[Cite as *State v. Lucas*, 2017-Ohio-7663.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 16CA7
vs.	:	
LINDSEY M. LUCAS,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

James S. Sweeney, James Sweeney Law, LLC, Columbus, Ohio, for appellant.

Thomas Webster, Belpre Law Director, Belpre, Ohio, for appellee.

CRIMINAL APPEAL FROM MUNICIPAL COURT
DATE JOURNALIZED: 9-11-17
ABELE, J.

{¶ 1} This is an appeal from a Marietta Municipal Court judgment that revoked community control and ordered Lindsey Lucas, defendant below and appellant herein, to serve her suspended jail sentence. Appellant assigns the following error for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT WAS NOT PERMITTED TO IMPOSE JAIL TIME FOR A COMMUNITY CONTROL VIOLATION BECAUSE IT FAILED TO COMPLY AT SENTENCING WITH THE REQUIREMENTS OF R.C. 2929.25."

{¶ 2} On October 31, 2014, appellant pled guilty to operating a vehicle while under the influence (OVI) in violation of R.C. 4511.19(A)(1)(j)(i), a first-degree misdemeanor. The trial court

(1) imposed a 123-day jail sentence, but suspended 120 days of the jail sentence for a period of one year upon the following terms and conditions: (a) general terms of probation[1], (b) good behavior and no new offenses, and (c) alcohol and drug assessment, with treatment if so recommended; (2)suspended the execution of the three day jail sentence for completion of a 72-hour Driver Intervention Program (DIP) within 120 days, (3) ordered a one-year driver's license suspension, with credit for 147 days of pretrial suspension but reduced to 180 days upon successful completion of the 72-hour DIP, and (4) ordered a $525 fine and costs.

{¶ 3} On January 20, 2016, appellant's probation officer gave notice to appellant that her multiple positive tests for drugs of abuse violated the terms of her probation. As of January 20, 2016, appellant had completed the DIP and served 18 days in jail on probation holders. The state thus requested that the trial court terminate her community control and that appellant serve the remaining 102-day suspended jail sentence. Subsequently, the trial court found that appellant had violated the terms of her community control, revoked her community control and imposed 90 days of appellant's suspended sentence. This appeal followed.

{¶ 4} In her sole assignment of error, appellant asserts that the trial court could not impose jail time for a community control violation because at sentencing it failed to comply with the R.C. 2929.25 requirements. In particular, appellant contends that because the trial court did not notify her at the initial sentencing hearing that the court could impose a definite jail term if appellant violated her community control, the court could not now impose a jail sentence.

[1]Although the trial court's entry and transcript generally refers to "probation," the terminology has changed. We note that the terms "community control" and "probation" are functional equivalents. *State v. Guevara*, 6th Dist. Wood No. WD-05-040, 2005-Ohio-7006, at ¶ 5; *State v. Stevens*, 12th Dist. Butler No. CA2010-08-211, 2011-Ohio-2595, at ¶ 11; *State v. Evans*, 4th Dist. Meigs No. 00CA003, 2000 WL 33538779 (Dec. 15, 2000).

{¶ 5} Generally, the standard of review for sentencing in misdemeanor cases is abuse of discretion. *State v. Sims*, 4th Dist. Ross No. 04CA2779, 2006-Ohio-528, ¶ 20, citing *In re Slusser*, 140 Ohio App.3d 480, 487, 748 N.E.2d 105 (3rd Dist.2000); *State v. Perz*, 173 Ohio App.3d 99, 2007-Ohio-3962, 877 N.E.2d 702, ¶ 26 (6th Dist.). An abuse of discretion connotes a court's attitude that is unreasonable, unconscionable, or arbitrary. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983); *Sims* at ¶ 9, citing *Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd.*, 63 Ohio St.3d 498, 506, 589 N.E.2d 24 (1992).

{¶ 6} R.C. 2929.25(A)(1) permits a trial court to sentence a misdemeanant as follows:

> (A)(1) Except as provided in sections 2929.22 and 2929.23 of the Revised Code or when a jail term is required by law, in sentencing an offender for a misdemeanor, other than a minor misdemeanor, the sentencing court may do either of the following:
>
> (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.
>
> (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.

