

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO :
 :
 Plaintiff-Appellee, :
 : No. 107775
 v. :
 :
 MICHAEL G. BARRON :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

**JUDGMENT: SENTENCE REVERSED AND MODIFIED
RELEASED AND JOURNALIZED: April 18, 2019**

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-614793-A

Appearances:

Mark A. Stanton, Public Defender, and Paul Kuzmins,
Assistant Public Defender, *for appellant.*

Michael C. O'Malley, Prosecuting Attorney, and Mary M.
Frey, Assistant Prosecuting Attorney, *for appellee.*

MICHELLE J. SHEEHAN, J.:

{¶ 1} Michael Barron appeals his sentence of 11 months imposed by the trial court after he tested positive for marijuana while under a community control sanction. Having reviewed the record and pertinent law, we conclude that his

sentence is not authorized by law and, therefore, reverse and modify his sentence pursuant to R.C. 2953.08 (G)(2).

{¶ 2} The record reflects that, on June 6, 2017, Barron pleaded guilty to drug possession, a fifth-degree felony, and criminal damaging, a second-degree misdemeanor. He filed a motion for intervention-in-lieu-of-conviction pursuant to R.C. 2951.041. The trial court granted his motion and placed him under the supervision of the county probation department's intervention-in-lieu-of-conviction program for one year. He was ordered to comply with the standard conditions of community control, to abstain from the use of illegal drugs and alcohol, and to submit to regular random testing for drugs and alcohol.

{¶ 3} Soon after, Barron tested positive for drug use; on July 19, 2017, the trial court issued a capias. Under R.C. 2951.041(F), when an offender fails to comply with conditions imposed by the trial court as part of the intervention program, the trial court can either continue the offender on the intervention-in-lieu-of-conviction program, continue the program with additional terms and conditions, or enter a finding of guilt and impose an appropriate sanction. Pursuant to the statute, the prosecutor asked the trial court to either continue Barron's participation in the intervention-in-lieu-of-conviction program or impose a community control sanction for one year.

{¶ 4} On July 31, 2017, the court held a hearing regarding Barron's violation. The court sentenced him to 11 months at the Lorain Correctional Institution on the original drug possession count but suspended the sentence,

placing him on a community control sanction for one year. The court also fined him \$250 for the criminal damaging count. A journal entry issued on August 2, 2017, stated “defendant is sentenced to 11 months at [the Lorain Correctional Institution]. * * * Imposition of sentence suspended — defendant placed on one year probation * * *.”

{¶ 5} Several months later, on October 24, 2017, Barron filed a motion to be reinstated into the intervention-in-lieu-of-conviction program. He reported he had maintained sobriety since June 30, 2017, when he last tested positive for drugs; he attended AA meetings regularly; and he was very close to completing an associate degree at Lakeland Community College. He also explained that his fifth-degree felony conviction would cause him to lose his financial aid and future educational and employment opportunities. The prosecutor opposed Barron’s motion on the ground that the sentence of 11 months imposed on July 31, 2017, was final and Barron could not be reinstated into the intervention-in-lieu-of-conviction program.

{¶ 6} On December 20, 2017, the court held a hearing on Barron’s motion. Barron’s counsel reported that Barron had completed 16 weeks of intensive outpatient treatment and had been testing negative for drugs and alcohol. Despite the state’s objection, the trial court reinstated Barron into the intervention program but ordered the one-year term to be started from the beginning, without credit for the time Barron had already spent in the program. The court’s journal entry dated December 22, 2017, stated “defendant placed in treatment in lieu of conviction” and “defendant to start fresh.”

{¶ 7} The record next reflects that, on August 7, 2018, a *capias* was issued for Barron because he tested positive for marijuana. On September 11, 2018, another violation hearing was held, and the court subsequently issued a journal entry sentencing him to 11 months in prison.

{¶ 8} Barron timely appeals from that judgment. He assigns a single error for our review. Barron's assignment of error states:

The trial court's 11-month prison sentence for a technical violation of community control sanctions is contrary to law because it exceeded the 90 day maximum sentence authorized by R.C. 2929.15.

The state filed a notice of conceded error pursuant to Loc.App.R. 16(B).

{¶ 9} R.C. 2929.15 governs community control sanctions, and R.C. 2929.15(B) prescribes the penalties a trial court may impose on an offender for a violation of community control sanctions. Effective September 29, 2017, R.C. 2929.15(B)(1)(c) was amended by H.B. 49. Before the amendment, a violation of community control sanctions could result in a prison sentence of any length authorized for the underlying offense. *State v. Neville*, 8th Dist. Cuyahoga No. 106885, 2019-Ohio-151, ¶ 16; former R.C. 2929.15(B)(1)(c). The 2017 amendment limits the length of prison sentence a trial court may impose on certain low-level (fourth- or fifth-degree) felonies for a violation of community control sanctions. *State v. Catron-Wagner*, 8th Dist. Cuyahoga No. 106887, 2019-Ohio-153, ¶ 18.

{¶ 10} In *Neville*, this court explained the purpose of H.B. 49 and quoted the testimony of the Director of the Ohio Department of Rehabilitation and Correction before the House Finance Committee.

[T]he purpose of the H.B. 49 amendments with respect to criminal sentencing was to reduce the amount of low-level felony offenders in state prisons. * * * [A]lthough there have been “previous reform efforts, Ohio’s prison population has not realized the reduction in prison population found in other states.” * * * H.B. 49 “strikes the appropriate balance between treating those drug addicted Ohioans in the community, while maintaining the Department’s obligation to protect the public by safely incarcerating those who commit more serious offenses.” Thus, the purpose of the relevant amendments to H.B. 49 was to reduce the amount of low-level felony offenders in the state’s prison population, to save the state money, and to provide drug addiction treatment to offenders by keeping them in their local communities.

Id. at ¶ 30.

{¶ 11} As Barron’s latest violation hearing took place on September 11, 2018, the amended statute applies to Barron’s sentence for his violations. *Neville* at ¶ 23. For an offender such as Barron who was sentenced to community control sanctions for a fifth-degree felony, the amended statute states, in pertinent part,

(B)(1) If the conditions of a community control sanction are violated or if the offender violates a law or leaves the state without the permission of the court or the offender’s probation officer, the sentencing court may impose upon the violator one or more of the following penalties:

* * *

(c) A prison term on the offender pursuant to section 2929.14 of the Revised Code and division (B)(3) of this section, provided that a prison term imposed under this division is subject to the following limitations, as applicable:

(i) If the prison term is imposed for any technical violation of the conditions of a community control sanction imposed for a felony of the fifth degree *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 ninety days.

(Emphasis added.)

{¶ 12} Pursuant to the amended statute, therefore, if a fifth-degree felony offender commits a “technical violation” of the conditions of a community control sanction or commits a new offense which is not a felony while under a community control sanction, the maximum sentence that can be imposed by the trial court for the violation is 90 days.

{¶ 13} The amended statute, effective on September 29, 2017, governs the punishment imposed on September 11, 2018, for Barron’s violation of his community control sanction. Amended R.C. 2929.15(B)(1)(c)(i) limits the length of a prison sentence for a violation of community control sanctions to 90 days for an offender in Barron’s situation, yet the trial court sentenced him to 11 months for his community control sanctions violation. Barron argues the trial court’s sentence is not authorized by law. We agree.

{¶ 14} The statute does not define “technical violations.” In *Catron-Wagner*, 8th Dist. Cuyahoga No. 106887, 2019 Ohio-153, this court found that testing positive for alcohol constituted a technical violation of the defendant’s community control. *Id.* at ¶ 39. In this case, we need not reach the issue of whether testing positive for marijuana is a “technical violation,” because the state concedes the offense was a minor misdemeanor. Therefore, the maximum prison term for Barron is 90 days pursuant to the amended R.C. 2929.15(B)(1)(c).

{¶ 15} The trial court’s imposition of 11 months of prison on September 11, 2018, was not authorized by law. Pursuant to R.C. 2953.08 (G)(2), an appellate

court may reduce or modify a sentence that is not authorized by law. In accordance with the foregoing, we sustain Barron's assignment of error, reverse his sentence, and modify it to 90 days of prison.

{¶ 16} The sentence in this case is reversed and modified.

It is ordered that appellant recover of appellee 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. Case remanded to the trial court for execution of sentence. The trial court is hereby directed to vacate its prior sentencing order journalized September 17, 2018, and issue a journal entry consistent with this opinion. The trial court is further directed to take all necessary administrative steps to inform the prison system of appellant's modified sentence.

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

MICHELLE J. SHEEHAN, JUDGE

ANITA LASTER MAYS, P.J., and
EILEEN A. GALLAGHER, J., CONCUR