No. 2018-0376

In the Supreme Court of Ohio

APPEAL FROM THE FRANKLIN COUNTY COURT OF APPEALS
TENTH APPELLATE DISTRICT
Case No. 17 AP 242

STATE OF OHIO,
Appellee,

v.

JOHN M. HOWARD,
Appellant.

APPELLANT JOHN M. HOWARD's MERIT BRIEF

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Introduction

This Court has long held that, for the protection of offenders and the public alike, sentencing statutes are to be strictly adhered to at sentencing hearings. Consistent with that theme, this Court has ruled that every hearing in which a court considers revocation of an offender's sentence of community control is, itself, a sentencing hearing, and at every sentencing hearing the offender is sentenced anew.

The trial court ignored these rules in the case *sub judice*, by, first, failing to provide Appellant, when it resentenced him at a revocation hearing, with the statutorily required notification of the prison term he might face for any subsequent violation of his community control sanction, and, second, by failing to make the statutorily required findings necessary to impose consecutive prison sentences when it sentenced Appellant to prison upon his subsequent violation.

This Court's decisions make it mandatory for the trial court to comply with those statutes at revocation hearings, yet the Tenth District misinterpreted and/or ignored this Court's precedents in order to uphold the actions of the trial court.

The failure of the trial court to comply with two critical sentencing statutes, one, a prerequisite for sending Appellant to prison, and the second, a prerequisite for requiring his sentences to run consecutively, deprived Appellant of due process, requiring that this case be remanded for resentencing.

However, on a broader scale, the Tenth District's holding requires intervention by this Court to avoid an avalanche of unnecessary and premature appeals, by defendants who are sentenced to community control sanctions. The Tenth District refused to consider Appellant's argument that the trial court erred in failing to address, at his revocation hearing, the R.C. 2929.14(C)(4) sentencing factors required for his sentences to be served consecutively, holding

that Appellant's challenge was time-barred because the proper time for asserting the appeal was following the original sentencing when the trial court first notified Appellant of his potential prison sentences.

Guidance is required from this Court to make it clear that whenever an offender is sentenced to community control, he or she has not, at the same time, been sentenced to prison. The notification the offender is entitled to receive of the prison sentence that might be served for a violation of community control sanctions is only a potential sentence, making any sentencing errors only potential errors. The proper time for challenging those errors is when, if ever, they ripen into actual imprisonment upon a subsequent revocation of community control.

This Court must correct the Tenth District's erroneous holding and make it clear that errors arising during sentencing at revocation hearings stand on their own, and are subject to challenge on appeal of the revocation hearing sentence. Sentencing errors committed at the revocation hearing do not relate back to the original sentencing hearing.

Statement of Facts and Case History

Appellant, John M. Howard, was indicted on August 19, 2013 on one count of importuning, a felony of the fifth degree, and one count of attempted unlawful sexual conduct with a minor, a felony of the fourth degree. In a bench trial held before Judge Richard S. Sheward on January 8, 2014, Appellant was found guilty on both counts. (Appx. 3, at ¶ 2.)

The charges arose as a result of a 2013 posting by Howard of an advertisement in the adult only "Casual Encounters" section of the website Craigslist. A Grandview Heights

detective responded to the advertisement, initiating contact with Howard using a 14-year old persona named "Nick." *State v. Howard*, 10th Dist. No. 14AP-239, 2014-Ohio-5103, ¶¶ 3-5.[1]

At trial, Howard testified that he posted the ad on Craigslist in an effort to have a sexual relationship with a consenting adult male, not with a child. Nevertheless, after having been told that "Nick" was 14 years old, Howard continued to exchange e-mails and text messages with the detective, believing him to be Nick. Howard ultimately arranged to meet with Nick, and was arrested when he appeared for the meeting. *Id*.

Appellant was sentenced on February 21, 2014 (the "sentencing hearing"), to three years of community control sanctions, with specific conditions and intensive supervision on the sex offender caseload, and was classified as a Tier II sex offender. At the sentencing hearing, Judge Sheward informed Appellant that if his community control was revoked due to his violation of any of the conditions of his community control, he would be sentenced to 11 months in prison on the importuning conviction and 17 months in prison on attempted unlawful sexual conduct with a minor conviction, to be served consecutively. (Supp. 9, Tr. 9.) At no time during the sentencing hearing did Judge Sheward engage in any analysis of, or make any findings under, R.C. 2929.14(C)(4). (Supp. 2-14 *in passim*, Tr. 2-14.)

On September 14, 2016, Appellant's probation officer sought revocation of Appellant's community control for two violations: first, for traveling out of his county of residence without permission, and, second, because Appellant was convicted of an assured clear distance traffic violation. (Supp. 28; Supp. 19, Tr. 4.)

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[1] Howard appealed his conviction in 2014, on the grounds of entrapment. The Tenth District upheld the conviction in *State v. Howard*, 2014-Ohio-5103. That appeal is not connected with the instant appeal, which solely concerns the prison sentence imposed on him in 2017 upon his violation of community control sanctions.

A revocation hearing was held on October 4, 2016 (the "first revocation hearing") before the Honorable Judge David C. Young (who had succeeded Judge Sheward on the case), at the conclusion of which Judge Young continued Appellant's community control, and imposed two new penalties on him. First, the court required Appellant to complete the STOP sex offender program (a mental health treatment program) and, second, the court extended the community control sanctions for an additional year (until 2/20/18). (Supp. 19, Tr. 4.)

At this first revocation hearing, Judge Young made no mention of the specific prison term Appellant faced in the event of any subsequent violations of his new community control sanctions. Rather, the only "notification" Appellant received from the court at that hearing was: "And if I see you again, Mr. Howard, plan on going to the penitentiary. All right? That will be all." (Supp. 19, Tr. 4.)

A subsequent violation did, in fact, occur. On January 17, 2017, Appellant was taken into custody on a holder, and on February 21, 2017, the probation officer filed a request to revoke Appellant's community control for three violations: first, because Appellant had been terminated from the STOP program; second, because he admitted to using the internet to view YouTube videos; and, third, because he admitted to viewing magazines that were sexually arousing to him. (Supp. 30; Supp. 21, 23, Tr. 8, 10.)

At the second revocation hearing held on March 7, 2017 (the "second revocation hearing"), Judge Young revoked Appellant's community control and then imposed the prison sentences of 17 months and 11 months, to be served consecutively, based on the notification Judge Sheward had provided during the original sentencing hearing. (Supp. 25, Tr. 12.) During the second revocation hearing, Judge Young partially addressed the sentencing factors under R.C. 2929.14(C)(4), but he failed to make all the findings required in order to impose

consecutive sentences, due to his mistaken belief that Judge Sheward had made, at the original sentencing hearing, one of the required findings.[2] (Supp. 25, Tr. 12.) As previously noted, Judge Sheward had, in fact, made no such finding.

