ¶ 11; citing *State v. Marshall*, 6th Dist. Erie No. E-12-022, 2013-Ohio-1481, ¶ 8-12; *State v Vlad*, 153 Ohio App.3d 74, 2003-Ohio-2930, 790 N.E.2d 1246, ¶ 16 (7th Dist.); See also, *State v. Nistelbeck*, 10th Dist. Franklin No. 11AP-874, 2012-Ohio-1765 and State v. West, 2nd Dist. Montgomery No. 24998, 2012-Ohio-4615.

{¶11} However, in *Marshall,* the court noted that one of the factors that led to its decision was the fact that the 2009 sentencing entry stated that the prison term "would be imposed" if community control sanctions were violated and that such "conditional language" supported the conclusion that "the prison term was not actually imposed prior to the effective date of the

2011 amendments to R.C. 2929.14." *Marshall* at ¶ 12. The Fifth District reached the same result based upon similar reasoning in *State v. Fisher*, 5th Dist. Stark No. 2012CA00031, 2013-Ohio-2081. In *Fisher*, the court determined that the amended version of R.C. 2929.14 applied to the appellant, in part, because of "conditional language" contained in the original pre-H.B. 86 sentencing entry which suggested a prison term was not actually imposed at that time.

{¶12} The case presently before us, however, is factually distinguishable from the above cases, including *Tolliver*. Here, the trial court, at the original sentencing hearing held in 2008, stated as follows:

> " * * * it is hereby ORDERED, ADJUDGED and DECREED that the said Jeffrey A. Coon, as to Count Three, charging the offense of THEFT, a felony of the fourth degree, be sentenced to a term of EIGHTEEN MONTHS in a proper state penal institution; and as to Count Four, charging the offense of PASSING BAD CHECKS, a felony of the third degree, be sentenced to a term of FIVE YEARS in a proper state penal institution."

The court further ordered those sentences to be served consecutively for an aggregate sentence of six and one-half years. The court went on to state as

follows in the same sentencing entry: "It is further ORDERED that the sentences as to Counts Three and Four be suspended and the Defendant placed on community control for a period of five years * * *."

{¶13} Thus, we believe it is clear that the trial court actually imposed the terms of imprisonment during the 2008 sentencing hearing, but then suspended them and placed Appellant on community control. In imposing the sentences at that time, the court did not use conditional language or simply warn Appellant that a stated prison term could be imposed, but rather it imposed the sentence of imprisonment and then suspended the sentence. We find this distinction key and determine, as a result, that the penalty of a five-year term of imprisonment had already been imposed at the time H.B. 86 was passed. This scenario is expressly excepted by R.C. 1.58(B), which excludes from application cases in which the penalty has already been imposed.

{¶14} The same result was reached by the Fifth District based upon similar facts in *State v. Radcliff*, 5th Dist. Delaware No. 02CAA01004, 2002 WL 598507. In *Radcliff*, the court reasoned that the sentencing statute in effect at the time probation was ordered was applicable rather than the amended statute in effect at the time of the revocation, because the trial court originally ordered an indefinite sentence, which was suspended in lieu of

probation. Id. at *1. Based upon those facts, the *Radcliff* court held that the "sentence was not a new sentence, but rather a reimposition of the previously suspended sentence." Id.

{¶15} Based upon the foregoing, we conclude that the trial court sentenced Appellant to a five-year term of imprisonment in 2008, actually imposed the penalty at that time, and then suspended that sentence and ordered community control in lieu. As such, the prior version of R.C. 2929.14, which provided that the maximum term of imprisonment for Appellant's third degree felony offense was five years was applicable. Because the suspended sentence re-imposed by the trial court in 2013 was within the permissible range at the time it was originally imposed, we cannot conclude that the sentence was contrary to law. Thus, we find no error on the part of the trial court. Having found no merit in the sole assignment of error raised by Appellant, it is overruled, and the decision of the trial court is affirmed.

JUDGMENT AFFIRMED.

Hoover, J., dissenting:

{¶16} I respectfully dissent.

