

[Cite as *State v. May*, 2016-Ohio-7491.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104107

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DENNIS F. MAY

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-11-547913-A

BEFORE: Boyle, J., Keough, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: October 27, 2016

FOR APPELLANT

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Dennis May, appeals the trial court’s denial of his motion to correct errors in his sentence. He raises three assignments of error for our review:

1. The trial court erred and committed plain error when it failed to correctly sentence Mr. May to a CBCF and awarded this portion of sentencing to the probation department, thus forfeiting jurisdiction over the CBCF portion of his sentence.
2. The trial court erred and committed plain and reversible error when it failed to timely serve Mr. May with a copy of its decision and journal entry.
3. The state erred and committed plain and reversible error when it failed to timely serve Mr. May with a copy of its response to his motion.

{¶2} Because we find May’s sentence to be contrary to law based on our recent en banc decision, *State v. Anderson*, 8th Dist. Cuyahoga No. 102427, 2016-Ohio-7044, we vacate May’s sentence on Counts 16 and 17, and remand for resentencing.¹

I. Procedural History and Factual Background

{¶3} In August 2011, May pleaded guilty to five counts of sexual battery. According to the record, the victim was five years old when May began committing the sexual acts against the victim. The sexual acts “were on-going until the victim was under the age of 13.” *State v. May*, 8th Dist. Cuyahoga No. 97354, 2012-Ohio-2766, ¶ 10. As part of his plea, May agreed that the offenses were not allied offenses of similar import.

{¶4} Before sentencing, May’s counsel requested the court to order a mitigation

¹The writer of this panel decision dissented on the en banc *Anderson* decision. *See id.* (Boyle, J., dissenting). Nonetheless, I am constrained to follow the majority en banc decision.

and presentence investigation report (“PSI”), as well as “an eligibility interview for the Wood County Community-Based Correctional Facility [‘CBCF’].” *Id.* at ¶ 3. May, however, refused to participate in the eligibility interview for the CBCF. And although May pleaded guilty, he denied his guilt in the PSI.

{¶5} Between the time of the plea hearing and sentencing, May filed a motion to withdraw his guilty plea. He also obtained new counsel before the sentencing hearing. At the start of the sentencing hearing, however, new counsel withdrew May’s motion to withdraw his plea.

{¶6} The trial court sentenced May to one year in prison on one count of sexual battery, consecutive to a two-year prison term on another count, consecutive to three years on another count, for an aggregate sentence of six years in prison. On the remaining two counts (Counts 16 and 17), the trial court imposed five years of community control sanctions on each count, ordered them to be served consecutive to each other, and ordered that they commence upon his release from prison imposed on the other three counts.

{¶7} The court ordered that upon May’s completion of his prison sentence, the probation department would determine whether he is eligible for participation in the community-based correction program. As part of his community control sanctions, the trial court further ordered that May would be placed in the sex offender unit to “receive sex offender treatment, regular polygraph examinations, sex offender supervision and maintain full-time employment.” *Id.* at ¶ 15.

{¶8} May appealed his sentence, which this court affirmed. *Id.* at ¶ 38.

{¶9} In August 2012, May filed a “motion for review of sentence which is contrary to law.” The trial court denied his motion, and May did not appeal.

{¶10} May also applied to reopen his direct appeal in August 2012 pursuant to App.R. 26(B). *See State v. May*, 8th Dist. Cuyahoga No. 97354, 2012-Ohio-5504. In his application, May asserted that his appellate counsel was ineffective for not arguing the following: (1) the indictment was duplicitous because it did not provide enough information in each count to allow May to defend against double jeopardy in future prosecutions; (2) the guilty plea was not knowingly, intelligently, or voluntarily made; (3) the sentence was contrary to law; (4) there was a disparity of treatment among this offender and other offenders similarly situated; (5) trial counsel was ineffective; and (6) May’s speedy trial rights were violated. *Id.* at ¶ 1. This court denied his application. *Id.* at ¶ 11.

{¶11} May filed two more motions to correct his “illegal sentence,” in February and August 2013, which were denied by the trial court. May did not appeal these denials.

{¶12} In November 2015, May filed the motion that is at issue in this appeal, titled “motion to correct errors in sentence pursuant [to] Crim.R. 36.” The trial court denied this motion. It is from this judgment that May now appeals.

II. Motion to Correct Sentence

{¶13} In his first assignment of error, May contends that the trial court erred by not sentencing him to a definite term in a CBCF. Moore raised this issue in one of his

previous motions and did not appeal the trial court's denial of that motion. Thus, we would normally be barred from addressing this issue because of res judicata. We will address this issue, however, because we find it to be contrary to law for multiple reasons.

See State v. Fischer, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 31 (When a sentence is contrary to law, "[p]rinciples of res judicata, including the doctrine of the law of the case, do not preclude appellate review.").

{¶14} First, when the trial court sentenced May to five years of community control sanctions for each Count 16 and 17, it stated that as part of May's community control sanctions, the probation department would determine whether he is eligible for participation in the community-based correction program. May is correct that the trial court should have advised May at the sentencing hearing and in the journal entry that if he was eligible for the CBCF, he could spend *up to six months* in the facility. R.C. 2929.16(A)(1); *State v. Moore*, 8th Dist. Cuyahoga No. 102242, 2015-Ohio-3233, ¶ 8. Thus, May's sentence on Counts 16 and 17 is contrary to law.

{¶15} May's sentence for Counts 16 and 17 is contrary to law for a second reason. The trial court ordered May to serve consecutive five-year terms of community control sanctions. This part of May's sentence is also contrary to law under R.C. 2929.15(A)(1), which states in pertinent part: "[t]he duration of all community control sanctions imposed upon an offender under this division shall not exceed five years." Accordingly, May's sentence on Counts 16 and 17 is contrary to law for this reason as well.

{¶16} Finally, May's sentence for Counts 16 and 17 is contrary to law for another

reason. In *Anderson*, 8th Dist. Cuyahoga No. 102427, 2016-Ohio-7044, this court recently decided en banc that a trial court cannot sentence a defendant to prison for one felony offense and community control sanctions for another felony offense, and order the community control sanctions to commence upon the defendant's release from prison. *See id.* Here, the trial court sentenced May to six years in prison, and then ordered that May serve five years of community control sanctions to begin after he served his prison sentence. This is contrary to law pursuant to *Anderson*. *See id.*

{¶17} May's remaining assignments of error have been rendered moot by our disposition of his first assignment of error.

{¶18} Judgment reversed. May's sentence on Counts 16 and 17 is vacated. This matter is remanded for resentencing.

It is ordered that appellant recover from appellee 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 J. BOYLE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
ANITA LASTER MAYS, J., CONCUR