Appellant timely appealed his sentence to the Tenth District Court of Appeals in the instant appeal, asserting two assignments of error. (Appx. 3.) The Tenth District overruled both of Appellant's assignments of error and upheld his sentencing in a decision rendered on November 30, 2017 in *State v. Howard*, 10th Dist. No. 17AP-242, 2017-Ohio-8747. (Appx. 3 and 10.) Appellant timely moved for reconsideration and to request the court to certify a conflict to this Court between its decision in the case s*ub judice* and the Second District's decision in *State v. Snoeberger*, 2013-Ohio-1375. The Tenth District denied both motions on January 25, 2018. Appellant's jurisdictional appeal to this Court (Appx. 1) was accepted on June 6, 2018.

Argument

Appellant's appeal involves his challenge of two errors made by the trial court when it sentenced him to imprisonment at his second revocation hearing. First, by failing to provide notification at his first revocation hearing of the prison term Appellant might face for subsequent violations of his community control sanctions, as required under R.C. 2929.19(B)(4), the trial court was barred from sentencing him to prison at the second revocation hearing. Second, when sentencing Howard to imprisonment at the second revocation hearing, the court failed to make the findings required under R.C. 2929.14(C)(4) in order to impose consecutive sentences. (Appx. 3, at ¶ 8.)

[2] Judge Young stated that: "I believe Judge Sheward, when he imposed [the original sentence], he made the finding that consecutive sentences are necessary to punish the defendant or to protect the public from future crime. (Supp. 25, Tr. 12.)

The Tenth District upheld the trial court's sentencing of Appellant, holding that the R.C. 2929.19(B)(4) notification was not required at the first revocation hearing because, the court reasoned, the notification had already been provided by the trial court at the original sentencing hearing, and holding that Appellant had waited too long to challenge the trial court's failure to make the findings required under R.C. 2929.14 because, the court reasoned, the challenge should have been brought three years earlier when the trial court imposed the prison terms at the original sentencing hearing, and the trial court had no duty to revisit R.C. 2929.14 at the second revocation hearing. (Appx. 3.)

If Appellant is successful in his challenge of the trial court's failure to adequately address R.C. 2929.14, this case will be remanded for resentencing. Although Appellant is confident that consecutive sentences cannot be imposed at resentencing, nevertheless the result is that Appellant will likely still be sentenced to some prison time. On the other hand, if Appellant prevails in his challenge of the trial court's failure to provide the required R.C. 2929.19(B)(4) notification, the result is that this case will be remanded for resentencing "with a prison term not an option." *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, ¶ 33.

Although the failure-to-notify issue would be case dispositive, this appeal will first address the sentencing-factors portion of the Tenth District's decision for two reasons. The appellate court ruled, for all intents and purposes, that sentencings do not take place at revocation hearings, as a result of which the trial court is not required to comply with felony sentencing statutes at revocation hearings. It stated this conclusion in addressing the felony-sentencing portion of this appeal:

> [At the second revocation hearing, t]he new trial court judge did not literally sentence Howard. The new trial court judge enforced the sentence previously imposed.

(Appx. 3, at ¶ 24.)

This finding directly conflicts with this Court's decision in *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, ¶ 17, which held that each revocation hearing is a sentencing hearing, at which the trial court is required to comply with all relevant sentencing statutes. Addressing this threshold error in the appellate court's decision lays the foundation for the failure-to-notify portion of the appeal.

Yet another, far more important, reason to first address the errors made by the Tenth District in the sentencing-factors portion of its decision, is to obtain this Court's intervention in order to prevent the appellate court's holding from causing unnecessary premature appeals of potential sentencing errors, which will wreak havoc on litigants, counsel and the courts if left unchecked.

Thus, Appellant's argument begins with his challenge of the trial court's failure to adequately address the R.C. 2929.14 sentencing factors at his second revocation hearing, before imposing a sentence of imprisonment on him. Once it is established that a court must comply with sentencing statutes at revocation hearings, it becomes evident why the Tenth District's ruling was erroneous when it concluded that the trial court was not required to give an offender notification at the revocation hearing of the potential prison term he or she might face for violation of subsequent community control sanctions.

PROPOSITION OF LAW NO. 1

A REVOCATION HEARING IN WHICH THE COURT DECIDES TO REVOKE COMMUNITY CONTROL AND IMPOSE A PRISON SENTENCE IS A SENTENCING HEARING, AT WHICH THE COURT IS REQUIRED TO COMPLY ANEW WITH ALL RELEVANT SENTENCING STATUTES, INCLUDING R.C. 2929.14, BEFORE THE COURT MAY ENFORCE ANY TERM OF IMPRISONMENT.

In his Assignment of Error No. 2, Appellant challenged his sentencing on the grounds that the trial court failed to make the findings required under R.C. 2929.14(C)(4) in order to impose consecutive sentences.

The fact that the trial court failed to make one of the required findings at the original sentencing hearing is beyond argument, as the State conceded.[3] The trial court also failed to make the same finding at the second revocation hearing, although the State offered some argument on this point.[4]

In any event, the Tenth District never addressed the merits of this issue, finding instead that *res judicata* prevented Appellant from challenging that sentencing error. Although the

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[3] Judge Sheward never addressed any of the R.C. 2929.14(C)(4) factors at the original sentencing, and specifically not the finding that consecutive sentences were necessary to punish the defendant or to protect the public from future crime. (Supp. 8-9 and *in passim*, Tr. 5-9.) The State acknowledged this fact at p. 27 in its brief on appeal ("[Appellant] is correct that Judge Sheward never made this finding").

[4] When Judge Young sentenced Appellant to imprisonment at the second revocation hearing, he ordered the two sentences to run consecutively. However, when addressing R.C. 2929.14(C)(4), Judge Young stated: "I believe Judge Sheward, when he imposed [the sentences], he made the finding that consecutive sentences are necessary to punish the defendant or to protect the public from future crime." (Supp. 25, Tr. 12.) As noted in the preceding footnote, Judge Sheward had not made this finding, and, accordingly Judge Young mistakenly failed to address this factor. The State, however, attempted to put lipstick on this error by arguing at p. 27 in its brief on appeal that "[a]lthough Judge Young was mistaken in thinking Judge Sheward made the finding, the fact that Judge Young reiterated what he thought Judge Sheward said sufficiently shows that he – Judge Young – 'engaged in the analysis' and 'considered the statutory criteria' required by R.C. 2929.14(C)(4)."

Tenth District never used that terminology, that was clearly the effect of its holding that "[t]he time to challenge failure to make the findings set forth in R.C. 2929.14(C)(2) [sic] is to file a direct appeal of the original sentence rather than by appealing from a subsequent revocation entry years later." (Appx. 3, at ¶ 24.)

At the second revocation hearing, the court revoked community control and ordered Appellant to serve a 28-month prison term. The court reasoned that Appellant was time-barred from challenging the sentencing errors made at that hearing, because it found that the trial court "did not literally sentence" the offender at the second revocation hearing, but, rather, it merely "enforced the sentence previously imposed" at the original sentencing hearing. *Id*.

