[Cite as *State v. Powell*, 2017-Ohio-1068.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case Nos. 14CA31 & 14CA45
vs.	:	
ELIZABETH POWELL,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Francisco E. Luttecke, Assistant State Public Defender, Columbus, Ohio[1], for appellant.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 2-17-17
ABELE, J.

{¶ 1} This is a consolidated appeal from two Athens County Common Pleas Court judgments. Elizabeth Powell, defendant below and appellant herein, pled guilty to several criminal offenses. Appellant now assigns the following sentencing related errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT SENTENCED MS. POWELL TO UNDIFFERENTIATED COMMUNITY CONTROL WITHOUT PROPERLY NOTIFYING HER OF THE PRISON

[1]Different counsel represented appellant during the trial court proceedings.

TERMS UNDERLYING THOSE SENTENCES."
SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT IMPOSED SEPARATE SENTENCES FOR OFFENSES THAT AROSE FROM THE SAME CONDUCT, WERE NOT COMMITTED SEPARATELY OR WITH A SEPARATE ANIMUS, HAD A SIMILAR IMPORT, AND SHOULD HAVE BEEN MERGED FOR SENTENCING PURPOSES UNDER R.C. 2941.25"

{¶ 2} These appeals involve multiple criminal cases, with complex and convoluted procedural histories. We set out an abbreviated recitation concerning the procedural background of each case.

Criminal Case No. 10CR0434

{¶ 3} On October 25, 2010, the Athens County Grand Jury returned an indictment that charged appellant with (1) three counts of trafficking heroin in violation of R.C. 2925.03(A), and (2) two counts of possession of heroin in violation of R.C. 2925.11(A). Appellant initially pled not guilty, but later agreed to plead guilty to all counts.

{¶ 4} At the November 23, 2010 hearing, the State recited the parties' plea agreement terms that included, inter alia, eighteen months imprisonment on one count and that appellant "be placed on community control for up to five years on the remaining counts." Defense counsel acknowledged the terms of the agreement and both parties also agreed to a "four year underlying sentence." At the hearing the trial court also (1) sentenced appellant to serve eighteen months in prison on one trafficking count and five years community control on the remaining counts, (2) merged the two possession counts for purposes of sentencing, (3) notified appellant that if she violated community control, she could receive a number of sanctions including a "prison commitment of four (4) years." No appeal was taken from that judgment.

{¶ 5} A month later, appellant requested judicial release. The trial court granted that motion on January 10, 2011.[2] However, approximately six months after her release, the State filed a notice of community control violation and asserted, inter alia, that appellant had been indicted on other charges and that, during her arrest, she possessed ten "balloons of heroin." Subsequently, appellant admitted to the violations and, on September 6, 2011, the trial court sentenced her to serve four years in prison.

{¶ 6} On October 10, 2012, appellant filed yet another motion for judicial release. Despite the State's opposition, the trial court once again granted appellant's request.

Criminal Case No. 11CR0267

{¶ 7} On July 11, 2011, the Athens County Grand Jury returned an indictment that charged appellant with (1) five counts of drug possession in violation of R.C. 2925.11(A), and (2) one count of conveying prohibited items onto the grounds of a government facility in violation of R.C. 2921.36(A)(2). Initially, appellant pled not guilty, but later agreed to plead guilty to all charges. On December 13, 2011, the trial court (1) sentenced appellant to serve five years community control for both this case as well as Case No. 11CRO330, and (2) ordered that this sanction be served consecutively to her prison sentence for violating community control in Case No. 10CR0434.

Criminal Case No. 11CR0330

{¶ 8} On August 22, 2011, the Athens County Grand Jury returned an indictment that charged appellant with two counts of trafficking in the vicinity of a juvenile in violation of R.C.

[2] Pursuant to the plea agreement, the State did not oppose her motion.

2925.03(A)(1). Appellant initially pled not guilty, but later pled guilty to both counts. The trial court held a plea and sentencing hearing on December 5, 2011.

{¶ 9} Although a transcript of that proceeding indicates that the parties agreed that appellant would receive eighteen months on each count, the community control issue is much less clear. A written "Plea of Guilty" indicates that the only "promises" made to appellant included the thirty-six month underlying sentence and five years community control. Appellant's signature appears on that form.

{¶ 10} On December 13, 2011, the trial court sentenced appellant to serve five years community control for both this case and Case No. 11CR0267. The trial court stated that "[f]or Case 11CRO330 [appellant's] underlying sentence is eighteen (18) months for each count to run consecutive to each other for a total of three (3) years for case 11CRO330." The court also ordered that these sentences be served consecutively to the prison term that appellant was serving for Case No. 10CR0434. No appeal was taken from that judgment.

Proceedings Common to All Cases

{¶ 11} On January 7, 2013, the State once again filed a notice that appellant had violated community control by failing to complete a program at the Monday Correctional Institution. On April 11, 2013, the trial court continued community control, but directed appellant to complete the "River City Correctional Program."

