

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92327

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

BRETT LEE

DEFENDANT-APPELLEE

**JUDGMENT:
VACATED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515588

BEFORE: Jones, J., Rocco, P.J., and Sweeney, J.

RELEASED: November 5, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Appellant, the State of Ohio, appeals the trial court's judgment sentencing defendant-appellee, Brett Lee, to six days in jail without first ordering or considering the required presentence investigation ("PSI") report.

For the reasons that follow, we vacate Lee's sentence and remand the matter for resentencing.

{¶ 2} Lee pleaded guilty to one count of drug possession, a felony of the fifth degree. The trial court sentenced Lee to six days in jail and gave him credit for time served during the pendency of the case. He had spent five days in the municipal jail and one day in the county jail, for a total of six days. He was also ordered to pay a fine of \$100 and to pay court costs in the amount of \$100. His driver's license was also suspended for six months with occupational driving privileges. The state did not appear at the plea hearing or the sentencing hearing that occurred immediately after the plea.

"I. The trial court erred in imposing community control sanctions without ordering a pre-sentence investigation report in violation of Crim.R. 32.2 and R.C. 2951.03."

{¶ 3} In its first assigned error, the state maintains that the trial court erred by sentencing Lee to community control without first ordering and considering a PSI report, in strict contravention of Crim.R. 32.2 and R.C. 2951.03. Lee, however, argues his sentence does not constitute community control; therefore, a PSI report was not necessary.

{¶ 4} In *State v. Kalish*,¹ the Ohio Supreme Court set forth the standard for appellate review of felony sentences subsequent to its ruling in *State v. Foster*.² Post-*Foster*, we must use a two-step process in reviewing sentences. First, we “must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law.”³ If this first prong is satisfied, we must then review the trial court’s decision under an abuse-of-discretion standard.⁴ Applying this standard, we conclude Lee’s sentence is contrary to law and thus, invalid.

{¶ 5} We agree a PSI report must be considered prior to sentencing a defendant who committed a felony to community control.⁵ In the instant case, however, the sentence imposed does not constitute community control; it is also not a valid prison sentence.

{¶ 6} Because Lee pleaded guilty to a fifth degree felony, the only option for the court was to sentence Lee to either community control or

¹120 Ohio St.3d 23, 2008-Ohio-4912.

²109 Ohio St.3d 1, 2006-Ohio-856.

³*Kalish*, supra, at ¶4.

⁴*Id.*

⁵Crim.R. 32.2; R.C. 2951.03(A)(1). See *State v. Ross*, Cuyahoga App. No. 92461, 2009-Ohio-4720; *State v. Pickett*, Cuyahoga App. No. 91343, 2009-Ohio-2127; *State v. Walker*, Cuyahoga App. No. 90692, 2008-Ohio-5123; *State v. Mitchell* (2001), 141 Ohio App.3d 770, discretionary appeal not allowed by 92 Ohio St.3d 1443; *State v. Preston*, 155 Ohio App.3d 367, 2003-Ohio-6187.

imprisonment.⁶ The trial court did neither. The six days in jail did not constitute prison time because time spent in jail is not equivalent to prison,⁷ and the minimum term of imprisonment for a fifth-degree felony is six months.

{¶ 7} Pursuant to R.C. 2929.16(A)(2), the court can impose jail time as a community residential sanction. However, in the instant case, Lee was never placed under the supervision of the probation department as required by R.C.2929.15(A)(2)(a), which provides:

“If a court sentences an offender to any community control sanction or combination of community control sanctions * the court *shall* place the offender under the general control and supervision of a department of probation * * * for purposes of reporting to the court a violation of any condition of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender’s officer.” (Emphasis added).**

{¶ 8} Recently, this court in *State v. Eppinger*⁸ concluded that a sentence, similar to the one in the instant case, was invalid for the same reason. Moreover, as we noted in *Eppinger*, the court must also advise the defendant of the consequences for violating community control. R.C.

⁶R.C. 2929.14(A)(5). See, also, *State v. Eppinger*, Cuyahoga App. No. 92441, 2009-Ohio-5233.

⁷*State v. Lowe*, 7th Dist. No. 04 BE 50, 2005-Ohio-6775.

⁸*State v. Eppinger*, *supra*.

2929.19(B)(5) requires that a court sentencing an offender to community control must:

“* * * notify the offender that, if the conditions of the sanction are violated, 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.”

{¶ 9} The sentence pronounced by the court in the instant case was as follows:

“You’re sentenced to six days in jail, including your municipal and county time. You are to pay \$100 in fines, \$100 in costs. Your driver’s license is suspended, with occupational driving privileges.”⁹

{¶ 10} Thus, the court failed to inform Lee of the consequences if he did not pay the fine or court costs, or engaged in operating a vehicle other than for occupational reasons.

{¶ 11} Because of the court’s failure to place Lee under the supervision of the probation department and failure to advise him of the consequences of violating the conditions of the imposed sentence, the court failed to impose a valid community control sanction. Accordingly, pursuant to the first prong of

⁹Tr. 8.

Kalish, the sentence is contrary to law. The state's first assigned error is sustained.

{¶ 12} In its second assigned error, the state challenges the termination of Lee's community control sanction before Lee had ever been supervised. Because we have concluded the court did not sentence Lee to a valid sentence, this assigned error is moot.¹⁰

Judgment vacated and cause remanded to the lower court for further proceedings consistent with this opinion.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

LARRY A. JONES, JUDGE

KENNETH A. ROCCO, P.J., and
JAMES J. SWEENEY, J., CONCUR

¹⁰App.R.12(A)(1)(c).