[Cite as *State v. Varholic*, 2015-Ohio-2411.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102402

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES VARHOLIC

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-06-485615-A

BEFORE: Jones, P.J., E.A. Gallagher, J., and Boyle, J.

RELEASED AND JOURNALIZED: June 18, 2015

FOR APPELLANT

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LARRY A. JONES, SR., P.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 James Varholic appeals from the trial court's 2014 judgment denying his motion to correct unlawful sentence. We affirm.

I. Procedural History

{¶3} In August 2006, Varholic was charged with one count each of driving under the influence (OVI offense) and drug possession. The OVI offense contained four furthermore clauses detailing prior OVI convictions from 2003 and 2005; it also contained a furthermore clause for failure to submit to chemical tests.

{¶4} In January 2007, Varholic waived his right to a jury trial and the case proceeded to a bench trial. The trial court found him guilty of driving under the influence, as indicted, a felony of the fourth degree. The court found him not guilty of drug possession.

{¶5} The trial court sentenced Varholic to 30 months in prison in February 2007, but stayed execution of the sentence pending appeal. In April 2008, this court issued its decision upholding his conviction. *State v. Varholic*, 8th Dist. Cuyahoga No. 89627, 2008-Ohio-962. The Ohio Supreme Court denied Varholic's appeal. *State v. Varholic*, 119 Ohio St.3d 1446, 2008-Ohio-4487, 893 N.E.2d 516.

{¶6} In January 2009, the trial court resentenced Varholic to two years of community control sanctions with conditions and 60 days local jail time. The court

advised Varholic that the community control sanctions would be terminated if he remained violation free for one year. It further advised him that a violation of the sanctions "may result in more restrictive sanctions, or a prison term of 30 months as approved by law." The court also advised Varholic of postrelease control.

{¶7} In July 2009, the trial court held a hearing on an alleged violation Varholic committed. At the conclusion of the hearing, the court found Varholic guilty of violating the terms and conditions of his sanctions. The court terminated his community control sanctions and sentenced him to 30 months in prison.

{¶8} In April 2010, Varholic filed a motion to correct improper sentence, which the trial court denied in February 2011. Varholic appealed; the appeal was dismissed by this court, but then reinstated. *State v. Varholic*, 8th Dist. Cuyahoga No. 96464, Motion Nos. 44265 and 442879. The sole issue in that appeal was whether the trial court had jurisdiction to rule on his motion to correct improper sentence. In October 2011, this court upheld the sentence. *State v. Varholic*, 8th Dist. Cuyahoga No. 96464, 2011-Ohio-5277. This court denied Varholic's motion for reconsideration (*see* Motion No. 44888) and the Ohio Supreme Court denied leave to appeal.[1] *State v. Varholick*, 131 Ohio St.3d 1458, 2012-Ohio-648, 961 N.E.2d 1136.

{¶9} In August 2012, Varholic filed a motion for a delayed appeal, which this court denied in September 2012. *State v. Varholic*, 8th Dist. Cuyahoga No. 98790,

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[1]Throughout the record and the other varying cases the defendant's last name is spelled two different ways. In this case he was indicted as "Varholic," and that, therefore, is how we refer to

Motion No. 457639. The Ohio Supreme Court declined to accept jurisdiction. 02/06/2013 Case Announcements, 2013-Ohio-347.

{¶10} In September 2014, with his sentence in this case completed, Varholic filed a motion to correct an unlawful sentence.[2] A hearing was had, at the conclusion of which the trial court denied the motion. Varholic now raises the following two assignments of error for our review:

> [I.] The trial court abused its discretion and erred to the prejudice of the appellant by denying his motion to correct an unlawful sentence which is contrary to established law as set forth by the Ohio Supreme Court.
>
> [II.] The trial court erred to the prejudice of the appellant by failing to properly impose the statutory mandated sentence as argued in assignment of error number one and therefore he was not properly appraised [sic] of the maximum penalty he could or would receive were he to violate his community control sanctions and as a result, his subsequent sentence of thirty months is void and contrary to established law as upheld by the Eighth Appellate District and the Ohio Supreme Court.

II. Law and Analysis

{¶11} The two issues presented in this appeal are (1) whether any issue regarding the 30-month sentence are moot because Varholic has already served his sentence, and (2) whether, in sentencing Varholic for violating his community control sanctions, the trial court could impose a 30-month prison term, or was it limited to an 18-month prison term.

