

IN THE SUPREME COURT OF OHIO
2006

06-2314

STATE OF OHIO,

Case No.

Plaintiff-Appellant,

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

-vs-

BRIGHAM JOHNSON,

Court of Appeals
Case No. 06AP-860

Defendant-Appellee.

MEMORANDUM OF PLAINTIFF-APPELLANT SUPPORTING JURISDICTION

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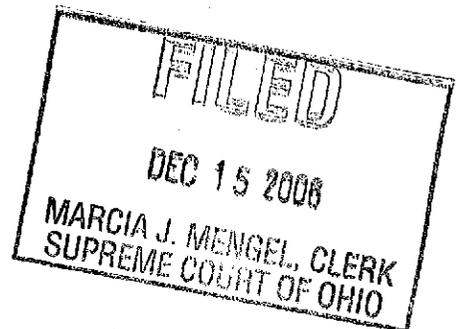


TABLE OF CONTENTS

EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION...1

STATEMENT OF THE CASE AND FACTS.....5

ARGUMENT6

First Proposition of Law: Under App.R. 5(C), the State need not prove a probability that “errors” occurred but rather a probability that the “errors *claimed*” occurred. The leave-to-appeal stage is a vetting stage to determine whether the State has reasonable grounds to appeal, not a stage to reach the full merits.....6

Second Proposition of Law: A sentence that lacks a mandatory term of postrelease control is void and thus subject to correction. Neither the lack of a timely State’s appeal nor the defendant’s release from prison precludes the trial court from correcting such a sentence.....8

CONCLUSION15

CERTIFICATE OF SERVICE15

APPENDIX

Tenth District Judgment Entry (filed November 1, 2006).....A-1

Tenth District Memorandum Decision (filed October 31, 2006).....A-2

EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

This felony case presents two important issues warranting this Court's review: (1) whether an appellate court may deny the State leave to appeal, when the State sufficiently claims error and presents reasonable grounds for the appeal, and (2) whether a trial court may refuse to correct a void sentence so as to add a statutorily mandated term of postrelease control (PRC).

In July 2001, defendant pleaded guilty to attempted rape, a felony of the second degree. The trial court imposed the jointly-recommended three-year prison term, but failed to include the mandatory five-year PRC term in the sentencing entry. On July 11, 2006¹, a week before defendant's scheduled release from prison, the State moved to correct defendant's sentences so as to add the PRC term. Without holding a hearing, the trial court denied the State's motion on July 26, 2006. The State then sought leave to appeal in the Tenth District. Attached to the State's motion for leave were certified copies of the relevant portions of the record and a memorandum presenting reasonable grounds for the appeal.

The Tenth District, however, denied leave. Although the decision to grant leave to appeal is a matter of discretion, *State v. Fisher* (1988), 35 Ohio St.3d 22, paragraph two of the syllabus, the Tenth District did not purport to exercise any discretion, but, rather, engaged in an apparent merits inquiry into the State's claims. While the Tenth District cited App.R. 5(C), the tenor of the Court's analysis was reflective of a merits

¹ July 11, 2006 is the effective date of R.C. 2929.191, which creates a procedure by which a trial court can correct a sentence via *nunc pro tunc* entry so as to add the necessary PRC term, provided that the offender has not yet been released from imprisonment under the prison term

determination rather than a mere assessment of whether there were reasonable grounds for appeal.

But the State is not required to prevail on the merits at the leave-to-appeal stage. Rather, the State is required only to show “the probability that the errors *claimed* did in fact occur * * *.” App.R. 5(C) (emphasis added). Unlike a merit brief, which must demonstrate that the judgment warrants either reversal or affirmance, a motion for leave to appeal under App.R. 5(C) needs only to show that the State has sufficiently claimed error to warrant full briefing and argument. Accordingly, appellate courts would benefit from this Court clarifying the proper standard of review under App.R. 5(C).

Not only was the Tenth District wrong in prematurely conducting its merits inquiry, but it was also wrong in its substantive legal analysis. The State argued in its motion for leave to appeal that defendant’s sentence was void, that the trial court retained authority to correct defendant’s sentence, and that such a correction would not violate double jeopardy. The State cited *State v. Beasley* (1984), 14 Ohio St.3d 74, in which this Court held that a trial court’s imposition of a fine instead of the mandatory prison term rendered the defendant’s sentence void and thus subject to correction. The State also pointed out that defendant’s satisfaction of the void sentence by serving the prison term was immaterial, given that in *Beasley* the defendant paid the fine (thus satisfying the void sentence) before the trial court corrected the sentence.

The Tenth District, however, refused to follow *Beasley*, stating that “[a]bsurd results could follow, in that an offender could be released from the term of imprisonment and then years later be re-sentenced to correct some error in the void sentence that had already been served.” Memo. Dec., ¶10. But the “absurd results” that the Tenth District

feared were absent in the present case—the State filed its motion to correct defendant’s sentence while he was still in prison, and the trial court denied the motion only eight days after defendant’s release. Also, regardless of how much time has elapsed, there is nothing “absurd” about correcting an offender’s sentence so as to add a statutorily mandated PRC term, especially when the offender (like defendant) has known all along that his sentence requires PRC. Correcting an offender’s sentence to add a mandatory PRC term is no more “absurd” than allowing the offender to avoid PRC.

The Tenth District also misread this Court’s recent decision in *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126. In *Hernandez*, the petitioner was serving an administratively-imposed prison term for a PRC violation. After refusing to remand the case for resentencing, this Court granted habeas relief, finding that the petitioner’s confinement was illegal due to the absence of PRC in the sentencing entry. The Tenth District stated that this Court found in *Hernandez* “that a trial court may not correct a sentence to add post-release sanctions after the defendant has already completed his term of imprisonment and been released from confinement.” Memo. Dec., ¶12, citing *Hernandez*, at ¶¶30-32.

The Tenth District, however, read *Hernandez* too broadly. Because *Hernandez* was a habeas case, the only issue in that case was the legality of the petitioner’s confinement. Thus, this Court’s refusal in *Hernandez* to remand for resentencing means only that a resentencing could not *retroactively* legalize what the parole board had already done. *Hernandez* does not stand for the proposition that a trial court may not correct a sentence so as to give the parole board *prospective* authority to enforce PRC.

Indeed, this Court has previously explained that “[h]abeas corpus is directed only to the present confinement of a petitioner, and the granting of relief therein operates only to release him from such confinement, *it does not act as an absolute discharge from the legal consequences of a crime.*” *Foran v. Maxwell* (1962), 173 Ohio St. 561, 562 (emphasis added). Interpreting *Hernandez* as addressing whether a non-existent corrected sentencing entry would give the parole board prospective authority to enforce PRC would be to read the case as a disfavored advisory opinion. *State ex rel. Barletta v. Fersch*, 99 Ohio St.3d 295, 2003-Ohio-3629, ¶22 (“We have consistently held that we will not issue advisory opinions, * * *.”).

The public has a substantial interest in insuring that felony offenders serve statutorily mandated PRC terms. One of the purposes of PRC (and indeed of felony sentencing in general) is to protect the public. *Woods v. Telb* (2000), 89 Ohio St.3d 504, 509; R.C. 2929.11(A). Addressing the conceptually similar “parole,” the United States Supreme Court has stated that “a State has an ‘overwhelming interest’ in supervising parolees because ‘parolees . . . are more likely to commit future criminal offenses.’” *Samson v. California* (2006), 126 S.Ct. 2193, 2200, quoting *Pennsylvania Bd. of Probation and Parole v. Scott* (1998), 524 U.S. 357, 365. By denying the State’s motion for leave, the Tenth District effectively allowed the trial court to grant defendant clemency from PRC.

In sum, this case presents questions of such great public interest as would warrant this Court’s review. The State respectfully requests that this Court accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

On July 31, 2001, defendant entered a guilty plea to attempted rape, a felony of the second degree. In the "Entry of Guilty Plea" form, which both defendant and his attorney signed, defendant acknowledged that he understood that he was subject to a mandatory five-year PRC term. The plea form goes on to explain the possible consequences of violating PRC.

Immediately after the change-of-plea hearing, the trial court imposed the jointly-recommended three-year prison term. Through an apparent oversight, however, the trial court's sentencing entry contains no reference to PRC.

On July 11, 2006, the State filed a motion requesting that defendant be resentenced. Attached to the motion was an ODRC printout showing that defendant was still in prison; in addition to the three-year prison term imposed in this case, defendant was serving a four to 15 year prison term for aggravated burglary out of Jefferson County. According to the ODRC printout, defendant's "Supervision Start Date" was July 18, 2006. Without holding a hearing, the trial court on July 26, 2006, denied the State's motion to correct defendant's sentence. Although defendant was still incarcerated at the time the State filed its motion, the trial court concluded that defendant had completed his sentence and thus could not be resentenced.

