

{¶ 1} Defendant-appellant, Garrett K. Dolby, appeals from the judgment of the Champaign County Court of Common Pleas revoking his community control sanctions imposed after being granted judicial release and sentencing him to four years in prison. For the reasons outlined below, the judgment of the trial court will be affirmed.

Facts and Course of Proceedings

{¶ 2} On April 2, 2009, Dolby was indicted on one count of domestic violence in violation of R.C. 2919.25(A), a felony of the third degree; one count of disrupting public services in violation of R.C. 2909.04(A)(1), a felony of the fourth degree; and one count of abduction in violation of R.C. 2905.02(A)(2), a felony of the third degree. Pursuant to a plea agreement, Dolby pled guilty to domestic violence and the remaining charges were dismissed. On July 1, 2009, the trial court sentenced Dolby to a four-year prison term and a fine of \$200 plus costs, which were calculated at \$1,728.40.¹

{¶ 3} After being incarcerated for approximately six months, on January 14, 2010, Dolby filed a motion for judicial release. Following a hearing on the motion, the trial court indicated that a ruling on the motion would be withheld until Dolby completed an eligibility screening for admission into the West Central Community Based Correction Facility (“West Central”). After the screening was complete, on February 12, 2010, the trial court issued an entry granting judicial release. The entry stated, in pertinent part, that:

The Court has been advised the Defendant has been accepted for placement in the West Central Community Correctional Facility program.

¹ Dolby was sentenced under a former version of R.C. 2929.14(A)(3) which provided that a felony of the third-degree carried a prison term of one, two, three, four, or five years.

The Court grants Judicial Release and Defendant is returned to community control. Standard terms of state probation will apply. Special conditions include the requirement that Defendant successfully complete the West Central Community Correctional Facility program. Defendant may not have any contact with the victim * * * [.]

* * *

REVOCAION OF COMMUNITY CONTROL

If Defendant violates community control, [a] sentence will be imposed as follows: Count 1 – Four (4) years to the Ohio Department of Corrections.

Journal Entry (Feb. 12, 2010), Champaign County Court of Common Pleas Case No. 2009-CR-71, Docket No. 68, p. 1-2.

{¶ 4} Dolby was subsequently admitted to West Central on February 25, 2010. Three years later, the probation department requested a status hearing on the progress Dolby was making on his financial sentencing obligation, as he still owed \$1,359.90 in costs and the \$200 fine. The trial court held a status hearing on February 8, 2013, during which the trial court noticed the entry granting judicial release did not state the duration of Dolby's community control sanctions. The trial court also noted that the record did not show that Dolby had ever signed the conditions of his community control. Upon discovering this, the trial court took a short recess and contacted the probation department. The probation department advised the trial court that Dolby had signed the conditions of his community control while at West Central on March 16, 2010. However, the probation department had no information regarding the duration of Dolby's community control sanctions.

{¶ 5} The trial court resumed the status hearing and noted that the judge who granted Dolby's judicial release customarily placed defendants on an initial three-year period of community control. Dolby also indicated that he recalled the judge ordering him to serve a three-year period of community control. The trial court then explained to Dolby that it was inclined to extend his community control for an additional two years in order to give him time to satisfy his financial sentencing obligation. However, the court expressed uncertainty as to whether it should treat it as an extension or resentencing of community control. As a result, the trial court gave Dolby the option of having trial counsel appointed to advise him on the matter, which Dolby accepted. The trial court then scheduled an additional hearing on Dolby's community control status.

{¶ 6} The additional hearing on Dolby's community control status was held on February 11, 2013. During that hearing, the trial court explained the situation to Dolby's newly appointed counsel and noted that the court had reviewed the judicial release hearing transcript and confirmed that the trial court had never indicated the duration of Dolby's community control sanctions.² The parties ultimately agreed that the best course of action was to have the trial court resentence Dolby to give him the maximum five-year term of community control sanctions with credit for the three years already served so that he could pay off his financial obligation over the next two years.

{¶ 7} The trial court scheduled a resentencing hearing for February 20, 2013. At the hearing, the trial court resentedenced Dolby to a five-year period of community control with credit for three years already served, thus effectively extending Dolby's community control by two years. The journal entry memorializing the resentencing was issued on

² This court was not provided with the transcript of the January 25, 2010 judicial release hearing.

