

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

STATE OF OHIO,	:	Case No. 18CA2
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
ROBERT L. WHITE,	:	
Defendant-Appellant.	:	<b>RELEASED: 09/26/2018</b>

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APPEARANCES:

Alisa Turner, Logan, Ohio, for appellant.

Benjamin E. Fickel, Hocking County Prosecuting Attorney, and Jordan M. Meadows, Hocking County Assistant Prosecuting Attorney, Logan, Ohio, for appellee.

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Harsha, J.

{¶1} Previously we affirmed Robert White’s three felony convictions for intimidation but reversed his sentence for violating his community control sanction. We remanded so that the trial court could notify him of the specific prison term that could be imposed for an additional violation. Based on his prior guilty plea the trial court re-entered judgment on his three felony intimidation convictions, reimposed concurrent community control for each conviction, and provided the statutorily required notice concerning violations. The court also sua sponte corrected an unassigned error dealing with packaged sentences on the intimidation convictions.

{¶2} After our remand and the trial court’s new judgment, White asserts that as the result of the erroneous imposition of a “packaged sentence” for his felony convictions the trial court never issued a final appealable order until it resentenced him on January 24, 2018. In light of this contention he also claims this proceeding represents the first appeal in the case. We recently rejected this claim by holding that a

trial court's erroneous imposition of a "packaged" one lump-sum community-control sentence for multiple convictions constitutes a final appealable order. Nevertheless, we sustain his first assignment of error and vacate the orders entered prior to the January 24, 2018 purporting to sentence him on his felony convictions and for violating the community-control sanction. Because those entries are void due to their lump-sum nature, they are subject to collateral attack at any time.

{¶3} Next White contends that the trial court erred by finding that he violated the terms of his community control with conduct that occurred prior to the filing of a final appealable order. Because we have vacated the entry finding him guilty of violating community control, this assignment of error is moot.

{¶4} White also claims that he was deprived of his right to the effective assistance of counsel, which rendered his guilty pleas to the offenses and to his violation of community control invalid. Because we have vacated the entry convicting him of violating his community control and the trial court has not reimposed that conviction, that claim is also moot.

{¶5} And his guilty plea to the three felony counts of intimidation, which the trial court reimposed with its January 2018 entry, forfeited a claim of ineffective assistance of counsel unless it precluded him from knowingly, intelligently, and voluntarily entering it. However, the bases for his claims of ineffective assistance rely upon evidence outside the record on appeal. Therefore a direct appeal is not the appropriate vehicle for White to raise this claim.

{¶6} We sustain White's first assignment of error and vacate the orders entered prior to January 24, 2018 convicting him of intimidation and violating his community-

control sentence. But we overrule his third assignment of error and affirm his January 2018 convictions and sentence for three counts of felony intimidation.

### I. FACTS

{17} Based upon separate incidents occurring on three different days spanning from April 2016 to August 2016, the Hocking County Grand Jury returned an indictment charging Robert White with three counts of felony intimidation and six related misdemeanors. The alleged victim was a Hocking County Juvenile Court employee. While represented by counsel, White pleaded guilty to the charges, and the trial court merged the misdemeanors into the three associated felonies, but did not merge any of the felonies for sentencing. However, the trial court imposed a lump-sum five-year term of community control as a packaged sanction. And it failed to advise him that any violation of his community control could result in the imposition of a prison sentence. White appealed from his convictions and sentence, see Case No. 16CA23.

{18} After White's sentencing hearing, but before journalization of his sentencing entry in Case No. 16CA23, White allegedly violated the terms of his community control by entering the courthouse with a baseball bat, contrary to the civil protection order in favor of the victim, who worked there. But the court recognized it could not sentence him to prison because it had failed at the original sentencing hearing to advise White of the potential prison sentence for violating community control. Instead, the trial court continued his community control, but this time advised him that if he violated it, he could be sentenced to up to 108 months in prison. The trial court found White guilty of violating his community control, continued the collective lump-sum

sanction, and stated that the maximum sentence for his community-control violation was 108 months. White appealed his resentencing in Case No. 17CA1.

{¶9} In a consolidated appeal we noted the three felony counts of intimidation represented three separate incidents. Therefore we rejected White’s argument that the convictions should merge for sentencing. We affirmed the trial court’s judgment in Case No. 16CA23. See *State v. White*, 4th Dist. Hocking Nos. 16CA23 and 17CA1, 2017-Ohio-8275, ¶ 2, 23.

{¶10} But we sustained his contention that the trial court erred by notifying him that he could serve “up to” 108 months for a violation of the terms of his community control. So we reversed the sentence in Case No. 17CA1, and remanded the case for resentencing. *White I* at ¶ 3, 23.

{¶11} In the consolidated appeal White did not raise an argument contesting the packaged community-control sentence for his three intimidation convictions.

{¶12} On remand the trial court’s new sentencing entry imposed separate five-year community-control terms (to be served concurrently) for each of his three felony intimidation convictions, and provided notice that a violation of the conditions of his community control could result in more restrictive sanctions or a 12-month prison term on each of the counts. Thus the court sua sponte removed the packaged sentence and imposed individual sanctions for each conviction. This appeal followed.

### III. ASSIGNMENTS OF ERROR<sup>1</sup>

{¶13} White assigns the following errors for our review:

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<sup>1</sup> In his initial brief White raised four assignments of error. With leave of the court White filed an amended brief that raises the three assignments of error that appear in our opinion.

1. THE TRIAL COURT ERRED BY FAILING TO JOURNALIZE A FINAL APPEALABLE ORDER UNTIL JANUARY 24, 2018 WHICH IMPOSED A SANCTION FOR EACH AND EVERY CONVICTION.
2. THE TRIAL COURT ERRED BY FINDING APPELLANT VIOLATED THE TERMS OF HIS PROBATION WITH CONDUCT THAT OCCURRED PRIOR TO THE FILING OF A FINAL APPEALABLE ORDER.
3. APPELLANT WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL RENDERING HIS GUILTY PLEAS NOT KNOWINGLY OR INTELLIGENTLY ENTERED.

#### IV. LAW AND ANALYSIS

##### A. Final Appealable Order and Void Sentence

{¶14} Initially White asserts that until January 24, 2018 the trial court failed to journalize a final appealable order that imposed a separate sanction for each of his three intimidation convictions. Thus he asserts this is his initial direct appeal.

{¶15} White claims that until the trial court entered separate individual sentences on January 24, 2018 on remand from our decision in *White I*, there was no final appealable order on either his convictions for felony intimidation, or his conviction for violating the original community-control sanction.

{¶16} As the state appears to concede, the trial court initially erred by imposing a “packaged” sentence for White’s felony intimidation convictions. “[U]nder Ohio’s sentencing statutes, a judge lacks authority to consider multiple offenses as a group and to impose only an omnibus sentence for a group of offenses.” *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 9. Thus, the sentence-packaging doctrine has no application to Ohio sentencing laws. *Id.*, ¶ 10. “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. Powell*, 4th Dist. Athens

Nos. 14CA31 and 14CA15, 2017-Ohio-1068, ¶ 18, citing *State v. Williams*, 3d Dist. Hancock No. 5-10-02, 2011-Ohio-995, and *State v. Mack*, 1st Dist. Hamilton No. C-140054, 2015-Ohio-1430. The trial court thus erred in its original sentencing entry by imposing one lump-sum “packaged” five-year term of community control for White’s three convictions for intimidation, and sentencing White for violating the void community control sanction.