The State thereafter sought leave to appeal in the Tenth District under App.R. 5(C). The Tenth District, however, denied leave. The State now seeks review in this Court.

ARGUMENT

First Proposition of Law: Under App.R. 5(C), the State need not prove a probability that “errors” occurred but rather a probability that the “errors *claimed*” occurred. The leave-to-appeal stage is a vetting stage to determine whether the State has reasonable grounds to appeal, not a stage to reach the full merits.

Although leave to appeal is within the discretion of the Court of Appeals, the leave-to-appeal stage is not meant to reach the full merits of the legal issues presented. App.R. 5(C) provides that the State shall provide affidavits or parts of the record “to show the *probability* that the errors *claimed* did in fact occur” and that the State shall provide “a brief or memorandum of law in support of the movant’s *claims*.” (Emphasis added) Thus, the State need not prove a probability that “errors” occurred but rather only a probability that the “errors *claimed*” occurred. In contrast, a merit brief must contain a statement of the “assignments of *error* presented for review, with references to the place in the record where each *error* is reflected.” App.R. 16(A)(3) (emphasis added).

App.R. 5(C)’s focus on the “errors claimed” and App.R. 16(A)(3)’s focus on the “error[s]” highlight the different functions served by motions for leave and merit briefs. The leave-to-appeal stage is a vetting stage to determine whether the State has sufficiently *claimed* error. In contrast, the merit-briefing stage determines whether there was reversible error or whether the trial court’s judgment should be affirmed.

Further supporting the view that the motion-for-leave stage is different from a merits inquiry is the method by which App.R. 5(C) directs the State to show the probability that its claimed errors occurred. In this regard, the rule requires the State to attach to its motion for leave “affidavits [or] parts of the record upon which the movant relies * * *.” Thus, whether the State has shown the probability that its claimed errors

occurred is a *factual* inquiry, *i.e.* whether the claimed error will be reflected in the record, such that the issue would be appropriate for appellate review. In short, showing the probability that a claimed error occurred differs from showing that the judgment warrants reversal—the former is addressed in a motion for leave, the latter in the merit brief.

While App.R. 5(C) also requires a brief or memorandum in support of the State's claims, the structure of the rule demonstrates that this "brief or memorandum" requirement is separate from the "probability that the errors claimed did in fact occur" requirement. If anything, the "brief or memorandum" requirement serves only to alert the appellate court to the specific legal arguments the State intends to raise to ensure that the arguments are not frivolous.

Until the mid-1990's, defendants pursuing motions for delayed appeal were required to make the same showing of a probability that the errors claimed had occurred. In *State v. Strickland* (March 3, 1994), Franklin App. No. 93AP-1445, the Tenth District addressed that standard, as follows:

Although a court *should not address or decide the merits* of an appeal on a motion for leave to file a delayed appeal, appellant must still demonstrate the probability that error occurred. Appellant's memorandum in support of his motion satisfies this requirement. (Emphasis added)

The Court noted that the defendant "adequately alleged error and set forth those portions of the record to demonstrate the probability that those errors occurred." *Id.*

The State agrees that, as part of this vetting function, a Court of Appeals can reject appeals that are frivolous. But the State's appeal issues in this case are not frivolous. For example, the State's proposed assignment of error was supported by this Court's holding in *State v. Beasley* (1984), 14 Ohio St.3d 74, which held that double

jeopardy does not preclude a trial court from correcting a void sentence. The State further explained why this Court's refusal to remand for resentencing in *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, did not preclude the trial court from correcting defendant's sentence so as to give the parole board prospective authority to enforce PRC. Finally, the State noted that its motion to correct defendant's sentence was not barred by *res judicata*. The Tenth District should have granted leave to appeal so that it would have the benefit of full briefing from the parties before it made any ultimate legal conclusions about the merits of the State's proposed claims.

While the Tenth District recited the "probability" language of App.R. 5(C), the tenor of the Court's analysis was reflective of a merits determination rather than a mere assessment of whether there were reasonable grounds for appeal.

Second Proposition of Law: A sentence that lacks a mandatory term of postrelease control is void and thus subject to correction. Neither the lack of a timely State's appeal nor the defendant's release from prison precludes the trial court from correcting such a sentence.

"The plain language of R.C. 2929.14(F) and 2967.28 evinces the intent of the General Assembly not only to make all incarcerated felons subject to mandatory or discretionary postrelease control but also to include postrelease control as part of the sentence for every incarcerated offender." *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶21. Thus, having sentenced defendant to a prison term for a felony sex offense, the trial court was required to include a mandatory five-year PRC term in its sentencing entry. R.C. 2929.14(F); R.C. 2967.28(B)(1).

“Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void.” *Beasley*, 14 Ohio St.3d at 75. In *Beasley*, the trial court originally sentenced the defendant to a fine rather than imposing the mandatory prison term. The trial court eventually corrected the error to impose the required prison term. This Court held that, because the original sentence was void, the trial court committed no error in correcting the defendant’s sentence. *Id.* at 74-76. Accordingly, trial courts retain authority to correct void sentences. *State v. Garretson* (2000), 140 Ohio App.3d 554, 559, citing *Beasley*, 14 Ohio St.3d at 75.

As in *Beasley*, defendant’s sentence is void in that it does not include the mandatory five-year PRC term. Indeed, this Court has indicated that the failure to properly impose PRC as part of a prison term is a *Beasley*-type sentencing error. *Jordan*, at ¶¶23-26.

Beasley itself defeats any argument that *Beasley*’s void-sentence doctrine does not apply because defendant already completed the prison term. In mandamus proceedings relating to *Beasley*, this Court noted that the defendant paid the fine shortly after her sentencing. *State ex rel. Leis v. Outcalt* (1980), 62 Ohio St.3d 331, 331. Yet despite the defendant satisfying the void sentence, this Court ultimately held that the trial court properly corrected her sentence to impose the mandatory prison term. *Beasley*, 14 Ohio St.3d at 74-76.

Nor would correcting defendant’s sentence violate double jeopardy. As a general matter, “[t]he Constitution does not require that sentencing should be a game in which one wrong move by the judge means immunity for the prisoner.” *United States v. DiFrancesco* (1980), 449 U.S. 117, 135, quoting *Bozza v. United States* (1947), 330 U.S.

160, 166-67. For double jeopardy purposes, “the pronouncement of a sentence has never carried the finality that attaches to an acquittal.” *DiFrancesco*, 449 U.S. at 133. Thus, “[t]he Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be.” *Id.* at 137. Accordingly, “application of double jeopardy protections to a change in a sentence is dependent upon the extent and legitimacy of a defendant’s expectation of finality.” *State v. Bell*, Franklin App. No. 03AP-1282, 2004-Ohio-5256, ¶12.

Again, *Beasley* controls. In *Beasley*, this Court held that the Double Jeopardy Clause does not prohibit a trial court from correcting a void sentence. *Beasley*, 14 Ohio St.3d at 75-76. This Court explained that since jeopardy does not attach to a void sentence, “the trial court’s correction of a statutorily incorrect sentence did not violate appellant’s right to be free from double jeopardy.” *Id.* at 75-76; see, also *Foran v. Maxwell* (1962), 173 Ohio St. 561, 562 (“[a] plea of former jeopardy cannot be based on a void judgment.”).

Moreover, defendant could have acquired no legitimate expectation of finality with respect to his void sentence. That is to say, defendant could not have legitimately expected to avoid PRC. A defendant knows or is charged with knowing how sentencing laws operate. *DiFrancesco*, 449 U.S. at 136 (defendant charged with knowledge of the statute giving the government the right to appeal, and thus had no expectation of finality in his sentence); *United States v. McClain* (9th Cir. 1998), 133 F.3d 1191, 1194. Thus, “a defendant can acquire no expectation of finality in an illegal sentence, which remains subject to modification.” *United States v. Kane* (9th Cir. 1989), 876 F.2d 734, 737.

Indeed, defendant did not just have constructive knowledge that the law required a mandatory five-year PRC term, he had *actual* knowledge of this fact. Defendant and his attorney both signed the Entry of Guilty Plea form, in which defendant acknowledged that his sentence includes a mandatory five-year PRC term. It is difficult to see how defendant could have a legitimate expectation of finality in his sentence, when he has known and acknowledged all along that his sentence requires a mandatory five-year PRC term.

That defendant served his prison term is insignificant for double-jeopardy purposes. Even if a defendant has completely served a void sentence, double jeopardy does not bar correcting the sentence. *Kane*, 876 F.2d at 737, discussing *United States v. Edmonson* (9th Cir. 1986), 792 F.2d 1496, 1496. This is especially so in the present case, given that defendant has known all along that the law required his sentence includes a mandatory five-year PRC term. Indeed, as explained above, the defendant in *Beasley* satisfied her void sentence by paying the fine, yet this Court found no double jeopardy violation in the trial court's correction of her sentence. *Beasley*, 14 Ohio St.3d at 74-76.

This Court's decision in *Hernandez* does not preclude the trial court from correcting defendant's sentence. As a habeas case, the only issue in *Hernandez* was the legality of the petitioner's present confinement, *i.e.* whether the then-existing sentencing entry authorized the parole board to enforce PRC on the petitioner and to impose a prison term for violating his PRC. Thus, this Court's finding that the administratively-imposed prison term was unlawful has no bearing on whether a trial court can correct a sentence to give the parole board the *prospective* authority to enforce PRC. Likewise, given the necessary focus on the legality of the petitioner's confinement, this Court's refusal to

remand the case for resentencing does not mean that any corrected sentencing entry would be unlawful, but rather means only that a corrected entry cannot *retroactively* legitimize the parole board's prior enforcement of PRC.

This Court has explained that “[h]abeas corpus is directed only to the present confinement of a petitioner, and the granting of relief therein operates only to release him from such confinement, *it does not act as an absolute discharge from the legal consequences of a crime.*” *Foran v. Maxwell* (1962), 173 Ohio St. 561, 562 (emphasis added); see, also, *In re Knight* (1944), 144 Ohio St. 257 (granting of habeas relief based on sentencing error did not preclude authorities from arresting the petitioner upon his release and resentencing him so as to correct the error). This reality about the nature of habeas relief demonstrates the narrow holding of *Hernandez*.

Moreover, *Hernandez* analogized PRC-revocation proceedings with community-control-revocation proceedings. This Court cited a passage from *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, which held that, when a trial court fails to notify an offender of the specific prison term that may be imposed for a community control violation, it cannot legitimize a prison term imposed for a community control revocation merely by “renotifying” the offender. *Hernandez*, at ¶30, citing *Brooks*, at ¶33. After *Brooks* and before *Hernandez*, this Court held that, even if a trial court fails to notify an offender of the specific prison term that may be imposed for a community control violation, it may give the notification at a subsequent revocation hearing, thereby allowing the trial court to impose a prison term for any future violations. *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, ¶17.

Thus, following through with this Court's PRC/community-control analogy, while correcting a sentence to add PRC may not retroactively legitimize the parole board's prior enforcement of PRC, a sentence correction *would* give the parole board the prospective authority to enforce PRC—just like renotification gives a trial court the prospective authority to impose a prison term for future community-control violations.

Although not specifically addressed in the Tenth District's memorandum decision, the States notes that R.C. 2967.28(D)(1)—which states that the parole board shall impose PRC sanctions “[b]efore the prisoner is released from imprisonment”—poses no bar to correcting defendant's sentence. “As a general rule, a statute providing a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure.” *State v. Bellman* (1999), 86 Ohio St.3d 208, 210, quoting *State ex rel. Jones v. Farrar* (1946), 146 Ohio St. 467, paragraph three of the syllabus. Absent an expression of intent to restrict authority for untimeliness, a statutory time requirement is not jurisdictional. *Bellman*, 86 Ohio St.3d at 210, citing *In re Davis* (1999), 84 Ohio St.3d 520, 522.

Nothing in R.C. 2967.28(D)(1) evinces an intent to deprive the parole board of authority to impose PRC after an offender's release. Instead, the timing scheme in R.C. 2967.28(D)(1) serves two other, non-jurisdictional purposes. The first purpose, like most timing requirements, is to make imposing PRC sanctions a convenient and orderly procedure. In this regard, it is much easier for the parole board to give offenders notice of their PRC sanctions when they are still in prison, as opposed to after their release.

The second purpose of R.C. 2967.28(D)(1)'s timing requirement is to provide the maximum amount of protection to the public. One of the purposes of imposing conditions on an offender's release from prison (and indeed of felony sentencing in general) is to protect the public. *Woods v. Telb* (2000), 89 Ohio St.3d 504, 509; R.C. 2929.11(A). As stated by the United States Supreme Court, "a State has an 'overwhelming interest' in supervising parolees because 'parolees . . . are more likely to commit future criminal offenses.'" *Samson v. California* (2006), 547 U.S. ___, 126 S.Ct. 2193, 2200, quoting *Pennsylvania Bd. of Probation and Parole v. Scott* (1998), 524 U.S. 357, 365. Imposing PRC sanctions while offenders are still in prison ensures that supervision of the offenders begins immediately upon their release.

Reading R.C. 2967.28(D)(1) as jurisdictional, however, would defeat the parole board's ability to protect the public. *In re Davis*, 84 Ohio St.3d 522-23 (refusing to read statutory time limit as jurisdictional, because to do so "would defeat the very purposes the time limit was designed to protect"). Under such a reading, any release of an offender before the parole board imposes PRC would result in the offender going forever unsupervised. The General Assembly never would have intended such a result.

Finally, the fact that the State did not pursue a timely appeal of defendant's sentence is immaterial. *Res judicata* does not apply to void judgments. *State v. Wilson* (1995), 73 Ohio St.3d 40, 45, n. 6. Simply put, the State cannot "waive" a statutorily mandated sentence.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court accept jurisdiction.

Respectfully submitted,



SETH L. GILBERT 0072929
Assistant Prosecuting Attorney
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, December 15, 2006, to SARAH BEAUCHAMP, 118 East Main Street, Columbus, Ohio 43215; Counsel for Defendant-Appellee.



SETH L. GILBERT 0072929
Assistant Prosecuting Attorney

APPENDIX

Tenth District Judgment Entry (filed November 1, 2006).....A-1

Tenth District Memorandum Decision (filed October 31, 2006)A-2

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FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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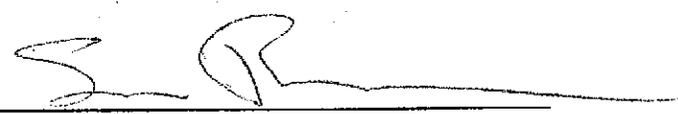
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State of Ohio,	:	
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Plaintiff-Appellant,	:	
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v.	:	No. 06AP-860
	:	(C.P.C. No. 01CR-03-1522)
Brigham A. Johnson,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on October 31, 2006, it is the judgment and order of this court that the state's motion for leave to appeal is denied. Costs are assessed against the state.

BROWN, PETREE, & FRENCH, JJ.



Judge Susan Brown

A-1

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
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Plaintiff-Appellant,	:	
	:	No. 06AP-860
v.	:	(C.P.C. No. 01CR-03-1522)
	:	
Brigham A. Johnson,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

MEMORANDUM DECISION

Rendered on October 31, 2006

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

Beauchamp & Fleck, and Sarah Beauchamp, for appellee.

ON MOTION FOR LEAVE TO APPEAL

BROWN, J.

ON COMPUTER 12

{¶1} On August 25, 2006, the State of Ohio, plaintiff, filed a motion for leave to appeal, pursuant to R.C. 2945.67(A) and App.R. 5(C), from the July 26, 2006 judgment of the Franklin County Court of Common Pleas.

{¶2} On July 31, 2001, a sentencing hearing was held for Brigham A. Johnson, defendant, based upon his plea of guilty to attempted rape, a second-degree felony.

Defendant signed a guilty plea form acknowledging that he would be subject to a mandatory five-year post-release control ("PRC") term upon his release from prison. In the trial court's August 1, 2001 sentencing judgment entry, however, the trial court failed to indicate the mandatory PRC term. Defendant commenced serving his term of incarceration and was scheduled to be released on July 18, 2006.

{¶3} On July 11, 2006, the state filed a motion for corrected judgment entry and/or for re-sentencing, in which the state requested the trial court either correct the August 1, 2001 judgment to reflect the PRC term or re-sentence defendant to include the PRC term. On August 25, 2006, the trial court issued a journal entry denying the state's motion to re-sentence defendant. The trial court reasoned that, pursuant to *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, because defendant had already completed his sentence as of that date, the court was precluded from re-sentencing defendant to add the PRC term. The state has filed the present motion, pursuant to R.C. 2945.67(A) and App.R. 5(C), seeking leave to appeal the trial court's judgment.

{¶4} The state's right to appeal a trial court's decision is governed by R.C. 2945.67(A), which provides that:

A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter of right any decision of a trial court in a criminal case * * * which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief * * * and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case * * *.

Thus, R.C. 2945.67(A) grants the state a substantive, but limited, right of appeal. *State v. Burke*, Franklin App. No. 06AP-656, 2006-Ohio-4597, at ¶7, citing *State v. Slatter* (1981),

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66 Ohio St.2d 452, 456-457. The state's absolute right of appeal is only available where the trial court's decision falls within one of four categories stated in the statute: (1) a motion to dismiss all or part of an indictment, complaint, or information; (2) a motion to suppress evidence; (3) a motion for the return of seized property; or (4) a petition for post-conviction relief. *Id.*, citing *State v. Matthews* (1998), 81 Ohio St.3d 375, 377-378. Here, the trial court's decision not to re-sentence defendant or correct the judgment in order to specify that he is subject to PRC does not fall under any of these categories.

{¶5} Further, the state may appeal "any other decision" of the trial court only if the state first obtains leave from the appellate court to take the appeal. *Burke*, at ¶8, citing *Matthews*, at 378, and R.C. 2945.67(A). The decision to grant or deny the state leave to appeal rests solely within the discretion of the court of appeals. *Id.*, citing *State v. Fisher* (1988), 35 Ohio St.3d 22, 23; *State v. Phipps*, Auglaize App. No. 2-05-19, 2006-Ohio-602, at ¶12; and *State v. Johnson* (Apr. 4, 1996), Franklin App. No. 95APA10-1380. To be entitled to leave to appeal, the state must demonstrate a probability that the claimed errors did in fact occur. *Id.*, citing App.R. 5(C), and *State v. Garcia* (May 2, 1995), Franklin App. No. 94APA11-1646.

{¶6} Here, the state argues that the trial court erred in refusing to correct defendant's sentence because: (1) newly enacted R.C. 2929.191, effective July 11, 2006, gave the trial court authority to correct defendant's sentence before his release from prison; (2) the omission of mandatory PRC from the sentencing entry renders defendant's sentence void and, thus, subject to correction; and (3) the omission of mandatory PRC from the sentencing entry was a clerical mistake and, thus, was correctable under Crim.R.

36. With regard to R.C. 2929.191, which only coincidentally became effective the same day the state filed its motion, that statute provides, in pertinent part:

(A)(1) If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section 2929.14 of the Revised Code, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison.

* * *

(2) If a court prepares and issues a correction to a judgment of conviction as described in division (A)(1) of this section before the offender is released from imprisonment under the prison term the court imposed prior to the effective date of this section, the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. If the court sends a copy of the entry to the department, the department promptly shall deliver a copy of the entry to the offender. The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the sentence and the judgment of conviction entered on the journal and had notified the offender that the offender will be so supervised regarding a sentence including a prison term of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code or that the offender may

be so supervised regarding a sentence including a prison term of a type described in division (B)(3)(d) of that section.

(C) On and after the effective date of this section, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division. Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction. The offender has the right to be physically present at the hearing, except that, upon the court's own motion or the motion of the offender or the prosecuting attorney, the court may permit the offender to appear at the hearing by video conferencing equipment if available and compatible. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if the offender were physically present at the hearing. At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction.

{¶7} In the present case, the state claims that, because it filed its motion on July 11, 2006, at which time defendant was still serving his sentence, the trial court improperly found it was precluded from re-sentencing defendant based upon the finding that defendant had been released at the time of the court's decision. In other words, the state claims that R.C. 2929.191 should still apply to the present case because defendant was still confined as of the filing date of its motion, and that date should be the pertinent date by which to determine the matter. The state maintains the trial court's delay in addressing the motion should not preclude the application of R.C. 2929.191.

{¶8} However, a plain reading of R.C. 2929.191 makes clear that a trial court may prepare and issue a correction to the judgment of conviction to include a statement

that the offender will be subject to PRC after the offender leaves prison only "before the offender is released from imprisonment under that term[.]" R.C. 2929.191(A)(1). Courts should construe words in common use in their ordinary significance and with the meaning commonly attributed to them. *Eastman v. State* (1936), 131 Ohio St. 1, paragraph five of the syllabus. Under R.C. 1.42, courts read words and phrases in context and construe them according to the rules of grammar and common usage. The accepted rules of statutory construction also require that statutes be construed in accordance with common sense and reason and not result in absurdity. *State ex rel. Webb v. Bryan City School Dist. Bd. of Edn.* (1984), 10 Ohio St.3d 27, citing *Prosen v. Duffy* (1949), 152 Ohio St. 139, and *Crowl v. DeLuca* (1972), 29 Ohio St.2d 53. When the statutory language is "plain and unambiguous and conveys a clear and definite meaning," a court need not apply rules of statutory interpretation. *Meeks v. Papadopoulos* (1980), 62 Ohio St.2d 187, 190, citing *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus.

{¶9} Applying these rules of statutory construction to the present case, we conclude that R.C. 2929.191 can only be read to mean that the trial court could not, under that statute, correct defendant's sentence to include PRC after the defendant had completed his term of imprisonment, even if the state filed its motion prior to completion of the term. If the legislature had desired to permit such a correction after a defendant's release, based upon a motion filed prior to the expiration of the term, it could have done so. That the legislature did not do so, but, instead, included clear, explicit terms limiting the trial court's ability to correct the sentence to the period only before the offender is released from imprisonment, leaves no room for further interpretation. The state presents no authority or general proposition of law to demonstrate that the date of the filing of its

motion should have been the operative date to come within the purview of R.C. 2929.191. Thus, in this respect, the state cannot demonstrate a probability that the claimed error did in fact occur.

{¶10} The state also claims that the trial court could correct defendant's sentence to include PRC, even after defendant completed his term of confinement, based upon its inherent authority to correct void sentences and Crim.R. 36, which gives the trial court the discretion to correct clerical mistakes at any time. We initially note that, with regard to the inherent authority to correct void sentences, following the state's theory would result in the need to create an arbitrary line as to how long after an offender is released from prison a trial court could amend its sentencing judgment to add a further punishment to the offender. Absurd results could follow, in that an offender could be released from the term of imprisonment and then years later be re-sentenced to correct some error in the void sentence that had already been served.

{¶11} We further note that, while we agree that Crim.R. 36 permits the trial court to put on a corrective entry at "any time," Crim.R. 1 provides that the criminal rules are to be followed only when a court exercises criminal jurisdiction. Criminal jurisdiction ends upon the defendant's release from incarceration or any post-release terms, whichever event occurs last. See *State v. Nye* (June 4, 1996), Franklin App. No. 95APA11-1490. In the present case, defendant was released on July 18, 2006, and his release was full and final insofar as the present sentence is concerned. As there were no pending criminal proceedings against defendant with regard to the instant offense after that date, the trial court could not take advantage of the criminal rules to issue a corrective order under Crim.R. 36. See *id.* Further, as we recognized above with regard to the court's inherent

authority to correct void sentences, we also acknowledged in *Nye* that there must be some reasonable limit to the provisions of Crim.R. 36. Otherwise, the court could put on a nunc pro tunc entry many years after release from imprisonment. See *id.*

{¶12} Notwithstanding these difficulties with the state's arguments, the Ohio Supreme Court has given guidance on this issue. As cited by the trial court herein, the Ohio Supreme Court found in *Hernandez* that a trial court may not correct a sentence to add post-release sanctions after the defendant has already completed his term of imprisonment and been released from confinement. *Hernandez*, at ¶¶30-32. Other appellate courts have interpreted *Hernandez* likewise. See *State v. Ayers*, Erie App. No. E-05-079, 2006-Ohio-5108, at ¶19 (citing *Hernandez* for the proposition that trial courts retain the authority to correct void sentencing orders only so long as the defendant has not served out the term of his sentence); *State v. Rutherford*, Champaign App. No. 06CA13, 2006-Ohio-5132, at ¶10 (finding *Hernandez* stands for the proposition that the offender cannot be re-sentenced if he has completed his prison term because the omission in the sentence the court imposed is then no longer subject to correction; thus, the correction must be made while the term of imprisonment continues and post-release sanctions are yet available). The same trial court that issued the order in the present case has also decided this issue the same in the past. See *State v. Ramey*, 136 Ohio Misc.2d 24, 2006-Ohio-885, at ¶14 (finding that *Hernandez* makes clear that, once a defendant has completed his or her prison sentence, there can be no further corrections or changes to the sentencing entry). Therefore, based upon all the above reasons, after a review of the motion, we find the state has failed to demonstrate a probability that the claimed errors did in fact occur.

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{¶13} We would further point out that, despite the fact that the state has chosen to file a motion for leave to appeal, it also mentions briefly, without any supporting argument, that it believes it may pursue the present appeal as a matter of right pursuant to R.C. 2953.08(B)(2), which allows the prosecutor to appeal any sentence "contrary to law." However, R.C. 2953.08(E) indicates that the prosecutor must file an appeal under R.C. 2953.08 within the time limits specified in App.R. 4(B), which the state did not do in the present case. In addition, here, it is clear the state is not appealing a sentence imposed by the trial court. Rather, the state is appealing an order of the court denying its motion to correct a judgment five years after the imposition of the original sentence. Thus, the state's appeal is not one that may be taken as a matter of right under R.C. 2953.08(B)(2).

{¶14} Accordingly, we deny the state's motion for leave to appeal.

Motion for leave to appeal denied.

PETREE and FRENCH, JJ., concur.
