

[Cite as *State v. Terry*, 2011-Ohio-6666.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 11AP-127
v.	:	(C.P.C. No. 07CR-11-8555)
	:	
Leon Terry,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 22, 2011

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellant.

W. Joseph Edwards, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, State of Ohio, appeals from a judgment and sentence entered by the Franklin County Court of Common Pleas following defendant-appellee, Leon Terry's, violation of the terms of his judicial release. For the following reasons, we reverse the trial court's judgment and remand the matter for resentencing.

Facts and Procedural History

{¶2} On July 21, 2008, Terry pled guilty to burglary in violation of R.C. 2911.12 (Count 1 of the indictment), a felony of the fourth degree, and to felonious assault in

violation of R.C. 2903.11 (Count 2 of the indictment), a felony of the second degree. The trial court found Terry guilty of the charges to which he pled and, on September 22, 2008, it imposed a sentence of 11 months imprisonment for the burglary conviction (Count 1 of the indictment) and 4 years for the felonious assault conviction (Count 2 of the indictment), to be served consecutive to each other.¹

{¶3} On May 4, 2009, the trial court granted Terry's motion for judicial release pursuant to R.C. 2929.20 and imposed a period of 5 years community control. The trial court advised Terry that it would reimpose a sentence of 4 years and 11 months incarceration (his original sentence) if he violated the terms of community control.

{¶4} Subsequently, Terry violated the terms of his judicial release. Pursuant to a request for revocation of community control, the trial court held a hearing on January 24, 2011 to address the violations. Terry stipulated to probable cause and to the community control violations. The trial court revoked community control and imposed a prison sentence of 18 months on Count 1 of the indictment and 3 years on Count 2 of the indictment to be served concurrently with each other. Thereafter, the State filed a notice of appeal.

{¶5} On March 10, 2011, the trial judge wrote a letter to the file stating the following:

Please be advised that a sentencing hearing on State of Ohio vs. Leon Terry, Common Pleas Court No. 07CR-855 was scheduled for March 9, 2011. Upon commencement of said hearing, the prosecutor announced that a notice of appeal

¹ Terry was indicted for one count of aggravated burglary, a felony of the first degree, one count of felonious assault, a felony of the second degree, and one count of domestic violence, a felony of the third degree.

had been filed in the case thereby removing jurisdiction [from] me to continue with the sentencing.

On the record, I informed the State that my intention was to correct the erroneous sentence that was given at the revocation/resentencing hearing on January 24, 2011 in which the court imposed eighteen (18) months incarceration as to count one to be served concurrently with three (3) years incarceration as to count two. The court intended to sentence defendant to its original sentence of eleven (11) months as to count one; three (3) years as to count two to be served concurrently with each other. Further, the defendant had seven hundred eighty two (782) days of jail time credit as of January 24, 2011. Since the matter is under appeal, I can no longer make these changes for the record until the Court of Appeals rules. If you should have any questions, please feel free to contact me at 614-525-3664.

{¶6} Although the trial court stated in the letter that it intended to impose the original sentence, the sentence it identified was not the original sentence. Regardless, the trial court took no action because of the pending appeal.

{¶7} The State assigns the following error of our review:

THE TRIAL COURT ACTED CONTRARY TO LAW IN
REDUCING DEFENDANT'S SENTENCE AFTER
REVOKING JUDICIAL RELEASE.

Analysis – Judicial Release

{¶8} A trial court has no jurisdiction to amend or modify a valid sentence of imprisonment, other than through judicial release. *State v. Longmire*, 11th Dist. No. 2001-P-0014, 2002-Ohio-7153, ¶14; Katz & Gianinelli, *Criminal Law* (2009) Vol. 3, Section 120:7.² R.C. 2929.20(K) governs the granting of judicial release and the revocation thereof in the event an offender violates a condition of the release. Judicial release is

² A trial court does retain jurisdiction to correct a void sentence or a clerical mistake. *State v. Garretson*, 140 Ohio App.3d 554, 558-59.

akin to the former relief known as "shock probation." *State v. Darthard*, 10th Dist. No. 01AP-1291, 2002-Ohio-4292, ¶11; *State v. McConnell*, 143 Ohio App.3d 219, 2001-Ohio-2129, ¶1. R.C. 2929.20(K) states in relevant part:

If the court grants a motion for judicial release under this section, the court shall order the release of the eligible offender, shall place the eligible offender under an appropriate community control sanction, under appropriate conditions, and under the supervision of the department of probation serving the court and shall reserve the right to reimpose the sentence that it reduced if the offender violates the sanction. If the court reimposes the reduced sentence, it may do so either concurrently with, or consecutive to, any new sentence imposed upon the eligible offender as a result of the violation that is a new offense. * * *

{¶9} When a trial court grants a motion for judicial release pursuant to R.C. 2929.20(I), "it, in effect, suspends the balance of the terms of the originally imposed sentences and places 'the eligible offender under an appropriate community control sanction[.]' " *Darthard* at ¶11, citing *McConnell* at 222, and R.C. 2929.20(I).³ We note that the rules dealing with a violation of an original sentence of community control (R.C. 2929.15) should not be confused with the sections of the Revised Code that address judicial release (R.C. 2929.20) even though the language of R.C. 2929.20(K) uses the phrase "community control sanction" in reference to the status of an offender when granted early judicial release. *State v. Franklin*, 5th Dist. No. 2011-CA-00055, 2011-Ohio-4078, ¶12. R.C. 2929.15(B) only applies to offenders who were initially sentenced to community control sanctions and permits a trial court to newly impose a prison term upon an offender who later violates the community control sanction. *Id.* at ¶14. In contrast, an

³ R.C. 2929.20(1) was amended and that provision is now contained in R.C. 2929.20(K).

offender who has been granted early judicial release pursuant to R.C. 2929.20 has already been ordered to serve a term of incarceration as part of the original sentence but, upon motion by the "eligible offender," is released early from prison. The trial court conditionally reduces the already-imposed term of incarceration, and the trial court is required to place the eligible offender under appropriate community control sanctions and conditions. *Id.* at ¶15, citing *State v. Mann*, 3d Dist. No. 3-03-42, 2004-Ohio-4703, ¶7, 8.

{¶10} Coincident with granting judicial release, a trial court shall reserve on the record the right to reimpose the original sentence on an offender if the offender violates the community control sanction. *Darthard* at ¶11. If the court chooses to reinstate the original sentence, pursuant to this reserved right, "[b]y the clear language of R.C. 2929.20(l), the trial court's option in this instance with respect to ordering incarceration is limited to the reinstatement, with credit for time served, of the sentences that it suspended upon the granting of judicial release." *Id.* at ¶13.

{¶11} In its sole assignment of error, the State contends that the trial court erred when, following the revocation of judicial release, it imposed a sentence less than Terry's original sentence. We agree.

{¶12} The clear and unambiguous meaning of the phrase "shall reserve the right to reimpose the sentence that it reduced" is that the court can reimpose the original sentence that it suspended when it granted judicial release in the event the offender violates the community control sanction. The statute does not authorize the trial court to increase or reduce the original sentence. "A court has no power to substitute a different sentence for that provided for by statute or one that is either greater or lesser than that

provided for by law." *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438; *State v. Jackson*, 10th Dist. No. 06AP-631, 2007-Ohio-1474, ¶14.