February 25, 2013.

{¶ 8} Eight months later, on October 16, 2013, the probation department filed a notice of community control violation. At the hearing on the merits of the violation, the trial court noticed that the resentencing entry of February 25, 2013, did not specify that the prison sentence for violating community control while on judicial release would be the originally imposed four-year prison term. In addition, the trial court did not reserve its right to reimpose the original prison term on the record at the February 20, 2013 resentencing hearing. As a result, the trial court dismissed Dolby's community control violation and held a second resentencing hearing to correct its perceived mistake.

{¶ 9} The second resentencing hearing was held on December 3, 2013. At the second resentencing hearing, the trial court once again resentedenced Dolby to the maximum five-year term of community control with credit for three years already served, but this time, the court specifically stated that if Dolby violated his community control sanction, the prison term for the violation would be the originally imposed prison sentence of four years, less jail time served. On December 11, 2013, the trial court journalized the second resentencing as "Journal Entry Clarifying Sentence."

{¶ 10} Two months later, on February 4, 2014, the probation department filed a second notice of community control violation. The trial court held a hearing on the merits of the violation on February 18, 2014. At the hearing, the State presented testimony from Dolby's probation officer and Dolby testified in his own defense. Following the presentation of evidence, the trial court found Dolby guilty of violating his community control while on judicial release and proceeded directly to sentencing.

{¶ 11} Before imposing a sentence for the second community control violation, the

trial court noted that when Dolby was resentenced the second time, the trial court informed him that his period of post-release control could be *up to* three years, when in fact, he should have been advised that he was subject to a mandatory three-year period of post-release control. The trial court explained that post-release control was mandatory because Dolby was sentenced for a third-degree felony whereby he attempted to cause physical harm to another. Since Dolby had not yet been released on post-release control, the trial court determined that it had authority to resentence Dolby to the correct period of post-release control, and did so during the sentencing hearing on the second community control violation. The trial court then revoked Dolby's community control, reimposed the original four-year prison sentence with 506 days of jail time credit, and noted that Dolby was liable for the remainder of the fine and costs originally imposed. On February 19, 2014, the trial court journalized this decision as "Journal Entry of Community Control Violation Disposition."

{¶ 12} Dolby now appeals from the trial court's decision revoking his community control and sentencing him to four years in prison. He raises two assignments of error for review.

First Assignment of Error

{¶ 13} Dolby's First Assignment of Error is as follows:

THE TRIAL COURT WAS WITHOUT JURISDICTION TO ISSUE THE DECEMBER 11, 2013 "JOURNAL ENTRY CLARIFYING SENTENCE" OR ITS FEBRUARY 19, 2014 "JOURNAL [ENTRY] OF COMMUNITY CONTROL VIOLATION DISPOSITION."

{¶ 14} Under his First Assignment of Error, Dolby maintains that he was issued a valid sentence during the first resentencing hearing reflected in the trial court’s February 25, 2013 journal entry. He therefore argues that the trial court did not have jurisdiction to resentence him again in December 2013, because trial courts lack jurisdiction to reconsider valid, final judgments in criminal cases unless correcting a void sentence or clerical error, which Dolby claims is not the case here. As a result, Dolby contends his second resentencing, which was reflected in the December 11, 2013 “Journal Entry Clarifying Sentence,” is void and that any violation of community control should be punished under the terms of the first resentencing entry of February 25, 2013, which did not state that his original four-year prison term would be reimposed if he violated community control. Therefore, Dolby claims the trial court did not have authority to sentence him to four years in prison for his second community control violation in February 2014. We disagree.

{¶ 15} Generally, “ ‘trial courts lack authority to reconsider their own valid final judgments in criminal cases.’ ” *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684, ¶ 20, quoting *State ex rel. White v. Junkin*, 80 Ohio St.3d 335, 338, 686 N.E.2d 267 (1997). (Other citation omitted.) However, it is well-established that “trial courts retain continuing jurisdiction to correct a void sentence and to correct a clerical error in a judgment[.]” *Id.*, citing *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19. When a judgment is void “ ‘ “[i]t is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment.” ’ ” *State v. Billiter*, 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960, ¶ 10, quoting *State v. Bezak*, 114 Ohio

St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 12, quoting *Romito v. Maxwell*, 10 Ohio St.2d 266, 267-268, 227 N.E.2d 223 (1967). “[W]here a sentence is void because it does not contain a statutorily mandated term, the proper remedy is * * * to resentence the defendant.” *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 23, citing *State v. Beasley*, 14 Ohio St.3d 74, 75, 471 N.E.2d 774 (1984).

{¶ 16} R.C. 2929.20(K) governs the granting of judicial release and the revocation thereof in the event an offender violates a condition of the release. The statute states, in relevant part, that:

If the court grants a motion for judicial release under this section, the court *shall order the release of the eligible offender, shall place the eligible offender under an appropriate community control sanction, under appropriate conditions, and under the supervision of the department of probation serving the court and shall reserve the right to reimpose the sentence that it reduced if the offender violates the sanction.* If the court reimposes the reduced sentence, it may do so either concurrently with, or consecutive to, any new sentence imposed upon the eligible offender as a result of the violation that is a new offense.

(Emphasis added.) R.C. 2929.20(K).

{¶ 17} The “shall” language in the statute indicates that the trial court is required to do three things upon granting judicial release: (1) release the offender; (2) place the offender under an appropriate community control sanction with appropriate conditions under the supervision of the probation department; and (3) reserve the right to reimpose the original sentence if the offender violates community control. “The clear and

unambiguous meaning of the phrase ‘shall reserve the right to reimpose the sentence that it reduced’ is that the court can reimpose the original sentence that it suspended when it granted judicial release in the event the offender violates the community control sanction.” *State v. Terry*, 10th Dist. Franklin No. 11AP-127, 2011-Ohio-6666, ¶ 12. “The statute does not authorize the trial court to increase or reduce the original sentence.” *Id.*

{¶ 18} In this case, the parties agree that the trial court’s original grant of judicial release in February 2010 is void due to the court failing to specify the duration of Dolby’s community control sanction. The issue raised by Dolby, however, concerns whether the subsequent resentencing of February 2013 was valid and whether it provided the trial court with authority to reimpose the original four-year prison term. The record indicates that the trial court believed its February 2013 resentencing was defective due to the court’s failure to state on the record that the original four-year prison sentence would be reimposed if Dolby violated the conditions of his judicial release. As previously noted, the trial court resentenced Dolby a second time in December 2013 to correct its perceived mistake.

{¶ 19} There is a split in authority as to whether a trial court must explicitly state on the record that it reserves the right to reimpose the original prison sentence if an offender violates the community control sanctions imposed following judicial release. Ohio’s Third and Fifth Appellate Districts take the position that a trial court does not have to explicitly reserve the right on the record because it is implicit under the circumstances of judicial release. See, e.g., *State v. Monroe*, 3d Dist. Defiance Nos. 4-01-27, 4-01-28, 2002 WL 418393, *2 (Mar. 18, 2002) (“By ordering the release of the offender pursuant to

R.C. 2929.20[(K)], the trial court has implicitly reserved the right to reimpose the original sentence in order for the offender to be released.”); *State v. Mann*, 3d Dist. Crawford No. 3-03-42, 2004-Ohio-4703, ¶ 12 (“By virtue of being subject to the specific term of imprisonment imposed at the original sentencing hearing, it cannot be said that the eligible offender has not been informed of the specific term of imprisonment conditionally reduced by the trial court’s granting of early judicial release.”); *State v. Smith*, 3d Dist. Union No. 14-06-15, 2006-Ohio-5972, ¶ 12; *State v. Durant*, 5th Dist. Stark No. 2005 CA 00314, 2006-Ohio-4067, ¶ 17 (“Although it would be preferred that a trial court explicitly reserve, on the record or in the judgment entry, its right to reimpose the original sentence, the failure of the trial court to do so does not deprive the court of authority to later reimpose the conditionally reduced sentence. * * * [B]y ordering judicial release, the trial court has implicitly reserved the right to reimpose the original sentence in order for the defendant to be released.”); *State v. James*, 5th Dist. Richland No. 2007-CA-0009, 2008-Ohio-103, ¶ 35.

{¶ 20} In contrast, Ohio’s Fourth, Tenth, and Eleventh Appellate Districts have concluded that the trial court must expressly reserve the right to reimpose the original prison sentence on the record. See, e.g., *State v. Evans*, 4th Dist. Meigs No. 00CA003, 2000 WL 33538779, *3 (Dec. 13, 2000); *State v. Perry*, 4th Dist. Athens No. 13CA12, 2013-Ohio-4066, ¶ 16; *State v. Hart*, 4th Dist. Athens No. 13CA8, 2014-Ohio-3733, ¶ 28 (“In order to reserve the right to reimpose the original sentence under R.C. 2929.20, we have previously held that a trial court must expressly reserve, on the record, the right to reimpose the original sentence when it grants judicial release”); *State v. Darthard*, 10th Dist. Franklin Nos. 01AP-1291, 01AP-1292, 01AP-1293, 2002-Ohio-4292, ¶ 11; *Terry* at

¶ 10 (“Coincident with granting judicial release, a trial court shall reserve on the record the right to reimpose the original sentence on an offender if the offender violates the community control sanction”); *State v. Bazil*, 11th Dist. Trumbull No. 2003-T-0063, 2004-Ohio-5010, ¶ 23.

{¶ 21} In *Evans*, the Fourth District further explained that:

The provisions of R.C. 2929.20[(K)] do not expressly indicate what should happen if a trial court fails to reserve the right to reimpose an original sentence upon violation of a community control sanction during judicial release, and our research has found no case law addressing this particular issue. However, the plain wording of the statute suggests that the original sentence could not be reimposed by the trial court absent the reservation of such a right. Were it otherwise, and if the trial court was able to simply reimpose that sentence, the Ohio General Assembly would presumably have written the statute in that fashion rather than requiring a reservation of the right. Further, the statute would not go on to speak of reimposing the sentence “pursuant to this reserved right,” but would have allowed for reimposition of the sentence irrespective of any action on the part of the trial court. It then follows that in the absence of an express reservation of the right to do so, a trial court has no authority to reimpose the sentence it reduced after a violation of community control sanction(s) on judicial release. In the case sub judice, we find no such express reservation of right and we therefore conclude that the trial court erred in reimposing its original sentence after appellant violated the terms of his judicial release

from prison on the first count of his prior conviction.

Thus, in the absence of a reserved right to [reimpose] the original prison sentence, the trial court should have treated appellant's violation of judicial release as it would have treated any other violation of a community control sanction.

Evans, 4th Dist. Meigs No. 00CA003, 2000 WL 33538779 at *3-4.

{¶ 22} In the foregoing interpretation of R.C. 2929.20(K), which was then codified as R.C. 2929.20(I), the Fourth District relies on the language: "If the court reimposes the reduced sentence *pursuant to this reserved right*, it may do so either concurrently with, or consecutive to, any new sentence imposed upon the eligible offender * * * [.]" (Emphasis added.) *Evans*, at *3. We note that effective March 7, 2009, Am.Sub.H.B. No. 130, 2008 Ohio Laws 173 amended R.C. 2929.20(K) to omit the phrase "pursuant to this reserved right." This weakens the Fourth District's reasoning for concluding that the trial court lacks authority to reimpose the original sentence if the right to do so is not expressly reserved, as R.C. 2929.20(K) now provides that:

If the court grants a motion for judicial release under this section, the court shall order the release of the eligible offender, shall place the eligible offender under an appropriate community control sanction, * * * *and shall reserve the right to reimpose the sentence that it reduced if the offender violates the sanction.*

(Emphasis added.)

{¶ 23} Regardless of the split in authority, the holding in *Evans*, and the amendment to R.C. 2929.20(K), in this case we need not determine whether R.C.

2929.20(K) requires a trial court to expressly reserve its right to reimpose the original prison sentence on the record because under either approach, Dolby was appropriately sentenced to four years in prison after he violated the conditions of his judicial release.

{¶ 24} If R.C. 2929.20(K) *does not* require a trial court to expressly reserve its right to reimpose the original prison sentence when placing an offender on judicial release, and the right is instead implied from the circumstances, then the trial court in this case could have reimposed the original four-year prison sentence pursuant to the first resentencing in February 2013, despite its failure to expressly reserve its right to do so. As a result, the trial court's second resentencing in December 2013 would have been superfluous, but nevertheless, harmless.

