[Cite as *State v. Ortiz*, 2023-Ohio-2623.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio	Court of Appeals No. WD-22-055
Appellee	Trial Court No. 2022CR0059
v.	
Buenaventura Carlos Ortiz	**DECISION AND JUDGMENT**
Appellant	Decided: July 28, 2023

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
David T. Harold, Chief Assistant Prosecuting Attorney, for appellee.

Autumn Adams, for appellant.

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ZMUDA, J.

I. Introduction

{¶ 1} Appellant, Buenaventura Carlos Ortiz, appeals the August 4, 2022 judgment of the Wood County Court of Common Pleas sentencing him to an aggregate 54-month prison term following his admitted violation of the conditions of his community control term. For the following reasons, we affirm the trial court's judgment.

A. Facts and Procedural Background

{¶ 2} On March 3, 2022, appellant was indicted on one count of failure to comply with an order or signal of a police officer in violation of R.C. 2921.331(B), a third-degree felony; and one count of receiving stolen property in violation of R.C. 2913.51(A), a fourth-degree felony. The charges arose from a July 17, 2021 incident in which an officer from the Lake Township Police Department in Wood County, Ohio, discovered appellant and another individual asleep in a vehicle. The officer knocked on the window. When appellant awoke, he rolled down the window to speak with the officer but refused to provide a driver's license or registration for the vehicle. Appellant then turned on the vehicle's ignition and fled from the scene. Following a chase in which appellant exceeded 90 miles per hour, appellant slowed and jumped from the vehicle, attempting to elude the officer on foot. He was ultimately apprehended after a brief pursuit. Following his arrest, appellant admitted that he had stolen the vehicle, a fact confirmed when the officer's review of the vehicle's identification number showed that it was reported stolen.

{¶ 3} Appellant entered a guilty plea to both charged offenses on May 31, 2022. After participating in a presentencing investigation, appellant appeared for sentencing on July 26, 2022. At that time, the trial court imposed a 4-year term of community control. As part of the conditions of his community control, the trial court ordered appellant to immediately enter and complete a drug treatment program—known as SEARCH—pursuant to R.C. 2929.17(D). Appellant was also ordered to comply with the general conditions of community control which required him to complete any requested drug screening, with the advisement that any screenings yielding a positive result would be a

violation of that condition. The court then advised appellant that if he violated the terms of his community control, the trial court could impose a prison term of up to 36 months on the failure to comply offense and up to 18 months on the receiving stolen property offense. The court also advised appellant that those sentences would be served consecutively pursuant to R.C. 2921.331(D) for an aggregate 54-month prison term. Appellant was then remanded to the Wood County Jail to await transport to the SEARCH program.

{¶ 4} On July 29, 2022, while still awaiting transport, appellant submitted to a drug screen pursuant to the recently imposed terms of his community control sanction. The drug screen returned a positive result for Fentanyl and cocaine. The state filed a petition for revocation of community control on August 1, 2022, based on those results. Appellant appeared for a hearing on the state's petition the following day. At that time, appellant waived the required hearing pursuant to Crim.R. 32.3(A) and admitted to the violation. The trial court proceeded immediately to disposition of the violation and ordered appellant to serve the aggregate 54-month prison term identified at his original sentencing.

B. Assignment of Error

{¶ 5} Appellant timely appealed and asserts the following error for our review:

> Pursuant to R.C. 2929.15(A)(1), when the probation violation was filed Ortiz was confined in an institution and thus his community control was suspended so a community control violation could not have been filed against Ortiz.

II. Law and Analysis

{¶ 6} In his single assignment or error, appellant argues that the trial court could not impose a sentence for his community control violation because the service of his community control had been tolled at the time of the positive test.[1] In support of his argument, appellant cites R.C. 2929.15(A)(1) which states, in relevant part:

> [I]f the offender is confined in any institution for the commission of any offense while under a community control sanction, the period of the community control sanction ceases to run until the offender is brought before the court for its further action.

Appellant argues that because he was confined to the Wood County Jail at the time of his positive test that he was "confined to an institution while under a community control sanction" and, therefore, his community control, including compliance with the related conditions, was tolled during his confinement. As a result, he argues, the trial court could not have imposed a sentence for his admitted violation of the terms of his community control because he was not actually serving a term of community control at the time of the violation.

