

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : SCT: 2007-0052
Appellee :
-vs- : On Appeal from the
CURTIS SIMPKINS : Cuyahoga County Court
Appellant : of Appeals, Eighth
: Appellate District Court
: of Appeals
: CA: 87692

APPELLANT'S REPLY BRIEF

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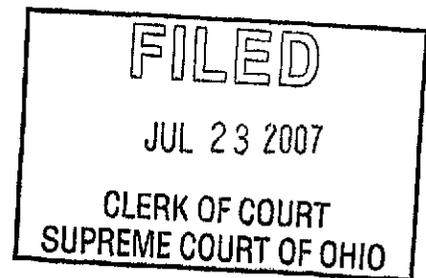


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LAW AND ARGUMENT

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.

In his merits brief, Mr. Simpkins argues that the trial court's last-minute imposition of post-release control:

1. Violates by res judicata because the State of Ohio never appealed at the time of the original sentencing.
2. Violates his due-process protected expectation of finality in his almost-completely-served sentence.
3. Violates his protection against multiple punishment.

In response, the State argues that the original sentence was void and thus the State of Ohio can challenge its imposition at any time prior to its completion.

The State's argument should be rejected.

The State Of Ohio Is Barred By Res Judicata From Challenging The Original Failure To Include Post-Release Control In A Sentence That The State Did Not Timely Appeal.

The State's argument hinges on the characterization of the initially-imposed sentence as a "void" sentence. This Court has recognized that sentences without post-release control are "void" *State v. Bezak* 114 Ohio St.3d 94, 2007-Ohio-3250. The State contends that a "void" sentence negates the sentence in all contexts. The State essentially argues that the sentencing error freezes the sentencing proceedings in time and causes

them to be subject to defrosting at any later moment, so long as the sentence is not completely served.¹

This Court does not look upon the term “void” as being as rigid as does the State, and it should not abandon its precedent in this regard. . In *Pratts v. Hurley*, 102 Ohio St.3d 81, 84 2004-Ohio-1980, this Court held that “[o]nce 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.” Id. at ¶ 12 (internal citations and punctuation removed).² Thus, the operative distinction is between a lack of subject matter jurisdiction (which can always be challenged) and those actions taken by a trial court that has subject matter and personal jurisdiction (which can only be challenged in a manner permitted by the principle of *res judicata*). 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 is one

¹ It is not clear, under its logic, why the State would even concede that the complete service of the sentence would resolve the problem of the sentence being “void.” Nonetheless, the State does so; the contrary argument would run afoul of language in *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, on which the Stae relies, as well as other constitutional considerations regarding finality. See *infra*.

² In Mr. Simpkins’ merits brief, it was incorrectly noted that *Pratts* was a further interpretation of the holding in *State v. Green* (1998), 81 Ohio St.3d 100. This was technically incorrect; *Pratts* addressed a different error relating to capital murder statutory procedure, that had been earlier recognized in *State v. Parker*, 95 Ohio St.3d 524, 2004-Ohio-1980 -- not in *Green*. While *Parker’s* majority opinion did not use the term “void,” it effectively treated the error therein as one causing the judgment to be void. It was thus necessary for this Court in *Pratts* to distinguish between that which is truly “void,” and capable of being challenged at any time, and that which is merely “voidable” if timely appealed.

that is controlled by res judicata, and was thus required to have been raised on direct appeal. *Pratts* at ¶ 24.

The State's reliance on *Cruzado* is misplaced. As a case involving a writ of prohibition, *Cruzado* merely held that the trial court did not "patently and unambiguously lack jurisdiction" to correct its previously flawed sentence. *Cruzado* at ¶1. But the principle of res judicata and the State's waiver of its opportunity on direct appeal to have the trial court's error corrected is not a question of jurisdiction – it is a question of raising the issue at the appropriate time. See *Pratts* at ¶ 24. .

Mr. Simpkins' Due Process Rights Were Violated by His Resentencing

The State's reliance on *Cruzado* in opposing this argument is misplaced. As a prohibition case, *Cruzado* could not, and did not, address this constitutional argument, which is apart from whether the trial court patently and unambiguously lacked jurisdiction over the case. Nor did *Hernandez v. Kelly*, 108 Ohio St. 3d 395, 2006 Ohio 126, which issued a writ habeas corpus, address this issue. As discussed in Mr. Simpkins' merits brief, *Hernandez*, on which the State relies, supports the conclusion that the trial court acted improperly in conducting its last-minute resentencing.

This Court may well need to draw a line as to when a defendant's expectation of finality crystallizes to where further modification of the sentence violates due process. That line can be fairly drawn at the point where the appellate process has run its course. Because both parties have an opportunity to appeal a sentence, neither party can be assured of the finality of the sentence until the direct appellate process is exhausted. Where, as here, no appeal was ever taken, the expiration of the State's time to appeal, i.e.,

thirty days after journalization of the sentence, triggered the expectation of finality that due process guarantees to Mr. Simpkins.

Even if the Court rejects this bright line for determining an expectation of finality, it should hold that the expectation of finality in an eight-year prison sentence in which post-release control was not mentioned at sentencing occurs long before the time when Mr. Simpkins was subject to a “new” sentencing – approximately five days before his scheduled release.

The Resentencing Constitutes Multiple Punishment in Violation of the Fifth Amendment

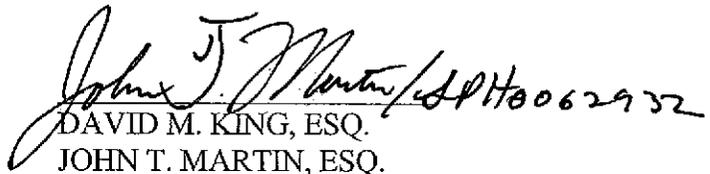
Finally, the Fifth Amendment also protected Mr. Simpkins from being subjected to multiple punishment for the same offense. The State argues that *Hudson v. United States* (1997), 522 U.S. 93, 98-99 is inapposite because it addresses a criminal sanction imposed after a civil sanction. However, just the opposite is true – if double jeopardy protects against a criminal sanction added to a civil sanction, then it protects all the more the imposition of two criminal sanctions (i.e. imprisonment and post-release control), one years after the other.

What *Hudson* also makes clear is that multiple punishment is a practical concept. Here, the practical effect of the trial court’s eleventh-hour imposition of post-release control was to add more punishment to Mr. Simpkins. This violates the Fifth Amendment.

CONCLUSION

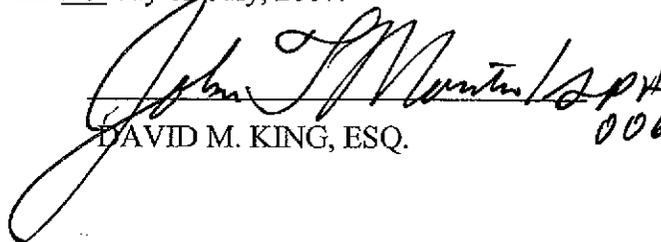
For all these reasons, this Court should reverse the decision of the Eighth District Court of Appeals, and vacate the Cuyahoga County Court of Common Pleas' imposition of post-release control.

Respectfully submitted,


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CERTIFICATE OF SERVICE

A copy of the foregoing Brief was hand-delivered upon William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 23rd day of July, 2007.


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