[Cite as *State v. Papenfuse*, 2013-Ohio-4523.]

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

State of Ohio — Court of Appeals No. L-13-1021

Appellee — Trial Court No. CR0201003133

v.

Noel Papenfuse — **DECISION AND JUDGMENT**

Appellant — Decided: October 11, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Jerome Phillips, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals a judgment of the Lucas County Court of Common Pleas vacating the "good time" credit earned by offender during incarceration at the Correctional Center of Northwest Ohio (CCNO). Because we conclude that the

elimination of "good time" credit already earned would be fundamentally unfair, we reverse and remand for further proceedings.

{¶ 2} Appellant, Noel Papenfuse, was tried before a jury on three counts of aggravated vehicular homicide, all third degree felonies, arising from a car accident in which three passengers were killed. The jury found appellant guilty of three counts of the lesser included offense of vehicular homicide, misdemeanors in the first degree. On October 31, 2011, the trial court sentenced appellant to three consecutive six-month terms of incarceration. He began serving his time immediately following sentencing at the CCNO.

{¶ 3} While incarcerated, appellant earned "good time" for his behavior and for participating in mental health classes and other betterment programs. By mid-January, 2013, he had earned enough "good time" credit to be within days of release. At some point during this period, the trial court was advised of appellant's imminent release.

{¶ 4} On January 14, 2013, the trial court held an "on-the-record informal discussion" with the families of the victims, a representative for the state, and appellant's attorney. During the meeting, the trial court indicated regretful acceptance of its inability to modify the "good time" credit, stating "that is not a calculation that I have authority to change. That is a credit that he is given based on the time in and how the statute allows the time to be credited with a good time requirement." The trial court indicated the projected release date and that "I will only have obviously at this point * * * 14 days

available to me to potentially hang over his head * * *." It then scheduled a hearing for the next day to consider a sua sponte modification of the sentence.

{¶ 5} On January 15, 2013, appellant was present with his attorney for the court's motion proceedings. During the course of the hearing, the trial judge stated, "I obviously have no control over the calculation of good days, and I'll be real honest with you Mr. Papenfuse, I wish you wouldn't be getting them." The trial court then ordered there be no additional calculation of "good time" credit, suspended the incarceration portion of the sentence, placed appellant on five years of probation, ordered him to attend three AA meetings per week, and required him to have a mental health evaluation. The judge again recognized, "I have very, very minimal days to place you back in custody."

{¶ 6} In its judgment entry, however, the court calculated that appellant had 444 days of jail credit served on the 18 month sentence. With this calculation, appellant would have 101 days left to serve as opposed to less than 10 days if the "good time" credit was applied. It is from this judgment entry that appellant appeals.

{¶ 7} Appellant set forth a single assignment of error:

> The Trial Court abused its discretion by denying Appellant Good Time Credit.

{¶ 8} When a criminal sentence is appealed, "the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence." *State v. Weatherspoon*, 6th Dist. Ottawa No. OT-09-008, 2009-Ohio-6671, ¶ 9, quoting

State v. Kalish, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 14. If a sentence is clearly contrary to the law, the sentence must be vacated as a matter of law. *Id.*

{¶ 9} With misdemeanor jail terms, the sentencing court retains jurisdiction over the offender and has the authority to modify the defendant's sentence. R.C. 2929.24. *See State v. Faircloth*, 2d Dist. Montgomery Nos. 24395, 24396, 2011-Ohio-3727, ¶ 9. R.C. 2929.24(H) provides:

> If a court sentences an offender to a jail term under this section, the sentencing court retains jurisdiction over the offender and the jail term. Upon motion by either party or the court's own motion, the court, in the court's sole discretion and as the circumstances warrant, may substitute one or more community control sanctions under section 2929.26 or 2929.27 of the Revised Code for any jail days that are not mandatory jail days.

{¶ 10} Appellant concedes that R.C. 2929.24(H) gives a misdemeanor sentencing court the power to substitute one or more community control sanctions for any non-mandatory jail days. By this authority, the trial court had the jurisdiction to bring appellant back from CCNO and release him under community control sanctions. Consequently, the modification of sentence to impose community control sanctions upon appellant is not contrary to law and is thus enforceable. R.C. 2929.24(H). *See State v. Wood*, 5th Dist. Perry No. 12-CA-00013, 2013-Ohio-3446, ¶ 20.

{¶ 11} At issue here is whether the sentencing court abused its discretion by its denial of "good time" credit already earned. A trial court will not be found to have

abused its discretion unless its decision involves more than an error of judgment or law and can be characterized as unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 12} The record indicates that both the trial court and appellant were aware of CCNO's determination that appellant would receive good time credit and be released on January 28, 2013. This was the reason for the trial court to call the "informal discussion" on January 14, 2013, and the hearing on the motion to modify sentence on January 15, 2013.

{¶ 13} According to the judgment entry dated January 16, 2013, the trial court ordered the execution of sentence be suspended with apparently no credit for good time days. In both the "informal meeting" on January 14 and the formal hearing on January 15, however, the trial judge made statements which contradict this determination. The trial judge first stated that "what you have notice of now is that the way the statute allows good time to be credited is not something – this is not my calculation this is not a release for Mr. Papenfuse based on this early release motion." Subsequently, the trial judge acknowledged that

> [t]he court is aware that based on the population sheet, he has a scheduled release date of January 28, 2013 which would be considered his sentence in full. * * * Now when Mr. Papenfuse is released, if his time is not done in full as of January 28, I have not an ounce of control over him again because he will have served his full sentence.

{¶ 14} During the hearing the following day, the court again referenced its inability to change the calculation of good time served. The court stated, "Mr. Papenfuse, I do monitor the release dates and you, with the earned time credit on good time that is calculated out at the CCNO, are scheduled to be released on January 28, 2013 and at that point you would be considered in completion of your sentence." The trial court continued,

> I obviously have no control over calculation of good days and I'll be real honest with you, Mr. Papenfuse, I wish you wouldn't be getting them. You understand that the minimizing in any way of this sentence is, to me, an outrageous choice. Again, it's the way they calculate their days and it's not my calculation of days.

{¶ 15} Throughout both transcripts we find the trial court disagreed with granting good time credit, but accepted its lack of authority to change it. The trial court then directed that appellant be removed from CCNO and "order[ed] that there be no calculation of good time on any additional merits."

{¶ 16} Appellant participated in a work program and Choices Classes while at CCNO. The record reflects that he did so with the expectation of receiving good time credit. He was given "good day sheets" that were turned into authorities at CCNO who would then calculate the credit based upon the activity. The court used language indicating it had no control over appellant and his earned good time, yet proceeded to revoke it. Accordingly, we conclude that the trial court abused its discretion when it

denied appellant the benefit of good time already earned. Appellant's sole assignment of error is well-taken.

{¶ 17} Because the record is unclear as the exact amount of the "good time" to which appellant is entitled, we vacate that portion of the judgment entry of January 16, 2013, and remand the matter to the trial court for a proper calculation of appellant's time served credit.

{¶ 18} The judgment of the Lucas County Court of Common Pleas is vacated, in part, and the matter is remanded to said court for further proceedings in conformity with this decision. Appellee is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment vacated, in part.

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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE
CONCUR.