

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-901 (C.P.C. No. 12CR-04-2098)
Michael E. June,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 28, 2013

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*,
for appellant.

Toki Clark, for appellee.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Plaintiff-appellant, State of Ohio ("the state"), appeals from a judgment of the Franklin County Court of Common Pleas imposing a prison sentence on defendant-appellee, Michael E. June ("appellee"), pursuant to his guilty plea. Because we conclude that the trial court erred by imposing a concurrent prison sentence for appellee's failure-to-comply conviction, when it was required by statute to impose a consecutive sentence, we reverse and remand for re-sentencing.

{¶ 2} Appellee was indicted on five charges stemming from an incident in which he stole a gun and then fled from police in a car. Ultimately, appellee pled guilty to two charges: having a weapon under disability, a felony of the third degree, and failure to comply with an order of a police officer, a felony of the fourth degree. The trial court sentenced appellee to one year of imprisonment on the conviction for having a weapon under disability and six months of imprisonment on the failure-to-comply conviction. The

trial court ordered these prison sentences to be served concurrently to each other and concurrently to sentences imposed in two other cases.

{¶ 3} The state appeals from the trial court's judgment, assigning one error for this court's review:

THE TRIAL COURT ERRED IN IMPOSING CONCURRENT SENTENCES, WHERE R.C. 2921.331(D) AND R.C. 2929.14(C)(3) REQUIRED CONSECUTIVE SENTENCES.

{¶ 4} In its sole assignment of error, the state argues that the trial court erred by ordering that appellee's sentence for failure to comply with an order of a police officer be served concurrently with his sentence for having a weapon under disability. The state asserts that the trial court was required by statute to impose a consecutive sentence for the failure-to-comply conviction.

{¶ 5} Appellant argues that the sentence imposed on appellee is contrary to law. In relevant part, R.C. 2929.14(C)(3) provides that, "[i]f a prison term is imposed for * * * a felony violation of division (B) of section 2921.331 of the Revised Code, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed on the offender." Similarly, R.C. 2921.331(D) provides that, "[i]f an offender is sentenced pursuant to division (C)(4) or (5) of this section for a violation of division (B) of this section, and the offender is sentenced to a prison term for that violation, the offender shall serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender."

{¶ 6} Appellee was indicted for violating R.C. 2921.331(B) by operating a motor vehicle so as to willfully elude or flee a police officer after receiving a visible or audible signal from a police officer to bring his motor vehicle to a stop. The indictment further provided that, in committing the offense, appellee was fleeing immediately after the commission of a felony. Appellee pled guilty to this count of the indictment as charged. R.C. 2921.331(C)(4) provides that operating a motor vehicle so as to willfully elude or flee a police officer after receiving a signal to stop while fleeing immediately after the commission of a felony is a felony of the fourth degree. Thus, appellee was charged with and pled guilty to a violation of R.C. 2921.331(B) and was sentenced pursuant to R.C. 2921.331(C)(4).

{¶ 7} Under the terms of both R.C. 2929.14(C)(3) and 2921.331(D), the trial court was required to impose any prison term for the failure-to-comply conviction consecutively to any other prison term imposed on appellee. Other appellate courts have reached the same conclusion in applying these statutes. *See State v. Spicer*, 8th Dist. No. 92384, 2010-Ohio-61, ¶ 19 ("[P]ursuant to R.C. 2921.331(D), a term of imprisonment for failure to comply must run consecutive to that of any other term of imprisonment, no matter if the sentence is being imposed on the same or different case."); *State v. Whittsette*, 8th Dist. No. 85478, 2005-Ohio-4824, ¶ 10 ("[A] trial court has no discretion in the decision to impose a consecutive sentence for a violation of R.C. 2921.331(B)."); *State v. Mango*, 7th Dist. No. 01 CA 170, 2002-Ohio-6890, ¶ 19 ("[I]t appears that the trial court has no discretion in the decision to impose a consecutive sentence for a violation of R.C. 2921.331(B)."). Accordingly, the trial court's judgment is contrary to law because it does not comply with the mandates of R.C. 2929.14(C)(3) and 2921.331(D).

{¶ 8} Appellee argues that the trial court acted within its discretion by imposing concurrent sentences. Appellee does not claim that the relevant statutes permit concurrent sentences; rather, appellee argues that modifying appellee's sentence on remand would violate the constitutional protections against double jeopardy. Appellee also asserts that R.C. 2929.14(C)(3) is unconstitutionally vague.

{¶ 9} Ohio courts have rejected the assertion that correcting a statutorily deficient sentence on remand violates the constitutional protections against double jeopardy. "Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." *State v. Beasley*, 14 Ohio St.3d 74, 75 (1984). "Because jeopardy does not attach to a void sentence, the subsequent imposition of the statutorily required sentence cannot constitute double jeopardy." *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶ 27. In this case, the trial court was statutorily required to impose a consecutive sentence for appellee's conviction for failure to comply but failed to do so. Therefore, appellee's original sentence was void. Jeopardy did not attach to the void sentence, and an order from the trial court correcting the sentence would not constitute double jeopardy. *See, e.g., State v. Jackson*, 10th Dist. No. 06AP-631, 2007-Ohio-1474, ¶ 16 (defendant was not subjected to double jeopardy when trial court re-sentenced him and imposed a statutorily required three-year period of post-

release control); *State v. Aylward*, 11th Dist. No. 2003-P-0097, 2004-Ohio-6176, ¶ 29 (re-sentencing would not violate double jeopardy protections where the trial court failed to comply with statutory requirement of making findings on the record at the sentencing hearing).

{¶ 10} While we note that the vagueness doctrine may be implicated with respect to a sentencing statute, appellee has failed to demonstrate that R.C. 2929.14(C)(3) is unconstitutionally vague. "[V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *U.S. v. Batchelder*, 442 U.S. 114, 123 (1979). A party arguing that a statute is unconstitutionally vague must prove the claim beyond a reasonable doubt. *State v. Collier*, 62 Ohio St.3d 267, 269 (1991). Appellee has not met this burden, failing to even cite the appropriate test used to evaluate whether a statute is unconstitutionally vague. *See id.* at 269-70; *State v. Turner*, 10th Dist. No. 04AP-1166, 2005-Ohio-3143, ¶ 6, quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) ("A penal statute is unconstitutionally vague if it 'forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application.' "). Moreover, as explained above, the trial court was required to impose consecutive sentences under *both* R.C. 2929.14(C)(3) and 2921.331(D). Therefore, even if appellee was correct that R.C. 2929.14(C)(3) was unconstitutionally vague, R.C. 2921.331(D) would still apply. Appellee presents no argument that R.C. 2921.331(D) is unconstitutionally void.

{¶ 11} For the foregoing reasons, we sustain the state's sole assignment of error. We reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for re-sentencing in accordance with law and consistent with this decision.

Judgment reversed; cause remanded for re-sentencing.

BROWN and O'GRADY, JJ., concur.
