

[Cite as *State v. Johns*, 2010-Ohio-162.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93226

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRUCE JOHNS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-471134

BEFORE: Stewart, J., Gallagher, A.J., and Celebrezze, J.

RELEASED: January 21, 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).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Bruce Johns, appeals from an order denying his petition for postconviction relief from a sentence imposed for violation of a community controlled sanction. Johns sought relief on grounds that the court failed to inform him during plea proceedings of the precise prison term that could be imposed in the event he violated community control, and that the four-year term imposed for the violation was so grossly disproportionate to the violation that it constituted cruel and unusual punishment. The state argued that the petition was untimely and otherwise barred by res judicata because Johns could have and should have raised the issues on direct appeal.

The court granted summary judgment on grounds that the petition had not been timely filed. Johns's sole assignment of error contests the court's ruling that he did not timely file his petition. We affirm.

I

{¶ 2} In 1993, Johns was found guilty of sexual battery and abduction. The parties agree that at the time of conviction, the court did not conduct a hearing on whether Johns should be classified as a sexual offender. They further agree that upon his release from prison in 2003, Johns nonetheless reported to the sheriff's office, signed an acknowledgment of his duties to register as a sexual offender, and registered as a sexual offender.

{¶ 3} Johns failed to update his registration as required by law and later pleaded guilty to a single count of failure to verify his address. On April 24, 2006, the court ordered him to serve a three-year community controlled sanction. Johns did not appeal from this sentence.

{¶ 4} In August 2007, during the term of his community controlled sanction, Johns was jailed on a charge of misdemeanor assault. He was convicted of that offense and sentenced to time served. Upon his release from jail, Johns was ordered to report to the probation department. Johns did not report to the probation department nor did he register his address with the sheriff. The court found probable cause to conclude that Johns violated the terms of community control by failing to report to the probation department.

{¶ 5} Johns defended the alleged violation of community control by disputing whether he had been properly classified as a sexual offender, claiming that he did not receive a hearing on the classification prior to his release from prison on the underlying sexually-oriented offenses. On that basis, he filed a motion to withdraw his guilty plea. The court denied the motion. It then found that Johns violated his community control and sentenced him to four years in prison.

{¶ 6} In February 2009, Johns filed his petition for postconviction relief. The petition claimed that during Johns's sentencing on the 2006

failure to verify address count, the court failed to state the specific sentence that it would impose in the event Johns violated community control and that the four-year sentence for violating community control was grossly disproportionate to the crime. The state filed a motion for summary judgment in which it argued that the petition was untimely because it should have been filed within 180 days of the date on which the record would have been due on direct appeal from the April 2006 sentencing. The court granted summary judgment without opinion, but cited to R.C. 2953.21(A)(2), thus indicating that the petition had not been timely filed.

II

{¶ 7} Johns argues that the court erred by granting the state's motion for summary judgment because he timely filed his petition for postconviction relief from the date of his sentence for the violation of community control.

{¶ 8} R.C. 2953.21(A)(1) permits a person convicted of a criminal offense and who claims that there was a denial or infringement of the person's rights under either the Ohio Constitution or the United States Constitution to file a petition asking the court to vacate or set aside the judgment. R.C. 2953.21(A)(2) states that a petition for postconviction relief must be filed "no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction[,]" or if no appeal is filed from the conviction, the

petition must be filed “no later than one hundred eighty days after the expiration of the time for filing the appeal.” The time requirements for postconviction relief under R.C. 2953.21(A) are jurisdictional. *State v. Hutton*, Cuyahoga App. No. 80763, 2007-Ohio-5443, at ¶23.

{¶ 9} In his first claim for relief, Johns argued that the court lacked authority to sentence him to prison for violating community control because it failed to inform him at the time of his plea of the specific consequences of a violation. The state maintained that this was a claim that could have been raised on direct appeal from the conviction for failure to verify an address, and so the petition was not timely filed. Johns claims that any attempt to appeal would have been premature until he suffered the actual consequences of a violation of community control.

{¶ 10} It is well-established that the court errs by failing to inform a defendant of the specific consequences of violating the terms of community control: “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.” *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, paragraph two of the syllabus.

{¶ 11} During the April 20, 2006 sentencing on the failure to verify address count, the court told Johns:

{¶ 12} “If you fail to [report for probation and pay court costs and fees] and we can’t keep track of it, if you are not following the rules, you are testing positive for drugs or alcohol, I will send you to prison.

