

[Cite as *State v. Rice*, 2010-Ohio-337.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

VICKEY L. RICE

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2009CA0062

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 08CR524

JUDGMENT:

Sentence Vacated & Remanded

DATE OF JUDGMENT ENTRY:

January 26, 2010

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Farmer, J.

{¶1} On August 1, 2008, the Licking County Grand Jury indicted appellant, Vickey Rice, on one count of possessing crack cocaine in violation of R.C. 2925.11, a felony of the fifth degree.

{¶2} A hearing was held on January 30, 2009 wherein appellant was scheduled to change her plea. Appellant failed to appear.

{¶3} On April 14, 2009, appellant pled no contest to the possession count. By judgment entry filed same date, the trial court found appellant guilty, and sentenced her to nine months in prison. This sentence was ordered to be served consecutively to a sentence imposed in another case (Case No. 08CR474).

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT ERRED BY IMPOSING A PRISON SENTENCE IN THIS CASE AS THE SENTENCE IMPOSES AN UNNECESSARY BURDEN ON STATE RESOURCES (REFLECTED IN JOURNAL ENTRY OF SENTENCE)."

II

{¶6} "APPELLANT WAS NOT APPRISED OF POST RELEASE CONTROL AT THE TIME OF SENTENCING (REFLECTED IN SENTENCING TRANSCRIPT)."

I

{¶7} Appellant claims the trial court erred in sentencing her to prison when community control would have been appropriate, and her sentence created an unnecessary burden on state resources. We disagree.

{¶8} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus, the Supreme Court of Ohio, in striking down parts of Ohio's sentencing scheme, held "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Thus, an appellate court reviews felony sentences for an abuse of discretion. *Id.* An abuse of discretion implies the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. When applying an abuse of discretion standard, an appellate court may not generally substitute its judgment for that of the trial court. See *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619.

{¶9} Appellant pled no contest to possessing crack cocaine, a felony in the fifth degree, and was sentenced to nine months in prison. Appellant concedes said sentence is within the statutory guidelines. See, R.C. 2929.14(A)(5). However, appellant argues a community control sentence would facilitate her rehabilitation and be less costly, constituting a savings for the state of Ohio.

{¶10} The trial court clearly rejected appellant's request for community control because of her previous drug conviction, her failure to appear for prior court hearings, and her committing a second offense while out on bond. T. at 19.

{¶11} Upon review, we conclude the trial court did not abuse its discretion in sentencing appellant to nine months in prison.

{¶12} Assignment of Error I is denied.

II

{¶13} Appellant claims the trial court erred in not informing her of her post-release control at the time of her plea/sentencing. We agree.

{¶14} R.C. 2967.28 governs post-release control. Subsection (C) states the following:

{¶15} "Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(d) of section 2929.19 of the Revised Code regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(2) of section 2929.14 of the Revised Code a statement regarding post-release control. Pursuant to an agreement entered into under section 2967.29 of the Revised Code, a court of common pleas or parole board may impose sanctions or conditions on an offender who is placed on post-release control under this division."

{¶16} In *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph one of the syllabus, the Supreme Court of Ohio held, "when sentencing felony offender to term of imprisonment, trial court is required to notify offender at sentencing hearing about

postrelease control and is further required to incorporate that notice into its journal entry imposing sentence."

{¶17} Appellant was sentenced on three separate drug offenses in two separate case numbers at the same time. T. at 3. During the trial court's colloquy pursuant to Crim.R. 11, the trial court stated the following:

{¶18} "Q. And do you understand, Ms. Rice, upon release from the penitentiary, you'll be placed on post-release control and if you violate the terms of post-release control, you're subject to being returned to the penitentiary for incarceration even though you completed your sentence? Do you understand that?"

{¶19} "A. Yes, Your Honor." T. at 15.

{¶20} After appellant pled no contest, the trial court found appellant guilty (T. at 16) and imposed sentence as follows:

{¶21} "You know, on that basis today, Ms. Rice, in 08 CR 524 I'll impose a term of nine months in the state penitentiary on the possession of crack cocaine charge. On 08 CR 447, I'll - - the possession of crack cocaine, I'll impose - - on the aggravated possession of drug charge, the fifth degree felony, I'll impose a nine-month sentence. I'll impose a two month - - two-year, rather, sentence on the crack cocaine possession. I'll order all of those run consecutively with each other.

{¶22} "I'll not impose any fines. I will impose court costs, costs of prosecution and counsel fees. I'll impose a three-year driver's license suspension.

{¶23} "Upon your release from the penitentiary, you'll be placed on post-release control for three years. If you were to violate the terms of post-release control, you're subject to being returned to the penitentiary for nine months; for repeated violations,

one and a half years. Should any violation itself constitute a new felony offense, you would be both returned to the penitentiary for one year or the amount of post-release control time remaining, whichever is greater, in addition to receiving a new prison term for any new felony offense." T. at 19-21.

{¶24} In this case (08CR524), post-release control is not mandatory. In the other case (08CR447), post-release control is mandatory. We note appellant's sentences were ordered to be served consecutively.

{¶25} From a reading of the transcript, it is obvious that only one three year post-release control was given by the trial court. Based upon *Jordan*, we remand the matter for re-sentencing for post-release control in the case sub judice.

{¶26} Assignment of Error II is granted.

{¶27} The sentence issued by the Court of Common Pleas of Licking County, Ohio is hereby vacated, and the matter is remanded to the trial court for resentencing.

By Farmer, J.

Gwin, P.J. and

Wise, J. concur.

s/Sheila G. Farmer

s/W. Scott Gwin

s/ John W. Wise

JUDGES

