**[Cite as *State v. Jirousek*, 2015-Ohio-949.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**GEAUGA COUNTY, OHIO**

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|---|---|---|
| STATE OF OHIO, | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | **CASE NO. 2014-G-3192** |
| - vs - | : | |
| MICHAEL D. JIROUSEK, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Geauga County Court of Common Pleas, Case No. 11 C 000164.

Judgment: Affirmed.

*James R. Flaiz,* Geauga County Prosecutor, and *Nicholas A. Burling,* Assistant Prosecuting Attorney, Courthouse Annex, 231 Main Street, Suite 3A, Chardon, OH 44024 (For Plaintiff-Appellee).

*Paul A. Mancino, Jr.,* Mancino, Mancino & Mancino, 75 Public Square, #1016, Cleveland, OH 44113-2098 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

**{¶1}** Appellant, Michael D. Jirousek, appeals from the judgment on sentence of the Geauga County Court of Common Pleas. For the reasons that follow, we affirm.

**{¶2}** On November 21, 2011, appellant was indicted on one count of importuning, in violation of R.C. 2907.07(D)(1), a felony of the fifth degree; one count of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A), a felony of the

fourth degree; and one count of endangering children, in violation of R.C. 2919.22(B)(5), a felony of the second degree.

**{¶3}** Appellant ultimately entered pleas of guilty to one count of felony-five importuning; one count of felony-four unlawful sexual conduct with a minor, and one count of felony-four pandering obscenity involving a minor, a lesser-included offense of endangering children. The court set the matter for sentencing and ordered a presentence investigation report ("PSI").

**{¶4}** After a hearing, appellant was sentenced to 17 months imprisonment for unlawful sexual conduct with a minor; 11 months imprisonment for importuning, to run concurrently with the 17-month sentence; and 12 months for pandering obscenity involving a minor, to run consecutively to the 17-month aggregate sentence for the first two counts.

**{¶5}** Appellant appealed the judgment and, in *State v. Jirousek*, 11th Dist. Geauga Nos. 2013-G-3128 and 2013-G-3130, 2013-Ohio-5267 ("*Jirousek I")*, this court affirmed the court's judgment in part, reversed it in part, and remanded the matter for resentencing. Appellant subsequently filed an application for reconsideration and a motion to certify a conflict. Each of these pleadings was denied.

**{¶6}** On January 24, 2014, appellant was resentenced to 11 months imprisonment for importuning and 17 months imprisonment for unlawful sexual conduct with a minor. These terms were ordered to run concurrently. For pandering obscenity, appellant was sentenced to five years of community control, six months of which was to be served as residential community control. The trial court also advised him that he could face a 17-month prison sentence for violating the terms of his community control based upon the pandering conviction. The court acknowledged that appellant was

entitled to 646 days of jail credit toward his prison sentences. Given the jail credit, appellant was immediately placed on residential community control.

**{¶7}** Appellant appealed the trial court's judgment; he also filed a motion to modify probation, seeking to be released from his residential community control. Appellant then filed a motion for release in this court pending his appeal. Because the trial court had not ruled upon his original motion, this court determined the motion was not ripe. On April 28, 2014, the trial court denied appellant's motion, but, upon its own motion, the court suspended the residential sanction, effective May 2, 2014 at 4:00 p.m.

**{¶8}** Appellant assigns four errors for our review. His first assignment of error provides:

**{¶9}** "The court erred in proceeding with re-sentencing as this case was still pending in the court of appeals."

**{¶10}** Appellant argues the trial court lacked jurisdiction to resentence him on January 24, 2014, on this court's remand order from *Jirousek I*, because his application for reconsideration was still pending with this court. Appellant contends the Supreme Court of Ohio's decision in *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94 (1978), supports his contention.

**{¶11}** We shall first address appellant's misplaced reliance upon *Special Prosecutors*. In *Special Prosecutors*, the defendant pleaded guilty to murder; the plea was accepted, resulting in a conviction. The defendant appealed and the reviewing court affirmed the conviction. Subsequently, the defendant filed a motion to withdraw the plea, which the trial court granted. After a trial date had been set, the Supreme Court granted a writ of prohibition to prevent the trial from going forward. The Supreme Court held:

**{¶12}** [T]he trial court's granting of the motion to withdraw the guilty plea and the order to proceed with a new trial were inconsistent with the judgment of the Court of Appeals affirming the trial court's conviction premised upon the guilty plea. The judgment of the reviewing court is controlling upon the lower court as to all matters within the compass of the judgment. Accordingly, we find that the trial court lost its jurisdiction when the appeal was taken, and, absent a remand, it did not regain jurisdiction subsequent to the Court of Appeals' decision. *Id.* at 97.

**{¶13}** In this case, this court remanded the judgment for resentencing thereby conferring jurisdiction anew on the trial court. The trial court not only had jurisdiction to resentence appellant, but was required to do so pursuant to a superior court's order. The facts of *Special Prosecutors* are consequently distinguishable from the instant matter. The trial court's action in the matter sub judice, however, was consistent with the general legal precedent espoused in *Special Prosecutors*.

**{¶14}** Appellant has failed to set forth any specific authority for his contention that a pending application for reconsideration on issues unrelated to the remand order suspends the trial court's jurisdiction to address the matter at issue in the remand order. Several sister districts have addressed similar arguments, however, and determined a pending application for reconsideration has no impact upon a trial court's jurisdiction to proceed on remand from an appellate court.

**{¶15}** Most recently, in *Scott v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. Franklin Nos. No. 14AP-98, No. 14AP-105, No. 14AP-106, No. 14AP-107, No. 14AP-108, No. 14AP-109, No. 14AP-110, No. 14AP-111, No. 14AP-112, No. 14AP-113, 2014-

Ohio-2796, the Tenth Appellate District addressed a similar issue. In that case, the appellants cited S.Ct.Pract.R. 7.01(A)(5) in support of their position that a pending application for reconsideration automatically tolls an appellate court's judgment. That subsection provides:

> **{¶16}** (a) When a party timely files an application for reconsideration in the court of appeals pursuant to App.R. 26(A)(1), the time for filing a notice of appeal from the court of appeals' entry of judgment shall be tolled.
>
> **{¶17}** (b) If a timely application for reconsideration is filed in the court of appeals, and the appellant seeks to appeal from the court of appeals' entry of judgment, the appellant shall file a notice of appeal within forty-five days of the court of appeals' decision denying the application for reconsideration, or if reconsideration is granted, from the subsequent entry of judgment.

**{¶18}** The Tenth District determined the foregoing rule not only failed to support the appellants' position, but actually supported the opposite proposition. The court observed: "While [the] rule tolls the time for filing a notice of appeal in the Supreme Court of Ohio, notably absent from the rule is *any* language indicating that a judgment of the court of appeals is automatically stayed by a party's act of filing an application for reconsideration." (Emphasis sic.). *Id.* at ¶7.

**{¶19}** The Tenth District therefore concluded S.Ct.Pract.R. 7.01(A)(5) could not be read as authority to support the proposition that an application for reconsideration automatically stays an appellate court's judgment. Because the appellants in *Scott* offered no authority for their position and there was no obvious conflict or other legal

prohibition that would prevent the trial court from acting on the remand order, the Tenth District determined a pending application for reconsideration does not stay an appellate court's remand order. *Id.* at ¶9. *See also State v Pippen*, 4th Dist. Scioto No. 12CA3526, 2013-Ohio-2239, ¶12 (there is "no express prohibition against the trial court's exercise of jurisdiction in re-sentencing Appellant, pursuant to [its] remand order, despite the fact that an application for reconsideration had been filed and was still pending at the time of the re-sentencing hearing."); *State v. Moore*, 7th Dist. Mahoning No. 13 MA 60, 2014-Ohio-2525, ¶10 (while an application for reconsideration extends the time to appeal to the Supreme Court of Ohio, "from a procedural standpoint[,] it does little else on its own.")

**{¶20}** Under the circumstances of this case, we agree with the analyses of the Fourth, Seventh and Tenth Districts.

**{¶21}** We recognize that, once an appeal has been timely perfected, a trial court loses jurisdiction except to act in aid of the appeal. *See e.g. State ex rel. Special Prosecutors, supra, at* 97. It is also well-established that, once an appeal is perfected, a trial court retains jurisdiction over issues "not inconsistent with the appellate court's jurisdiction to reverse, modify, or affirm the judgment appealed from." *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, ¶9. In this case, the trial court did not act in a manner inconsistent with this court's jurisdiction; to the contrary, the trial court followed a remand order issued by this court and therefore exercised its jurisdiction pursuant to this court's directive.

