

IN THE OHIO COURT OF APPEALS
FIFTH APPELLATE DISTRICT
RICHLAND COUNTY, OHIO

STATE OF OHIO,

Plaintiff - Appellee

-vs-

GREGORY A. DRAKE,

Defendant - Appellant

Case Nos. 2026 CA 0020 and
2026 CA 0021

Opinion & Judgment Entry

Appeals from the Court of Common Pleas
of Richland County, Case Nos.
2026 CR 0058 N and 2025 CR 0731 N

Judgment: Affirmed in Part, Reversed in
Part, and Remanded

Date of Judgment: September 25, 2026

BEFORE: Craig R. Baldwin, Andrew J. King, and David M. Gormley, Judges

APPEARANCES: Jodie M. Schumacher (Richland County Prosecuting Attorney) and Michelle A. Fink (Assistant Prosecuting Attorney), Mansfield, Ohio, for Plaintiff-Appellee; Darin L. Avery, Mansfield, Ohio, for Defendant-Appellant.

Gormley, J.

{¶1} Defendant Gregory Drake challenges in these two related cases the sentences that he was ordered to serve after he pled guilty to two felony-level drug-related charges. He argues here that the trial court imposed sentences that are contrary to Ohio law by (1) delaying the start of Drake’s community-control supervision period in one of the cases until after he has served a prison term in the other case, and (2) ordering in the community-control case that Drake spend time in a community-based correctional facility (CBCF) after the completion of the prison term in the other case.

{¶2} On the first of those issues, we conclude that the trial court had the authority to delay the start of Drake’s community-control period in one of the cases while Drake serves a prison term in the other case. We agree with Drake, though, on the other issue and conclude

that the trial court had no authority to impose a CBCF term in the community-control case consecutive to the prison term in the other case. We therefore vacate the community-control sentence and remand the case in which that sentence was imposed. On remand, the trial court must eliminate the CBCF term from the community-control sentence.

The Key Facts

{¶3} Drake pled guilty in the trial court to two fifth-degree-felony charges of aggravated possession of drugs. (The offenses were committed on different days, and the two charges were listed in separate charging documents under different trial-court case numbers.)

{¶4} On one of the drug charges, the trial judge imposed a 12-month prison term. On the other charge, the judge placed Drake under community-control supervision for five years. In the case in which Drake was placed under community-control supervision, the judge also ordered that Drake serve a residential sanction by spending several months at a CBCF. As the judge explained, “As soon as you are done with . . . [the prison] sentence, you will go to the CBCF.”

{¶5} The sentencing entries filed several days after the sentencing hearing memorialized the sentences announced in court. The sentencing entry for the 12-month prison term indicated that Drake’s behind-bars time on the two drug charges was to be served consecutively, and the sentencing entry for the community-control sentence included language indicating that the supervision period would be tolled until Drake was released from prison. Drake now appeals his sentences on both charges.

The Trial Court Had the Authority to Toll the Community-Control Sentence on One Charge While Drake is Serving a Prison Term on the Other Charge

{¶6} Our reading of the Revised Code leads us to conclude that the trial court’s tolling order for the community-control sentence was permissible.

{¶7} First, of course, the trial court undeniably had the authority to impose a prison term on one of the felony charges while imposing a community-control sentence on the other. *See State v. Hitchcock*, 2019-Ohio-3246, ¶ 20 (noting that the Revised Code gives trial courts “express authorization to impose a prison term for one offense and community-control sanctions for another offense”) (Justice Fischer, with Chief Justice O’Connor and Justices Donnelly and Stewart concurring in judgment only); *id.* at ¶ 36 (“Under the plain terms of Ohio’s sentencing statutes, a trial court is authorized to impose on one count a term of imprisonment and on another count a term of community control”) (Justice DeWine concurring in part and joined by Justices Kennedy and French).

{¶8} After all, as R.C. 2929.13(A) tells us, “a court that imposes a sentence upon an offender for a felony may impose any sanction or combination of sanctions on the offender that are provided in Sections 2929.14 to 2929.18 of the Revised Code.” And of course a trial judge imposing sentences on multiple charges “must consider each offense individually and impose a separate sentence for each offense.” *State v. Saxon*, 2006-Ohio-1245, ¶ 9.

{¶9} As for the question of tolling the start of Drake’s community-control sentence while he is serving his prison term, we agree with Justice DeWine’s separate opinion in *Hitchcock*, where — joined by then-Justice Kennedy and Justice French — he wrote that a trial judge “is permitted to sentence an offender to prison on one count and community control on another,” and when the judge does so, “the community-control sanction will necessarily not start to run until after the prison term is complete.” *Hitchcock* at ¶ 39 (Justice DeWine, concurring in part).

{¶10} Those three justices looked to R.C. 2929.15(A)(1), which indicates that if an offender “is confined in any institution for the commission of any offense while under a

community control sanction,” the community-control period “ceases to run until the offender is brought before the court for its further action.” Similar language appears in R.C. 2951.07.

