

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
ERIE COUNTY

State of Ohio

Court of Appeals No. E-12-022

Appellee

Trial Court No. 2008-CR-344

v.

Mike Marshall

**DECISION AND JUDGMENT**

Appellant

Decided: April 12, 2013

\* \* \* \* \*

Kevin J. Baxter, Erie County Prosecuting Attorney, and  
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Jeffrey J. Whitacre, for appellant.

\* \* \* \* \*

**YARBROUGH, J.**

**I. Introduction**

{¶ 1} Appellant, Mike Marshall, appeals the judgment of the Erie County Court of Common Pleas, revoking his community control and sentencing him to four years in prison. For the following reasons, we reverse.

### **A. Facts and Procedural Background**

{¶ 2} On August 14, 2008, Marshall was indicted on one count of burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree. Several months later, he entered into a plea agreement in which he agreed to enter a plea of guilty to the amended offense of burglary in violation of R.C. 2911.12(A)(3), a felony of the third degree. The trial court subsequently imposed a four-year term of community control sanctions and stated that “further, harsher sanctions, including a prison term of four (4) years, would be imposed if [Marshall did] not comply with community sanctions.”

{¶ 3} On February 9, 2012, Marshall admitted to violating the terms of his community control, and waived his right to a hearing on the matter. Following a sentencing hearing on April 12, 2012, the trial court terminated Marshall’s community control and imposed the four-year prison term that was promised to Marshall in the event he violated community control. The trial court imposed the four-year sentence despite Marshall’s argument he could only be sentenced to a three-year term as a result of amendments made to R.C. 2929.14 in 2011.

### **B. Assignment of Error**

{¶ 4} Marshall subsequently filed a timely notice of appeal, assigning the following error for our review:

THE TRIAL COURT ABUSED ITS DISCRETION AND  
VIOLATED THE MANDATES OF OHIO LAW WHEN, AFTER  
FINDING APPELLANT IN VIOLATION OF COMMUNITY CONTROL,

SENTENCED APPELLANT ON A LOW TIER FELONY OF THE  
THIRD DEGREE (F-3) TO A PERIOD OF FOUR (4) YEARS IN  
PRISON.

## II. Analysis

{¶ 5} In his sole assignment of error, Marshall argues that the trial court erred by sentencing him to a prison term that exceeds the maximum allowable term under R.C. 2929.14(A). Essentially, Marshall contends that the 2011 amendments to R.C. 2929.14(A) should apply in this case and reduce his prison term to a maximum of three years.

{¶ 6} In 2011, R.C. 2929.14(A) was amended by H.B. No. 86. Section 4 of H.B. No. 86 provides that it “appl[ies] to a person who commits an offense \* \* \* on or after the effective date of this section and to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.” R.C. 1.58(B) states: “If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.”

{¶ 7} Here, there is no dispute that the offense was committed prior to the effective date of amended R.C. 2929.14(A). Further, it is clear that the amendments to R.C. 2929.14 reduced the punishment for Marshall’s offense by changing the maximum allowable prison term to three years instead of five years. Thus, the issue in this case is

whether Marshall's prior sentence was "already imposed" at the time of the April 12, 2012 sentencing hearing.

{¶ 8} Although this court is yet to examine this issue, at least two other appellate districts have held that the prison term is not imposed until the offender's community control is revoked. *State v. Nistelbeck*, 10th Dist. No. 11AP-874, 2012-Ohio-1765; *State v. West*, 2d Dist. No. 24998, 2012-Ohio-4615.

{¶ 9} In *State v. Nistelbeck*, 10th Dist. No. 11AP-874, 2012-Ohio-1765, the Tenth District examined the Ohio Supreme Court's decision in *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, and the language of R.C. 2929.19(B)(5), in order to resolve whether the prison sentence was actually imposed prior to the revocation of Nistelbeck's community control. After *Nistelbeck* was released, R.C. 2929.19 was amended without relevant substantive change, and R.C. 2929.19(B)(5) was moved to R.C. 2929.19(B)(4).

{¶ 10} R.C. 2929.19(B)(4) provides:

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, \* \* \* 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. (Emphasis added.)

Construing this language, the Ohio Supreme Court in *Brooks* held that a trial court is required, at sentencing, to “notify the offender of the specific prison term that may be imposed for a violation of the conditions of the sanction, as a prerequisite to imposing a prison term on the offender for a subsequent violation.” *Brooks* at paragraph two of the syllabus.

{¶ 11} Ultimately, the Tenth District held that a prison term applicable only upon a defendant’s violation of community control is not actually imposed until community control is revoked. *Nistelbeck* at ¶ 10. Subsequently, the Second District examined the decision in *Nistelbeck* and reached the same result. *West* at ¶ 14.

{¶ 12} We agree with the analysis and reasoning contained in both *Nistelbeck* and *West*. The language of R.C. 2919.19(B)(4) and the holding in *Brooks* compels us to conclude that the amended version of R.C. 2929.14 is applicable in this case. Additionally, the trial court’s original judgment entry argues against a finding that the prison term was imposed in 2009. The entry stated that Marshall’s prison term “would be imposed” if the community control sanctions were violated. The court’s use of conditional language in its entry supports the conclusion that the prison term was not actually imposed prior to the effective date of the 2011 amendments to R.C. 2929.14.

{¶ 13} In light of the foregoing, we find that the trial court erred in failing to apply the amended version of R.C. 2929.14 to its sentencing of Marshall. Accordingly, Marshall's sole assignment of error is well-taken.

### III. Conclusion

{¶ 14} Based on the foregoing, the judgment of the Erie County Court of Common Pleas is reversed and this matter is remanded to the trial court for resentencing in accordance with amended R.C. 2929.14. Costs are hereby assessed to the state in accordance with App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Stephen A. Yarbrough, J.

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JUDGE

James D. Jensen, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.