{¶13} The trial court may only "reimpose" the original sentence if it chooses to revoke community control. Appellate courts have almost uniformly found error when a trial court, after revoking judicial release, imposed a sentence greater or lesser than the original sentence. *Darthard* at ¶13 (error in increasing original sentence—"the trial court's option * * * is limited to the reinstatement, with credit for time served, of the sentences that it suspended upon the granting of judicial release"); *State v. Hardy*, 8th Dist. No. 83572, 2004-Ohio-2696, ¶6 (error in increasing original sentence—"the plain, unambiguous language set forth in R.C. 2929.20(l) permits a trial court to merely reinstate the reduced, original prison term upon a violation of the conditions of early judicial release"); *State v. Jones*, 3d Dist. No. 10-07-26, 2008-Ohio-2117, ¶15 (error in increasing original sentence—"if a defendant violates the conditions of judicial release, the trial court is limited to reimposing the original term of incarceration with credit for time already served"); *State v. Wiley*, 9th Dist. No. 3204-M, 2002-Ohio-460, ¶10 (error in increasing original sentence—"if the offender violates the conditions of release, the statute provides that the court may reinstate the original prison sentence with credit given for time already served"); *State v. James*, 5th Dist. No. 2007-CA-0009, 2008-Ohio-103, ¶25 (error in reducing original sentence—"the plain, unambiguous language set forth in R.C. 2929.20 limits a trial court to reimposing the reduced, original prison term upon a defendant's violation of conditions of early judicial release"); *State v. Mitchell*, 5th Dist. No. 2007-CA-0046, 2007-Ohio-6343, ¶18 (error in reducing original sentence—"R.C. 2929.20(l) merely reserves the right of the trial court to re-impose the sentence that is reduced pursuant to

the judicial release if the defendant violates the sanction. * * * It does not authorize the trial court to modify the original sentence.").

{¶14} Here, Terry's original sentence was 11 months imprisonment for the burglary conviction (Count 1) and 4 years imprisonment for the felonious conviction (Count 2) to be served consecutively. When the trial court granted Terry judicial release, it specifically informed Terry that if he violated the terms of his judicial release, the trial court would reimpose a prison term of 4 years and 11 months. Although the record seems to indicate that the trial court intended to reimpose the original sentence, it failed to do so. Therefore, the trial court erred.

{¶15} Terry relies upon *State v. Ford*, 3d Dist. No. 14-05-30, 2006-Ohio-610, in arguing that a trial court may impose a lesser period of incarceration than the period set forth in the original sentence when a defendant has violated a term of judicial release. We find *Ford* distinguishable on its facts and unpersuasive in its legal analysis.

{¶16} In *Ford*, the defendant was granted judicial release and placed under community control. His original sentence was 3 years incarceration. At the time of his release, the trial court notified the defendant that if he violated the terms of his community control, he could be returned to prison to serve a sentence up to 2 years and 11 months. When the defendant violated the terms of community control, the trial court ordered that he be returned to prison for 3 years, less time served.

{¶17} In reversing the trial court's order, the majority opinion in *Ford* looked to the community control statute, R.C. 2929.15, and noted that if a prison term is imposed following a community control violation, the prison term shall not exceed the prison term specified in the notice provided to the offender when placed on community control. R.C.

2929.15(B)(2) ("The prison term, if any, imposed upon a violator * * * shall not exceed the prison term specified in the notice provided to the offender at the sentencing hearing."). The majority in *Ford* applied this same reasoning to the revocation of judicial release and held that the trial court's imposition of a prison term was limited in length to the amount stated in the judgment entry granting judicial release, which was 2 years and 11 months. The majority in *Ford* did not address the limiting nature of the phrase "the right to reimpose the sentence that it reduced" contained in R.C. 2929.20. Nor has *Ford* been cited by any other appellate decision. For these reasons, we find *Ford* unpersuasive.

{¶18} In the case at bar, the trial court informed Terry at the time it granted judicial release that it would impose a sentence of 4 years and 11 months incarceration (his original sentence) if Terry violated the terms of release. After Terry violated those terms, it appears that the trial court intended to reimpose the original sentence. However, it failed to do so.

{¶19} Because the trial court erred when it imposed a period of incarceration less than that set forth in Terry's original sentence, we sustain appellant's sole assignment of error. Therefore, we reverse the judgment of the Franklin County Court of Common Pleas and remand the matter for resentencing.

*Judgment reversed; cause remanded
for resentencing.*

FRENCH and DORRIAN, JJ., concur.