{¶11} As Justice DeWine and two of his colleagues explained in their separate opinion in *Hitchcock* at ¶ 39, “one cannot serve a term of ‘community’ control while one is in prison,” because, according to R.C. 2929.01(E), a community-control sanction “means a sanction that is not a prison term.” And again, as Justice DeWine noted in his *Hitchcock* opinion, “one cannot be [in the words of R.C. 2929.15(A)(2)(a)] ‘under the general control and supervision of a department of probation’ . . . while held in prison.” *Hitchcock* at ¶ 40 (Justice DeWine, concurring in part, joined by then-Justice Kennedy and Justice French).

{¶12} To be sure, four of Justice DeWine’s colleagues refrained from embracing the views that he expressed in *Hitchcock*. Yet only one of those four expressly disagreed with what he wrote on this point about the necessary tolling of community control while an offender is serving a prison term. *See Hitchcock* at ¶ 34 (“R.C. 2929.15(A) gives no support to the proposition that the term of community control imposed in this case would not start to run until a prison term imposed on another count is completed”) (Justice Stewart, concurring in judgment only). And those four colleagues of Justice DeWine expressed such divergent views among themselves that they produced no majority opinion and in fact themselves wrote three separate opinions without concurring in each other’s opinions.

{¶13} In short, we can draw little insight — and certainly no opinion-for-the-court words of wisdom — from the disparate and divergent views voiced by the four justices whose cobbled-together votes produced the judgment in *Hitchcock*. More insightful, we believe, are the views expressed in the three-justice opinion authored by Justice DeWine in that case.

{¶14} For that reason, and because we agree that R.C. 2929.15(A)(1) and R.C. 2951.07 support the view that Ohio’s sentencing statutes call for the automatic tolling of a felony defendant’s community-control period when he or she is — as those statutes say — “confined in any institution,” we conclude that the trial judge in this case rightly tolled the starting date of Drake’s community-control period on one of Drake’s two cases while Drake serves a prison term in the other.

{¶15} And our view is not changed by our court’s decades-ago decision in *State v. Fanti*, 2001-Ohio-7028, ¶ 13 (5th Dist.), where we wrote that “the language of R.C. 2951.07 permits tolling” of a non-prison supervision period for one offense when the defendant is incarcerated for some other offense “only when tha[t other] offense occurs subsequent to the commencement of the probation period.” As we noted in that decision, that case addressed the “pre-1996 statutory scheme for sentencing and probation.” *Id.* at ¶ 8. *See also id.* at ¶ 11 (reiterating that the sentences in that case “utilize probation and pre-date the 1996 statutory changes regarding community control options”). The case’s relevance today is questionable at best, in our view, and we find more persuasive the much more recent views expressed by Justice DeWine in *Hitchcock*, where he and three of his colleagues analyzed the sentencing provisions that apply in our case today.

{¶16} In short, we conclude that the trial judge in Drake’s cases permissibly and properly delayed the starting date for his community-control period on one of his cases while Drake serves the prison term in his other case. The five-year supervision period in the community-control case will begin in early 2027 once Drake is released from prison.

The Trial Court Had No Authority to Order Drake to Spend Time in a CBCF After Drake’s Prison Term

{¶17} The second concern raised by Drake focuses on the trial court’s order that he serve time in a CBCF in the community-control case as soon as his prison term is finished in the other case. That kind of order is not permitted under Ohio law. *See Hitchcock* at ¶ 25 (“there is no statutory basis for ordering that an offender be assessed for placement in a CBCF after that offender’s completion of a prison term imposed for another offense”) (Justice Fischer, with Chief Justice O’Connor and Justices Donnelly and Stewart concurring in judgment only); *id.* at ¶ 50 (“Hitchcock may not be sentenced to a CBCF to be served consecutively to his prison time”) (Justice DeWine, concurring in part, joined by then-Justice Kennedy and Justice French); *State v. Paige*, 2018-Ohio-813, ¶ 13 (“the trial court’s imposition of a CBCF term as a community-control sanction, to be served consecutively to a prison term imposed on a separate offense, was improper”).

{¶18} Those definitive statements disallowing the kind of prison-followed-by-CBCF sentencing approach that the trial judge embraced in Drake’s cases flow from the tight limits that Ohio law imposes on consecutive periods of incarceration. As R.C. 2929.41(A) tells us, any “sentence of imprisonment” must be served “concurrently” with “any other prison term, jail term or sentence of imprisonment.” And under R.C. 1.05(A), “a term of imprisonment” includes time in a CBCF. *See also Hitchcock* at ¶ 12 (“Placement in a CBCF is . . . a ‘sentence of imprisonment’”) (Justice Fischer, with Chief Justice O’Connor and Justices Donnelly and Stewart concurring in judgment only); *id.* at ¶ 50 (“a sentence to a CBCF is a sentence of imprisonment”) (Justice DeWine, concurring in part, joined by then-Justice Kennedy and Justice French); *Paige* at ¶ 12 (“a term of confinement in a CBCF is a ‘sentence of imprisonment’ under R.C. 2929.41(A)”).

