

IN THE SUPREME COURT OF OHIO

12-1707

State of Ohio,

:
: Case No.

Plaintiff-Appellee,

:
: On Appeal from the Stark
: County Court of Appeals
: Fifth Appellate District

v.

Korvon Kelley,

:
: Court of Appeals
: Case No. 2011CA00271

Defendant-Appellant.

:

Memorandum in Support of Jurisdiction of Appellant Korvon Kelley

Office of the Ohio Public Defender

Renee M. Watson, 0072906
Assistant Prosecuting Attorney

By: Stephen P. Hardwick, 0062932
Assistant Public Defender

Stark County Prosecutor's Office
110 Central Plaza South - Suite 510
Canton, Ohio 44702
(330)451-7897
(330) 451-7965 - Fax

250 East Broad Street - Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 - Fax
stephen.hardwick@opd.ohio.gov

Counsel for Plaintiff-Appellee

Counsel for Defendant-Appellant

FILED
OCT 09 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page No.

This Court Should Hear this Case1

Statement of the Case and the Facts3

Argument4

Proposition of Law:

A period of community control begins when the judgment entry of sentence
is filed with the clerk.....4

CONCLUSION6

CERTIFICATION OF SERVICE7

APPENDIX:

Judgment Entry and Opinion, Stark County Court of Appeals Case No.
2011CA00271 (August 27, 2012) A-1

THIS COURT SHOULD HEAR THIS CASE

This case concerns a conflict over a critical and basic question of Ohio criminal law: when does a community control sentence begin – does it begin when the sentence is orally pronounced by the court, or when then judgment entry is journalized? The answer to this question determines not only when the sentence begins, but when the sanction ends.

The question is critical, because all parties to the criminal justice system need to know when a defendant is subject to his community control terms and when he is not. Probation and police officers need to know when they can search the defendant without a warrant; probation departments need to know when they can begin collecting supervision fees; defendants need to know when they must begin following the terms of community control; defense lawyers need to know how to advise their clients; prosecutors need to know what to tell victims. And both judges and lawyers need to know that it is critical that oral sentences be promptly journalized.

In this case, the Fifth Appellate District, relying on precedent from the First and Ninth Appellate Districts, held that Mr. Kelley was subject to community control sanctions immediately after sentence was orally imposed at the sentencing hearing. Opinion at ¶ 32 - 36, Apx. A-8 to A-9. (“Appellant maintains that he could not be found to have violated his community control based on incidents that occurred before his sentencing entry was filed. We disagree.”), citing *State v. Wetzel*, 9th Dist. No. 16407, 1994 WL 45791 (Feb. 9, 1994), and *State v. Henderson*, 62 Ohio App.3d 848, 853 (1st Dist., 1989).

But the Second District Court of Appeals has correctly come to the contrary view. That court has held that, because a court speaks through its journal, a defendant's probation requirements or community control sanctions do not begin until the sentence has been journalized. *State v. Hatfield*, 2^d Dist. No. 2006 CA 16, 2006-Ohio-7090, ¶ 9 ("Hatfield's community control began with the filing of the judgment entry"). The Second District's decision is consistent with this Court's holding in *State v. Carlisle*, 131 Ohio St. 3d 127, 2011-Ohio-6553, ¶ 3 ("A criminal sentence is final upon issuance of a final order").

When does a community control sentence begin? When does it end? The criminal justice system needs a consistent answer. This Court should accept this appeal, hold that a community control sanction begins when it is journalized, vacate Mr. Kelley's prison term and remand this case for reimposition of the original sentence.

STATEMENT OF THE CASE AND THE FACTS

On October 11, 2011, the Stark County Common Pleas Court orally sentenced Korvon Kelley to community control for burglary and domestic violence. At the sentencing hearing, the trial court told Mr. Kelley that, as part of his sentence, he was prohibited from contacting the victim. The entry was journalized on October 17, 2011. Between October 13, 2011 and October 21, 2011, Mr. Kelley or someone using his jail phone PIN number called or attempted to call the victim 18 times. Three of the calls were completed and the victim identified Mr. Kelly's voice, but those three calls were on October 13 and 15, 2011, before Mr. Kelley's sentence was journalized.

On November 2, 2011, the trial court held a hearing and, over objection, revoked Mr. Kelley's community control, and sentenced him to an aggregate of eight years in prison. Mr. Kelley appealed, arguing that trial court improperly revoked his community control because the court had not provided him with written notice of the community control terms. The Fifth District Court of Appeals held that the trial court's actions were proper because Mr. Kelley was on community control and that any error was harmless.

This timely appeal follows.

ARGUMENT

Proposition of Law:

A period of community control begins when the judgment entry of sentence is filed with the clerk.

“[T]he axiomatic rule is that a court speaks through its journal entries.” *State v. Miller*, 127 Ohio St. 3d 407, 2010-Ohio-5705, ¶ 12. And when that journal entry is filed, the sentence becomes final. *State v. Carlisle*, 131 Ohio St. 3d 127, 2011-Ohio-6553, ¶ 3 (“A criminal sentence is final upon issuance of a final order”). As a result, a criminal sentence is not final until it is journalized, but when it is journalized, it is final. So once the final entry is journalized, the trial court loses power to modify it. *Id.* at ¶ 1 (“a trial court is generally not empowered to modify a criminal sentence by reconsidering its own final judgment”).

The Fifth District’s decision that Mr. Kelley was on community control between the time of oral pronouncement and journalization conflicts with this basic principle. Opinion at ¶ 32 (“Appellant maintains that he could not be found to have violated his community control based on incidents that occurred before his sentencing entry was filed. We disagree.”). The Fifth District, based on decisions from the First and Ninth Appellate Districts, also incorrectly found that any error was harmless. The court held that Mr. Kelley’s argument was “self-defeating” and “harmless beyond a reasonable doubt” because, under the argument, the trial court retains authority to modify an unjournalized sentence. Opinion at ¶ 32 – 36, Apx. A-8 to A-9., quoting *State v. Wetzel*,

9th Dist. No. 16407, 1994 WL 45791 (Feb. 9, 1994), quoting *State v. Henderson*, 62 Ohio App.3d 848, 853 (1st Dist., 1989).

The First, Fifth and Ninth Districts' reasoning is correct—to an extent. Before journalization, the trial court remains free to vacate or modify a criminal sentence. As previously explained, this Court has recognized that the trial court's power to modify a sentence ends when the sentence is journalized, not when the sentence is executed. *State v. Carlisle*, 131 Ohio St. 3d 127, 2011-Ohio-6553, ¶ 1 (“a trial court is generally not empowered to modify a criminal sentence by reconsidering its own final judgment”). So it is true that in some circumstances, the rule of the Second District favors the State—when a defendant misbehaves before an oral sentence has been journalized, the trial court has a blank slate from which to impose harsher sanctions. Further, the trial court need not confine itself to acts that violate the criminal code or the terms of community control—the trial court can use *any* inappropriate behavior relevant to the sentencing factors to increase a sentence at any time before journalization. *See, e.g., State v. Overstreet*, 9th Dist. No. 21367, 2003-Ohio-4530, (sentence increased after oral pronouncement due to “a rude comment by defendant”).

But the error cannot be harmless where, as here, the trial court attempts to increase the sentence after the trial court has journalized the initial orally pronounced sentence. Under *Carlisle*, once that sentence was journalized, it could not be modified. So, contrary to the Fifth District's assertion, the trial court had no authority to sentence Mr. Kelley to prison.

It is true that the journalization rule can create a window in which trial courts lose the ability to punish defendants like Mr. Kelley for what would otherwise be community control violations. But the State can close that window quickly by ensuring that judgment entries are promptly journalized after oral pronouncement of sentence. Defendants also have an interest in the prompt filing of the entry because the sooner a community control term begins, the sooner it ends.

CONCLUSION

Once the trial court journalized Mr. Kelley's community control prison term, it lost authority to sentence him to prison. And before the court journalized the sentence, the community control terms were not enforceable against Mr. Kelley. This Court should reverse the decision of the court of appeals, vacate Mr. Kelley's prison term, and remand this case for enforcement of the original community control prison term.

Respectfully submitted,

Office of the Ohio Public Defender



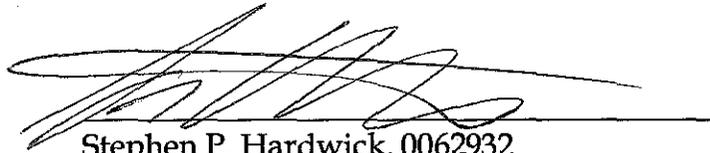
By: Stephen P. Hardwick, 0062932
Assistant Public Defender

250 East Broad Street - Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (Fax)
stephen.hardwick@opd.ohio.gov

Counsel for Korvon Kelley

CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant Korvon Kelley** was forwarded by regular U.S. Mail, postage prepaid to the office of Renee M. Watson, Assistant Stark County Prosecutor, 110 Central Plaza South - Suite 510, Canton, Ohio 44702 this 9th day of October, 2012.

A handwritten signature in black ink, appearing to read 'S. Hardwick', is written over a horizontal line.

Stephen P. Hardwick, 0062932
Assistant Public Defender

Counsel for Korvon Kelley

#378500

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No.
	:	
Plaintiff-Appellee,	:	On Appeal from the Stark
	:	County Court of Appeals
v.	:	Fifth Appellate District
	:	
Korvon Kelley,	:	Court of Appeals
	:	Case No. 2011CA00271
Defendant-Appellant.	:	

Appendix To

Memorandum in Support of Jurisdiction of Appellant Korvon Kelley

OK Copy

NANCY S. REINBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

12 AUG 27 PM 2:38

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Patricia A. Delaney, P.J.
Plaintiff-Appellee	:	W. Scott Gwin, J.
	:	Julie A. Edwards, J.
-vs-	:	Case No. 2011CA00271
	:	
KORVON KELLEY	:	<u>OPINION</u>
Defendant-Appellant	:	

CHARACTER OF PROCEEDING: Criminal Appeal from Stark County Court of Common Pleas Case No. 2011CR0667

JUDGMENT: Affirmed B

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

JOHN D. FERRERO
Prosecuting Attorney
Stark County, Ohio

APRIL R. BIBLE
200 W. Tuscarawas Street
Suite 200
Canton, Ohio 44702

BY: RENEE M. WATSON
Assistant Prosecuting Attorney
Appellate Section
110 Central Plaza, South - Suite 510
Canton, Ohio 44702-1413

ATRUE COPY TESTE
NANCY S. REINBOLD, CLERK
By Deputy
Date 8/27/12

Edwards, J.

{¶1} Defendant-appellant, Korvon Kelley, appeals from the November 9, 2011, Judgment Entry of the Stark County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On June 20, 2011, the Stark County Grand Jury indicted appellant on one count of burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree, and one count of domestic violence in violation of R.C. 2919.25(A), a felony of the third degree. The victim with respect to both counts was Ladonna Wilson. At his arraignment on June 24, 2011, appellant entered a plea of not guilty to the charges.

{¶3} Subsequently, on September 19, 2011, appellant withdrew his former not guilty plea and entered a plea of guilty to both charges. As memorialized in a Judgment Entry filed on October 17, 2011, appellant was placed on community control for a period of five (5) years under specified terms and conditions. One of the conditions forbade appellant from having any direct or indirect contact with the victim.

{¶4} On October 27, 2011, a Motion to Revoke Probation or Modify Former Order was filed by a Probation Officer. The motion alleged that appellant had violated the terms and conditions of his community control by failing to have no direct or indirect contact with the victim.

{¶5} An evidentiary hearing was held on November 2, 2011. At the hearing, Rachel Carosello, appellant's probation officer, testified that appellant had violated his community control by contacting his victim from the jail. At the hearing, a detailed report from the jail was admitted as an exhibit showing that appellant had attempted to make

18 telephone calls to the victim's phone number between October 13, 2011, and October 21, 2011. Three of the calls were completed. While one of the completed telephone calls was on October 13, 2011, the other two were on October 15, 2011. According to Carosello, appellant attempted to call the victim four times on October 17, 2011, and twice on October 21, 2011. A CD of the telephone calls was played to the trial court.

{¶6} Carosello testified that she had an opportunity to listen to the first call, which lasted approximately 15 minutes, and that during the call, the victim identified appellant as Korvon Kelley and identified herself as the victim. During the telephone call, the victim told appellant "at least three times don't call me and you know you are not supposed to be calling me..." Transcript at 17. The following is an excerpt from Casorello's testimony:

{¶7} "Q. After listening to the second call from October 15, 2011, were you able to determine the parties on that call as well?

{¶8} "A. Yes.

{¶9} "Q. And how were you able to do so?

{¶10} "A. She - - they both identified the domestic violence and the burglary. He states that he is sorry for what he did.

{¶11} "Q. Okay. And did she indicate she still did not want to have contact, that she was going to deal with that?

{¶12} "A. Correct.

{¶13} "Q. And what did she indicate she was going to do, if you recall?

{¶14} "A. That she was going to call and tell.

{¶15} "Q. Okay. All right. And the person that has been identified and has been given to you on probation is a Korvon Kelley, correct?

{¶16} "A. Correct." Transcript at 18.

{¶17} On cross-examination, Casorello testified that she had never met with appellant, that no one else from the Probation Department had met with appellant, and that appellant was in jail waiting for a bed to go to Stark Regional Community Correction Center [SRCCC]. She further testified that no one from probation went over the rules of probation with appellant because the Probation Department does not go over the rules until a defendant arrives at SRCCC. Casorello also testified that of the three telephone calls that were completed before October 17, 2011, none were identified as having come from appellant's PIN.¹ On redirect, she testified that people sometimes used other people's PIN numbers and that most of the calls were made from the same area in the jail.

{¶18} At the hearing, appellant's counsel argued that appellant was not on probation at the time of the October 13, 2011, and October 15, 2011, completed telephone calls because appellant had never signed the rules of probation and had never met with a probation officer to go over the rules. Appellant's counsel further noted that the Journal Entry was not filed until October 17, 2011, and that the court should not consider any evidence prior to such date. Appellant's counsel also argued that there were no completed telephone calls on October 17, 2011, and that the telephone call on October 21, 2011, was not a completed call.

¹ According to Casorello, if an inmate wants to make a call from the jail, he or she punches in his or her PIN, which is generally his or her social security number.

{¶19} Pursuant to a Judgment Entry filed on November 9, 2011, the trial court revoked appellant's community control and sentenced appellant to an aggregate sentence of eight (8) years in prison.

{¶20} Appellant now raises the following assignment of error on appeal:

{¶21} "DEFENDANT WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION BY NOT BEING PROPERLY NOTIFIED OF THE CONDITIONS OF HIS PROBATION."

I

{¶22} Appellant, in his sole assignment of error, argues that his due process rights were violated when his community control was revoked before he had been properly notified of the terms and conditions of the same pursuant to R.C. 2301.30(A).

{¶23} R.C. 2301.30 states, in relevant part, as follows: "The court of common pleas of a county in which a county department of probation is established under division (A) of section 2301.27 of the Revised Code *shall* require the department, in the rules through which the supervision of the department is exercised or otherwise, to do all of the following:

{¶24} "(A) Furnish to each person under a community control sanction or post-release control sanction or on parole under its supervision or in its custody, a written statement of the conditions of the community control sanction, post-release control sanction, or parole *and* instruct the person regarding the conditions; ..." (Emphasis added).

{¶25} There is no dispute that appellant was not provided with a written statement of the conditions of his community control or instructed regarding the same.

{¶26} In *State v. Mynhier*, 146 Ohio App.3d 217, 765 N.E.2d 917, (1st Dist. 2001) the appellant pleaded guilty to three counts of sexual battery and, as a condition of his community control, was ordered to have no contact with his stepdaughter. After he was found guilty, following a community control revocation hearing, of violating the condition prohibiting him from having contact with his stepdaughter and after his community control was revoked, the appellant appealed.

{¶27} On appeal, the appellant, in *Mynhier*, argued, in part, that the trial court denied him due process of law under both the Ohio and United States Constitutions by revoking his community control without requiring the probation department to comply with R.C. 2301.30(A). The appellant had never received a copy of the written supplemental rules of community control which contained the condition that he was to have no contact with his stepdaughter.

{¶28} The First District Court of Appeals, in ruling on the appellant's argument, held, in relevant part, as follows: "While it can technically be argued that the probation department violated Ohio law by not providing Mynhier with a copy of the supplemental rules prior to charging him with a violation, this did not give rise to a constitutional violation. The touchstone of due process is fundamental fairness. In this case, fairness required notice to Mynhier of the conditions of his community control prior to charging him with a violation of one of those conditions.

{¶29} "A review of the record demonstrates that Mynhier, prior to September 7, 2000, had received notice of the condition that he was not to have any contact with his

stepdaughter. The trial court informed him of this condition at his sentencing hearing, and it was also set forth in the judgment entry. On August 10, 2000, his probation officer, Edward Tullius, reviewed and instructed Mynhier on the conditions of his community control, including the condition that he not have contact with his stepdaughter. That same day, Mynhier signed a written statement of the supplemental rules, acknowledging that he had discussed the conditions with his probation officer. Additionally, a copy of the general rules of community control, which included the requirement that Mynhier abide by the supplemental conditions, was left with Mynhier. Because the state complied with due process by providing notice to Mynhier of the pertinent condition, there was no constitutional violation. While there may have been a statutory violation, we hold that Mynhier suffered no prejudice from this error and, thus, that it was harmless. Mynhier never argued at his revocation hearing that he had not received notice of the condition that he not have contact with his stepdaughter. Further, Tullius testified at the revocation hearing that when he spoke with Mynhier in early September regarding the alleged violation, Mynhier admitted that he knew that he was not to have had contact with his stepdaughter. Accordingly, Mynhier's first assignment of error is overruled." *Id.* at 221 (Citations omitted).