To support its conclusion, the court cited a Fifth District decision which held that "fundamental flaws" in the sentencing process must be "challenge[d] in an appeal from the original sentencing entry, rather than by appealing from a subsequent revocation entry." *State v. Gibson*, 5th Dist. No. 05COA032, 2006-Ohio-4052, at ¶ 12. However, *Gibson* was not precedent for the issue before the Tenth District. In *Gibson*, the facts were the reverse of those in the case at bar. Gibson had initiated an appeal from his sentencing hearing, challenging the legality of the prison term the court had notified him he faced when it placed him on community control, and it was the State that took the position that the appeal was premature, arguing that "the issue before us is not ripe for appeal, as appellant's prison term was deferred by the trial court and appellant had not [yet] violated community control." *Id*. at ¶ 8. The Fifth District permitted the appeal, but limited the applicability of its ruling to only those situations in which "a *Blakely* or *Foster* challenge to a sentence which includes a community control sanction represents an allegation of a 'fundamental flaw' in the sentencing process." *Id*. at ¶ 12.

To the extent the *Gibson* ruling is even correct, it is not applicable to the issue raised in Appellant's appeal. More on point with Appellant's situation was a case decided by the same Fifth District two years prior to *Gibson*. In *State v. Williard*, 5th Dist. No. 04CA010, 2004-Ohio-5880, the defendant attempted to appeal the trial court's failure to provide the R.C. 2929.14(B)(4) notification, in a direct appeal of his original sentencing and not from any revocation hearing. The Fifth District refused to hear the appeal because the "appellant's community control has not been revoked and the trial court has not attempted to sentence appellant to any prison time. We therefore conclude this assignment of error is premature." *Id*. at ¶ 23.

Because *Gibson* did not modify *Williard* in any respect, the Tenth District misplaced its reliance on the Fifth District's precedents. The Tenth District cited as authority a decision (*Gibson*) in which the court's ruling expressly stated that it was limited to situations not applicable to Appellant's case, and ignored a decision (*Williard*) which was on all-fours with Appellant's case. More than that, the *Williard* decision is consistent with this Court's holdings in *Brooks* and *Fraley* and their progeny as interpreted by every other Ohio appellate court considering the issue, all of which was ignored by the Tenth District in its holding.

To better understand the reason for the Tenth District's incorrect holding, one must understand the court's reasoning process. In a nutshell, the Tenth District determined that the sentencing errors complained of by appellant had their genesis in the original sentencing hearing. (Appx. 3, at ¶ 24.) In essence then, the court determined that the trial court had pronounced a prison sentence on Appellant when it first sentenced him to community control, and that the new trial court judge did not really sentence Appellant to imprisonment at the second revocation

hearing. *Id*. Moreover, the appellate court concluded that the sentence it believed the trial court had "previously imposed" was merely "held in abeyance." *Id*.

Thus, because the Tenth District concluded that (1) no prison sentence was imposed at the second revocation hearing and (2) the prison sentence was imposed at the original sentencing hearing, when Appellant was first placed on community control, any sentencing errors could only have occurred at the original sentencing hearing and, therefore, had to be challenged in a timely "direct appeal of the original sentencing," and during the revocation hearing "the trial court did not need to revisit the requirements of R.C. 2929.14." *Id*.

Focusing solely on errors that occurred during the original sentencing flies in the face of common sense. It ignores the reality that the court can commit errors at revocation hearings. Errors did, in fact, occur during Appellant's first and second revocation hearings, yet the Tenth District gave no reason why Appellant could not challenge those errors.

Had Judge Young sent Appellant to prison for 50 years at his second revocation hearing, that sentence would obviously have been illegal under sentencing laws, as exceeding "the range of prison terms available for the offense." R.C. 2929.15(B)(3); R.C. 2929.14. Yet according to the Tenth District's ruling, the new trial court judge did not sentence Appellant at the second revocation hearing, and it found the court had no obligation to revisit the sentencing statutes. How, then, would Appellant be entitled to challenge such an illegal sentence? The obvious answer, one that even the Tenth District would have to agree with, is because an offender is entitled to challenge errors made by the trial court when applying the sentencing statutes. This is exactly what Appellant did in his appeal – he challenged the errors made by Judge Young during the second revocation hearing – which the appellate court refused to consider.

Part of the problem with the Tenth District's reasoning is that it appears the court was following the former practice involving probation, in which the prison sentence hanging over the offender's head was not potential, but was the sanction actually imposed on the offender. "Prior to S.B. 2, it was a regular practice in felony sentencing to impose a prison sentence and then suspend the sentence and grant probation with specific terms and conditions." *State v. Anderson*, 143 Ohio St.3d 173, 2015-Ohio-2089, 35 N.E.3d 512, ¶ 21 (quoting *State v. Hoy*, 3d Dist. Union Nos. 14-04-13 and 14-04-14, 2005-Ohio-1093, ¶ 18).

However, this all changed in 1995 when the General Assembly enacted Am.Sub.S.B. No. 2, 146 Ohio Laws, Part IV, 7136 ("S.B. 2"), dramatically revising Ohio's criminal code, including, among other changes, that "community control replaced probation as a possible sentence under Ohio's felony sentencing law." *State v. Talty,* 103 Ohio St.3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶ 16.

The former practice involving probation cannot be applied to the current sentencing laws which involve community control as a sanction. Probation was, in essence, an arrangement (a contract) between the court and the offender designed to keep the offender from having to serve the prison sentence that had been imposed upon him or her, whereas community control is a sanction, a punishment, in and of itself, in lieu of a prison sentence. "Unlike probation, which is a period of time served during suspension of a sentence, community control sanctions are imposed as the punishment for an offense at a sentencing hearing." *State v. Heinz*, 146 Ohio St.3d 374, 2016-Ohio-2814, 56 N.E.3d 965, ¶ 14.

Thus, pre-S.B. 2, courts would impose prison sentences and then implement probation; whereas post-S.B. 2, courts impose either a prison sentence or community control. *Anderson*, 143 Ohio St.3d 173, 2015-Ohio-2089 at ¶ 21 ("current felony sentencing statutes, contained

primarily in R.C. 2929.11 to 2929.19, require trial courts to impose either a prison term or community control sanctions on each count" (quoting *State v. Berry*, 2012-Ohio-4660, 980 N.E.2d 1087, ¶ 21 (3rd Dist.)); *see, also, State v. Duncan*, 2016-Ohio-5559, 61 N.E.3d 61, ¶ 19 ("[p]ursuant to R.C. 2929.19(B), community control sanctions and prison terms are mutually exclusive and cannot be imposed at the same time on the same count of conviction"). Accordingly, when the trial court imposed community control sanctions on Appellant at the original sentencing hearing, it did not, and could not have, also imposed a prison sentence on him at that same time.

Contrary to the Tenth District's reasoning, post-S.B. 2, sentences are no longer suspended (or held in abeyance) when community control is imposed as the sanction at sentencing. "To emphasize the break with past assumptions, the [post–S.B. 2 felony-sentencing] statutes no longer discuss 'suspension' of sentence; rather, the alternative to a sentence of imprisonment is a sentence of community control sanctions." *Anderson*, at ¶ 23 (quoting *Baldwin's Ohio Practice, Criminal Law*, Section 119:2). *See, also*, *Duncan*, at ¶ 21 ("when a defendant is sentenced to community control on a count of conviction and notified at that time of the specific prison term he faces should he violate his community control, the defendant is only sentenced to community control sanctions and is not sentenced to that prison term").

There can be no argument that this Court has clearly found that, post-S.B. 2, the imposition of a community control sanction at sentencing is mutually exclusive to the imposition of a prison sentence at that same hearing:

> [T]he General Assembly intended prison and community-control sanctions as alternative sentences for a felony offense. Therefore, we hold that as a general rule, when a prison term and community control are possible sentences for a particular felony offense, absent an express exception, the court must impose either a prison term or a community-control sanction or sanctions.

Anderson, at ¶ 31 (emphasis added), which went on to note that the new requirement set forth in R.C. 2929.13(B)(2)(a) is "[f]urther indication that these alternatives are mutually exclusive," *id.* at ¶ 27.

Citing this authority, the Twelfth District held that "under current felony sentencing statutes, a sentencing court cannot suspend a prison term or make community control a condition of a suspended prison term." *Duncan*, at ¶ 19.

On its face, R.C. 2929.19(B)(4) is equally unambiguous in providing that the notification of the potential prison term is not a sentence – it is a notice, and nothing more.

> If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The court shall notify the offender that, if the conditions of the sanction are violated, . . . [the court] may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation.

R.C. 2929.19(B)(4) (emphasis added).

"[T]he purpose of the statute is to *notify* the defendant of a specific prison term that *may be imposed* if the defendant violates community control. *Duncan*, at ¶ 21 (citing *Brooks,* 103 Ohio St.3d 134, 2004-Ohio-4746 at ¶ 23) (emphasis in original). "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.' Notice, however, is just that." *State v. Jimenez*, 8th Dist. No. 104735, 2017-Ohio-1553, ¶ 9 (quoting *Fraley,* at ¶ 18).

There can be no doubt, then, that the Tenth District was in error when it concluded that the trial court had previously imposed a prison sentence on Appellant when he was sentenced to community control at his original sentencing hearing, and then simply held that prison sentence in abeyance until a violation occurred. "[T]he purpose of the community control statute is not to sentence a defendant to a specific prison term and then suspend or reserve that prison term."

State v. Berry, 2012-Ohio-4660, 980 N.E.2d 1087, ¶ 25 (3rd Dist.). Thus, there was no sentence for the new trial court judge to merely enforce at the second revocation hearing.

For this reason, Appellant was not sentenced to prison until Judge Young sentenced him at the second revocation hearing. This is the only conclusion which can logically follow from this Court's holding in *Fraley* and appellate decisions properly interpreting R.C. 2929.19(B)(4):

> 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.

Fraley, 105 Ohio St.3d 13, 2004-Ohio-7110 at ¶ 17; *see*, also, *State v. Heinz*, 146 Ohio St.3d 374, 2016-Ohio-2814 at ¶ 15; *State v. Beyersdoerfer*, 1st Dist. No. C–170037, 2017-Ohio-9281, ¶ 6 ("[f]ollowing a community-control violation, the court sentences the offender anew"); *State v. Silver*, 8th Dist. No. 104749, 2017-Ohio-2660, ¶ 19 ("[a] community control violation hearing is effectively a second sentencing hearing where the court 'sentences the offender anew and must comply with the relevant sentencing statutes'" (quoting *Heinz, supra*)).

Moreover, Appellant was not sentenced at the second revocation hearing for the offenses of which he was convicted. Appellant had already been sentenced for those offenses at his original sentencing hearing – and the sentence he received was community control sanctions. *Anderson*, 143 Ohio St.3d 173, 2015-Ohio-2089 at ¶ 31 (when sentencing for a particular felony offense, "the court must impose either a prison term or a community-control sanction"). "It is well-established that any penalty imposed for violating a condition of one's community control sanctions is a punishment for that violation and not for the original underlying offense." *State v. Richter*, 12th Dist. No. CA2014-06-040, 2014-Ohio-5396, ¶ 8.

Thus, when the trial court decided to revoke Appellant's community control at the second revocation hearing, it was sentencing him anew ("a sentence imposed following a community control violation constitutes a full sentencing hearing," *State v. Frazier*, 8th Dist. No. 104596, 2017-Ohio-470, ¶ 15), and was sentencing him for violating the conditions of his community control, not for his original offenses.

Although a court is authorized to sentence an offender to prison for violating his or her community control sanctions, and the prison term can be for as much as the offender was notified of at his or her sentencing hearing, the court is nevertheless limited, when imposing a prison sentence at a revocation hearing, by the dictates of R.C. 2929.14. To that end, R.C. 2929.15(B) provides that:

> (1) If the conditions of a community control sanction are violated . . . the sentencing court may impose upon the violator one or more of the following penalties:
>
> * * *
>
> (c) A prison term on the offender pursuant to section 2929.14 of the Revised Code and division (B)(3) of this section . . . .
>
> * * *
>
> (3) The prison term, if any, imposed upon a violator pursuant to division (B)(1) of this section 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) [sic][5] of section 2929.19 of the Revised Code.

(Emphasis added.)

Thus, at the second revocation hearing, the court was sentencing Appellant anew, and ORC 2929.15(B)(1)(c) mandated compliance with R.C. 2929.14 in order for the court to impose imprisonment at that hearing. And although Appellant appealed the new trial court judge's failure to comply with R.C. 2929.14 at his second revocation hearing, the Tenth District refused to consider the challenge because it believed that Appellant's window for asserting this challenge had closed three years earlier.

[5] The reference in R.C. 2929.15(B)(3) to R.C. 2929.19(B)(2) is in error; it should reference R.C. 2929.19(B)(4), as this Court observed once before. *See Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746at ¶ 7.

"[A] sentence imposed following a community control violation constitutes a full sentencing hearing where the court must abide by the relevant sentencing provisions and the rights that inure to a criminal defendant. . . . Because offenders are sentenced anew, they must be afforded the same rights as those afforded during an original sentencing hearing." *Jimenez*, 2017-Ohio-1553 at ¶ 8 (emphasis added). "At this second hearing, the court sentences the offender anew and must comply with the relevant sentencing statutes." *Heinz*, 146 Ohio St.3d 374, 2016-Ohio-2814 at ¶ 15 (emphasis added); accord, *Silver*, 2017-Ohio-2660 at ¶ 19 and *Frazier,* 2017-Ohio-470 at ¶ 15.

Can there be any better evidence that R.C. 2929.14 was relevant at the second revocation hearing, than the fact that R.C. 2929.15(B)(1)(c) expressly required compliance with R.C. 2929.14 before imposing a prison sentence on an offender for his or her violation of community control?

In the case *sub judice*, the trial court did not comply with relevant sentencing statutes at either of Appellant's revocation hearings. The court did not comply with R.C. 2929.19(B)(4) at the first revocation hearing, by failing to provide the notification of potential prison term faced for violating the sanctions imposed at that hearing (discussed in Proposition of Law No. 2, *infra*), and did not comply with R.C. 2929.14 at the second revocation hearing, by failing to make the required findings in order to impose consecutive prison terms. The Tenth District blessed these errors when, concluding that the "new trial court judge did not literally sentence Howard" at the revocation hearing, it held that "the trial court did not need to revisit the requirements of R.C. 2929.14." (Appx. 3, at ¶ 24.) Presumably, the appellate court meant that the trial court did not have to revisit any sentencing statutes at any revocation hearing, since the offender is not sentenced at a revocation hearing.

This Court's directive that the trial court must comply with the requirements of all relevant sentencing statutes at revocation hearings is unambiguous. *See Fraley; Brooks; Heinz; Anderson.* "If the trial court is imposing a prison term upon the violation of the community control sanctions already imposed, the court must independently consider the sentencing factors at the time of the violation and in the ensuing final sentencing entry that complies with all applicable requirements for finality." *Jimenez*, 2017-Ohio-1553 at ¶ 9.

Appellant was sentenced at his second revocation hearing for violating the conditions of his community control. What were those violations? He failed to complete his mental health program, and during the polygraph exam administered to him in conjunction with that program, he admitted he used the internet and he viewed sexually explicit magazines.

Not to downplay the gravity of Appellant's offenses, but even the trial court recognized that his problem stemmed from a mental health issue, as the additional condition of community control imposed at his first revocation hearing was that Appellant had to complete the STOP program, a mental health treatment program for sex offenders. (Supp. 19, Tr. 4.) While participating in the STOP program, Appellant admitted to having viewed sexually explicit magazines and using the internet, as a result of which he was terminated from the program. (Supp. 30; Supp. 21-23, Tr. 8-10.)

Since his conviction in 2014, Appellant has not engaged in, nor has he been accused of committing, the offenses for which he was convicted in this case. Appellant has no prior criminal history outside of this case. At his original sentencing, Judge Sheward noted that there had been no victim of his offenses, and he felt Appellant should be sentenced to community control, not prison. (Supp. 8-9, Tr. 8-9.)

Had Judge Young considered at the second revocation hearing the R.C. 2929.14(C)(4) sentencing factors before he summarily imposed the prison sentences on Appellant, it is difficult to imagine that he could have justified consecutive sentences. Judge Sheward made no findings at the original sentencing that justified the imposition of consecutive prison sentences at that time, and nothing changed for the worse by the time Appellant appeared before Judge Young at the second revocation hearing. (Supp. 21-27 *in passim*, Tr. 8-14.)

However, Judge Young did not fully consider R.C. 2929.14 at the second revocation hearing, as required by R.C. 2929.15(B)(1)(c). The Tenth District found that he was not obligated to revisit R.C. 2929.14 at that hearing. Although Judge Young partially addressed R.C. 2929.14(C)(4), it is clear that he failed to make the findings thereunder required in order to have those sentences be served consecutively, as he mistakenly relied on his belief that Judge Sheward had made one of the findings, when, in fact, Judge Sheward had not.

"In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. "[T]he failure to make the findings at the sentencing hearing renders the sentence contrary to law, and the matter must be remanded for resentencing." *Id*. at ¶¶ 36-37.

"In cases where consecutive sentences are imposed following a violation and termination of community control sanctions, the mandates of R.C. 2929.14(C)(4) must still be followed." *State v. Ladson*, 8th Dist. No. 105374, 2017-Ohio-8876, ¶ 9.

The Tenth District erred when it held that Appellant was not sentenced at his second revocation hearing. That hearing constituted a full sentencing hearing, at which the trial court was required to comply with R.C. 2929.14 (and all other relevant sentencing statutes) prior to

punishing Appellant for his violation of community control sanctions. Appellant was entitled to the same rights as those afforded him during his original sentencing hearing.

Because the errors committed by the trial court at the second revocation hearing were thus committed at a sentencing hearing, the proper time for challenging those errors was following the second revocation hearing, not three years earlier before the errors occurred. Moreover, because no prison sentence was imposed at the original sentencing hearing, any errors involving the prison sentences had to be potential errors, as the prison sentences were, themselves, only potential sentences.

The Tenth District's holding that the proper time for an appeal of potential sentencing errors is immediately following the original sentencing, when the offender is sentenced to community control, would place an unreasonable burden on criminal defendants, their counsel and appellate courts alike. It would necessitate appeals by anyone sentenced to community control to challenge all perceived sentencing errors involving the potential prison term that might be imposed for a violation of the community control sanctions. It would require appeals of potential prison sentences even though imprisonment might never occur or the potential prison term might be changed at a later hearing, and even though any sentencing errors can be corrected downstream at a subsequent revocation hearing, and it would require the appeal before it is known whether any of the "ifs" come to pass. Thus, the ruling will force appeals of issues that start out as moot, and might never ripen to actual controversies.

This Court has required appeals to be based on actual harm, not on hypothetical malaise:

> Not every conceivable controversy is an actual one. * * * [I]n order for a justiciable question to exist, [t]he danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events * * * and the threat to his position must be actual and genuine and not merely possible or remote.

Mid-Am. Fire & Cas. Co. v. Heasley, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 9 (citation and quotation marks omitted).

The fallacy of the Tenth District's logic should be evident. According to its belief that a revocation hearing was not a sentencing hearing, every error regarding the sentencing would have to be challenged following the original sentencing of community control. How could, for example, an offender challenge a court's failure to give the required R.C. 2929.19(B)(4) notification at the original sentencing hearing, unless the offender challenged it at that time? That is, after all, when the error occurred. Yet this Court and appellate courts throughout the State, including the Tenth District, regularly entertain appeals involving the failure of a trial court to provide the R.C. 2929.19(B)(4) notification, without requiring the challenge to occur immediately following the original sentencing.

The Tenth District's decision conflicts with sentencing statutes and decisions by this Court and all other appellate districts having addressed this issue, as well as practical common sense. The ruling would force appeals of potential sanctions that might never become actual sanctions. *See Duncan*, 2016-Ohio-5559 at ¶ 18 ("it is possible that the specific prison term of which notice is given pursuant to R.C. 2929.19(B)(4) may never be ordered to be served. . . . In this sense, the specific prison term of which notice is given pursuant to R.C. 2929.19(B)(4) when a defendant is sentenced to community control is only a potential prison term"). "For a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties." *Beadle v. O'Konski-Lewis*, 2016-Ohio-4749, 68 N.E.3d 221, ¶ 10 (6th Dist.) (citation and quotation marks omitted).

The only logical, common-sense time for appealing sentencing errors in situations involving a sentence of community control is at the time, if any, when a violation of community

control occurs which results in the imposition of the prison sentence. This is the point in time when the theoretical error ripens into a justiciable cause.

Because the second revocation hearing was a full sentencing hearing, Appellant was entitled to have the trial court comply with all relevant sentencing statutes, including R.C. 2929.14, at that hearing. The trial court's failure to do so deprived Appellant of his due process rights, which he should be permitted to challenge from the second revocation hearing. This Court should make it clear that the time for appealing sentencing errors which occur at revocation hearings is following the revocation hearing, and not following the original sentencing hearing.

Appellant is, accordingly, entitled to have this matter remanded for resentencing on this issue.

PROPOSITION OF LAW NO. 2

A REVOCATION HEARING IN WHICH THE COURT CONTINUES A COMMUNITY CONTROL SANCTION IS A SENTENCING HEARING, AT WHICH THE COURT IS REQUIRED TO NOTIFY THE OFFENDER ANEW THAT THE COURT MAY IMPOSE A PRISON TERM ON THE OFFENDER IF THE CONDITIONS OF THE SANCTION ARE VIOLATED AND MUST INDICATE THE SPECIFIC PRISON TERM THAT MAY BE IMPOSED AS A SANCTION FOR THE VIOLATION.

