

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee

v.

JAMES C. BLOOMER,

Defendant-Appellant

07-0693

Case No. _____

On Discretionary Appeal from the
Fulton County Court of Appeals,
Sixth Appellate District,
Case No. 06FU12

JAMES C. BLOOMER'S MEMORANDUM IN SUPPORT OF JURISDICTION

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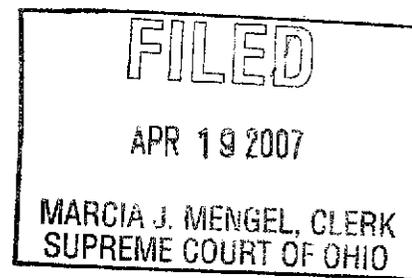


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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This Case should take this case and hold it for the decision in State v. Simpkins, Case No. 2007-52, discretionary appeal granted, ___ Ohio St.3d ___, 2007-Ohio-1266. Both cases present a procedurally clean version of the issue this Court left open in State ex rel. Cruzado v. Zaleski, 111 Ohio St.3d 353, 2006-Ohio-5795—can a judgment that does not include postrelease control be collaterally challenged?

This case is procedurally clean because Mr. Bloomer timely appealed the trial court’s order that added postrelease control to his sentence years after he was sentenced to prison and only shortly before the expiration of his term. He also timely appeals to this Court from the court of appeals decision.

This case is important because, as the Department of Rehabilitation and Correction has argued in other cases, thousands of inmates have sentences that do not include postrelease control. See, e.g., Watkins et al. v. Collins, Case No. 06-1634, Return of Writ at p. 13. A case that affects thousands of criminal cases is almost by definition, a case of “public or great general interest.”

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

James C. Bloomer pleaded guilty to the illegal manufacture of drugs, a second degree felony. R.C. 2925.04(A). On November 26, 2002, the trial court sentenced him to four years in prison, but did not sentence him to postrelease control. The State did not exercise its right to appeal the sentence.

On May 23, 2006, the trial court held a resentencing hearing. Mr. Bloomer objected to the hearing and to the resentencing. The trial court added postrelease control to Mr. Bloomer's sentence. The entry was filed on May 25, 2006 and journalized on May 26, 2006. Mr. Bloomer filed a timely notice of appeal. On appeal, he challenged the trial court's authority to collaterally attack his judgment of conviction. The court of appeals affirmed. Apx. at A-1.

Proposition of Law:

A trial court may not add postrelease control to a sentence except as ordered by a court of appeals on a timely direct appeal.

I. Arguments in support of proposition of law:

A. The State waived its right to assert that postrelease control is part of Mr. Bloomer's sentence by failing to object at his initial sentencing hearing and by failing to appeal the original sentence.

The State did not object to Mr. Bloomer's postrelease control-free sentence. Challenges to criminal sentences must be raised in the trial court or they are waived. State v. Dudukovich, 2006-Ohio-1309, C. A. No. 05CA008729.¹

Dudukovich applies even to errors that render a sentence "void." That case held that the failure to object to a sentence that is illegal under Foster waives the error. *Id.* In State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court compared Foster error to the failure to include postrelease control:

The sentences of Foster, Quinones, and Adams were based on unconstitutional statutes. When a sentence is deemed void, the ordinary course is to vacate that sentence and remand to the trial court for a new sentencing hearing. See, e.g., State v. Jordan, 104 Ohio St.3d 21, 2004 Ohio 6085, 817 N.E.2d 864, ¶23 (where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is to resentence the offender). In fact, in the case of Quinones, the court of appeals, whose judgment we today affirm, vacated the sentence and remanded to the trial court for resentencing.

¹ This Court accepted State v. Payne, Case No. 2006-1245 and 2006-1383, to decide whether the holding in Dudukovich is correct. 111 Ohio St.3d 1407, 2006-Ohio-5083, 111 Ohio St.3d 1410, 2006-Ohio-5083.

Id. at ¶103 (footnote omitted).

B. Res judicata bars a trial court from adding postrelease control to a sentence after the time for appeal has run.

“Res Judicata” is not Latin for “the State wins.”

Res judicata is a doctrine that ensures finality and that applies to all litigants, even the State. Here, the State is barred by res judicata and collateral estoppel from challenging the sentence because the State failed to timely appeal Mr. Bloomer’s original sentence. The State did not appeal the postrelease-control-free sentence, so the judgment became final. Final judgments are 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 as between the parties.

