

[Cite as *State v. Stevens*, 2011-Ohio-2595.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-08-211
- vs -	:	<u>OPINION</u> 5/31/2011
JAMES L. STEVENS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR1985-10-0583

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamdawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011-6057, for plaintiff-appellee

Brandabur, Bowling & Crehan Co., L.P.A., Eric H. Pavri, 315 South Monument Avenue, Hamilton, Ohio 45011, for defendant-appellant

HUTZEL, J.

{¶1} Defendant-appellant, James Stevens, appeals a decision of the Butler County Court of Common Pleas revoking his probation and ordering him to serve his original but previously suspended prison sentence.

{¶2} In October 1985, appellant pled guilty to one count of attempted

burglary, a felony of the third degree. In December 1985, the trial court sentenced appellant to two to ten years in prison. The trial court suspended the prison sentence and placed appellant on probation for a period of five years. Appellant did not complete probation and was declared an absconder. Apparently, appellant absconded to Kentucky where he lived until he was arrested in May 2010. A probation revocation hearing was held. At the hearing, following appellant's admission he had violated probation, the trial court stated it would impose the original two-to-ten-year prison sentence. By entry filed August 31, 2010, the trial court revoked appellant's "community control" and imposed the previously suspended two-to-ten-year prison sentence.¹

{¶13} Appellant appeals, raising one assignment of error:

{¶14} "THE TRIAL COURT ERRED BY IMPOSING A PRISON TERM ON THE DEFENDANT FOR VIOLATING CONDITIONS OF HIS PROBATION."

{¶15} Appellant argues the trial court was not permitted to impose a prison sentence upon the revocation of his probation because at the original sentencing hearing in 1985, the trial court did not notify him of the specific prison term that could be imposed if he violated probation. Appellant cites R.C. 2929.19(B)(5), 2929.15(B), and *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, in support of his argument.

{¶16} R.C. 2929.19(B)(5) states, in relevant part, that when imposing a

1. We note that while community control sanctions essentially replaced the concept of probation in Ohio's criminal justice system in 1996, and although they are similar in their operational effect, see *State v. Ogle*, Wood App. No. WD-01-040, 2002-Ohio-860, appellant was never sentenced to community control in the case at bar. Rather, appellant was placed on probation after his original prison sentence was suspended. Thus, in its entry, the trial court should have used the proper terminology and referred to appellant's *probation*, and not to his community control. The trial court used the proper terminology at the probation revocation hearing.

community control sanction, the trial 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[.]"

{¶17} R.C. 2929.15, which details procedures for a trial court to follow when an offender has violated the conditions of community control, provides in relevant part that if an offender violates the conditions of his community control and the court chooses to impose a prison term, such "shall not exceed the prison term specified in the notice provided to the offender at the sentencing hearing."

{¶18} Addressing both statutory provisions in *Brooks*, the Ohio Supreme Court held that "pursuant to R.C. 2929.19(B)(5) and 2929.15(B), a trial court sentencing an offender to a community control sanction must, at the time of the sentencing, notify the offender of the specific prison term that may be imposed for a violation of the conditions of the sanction, as a prerequisite to imposing a prison term on the offender for a subsequent violation." *Brooks*, 2004-Ohio-4746 at ¶29. When an offender who violates conditions of community control has not received proper notice of sentence pursuant to *Brooks*, the trial court may not impose a prison term for those violations, but must either impose a longer time under the same sanction or impose a more restrictive sanction. *Id.* at ¶33, fn. 2.

{¶19} Appellant's argument assumes that both statutory provisions and *Brooks* apply retroactively. However, we find that R.C. 2929.19(B)(5), 2929.15(B),

and *Brooks* do not and cannot apply retroactively in the case at bar.

{¶10} In *Brooks*, the supreme court specifically addressed the requirements set forth in R.C. 2929.19(B)(5) and 2929.15(B). Both statutory provisions specifically govern community control sanctions, not probation. Both statutory provisions were enacted in 1996 with the passage of Am.Sub.S.B. No. 2 ("Senate Bill 2"), 146 Ohio Laws, Part IV, 7136, effective July 1, 1996, which overhauled Ohio's felony sentencing laws.

{¶11} In enacting Senate Bill 2, the General Assembly essentially replaced the concept of probation in Ohio's criminal justice system with community control sanctions. See *State v. Evans*, Meigs App. No. 00CA003, 2000-Ohio-2025. Although similar in operational effect, probation and community control sanctions are based on different philosophies, and differ a great deal in many ways, including the manner by which violations of those controls are handled. *State v. Drake*, Montgomery App. No. 21939, 2007-Ohio-6586, ¶39; *State v. Ogle*, Wood App. No. WD-01-040, 2002-Ohio-860, ¶6.

{¶12} Prior to Senate Bill 2, probation "was conditioned on good behavior. Violation of that probation was a breach of contract with the sentencing judge. For the breach, the judge could properly impose the suspended prison sentence – even for the most trivial violation of probation." *Ogle* at ¶7, quoting Griffin & Katz, Ohio Felony Sentencing Law (2001 Ed.) 581, Section T5.36. By contrast, "[u]nder Senate Bill 2, a sentence to a community control sanction is not a contract for good behavior that automatically is punishable by prison if it is violated. The community control sanction that is imposed is the appropriate sentence for the crime of conviction." *Id.* at ¶8.

{¶13} *Brooks* does not apply retroactively in the case at bar because it specifically interpreted R.C. 2929.19(B)(5) in conjunction with RC. 2929.15(B), and solely addressed community control sanctions, and not probation. In *Brooks*, the supreme court noted how "much of the difficulty in complying with R.C. 2929.19(B)(5) has occurred as judges adapt to the new sentencing procedures. While community control is similar to the former concept of probation, there are significant differences between the two. These differences require a trial judge imposing community control to focus with special care on the relevant statutes and not to approach it as a form of probation." *Brooks*, 2004-Ohio-4746 at ¶28. The holding of *Brooks* clearly applies only to community control sanctions as enacted by Senate Bill 2.

{¶14} Likewise, neither R.C. 2929.19(B)(5) nor R.C. 2929.15(B) apply retroactively in the case at bar. As stated earlier, both statutory provisions were enacted in 1996 with the passage of Senate Bill 2, effective July 1, 1996. In *State v. Rush*, 83 Ohio St.3d 53, 1998-Ohio-423, certiorari denied (1999), 525 U.S. 1151, 119 S.Ct. 1052, the Ohio Supreme Court unequivocally held that the "amended sentencing provisions of [Senate Bill 2] apply only to those crimes committed on or after July 1, 1996." *Id.* at paragraph two of the syllabus. See, also, *State v. Warren*, 118 Ohio St.3d 200, 2008-Ohio-2011 (extensive revisions to criminal statutes that were enacted in Senate Bill 2, effective July 1, 1996, apply only to crimes committed on or after July 1, 1996; even though Warren was indicted in 2004, the case was governed by the law in effect in 1988 as the crimes were committed in 1988).

{¶15} The offense underlying appellant's conviction for attempted burglary occurred in 1985. Because the offense was committed before July 1, 1996, the effective date of Senate Bill 2, appellant was sentenced pursuant to the former

version of R.C. Chapter 2929. Accordingly, it is under the pre-Senate Bill 2 version of R.C. Chapter 2929 which we conduct our review. See *State v. Crowder*, Clermont App. No. CA2001-02-023, 2001-Ohio-8688. In addition, by virtue of R.C. 2951.011(A), pre-1996 sentencing law applies to appellant's probation. See *State v. Baker*, Butler App. No. CA2001-05-103, 2002-Ohio-3346.²

{¶16} "Under the pre-Senate Bill 2 version of R.C. Chapter 2929, an appellate court would generally not reverse a sentencing court's exercise of discretion in sentencing when the sentence was authorized by statute and was within the statutory limits." *State v. Pierce*, Butler App. No. CA2003-04-085, 2004-Ohio-912, ¶19. Under the pre-Senate Bill 2 version of R.C. 2951.09, the decision whether to revoke a defendant's probation lies within the discretion of the trial court. *Crowder* at 3. In addition, the trial court has jurisdiction to terminate the defendant's probation and may impose any sentence that might originally have been imposed at any time during the probationary period. *Baker* at ¶10.

{¶17} In 1985, the trial court sentenced appellant to two to ten years in prison. The trial court suspended the prison sentence and placed appellant on probation for a period of five years. In 2010, following appellant's admission he had violated his probation, the trial court revoked appellant's probation and imposed the previously suspended two-to-ten-year prison sentence. We find no abuse of discretion by the trial court in imposing appellant's original but suspended two-to-ten-year prison sentence upon revocation of his probation. Appellant's assignment of error is

2. R.C. Chapter 2951 governs probation. R.C. 2951.011(A) provides that "[R.C.] Chapter 2951 as it existed prior to July 1, 1996, applies to a person upon whom a court imposed a term of imprisonment prior to July 1, 1996, and a person upon whom a court, on or after July 1, 1996, and in accordance with law existing prior to July 1, 1996, imposed a term of imprisonment for an offense that was committed prior to July 1, 1996."

overruled.

{¶18} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.