

[Cite as *State v. Gay*, 2015-Ohio-1452.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101647

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

AARON GAY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-581403-B

BEFORE: Laster Mays, J., Celebrezze, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: April 16, 2015

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant Aaron Gay (“Gay”) appeals from the sentence imposed after he pleaded guilty to three counts of forgery.

{¶2} Gay presents a single assignment of error. He argues that his sentence is contrary to law because the trial court did not specify at the sentencing hearing the length of a prison term it would impose should Gay violate community control sanctions. The state counters by claiming that Gay’s argument is premature.

{¶3} This court finds that Gay is not required to violate the terms of his community control in order to challenge the lawfulness of the sentence imposed in this case. However, the trial court’s comments sufficiently apprised Gay of the consequences for any violation of community control. Gay’s sentence is therefore affirmed.

{¶4} Gay was indicted in this case with a codefendant; ten of the counts in the indictment pertained to Gay. Eventually, Gay pleaded guilty to three counts of forgery in exchange for the state’s dismissal of the remaining counts. Gay stated during the plea colloquy that he understood that his guilty pleas in this case meant that he was in violation of community control sanctions¹ imposed on him in two other cases.

{¶5} When the trial court called this case for sentencing, the court made the following comments:

THE COURT: * * * What I’m going to do in this case is for forgery, Counts 9, 11, and 13, each a felony of the fifth degree, I’m going to put you

¹The trial court used the words “community control” and “probation” to mean the same thing.

in the local incarceration program for six months. I'm going to run each one of these concurrent.

* * *

So what I'm going to do, rather than put you in prison, is put you in the local incarceration * * * and put you on community control sanctions for a period of two years. * * * I'm also going to apply the sentence to the cases that you're on probation to me. * * * [T]he sentences that I've imposed in the underlying case here are also the sentences in these two probation cases. I'm going to run those concurrent, and those two cases will be terminated when your service of 180 days is finished.

Then you'll be on probation for * * * one year * * *. So once you get out, you'll have one year of probation remaining * * * .

* * *

Now *if you violate* the terms and conditions that I've set forth here, while you're on probation and after you finish your time in the county jail, if you violate, I reserve the right to *put you in prison for a period of time of six months to 12 months and any month in between*. If you — if I find that you're in violation and I put you in prison for whatever period of time and you serve that time, you would then be up for what's called post-release control or parole.

(Emphasis added.)

{¶6} The relevant portion of the journal entry of sentence in this case states that “violation of the terms and conditions [of community control] may result in more restrictive sanctions, or a prison term of 12 month(s), as approved by law.”

{¶7} Gay appeals from his sentence with the following assignment of error.

I. The trial court erred in sentencing the Appellant to local incarceration and an indefinite term of prison if he violated his community control sanctions.

{¶8} Citing *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, ¶ 2 of the syllabus, Gay essentially argues that the sentence imposed on him is contrary to law because the trial court failed to specify during the sentencing hearing the precise prison term he would receive for a violation of his community control sanctions. The state responds that Gay's argument is premature, in that he has not yet violated any community control sanctions.

{¶9} This court reviews sentences pursuant to R.C. 2953.08(G)(2), which states in pertinent part:

The appellate courts' standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds * * * :

* * *

(b) That the sentence is * * * contrary to law.

{¶10} Inasmuch as the court in *Brooks* unequivocally held that R.C. 2929.19(B)(4) requires a trial court at the sentencing hearing to orally notify the offender of the prison term he faces in the event of a community control violation, and also held that a failure to provide this notification results in the trial court being prohibited from imposing a prison term if the offender does violate, this court sees no logic in deeming Gay's argument unripe for review. To adopt the state's position potentially would lead to a conclusion that appellant waived such an argument if he did not raise it in a direct appeal of his sentence. *See, for example, State v. Johns*, 8th Dist. Cuyahoga No. 93226,

2010-Ohio-162, ¶ 15-17; compare *State v. Hatfield*, 164 Ohio App.3d 338, 2005-Ohio-6259, 842 N.E.2d 128, ¶ 9 (2d Dist.).²

{¶11} Proceeding to Gay’s argument, in *State v. Lyle*, 3d Dist. Allen Nos. 1-13-16 and 1-13-17, 2014-Ohio-751, ¶ 18-20, the court stated as follows:

[T]he court must notify the offender of the specific term it may impose if the community control is violated. *Brooks* at ¶ 19. The statute requires that the trial court “shall, in straightforward and affirmative language, inform the offender at the sentencing hearing that [it] will impose a definitive term of imprisonment of a fixed number of months or years, such as ‘twelve months incarceration’ if the conditions are violated.” *Id.* To be in compliance, the court must be specific, it cannot state the prison term as a range, as the maximum, or any other indefinite term. *Id.* This court has interpreted the requirement in *Brooks* “to stand for the proposition that the trial court must establish a ‘definite prison term,’ *rather than mandating the trial court to go as far as to state ‘if you violate community control sanctions, you will be sentenced to “x” months or years in prison.’*” *State v. Schafer*, 3d Dist. Defiance No. 4-08-07, 2008-Ohio-6183, ¶ 10, quoting *State v. Reed*, 3d Dist. Defiance No. 4-05-22, 2005-Ohio-5614, ¶ 9.

The court must strictly comply with this requirement and specifically state what the *possible* prison term may be to the offender orally at the time of sentencing. *Brooks* at ¶ 29; see also [*State v.*] *Snoeberger*, [2d Dist. Montgomery No. 24767,] 2013-Ohio-1375, ¶ 15 (failing specificity by providing a range of “up to” a certain amount); *State v. Lippert*, 6th Dist. Sandusky Nos. S-04-021, S-05-002, S-05-003, S-06-004, S-06-005, 2006-Ohio-5905, ¶ 25 (failing strict compliance by misstating the maximum sentence allowed by law); *State v. Hatfield*, 164 Ohio App.3d 338, 2005-Ohio-6259, ¶ 8, 842 N.E.2d 128 (2d Dist.) (failing specificity by only stating possible prison term in journal entry and not orally to defendant at sentencing). * * *

Further, the Ohio Supreme Court has noted that “other notifications to the offender may be used to clarify or supplement what is said later at the sentencing hearing to the offender.” *Brooks* at ¶ 18. As an example, the

²This is not to state that Gay could not have raised the issue at a community control violation hearing, as the defendant in *Brooks* did. *Hatfield*; see also *Johns* at ¶ 17-19.

Court explained that it is not always necessary to give the specific prison term at the exact moment of sentencing * * * .

(Emphasis added.)

{¶12} The *Lyle* court thus rejected an “overly rigid” approach, relying in part, upon the Ohio Supreme Court’s decision in *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, where the court noted:

The notification requirement in R.C. 2929.19(B)(5) is meant to put the offender on notice of the specific prison term he or she faces if a violation of the conditions occurs. *Following a community control violation, the trial court conducts a second sentencing hearing. At this second hearing, the court sentences the offender anew and must comply with the relevant sentencing statutes. State v. Martin*, 8th Dist. Cuyahoga No. 82140, 2003-Ohio-3381, at ¶ 35. *The trial court could therefore comply with both the sentencing statutes and our holding in Brooks if, at this second hearing, the court notifies the offender of the specific prison term that may be imposed for a subsequent violation occurring after this second hearing. We believe that this process complies with the letter and spirit of R.C. 2929.19(B)(5) and 2929.15(B).*

We therefore hold that pursuant to R.C. 2929.19(B)(5) and 2929.15(B), 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 such a subsequent violation.

(Emphasis added.) *Id.* at ¶ 17-18.

{¶13} This court, too, has rejected a rigid approach. *State v. Oulhint*, 8th Dist. Cuyahoga No. 99296, 2013-Ohio-3250. The record in this case reflects the trial court complied with its duty to inform Gay at the sentencing hearing of the potential term of imprisonment it would impose for a violation of his community control sanctions, i.e., “a period of time of six months to 12 months and any month in between.” As in *Oulhint*,

Gay “was well aware that he could be sentenced to up to [twelve] months in prison if he violated the conditions of his community control.” *Id.* at ¶ 17. The trial court also placed the notification in the journal entry of sentence. Under these circumstances, Gay’s sentence is not contrary to law. His assignment of error, accordingly, is overruled.

{¶14} Gay’s sentence is affirmed. This case is remanded to the trial court for further proceedings consistent with this opinion.

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.

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

ANITA LASTER MAYS, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
MARY EILEEN KILBANE, J., CONCUR