

[Cite as *State v. Mericsko*, 2015-Ohio-4489.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102262

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DALE R. MERICKO

DEFENDANT-APPELLANT

JUDGMENT:
SENTENCE VACATED AND REMANDED
FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-581116-A

BEFORE: Kilbane, J., Keough, P.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: October 29, 2015

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Dale R. Mericsko (“Mericsko”), appeals from his sentence after pleading guilty to one count of operating a vehicle while intoxicated (“OVI”). In light of the Ohio Supreme Court’s recent decision in *State v. South*, Slip Opinion No. 2015-Ohio-3930, we vacate Mericsko’s sentence and remand the matter for resentencing.

{¶2} In January 2014, Mericsko was charged in a six-count indictment, in connection with an incident where Mericsko was driving with his vehicle lights turned off during the early morning hours of December 18, 2013. Mericsko was charged in Counts 1 and 3 with third-degree felony OVI, and in Count 5 he was charged with fourth-degree felony OVI, all in violation of R.C. 4511.19(A)(1)(h) (driving with a concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person’s breath). Each of Counts 1, 3, and 5 carried a furthermore clause setting forth previous felony OVI convictions and a repeat OVI offender specification pursuant to R.C. 2941.1413(A), stating that within the past twenty years, he had been convicted of five or more felony OVI offenses. In Counts 2 and 4, Mericsko was charged with third-degree felony OVI, and in Count 6, he was charged with fourth-degree felony OVI, all in violation of R.C. 4511.19(A)(1)(a) (driving while under the influence of alcohol). Each of Counts 2, 4, and 6 contained a furthermore clause setting forth previous felony OVI convictions and a repeat OVI offender specification pursuant to R.C. 2941.1413(A), stating that within the past twenty years, he had been convicted of five or more felony OVI offenses.

{¶3} Trial was set for March 17, 2014. On that day, Mericsko entered into a plea agreement, in which he pled guilty to Count 1 with the furthermore clause and prior conviction specification. The remaining charges and specifications were nolle. The matter proceeded to sentencing in April 2014. The record demonstrates that Mericsko struggled with alcohol and

drug abuse and has had over 25 alcohol-related convictions in the preceding 20 years, nearly 10 of which were OVIs. At the time of the offense, his breath-alcohol level was determined to be .179 grams of alcohol per 210 liters of breath. The trial court sentenced Mericsko to a “five year mandatory term on [the specification] to be served prior to and consecutive with 120 days on Count 1, driver[’]s license suspension for lifetime.”

{¶4} Mericsko appeals, raising the following three assignments of error for review, which shall be discussed together where appropriate.

Assignment of Error One

The trial court erred in sentencing [Mericsko] to five years incarceration under [R.C. 2929.13(G)(2)] after the state legislature revised third degree felony prison terms to a maximum of thirty-six months in the definite prison term statute, [R.C. 2929.14].

Assignment of Error Two

The trial court erred in sentencing [Mericsko] to five years incarceration on an indicted specification found to be a violation of due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article 1 Section 2 of the Ohio Constitution.

Assignment of Error Three

The trial court erred in sentencing [Mericsko] to five years plus 120 days when the statutory authority allows a maximum of five years.

Sentencing Issues

{¶5} In the first and third assignments of error, Mericsko challenges his sentence.

{¶6} Appellate courts review sentences according to the framework set forth by the legislature in R.C. 2953.08(G)(2), which provides:

The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's 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 either of the following:

* * *

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

{¶7} Mericsko contends that the furthermore specification set forth in the OVI statute (R.C. 4511.19), which allows for up to five years in prison, is in conflict with the definite prison term statute (R.C. 2929.14), which allows for a maximum of 36 months in prison for third-degree felonies. He further argues that the court erred when it sentenced him to five years in prison on the specification, consecutive to the 120 days on the OVI. He maintains that under R.C. 4511.19(G)(1)(e)(ii), his sentence should not have exceeded an aggregate of five years in prison. Specifically, Mericsko discusses the interplay of R.C. 4511.19(G)(1)(e)(ii), 2941.1413, 2929.13(G)(2), and 2929.14(A)(3)(b).