{¶ 12} Once again, on November 18, 2013, the State filed a notice of violation of community control because of appellant's positive test for opiates and marijuana. Also, a number of supplemental notices of community control violation were filed in March and April 2014. On August 7, 2014, the trial court imposed sentence in all three cases as follows:

"The Court sentences [appellant] on Case 11CRO267 to serve one (1) year in the State Penal System for each count with Count One, Two, and Three to run concurrent to each other and with Count Four and Five concurrent to each other but consecutive to the Count one, Two, and Three for a total of two (2) years in the State Penal System for Case 11CRO267. The Court also orders Defendant to serve eighteen (18) months for each count for Case 11CR0330 to run consecutive to each other for a total of three(3) years to run consecutive to Case 11CRO267 for a total of five (5) years. For Case 10CRO434, the Court sentences [appellant] to serve the remainder of the previously suspended four (4) year prison terms on Counts One, Two, Three and Five consecutive to the previously suspended eighteen (18) month term for Count Four for a total of five (5) years for Case 10CRO434. Case 10CRO434 shall run consecutive to Case 11CRO267 and 11CRO330 for an aggregate prison term of ten (10) years."[3]

Appellate Case No. 14CA31 stems from a notice of appeal filed with regard to this particular judgment.

Criminal Case No. 14CR0193

{¶ 13} On April 28, 2014, the Athens County Grand Jury returned an indictment that charged appellant with the failure to appear as required by recognizance, in violation of R.C. 2937.99(B). Appellant initially pled not guilty, but later pled guilty. At the September 3, 2014 hearing, the trial court accepted appellant's plea and sentenced her to serve eight months incarceration, to be served consecutively to the terms imposed in Case Nos. 10CRO434, 11CRO267 and 11CRO330. Although no immediate appeal was taken from that judgment, on December 1, 2014 appellant requested leave to file a delayed appeal. We granted appellant's motion and this judgment became the basis for Appellate Case No. 14CA45. On January 23, 2015, we also granted appellant's motion to consolidate both cases.

I

{¶ 14} In her first assignment of error, appellant asserts that the trial court erred in two

[3] Subsequently, the trial court filed a nunc pro tunc entry to correct a mathematical calculation in the sentence.

respects. First, appellant argues that the trial court failed to adequately notify her of the underlying prison terms in both the November 23, 2010 and December 13, 2011 judgments of conviction and sentence. To support her argument, appellant cites (1) *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, at ¶¶15&19, (trial courts must notify a defendant at the sentencing hearing of the specific prison term the offender faces if community control is violated) and (2) *State v. Saxon*, 109 Ohio St.3d 176, 846 N.E.2d 824, 2006-Ohio-1245, (instead "of considering multiple offenses as a whole and imposing one, over-arching sentence to encompass the entirety of the offenses as in the federal sentencing regime, a judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense").

{¶ 15} Second, appellant asserts that the trial court failed to notify appellant of the specific terms that could be imposed for community control violations. Thus, appellant argues that neither the November 23, 2010 judgment (Case No. 10CRO434) nor the December 13, 2011 judgment (Case No. 11CR0330) satisfies these requirements. Appellant additionally contends that the trial court erred by imposing "global community control sentences." We interpret appellant's argument to be that the trial court erred by imposing a single, lump sum community control sanction for all of the offenses in Case No. 10CRO434 and Case No. 11CR0330.

{¶ 16} The State does not respond to the merits of appellant's arguments, but instead argues that res judicata should bar those arguments from consideration because those alleged errors should have been raised in direct appeals.

{¶ 17} Generally, the doctrine of res judicata will not bar a challenge to a sentence that is not in accordance with statutorily mandated terms, *State v. Fischer*, 128 Ohio St.3d 420,

2008-Ohio-1197, 884 N.E.2d 568, and may be reviewed at any time, either on direct appeal or by collateral attack. Id., at paragraph one of the syllabus; *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.2d 382. *State v. Billiter*, 134 Ohio. St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960. Although a sentence or sanction that does not comply with the statutorily mandated terms may be reviewed at any time, res judicata will apply to other aspects of the merits of a conviction. *Fischer*. Generally, when a sentence does not contain a statutorily mandated term, the proper remedy is to resentence the defendant. *Fischer*; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864; *State v. Tanksley*, 2nd Dist. No. 2015-CA-80, 2016-Ohio-2963.

{¶ 18} In the case sub judice, we agree with appellant that a trial court must separately dispose of each count for which a defendant has been convicted, including specific community control terms for each separate count. In other words, a court may not impose one, lump sum community control sentence instead of imposing a specific community control sentence for each count. *State v. Williams*, 3rd Dist. Hancock No. 5-10-02, 2011-Ohio-995. See, also, *State v. Mack*. 1st Dist. Hamilton No. C-140054, 2015-Ohio-1430.

{¶ 19} Accordingly, for these reasons we find merit to the arguments set forth in appellant's first assignment of error. We hereby (1) vacate appellant's sentences (in Case Nos. 10CR434, 11CR330) and remand for resentencing in order to properly impose community control sentences and (2) vacate appellant's sentence in Case No. 11CR267 (Global Community Control sentences) and remand for resentencing.

II

{¶ 20} Appellant’s second assignment of error is directed to the November 23, 2010 judgment (Case No. 10CRO434). In particular, appellant asserts that the trial court erred by not

merging her trafficking and possession convictions (counts two and four and counts three and five) as allied offenses of similar import pursuant to R.C. 2941.25. In view of our resolution of appellant's first assignment of error and in consideration of the myriad of problems that have surfaced regarding appellant's sentences, the trial court should revisit the issue of allied offenses when it attempts to determine appropriate sentences upon appellant's resentencing.

{¶ 21} Accordingly, based upon the foregoing reasons, we hereby reverse the trial court's judgment in part and remand this matter for further proceedings, including a complete review and resentencing of appellant consistent with this opinion.

JUDGMENT REVERSED IN PART AND CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be reversed in part and the cause remanded for further proceedings consistent with this opinion. Appellant shall recover of appellee the costs herein taxed.

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, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, 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.