{¶ 7} The state, in response, notes that to resolve appellant's argument that this court must determine whether R.C. 2929.15(A)(1)'s tolling provision is applicable to the present case and, if so, whether it tolls the conditions of appellant's community control term to preclude the imposition of the previously-announced sentence that could be

[1] To avoid any confusion, we note that appellant's admitted violation resulted from his positive drug screen administered on July 29, 2022 and not the actual ingestion of drugs. We limit our analysis accordingly and do not address appellant's "tolled" community control term argument as it relates to his ingestion of the illegal drugs.

imposed upon a violation of those conditions. The state argues that the plain language of R.C. 2929.15(A)(1) shows that the tolling provision applies only when an offender commits "any offense while under a community control sanction." The state argues that the plain language of the tolling provision only applies, then, to a scenario in which someone serving a term of community control commits a separate offense, not a violation of their community control. Here, the state argues, since appellant committed a community control violation rather than a separate offense, the statute's tolling provision is entirely inapplicable.

A. Appellant is limited to plain error review.

{¶ 8} At the outset, we find that appellant has forfeited all but plain error review of his assigned error. At his community control violation hearing, appellant made no argument regarding R.C. 2929.15(A)(1) and admitted to the violation in its entirety. Now, he asks this court, for the first time, to find that the trial court was precluded from sentencing him on that admitted violation because his community control was tolled at that time. "Arguments raised for the first time on appeal are generally barred. Such arguments are barred by the doctrine of waiver for failure to raise these arguments before the trial court. It is well-established that a party cannot raise any new issues or *legal theories* for the first time on appeal[.]" *State v. Talley*, 6th Dist. Lucas Nos. L-20-1131, L-20-1132, 2021-Ohio-2558, ¶ 22, citing *Cawley JV, LLC v. Wall St. Recycling, LLC*, 35 N.E.3d 30, 2015-Ohio-1846 (8th Dist.) (emphasis added). When an argument is forfeited on appeal for failing to make that argument at trial, the appellant waives all but plain

error review. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 23.

{¶ 9} Crim.R. 52(B) states "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "Under Crim.R. 52(B), the appellant bears the burden of demonstrating that a plain error affected his substantial rights." *State v. Boaston*, 2017-Ohio-8770, 100 N.E.3d 1002, ¶ 63 (6th Dist.), citing *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 14. In order for a reviewing court to find plain error, it must make the following three findings:

> "First, there must be an error, i.e. a deviation from a legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. * * * Third, the error must have affected "substantial rights."

Id., citing *State v. Barnes*, 94 Ohio St.3d 21, 759 N.E.2d 1240 (2002). Affecting a substantial right means "that the trial court's error must have affected the outcome" of the trial court proceedings. *Id.* Finding plain error must be done "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.*, citing *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978). Here, appellant argues that because one of the conditions of his community control term required him to remain in confinement that R.C. 2929.15(A)(1)'s tolling provision was applicable and suspended all conditions related to that sanction that the trial court could not have imposed a sentence for his admitted violation. Appellant's argument fails at the first step

of our plain error analysis because he cannot show that the trial court committed any error in failing to apply the unambiguous tolling provision to the present case.

B. R.C. 2929.15(A)(1)'s tolling provision does not apply to appellant's admitted community control violation.

{¶ 10} The threshold question appellant raises in this appeal is whether R.C. 2929.15(A)(1)'s tolling provision is applicable to his admitted community control violation. Generally, "[a] question of statutory construction presents an issue of law that appellate courts review de novo." *State v. Calhoun,* 6th Dist. Wood No. WD-17-067, 2019-Ohio-228, ¶ 24. "We review statutory language for plain meaning, unless there is an ambiguity." *Id.,* citing *State v. Polus,* 145 Ohio St.3d 266, 2016-Ohio-655, 48 N.E.3d 553, ¶ 7. "A statute is ambiguous when its language is susceptible to more than one reasonable interpretation." *Hamer v. Danbury Township Board of Zoning Appeals,* 2020-Ohio-3209, 155 N.E.3d 218, ¶ 9 (6th Dist.). "If we find the statutory language is clear and unambiguous, we must apply the statute as written." *Calhoun* at ¶ 24. We find that the language of R.C. 2929.15(A)(1) is unambiguous and that its plain language precludes application of its tolling provisions to appellant's community control violation.

{¶ 11} First, we disregard in its entirety appellant's argument that R.C. 2929.15(A)(1) would ever suspend his compliance with the conditions of his community control. The tolling provision of R.C. 2929.15(A)(1) states that "the period of" an offender's community control sanction is tolled if they are "confined in any institution for the commission of any offense while under a community control sanction." Neither appellant nor the state discusses the scope of that tolling provision—that is, whether it

tolls only the duration of the community control term or also tolls an offender's compliance with the related conditions. Appellant only makes the bare assertion that because he was confined in the Wood County Jail at the time he committed his admitted violation that he was not subject to the conditions of his community control pursuant to R.C. 2929.15(A)(1). Appellant's unsupported argument is in direct contrast with the plain language of the statute and, if accepted, would create patently absurd results.

