

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee

-vs-

ANDREW J. FERGUSON

Appellant

07-1427

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 88450

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT ANDREW J. FERGUSON

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**EXPLANATION OF WHY THIS FELONY CASES RAISES SUBSTANTIAL
CONSTITUTIONAL QUESTIONS AND IS MATTER OF GREAT PUBLIC AND
GREAT GENERAL INTEREST**

The instant cases raises, in Proposition of Law I, an issue that has been the subject of discussion by this Court in two recent cases, but which has yet to be determined: whether this Court's decision in *State v. Cook* (1998), 83 Ohio St. 3d 404 needs to be revisited because subsequent amendments to R.C. 2950.01 et seq., have caused the sexual classification system in Ohio to have become punitive, and not merely regulatory. This discussion was set forth in the separate opinion of two present members of this Court (as well as a third member of the Court sitting by designation) in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202 (Lanzinger, J., concurring in part and dissenting in part). Even more recently, in *State v. Williams*, 114 Ohio St.3d 103, 2007-Ohio-3268, this Court again noted that changes in R.C. 2950.01 et seq., had caused the burden on registrants to be heavier than when *Cook* was decided. Respectfully, the time has come to address this issue.

It may well be argued that Ohio's recent enactment of the Adam Walsh Act causes any discussion of R.C. 2950.01 to be moot. It does not. The AWA will undoubtedly be the subject of much litigation, both in Ohio and nationally. Courts in Ohio will undoubtedly start with R.C. 2950.01 et seq., and how it was evaluated in *Cook*, in evaluating the AWA. It is important for Ohio's lower courts to know whether, in determining if the AWA is punitive, *Cook* is really good law when applied to the current version of the AWA. Moreover, if the AWA is held to be unconstitutional, perhaps by the United States Supreme Court, Ohio courts and the General Assembly will need to know whether R.C. 2950.01 in its present form, is an available default. Perhaps most importantly in this regard, R.C. 1.58 may be used to preclude retroactive application of the AWA to already-designated sex offenders, in which case, the constitutionality

of R.C. 2950.01 et seq. will again be of importance.

The second proposition of law also raises a significant issue. In *Wilson*, this Court recognized that courts of appeals are to be deferential to trial courts' sexual predator determinations. This case raises a corollary to that rule – trial courts must faithfully adhere to the statutory procedure for determining whether an offender is or is not a predator. In so doing, *Wilson* will be complemented to effect a rule of law that provides for trial court's faithfully following the statutorily prescribed regimen, after which appellate courts are appropriately deferential. But deference by the appellate court without adherence to the statute by the trial court is not only an incomplete remedy, it is dangerous to both offenders and the public, both of whom have a right to protection under Ohio's Megan's law.

STATEMENT OF THE CASE AND FACTS

This is an appeal of a sexual predator determination. Defendant-Appellant Andrew Ferguson was convicted in 1990 of rape. Previously, he had been convicted of rape in 1980.

The State presented evidence regarding the issue of whether Mr. Ferguson was likely to engage in sexual crimes in the future. This evidence included a Court Psychiatric Clinic report that included a STATIC-99 test indicating a high risk of recidivism. Mr. Ferguson testified that he was not likely to re-offend, as evidence by his past five years of discipline-free incarceration.

The trial court's concluded that Mr. Ferguson was a sexual predator, stating:

Very well. A.ll right. And based on all of the evidence presented, and the testimony of Mr. Ferguson, and particularly in the light of the evaluation of the Court Psychiatric Clinic, the defendant is assessed to be in the high risk category for recidivism.

So I am going to find Mr. Ferguson to be a sexual predator . . .

No finding was made as to whether Mr. Ferguson was an habitual sexual offender.

On timely appeal, the Eighth District Court of Appeals affirmed.

This timely appeal follows.

ARGUMENT

Proposition of Law I:

R.C. §2950.01 et seq., as applied to persons who committed their sexually oriented offenses prior to July 31, 2003, violates Art. I, Sec. 10, of the United States Constitution as ex post facto legislation, and violates art. II, Sec. 28 of the Ohio Constitution as retroactive legislation.

One of the first challenges to Ohio's version of "Megan's Law" was an attack claiming that the new notification and registration requirements violated the prohibition against ex post facto laws in the Ohio and United States Constitutions. Eventually, were resolved because the Ohio Supreme Court concluded that the laws were not "punishment" and therefore did not implicate the prohibition. See, *State v. Cook*, 83 Ohio St. 3d 404.

