[Cite as *State v. Fankle*, 2015-Ohio-1581.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	Appellate Case Nos. 26350
	:	26351
Plaintiff-Appellee	:	26352
	:	
v.	:	Trial Court Case Nos. 14-CRB-1796
	:	14-CRB-3975
JAMMIE R. FANKLE	:	14-CRB-4892
	:	
Defendant-Appellant	:	(Criminal Appeal from
	:	Dayton Municipal Court)
	:	

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O P I N I O N

Rendered on the 24th day of April, 2015.

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HALL, J.

{¶ 1} This matter comes before us on three consolidated appeals filed by

defendant-appellant Jammie R. Fankle.

{¶ 2} In appellate case numbers 26350 and 26351, Fankle appeals from the trial court's revocation of community control and its imposition of previously suspended jail sentences. In appellate case number 26352, Fankle appeals from his conviction and sentence following a guilty plea to violating a protection order.

{¶ 3} The record reflects that Fankle pled guilty to misdemeanor drug abuse in appellate case number 26350. In April 2014, he received a 180-day suspended jail sentence with credit for twelve days served and was placed on community control.

{¶ 4} Shortly thereafter, Fankle pled guilty to misdemeanor charges of domestic violence and carrying a concealed weapon in appellate case number 26351. In June 2014, he received concurrent 180-day jail sentences for these two convictions. The trial court gave him credit for fourteen days served, ordered him to serve another sixteen days, suspended the remaining balance of 150 days, and placed him on community control.

{¶ 5} Finally, in appellate case number 26352, Fankle pled guilty to a misdemeanor charge of violating a protection order. In July 2014, the trial court imposed a 180-day jail sentence with credit for fifteen days served. Based in part on this new conviction, the trial court also revoked Fankle's community control in the two prior cases and reinstated the remainder of the 180-day jail terms in each of them. Of significance here, the trial court ordered Fankle to serve each of his three jail sentences consecutively.

{¶ 6} In his first assignment of error, Fankle contends the trial court erred in ordering him to serve the jail terms in the first two cases (appellate case numbers 26350 and 26351) consecutively after revoking community control. Fankle does not contest the

trial court's ability to order the sentence in the last case (appellate case number 26352) to be served consecutive to the first two. He argues, however, that the trial court could not make the first two sentences consecutive after revoking community control because they were not originally imposed consecutively.

{¶ 7} Upon review, we find Fankle's argument to be persuasive. As set forth above, the trial court first imposed a 180-day jail sentence for misdemeanor drug abuse in appellate case number 26350. That sentence could not have been imposed consecutive to anything because no other conviction existed. But when the trial court later imposed and partially suspended another 180-day jail sentence in appellate case number 26351 for domestic violence and carrying a concealed weapon, it could have made that sentence consecutive to the first 180-day sentence. It did not do so, however, and under R.C. 2929.41(B)(1) misdemeanor jail sentences are to be served concurrently unless the trial court specifies consecutive service. Therefore, the record supports a finding that the trial court originally imposed concurrent jail terms in appellate case numbers 26350 and 26351.

{¶ 8} When the trial court subsequently revoked community control and reinstated the previously suspended sentences, it was not imposing a new sentence. Rather, it was simply ordering into execution jail sentences it already had imposed. Although the trial court attempted to make the previously suspended sentences consecutive when revoking community control, we find no authority permitting such modification. An entry imposing a suspended sentence and placing a defendant on community control is a final judgment. *See* R.C. 2951.10. A court has no authority to reconsider its own valid final judgments in criminal cases. (Citation omitted.) *State ex rel. Hansen v. Reed*, 63 Ohio St. 3d 597, 599,

589 N.E.2d 1324, 1326 (1992). We are aware of no exception to this rule for misdemeanor cases involving the imposition of suspended sentences.

{¶ 9} We do recognize that prior to January 1, 2004, revocation proceedings were governed by R.C. 2951.09, which, upon revocation, permitted a trial court to impose "any sentence that originally could have been imposed." Relying on R.C. 2951.09, the Ohio Supreme Court held in *State v. McMullen*, 6 Ohio St.3d 244, 452 N.E.2d 1292 (1983), that a more severe sentence than originally imposed and suspended could be imposed after a revocation proceeding. Under the rule of *McMullen*, the trial court here arguably could have modified Fankle's previously suspended concurrent sentences and ordered them to be served consecutively upon revoking his community control. Notably, however, *McMullen* observed that modification was permissible "within the standards of state law." The specific law upon which *McMullen* relied to find modification of a sentence permissible upon revocation of probation was R.C. 2951.09. That statute was repealed effective January 1, 2004. *See State ex rel. Hemsley v. Unruh*, 128 Ohio St.3d 307, 2011-Ohio-226, 943 N.E.2d 1014, ¶ 13 (recognizing the statute's repeal). Thus we do not consider *McMullen* as authority for the consecutive sentences imposed here for the first two offenses.

{¶ 10} Misdemeanor community control sanctions are governed by R.C. 2929.25, which was rewritten effective January 1, 2004. In relevant part, R.C. 2929.25 gives a trial court two options when sentencing a misdemeanor offender: (1) directly impose a sentence that consists of a community control sanction; or (2) impose a jail sentence, suspend some or all of that sentence, and place the offender on community control. R.C. 2929.25(A)(1)(a) and (b). If a trial court elects to sentence an offender directly to

community control, it must notify the offender of certain things, including the fact that a violation of community control may result in the imposition of "a definite jail term from the range of jail terms authorized for the offense[.]" R.C. 2929.25(A)(3)(c).

{¶ 11} In the present case, the trial court did not sentence Fankle directly to community control. Rather, it sentenced him to a 180-day jail term in each of the first two cases. It then suspended those terms and placed him on community control. When imposing a partially suspended jail sentence in the second case, the trial court said nothing about the possibility of consecutive jail terms if community control were revoked. Therefore, we are compelled to conclude that the trial court imposed concurrent jail terms in appellate case numbers 26350 and 26351. That being so, Fankle can be required to serve only one180-day term in those two cases minus jail-time credit. In the third case (appellate case number 26352), the trial court then had discretion to (and did) impose another 180-day term consecutive to the concurrent 180-day terms in the first two cases, resulting in an aggregate jail term of 360 days in all three cases.

{¶ 12} In opposition to the forgoing conclusion, the State asserts that the trial court never had the first two cases before it, together, until Fankle admitted violating community control in both cases. The State reasons that a court "cannot be expected to determine that jail time run consecutively with any possible, hypothetical future criminal charges or probation violations when the court has but one case in front of it." (Appellee's brief at 10). We disagree with the State's premise. When imposing a partially suspended jail sentence in Fankle's second case, we see no reason why the trial court could not have ordered that sentence to be served consecutive to the suspended sentence imposed in the first case, or at least inform the defendant that the consequence of community control violation

could involve consecutive sentencing. Contrary to the State's argument, doing so would not have required the trial court to foresee the future or to rely on hypothetical conduct.

{¶ 13} The State also contends the trial court's sentencing decision is supported by *State v. Richter*, 12th Dist. Clermont No. 2014-06-040, 2014-Ohio-5396. Again, we disagree. In *Richter*, the Twelfth District faced a different situation. The defendant there received a partially suspended jail sentence in municipal court and was placed on community control for a misdemeanor OVI conviction. Thereafter, he was convicted of a felony OVI offense in common pleas court and sentenced to prison. As a result, the municipal court revoked community control and ordered the defendant to serve the remainder of his suspended jail sentence consecutive to the new prison sentence he had received. On appeal, the Twelfth District found nothing in R.C. 2929.25(D), which addresses the consequences of violating community control, to prohibit the consecutive sentence imposed in that case, which the court characterized as involving a "unique situation." *Id*. at ¶ 11. The *Richter* court reasoned that "[t]o hold otherwise would effectively eliminate any penalty for [the defendant's] admitted violation of his community control sanctions through the commission of a new felony offense." *Id*. The Twelfth District also found no violation of R.C. 2929.41(B)(3), which governs the imposition of consecutive misdemeanor and felony sentences. *Id*. at ¶ 12.