State v. Szefcyk (1996), 77 Ohio St.3d 93, 95, internal citations and quotation marks omitted; State v. Riley, Summit App. No. 21852, 2004-Ohio-4880, at ¶27 (“an error must be brought to the attention of the trial court at a time when the error could have been corrected”). Further, a “valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” Kelm v. Kelm, 92 Ohio St.3d 223, 227, 2001-Ohio-168, quoting Grava v. Parkman Twp. (1995), 73 Ohio St.3d 379, syllabus; Hughes v. Calabrese, 95 Ohio St.3d 334, 2002-Ohio-2217 at ¶12; Pipe Fitters Union Local No. 392 v. Kokosing Constr. Co. (1998), 81 Ohio St. 3d 214, 218.

The Eighth District has held that procedural bars can prevent the imposition of postrelease control. That court specifically held that the law-of-the-case doctrine can serve to bar the imposition of postrelease control. McGrath v. Ohio Adult Parole Authority, 8th Dist. No. 84362, 2004-Ohio-6114. Here, although the State is dissatisfied with the sentence, the State failed to appeal the sentence when it had the opportunity, more than three years ago. No rule or statute permits the State to use a collateral attack as a substitute for a timely appeal.

C. Adding postrelease control after-the-fact violates the prohibition against double jeopardy.

Adding postrelease control to Mr. Bloomer's sentence violated his right to be free from double jeopardy because he had a legitimate expectation of finality in his original judgment entry. Mr. Bloomer's sentence became final when he was delivered to the Department of Rehabilitation and Correction. "Once a sentence has been executed, the trial court loses jurisdiction to amend or modify the sentence." State v. Carr, 167 Ohio App.3d 223, 2006-Ohio-3073, at ¶3. And once a defendant "is delivered to the institution where the sentence is to be served[,]" the sentence has been executed and the trial court loses jurisdiction. *Id.* Accordingly, Mr. Bloomer's sentence became final when he was originally delivered to the Department of Rehabilitation and Correction, and he gained a legitimate expectation of finality.

Once a defendant has a legitimate expectation of finality, the right to be free from double jeopardy prohibits the state from increasing a criminal sentence. United States v. DiFrancesco (1980), 449 U.S. 117, 137, 66 L. Ed.

2d 328, 101 S. Ct. 426 (defendant “has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired”).

Although, generally speaking, defendants do not have a legitimate expectation of finality in an illegal sentence, United States v. Arrellano-Rios (C.A. 9 1986), 799 F. 2d 520, 524, under Ohio law, a sentence is final once a defendant is delivered to the penal institution. And while the this Court previously ruled that an illegal sentence was void, State v. Beasley (1984), 14 Ohio St.3d 74, 75, this Court has subsequently made it clear that errors other than subject matter and personal jurisdiction render a sentence merely voidable, not void abinitio. Pratts v. Hurley, 102 Ohio St.3d 81, 84, 2004-Ohio-1980, at ¶22, State v. Filiaggi (1999), 86 Ohio St.3d 230, 240, 1999-Ohio-99, 714 N.E.2d 867. Further, in Hernandez, the this Court ruled that a defendant should be permitted to rely on a judgment entry that does not include postrelease control. An “after-the-fact” resentencing “circumvent[s] 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.” Hernandez, at ¶28, ¶31.

Mr. Bloomer’s sentence was final once it was imposed, he was delivered to prison, and the State’s time for appeal had run. He had a legitimate expectation of finality. Adding postrelease control to his sentence violated his right not to be placed in Double Jeopardy.

D. Once a defendant nears completion of his judicially-imposed but illegal punishment, he gains a legitimate expectation of finality as a matter of federal constitutional law so the State cannot increase the punishment.

The State could not add a criminal sanction to Mr. Bloomer's sentence because he had completed most of his judicially-imposed sentence. Generally, there is no double jeopardy violation when a defendant is resentenced on direct appeal because his first judicial punishment was illegal. State v. Jordan, 104 Ohio St.3d 21, 2004-Ohio-6085; State v. Beasley (1984), 14 Ohio St.3d 74. But "the power of a sentencing court to correct an invalid sentence must be subject to some temporal limit." Breest v. Helgemoe (C.A. 1, 1978), 579 F.2d 95, 101.

Neither Beasley nor Jordan addressed a case in which the defendant had completed or nearly completed his prison term. A defendant can gain an expectation of finality that triggers double jeopardy and due process protections as he approaches the completion of his sentence. U.S. v. Daddino (C.A. 7, 1993), 5 F.3d 262, 265 (where the sentence is final, and the defendant has served all or nearly all of his sentence, there is an expectancy of finality); Fifth and Fourteenth Amendments to the United States Constitution.

Mr. Bloomer's sentence became final as he approached completion of the punishment the trial court imposed. The State should have sought to "correct" Mr. Bloomer's sentence on a timely direct appeal of his prison sentence. R.C. 2953.08 (State permitted to appeal sentences that are "contrary to law"). It is too late to add punishment to Mr. Bloomer's sentence.

II. State ex rel. Cruzado v. Zaleski, 111 Ohio St.3d 353, 2006-Ohio-5795, does not preclude relief

A. State ex rel. Cruzado v. Zaleski, 111 Ohio St.3d 353, 2006-Ohio-5795, did not abrogate standard conceptions of waiver and res judicata.

While it is true that in State ex rel. Cruzado v. Zaleski, 111 Ohio St.3d 353, 2006-Ohio-5795, this Court held that a trial court has jurisdiction to resentence a defendant, the decision did not address whether such a claim would be barred by res judicata or waiver. In fact, this Court could not have addressed such claims because res judicata—unlike jurisdiction—cannot be challenged via extraordinary writ. See State ex rel. Nationwide Mut. Ins. Co. v. Henson, 96 Ohio St. 3d 33, 2002-Ohio-2851, at ¶11.

B. Cruzado expressly left constitutional challenges to postrelease control resentencing judgments to be heard on direct appeal.

Cruzado expressly left open the door to constitutional challenges to postrelease control resentencing hearings. Cruzado at ¶31 (“Double-jeopardy claims are not cognizable in prohibition”). Mr. Bloomer concedes that if the State had availed itself of its right to file a direct appeal of the original sentencing judgment, the State would be entitled to a reversal. But Mr. Bloomer makes his double jeopardy and due process claims based on the fact that the time for appeal expired years ago. Unlike Mr. DiFrancesco, whose sentence was increased on appeal, United States v. DiFrancesco (1980), 449 U.S. 117, the State here waited years before changing Mr. Bloomer’s sentence in a collateral action.

C. Cruzado was wrongly decided on the issue of the trial court’s jurisdiction to conduct a resentencing hearing.

Cruzado was wrongly decided because it departs from a line of cases in which the Supreme Court of Ohio limited the ability of trial courts to “correct” judgment entries except on direct appeal. When the trial court originally sentenced Mr. Bloomer, 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 question 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).

Because the trial court unquestionably had jurisdiction over the parties and the subject matter when it originally sentenced Mr. Bloomer, the question of whether it should have included postrelease control in the sentence concerns only the exercise of jurisdiction. A challenge to the improper exercise of jurisdiction can only be raised on direct appeal. Pratts at ¶24.

The exercise-of-jurisdiction rule applies even if the sentence is “void.” So, regardless of whether Mr. Bloomer’s original sentence was “void” under State v. Beasley (1984), 14 Ohio St.3d 74, the remedy to correct the sentence is a timely direct appeal, the time for which expired long ago. Like nearly all other challenges to a final judgment in a criminal case, challenges to “void” sentences may be raised only on direct appeal. Compare State v. Green (1998), 81 Ohio St.3d 100, 105 (violation of R.C. 2945.06 renders sentence “void”), to

Pratts v. Hurley, 102 Ohio St.3d 81, 2004-Ohio-1980, at ¶32 (violations of R.C. 2945.06 must be raised on direct appeal).

III. Am. Sub. H.B. 137 does not confer jurisdiction to add postrelease control after-the-fact.

A. H.B. 137 violates the Single Subject Rule

House Bill 137 purports to give trial courts the authority to add postrelease control after a sentence has been executed and to give the Adult Parole Authority the power to impose postrelease control without a judicial order. Before the postrelease control provisions were added, the bill concerned only measures regarding the sealing of juvenile court records.² The adult postrelease control provisions were added only shortly before passage.³

The Ohio Constitution requires that bills address only a single subject. Section 15(D), Article II of the Ohio Constitution. Violations of that rule can lead to the invalidation of the act:

We hold that a manifestly gross and fraudulent violation of the one-subject provision contained in Section 15(D), Article II of the Ohio Constitution will cause an enactment to be invalidated. Since the one-subject provision is capable of invalidating an enactment, it cannot be considered merely directory in nature.

In re Nowak, 104 Ohio St. 3d 466, 2004-Ohio-677, at ¶54.

Since postrelease control is limited to people convicted of crimes, not to the sealing of juvenile records, it violates the single subject rule.

² http://www.legislature.state.oh.us/bills.cfm?ID=126_HB_137_I.

³ http://www.legislature.state.oh.us/bills.cfm?ID=126_HB_137.

B. H.B. 137 violates the Double Jeopardy Clause of the Fifth Amendment.

As explained in the above, increasing the punishment of a defendant after the time for appeal has run violates a defendant's right to be free from double jeopardy under the Fifth and Fourteenth Amendments to the United States Constitution. To the extent that H.B. 137 permits adding punishment to a sentence after a defendant is incarcerated and after the time for appeal has run, the bill is unconstitutional.

C. H.B. 137 renders postrelease control unconstitutional because it permits the executive to impose the sanction without a court order.

Postrelease control survived its initial separation of powers challenge only because a court authorized the sanction before the executive could impose it on a defendant. Woods v. Telb (2000), 89 Ohio St. 3d 504, 512 ("in contrast to the bad-time statute, post-release control is part of the original judicially imposed sentence . . . [;] there is nothing in the Parole Board's discretionary ability to impose post-release control sanctions that impedes the judiciary's ability to impose a sentence").

However, Am. Sub. H.B. 137 now authorizes the executive branch to impose the sanction without a court order. R.C. 2929.14(F)(1) ("the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender"). Because postrelease control no longer requires court authorization, and because R.C. 2929.14(F)(1)

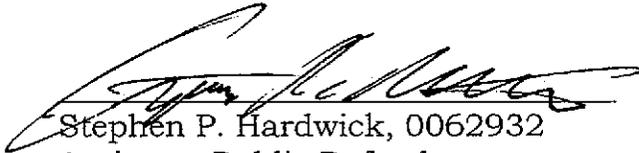
now "impedes the judiciary's ability to impose a sentence[,]" postrelease control can no longer survive a separation of powers challenge.

CONCLUSION

This Court should accept jurisdiction, reverse the decision of the court of appeals, and vacate Mr. Bloomer's term of postrelease control.

Respectfully submitted,

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Counsel for James C. Bloomer

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **JAMES C. BLOOMER'S MEMORANDUM IN SUPPORT OF JURISDICTION** was sent via regular U.S. mail, postage prepaid to the office of John H. Whitmore, Assistant Fulton County Prosecuting Attorney, 123 Courthouse Plaza, Wauseon, Ohio 43567 this 19th day of April, 2007.



Stephen P. Hardwick #0062932
Assistant Public Defender

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:
	: Case No. _____
Plaintiff-Appellee	:
	:
v.	: On Discretionary Appeal from the
	: Fulton County Court of Appeals,
JAMES C. BLOOMER,	: Sixth Appellate District,
	: Case No. 06FU12
Defendant-Appellant	:

APPENDIX TO

JAMES C. BLOOMER'S MEMORANDUM IN SUPPORT OF JURISDICTION

JOURNALIZED 3/9/07
VOL 9 PG 1583

FILED
FULTON COUNTY COURT OF APPEALS
MAR 9 2007
May Hagan CLERK

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

State of Ohio

Court of Appeals No. F-06-012

Appellee

Trial Court No. 02CR000044

v.

James C. Bloomer

DECISION AND JUDGMENT ENTRY

Appellant

Decided: March 9, 2007

* * * * *

Roger D. Nagel, Fulton County Prosecuting Attorney, and
Jon H. Whitmore, Assistant Prosecuting Attorney, for appellee.

David H. Bodiker, State Public Defender, and
Stephen P. Hardwick, Assistant Public Defender for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Fulton County Court of Common Pleas that sentenced appellant to four years incarceration on his conviction of one count of illegal manufacture of drugs and three years of mandatory post-release control. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} Appellant sets forth a single assignment of error:

1.

{¶ 3} "The trial court erred by resentencing Mr. Bloomer pursuant to an 'after-the-fact' hearing in violation of his right to due process and his right to be free from double jeopardy and ex post facto legislation. U.S. Const. Art. I, § 10, Fifth and Fourteenth Amendments to the U.S. Const.; R.C. 2953.08."

{¶ 4} Appellant was convicted of one count of illegal manufacture of drugs in violation of R.C. 2925.04(A), a second-degree felony, after entering a plea of guilty to the charge. On November 22, 2002, the trial court sentenced appellant to four years incarceration. The mandatory three-year period of post-release control for a conviction of a second-degree felony was set forth in the "Notice pursuant to R.C. 2929.19(B)(3)" and on the plea form, both of which appellant signed, but the trial court did not address the issue of post-release control in its sentencing entry. Accordingly, upon the state's motion, a resentencing hearing was held on May 23, 2006, before appellant completed his sentence. The hearing was held in order to notify appellant that he would be subject to post-release control upon his release from prison. Appellant's sentence was not modified in any other respect.

{¶ 5} Appellant argues that the trial court's "after-the-fact" resentencing violated his right to due process and subjected him to double jeopardy.

{¶ 6} While a trial court lacks authority to reconsider its own valid final judgment in a criminal case, *State ex rel. White v. Junkin* (1997), 80 Ohio St.3d 335, 338, this rule is subject to two narrow exceptions which provide the trial court with continuing jurisdiction. *State v. Garretson* (2000), 140 Ohio App.3d 554, 559. First, a trial court

can correct clerical errors in judgments. *Id.*, citing Crim.R. 36. Second, a trial court may correct a void sentencing order. *Id.*, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 75. The case before us falls within the second exception.

{¶ 7} As noted above, the trial court did not impose the mandatory three-year term of post-release control required by R.C. 2967.28(B)(2) for a second-degree felony conviction. Therefore, appellant's sentence was void. "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. Further, the Supreme Court of Ohio has held that "where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is * * * to resentence the defendant." *State v. Cruzado*, 111 Ohio St.3d 353, 2006-Ohio-5795, ¶ 20, citing *State v. Jordan*, 104 Ohio St.3d 21, 2004-6085, ¶ 23. Resentencing would not be an option in this case if appellant's journalized sentence had expired by the time the omission was discovered. *Cruzado*, ¶ 22, citing *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126. But because appellant's sentence had not been completed when he was resentenced, the trial court was authorized to correct the invalid sentence to include the appropriate mandatory term of post-release control. *Cruzado*, supra, ¶ 28.

{¶ 8} The Supreme Court noted in *Cruzado* at ¶ 20 that, following its decision in *Hernandez*, supra, "the General Assembly amended R.C. 2967.28 to provide that when a trial court imposes a sentence that should include a mandatory term of post release control after the July 11, 2006 effective date of the amendment, 'the failure of a

sentencing court to notify the offender * * * of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under this division." R.C. 2967.28(B).

Cruzado continues: "For those cases in which an offender was sentenced before the July 11, 2006 amendment and was not notified of mandatory post release control or in which there was not a statement regarding post release control in the court's journal or sentence, R.C. 2929.191 authorizes the sentencing court – before the offender is released from prison – to '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.'"

{¶ 9} Appellant herein was sentenced before July 11, 2006. It is clear that the trial court in this case followed the procedure set forth in R.C. 2929.191 and acknowledged in *Cruzado*, supra. Further, contrary to appellant's claim, a trial court's correction of a statutorily incorrect sentence does not violate an appellant's right to be free from double jeopardy. *Beasley*, supra at 76.

{¶ 10} Based on the foregoing, we find that the trial court was authorized to correct appellant's invalid sentence that had not expired and, accordingly, appellant's sole assignment of error is not well-taken.

{¶ 11} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant

to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Fulton County.

JUDGMENT AFFIRMED.

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

Peter M. Handwork, J.

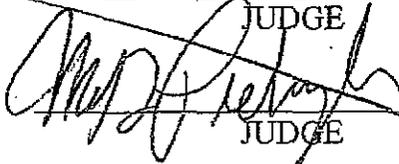
Mark L. Pietrykowski, P.J.

Thomas J. Osowik, J.

CONCUR.



JUDGE



JUDGE



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>.