{¶17} "Generally, when reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08(G)(2)." *State v. Baker*, Athens No. 13CA18, 2014–Ohio–1967, ¶ 25. *See also State v. Brewer*, Meigs No. 14CA1, 2014–Ohio–1903, ¶ 33 ("we join the growing number of appellate districts that have abandoned the *Kalish* plurality's second-step abuse-of-discretion standard of review; when the General Assembly reenacted R.C. 2953.08(G)(2), it expressly stated that '[t]he appellate court's standard of review is not whether the sentencing court abused its discretion' "). R.C. 2953.08(G)(2) specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either that "the record does not support the sentencing court's findings" under the specified statutory provisions or "the sentence is otherwise contrary to law."

{¶18} Although *Kalish* may not provide the standard of review framework for reviewing felony sentences, it does provide guidance for determining whether a sentence is clearly and convincingly contrary to law. *See State v. Lee*, 12th Dist. Butler No. CA2012-09-182, 2013-Ohio-3404,

¶ 10. According to *Kalish*, a sentence is not clearly and convincingly contrary to law when the trial court considered the purposes and principles set forth in 2929.11, as well as the factors listed in R.C. 2929.12, properly applies post release control, and sentences within the permissible statutory range. *Id.*; *see also Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124 at ¶ 18.

{¶19} In 1996, new sentencing statutes contained in Am. Sub.S.B. No.2 ("S.B.2") took effect, which *inter alia*, prohibit a trial court from imposing both a prison sentence and community control sanctions on the same offense. *State v. Vlad*, 153 Ohio App.3d 74, 78, 2003-Ohio-2930, 790 N.E.2d 1246 (7th Dist.); *State v. Hoy*, 3d Dist. Nos. 14–04–13, 14–04–14, 2005-Ohio-1093, 2005 WL 579119, ¶ 18.

{¶ 20} In *State v. Francis*, 4th Dist. Meigs No. 10CA2, 2011-Ohio 4497 at ¶ 17 this court found a sentence to be void when a trial court imposed both a prison sentence and community control for the same offense. This court stated:

> "[T]he sentencing statute[, however,] does not allow a trial court to impose both a prison sentence and community control for the same offense." *State v. Jacobs*, 189 Ohio App.3d 283, 2010–Ohio–4010, at ¶ 5 (citations omitted). See, also, *State v.*

> *Vlad*, 153 Ohio App.3d 74, 2003–Ohio–2930, at ¶ 16 ("[T]rial courts need to decide which sentence is most appropriate—prison or community control sanctions—and impose whichever option is deemed to be necessary."). The state concedes that Francis's sentence is contrary to law. Furthermore, the state argues that Francis's sentence is void. We agree. "Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, superseded by statute on other grounds. And because the trial court disregarded statutory requirements when it sentenced Francis to both a prison term and community control sanctions, we find that Francis's sentence is void.

{¶21} Coon's sentence should not be affirmed when it is void as a matter of law. When the prison term was imposed in 2008, it was contrary to law. At the sentencing hearing in 2008, the trial court imposed a prison term of eighteen months on count three, theft, and a prison term of five years on count four, passing bad checks. The trial court then suspended the sentences on counts three and four and placed Coon on community control for a period of five years.

{¶22} The principle opinion's reliance upon *State v. Radcliff*, 5th Dist. Delaware No. 02CAA01004 is misplaced. In *Radcliff*, the sentence was a pre-S.B.2 sentence. Radcliff was sentenced on May 9, 1996. S.B.2 was not effective until July 1, 1996. Therefore, when the trial court sentenced Radcliff to an indefinite term of one to five years in prison, suspended in lieu of probation, this sentence was not contrary to law. When the trial court "reimposed" the original sentence, the sentence was not a new sentence. The trial court was correct in binding Radcliff to the original sentence.

{¶23} In the case sub judice, Coon is urging this court to allow him to benefit from R.C. 1.58(B) which states:

> "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."

{¶24} Even though the trial court tried to impose the sentence in 2008, it was void as a matter of law since prison and community control were both ordered simultaneously for the same offense. Since the 2008 sentence is void, Coon must be resentenced. Coon must be sentenced under the terms of H.B. 86, effective September 30, 2011 which reduced the maximum possible prison term for third degree felony passing bad checks in

violations of R.C. 2913.11 from five years to thirty-six months. See *State v. Tolliver*, 4th Dist. Athens No. 12CA36, 2013-Ohio-3861.

{¶25} I would sustain Coon's assignment of error, reverse and remand the case for resentencing.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, P.J.: Concurs in Judgment and Opinion.
Hoover, J.: Dissents with Dissenting Opinion.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.