

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

STATE OF OHIO,	:	Case Nos. 16CA23 and 17CA1
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
ROBERT WHITE,	:	
	:	RELEASED: 09/29/17
Defendant-Appellant.	:	

APPEARANCES:

Ryan Shepler, Kernen & Shepler, L.L.C., Logan, Ohio, for appellant.

Benjamin E. Fickel, Hocking County Prosecuting Attorney, Logan, Ohio, for appellee.
Harsha, J.

{¶1} After Robert White pleaded guilty to three felony counts of intimidation, three misdemeanor counts of aggravated menacing, and three misdemeanor counts of telecommunications harassment, the Hocking County Court of Common Pleas merged his misdemeanor charges and sentenced him to five years of community control.

{¶2} In this consolidated appeal White asserts that the trial court erred by failing to merge his felony counts of intimidation at his original sentencing hearing. White did not raise this issue during the proceedings so he forfeited all but plain error. The trial court did not err by failing to merge these offenses because the record indicates they were committed separately, i.e., at three distinct dates separated by more than four months. Because White failed to carry his burden of proof on the merger issue, we overrule his first assignment of error.

{¶3} Next White contends that the trial court's declaration that he could serve up to 108 months in prison if he violated the terms of his community control was

erroneous. The trial court did not originally advise White of any prison sentence should he violate his community control. When White subsequently violated his community control, the trial court continued that sanction, but this time advised him that a subsequent violation could result in a prison term of *up to* 108 months. We agree that the trial court erred by failing to notify White at the sentencing on his community-control violation of the *specific* prison term that may be imposed for an additional violation of the conditions of the sanction. Because White has not yet violated the terms of his community control after being resentenced, the trial court may correct the error by resentencing him with the proper notification. We sustain White's second assignment of error and remand the cause for resentencing.

I. FACTS

{¶4} The Hocking County Grand Jury returned an indictment charging Robert White with three counts of felony intimidation, three counts of misdemeanor aggravated menacing, and three counts of misdemeanor telecommunications harassment based upon separate incidents occurring on three different days spanning from April 2016 to August 2016. The alleged victim was Hocking County Juvenile Court employee Jamie Green. White subsequently pleaded guilty to the charges, and the trial court merged the misdemeanors into the three associated felonies, but did not merge any of the felonies for sentencing. The trial court imposed five years of community control, but did not advise him that any violation of his community control could result in the imposition of a prison sentence. White appealed from his convictions and sentence in Case No. 16CA23.

{¶15} Shortly after his sentencing the state filed a motion to revoke his community control, alleging that White entered the courthouse with a baseball bat and thereby violated the civil protection order in favor of the juvenile court employee he had threatened. The trial court determined that White had violated his community control. But because it had failed at his original sentencing to advise him of the potential prison sentence should he violate his community control, the court recognized it could not sentence him to prison. Instead, the trial court continued White's community control, but this time advised him that if he violated it, he could be sentenced to up to 108 months in prison:

THE COURT: All right. As the court understands its role in this hearing today, the Court, in order to clear up any possible problems with this entry from October 6th, the Court needs to inform the Defendant at this point that his maximum exposure as to prison time would be 108 months. That would be three F3s times three for a total of 108 months. And that, I understand is the only possible defect as to the October 6th sentencing.

* * *

Okay. The thing is, is that my understanding is that your argument is that any defect with the October 6th hearing is that Mr. White was not informed that his maximum exposure prison time was 108 or if you're correct, 36 months.

MR. MEADE: Somewhat, Your Honor. I think the issue is that Mr. White was not notified of—pursuant to statute and I'll quote it here—of the—I'll find it exactly here—of what the sentence he would face for a violation of the community control. It's not that the—

THE COURT: I think the Court's only required to provide him with an idea of what the maximum possible * * * [t]erm would be.

MR. ARCHER: * * * [A]s Mr. Meade had indicated that the Court in order to give the defendant notice and it says shall indicate the specific prison term that may be imposed as a sanction for the violation.

THE COURT: May be imposed?

MR. ARCHER: May be. Well yeah, may be imposed, right.

THE COURT: That would indicate to me that you inform the defendant of the maximum exposure and then at the time where the sentence gets converted from a community control sanction to an actual prison sentence, hopefully we don't reach that point, but assuming you do, if the court—at that point the court would sentence the defendant either to the max or some other sentence less than the max.

* * *

Yes, to me means, you know, the court could at this time articulate the maximum potential sentence so then if we—hopefully we won't get to that point. But if we do, the Court could give the defendant a less[e]r sentence—a less[e]r prison sentence.

