

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 2007-0693
Plaintiff-Appellee, : On Discretionary Appeal from
-vs- : The Fulton County Court of
 : Appeals, Sixth Appellate District,
JAMES C. BLOOMER, : Case No. 06FU12
 :
Defendant-Appellant. :

STATE'S MEMORANDUM IN OPPOSITION OF JURISDICTION

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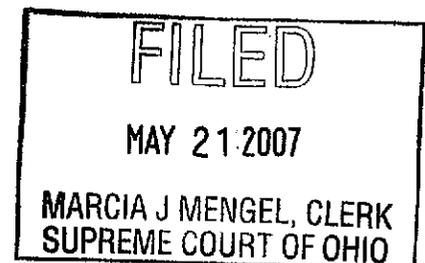


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

In view of this Court's recent and manifest reaffirmation in *State ex rel. Cruzado v. Zaleski* (2006), 111 Ohio St.3d 353 of a principle first evinced in *State v. Beasley* (1984), 14 Ohio St.3d 74, the Appellant's pursuit of a contrary holding now verges on the quixotic. The State in the present case is perplexed as to what issue concerning the correction of void judgments this Court "left open," as the Appellant believes. Citing *Beasley*, this Court in *Cruzado* observed: "Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." *Cruzado* at 357. Moreover, as initially recognized in *State v. Jordan* (2004), 104 Ohio St.3d 21, "where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is to resentence the defendant." *Id.* As in *Cruzado*, resentencing of the Appellant in the instant case was accomplished before his journalized prison term had expired.

Furthermore, the instant case may be viewed as procedurally similar to that of *State v. Ramey*, Franklin App. No. 06AP-245, 2006- Ohio-6429, one in which this Court declined jurisdiction recently. *State v. Ramey*, Case No. 2007-0125, appeal not accepted for review, ___ Ohio St.3d ___, 2007- Ohio- 1986.

Given all of the preceding, the State respectfully contends that this case has now devolved merely into an opportunity to tilt at windmills, rather than one of public or great general interest, or involving a substantial constitutional question.

STATEMENT OF THE CASE AND FACTS

On September 19, 2002, the Appellant pled to and was found guilty of Count II of an original six count indictment, Illegal Manufacture of Drugs, in violation of O.R.C. §2925.04(A), a felony of the second degree. The Appellant was sentenced on November 22, 2002 to a mandatory prison term of four (4) years at the Ohio Department of Rehabilitation and Correction. While 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, the trial court did not specify in its sentencing entry that the Appellant would be subject to mandatory post release control. Upon the State's Motion, a resentencing hearing was held on May 23, 2006. The Appellant had opposed the State's Motion. The purpose of this hearing was, in accordance with the Ohio Supreme Court's ruling in *Hernandez v. Kelly*, to notify the Appellant that he would be subject to post release control upon his release from incarceration. No other alterations or modifications of the original sentence imposed in 2002 were made. Appellant timely filed his notice of appeal of his resentencing. On appeal, he posited that the trial court had erred by resentencing him pursuant to an "after-the-fact" hearing in violation of his right to be free from double jeopardy and ex post facto legislation. The court of appeals deemed his single assignment of error as not well-taken and affirmed the trial court's resentencing.

ARGUMENT

Response to Propositions of Law:

A trial court may remedy a previously rendered void judgment by resentencing a defendant before his journalized prison term has expired without violating his right to be free from double jeopardy.

I. Arguments in support of proposition of law

A. Judgments rendered in disregard of statutory requirements are nullities or void.

As noted above, this Court reaffirmed in *Cruzado* the principle first recognized in *Beasley* that any attempt by a court to disregard a statutory requirement when sentencing renders that attempt a nullity or void. At the risk of sounding both flippant as well as redundant, the state notes that, to paraphrase a frequent misquotation of the writer Gertrude Stein, a nullity is a nullity is a nullity. A void judgment is not improved by, nor gains legitimacy through the mere passage of time. Consequently, *res judicata*, notwithstanding the Appellant's wry assertion to the contrary, is inapplicable to the present case.

B. The statutorily mandated requirement of notification of post-release control may be effectuated at a resentencing hearing and corresponding judgment entry.

Relying upon its earlier holding in *State v. Jordan*, 104 Ohio St.3d 21, 2004-6085, this Court reaffirmed in *Cruzado* that "where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is ...to resentence the defendant." *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d

353, 2006-Ohio-5795. Additionally, when a defendant's sentence has not been completed, a trial court is authorized to correct the invalid sentence, so as to include an appropriate mandatory term of post-release control. *Id.*

As noted above, this is what was done in the instant appeal. Accordingly, the Appellate Court's affirmation below of Appellant's resentencing is not in conflict with this Court's holdings in *Cruzado*.

C. Resentencing before a defendant's term of incarceration does not violate his or her right to be free from double jeopardy.

The Appellant propounds that resentencing violates his right to be free from double jeopardy. He cites to *State v. Carr*, 167 Ohio App.3d 223, 2006-Ohio-3073 in support of his position. However, the facts and circumstances surrounding the sentencing entry in *Carr* make it easily distinguishable from the present case. In *Carr*, the trial judge endeavored to modify his previous sentencing entry for the purpose of eliminating an ambiguity concerning whether sentences for misdemeanor offenses were to be served consecutively or concurrently. *Id.* Unlike in the present case, the trial court's sentencing entry in *Carr* was not void, as it had not disregarded a statutory *requirement*. As such, the Appellant's unflagging efforts to characterize the sentencing court in this case as having lost jurisdiction must go for naught. Here again, the *Beasley* decision holds otherwise: "[T]he trial court's correction of a statutorily incorrect sentence did not violate appellant's right to be free from double jeopardy." *Beasley* at 75-76.

CONCLUSION

For all of the foregoing reasons, this case does not embody a matter of great general or public interest, nor a substantial constitutional question. Therefore, the State respectfully requests that this Court decline jurisdiction in the instant case.

Respectfully submitted,

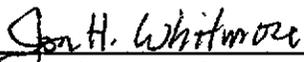
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CERTIFICATE OF SERVICE

This is to certify that on May 16, 2007 a copy of the foregoing was sent by regular U.S. mail directed to: Stephen P. Hardwick, Assistant Public Defender and Attorney for Defendant, Ohio Public Defender's Office, 8 East Long Street, 11th Floor, Columbus, Ohio 43215.



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