

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. 15-0462

Appellant

ON APPEAL FROM THE
SUMMIT COUNTY
COURT OF APPEALS,
NINTH APPELLATE DISTRICT

v.

MICHAEL R. WIREBAUGH

COURT OF APPEALS
CASE NO. 27442

Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT STATE OF OHIO

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EXPLANATION OF WHY LEAVE TO APPEAL SHOULD BE GRANTED

This Court certified a conflict in *State v. South*, Supreme Court Case No. 2014-0563. The decision in this case was based on *South*. Therefore, the State asks that this court grant leave to appeal, stay execution of the appellate court's decision, and hold the cause for the decision in Supreme Court, *State v. South*.

STATEMENT OF THE CASE AND FACTS

The Ninth District Court of Appeals held that the four year prison term imposed for violation of R.C. 4511.19(A)(1)(a) was contrary to law and, therefore, reversed and remanded the matter for the trial court to impose no longer than a three year prison term. The court relied on its decision in *South*, which this court accepted on a certified conflict.

PROPOSITION OF LAW

WHEN A DEFENDANT IS CONVICTED OF A THIRD-DEGREE FELONY OVI IN VIOLATION OF R.C. 4511.19(A)(1)(A), IS THE TRIAL COURT AUTHORIZED TO SENTENCE THE OFFENDER TO A MAXIMUM OF FIVE YEARS OF INCARCERATION PURSUANT TO R.C. 4511.19(G)(1), OR IS IT REQUIRED TO SENTENCE THE OFFENDER TO A MAXIMUM OF THREE YEARS OF INCARCERATION PURSUANT TO R.C. 2929.14(A)(3)(B)?

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Since this issue is pending before the Supreme Court, the State asks that this court grant leave to appeal and stay briefing pending a decision in *South*.

CONCLUSION

For all these reasons, the State urges this Court to grant leave to appeal, stay execution of the appellate court's decision, and hold the cause for the decision in Supreme Court, *State v. South*.

Respectfully submitted,

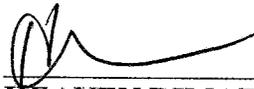
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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support was sent by regular U.S. Mail to Attorneys David M. Leneghan and K. Scott Carter, The Law Office of David M. Leneghan, 200 Treeworth Blvd., Suite 200, Broadview Heights, Ohio 44147 and to Timothy Young, State Public Defender, The Midland Building, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215 on this 16th day of March, 2015.



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Assistant Prosecuting Attorney
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APPENDIX

STATE OF OHIO)
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 27442

Appellee

v.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 13 12 3373

MICHAEL R. WIREBAUGH

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 4, 2015

WHITMORE, Judge.

{¶1} Defendant-Appellant, Michael Wirebaugh, appeals from his sentence in the Summit County Court of Common Pleas. This Court reverses.

I

{¶2} As a result of an incident that occurred on or about October 30, 2013, a grand jury indicted Wirebaugh on each of the following counts: (1) operating a vehicle while under the influence ("OVI"), in violation of R.C. 4511.19(A)(1)(a); (2) OVI, in violation of R.C. 4511.19(A)(2); (3) having an open container; and (4) driving under suspension. Wirebaugh later pleaded guilty to three of the charges in exchange for the State's dismissal of the second OVI charge. Relevant to this appeal, the court sentenced him to four years in prison on his remaining OVI count under R.C. 4511.19(A)(1)(a).

{¶3} Wirebaugh now appeals and raises one assignment of error for our review.

II

Assignment of Error

WIREBAUGH'S FOUR YEAR SENTENCE EXCEEDS THE MAXIMUM SENTENCE ALLOWED FOR A THIRD DEGREE FELONY UNDER R.C. 2929.14.

{¶4} In his sole assignment of error, Wirebaugh argues that his four-year prison sentence is contrary to law. He argues that the maximum prison term a trial court may impose on a third-degree felony OVI offense is three years. We agree.

{¶5} “When reviewing a trial court’s sentence, we apply a two-step approach.” *State v. Stoddard*, 9th Dist. Summit No. 26663, 2013-Ohio-4896, ¶ 14. “First, [we] must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law.” *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26. If the sentence is not contrary to law, we review the trial court’s decision in imposing a term of imprisonment for an abuse of discretion. *Id.* Because Wirebaugh’s appeal only concerns the first step of the *Kalish* analysis, we only review his sentence to determine whether it is clearly and convincingly contrary to law. *See id.* In doing so, we review the matter de novo. *See State v. Clayton*, 9th Dist. Summit No. 26910, 2014-Ohio-2165, ¶ 43.

{¶6} For committing a violation of R.C. 4511.19(A)(1)(a), Wirebaugh was convicted of a third-degree felony OVI. In *State v. South*, 9th Dist. Summit No. 26967, 2014-Ohio-374, this Court recognized that third-degree felony offenses under that subsection are “subject to a maximum of 36 months in prison.” *South* at ¶ 18. The OVI statute requires a trial court to impose a 60-day sentence upon a third-degree felony OVI offender, but also permits the court to impose an additional prison term. *See* R.C. 4511.19(G)(1)(e)(i). R.C. 2929.14 explicitly defines

the length of that additional prison term. See R.C. 2929.14(B)(4). Specifically, “[t]he total of the additional prison term imposed * * * plus the sixty * * * days imposed as the mandatory prison term * * * shall equal one of the authorized prison terms specified in [R.C. 2929.14](A)(3) * * *.” *Id.* Because the longest prison term a trial court may impose upon a third-degree felony OVI offender under R.C. 2929.14(A)(3)(b) is 36 months, offenders such as Wirebaugh are only “subject to a maximum of 36 months in prison.” *South* at ¶ 18.

{¶7} This Court has certified its decision in *South* as being in conflict with the Twelfth District’s decision in *State v. Sturgill*, 12th Dist. Clermont Nos. CA2013-01-002 & CA2013-01-003, 2013-Ohio-4648. The Supreme Court has accepted the issue for consideration, and we decline the State’s invitation to revisit our holding in *South* at this juncture. We are not persuaded by the State’s argument that a trial court may impose a five-year sentence on third-degree felony OVI offenders pursuant to R.C. 4511.19(G)(1)(e). That statutory subsection only provides that the “cumulative total” of (1) the 60-day mandatory sentence and (2) the optional, additional prison term a court may impose upon a third-degree felony OVI offender “shall not exceed five years.” R.C. 4511.19(G)(1)(e)(i). The subsection does not authorize a five-year sentence; it merely states that the sentence imposed may not *exceed* five years. Because the three-year prison term authorized by R.C. 2929.14 does not exceed five years, the two statutes can be read together.

{¶8} The four-year sentence that the trial court imposed upon Wirebaugh is contrary to law. The maximum prison term Wirebaugh may receive is three years. See *South* at ¶ 18. Accordingly, we vacate Wirebaugh’s sentence and remand this matter for the trial court to resentence him. Wirebaugh’s sole assignment of error is sustained.

III

{¶9} Wirebaugh's sole assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed, and the cause is remanded for further proceedings consistent with the foregoing opinion.

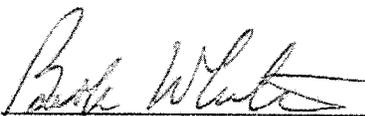
Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.


BETH WHITMORE
FOR THE COURT

HENSAL, P. J.
MOORE, J.
CONCUR

APPEARANCES:

DAVID L. LENEGHAN and K. SCOTT CARTER, Attorneys at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.