

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellee	:	Hon. Craig R Baldwin, J.
	:	Hon. John W. Wise, J.
-Vs-	:	
	:	
HARRY H. KROUSKOUPF, III	:	Case No. CT2019-0066
	:	
Defendant - Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Muskingum County Court of Common Pleas, Case No. CR2018-0007

JUDGMENT: Affirmed

DATE OF JUDGMENT: March 20, 2020

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Baldwin, J.

{¶1} Defendant-appellant Harry H. Krouskouf III appeals his conviction and sentence from the Muskingum County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On January 3, 2018, appellant was indicted on one count of theft, a felony of the fifth degree, in violation of R.C. 2913.02(A)(1), two counts of theft, misdemeanors of the first degree, in violation of R.C. 2913.02(A)(1), and two counts of aggravated robbery, felonies of the first degree, in violation of R.C. 2911.01(A)(1). The indictment also contained firearm and repeat violent offender specifications. At his arraignment on January 10, 2018, appellant entered a plea of not guilty to the charges.

{¶3} Thereafter, on February 26, 2018, appellant entered a plea of guilty to theft, a felony of the fifth degree, and two counts of robbery, felonies of the second degree, with a repeat violent offender specification. The remaining counts and firearm specifications were dismissed Pursuant to an Entry filed on March 13, 2018, appellant was sentenced to an aggregate sentence of thirteen (13) years in prison. The trial court also found that appellant had violated the terms of his post-release control and, at the sentencing hearing, terminated appellant's post-release control and ordered him to a prison term equal to the time remaining on that sanction. (Sent. Hearing, Mar. 12, 2018 at 8-9). The court ordered appellant to serve that sentence consecutive to the thirteen-year prison sentence. (Id.)

{¶4} Appellant then appealed, arguing that trial court was required to inform him before accepting his guilty plea to an offense he committed while on post-release control that pursuant to R.C. 2929.141(A)(1), a sentence for a post-release control violation must be served consecutively to the sentence for the newly committed offense and that the trial court did not do so. Pursuant to an Opinion filed on March 6, 2019 in *State v. Krouskoupf*, III, 5th Dist. Muskingum No. CT2018-0020, 2019 -Ohio 806, this Court vacated appellant's plea and remanded the case to the trial court for further proceedings, finding that the trial court had completely failed to inform appellant that a consecutive prison sentence under R.C. 2929.141(A) was possible.

{¶5} The trial court, as memorialized in an Entry filed on April 12, 2019, ordered that appellant's previously entered guilty plea was vacated.

{¶6} Thereafter, on July 19, 2019, appellant withdrew his former not guilty plea and entered a plea of guilty to the amended count of robbery in violation of R.C. 2911.02(A)(1), a felony of the second degree, and an amended count of robbery in violation of R.C. 2911.02(A)(3), a felony of the third degree. Via an Entry filed on July 23, 2019, the trial court sentenced appellant to an aggregate prison sentence of eleven (11) years. The trial court, at the July 19, 2019 hearing, terminated appellant's post-release control and ordered "that any time left remaining on that must be served consecutively to the sentence you just received here today..." Transcript of July 19, 2019 hearing at 15. The trial court, in its July 23, 2019 Entry, stated that it was imposing the "reminder of time left on Post Release Control [to] be served in prison. According to statute, it is mandatory that the reminder of time left on Post Release Control be served consecutively to the eleven (11) year aggregate prison sentence in the instant case."

{¶7} As memorialized in an Order filed on July 23, 2019, the remaining counts and specifications were dismissed.

{¶8} Appellant now raises the following assignment of error on appeal:

{¶9} "I. APPELLANT DID NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTER HIS PLEAS OF GUILTY, IN VIOLATION OF HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION SIXTEEN OF THE OHIO CONSTITUTION."

I

{¶10} Appellant, in his sole assignment of error, argues that his plea was not knowing, intelligent and voluntary because the trial court failed to advise him of the maximum penalty for the prison term that it imposed for his post release control violation. Appellant contends that the trial court was obligated to notify him of the time he would be required to serve as a result of the violation of the terms of post release control.

{¶11} R.C. 2929.141(A)(1) provides for the termination of post-release control upon commission of a new felony as follows:

{¶12} (A) Upon the conviction of or plea of guilty to a felony by a person on post-release control at the time of the commission of the felony, the court may terminate the term of post-release control, and the court may do either of the following regardless of whether the sentencing court or another court of this state imposed the original prison term for which the person is on post-release control:

{¶13} (1) In addition to any prison term for the new felony, impose a prison term for the post-release control violation. The maximum prison term for the violation shall be

the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony. In all cases, any prison term imposed for the violation shall be reduced by any prison term that is administratively imposed by the parole board as a post-release control sanction. A prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony. The imposition of a prison term for the post-release control violation shall terminate the period of post-release control for the earlier felony.

{¶14} Only the trial court itself may make the decision to sentence for a post-release control violation. *State v. Branham*, 2nd Dist. Clark No. 2013–CA–49, 2014–Ohio–5067. Once the court decides to impose a sentence for such a violation, it is bound by R.C. 2929.141 when determining the time to be served. *Id.*

{¶15} While the statute gives the court discretion to decide whether or not to sentence for a post-release control violation, once the court has decided to impose a sentence, that sentence is determined by statute. The trial court specifically stated on the record that it was terminating appellant's post-release control and that it would impose the time that appellant “had left on it”, which would be the remainder of his post-release control. Transcript at 4. That specific sentence is calculable to a certainty from information within the possession of the Adult Parole Authority, while such information may not be readily available to the sentencing court. Therefore, we find no error in the trial court's failure to advise appellant of the exact sentence and include the exact sentence in the sentencing entry, as the sentence may be administratively determined by the Adult Parole Authority as set forth by R.C. 2929.141(A)(1). See *State v. Clark*, 5th Dist. Muskingum No. CT2017–0032, 2018-Ohio-1155. See also *State v. Dunwoody*, 5th Dist. Muskingum

No. CT2017-0050, 2018 -Ohio- 2386 and *State v. Johnson*, 5th Dist. Muskingum No. CT2017-0058, 2018-Ohio-2387.

{¶16} We find, therefore, that the trial court properly advised appellant of the penalty for the post release control violation and that his plea was knowing, intelligence and voluntary.

{¶17} Appellant's sole assignment of error is, therefore, overruled.

{¶18} Accordingly, the judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Baldwin, J.

Gwin, P.J. and

Wise, John, J. concur.