Whether or not the trial court complied with R.C. 2929.14 at the second revocation hearing and properly sentenced Appellant to consecutive prison terms, Appellant contends that the court was without authority to impose any prison sentence on him whatsoever at that hearing, for the reason that Appellant was never notified of the specific prison term he might face for a violation of the conditions of his community control when Appellant was resentenced at his first revocation hearing.

R.C. 2929.19(B)(4) provides that:

> If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to section 2929.14 of the Revised Code.

(Relevant portions underscored.)

As established in Proposition of Law No. 1, *supra*, a revocation hearing is a sentencing hearing, at which relevant sentencing statutes must be complied with anew by the trial court. Again, not all sentencing statutes must be complied with – only those relevant to the actions taken by the court at the revocation hearing.

At the original sentencing hearing, the court has to decide on one of two options – either sentence the offender to community control or to prison. So, too, at a revocation hearing, which constitutes a full sentencing hearing, the court has the same two choices. In the case at bar, at his first revocation hearing, the court sentenced Appellant to continue community control, added an additional year of community control, re-imposed all the conditions of community control imposed on Appellant at his original sentencing hearing and imposed a new condition (requiring Appellant to complete the STOP treatment program). (Supp. 19, Tr. 4.)

The court thusly resentenced Appellant at the first revocation hearing, declining to grant defense counsel's request of the court to either terminate community control or allow it to run the remainder of its original 3-year term. Counsel had argued that Appellant had less than six

months left to serve and he had not been in trouble or noncompliant with the conditions of his community control, other than the current two instances. (Supp. 17-18, Tr. 2-3.)

The trial court was unmoved and chose instead to impose additional punishment on Appellant for his two violations of community control conditions. R.C. 2929.15(B)(1) details the procedures for a trial court to follow when an offender has violated his or her community control.

Pursuant to that statute, "[a] trial court has three options for punishing offenders who violate community control sanctions. The court may (1) lengthen the term of the community control sanction, (2) impose a more restrictive community control sanction, or (3) impose a prison term on the offender." *State v. McPherson*, 142 Ohio App.3d 274, 278, 2001-Ohio-2373, 755 N.E.2d 426 (4th Dist.).

At his first revocation hearing, the trial court chose the first two options. According to this Court's prior rulings, Appellant was thereby sentenced anew. *Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110 at ¶ 17.

On its face, the provisions of R.C. 2929.19(B)(4) would clearly seem to be applicable (and, therefore, relevant) to the sentencing at the first revocation hearing. Because the court resentenced Appellant to an extended period of community control, the statute makes it mandatory for the court to also inform him if the court intends to impose a prison sentence on him for subsequent violations of that sanction and, if so, the court must identify the specific prison term that may be imposed. In the case at bar, Judge Young somewhat complied with R.C. 2929.19(B)(4), but not at an adequate level, as the only words he mentioned at the hearing regarding a prison sentence were:

> And if I see you again, Mr. Howard, plan on going to the penitentiary. All right? That will be all.

(Supp. 19; Tr. 4.)

The Tenth District acknowledged that Judge Young did not provide Appellant with notification of the terms of imprisonment at the first revocation hearing. (Appx. 3, at ¶ 6.) If the R.C. 2929.19(B)(4) notification was required to be provided anew at the first revocation hearing, the court was without authority to impose a prison sentence on Appellant at the second revocation hearing. Although an error in sentencing normally calls for the case to remanded to the trial court for resentencing, such is not the case for the court's failure to comply with R.C. 2929.19(B)(4). Rather, "where no such notification was supplied, and the offender then appeals after a prison term is imposed under R.C. 2929.15(B), the matter must be remanded to the trial court for a resentencing under that provision with a prison term not an option." *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746 at ¶ 33 (emphasis added). "The failure to set forth with specificity the term of incarceration for a violation of community control at sentencing means that an offender can never receive incarceration for violating his community control related to that offense." *Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110 at ¶ 27 (PFEIFER, J., dissenting).

Thus, the critical question in this branch of Appellant's appeal was properly framed by the appellate court: "the question to be answered is whether the notification of the specific prison term at Howard's original sentencing suffices for purposes of all future revocation hearings?" (Appx. 3, at ¶ 13.)

Appellate courts do not relish the idea of rewarding miscreants for instances of technical noncompliance with sentencing statutes, and, accordingly, there has been a tendency to construe this Court's holding in *Fraley* so as to avoid having to recognize this particular sentencing error. So, too, the Tenth District fell prey to the movement, relying on decisions rendered by the Fourth, Eighth, Ninth and Twelfth districts in holding that the trial court was not required to issue

the R.C. 2929.19(B)(4) notification at a subsequent revocation hearing, when the notification had already been provided at the original sentencing hearing. The Tenth District, as did the Fourth, Eighth, Ninth and Twelfth districts, reached this conclusion based on their belief that *Fraley* meant that once the notification had been given, it did not have to be repeated.

However, what *Fraley* actually held was that a failure to give the required notification at the original sentencing hearing could be corrected by providing it at a subsequent revocation hearing. This Court has never ruled the other way around – that providing the notification at an earlier hearing relieves the trial court, forever after, from any obligation to provide such notification at a subsequent hearing. Moreover, *Fraley, Brooks* and their progeny strongly suggest the opposite is true.

The Tenth District noted that this Court had not ruled in a manner which supported its conclusion. "Between *Brooks* and *Fraley*, the Supreme Court of Ohio does not clearly resolve whether the trial court must repeat its notification of the possible prison term for a community control violation at each revocation hearing if proper notice has already been given." (Appx. 3, at ¶ 16.)

The Second District, in considering this same issue, implored this Court to resolve the question:

> Although the issue is not squarely before us in this case, *Brooks* and *Fraley* do not clearly resolve whether the trial court must repeat its notification of the possible prison term for a community control violation at each revocation hearing if proper notice has already been given. We urge the Supreme Court of Ohio to clarify the law. In the meantime, trial courts should advise defendants at their initial sentencing of the specific term of imprisonment which would be imposed for a community control violation; both the majority and the dissent in *Fraley* agree on this. But the trial court should also, at any subsequent revocation hearing/disposition/sentencing/resentencing where the defendant is continued/placed on/sentenced to community control, advise the defendant of the specific term that could be imposed should there be another violation of community control sanctions.

State v. Snoeberger, 2nd Dist. No. 24767, 2013-Ohio-1375*,* ¶ 24.

Appellant respectfully suggests that this Court's prior decisions do, in fact, clearly resolve the question. Nevertheless, the uncertainty on the part of appellate courts, and what has now become a trend by appellate courts to interpret *Fraley* in a manner not intended by that decision, require immediate guidance from this Court on the issue. The case *sub judice* provides the appropriate platform for this Court to make clear that when it previously held that "[a]t [a revocation] hearing, the court sentences the offender anew and must comply with the relevant sentencing statutes" (*Fraley*, at ¶ 17), it meant compliance with R.C. 2929.19(B)(4) if community control is continued, compliance with R.C. 2929.14 if a prison sentence is being imposed and compliance with other sentencing statutes if relevant to the action being taken by the court at such hearing.

Fraley began by revisiting its earlier holding in *Brooks*:

> Pursuant to R.C. 2929.19(B)(5) [now (B)(4)] 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 a subsequent violation.

Brooks, 103 Ohio St.3d 134, 2004-Ohio-4746 at paragraph two of the syllabus.

The *Brooks* holding led the *Fraley* court to consider whether a trial court is mandated to provide the R.C. 2929.19(B)(4) notification at the initial sentencing, or whether such notification may be provided at a later sentencing hearing.[6] *Fraley*, at ¶ 11. The Court held that the

[6] In footnote 2 of the *Brooks* decision, the Court noted that: "We do not reach the issue of whether a trial judge who, in [the situation where the court has not previously provided the R.C. 2929.19(B)(4) notification, thus limiting the trial court at the revocation hearing to choosing one of the other options under R.C. 2929.15(B) (i.e., imposing a longer time under the same sanction

notification could, in fact, be provided at a later hearing, to correct for the failure to provide it at the original sentencing hearing. *Fraley*, at ¶ 19.

However, *Fraley* did not state that the opposite was true – that once the notification is given at an earlier hearing, it does not need to be revisited at subsequent hearings. In fact, *Fraley* strongly suggests that the notification is only good until the next hearing:

> the *original* sentencing hearing is the time when the notification must be given for the court to impose a prison term upon a defendant's *first* community control violation.

Fraley, at ¶ 15 (emphasis in original).

The fact that the *Fraley* court emphasized the words that it did, speaks volumes. Those words make it clear that the R.C. 2929.19(B)(4) notification provided at the original sentencing hearing permits the imposition of a prison sentence the first time the offender violates his or her community control sanctions. *Fraley* did not say that providing the R.C. 2929.19(B)(4) notification at the original sentencing hearing permits the imposition of a prison sentence at any subsequent hearing in the event of multiple violations of community control. Words have meaning, and the Court could have easily rephrased what it said had it meant to extend the effect of its ruling beyond the first violation. Simply stating that providing the notification at the original sentencing hearing would permit the imposition of a prison sentence "upon any subsequent community control violation," would have given *Fraley* the meaning ascribed to it by the Tenth District,

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or imposing a more restrictive sanction)], at the time of the R.C. 2929.15(B) sentencing, informs the offender of the specific term he or she faces for a violation of the conditions of community control may subsequently impose a prison term if the offender violates conditions of community control a second time."

It seems clear that, in *Fraley,* this Court meant that the notification had to be provided at the hearing immediately preceding the hearing at which the court was imposing imprisonment.

This interpretation is not only straightforward, it is also consistent with the theme of *Brooks* and *Fraley* that a revocation hearing is a sentencing hearing at which the offender is sentenced anew and at which the court must comply with all relevant sentencing statutes. Thus, if at the first revocation hearing the court decides to continue community control, the R.C. 2929.19(B)(4) notification provided at the original sentencing will have grown stale and a new notification must be provided, if the court intends to impose a prison sentence for a subsequent violation.

The foregoing is what R.C. 2929.15(B)(1)(c) expressly mandates, and the *Fraley* decision followed this logic. However, it was apparently not with the crystal-clarity our appellate courts required. In considering when the notification must be provided in the event of multiple violations of community control (resulting in multiple revocation hearings), *Fraley* held that the notification could be provided at a subsequent revocation hearing. *Fraley*, at ¶ 19. The apparent imprecision in the Court's holding is that *Fraley* didn't specifically state that the notification had to provided at a subsequent hearing that immediately precedes the revocation hearing at which imprisonment is imposed. (Although it is worth noting that in *Fraley* the notification was provided at the third revocation hearing, and the defendant's community control was revoked and he was sent to prison at his fourth revocation hearing).

Notwithstanding *Fraley'*s failure to state with specificity the obvious, it seems clear that the intent of *Fraley* was to require the R.C. 2929.19(B)(4) notification at the hearing preceding the hearing at which community control is revoked, in order for the court to have authority to impose a prison sentence upon such revocation.

Ohio courts seem to have no trouble with understanding that *Brooks* and *Fraley* require compliance anew with relevant sentencing statutes at revocation hearings. *See, e.g., Jimenez*, 2017-Ohio-1553 at ¶ 10 ("the state claims that the trial court considered the factors enumerated in R.C. 2929.11 and 2929.12 because at the original sentencing hearing the court noted such. . . . [However], it was concluded that the trial court must consider the sentencing factors in the new sentencing hearing that occurs following a violation of the community control sanctions"). For some reason, the R.C. 2929.19(B)(4) notification requirement is the one sentencing provision that appellate courts have been unable to see fit as falling within the directives of *Brooks* and *Fraley*.

Regardless of whether *Fraley* was clear enough on the question at issue in this appeal, it was quite clear on what it did say. *Fraley* gave "upstream" effect to the notification; that is, notification provided at a later revocation hearing cured the trial court's error in not providing the notification at the original sentencing hearing.[7] *Fraley* did not authorize "downstream" effect; that is, it did not hold (nor should it be interpreted as meaning) that compliance with any sentencing statute at the original sentencing satisfies any need to ever again comply with that statute at a subsequent revocation hearing.

Yet this "downstream" effect is how the Tenth District interpreted *Fraley* (as did the Fourth, Eighth, Ninth and Twelfth districts). However, such an interpretation vitiates, or at least makes confusing, *Fraley*'s holding that revocation hearings are sentencing hearings at which the

[7] *Fraley* actually did more than that – it provided authority for the concept that failure to comply with <u>any</u> of the sentencing statutes at the original sentencing could be cured by compliance with the statute at a subsequent revocation hearing.

offender is sentenced anew, and at which the court must comply with all relevant sentencing statutes. *Fraley*, at ¶ 17.

It is reasonable to ask whether a particular sentencing statute is relevant at a particular hearing. For example, because R.C. 2929.15(B)(1)(c) expressly mandates compliance with R.C. 2929.14 before a prison sentence can be imposed upon revocation of community control, if the court decides to continue community control, R.C. 2929.14 would not be relevant at that revocation hearing, as no prison sentence is being imposed. On the other hand, if the court decides to revoke community control and impose imprisonment, the court is required to address the sentencing factors under R.C. 2929.14 before it can impose the prison sentence, even if the court had already addressed those sentencing factors at the original sentencing hearing. R.C. 2929.15(B)(1)(c); *see, also, Jimenez, supra.*

Likewise, if the trial court's decision is to continue community control and continue to reserve the possibility of prison upon a subsequent violation of the sanction, the court must repeat the notification of the specific prison term the offender faces for subsequent violations. That specific prison term may be the same one the offender was originally notified of, or it may be of shorter or longer duration, so long as it is within the legal range of prison terms for the offense. R.C. 2929.15(B)(3).

This is the logical meaning of *Fraley,* because the offender is being sentenced anew. The circumstances may very well have changed since the original sentencing, and the originally notified prison terms may no longer be appropriate.