{¶8} The Ohio Supreme Court recently addressed the interplay of R.C. 2941.1413, 4511.19(G)(1)(e)(i), 2929.13(G)(2), and 2929.14(A)(3)(b) in *South*, Slip Opinion No. 2015-Ohio-3930. *South* was charged with one count of OVI, in violation of R.C. 4511.19(A)(1)(a), a third-degree felony, and a repeat-offender specification under R.C. 2941.1413; one count of OVI, in violation of R.C. 4511.19(A)(1)(d), a third-degree felony; and one count of driving under suspension, in violation of R.C. 4510.11, a first-degree misdemeanor. The jury returned a guilty verdict on each count, including the specification. *Id.* at ¶ 2.

{¶9} The trial court merged the two OVI counts for sentencing purposes. The court imposed a three-year sentence for the specification, plus an additional, consecutive five-year sentence for the underlying OVI offense. The court characterized both counts as “mandatory.”

Id. at ¶ 3. South appealed to the Ninth District Court of Appeals, which vacated his sentence, holding that it was contrary to law. *Id.* at ¶ 4. The Ninth District found that South’s sentence “‘‘had to consist of a one- to five-year mandatory prison term on his specification[,] R.C. 4511.19(G)(1)(e)(i),’ and a prison term ‘of any duration specified in division (A)(3) of [R.C. 2929.14].’” *Id.* at ¶ 4, quoting *State v. South*, 9th Dist. Summit No. 26967, 2014-Ohio-374, ¶ 17, quoting R.C. 2929.14(B)(4). Because the trial court’s five-year sentence exceeded the permissible maximum under R.C. 2929.14(A)(3)(b), the Ninth District vacated the sentences related to his underlying OVI conviction and the specification and remanded the matter to the trial court for resentencing. *Id.* at ¶ 4.

{¶10} The Ninth District then certified that its decision conflicted with *State v. Sturgill*, 12th Dist. Clermont Nos. CA2013-01-002 and CA2013-01-003, 2013-Ohio-4648. In *Sturgill*, the Twelfth District analyzed the sentence imposed for identical third-degree-felony OVI and repeat-offender-specification convictions. The court upheld Sturgill’s five-year sentence for the underlying OVI conviction and separate five-year mandatory sentence for the specification conviction. *South*, Slip Opinion No. 2015-Ohio-3930 at ¶ 5.

{¶11} The Ohio Supreme Court agreed that a conflict existed on the following question: “‘‘When a defendant is convicted of [an] R.C. 2941.1413 specification, does Ohio’s OVI statute R.C. 4511.19 prevail so that a five-year sentence can be imposed for a third-degree felony OVI or does R.C. 2929.14(A) require that the maximum sentence that can be imposed is three years?’” *South*, Slip Opinion No. 2015-Ohio-3930 at ¶ 5, citing 139 Ohio St.3d 1402, 2014-Ohio-2245, 9 N.E.3d 1061.

{¶12} The court began its analysis by considering the legislative intent of R.C. 4511.19, 2941.1413, 2929.13, and 2929.14. The court stated:

R.C. 4511.19

South was convicted of violating 4511.19(A)(1)(a) and (d), which prohibit operating a motor vehicle while under the influence of alcohol or drugs. R.C. 4511.19(G)(1) requires a court to sentence an offender under R.C. Chapter 2929, “except as otherwise authorized or required by” R.C. 4511.19(G)(1)(a) to (e). R.C. 4511.19(G)(1)(e) provides that an offender who, like South, has previously been convicted of a felony OVI, is guilty of a felony of the third degree. For an offender who, like South, is being sentenced for a violation of R.C. 4511.19(A)(1)(a) or (d), subsection (G)(1)(e)(i) requires the court to impose “a mandatory prison term of one, two, three, four, or five years as required by and in accordance with [R.C. 2929.13(G)(2)] if the offender also is convicted of or also pleads guilty to a specification of the type described in [R.C. 2941.1413].”