**{¶22}** Upon entry of this court's judgment reversing and remanding the matter for the limited purpose of resentencing, the trial court's jurisdiction was properly re-invoked to effectuate this court's order. We acknowledge that, had appellant's

application for reconsideration addressed substantive issues pertaining to appellant's sentence, our conclusion would likely be different. Appellant's application for reconsideration, however, asked this court to reconsider our conclusions that (1) his appeal of the misdemeanor contempt orders was moot and (2) the trial court's failure to notify him of the residency restrictions relating to his sex offender status was not reversible error. The first issue had no impact upon the remand order directing the trial court to resentence appellant; and, while the second issue may seem related to sentencing, it is both ancillary to and distinct from the imposition of a defendant's sentence. *See Burbrink v. State*, 185 Ohio App.3d 130, 2009-Ohio-5346, ¶10 (1st Dist.) ("sex-offender registration and notification statutes are remedial and not punitive. * * * They are not punishment and they are not part of any sentence imposed on the sex offender"); see also *State v. Eshbaugh*, 11th Dist. Trumbull No. 97-T-0109, 2001 Ohio App. LEXIS 5844, *6 (Dec. 21, 2001) (noting sexual offender registration requirements are remedial and non-punitive).[1]

**{¶23}** Because there was no clear conflict between the remand order and the matters at issue in an application for reconsideration, we therefore hold the trial court possessed jurisdiction to proceed to resentence appellant notwithstanding the pending application for reconsideration.

**{¶24}** Appellant's first assignment of error is without merit.

**{¶25}** Appellant's second assignment of error states:

1. Although these cases pre-date the Ohio Supreme Court's decision finding the Adam Walsh Act unconstitutional on separation-of-powers grounds in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2010, *Bodyke* did not affect the substantive conclusion that sexual offender registration statutes are remedial rather than punitive. *See In re Sexual Offender Reclassification Cases*, 126 Ohio St.3d 322, 2010-Ohio-3753, ¶15 (clarifying that the Court's reversal of sexual offender reclassification cases in *Bodyke* was limited to the separation-of-powers violation; and, thus, all other aspects of the various appellate courts' opinions, including the rejection of the argument that sexual offender statutes were punitive, remained unaffected.)

**{¶26}** "Defendant was improperly charged with jury costs when no jury was impaneled."

**{¶27}** Appellant asserts the trial court improperly required appellant to pay for jury costs because he entered a plea of guilty and no jury trial occurred. We find no error.

**{¶28}** In its judgment on sentence, the trial court ordered appellant to pay "court costs for which judgment is rendered (R.C. 2947.23)[.]" The relevant portions of R.C. 2947.23(A), effective May 22, 2012, provide:

**{¶29}** (2) The following shall apply in all criminal cases:

**{¶30}** (a) If a jury has been sworn at the trial of a case, the fees of the jurors shall be included in the costs, which shall be paid to the public treasury from which the jurors were paid.

**{¶31}** (b) If a jury has not been sworn at the trial of a case because of a defendant's failure to appear without good cause *or because the defendant entered a plea of guilty or no contest less than twenty-four hours before the scheduled commencement of the trial*, the costs incurred in summoning jurors for that particular trial may be included in the costs of prosecution. If the costs incurred in summoning jurors are assessed against the defendant, those costs shall be paid to the public treasury from which the jurors were paid. (Emphasis added.)

**{¶32}** Appellant was sentenced on January 24, 2014, some 20 months after the statute's effective date. Further, appellant entered pleas of guilty on the morning of October 15, 2012, which was the day his jury trial was scheduled to commence and the

jurors had been summoned to the courthouse. The amended statute applied to appellant and therefore the trial court did not err in imposing the costs at issue.

**{¶33}** Appellant's second assignment of error lacks merit.

**{¶34}** Appellant's third assignment of error provides:

**{¶35}** "Defendant was subjected to multiple punishments in violation of the Fifth Amendment when the court failed to grant jail credit concerning his six month county jail sentence."

**{¶36}** Appellant contends the trial court erred when it failed to give him jail-time credit towards the six-month residential community control. We do not agree.

**{¶37}** R.C. 2929.16(A) provides, in relevant part: "the court imposing a sentence for a felony upon an offender who is not required to serve a mandatory prison term may impose any community residential sanction or combination of community residential sanctions." The statute also provides that community residential sanctions include up to six months at a community-based correctional facility as well as up to six months in jail.

**{¶38}** R.C. 2967.191 governs reduction of prison terms for related days of confinement. It provides that a prison term shall be reduced by "the number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced, including confinement in lieu of bail while awaiting trial * * *." Moreover, community control is a "sanction that is not a prison term." R.C. 2929.01(F).

**{¶39}** In this case, the trial court was not required to mitigate the community residential sanction with his jail-time credit because the language of R.C. 2967.191 specifically applies to prison sentences. Since community control is not a prison term,

the statute does not apply to appellant's case. We therefore discern no double jeopardy issue.

**{¶40}** Appellant's third assignment of error lacks merit.

**{¶41}** Appellant's fourth assignment of error provides:

**{¶42}** "Defendant was denied due process of law when the court imposed a consecutive sentence without adhering to the mandate in the prior appeal."