In *Cook*, this Court relied upon the "intent-effects" test utilized by several courts (including the United States Supreme Court) in evaluating whether subsequent legislation amounts to punishment. *Cook* at 415. Within this analysis the Supreme Court relied heavily on the "narrowly tailored" version of the law passed by the Ohio Legislature, and specifically that offenders "have the opportunity to submit evidence to prove that their label is no longer justified and thereby have the label and its obligations removed." *Id.* at 421-422.

Mr. Ferguson was found to be a sexual predator. At the time of his offenses, Mr. Fleming had the opportunity pursuant to R.C. 2950.09(D) to have this finding revisited, and thus at the time of his hearing Mr. Fleming was not subject to punishment. However, since the offense conduct was completed, Ohio's 125th General Assembly passed Senate Bill 5, effective July 31, 2003. The Bill, which was signed into law by the Governor, repealed Mr. Ferguson's right to have his sexual

predator classification revisited. In addition, since *Cook*, R.C. 2950.031 was passed, which imposes residency restrictions on all classified sexual offenders.

Because of these changes, Mr. Ferguson challenges Ohio's new version of Megan's Law because it imposes ex post facto punishment. The irreversibility of the predator determination causes the classification to be punitive – it applies forever, whether needed or not. The residency restriction is akin to the restrictions that are part of a criminal sentence to probation.

Article I, Section. 10 of the United States Constitution prohibits States from passing ex post facto laws. The comparative provision in the Ohio Constitution provides that "[t]he general assembly shall have no power to pass retroactive laws[.]" Art. II, Sec. 28.

In *Calder v. Bull* (1798), 3 U.S. 386, 390, the Supreme Court offered an enduring definition of the ex post facto provision: States cannot retroactively criminalize acts and they cannot pass a law which "changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed."

"Critical to relief under the [federal] Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver v. Graham* (1980), 450 U.S. 24, 30.

An ex post facto inquiry begins with a determination that the law is, in effect, punitive. The inability of a person such as Mr. Ferguson to ever escape his predator status, regardless of whether he ever ceases to be such a public threat, evinces the punitive nature of the predator designation – Mr. Ferguson is being sanctioned for a lifetime, whether the predator designation continues to be reflective of his actual state in life. For example, if he is 100 years old and confined to a bed, or becomes comatose, he will continue to be deemed a predator, despite the impossibility of his ever

preying upon another.

Similarly, the residency restriction causes R.C. 2950.01 et seq. to cross the line from regulatory to punitive. Such restrictions are oftentimes a condition of criminal probation, and thus a form of punishment.

Since Appellant's commission of the sexual offenses occurred prior to the effective date of Revised 2950.01 et seq., the statute's application affecting Appellant's substantive rights cannot survive scrutiny under the Ohio and Federal Constitutions. Accordingly, the "sexual predator" finding in the case at bar must be reversed.

Proposition of Law II:

A trial court is required to explicitly analyze the "relevant factors" enumerated in R.C. 2950.09 when determining whether a defendant is or is not a sexual predator.

H.B. 180, effective January 1, 1997, in part, and July 1, 1997, in part, substantially revised Chapter 2950 of the Ohio Revised Code. R.C. §2950.01 expanded classification of sex offenders into three categories: "sexually oriented offenders" who have been convicted of a single sex offense; "habitual sexual offenders" who have been convicted of two or more sex offenses; and, "sexual predators" who have been convicted of a sex offense and are "likely to engage in the future in one or more sexually oriented offenses." Each class of offender must register residence with law enforcement officials. R.C. 2950.07 provides durations of registration for the three classes of offenders.

The procedures that must be employed in a court's determination of "sexual predator" status in cases occurring after the effective dates of R.C. §2950.01 *et seq.* are provided in R.C. §2950.09(B), which provides:

(B)(1) Regardless of when the sexually oriented offense was committed, if a person

is to be sentenced on or after the effective date of this section for a sexually oriented offense that is not a sexually violent offense, or if a person is to be sentenced on or after the effective date of this section for a sexually oriented offense that is a sexually violent offense and a sexually violent predator specification was not included in the indictment, count in the indictment, or information charging the sexually violent offense, the judge who is to impose sentence upon the offender shall conduct a hearing to determine whether the offender is a sexual predator. The judge shall conduct the hearing prior to sentencing and, if the sexually oriented offense is a felony, may conduct it as part of the sentencing hearing required by section 2929.19 of the Revised Code. The court shall give the offender and the prosecutor who prosecuted the offender for the sexually oriented offense notice of the date, time, and location of the hearing. At the hearing, the offender and the prosecutor shall have an opportunity to testify, present evidence, call and examine witnesses and expert witnesses, and cross-examine witnesses and expert witnesses regarding the determination as to whether the offender is a sexual predator. The offender shall have the right to be represented by counsel and, if indigent, the right to have counsel appointed to represent the offender.