{¶ 7} R.C. 2929.25(A)(1) describes two ways that a trial court may impose community control sanctions in a misdemeanor case. First, "R.C. 2929.25(A)(1)(a) gives the court the option of directly imposing community control sanctions." *State v. Russell*, 7th Dist. Mahoning No. 09 MA 156, 2011-Ohio-1181, ¶ 27. Second, "R.C. 2929.25(A)(1)(b) * * * allows the trial court to impose a jail term, suspend the jail term, and then place the offender on community control." *Id.*

{¶ 8} R.C. 2929.25(A)(3) specifies when a trial court must notify an offender of the

consequences of violating community control and the type of notice that a court must provide. The statute states:

> (3) 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:*
> "(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;
> "(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;
> "(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.)

{¶ 9} R.C. 2929.25(A)(3) indicates that the notifications apply when the court directly imposes community control under R.C. 2929.25(A)(1)(a). However, R.C. 2929.25(A)(3) does not indicate that a trial court must provide these same notifications when imposing a jail sentence, suspending the sentence, and imposing community control under R.C. 2929.25(A)(1)(b). Thus, "[t]he requirement in R.C. 2929.25(A)(3) to notify the defendant of the consequences of violating community control applies only if the court directly imposes community control. If the court imposes a jail term and then suspends it, the court need not notify the defendant that a jail term may result from violating the terms of community control because the jail term has already been imposed and the defendant has been notified of that term." *Russell*, 7th Dist. Mahoning No. 09 MA 156, 2011-Ohio-1181, at ¶ 27-28, citing *State v. Drake*, 2d Dist. Montgomery No. 21939, 2007-Ohio-6586, ¶ 22. The Second District explained the rationale for the rule as follows: "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." *Drake* at ¶ 22; *accord Russell* at ¶ 28; *see also State v. Robenolt*, 7th Dist. Mahoning No. 04 MA 104, 2005-Ohio-6450, ¶ 23-28.

{¶ 10} In the case sub judice, the trial court imposed appellant's original sentence pursuant to R.C. 2929.25(A)(1)(b), i.e., the court imposed a definite jail term, suspended the jail term, and imposed community control. Thus, it appears that R.C. 2929.25(A)(3) does not require the trial court to notify appellant of the consequences of violating community control. Similarly, in *State v. Begley*, 12th Dist. Clermont Nos. CA2015-01-005, CA2015-01-006, CA2015-01-007, 2015-Ohio-2892, the court considered a case in which the court sentenced the defendant to serve 180 days in jail for his conviction on one count of arson, a first-degree misdemeanor. The court suspended the jail sentence and placed the defendant on two years of community control. At the same time, the court sentenced the defendant to serve 180 days in jail for his conviction on one count of underage consumption. Once again, the court suspended the jail sentence and placed the defendant on two years of community control. The Twelfth District found that Begley was sentenced under R.C. 2929.25(A)(1)(b) in both cases as the trial court imposed jail sentences in both cases, then suspended the jail sentences and placed the defendant under community control. As such, because the trial court sentenced the defendant under R.C. 2929.25(A)(1)(b), the court had no duty under R.C. 2929.25(A)(3) to inform him that a violation of his community control sanctions could lead to the imposition of his remaining suspended jail terms. *Id.* at ¶ 10.

{¶ 11} Appellant contends that our decisions in *State v. Maxwell*, 4th Dist. Ross No. 04CA2811, 2005-Ohio-3575, and *State v. Sims*, 4th Dist. Ross No. 04CA2779, 2006-Ohio-528, mandate that we reverse the trial court's imposition of her suspended sentence. We believe, however, that both cases are distinguishable from the case at bar.

{¶ 12} In *Maxwell*, the defendant pled guilty to theft, a first-degree misdemeanor. The trial court sentenced the defendant to serve 90 days in jail (a definite jail term) and 2 years of community control sanctions. At the sentencing hearing, the court did not inform the defendant of the possible sanctions for violating his community control. Subsequently, the defendant admitted to a violation of community control, and the trial court sentenced him to serve a jail term. The defendant appealed the trial court's imposition of the jail term and argued that the trial court's failure to inform him at the sentencing hearing of the consequences of violating community control precluded the court from imposing a jail term for violating community control. We agreed with the defendant and reversed the trial court's judgment.

{¶ 13} In *Sims*, the trial court sentenced the defendant under R.C. 2929.25(A)(1)(a), ordered the defendant to serve 12 days in jail, imposed community control sanctions, but did not give the defendant the R.C. 2929.25(A)(3) notifications at the original sentencing hearing. On appeal from the court's original sentencing decision, we determined, in a plurality opinion, that the court's failure to comply with R.C. 2929.25(A)(3) required a remand for a re-sentencing hearing.

