

IN THE SUPREME COURT OF OHIO  
2007

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

RICARDO E. JACKSON,

Defendant-Appellant.

Case No. 07-0854

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

Court of Appeals  
Case No. 06AP-631

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

RON O'BRIEN 0017245  
Franklin County Prosecuting Attorney  
373 South High Street-13<sup>th</sup> Fl.  
Columbus, Ohio 43215  
614/462-3555

And

SHERYL L. PRICHARD 0064868  
(Counsel of Record)  
Assistant Prosecuting Attorney

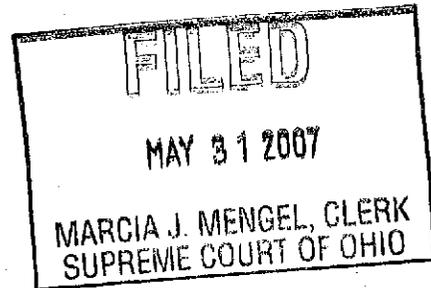
COUNSEL FOR PLAINTIFF-APPELLEE

YEURA R. VENTERS 0014879  
Franklin County Public Defender  
373 South High Street-12<sup>th</sup> Fl.  
Columbus, Ohio 43215  
614/462-3960

and

ALLEN V. ADAIR 0014851  
(Counsel of Record)  
Assistant Public Defender

COUNSEL FOR DEFENDANT-  
APPELLANT



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## **EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION**

In affirming the trial court's correction of defendant's void sentence, the Tenth District correctly applied well-settled law. Defendant's proposition of law therefore deserves no further review by this Court.

The instant case does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. Am. Sub. H.B. 137, effective July 11, 2006, has settled the issue raised by appellant. R.C. 2929.191, enacted as part of Am. Sub. H.B. 137, effective July 11, 2006, states:

(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 [F-1, F-2, F-3 with harm, felony sex offense] 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.

\*\*\*

(C) On and after the effective date of this section, a court that wishes to prepare and issues a correction to a judgment of conviction of a type described in division (A)(1) and (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division.

Therefore, the Court may hold a re-sentencing hearing where a defendant is still in prison and notify defendant about PRC prior to preparing a nunc pro tunc entry to add post-release control. Furthermore, this court declined review of another Tenth District

Court of Appeals case dealing with this issue, *State v. Ramey*, Case No. 2007-01255. It is respectfully submitted that jurisdiction should be declined.

**STATEMENT OF THE CASE AND FACTS**

Appellee State of Ohio accepts the Statement of the Case and Facts set forth by appellant on pages two and three of his brief as accurate.

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## ARGUMENT

### RESPONSE TO PROPOSITION OF LAW

THE TRIAL COURT PROPERLY CORRECTED  
DEFENDANT'S VOID SENTENCE SO AS TO ADD  
THE STATUTORILY MANDATED THREE-YEAR  
POST-RELEASE CONTROL TERM.

Defendant argues that the trial court erred in correcting his original sentence so as to add the statutorily mandated three-year term of PRC. “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 at ¶21. Thus, having sentenced defendant to a prison term for second-degree felony arson, the trial court was required to include a mandatory three-year PRC term its original sentencing entry. R.C. 2929.14(F); R.C. 2967.28(B)(2). Indeed, it was “duty-bound” to do so. *Jordan*, at ¶22. Since the trial court did not include PRC in its original sentencing entry, defendant’s original sentence was void and subject to correction.

“[S]ociety’s interest in enforcing the law, and in meting out the punishment the legislature has deemed just, must be served.” *State v. Beasley* (1984), 14 Ohio St.3d 74, 75. The trial court committed no error in correcting defendant’s void sentence.

Defendant’s first and second assignments of error should therefore be overruled.

#### **I. The Trial Court Had Jurisdiction to Correct Defendant’s Void Sentence**

Defendant complains that the trial court had no statutory authority to correct his sentence. But it was the trial court’s *original* sentencing entry that was unauthorized by statute. As the trial court’s original sentencing entry did not include the statutorily

mandated three-year PRC term, defendant's original sentence was void and therefore subject to correction.

As explained by this Court:

\* \* \* Crimes are statutory, as are the penalties therefor, and the only sentence which a trial court may impose is that provided for by statute. A court has no power to substitute a different sentence for that provided for by statute or one that is either greater or lesser than that provided for by law.

*Colegrove v. Burns* (1964), 175 Ohio St. 437, 438. "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.

