

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 12AP-181
v.	:	(C.P.C. No. 10CR-5986)
	:	
Timothy Allen Livesay,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 30, 2012

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*,
for appellee.

Yeura R. Venters, Public Defender, and *David L. Strait*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶ 1} Defendant-appellant, Timothy Allen Livesay, appeals from a judgment of the Franklin County Court of Common Pleas revoking his community control and imposing a sentence of 13 months to be served consecutively to defendant's then-existing prison term arising out of a Delaware County felony conviction. Defendant assigns one error:

The trial court erred by imposing a prison sentence for a community control violation consecutive to a prison term that was not in effect at the time of the original sentence.

Because the trial court properly imposed a prison sentence to be served consecutively to defendant's then-existing Delaware County sentence, we affirm.

I. Facts and Procedural History

{¶ 2} By indictment filed October 12, 2010, defendant was charged with one count each of theft and receiving stolen property. Although defendant initially entered a not guilty plea, defendant on January 12, 2011 changed his plea to guilty to the receiving stolen property charge; on the prosecution's request, the court ordered a nolle prosequi on the theft charge. Finding defendant guilty, the trial court sentenced defendant on February 17, 2011 to 3 years of community control, for violation of which he could receive a prison term of 17 months.

{¶ 3} On December 28, 2011, a probation officer with the Franklin County Court of Common Pleas filed a request for revocation of probation and statement of violations concerning defendant. According to the filing, defendant violated the terms of his community control when (1) he left the community-based correctional facility on May 16, 2011 without leave, and (2) he was convicted of a felony theft offense in the Delaware County Court of Common Pleas.

{¶ 4} On February 2, 2012, the trial court held a hearing on the allegations, at which defendant admitted probable cause, waived a second hearing, and admitted to the violations. The court found defendant violated the terms of his community control, imposed a sentence of 13 months to be served consecutively to his Delaware County sentence, and credited defendant with 227 days of jail-time credit.

II. Assignment of Error - Consecutive Sentences

{¶ 5} Defendant's single assignment of error contends the trial court erred in ordering defendant's sentence for violating the terms of his community control be served consecutively to a case that did not exist at the time of defendant's February 17, 2011 sentencing.

{¶ 6} Defendant admits R.C. 2929.15(B)(1)(c) authorized the trial court to impose a prison term and further acknowledges the trial court did not exceed the 17-month prison term specified in the notice the court gave defendant at the time it sentenced him in 2011. Relying on *State v. White*, 18 Ohio St.3d 340 (1985), defendant nonetheless asserts the trial court erred in imposing a sentence for defendant's violation of community control to be served consecutively to a case that did not exist at the time of defendant's February 17, 2011 sentencing. In discussing consecutive sentences, *White* stated "this court is

persuaded that the grant of discretion to a trial court concerning the imposition of a consecutive sentence is based upon the premise that the other sentence is either one being imposed by the trial court at that time or is a sentence previously imposed, even if by another court, and is not a sentence *in futuro*." *Id.* at 342.

{¶ 7} The trial court did not order defendant's 13-month sentence to be served consecutively to a non-existing sentence; the Delaware County sentence preceded imposition of the Franklin County 13-month sentence. Although defendant was advised at his February 17, 2011 sentencing hearing of his potential 17-month sentence were he to violate the terms of his community control, those months, as the parties seem to agree, were not imposed until defendant violated the terms of his community control, at which time the Delaware County conviction had resulted in the 18-month sentence defendant was serving in another correctional institution. Indeed, defendant acknowledges no Ohio court has applied *White* in the manner he suggests.

III. Disposition

{¶ 8} Moreover, we agree with defendant that the issue raised under *White* is the only potential error arising from the record. Because the trial court did not err in requiring defendant's sentence for violation of the terms of his community control to be served consecutively to his Delaware County sentence, we overrule defendant's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and DORRIAN, J., concur.