(2) In making a determination under divisions (B)(1) and (3) of this section as to whether an offender is a sexual predator, the judge shall consider all relevant factors, including, but not limited to, all of the following:

- (a) The offender's age;
- (b) The offender's prior criminal record regarding all offenses, including, but not limited to, all sexual offenses;
- (c) The age of the victim of the sexually oriented offense for which sentence is to be imposed;
- (d) Whether the sexually oriented offense for which sentence is to be imposed involved multiple victims;
- (e) Whether the offender used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;
- (f) If the offender previously has been convicted of or pleaded guilty to any criminal offense, whether the offender completed any sentence imposed for the prior offense and, if the prior offense was a sex offense or a sexually oriented offense, whether the offender participated in available programs for sexual offenders;
- (g) Any mental illness or mental disability of the offender;
- (h) The nature of the offender's sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented

offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;

- (i) Whether the offender, during the commission of the sexually oriented offense for which sentence is to be imposed, displayed cruelty or made one or more threats of cruelty;
- (j) Any additional behavioral characteristics that contribute to the offender's conduct.

(3) After reviewing all testimony and evidence presented at the hearing conducted under division (B)(1) of this section and the factors specified in division (B)(2) of this section, the judge shall determine by clear and convincing evidence whether the offender is a sexual predator. If the judge determines that the offender is not a sexual predator, the judge shall specify in the offender's sentence and the judgment of conviction that contains the sentence that the judge has determined that the offender is not a sexual predator. If the judge determines by clear and convincing evidence that the offender is a sexual predator, the judge shall specify in the offender's sentence and the judgment of conviction that contains the sentence that the judge has determined that the offender is a sexual predator and shall specify that the determination was pursuant to division (B) of this section. The offender and the prosecutor who prosecuted the offender for the sexually oriented offense in question may appeal as a matter of right the judge's determination under this division as to whether the offender is, or is not, a sexual predator.

(4) A hearing shall not be conducted under division (B) of this section regarding an offender if the sexually oriented offense in question is a sexually violent offense and the indictment, count in the indictment, or information charging the offense also included a sexually violent predator specification.

The facts that must be presented to the trial court must amount to clear and convincing evidence that an offender falls into one of the sex offender categories. For "sexually oriented offenders," this means that the state must prove by clear and convincing evidence that the offender has committed a sexually oriented offense. R.C. §2950.01. For "habitual sexual offenders," the state must prove by clear and convincing evidence that the offender has committed two or more sexually oriented offenses. R.C. §2950.01.

As a threshold evidentiary matter, the state's burden in these two "quantitative" assessments is both simple and straight-forward: certified conviction records are sufficient for

satisfying the state's burden. Thus in regard to "habitual sexual offenders" and "sexually oriented offenders," a court's determination may be made upon conviction data alone.

Yet the legislature imposed a very different, *qualitative* burden on the state in proving, by clear and convincing evidence that an offender is a sexual predator. In these cases, the state must prove that the offender is "likely to" commit an offense in the future. See, R.C. §2950.01. Given the more severe sanctions of registration and notification imposed for this category of offender, the General Assembly clearly intended that more be presented by the state, and considered by the court, than simply old conviction data. If not, then the distinction between a "sexually oriented offender" and a "sexual predator" disappears with respect to the evidence necessary. Accordingly, the General Assembly intended that more evidence be required in making the qualitative "sexual predator" determination than in making the quantitative determinations inherent in the lesser categories of offender.

A review of the record reveals that the trial court did not specifically address the statutory factors as was required. See, *State v. Eppinger* (2001), 91 Ohio St.3d 158; R.C. 2950.09.

Age of Offender. This factor was never analyzed

Offender's Prior Record. This factor was not specifically addressed.

The age of the victim in the instant case. This factor was not analyzed.

Whether the instant case involved multiple victims. This factor was not analyzed and inured to Mr. Ferguson's benefit as there was only one victim. (T. 8-9).

Whether drugs or alcohol was used to facilitate the offense. This factor was not analyzed and inured to Mr. Ferguson's benefit as there were no drugs involved. (T. 8-9).

The defendant's service of his sentence for prior crimes, and whether he participated in available programs for sex offenders. This was not specifically addressed.

Mental illness or disability. This does not apply but was never considered.

The nature of the offense conduct and whether it involved a demonstrated pattern of abuse. This was never specifically addressed. .

Display of cruelty in offense commission. This was never specifically addressed. .

In the end, the critical issue in a predator evaluation is the need for public, and particularly neighborhood, notification. Nothing in the record indicates that the trial court ever focused on this central point. Moreover, the trial court has failed to give this Court a record of its reasoning as required by statute and by Fourteenth Amendment due process.

For all of these reasons, Mr. Ferguson was also denied his federal constitutional rights under the Sixth and Fourteenth Amendments to due process of law when the trial court failed to make findings, thus ensuring compliance with the statute and meaningful appellate review.

Accordingly, the sexual predator designation should be vacated and the case remanded for a new sexual predator hearing.

Proposition of Law III:

Even when a trial court determines that a defendant is a sexual predator, the trial court must also determine whether the defendant is an habitual sexual offender.

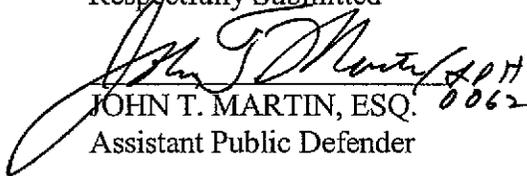
Because he had a prior sexually oriented offense, Mr. Ferguson was an habitual sexual offender. The trial court's failure to so find was erroneous. *State v. Pumerano*, Cuyahoga App. No. 85146, 2005-Ohio-2833.

Federal due process under the Fourteenth Amendment requires that the appropriate remedy in such a situation be to remand the case for a new hearing entirely. It may well be that when the trial court realizes that an habitual sexual offender finding is available, the trial court will determine that a sexual predator finding is not necessary in this case. Thus, much as this Court would reverse a conviction for failure to consider a lesser included offense, this Court should reverse the sexual predator finding and remand for a new hearing in order to ensure that the habitual sexual offender finding that is required is not such as to cause the trial court to find that Mr. Ferguson is not a sexual predator.

CONCLUSION

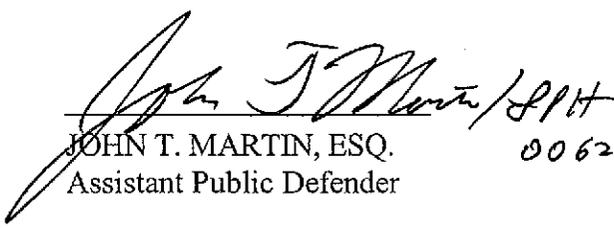
Wherefore, this Court should accept the instant case and determine these important issues.

Respectfully Submitted


JOHN T. MARTIN, ESQ. 0062932
Assistant Public Defender

SERVICE

A copy of the foregoing was served upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 2nd day of August, 2007.


JOHN T. MARTIN, ESQ. 0062932
Assistant Public Defender

Judge Friedland

JUN 18 2007

Court of Appeals of Ohio

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EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

m(GCI)

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

JOURNAL ENTRY AND OPINION
No. 88450

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.



ANDREW J. FERGUSON

A224002

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-254450

BEFORE: Rocco, J., Gallagher, P.J., Calabrese, J.

RELEASED: June 7, 2007

JOURNALIZED:

JUN 18 2007

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**FILED AND JOURNALIZED
PER APP. R. 22(E)**

JUN 18 2007

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.**

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

JUN -7 2007

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

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KENNETH A. ROCCO, J.:

Defendant-appellant, Andrew J. Ferguson, appeals from a common pleas court order finding him to be a sexual predator. He argues that the court erred by failing to specifically address all of the statutory factors as required, the court erred by failing to find he was an habitual sexual offender, and Ohio's sexual predator statutes are unconstitutional ex post facto legislation. We find no error in the proceedings below. We also find that R.C. 2950.01 et seq. is not an unconstitutional ex post facto law. Accordingly, we affirm.

Appellant was convicted of three counts of rape and one count of kidnapping in August 1990, and was sentenced to a prison term of fifteen to twenty-five years. His conviction was affirmed on appeal.

On July 3, 2000, the state moved the court to adjudicate appellant to be a sexual predator. On February 22, 2006, the court instructed the warden of the Grafton Correctional Institution to send a House Bill 180 packet to the court, and ordered appellant returned to the court for hearing. After the hearing, the court determined that appellant was a sexual predator. In its order entered June 15, 2006, the court found that the defendant "is by clear and convincing evidence, likely to engage in one or more sexually oriented offenses in the future *** for the following reasons: among other things a prior rape conviction in 1980

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and the fact that defendant presents in the moderate to high risk category for reoffending." Appellant appeals from this order.

In his first assignment of error, appellant complains that the court did not individually assess each of the statutory factors it was required to consider under R.C. 2950.09(B)(2). In concluding that the court was required to do so, appellant misreads the Ohio Supreme Court's decision in *State v. Eppinger*, 91 Ohio St.3d 158, 2001-Ohio-247. *Eppinger* does not dictate that the trial court must individually assess each of the statutory factors on the record. Rather, *Eppinger* holds that "the trial court *should consider* the statutory factors listed in R.C. 2950.09(B)(2), and *should discuss on the record the particular evidence and factors upon which it relies* in making its determination regarding the likelihood of recidivism." *Id.* at 889 (emphasis added); also see *State v. Thompson*, 92 Ohio St.3d 584, 587-88, 2001-Ohio-1288. Thus, while it might be the better practice for the court to assess each of the statutory factors expressly, *Eppinger* only suggests that the court should discuss the factors it actually relied upon in reaching its decision.

At the sexual predator hearing, the state presented evidence of appellant's conviction and sentence in this case, as well as appellant's prior convictions for rape and robbery in 1980 and grand theft in 1976. The state further presented a copy of the court of appeals' decision in this case, which set forth the evidence

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upon which these convictions were based, and a copy of the police report, the victim's statement and the appellant's statement to the police regarding the 1980 rape. The state also presented a court psychiatric report regarding appellant, and the results of a STATIC-99 test which placed him in a high risk category for reoffending. Appellant also testified at the hearing. The court stated that "based on all of the evidence presented, and the testimony of Mr. Ferguson, and particularly in light of the evaluation of the Court Psychiatric Clinic, the defendant is assessed to be in the high risk category for recidivism." Therefore, the court found, appellant was a sexual predator. In its judgment entry, the court specifically included appellant's prior rape conviction as a basis for its sexual predator finding, as well as the psychiatric assessment that appellant was at a moderate to high risk for reoffending. The basis for the court's decision was clear on the record. There is some competent credible evidence in the record to support the court's decision that the state proved appellant was a sexual predator by clear and convincing evidence. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶41. Therefore, we overrule the first assignment of error.

Second, appellant contends that the court erred by failing to find that he was an habitual sexual offender. We disagree. Because appellant was convicted before January 1, 1997, the court was required to make a determination whether

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appellant was an habitual sexual offender only if it found that he was not a sexual predator. Compare R.C. 2950.09(C)(2)(c) and (E)(1). Therefore, we overrule the second assignment of error. *State v. Twiggs*, Cuyahoga App. No. 88142, 2007-Ohio-1302, ¶28.

Finally, appellant contends that R.C. 2950.09 as amended by Senate Bill 5 (which repealed an offender's ability to seek removal of the sexual predator label and imposed residency restrictions on offenders) imposes *ex post facto* punishment. Again, we must disagree. In fact, the United States Supreme Court has "upheld against *ex post facto* challenges laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment. See *De Veau* [v. *Braisted* (1960)], 363 U.S. [144], at 160; *Hawker* [v. *New York* (1898), 170 U.S. [189], at 197. As stated in *Hawker*: 'Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application' *Ibid.* The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause." *Smith v. Doe* (2003), 538 U.S. 84, 104. If the lack of individualized risk assessment does not make a regulatory burden punitive, we fail to see how the lack of individualized

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risk re-assessment could do so. See *State v. Baron*, 156 Ohio App.3d 241, 2004-Ohio-747, ¶11. Accordingly, we overrule the third assignment of error.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, P.J., and
ANTHONY O. CALABRESE, JR., J., CONCUR

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