{¶ 12} We note that the statute plainly references "the period of" community control as the subject of the tolling provision. When the tolling provision of a statute references a period of time, that reference indicates only that that the duration of the time period at issue is tolled, not any other aspect of the parties' obligations during that time period. *See State v. Dague*, 4th Dist. Ross No. 96CA2256, 1997 WL 467007 (August 11, 1997) (holding that statutory reference to tolling a "period" of probation precluded offender from being credited with days during the tolled period but did not suspend "the conditions of probation."). Tolling the period of community control ensures that an offender serving a term of community control who is confined during that time period is not credited with days served towards the total length of their term. *Id.* at *2. The statute, however, makes no reference to tolling the conditions of a community control term. Put simply, appellant's argument that the tolling provision, if applicable, would toll not only the duration of his community control but also his compliance with the related conditions is in direct contrast to the plain language of the statute.

{¶ 13} Moreover, appellant's requested interpretation of R.C. 2929.15(A)(1)—that he cannot violate his community control if he is confined—would lead to absurd results.

Under appellant's theory, had he dealt drugs within the jail, committed a felonious assault, or even murdered someone while in confinement, he could not have been held to be in violation of the condition of his community control requiring him to abide by the laws of this state because that condition was tolled. Tolling the duration of a period of community control during confinement cannot logically be interpreted as also providing an offender with "a free pass to commit new violations" of their community control. *Id.* Adopting appellant's argument would provide him that free pass and is an unreasonable interpretation of R.C. 2929.15(A)(1). A clear reading of the statute lead us to conclude, and we so find, that the statute is unambiguous as to the limited scope of the tolling provision to toll only the duration of an offender's community control. It does not toll an offender's compliance with the conditions of their community control. Therefore, appellant's argument that he was not required to comply with the conditions of his community control at the time of his admitted violation while in confinement is without merit.

{¶ 14} Second, appellant's primary argument that R.C. 2929.15(A)(1)'s tolling provision is even applicable in this case regardless of its limited scope is likewise without merit. Appellant argues that R.C. 2929.15(A)(1) tolled his community control because one of the conditions imposed upon him at sentencing—that he complete the SEARCH program—required his confinement. In other words, appellant argues that his 4-year term of community control that he was ordered to serve would be immediately tolled under R.C. 2929.15(A)(1) until he completed that program. Such a requested interpretation is in direct conflict with R.C. 2929.16, which authorizes trial courts to

impose several types of residential confinement as a community control sanction. These sanctions include ordering offenders to serve a term in a community-based correctional facility, a jail term, a term in a halfway house, or a term in an alternative residential facility. R.C. 2929.16(A)(1), (2), (3), and (4). Each of these sanctions require some level of confinement and, under appellant's interpretation of R.C. 2929.15(A)(1), the imposition of any of those statutorily authorized community control sanctions would immediately be tolled because they required the offender's confinement. It is entirely unreasonable to conclude that R.C. 2929.16 would permit the use of confinement as a community control sanction only to have R.C. 2929.15(A)(1) immediately toll the service of that sanction.

{¶ 15} In sum, appellant's arguments that R.C. 2929.15(A)(1)'s tolling provision is applicable here, or that even if it were applicable would relieve him from compliance with the conditions of his community control during that tolling period, are unreasonable interpretations of the statute. Therefore, appellant cannot show that R.C. 2929.15(A)(1) is ambiguous and we must apply the plain language of the statute.

{¶ 16} The plain language of R.C. 2929.15(A)(1) shows that its tolling provision only applies when an offender is confined in an institution for committing an offense while "under a community control sanction." This language plainly indicates that the confinement that tolls a community control term must result from the commission of a separate offense other than violating the community control being served. Further, the statute's explicit reference to tolling only "the period" of community control plainly indicates that an offender may not count the period of confinement toward the total length

of their community control term, not that they are excused from compliance with any related conditions. Therefore, R.C. 2929.15(A)(1) did not toll appellant's compliance with the terms of his community control at the time of his admitted violation and the trial court committed no error, let alone plain error, when it imposed appellant's sentence. Because appellant cannot show that the trial court committed any error in imposing his sentence, his single assignment of error is found not well-taken.

III. Conclusion

{¶ 17} For these reasons, we find that the trial court did not commit plain error when it imposed a sentence on appellant's admitted community control violations. We find appellant's assignment of error not well-taken and we affirm the August 4, 2022 judgment of the Wood County Court of Common Pleas.

{¶ 18} Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J. _____
JUDGE

Gene A. Zmuda, J. _____
JUDGE

Charles E. Sulek, J. _____
CONCUR.
JUDGE