{¶30} In *State v. Seefong*, 5th Dist. No. 2005CA00293, 2006-Ohio-2723, the appellant's probation officer did not go over the terms and conditions of his community control with him as required by R.C. 2301.30(A). The appellant's counsel argued that the appellant could not therefore, be found in violation of his community control. This Court, however, cited to *Mynhier*, in holding that the trial court did not commit reversible error in finding the appellant guilty of violating the terms and conditions of his

community control. This Court noted that there was no dispute that the appellant had been advised on the record at the sentencing hearing on the terms and conditions. This Court further noted that the appellant did not argue that he did not have actual notice of knowledge of the condition of his community control prohibiting the possession of pornography and that the condition was set forth in the trial court's Judgment Entry. On such basis, this Court found that any violation of R.C. 2301.30(A) was harmless and that the trial court did not err in holding that the appellant had violated his community control and in revoking the same.

{¶31} In the case sub judice, the trial court advised appellant at the sentencing hearing on October 11, 2011, that he was "not to have any contact directly or indirectly with the victim." Transcript of October 11, 2011 hearing at 7. Appellant had, therefore, actual notice of the no contact order and does not dispute that he was aware of the same. We find any violation of R.C. 2301.30(A) was, therefore, harmless.

{¶32} Appellant maintains that he could not be found to have violated his community control based on incidents that occurred before his sentencing entry was filed. We disagree. In *State v. Wetzel*, 9th Dist. 16407, 1994 WL 45791 (Feb. 9, 1994), the appellant was convicted of corruption of a minor and sentenced to two years in prison. His sentence was suspended and he was placed on probation on June 23, 1993. However, the journal entry placing him on probation was not filed until July 8, 1993. The appellant had violated his probation on June 26, 1993.

{¶33} On July 16, 1993, the appellant's probation was revoked due to the June 26, 1993, incident. The appellant's counsel, in *Wetzel*, had argued to the trial court that

the appellant was not on probation at the time of such incident because the entry ordering probation was not filed until after the date of the incident.

{¶34} On appeal, the appellant argued that the trial court erred in revoking his probation “on grounds that he had violated probation by his conduct which predate, by more than ten days, the filing of the judgment of conviction and sentencing”. In affirming the judgment of the trial court, the court, in *Wetzel*, stated, in relevant part, as follows: “In *State v. Henderson* (1989), 62 Ohio App.3d 848, 853, the court found that “[e]ven if * * * defendant was not yet legally on probation at the time of his arrest [for a probation violation], the trial judge had the option at any time before execution [of the sentence] to modify the sentence by withdrawing the oral pronouncement of probation and committing him to the penitentiary.’

{¶35} “In this case, Appellant's argument is self-defeating. The oral pronouncement of probation was journalized after the alleged probation violation occurred. Following Appellant's argument, he could not have begun to serve a sentence which was not yet valid. As the sentence had not been executed, the trial court could have amended the sentence, by withdrawing the granting of probation and sentencing him to a term of imprisonment.

{¶36} “The net result of the trial court's finding that Appellant was in violation of probation and reinstating the term of imprisonment is the same. While it may have been error for the court to find a violation of the terms of probation when the order imposing probation had not yet been journalized, we find that the error was harmless beyond a reasonable doubt. Crim.R. 52(A); *State v. Williams* (1988), 38 Ohio St.3d 346, 349.” *Id.* at 2.

{¶37} Based on the foregoing, appellant's sole assignment of error is, overruled.

{¶38} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, J.

Delaney, P.J. and

Gwin, J. concur

Julie A. Edwards

Lutricia A. Delaney

W. Scott Gwin

JUDGES

JAE/d0618

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

STATE OF OHIO

Plaintiff-Appellee

-vs-

KORVON KELLEY

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2011CA00271

12 AUG 27 PM 2:38

NANCY S. BERNOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

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

Julie A. Edwards
Patricia A. Delaney
W. Scott Hill

JUDGES