[Cite as *State v. Schultz*, 2015-Ohio-2934.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 27555
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
RONALD L. SCHULTZ	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 2013 10 2909

DECISION AND JOURNAL ENTRY

Dated: July 22, 2015

HENSAL, Presiding Judge.

{¶1} Ronald Schultz appeals his sentence in the Summit County Court of Common Pleas for operating a vehicle under the influence of drugs or alcohol (OVI). For the following reasons, this Court reverses.

I.

{¶2} The Grand Jury indicted Mr. Schultz for two counts of OVI and one count of driving under suspension. Because of the number of Mr. Schultz's prior OVI convictions, the indictment stated that the current offenses were felonies of the third degree. Mr. Schultz entered into a plea agreement under which he agreed to plead guilty to one of the OVI counts, and the State agreed to dismiss the other counts. The trial court accepted his plea and sentenced him to four years imprisonment. Mr. Schultz has appealed his sentence, assigning as error that it is contrary to law.

II.

ASSIGNMENT OF ERROR

THE TRIAL COURT'S SENTENCE IS CONTRARY TO LAW.

{¶3} Mr. Schultz argues that his sentence is contrary to law because the maximum sentence he could receive for his OVI offense was three years. In *State v. South*, 9th Dist. Summit No. 26967, 2014-Ohio-374, this Court determined that, following amendments to the Revised Code in 2011, the maximum sentence for a third-degree OVI felony is 36 months in prison. *Id*. at ¶ 18. This Court, therefore, concluded that the defendant's sentence "to five years on his underlying OVI conviction * * * was contrary to law." *Id*.

{¶4} The State notes that *South* is currently before the Ohio Supreme Court on the certification of a conflict between it and *State v. Sturgill*, 12th Dist. Clermont Nos. CA2013-01-002 and CA2013-01-003, 2013-Ohio-4648. The State requests that this Court stay its decision in this case until the Supreme Court issues a decision in *South*. It also requests that this Court reconsider its analysis in *South* and, instead, adopt the position of the Tenth District Court of Appeals in *State v. Mercier*, 10th Dist. Franklin No. 13AP-906, 2014-Ohio-2910. Upon review, however, we do not find it necessary to hold our decision or depart from our precedent in *South*. *See State v. Wirebaugh*, 9th Dist. Summit No. 27442, 2015-Ohio-754, ¶ 7; *Bauer v. Brunswick*, 9th Dist. Medina No. 11CA0003-M, 2011-Ohio-4877, ¶ 9; *State v. Posey*, 10th Dist. Franklin Nos. 86 AP-1132, 86 AP-1162, and 86 AP-1163, 1987 WL 14991, *2 (July 28, 1987).

{¶5} Because the maximum sentence for a third-degree OVI felony conviction is 36 months, we conclude that the trial court erred when it sentenced Mr. Schultz to four years imprisonment. Mr. Schultz's assignment of error is sustained.

III.

{¶6} The trial court sentenced Mr. Schultz to a prison term that exceeded the statutory maximum. The judgment of the Summit County Court of Common Pleas is reversed, and this matter is remanded for resentencing.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

JENNIFER HENSAL
FOR THE COURT

WHITMORE, J.
CONCURS.

SCHAFER, J.
DISSENTING.

{¶7} Due to the nature of Schultz's conviction, R.C. 4511.19(G)(1)(e)(i) governed the trial court's imposition of sentence. The language in this provision is plain as day and it allows trial courts to impose prison terms of up to five years in third-degree OVI felony cases. Because the trial court's sentence here falls within this statutory range, it was not contrary to law and I must respectfully dissent from the majority's conclusion to the contrary.

{¶8} Schultz was convicted on one count of OVI in violation of R.C. 4511.19(A)(1)(a). Specifically, he pled guilty to count one of the indictment, which indicated that Schultz had previous OVI convictions and that this violation was a felony of the third degree. The trial court subsequently sentenced Schultz to a prison term of four years.

