

NO. 2005-0338

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 84008

STATE OF OHIO,
Plaintiff-Appellee

-vs-

JACK BEZAK,
Defendant-Appellant

MOTION FOR RECONSIDERATION

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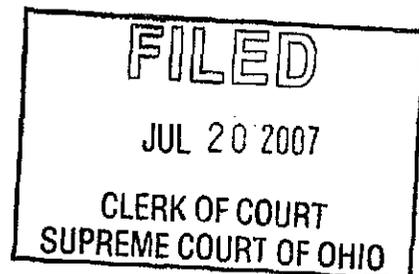
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Jack Bezak, found guilty of obstruction of justice now stands without being convicted. This Court has ordered that the trial court enter and record a sentence that is a nullity, one that doesn't exist. Further, countless other convictions have been erased by this Court's determination that Bezak cannot be resentenced. These problems arise not only from this Court's order upon remand, but because this Court determined that the sanction for postrelease control is not an independent sanction capable of independent review upon appeal. The State asks that this Court reconsider its determination in this matter that requires vacation of an entire sentence when there is error in the imposition of the sanction of postrelease control. Under Senate Bill 2 sentencing procedures this result is unnecessary and leads to the unintended consequence of allowing proven criminals like Bezak to avoid conviction for their crimes.

In this matter, this Court holds that, “that when a trial court fails to notify an offender that he may be subject to postrelease control at a sentencing hearing, as required by former R.C. 2929.19(B)(3), the sentence is void; the sentence must be vacated and the matter remanded to the trial court for resentencing. The trial court must resentence the offender as if there had been no original sentence. When a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense.”¹

In effecting a remedy, this Court ordered that Bezak “cannot be subject to resentencing in order to correct the trial court’s failure to impose postrelease control at Bezak’s original sentencing hearing. In order that its record may be complete, the trial court is instructed to note on the record of Bezak’s sentence that because he has completed his sentence, Bezak will not be subject to resentencing pursuant to our decision.”² However, this Court determined his sentence to be void, declaring it not to exist.³

Because he cannot be resentedenced, Jack Bezak now stands without a conviction. His guilt was found by a jury and affirmed upon review, yet he is not now, and by order of this Court, will not be convicted under Ohio law of obstructing justice. Ohio law recognizes a conviction only where there is a determination of guilt and where

¹ *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at ¶ 16.

² *Id.*, at ¶ 18.

³ *Id.*, at ¶ 12, 13.

a sentence is imposed.⁴ After a jury of his peers found that Jack Bezak committed the felony offense of obstruction of justice, this Court erased his conviction. Worse yet, after more than a decade since the adoption of Senate Bill 2,⁵ this Court has provided a means for countless criminals to avoid convictions for crimes that they have been proven guilty. Because a criminal who was “fortunate” enough to have a court err in the imposition of the postrelease control sanction attendant to his sentence by either not properly informing him of the possibility of postrelease control or by failing to journalize that sanction, he can avoid the consequences of his crime under this case. That criminal, although proven guilty of a crime, is now not convicted under law. Without convictions, that proven criminal is afforded relief from a significant and meaningful portion of Ohio’s criminal statutes; those sections of the code that enhance felony offenses and punishments for repeat offenders.⁶

Although Bezak may not be subject to execution of the sanction of postrelease control under this Court’s holding in *Hernandez v. Kelly*⁷ because he was released from prison, he must be subject to resentencing in order to ensure that he is in fact convicted of his crime. His release from prison should have no bearing on the ability to impose a

⁴ *State v. Henderson*, 58 Ohio St.2d 171, 389 N.E.2d 494, 12 O.O.3d 177; see, also *State v. Carter* (1992), 64 Ohio St.3d 218, 222, 594 N.E.2d 595, 599.

⁵ Am.Sub.S.B. No. 2, 146 Ohio Laws, Part IV, 7136.

⁶ Penalty enhancing sentencing provisions based on prior convictions found in the Revised Code are not limited to include not only specifications for repeat violent offenders, R.C. 2929.14(D)(2) or sexually violent predators, R.C. 2971.03, but also include offenses such as Having a Weapon Under Disability, R.C. 2923.13 and Domestic Violence, R.C. 2919.25.

