

[Cite as *State v. Sharp*, 2002-Ohio-4028.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT  
COUNTY OF CUYAHOGA  
NO. 79230

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
	:	
-vs-	:	AND
	:	
JUNIOUS SHARP	:	OPINION
	:	
Defendant-Appellant	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	AUGUST 8, 2002
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from Common Pleas Court Case No. CR-344312
	:	
JUDGMENT	:	VACATED
	:	
DATE OF JOURNALIZATION	:	
	:	
APPEARANCES:		
For Plaintiff-Appellee:		William D. Mason Cuyahoga County Prosecutor STEVEN GRAINES Assistant County Prosecutor 8 <sup>th</sup> Floor Justice Center 1200 Ontario Street Cleveland, Ohio 44113
For Defendant-Appellant:		Robert L. Tobik Chief Public Defender DARIN THOMPSON Assistant Public Defender 1200 West Third St. N.W. 100 Lakeside Place Cleveland, Ohio 44113
ANNE L. KILBANE, J.		

{¶1} This is an appeal from an order of Judge Nancy R. McDonnell sentencing appellant Junious Sharp to a twelve-month term of incarceration for violating community control sanctions ("CCS"), imposed following his guilty plea to possession of drugs. He claims that, because the duration of the CCS had expired, the judge lacked the jurisdiction to find he had violated his CCS, he should not have received any prison sentence and he should not have received the maximum sentence. We vacate the judgment.

{¶2} Sharp was indicted for one count of aggravated trafficking of a controlled substance, and one count of possession of drugs.<sup>1</sup> In January 1997, he pleaded guilty to the fifth-degree felony possession charge, with the remaining count nolle. At that time, the judge advised him that his plea could expose him to a possible prison term of six to twelve months, in monthly increments, but also told him that because of the degree of the offense, there was a presumption -- but no promise -- of community control sanctions and that a violation of the terms of community control sanctions could result in a prison term. On March 27, 1997, he was sentenced to two years of CCS, he was to maintain full-time employment, to participate in an in-patient drug treatment program and aftercare, undergo random drug tests, and pay costs.<sup>2</sup> He was

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<sup>1</sup>These charges were based on the allegation that Sharp had sold one Dilaudid pill to an undercover police officer.

<sup>2</sup>Only the journal entry claims that Sharp was to pay the standard probation supervision costs.

not told of any consequences or specific prison term that could be imposed if these conditions were violated or not fulfilled.

{¶3} In May 1997, the judge found that Sharp had violated the terms of his CCS by being discharged from his drug treatment program for marijuana usage and "house infractions," and continued his CCS but ordered him to submit to an in-patient drug treatment program and warned him that another violation would result in a prison term. Another capias was issued in November 1998, because Sharp failed to report to his probation officer.<sup>3</sup> He was arrested on November 29, 1999, and held in the Cuyahoga County jail. For his defense at the violation hearing, Sharp contended he believed he had finished his term of CCS. The judge, however, found that, because Sharp had failed to pay court costs and the standard probation supervision fees, he had violated the terms of his CCS. She continued the CCS and ordered him to pay the costs through court community service. She told him if he paid the costs and if his probation officer consented, his "probation" would terminate but she repeated the threat of a prison term if he again violated the terms of his CCS. On May 27, 2000, another capias was issued when Sharp failed to comply with reporting and community service requirements previously imposed. At the September 11, 2000 hearing following execution of that warrant, Sharp admitted he had not

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<sup>3</sup>A requirement that he report to a probation officer is not found in the sentencing transcript or journal entry, nor are several other requirements under R.C. 2929.19(B)(5).

complied. The judge found him to be unsuited for CCS, that he had violated the terms of his CCS, and stated: "Felony of the third degree, I sentence you to a year, [and] give you credit for any time that you served thus far." Sharp was given sixty-four days credit, did not move to stay execution of the sentence and completed his prison term on July 9, 2001.

{¶4} Before we address Sharp's assigned errors, we must respond to the State's argument that this appeal is moot because he never challenged his underlying conviction for drug possession or the finding that he violated his CCS and voluntarily (i.e. without attempting to have the sentence stayed pending appeal) completed his entire prison term. In his assignment of error number one, however, while Sharp does not substantively challenge the judge's finding that in September 2000, over two years after the CCS had expired, he violated the terms of his CCS, he challenges her jurisdiction to find that he violated CCS and was subject to imprisonment and the State's brief fails to address the issue.

{¶5} The Ohio Supreme Court has held that, regardless of whether a defendant has served an entire sentence for a felony conviction, an appeal of the conviction itself does not become moot because of the obvious civil disabilities attendant to acquiring the status of a "felon."<sup>4</sup> We are aware that whatever the outcome of this appeal, because of his conviction for drug possession,

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<sup>4</sup>*State v. Golston* (1994), 71 Ohio St.3d 224, 1994-Ohio-109, 643 N.E.2d 109, syllabus.