{¶ 13} “It is an F-3 and it’s five years to LCI and I will send you to LCI and [sic] because I can’t take any chances with you – with your past history – okay?”

{¶ 14} Johns argues that the court’s language, “it’s five years to LCI,” does not comport with the *Brooks* requirement to notify the offender of the specific prison term that may be imposed for a violation of the conditions of the sanction because the court’s statement does not clearly indicate whether Johns *would* be sentenced to five years or *could* be sentenced to five years for violating community control.

{¶ 15} We need not resolve this question because it is plain that Johns could have raised this issue on direct appeal. Res judicata bars a defendant who was represented by counsel from raising an issue in a postconviction petition if he could have raised the issue on direct appeal. *State v. Reynolds*, 79 Ohio St.3d 158, 161, 1997-Ohio-304. The imposition of a community control sanction and notification of the length of prison term that would be imposed for a violation of community control are sentencing matters that

could have been raised on direct appeal. See *State v. Seeley*, Union App. No. 14-06-38, 2007-Ohio-1538, at ¶17-18. Cf. *State v. Lehrfeld*, Hamilton App. No. C-030390, 2004-Ohio-2277 (rejecting Civ.R. 60(B) motion to vacate sentence for failure to advise defendant of consequences of violating community control because the issue could have been raised on direct appeal).

{¶ 16} Johns maintains that he could not properly raise any issues relating to violations of community control on direct appeal because they were not ripe for review until such time as the sentence had been imposed.

{¶ 17} It is true that the courts have held that an appeal of a reserved sentence of community control is not ripe until the actual sentencing order imposes a prison term for a community-control violation. See *State v. Dismuke*, Cuyahoga App. No. 89169, 2007-Ohio-5847, at ¶7. See, also, *State v. Wilson*, Hamilton App. No. C-061000, 2007-Ohio-6339, fn. 1 (collecting cases). But Johns's argument in his petition for postconviction relief was not that the court erred by imposing a sentence for the violation of community control, but that the court failed at the time of sentencing to inform him of the specific prison term that would be imposed in the event he violated community control. Johns cited to *Brooks* for the proposition that R.C. 2929.19 has been interpreted by the supreme court to require the trial court to "specifically state the prison term a parole violator would receive at a future hearing." Petition for Postconviction Relief at 4. Posited in this

manner, Johns's argument is that the court's failure to advise him of the specific sentence that could be imposed in the event he violated the terms of community control was an error that occurred at the time of sentencing.

{¶ 18} Our conclusion is supported by *Brooks*, as the supreme court noted that compliance with R.C. 2929.19(B)(5) must come "at the sentencing hearing[.]" *Id.* at ¶17. And *Brooks* held that the remedy for the trial court's failure to provide proper notice of a specific term of community control to the offender is a remand for resentencing:

{¶ 19} "When a trial court makes an error in sentencing a defendant, the usual procedure is for an appellate court to remand to the trial court for resentencing. See R.C. 2953.08(G); [*State v.*] *Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473, at ¶10, 23, 27. In community control sentencing cases in which the trial court failed to comply with R.C. 2929.19(B)(5), however, a straight remand can cause problems. Due to the particular nature of community control, any error in notification cannot be rectified by 'renotifying' the offender. When an offender violates community control conditions and that offender was not properly notified of the specific term that would be imposed, an after-the-fact reimposition of community control would totally frustrate the purpose behind R.C. 2929.19(B)(5) notification, which is to make the offender aware *before a violation* of the specific prison term that he or she will face for a violation. Consequently,

where no such notification was supplied, and the offender then appeals after a prison term is imposed under R.C. 2929.15(B), the matter must be remanded to the trial court for a resentencing under that provision with a prison term not an option. In this case, since the prison term has already been served, there will be no remand for resentencing.” Id. at ¶33 (emphasis sic).

{¶ 20} This case does not involve a direct appeal from the imposition of a prison term for violation of community control; rather, it is an appeal from a petition for postconviction relief. Johns plainly did not file his February 2009 petition within 180 days after the date on which the time to appeal from the April 2006 sentencing expired. It follows that his petition for postconviction relief was not timely filed and that the court did not err by granting the state’s motion for summary judgment on that basis.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR