[Cite as *State v. Bourne*, 2021-Ohio-3329.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
CARROLL COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

KYLE G. BOURNE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 CA 0947

Criminal Appeal from the
Court of Common Pleas of Carroll County, Ohio
Case No. 18 CR 6302

BEFORE:
David A. D'Apolito, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed and Remanded.

Atty. Steven D. Barnett, Carroll County Prosecutor and *Atty. Michael J. Roth,* Chief Assistant Prosecuting Attorney, 7 East Main Street, Carrollton, Ohio 44615, for Plaintiff-Appellee and

Atty. Brian A. Smith, Brian A. Smith Law Firm, LLC, 755 White Pond Drive, Suite 403, Akron, Ohio 44320, for Defendant-Appellant.

Dated: September 15, 2021

D'APOLITO, J.

{¶1} Appellant, Kyle Bourne appeals the amended judgment entry of the Carroll County Court of Common Pleas imposing an eighteen-month sentence for two stipulated community control violations. He contends that the violations – the first, two outstanding warrants in different jurisdictions, and, the second, his failure to report to the Carroll County Adult Probation Department ("CCAPD") for three months – are technical violations, and any sentence imposed beyond the 180-day statutory cap on technical violations in R.C. 2929.15(B)(1)(c)(ii) is contrary to law. For the following reasons, Appellant's sentence is affirmed, however this matter is remanded to the trial court to amend the judgment entry to apply 30 days of jail-time credit to Appellant's eighteen-month sentence.

FACTS AND PROCEDURAL HISTORY

{¶2} On November 9, 2018, Appellant was indicted for one count of Aggravated Trafficking in Drugs, in violation of R.C. 2925.03(A)(1), a felony of the fourth degree; one count of Aggravated Possession of Drugs, in violation of R.C. 2925.11(A), a felony of the fifth degree; one count of Possessing Criminal Tools, in violation of R.C. 2923.24(A), a felony of the fifth degree; one count of Possession of Drugs, in violation of R.C. 2925.11(A), a misdemeanor of the first degree; and one count of Drug Paraphernalia Offenses, in violation of R.C. 2925.14(C)(1), a misdemeanor of the fourth degree. Appellant is a long-time alcohol and drug abuser.

{¶3} On January 3, 2019, Appellant pleaded guilty to the first three counts of the indictment, and the remaining counts were nolled by motion of the state. On January 17, 2019, the trial court imposed a sentence of five years of community control and a $500 fine.

{¶4} Relevant to this appeal and according to the terms of his community control sanction, Appellant was prohibited from engaging in any "further illegal activity or offensive course of conduct," and was required to report "as directed to the [CCAPD], but not less than once per month in person." Additionally, Appellant was also required to

successfully complete a program of counseling and treatment for drug and alcohol abuse at The Landing at Cedar Ridge.

{¶5} On February 5, 2020, an officer of the CCAPD filed a "motion/affidavit request for capias," which states the two violations at issue in this appeal:

> Term #1 - Defendant shall engage in no further illegal activity or offensive course of conduct. To wit: Defendant has outstanding warrants in Stark County (Nov. 2019), and New Albany P.D. (Dec. 2019).
>
> Term #2 – Defendant shall report as directed to the CCAPD, but not less than once per month in person. To wit: Defendant has failed to report as directed since October 2019.

(2/5/20 Mot., p. 1.)

{¶6} Appellant committed a previous violation of the terms of his community control having tested positive for methamphetamine on June 10, 2019. On July 8, 2019, the trial court elected to impose a thirty-day jail sentence, rather than revoke Appellant's community control sanction.

{¶7} At the merits hearing on the 2020 violations, held on September 4, 2020, Appellant waived his right to offer evidence and stipulated to both violations. The CCAPD officer provided the following unsworn statement at the hearing:

> [P]art of my recommendation is that um . . . we would like to clo, close supervision on [Appellant]. Um . . . the uh . . . the facts of the offense, [Appellant] came up from Fort Washington, Ohio to a park in the Village of Minerva. Uh . . . he had uh . . . legal [sic] drugs for sale on Facebook. Um . . . he received community control for that and has absconded since receiving that. And my greatest fear was that while he absconded was [sic], maybe he was out doing that again. While back, it appears he may have been doing that again. He was charged one [sic] count, a felony three uh . . . drug offense. Uh . . . for this offense it's, it's our position that he is uh . . . not appropriate for any uh . . . community control.

