

IN THE SUPREME COURT OF OHIO

07 - 1407

STATE OF OHIO,

CASE NO. _____

PLAINTIFF-APPELLEE

VS.

On Discretionary Appeal from the
Ashtabula County Court of Appeals,
Eleventh Appellate District,
Case No. 2006-A-0088

STEVEN P. ROSS,

DEFENDANT-APPELLANT

STEVEN P. ROSS'S MEMORANDUM IN SUPPORT OF JURISDICTION

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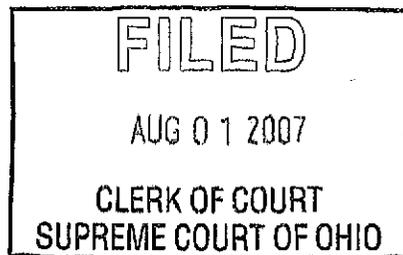


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Case No. 2006-A-0088(June 29, 2007)

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

This Court 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. Ross 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, as case of "public or great general interest."

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

On February 4, 2002, Steven P. Ross entered a plea of guilty to one count of Aggravated Robbery, with a gun specification, and a plea of guilty to one count of Felonious Assault, with a gun specification. On March 25, 2002, the trial court sentenced Mr. Ross to a total term of incarceration of seven years on each count; these terms were ordered to be served concurrently. The trial court's judgment entry of this sentence did not mention postrelease control. The State did not exercise its right to appeal the sentence.

On December 1, 2006 the trial court held a resentencing hearing. Mr. Ross objected to the hearing and to the resentencing. The trial court added postrelease control to Mr. Ross's sentence. Mr. Ross 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. Ross'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. Ross'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.

Id. at ¶103 (footnote omitted).

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.

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. Ross’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. Ross'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. Ross'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. Ross'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 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, 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. Ross’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. Ross'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. Ross's sentence became final as he approached completion of the

punishment the trial court imposed. The State should have sought to “correct” Mr. Ross’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. Ross’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. Ross 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. Ross

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. Ross'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. Ross, 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. Ross, 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. Ross'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-

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.

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.

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").

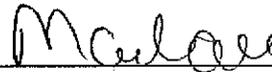
However, Am. Sub. H.B. 137 now authorizes the executive branch to

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 or appeals, and vacate Mr. Ross’s term of postrelease control.

Respectfully submitted,



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Counsel for Steven P. Ross

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was sent via regular U.S. mail to Thomas L. Sartini, Ashtabula County Prosecuting Attorney, 25 W. Jefferson Street, Jefferson , Ohio 44047 this ____ day of July, 2007.



Marie Lane, #0055898

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee

Case No. _____

Vs.

On Discretionary Appeal from the
Ashtabula County Court of Appeals,
Eleventh Appellate District,
Case No. 2006-A-0066

MICHAEL P. MCKAY

Defendant-Appellant

APPENDIX TO

MICHEAL P. MCKAY'S MEMORANDUM IN SUPPORT OF JURISDICTION

IN THE SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee

Case No. _____

Vs.

On Discretionary Appeal from the
Ashtabula County Court of Appeals,
Eleventh Appellate District,
Case No. 2006-A-0088

STEVEN P. ROSS

Defendant-Appellant

APPENDIX TO

STEVEN P. ROSS'S MEMORANDUM IN SUPPORT OF JURISDICTION

COURT OF APPEALS

STATE OF OHIO

FILED
JUL 6 2007

IN THE COURT OF APPEALS

COUNTY OF ASHTABULA)

2007 JUN 29 A 10: 54

ELEVENTH DISTRICT

STATE OF OHIO,

CAROL A. MEAD
CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO. OH

RECEIVED
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Plaintiff-Appellee, ASHTABULA CO. OH

JUDGMENT ENTRY

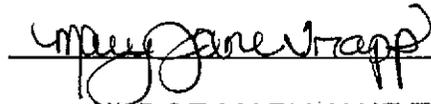
- vs -

CASE NO. 2006-A-0088

STEVEN P. ROSS,

Defendant-Appellant.

For the reasons stated in the opinion of this court, appellant's assignment of error is without merit. It is the judgment and order of this court that the judgment of the Ashtabula County Court of Common Pleas is affirmed.



JUDGE MARY JANE TRAPP

FOR THE COURT

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO

FILED
COURT OF APPEALS
2007 JUN 29 A 10:37
CLERK OF COURT
ASHTABULA COUNTY
OHIO

STATE OF OHIO, : OPINION
Plaintiff-Appellee, :
- VS - : CASE NO. 2006-A-0088
STEVEN P. ROSS, :
Defendant-Appellant. :

Criminal Appeal from the Court of Common Pleas, Case No. 01 CR 327.

Judgment: Affirmed.

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Marie Lane, Ashtabula County Public Defender, Inc., 4817 State Road, #202, Ashtabula, OH 44004 (For Defendant-Appellee).

MARY JANE TRAPP, J.

{¶1} Appellant, Steven P. Ross, appeals from the December 4, 2006 judgment entry of the Ashtabula County Court of Common Pleas, which resentenced appellant in order to notify him that postrelease control would be imposed following incarceration. For the following reasons, we affirm.

{¶2} **Substantive and Procedural History**

{¶3} On February 4, 2002, appellant pled guilty to one count of aggravated robbery with a firearm specification, a first degree felony in violation of R.C. 2911.02;

and one count of felonious assault, a second degree felony in violation of R.C. 2903.11. Appellant was sentenced on March 22, 2002, to a mandatory three-year term for the firearm specification to be served consecutively to two four-year concurrent sentences for the offenses of aggravated robbery and felonious assault. The trial court's judgment entry of the sentence did not contain a notice regarding postrelease control.

{¶4} On December 1, 2006, the trial court held a sentencing hearing to resentence appellant and on December 4, 2006, the trial court issued a nunc pro tunc judgment entry to correct the sentence. The judgment entry again imposed the same sentence, albeit with a notice of the post-release control. Appellant asserts that the trial court was without authority to resentence him, raising the following single assignment of error:

{¶5} "The trial court erred when it re-sentenced appellant following the decision of *Hernandez v. Kelly*."

{¶6} In this assignment of error, appellant is relying on the decision from the Supreme Court of Ohio in the case of *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126. "In that decision, the court held that the Ohio Adult Parole Authority may not impose postrelease control unless the trial court notified the defendant at his sentencing hearing that he would be subject to postrelease control and incorporated postrelease control into its sentencing order." *State v. Leonard*, 11th Dist. No. 2006-A-0064, 2007-Ohio-1545, at ¶5.

{¶7} Appellant argues that a trial court only has the authority to correct a sentence on direct appeal and that permitting the trial court to correct a sentence in the absence of a direct appeal undermines the sentencing statutes. Further, appellant contends that res judicata bars the trial court from correcting a previous judgment entry;

and that a sentence, newly imposed so close to the expiration of his stated prison term, violates his “expectation of finality” and triggers double jeopardy and due process concerns.

{¶8} This court recently addressed these identical issues in *State v. Leonard*, supra, where we held: “the enactment of R.C. 2929.19 and 2929.191 now authorize a trial court to correct a sentencing order that omitted a notice regarding postrelease control.” Id. at ¶8. See, also, *State v. McKay*, 11th Dist. No. 2006-A-0066, 2007-Ohio-1923, at ¶9.

{¶9} Thus, “the above statutory enactments supersede the decision in *Hernandez v. Kelly*. After July 11, 2006, a trial court may now resentence an offender prior to the expiration of his original stated prison term in order to notify him regarding postrelease control.” *Leonard* at ¶18, *McKay* at ¶10; see, also, *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, at ¶29.

{¶10} Based upon the authority of *State v. Leonard*, appellant’s assignment of error is without merit.

{¶11} The judgment of the Ashtabula County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, P.J.,

DIANE V. GRENDALL, J.,

concur.