

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2008-P-0044
MARK A. BEDELL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2006 CR 0272.

Judgment: Reversed and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Rachel E. Zbiegien, P.O. Box 23102, Euclid, OH 44123 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Mark A. Bedell, appeals his sentence imposed by the Portage County Court of Common Pleas. Bedell plead guilty to two counts of nonsupport of dependents, in violation of R.C. 2919.21(A)(2) and (B), both felonies of the fifth degree.

{¶2} Bedell is the father of four children. In June 2001, Bedell was first convicted for criminal nonsupport of his two sons, ages 16 and 17. In fact, at the sentencing hearing for the instant matter, Bedell was serving his sentence for this prior

conviction. Bedell's attorney informed the court that he would be released on June 21, 2008.

{¶3} Bedell's sentencing hearing for the instant matter was held on March 24, 2008. The trial court reported that Bedell had a child support arrearage of \$35,314.56, as of December 31, 2007. Bedell was sentenced to a combination of residential and nonresidential community control sanctions, including: a 200-day jail term; Intensive Supervision Program for one year; and 48 months under the control of the General Division of the Adult Probation Department. In addition to abiding by the standard rules of supervision, the trial court ordered the following: (1) Bedell shall undergo a mental health evaluation and follow the recommendations; (2) commencing May 1, 2008, Bedell shall abide by a payment plan of \$300.93 per month, arranged by the Adult Probation Department and Child Support Enforcement Agency to satisfy all present, past, and future judgments, including arrearages in the amount of \$36,000 within five years; (3) Bedell shall obtain full-time employment within six months, maintaining employment during probation.

{¶4} On June 30, 2008, this court granted Bedell's motion to file a delayed appeal pursuant to App.R. 5(A).

{¶5} On appeal, Bedell challenges the trial court's sentence imposed upon him and asserts, for our review, the following two assignments of error:

{¶6} "[1.] The trial court erred in imposing a sentence upon Mr. Bedell that was contrary to law.

{¶7} "[2.] The trial court abused its discretion in sentencing Mr. Bedell to community control sanctions without considering R.C. 2929.11 and R.C. 2929.12."

{¶8} Under his first assignment of error, Bedell asserts three arguments for our review. First, Bedell maintains that his jail term is outside the statutory maximum, as allowed by R.C. 2929.16(A)(2). Second, Bedell argues his sentence, which includes a five-year probation period in addition to the jail term, is beyond the statutory limits of R.C. 2929.15(A). Third, even though the jail term has been completed, Bedell maintains the instant appeal is not moot, since this court must review his entire sentence of community control sanctions.

{¶9} After the *State v. Foster* decision, “[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at paragraph seven of the syllabus. The Supreme Court of Ohio, in a plurality opinion, has recently held that felony sentences are to be reviewed under a two-step process. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The Court held:

{¶10} “First, [appellate courts] must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court’s decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard.” *Id.*

{¶11} “The term ‘abuse of discretion’ connotes more than an error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157. (Citations omitted.)

{¶12} “If a sentencing court determines that a community control sanction, or combination of community control sanctions, is appropriate, the court is vested with broad discretion to decide which sanctions may be imposed. R.C. 2929.13(A) and 2929.15. R.C. 2929.16 and 2929.17 provide seventeen different nonprison sanctions that can be used to impair an offender’s freedom, and R.C. 2929.18 provides four types of financial sanctions. ***

{¶13} “One community control sanction is a jail sentence. R.C. 2929.16(A)(2) authorizes a felony offender who is eligible for a community control sanction to be incarcerated for a jail term of up to six months. A jail sentence may be followed by other community control sanctions. R.C. 2929.15(A)(1).” *State v. Jordan*, 4th Dist. No. 03CA2878, 2004-Ohio-2111, at ¶12-13. (Internal citation omitted.)

{¶14} The March 26, 2008 judgment entry indicates the trial court imposed a 200-day jail term, granting Bedell 93 days of jail-time credit. Therefore, in order to satisfy his sentence, Bedell was required to serve an additional 107 days.

