

[Cite as *State v. Peck*, 2009-Ohio-4718.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92374

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

RICKY PECK

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511394

BEFORE: Stewart, J., Rocco, P.J., and Blackmon, J.

RELEASED: September 10, 2009

**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), is filed within ten (10) 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. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellee, Ricky Peck, pleaded guilty to one count of receiving stolen property, a fifth degree felony. The court sentenced Peck to serve 45 days in the county jail and ordered him to make restitution to the victim in the amount of \$1,500. The state of Ohio appeals from this sentence pursuant to R.C. 2953.08(B)(2), arguing that the court should have ordered a term of postrelease control to ensure that Peck made restitution and that the sentence was contrary to law because it was “wimpy.” Finding no support for the state’s contentions, we affirm.

I

{¶ 2} The state first argues that the court should have imposed a term of postrelease control as a means of enforcing the ordered restitution.

{¶ 3} Even assuming that the state is correct in its argument that postrelease control should have been ordered as a means of enforcing the restitution order, we cannot rectify that error because Peck would have long ago been released from confinement, thus barring the imposition of postrelease control. The court offset the 45-day period of residential sanction with Peck’s time-served while awaiting trial. It is unclear from the record exactly how many days of residential sanction Peck would be required to serve after that offset. But given that more than eight months have elapsed since sentencing, there appears to be little likelihood that Peck is still confined. The court has no authority to impose a term of postrelease control

after an offender has been released. See *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶6.

II

{¶ 4} R.C. 2953.08(B)(2) grants the state a limited right to appeal a felony sentence. As applicable here, the statute allows the state to appeal as a matter of right any felony sentence that is “contrary to law.” We determine whether a sentence is “contrary to law” by “examin[ing] the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence * * *.” *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶4.

{¶ 5} Peck pleaded guilty to a violation of R.C. 2913.51(A), a fifth degree felony. R.C. 2929.14(A)(5) states the penalty for a fifth degree felony is a prison term of “six, seven, eight, nine, ten, eleven, or twelve months.” However, the sentencing court is granted broad discretion to consider any sanction or combination of sanctions provided in R.C. 2929.14 to 2929.18. See R.C. 2929.13(A). Among the available sanctions for a fifth degree felony is a community control sanction. See R.C. 2929.15(A)(1). When a mandatory prison term is not required, the court may, in lieu of a prison term, impose a community residential sanction of up to six months in jail. See R.C. 2929.16(A)(2).

{¶ 6} The court imposed a community residential sanction of 45 days. That time period is well within the six-month period allowed by R.C. 2929.16(A)(2), so the jail term is not contrary to law.

III

{¶ 7} The state argues that a community control sanction is absurdly short because Peck is a repeat offender with “approximately 18 felony convictions over the course of 25 years.” It further argues that in this and other cases the court has “ignore[d] that part of the goals of felony sentencing is to punish the offender.” Appellant’s Brief at 6.

{¶ 8} R.C. 2929.11 and 2929.12 set forth statutory factors that the court must consider when imposing sentence. *State v. Page*, Cuyahoga App. No. 90485, 2008-Ohio-4424. R.C. 2929.11(A) states that the “overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender.”

{¶ 9} Although the court must consider the statutory factors contained in R.C. 2929.11, it need not make findings or give its reasons when imposing sentence. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at paragraph three of the syllabus. When a sentence is within the statutory range and there is a notation in the court’s sentencing journal entry that it considered all required factors of the law, the court has complied with R.C. 2929.11. See

State v. Bonnel, Cuyahoga App. No. 91785, 2009-Ohio-2721, at ¶17, citing *Kalish*, 120 Ohio St.3d at fn.4.

{¶ 10} Moreover, the court's discretion to impose a community controlled sanction is broad – R.C. 2929.15(A)(1) allows the court to impose one or more community sanctions that it considers “appropriate.” We therefore review the imposition of a community sanction in lieu of a prison term for an abuse of discretion. *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, at ¶10; *State v. Braxton*, Cuyahoga App. No. 91881, 2009-Ohio-2724, at ¶39.

{¶ 11} The court's sentencing entry states that the court considered all required factors of the law, so it fulfilled its legal obligations. Moreover, we find no abuse of discretion on the record before us. The state failed to offer any evidence of Peck's prior felony record at the time of sentencing. In related circumstances, we have held that a defendant who claims a sentence is disproportionate to sentences imposed on other offenders must raise the issue to the trial court and present evidence to support the claim and preserve it on appeal. *State v. Redding*, Cuyahoga App. No. 90864, 2008-Ohio-5739, at ¶18, fn. 7. Having offered no evidence of Peck's prior criminal history, the state failed to preserve the issue for appeal.

{¶ 12} For the same reasons, we reject the state’s assertion that the 45-day jail sentence was a violation of R.C. 2929.15(C)¹ given that Peck had been held in jail on the receiving stolen property charge for nearly 45 days, and that the court granted him jail credit. Nothing in the record shows that Peck has been released from jail, and it is not a fact that we can infer from the record.

{¶ 13} And even if the state had offered such evidence, it would be difficult to conclude that the court abused its broad discretion by ordering Peck to serve a community residential sanction. The court considered the circumstances of the crime based on Peck’s and defense counsel’s statements during sentencing. The court also considered that, despite having served a prior prison term, Peck was not then on postrelease control and nearly one year had elapsed with Peck being on good conduct. On these facts, an abuse of discretion would not have been shown.

{¶ 14} Judgment affirmed.

It is ordered that appellee recover of appellant his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

¹R.C. 2929.15(C) states: “If an offender, for a significant period of time, fulfills the conditions of a sanction imposed pursuant to section 2929.16, * * * of the Revised Code in an exemplary manner, the court may reduce the period of time under the sanction or impose a less restrictive sanction * * *.”

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 _____

KENNETH A. ROCCO, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR