



State v. Miller

2024-Ohio-5326 (2024) | Cited 0 times | Ohio Court of Appeals | November 7, 2024

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, : No. 113764 v. :

CLARK MILLER, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED RELEASED AND JOURNALIZED: November 7, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas Case No. CR-21-659025-A

Appearances:

Attorney, and Frank Romeo Zeleznikar, Assistant

Prosecuting Attorney, for appellee.

Allison F. Hibbard, for appellant.

EILEEN T. GALLAGHER, J.:

Defendant-

of imprisonment for violating the terms

of his community-control sanctions. Miller raises the following assignments of error

for review: 1. The trial court erred in imposing a consecutive prison sentence.



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After careful review of the record and relevant case law, we affirm the

I. Procedural and Factual History

On August 26, 2021, Miller was named in a seven-count indictment, charging him with two counts of drug trafficking in violation of R.C. 2925.03(A)(2), with forfeiture specifications (Counts 1 and 3); four counts of drug possession in violation of R.C. 2925.11(A), with forfeiture specifications (Counts 2, 4, 5, and 6); and a single count of possession of criminal tools in violation of R.C. 2923.24(A), with forfeiture specifications (Count 7).

On March 1, 2022, Miller appeared before the trial court and expressed his willingness to accept the terms of a negotiated plea agreement with the State. Following a Crim.R. 11 colloquy, Miller pleaded guilty to drug trafficking, with forfeiture specifications, as charged in Count 1 of the indictment; and two counts of drug possession, with forfeiture specifications, as charged in Counts 4 and 5 of the indictment. The remaining counts were nolle.

On March 31, 2022, the trial court issued a sentencing journal entry, sentencing Miller to a two-year term of community-control sanctions. Miller was ordered to be screened for placement into the McDonnell Center Community Based successfully complete the CBCF program and follow all program- and community- plan recommendations. Upon successful completion of the CBCF program, Miller was required to:

1.) Report to probation officer according to risk level guidelines or as directed by P.O.



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- 2.) Defendant to be supervised by: CBCF Unit.
- 3.) Attend programming as indicated in case plan.
- 4.) Defendant is ordered to pay a monthly supervision fee of \$20.
- 5.) Random drug testing.
- 6.) Conditions and terms of probation are subject to modification by the probation officer with approval of the court.

During the sentencing hearing, the court orally advised Miller that if he

violated the terms of his community-

month sentence in each felony four, plus a 12-month sentence on the felony five. So

. journal entry, which reiterated that a violation of community-control sanctions

On May 11, 2022, it was determined that Miller was not eligible for

placement at CBCF due to certain medical needs. He was therefore released to

supervised probation.

On July 12, 2023, Miller was found to be in violation of his community-

control sanctions after testing positive for drugs and alcohol. Upon hearing from

- complete an inpatient treatment program, and follow all aftercare Miller was remanded, to await

a bed for an inpatient treatment program.

On July 17, 2023, Miller appeared before a substituting trial judge

based on allegations that Miller passed a substance to a fellow inmate who

overdosed on fentanyl just minutes later. The inmate was revived and taken to the

hospital for medical treatment. At the violation hearing, Detective Scott Vargo



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alleged hand-to-hand camera system.

(Tr. 69.) Det. Vargo obtained a search warrant to complete a body cavity search but

could not get the hospital to execute the warrant. Approximately three or four hours

after the object was first observed on the body scanner, an x-ray taken at the hospital. During a subsequent interview with the inmate, Det. Vargo confirmed that the

inmate received the drugs from Miller. (Tr. 68.)

Based on the testimony adduced at the violation hearing, the court

found Miller to be in violation of his community-control sanctions were terminated, and he was sentenced to 18 months in prison on Counts 1 and 4, and 12 months in prison on Count 5. The prison terms

were ordered to run consecutively for an aggregate prison term of 48 months.

Miller now appeals from his sentence.

II. Law and Analysis

A. Consecutive Sentences

In the first assignment of error, Miller argues the trial court erred by

of the consequences of violating community control and there was no suspended prison sentence imposed.

The proper scope of felony-sentence review by Ohio appellate courts

is set forth in R.C. 2953.08(G)(2). Pursuant to R.C. 2953.08(G)(2), an appellate

that the record does not support the trial court

State v. Marcum, 2016-Ohio-1002,

¶ 1.



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Clear and convincing evidence is that measure or degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.

Cross v. Ledford, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

State v. Williams, 2016-Ohio-7658, ¶ 22, citing State v. Fischer, 2010-

Ohio-6238, ¶ 21- Id., quoting

Fischer at ¶ 21-22. See also State v. Hitchcock, 2019-Ohio- judges have no inherent power to create sentences, and the only sentence that a trial

stated on the record during the sentencing hearing that he was required to undergo

an evaluation with CBCF before the court was willing to find that he was amenable

to community control. Thus, Miller contends that the court had no authority to find

him in violation of community control when the original sentence was not properly

imposed.

Under the doctrine of res judicata,

a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment.

State v. Perry, 10 Ohio St.2d 175, 180 (1967).

This court has previously recognized that an appeal from a

community-control- an appeal of issues that could State v. Turner, 2018-Ohio-2730, ¶ 6 (8th Dist.), citing State v. Bailey, 2016-Ohio-494, ¶ 7 (8th

Dist.). Other Ohio appellate courts have reached the same conclusion. See, e.g.,

State v. Boone, 2023-Ohio-2017, ¶ 15 (9th Dist.); State v. Allbaugh, 2013-Ohio-



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2031, ¶ 14 (4th Dist.); State v. Turner, 2017-Ohio-4101, ¶ 8 (2d Dist.); State v. Fields, 2012-Ohio-4808, ¶ 16-19 (5th Dist.).

In this case, Miller did not appeal from the sentencing journal entry issued on March 31, 2022. Accordingly, he cannot collaterally attack the validity of his original sentence in an appeal from the judgment imposing sentence on violations of his community-control sanctions. See State v. Hamilton, 2024-Ohio-4504, ¶ 10 (2d Dist.); State v. Cooper, 2019-Ohio- bars [defendant] from raising an issue on appeal from the revocation of his community control sanctions which could have and should have been raised on direct appeal from the judgment of conviction in which community control was first s argument is untimely and barred by the doctrine of res judicata.

Miller claims the trial court failed to comply with R.C. 2929.19(B)(4) because the rly notify [him] of the possibility of consecutive sentences interpretation of the record. R.C. 2929.19(B)(4) governs the imposition of community-control sanctions. The current version of R.C. 2929.19(B)(4), effective September 30, 2021, reads as follows:

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 range from which the prison term may be imposed as a sanction for the violation, which shall be the range of prison terms for the offense that is specified pursuant to section 2929.14 of the Revised Code and as described in section 2929.15 of the Revised Code.



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Id.

In State v. Brooks, 2004-Ohio-4746, the Ohio Supreme Court

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[P]ursuant to R.C. 2929.19(B)(4) and 2929.15(B), a trial court sentencing an offender to a community control sanction must, at the time of the sentencing, 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.

Id. at ¶ 29. In addition to notifying the offender at the time of sentencing, such

State v. Goforth, 2008-Ohio-5596, ¶ 20 (8th Dist.), quoting State v.

McWilliams, 2005-Ohio- State

1 The Brooks Court interpreted former analogous R.C. 2929.19(B)(5). v. Clinton, 2022-Ohio-mandatory provision, such as the notification provision under R.C. 2929.19(B)(4),

State v. Batty, 2014-Ohio-2826, ¶ 22 (4th Dist.). Thus,

when a trial court fails to provide proper notice of a specific term to the offender, [t]he matter must be remanded to the trial court for a resentencing under that provision with a prison term not an option. . . . Although a prison term is not an option at the resentencing, the trial court may choose to impose a longer time under the same sanction or impose a more restrictive sanction.

State v. Goldsberry, 2009-Ohio-6026, ¶ 11 (3d Dist.), quoting Brooks at ¶ 33.

Regarding the imposition of consecutive sentences, the Ohio Supreme

Court has further clarified that

[w]hen a court revokes community control, it may require that the reserved prison term be served consecutively to any other sentence then existing or then being imposed but only if at the time it imposed community control, it notified the offender that a consecutive sentence on revocation of community control was a possibility.

State v. Jones, 2022-Ohio- ordered to be served consecutively to any other sentence at a community-control-



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revocation hearing if notice was given when the prison term was reserved that the term could be required to be served consecutively to another prison term at the time Id prison term may be consecutive, a concurrent term should be presumed, in Id. at ¶ 16.

Miller during his original sentencing hearing satisfied the requirements set forth in Jones. In this case, the trial court engaged Miller on the record and expressly require the reserved prison terms of 12 months on the fifth-degree felony and 18 months on each fourth-degree felony to be served consecutively. See State v. Thompson, 2024-Ohio-3361 (4th Dist.). An aggregate 48-month prison term could only be reached by ordering each reserved prison term to run consecutively. Accordingly, the imposition of consecutive sentences is not clearly and convincingly contrary to law. 2

The first assignment of error is overruled.

B. Due Process

In the second assignment of error, Miller argues the trial court violated his right to due process because violation, the evidence against him was not disclosed prior to the hearing, he did not have an adequate opportunity to present witnesses and documentary evidence, and his right to confront and cross-examine advers State v.

Bailey, 2016-Ohio-494, ¶ 9 (8th Dist.), citing Gagnon v. Scarpelli, 411 U.S. 778, 781

2 Miller does not raise any additional arguments related to the trial court s compliance with R.C.



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2929.14(C)(4). See App.R. 16(A)(7). We, therefore, decline to consider this issue sua sponte. See App.R. 12(A)(2). (1973); State v. Miller, 42 Ohio St.2d 102 (1975), syllabus. A person subject to

community control may be punished for a violation of conditions of community

control, but only if certain due-process rights are observed. See Crim.R. 32.3(A).

The minimal due process requirements are:

(1) written notice of the claimed violations; (2) disclosure of evidence against him; (3) opportunity to be heard and to present witnesses and documentary evidence; (4) the right to confront and cross-examine hearing body; and (6) a written statement by the factfinder of the evidence relied upon and reasons for revocation.

State v. Davis, 2010-Ohio-5126, ¶ 26 (8th Dist.), citing Miller at 104.

Bailey at ¶ 10, citing

State v. Simpkins, 2006-Ohio-3496, ¶ 12 (8th Dist.), citing State v. Henderson, 62

Ohio App.3d 848, 853 (5th Dist. 1989). In this case, Miller did not object or raise a

due process objection at the time of the revocation hearing. Accordingly, he has

waived all but plain error. See State v. Dagley, 2022-Ohio-2671, ¶ 12 (8th Dist.).

substantial rights may be noticed although they were not brought to the attention of

State v. English, 2021-Ohio- Id., quoting State v. Barnes, 94

Ohio St.3d 21, 27 (2002), citing State v. Long, 53 Ohio St.2d 91 (1978). Miller does not raise a plain-error argument on appeal. Nevertheless,

the record reflects that Miller was afforded a revocation hearing and appeared

before the court with counsel. At the onset of the hearing, the trial court indicated

that counsel was previously notified of the revocation hearing but required a

continuance based his unavailability. (Tr. 66.) In addition, Miller was provided an



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opportunity to be heard about the circumstances surrounding the alleged violations, and defense counsel was able to cross-examine Det. Vargo about his role in the investigation into the alleged drug transaction. The trial court also made an adequate inquiry into the allegations and carefully questioned Det. Vargo and Miller before making any decision on revocation. (Tr. 74-76.) Under these circumstances, we find the record does not demonstrate plain error.

The second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the

conviction having been affirmed, any bail pending appeal is terminated. Case

remanded to the trial court for execution of sentence. A certified copy of this entry shall constitute the mandate pursuant to Rule 27

of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, A.J., CONCURS; EILEEN A. GALLAGHER, J., CONCURS (WITH SEPARATE OPINION)

EILEEN A. GALLAGHER, J., CONCURRING:

I concur with my colleagues but write separately to express my concern as to the handling of this matter.

The violation hearing held on July 17, 2023 was ostensibly based upon



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information that the appellant had provided a narcotic, later determined to be fentanyl, to another inmate in the Cuyahoga County Jail.

A Cuyahoga County Sheriff testified that an inmate in the jail had overdosed and was transported to MetroHealth Medical Center questioned as to the source of the narcotics that he had ingested and he reported

that the appellant had provided it to him.

The detective testified that he then reviewed a video recording of an interaction between appellant and this other inmate wherein a transaction was made between the two men and that he later discussed his observation with the other inmate who confirmed that what the detective described to him was the point where appellant provided narcotics to him. I am concerned that there is a video of a drug transaction between two

inmates in an Ohio detention facility or institution, that one of those inmates was in possession of a deadly, controlled substance, that those actions were in violation of multiple sections of the Ohio Revised Code and that, if true, appellant could, and should, be charged with a criminal offense(s). That video was not offered as evidence nor reviewed by the court at the violation hearing but rather the contents were merely described to the court.

We know not whether this recording has been retained by the Cuyahoga County Sheriff's Department.

I find this to be troubling.