Trial courts retain jurisdiction to correct void sentences. *State v. Garretson* (2000), 140 Ohio App.3d 554, 559, citing *Beasley*, 14 Ohio St.3d at 75. Thus, by correcting defendant's void sentence, the trial court did not exceed its statutory authority, but rather *complied* with R.C. 2929.14(F) and R.C. 2967.28(B)(2) by ensuring that defendant serves the statutorily mandated three-year PRC term.

Numerous courts have followed *Beasley* in holding that a trial court retains authority to correct an illegal (*i.e.* void) sentence. See, e.g., *In re Futrell*, 153 Ohio App.3d 20, 2003-Ohio-2685 (trial court originally imposed six months at DYS instead of statutorily required 12 months; correction of sentence was proper); *State v. Druckenmiller* (Mar. 1, 2000), Crawford App. No. 3-99-28 (original entry imposed concurrent sentences, even though statute required consecutive sentences; trial court's correction was proper); *State v. Bush* (Nov. 30, 1999), Franklin App. No. 99AP-4 (trial court improperly imposed definite sentence under S.B. 2 law; resentencing under pre-S.B. 2 law was proper); *State v. McCulloch* (1991), 78 Ohio App.3d 42 (original sentence imposed under wrong statute; trial court properly resentenced defendant under proper

statute, even though corrected sentence more severe); *State v. Whitehead* (Mar. 28, 1991), Franklin App. No. 90AP-260 (trial court erroneously imposed definite sentence; later correction to indefinite sentence was proper); *State v. Dickens* (1987), 41 Ohio App.3d 354 (trial court inadvertently imposed 18-month sentence, even though statute required three-year minimum; trial court properly corrected sentence).

As in *Beasley*, defendant's original sentence was void in that it did not include the mandatory three-year PRC term. The trial court therefore retained jurisdiction to correct defendant's sentence. Indeed, a refusal to correct defendant's sentence would have been equivalent to the trial court granting defendant executive clemency from PRC. *Beasley*, 14 Ohio St.3d at 76 ("Clemency is a function of the Executive branch and the courts are without authority to free guilty defendants absent a specific legislative enactment."), citing *Ex parte United States* (1916), 242 U.S. 27, 29.

## **II. Correcting Defendant's Void Sentence Does Not Violate Double Jeopardy**

Defendant also complains that the trial court's correction of his sentence violated double jeopardy. But "[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. This is because, 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. "[A] sentence does not have the qualities of constitutional finality that attend an acquittal." *Id.* at 134.

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, citing *DiFrancesco*, 449 U.S. at 139 and *McCulloch*, 78 Ohio App.3d 42.

Again, *Beasley* controls. In that case, the 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. The 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 *Necak*, 30 Ohio App.3d at 120 (“Resentencing to impose an omitted mandatory penalty does not violate double jeopardy restraints.”).

As explained above, defendant’s original sentence was void in that it did not include the mandatory three-year PRC term. The Double Jeopardy Clause therefore did not preclude the trial court from correcting defendant’s sentence.

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. *United States v. McClain* (9<sup>th</sup> Cir. 1998), 133 F.3d 1191, 1194; *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). Thus, “a defendant can acquire *no* expectation of finality in an illegal sentence, which remains subject to modification.” *United States v. Kane* (9<sup>th</sup> Cir. 1989), 876 F.2d 734, 737 (emphasis added).

A defendant acquires no expectation of finality merely because he has commenced serving a void sentence. *McCulloch*, 78 Ohio App.3d at 43-44 (no double jeopardy violation when trial court corrected sentence three and a half years after defendant began serving void sentence). In fact, even if a defendant has completely served an illegal sentence, double jeopardy does not bar correcting the sentence. *Kane*, 876 F.2d at 737, discussing *United States v. Edmonson* (9<sup>th</sup> 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 include a mandatory three-year PRC term.

### **III. The State's Motion Was Not Barred by Res Judicata**

Defendant also contends that the State could have appealed defendant's sentence pursuant to R.C. 2953.08 and that the State's motion was barred by res judicata. But res judicata does not apply to judgments that are void for lack of jurisdiction. *State v. Wilson* (1995), 73 Ohio St.3d 40, 45, n. 6. A trial court's imposition of a sentence not authorized by statute is a jurisdictional error. *State ex rel. Mason v. Griffin*, 104 Ohio St.3d 279, 2004-Ohio-6384, ¶¶13-15.