{¶19} To be sure, a few notable exceptions exist to the presumption that concurrent incarceration periods are the norm in Ohio: (1) misdemeanor sentences under R.C. 2929.41(B)(1) and (B)(3); (2) interstate prison terms under R.C. 2929.41(B)(2); (3) felony prison terms under R.C. 2929.14(C)(4); and (4) sentences for certain violent sex offenses under R.C. 2971.03.

{¶20} Yet none of those apply to Drake’s cases. *See Hitchcock* at ¶ 125 (“Because a term of confinement in a CBCF is not a prison term,” R.C. 2929.14(C)(4) — which permits trial courts to impose consecutive *prison terms* after making certain findings — “does not permit a court to impose a CBCF term consecutively to a prison term”) (Justice Fischer, with Chief Justice O’Connor and Justices Donnelly and Stewart concurring in judgment only); *id.* at ¶ 50 (noting that none of the statutory exceptions to R.C. 2929.41(A)’s concurrent-sentencing rule permit a trial court to impose a CBCF term consecutively to a prison term) (Justice DeWine, concurring in part, joined by then-Justice Kennedy and Justice French).

{¶21} As a result, the trial court’s order directing Drake to serve, as a community-control residential sanction, some time in a CBCF consecutively to Drake’s prison term was improper.

{¶22} In addition, the trial court’s reference in Drake’s trial-court case number 2025-CR-0731-N to some of R.C. 2929.14(C)(4)’s consecutive-sentence findings is out of place in Drake’s situation, given that that statutory provision, by its own terms, applies only when “multiple prison terms are imposed on an offender.” In Drake’s cases, of course, just one prison term was imposed.

{¶23} For the reasons explained above, the judgments of the Court of Common Pleas of Richland County are affirmed in part and reversed in part.

{¶24} We make no changes to the sentence in the case in which a prison term was imposed — trial-court case number 2025-CR-0731-N — though the reference to “consecutive sentences” and to certain R.C. 2929.14(C)(4) consecutive-sentence findings in the sentencing entry in that case will have no ongoing effect in light of our conclusion that Drake must be released from custody once he completes his prison term.

{¶25} As for the community-control case — trial-court case number 2026-CR-0058-N — that one is remanded to the trial court, where the imposition of a CBCF term as a community-control residential sanction must be removed.

{¶26} Any court costs are waived.

By: Gormley, J.;

Baldwin, J. concurs, and

King, P. J. concurs in part and dissents in part.

King, P.J., concurring in part and dissenting in part.

{¶27} I join the court in holding that the trial court could not order Drake into a community based correctional facility at the end of the prison term imposed in the other case. A CBCF placement is a sentence of imprisonment. R.C. 1.05(A); R.C. 2929.41(A); *State v. Paige*, 2018-Ohio-813, ¶ 12–13; *State v. Hitchcock*, 2019-Ohio-3246, ¶ 25 (lead opinion), ¶ 50 (DeWine, J., concurring in part). That part of the judgment should be reversed.

{¶28} The majority, following Justice DeWine's separate opinion in *Hitchcock*, treats delayed commencement of community control as a necessary feature of a mixed prison-and-community control sentence. *See Hitchcock* at ¶ 39 (DeWine, J., concurring in part). I agree

that supervising an inmate as if he were in the community is awkward. That difficulty is not an invitation for the judiciary to create a workaround. Sentencing courts have no inherent authority to invent one and must follow the statutory scheme the General Assembly enacted. *State v. Logan*, 2025-Ohio-1772, ¶ 18. The Revised Code does not provide a mechanism to postpone the start of community control until a prison term on another case has ended.

{¶29} The Revised Code permits a prison term for one offense and community control on another. *Hitchcock* at ¶ 20, 36. It does not, by that fact, permit the court to postpone when community control begins. And I am not convinced that the provisions on which the majority relies on grant that power. R.C. 2929.15(A)(1) states that if an offender is confined "for the commission of any offense while under a community control sanction," the period of community control "ceases to run" until the offender is brought before the court. R.C. 2951.07 is to the same effect. Both describe tolling of a sanction that is already underway. Neither authorizes a delayed commencement. "While under" is not "until after."

{¶30} Finally, R.C. 2929.41(A) supplies the consecutive imprisonment rule and its exceptions. R.C. 2929.14(C)(4) is one of those exceptions, and it applies only when "multiple prison terms are imposed." Community control is not a prison term. The absence of a statute authorizing consecutive community control after prison is not an invitation to treat delayed commencement as "necessary." A community control sanction begins when the court imposes it, unless the Revised Code provides otherwise. R.C. 2929.15(A)(1) and R.C. 2951.07 do not.

{¶31} Because sentencing authority is statutory, I would not affirm the order that community control begins only after the prison term ends. I would vacate that delayed commencement language and remand the community control case for resentencing under R.C. 2929.15. I concur in the judgment insofar as it vacates the CBCF term.