So, applied here, R.C. 4511.19 identifies South’s offenses as third-degree felonies. But more important for the question at hand, cross-referencing both R.C. 2929.13(G)(2) and R.C. 2941.1413, R.C. 4511.19 requires a sentencing court to impose a mandatory term of one to five years if an offender is convicted of a specification pursuant to R.C. 2941.1413. We turn, then, to the specification.

R.C. 2941.1413

South was convicted of violating R.C. 2941.1413(A), which prescribes the repeat-offender specification an indictment must include in order to support “[i]mposition of a mandatory additional prison term of one, two, three, four, or five years upon an offender under” R.C. 2929.13(G)(2). In this way, this section simply repeats the one- to five-year mandatory additional prison term that R.C. 4511.19 prescribes. Both sections also refer to R.C. 2929.13, which we consider next.

R.C. 2929.13

R.C. 2929.13 is a general sentencing statute that provides guidance by degree of felony. R.C. 2929.13(A) states: “Except as provided in division (E), (F), or (G) of this section and unless a specific sanction is required to be imposed or is precluded from being imposed pursuant to law, a court that imposes a sentence upon an offender for a felony may impose any sanction or combination of sanctions on the offender that are provided in” R.C. 2929.14 to 2929.18.

R.C. 2929.13(A) provides: If the offender is being sentenced for a third-degree-felony OVI offense, in addition to “the mandatory prison term required for the offense by division (G)(1) or (2) of this section,” the court must impose a fine and may impose whichever of the following is applicable:

* * *

(2) For a third or fourth degree felony OVI offense for which sentence is imposed under division (G)(2) of this section, an additional prison term as described in [R.C. 2929.14(B)(4)] or a community control sanction as described in (G)(2) of this section.

R.C. 2929.13(G) says:

Notwithstanding divisions (A) to (E) of this section, if an offender is being sentenced for a * * * third degree felony OVI offense, the court shall impose upon the offender a mandatory term of local incarceration or a mandatory prison term in accordance with the following:

* * *

(2) If the offender is being sentenced for a third degree felony OVI offense, * * * the court shall impose upon the offender a mandatory prison term of one, two, three, four, or five years if the offender also is convicted of or also pleads guilty to a specification of the type described in [R.C. 2941.1413] * * *. * * * The offender shall serve the one-, two-, three-, four-, or five-year mandatory prison term consecutively to and prior to the prison term imposed for the underlying offense and consecutively to any other mandatory prison term imposed in relation to the offense.

Several points are important here. First, subsection (G)(2) repeats the imposition of a one- to five-year mandatory term following a conviction for an R.C. 2941.1413 specification — the same one- to five-year mandatory term that both R.C. 4511.19 and 2941.1413 impose for the specification conviction. Second, subsection (G)(2) expressly states that the offender must serve the specification-related sentence “consecutively to and prior to the prison term imposed for the underlying offense.” And third, subsection (A) requires that when a sentencing court imposes the mandatory specification-related sentence, the court also “may impose” an additional prison term prescribed in R.C. 2929.14 or a community-control sanction prescribed in subsection (G)(2) for the underlying OVI offense. To determine the term a court may impose, we turn, finally, to R.C. 2929.14.

R.C. 2929.14

Subject to exceptions not applicable here, R.C. 2929.14 applies if a sentencing court elects or is required to impose a prison term. R.C. 2929.14(A)(3)(a) provides that for a felony of the third degree that is a violation of listed offenses not at issue here, the term “shall be” in the range of 12 to 60 months. But for third-degree-felony offenses not listed in division (A)(3)(a), “the prison term shall be nine, twelve, eighteen, twenty-four, thirty, or thirty-six months.” R.C. 2929.14(A)(3)(b).

R.C. 2929.14(B)(4) also provides:

If the offender is being sentenced for a third or fourth degree felony OVI offense under [R.C. 2929.13(G)(2)], 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 third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section.