Contrary to defendant's assertion, *Jordan* confirms inapplicability of res judicata. Defendant claims that *Jordan* "is an example of the State properly appealing an error, and the court remedying this error with a re-sentencing hearing following the appeal." (Brief, 9) But defendant misconstrues the procedural histories in *Jordan*. In both of the consolidated cases in *Jordan*, it was the *defendant*, not the State, who appealed the lack of PRC to the appellate court. In defendant Finger's case, the appellate court held that PRC could not be part of the defendant's sentence. *Jordan*, at ¶2.

This Court, however, reversed the appellate court's decision in *Finger*. After discussing *Beasley*, the Court stated, "the court's duty to include a notice to the offender about postrelease control at the sentencing hearing is the same as any other statutorily mandated term of a sentence. And based on the reasoning in *Beasley*, a trial court's failure to notify an offender at the sentencing hearing about postrelease control is error." *Id.*, at ¶26. Because the appellate court in *Finger* ordered the trial court to "correct" *Finger*'s sentence to reflect that post-release control is not part of his sentence (instead of remanding the case for resentencing), the Court reversed. *Id.* at ¶29.

If this Court intended res judicata to be a barrier to correcting a defendant's sentence so as to add PRC, then *Finger* would have been the perfect case to announce such a rule. The Court could have easily said that the State's failure to appeal the PRC issue in the Court of Appeals precluded it from later seeking to correct defendant's sentence. But rather than affirm the Court of Appeals' no-PRC holding on res judicata grounds, this Court reversed and ordered that *Finger* be resentenced to make PRC a part of his sentence.

*Beasley* similarly confirms the inapplicability of res judicata. In *Beasley*, the State never appealed the defendant's original sentence. Instead, it obtained a writ of mandamus from the Court of Appeals, which was eventually reversed by this Court. *Beasley*, 14 Ohio St. at 74, citing *Outcalt*, 62 Ohio St.2d 331. Like in *Jordan*, it would have been easy for this Court in *Beasley* to say that the State's failure to pursue a timely appeal made the issue res judicata. But the Court affirmed the trial court's resentencing entry and never once hinted that the State had somehow forfeited the issue by not seeking a timely appeal. Simply put, the State cannot "waive" a statutorily mandated sentence.

#### IV. The Trial Court Retained Jurisdiction to Correct Clerical Mistakes

Apart from the void-sentence doctrine, Crim.R. 36 gave the trial court the authority to correct defendant's void sentence. That rule states that "clerical mistakes \* \* \* arising from oversight or omission, may be corrected by the court at any time."

Crim.R. 36. The term "clerical mistake" refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment. *State v. Brown* (2000), 136 Ohio App.3d 816, 819-20, citing *Dentsply Internatl., Inc. v. Kostas* (1985), 26 Ohio App.3d 116, 118.

The tool utilized to correct such errors is generally a nunc pro tunc entry. *Brown*, 136 Ohio App.3d at 819. "[N]unc pro tunc entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided or what the court intended to decide." *Id.* at 820, citing *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 163-64.

The omission of the mandatory three-year PRC term from the trial court's original sentencing entry was an inadvertent oversight. Thus, the trial court's original sentencing entry was not the result of the trial court misapplying its judgment to reach a wrong legal decision. Instead, the trial court simply forgot to include in its sentencing entry what was understood to be a required part of defendant's sentence. In other words, by granting the State's motion, the trial court did not change its mind about the appropriate sentence, but rather corrected its illegal sentencing entry so as to reflect the actual sentence imposed.

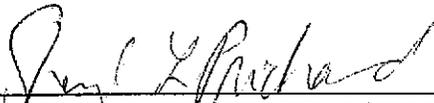
Moreover, defendant ignores the plain language of the rule in arguing that his sentence could not be corrected because his release from prison was "imminent." As quoted above, clerical mistakes may be corrected "at any time." Crim.R. 36.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

RON O'BRIEN 0017245  
Prosecuting Attorney



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SHERYL L. PRICHARD 0064868  
Assistant Prosecuting Attorney  
373 South High Street-13<sup>th</sup> Fl.  
Columbus, Ohio 43215  
614/462-3555

Counsel for Plaintiff-Appellee

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was hand-delivered this day, May 31, 2007, to ALLEN V. ADAIR, 373 South High Street-12th Fl., Columbus, Ohio 43215; Counsel for Defendant-Appellant.

  
\_\_\_\_\_  
SHERYL L. PRICHARD 0064868  
Assistant Prosecuting Attorney

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