

[Cite as *State v. Mitchell*, 2010-Ohio-1575.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92694

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RONALD MITCHELL

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-468906

BEFORE: Jones, J., Stewart, P.J., and Celebrezze, J.

RELEASED: April 8, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

LARRY A. JONES, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} Defendant-appellant, Ronald Mitchell (“Mitchell”), appeals his sentence. Finding no merit to the appeal, we affirm.

{¶ 3} In 2006, Mitchell was charged with two counts of drug trafficking and one count of possessing criminal tools. Pursuant to a plea agreement with the state, Mitchell entered a plea of guilty to possessing criminal tools and was permitted to participate in the prosecutor’s Early Intervention Program (“EIP”). The two counts of drug trafficking were dismissed.

{¶ 4} In March 2007, Mitchell appeared before the trial court for an alleged violation of the EIP requirements. He admitted to the violation, and the court found him guilty of the original charge and placed him on one year of community control sanctions.

{¶ 5} In September 2008, Mitchell appeared before the trial court for a violation of his community control sanctions. He pled guilty to the violation. The trial court informed Mitchell: “I will continue the supervision. You come back here, sir, and you serve one year in prison * * *.” In its journal entry, the court wrote, in pertinent part, that “[c]ommunity control is continued with prior conditions. Upon return 1 year.”

{¶ 6} In 2009, Mitchell again appeared before the court for a violation of his community control sanctions; the trial court revoked his community control sanction status and sentenced him to six months in prison.

{¶ 7} It is from that sentencing entry that Mitchell now appeals, raising the following assignment of error for our review:

{¶ 8} “1. The trial court was without jurisdiction and abused its discretion and violated appellant’s constitutional and statutory rights when it sentenced appellant to prison although it never notified appellant in the sentencing journal entry or at subsequent hearings that a specific prison sentence may be imposed for [a] violation of community control sanctions.”

{¶ 9} Mitchell argues that because the trial court failed to inform him at his first sentencing hearing that a violation of his community control sanctions could result in a prison sentence, the trial court was without jurisdiction to sentence him to prison at a subsequent violation hearing. We disagree.

{¶ 10} In *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, the Ohio Supreme Court held:

{¶ 11} “Pursuant to R.C. 2929.19(B)(5) and 2929.15(B), a trial court sentencing an offender to a community control sanction must, at the time of the sentencing, notify the offender of the specific prison term that may be imposed for a violation of the conditions of the sanction, as a prerequisite to imposing a prison term on the offender for a subsequent violation.”

{¶ 12} Id. at paragraph two of the syllabus. In *Brooks*, however, the Court stated that it would not determine if a trial court may subsequently impose a prison term on a defendant for a second violation of community control if the court had failed to notify the defendant of the specific term of prison at the original sentencing hearing, but notified the defendant of the specific term of prison at a violation hearing. Id. at fn. 2. In other words, the Court recognized but declined to reach the issue of whether a court could “cure” its defective sentence from the original sentencing hearing at a subsequent violation hearing.

{¶ 13} It was in *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, that the Court determined the issue. The Court certified the question “whether R.C. 2929.19(B)(5) requires a judge to notify a defendant at his initial sentencing hearing, as opposed to any subsequent sentencing hearings, of the specific prison term that may be imposed as a sanction for a subsequent community control violation.”

{¶ 14} In *Fraley*, the trial court failed to inform the defendant that he could be subject to a prison term if he violated the conditions of his community control sanctions at his original sentencing and at two violation hearings. Id. At the third hearing, however, the court told the defendant that if he violated the conditions again, he would be subject to a definite term in prison. The defendant violated and the trial court sentenced him to prison. Id. The court of appeals reversed, finding that it was error for the trial court not to

have told the defendant at the original hearing that he could be subject to prison if he violated the terms of his community control sanctions. Id.

{¶ 15} The Ohio Supreme Court reversed the decision of the appellate court, finding:

“The notification requirement in 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. 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. *State v. Martin*, 8th Dist. No. 82140, 2003-Ohio-3381, 2003 WL 21474154, at ¶35. The trial court could therefore comply with both the sentencing statutes and our holding in *Brooks* if at this second hearing the court notifies the offender of the specific prison term that may be imposed for a subsequent violation occurring after this second hearing. We believe that this process complies with the letter and spirit of R.C. 2929.19(B)(5) and 2929.15(B).”

{¶ 16} Id. at ¶17.

{¶ 17} Recently, this court analyzed the holding in *Fraleigh* and found that when a trial court fails to notify a defendant of the specific penalty he will face upon violation of community control sanctions at the initial sentencing, the court may “cure” that failure at a subsequent violation hearing by then advising the defendant of the definite term of imprisonment that may be imposed upon any subsequent finding of a violation. *State v. Hodge*, Cuyahoga App. No. 93245, 2010-Ohio-78.

{¶ 18} In this case, there is no dispute that the trial court did not inform Mitchell that he would be subject to a year in prison if he violated his community control sanctions at his original sentencing hearing or at his first

violation hearing. But at the second violation hearing, the trial court both orally and in its journal entry notified Mitchell that he would go to prison for a year if he violated his conditions again.

{¶ 19} Therefore, based on *Fraley*, we find that the trial court cured its deficiency in the first and second sentencing hearings by informing Mitchell he would be subject to a definite prison term at his third violation hearing.

{¶ 20} The sole assignment of error is overruled.

{¶ 21} Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

MELODY J. STEWART, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR