[Cite as *State v. Panella*, 2010-Ohio-3354.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23628
Plaintiff-Appellant	:	
	:	Trial Court Case No. 09-CR-333
v.	:	
	:	(Criminal Appeal from
JOHN SAMUEL PANELLA	:	Common Pleas Court)
	:	
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the16th day of July, 2010.

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BROGAN, J.

{¶ 1} The State of Ohio appeals from the trial court's termination entry ordering appellee John Panella to serve a sixty-day term at a local treatment facility to be followed by up to five years of community control.

{¶ 2} In its sole assignment of error, the State contends Panella's sentence is contrary to law because the trial court neglected to impose a mandatory sixty-day

prison term.

{¶ 3} The record reflects that Panella pled guilty to a third-degree felony OVI charge in May 2009. The trial court ordered a pre-sentence investigation, and Panella appeared for sentencing in September 2009. At the outset of the hearing, defense counsel Michael Miller noted that sentencing already had been discussed in chambers. Miller then incorporated by reference the contents of his sentencing memorandum. Panella declined to speak on his own behalf, and prosecutor Andrew French presented nothing. Based on the pre-sentence investigation report, the trial court found that Panella needed to be educated about how his Type II diabetes affected his body's ability to absorb alcohol. Among other things, it then ordered him to serve sixty days of mandatory incarceration at a "STOP" treatment facility to be followed by up to five years of community control. Immediately after the trial court finished its sentencing colloquy and remanded Panella into custody, the following exchange occurred:

{¶ 4} MR. FRENCH: "And, your Honor, just for the record, as I indicated in chambers, it's my belief that the statute requires up to 60 days to be served at CRC, so I just wanted to make that for the record."

{¶ 5} THE COURT: "All right."

{¶ 6} MR. MILLER: "And I've indicated to my client that it's the Court's hope and desire that he be able to serve his time in the STOP program. He is prepared, however, if that's not possible. He understands that the 60 days could be served in a combination of local or CRC time, so he's aware for any possibility.

{¶ 7} THE COURT: "All right. Thank you."

{¶ 8} On appeal, the State contends the trial court was required to sentence Panella to sixty days in prison prior to his community control sanctions. Upon review, we agree that the Revised Code required a prison term of sixty days rather than participation in the STOP program.

{¶ 9} Panella pled guilty to operating a vehicle while under the influence of alcohol with a prior felony OVI conviction in violation of R.C. 4511.19(A)(1)(a). In relevant part, R.C. 4511.19(G)(1)(e) provides:

{¶ 10} "(e) An offender who previously has been convicted of or pleaded guilty to a violation of division (A) of this section that was a felony, regardless of when the violation and the conviction or guilty plea occurred, is guilty of a felony of the third degree. The court shall sentence the offender to all of the following:

{¶ 11} "(i) *If the offender is being sentenced for a violation of division (A)(1)(a)* * * * of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code *or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender is not convicted of and does not plead guilty to a specification of that type.* The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a sixty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. *In addition to the mandatory prison term* or mandatory prison term and additional prison term the court imposes*, the court also may sentence the offender to a community control*

sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction." (Emphasis added).

{¶ 12} In turn, R.C. 2929.13(G)(2) provides, in relevant part:

{¶ 13} "(G) * * * [I]f an offender is being sentenced for a fourth degree felony OVI offense or for a third degree felony OVI offense, the court shall impose upon the offender a mandatory term of local incarceration or a mandatory prison term in accordance with the following:

{¶ 14} "* * *

{¶ 15} "(2) *If the offender is being sentenced for a third degree felony OVI offense*, or if the offender is being sentenced for a fourth degree felony OVI offense and the court does not impose a mandatory term of local incarceration under division (G)(1) of this section, the court shall impose upon the offender a mandatory prison term of one, two, three, four, or five years if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code *or shall impose upon the offender a mandatory prison term of sixty days or one hundred twenty days as specified in division (G)(1)(d) or (e) of section 4511.19 of the Revised Code if the offender has not been convicted of and has not pleaded guilty to a specification of that type.* The court shall not reduce the term pursuant to section 2929.20, 2967.193, or any other provision of the Revised Code. The offender shall serve the one-, two-, three-, four-, or five-year mandatory prison term consecutively to and prior to the prison term imposed for the underlying offense and consecutively to any other mandatory prison term imposed in relation to the offense. In no case shall an offender who once has been sentenced to a mandatory

term of local incarceration pursuant to division (G)(1) of this section for a fourth degree felony OVI offense be sentenced to another mandatory term of local incarceration under that division for any violation of division (A) of section 4511.19 of the Revised Code. *In addition to the mandatory prison term described in division (G)(2) of this section, the court may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve the prison term prior to serving the community control sanction.*" (Emphasis added).

{¶ 16} In the present case, Panella was not convicted of a specification of the type described in R.C. 2941.1413. Therefore, under R.C. 4511.19(G)(1)(e)(i), the trial court was required to impose "a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code." Moreover, Panella was required to serve this prison term "prior to serving the community control sanction." As set forth above, R.C. 2929.13(G)(2) imposed the same sentencing requirement, namely "a mandatory prison term of sixty days," for Panella's third-degree felony OVI conviction. Under R.C. 2929.01(AA), "prison" means "a residential facility used for the confinement of convicted felony offenders that is under the control of the department of rehabilitation and correction * * *." A "prison term" is defined in R.C. 2929.01(BB) as either "[a] stated prison term" or "[a] term in a prison shortened by, or with the approval of, the sentencing court pursuant to" various Revised Code sections.

{¶ 17} Rather than sentencing Panella to a sixty-day term in a prison under the control of the Ohio Department of Rehabilitation and Correction ("ODRC"), the

trial court sentenced him to sixty days in a STOP residential treatment program under the supervision of the Montgomery County Division of Criminal Justice Services. In so doing, the trial court violated R.C. 4511.19(G)(1)(e) and R.C. 2929.13(G)(2). Panella's sentence is contrary to law because the trial court did not comply with all applicable statutes when imposing it. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶14-15.

{¶ 18} For his part, Panella raises three arguments in opposition to the foregoing conclusion. First, he contends the State failed to raise a timely objection to the STOP program and, when it did object, failed to raise the argument it advances on appeal. We find this assertion to be without merit. As noted above, defense counsel and the prosecutor both recognized at sentencing that a discussion had occurred with the trial court in chambers. Immediately after the trial court finished sentencing Panella, the prosecutor stated: "And, your Honor, just for the record, as I indicated in chambers, it's my belief that the statute requires up to 60 days to be served at CRC, so I just wanted to make that for the record."

{¶ 19} In his appellate brief, Panella contends "[t]he State has now appealed not asserting that [he] should have served 'up to 60 days at CRC'; but rather that the Court erred in ordering [him] to serve a mandatory sixty (60) consecutive days in the STOP program because the Program is not under the control of the department of rehabilitation and correction." Panella is making a distinction without a difference.

{¶ 20} On appeal, the State contends R.C. 4511.19(G)(1)(e) and R.C. 2929.13(G)(2) compelled the trial court to sentence him to sixty days in prison. As set forth above, a "prison" is a residential facility for convicted felons under the control of

ODRC. We take judicial notice that the "CRC" is the Correctional Reception Center, a state prison operated by ODRC.[1] Therefore, when the prosecutor objected to Panella not being sentenced to up to sixty days "at CRC" he necessarily was contesting the lack of a sentence to a prison operated by ODRC. This is the same argument the State makes on appeal.[2]

{¶ 21} As for the timeliness of the State's objection, we find no waiver. The sentencing transcript reveals that some discussion about Panella's sentence took place during an unrecorded conference in chambers. Defense counsel and the prosecutor both alluded to this fact during the sentencing hearing. The discussion in chambers appears to have included whether Panella could serve his mandatory sixty days in the STOP program. Immediately after the trial court finished its sentencing colloquy, the prosecutor placed this issue on the record by referencing the earlier discussion in chambers and expressing his belief that the Revised Code "requires up to 60 days to be served at CRC[.]" Although the prosecutor voiced this objection after the trial court had finished sentencing Panella, it is apparent that the issue had been raised before sentencing. The prosecutor was not required to interrupt the trial court's remarks to make his record for appeal. We find no waiver of the State's challenge to Panella's sentence.

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[1]See http://www.drc.state.oh.us/Public/crc.htm.

[2]We do recognize that the prosecutor's objection at sentencing concerned the trial court's failure to impose a prison sentence of "up to" sixty days, whereas the State argues on appeal that the Revised Code required exactly sixty days in prison. Although a subtle difference may exist between these two positions, it is also true that a prison sentence of "up to " sixty days includes a sentence of exactly sixty days. Therefore, the State's appellate argument is not inconsistent with the prosecutor's objection at trial.

{¶ 22} In a second argument, Panella maintains that the trial court did not err when it ordered him to serve sixty days in the STOP program. In support, he points out that R.C. 2929.13(G)(2) in some instances allows ODRC to place an inmate in an "intensive program prison" to receive treatment. The relevant portion of the statute provides:

{¶ 23} "* * * The department of rehabilitation and correction may place an offender sentenced to a mandatory prison term under this division in an intensive program prison established pursuant to section 5120.033 of the Revised Code if the department gave the sentencing judge prior notice of its intent to place the offender in an intensive program prison established under that section and if the judge did not notify the department that the judge disapproved the placement."

