[Cite as *State v. Mack*, 2009-Ohio-6460.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92606

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CURTIS MACK

DEFENDANT-APPELLANT

JUDGMENT:
VACATED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-477063

BEFORE: Celebrezze, J., Kilbane, P.J., and Dyke, J.

RELEASED: December 10, 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).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Curtis Mack, appeals what he classifies as the trial court's imposition of sentence after a more than 26-month delay between conviction and the imposition of community control sanctions and restitution. After a thorough review of the record, and for the following reasons, we vacate appellant's community control and restitution sanctions.

{¶ 2} On February 2, 2006, a vehicle stalled on Interstate 71. Norbert Magalski pulled his car over and was attempting to warn other drivers of the stopped vehicle when appellant's car struck Mr. Magalski. Appellant was indicted for aggravated vehicular assault,[1] failure to stop after an accident – exchange of identity and vehicle registration,[2] driving while under the influence of alcohol,[3] and improperly handling a firearm in a motor vehicle.[4] Appellant was arraigned on March 10, 2006, and his case proceeded to trial on July 12, 2006. Trial concluded on July 17, 2006, where the jury found appellant guilty of vehicular assault, failure to stop after an accident – exchange of identity and vehicle registration, and improperly handling a

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[1] Count 1, a violation of R.C. 2903.08(A)(2), a felony of the third degree. Because appellant was found not guilty of driving while under the influence, the aggravated vehicular assault became a fourth degree felony.

[2] Count 2, a violation of R.C. 4549.02, a felony of the fifth degree.

[3] Count 3, a violation of R.C. 4511.19.

[4] Count 4, a violation of R.C. 2923.16, a felony of the fifth degree.

firearm in a motor vehicle. The jury found appellant not guilty of the remaining charges.

{¶ 3} After a presentence investigation, appellant was sentenced on August 15, 2006 to eight months incarceration at the Lorain Correctional Institution on Count 1. The trial court also ordered that, "[u]pon completion of sentence, [appellant] is ordered to be returned to Cuyahoga county jail for terms and condition of 5 years of community control sanctions as to Counts 2 [failure to stop] and 4 [improper handling of a firearm] to include treatment, drug and alcohol testing and restitution to victim. Post release control is part of this prison sentence for 3 years for the above felony(s) under R.C. 2967.28."

{¶ 4} Upon completion of his incarceration, instead of being transferred to the Cuyahoga County jail, appellant was released on April 5, 2007. On April 25, 2007, appellant moved the trial court for occupational driving privileges, which was denied six days later.

{¶ 5} On October 30, 2008, upon realizing that the terms of appellant's community control and restitution had not been worked out, the court scheduled a hearing for December 1, 2008. The trial court stated the reason for the oversight was that "it fell through the cracks," and it "was recently brought to [the court's] attention."

{¶ 6} At the December 2008 hearing, appellant was informed of the terms of his community control. He was also ordered to undergo random drug and alcohol testing, maintain verifiable employment, and make restitution in the amount of $107,000 to Mr. Magalski. Appellant asked that the community control sanction run from the time he was released from prison in 2007, which the court refused.

Law and Analysis

{¶ 7} On appeal, appellant claims the delay between the August 2006 sentencing hearing and the December 2008 hearing constitutes an unreasonable delay, depriving the trial court of jurisdiction to impose sentence.

{¶ 8} Appellant wishes to classify the December 2008 hearing as a second or final sentencing hearing, while the state argues that it was merely a modification of appellant's community control sanction. The state argues that sanctions for Counts 2 and 4 were imposed at the August 2006 sentencing hearing, and the December 2008 hearing was merely a modification of the original sentence.

{¶ 9} R.C. 2953.08(G)(2) requires this court to affirm a sentence meted out by the trial court unless it can be shown by clear and convincing evidence that "the record does not support the sentencing court's findings * * * or [t]hat the sentence is otherwise contrary to law." Clear and convincing evidence is

"that evidence 'which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'" *State v. Garcia* (1998), 126 Ohio App.3d 485, 487, 710 N.E.2d 783, quoting *Cincinnati Bar Assn. v. Massengale* (1991), 58 Ohio St.3d 121, 122, 568 N.E.2d 1222.

{¶ 10} For Counts 2 and 4, the journal entry from the August 2006 sentencing hearing is not sufficient to constitute a valid sentence under the Ohio Revised Code. When sentencing a defendant to community control that could result in jail time if the terms of such control are violated, the trial court must inform the defendant of the term of incarceration that could result. R.C. 2929.19(B)(5). See *State v. Sutherlin*, 154 Ohio App.3d 765, 2003-Ohio-5265, 798 N.E.2d 1137. Here, the August 2006 journal entry makes no reference to any prison term for violation of community control; however, the December 2008 journal entry does specify that appellant would be subject to two years of incarceration for a violation of community control sanctions.

{¶ 11} The restitution order is similarly statutorily deficient. Under R.C. 2929.18(A)(1), the trial court is required to determine the amount of restitution to be paid and to whom. This section states: "If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender." See *State v. Vaughn*, Darke App. No. 1564, 2002-Ohio-4975. The August 2006 journal entry imposing sentence

makes no reference to the amount of restitution or to whom specifically it shall be paid. The December 2008 journal entry specifies that restitution will be paid to Mr. Magalski in the amount of $107,000.