It seems straightforward from this Court's prior decisions that a court conducting a revocation hearing must comply with relevant sentencing statutes at that hearing. Thus, the only

question should be: is the R.C. 2929.19(B)(4) notification relevant at a revocation hearing? The question should not be, is the notification relevant unless it was already given at a prior hearing.

Where, as in the case at bar, the court resentences an offender by continuing community control and imposing new penalties (such as extending the term of community control, adding affirmative conditions to be performed by the offender, etc.), the offender is entitled to know what penalty he faces for violation of community control. He is not required to guess.

This need to be notified of the sanction the offender might face is perhaps even more compelling in Appellant's case, where he has shown no signs of recidivism, has not further engaged in the conduct for which he was convicted, has not been charged with any criminal offenses, has served almost the entire amount of his community control and the court has already previously found that his conduct did not warrant imprisonment. Appellant felt his situation might have justified termination of his community control sanctions when he appeared at his first revocation hearing, and thus he had every reason to expect that he no longer faced the potential prison term he was warned of at his original sentencing. Again, it was not Appellant's job to guess at the penalty he might face for a violation of the new community control sanctions. The duty is on the trial court to administer the sentencing laws to provide "truth in sentencing" so that the offender knows what punishment he can expect to receive. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 34.

At a revocation hearing, an offender faces punishment for violating his community control sanctions. The offender no longer faces punishment for the offenses of which he was originally convicted. The offender was already punished for those offenses when he was sentenced to community control sanctions. *Richter*, 2014-Ohio-5396 at ¶ 8; *Duncan*, 2016-Ohio-

5559 at ¶ 22 ("any penalty imposed for violating a condition of one's community control sanctions is a punishment for that violation and not for the original underlying offense").

At Appellant's first revocation hearing, where his violations consisted of driving into the adjoining county and being cited for an assured clear distance violation (Supp. 19, Tr. 4), and when he was less than six months from completing his community control (*id*.), it was incumbent on the court to notify Appellant of the specific prison term it intended to enforce against him for any subsequent violations of his newly-imposed sanctions.

It is an understatement to say that Appellant and his counsel were both shocked when the court decided to send Appellant to prison for the maximum 28-month term, when the violations at his second revocation hearing consisted of his being terminated from the mental health program due to his admission that he had used the internet and viewed sexually explicit magazines. Yes, these were violations of his community control conditions and, yes, they were serious. But, no, they did not rise to the level of the offenses for which he was convicted and for which the court originally considered a 28-month prison term.

Appellant was entitled to the R.C. 2929.19(B)(4) notification at his first revocation hearing if the court had any intention of sentencing Appellant to a maximum prison term for any subsequent community control violation. R.C. 2929.19(B)(4) was most definitely one of the relevant sentencing statutes the court was required to comply with at his first revocation hearing.

This is especially true where the court has imposed new and additional conditions when it continued his community control. New conditions are punishment for a violation of the community control sanctions originally imposed. R.C. 2929.15(B)(1) ("If the conditions of a community control sanction are violated . . ., the sentencing court may impose upon the violator one or more of the following penalties" (emphasis added)).

Thus, Appellant was sentenced anew at his first revocation hearing. New punishment was meted out at that hearing, and the punishment exceeded that which was first imposed on Appellant at his original sentencing. Through *Fraley* and *Brooks*, this Court has mandated compliance by the sentencing court with all applicable sentencing statutes at all revocation hearings. This requirement cannot be satisfied by the trial court's compliance with a sentencing statute at an earlier juncture in the proceedings.

By failing to provide Appellant with the notification required by R.C. 292919(B)(4) at Appellant's first revocation hearing, the trial court was without authority to impose imprisonment upon Appellant at his second revocation hearing. R.C. 2929.15(B). As a result, Appellant is entitled to have this matter remanded for sentencing, with the *proviso* that no prison time may be imposed, and, accordingly, this Court should order Appellant's immediate release from prison.

Conclusion

A trial court is required to comply with all relevant sentencing statutes at all revocation hearings. Accordingly, at his first revocation hearing, Appellant was entitled to receive notification under R.C. 2929.19(B)(4) of the prison term which the court might impose on him for subsequent violations of his community control, as a perquisite to sentencing him to imprisonment. Likewise, at his second revocation hearing, Appellant was entitled to have the court make the findings required under R.C. 2929.14(C)(4) before it could require Appellant to serve his sentences consecutively. The trial court failed to comply with either of the foregoing statutes at the respective hearings.

This Court's decisions in *Brooks, Fraley* and their progeny do not permit trial courts to avoid compliance with relevant sentencing statutes, on the grounds that the court previously complied with the statute(s) in a prior hearing.

As a consequence, Appellant was denied his due process rights by the trial court's failure to comply with the mandatory requirements of Ohio's sentencing laws. He is entitled to have this matter remanded for resentencing, with the instruction that no prison time can be imposed on him and ordering his immediate release from incarceration.

Moreover, Appellant is not barred by *res judicata* from raising his challenges to the court's sentencing errors. The proper time for asserting an appeal of errors that involve a potential prison term an offender may serve upon violation of community control sanctions, is when the community control is revoked and the offender is sentenced to imprisonment, not when the offender is first notified of the potential prison sentence. Until such time as the offender is sentenced to imprisonment, any errors in sentencing are only potential errors and have not ripened into actual controversies suitable for litigation.

July 20, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of July, 2018, Appellant's Merit Brief, together with the Appendix and Supplement thereto, were filed electronically via the Court's e-Filing System, and, in accordance therewith, notice and service of this filing will be sent to all parties who are registered users or are represented by registered users of the e-Filing System by e-Service through operation thereof, and a copies thereof were served upon Seth L. Gilbert, Esq., Attorney for Appellee, via e-mail at sgilbert@franklincountyohio.gov, this date.

/s/ *Charles A. Koenig*
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Counsel of Record for Appellant, John M. Howard

APPENDIX

Pursuant to S.Ct.Prac.R. 16.02(B)(5), copies of the following are appended to Appellant's Merit Brief, and are filed contemporaneously with this Brief:

1. Notice of Appeal to the Supreme Court of Ohio (March 12, 2018)
2. Opinion of the Franklin County Court of Appeals, No. 17AP-242 (November 30, 2017)
3. Judgment Entry of the Franklin County Court of Appeals (November 30, 2017)
4. R.C. section 2929.14
5. R.C section 2929.15
6. R.C. section 2929.19

SUPPLEMENT

Pursuant to S.Ct.Prac.R. 16.09 and 16.10, copies of the following portions of the record are provided to supplement Appellant's Merit Brief, and are filed contemporaneously with this Brief:

1. Transcript of Sentencing Hearing by Trial Court, Judge Sheeran presiding (February 21, 2014)
2. Transcript of First Revocation Hearing, Judge David Young presiding (October 4, 2016)
3. Transcript of Second Revocation Hearing, Judge David Young presiding (March 7, 2017)
4. Request for Revocation of Community Control and Statement of Violation(s) (September 14, 2016)
5. Request for Revocation of Community Control and Statement of Violation(s) (February 21, 2017)