

[Cite as *State v. Breedlove*, 2020-Ohio-5285.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MATTHEW RYAN BREEDLOVE

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. W. Scott Gwin, J.

Hon. John W. Wise, J.

Case No. 2020 CA 0036

O P I N I O N

CHARACTER OF PROCEEDINGS:

Appeal from the Richland County Court of
Common Pleas, Case No. 2018-CR-0671

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 12, 2020

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, P.J.

{¶1} Defendant-Appellant Matthew Breedlove appeals the judgment entered by the Richland County Common Pleas Court revoking his community control for possession of heroin (R.C. 2925.11 (A)&(C)(6)(a)), a felony of the fifth degree, and sentencing him to a term of incarceration of 12 months. Appellee is the state of Ohio.

STATEMENT OF THE CASE¹

{¶2} On January 23, 2019, Appellant was convicted following his plea of guilty to one count of possession of heroin, a fifth-degree felony. He was sentenced to three years community control, violation of which would lead to twelve months in prison, and three years of post-release control.

{¶3} On January 16, 2020, Appellant was charged with four violations of his community control. The complaint alleged on or about January 14, 2020, Appellant possessed a drug abuse instrument (hypodermic needle); on or about January 14, 2020, Appellant possessed drug paraphernalia (burnt spoon); on or about January 14, 2020, Appellant admitted the use of fentanyl to his supervising officer; and beginning January 7, 2020, Appellant failed to call the drug testing hotline as required by his supervising officer.

{¶4} The case proceeded to hearing in the Richland County Common Pleas Court on February 10, 2020. Appellant admitted all four community control violations. The trial court sentenced Appellant to 12 months incarceration, to be served consecutively with the sentence imposed for the same community control violations filed in case number 2013 CR 702 (appellate number 2020 CA 0037).

¹ A rendition of the facts is not necessary for our resolution of the issues raised on appeal.

{¶15} It is from the February 13, 2020 judgment of the trial court Appellant prosecutes this appeal, assigning as error:

I. THE COURT ERRED IN SENTENCING DEFENDANT TO A PRISON TERM MORE THAN 180 DAYS FOR AN F4 AND MORE THAN 90 DAYS FOR AN F5 WHERE THE VIOLATION DOES NOT CONSTITUTE A FELONY LEVEL CRIME.

II. THE COURT ERRED IN SENTENCING DEFENDANT IN EXCESS TO THE PROVISIONS OF ORC 2929.15(B)(1)(c)(i) AND (ii) WHERE THERE WAS NO FINDING THAT DEFENDANT'S CONDUCT WAS IN VIOLATION OF COMMUNITY CONTROL WAS MORE THAN TECHNICAL (SIC).

I.

{¶16} In his first assignment of error, Appellant argues he could not be sentenced to more than 90 days for a community control violation for a fifth degree felony pursuant to R.C. 2929.15(B), which provides 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.

{¶7} “Subsection (B)(1) sets out the sanctions that may be imposed on an offender who violates the terms of his community control, and subsections (B)(1)(c)(i) and (ii) place caps on the length of sentences for community-control violations when the underlying crime was a fourth- or fifth-degree felony.” *State v. Nelson*, 2020-Ohio-3690, ¶ 21. The caps apply in two circumstances: one, when the conduct constituting the violation was a “technical violation” and two, when the conduct was “any violation of law committed while under a community control sanction imposed for [a fourth- or fifth-degree] felony that consists of a new criminal offense and that is not a felony.” *Id.* citing R.C. 2929.15(B)(1)(c)(i) and (ii).

{¶8} In *Nelson, supra*, the Supreme Court of Ohio addressed the distinction between technical and nontechnical violations of community control. The court held a violation is “nontechnical” if, after considering the totality of the circumstances, the

violation concerns “a condition of community control that was ‘specifically tailored to address’ matters related to the defendant’s misconduct or if it can be deemed a ‘substantive rehabilitative requirement which addressed a significant factor contributing to’ the defendant’s misconduct.” *Id.* at ¶ 26, quoting *State v. Davis*, 12th Dist. Warren No. CA2017-11-156, 2018-Ohio-2672, ¶ 17, 18. On the other hand, a violation of community control is considered technical in nature “when the condition violated is akin to ‘an administrative requirement facilitating community control supervision.’” *Id.*, quoting *Davis* at ¶ 18.

{¶19} In making the determination whether the violation was technical or nontechnical, the *Nelson* court held the trial court is to consider the totality of the circumstances because there is no one single factor which determines whether a violation was technical or nontechnical. *Id.* at ¶ 26. Further, the determination of whether a violation was a “technical violation” under R.C. 2929.15(B)(1)(c) does not depend upon whether the conduct at issue is criminal. *Id.* at ¶ 26; *State v. Mannah*, 5th Dist. Fairfield No. 17-CA-54, 2019-Ohio-4219, ¶ 14. The statute allows the trial court to use its discretion and “engage in a practical assessment of the case before it, i.e., to consider the nature of the community control condition at issue and the manner in which it was violated, as well as other relevant circumstances in the case.” *Id.* at ¶ 26; See also *State v. Whitacker*, 6th Dist. Wood Nos. WD-19-038, WD-19-039, WD-19-040, 2020-Ohio-4249, ¶ 17; *State v. Calhoun*, 6th Dist. Wood No. WD-17-067, 2019-Ohio-228, ¶ 30.

{¶10} Recently in *State v. Castner*, 2020-Ohio-4950, the Ohio Supreme Court applied the law as set forth in *Nelson* to a violation of community control in a drug offense case. In *Castner*, the defendant was convicted of aggravated possession of drugs, a fifth

degree felony, in the Richland County Common Pleas Court. He was placed on community control. He violated the terms of his community control by getting kicked out of his drug treatment program after program staff discovered he was using the facility's computers to contact young girls via a "Hello Kitty" themed email account. The Ohio Supreme Court held, "The conditions imposed by the court mandating that Castner complete the Alvis House and Re-Entry Court programs were plainly substantive rehabilitative requirements that were specifically tailored to address Castner's drug use and were aimed at reducing his likelihood of recidivism. Indeed, substance-abuse treatment was the central focus of Castner's community-control sanction." *Id.* at ¶16.

{¶11} Appellant argues there was no evidence the substance he injected was actually fentanyl, and therefore no evidence his violations of community control constituted a felony. He argues he therefore could only be sentenced to ninety days incarceration for violation of community control for a fifth degree felony. However, based on the Ohio Supreme Court's decisions in *Nelson* and *Castner*, the violation need not be a new felony offense, or even a new criminal offense, in order to be non-technical in nature, allowing the trial court to sentence Appellant to more than ninety days.

{¶12} The instant case is similar to *Castner*. Appellant was originally convicted of possession of heroin. The violations of his community control, which he admitted, were all drug-related violations of substantive rehabilitative requirements specifically tailored to address his drug use and reduce his likelihood of recidivism. We find the trial court did not abuse its discretion in sentencing Appellant to twelve months incarceration for violation of community control which was non-technical in nature.

{¶13} The first assignment of error is overruled.

II.

{¶14} In his second assignment of error, Appellant argues the trial court failed to make a specific finding the violations were substantive, and not merely technical, in nature.

{¶15} Nothing in the statute or the case law promulgated thereunder requires a specific finding by the trial court the offenses were substantive in nature. From the trial court's sentence, we can infer the trial court found the offenses to be non-technical in nature.

{¶16} The second assignment of error is overruled.

{¶17} The judgment of the Richland County Common Pleas Court is affirmed.

By: Hoffman, P.J.

Gwin, J. and

Wise, John, J. concur