{¶ 25} If R.C. 2929.20(K) *does* require a trial court to expressly reserve its right to reimpose the original prison sentence when placing an offender on judicial release, then the failure to comply with that term of the statute would render the February 2013 resentencing void, and it would be as if Dolby was never granted judicial release nor sentenced to community control. See *Billiter*, 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960 at ¶ 10. In that circumstance, it was appropriate for the trial court to resentence Dolby a second time in December 2013, to expressly state on the record that the original four-year prison term would be reimposed upon Dolby violating the conditions of his judicial release. Therefore, even if R.C. 2929.20(K) mandates the trial court to expressly reserve its right to reimpose the original prison sentence on the record, the resentencing of December 2013 corrected the trial court's mistake and satisfied that requirement.

{¶ 26} Under either of the foregoing scenarios, the trial court had authority to

reimpose the original four-year prison sentence upon Dolby violating the conditions of his judicial release. Accordingly, Dolby's First Assignment of Error is overruled.

Second Assignment of Error

{¶ 27} Dolby's Second Assignment of Error is as follows:

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED R.C.
2901.04 WITH THREE SUCCESSIVE ATTEMPTS TO RESENTENCE
THE DEFENDANT.

{¶ 28} Under his Second Assignment of Error, Dolby contends that it was an abuse of discretion and a violation of R.C. 2901.04(B) for the trial court to take four years and three attempts to correctly sentence him. As a result of this, Dolby claims that the four-year prison sentence he received for his community control violation should be overturned. We again disagree.

{¶ 29} R.C. 2901.04(B) provides a rule of statutory construction stating that the "[r]ules of criminal procedure and sections for the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice." Therefore, R.C. 2901.04(B) governs how the rules of criminal procedure and related statutes should be interpreted.

{¶ 30} In this case, the basis of Dolby's R.C. 2901.04(B) claim is unclear. Dolby failed to state what statute or rule governing criminal procedure was incorrectly interpreted by the trial court under R.C. 2901.04(B) and does not otherwise explain how the trial court violated the statute. He merely states that the trial court violated R.C. 2901.04(B) by taking four years and three attempts to sentence him correctly, which has

nothing to do with statutory interpretation. Because he has failed to raise a claim involving the interpretation and construction of a rule of criminal procedure or related statute, we find no merit to his claim that R.C. 2901.04(B) was violated.

{¶ 31} We also find that Dolby’s abuse of discretion claim lacks merit. “A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary.” *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). “It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.” *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶ 32} Here, it cannot be said that the trial court acted unreasonably in attempting to correct the sentencing mistakes it made over the course of this case. Because the trial court did nothing more than strive to correctly sentence Dolby, we do not find that the multiple resentencings amount to an abuse of discretion.

{¶ 33} Dolby’s Second Assignment of Error is overruled.

Conclusion

{¶ 34} Having overruled both assignments of error raised by Dolby, the judgment of the trial court is affirmed.

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FROELICH, P.J., concurs in judgment only.

HALL, J., concurring:

{¶ 35} I agree with and concur with the result we have reached in this case. I write separately to express my belief, consistent with the holdings by the Third and Fifth Districts cited in the lead opinion, that a trial court placing a prisoner on judicial release does not have to specifically reserve the right to reimpose the remainder of the offender's sentence if there is a violation of the conditions of release. The very nature of judicial release is suspension of the offender's previously imposed sentence. Upon violation, the remainder of the sentence is reimposed.

{¶ 36} In my view, the opinions of those districts that hold a trial court must specifically reserve the right to reimpose the balance of the original sentence do not logically follow the statute which allows a grant of judicial release in the first place. Those districts holding that R.C. 2929.20(K) has mandatory language that requires that a court granting judicial release "shall reserve the right to reimpose the sentence," do not address the consequence of their strict construction. What is the consequence of a failure to strictly comply with mandatory language? The grant of judicial release is ineffective and incomplete, or, to use that dreaded terminology, void. Therefore the offender was never properly placed on judicial release and should be returned to prison. An offender cannot have it both ways. If the reservation of prison sentence was mandatorily required in order to grant the release, then the release itself is ineffective.

{¶ 37} Given the nature of judicial release and the illogical result of negating judicial release by blind application of statutory language I agree with the Third and Fifth Districts that upon a grant of judicial release the trial court retains the inherent ability to reimpose the balance of an offender's prison sentence upon a violation of the release

terms.

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