

CASE NO.

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE EIGHTH DISTRICT COURT OF APPEALS
CUYAHOGA COUNTY, OHIO
CA 96575

12-1488

STATE OF OHIO
Plaintiff/Appellant

vs.

ANTWAN NASH
Defendant/Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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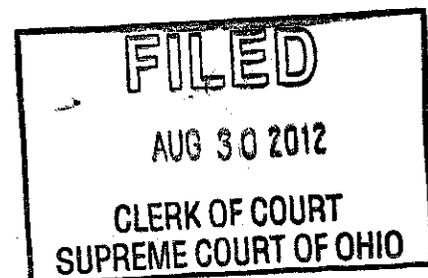


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**EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC OR GENERAL
INTEREST**

This case departs from governing law and permits trial courts to disregard sentencing requirements and afford felons the equivalent of misdemeanor sentences. Appellee Antwan Nash pleaded guilty to drug possession, a fifth-degree felony, and was sentenced to time served in jail for three days (time after arrest and prior to posting bond) and fined one hundred dollars. However, based on the appellate court's interpretation of Ohio's sentencing guidelines, the Eighth District provided that the trial court could ignore statutory law, which requires courts to impose terms of community control sanctions or prison terms for felony offenses. Further, because one of the overriding purposes of felony sentencing is to protect the public; such minimal sentences circumvent any meaningful preservation of public safety, and therefore, the State asks this Honorable Court to accept jurisdiction of this matter and adopt the following proposition of law:

Trial courts in the State of Ohio have two sentencing options when imposing sentence for felony offenses: 1) impose a term of supervised community control sanctions or 2) imprisonment.

Despite Appellee's felony conviction, in its en banc decision, the Eighth District approved Nash's sentence to time served in jail of three days, a one hundred dollar fine, and suspension of his driver's license for six months. *State v. Nash*, 8th Dist. No. 96575, 2012-Ohio-3246. The court found that this sentence – which did not include a prison term or term of community control - was not contrary to law, but instead properly served as a residential community control sanction. *Id.* Accordingly, the appellate court disregarded the applicable sentencing statutes illustrated in a long line of prior cases which held that a trial court has the

option of a sentence of imprisonment or a term of community control sanctions. See, e.g., *State v. Eppinger*, 8th Dist. No. 92441, 2009-Ohio-5233, at ¶ 9.

This Court has held that a trial court must sentence in accordance with statutory law. *State v. Fischer*, 128 Ohio St.3d 92, 942 N.E.2d 332, 2010-Ohio-6238, at ¶ 22. The Ohio Revised Code, section 2929.14(A)(5), provides that with respect to fifth-degree felonies, a sentencing court's "only option" is to impose a sentence of "community control or imprisonment." *State v. Lee*, 8th Dist. No. 92327, 2009-Ohio-5820, at ¶ 6. (Overruled by *Nash*, 8th Dist. No. 96575, 2012-Ohio-3246). Moreover, section 2929.15(A)(2)(a) of the Code reads:

If a court sentences an offender to any community control sanction or combination of community control sanctions authorized pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, the court shall place the offender under the general control and supervision of a department of probation.

Here, the sentencing court ignored this provision by not sentencing Nash to a supervised community control sanction. See *Eppinger*, 2009-Ohio-5233, at ¶ 9.

This matter involves a question of great public and general interest, because the Eighth District overlooked the law and afforded felons the equivalent of misdemeanor sentences. Allowing such sentences places the public's safety at risk. Because of this, the State asks this Honorable Court to accept jurisdiction of this matter upon the following proposition of law:

Trial courts in the State of Ohio have two sentencing options when imposing sentence for felony offenses: 1) impose a term of supervised community control sanctions or 2) imprisonment.

STATEMENT OF THE CASE AND FACTS

Appellee pleaded guilty to possession of Oxycodone, a fifth-degree felony. He has prior convictions for felony drug offenses. On March 16, 2011, the trial court sentenced Nash to time served in jail of three days, a one hundred dollar fine, and suspended his driver's license for a period of six months. *State v. Nash*, 8th Dist. No. 96575, 2012-Ohio-1188, at ¶ 1-2. The trial

court did not place Appellee under community control supervision. *Id.* The Eighth District Court of Appeals determined en banc that it misinterpreted Ohio sentencing law in *State v. Eppinger*, and held that Nash's sentence was not contrary to law; finding that it was a properly imposed residential sanction. *Nash*, 2012-Ohio-3246, at ¶ 2.

In dissent, Boyle, J. and Cooney, J. concurred with Gallagher, J. who wrote, "because a community control sanction was imposed, probation supervision was mandatory. If the legislature wanted to exempt fines as community control sanctions from supervision, it should have said so." *Nash*, 2012-Ohio-3246, at ¶ 24 (Gallagher, J., dissenting). Further, Justice Gallagher illustrated that the appellate court's decision to skirt around the wording of R.C. 2929.15, which reads in part that "*the court shall place the offender under the general control and supervision of a department of probation,*" results in a "'hole' or 'gap' in the statute." *Id.* at ¶ 22-26 (Gallagher, J., dissenting). (Emphasis added.)

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: Trial courts in the State of Ohio have two sentencing options when imposing sentence for felony offenses: 1) impose a term of supervised community control sanctions or 2) imprisonment.

By accepting jurisdiction of this case, this Court will be able to establish that felony sentencing courts have two sentencing options: 1) to impose a term of supervised community control sanctions or 2) to impose a term of imprisonment. See, *State v. Lee*, 8th Dist. No. 92327, 2009-Ohio-5820. The appellate court departed from governing law by failing to sentence Nash accordingly, and disregarded the principles and purposes of sentencing to protect the public.

A. STANDARD OF REVIEW

This Court established the applicable standard for appellate review of felony sentences in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. *Kalish* provides a two-

prong test to review felony sentences. *Id.* at ¶ 4. First, a reviewing court must determine a 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." *Id.* If the reviewing court finds this prong satisfied, then it evaluates the sentencing court's decision under "an abuse-of-discretion standard." *Id.*

B. STATUTORY CONSIDERATIONS

i. FELONY SENTENCING REQUIREMENTS

Felony sentencing in Ohio requires the imposition of either a prison sentence or placing the offender on community control sanctions at a sentencing hearing. R.C. 2929.19(A),(B)(2),(4); R.C. 2929.13(B); See, also, 1 Griffin & Katz, Ohio Felony Sentencing Law (2006 Ed.) 109, 2929.13. For a felony of the fifth degree, the sentencing court is not required to impose a prison sentence, although it may impose a sentence of up to twelve months. R.C. 2929.14(A)(5). Alternatively, a sentencing court may impose a sentence consisting of community control sanctions in accordance with sections 2929.16, 2929.17, or 2929.18 of the Revised Code. R.C. 2929.15(A)(1).

Additionally, courts may impose any sanction or combination of sanctions on offenders convicted of felonies in compliance with R.C. 2929.14 through 2929.18. However, courts must abide by the overriding purposes and principles of Ohio sentencing procedure, which are to "protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." R.C. 2929.11(A).

ii. **H.B. 86: AMENDED R.C. 2929.13**

R.C. 2929.13 was amended under H.B. 86 as of October 30, 2011. Prior to the amendment, R.C. 2929.13(A) read in pertinent part,

*** If the offender is eligible to be sentenced to community control sanctions, the court shall consider the appropriateness of imposing a financial sanction pursuant to section 2929.18 of the Revised Code or a sanction of community service pursuant to section 2929.17 of the Revised Code as the sole sanction for the offense.

The statute mandates that courts determine whether the offense was committed under several conditions which would justify the imposition of a prison term. R.C. 2929.13(B)(2)-(3). If not, the amended version of R.C. 2929.13(B) now provides that when imposing any community control sanction, the term shall be at least one year. Specifically, this section now reads:

(a) Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence, **the court shall sentence the offender to a community control sanction of at least one year's duration if all of the following apply:**

(i) The offender previously has not been convicted of or pleaded guilty to a felony offense or to an offense of violence that is a misdemeanor and that the offender committed within two years prior to the offense for which sentence is being imposed.

(ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.

(iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty-five-day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.

R.C. 2929.13(B)(1)(a). (Emphasis added.)

iii. **SUPERVISION OF THE OFFENDER**

Prior to imposing any community control sanction, the sentencing court must first obtain a presentence investigation report as mandated by Crim.R. 32.2, which dictates that, “In felony cases the court shall *** order a presentence investigation and report before imposing community control sanctions or granting probation.” Similarly, R.C. 2951.03 mandates that a court obtain a presentence investigative report prior to the imposition of any community control sanctions. Moreover, one of the results of sentencing an offender to community control sanctions is supervision.

When a court imposes community control sanctions in lieu of imposing a prison term, R.C. 2929.15 through 2929.18 provide options for sentencing. R.C. 2929.15(A)(1) provides general guidelines and definitions of what constitute community control sanctions, and authorizes a court to impose any community control sanction under R.C. 2929.16, 2929.17 or 2929.18. Additionally, R.C. 2929.15 reads in part that, “[i]f a court sentences an offender to any community control sanction or combination of community control sanctions authorized pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, the court *shall* place the offender under the general control and supervision of a department of probation in the county that serves the court ...” R.C. 2929.15(A)(2)(a). (Emphasis added.) Where a court does not have to impose a mandatory prison term, it must impose a community control sanction. When so doing, R.C. 2929.19(B)(5) requires that a sentencing court notify the offender of the consequences of violating community control, as follows:

If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The 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.

R.C. 2929.19(B)(5).

C. COMMUNITY CONTROL SANCTIONS PRESUME SUPERVISION

In this matter, the court's decision constituted a sentence contrary to law. The court found that a term of jail was a community control residential sanction authorized by law and found no error in the trial court's imposition of that sanction only without placing the defendant under a term of community control supervision. *Nash*, 2012-Ohio-3246. Essentially, the panel found that a felony sentence could, under law, be a simple sentence of "time served." However, this conclusion ignores the design of the felony sentencing requirements contained within R.C. 2929.11 through 2929.19. The overriding purposes of protection of the public and punishment of an offender in felony cases cannot be met by simple statements of three or five days in jail. The General Assembly set forth a detailed set of community control sanctions that would operate to achieve those sentencing ends. R.C. 2929.15(A)(2) states that the imposition of *any* community control sanction requires the placement of the offender under the control and supervision of a probation department.

A sentence of "time served" does not comply with the underlying structure of the community control sanctions, which presumes a term of supervision. Had such a result been intended, the statute would have specifically provided for a sanction without the need for supervision. In fact, the General Assembly provided only one exception to the premise of supervision on community control. Under R.C. 2929.13(A):

If the offender is eligible to be sentenced to community control sanctions, the court shall consider the appropriateness of imposing a financial sanction pursuant

to section 2929.18 of the Revised Code or a sanction of community service pursuant to section 2929.17 of the Revised Code **as the sole sanction for the offense.**

(Emphasis added.)

This statute clearly delineates the court's ability to consider a monetary sanction as the "sole" sanction of the offense. When read in conjunction with R.C. 2929.15 and its requirement of supervision, it is clear that a court may only relieve an offender from a term of supervision where it imposes a financial sanction. Otherwise, the felony sentencing statutes should be read to require a term of supervision. Moreover, since October 30, 2011, the General Assembly made clear the requirement and duration of community control sanctions¹ – they are to be a minimum of one year. This amendment removes any doubt as to the prior statute's purpose and structure in felony sentencing.

D. PRINCIPLES OF CONSISTENCY IN THE LAW AND AMENDMENTS TO R.C. §2929.13 REQUIRE REVERSAL OF THE EN BANC DECISION

Since 2001, the Eighth District decided several cases on the propriety of a trial court sentencing a felony defendant to "time served." Prior to *Eppinger* in 2009, the court recognized that felony sentencing requires only two options for a sentencing court; the imposition of a prison sentence or the imposition of community control sanctions. In *State v. Mitchell*, 141 Ohio App.3d 770, 771, 753 N.E.2d 284, 285 (2001), the court stated: "First, a definite term of imprisonment pursuant to R.C. 2929.14(A)(4). Or, second, place Mitchell under community control sanctions pursuant to R.C. 2929.13 to 2929.18." This statement of the law was, and is, correct as R.C. 2929.13 and 2929.19 allow for a felony sentence to consist of either a prison sentence or a term of community control.

¹ This requirement applies to sentencing of fourth and fifth degree felonies. See *State v. Ogle*, 8th Dist. No. 97926, 2012-Ohio-3683 at ¶ 7.

Prior to this case, the Eighth District consistently determined felony sentencing had heightened requirements; it is not simply sentencing as misdemeanor offenses with a few days in jail and a fine. However, the common pleas court continued to sentence such cases as if they were misdemeanors, as noted by the cases in which the appellate court reversed the trial court:

- *State v. Ashby*, 8th Dist. No. 96119, 2011-Ohio-5160
- *State v. Becker*, 8th Dist. No. 95901, 2011-Ohio-4100
- *State v. Eppinger*, 8th Dist. No. 92441, 2009-Ohio-5233
- *State v. Peck*, 8th Dist. No. 92374, 2009-Ohio-5845
- *State v. Disanza*, 8th Dist. No. 92375, 2009-Ohio-5364
- *State v. Ross*, 8th Dist. No. 92461, 2009-Ohio-4720
- *State v. Pickett*, 8th Dist. No. 91343, 2009-Ohio-2127
- *State v. Lee*, 8th Dist. No. 92327, 2009-Ohio-5820
- *State v. Walker*, 8th Dist. No. 90692, 2008-Ohio-5123

From 2001 until this case, the common pleas court continued to ignore precedent in felony sentencing. The decision in this case simply validates the court's disregard of the appellate court's precedent. Consistency and stare decisis are important factors in our system of jurisprudence. This decision flies in the face of those principles – as well as in the intent and letter of the statutory law.

CONCLUSION

In this case, the appellate court reversed a decade of precedent in which it had held that felony sentencing upon fifth degree felonies required the imposition of either a term of imprisonment or a term of community control supervision. These holdings were ignored by the trial court, and that court was rewarded by the appellate court by its reversal of its own precedent. The decision in this case has interpreted the prior sentencing statutes in a manner inconsistent with the intent of the law, and has simply created a “hole” or “gap” in the statute” that allowed the court to impose minimal sentences upon felony offenders and not place them on a term of supervised community control. For these reasons, the State asks that this Court accept

jurisdiction and hold that Trial courts in the State of Ohio have two sentencing options when imposing sentence for felony offenses: 1) impose a term of supervised community control sanctions or 2) imprisonment.

Respectfully submitted,

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SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction has been mailed this 29 day of August, 2012, to John T. Martin, 310 Lakeside Avenue, 2nd Floor, Cleveland, Ohio 44113.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

State of Ohio

Appellant

COA NO.
96575

LOWER COURT NO.
CP CR-545811

COMMON PLEAS COURT

-vs-

Antwan Nash

Appellee

MOTION NOS. 457274 & 457401

Date 08/24/2012

Journal Entry

This matter is before the court on Appellee's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

Appellee has not demonstrated any conflict between this court's en banc decision and any other decisions of this court. The Motion for Reconsideration filed in *State v. Cox*, 8th Dist. No. 97924, 2012-Ohio-3158, having been denied, Appellee's Motion for Reconsideration, En Banc is denied as moot. Appellant's Motion to Strike Attachments to Appellee's Motion for Reconsideration is, likewise, denied.


PATRICIA A. BLACKMON, ADMINISTRATIVE JUDGE

Concurring:

MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.,
SEAN C. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
MARY EILEEN KILBANE, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

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[Cite as *State v. Nash*, 2012-Ohio-3246.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
EN BANC
No. 96575

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

ANTWAN NASH

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-545811

BEFORE: En Banc Court

RELEASED AND JOURNALIZED: July 19, 2012

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LARRY A. JONES, SR., J.:

{¶1} Pursuant to App.R. 26 and Loc.App.R. 26, this court determined that a conflict existed between the panel's decision in this case and this court's previous decisions on the issue of whether a court sentencing a defendant to community control sanctions must place the offender under the supervision of the adult probation department, or whether it has the discretion to determine that supervision is not necessary.

Accordingly, we sua sponte granted en banc consideration in this matter and convened an en banc conference in accordance with App.R. 26(A)(2), Loc.App.R. 26(D), and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672.

{¶2} The appellant state urges us to follow our precedent, which would require the trial court to order probation department supervision of every defendant sentenced to a community control sanction. *State v. Eppinger*, 8th Dist. No. 92441, 2009-Ohio-5233. Upon en banc review, we overrule our decision in *Eppinger* and hold that R.C. 2929.15(A)(2) requires probation department supervision of a defendant placed on community control sanctions only when there is a condition that must be overseen or a term during which a defendant's conduct must be supervised. Accordingly, we affirm the trial court's judgment.

I.

{¶3} Nash pleaded guilty to one count of drug possession, a fifth degree felony. The trial court sentenced him to a three-day jail term with credit for three days served and

imposed a \$100 fine. The state appealed of right, raising the following assignment of error for our review:

The sentence imposed by the trial court is contrary to law as the trial court failed to sentence appellee to a valid sentence of imprisonment or community control sanctions, failed to place appellee under supervision, and failed to inform appellee of the consequences of appellee's failure to pay the fine or costs.

II.

{¶4} Our review of trial court sentencing decisions is guided by *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. *Kalish* sets forth a two-prong test that guides our review of felony sentences. Under the first prong, we review whether the trial court complied with all applicable rules and statutes to determine if the sentence is clearly and convincingly contrary to law. If the first prong is satisfied, then we review the trial court's decision under an abuse-of-discretion standard. *Id.* at ¶ 4.

{¶5} The issue raised by the state in this case was first visited by this court in *Eppinger*.¹ There, the trial court sentenced the defendant to a 25-day jail term with

¹Numerous cases have been reversed and remanded by this court following *Eppinger*. It has troubled us to learn through this en banc proceeding that the mandate of this court was either wholly ignored or not fully complied with in several of the cases.

In *Eppinger* itself, for example, the trial court resentenced the defendant to the original 25-day jail term with credit for 25 days served, waived costs, fines, and assigned counsel fees, but did not impose probation department supervision. Similarly, in *State v. Lee*, 8th Dist. No. 92327, 2009-Ohio-5820, the trial court reimposed substantially the same sentence that we had found to be contrary to law, again failing to place the offender under the probation department's supervision. In *State v. Becker*, 8th Dist. No. 95901, 2011-Ohio-4100, and *State v. Ashby*, 8th Dist. No. 96119,

credit for 25 days served and a \$100 fine. This court found the sentence contrary to law under the first prong of *Kalish*. We noted that in sentencing a felony offender, a trial court has the option of a sentence of imprisonment or a sentence of community control sanctions. *Id.* at ¶ 9 (quoting 1 Griffin & Katz, *Ohio Felony Sentencing Law*, Section 2929.13 at 109 (2006 Ed.)). If a trial court sentences an offender to community control sanctions, it can impose a sanction authorized under R.C. 2929.16, 2929.17, or 2929.18. *Id.* (citing R.C. 2929.15). These sections govern residential sanctions, nonresidential sanctions, and financial sanctions, respectively. *Id.* We held that “[o]ne of the results of sentencing an offender to community control is supervision of the offender.” *Id.* at ¶ 10. Because the trial court did not sentence Eppinger to “either prison or a community control [sanction] under the supervision of the probation department,” this court held the sentence was contrary to law.