Mootness

{¶12} Generally, in Ohio, an appeal from a conviction is moot when the offender

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him.

[2]At the time Varholic filed the motion, he was serving a four-year sentence in another case, Cuyahoga C.P. No. CR-09-526692; that sentence, which was imposed in October 2009, was ordered

has completed his sentence and has failed to sustain his burden of demonstrating a collateral disability or loss of civil rights stemming from that conviction. *State v. Berndt*, 29 Ohio St.3d 3, 504 N.E.2d 712 (1987); *State v. Wilson*, 41 Ohio St.2d 236, 325 N.E.2d 236 (1975). But the Ohio Supreme Court recognized that there are "numerous adverse collateral consequences imposed upon convicted felons,"[3] and therefore, "adopted a conclusive presumption that '[a] person convicted of a felony has a substantial stake in the judgment of conviction which survives the satisfaction of the judgment.'" *Cleveland Hts. v. Lewis*, 129 Ohio St.3d 389, 2011-Ohio-2673, 953 N.E.2d 278, ¶ 19, quoting *Golston* at syllabus. Thus, the court held that "an appeal challenging a felony conviction is not moot even if the entire sentence has been satisfied before the matter is heard on appeal." *Golston* at *id.*

{¶13} The court further explained that the "completion of a sentence is not voluntary and will not make an appeal moot if the circumstances surrounding it demonstrate that the appellant neither acquiesced in the judgment nor abandoned the right to appellate review, that the appellant has a substantial stake in the judgment of conviction, and that there is subject matter for the appellate court to decide." *Lewis* at paragraph one of the syllabus.

{¶14} Varholic contends that he suffered a collateral consequence. Specifically, he contends that his sentence in his second case was run consecutive to the sentence in

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to be served consecutive to the sentence in this case.

[3] *State v. Golston*, 71 Ohio St.3d 224, 227, 643 N.E.2d 109 (1994).

this case, which would not have occurred if the trial court in this case had properly sentenced him. Although Varholic did not raise the sentencing issue he now raises in his 2010 appeal,[4] under a liberal review of the circumstances surrounding this case, we do not find that he acquiesced in the judgment or abandoned his right to appellate review.[5] Thus, this appeal is not moot.

Prison Sentence after Violation of Community Control Sanctions

{¶15} Varholic's contention in this appeal is that if a trial court imposes community control sanctions for a fourth-degree felony OVI offense, it is then prohibited from imposing a prison term under the specific statutes relating to OVI, but instead, if it imposes a prison term, it must do so under the statute generally governing felony offenses. The difference is a maximum sentence of 30 months under the OVI statute, as opposed to a maximum sentence of 18 months under the general statute. Varholic cites the Twelfth Appellate District's decision in *Rabe* in support of his contention.

{¶16} In *Rabe*, the defendant was convicted, as was Varholic, of driving under the influence in violation of R.C. 4511.19(A)(1)(a), a felony of the fourth degree. He was sentenced to five years of community control sanctions, and ordered to serve 60 days in the local jail. The defendant was advised that any violation of the terms and conditions of his community control sanctions could lead to a longer or more restrictive sanction,

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[4] *See Varholic*, 8th Dist. Cuyahoga No. 96464, 2011-Ohio-5277.

[5] Further, the case upon which Varholic bases his error, *State v. Rabe*, 12th Dist. Clermont No. CA2013-04-027, 2013-Ohio-4867, was not decided at the time of his 2010 appeal.

including a prison term of 29 months.

{¶17} Two years into his community control sanctions, the defendant violated them. The trial court revoked his community control sanctions and sentenced him to 29 months in prison. The defendant filed a motion to correct an unlawful sentence, contending that, under R.C. 2929.15(B) and 2929.14(A), the maximum possible prison term he could receive for his violation was 18 months. The trial court denied his motion.

{¶18} On appeal, the defendant raised a different, but similar argument. He contended that because the trial court had already sentenced him to a mandatory 60-day term of local incarceration under R.C. 2929.13(G)(1), the maximum penalty that the court could have imposed on him for violating his community control sanctions was one year of local incarceration.

