

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08-CA-61
TODD DELCOL	:	
	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of
Common Pleas Case No. 03CR-I-07-0308

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: August 5, 2009

APPEARANCES:

For Plaintiff-Appellee:

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Delaware County Prosecuting Attorney
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(Counsel of Record)

For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant, Todd Delcol, was indicted on July 25, 2003, on one count of kidnapping, in violation of R.C. 2905.01(A)(3), and on two counts of felonious assault, in violation of R.C. 2903.11(A)(1) and (A)(2), respectively. At his arraignment, Appellant entered pleas of not guilty to all charges.

{¶2} On April 1, 2004, Appellant entered a change of plea and pled guilty to counts two and three of the indictment, that being the two charges of felonious assault, both felonies of the second degree. As part of the plea, the prosecution agreed to recommend that Appellant would serve four years in prison as to count two of the indictment and that Appellant be placed on a five year term of community control with respect to count three, to be served consecutive to Appellant's prison term on count two.

{¶3} At the plea hearing, the trial court engaged in a colloquy with Appellant regarding the potential sentence that the trial court could impose. The court specifically asked Appellant, "Can you tell me what the potential sentence could be if I accept your plea of guilty today to a felony of the second degree?", to which Appellant responded, "It could be two to eight years." Moreover, in the judgment entry filed by the court after the plea, but prior to sentencing, the court stated, "the Defendant acknowledged that he had reviewed the legislation defining Community Control sanctions with his attorney prior to the commencement of the instant hearing."

{¶4} The parties reconvened for a sentencing hearing on June 30, 2004. The court proceeded to sentence Appellant to four years incarceration as to count two of the indictment and sentenced Appellant to five years of community control as to count

three, to be served consecutively to his incarceration on count two. In explaining the sentence as to count three, the following exchanges took place between the court and Appellant:

{¶5} “THE COURT: Now, you can be seated. The court is going to impose a split sentence as to count three, felonious assault. The court is going to hold over your head eight years on this count. Does that bother you?

{¶6} “THE DEFENDANT: Yes, sir, it does.

{¶7} “THE COURT: You shouldn’t be smirking. You have done very serious offenses. I’m going to make sure, sir, as long as I am the court, that you do live up to what your mouth said. Because if you don’t I will have no qualm about putting you back into prison for eight years. Do you understand all of that?

{¶8} “THE DEFENDANT: Yes, sir.

{¶9} “* * *

{¶10} “THE COURT: Absolutely. You better be very thankful that you have your family here, because a lot of defendants don’t have the support of the family; you have that support.

{¶11} “THE DEFENDANT: I understand that.

{¶12} “THE COURT: Don’t you let them down. If you let them down you will go back into C.R.C. for eight years. Do you understand that?

{¶13} “THE DEFENDANT: Yes, sir.

{¶14} “* * *

{¶15} “THE COURT: * * * You will be on community control sanctions once you complete C.R.C., you’ll be on community control sanctions for a period not to exceed five years. Do you understand that?”

{¶16} “THE DEFENDANT: Yes, sir.

{¶17} “THE COURT: Five years is tolled or suspended until you complete your prison term, which I gave you, as to count two. Once you are released, if you have not had sufficient counseling on anger management, then the first thing you will do is either be in a halfway house or C.B.C.F. I know you already completed one of them, it didn’t work, but hopefully, your attitude has been adjusted. Hopefully it will not be necessary.

{¶18} “THE DEFENDANT: It won’t.

{¶19} “THE COURT: If it is we’ll address it at that time. Do you understand that?”

{¶20} “THE DEFENDANT: Yes, sir.

{¶21} “THE COURT: You’ll be on intensive supervision under Delaware County. They’ll have the authority to have you on electronic monitoring; house arrest; curfew; whatever they feel is necessary to make sure you are staying away from the booze, staying away from the drugs. Do you understand that?”

{¶22} “THE DEFENDANT: Yes, sir.

{¶23} “THE COURT: You will have no further misconduct: no felonies; misdemeanors; minor misdemeanors; nor moving traffic violations.

{¶24} “When you complete your C.R.C. time you shall report to the intensive supervision office within 24 hours. Now, they are not going to transport you, they’ll let you out wherever you are in C.R.C., then it will be your responsibility to get to the

intensive supervision office of Delaware County. If you don't you have violated this order, then I can impose the eight years. Do you understand that?

{¶25} "THE DEFENDANT: Yes, sir.

{¶26} "THE COURT: Any questions?

{¶27} "THE DEFENDANT: No sir."

{¶28} The court then went on to specifically go through every requirement of community control, including intensive supervision, obtaining a job, obtaining a residence, remaining in Ohio, not possessing or consuming alcoholic beverages or controlled substances, obtaining a driver's license upon his release from prison, not possessing or owning a firearm, performing 200 hours of community service, and paying child support. The court went over each of these requirements individually, asking Appellant after explaining each requirement if Appellant understood the requirements. Appellant responded in the affirmative. The following exchange then occurred:

{¶29} "THE COURT: You will have 60 days after you get out of the institution to make sure there is a valid, appropriate child support order on. If you don't see to that, guess what? You violate this order and the eight years can be imposed. You must also understand Mr. Delcol, while you're in prison the child support arrearage continues to grow.

{¶30} "THE DEFENDANT: Yes.

{¶31} "THE COURT: So, rightfully so. In the court's opinion, you have done actions that voluntarily put you in prison, no one forced you to do what you did. Do you understand?

{¶32} “THE DEFENDANT: I understand that.

{¶33} “THE COURT: Does either counsel wish anything to be clarified, additionally added to the community control sanctions that will be imposed upon this defendant, to commence after he completes the prison term?

{¶34} “MS. HEMMETER: No, your honor.

{¶35} “MR. SHAMANSKY: No, judge.

{¶36} “THE COURT: Mr. Delcol, we have been through this before, I know you understand, I need to go through it again. You understand that if you violate the community control sanctions I can impose stiffer sanctions?

{¶37} “THE DEFENDANT: Yes, sir.

{¶38} “THE COURT: I can also impose an eight year sentence if I wish.

{¶39} “THE DEFENDANT: Yes, sir.

{¶40} “THE COURT: Questions about that?

{¶41} “THE DEFENDANT: No, sir.”

{¶42} Appellant filed numerous motions for jail time credit and judicial release during the pendency of his incarceration on count two. All motions were denied by the court.

{¶43} On June 27, 2008, the trial court put on a judgment entry indicating that Appellant’s case would be scheduled for a status conference and resentencing pursuant to *State v. Brooks*. A hearing was eventually held, after several continuances, on September 22, 2008. Prior to the actual hearing date, on September 16, 2008, the State filed a motion, stating that Appellant had violated community control by failing to

obtain employment within 60 days from his release from prison and that he failed to report to the parole office on four separate occasions.

{¶44} At the September 22, 2008, hearing, the State withdrew the motion for community control violations, and the court again stated on the record that it would impose a sentence of eight years if Appellant failed to comply with the conditions of community control. Though the reasoning is not clear in the record, the court appeared to be under the impression that pursuant to *State v. Brooks*, it also needed to articulate the eight year sentence for a violation of community control in its judgment entry. Specifically, the court found on the record at the September 22, 2008, hearing, “Based on *State versus Brooks*, the court is imposing, if the defendant fails to comply with the conditions of community control, the court will impose an eight year sentence to C.R.C.” The court additionally noted in its judgment entry, dated September 29, 2008, “And, pursuant to *St. v. Brooks*, 103 Ohio St.3d 134 (2004), the Court resentenced the Defendant to a definite prison term of eight (8) years as to the Indictment should the Defendant violate his Community Control Sanctions.”

{¶45} At the hearing, when the court informed the parties that it would be articulating the sentence for the violation of community control on the record again, as well as in the judgment entry, defense counsel, who also represents Appellant in the instant appeal, stated, “It was my belief that the court was proceeding appropriately at this point based on *State v. Brooks*. And that if it’s this court’s intention now to resentence according to *Brooks*, that’s fine.”

{¶46} At that time, Appellant’s community control was continued and Appellant was not incarcerated since the State dismissed the motion at the hearing.

{¶47} On October 24, 2008, Appellant filed a notice of appeal, contesting the September 29, 2008, judgment entry.

{¶48} Appellant raises two Assignments of Error:

{¶49} “I. THE TRIAL COURT ERRED WHEN IT INCLUDED A PRISON TERM AT THE APPELLANT’S SEPTEMBER 22, 2008 HEARING WHEN IT DID NOT PROPERLY INCLUDE A PRISON TERM AT THE APPELLANT’S ORIGINAL SENTENCING HEARING.

{¶50} “II. THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO A MAXIMUM PRISON TERM IF THE APPELLANT VIOLATES THE TERMS OF HIS COMMUNITY CONTROL SANCTION.”

I& II

{¶51} In his first assignment of error, Appellant argues that the trial court erred in not properly informing Appellant that he would be subject to a specific prison term at his original sentencing hearing and then by informing Appellant at a subsequent hearing that a specific prison term would be imposed for future violations of community control.

{¶52} Ohio Revised Code 2929.19(B)(5) provides that if a trial court elects to impose community control sanctions at a sentencing hearing: “[t]he 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, as selected by the court from the range of prison terms for the offense pursuant to section 2929.14 of the Revised Code.”

{¶53} The Ohio Supreme Court in *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, set forth a strict compliance standard regarding R.C. 2929.19(B)(5), stating that trial courts must comply with the requirements of R.C. 2929.19(B)(5) *at the sentencing hearing*. *Brooks*, at ¶15 (emphasis added). “[N]otification given in a court’s journal entry issued after sentencing does not comply with R.C. 2929.19(B)(5).”

{¶54} The *Brooks* court, having established that the notification of a specific prison term for a community control violation must occur at a sentencing hearing, stated that the notification by the trial court shall “in straightforward and affirmative language, inform the offender at the sentencing hearing that the trial court will impose a definite term of imprisonment of a fixed number of months or years, such as ‘twelve months’ incarceration,’ if the conditions are violated. To comply with the literal terms of the statute, the judge should not simply notify the offender that if the community control conditions are violated, he or she will receive ‘the maximum,’ or a range, such as ‘six to twelve months,’ or some other indefinite term, such as ‘up to 12 months.’ The judge is required to notify the offender of the ‘specific’ term the offender faces for violating community control.” *Id.*, at ¶19.

{¶55} In reviewing whether the trial court in the instant matter complied with *Brooks*, we must determine if, at the original sentencing hearing, the court, in imposing community control on count three, informed Appellant of a specific prison term as a sanction for a violation of community control. We find the trial court was in compliance

with R.C. 2929.19(B)(5) and that the court did notify Appellant that he would be subject to a specific prison term of eight years should he violate community control. As set forth in our recitation of the facts above, at six separate times during the original sentencing hearing, the trial court informed Appellant that if he violated community control, the court would send him to prison for eight years.

{¶56} Having determined that the trial court complied with R.C. 2929.19(B)(5) during the original sentencing hearing, we find Appellant's argument that the trial court erred in reiterating the eight year sentence for a community control violation at the September 22, 2008, hearing, to be moot.

{¶57} Moreover, Appellant's second assignment of error relates to a challenge that at the September 22, 2008, hearing, the trial court erred in imposing a maximum sentence should Appellant violate community control. In support of his contention, he argues that the trial court failed to consider the statutory factors proscribed in R.C. 2929.11 and R.C. 2929.12 at the September 22, 2008, hearing. Such an argument is also moot, as we have found that there is no need to consider the September 22, 2008, hearing since the trial court complied with R.C. 2929.19(B)(5) at Appellant's original hearing.

{¶58} Appellant's first and second assignments of error are overruled.

{¶59} Based on the foregoing, we affirm the judgment of the Delaware County Court of Common Pleas.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
TODD DELCOL	:	
	:	
Defendant-Appellant	:	Case No. 08-CA-61
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE