

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

State of Ohio

Court of Appeals No. OT-08-040

Appellee

Trial Court No. 06-CR-142

v.

Walter N. Polus

DECISION AND JUDGMENT

Appellant

Decided: January 8, 2010

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, for appellee.

James F. Schaller, II, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This is an accelerated appeal from a judgment of the Ottawa County Court of Common Pleas, which found that appellant, Walter N. Polus, had violated the terms of his community control sanction, imposed on November 27, 2006. On June 23, 2008, appellant was ordered to serve concurrent sentences as follows: five years for burglary, in violation of R.C. 2911.12(A)(3), a felony of the third degree; 12 months for breaking and

entering, in violation of R.C. 2911.13(B), a felony of the fifth degree; and 180 days for assault, in violation of R.C. 2903.13(A), a misdemeanor of the first degree.

{¶ 2} On April 17, 2009, in *State v. Polus*, 6th Dist. No. OT-08-040, 2009-Ohio-1810, this court allowed appellant's first appellate counsel to withdraw pursuant to *Anders v. California* (1967), 386 U.S. 738. Having found a potential error upon our own review, we assigned appellant new appellate counsel, who raises the following sole assignment of error:

{¶ 3} "The trial court erred in sentencing the defendant-appellant to prison terms of five years and twelve months for violations of community control when the trial court failed to comply with the notice requirements of R.C. 2929.19(B)(5) at the sentencing hearing."

{¶ 4} R.C. 2929.19(B)(5) provides as follows:

{¶ 5} "If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the specific prison term that

may be imposed as a sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to section 2929.14 of the Revised Code."

{¶ 6} As set forth in *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, paragraph one of the syllabus, a trial court sentencing an offender to a community control sanction is required to deliver the statutorily detailed notifications in R.C. 2929.19(B)(5) at the sentencing hearing. Additionally, at the time of sentencing, a trial court sentencing an offender to a community control sanction must "notify the offender of the specific prison term that may be imposed for a violation of the conditions of the sanction, as a prerequisite to imposing a prison term on the offender for a subsequent violation." *Id.* at paragraph two of the syllabus. Because the trial court must notify an offender of the "specific" prison term that may be imposed for a community control violation, the Ohio Supreme Court has held that notifying an offender that a sentence could be imposed "up to" a certain number of months or years, or notifying an offender of "a range" of time that could be imposed for a violation of community control, was not sufficient notification pursuant to R.C. 2929.19(B)(5). *Id.* at ¶ 26. Rather, strict compliance with the notification requirement in R.C. 2929.19(B)(5) is required to impose a prison term on an offender for a subsequent community control violation. *Id.* at ¶ 24.

{¶ 7} In this case, the trial court stated the following to appellant on the record during the October 12, 2006 sentencing hearing:

{¶ 8} "Now if you violate the conditions of your probation, a number of things could happen. First of all, we will be back here talking about it, and I will be very unhappy to see you back here.

{¶ 9} "I could extend your probation for up to five years. I could impose more restrictive conditions of probation, including local time, house arrest, ankle bracelets, all that sort of thing. And if all else fails, I would sentence you to twelve months on the felony five and would sentence up to five years on the felony three."

{¶ 10} Upon review of the record, we find that the trial court failed to strictly comply with the notification requirements set forth in R.C. 2929.19(B)(5). First, the trial court was required to notify appellant that additional consequences to his sentence may occur "if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation office." However, in this case, the trial court only notified appellant that a violation of the conditions of his "probation" could affect his sentence. Second, although the trial court correctly notified appellant that the terms of his community control sanction could be extended or made more restrictive, the trial court failed to notify appellant of the specific term of incarceration he could receive for community control violations. Informing appellant that he would be sentenced 12 months on the fifth degree felony is arguably specific; however, the trial court's notification that it could sentence appellant "up to five years" was not specific. See *Brooks*, supra, ¶ 26.

{¶ 11} Appellant's sole assignment of error is therefore found well-taken. This matter is remanded to the trial court for resentencing under R.C. 2929.15(B). However, because the trial court failed to strictly comply with the notification requirements of R.C. 2929.19(B)(5), a prison term is not an option. See *Brooks*, supra, ¶ 33.

{¶ 12} On consideration whereof, this court finds that appellant was improperly sentenced to prison for violating the terms of his community control. Accordingly, we vacate the Ottawa County Court of Common Pleas' June 23, 2008 judgment entry of sentencing and remand this matter to the trial court for resentencing in accordance with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT VACATED.

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

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