⁷ 108 Ohio St. 3d 395, 844 N.E.2d 301, 2006-Ohio-126, syllabus.

valid sentence under this Court's decision. Regardless of any notation ordered upon the journal, Bezak now has no sentence because this Court determined his sentence to be void, a "nullity", and to be considered as if "it did not exist."⁸

This Court declined to find that an error in imposing the sanction of postrelease control is severable from the remainder of the sentence and subject to remand on its own.⁹ By following *Jordan* in this case and declaring the entirety of a sentence void this Court has created precedent with dire consequences. It has not only ordered the trial court to enter upon its journal a void sentence, it has created a precedent that will allow other defendants to avoid conviction for their crimes; crimes for which those defendant have admitted guilt or have been determined guilty. This error cannot stand.

This Court can correct the error by finding, as it did in *State v. Evans*,¹⁰ that the imposition of postrelease control is a severable sanction under Senate Bill 2 sentencing. By so doing, the syllabus law in *State v. Bezak*,¹¹ could reflect this Court's decision in *Evans* as follows:

When a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the

⁸ *Bezak*, 2007-Ohio-3250, at ¶12.

⁹ *Bezak*, 2007-Ohio-3250, at ¶ 14.

¹⁰ 113 Ohio St.3d 100, 863 N.E.2d 113, 2007 -Ohio- 861.

¹¹ 114 Ohio St.3d 94, 2007-Ohio-3250.

sanction of postrelease control is void. The offender is entitled to a new sentencing hearing for that particular offense.¹²

An appellate court may not vacate and remand an entire sentence imposed upon a defendant when the error in sentencing pertains only to a sanction imposed for postrelease control.¹³

Postrelease control is a sanction to be imposed in conjunction with all prison terms.¹⁴In *State v. Saxon*,¹⁵ and *State v. Evans*¹⁶ this court found under the present Senate Bill 2 sentencing mandates that sanctions are to be imposed independently, are to be reviewed independently, and as such are subject to be vacated and corrected independently. Although this Court distinguished *Saxon* in *Bezak*, it failed to address *Evans*. *Evans*' reasoning is wholly applicable to the resolution of the issue determined in *Bezak*.

The *Evans* court held that, "An appellate court may not vacate and remand an entire sentence imposed upon a defendant when the error in sentencing pertains only to

¹²The syllabus in *Bezak* reads, "When a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense." 114 Ohio St.3d 94, 2007-Ohio-3250.

¹³ The first paragraph of the syllabus in *Evans* reads, "An appellate court may not vacate and remand an entire sentence imposed upon a defendant when the error in sentencing pertains only to a sanction imposed for one specification." 113 Ohio St.3d 100, 863 N.E.2d 113, 2007-Ohio-861.

¹⁴ R.C. 2929.19(B)(3).

¹⁵ 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, syllabus

¹⁶ 113 Ohio St.3d 100, 863 N.E.2d 113, 2007 -Ohio- 861, syllabus.

a sanction imposed for one specification.”¹⁷ By extending the reasoning of *Saxon*, this Court determined that a sanction imposed upon a specification, even though dependent upon an underlying offense was severable from the sanction imposed on the underlying offense.¹⁸ “[T]hough specifications depend on the existence of underlying offenses and serve to enhance the penalties for those offenses, the Revised Code does not provide that either a trial court or an appellate court may consider an offense and an attendant specification together as a ‘bundle.’”¹⁹ This Court has now “bundled” the sanction of postrelease control together with the entirety of the sentence imposed in this case. This bundling was rejected in *Saxon* and then *Evans* and should be rejected here.²⁰

The logic behind not vacating the entirety of a sentence where only one component of that sentence was set forth in *Evans*:

[T]he sentencing statutes set forth the sanctions available for an underlying offense and, separately, the additional sanctions for a specification. See R.C. 2929.11 through 2929.19. In this way, the sanctions imposed for the conviction of the underlying offense are separate from those imposed for conviction of the specification, and an error

¹⁷ *Id.*

¹⁸ *Id.*, at ¶16.

¹⁹ *Id.*

²⁰ Beyond prison terms, Ohio sentencing creates distinct and severable sanctions that are independently imposed and capable of independent review and analysis. These include sanctions for fines, R.C. 2929.18 and provisions for victim’s compensation, R.C. 2929.18.

in the sanction imposed for a specification does not affect the remainder of the sentence.²¹

The sanction of postrelease control is separately stated in the Revised Code. In this regard, a postrelease control sanction is no different than those sanctions imposed for a specification for a firearm, a sexually violent predator, or repeat violent offender. In *Evans*, the sanctions for specifications were found to be independent, not dependent upon any underlying offense.²² Similarly, postrelease control is equally independent.²³ Postrelease control is a sanction to be imposed separately from any prison term. This Court should reconsider its holding in this case and avoid vacating otherwise properly imposed sentences, which thereby void convictions throughout the State.

In deciding *Bezak*, this Court may have believed it to be bound to follow *Jordan*²⁴ in its entirety and vacate all sentences imposed. Since *Jordan*, however, this Court refined the definition of what constitutes a sentence in *Saxon* and *Evans*. Because of these refinements, a defendant's right to be free from multiple punishments under the double jeopardy clause of the U.S. and Ohio Constitutions is not implicated by declaring void only one sentence of several imposed. Accordingly, the procedure of sentencing and the review thereof as stated in *Saxon* and *Evans* is applicable to this case and

²¹ 2007 -Ohio- 861, at ¶ 16.

²² *Evans*, 2007-Ohio-861, syllabus.

²³ R.C. 2967.28; R.C. 2929.19(B)(3)(c).

²⁴ 104 Ohio St.3d 21, 817 N.E.2d 864, 2004-Ohio-6085

double jeopardy is not implicated. A valid sentence need not be vacated to correct an error in another, separately imposed and independent sanction or sentence.

In this matter, Bezak was informed of postrelease control at his sentencing hearing, albeit deficiently.²⁵ His sentence reflected the imposition of postrelease control.²⁶ By vacating only that portion of the sentence as it relates to postrelease control, this Court would not be providing the sentencing court the authority to impose multiple or successive punishments which would violate the double jeopardy clause. Merely vacating a sentence imposed in error that was challenged upon appeal and ordering that resentencing occur does not implicate double jeopardy concerns. If such action did, then no defendant could be resentenced upon remand where any error in sentencing occurred.

In *State v. Beasley*²⁷ a case on which the Court predicated its holding in *State v. Jordan*,²⁸ it was determined that jeopardy would not attach to a sentence imposed in violation of law where a court attempted to circumvent a statute.²⁹ In contrast, in *Bezak* the sentencing court did not attempt to disregard its duty to impose postrelease control; rather, it imposed postrelease control in a manner that was not designated by the legislature. Further, *Beasley* was decided prior to Senate Bill 2. The *Jordan* court did

²⁵ *Bezak*, 2007-Ohio-3250, at ¶3.

²⁶ *Id.*

²⁷ (1984) 14 Ohio St.3d at 75, 14 OBR 511, 471 N.E.2d 774.

²⁸ 104 Ohio St.3d 21, 817 N.E.2d 864, 2004 -Ohio- 6085.

²⁹ 14 Ohio St.3d at 75.

not reach the issue as refined by this Court in *Saxon* and *Evans* that Senate Bill 2 does not present an integrated, indivisible sentence, which existed prior to July, 1996. Under Senate Bill 2, felony sentences are composed of independent sanctions to be imposed and reviewed individually.

The result in *Beasley*, and thus *Jordan*, requiring vacation of all sentences and sanctions imposed on an offender stems from the prior sentencing scheme in effect in Ohio. However, Senate Bill 2 sentencing is different, as it does not create a single sentence upon an offender in a case, rather, “[A] judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense. See R.C. 2929.11 through 2929.19.”³⁰ Finally, Bezak cannot complain of resentencing as being violative of his right to be free from multiple punishments where he appealed the judgment entry of his sentence.³¹

Bezak has avoided a conviction for obstruction of justice despite his guilt. Countless other proven criminals will avoid the penalties of their crimes as they stand today without conviction if this Court does not reconsider its holding and remedy in this matter. The State urges this Court to consider the import and effect of its resolution of the issue in this matter and to determine that the sanction of postrelease control is a sanction independent of other portions of a sentence, that where postrelease control is imposed in error the district courts of appeal have the ability to vacate only that sanction

³⁰ *Saxon*, 2006-Ohio-1245, at ¶ 9.

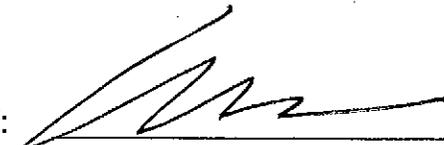
³¹ See, generally, *U.S. v. DiFrancesco* (1980), 449 U.S. 117, 101 S.Ct. 426; *State v. McCullough*, 78 Ohio App.3d 42, 603 N.E.2d 1106.

found to be in error. Jack Bezak is guilty of obstructing justice. This Court should not allow his case to obstruct justice in countless others.

Respectfully submitted

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SERVICE

A copy of the foregoing Motion for Reconsideration has been mailed and faxed this 19th day of July, 2007, to John T. Martin, 310 Lakeside Avenue #200, Cleveland, Ohio 44113, FAX 216-443-3632 and James R. Foley, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215, FAX 614-752-5167.



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