

[Cite as *State v. Gaines*, 2018-Ohio-5347.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106784

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RAMONE GAINES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; VACATED IN PART;
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-619166-A

BEFORE: Celebrezze, J., E.A. Gallagher, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: December 27, 2018

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendant-appellant, Ramone Gaines, brings the instant appeal challenging the trial court's sentence on his convictions for domestic violence and grand theft. Specifically, Gaines argues that the trial court violated his due process rights in revoking his community control sanctions, and that the trial court erred in imposing a prison sentence. After a thorough review of the record and law, this court affirms in part, vacates the trial court's sentence, and remands the matter for resentencing.

I. Factual and Procedural History

{¶2} The instant matter arose from an altercation that occurred in June 2017, between Gaines and the victim, C.W., who have a child together. On July 17, 2017, the Cuyahoga County Grand Jury returned a five-count indictment charging Gaines with (1) domestic violence, a fourth-degree felony in violation of R.C. 2919.25(A), with a furthermore specification alleging

that Gaines “previously had pleaded guilty to or been convicted of Aggravated Assault (against a Family or Household Member, [R.C.] 2903.12 A (F-4), and Ramone Gaines, on or about the 2nd day of December, 2014, in the Court of Common Pleas, Cuyahoga County, Ohio, in Case No. CR 589346”; (2) disrupting public services, a fourth-degree felony in violation of R.C. 2909.04(A)(3); (3) grand theft, a fourth-degree felony in violation of R.C. 2913.02(A)(1); (4) violating a protection order, a third-degree felony in violation of R.C. 2919.27(A)(1); and (5) criminal damaging or endangering, a first-degree misdemeanor in violation of R.C. 2909.06(A)(1), with a furthermore specification alleging that “the violation of this section created a risk of physical harm to any person.” Gaines was arraigned on July 20, 2017. He pled not guilty to the indictment.

{¶3} The parties reached a plea agreement. The state agreed to delete the furthermore specification underlying the domestic violence count. On November 7, 2017, Gaines pled guilty to the amended domestic violence count and the grand theft count. Counts 2 and 4 were nolle. The trial court ordered a presentence investigation report and set the matter for sentencing.

{¶4} The trial court held a sentencing hearing on December 4, 2017. The trial court sentenced Gaines to a prison term of one year. However, the trial court suspended the execution of the one-year sentence and imposed community control sanctions for a period of two years on both counts. The trial court set forth the following conditions of Gaines’s community control: (1) Abide by all rules and regulations of the probation department; (2) report weekly for three months and every two weeks thereafter; (3) attend domestic violence programming as determined by probation officer; (4) attend additional programming as indicated in the case plan; (5) pay a monthly supervision fee of \$20.00; (6) random drug testing; and (7) conditions and terms are

subject to modification by the probation officer and approval of the court. *See* trial court's December 4, 2017 journal entry. Regarding the condition of drug testing, the trial court explained, "You'll be randomly drug tested. No drugs or alcohol, only what's been prescribed to you." (Tr. 22.) Finally, the trial court ordered Gaines to have "no contact with [the] victim(s)" and to "comply with mental health."

{¶5} On January 4, 2018, the trial court held a hearing on an alleged violation of the terms of Gaines's community control. Gaines's probation officer advised the trial court that Gaines tested positive for PCP on December 14 and December 20, 2017. The probation officer further explained that despite the fact that Gaines was ordered to have no contact with the victim, he attempted to make contact with the victim, through the victim's mother, on December 7, 2017. Gaines, through counsel, acknowledged that he had, in fact, violated the terms of community control by testing positive for PCP.

{¶6} The trial court found that Gaines violated the terms of his community control sanctions by testing positive for PCP. The trial court terminated Gaines's community control, concluding that he was "not amenable to [c]ommunity [c]ontrol [s]anctions." (Tr. 31.) The trial court sentenced Gaines to a prison term of one year: six months on the domestic violence count, and six months on the grand theft count. The trial court ordered Gaines to serve the counts consecutively.

{¶7} On February 1, 2018, Gaines filed the instant appeal challenging the trial court's judgment. He assigns two errors for review:

- I. The trial court revoked [Gaines's] community control sanctions in violation of his due process rights.
- II. The trial court erred in not considering any of the less severe sanctions, other

than prison, when sentencing [Gaines].

II. Law and Analysis

A. Due Process

{¶8} In his first assignment of error, Gaines argues that the trial court violated his due process rights in revoking his community control sanctions. Specifically, Gaines contends that the trial court violated his due process rights because he was not given written notice of the alleged community control violations, and the trial court did not hold a preliminary probable cause hearing on the alleged violations.

{¶9} As an initial matter, we note that Gaines did not object to the trial court's failure to hold a preliminary hearing. Accordingly, he has waived all but plain error. *State v. Murphy*, 91 Ohio St.3d 516, 532, 2001-Ohio-112, 747 N.E.2d 765, quoting *State v. Childs*, 14 Ohio St.2d 56, 62, 236 N.E.2d 545 (1968) ("Even constitutional rights 'may be lost as finally as any others by a failure to assert them at the proper time.'"). Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Notice of plain error is to be taken "with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240, quoting *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978).

{¶10} Gaines argues that the trial court erred by holding "just one community control sanctions revocation hearing." Appellant's brief at 3. Relying on *Gagnon v. Scarpelli*, 411 U.S. 778, 784-786, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), Gaines contends that the trial court was required to hold two hearings: (1) a preliminary probable cause hearing, and (2) "a subsequent final revocation hearing." Appellant's brief at 2.

{¶11} Gaines further argues that his due process rights were violated because he did not receive written notice of the purported violations prior to the trial court’s January 4, 2018 hearing. He contends that without written notice of the alleged violations and a preliminary hearing on the violations, he was unable to review the evidence pertaining to the alleged violations and prepare a defense. Gaines’s arguments are misplaced and unsupported by the record.

{¶12} A trial court’s revocation of community control can result in a serious loss of liberty. Accordingly, “a probationer must be accorded due process at the revocation hearing.” *State v. Bailey*, 8th Dist. Cuyahoga No. 103114, 2016-Ohio-494, ¶ 9, citing *Gagnon* at 781; *State v. Miller*, 42 Ohio St.2d 102, 326 N.E.2d 259 (1975), syllabus.

A defendant is entitled to a preliminary hearing to determine whether there is probable cause to believe that the defendant has violated the terms of his or her community control. *State v. Roberts*, [2017-Ohio-481, 84 N.E.3d 339, ¶ 18 (2d Dist.)], citing *Gagnon*. Due process also requires a final hearing to determine whether community control should be revoked. *Id.*
State v. Cox, 8th Dist. Cuyahoga No. 105932, 2018-Ohio-748, ¶ 15.

{¶13} First, regarding Gaines’s argument that he did not receive written notice of the alleged violations, this court has held that it is preferred that a defendant be notified in writing of any claimed community control violations. *See State v. Patton*, 2016-Ohio-4867, 68 N.E.3d 273, ¶ 9 (8th Dist.). Although written notice is preferred, this court has held, however, that oral notice of purported community control violations may be sufficient “when the oral statements ‘explain the basis of the revocation proceeding,’ ‘provide adequate notice to the probationer,’ and ‘provide a record for appellate review of the revocation hearing.’” *Patton* at *id.*, quoting *State v.*

Washington, 8th Dist. Cuyahoga Nos. 101157 and 101170, 2015-Ohio-305, ¶ 22, citing *State v. Lenard*, 8th Dist. Cuyahoga No. 93373, 2010-Ohio-81, ¶ 10-11, and *Lakewood v. Sullivan*, 8th Dist. Cuyahoga No. 79382, 2002-Ohio-2134, ¶ 26.

{¶14} In the instant matter, as noted above, Gaines was orally notified of the purported community control violations during the trial court's January 4, 2018 hearing. The record reflects that the oral notice of the claimed violations satisfied the minimum due process guarantee. *See Patton* at ¶ 10. During the violation hearing, Gaines's probation officer read into the record the basis for his allegations. Specifically, the probation officer stated that Gaines violated his community control sanctions by (1) testing positive for PCP on December 14 and December 20, 2017, and (2) attempting to make contact with the victim, through the victim's mother, on December 7, 2017. From this point on, Gaines was aware of the basis of the alleged violations.

{¶15} Second, regarding Gaines's argument that the trial court was required to hold two separate hearings, the record reflects that the trial court held a preliminary hearing on probable cause and a final revocation hearing on the same day, January 4, 2018. *See State v. Greene*, 8th Dist. Cuyahoga No. 106028, 2018-Ohio-1965, ¶ 20-21; *Cox*, 8th Dist. Cuyahoga No. 105932, 2018-Ohio-748, at ¶ 15. The transcript from the trial court's January 4, 2018 hearing reflects that the hearing began as a preliminary, probable cause hearing. During the probable cause portion of the hearing, the trial court heard testimony from Gaines's probation officer, Gaines, defense counsel, and the prosecutor. Gaines's probation officer informed the trial court that Gaines violated the terms of community control by testing positive for PCP and attempting to make contact with the victim. Gaines and his defense counsel admitted that Gaines had, in fact, tested positive for PCP. Thereafter, the hearing transitioned into a final revocation hearing.

This court has repeatedly held that oral notice coupled with the complete admission at the preliminary hearing on the violation of sanctions satisfies any due process * * * concerns. *See, e.g.*, [*State v. Frazier*, 8th Dist. Cuyahoga No. 104596, 2017-Ohio-470, ¶ 10-12]; [*Patton* at ¶ 9] (oral notice of alleged violation may be sufficient to satisfy constitutional due process concerns); *State v. Jones*, 8th Dist. Cuyahoga No. 102999, 2016-Ohio-2626, ¶ 10; *Washington* [at] ¶ 22; *Lenard* [at] ¶ 12; *Sullivan* [at] ¶ 26. Further, the admission to the violation during a preliminary hearing waives any further argument as to whether the offender violated the terms of his community control sanctions during subsequent proceedings. *Frazier* at ¶ 17.

State v. Jimenez, 8th Dist. Cuyahoga No. 104735, 2017-Ohio-1553, ¶ 6.

{¶16} After reviewing the record, we cannot say that Gaines was prejudiced by the trial court's failure to hold two separate hearings. During the probable cause portion of the hearing, Gaines was able to confront and address his probation officer's allegations. Gaines and his counsel both admitted that Gaines tested positive for PCP.

{¶17} Based on the foregoing analysis, we find no basis upon which to conclude that Gaines's due process rights were violated. The trial court did not commit plain error by conducting the preliminary probable cause hearing and the revocation hearing on the same day, Gaines was not prejudiced by the trial court's failure to hold two separate hearings, and the oral notice of the claimed violations was sufficient. Accordingly, Gaines's first assignment of error is overruled.

B. Trial Court's Sentence

{¶18} In his second assignment of error, Gaines argues that the trial court erred and abused its discretion in imposing the one-year prison sentence.

{¶19} Misdemeanor sentencing is governed by R.C. 2929.21 through 2929.28. *N. Olmsted v. Rock*, 8th Dist. Cuyahoga No. 105566, 2018-Ohio-1084, ¶ 32. In imposing a sentence for a misdemeanor conviction, a trial court must consider the overriding purposes of misdemeanor sentencing, “to protect the public from future crime by the offender and others and to punish the offender,” set forth in R.C. 2929.21, and the factors set forth in R.C. 2929.22(B) regarding the appropriate method of achieving those purposes. *Lakewood v. Dobra*, 8th Dist. Cuyahoga No. 106001, 2018-Ohio-960, ¶ 9.

{¶20} A trial court enjoys broad discretion in imposing sentence on a misdemeanor offense. *Dobra* at ¶ 8, citing *Cleveland v. Meehan*, 8th Dist. Cuyahoga No. 100202, 2014-Ohio-2265, ¶ 7. Accordingly, this court reviews a trial court’s misdemeanor sentence for an abuse of discretion. *Cleveland v. Peoples*, 8th Dist. Cuyahoga No. 100955, 2015-Ohio-674, ¶ 13. “A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary.” *Id.*, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

This court has held that the trial court’s failure to consider [the factors set forth in R.C. 2929.21 and 2929.22] constitutes an abuse of discretion. *Maple Heights v. Sweeney*, 8th Dist. Cuyahoga No. 85415, 2005-Ohio-2820, ¶ 7. However, the trial court is not required to make factual findings on the record related to these factors. *Id.* at ¶ 8. Indeed, “when a misdemeanor sentence is within the statutory limits, the trial court is presumed to have considered the required factors [under R.C. 2929.22], absent a showing to the contrary by the defendant.” *Id.*

Dobra at ¶ 10.

{¶21} In the instant matter, Gaines argues that the trial court failed to consider the overriding purposes of misdemeanor sentencing. He appears to suggest that substance abuse

treatment was a more appropriate sentence than the one-year prison sentence imposed by the court. Gaines contends that the trial court abused its discretion by failing to consider sanctions that were less severe than prison. We disagree.

{¶22} After reviewing the record, we do not find that the trial court abused its discretion in imposing the one-year prison sentence. The six-month sentences imposed on the domestic violence and grand theft counts were within the permissible statutory range under R.C. 2929.24(A) for first-degree misdemeanors. The trial court's December 4, 2017 sentencing journal entry provides, in relevant part, "the court considered all required factors of the law." Aside from this notation in the sentencing entry, the record reflects that the trial court did, in fact, consider the sentencing factors under R.C. 2929.21 and 2929.22(B) in crafting Gaines's sentence.

{¶23} During the sentencing phase of the January 4, 2018 hearing, the trial court considered Gaines's conduct. The trial court opined that Gaines's PCP use was more concerning than his attempt to contact the victim through her mother, emphasizing that Gaines has a history of using PCP when he is stressed. (Tr. 30.) The trial court explained the basis for its concern: "When someone takes PCP, it is so unpredictable. When they seem to have, you know, problems following some simple rules, the Court gets very nervous. You can get hurt. I can't have that." (Tr. 30.)

{¶24} The trial court reviewed Gaines's criminal history during the sentencing phase of the hearing: "You have multiple criminal history felony convictions. In this case you violated a protection order and were convicted of another domestic violence in Municipal Court and you had other prior violent felonies, including robberies, and firearms, drug possessions, felonious assault, domestic violence, burglary." (Tr. 30.) The trial court determined that "I need to

protect our community.” (Tr. 30.) Finally, the trial court concluded that Gaines was “not amenable to [c]ommunity [c]ontrol [s]anctions.” (Tr. 31.)

{¶25} Based on the foregoing analysis, we find no basis upon which to conclude that the trial court erred or abused its discretion in imposing the one-year prison sentence. Accordingly, Gaines’s second assignment of error is overruled.

{¶26} Although Gaines does not specifically challenge the trial court’s imposition of consecutive sentences, the record reflects that the trial court erred in imposing consecutive sentences.

{¶27} R.C. 2929.14(C)(4) provides that in order to impose consecutive sentences, the trial court must find that consecutive sentences are (1) necessary to protect the public from future crime or to punish the offender, (2) that such sentences would not be disproportionate to the seriousness of the conduct and to the danger the offender poses to the public, and (3) that one of the following applies:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under postrelease control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender’s conduct.

(c) The offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶28} Compliance with R.C. 2929.14(C)(4) requires the trial court to make the statutory findings at the sentencing hearing, which means that “the [trial] court must note that it engaged

in the analysis’ and that it ‘has considered the statutory criteria and specific[d] which of the given bases warrants its decision.’” *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 26, quoting *State v. Edmonson*, 86 Ohio St.3d 324, 326, 715 N.E.2d 131 (1999). Further, the reviewing court must be able to discern that the record contains evidence to support the findings. *State v. Davis*, 8th Dist. Cuyahoga No. 102639, 2015-Ohio-4501, ¶ 21, citing *Bonnell* at ¶ 29. A trial court is not, however, required to state its reasons to support its findings, nor is it required to give a rote recitation of the statutory language, “provided that the necessary findings can be found in the record and are incorporated in the sentencing entry.” *Bonnell* at ¶ 37.

{¶29} In the instant matter, the record reflects that the trial court did not make the requisite consecutive sentence findings, either during the original sentencing hearing on December 4, 2017, or during the sentencing phase of the January 4, 2018 hearing. Furthermore, the trial court did not incorporate its consecutive sentence findings into its January 4, 2018 sentencing journal entry.

{¶30} Based on the foregoing analysis, we find that the trial court erred in imposing consecutive sentences. The consecutive nature of the trial court’s sentence is vacated, and the matter is remanded to the trial court for the limited purpose of determining whether consecutive sentences are appropriate and, if so, to make the requisite findings pursuant to R.C. 2929.14(C)(4). See *State v. Brown*, 8th Dist. Cuyahoga No. 106771, 2018-Ohio-4707, ¶ 10, citing *State v. Lasalla*, 8th Dist. Cuyahoga No. 101316, 2015-Ohio-106, ¶ 21, *State v. Matthews*, 8th Dist. Cuyahoga No. 102217, 2015-Ohio-4072, ¶ 18, and *State v. Frost*, 8th Dist. Cuyahoga No. 100498, 2014-Ohio-2645, ¶ 10.

III. Conclusion

{¶31} After thoroughly reviewing the record, we find that the trial court did not violate Gaines's due process rights in revoking his community control sanctions; and the trial court did not err or abuse its discretion in imposing the six-month sentences on Gaines's domestic violence and grand theft convictions.

{¶32} The trial court failed to make the required consecutive sentence findings pursuant to R.C. 2929.14(C)(4) and incorporate those findings into its sentencing journal entry. Accordingly, we vacate the consecutive nature of Gaines's sentence and remand the matter to the trial court for the limited purpose of determining whether consecutive sentences should be imposed and, if so, to make the required findings.

{¶33} Judgment affirmed in part, vacated in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed in part, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

EILEEN A. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR