

ORIGINAL

**IN THE SUPREME COURT OF OHIO
Supreme Court Case Number 10-1482**

**STATE OF OHIO ex rel.
GREG H. HEMSLEY**

Relator-Appellant

**On Appeal from the Summit
County Court of Appeals
Ninth Appellate District
Court of Appeals No. 25445**

v.

HONORABLE JUDGE BRENDA BURNHAM UNRUH

Respondent-Appellee

**MERIT BRIEF OF APPELLEE
JUDGE BRENDA BURNHAM UNRUH**

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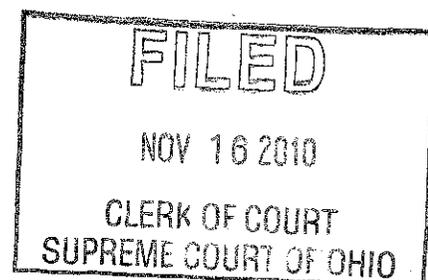
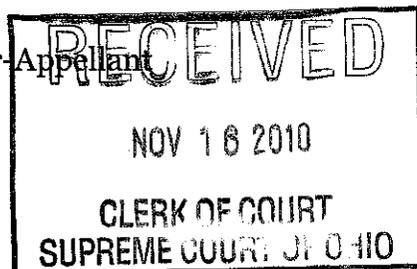


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STATEMENT OF FACTS

Relator Greg H. Hemsley was granted judicial release and placed on three years community control by Respondent Judge Unruh by entry dated March 30, 2005. R. 1, Ex. B. Judge Unruh extended community control for a period of two years by entry dated March 4, 2008. R. 1, Ex. C. Absent any tolling events the five year period of community control expired March 29, 2010. *Kaine v. Marion Prison Warden*, 88 Ohio St.3d 454, 2000-Ohio-381.

Hemsley moved to North Carolina during the initial period of three years community control and his supervision was transferred to that State. R. 1, Ex. D.

Hemsley was charged with two violations of community control on January 13, 2010. R. 1, Ex. L. The alleged charges are 1) that in violation of the terms and conditions of community control Hemsley left the continental United States in 2009 on multiple occasions to go to the Bahamas for business, to Turkey to visit relatives, and in 2010 went to Mexico; and 2) Hemsley resided in a home containing a handgun and shotgun. Arraignment was set for January 28, 2010. *Id.*

At Hemsley's request arraignment was continued to February 4, 2010. R. 1, Ex. O. Arraignment was held on February 11, 2010. R. 1, Ex. M. The transcript indicates that Hemsley and/or Hemsley's counsel had appeared before Judge Unruh prior to that date and contested whether there was a violation of community control. Judge Unruh stated that she had spoken with the probation officer who stated that she was not aware Hemsley was going to Mexico and had not given permission for that trip. Judge Unruh stated that Hemsley had not attended required Gamblers Anonymous meetings. *Id.* Judge Unruh stated that the notice of violations would have to be amended to include the Gamblers Anonymous situation. *Id.* Judge Unruh stated that

contrary to Hemsley's assertion that the probation officer did give Hemsley permission to go to Mexico a probation officer had told Judge Unruh that Hemsley did not have permission to go to Mexico. Id. Hemsley pled not guilty to going to Mexico without permission. Id.

An addendum to the notice of charges is dated April 12, 2010. R. 1, Ex. P. There are four alleged violations. The first alleged violation is that on or about January 6, 2010 Hemsley went to Mexico with the permission of Supervising Officer Sherain Teel. Id. This is part of the first alleged violation in the notice dated January 13, 2010.

The second through fourth alleged violations concerned Hemsley's failure to pay restitution, his failure to verify employment, and his failure to attend Gamblers Anonymous meetings. R. 1, Ex. P.

There was a hearing on April 22, 2010. R. 1, Ex. Q. Hemsley moved to dismiss since the period of community control had expired. Judge Unruh overruled that motion. Hemsley asked for additional time to review the alleged violations. Probation Officer Rogerson stated that Hemsley had been served with the initial notice of charges on January 28, 2010. Id.

Judge Unruh continued the hearing to May 13, 2010. R. 1, Ex. R. There was no hearing because Hemsley filed an appeal from a non-final order. Amended Merit Brief, Ex. C.

Hemsley then filed the instant action in prohibition. The Ninth District Court of Appeals dismissed the complaint because the community control violation proceedings commenced in January of 2010 before community control expired. Amended Merit Brief, Ex. B.

Judge Unruh agrees that proceedings have been stayed pending resolution of this appeal.

There is no evidence in the record that Hemsley has been advised by his supervising probation officer in North Carolina that Hemsley was released from supervision on March 25, 2010. Amended Merit Brief, 4, 7.

There is also no basis for Hemsley's assertions that he never left the jurisdiction of the court without permission. Hemsley relies on information from E.B. Pinner. R. 1, Exs. K, N. Hemsley's assertion conflicts with the addendum dated April 4, 2010 that North Carolina Supervising Officer Sherain Teel did not approve Hemsley's trip to Mexico, R. 1, Ex. P, and Judge Unruh's statement on February 11, 2010 that the probation officer was not aware that Hemsley was going to Mexico and that the probation officer had not given permission for the trip. R. 1, Ex. M. If this Court permits the community control violation hearing to go forward this issue must be examined. But Hemsley cannot assert that he never violated terms of community control.

Last, there is nothing in the record showing that Hemsley was brought before the court on January 13, 2010. The initial notice of violations is dated January 13, 2010. R. 1, Ex. L. But Hemsley was not served on that date.

Probation Officer Rogerson stated that Hemsley was served with the initial notice of violations on January 28, 2010. R. 1, Ex. Q. Examination of the Complaint for Writ of Prohibition shows that Hemsley never asserted that he was brought before the court on January 13, 2010. In fact, he asserted that he was called before the court on January 28, 2010 and that he was charged with the community control violation on January 28, 2010. R. 1, 4 ¶18; 3.

PROPOSITIONS OF LAW I AND II

PROPOSITION OF LAW I

A Trial Court Patently And Unambiguously Lacks Jurisdiction To Hold A Community-Control Revocation Hearing Once The Term For Community Control Has Expired.

- A. Mr. Hemsley's Term Of Community Control Had By Law Terminated At The Time The Court Scheduled And Will Reschedule His Probation Revocation Hearing.**
- B. The Trial Court Patently Lacks The Subject Matter Jurisdiction To Hold A Hearing And Potentially Revoke Mr. Hemsley's Community Control Because The Term Of His Sanction Has Expired By Law.**
- C. The Fact That The State Initiated Violation Proceedings Prior To The Expiration Of Mr. Hemsley's Community Control Is Irrelevant.**
- D. The Appellate Court's Decision Violates Mr. Hemsley's Constitutional Rights.**

PROPOSITION OF LAW II

A Defendant Cannot Be Charged With A Community-Control Violation After He Or She Has Served His Entire Term Of Community Control.

LAW AND ARGUMENT

Judge Unruh agrees with the standard of review in Hemsley's Amended Merit Brief. Judge Unruh agrees that the issue is whether she patently and unambiguously lacks jurisdiction to conduct a community control violation proceeding against Hemsley. *State ex rel. Plant v. Cosgrove*, 119 Ohio St.3d 264, 2008-Ohio-3838, ¶5.

I

The specific issue is whether Judge Unruh patently and unambiguously lacks jurisdiction where the initial notice of community control violations is dated and served

on Hemsley during the period of community control and where arraignment was held during the period of community control.

Long ago this Court held that,

Where a court acquires jurisdiction of an action, such court (unless the action be ended by the parties), retains jurisdiction until it renders a final judgment in the case.

Bolles v. Stockman (1884), 42 Ohio St. 445, paragraph one of the syllabus.

Several Courts of Appeals hold that a trial court retains jurisdiction over a community control violation proceeding where the proceeding is instituted before the period of community control expires even if the period of community control expires before conclusion of the proceeding.

One such case is *State v. Johnson*, 7th Dist. App. No. 09-MA-94, 2010-Ohio-2533, ¶30-¶31. Another is *State v. Semenchuk*, 4th Dist. App. No. 10CA3140, 2010-Ohio-4864, ¶7. Another is *State v. Breckenridge*, 10th Dist. App. No. 09AP-95, 2009-Ohio-3620, ¶7. Yet another is *State v. Harrington*, 3rd Dist. App. No. 14-03-34, 2004-Ohio-1046, ¶15.

By its decision in this case the Ninth District Court of Appeals has joined these appellate districts. *Johnson* cites R.C. 2929.25(B)(1) providing that the sentencing court retains jurisdiction over a sentenced defendant for the duration of the sanctions imposed. *Johnson*, supra ¶30. When that jurisdiction is invoked during the term of the community control period by notice of an alleged community control violation the court retains jurisdiction to adjudicate the charge. *Bolles*, supra.

A similar case is *State v. Powell* (Mar. 27, 2000), 4th Dist. App. No. 99 CA 15, 2000 WL 331593. There, a motion to revoke probation was filed on December 31, 1996. Then on January 2, 1997, five days before the expiration of the period of probation, the trial court entered an order tolling the probation period. It was not until May 26, 1999

that the defendant admitted the violation and the court extended probation for two and one half-years. The court of appeals reversed because the trial court extended the term of probation past five years. *Id.* *2. But the court stated that on May 26, 1999 the trial court could have imposed a prison sentence or continued probation for five days. *Id.* Since there are no tolling events noted in the opinion other than the motion to revoke probation the court of appeals apparently agrees with the proposition that the trial court retains jurisdiction where revocation proceedings are commenced prior to the end of the term of probation.

II

Still other Courts of Appeals indicate that if community control violation proceedings are commenced prior to expiration of the community control period then the trial court has jurisdiction to conduct a hearing on the alleged violations. *State v. Shorter*, 2nd Dist. App. No. 22188, 2008-Ohio-1986, ¶10; *State v. Adkins*, 2nd Dist. App. No. 21810, 2007-Ohio-4886, ¶7; *State v. Fairbank*, 6th Dist. App. Nos. WD-06-015 and WD-06-016, 2006-Ohio-6180, ¶11.

A similar case is *State v. Yates* (1991), 58 Ohio St.3d 78. There, the defendant was declared an absconder more than a month after the term of probation ended. This Court stated,

[b]ecause the state failed to initiate probation violation proceedings during the original probation period, we conclude that the trial court lost its jurisdiction to impose the suspended sentence once the term of probation expired.

Id. *80.

This Court's statement indicates that if violation proceedings had been commenced during the term of probation the trial court would have had jurisdiction to proceed on the violation.

III

Hemsley principally relies on *Davis v. Wolfe*, 92 Ohio St.3d 549, 2001-Ohio-1051 for the proposition that (absent a statutory tolling event) a trial court's jurisdiction to act on an alleged community control violation ceases when the period of community control ends.

Several cases rely on *Davis* and bolster Hemsley's argument here. Those cases are *State v. Miller*, 6th Dist. App. No. WD-06-086, 2007-Ohio-6364, ¶15 (creating a conflict with *Fairbank*, supra); *State v. Osterud*, 6th Dist. App. No. WD-08-082, 2009-Ohio-1741, ¶13, citing *Miller*, supra; *State v. McKinney*, 5th Dist. App. No. 03CA083, 2004-Ohio-4035, ¶19; *State v. Lawless*, 5th Dist. App. No. 03 CA 30, 2004-Ohio-5344, ¶12, citing *McKinney*, supra; *State v. Justice*, 5th Dist. App. No. 08 CA 47, 2009-Ohio-2064, ¶17-¶18, citing *McKinney*, supra.

Davis was distinguished in *State v. Breckenridge*, supra on the basis that *Davis* relied on former R.C. 2951.09 that provided "[a]t the end or termination of the period of probation, the jurisdiction of the judge or magistrate to impose sentence ceases and the defendant shall be discharged." *Breckenridge*, supra 2009-Ohio-3630, ¶7; See *State v. Semenchuk*, supra 2010-Ohio-4864, ¶6. R.C. 2951.09 was repealed effective January 1, 2004. *Breckenridge*, supra.

Hemsley says that former R.C. 2951.09 applies to him. Hemsley was sentenced to community control by entry dated March 30, 2005. R. 1, Ex. B. He says that he was

first sentenced on June 22, 2002. Amended Merit Brief, 1. Judge Unruh will agree that Hemsley was sentenced on three felony offenses by entry dated June 18, 2002.

Hemsley cites *State v. Young*, 2nd Dist. App. No. 23679, 2010-Ohio-4145 for the proposition that former R.C. 2951.09 applies to him because he was sentenced on the offenses prior to January 1, 2004.

Young involved a defendant who was sentenced for petty theft in 2003. Id. ¶13. The court stated that former R.C. 2951.09 applied to the defendant under R.C. 2951.011(B)(1): “Chapter 2951. of the Revised Code, as it existed prior to January 1, 2004, applies to a person upon whom a court imposed a sentence for a misdemeanor offense prior to January 1, 2004.” *Young*, supra ¶6. Since Hemsley was convicted of felony and not misdemeanor offenses he cannot benefit from former R.C. 2951.09.

Contrary to the position of the parties in *State v. Miller*, supra Judge Unruh does not agree that R.C. 2951.011(B)(1) applies to defendants convicted prior to January 1, 2004 of felony offenses. *Miller*, supra 2007-Ohio-6364, ¶10; See *State v. Eberth*, 7th Dist. App. No. 05 MA 108, 2006-Ohio-4683, ¶8 (“R.C. 2951.011 expressly forbids the application of the new misdemeanor probation statutes to defendants *** who were sentenced prior to January 1, 2004**”).)

Last, *Kaine v. Marion Prison Warden*, 88 Ohio St.3d 454, 2000-Ohio-381 does not aid Hemsley. In that case the defendant’s probation was revoked within the period of probation. The statement quoted by Hemsley is from *State v. Jackson* (1988), 56 Ohio App.3d 141, a case relying on former R.C. 2951.09. Id. *142. That repealed statute does not apply to Hemsley.

IV

This Court prudently declared in *State ex rel. Hamilton County Board of Commissioners v. Hamilton County Court of Common Pleas*, 126 Ohio St.3d 111, 2010-Ohio-2467:

“ [w]e need not rule on the merits of [the board's jurisdictional claims], because our duty is limited to determining whether jurisdiction is patently and unambiguously lacking.’ ” *Goldberg v. Maloney*, 111 Ohio St.3d 211, 2006-Ohio-5485, 855 N.E.2d 856, ¶ 45, quoting *108 *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 2005-Ohio-3804, 831 N.E.2d 1003, ¶ 28. This conclusion is consistent with our duty not to issue advisory opinions as well as “ ‘the cardinal principle of judicial restraint-if it is not necessary to decide more, it is necessary not to decide more.’ ” *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462, ¶ 51, quoting *PDK Laboratories, Inc. v. United States Drug Enforcement Adm.* (C.A.D.C.2004), 362 F.3d 786, 799 (Roberts, J., concurring in part and in judgment).

Id. ¶38.

It is not necessary for this Court to decide whether in fact a trial court retains jurisdiction in a community control violation proceeding past the community control termination date where the notice of alleged violations is dated and served on the defendant before the period of community control terminates and the court has held an arraignment on the charges. It is enough that the case law cited above in I and II arguably authorizes Judge Unruh to proceed. *State ex rel Hamilton County Board of Commissioners*, supra ¶37.

Judge Unruh does not believe that any case from this Court holds contrary to her position. Therefore Judge Unruh does not patently and unambiguously lack jurisdiction to proceed with the alleged community control violations dated and served on Hemsley in January of 2010. This is not a question of tolling. The cases relied on by Judge

Unruh indicate that she has jurisdiction to proceed because the proceeding was commenced before March 30, 2010.

V

The final issue is whether Judge Unruh patently and unambiguously lacks jurisdiction to proceed on the three new alleged violations contained in the notice dated April 12, 2010. R. 1, Ex. P.

This issue involves tolling. R.C. 2951.07. Hemsley admits he left for Mexico on January 2, 2010. Amended Merit Brief, 8. The record shows that Hemsley was served with the initial charges and brought before the court on January 28, 2010. R. 1, Ex. Q. That is a period of twenty-seven days. The charges dated April 12, 2010 indicate that Hemsley left for Mexico without the permission of Supervising Probation Officer Sherain Teel. R. 1, Ex. P. The twenty-seven days extends the period of community control from March 29, 2010 until April 25, 2010. There was a hearing on the charges filed April 12, 2010, on April 22, 2010. R. 1, Ex. Q. Proceedings on the charges filed April 12, 2010 had commenced within the extended period of community control.

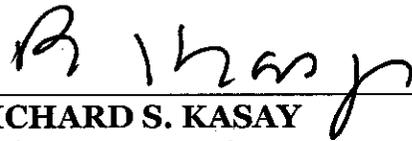
Judge Unruh submits that for the reasons stated above she did not patently and ambiguously lack jurisdiction to proceed on the three new alleged community control violations.

CONCLUSION

Pursuant to the argument offered, Respondent Judge Brenda Burnham Unruh respectfully contends that the judgment of the Ninth District Court of Appeals should be affirmed.

Respectfully submitted,

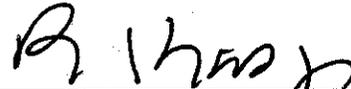
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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by regular U.S. Mail to Attorney Dennis J. Bartek and Attorney Natalie M. Niese, Bartek Law Office, 2300 East Market Street, Suite E, Akron, Ohio 44312, on the 15th day of November, 2010.



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APPENDIX

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COURT OF APPEALS
DANIEL M. HERRIGAN

STATE OF OHIO EX REL. GREG HEMSLEY AUG 4 AM 9: C.A. No. 25445
HEMSLEY

SUMMIT COUNTY
CLERK OF COURTS

Relator

v.

HONORABLE JUDGE BRENDA
BURNHAM-UNRUH

JOURNAL ENTRY

Respondent

Greg H. Hemsley was placed on community control by Judge Brenda Burnham-Unruh. Later, he was charged with violating the conditions of his community control. He moved to dismiss the community control violation complaint because he had completed five years of community control supervision, the maximum authorized by statute. After Judge Unruh denied his motion, Mr. Hemsley appealed. Following this Court's dismissal of his appeal for lack of a final appealable order, Mr. Hemsley petitioned this Court for a writ of prohibition seeking to prevent Judge Unruh from proceeding with the hearing on the community control violation. Judge Unruh has moved to dismiss the complaint. Because Judge Unruh has jurisdiction to consider the community control violation complaint, this Court grants her motion and dismisses Mr. Hemsley's complaint.

For this Court to issue a writ of prohibition, Mr. Hemsley must establish that: (1) Judge Unruh is about to exercise judicial power, (2) the exercise of that power is unauthorized by law, and (3) the denial of the writ will result in injury for which no other adequate remedy exists. *State ex rel Jones v. Garfield Hts. Mun. Court*, 77 Ohio St. 3d 447, 448 (1997). Unless the trial court unambiguously lacks jurisdiction to proceed, a court having general jurisdiction of the subject matter has the authority to determine its

own jurisdiction to hear a cause, and the party challenging the court's jurisdiction has an adequate remedy through an appeal. *Brooks v. Gaul*, 89 Ohio St.3d 202, 203 (2000).

Mr. Hemsley cannot prevail on the facts he has alleged in his complaint. He has alleged that Judge Unruh lacks jurisdiction because the maximum term of his community control period has expired. Mr. Hemsley was placed on community control for three years in March 2005. In March 2008, his community control period was extended for two additional years, to the maximum five-year period authorized by statute. As a result of the extension, Mr. Hemsley's community control continued until March 24, 2010.

The complaint was filed when Judge Unruh had jurisdiction to act.

Mr. Hemsley was charged with a community control violation in January 2010, while he was still serving his term of community control. He has argued that Judge Unruh lost jurisdiction when she continued the community control violation hearing beyond the March 24, 2010, expiration of his five-year community control term.

Judge Unruh did not lose jurisdiction to continue with the community control violation hearing. The complaint was filed prior to the expiration of Mr. Hemsley's community control term. Judge Unruh had jurisdiction over Mr. Hemsley at the time the complaint was filed, and she retained jurisdiction over the complaint after the expiration of the community control period. *State v. Johnson*, 7th Dist. No. 09-MA-94, 2010-Ohio-2533, ¶31 ("Because appellant's probation officer began the probation violation proceedings before appellant's community control period expired, the trial court retained jurisdiction over appellant."); see, also, *State v. McQuade*, 9th Dist. No. 08CA0081-M, 2009-Ohio-4795.

Conclusion

Because Mr. Hemsley is not entitled to a writ of prohibition, Judge Unruh's motion to dismiss is granted and this case is dismissed. Costs taxed to Mr. Hemsley. The clerk of courts is hereby directed to serve upon all parties not in default notice of this judgment and its date of entry upon the journal. See Civ.R. 58(B).



Judge

Concur:
Whitmore, J.
Moore, J.

2929.25 [Effective Until 9/17/2010] Community control sanctions - misdemeanor.

(A)(1) Except as provided in sections 2929.22 and 2929.23 of the Revised Code or when a jail term is required by law, in sentencing an offender for a misdemeanor, other than a minor misdemeanor, the sentencing court may do either of the following:

(a) Directly impose a sentence that consists of one or more community control sanctions authorized by section 2929.26, 2929.27, or 2929.28 of the Revised Code. The court may impose any other conditions of release under a community control sanction that the court considers appropriate. If the court imposes a jail term upon the offender, the court may impose any community control sanction or combination of community control sanctions in addition to the jail term.

(b) Impose a jail term under section 2929.24 of the Revised Code from the range of jail terms authorized under that section for the offense, suspend all or a portion of the jail term imposed, and place the offender under a community control sanction or combination of community control sanctions authorized under section 2929.26, 2929.27, or 2929.28 of the Revised Code.

(2) The duration of all community control sanctions imposed upon an offender and in effect for an offender at any time shall not exceed five years.

(3) At sentencing, if a court directly imposes a community control sanction or combination of community control sanctions pursuant to division (A)(1)(a) of this section, the court shall state the duration of the community control sanctions imposed and shall notify the offender that if any of the conditions of the community control sanctions are violated the court may do any of the following:

(a) Impose a longer time under the same community control sanction if the total time under all of the offender's community control sanctions does not exceed the five-year limit specified in division (A)(2) of this section;

(b) Impose a more restrictive community control sanction under section 2929.26, 2929.27, or 2929.28 of the Revised Code, but the court is not required to impose any particular sanction or sanctions;

(c) Impose a definite jail term from the range of jail terms authorized for the offense under section 2929.24 of the Revised Code.

(B)(1) If a court sentences an offender to any community control sanction or combination of community control sanctions authorized under section 2929.26, 2929.27, or 2929.28 of the Revised Code, the court shall place the offender under the general control and supervision of the court or of a department of probation in the jurisdiction that serves the court for purposes of reporting to the court a violation of any of the conditions of the sanctions imposed. If the offender resides in another jurisdiction and a department of probation has been established to serve the municipal court or county court in that jurisdiction, the sentencing court may request the municipal court or the county court to receive the offender into the general control and supervision of that department of probation for purposes of reporting to the sentencing court a violation of any of the conditions of the sanctions imposed. The sentencing court retains jurisdiction over any offender whom it sentences for the duration of the sanction or sanctions imposed.

(2) The sentencing court shall require as a condition of any community control sanction that the offender abide by the law and not leave the state without the permission of the court or the offender's probation officer. In the interests of doing justice, rehabilitating the offender, and ensuring the offender's good behavior, the court may impose additional requirements on the offender. The offender's compliance with the additional requirements also shall be a condition of the community control sanction imposed upon the offender.

(C)(1) If the court imposing sentence upon an offender sentences the offender to any community control sanction or combination of community control sanctions authorized under section 2929.26, 2929.27, or 2929.28 of the Revised Code, and if the offender violates any of the conditions of the sanctions, the public or private person or entity that supervises or administers the program or activity that comprises the sanction shall report the violation directly to the sentencing court or to the department of probation or probation officer with general control and supervision over the offender. If the public or private person or entity reports the violation to the department of probation or probation officer, the department or officer shall report the violation to the sentencing court.

(2) If an offender violates any condition of a community control sanction, the sentencing court may impose upon the violator a longer

time under the same community control sanction if the total time under all of the community control sanctions imposed on the violator does not exceed the five-year limit specified in division (A)(2) of this section or may impose on the violator a more restrictive community control sanction or combination of community control sanctions, including a jail term. If the court imposes a jail term upon a violator pursuant to this division, the total time spent in jail for the misdemeanor offense and the violation of a condition of the community control sanction shall not exceed the maximum jail term available for the offense for which the sanction that was violated was imposed. The court may reduce the longer period of time that the violator is required to spend under the longer sanction or the more restrictive sanction by all or part of the time the violator successfully spent under the sanction that was initially imposed.

(D) Except as otherwise provided in this division, if an offender, for a significant period of time, fulfills the conditions of a community control sanction imposed pursuant to section 2929.26, 2929.27, or 2929.28 of the Revised Code in an exemplary manner, the court may reduce the period of time under the community control sanction or impose a less restrictive community control sanction. Fulfilling the conditions of a community control sanction does not relieve the offender of a duty to make restitution under section 2929.28 of the Revised Code.

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