{¶ 24} Panella reasons that the STOP program is akin to an intensive program prison under R.C. 2929.13(G)(2) with the main difference being that the STOP program is not supervised by ODRC. Under R.C. 4511.19(G)(1)(e) and R.C. 2929.13(G)(2), however, this difference is crucial. Both statutes obligated the trial court to impose a mandatory sixty-day prison term. Because the STOP program is not under the control of ODRC, a sentence there is not a prison sentence. Panella characterizes this analysis as a "formal exercise in splitting hairs," but we cannot ignore the statutory language. While ODRC, in some cases, may place an offender sentenced to a mandatory prison term in an intensive program prison, R.C. 4511.19(G)(1)(e) and R.C. 2929.13(G)(2) obligated the trial court to impose a mandatory prison term in the first instance. It erred in failing to do so.

{¶ 25} Under his second argument, Panella also asserts that the trial court

correctly ordered him to serve sixty days in the STOP program *prior to* commencement of his community control sanctions, rather than making participation in the STOP program part of the community control sanctions. Even if true, this assertion misses the point. The fundamental error is that the trial court sentenced him to serve sixty days in the STOP program rather than prison. This error exists even if the trial court correctly ordered him to serve the sixty days before starting community control.[3]

{¶ 26} In a final argument, Panella claims public policy and equity favor upholding the trial court's sentence. In support, he relies on a dissenting opinion in *State v. Roberts*, 180 Ohio App.3d 216, 2008-Ohio-6827, reversed, 123 Ohio St.3d. 465, 2009-Ohio-5800. In that case, ODRC placed an inmate with a five-year sentence in an intensive prison "boot camp," purportedly without giving the sentencing judge the required notice and a chance to veto the placement. The inmate completed the ninety-day program, and ODRC released him from prison. After the alleged error was discovered, the defendant was ordered to serve the remaining portion his sentence. Upon review, the First District Court of Appeals affirmed. The dissenting judge in *Roberts* reasoned that the defendant had done everything asked of him and that the error was the government's fault. Under such circumstances, the dissenting judge opined that equity should prevail and that the

[3]During the sentencing hearing, the trial court indicated that it wanted Panella to serve the mandatory sixty days in STOP to be followed by community control. The trial court's termination entry, however, appears to make Panella's sixty days in the STOP program part of his community control sanctions.

defendant should be released.[4]

{¶ 27} Similarly, Panella argues that his placement in the STOP program was the trial court's idea and that he successfully completed sixty days there. He contends it is inequitable to "jerk him off the street" and require him to serve sixty days in prison merely because he completed the first sixty days in the wrong type of facility. Under the facts of this case, we agree that Panella must be credited with the sixty days he served in the STOP program. Although the trial court required him to serve his time in the wrong place, the fact remains that he completed that part of his sentence. Panella cannot "unserve" the time he spent in a residential treatment facility under the trial court's order. We note too that he attempted to secure a stay to avoid the current problem.[5] The State could have done likewise if it wanted to ensure that Panella served his time in prison rather than in the STOP program. Instead, it stood by and allowed him to complete a sixty-day sentence while its appeal challenging the propriety of that sentence was pending.

{¶ 28} In short, although the trial court imposed a sentence that is contrary to law, we are persuaded that Panella should not be re-sentenced to a sixty-day term

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[4]After initial briefing in this case, the Ohio Supreme Court reversed the judgment in *Roberts*, not on the equitable grounds cited by the dissent, but because the State "failed to prove that the sentencing court never received notice of the intended placement of appellant in an intensive program prison." *State v. Roberts*, 123 Ohio St.3d 465, 2009-Ohio-5800, ¶7.

[5]The record reflects that Panella sought a stay in this court on September 28, 2009. In his motion, he indicated that he recently had been accepted into the STOP program and had begun his sixty days there. He also recognized the State's appellate argument about the STOP program not being a prison and requested a stay to prevent having participated in the program for nothing if the State prevailed. We overruled the motion on October 19, 2009 based on Panella's failure first to seek a stay in the trial court as required by App.R. 8(B).

he already has served. Cf. *State v. Simpkins*, 117 Ohio St.3d 420, 429, 2008-Ohio-1197, ¶38 (recognizing the possibility that when an unlawful sentence has been served "it may be reasonable to find that a defendant's expectation of finality in his sentence has become legitimate and must be respected"); *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 357-358, 2006-Ohio-5795, ¶17-28 (observing that re-sentencing to correct an invalid sentence may not be possible when the sentence has expired); *State v. Bezak*, 114 Ohio St.3d 94, 97, 2007-Ohio-3250, ¶18 ("[I]n this case, Bezak has already served the prison term ordered by the trial court, and therefore he cannot be subject to resentencing in order to correct the trial court's failure to impose postrelease control at Bezak's original sentencing hearing."). Nothing before us indicates that the trial court intended Panella to serve sixty days in prison *and* sixty days in the STOP program. But that would be the unavoidable consequence of requiring him to be sentenced again.

{¶ 29} Based on the reasoning set forth above, we overrule the State's assignment of error and affirm the trial court's judgment.

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FAIN and GRADY, JJ., concur.

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