

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 12AP-904
 : (M.C. No. 2012 CRB 20930)
 Marqueith L. Simpson, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 6, 2013

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, for appellee.

Yeura R. Venters, Public Defender, and *Timothy E. Pierce*, for appellant.

APPEAL from the Franklin County Municipal Court.

SADLER, J.

{¶ 1} Defendant-appellant, Marqueith L. Simpson, appeals from a judgment of the Franklin County Municipal Court convicting him of two counts of aggravated menacing and one count of possession of drugs. For the reasons that follow, the judgment re-sentencing appellant is vacated and the original sentence is reinstated.

I. BACKGROUND

{¶ 2} By complaint filed on August 26, 2012, appellant was charged with two counts of aggravated menacing, one count of domestic violence, and one count of drug possession. Appellant entered pleas of guilty on September 6, 2012, to one count of drug possession, a minor misdemeanor, in violation of R.C. 2925.11, and two counts of

aggravated menacing, first degree misdemeanors, in violation of R.C. 2903.21. As is relevant here, on the aggravated menacing charge, appellant was sentenced to 180 days in jail with 150 days suspended for a period of two years of community control.¹ Additionally, appellant was granted jail time credit in the amount of 12 days but was required to serve 38 days forthwith. At the sentencing hearing, the court stated, "[o]nce you have completed the days in jail, I am asking that we do EMHI for 30 days just to make sure we are enforcing the stay away." (Sept. 6, 2012 Tr., 11-12.) Additionally, the trial court's sentencing entry stated, "[s]weep for guns before EMHI."

{¶ 3} Thus, according to the sentence imposed, appellant was to be released from jail on October 13, 2012. On October 12, 2012, the trial court held a hearing wherein the court stated:

There was an agreement that you were going to be on electronic monitored house arrest; however, in order to effectuate that release, we needed an address of where you were going to be living, the consent of the person with whom you were going to be living, and an opportunity to review that location to make sure there would be nothing in violation of the terms of your probation in that location.

The Court was given a note last night that perhaps that address information has been provided to your counsel. However, that does not leave the Court with sufficient time to answer the other three – the other two questions that were a part of that requirement.

So, at this time, Mr. Simpson, what the Court is proposing is that as opposed to you being released on a Saturday where there would no one able to attach you to the EMH equipment, and where the Court would not have had adequate time to do the other precursors to you being on EMHI, that you would be held over until Tuesday.

(Oct. 12, 2012 Tr., 2-3.)

{¶ 4} Appellant's counsel objected to the court's sua sponte resentencing. Noting appellant's objection, the trial court ordered appellant to be held until October 16, 2012 so that a search could be completed on the residence. Appellant's counsel requested a stay of

¹ Terms of probation included, inter alia, a stay away order, no further acts of violence, and counseling as determined by the probation department.

sentence pending appeal and the trial court denied the request. An entry reflecting the trial court's actions was filed on October 12, 2012. Specifically, the entry stated the defendant was "to be held until 10-16-12 for search of residence prior to release. Sentence stay denied."

II. ASSIGNMENTS OF ERROR

{¶ 5} This appeal followed, and appellant brings the following two assignments of error for our review:

[I.] Appellant's sentence was contrary to law and violated the due process provisions of the United States and Ohio Constitutions when the lower court punished him by ordering that he serve additional days in jail after he had already completed the period of incarceration previously imposed by the court as a condition of community control.

[II.] The lower court unlawfully punished Appellant when it imposed jail time in excess of that it had initially ordered as a community control sanction which violated the double jeopardy clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution.

III. DISCUSSION

{¶ 6} Together these assigned errors challenge the trial court's entry filed on October 12, 2012 ordering appellant to be held in jail until October 16, 2012. As previously discussed, on September 6, 2012, appellant was sentenced to a term of 180 days in jail with 150 days suspended for a period of two years of community control. Additionally, while appellant was granted jail time credit in the amount of 12 days, appellant was required to serve 38 days forthwith. While the trial court's sentencing entry states, "[s]weep for guns before EMHI," appellant's release from jail was not conditioned upon such event occurring. Thus, according to the sentence imposed on September 6, appellant was to be released from jail on October 13, 2012. However, on October 12, 2012, the trial court filed an entry indicating appellant was to be held until October 16, 2012.

{¶ 7} Plaintiff-appellee, state of Ohio, concedes the trial court's imposition of an additional three days of incarceration, beyond the 38 days imposed in the September 6, 2012 entry, constitutes an impermissible sentence modification requiring reversal of the trial court's judgment rendered on October 12, 2012. *See, e.g., State v. Bell*, 10th Dist. No.

03AP-1282, 2004-Ohio-5256 (a trial court has no authority to reconsider a valid final judgment in a criminal case); *State v. Dillon*, 3d Dist. No. 5-06-50, 2007-Ohio-4934 (once execution of a sentence commences, the trial court may not amend the sentence to increase the punishment); *State v. Waddell*, 106 Ohio App.3d 600 (4th Dist.1995) (three-day sentence imposed by acting judge was lawful; therefore, no authority of resident judge to reconsider original sentence and impose a ten-day sentence upon his return).

{¶ 8} Because the trial court's September 6, 2012 judgment was a valid final judgment that did not require correction, the court was without authority to reconsider said sentence as it did on October 12, 2012. Accordingly, we sustain appellant's two assignments of error. Therefore, we vacate the trial court's entry of October 12, 2012 and reinstate the original September 6, 2012 sentence. *Waddell* (new sentence of ten days incarceration entered on August 24 vacated and original three-day sentence entered on August 5 reinstated); *Brook Park v. Necak*, 30 Ohio App.3d 118 (8th Dist.1986) (trial court modification of legally proper sentence without statutory authority improper, thus, new sentence vacated and original sentence reinstated); *State v. Perkins*, 6th Dist. No. L-06-1184, 2007-Ohio-2035 (no authority to resentence defendant to a more severe and restrictive sentence; therefore, new sentence vacated and original reinstated).

IV. CONCLUSION

{¶ 9} Based on the foregoing, appellant's two assignments of error are sustained, the judgment of the Franklin County Municipal Court re-sentencing appellant is reversed, and the original sentence of September 6, 2012 is reinstated.

*Judgment reversed;
original sentence of September 6, 2012 reinstated.*

KLATT, P.J., and BROWN, J., concur.
