[Cite as *State v. Hodge*, 2010-Ohio-78.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93245

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT HODGE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-507081

BEFORE: McMonagle, J., Cooney, P.J., and Blackmon, J.

RELEASED: January 14, 2010

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. 2.2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records, and briefs of counsel.

{¶ 2} Defendant-appellant Robert Hodge was charged with breaking and entering and theft. After negotiations with the state, he pleaded guilty to breaking and entering; the theft charge was dismissed. He was sentenced to one year of community control sanctions and advised of the following: "Any violations of this order may result in imposing a longer period of supervision, more restrictive community control sanctions or a prison term. The fine for violation of this order will be $2500. The prison term for violation of this order will be 12 months in prison."

{¶ 3} Hodge violated his community control sanctions twice. After the first violation, the court ordered him to inpatient drug treatment and stated in its judgment entry that "community control is continued with prior conditions."[1] After the second violation, Hodge was sentenced to nine months in prison. In his sole assignment of error, he contends that the trial

[1]It has been contended that the court's advisement to Hodge upon his first violation that "community control is continued with conditions" could be construed as re-notification of the one year prison term to be imposed for a subsequent violation.

court erred in sentencing him to prison because it did not advise him again after his first violation that a prison term could be imposed. We disagree.

{¶ 4} Hodge cites *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, in support of his contention. In *Brooks*, the journal entry from the original sentencing hearing provided that a violation of the conditions could lead to a "prison term of 6 to 12 months." The *Brooks* Court held that "the sentencing hearing itself [is] the time when the notification must be given." Id. at ¶19. And this required notification may not be a range, but must rather be the "definite prison term that awaits if community control is violated." Id. at ¶25. Of significance, the Court stated that "the purpose behind R.C. 2929.19(B)(5) notification * * * [is] to make the offender aware *before a violation* of the specific term that he or she will face for a violation." (Emphasis sic.) Id. at ¶33. In short, a trial court may not imprison an offender unless, before the violation, he has been warned of the specific term that will be imposed.[2]

{¶ 5} Following *Brooks*, the Ohio Supreme Court decided *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995. In *Fraley*, the defendant was notified at the original sentencing hearing that failure to comply with the terms and conditions of community control could result in harsher sanctions,

[2]The *Brooks* decision was a 5-2 decision, with dissents by Justices Lundberg Stratton and O'Donnell, who would both hold that, at the original sentencing, a range of prison options was acceptable notification, so long as the sentence ultimately imposed fell within the range.

"including up to five years of imprisonment." Id. at ¶1. "The specific term of five years was set forth in the journal entry but was not mentioned at the sentencing hearing." Id. Not only did the "up to" language fail as a notice of a specific imprisonment, but likewise an after-the-fact journal entry advising a defendant of the penalty that would be imposed.

{¶ 6} *Fraley*, like *Brooks*, dealt with a case where the original sentence was legally deficient. In *Fraley,* the defendant presented at two community control sanction violation hearings; however, he was never imprisoned, so the original deficient notification did not come into play. At a third violation hearing, however, Fraley was finally appropriately advised that any further violations would result in a prison term of "four years in case No. 97-CR-479 and nine months in case No. 99-CR-504, and the sentences would run consecutively." Id. at ¶4. At Fraley's fourth violation hearing, the court made good on its threat of imprisonment, and sentenced him to the identical sentence previously outlined. Fraley appealed, arguing that since the original sentencing notice was legally deficient, pursuant to *Brooks*, he simply could never have been imprisoned for any violation. The appellate court agreed with this argument, and certified the issue to the Ohio Supreme Court for determination upon conflict. The Supreme Court reversed.

{¶ 7} The Supreme Court stated: "**The question certified to us for determination is whether R.C. 2929.19(B)(5) requires a judge to notify a defendant at his initial sentencing hearing, as opposed to any subsequent**

sentencing hearings, of the specific prison term that may be imposed as a sanction for a subsequent community control violation." (Emphasis added.) Id. at ¶8. The Court first held that "the *original* sentencing hearing is the time when the notification must be given for the court to impose a prison term upon a defendant's *first* community control violation." (Emphasis sic.) Id. at ¶15.

{¶ 8} The court went on, however, to discuss what a trial court should do when there are multiple violations of community control sanctions, and stated that "a trial court sentencing an offender upon a violation of the offender's community control sanction must, at the time of such sentencing, notify the offender of the specific prison term that may be imposed for an additional violation of the conditions of the sanction as a prerequisite to imposing a prison term on the offender for a subsequent violation." Id. at ¶18. According to Hodge, this means that the defendant must consistently be re-noticed at each and every community control sanctions hearing, regardless of whether the offender was properly and legally noticed at the original sentencing hearing. While we agree that the language in *Fraley* might support that conclusion, in context, it does not. *Fraley* is based upon a wholly different set of facts than our case at bar. Hodge's original sentence was not legally deficient; Fraley's was.

{¶ 9} We construe the holding of the Supreme Court in *Fraley* narrowly to mean that a trial court that fails to notify a defendant of the specific penalty he will face upon violation of community control sanctions at the initial sentencing, may "cure" that failure at a subsequent violation hearing by then advising the

defendant of the definite term of imprisonment that may be imposed upon any subsequent finding of violation. We find nothing in the statute or *Fraley* that requires a legally adequate notification in the first instance be given over and over again.[3]

{¶ 10} Finally, Hodge's citation to *State v. Goforth*, Cuyahoga App. No. 90653, 2008-Ohio-5596, is not persuasive. Goforth argued "that the trial court erred in sentencing her to a term of imprisonment because the court failed to notify her, at the original sentencing hearing **or in any judgment entry**, of the specific prison term that may be imposed for a violation of the conditions of sanctions." (Emphasis added.) Id. at ¶10. That is not the case in the matter at bar; Hodge was clearly notified by judgment entry at the time of the original sentencing that he would be imprisoned for one year if he violated his community control sanctions. The language in *Goforth* that states "[a]ccordingly, the trial court erred in imposing a term of imprisonment for the community control violation because the trial court failed to advise appellant in the **judgment entry** of the preceding sentencing hearing that she would be subject to a specific prison time if she violated community control sanctions[,]"[4] is, in short, about the necessity of the notice being contained in a judgment entry, not about the timing of the notice.

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[3]In *Fraley*, Justice Resnick concurred in judgment only, while Justices Moyer and Pfeifer each filed dissenting opinions, both stating that if the original sentencing were deficient in the manner described, no later "cure" could be had at a community control violation hearing.

[4]Id. at ¶20.

{¶ 11} Accordingly, there being no dispute that the original sentencing and the entry that memorialized it contained legally adequate language placing Hodge on notice of the specific sentence of imprisonment that would be imposed upon violation, we hold that neither R.C. 2929.19(B) nor any case law require that he had to be constantly re-advised of this fact each time he appeared in court upon a violation. The sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

CHRISTINE T. McMONAGLE, JUDGE

PATRICIA A. BLACKMON, J., CONCURS

COLLEEN CONWAY COONEY, P.J., DISSENTS WITH SEPARATE OPINION

COLLEEN CONWAY COONEY, P.J., DISSENTING:

{¶ 12} I respectfully dissent. I read the syllabus of *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, to clearly state that a trial court sentencing an offender upon a violation of community control must, at the time of such sentencing, notify the offender of the specific prison term that may be imposed for an additional violation of the conditions as a prerequisite to imposing a prison term for a subsequent violation.

{¶ 13} In the instant case, the trial court failed to notify Hodge at the October 2008 violation hearing of the specific prison term he faced for a subsequent violation. Therefore, I would reverse the trial court's imposition of a prison term.