{¶9} The majority, in reversing the trial court's imposition of a four year sentence, pledges fidelity to *South*'s proposition that R.C. 2929.14 only allows prison terms of up to three years for third-degree felony OVI convictions. But, this proposition is not supported by the plain terms of the OVI statute. Specifically, the Court must rely on R.C. 4911.19(G)(1)(e), which pertinently states as follows:

> 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:
>
> (i) If the offender is being sentenced for a violation of division (A)(1)(a) * * * of this section, * * * a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code 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. The cumulative total of a sixty-day mandatory prison term and the additional prison term for the offense shall not exceed five years.*

(Emphasis added.)

{¶10} This unambiguous language requires trial courts to impose a mandatory prison term of 60 days upon defendants who are convicted of third-degree felony OVI and not the specification outlined in R.C. 2941.1413. It also allows trial courts to impose an additional sentence that, when combined with the mandatory term, does not exceed five years. Essentially, the statute requires a prison term of at least 60 days and no more than five years. The trial court imposed a sentence in this matter that fit squarely within this range (four years). Accordingly, there can be no finding that the sentence is contrary to law.

{¶11} The majority follows *South* and applies the sentence limitations contained in R.C. 2929.14. But, these limitations do not apply here, as specifically contemplated by R.C. 4511.19(G)(1):

> Whoever violates any provision of divisions (A)(1)(a) to (i) or (A)(2) of this section is guilty of operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them. Whoever violates division (A)(1)(j) of this section is guilty of operating a vehicle while under the influence of a listed controlled substance or a listed metabolite of a controlled substance. The court shall sentence the offender for either offense under Chapter 2929. of the Revised Code, *except as otherwise authorized or required by divisions (G)(1)(a) to (e) of this section*[.]

(Emphasis added.) This language manifestly shows that a trial court, when sentencing a defendant for an OVI conviction must first look to the requirements of R.C. 4511.19(G)(1)(a) – (e). Then, only if these provisions are inapplicable, can it move to a consideration of the mandates contained in R.C. Chapter 2929. *South* fails to account for the language of R.C. 4511.19(G)(1) and consequently misconstrues its interplay with R.C. Chapter 2929. As a result, I believe that *South* was wrong when it was decided and that we should overrule it. *See Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849 (stating that prior decisions may be overruled if "the decision was wrongly decided at that time").

{¶12} Both the Eighth District Court of Appeals and the Tenth District Court of Appeals have adopted the view that R.C. 4911.19(G)(1) authorizes trial courts to impose prison terms of up to five years for third-degree felony OVI convictions. In *State v. Mercier*, 10th Dist. Franklin No. 13AP-906, 2014-Ohio-2910, the court rejected *South* and determined that "R.C. 4511.19(G)(1) explicitly allows for a court to sentence a defendant for violations of R.C. 4511.19(A)(1)(a) to the exclusion of R.C. Chapter 2929." *Id*. at ¶ 14. Accordingly, it concluded that "the trial court * * * was authorized under R.C. 4511.19 to sentence appellant up to five years." *Id*. at ¶ 18. The Eighth District has since followed *Mercier* and likewise rejected *South*. *See State v. Jarrells*, 8th Dist. Cuyahoga No. 101707, 2015-Ohio-879, ¶ 17 ("This court agrees with the interpretation of the involved statutes set forth by the Tenth District. R.C. 4511.19(G)(1) specifically indicates the provisions found in R.C. 4511.19(G)(1) through (e) may act to enhance the sentence imposed for a third-degree felony above the range set forth in R.C. 2929.14. R.C. 4511.19(G)(1)(e) specifically provides for a sentence [that is] five years as opposed to 36 months."). We should join the parade towards this more appropriate reading of the Revised Code for it better reflects the statutory language and the intent of the General Assembly.

{¶13} In sum, I would find that the trial court was empowered to impose a prison term of up to five years in this matter under R.C. 4511.19(G)(1)(e)(i) and that its imposition of a four year sentence was not contrary to law. Consequently, I would overrule the sole assignment of error and affirm the trial court's judgment.

APPEARANCES:

JONATHAN T. SINN and GREGORY A. PRICE, Attorneys at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.