{¶17} Nonetheless in *State v. Wheatley*, 2018-Ohio-464, 94 N.E.3d 578, fn. 9 (4th Dist.), we rejected the argument that a trial court’s error in issuing a collective sentence for multiple convictions renders the sentencing entries non-final and interlocutory:

We observe that some appellate courts have determined that a trial court order that imposes a collective sentence rather than individual sentences is not a final, appealable order. *State v. Cousino*, 8th Dist. Cuyahoga No. 102388, 2015-Ohio-3587, 2015 WL 5158966, ¶ 4; *State v. Jones*, 8th Dist. Cuyahoga No. 102314, 2015-Ohio-2409, 2015 WL 3822060, ¶ 8. These courts reason that a collective sentence that does not specifically dispose of each individual offense fails to constitute a final, appealable order in accordance with Crim.R. 32(C) and *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142. In *Lester*, the Ohio Supreme Court held that “a judgment of conviction is a final order \* \* \* when the judgment entry sets forth (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk.” *Id.* at ¶ 14. Additionally, “a valid judgment of conviction requires a full resolution of any counts for which there were convictions.” *State v. Jackson*, 151 Ohio St.3d 239, 2017-Ohio-7469, 87 N.E.3d 1227.

However, the Third District Court of Appeals noted that the Ohio Supreme Court remanded collective-sentence cases to it to rule upon the merits, even though the Third District had concluded that the collectively-imposed sentence did not constitute a final order. *State v. South*, 3rd Dist. Union No. 14–07–40, 2010-Ohio-983, 2010 WL 893681, ¶ 18.

Given the state of uncertainty and our recent *Powell* decision that considered the merits, we believe that the trial court's decision that imposed a collective sentence constitutes a final, appealable order. We note that the trial court's judgment of conviction attempted to entirely

dispose of each count, but it did so in an incorrect manner. See *generally State v. Pari*, 9th Dist. Summit No. 28098, 2017-Ohio-4165, 2017 WL 2467099, ¶¶ 31–40 (considering sentencing-package argument even though state sought dismissal due to lack of final, appealable order).

{¶18} The *Wheatley* footnote cited *State v. South*, 120 Ohio St.3d 358, 2008-Ohio-6693, 889 N.E.2d 146, where in a post-*Saxon* case, the Supreme Court of Ohio unanimously reversed the court of appeals, which had dismissed review of a packaged sentencing entry for lack of a final appealable order. The Supreme Court remanded the case to the appellate court to address the merits of the defendant’s assignments of error, i.e., the Supreme Court rejected the claim that a trial court’s entry of a collective sentence for multiple convictions rendered the sentence non-final. Therefore, we also reject White’s assertion that the trial court’s prior sentencing entries did not constitute final appealable orders.

{¶19} Nevertheless, we agree with White’s alternative claim that the prior sentencing entries for his intimidation convictions and violation of the community-control sanction were void because they disregarded statutory mandates that required separate sentences for each conviction/community control sanction; and thus they are void. *Powell*, 2017-Ohio-1068, at ¶ 17-19, citing *State v. Fischer*, 128 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, paragraph one of the syllabus (“the doctrine of res judicata will not bar a challenge to a sentence that is not in accordance with statutorily mandated terms, \* \* \* and may be reviewed at any time, either on direct appeal or by collateral attack”).

{¶20} Therefore, we sustain White’s first assignment of error and vacate the trial court’s sentencing entries imposed prior to its January 24, 2018 sentencing entry.

White concedes that the trial court's January 2018 entry complied with its duty to enter separate sentences for each of his three felony intimidation convictions.

#### B. Community-Control Violation

{¶21} In his second assignment of error White contends that the trial court erred by convicting him of violating his community-control sanction, which was not journalized at the time he committed the conduct that formed the basis for the violation. We have already vacated the sentencing entry for his violation of community control under the first assignment of error. Therefore this assignment of error is moot and we need not address it. App.R. 12(A)(1)(c).

#### C. Ineffective Assistance of Counsel

{¶22} In his third assignment of error White argues because he was deprived of his right to the effective assistance of counsel, his original guilty pleas to the three felony intimidation charges and the community-control violation are invalid.

{¶23} To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶24} Because we have vacated the entry convicting him of violating his community control and the trial court has not reimposed the conviction, his claim for that conviction is moot, as noted above.



{¶25} We look now to the three convictions for intimidation, which the trial court reimposed in its January 24, 2018 sentencing entry. His guilty plea forfeited the claim of ineffective assistance of counsel unless it precluded him from knowingly, intelligently, and voluntarily entering a guilty plea. See *State v. Betts*, 4th Dist. Vinton No. 18CA710, 2018-Ohio-2720, ¶ 26, quoting *State v. Grove*, 8th Dist. Cuyahoga No. 103042, 2016-Ohio-2721, ¶ 26 (“ [a] claim of ineffective assistance of counsel is \* \* \* waived by a guilty plea, unless the ineffective assistance of counsel precluded the defendant from knowingly, intelligently, and voluntarily entering a guilty plea’ ”).

{¶26} White claims that his trial counsel was ineffective because counsel: (1) knew that White was under duress at the time of the plea; (2) knew White believed he was innocent of the charges; (3) failed to advise White of the possible defenses to the charges; (4) failed to file a motion to obtain a reasonable bond pending trial; and (5) failed to note the obvious issues concerning the sufficiency of the evidence.

{¶27} Our review of the record does not support White’s contentions. On the issue of duress, at his change-of-plea hearing White acknowledged to the court that he was not threatened in any way to change his plea and there was nothing affecting his ability to make a free and voluntary choice about whether to plead guilty. His contention that counsel failed to advise him of possible defenses is likewise unsupported by the record; White told the court that he had enough time with his attorney to review any defenses he may have to the charges. As for the sufficiency of the evidence, White affirmatively stated to the court that he knew that by pleading guilty to the charged offenses he would give up his rights to present evidence at trial, and to force the state to prove each and every element of the charges against him beyond a reasonable doubt.

{¶28} As for trial counsel’s failure to move for a reasonable bond, White was an indigent defendant and the record does not establish how he would have been able to post bond. See *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 206 (rejecting an ineffective-assistance claim based on counsel’s failure to request bond on this basis). Moreover, following his convictions, “ ‘any error concerning the issue of pretrial bail is moot.’ ” *Id.* (citing this as an additional reason to reject the defendant’s ineffective–assistance claim based on a failure to request bond).

{¶29} Our de novo review of the record establishes that the trial court complied with the constitutional and procedural safeguards to ensure that White’s plea was knowingly, intelligently, and voluntarily entered. The trial court fully complied with Crim.R. 11. White stated that he understood the proceedings, that he was in agreement with the plea, that the plea had been explained to him and he understood it, and that he was not under the influence of any alcohol or drug that would interfere with his ability to understand the change of plea. White also stated that he had no complaints about the way his trial counsel represented him.

{¶30} The argument in White’s brief is largely bereft of any record citations. In essence White is relying on evidence that is outside the record to support his claim. In these types of cases, postconviction relief—not direct appeal—is the appropriate method to seek relief based on a claim of ineffective assistance. See *State v. Williams*, 4th Dist. Jackson No. 15CA3, 2016-Ohio-733, ¶ 37, citing *State v. Hampton*, 4th Dist. Lawrence No. 15CA1, 2015-Ohio-4171, ¶ 28 (petition for postconviction relief is the proper vehicle to raise a claim of ineffective assistance of counsel that relies upon evidence outside the record). We overrule White’s third assignment of error.

#### IV. CONCLUSION

{¶31} Having sustained White's first assignment of error, we vacate those sentencing entries that failed to issue separate sentences for his separate convictions. We dismiss his second assignment of error as moot. Having overruled his third assignment of error, we affirm his January 24, 2018 sentencing entry. **IT IS SO ORDERED.**

JUDGMENT ACCORDINGLY.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT ENTERED January 24, 2018 is AFFIRMED and that Appellant shall pay the costs. THE PRIOR SENTENCING ENTRIES before the January 24, 2018 sentencing entry in this case ARE VACATED.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Court of Common Pleas 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.

Hoover, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: \_\_\_\_\_  
William H. Harsha, 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.**