{¶ 14} We, however, do not believe that either *Maxwell* or *Sims* controls our disposition here because the facts in the case at bar differ from *Maxwell* and *Sims.* First, as we pointed out above, *Sims* is a plurality decision and has very limited precedential value. Second, in *Maxwell* and *Sims* the trial court imposed the sentence under R.C. 2929.25(A)(1)(a), i.e., the court imposed both a jail

term and community control. Nothing in *Maxwell* or *Sims* suggests that either court imposed a suspended jail term in accordance with R.C. 2929.25(A)(1)(b). Thus, *Maxwell* and *Sims* involved R.C. 2929.25(A)(1)(a).

{¶ 15} Unlike *Maxwell* and *Sims*, in the case sub judice the trial court imposed its sentence under R.C. 2929.25(A)(1)(b) (the court imposed a jail term, then suspended the jail term and imposed community control). As we have previously indicated, the language of R.C. 2929.25(A)(3) appears to provide that it applies to R.C. 2929.25(A)(1)(a), but not to R.C. 2929.25(A)(1)(b). Consequently, in the case at bar the trial court did not impose the same type of sentence as the courts imposed in *Maxwell* and *Sims*. Therefore, we find both cases inapposite.[2] We recognize that the only distinguishing factor in the aforementioned cases as to whether a court must advise an offender of the (A)(3) notice language is not whether the court imposed a community control sanction (as the

[2] Appellant cites *State v. Taylor*, 4th Dist. Hocking No. 15CA11, 2015-Ohio-5394, to support her claim that R.C. 2929.25(A)(3) requires the court to notify her of the consequences of violating community control. In *Taylor*, the trial court, like the court in the case at bar, appears to have imposed a suspended sentence and community control sanctions pursuant to R.C. 2929.25(A)(1)(b). The trial court sentenced the defendant to serve four, consecutive one-hundred-eighty-day jail terms, then suspended the sentences and imposed community control sanctions. The defendant later violated the terms of his community control and the trial court imposed the suspended sentence. On appeal, the defendant asserted that the trial court did not notify him at the original sentencing hearing that the court could sentence him to jail if he violated the terms of his community control, and that the court's failure precluded it from imposing a jail term for his violation. We agreed with the defendant and reversed the trial court's judgment. However, *Taylor* appears to be at odds with other Ohio districts that have considered the issue. Although *Taylor* does not specify that the trial court imposed the defendant's sentence pursuant to R.C. 2929.25(A)(1)(b), that conclusion seems implicit. Thus, to the extent that *Taylor* holds that a trial court that sentences an offender under R.C. 2929.25(A)(1)(b) must give the offender the R.C. 2929.25(A)(3) notifications, we overrule it. Consequently, we do not believe that R.C. 2929.25(A)(3) applies to sentences imposed under R.C. 2929.25(A)(1)(b). Generally, when a court determines that it should overrule its precedent, the court must consider the following three elements: (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision; (2) the decision defies practical workability; and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it. *State v. Mozingo*, Adams App. No. 16CA1025, 2016-Ohio-8292 (4th Dist.), citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256; *State v. Certain*, 180 Ohio App.3d 457, 2009-Ohio-148, 905 N.E.2d 1259. We recognize that our decision did not precisely follow the language in the statutes and that we should not substitute our view for the sentencing procedures that the legislature expressed when it enacted these statutes. Unfortunately, however, these cases serve as yet more examples of the needless complexity and confusion that plagues Ohio's sentencing statutes.

courts did in all of the cited cases), but whether a court "directly" imposed a community control sanction pursuant to R.C. 2925(A)(1)(a). Obviously, this sentencing scheme, and the statutory lnaguage, much like the Ohio felony sentencing statutes, borders on the absurd. Nevertheless, courts are obligated to attempt to follow the language that the legislature has chosen to include in the sentencing statutes.

{¶ 16} Accordingly, based on the foregoing reasons, we conclude that the trial court did not err by revoking appellant's community control and imposing appellant's suspended sentence. Consequently, we hereby overrule appellant's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant 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 Marietta Municipal 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 Supreme Court of Ohio 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 Supreme Court of Ohio in the forty-five day 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 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.

Harsha, 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.