Sharp's status will remain that of a convicted felon. We, therefore, evaluate the viability of this appeal on the basis on his challenge to the judge's continuing *jurisdiction* and her ability to impose a prison sentence because of alleged violations of his CCS.<sup>5</sup>

{¶6} "I. The Trial Court Lacked Jurisdiction to Hold Appellant in Violation of His Community Control Sanctions Because The Period of Community Control Had Expired."

{¶7} R.C. 2929.19(B)(5) requires a judge who chooses to impose CCS to notify the offender at the sentencing hearing that if the terms are violated "the court may impose a longer time under the same

{¶8} 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

{¶9} selected by the court from the range of prison terms for the offense pursuant to section 2929.14 of the Revised Code."<sup>6</sup>

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<sup>5</sup>*State v. Wilson* (1975), 41 Ohio St.2d 236, 325 N.E.2d 236 and its progeny relate only to the issue of mootness when appeals from convictions involved questions about whether a sentence had been voluntarily served. See also *State v. Yates*, (1991), 58 Ohio St.3d 78, 79, 567 N.E.2d 1306, and *State v. Ogletree* (Aug.2, 2001), Cuyahoga App. No. 78306.

<sup>6</sup>R. C. 2929.19(B)(5).

{¶10} The transcript of the sentencing hearing reveals that Sharp was not told of any penalty should he violate the terms of his CCS, much less any specific prison term. As this court stated in *State v. Virasayachack*: "If no prison term was specified at the original sentencing, it follows that no prison term may be imposed."<sup>7</sup> Similarly, if Sharp was not advised of any penalty for violation of the CCS, none can be imposed.<sup>8</sup>

{¶11} Sharp contends his CCS terminated on March 27, 1999, two years after it was imposed. The State, asserting only that this appeal is moot, does not address any of his assignments of error and provides no rebuttal. The chronology reveals: (1) March 27, 1997: original two-year CCS sentence imposed; (2) May 9, 1997: first violation found, and CCS "continued," on condition that Sharp pay his costs, complete a substance abuse program, and report monthly to his probation officer; (3) November 20, 1998: second *capias* issued; (4) November 29, 1999: second *capias* arrest; (5) December 9, 1999: CCS "continued" again, on the condition that they would be terminated upon Sharp's satisfaction of his costs, and with monthly reporting still ordered; (6) May 27, 2000: third *capias* issued (with costs still unsatisfied and reporting requirement ignored again); (7) September 11, 2000: prison sentence

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<sup>7</sup>*State v. Virasayachack* (2000), 138 Ohio App.3d 570 at 575, 741 N.E.2d 943 at 946.

<sup>8</sup>R.C. 2929.19(B)(5); R.C. 2901.04(A).

imposed for failure to fulfill community service and reporting requirements.

{¶12} On March 27, 1999, two years of CCS imposed upon Sharp had ended. What, then, could extend the duration of those controls? If he had been on probation,<sup>9</sup> a capias warrant for the arrest of an alleged probation violator suspends the running of the probation term through the operation of R.C. 2951.07.<sup>10</sup>

{¶13} R.C. 2951.07, however, applies exclusively to the circumstance of court-imposed probation, and does not provide authority to suspend the running of a CCS term upon the issuance of a capias warrant stemming from an alleged CCS violation.<sup>11</sup> Under the version of R.C. 2929.15(A)(1) in force at all times relevant to this case,<sup>12</sup> no provision existed to toll the CCS term for a CCS

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<sup>9</sup>{¶a} According to R.C. 2951.07, in relevant part,  
{¶b} "[i]f the probationer absconds or otherwise absents himself or herself from the jurisdiction of the court without permission from the county department of probation or the court to do so, or if the probationer is confined in any institution for the commission of any offense whatever, the probation period ceases to run until such time as the probationer is brought before the court for its further action."

<sup>10</sup>*Rash v. Anderson*, 80 Ohio St.3d 349, 1997-Ohio-338, 686 N.E.2d 505.

<sup>11</sup>*State v. Griffin* (1998), 131 Ohio App.3d 696, 698, 723 N.E.2d 606.

<sup>12</sup>R.C. 2929.15(A)(1) eff. 3-23-00 now provides: \*\*\* If the offender absconds or otherwise leaves the jurisdiction of the court in which the offender resides without obtaining permission from the court or the offender's probation officer to leave the jurisdiction of the court, or if the offender is confined in any institution for

violation. As such, no tolling could have taken place, and Sharp's CCS - and the judge's jurisdiction to enforce CCS compliance - terminated on March 27, 1999, although the term was not successfully completed. Unfortunately, under the unique facts of this case, our resolution of this issue countenances the actions of a defendant who violated CCS requirements, eluded an ensuing capias until the stated term of CCS expired, and then slipped through a jurisdictional defect to escape any sanctions for his derelictions.

This result, however, is dictated by the failure of R.C. 2929.15(A)(1), prior to March 23, 2000, to address the suspension of the running of a CCS term prior to a judge's resolution of a pending possible violation. The judge lost her jurisdiction to find that Sharp had violated the terms of his CCS or impose any prison sentence once the term of his CCS had expired on March 27, 1999.<sup>13</sup> This assignment of error has merit.

{¶14} Sharp's second and third assignment of error state:

{¶15} "II. The Trial Court Erred in Sentencing Appellant to a

{¶16} Prison Term of One Year Where No Prison Term Had Been Specified by The Trial Court at The Time He Was Placed on Community Control Sanctions.

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the commission of any offense while under a community control sanction, the period of the community control sanction ceases to run until the offender is brought before the court for its further action. \*\*\*

<sup>13</sup>State v. Yates, supra.



{¶17} "III. The Trial Court Erred in Sentencing Appellant to  
{¶18} Maximum Terms (Sic) of Incarceration Without Making The  
Findings Required by R.C. 2929.14(C) AND R.C. 2929.19(B)(2)(d)."

{¶19} Because of our resolution of the first assignment of  
error we find these issues moot.<sup>14</sup>

Judgment vacated.

It is ordered that the appellee recover from appellant costs  
herein taxed.

This court finds there were reasonable grounds for this  
appeal.

It is ordered that a special mandate issue out of this court  
directing the Cuyahoga County Common Pleas Court to carry this  
judgment into execution.

A certified copy of this entry shall constitute the mandate  
pursuant to Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY, J., CONCURS IN JUDGMENT ONLY  
TERRENCE O'DONNELL, J., DISSENTS WITH SEPARATE OPINION

ANNE L. KILBANE, PRESIDING JUDGE

JUDGE TERRENCE O'DONNELL, DISSENTING:

{¶20} I respectfully dissent because, in my view, this appeal  
is moot.

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<sup>14</sup>App.R. 12(A) .

{¶21} In his first assignment of error, Sharp challenges the jurisdiction of the common pleas court to determine whether or not he violated his community control sanctions, and in the second and third assignments of error he contests the subsequent imposition of sentence. Regardless of whether the court acted correctly in its decision to do so, there can be no question that the trial court did have *jurisdiction* to consider the issue of whether Sharp violated community control.

{¶22} Sharp did not file a timely appeal from the court's decision to impose sentence on the underlying felony conviction, nor did he seek a stay of imposition of that sentence pending this appeal; further, he is not challenging his conviction for possession of drugs. Rather, he now appeals only the court's jurisdiction and its imposition of the sentence he already served.

{¶23} In its opinion, citing to *State v. Golston*, 71 Ohio St.3d 224, 1994-Ohio-109, 643 N.E.2d 109, the majority correctly recognizes this issue when it states:

{¶24} "The Ohio Supreme Court has held that, regardless of whether a defendant has served an entire sentence for a felony conviction, *an appeal of the conviction itself* does not become moot because of the obvious civil disabilities attendant to acquiring the status of a 'felon.'" (Emphasis added.)

{¶25} Two important clarifications are necessary here: one, Sharp is not appealing his *conviction*; and two, he only challenges

the court's jurisdiction to find him in violation of community control sanctions and the imposition of a sentence which he has already served.

{¶26} Several courts have addressed this precise issue. For example, in *State v. Beamon* (Dec. 14, 2001), Lake App. No. 2000-L-160, the defendant challenged an imposition of a sentence following violation of community control sanctions; the court there concluded the defendant's appeal to be moot, reasoning that he had "already served his sentence, and no relief can be granted by this court subsequent to the completion of the sentence if the underlying conviction itself is not at issue." That court further noted:

{¶27} "If an individual has already served his sentence, there is no collateral disability or loss of civil rights that can be remedied by a modification of the length of that sentence in the absence of a reversal of the underlying conviction."

{¶28} Accord *State v. Yopp*, Ashtabula App. No. 2001-A-0039, 2002-Ohio-2073 ("This court cannot grant any relief to appellant following the completion of the sentence because the underlying conviction is not at issue.").

{¶29} Likewise, in *State v. Smith*, Lake App. No. 2000-L-195, 2002-Ohio-1330, the court stated:

{¶30} "While a defendant can appeal a felony conviction after serving his full sentence, appellant only challenges his sentence

on appeal. Because appellant did not request a stay pending the outcome of this appeal of his sentence, he must have served the remainder of his sentence by now. 'No relief can be granted by this court subsequent to the completion of the sentence if the underlying conviction itself is not at issue.'" [Citation omitted.]

{¶31} In the instant appeal, the issues raised by Sharp, challenging the court's jurisdiction and the imposition of sentence, are moot because he has completed his sentence and the relief he seeks cannot be granted.

{¶32} I would therefore dismiss this appeal as moot.