Again, several points are important. First, because the underlying OVI offense at issue here is not one of the excepted third-degree felonies listed in R.C. 2929.14(A)(3)(a), subsection (A)(3)(b) provides a sentence of 9 to 36 months for that offense. Second, R.C. 2929.14(B)(4) repeats the requirement of imposing a one- to five-year sentence arising from R.C. 2929.13(G)(2) and the specification conviction. And finally, for those specification-offenders sentenced under R.C. 2929.13(G)(2), R.C. 2929.14(B)(4) expressly states that for third-degree-felony-OVI offenses, a sentencing court may impose “an additional prison term of any duration specified” in R.C. 2929.14(A)(3), that is, a sentence of 9 to 36 months for the underlying OVI offense.

Id. at ¶ 10-18.

{¶13} In applying these provisions together, the *South* court found that the permissible sentencing range for a third-degree-felony-OVI and a repeat-offender specification under R.C. 2941.1413 is “(1) a one- to five-year mandatory prison term for the repeat-offender-specification conviction, which must be served prior to and consecutive to any additional prison term imposed under R.C. 2929.14(A)(3)(b), and (2) a discretionary 9- to 36-month definite prison term for the underlying OVI conviction.” *Id.* at ¶ 19.

{¶14} The court then applied the foregoing to *South*’s sentence and found that his specification-related sentence — a mandatory three-year prison term — was not contrary to law because courts must impose a prison term of one, two, three, four, or five years for the R.C. 2941.1413-specification conviction. *Id.* at ¶ 23, citing R.C. 4511.19(G)(1)(e)(i) and 2929.13(G)(2). The court found *South*’s five-year mandatory sentence for the underlying OVI conviction was contrary to law because R.C. 2929.14(A)(3)(b) provides that any additional prison

term for an underlying third-degree-felony-OVI conviction must be 9, 12, 18, 24, or 36 months. *Id.* at ¶ 24.

{¶15} As a result, the court reinstated South’s mandatory three-year prison sentence associated with his repeat-offender-specification conviction, and remanded the matter to the trial court for resentencing on the underlying OVI conviction in accordance with R.C. 2929.14(A)(3)(b). *Id.* at ¶ 27.

{¶16} In applying *South* to the instant case, we find that Mericsko’s sentence is contrary to law. Mericsko received a five-year mandatory term on the specification to be served prior to and consecutive with a 120-day prison term for his underlying OVI conviction.

{¶17} R.C. 4511.19(G)(1)(e)(ii) provides in pertinent part:

An offender who previously has been convicted of or pleaded guilty to a violation of division (A) of this section that was a felony, regardless of when the violation and the conviction or guilty plea occurred, is guilty of a felony of the third degree. The court shall sentence the offender to all of the following:

* * *

(ii) __ If the sentence is being imposed for a violation of division (A)(1)[(g)] * * * of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with [R.C. 2929.13(G)(2)] if the offender also is convicted of or also pleads guilty to a specification of the type described in [R.C. 2941.1413] *or* a mandatory prison term of one hundred twenty consecutive days in accordance with [R.C. 2929.13(G)(2)] if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. (Emphasis added.)

{¶18} Under R.C. 4511.19(G)(1)(e)(ii), the 120-day prison term is applicable only when the offender is *not* convicted of the repeat offender specification. As a result, Mericsko’s 120-day sentence is in conflict with the five years the trial court imposed on the specification. The *South* court held that when the sentencing court imposes the mandatory specification-related sentence, “the court also ‘may impose’ an additional prison term [of 9, 12, 18, 24, or 36 months

as] prescribed in R.C. 2929.14 or a community-control sanction [as] prescribed in [R.C. 2929.13(G)(2)] for the underlying OVI offense.” *South* at ¶ 15.

{¶19} Therefore, we vacate Mericsko’s sentence and remand the matter for resentencing in accordance with *South*.