* * *

Somebody is ignoring the fact that what might have an influence on the sort of sentence the Court hands out is what happened in regard to the probation violation.

* * *

Or impose a prison term on the offender and the max possible term would be 108 months. The Court is not saying if there is a violation the court will impose 108 months, but that is the maximum possible term.”

{¶6} In its entry the trial court found White guilty of violating his community control, continued that sanction, and stated that “[t]he maximum sentence for community control violation is one hundred eight (108) months.”

{¶7} White appealed from his resentencing in Case No. 17CA1. We consolidated his appeals for purposes of argument and decision.

III. ASSIGNMENTS OF ERROR

{¶8} White assigns the following errors for our review:

1. THE TRIAL COURT ERRED BY FAILING TO MERGE THE FELONY COUNTS OF INTIMIDATION AT THE SENTENCING HEARING.

2. THE TRIAL COURT'S DECLARATION THAT MR. WHITE CAN SERVE 'UP TO 108 MONTHS' MUST BE STRICKEN FROM THE SENTENCING ENTRY AS AN IMPROPER NOTIFICATION OF HIS PROSEPECTIVE PRISON SENTENCE.

IV. LAW AND ANALYSIS

A. Allied Offenses of Similar Import

{¶9} In his first assignment of error White asserts that the trial court erred by failing to merge the three felony counts of intimidation at sentencing. White did not raise this issue during the proceedings below so he forfeited all but plain error. See *State v. Neal*, 2016-Ohio-64, 57 N.E.3d 272, ¶ 49 (4th Dist.). To prevail on a claim of plain error White must show that an error occurred, that the error was plain, and that but for the error, the outcome of the trial clearly would have been otherwise. *State v. Mammon*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 69. Appellate courts take notice of plain error with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 62.

{¶10} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb,” and this protection applies to Ohio citizens through the Fourteenth Amendment and is additionally guaranteed by Article I, Section 10 of the Ohio Constitution. This constitutional protection prohibits multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

{¶11} The General Assembly enacted R.C. 2941.25 to identify when a court may impose multiple punishments:

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶12} Appellate courts apply a de novo standard of review in an appeal challenging a trial court's determination of whether offenses constitute allied offenses of similar import that must be merged under R.C. 2941.25. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28; *State v. Cole*, 4th Dist. Athens No. 12CA49, 2014-Ohio-2967, ¶ 7. Merger is a sentencing question where the defendant bears the burden of establishing his entitlement to the protection of R.C. 2941.25. *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 18.

{¶13} In *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, the Supreme Court of Ohio recently clarified the appropriate analysis to determine whether two offenses merge under R.C. 2941.25. “In determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors—the conduct, the animus, and the import.” *Id.* at paragraph one of the syllabus. “Under R.C. 2941.25(B), a defendant whose conduct supports multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the

offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus.” *Id.* at paragraph three of the syllabus.

{¶14} White contends the three crimes of which he was convicted constitute a continuing course of conduct, rather than three discrete acts, requiring merger. On the record before us, which is largely silent due to White’s failure to raise the issue at sentencing, White has failed to establish that his three felony intimidation charges constituted allied offenses of similar import. By pleading guilty White admitted the allegations of the indictment, which stated the offenses were committed on different dates that spanned an approximate four-month period—the first occurred on April 7, 2016, the second occurred several months later on August 4, 2016, and the third occurred nearly a week later on August 10, 2016. Even White refers on appeal to the charges as “three *separate* incidents.” (Emphasis added.) *See, e.g., State v. Arroyo-Garcia*, 10th Dist. Franklin No. 15AP-890, 2016-Ohio-7006, ¶ 11 (offenses committed on separate days were not allied offenses of similar import). Because each count of intimidation was committed separately, White was not entitled to have them merged.

{¶15} Based on the record before us, White has not established that the trial court erred, much less plainly erred, in failing to merge White’s felony intimidation charges. We overrule his first assignment of error.

B. Notification of Specific Prison Term for Violation of
Community Control

{¶16} White contends in his second assignment of error that the trial court erred by declaring in its resentencing entry that he can serve *up to* 108 months in prison should he violate his community control.

{¶17} R.C. 2929.19(B)(4) requires the trial court, when imposing a community control sanction, notify the offender that if the conditions of the sanction are violated, the court may impose a prison term and shall include the *specific* prison term that may be imposed:

If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to section 2929.14 of the Revised Code.

{¶18} “Pursuant to R.C. 2929.19(B)(5) [now R.C. 2929.19(B)(4)] and 2929.15(B), a trial court sentencing an offender upon a violation of the offender’s community control sanction must, at the time of such sentencing, notify the offender of the specific prison term that may be imposed for an additional violation of the conditions of the sanction as a prerequisite to imposing a prison term on the offender for a subsequent violation.” *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, syllabus.

{¶19} At his original sentencing hearing the trial court failed to notify White that a violation of the terms of his community control sanction could result in the imposition of a prison sentence. Therefore, in accordance with *Fraley* and *Brooks*, the trial court recognized that it could not impose a prison term on White for his violation of community control. Instead, the trial court notified White that any subsequent violation of his community control could result in a prison sentence of *up to* 108 months in prison.

{¶20} In *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, at ¶ 19, 26-27, the Supreme Court of Ohio rejected comparable notification language:

Having established that the statutory scheme envisions the sentencing hearing itself as the time when the notification must be given, we next consider what language the trial court should use. By choosing the word “specific” in R.C. 2929.19(B)(5) [now R.C. 2929.19(B)(4)] to describe the notification that a trial judge must give when sentencing an offender to community control, the General Assembly has made clear that the judge shall, in straightforward and affirmative language, inform the offender at the sentencing hearing that the trial court will impose a definite term of imprisonment of a fixed number of months or years, such as “twelve months' incarceration,” if the conditions are violated. To comply with the literal terms of the statute, the judge should not simply notify the offender that if the community control conditions are violated, he or she will receive “the maximum,” or a range, such as “six to twelve months,” or some other indefinite term, such as “up to 12 months.” The judge is required to notify the offender of the “specific” term the offender faces for violating community control.

* * *

A recurrent scenario involves a trial court that gave notice to the offender under R.C. 2929.19(B)(5) [now R.C. 2929.19(B)(4)] that the trial court would impose “up to” a certain number of months or years for a violation. See, e.g., *Grodhaus*, 144 Ohio App.3d at 616, 761 N.E.2d 80 (trial court failed to comply with R.C. 2929.19[B][5] when court warned offender it would impose “a prison term of up to five years” for a violation of community control); *Housley*, 2003-Ohio-2223 (adequate compliance found when trial court informed the offender it could impose any term up to the five-year maximum). Another typical scenario involves the trial court's informing the offender of a range that the prison term imposed would fall within if the conditions are violated. The trial court's journal entry in this case followed this approach, stating that appellant faced “6 to 12 months” for a violation of community control. As discussed above, this notice was ineffective because it did not occur at the sentencing hearing, but under the court of appeals' general approach to the certified issue, that court would surely have found the same statement sufficient to comply with R.C. 2929.19(B)(5) [now R.C. 2929.19(B)(4)] if it had occurred at the sentencing hearing.

We determine that because R.C. 2929.19(B)(5) [now R.C. 2929.19(B)(4)] is so clear in requiring that the offender be notified of the specific term that awaits a violation of community control, the above scenarios simply stray too far from the statutory text to constitute compliance.

{¶21} By merely stating that 108 months was the maximum potential prison term it could impose (but that it might impose a lower prison term depending on the facts of any subsequent violation), the trial court did not comply with the notification required by the plain language of R.C. 2929.14(B)(4) of a *specific* prison term.¹

{¶22} Although we sustain White's second assignment of error, we reject his contention that the appropriate remedy for this error is the striking of the potential prison term for a future violation of community control. "When a trial court makes an error in sentencing a defendant, the usual procedure is for an appellate court to remand to the trial court for resentencing." *Brooks*, at ¶ 33. When a defendant has not been provided the appropriate notification of the specific prison term he or she will face for a violation of community control and the offender violates community control, the prison term is not an option. *Id.* But if the defendant has not yet violated community control, nothing prevents the trial court from resentencing the defendant on remand to provide the appropriate notification so that the specific prison term is an available option for a subsequent violation of community control. See *Fraley*, 105 Ohio St3d 13, 2004-Ohio-7110, 821 N.E.2d 995, at ¶ 19 (prison term is an option for violation of community control if the trial court notifies the defendant of the specific prison term that will be imposed for a subsequent violation). On remand, the trial court can resentence White with the appropriate notification of the specific prison term it may impose for a subsequent violation.

IV. CONCLUSION

¹ We understand the trial court's rationale for stating the maximum and the possibility of a lesser sanction based upon facts yet to unfold, but we must simply follow the statute and precedent in this somewhat irrational area of criminal law.

{¶23} Having overruled White's first assignment of error, we affirm the trial court's judgment in Case No. 16CA23. Having sustained White's second assignment of error, we reverse the trial court's sentence in Case No. 17CA1 and remand the cause for resentencing.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART, AND
CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. and Hoover, J.: Concur in Judgment & Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.