{¶ 12} Generally, the appropriate measure is to allow the trial court to modify the sentence; however, a court may violate constitutional rights of individuals by modifying a sentence after they have begun to serve their validly imposed punishment. See *State v. McColloch* (1991), 78 Ohio App.3d 42, 603 N.E.2d 1106 (modification of a validly imposed sentence after individual began serving sentence violates Double Jeopardy Clause of United States and Ohio Constitutions); *State v. Papa* (1990), 66 Ohio App.3d 146, 583 N.E.2d 1044 (a trial court may not modify a sentence by changing terms of a defendant's probation after he commences his sentence and satisfies terms of the original probation). A statutorily deficient sentence is considered void. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263 (any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void).

{¶ 13} This appellate court has previously held that "[a] trial court's failure to comply with statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." *State v. Abner*, Cuyahoga App. No. 81023, 2002-Ohio-6504, at ¶15, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, 471 N.E.2d 774. The trial court's attempted sentence on

Counts 2 and 4 at the August 2006 hearing is void; therefore, the December 2008 hearing was the first time appellant was sentenced for Counts 2 and 4.

{¶ 14} The trial court is under a duty to impose sentence without any unnecessary delay. Crim.R. 32(A). In cases where a long delay exists between a finding of guilt and pronouncement of sentence, many Ohio courts have determined that the trial court loses jurisdiction to impose sentence when the delay is unreasonable. See *Artiaga v. Money* (July 11, 2006), N.D. Ohio No. 3:04CV7121. Because the sentences for Counts 2 and 4 as imposed at the August 2006 sentencing hearing are void, there was a delay of over 26 months between appellant's finding of guilt and the imposition of sentence on those counts in December 2008. Even if that were not the case, there was a delay of some 19 months between appellant's release from prison and the December 2008 sentencing hearing. This delay was due to a breakdown in the machinery of justice. This is the very definition of unnecessary and cannot be characterized as reasonable.

{¶ 15} This court is loath to deprive Mr. Magalski of a restitution award, but the trial court lost jurisdiction to impose sentence due to the inexcusable delay between appellant's conviction and his December 2008 sentencing hearing. Appellant's first assignment of error is well taken. The sentence imposing community control and restitution is hereby vacated. R.C.

2953.08(G)(2). This renders appellant's remaining assignments of error moot.

{¶ 16} This cause is vacated and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the 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.

FRANK D. CELEBREZZE, JR., JUDGE

ANN DYKE, J., CONCURS;
MARY EILEEN KILBANE, P.J., DISSENTS (WITH SEPARATE OPINION)

MARY EILEEN KILBANE, P.J., DISSENTING:

{¶ 17} I respectfully dissent. I disagree with the majority, who reached the conclusion that the trial court's August 2006 sentencing journal entry and restitution order are statutorily deficient. As the record makes clear, the trial court imposed a split sentence in this matter. This court has repeatedly held that such sentences are appropriate. *State v. Aitkens*, Cuyahoga App.

Nos. 79851 and 79929, 2002-Ohio-1080; *State v. Molina*, Cuyahoga App. No. 83166, 2004-Ohio-1110. During the December 1, 2008 hearing, the trial court stated that at least part of its reasoning for imposing a split sentence was to require Mack to make restitution to the victim:

> "The Court: Well, I'm concerned about getting this man restitution. You're going to pay it. That's why I did a split sentence, otherwise I would have put you in prison on all three counts." Id. at 5-6.

{¶ 18} The trial court did not commit plain error in imposing this specific financial sanction. Ohio law is clear that the court should consider the impact that a fine has on the offender; however, the court is required to consider such factors only if evidence is offered at the sentencing hearing. *State v. Burkitt* (1993), 89 Ohio App.3d 214, 229, 624 N.E.2d 210. Here, no such evidence was presented by Mack, and no objection was made. Mack could have called witnesses and presented evidence on his own behalf for the court's consideration, but did not do so. He never cross-examined the victim, nor did he ask any questions at the restitution hearing. Further, Mack did not object to the amount of the fine at the sentencing hearing and did not demonstrate to the court that he did not have the resources to pay the fine; therefore, he waives any objections to the fine on appeal. See *State v.*

Annotico (Dec. 14. 2000), Cuyahoga App. No. 76202, citing *Burkitt*, supra. See, also, *State v. Johnson* (1995), 107 Ohio App.3d 723, 669 N.E.2d 483.

{¶ 19} Mack was already on postrelease control when the trial court convened the December 2008 restitution hearing. Therefore, the trial court was not deprived of jurisdiction when it modified Mack's sentence pursuant to this hearing. "Postrelease control constitutes a portion of the maximum penalty involved in an offense for which a prison term will be imposed." *State v. Griffin*, Cuyahoga App. No. 83724, 2004-Ohio-4344, citing *State v. Jones* (May 24, 2001), Cuyahoga App. No. 77657, discretionary appeal not allowed, 93 Ohio St.3d 1434, 755 N.E.2d 356. Mack was therefore under the jurisdiction of the court in December 2008. The failure of the State to convey him to the Justice Center upon his release from prison, coupled with Mack's own failure to report to the probation office, does not divest the trial court of jurisdiction.

{¶ 20} For the reasons cited above, I would affirm Mack's sentence in all respects.