

[Cite as *State v. Miller*, 2005-Ohio-1300.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84540 and 84916

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	and
-vs-	:	
	:	OPINION
SEAN MILLER	:	
	:	
Defendant-Appellant	:	
	:	

DATE OF ANNOUNCEMENT	<u>MARCH 24, 2005</u>
OF DECISION:	

CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court Case No. CR-443646 and CR-435084
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JUDGMENT:	Sentence vacated; remanded for resentencing.
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DATE OF JOURNALIZATION:

APPEARANCE:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor PATRICK S. LEARY Assistant County Prosecutor 8 <sup>th</sup> Floor Justice Center 1200 Ontario Street Cleveland, Ohio 44113
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For Defendant-Appellant:	VICKI LYNN WARD The Superior Building Suite 1725 815 Superior Avenue Cleveland, Ohio 44114
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PATRICIA ANN BLACKMON, A.J.:

{¶ 1} Appellant Sean Miller appeals from the sentence imposed by the trial court. He assigns the following errors for our review:

**"I. The trial court erred when it sentenced defendant-appellant to consecutive sentences without placing its reasons for doing so on the record."**

**"II. The trial court failed to find that sentences imposed were not disproportionate to the seriousness of and to any danger posed by defendant-appellant's conduct."**

{¶ 2} Having reviewed the record and pertinent law, we vacate Miller's sentence and remand for resentencing. The apposite facts follow.

{¶ 3} On October 20, 2003, the Cuyahoga County Grand Jury indicted Miller in Case No. 443646 as follows: one count for possession of drugs in violation of R.C. 2925.11, two counts for drug trafficking in violation of 2925.03, and one count for possession of criminal tools in violation of R.C. 2923.24. Miller pled guilty to one count of drug trafficking, with the remaining counts being nolle.

{¶ 4} At the time of the indictment in the above case, Miller was on probation for a burglary charge in Case No. 435084. Miller had pled guilty to one count of burglary in violation of R.C. 2911.12(C), a third degree felony. The trial court had sentenced

him to four years in prison, but suspended the sentence and placed him on three years of community control.

{¶ 5} On March 23, 2004, the trial court conducted a sentencing hearing regarding Miller's drug trafficking plea and also conducted a hearing for Miller's probation violation on the burglary charge. After hearing statements from defense counsel, Miller, and Miller's mother, the trial court imposed an eleven-month prison term for drug trafficking and reinstated the four-year sentence for burglary. The trial court failed to state at the hearing or in its sentencing journal entries whether the sentences were to be served concurrently or consecutively. Miller now appeals.

{¶ 6} In his two assigned errors, Miller argues the trial court erred by failing to adhere to the requirements of the statutory guidelines in imposing consecutive terms. The State concedes the trial court erred in this respect. Our independent review of the sentencing transcript and the journal entries, however, indicates the trial court did not impose consecutive sentences. In fact, the trial court failed to state whether the sentences were to be served consecutively or concurrently.

{¶ 7} Under former R.C. 2929.41, which was pre-S.B.2, the trial court was required to sentence a probation violator consecutively. However, R.C. 2929.41, effective May 17, 2000, provides as follows:

(A) Except as provided in division (B) of this section, division (E) of section 2929.14, or division (D) or (E) of section 2971.03 of the Revised Code, a

sentence of imprisonment shall be served concurrently with any other sentence of imprisonment imposed by a court of this state, another state, or the United States. \*\*\*.<sup>1</sup>

{¶ 8} None of the exceptions listed in R.C. 2929.41(A) apply to this case. Consequently, we conclude under R.C. 2929.41(A) Miller's sentence is to be served concurrently. Therefore, we affirm the decision of the trial judge.

{¶ 9} Despite our disposition regarding Miller's sentence, we nonetheless find the matter needs to be remanded for resentencing.

Our review of the record indicates that although the trial court imposed post-release control in the sentencing journal entry, it failed to notify Miller of post-release control at the sentencing hearing. The Ohio Supreme Court recently held in *State v. Jordan*<sup>2</sup> that:

"When a trial court fails to notify an offender about postrelease control at the sentencing hearing but incorporates that notice into its journal entry imposing sentence, it fails to comply with the mandatory provisions of R.C. 2929.19(B)(3)(c) and (d), and,

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<sup>1</sup>R.C. 2929.41 was further revised effective January 1, 2004, but the changes do not affect the paragraph discussed. Because Miller committed his offenses in 2003, the former statute, effective May 17, 2000, applies.

<sup>2</sup>*State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085.

therefore, the sentence must be vacated and the matter remanded to the trial court for resentencing."<sup>3</sup>

{¶ 10} We also noticed that Miller's attorney mentioned at the hearing that Miller had been in jail for six months awaiting trial. The trial court, however, failed to credit him for this time in the sentencing order. Pursuant to R.C. 2967.191 "The department of rehabilitation and correction shall reduce the stated prison term of a prisoner \*\*\* by the total number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced \*\*\*." It is the trial court's responsibility to properly calculate the amount of days for which such credit may be given.<sup>4</sup> Since the provisions are mandatory, the trial court's failure to properly calculate such credit and include it in the body of the sentencing order is plain error.<sup>5</sup>

{¶ 11} Therefore, based on the fact Miller was not advised of post-release control and not credited for time served, the matter is remanded for resentencing and correction of the sentencing order.

Sentence vacated and case remanded for resentencing.

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<sup>3</sup>Id. at paragraph two of syllabus.

<sup>4</sup>*State ex rel. Corder v. Wilson* (1991), 68 Ohio App.3d 567, 589.

<sup>5</sup>See *State v. Hawkins* (Apr. 9, 1999), 2d Dist. No. 98CA6, and *State v. Hinzman* (June 19, 1986), 8th Dist. Nos. 50829, 50830.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

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

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

COLLEEN CONWAY COONEY, J., and

DIANE KARPINSKI, J., CONCUR.

PATRICIA ANN BLACKMON  
ADMINISTRATIVE JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).