{¶15} The record reflects Bedell did not file a timely appeal. This court granted Bedell’s motion to file a delayed appeal pursuant to App.R. 5(A) on June 30, 2008; however, neither Bedell nor his appointed appellate counsel moved this court to stay the execution of his sentence pending the determination of the instant appeal. As a result, Bedell completed his jail term on July 11, 2008 and, therefore, the argument relating solely to the imposition of his jail sentence is rendered moot. See *State v. Corpening*, 11th Dist. No. 2005-A-0058, 2006-Ohio-5290, at ¶6.

{¶16} Although Bedell has already completed his jail term, he next challenges the duration of the community control sanctions. Because Bedell’s jail term is only one

aspect of the community control sanction, we will address whether Bedell's sentence, which includes a five-year probation period in addition to the jail term, is beyond the statutory limits of R.C. 2929.15(A). In its brief, appellee concedes the trial court exceeded its statutory authority in sentencing Bedell.

{¶17} R.C. 2929.15(A)(1) states, in pertinent part: “[t]he duration of *all* community control sanctions imposed upon an offender under this division *shall not exceed five years.*” (Emphasis added.) In the instant matter, the duration of all community control sanctions upon Bedell exceeds the five-year period and, thus, his sentence is contrary to law. Therefore, we reverse the sentence and remand this matter for resentencing. Upon remand, the trial court shall comply with R.C. 2929.15(A)(1).

{¶18} Bedell further maintains, under his second assignment of error, the trial court abused its discretion when it imposed “severe community control sanctions,” including the 200-day jail term, the total duration of his community control sanctions, the one-year placement in the Intensive Supervision Program, and paying restitution in the amount of \$36,000 within five years. Bedell maintains that, “if the trial court had in fact considered the purposes of sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12, it could not have imposed [these] sanctions [upon him].”

{¶19} As previously indicated, Bedell had completed his jail term prior to filing the instant appeal. Furthermore, it was improper for the trial court to impose community control sanctions upon Bedell that exceeded the statutory maximum under R.C. 2929.15(A)(1).

{¶20} With regard to the restitution element of Bedell's sentence, the trial court ordered restitution to be paid \$300.93 per month "to satisfy all past, present and future judgments, including arrearages in an amount up to \$36,000.00 within five years." On remand, it would be beneficial if the trial court would clarify what it intends with regard to the restitution order. This clarification is necessary, because if Bedell paid the monthly amount mandated by the trial court, he would not satisfy his obligation of \$36,000 within the five-year time period. Furthermore, it is not apparent from the March 26, 2008 judgment entry the trial court's rationale for including the language "to satisfy all past, present and future judgments." The record on appeal indicates only that Bedell had a child support arrearage of \$35,314.56 as of December 21, 2007. Bedell essentially claims this amount is, or will be, impossible for him to pay. However, that is something we simply do not know at this point in time, and it would require speculation. It is possible Bedell may be able to comply under a number of different scenarios. In the event the trial court imposes sanctions for failure to comply with the order, Bedell will be afforded a hearing. If sanctions are imposed at that time and Bedell believes there has been an abuse of discretion or other error, Bedell has a right of appeal of that order.

{¶21} In imposing a sentence, the Supreme Court of Ohio, in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶36, determined that the factors in R.C. 2929.11 and R.C. 2929.12 "apply as a general judicial guide for every sentencing." As we stated in *State v. Delmanzo*, 11th Dist. No. 2007-L-218, 2008-Ohio-5856, at ¶21:

{¶22} "In sentencing an offender for a felony conviction, pursuant to R.C. 2929.11(A), a trial court must be guided by the overriding purposes of felony sentencing, which are 'to protect the public from future crime by the offender and others

and to punish the offender.’ To achieve these two purposes, the court must consider the need for incapacitating the offender, deterring him from future crime, rehabilitating the offender, and making restitution to the victim. Id. R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the two purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim. The court must also consider the seriousness and recidivism factors under R.C. 2929.12.”

{¶23} While there is no reference in the sentencing entry that the trial court has considered the statutory factors as set forth above, presumably upon resentencing, the trial court will be in a position to clarify whether or not it has considered them.

{¶24} Bedell’s assignments of error have merit to the extent indicated. Based on the foregoing, the judgment of the Portage County Court of Common Pleas is hereby reversed, and this matter is remanded for proceedings consistent with this opinion.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O’TOOLE, J., dissents.