

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	<b>OPINION</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NO. 2011-L-100</b>
NICHOLAS C. PETTI,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 11 CR 000019.

Judgment: Reversed and remanded.

*Charles E. Coulson*, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*David L. Doughten*, 4403 St. Clair Avenue, Cleveland, OH 44103-1125 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Nicholas C. Petti, appeals the judgment of the Lake County Court of Common Pleas sentencing appellant to a 19-year term of imprisonment. Appellant claims the trial court erred when it sentenced him to a repeat violent offender specification without sentencing him to the maximum sentence on the underlying conviction, aggravated robbery. Based on the following, we reverse and remand.

{¶2} Appellant entered a plea of guilty to robbery, a felony of the third degree, in violation of R.C. 2911.02(A)(3); and aggravated robbery, a felony of the first degree,

in violation of R.C. 2911.01(A)(3), with a repeat violent offender (“RVO”) specification pursuant to R.C. 2941.149.

{¶3} Appellant was sentenced to a prison term of four years on robbery and nine years on aggravated robbery, to be served concurrently for a total of nine years. In addition, appellant was ordered to serve an additional term of ten years on the RVO specification prior to and consecutive to the above-stated prison term. Thus, appellant was sentenced to a total prison term of 19 years.

{¶4} Appellant filed a timely notice of appeal and asserts:

{¶5} “The trial court erred by sentencing the appellant to ten additional years pursuant to a Repeat Violent Offender Specification, R.C. 2929.14(D)(2)(b),<sup>1</sup> because the court failed to sentence the appellant to the maximum term of incarceration for the underlying offense.”

{¶6} Appellant’s assigned error relates to his sentence of nine years on his conviction of aggravated robbery, in violation of R.C. 2911.01(A)(3), a felony of the first degree. Appellant argues it was error for the trial court to sentence him to the RVO specification when he was sentenced to less than the maximum term for the underlying offense, aggravated robbery. In its brief, appellee concedes the trial court erred and requests this court remand the matter for resentencing.

{¶7} If an indictment contains an RVO specification, it is the trial court that shall determine the issue of whether the offender is an RVO. R.C. 2941.149(B). An RVO is a person who (1) is being sentenced for committing or for complicity in committing aggravated murder, murder, any felony of the first or second degree that is an offense

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1. Appellant was sentenced prior to the amendment of R.C. 2929.14, effective September 30, 2011. See 2011 HB 86, § 1.

of violence, an attempt to commit any of these offenses if the attempt is a felony of the first or second degree, or a substantially equivalent offense; and (2) was previously convicted of or pleaded guilty to one of the aforementioned offenses. R.C. 2929.01(CC).

{¶8} Once the court determines a person to be an RVO, which is not an issue in the present appeal, penalty enhancement is governed by R.C. 2929.14(D). As relevant here, R.C. 2929.14(D)(2) mandates that:

{¶9} (b) *The court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:*

{¶10} (i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

{¶11} (ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (CC)(1) of section 2929.01 of the Revised Code, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the offender previously has been convicted or to which the

offender previously pleaded guilty, whether prosecuted together or separately.

{¶12} (iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person. (Emphasis added.)

{¶13} Under R.C. 2929.14(D)(2)(b), the offender may be sentenced to an additional term for an RVO specification after the trial court sentences him to the maximum penalty for the underlying conviction. The maximum penalty must be imposed due to the finding that appellant was an RVO. Here, the trial court did not sentence appellant to the maximum prison term for his first-degree felony, aggravated robbery. R.C. 2929.14(A)(1).

{¶14} Although in the context of post-release control, the Ohio Supreme Court has recognized that a trial court may only impose a sentence on a defendant as provided by statute; a trial court cannot impose a sentence less than or greater than that

provided for by law. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶22, citing *Colegrove v. Burns*, 175 Ohio St. 437, 438 (1964). “[A] trial court does not have the authority to impose a sentence that is contrary to law.” *Id.*, citing *Colegrove, supra*. Because the trial court failed to properly apply R.C. 2929.14(D)(2)(b), appellant’s sole assignment of error is with merit.

{¶15} Based on the opinion of this court, we reverse the judgment of the Lake County Court of Common Pleas and remand the matter for resentencing.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.

concur.