[Cite as *State v. Shugart*, 2009-Ohio-2635.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 197
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
JEFFREY SHUGART,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Youngstown Municipal Court, Case No. 05TRD3500.
JUDGMENT:	Probation Violation Affirmed; Sentence Reversed and Remanded.

APPEARANCES:

For Plaintiff-Appellee:	Attorney Joseph Macejko Prosecuting Attorney 26 South Phelps Street, 4th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Attorney Mark Verkhlin 839 Southwestern Run Youngstown, Ohio 44514

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 5, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Jeffrey Shugart appeals from the Youngstown Municipal Court's decision to revoke his probation for driving under suspension and to impose the maximum sentence of one hundred eighty days in jail. Appellant first argues that the state failed to produce sufficient evidence on the terms of his probation. However, the pertinent terms of his probation were sufficiently established.

¶{2} Next, he contends that the court was not authorized to impose incarceration for a probation violation where the court had never informed him at sentencing that a violation could result in incarceration. We agree that the trial court was not authorized to impose jail time for the probation violation where the court had previously failed to provide the statutory notifications at the original sentence regarding the consequences of violation of the terms of probation. His remaining argument, that the court failed to consider the purposes of misdemeanor sentencing before sentencing him on his probation violation, is thus moot.

¶{3} In accordance, the finding of a probation violation is affirmed, but appellant's sentence is reversed and the case is remanded for further proceedings.

STATEMENT OF THE CASE

¶{4} On November 2, 2005, a police officer observed appellant squealing the tires of his truck, causing the truck to fishtail, and then speeding down Wilson Avenue in Youngstown. The officer attempted to stop the vehicle in a parking lot. Before the officer could exit his vehicle, appellant sped off. The officer chased appellant onto Interstate 680 where he observed the truck recklessly weaving between cars. Appellant exited at South Avenue where he crashed head-on into a utility pole. The officer apprehended appellant as he ran from the crash site on foot. (Sent. Tr. 3).

¶{5} Appellant was charged with reckless operation, driving under suspension and failure to comply with the signal of a police officer by fleeing or eluding. On July 12, 2006, appellant entered a negotiated plea. The state dismissed the reckless operation charge, and appellant pled no contest to driving under suspension and failure to comply, both first degree misdemeanors.

¶{6} A sentencing hearing was held on September 7, 2006. The court noted that appellant had six prior convictions of driving under suspension and/or driving without a license. (Sent. Tr. 2-3, 5). The court found that he had become a menace to the public because he had now graduated to more serious offenses in order to avoid getting caught for driving under suspension. (Sent. Tr. 6).

¶{7} The court sentenced appellant to one hundred eighty days incarceration and imposed a $200 fine on the failure to comply charge. On the driving under suspension charge, the court sentenced appellant to zero days of incarceration, imposed one year of basic probation and ordered him to pay a $200 fine. He was to report to jail on September 18, 2006, and financial sanctions were to be paid by December 31, 2006.

¶{8} In October of 2006, a notice of a probation violation was filed, which stated that appellant failed to report for probation and failed to pay fines and costs. Apparently, he discovered this in January of 2008 and called the court. The probable cause hearing was held in August of 2008, where appellant appeared with counsel and stipulated to probable cause for the probation violation.

¶{9} The final probation violation hearing was held on September 9, 2008. The court stated that the basis for the violation was failure to report and failure to pay the fines. (Prob. Tr. 6). His probation officer testified that appellant did a probation intake on September 7, 2006, the day of his sentencing. (Prob. Tr. 8). She stated that the copy of the Rules and Regulations that he would have received at intake stated as a term of probation that he had an appointment with the probation officer on October 5, 2006. She explained that because appellant did not appear for the appointment or call and because he was not incarcerated on that date, she issued a probation violation on October 19, 2006. (Prob. Tr. 8-9, 12).

¶{10} Appellant and the probation officer informed the court that when appellant reported to jail as ordered on the failure to comply charge, he was furloughed. (Prob. Tr. 7, 10, 12). Appellant stated that he served twelve days on furlough in the work program. (Prob. Tr. 10). Appellant explained that a deputy at the jail advised him that his obligation to report for probation did not begin until the jail sentence was complete. (Prob. Tr. 10-11, 13). Appellant served the remainder of his

sentence from June 29, 2007 until December 16, 2007. He disclosed that after he was released, he called the court and was informed that they believed that he was in violation of the terms of his sentence. (Prob. Tr. 11). As to the failure to pay the fines, appellant testified that he was not able to work and that he was applying for disability due to ADHD and memory problems. (Prob. Tr. 14).

¶{11} The court concluded that appellant failed to report for probation and failed to pay his fines. (Prob. Tr. 13-14). The court thus found a probation violation. The court then imposed one hundred eighty days in jail as the sentence on the driving under suspension charge. (Prob. Tr. 15). The court journalized this order in a September 9, 2008 judgment entry from which appellant filed timely notice of appeal. Appellant filed his brief on December 12, 2008, and the city prosecutor's office provided notice that it would not be filing a brief.

ASSIGNMENT OF ERROR NUMBER ONE

¶{12} Appellant's first assignment of error contends:

¶{13} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR ON SEPTEMBER 9, 2008 WHEN IT FOUND DEFENDANT-APPELLANT JEFFREY SHUGART TO BE IN VIOLATION OF THE TERMS OF HIS PROBATION BUT FAILED TO PROVIDE ANY EVIDENCE THAT APPELLANT VIOLATED THE TERMS OF HIS PROBATION."

¶{14} Appellant's only argument here is that there was no evidence that reporting and paying fines were actually terms of his probation. However, the probation officer specifically testified that appellant's October 5, 2006 appointment with her was contained as a term of probation in the Rules and Regulations provided to him at intake on September 7, 2006 and that he did not appear for that appointment. (Prob. Tr. 8-9). Thus, she explicitly provided evidence that this was a term of probation and that it was violated.

¶{15} As for the failure to pay as a term of probation, the probation officer testified that the basis for the probation violation was both the failure to report and the failure to pay fines and costs. (Prob. Tr. 7-8). A rational inference can be drawn from her testimony that both reporting and paying were terms of probation. That is, where the probation officer claimed that appellant violated probation as a result of his failure

to pay fines, she implicitly testified that this was a term of probation. If it was not, then appellant should have defended with such argument below. He did not do so. In fact, appellant does not argue now that the failure to pay was not a term of probation; he just argues that there was insufficient evidence on the matter.

¶{16} In any event, the court can take judicial notice of the contents of the court's own Rules and Regulations provided to defendants at intake. See *State v. Belcher*, 4th Dist. No. 06CA32, 2007-Ohio-4256, ¶17 (where the defendant argued that the terms of probation were never placed in the record); Evid.R. 201(B)(2) (judicial notice can be taken of information not subject to reasonable dispute as capable of accurate and ready determination by resort to source whose accuracy cannot be reasonably questioned). See, also, *State v. Esparazo* (Feb. 1, 1990), 3d Dist. No. 4-88-6 (noting that court took judicial notice of standard terms and conditions of probation). Additionally, the Rules of Evidence do not apply to probation revocation proceedings. Evid.R. 101(C)(3). For all of these reasons, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

¶{17} Appellant's second assignment of error provides:

¶{18} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR ON SEPTEMBER 9, 2008 WHEN IT SENTENCED DEFENDANT-APPELLANT, JEFFRY SHUGART TO ONE-HUNDRED AND EIGHTY (180) DAYS FOR VIOLATING THE TERMS OF PROBATION HE WAS SENTENCED TO WHEN IT FAILED TO INFORM HIM AT HIS SENTENCING OF THE CONSEQUENCES OF VIOLATING HIS PROBATION PURSUANT TO R.C. 2929.25(A)(3)(c)."

¶{19} In sentencing a misdemeanor defendant to community control, the court has two options: (1) directly impose community control or (2) impose a jail term, suspend all or a portion of the jail term and place the offender under community control. R.C. 2929.25(A)(1)(a) and (b). Here, the court chose the first option regarding the driving under suspension charge as no jail time was imposed.

¶{20} As to this first option, the statute provides:

¶{21} "*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:

¶{22} "(a) Impose a longer time under the same community control sanction * * *

¶{23} "(b) Impose a more restrictive community control sanction * * *

¶{24} "(c) *Impose a definite jail term from the range of jail terms authorized for the offense* under section 2929.24 of the Revised Code." R.C. 2929.25(A)(3) (emphasis added).

¶{25} Where the court fails to provide such statutory notice at sentencing, the court is not authorized to impose the sanction of probation revocation as there was no prior notice that this option was possible. See, e.g., *State v. Potts*, 2d Dist. No. 21824, 2007-Ohio-6695, ¶14-15; *State v. Haymon*, 5th Dist. No. 2005CA163, 2006-Ohio-3296, ¶13-19; *City of Chillicothe v. Smittle*, 4th Dist. No. 05CA2836, 2005-Ohio-4806, ¶3-4; *State v. Maxwell*, 4th Dist. No. 04CA2811, 2005-Ohio-3575, ¶12.

¶{26} This is consistent with the Supreme Court's position in felony cases that a trial court is not authorized to impose a prison term for a probation violation if the sentencing court failed to provide notice that a violation could result in imposition of prison time. See *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, ¶8, applying R.C. 2929.19(B)(5).

¶{27} Here, the closest the sentencing court came to providing notice at the sentencing hearing was:

¶{28} "ON THE CHARGE OF FAILING TO COMPLY, YOU HAVE 180 DAYS IN JAIL. THE ONLY REASON I'M NOT SENTENCING YOU TO JAIL ON YOUR DRIVING UNDER SUSPENSION IS WHEN YOU DRIVE, I'M GOING TO HAVE YOU BACK AND KEEP GIVING YOU AS MUCH JAIL TIME AS I CAN." (Sent. Tr. 8).

