

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 13CA44
	:	
vs.	:	
	:	
MARK L. BARNHART,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
	:	
Defendant-Appellant.	:	<b>Released: 10/24/14</b>

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APPEARANCES:

Timothy Young, Ohio Public Defender, and Stephen P. Hardwick, Assistant Public Defender, Columbus, Ohio, for Appellant.

Keller J. Blackburn, Athens County Prosecutor, and Matthew M. Ward, Assistant Prosecuting Attorney, Athens, Ohio, for Appellee.

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McFarland, J.

{¶1} This is an appeal from an Athens County Court of Common Pleas judgment entry sentencing Appellant, Mark Barnhart, after he pled guilty to one count of burglary, a second degree felony in violation of R.C. 2911.12(A)(1), a crime which he committed while on post-release control. On appeal, Appellant contends that the trial court erred “by imposing postrelease control sanction time without specifying the term either at sentencing or in the judgment entry.” Because Appellant has failed to

demonstrate that his sentence is contrary to law, his sole assignment of error is overruled. Accordingly, the decision of the trial court is affirmed.

### FACTS

{¶2} Appellant, Mark Barnhart, was indicted for one count of burglary, a second degree felony in violation of R.C. 2911.12(A) on April 22, 2013. When the indictment was issued, Appellant was serving a three-year mandatory term of post-release control, which had begun on May 14, 2012. The burglary charge stemmed from an incident that resulted in Appellant's arrest after he was reportedly found inside an apartment located in an Athens, Ohio apartment complex. Upon being confronted by the apartment's occupant, Appellant picked up three DVDs and left. Although Appellant initially pled not guilty at his arraignment, he later changed his plea and entered a plea of guilty on September 27, 2013. Thereafter, Appellant was sentenced on October 29, 2013.

{¶3} At the sentencing hearing, the trial court sentenced Appellant to a five-year prison term on the burglary conviction as well as three years of mandatory post-release control upon his release. The trial court also terminated Appellant's current term of post-release control and imposed a prison term for the post-release control violation in accordance with R.C. 2929.141(A)(1). Thus, the trial court imposed an additional prison term

which consisted of the remainder of Appellant's current term of post-release control to be served consecutively to the prison term imposed on the burglary conviction.

{¶4} The trial court incorporated Appellant's sentence into a judgment entry filed on November 8, 2013. It is from this judgment entry that Appellant now brings his timely appeal, setting forth a single assignment of error for our review.

#### ASSIGNMENT OF ERROR

"I. THE TRIAL COURT ERRED BY IMPOSING POSTRELEASE CONTROL SANCTION TIME WITHOUT SPECIFYING THE TERM EITHER AT SENTENCING OR IN THE JUDGMENT ENTRY. R.C. 2929.141 AND 2929.19."

#### LEGAL ANALYSIS

{¶5} In his sole assignment of error, Appellant challenges the sentence imposed by the trial court insofar as the trial court imposed the time remaining on his post-release control as a prison sentence, to be served consecutively with the sentence on his new felony conviction, in accordance with R.C. 2929.141. Appellant questions whether a judicial sanction imposed pursuant to R.C. 2929.141 is void when the trial court fails to specify the amount of prison time imposed. Thus, Appellant essentially argues that because the trial court did not calculate the exact number of

years, months and days remaining on post-release control that the sentence was insufficiently precise.

{¶6} 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.”

{¶7} Thus, Appellant must demonstrate that his sentence is contrary to law. However, Appellant concedes he was unable to find any case law addressing the degree of specificity needed when imposing a post-release control prison sentence under R.C. 2929.141. Further, according to this Court’s research, it appears that this particular issue has yet to be addressed in Ohio. Appellant argues that “the cases concerning the imposition of

postrelease control apply by analogy because it would be illogical to require less specificity when imposing a postrelease control prison term than when imposing the underlying postrelease control.” The State counters by arguing that Appellant was told he would have to serve the amount of time between when he was sentenced, on October 29, 2013, and the date his post-release control was set to expire on May 14, 2015, which the State claims informed Appellant with “sufficient specificity to notify him of the length of his prison sentence.”

For the following reasons, we agree.

{¶8} R.C. 2929.141 addresses sentencing for an offense committed while under post-release control and provides as follows:

“(A) Upon the conviction of or plea of guilty to a felony by a person on post-release control at the time of the commission of the felony, the court may terminate the term of post-release control, and the court may do either of the following regardless of whether the sentencing court or another court of this state imposed the original prison term for which the person is on post-release control:

(1) In addition to any prison term for the new felony, impose a prison term for the post-release control violation. *The*

*maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony. In all cases, any prison term imposed for the violation shall be reduced by any prison term that is administratively imposed by the parole board as a post-release control sanction. A prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony. The imposition of a prison term for the post-release control violation shall terminate the period of post-release control for the earlier felony.”* (Emphasis added).

{¶9} In accordance with R.C. 2929.141, the trial court correctly informed Appellant that in addition to being sentenced to a prison term of five years on the new felony burglary conviction, he was being sentenced “to the PRC from the prior case[,]” to be served consecutively to one another. It was discussed earlier at the sentencing hearing that Appellant’s mandatory three-year term of post-release control began on May 14, 2012. Thus, Appellant would have been on post-release control until May 14, 2015. However, when Appellant was sentenced on his new felony burglary charge

on October 29, 2013, and the trial court imposed a prison term on the post-release control violation, Appellant's current term of post-release control terminated. See R.C. 2929.141(A)(1) ("The imposition of a prison term for the post-release control violation shall terminate the period of post-release control for the earlier felony.") As such, Appellant was sentenced to a prison term consisting of "*the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony.*" Id.

{¶10} Further, despite Appellant's argument that R.C. 2967.28(F)(3) provides that "postrelease control is tolled whenever a defendant is incarcerated for a violation of the sanction[,] we find that section inapplicable to the situation sub judice. Rather, we find that R.C. 2929.141(A)(1) speaks clearly to the issue of when post-release control is terminated, and that is when the prison term for the post-release control violation is actually imposed.

{¶11} Additionally, it was discussed on the record whether any of Appellant's post-release control time had been tolled. Appellant's counsel stated as follows when the trial court inquired as to the options for imposing the remainder of the term of post-release control:

“BY MR. FRANCIS: So your Honor, it’s five years consecutive or concurrent with the PRC?”

BY THE JUDGE: It’s consecutive.

BY MR. FRANCIS: And is that PRC up until today?

BY THE COURT: What’s the option here counsel, on PRC?

BY MR. FRANCIS: His PRC time was never tolled or anything of that nature. There’s no entry ever doing that. So my understanding is that it would be like if he was out on the PRC.

BY THE JUDGE: I don’t intend it to be more than a year and six months. And it might be less than that.

BY MR. DRISCOLL: That’s about what it is.”

Although the trial court did not specify the exact number of days, we believe that the manner in which the trial court imposed the remainder of Appellant’s post-release control term as a prison term is consistent with the language of the statute and was easily determinable by the parole board without reference to any other document than Appellant’s sentencing entry. As set forth in the sentencing entry, Appellant’s term of post-release control commenced on May 14, 2012, and Appellant was sentenced on the new



felony, which terminated the period of post-release control, on October 29, 2013.

{¶12} Based upon the foregoing, and in the absence of any case law or guidance to the contrary, we cannot conclude that Appellant's sentence is contrary to law. Thus, Appellant's sole assignment of error is overruled. Accordingly, the decision of the trial court is affirmed.

**JUDGMENT AFFIRMED.**

**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 Athens 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.

Harsha, J. & Hoover, J.: Concur in Judgment and 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.**