¶6 The sentence in this case, like the sentence in *Eppinger*, included a jail term and a fine. The trial court pronounced sentence against Nash as follows: “Well, this is a 2009 case, and it didn’t happen yesterday. You’re sentenced to three days in County

2011-Ohio-5160, the trial court has taken no action after we reversed the sentences imposed as contrary to law and remanded for further proceedings.

Although not directly relevant to this case, the state has also pointed out that the trial court has failed to comply with this court’s directives to obtain a presentence investigation report before sentencing an offender to community control sanctions. *E.g.*, *State v. Pickett*, 8th Dist. No. 91343, 2009-Ohio-2127; *State v. Disanza*, 8th Dist. No. 92375, 2009-Ohio-5364; *State v. Peck*, 8th Dist. No. 92374, 2009-Ohio-5845.

The trial court is bound to comply with this court’s mandate; it has no discretion to disregard our orders. *State ex rel. Sharif v. McDonnell*, 91 Ohio St.3d 46, 2001-Ohio-240, 741 N.E.2d 127.

Jail, with credit for three days served, and you have to pay a \$100 fine.” We now believe the *Eppinger* decision fundamentally misread R.C. 2929.15(A)(2)(a) and therefore improperly required the trial courts to impose probation department supervision in every case in which the defendant was sentenced to community control sanctions.

{¶7} Jail is a community residential sanction under R.C. 2929.16 and a fine is a financial sanction under R.C. 2929.18. The argument that probation department supervision is an essential element of community control sanctions ignores the purpose of placing a defendant under the supervision of the probation department. In particular, R.C. 2929.15(A)(2)(a) provides that in sentencing a defendant to community control sanctions, the sentencing court:

shall place the offender under the general control and supervision of a department of probation in the county that serves the court for the *purposes of reporting to the court a violation of any condition of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender’s probation officer.*

(Emphasis added.)

{¶8} The language “shall place the offender under the general control and supervision of the department of probation” must be read in conjunction with the purpose of supervising a defendant on community control: to report a “violation of any condition of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender’s probation officer.” *Id.* Thus, supervision is only necessary where there is a condition that must be overseen or a term

during which a defendant's conduct must be supervised. If there are no conditions, there is nothing to supervise. Further, when a court imposes a fine, it becomes a judgment against the defendant, enforceable by execution under R.C. 2929.18, and there is usually no need to monitor payment of the fine.

{¶9} Additionally, we find this court's reliance in *Eppinger* on a portion of a comment from the *Ohio Felony Sentencing Law* treatise should be considered in the context of its accompanying text. Specifically, *Eppinger* cited the comment, "The sentencing court has discretion to impose either a sentence of imprisonment or community control sanctions." *Eppinger* at ¶ 9, quoting *Ohio Felony Sentencing Law* at 109. The full text, which was not cited in *Eppinger*, provides as follows:

The sentencing court has discretion to impose either a sentence of imprisonment or community control sanctions (1) in accordance with the overriding purposes of sentencing — protection of the public and punishment of the offender — and (2) after determining the relative seriousness of the defendant's conduct and the likelihood that the defendant will commit additional offenses, (3) *provided that the sentence does not impose an unnecessary burden on governmental resources.*

(Emphasis added; footnotes omitted.) *Ohio Felony Sentencing Law* at *id.*

{¶10} We believe this comment suggests that a trial court has fairly broad discretion in fashioning sentences. We find support for this belief in the Revised Code. R.C. 2929.12(A), governing the factors to be considered in felony sentencing, provides that "[u]nless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony *has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code.*" (Emphasis added.)

Thus, under this section, unless the sentencing court must impose a mandatory sentence, it has discretion in sentencing a felony offender.

{¶11} R.C. 2929.13 provides that a court that imposes sentence on a felony offender may impose any sanction or combination of sanctions provided in R.C. 2929.14 to 2929.18, but “[t]he sentence shall not impose an unnecessary burden on state or local government resources.” With the passage of H.B. 86, this same requirement has now been incorporated into the purposes and principles of felony sentencing under R.C. 2929.11 (although the new provision is not applicable to this offender):

[a] court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.

{¶12} In light of the above, it may be that, in its discretion, the sentencing court finds that time served was sufficient “to protect the public from future crime by the offender and others and to punish the offender,” there is no need for the defendant to be supervised and monitored, and monitoring payment of a \$100 fine would “impose an unnecessary burden on the state or local government resources.” Removing that discretion from a sentencing court could result in the inefficient result of a defendant having to meet with a probation officer for no reason. Further, the costs associated with involving the probation department for the collection of a \$100 fine would likely exceed

the cost of the fine.²

{¶13} The Second and Ninth Appellate Districts have also considered this felony sentencing issue and come to the same conclusion, albeit on somewhat different reasoning. In *State v. Allen*, 9th Dist. Nos. 10CA009910 and 10CA009911, 2011-Ohio-3621, the Ninth Appellate District found that:

[i]n some cases the facts do not support a finding under Section 2929.13(B)(1) [for imposing a prison term], but the sentencing court also determines that a community control sanction is inconsistent with the purposes and principles of sentencing, thus taking the case outside the scope of both 2929.13(B)(2)(a) and (b). In such cases, the court is “not compelled * * * to impose a prison sentence or * * * to impose a community control sanction. Rather, it [is] within the trial court’s judgment to determine, after considering the factors set forth in R.C. 2929.12, what type of sentence would best serve the overriding purposes and principles of sentencing contained in R.C. 2929.11.”

Id. at ¶ 10, quoting *State v. Sutherland*, 2d Dist. No. 97CA25, 1997 WL 464788, (Aug. 15, 1997).

{¶14} In light of the above, Nash’s sentence was not contrary to law, the first prong under *Kalish*.³

{¶15} We also find that the trial court did not abuse its discretion in sentencing Nash. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v.*

²Discretion implies that the trial court has the power to place the offender under probation department supervision to oversee the payment of a fine, *or not*, as the circumstances may warrant. Nothing in this opinion precludes a court from imposing probation department supervision to oversee the payment of a fine.

³We recognize this court’s recent decision in *State v. Cox*, 8th Dist. No. 97924, 2012-Ohio-3158. This case is distinguishable from *Cox*, however, because it is decided under the law prior to the effective date of H.B. 86.

Blakemore, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Nash pleaded guilty to a fifth degree felony count of drug possession. The charge resulted from Nash having Oxycodone in his pocket, which was not prescribed for him. Prior to this case, and at the time of sentencing, Nash was working full time and paying child support. Nash's mother had recently passed away and he was "getting [his] life together." He was also supporting his two younger brothers. On this record, the trial court's sentence was not an abuse of discretion, the second prong under *Kalish*.

{¶16} Finally, the state's assignment of error implies that costs were assessed to Nash and the trial court failed to advise him of the consequences of not paying costs. But costs were waived here. The state also contends that the trial court "failed to notify Nash of the consequences of his failure to pay his fine as required by R.C. 2929.19(B)(5)." But as already stated, the fine becomes a judgment against Nash, enforceable by execution under R.C. 2929.18.

{¶17} In light of the above, the state's assignment of error is overruled.

III.

{¶18} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., JUDGE

PATRICIA ANN BLACKMON, A.J.,
FRANK D. CELEBREZZE, JR., J.,
EILEEN A. GALLAGHER, J.,
MARY EILEEN KILBANE, J.,
KATHLEEN ANN KEOUGH, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J., CONCUR;

COLLEEN CONWAY COONEY, J., DISSENTS
WITH SEPARATE OPINION WITH
SEAN C. GALLAGHER, J., and
MARY J. BOYLE, J., CONCURRING;

SEAN C. GALLAGHER, J., DISSENTS
WITH SEPARATE OPINION WITH
COLLEEN CONWAY COONEY, J., and
MARY J. BOYLE, J., CONCURRING

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶19} I concur in the dissenting opinion of Judge Sean Gallagher and write

separately only to add one point. I would honor stare decisis and follow this court's precedent. If a motion is filed, the remedy is to certify a conflict with the Ninth District's decision in *State v. Allen*, 9th Dist. Nos. 10CA009910 and 10CA009911, 2011-Ohio-3621, on which the majority relies.

{¶20} I find it ironic that the trial court has not complied with this court's prior mandates, and now the en banc majority changes the law in the Eighth District, ultimately rewarding this noncompliance.

SEAN C. GALLAGHER, J., DISSENTING:

{¶21} The mere fact that an appellate court would have to interpret whether supervision is required when a community control sanction is imposed is yet another blemish on the legacy of sentencing reform brought on by S.B. 2. While I understand the analytical gymnastics the majority was forced to hurdle to answer this question, and admire their effort, I respectfully dissent. I would follow our precedent in *Eppinger*, 8th Dist. No. 92441, 2009-Ohio-5233. Until the legislature addresses the overly confusing language in Ohio's sentencing statutes brought on by S.B. 2, I believe judicial interpretations of the statute only add to the problems.

{¶22} R.C. 2929.15 reads in part:

(2)(a) If a court sentences an offender to any community control sanction or combination of community control sanctions authorized pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, *the court shall place* the offender under the general control and supervision of a department of probation * * *. (Emphasis added.)

{¶23} In this case, part of the sentence was a \$100 fine, which even the majority acknowledges is a community control sanction under R.C. 2929.18.

{¶24} Thus, because a community control sanction was imposed, probation supervision was mandatory. If the legislature wanted to exempt fines as community control sanctions from supervision, it should have said so.

{¶25} In an apparent effort to allow judicial discretion where probation supervision would be deemed pointless or wasteful, the majority is forced to creatively read R.C. 2929.15(A)(2) to include the unwritten presumption that the mandatory provision is only necessary where there is a condition that must be overseen. By reaching deep into the bowels of the *Ohio Felony Sentencing Law* treatise, Section 109, the majority reads subsection 3 of that treatise to find supervision, under the circumstances in this case, to be an “unnecessary burden on governmental resources.” The majority even references the recent amendment to R.C. 2929.11 through H.B. 86 to not impose “an unnecessary burden on the state or local government resources,” even though they acknowledge this provision is not applicable to Nash. Frankly, this creative interpretation is on a par with some interpretations of the federal tax code.

{¶26} A big part of this problem seems to center on the fact that the legislature assumed that, when dealing with felony crimes, judges would impose *either* a prison term *or* a community control sanction or sanctions for felony crimes. The logical assumption is that because these are felony crimes, the nature of the community control sanctions would naturally warrant supervision. When, as here, judges look for alternatives to this approach, a “hole” or “gap” in the statute either exists or is created by the actions of the trial judge.

{¶27} Despite numerous passages in R.C. 2929.12, 2929.13, 2929.15, 2929.16, 2929.17, and 2929.18, containing unending preconditions with confusing phrases like “unless otherwise required,” “except as provided,” and the all too familiar term “if,” there are no clear provisions for a court to contemplate the type of sentence imposed in this

case. For this reason, I dissent.

{¶28} If this case stands for anything, it should be a call for the legislature to revisit the undefinable language of S.B. 2 and finally either fix it once and for all or assign it to the ash heap of history.
