[Cite as *State v. Johnson*, 2005-Ohio-319.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Brandon Johnson

Appellant

Court of Appeals No. L-04-1120

Trial Court No. CR-2003-2489

DECISION AND JUDGMENT ENTRY

Decided: January 28, 2005

* * * * *

Judy A. Flood, for appellant.

Julia R. Bates, Prosecuting Attorney, and J. Christopher Anderson, Assistant Prosecuting Attorney, for appellee.

* * * * *

HANDWORK, J

{¶ 1} Appellant, Brandon Johnson, appeals a judgment of the Lucas County Court of Common Pleas, which granted the motion of appellee, the state of Ohio, to revoke his community control and imposed a sentence of 16 months in prison.

{¶ 2} On October 17, 2003, appellant entered a plea of no contest to one count of attempted gross sexual imposition, a violation of R.C. 2923.02 and R.C. 2907.05(A)(4), a felony of the fourth degree. A sentencing hearing was held on November 14, 2003. As recommended by the prosecution, the court sentenced

appellant to four years of community control and community control sanctions. On November 17, 2003, the common pleas court entered its written judgment on appellant's sentence.

{¶ 3} Subsequently, on April 16, 2004, appellant appeared before the court as the result of an alleged violation of those sanctions and admitted that he had contravened the conditions of his community control. The trial court therefore sentenced him to 16 months of incarceration.

{¶ 4} Appellant appeals this judgment and sets forth the following assignments of error:

{¶ 5} "I. The trial court erred in sentencing the defendant-appellant to a sixteen month prison term for violation of community control when the trial court failed to comply with the notice requirements of Ohio Revised Code Section 2929.19(B)(5) at the sentencing hearing."

{¶ 6} "II. The trial court erred in imposing a sixteen month prison term upon defendant-appellant in that it did not comply with the requirements of Ohio Revised Code Section 2929.11 et seq. and was excessive."

{¶ 7} In his Assignment of Error No. I, appellant contends that during his original sentencing hearing the trial court failed to comply with the strictures of R.C.

2929.15(B), and, in particular, 2929.19(B)(5). Appellee claims that appellant waived his right to assert any error related to the original sentencing hearing because he neither made an objection at the appropriate time nor filed a timely notice of appeal of the November 17, 2003 judgment. Appellee thus concludes that we may consider appellant's Assignment of Error No. I only under the plain error rule. For the following reason, we disagree with appellee.

{¶ 8} A community control sanction is a sanction that is "not a prison term and that is described in sections 2929.15, 2929.16, or 2929.18 of the Revised Code." *State v. Ogle*, 6th Dist. No. WD-01-040, 2002-Ohio-860, at ¶6. Therefore, when a court refers to a potential sentence for the violation of a community control sanction, it is not ripe for review. Id. at ¶27. See, also, *State v. Trussel*, 153 Ohio App.3d 83, 2003-Ohio-2933, at ¶18. Instead, an assignment of error raising questions concerning R.C. 2929.15(B) is ripe for review only when "the actual sentencing order imposes a prison term for the violation of community control sanctions." *State v. Ogle* at ¶16 (Citations omitted.). cf. *State v. Baker*, 152 Ohio App.3d 138, 2002-Ohio-7295, at¶20 (When the court imposes an actual prison sentence but then suspends that sentence and places the defendant on community control, the sentence is immediately appealable.).

{¶ 9} Here, the trial judge initially sentenced appellant to community control with the mere possibility of a prison sentence for a violation of the sanctions imposed in conjunction with that sentence. Accordingly, the issue raised in appellant's Assignment of Error No. I was not ripe for review until the trial court imposed an actual prison term.

Because appellant filed a timely notice of appeal from that judgment, we can address his Assignment of Error No. I.

{¶ 10} Appellant maintains that the trial judge could not impose a 16 month sentence because he failed to comply with the requirements of R.C. 2929.15(B) and 2929.19(B)(5).

{¶ 11} R.C. 2929.15(B) provides, in material part:

{¶ 12} "If the conditions of a community control sanction are violated or if the offender violates a law or leaves the state without the permission of the court or the offender's probation officer, the sentencing court * * * may impose a prison term on the offender pursuant to 2929.14 of the Revised Code. The prison term, if any, shall be within the range of prison terms available for the offense for which the sanction for the violation was imposed and shall not exceed the prison term specified in the notice provided to the offender at the sentencing hearing pursuant to division (B)(3)of Section 2929.19 of the Revised Code."

{¶ 13} If an offender is placed on community control, R.C. 2929.19(B)(5) requires a trial court to notify an offender at the original sentencing hearing that if one of the community control sanctions is violated that the court may, among other options, "impose a prison term on the offender and *shall* indicate the specific prison term that may be imposed * * * as selected from the range of prison terms for the offense pursuant to 2929.14 of the Revised Code." (Emphasis added.)

{¶ 14} In *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, the Ohio Supreme Court read these two statutory sections in pari materia and determined that, at

the original sentencing hearing, a court must notify a defendant placed on community control of the specific prison term that may be imposed for a violation of a community control sanction "as a prerequisite to imposing a prison term on the offender for a subsequent violation." Id. at paragraphs one and two of the syllabus. In making this finding, the *Brooks* court held that a trial judge, using straightforward and affirmative language, must "inform the offender at the sentencing hearing that the court will impose a definite term of imprisonment for a fixed number of months or years" if a community control sanction is violated. Id. at ¶19. An indefinite term, such as "up to 12 years" or a range of possible prison terms is insufficient. Id.

{¶ 15} As stated previously, attempted gross sexual imposition is a felony of the fourth degree. R.C. 2907.05(A)(4) and 2923.02(E). A prison sentence of "six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months" may be imposed for a felony of the fourth degree. R.C. 2929.14(A). At appellant's original sentencing hearing, the common pleas court informed appellant that if he violated any of his community control sanctions, he would "probably find [himself] in prison, okay?" The court also stated: "If you violate any portion of the sentence [of community control with sanctions], it will lead to a longer and more restrictive sanction, including a prison term of 18 months."

{¶ 16} Reading the court's statements together, we conclude that at appellant's original sentencing hearing, the trial judge did not notify appellant of a specific prison term that might result from a violation of any of his community control sanctions. Thus, appellant's Assignment of Error No. I is found well-taken. Accordingly, the trial

court's judgment must be reversed and this cause must be remanded for the purpose of resentencing only. Id. at ¶33. We note, however, that due to the fact that appellant did not receive notice of a specific prison term prior to his violation, the option of a prison sentence is no longer available to the trial court on that remand. Id.

{¶ 17} Appellant's Assignment of Error No. II argues that the trial court did not comply with the requisites of R.C. 2929.11, et seq in sentencing him to 16 months in prison. Because we are reversing the trial court's judgment on sentencing and remanding this cause for a resentencing, appellant's Assignment of Error No. II is rendered moot.

{¶ 18} The judgment of the Lucas County Court of Common Pleas is reversed and this case is remanded to that court for further proceedings consistent with this judgment. Appellee is ordered to pay the costs of this appeal. See App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P. J. _____
JUDGE

George M. Glasser, J. _____
CONCUR.
JUDGE

Judge George M. Glasser, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.