

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	No. 16AP-165
	:	(C.P.C. No. 13CR-2298)
v.	:	
	:	(REGULAR CALENDAR)
Carla L. Pitkiewicz,	:	
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 22, 2016

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Michael P. Walton*, for appellant.

On brief: *Samuel H. Shamansky Co., L.P.A.*, *Samuel H. Shamansky*, and *Donald L. Regensburger*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

BROWN, J.

{¶ 1} The State of Ohio, plaintiff-appellant, appeals the judgment of the Franklin County Court of Common Pleas, in which the court sentenced Carla L. Pitkiewicz, defendant-appellee, to a term of incarceration after revoking community control.

{¶ 2} On November 12, 2013, appellee pled guilty to attempt robbery without specification, a third-degree felony, in violation of R.C. 2923.02, and having a weapon under disability, a third-degree felony, in violation of R.C. 2923.13. On January 13, 2014, the trial court imposed a period of community control for three years.

{¶ 3} On May 30, 2014, the trial court issued a *capias* based on appellee's failure to appear. Appellee was subsequently apprehended and underwent assessment at a

mental health facility. On July 16, 2014, the trial court placed appellee on home incarceration. Appellee absconded from the jurisdiction in July 2014, and the court issued a *capias* on August 8, 2014. Appellee was taken into custody in October 2014.

{¶ 4} On November 10, 2014, appellee's probation officer filed a request for revocation of community control and statement of violations. On November 14, 2014, the trial court revoked community control and imposed an aggregate prison term of 54 months, with 30 months for the attempted robbery and 24 months as to the weapon under disability, to be served consecutively.

{¶ 5} On May 18, 2015, appellee filed a motion for judicial release. On August 7, 2015, the trial court granted the motion for judicial release placing appellee on community control for three years and noting that if appellee violated the terms of community control, the court would impose the prison term of 30 months as to the attempted robbery and 24 months as to the weapon under disability, to be served consecutively.

{¶ 6} Appellee was in and out of custody and granted home incarceration multiple times. The trial court eventually ordered that appellee be admitted to Maryhaven in December 2015. On December 23, 2015, appellee absconded, and the trial court issued a *capias* on December 29, 2015. Appellee was taken into custody on January 11, 2016.

{¶ 7} On January 25, 2016, appellee's probation officer filed a request for revocation of community control and statement of violations. On February 5, 2016, appellee stipulated to the violations and the trial court issued a revocation entry, revoking appellee's judicial release. However, instead of imposing the original 54-month prison sentence, the court imposed a "modified" sentence of 30 months for the attempted robbery and 24 months as to the weapon under disability, to be served concurrently. This differed from the original sentence which ordered that the terms be served consecutively.

The state appeals, asserting the following assignment of error:

THE TRIAL COURT COMMITTED PLAIN ERROR BY
MODIFYING DEFENDANT'S SENTENCE UPON
REVOKING JUDICIAL RELEASE.

{¶ 8} Citing R.C. 2929.20(K), the state argues in its assignment of error that the trial court erred when it modified the prison terms to be served concurrently, resulting in an aggregate 30-month sentence, instead of consecutively, resulting in an aggregate 54-

month sentence as originally ordered. The state contends that, due to this error, we should remand the matter to the trial court with instructions to impose the remainder of the aggregate prison term of 54 months.

{¶ 9} Former R.C. 2929.20(K), which has since undergone amendments not pertinent here, provided, in pertinent part:

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.

{¶ 10} Appellee concedes that the trial court committed error when it modified its original sentence. Thus, based on former R.C. 2929.20(K), appellee agrees the trial court erred and the judgment must be reversed.

{¶ 11} However, appellee contends that this court, on remand, should not instruct the trial court to impose a specific sentence as the state argues but, rather, should remand it for resentencing to consider (1) whether it would be in the interest of justice to permit appellee to withdraw her stipulation, and (2) whether revocation is still appropriate in light of the sentencing limitations imposed by former R.C. 2929.20(K).

{¶ 12} We agree with appellee insofar that the matter should be returned to the trial court for resentencing. In similar circumstances, this court has remanded the matter for resentencing. *See, e.g., State v. Salter*, 10th Dist. No. 14AP-211, 2014-Ohio-5524 (finding that because the trial court erred when it imposed a period of incarceration less than that set forth in the appellant's original sentence, the matter must be remanded for resentencing); *State v. Terry*, 10th Dist. No. 11AP-127, 2011-Ohio-6666 (same); *State v. Darthard*, 10th Dist. No. 01AP-1291, 2002-Ohio-4292 (finding that because the trial court erred when it increased the sentence imposed on the defendant after revoking an order of judicial release, the matter must be remanded for resentencing). For these reasons, we find the state's assignment of error well-taken and sustain it.

{¶ 13} Accordingly, the state's assignment of error is sustained, the judgment of the Franklin County Court of Common Pleas is reversed as it relates to sentencing, and this matter is remanded for resentencing.

Judgment reversed and cause remanded.

LUPER SCHUSTER and HORTON, JJ., concur.
