

IN THE SUPREME COURT OF OHIO

07-0052

STATE OF OHIO :

Appellee :

-vs- :

CURTIS SIMPKINS :

Appellant :

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 87692

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT CURTIS SIMPKINS

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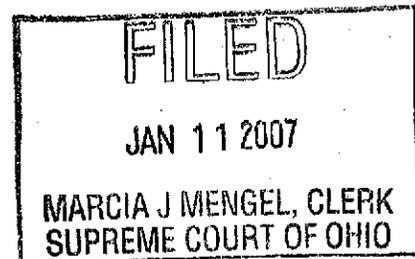


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**EXPLANATION OF WHY THIS FELONY CASE RAISES SUBSTANTIAL
CONSTITUTIONAL QUESTIONS AND IS A MATTER OF GREAT PUBLIC AND
GENERAL INTEREST**

The instant case presents an unresolved issue that this Court must address if it is to close the loop on its precedent regarding how trial courts are to address the problem of State prisoners who have been sentenced to post-S.B. 2 terms of imprisonment without having had post-release control included in the sentence.

This Court's jurisprudence regarding this issue has been ongoing since 2000 when, in *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171, this Court held that post-release control did not violate the separation-of-powers doctrine because R.C. 2967.28 provided that the Adult Parole Authority (APA) was exercising post-release control pursuant to a judicially mandated sentence. At the same time, *Woods* made clear that the APA's power to supervise flowed from the imposition of post-release control by the trial judge. *Id.*, at 512-13.

Because, prior to *Woods*, every district court of appeals had held that post-release control was unconstitutional, there were a great number of sentences imposed prior to *Woods* that did not include post-release control. While *Woods* settled the issue of the constitutionality of post-release control, it did not address the issue of what to do with those sentences that had failed to include post-release control at sentencing.

In *Stae v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, this Court began to address how the failure to include post-release control at sentencing affected the efficacy of the original sentence. *Jordan* was a consolidated case in which sentencing journal entries stated that post-release control was part of the sentence even though the trial court did not mention post-release control at sentencing. This Court held that, in such situations, an essential component of the statutorily-mandated sentence, i.e., post-release control, was missing and that the sentence was

thus void. The Court's remedy in *Jordan* was to vacate the sentences imposed and remand for sentencing de novo.

While *Jordan* thus addressed the issue of post-release-control-deficient sentences that were on direct appeal, it did not address what should happen to those persons who were still in prison serving sentences that did not include post-release control and whose sentences were no longer (or had never been) on direct appeal. Despite *Woods*, the APA was systematically subjecting such persons to post-release control as the APA saw fit. This Court ended this practice by the APA when, in *Hernandez v. Kelly* 108 Ohio St.3d 395, 2006-Ohio-126,, this Court granted habeas relief to a prisoner who had been subjected to post-release control after being released from prison despite post-release control never having been included at sentencing.

Hernandez created a firestorm within the APA as hundreds of persons who had already served their prison terms and were being subjected to post-release control were then promptly released from post-release control because their sentences had not included post-release control in the first place.

The question for the Department of Rehabilitation and Correction and for prosecutors at that point became what to do with those persons still in prison and whose sentences did not include post-release control. It was into this lot that Mr. Simpkins, the Defendant-Appellant herein, fell. As it did with numerous others in the wake of *Hernandez*, the State of Ohio brought Mr. Simpkins back to court just months before he finished serving a lengthy prison term. Relying on *Jordan's* holding that prison-terms-without-post-release-control are void, the State then asked the trial court to sentence the defendant to the same prison term as previously imposed, but with the addition of post-release control.

The State contends that, because Mr. Simpkins' first sentence was a nullity, this return to the trial court years after the defendant has entered prison is, as a matter of law, the initial sentencing. The logical extension of the State's argument is that the second sentencing would then not violate Fifth Amendment prohibitions regarding multiple or successive punishment for the same offense – because there has only been one sentencing.

Whether this years-after-the-fact “sentencing de novo” is legal is precisely the issue presented in this case. From the perspective of the State, the sentence must include post-release control and thus the original sentence is null and void – there never has been a valid sentencing until the defendant's return to court. From the perspective of the defense, the prisoner has developed a reasonable expectation that his or her sentence is about to end without inclusion of post-release control; including post-release control just prior to the defendant's leaving prison is, in reality, adding additional punishment to that already imposed. Further, from the defense perspective, the State should be precluded from reaping the benefits of post-release control being imposed when the State never appealed the original sentence at the time of its imposition.

In *State ex rel. Cruzado v. Zaleksi* (2006), 111 Ohio St.3d 353, 2006-Ohio-5795, an action in which the defendant sought a writ of prohibition, this Court held that a trial court does not patently and unambiguously lack jurisdiction to conduct an after-the-fact sentencing. *Id.* at 359, ¶ 32. However, *Cruzado* also recognized that there are times when a writ of prohibition may not issue (because jurisdiction is not patently and unambiguously lacking) even though the trial court's jurisdiction may ultimately be successfully challenged on direct appeal. *Id.*, at 356, ¶ 16 (direct appeal may lie even where writ of prohibition will not issue). Thus, whether *Cruzado's* conclusions regarding jurisdiction will apply to this direct appeal is not clear.

Moreover, as discussed *infra*, *Cruzado* has not addressed any non-jurisdictional issues, including whether an after-the-fact resentencing violates the defendant's constitutional rights and whether the State should be collaterally estopped from seeking a sentencing *de novo* when it failed to timely appeal the sentence originally. In the end, *Cruzado* does not resolve this case.

If the State's argument that the prior sentencing is null and void is taken to its logical conclusion, then, not only have hundreds of prisoners never been sentenced, they also have never been convicted, because an order of conviction is not entered until sentencing. Thus, the time for post-conviction relief and even for the taking of an initial appeal has never begun to run – there never has been entered a final appealable order. In the end, the State's position opens a Pandora's box that could cause defendants to re-open cases dating back to 1996, the advent of S.B. 2 -- just as the State has done to Mr. Simpkins. However, if defendants can re-open these cases, the ramifications will be far greater than resentencing – new issues can be raised on appeal, petitions for post-conviction relief claiming ineffective assistance of trial counsel can be timely filed, etc.

Recently, the General Assembly entered into the effort to fix this problem by enacting R.C. 2929.191. Under R.C. 2929.191, trial courts may now add post-release control to the previously-imposed sentence of a State prisoner via a *nunc pro tunc* entry entered after a hearing. The General Assembly has intended that this new legislation solves the ongoing problem of ensuring that current prisoners whose sentence did not include post-release control will now have post-release control added without resort to the sentencing *de novo* approach of the instant case.

However, the constitutionality of R.C. 2929.191 has yet to be resolved. This Court's decision in the upcoming case of *State v. Bezak*, Case No. 2005-0338, in which the Eighth District Court of Appeals remanded a case to the trial court with the express instruction to simply add post-release control to the previously imposed term of imprisonment without resort to a

sentencing de novo, may well be a precursor to the ultimate decision on the constitutionality of R.C. 2929.191, *Cruzado* has already indicated that the “nunc pro tunc” nature of the legislative remedy would likely be held invalid. *Id.*, at par. 19.

Because R.C. 2929.191, may well be found to be unconstitutional, the State may have to continue to rely on its sentencing de novo theory to accomplish the goal of imposing post-release control on prisoners prior to their release. For this reason, this Court should accept the instant case. This Court’s decision in this case will then complement its decision in *Bezak* and give clear direction as to whether the State can accomplish years later what the trial courts failed to do originally – include post-release control.

At stake are the constitutional rights of the defendant on the one hand, and the right of Ohio’s citizenry to be assured that prisoners are being supervised upon their release, on the other. In this regard, *Cruzado* specifically left for another day this Court’s determination as to whether after-the-fact resentencings violate the Fifth Amendment on the basis of multiple/successive punishment, nor did this Court address the due process considerations attendant to a defendant’s expectation of privacy in the finality of the originally-imposed sentence.

It is respectfully submitted that the issues left for another day by *Cruzado* should now be decided. Accordingly, this Court’s limited resources will be well spent by accepting this case.

STATEMENT OF THE CASE AND FACTS

On May 28, 1998, Defendant-Appellant, Curtis Simpkins, pled guilty to two counts of rape (post S.B. 2), which were first degree felonies punishable by terms of imprisonment of between three and ten years. He also pled guilty to one count of gross sexual imposition, a third-degree felony punishable by a term of imprisonment of between one and five years.

On June 11, 1998, in an action journalized on June 12, 1998, the Cuyahoga County Court

of Common Pleas sentenced Mr. Simpkins to eight years on each of the rape counts and three years on the gross sexual imposition count. These sentences were ordered to be served concurrently, for an aggregate sentence of eight years. At this sentencing hearing, the court failed to inform Mr. Simpkins that he was subject to post release control upon his release from prison.

More than seven years later, as Mr. Simpkins was close to leaving prison, the State of Ohio moved for resentencing. At that hearing, held on December 28, 2005, the trial court sentenced Mr. Simpkins to the same eight-year term but added the requirement that Mr. Simpkins would be subject to post release control upon release from prison.

The Eighth District rejected the defendant's arguments on appeal that the trial court's second sentencing was in error. (Opinion below, at 3-4).

This timely appeal follows.

ARGUMENT

Proposition of Law I:

A defendant who has been sentenced to a term of imprisonment that does not include post-release control may not be sentenced anew in order to add post-release control unless the State has challenged the failure to include post-release control in a timely direct appeal.

The trial court improperly sentenced Mr. Simpkins so as to include post-release control. In *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, this Court recognized that "after-the-fact" resentencing was an inappropriate means of imposing post-release control upon those whose sentences were no longer on appeal and for whom post-release control had not been originally included in the sentence: "*Jordan* notwithstanding, an after-the-fact notification of Hernandez, who has served his seven-year sentence, would circumvent the objective behind R.C.

2929.14(F) and 2967.28 to notify defendants of the imposition of postrelease control at the time of their sentencing.” *Id.*, at ¶ 28.

Here, the trial court in 2005 did exactly what this Court recognized a trial court should not do---hold an “after-the-fact” resentencing. *Id.* at Par. 28. As this Court recognized, such a resentencing “would circumvent the objective behind R.C. 2929.14(F) and 2967.28 to notify defendants of the imposition of post-release control at the time of their sentencing.” While this Court noted that Mr. Hernandez had completed his prison term, nothing in the opinion limits the holding to that fact. *Id.*

Because the trial court’s action in Mr. Simpkins’ case violated the clear holding in *Hernandez*, this Court should reverse the judgment imposing post-release control.

The trial court’s original sentences were, at worst, improper exercises of jurisdiction, the legality of which could only be challenged on direct appeal.

Hernandez followed a line of cases in which this Court has limited the ability of trial courts to “correct” judgment entries except on direct appeal. When the trial court sentenced Mr. Simpkins in 1998, it had jurisdiction over the parties and the subject matter, so any error was merely an improper exercise of jurisdiction. “Once a tribunal has jurisdiction over both the subject matter of an action and the parties to it, the right to hear and determine is perfect; and the decision of every questions thereafter arising is but the exercise of the jurisdiction thus conferred.” *Pratts v. Hurley*, 102 Ohio St.3d 81, 84 2004-Ohio-1980, at ¶ 12 (internal citations and punctuation removed). This distinction between subject matter jurisdiction and the exercise of jurisdiction applies even when sentences are “void.” Thus *Pratts* having made this distinction in a case in which there was a violation of R.C. 2945.06 relating to jury waivers, even though this Court’s earlier caselaw established that violations of R.C. 2945.06 rendered the sentence

“void.” Compare *Pratts* with *State v. Green* (1998), 81 Ohio St.3d 100, 105 (violation of R.C. 2945.06 renders sentence void).

Because the trial court unquestionably had jurisdiction over the parties and the subject matter when it sentenced Mr. Simpkins in 1998, the questions of whether the trial court should have included post-release control in the sentence only concerns the exercise of jurisdiction. And a challenge to the improper exercise of jurisdiction can only be raised on direct appeal. *Pratts* at ¶ 24. The State failed to take a direct appeal, and thus lost its chance to have post-release control included in the sentence. Final judgments are entitled to be final:

Our holding today underscores the importance of finality of judgments of conviction. Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled between the parties.

State v. Szefcyk (1996), 77 Ohio St.3d 93, 95 (internal citations and quotation marks omitted).

The Law of the Case

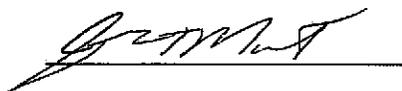
This Court should also hold that procedural bars, in this case the law-of-the-case doctrine, prevents the imposition of post-release control. The Eighth District has previously held that the law-of-the-case doctrine can serve to bar the imposition of post-release control. *McGrath v. Ohio Adult Parole Authority*, Cuyahoga App. No. 84362, 2004-Ohio-6114. Once again, although the State is dissatisfied with the sentence, the State failed to appeal the sentence – and thus influence the “law of the case” – when it had the opportunity, almost eight years ago. No rule or statute permits the State to use a resentencing hearing as a substitute for a timely appeal.

Constitutional Objections

Finally, the after-the-fact imposition of post-release control, particularly years after the fact, violated Mr. Simpkins constitutional protection against multiple punishments, as protected by the Fifth Amendment, and his constitutional right under the Fourteenth Amendment to due

process of law in that he had an expectation of finality in a sentence that was more than 90% completed at the time of the second sentencing. See generally, *United States v. Difrancesco* (1980), 449 U.S. 117.

Respectfully submitted,



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SERVICE

A copy of the foregoing memorandum in support of jurisdiction was sent via U.S. Mail to Hon. William D. Mason, County Prosecutor, Office of the Cuyahoga County Prosecutor, Justice Center, 9^h Floor, 1200 Ontario Street. Cleveland, Ohio 44113, this 11th day of January, 2007.



JOHN T. MARTIN, ESQ.

NOV 27 2006

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87692

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CURTIS SIMPKINS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-358419

BEFORE: Celebrezze, J., Dyke, A.J., and Rocco, J.

RELEASED: November 16, 2006

JOURNALIZED:

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**FILED AND JOURNALIZED
PER APP. R. 22(E)**

NOV 27 2006

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: Jm DEP.**

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

NOV 16 2006

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: Jm DEP.**

CA06087692

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

FRANK D. CELEBREZZE, JR., J.:

Appellant, Curtis Simpkins, appeals the trial court's resentencing order, which added post-release control to his prison term. Upon review of the applicable law and for the reasons set forth below, we affirm.

On May 21, 1998, appellant pleaded guilty to two counts of rape, in violation of R.C. 2907.02, felonies of the first degree. He also pleaded guilty to one count of gross sexual imposition, in violation of R.C. 2907.05, a felony of the third degree. The record demonstrates that, at the time he entered his guilty pleas, appellant was informed and understood that he would be subjected to five years of post-release control.

On June 11, 1998, a sentencing hearing was held, and appellant was sentenced to eight years incarceration on each of the rape counts and three years on the single count of gross sexual imposition. Those terms of incarceration were ordered to run concurrent to one another for an aggregate sentence of eight years, with credit for time served. The trial court failed to mention at the hearing that appellant would be subjected to post-release control upon his release from prison. The journal entry of the June 11th hearing also did not mention post-release control. Appellant was ordered into the custody of the state to commence his prison sentence.

In December 2005, prior to appellant's scheduled release from prison, the state filed a motion for resentencing, asserting that appellant's original sentence was void for failure to impose a term of post-release control. A hearing on this motion was held, and the trial court agreed and resentenced appellant to the identical eight-year term it had previously ordered, but added a term of five years of post-release control. An entry was journalized reflecting the resentencing. Appellant's prison term had not yet expired prior to the trial court's resentencing.

Appellant now appeals the resentence imposed by the trial court asserting one assignment of error:

"I. The trial court erred when it resentenced Mr. Simpkins so as to add post-release control to a sentence that had nearly been completely served."

Appellant's argument centers on the Ohio Supreme Court's ruling in *Hernandez v. Kelley*, 108 Ohio St.3d 395, 2006-Ohio-126; however, this appeal is directly in line with *State v. Rutherford*, Champaign App. No. 06CA13, 2006-Ohio-5132, a recent case decided by the Second Appellate District, which distinguished this issue from *Hernandez* as follows:

"In *Hernandez*, the defendant sought a writ of habeas corpus requiring his release from a term of imprisonment ordered by the Adult Parole Authority (APA) upon its finding that the defendant had violated a post-release control

sanction ordered by the APA. The defendant contended that his detention was illegal because the trial court that imposed his sentence had not included the potential of a post-release control sanction in its sentence. ***

“Unlike *Hernandez*, the present case is before us not on a petition for a writ of habeas corpus, but on a direct appeal from a judgment in which the court attempted to correct its prior failure to impose a post-release control sanction by resentencing Defendant-Appellant to the same punishments, but including the sanction.” *Rutherford*, supra at 1-2.

As was the case in *Rutherford*, the trial court here similarly attempted to correct its failure to impose post-release control at sentencing by resentencing appellant. Appellant argues that such resentencing amounts to an “after-the-fact” sanction and is not permitted under *Hernandez*. This same argument was rejected by the court in *Rutherford*. We concur with the analysis and ruling in *Rutherford* and reject appellant’s argument.

The trial court retained its jurisdiction to resentence appellant. R.C. 2967.28 mandates that a trial court impose a term of post-release control for the offenses to which appellant pleaded guilty; therefore, the trial court must impose post-release control orally at the sentencing hearing and transcribe such imposition in the court’s journal entry. Failure to do so renders the sentence void. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864.

Because appellant's 1998 sentence was void, resentencing was a proper remedy to correct the trial court's original error of omission. *Id.*; *State v. Beasley* (1984), 14 Ohio St.3d 74, 471 N.E.2d 774.

Furthermore, the trial court did not err in resentencing appellant when it did. As the court in *Rutherford* explained, "[i]n *Hernandez*, the Supreme Court emphasized that an 'after-the-fact' sanction, one imposed after the offender has completed his term of imprisonment, 'would totally frustrate the purpose behind [statutory] notification, which is to make the offender aware before a violation of the specific prison term that he or she will face for a violation.' *Id.* at 306. The court drew an analogy to a community control sanction to make its point, but as to both, it found a like requirement: the offender cannot be resentenced if he has completed his prison term because the omission in the sentence the court imposed is then no longer subject to correction. The correction must be made *while the term of imprisonment continues and post-release sanctions are yet available.*" *Rutherford*, *supra* at 5-6. (Emphasis added.)

Since the trial court resentenced appellant prior to his release from prison, the correction was clearly made while the term of his imprisonment continued and post-release sanctions were still available. Appellant's assignment of error is without merit and this appeal fails.

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 common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


FRANK D. CELEBREZZE, JR., JUDGE

ANN DYKE, A.J., and
KENNETH A. ROCCO, J., CONCUR