¶{29} Thereafter, the only direct reference to probation was the court's bare conclusion: "* * * BASIC PROBATION FOR A YEAR." (Sent. Tr. 10).

¶{30} Even if the initial statement could be interpreted as saying that appellant could get a maximum sentence on the driving under suspension if he is caught driving again, it does not equate with a notification that "if *any of the conditions of the*

community control sanctions are violated the court may * * * [i]mpose a definite jail term from the range of jail terms authorized for the offense." R.C. 2929.25(A)(3)(c) (emphasis added). Since driving was not the probation revocation basis here, this cannot be considered sufficient notice.

¶{31} We note that the form sentencing entry states at the bottom: "The Court advised the defendant that his/her failure to comply with any of the above sanctions could result in more restrictive sanctions being imposed." Even if the sentencing entry could make up for a deficiency at sentencing, this does not provide notice that the court may impose a jail term from the range of terms authorized for the offense.

¶{32} In any event, it has been stated that the notice statute's use of the phrase "at sentencing" requires the court to give the notice verbally at the sentencing hearing. *State v. Fisher*, 12th Dist. No. CA2006-01-008, 2006-Ohio-6079, ¶16 (notice in judgment entry does not cure failure); *Maxwell*, 4th Dist. No. 04CA2811 at ¶5, 9 (notice must occur at sentencing hearing rather than in judgment entry). See, also, *State v. Brown*, 4th Dist. No. 05CA2855, 2006-Ohio-1716, ¶1; *Potts*, 2d Dist. No. 21824 at ¶14-15; *Haymon*, 5th Dist. No. 2005CA163 at ¶13-19; *Smittle*, 4th Dist. No. 05CA2836 at ¶3-4 (all evaluating only statements from original sentencing hearing).

¶{33} We conclude that due to the violation of R.C. 2929.25(A)(3)(c) at the original sentencing hearing, the imposition of a jail sentence upon appellant for his probation violation was not authorized.

¶{34} If this were the only issue, we could remand for resentencing on the probation violation with instructions that no jail time could be imposed. See *Maxwell*, 4th Dist. No. 04CA2811 at ¶13-15. This is the Ohio Supreme Court's remedy where the sentencing court fails to notify a felon at the sentencing hearing of the specific jail term for which he will be sentenced if he violates community control. See *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, ¶33, fn.1 (remand with instructions that at probation revocation resentencing, no prison time can be imposed).

¶{35} However, as was the problem in the *Maxwell* case, the trial court's notice at the sentencing hearing also failed to satisfy subsections (A)(3)(a) regarding longer community control sanctions and (A)(3)(b) regarding more restrictive community

control sanctions. Since neither of these alternatives were imposed upon appellant, the notification error is harmless to appellant at this point.

¶{36} Yet, the problem precludes the trial court from imposing these options on remand. See *Brown*, 4th Dist. No. 05CA2855 at fn.1. See, also, *Smittle*, 4th Dist. No. 05CA2836 at ¶4-6 (if court only advised of jail time at original sentencing, court cannot sentence probation violator to jail plus extended or more restrictive community control sanctions). Thus, it is as if there is no sanction the court can impose for the probation violation on remand at this time. See *Maxwell*, 4th Dist. No. 04CA2811 at ¶15.

¶{37} If probation still exists, the trial court can rectify the notice problems *for future violations* at the remanded probation violation resentencing hearing. See *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, ¶16-19 (allowing probation resentencing to be used to rectify past notice problems for future violations); *Maxwell*, 4th Dist. No. 04CA2811 at ¶16-17. In this situation, the *Maxwell* Court remanded with instructions to advise the defendant "what portion of his original community control sanction, if any, remains in effect" before providing the notice required by R.C. 2929.25(A)(3) dealing with any future violations. Id. at ¶17. This is the proper remedy for this case as well.

¶{38} As such, on remand the court shall advise appellant what portion of his original community control sanction, if any, remains in effect before providing the notice of the effect of future violations as required by R.C. 2929.25(A)(3).

ASSIGNMENT OF ERROR NUMBER THREE

¶{39} Appellant's third assignment of error contends:

¶{40} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT SENTENCED DEFENDANT-APPELLANT, JEFFREY SHUGART TO SERVE A SENTENCE OF ONE-HUNDRED AND EIGHTY (180) DAYS FOR VIOLATING THE TERMS OF HIS COMMUNITY CONTROL WITHOUT CONSIDERING THE PURPOSES OF MISDEMEANOR SENTENCING PURSUANT TO R.C. 2929.22."

¶{41} Because a jail term was not permissible due to the lack of notification at the original sentencing, this assignment of error is moot.

¶{42} For the foregoing reasons, appellant's probation violation is affirmed, but his sentence is reversed, and the case is remanded for further proceedings consistent with this Court's opinion.

Donofrio, J., concurs.
Waite, J., concurs.