**{¶43}** Appellant contends the trial court erred when it imposed consecutive sentences without making the requisite findings pursuant to this court's order in *Jirousek I* and R.C. 2929.14(C)(4). We do not agree.

**{¶44}** The trial court ordered appellant to serve 11 months imprisonment for importuning and 17 months imprisonment for unlawful sexual conduct with a minor. These terms were ordered to run concurrently. The court also advised appellant that he could be returned to prison for a 17-month term, based upon the pandering conviction, if he violates community control.

**{¶45}** R.C. 2929.14(C)(4) requires a trial court to make certain statutory findings if it "requires the offender to serve * * * prison terms consecutively." The court did not actually impose the 17-month sentence for the pandering conviction and may never do so. Because the court did not order appellant to actually serve the term, it did not "require" appellant to serve it consecutively to the 17-month aggregate term. The findings required under R.C. 2929.14(C)(4) were accordingly unnecessary because consecutive sentences were not, in fact, imposed.

**{¶46}** Appellant's fourth assignment of error is without merit.

**{¶47}** For the reasons discussed in this opinion, the judgment of the Geauga County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J., concurs with a Concurring Opinion,

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part, with a Dissenting Opinion.

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TIMOTHY P. CANNON, P.J., concurring.

**{¶48}** I respectfully concur in the opinion of the majority to affirm the judgment of the trial court. However, with respect to the disposition of the third assignment of error, I would consider the matter moot. Appellant claims he should have been given credit for jail time served prior to his original sentence. He has completed service of his sentence. We cannot give those days back once they have already been served. Therefore, we cannot afford a meaningful remedy. If appellant later violates community control sanctions, and the trial court imposes jail time as a result, the issue of jail time credit should be addressed at that time. *State v. Franklin,* 2d Dist. Montgomery No. 25677, 2013-Ohio-5164, ¶15.

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COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part, with a Dissenting Opinion.

**{¶49}** I concur with the majority regarding the disposition of appellant's assignments of error Nos. 1, 2 and 4. I respectfully dissent regarding assignment of error No. 3 regarding the trial court's failure to credit appellant for additional time served against his six month sentence of residential community control.

**{¶50}** The majority states that the trial court was not required to mitigate the community residential sanction with jail time credit as the language of R.C. 2967.191 applies to prison sentences and not to community control. However, R.C. 2949.08(B) requires a trial court to include in its sentencing entry the number of days that a person was confined for any reason arising out of his/her offense prior to serving their sentence.

**{¶51}** "(A) When a person who is convicted of or pleads guilty to a felony is sentenced to a community residential sanction in a community-based correctional facility pursuant to section 2929.16 of the Revised Code or when a person who is convicted of or pleads guilty to a felony or a misdemeanor is sentenced to a term of imprisonment in a jail, the judge or magistrate shall order the person into the custody of the sheriff or constable, and the sheriff or constable shall deliver the person with the record of the person's conviction to the jailer, administrator, or keeper, in whose custody the person shall remain until the term of imprisonment expires or the person is otherwise legally discharged.

**{¶52}** "(B) The record of the person's conviction shall specify the total number of days, if any, that the person was confined for any reason arising out of the offense for which the person was convicted and sentenced prior to delivery to the jailer, administrator, or keeper under this section. The record shall be used to determine any reduction of sentence under division (C) of this section.

**{¶53}** "(C)(1) If the person is sentenced to a jail for a felony or a misdemeanor, the jailer in charge of a jail shall reduce the sentence of a person delivered into the jailer's custody pursuant to division (A) of this section by the total number of days the person was confined for any reason arising out of the offense for which the person was

convicted and sentenced, including confinement in lieu of bail while awaiting trial, confinement for examination to determine the person's competence to stand trial or to determine sanity, confinement while awaiting transportation to the place where the person is to serve the sentence, and confinement in a juvenile facility."

R.C. 2949.08(A) – (C).

**{¶54}** Under the statute appellant should have had his confinement in residential community control reduced by the number of days that he was confined, in excess of 17 months, arising out of the offenses for which he was convicted. *State v. Keckler,* 3rd Dist. Hancock No. 5-13-16, 2013-Ohio-5493, ¶8. The concurring opinion is correct in noting that appellant has completed service of his sentence and we cannot give these days back. I highlight this matter as this issue is capable of repetition yet evading review. Additionally, in this age of transparency and the internet, we owe it to the appellant (and the public) to see to it that records of convictions and sentencing are accurate.

**{¶55}** For this reason I respectfully dissent.