{¶19} The Twelfth District noted that, generally, fourth-degree felonies are subject to a prison term of anywhere between 6 to 18 months. *Rabe*, 12th Dist. Clermont No. CA2013-04-027, 2013-Ohio-4867, at ¶ 11, citing R.C. 2929.14(A)(4). The court then considered R.C. 2929.14(B)(4), which specifically deals with fourth-degree OVI offenses. That statute provides in relevant part as follows:

> If the offender is being sentenced for a * * * fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if

> the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months[.] * * *
>
> If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of section 2929.13 of the Revised Code and the court imposes a mandatory term of local incarceration, the court may impose a prison term as described in division (A)(1) of that section.

{¶20} The Twelfth District found that the trial court's decision to sentence the defendant to a 29-month prison term for his violation "overlook[ed] the plain language of R.C. 2929.14(B)(4)." *Rabe* at ¶ 13. The court focused on the second sentence in the first paragraph of the statute:

> In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months[.]

R.C. 2929.14(B)(4).

{¶21} According to the Twelfth District, that sentence "strongly indicates that it applies only at the *original* sentencing of the fourth degree felony OVI offender." (Emphasis sic.) *Rabe* at ¶ 14. The court further found that the first paragraph of R.C. 2929.14(B)(4) applied to a situation where the trial court was sentencing an offender to prison time, as opposed to local jail time, as the defendant there had been sentenced.

{¶22} The court then considered the second paragraph of R.C. 2929.14(B)(4), which states

> [i]f the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of section 2929.13 of the Revised Code and the court imposes a mandatory term of local incarceration, the court may impose a prison term as described in division (A)(1) of that section.

{¶23} R.C. 2929.13(A)(1) provides as follows:

> [i]f the court imposes upon the offender a community control sanction and the offender violates any condition of the community control sanction, the court may take any action prescribed in division (B) of section 2929.15 of the Revised Code relative to the offender including imposing a prison term on the offender pursuant to that division.

{¶24} R.C. 2929.15(B) in turn provides:

> (B)(1) If the conditions of a community control sanction are violated or if the offender violates a law or leaves the state without the permission of the court or the offender's probation officer, the sentencing court may impose upon the violator one or more of the following penalties:
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> (a) A longer time under the same sanction if the total time under the sanctions does not exceed the five-year limit specified in division (A) of this section;
>
> (b) A more restrictive sanction under section 2929.16, 2929.17, or 2929.18 of the Revised Code;
>
> (c) A prison term on the offender pursuant to section 2929.14 of the Revised Code.

{¶25} The *Rabe* court recognized R.C. 2929.15(B), but stated that it did not "specify what division of [R.C. 2929.14] should apply." *Rabe*, 12th Dist. Clermont No. CA2013-04-027, 2013-Ohio-4867, at ¶ 15. The court ultimately decided that R.C. 2929.14(A)(4), which sets the sentencing range for a fourth-degree felony at anywhere between 6 and 18 months, applied. The court reasoned that the 6 to 30 month

sentencing range could only be used as a sentence for a violation of community control sanctions where the trial court originally imposed a mandatory prison sentence. We disagree.

{¶26} The *Rabe* decision mentions R.C. 2929.15(B)(2), governing community control and the trial court's options for a violation of it, which specifically provides that the trial court does not become more limited in sentencing for a violation than it was in sentencing for the underlying crime, but does not explain why it is not applicable.

{¶27} The statute reads in relevant part as follows:

> The prison term, if any, imposed upon a violator pursuant to this division *shall be within the range of prison terms available for the offense for which the sanction that was violated was imposed* and shall not exceed the prison term specified in the notice provided to the offender at the sentencing hearing pursuant to division (B)(2) of section 2929.19 of the Revised Code.

(Emphasis added.) R.C. 2929.15(B)(2); *See also State v. Olmstead*, 5th Dist. Richland No. 2007-CA-119, 2008-Ohio-5884, ¶ 26-28 (Three-month sentence that the trial court imposed on defendant for his community control violation complied with R.C. 2929.15(B) as it was *within the range of prison terms available for the original offense* and did not exceed the term for which defendant was given notice under R.C. 2929.19.).

{¶28} In light of the above, we decline to follow *Rabe*, 12th Dist. Clermont No. CA2013-04-027, 2013-Ohio-4867, and find that the trial court, which initially was permitted to sentence Varholic to a 30-month prison term and which gave notice to him that a violation of his community control sanctions could result in such a sentence, lawfully sentenced him.

{¶29} Varholic's two assignments of error are overruled.

{¶30} 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.

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

LARRY A. JONES, SR., PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
MARY J. BOYLE, J., CONCUR