{¶ 14} Even if we accept the Twelfth District's reasoning,[1] the present case is

[1]The Twelfth District relied largely on R.C. 2929.25(D)(2)(c), which provides that if a misdemeanor offender violates a condition of community control, the sentencing court may impose "[a] combination of community control sanctions, including a jail term." The Twelfth District noted that nothing in R.C. 2929.25(D) "prohibits the sentencing court from ordering the sentence to be served consecutively to any other jail term or sentence of imprisonment." *Richter* at ¶ 10. On the other hand, the statute does not authorize consecutive sentences either. Therefore, in our analysis above, we have looked

distinguishable. As an initial matter, it does not involve the imposition of consecutive misdemeanor and felony sentences. Therefore, the statute that formed the primary basis of the defendant's argument in *Richter*, R.C. 2929.41(B)(3), has no applicability. Moreover, unlike the present case, the municipal court in *Richter* initially could not have imposed the partially suspended misdemeanor jail sentence consecutive to anything because no other sentence existed when it was imposed. Only after the defendant received a felony sentence in common pleas court did the issue of consecutive sentencing arise. In contrast, the trial court in the present case originally could have imposed the partially suspended jail sentence in Fankle's second case consecutive to the suspended jail sentence in his first case. But it did not. The Twelfth District's concern about effectively eliminating any penalty for a community control violation through the commission of a new offense also does not exist here. Again, we believe the trial court properly could impose a 180-day term in Fankle's third case consecutive to concurrent 180-day jail terms it originally imposed in the first two cases, resulting in an aggregate jail term of 360 days in all three cases. Under this approach, Fankle does receive a penalty for his community control violations and for the new offense that led to revocation. Finally, we express no opinion about how the revocation of supervision and consecutive

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elsewhere to determine whether the trial court could impose consecutive sentences upon revoking Fankle's community control. We note too that unlike a situation where a trial court directly sentences a defendant to community control and then later imposes a jail term on revocation (*see* R.C. 2929.25(A)(1)(a)), the trial court here directly imposed a jail sentence (*see* R.C. 2929.25(A)(1)(b)), which it suspended, and placed Fankle on community control. As set forth above, when the trial court later revoked community control and reinstated the previously suspended sentences, it was not imposing a new sentence. Rather, it was simply ordering into execution jail sentences it already had imposed. That being so, the trial court had no authority to modify what were previously concurrent sentences by making them consecutive, particularly where the trial court had required Fankle to serve a portion of one of them before suspending the remainder.

sentencing issue may play out when an offender on supervision is convicted of an offense in a different jurisdiction, is sentenced there and returns for revocation and sentencing in the first court. That is not the case before us.

{¶ 15} Based on the foregoing analysis, we sustain Fankle's first assignment of error. We hold that the trial court erred in ordering consecutive service of the previously suspended concurrent jail terms after revoking community control in appellate case numbers 26350 and 26351.

{¶ 16} In his second assignment of error, Fankle contends the trial court's imposition of three consecutive 180-day jail terms upon revocation of community control is excessive and constitutes an abuse of discretion. More specifically, he claims the trial court improperly based its sentencing decision on just two overriding factors: (1) vindicating its own sentencing power and (2) acceding to the victim's wishes.

{¶ 17} When sentencing for a misdemeanor offense, a trial court is guided by the "overriding purposes of misdemeanor sentencing," which are to protect the public from future crime by the offender and others and to punish the offender. R.C. 2929.21(A); *State v. Collins*, 2d Dist. Greene No. 2012–CA–2, 2012-Ohio-4969, ¶ 9. "To achieve those purposes, the sentencing court [must] consider the impact of the offense upon the victim and the need for changing the offender's behavior, rehabilitating the offender, and making restitution to the victim of the offense, the public, or the victim and the public." R.C. 2929.21(A). The sentence imposed must be "reasonably calculated to achieve the two overriding purposes of misdemeanor sentencing * * *, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar offenses committed by similar

offenders." R.C. 2929.21(B); *Collins* at ¶ 9.

{¶ 18} "A trial court is also required to consider the nature and circumstances of the offense, whether there was a history of persistent criminal activity or character that reveals a substantial risk of the offender committing another offense, and numerous other factors related to the offender and the offense. R.C. 2929.22(B). However, in misdemeanor sentencing, there is no requirement that a trial court specifically state the reasons for its sentence on the record." (Citations omitted) *Id*. at ¶ 10. "If the sentence imposed is within permissible statutory limits, a reviewing court will presume that the trial court considered the sentencing factors in R.C. 2929.22(B), absent a showing to the contrary." *State v. Johnson*, 2d Dist. Greene No. 04–CA–126, 2005-Ohio-6826, ¶ 9. We review misdemeanor sentences for an abuse of discretion. *State v. Peagler*, 2d Dist. Montgomery No. 24426, 2012-Ohio-737, ¶ 3.

{¶ 19} With the foregoing standards in mind, we turn now to the sentences the trial court imposed. In light of our resolution of the first assignment of error above, the remaining issue is whether the record supports ordering Fankle to serve the 180-day sentence in his third case (appellate case number 26352) consecutive to the concurrent 180-day sentences in his first two cases (appellate case numbers 26350 and 26351). We conclude that the record does support the aggregate 360-day sentence.

{¶ 20} As set forth above, Fankle pled guilty in the third case to violating a protection order. At sentencing, his attorney urged the trial court to consider his "alcoholism issues," which counsel claimed had impacted Fankle's poor decisions. (Tr. at 44). The trial court then heard from the victim, who testified that she feared Fankle and that his conduct had caused her severe distress, resulting in migraine headaches and

prompting her to move away from her residence to an undisclosed location. (*Id*. at 45). The victim testified that she was afraid Fankle would be "vindictive" and would try to "come back." (*Id*.). Defense counsel then argued for suspended jail time in the protection-order case as well as continued suspended jail time in the first two cases, which were back before the court on revocation proceedings. Defense counsel asked the trial court to order Fankle to "attend programs" through community control. (*Id*. at 46). The trial court responded: "* * * [T]he problem is I've given him that opportunity and he kind of blew it in our face. For the case from April, you know, he was on probation. He didn't, he did complete the drug and alcohol evaluation at Crisis Care and he was referred for outpatient treatment but he didn't cooperate, he didn't show up, he didn't do anything he was supposed to do." (*Id*.).

{¶ 21} The trial court proceeded to impose a 180-day jail sentence in the protection-order case. It ordered that sentence to be served consecutive to the 180-day jail sentences in the two earlier cases in which it revoked community control and ordered the previously-suspended sentences into execution. We see no abuse of discretion. The record reflects that Fankle was given opportunities on community control. Despite those opportunities, he failed to follow through and continued to violate the law. He was sentenced in the first case in April 2014. In that case, he avoided a domestic-violence conviction because the victim failed to appear and pled only to a drug-abuse charge. When it suspended his sentence, the trial court told him that he would be required to serve the remainder of his 180-day sentence if he violated community control. (Tr. at 15). Less than two months later, Fankle appeared in court on the second case in June 2014 and pled guilty to domestic violence and a concealed-weapon charge in exchange for the

dismissal of additional charges. The trial court imposed a partially-suspended 180-day jail sentence along with a no-contact order regarding the victim. The trial court did so despite being informed by the prosecutor that Fankle had been making calls from jail to try to get the victim not to appear in court and that these calls violated an existing protection order. (*Id*. at 24-25). The trial court warned Fankle that if he appeared in court again it would impose the remainder of the partially-suspended jail sentence. (*Id*. at 31). One month later, Fankle appeared in court again in July 2014 and pled guilty to a new charge of violating a protection order involving the same victim. The record reflects that after being released from jail in the second case, Fankle had proceeded directly to the victim's house despite being told not to. (*Id*. at 37).

{¶ 22} In light of Fankle's repeated, flagrant disregard of the trial court's admonitions, his failure to take advantage of opportunities given to him, his recurring criminal conduct over a short time span, and the victim's expressions of fear and distress, we cannot say the trial court abused its discretion in ordering his sentence in the protection-order case to be served consecutive to the previously-suspended sentences imposed in the two earlier cases. As noted above, however, those previously-suspended sentences themselves were required to be served concurrently, resulting in an aggregate jail sentence of 360 days in all three cases minus applicable jail-time credit. Fankle's second assignment of error is overruled.

{¶ 23} In his third assignment of error, Fankle alleges that he received ineffective assistance of counsel during the plea-bargaining process. Specifically, he contends he possessed a viable affirmative defense to the concealed-weapon charge in the second of his three cases (appellate case number 26351) and that his attorney provided

prejudicially deficient representation by advising him to plead guilty.

{¶ 24} We find this assignment of error unpersuasive for several reasons. As an initial matter, counsel's advice to Fankle is not part of the record. It does not follow from his guilty plea that counsel necessarily advised him to enter it. We also cannot find on this record that entering the plea could not have been sound trial strategy. In exchange for the plea, three other charges were dismissed, and the State agreed not to pursue possible charges for violating a protection order. In light of these benefits, counsel reasonably may have determined that the plea was wise even if a potential affirmative defense to the concealed-weapon charge did exist. Finally, it is too late for Fankle to raise his ineffective-assistance claim in any event. The judgment entry of conviction and sentence in the concealed-weapon case was filed on June 16, 2014. Fankle did not appeal from it. Instead, he appealed on August 14, 2014 after the trial court revoked community control on July 15, 2014 and ordered him to serve the previously-suspended sentence. If Fankle wanted to raise an ineffective-assistance claim concerning his plea in the concealed-weapon case, he was required to file a timely notice of appeal from the trial court's June 16, 2014 judgment entry. For the foregoing reasons, the third assignment of error is overruled.

{¶ 25} Based on the reasoning set forth above, the trial court's judgment is reversed with respect to its order requiring Fankle to serve his jail sentences in the first two cases (appellate case numbers 26350 and 26351) consecutively. The cause is remanded for resentencing to order the jail sentences in those cases to be served concurrently. In all other respects, the trial court's judgment is affirmed.

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FAIN, J., concurs.

FROELICH, P.J., concurring:

{¶ 26} In addressing Fankle's argument that the trial court's sentence upon revocation of his community control was excessive and an abuse of discretion, the opinion cites to *State v. Johnson*, 2d Dist. Greene No. 04-CA-126, 2005-Ohio-6826, for the proposition that "[i]f the sentence imposed is within permissible statutory limits, a reviewing court will presume that the trial court considered the sentencing factors in R.C. 2929.22(B), absent a showing to the contrary."

{¶ 27} *Johnson* cites to *State v. Wagner*, 80 Ohio App.3d 88, 96, 608 N.E.2d 852 (12th Dist.1992), which cites to *State v. Whitt*, 12th Dist. Butler No. CA89-06-091, 1990 WL 82592 (June 18, 1990). *Whitt*, in turn, cites to *State v. Gould*, 68 Ohio App.2d 215, 216-17, 428 N.E.2d 866 (1st Dist.1980), which held that, in the absence of a showing to the contrary, a judge is presumed to have considered the statutory factors if the sentence imposed is within statutory limits. *See also Columbus v. Jones* , 39 Ohio App.3d 87, 89, 529 N.E.2d 947 (10th Dist.1987) ("A judge is presumed, in the absence of a showing to the contrary, to have considered in the sentencing process the standards mandated by R.C. 2929.22 and 2929.12."), citing *Gould*.

{¶ 28} If this is simply an acknowledgement that an appellant has the burden of showing error, I agree. However, a trial court's (even presumptive) consideration of sentencing standards and factors must be based on facts in the record, as it was in these cases. A silent record, i.e., a record devoid of any facts upon which to apply the statutory standards and factors, should not be given the same conceit.

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