(9/8/20 Violation Hrg., 6-7.)

{¶8} Appellant's counsel responded that he "deem[ed] [the stipulated violations] to be technical violations." (*Id*., 7.) He continued, "[Appellant] has not even been arraigned on the felony charge. It's not anything that we stipulated to or agreed to. I can't even let him speak about that case 'cause [sic] it's not even started." (*Id.*)

{¶9} Appellant conceded at the hearing that his previous multiple efforts at rehabilitation had failed, but he asked the trial court for another chance. After reviewing the record, the trial court concluded at the hearing that Appellant "violated the terms of [his] probation," and "walked away from the treatment program." (*Id*., 12.) In the amended judgment entry, the trial court opined that "[Appellant's] community control violations are substantive to his treatment and rehabilitation and therefore not technical violations." (9/8/20 Amended J.E., p. 1.)

{¶10} The Amended Judgment Entry reads, in pertinent part:

> In accordance with [R.C.] 2929.19(B)(5), the Court notified and indicated to the defendant that the specific prison term reserved and which may be imposed as a sanction for a violation under Count One is eighteen (18) months. The Court notified and indicated to the defendant that the specific prison term reserved and which may be imposed as a sanction for a violation under Count Two is twelve (12) months. Furthermore, the Court notified and indicated to the defendant that the specific prison term reserved and which may be imposed as a sanction for a violation under Count Three is twelve (12) months. **The Court further ordered that the sentence reserved under Counts One, Two, and Three be served concurrently.**

(Emphasis in original)(1/17/19 Amended J.E., p. 4.)

{¶11} On December 11, 2020, we granted Appellant's motion to file a delayed appeal.

ANALYSIS

{¶12} Appellant advances a single assignment of error:

BECAUSE THE TRIAL COURT SENTENCED APPELLANT TO A SENTENCE GREATER THAN 180 DAYS ON A "TECHNICAL VIOLATION" OF COMMUNITY CONTROL AS DEFINED IN R.C. 2929.15(B)(1), THE TRIAL COURT'S SENTENCE OF APPELLANT WAS CONTRARY TO LAW.

{¶13} In *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, the Ohio Supreme Court opined that "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id.*

{¶14} R.C. 2929.15(B)(1)(c)(ii) provides that "[i]f the conditions of a community control sanction are violated," the sentencing court may sentence the offender to a prison term, subject to the following limitation:

> If the prison term is imposed for any technical violation of the conditions of a community control sanction imposed for a felony of the fourth degree that is not an offense of violence and is not a sexually oriented offense or for any violation of law committed while under a community control sanction imposed for such a felony that consists of a new criminal offense and that is not a felony, the prison term shall not exceed one hundred eighty days.

R.C. 2929.15(B)(1)(c)(ii). The legislature did not define the phrase "technical violation."

{¶15} The interpretation of a statute is a question of law, subject to de novo review on appeal. *State v. Vanzandt*, 142 Ohio St.3d 223, 2015-Ohio-236, 28 N.E.3d 1267, ¶ 6. The rule of lenity codified in R.C. 2901.04(A) requires that a criminal sentencing statute must be strictly construed against the State and liberally construed in favor of the accused. Nonetheless, courts should attempt to give effect to every word, phrase, sentence and part of the statute and to avoid an interpretation that would restrict, constrict, qualify, narrow, enlarge or abridge the General Assembly's wording. *State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 18.

{¶16} When analyzing statutory provisions, the paramount concern is to ascertain and give effect to the intention of the General Assembly. *Id.* at ¶ 7. Courts primarily seek to determine legislative intent from the plain language of a statute. If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary. *Id.*

{¶17} In the absence of a definition of a word or phrase used in a statute, words are to be given their common, ordinary, and accepted meaning." *State v. Black*, 142 Ohio St.3d 332, 2015-Ohio-513, 30 N.E.3d 918, ¶ 39. The Ohio Supreme Court has previously observed that prominent legal dictionaries define "technical" as immaterial and not substantive. *State v. Nelson*, 162 Ohio St.3d 338, 2020-Ohio-3690, 165 N.E.3d 1110, ¶ 18.

{¶18} For example, Black's Law Dictionary defines "technical" as "[i]mmaterial, not affecting substantial rights, without substance." Black's Law Dictionary 1463 (6th Ed.1990). Similarly, "technical" is defined in Ballentine's Legal Dictionary and Thesaurus as "[i]nvolved in detail or in form rather than in a principle or in substance." Lynton, Ballentine's Legal Dictionary and Thesaurus 661 (1995).

{¶19} In *Nelson, supra,* the Ohio Supreme Court was asked to determine whether the term "nontechnical" is synonymous with criminal conduct. The *Nelson* Court opined that the determination of whether a violation is a "technical violation" under R.C. 2929.15(B)(1)(c) does not turn on whether the conduct at issue is criminal. A violation is "nontechnical" if, considering the totality of the circumstances, the violation concerns a condition of community control that was specifically tailored to address matters related to the defendant's misconduct or if it can be deemed a substantive rehabilitative requirement which addressed a significant factor contributing to the defendant's misconduct. *Nelson* at ¶ 26. On the other hand, a violation is "technical" when the condition violated is akin to an administrative requirement facilitating community control supervision. *Id.*

{¶20} There is no single factor that determines whether a violation is technical or nontechnical. The statute allows the trial court to engage in a practical assessment of the case before it, that is, to consider the nature of the community-control condition at issue and the manner in which it was violated, as well as any other relevant circumstances in the case. *Id.*

{¶21} The facts in *Nelson* inform our decision. Nelson was accused of violating a standard term of community control, that is, to follow all orders given by his supervising officer. The supervising officer had specifically ordered Nelson to avoid any contact with a former girlfriend, in light of the role such contact played in his previous misconduct. The order was given after a previous incident, which occurred during community control, when Nelson, while drinking alcohol at his former girlfriend's house, got into a dispute with her neighbor and wielded a knife.

{¶22} Despite the order, Nelson continued his contact with the former girlfriend. The *Nelson* Court acknowledged that the violation was not criminal in nature, but, nonetheless, concluded that it was nontechnical. The Court opined that the order to avoid contact with the former girlfriend was not a mere administrative requirement facilitating community control supervision, but, instead, a substantive rehabilitative requirement which addressed a significant factor contributing to Nelson's misconduct. *Id.* at ¶ 33.

{¶23} The *Nelson* Court adopted the standard previously fashioned in *State v. Davis*, 12th Dist. Warren No. CA2017-11-156, 2018-Ohio-2672, and *State v. Mannah*, 5th Dist. Fairfield No. 17-CA-54, 2018-Ohio-4219. Those cases found a violation to be nontechnical when the condition violated was "specifically tailored to address and treat [the defendant's] substance abuse issues," and when it was "a substantive rehabilitative requirement which addressed a significant factor contributing to [the defendant's] criminal conduct." *Davis* at ¶ 17, 18; see also *Mannah* at ¶ 10, 12, and 15 (following *Davis*).

{¶24} In *Davis*, the Twelfth District opined that the violation of a special condition of community control, that is – the appellant's decision to voluntarily sign himself out of a court-ordered drug treatment program, was not a technical violation, but, instead, a violation of a "substantive rehabilitative requirement." *Id.* at ¶ 18. In so holding, the Twelfth District distinguished Davis' violation from violations deemed to be technical by other intermediate Ohio courts. *See State v. Cearfoss*, 5th Dist. Stark No. 2004CA00085, 2004-Ohio-7310 (defendant's failure to follow his probation officer's order to open the front door was a "technical" violation); *State v. Jenkins*, 2d Dist. Champaign No. 2005-CA-22, 2006-Ohio-2639 (defendant's failure to notify his parole officer before moving out of his residence where a convicted felon resided was "at best a 'technical' violation"); and *Amburgey v. Ohio Adult Parole Auth.*, 12th Dist. Madison No. CA2001-07-016, 2001 WL

1256365, 2001 Ohio App. LEXIS 4730 (Oct. 22, 2001) ("technical" violations, in the context of parole, are those violations of the terms and conditions of the parole agreement which are not criminal in nature, such as failure to report to the parole officer, association with known criminals, leaving employment, and leaving the state).

{¶25} Further, although Davis asserted that he was driven from the rehabilitation program due to bullying by other participants, the Twelfth District opined that the trial court was free to disbelieve Davis' excuse for terminating treatment. Likewise, in *Mannah,* the Fifth District opined that the failure to complete a court-ordered drug rehabilitation program, although not criminal in nature, was nonetheless nontechnical because it involved the violation of "substantive rehabilitative requirement to address a factor contributing to [Mannah's] drug convictions." *Id.* at ¶ 15.

{¶26} In *State v. Kernall,* 132 N.E.2d 758, 2019-Ohio-3070 (1st Dist.), the First District held that the cumulative nature of technical, non-felonious violations could establish a "pattern of conduct that demonstrates a failure to comply with the community-control sanction as a whole." *Id.* at ¶ 20. The Twelfth District reached the same conclusion in *State v. Smith*, 12th Dist. Clermont No. CA2020-08-044, 2021-Ohio-630, where Smith, who was convicted of fifth-degree felony aggravated trafficking of drugs but given a community control sanction, failed to report for supervision on two occasions, and failed to follow instructions. *Id.* at ¶ 24.

{¶27} Here, the trial court predicated the sentence on the stated violations, as well as Appellant's concession that he had voluntarily terminated drug treatment several times in the past and tested positive for methamphetamine in June of the previous year. In response to Appellant's request for another chance at treatment, the trial court responded, "I certainly would like to think drug treatment would have been a better option. But I'm not sure how I have any faith that you'd do that." (Hrg. Tr., p. 11.)

{¶28} Appellant contends that the stated violations are technical. He argues that the two pending warrants are not evidence of criminal activity and the statements regarding his arrest for a third-degree felony drug arrest in another county were unsworn, and, as a consequence, not subject to cross-examination. Finally, Appellant argues that his failure to report for supervision for three months is merely the violation of an administrative requirement of supervision.

{¶29} Based on the totality of the circumstances, we find that both of the violations at issue were non-technical violations. A violation is "nontechnical" if, considering the totality of the circumstances, the violation concerns a condition of community control that was specifically tailored to address matters related to the defendant's misconduct or if it can be deemed a substantive rehabilitative requirement which addressed a significant factor contributing to the defendant's misconduct. *Nelson* at ¶ 26. The terms of Appellant's community control specifically prohibited any "further illegal activity or offensive course of conduct," and required Appellant to report "as directed to the [CCAPD], but not less than once per month in person." Insofar as the prohibition on offensive conduct and the monthly reporting were substantive rehabilitative requirements, we find that Appellant's sole assignment of error has no merit.

{¶30} However, R.C. 2967.191 reads, in pertinent part:

> The department of rehabilitation and correction shall reduce the stated prison term of a prisoner * * * by the total number of days that the prisoner was confined *for any reason arising out of the offense for which the prisoner was convicted and sentenced*, including confinement in lieu of bail while awaiting trial, confinement for examination to determine the prisoner's competence to stand trial or sanity, [and] confinement while awaiting transportation to the place where the prisoner is to serve the prisoner's prison term, as determined by the sentencing court * * *.

(Emphasis added).

{¶31} In *State v. Nutter*, 4th Dist. Hocking No. 18CA1, 2018-Ohio-5368, Nutter asserted that the trial court failed to properly calculate the jail-time credit applied to her sentence for a second community control violation. She argued that the trial court should have credited her for a term of confinement resulting from a previous community control violation. The Fourth District agreed, recognizing that Nutter should be given jail time credit for confinement due to a previous community control violation, as said confinement arose out of the same offense and sentence. *Id.* at ¶ 21. The same is true here. Therefore, we remand this matter to the trial court to issue an amended judgment entry applying 30 days of jail-time credit to the eighteen-month sentence.

CONCLUSION

{¶32} For the foregoing reasons, the amended judgment entry of the trial court imposing the eighteen-month sentence is affirmed, however this matter is remanded to the trial court to apply 30 days of jail-time credit to Appellant's eighteen-month sentence.

Donofrio, P.J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Carroll County, Ohio, is affirmed. This matter is hereby remanded to the trial court to apply the 30 day jail-time credit to Appellant's eighteen-month sentence. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.