Equal Protection

{¶20} In the second assignment of error, Mericsko, relying on this court’s decision in *State v. Klembus*, 2014-Ohio-3227, 17 N.E.3d 603 (8th Dist.), *discretionary appeal allowed*, 141 Ohio St.3d 1473, 2015-Ohio-554, 25 N.E.3d 1080, argues that the repeat OVI offender specification in R.C. 2941.1413 violates the Equal Protection Clause of the United States and Ohio Constitutions.¹ We find *Klembus* distinguishable from the instant case.²

{¶21} In *Klembus*, the defendant filed a motion to dismiss his OVI specification from the indictment charging him with fourth-degree felony OVI. The trial court denied Klembus’s motion to dismiss, and Klembus subsequently pled no contest to the charges. *Id.* at ¶ 6. The trial court merged Klembus’s sentence and ordered Klembus to one year in prison on the underlying OVI charge and one year on the specification, to be served consecutively for a total of

¹The state submitted the following propositions of law:

Proposition of Law I: The repeat OVI specification codified in R.C. 2941.1413(A) is facially constitutional under the Equal Protection Clause of both the United States and Ohio Constitutions.

Proposition of Law II: When a defendant’s conduct violates multiple criminal statutes, the government may prosecute under either, even when the two statutes prohibit the same conduct but provide for different penalties, so long as the government does not discriminate against any class of defendants based upon an unjustifiable standard.

²We note that Mericsko never presented in the trial court any argument that challenged the proceedings based upon the unconstitutionality of R.C. 2941.1413. Generally, the “[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue.” *State v. Mays*, 18 N.E.3d 850, 2014-Ohio-3815, ¶ 43 (8th Dist.), *discretionary appeal not allowed*, 142 Ohio St.3d 1422, 2015-Ohio-1353, 28 N.E.3d 121, quoting *In re I.A.*, 2d Dist. Montgomery No. 25078, 2012-Ohio-4973, ¶ 4, quoting *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus.

two years in prison. *Id.* The court also imposed a lifetime suspension of driving privileges, and Klembus's vehicle was forfeited. *Id.*

{¶22} On appeal, Klembus argued the repeat OVI offender specification, on its face, violated the constitutional guarantees of equal protection and due process because the specification is based upon the same information or proof required to establish a fourth-degree felony. *Id.* at ¶ 7. We found the OVI specification unconstitutional on its face because the increased penalty under the specification did not require any additional proof that the base charge did not require. *Id.* at ¶ 19, 23. We reversed the portion of the trial court's judgment pertaining to the OVI specification. We stated that

the repeat OVI offender specification allows the prosecutor to arbitrarily subject some individual defendants, such as Klembus, to increased penalties that others are not subject to. In this way, a repeat OVI offender charged with the specification may be treated differently from other members of his class, who are not subject to the repeat OVI offender specification.

Id. at ¶ 21, 27.

{¶23} In the instant case, however, Mericsko was convicted of third-degree felony OVI, unlike Klembus's fourth-degree felony OVI conviction. Klembus was convicted of fourth-degree OVI, in violation of R.C. 4511.19(A)(1)(a) and 4511.19(A)(1)(h), along with the furthermore clause language of R.C. 4511.19(G)(1)(d) and the specification under R.C. 2941.1413. The furthermore clause provided that Klembus had been convicted of five or more OVI violations within the past 20 years of the offense. Whereas, Mericsko was convicted of third-degree felony OVI, in violation of R.C. 4511.19(A)(1)(h) and his furthermore clause provided that Mericsko had been convicted of a prior third-degree felony OVI. Therefore, separate proof (a prior felony) was required to establish the underlying OVI in Count 1 and the specification in R.C. 2941.1413 (five or more equivalent offenses in the past 20 years), making

Klembus factually distinguishable from the matter before us. Moreover, we note that while the Ohio Supreme Court in *South*, Slip Opinion No. 2015-Ohio-3930, did not address constitutionality, the court upheld the imposition of a prison term on the repeat offender specification prior and consecutive to the underlying felony.

{¶24} Accordingly, the second assignment of error is overruled.

{¶25} Judgment is vacated. The matter is remanded to the trial court for resentencing on Mericksko's third-degree-felony-OVI conviction.

It is ordered that appellee and appellant share the 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.

MARY EILEEN KILBANE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
EILEEN A. GALLAGHER, J., CONCUR