

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-08-054
 :
 - vs - : OPINION
 : 7/11/2011
 :
 ANTHONY C. BISHOP, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2006CR01022

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 N. Third Street, Batavia, Ohio 45103, for plaintiff-appellee

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HENDRICKSON, P.J.

{¶1} Defendant-appellant, Anthony C. Bishop, appeals the sentence imposed by the Clermont County Court of Common Pleas after appellant admitted to violating the terms of his community control.

{¶2} This appeal involves four separate cases that include charges of failure to appear, possession of cocaine, and four charges of nonsupport.

{¶3} At appellant's initial sentencing hearing for all of the charges in November 2009, appellant received an aggregate sentence of five years of community control. The state recommended an inpatient treatment program for appellant. However, the probation department recommended a "long prison sentence." Appellant's mother addressed the trial court and requested the trial court sentence appellant to "no less than a year in prison." The trial court found recidivism "more likely" regarding nonsupport because appellant failed to provide support for an extensive period of time. In regard to the drug offense, the trial court found recidivism "more likely" because appellant previously participated in an outpatient program but continued to use drugs. The trial court considered appellant's criminal record and expressed its concern with an increase in the seriousness of offenses. At that time, the trial court found that the offenses were not more serious or less serious than conduct normally constituting the respective offenses and that community control was consistent with the purposes and principles of sentencing.

{¶4} Accordingly, the trial court sentenced appellant to five years of community control. However, the trial court stated it did not want appellant "back on the streets" and sentenced appellant to the community based correctional facility (CBCF). The trial court explained possible penalties for violating the terms of community control, including imposing more restrictive sanctions, longer control sanctions, or prison up to the maximum term allowed for all offenses. The trial court addressed the specific prison term that would be imposed for any noncompliance: 36 months for three counts of nonsupport (F5s), 18 months for failure to appear (F4), 12 months for one count of nonsupport (F5), and 12 months for possession of cocaine (F5). The trial court also indicated it may order these prison terms to be served consecutively, for a total of 78 months.

{¶5} On June 30, 2010, a notice of probation violations was filed indicating appellant failed "to follow his probation officer's verbal or written instructions, answer truthfully all

questions placed to him by any Adult probation personnel [and] * * * cooperate with adult probation personnel * * *." The notice stated that appellant also failed "to complete all available programming at the Community Based Correctional Facility" and that on June 30, 2010, appellant was terminated from the program due to noncompliance with the program rules.

{¶6} At a hearing, appellant admitted to the allegations in the notice of probation violations. Before appellant's admission, the trial court again explained the possible consequences for violating probation, including a prison sentence for the specific term of an aggregate of 78 months as stated at the original sentencing hearing. Appellant indicated he understood the possible consequences. Appellant stated he had substantially complied with the program at CBCF, because he had completed the available alcohol, drug, and "corrective thinking" classes. However, because of several rule infractions, appellant's time at CBCF was lengthened and appellant was ultimately terminated from the program.

{¶7} The trial court indicated that it is difficult to be terminated from CBCF, and appellant's infractions indicated no change occurred in appellant's thinking. The trial court found recidivism was more likely than when appellant was sentenced to community control and incorporated the findings it made previously in all four cases. The trial court found prison was consistent with the purposes of sentencing and that appellant was not amenable to available community control sanctions. Appellant was sentenced to 12 months in prison for each of the nonsupport charges, for a total of 48 months, 11 months in prison for the failure to appear, and 11 months in prison for cocaine possession. However, the trial court ordered the sentences for failure to appear and cocaine possession run concurrently. Appellant was sentenced to an aggregate of 59 months in prison.

{¶8} Appellant appeals the trial court's sentence and raises one assignment of error:

{¶9} "THE TRIAL COURT ABUSED ITS DISCRETION IN REVOKING THE

APPELLANT'S [sic] COMMUNITY CONTROL AND SENTENCING HIM TO A SEVERE PRISON TERM".

{¶10} Appellant argues the trial court abused its discretion by finding he violated community control because he substantially complied with its terms and conditions. When appellant was terminated from the program, he was serving additional time due to multiple rule infractions. Appellant contends he received only minor infractions that included a nicotine violation, "out of place" violations, and three "thinking" violations.

{¶11} A trial court's decision revoking community control may only be reversed if the trial court abused its discretion. *State v. Hughes*, Warren App. No. CA2002-11-124, 2003-Ohio-3449, ¶7. An abuse of discretion occurs when the trial court's attitude is "unreasonable, arbitrary or unconscionable." *Id.* Whether an offender can remain on community control depends on compliance with the community control conditions and is a decision that rests "within the sound discretion of the court." *State v. Wolpert*, Butler App. No. CA2006-10-244, 2007-Ohio-4734, ¶10. When imposing community control sanctions, the trial court must communicate conditions to appellant "clear enough to notify [appellant] of the conduct expected of him." *Hughes* at ¶15, quoting *State v. Jones* (1990), 49 Ohio St.3d 51, 55. "A trial court does not abuse its discretion by revoking an offender's probation where the violation in question was one over which the offender had control or where the probation condition which has been violated was appropriate." *State v. Tranter* (Mar. 26, 2001), Clermont App. No. CA2000-05-035, at 8. In addition, a trial court does not abuse its discretion in revoking community control when the offender is on notice that successful participation in a particular program is a requirement of the community control and the offender is unsuccessfully discharged from the program. See *Hughes* at ¶13.

{¶12} Here, there is no dispute that appellant violated the terms of his probation because he admitted to the allegations in the notice of probation violations. Appellant was

notified on the record and in an entry that he was to comply with all applicable rules and regulations of CBCF. Appellant was also notified in the same manner that he was to follow his probation officer's verbal and written instructions, to answer all questions truthfully, and cooperate with probation personnel. Further, appellant indicated on the record that he understood the possible sanctions for admitting to the violations. Appellant had notice of the conduct expected of him and he admitted to violating the terms of his probation. Therefore, the trial court did not abuse its discretion in revoking appellant's community control.

{¶13} Appellant also argues on appeal that the trial court sentenced him to a severe prison term. "Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶100. "There is no presumption in favor of community control * * *." *Id.* at ¶69. If a judge does not find that community control is a sufficient sanction, the judge may impose a prison term. *Id.* When a court imposes a community control sanction under R.C. 2929.19, the court "shall indicate the specific prison term that may be imposed as a sanction for the violation * * *." R.C. 2929.19(B)(5). The offender must be notified of the specific prison term that may be imposed for a violation of the community control at the time of sentencing. *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, ¶29. If, however, the offender violates the terms of community control, the court may impose a lesser prison sentence than the specific prison sentence stated at the sentencing hearing. R.C. 2929.15(B); *Brooks* at ¶22.

{¶14} When an appellate court reviews a trial court's sentence, it must first "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶4. If the sentence meets the first

prong, then "the trial court's decision shall be reviewed under an abuse-of-discretion standard." *Id.*¹

{¶15} In applying the first prong of the test outlined in *Kalish*, a trial court must consider statutes specific to the case itself to ensure the sentence falls within the proper range. *Kalish* at ¶13. The trial court must also impose the correct term of postrelease control and consider the "purposes and principles" of R.C. 2929.11 and the factors listed in R.C. 2929.12. *Id.* However, the trial court still "has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure." *Id.* at ¶17. If a trial court complies with the applicable statutes and rules, an abuse of discretion analysis follows. *Id.* An abuse of discretion "implies that the trial court's decision was unreasonable, arbitrary, or unconscionable." *State v. Plummer*, Butler App. Nos. CA2009-06-148, CA2009-06-153, CA2009-06-151, CA2009-06-154, CA2009-06-152, 2010-Ohio-849, ¶9. Regarding abuse of discretion, a trial court does not abuse its discretion as long as "the trial court gave careful and substantial deliberation to the relevant statutory considerations." *Kalish* at ¶20.

{¶16} In applying the first prong to this case, the trial court imposed the maximum 12-month prison term for each of the fifth-degree felony nonsupport charges, but only an 11-month prison term for the fourth-degree felony failure to appear charge and an 11-month prison term for the possession of cocaine charge, also a fifth-degree felony. After running the four nonsupport charges consecutive to one another, the trial court ran the remaining two charges concurrent with one another but consecutive to the nonsupport charges. This sentence imposed by the trial court fell within the applicable statutory range for each

1. The state points out that appellant did not object to his prison sentence, and therefore, a plain error review should apply. *State v. Addis*, Brown App. No. CA2009-05-019, 2010-Ohio-1008, ¶8, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶15. However, because *Payne* was decided before *Kalish* and the Supreme Court of Ohio more recently addressed the standard of review regarding sentencing issues under *Kalish*, we analyzed appellant's assignment of error under *Kalish*. *State v. Simms*, Clermont App. No. CA2009-02-005, 2009-Ohio-5440, fn.3; *State v. Burk*, Butler App. No. CA2009-03-019, 2009-Ohio-5643, fn. 1; *State v. Elliott*, Clermont App. No. CA2009-03-020, 2009-Ohio-5926, fn. 1; *State v. Gray*, Clermont App. Nos. CA2010-01-006,

respective felony. The trial court also considered the "purposes and principles" of R.C. 2929.11 and the factors of R.C. 2929.12 when determining the appropriate sentence. The entry expressly states, "after considering the factors under R.C. 2929.12, the court finds that community control sanctions are no longer consistent with the purposes and principles of sentencing; that prison is consistent with the purposes and principles of sentencing; and that the defendant is not amenable to available community control sanctions." The trial court further notified appellant at the original sentencing hearing of the specific prison term that would be imposed for each underlying case and that it may order the prison terms to be served consecutively. The trial court imposed a lesser prison sentence than it stated at the original sentencing hearing. We find the sentence is not clearly and convincingly contrary to law.

{¶17} Regarding the second prong of the *Kalish* test, i.e., whether the sentence is an abuse of discretion, the trial court found recidivism to be even more likely after appellant's violation of community control because there was no change in appellant's thinking. The trial court found the likelihood of recidivism to be high when appellant was first sentenced to community control. At the initial sentencing hearing, the trial court found recidivism "more likely" regarding nonsupport because appellant failed to provide support for an extensive period of time and the increase in the seriousness of offenses in appellant's criminal record. As to the drug offense, the court found recidivism "more likely" because appellant previously participated in an outpatient treatment program but continued to use drugs. The probation department did not find appellant amenable to community control and recommended a "long prison sentence" and even appellant's mother asked the trial court to impose a prison sentence. The trial court incorporated its findings made previously in all four cases and from the trial court's analysis we cannot say the sentence was unreasonable, arbitrary, or

unconscionable.

{¶18} We find the trial court did not abuse its discretion in revoking appellant's community control and sentencing him to 59 months in prison. Appellant's assignment of error is overruled.

{¶19} Judgment affirmed.

PIPER and HUTZEL, JJ., concur.