

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

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STATE OF OHIO,)	OHIO SUPREME COURT
)	CASE NO. 2007-1407
Plaintiff-Appellee,)	
)	On Appeal from the Ashtabula County
-vs-)	Court of Appeals, Eleventh Appellate
)	District
STEVEN P. ROSS,)	
)	Ashtabula County Court of Appeals
Defendant-Appellant.)	Case No. 2006-A-0088

MEMORANDUM IN RESPONSE TO JURISDICTION

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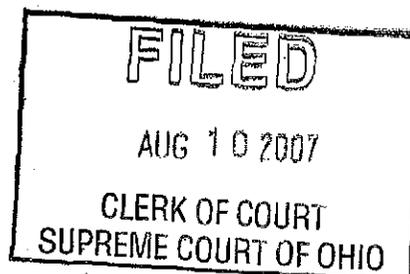




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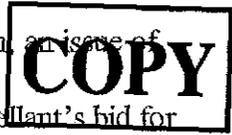


Steven P. Ross, appellant herein, seeks to invoke this Honorable Court's jurisdiction over this discretionary appeal. For the following reasons, jurisdiction is unwarranted, and the appeal should be dismissed.

Appellant argues that a trial court may not add postrelease control to a sentence except as ordered by a court of appeals on a timely direct appeal. In his appeal to the Eleventh District Court of Appeals, appellant argued that "a trial court has authority to correct a sentence only in connection with a direct appeal; that allowing the trial court to correct a sentence in the absence of a direct appeal undermines the sentencing statutes; that res judicata bars the trial court from initiating a correction to a previous judgment entry; and that a sentence, newly imposed so close to his stated prison term, violated [his] 'expectation of finality' and triggers double jeopardy and due process concerns." *State v. Ross*, 11th Dist. App. No. 2006-A-0088 at ¶7, 2007-Ohio-3388. The Eleventh District Court of Appeals held that due to the statutory enactments of R.C. 2929.191, "a trial court may resentence an offender, prior to the expiration of his original stated prison term, in order to notify him regarding postrelease control." *Id.* at ¶9.

In his appeal to this Honorable Court, appellant not only seeks to revisit the issues decided in the lower court, but now also seeks to challenge the constitutionality of R.C. 2929.191 as well. As "it is an established rule of long-standing in this state that a criminal constitutional question can not be raised in the Supreme Court unless it is presented and urged in the court below," appellant's constitutional arguments should not now be heard by this Honorable Court. *State v. Williams* (1977), 51 Ohio St.2d 112, 117, 364 N.E.2d 1364.

The discretionary appeal at bar presents neither a constitutional violation, an issue of great public or general interest, nor an issue of first impression. Therefore, appellant's bid for jurisdiction must fail.



STATEMENT OF THE CASE AND FACTS

The Ashtabula County Grand Jury returned an indictment on November 6, 2001 charging Steven P. Ross, appellant herein, with two Counts of Aggravated Robbery, in violation R.C. 2911.01(A)(1), felonies of the first degree; two Counts of Felonious Assault, in violation of R.C. 2903.11(A)(2), felonies of the second degree; and Carrying a Concealed Weapon, in violation of R.C. 2923.12(A), a felony of the fourth degree.

Appellant pled not guilty to all Counts of the indictment. On February 4, 2002, appellant withdrew his not guilty plea and entered a plea of guilty to one Count of Aggravated Robbery and one County of Felonious Assault. The remaining Counts of the indictment were dismissed. Appellant was later sentenced to a three year term of imprisonment for the Firearm Specification contained in Count One of the indictment, a four year term of imprisonment for Count One of the indictment, and a four year term of imprisonment for Count Two of the indictment. The sentences were ordered to be served concurrently, but consecutively to the Firearm Specification sentence.

On December 1, 2006, the trial court conducted a resentencing hearing pursuant to R.C. 2929.191(C). On September 5, 2006, the trial court entered a *nunc pro tunc* entry pursuant to R.C. 2929.191(A)(2) reinstating appellant's original sentence and advising appellant that he would be subject to post release control under R.C. 2967.28 upon his release from prison. The Eleventh District Court of Appeals affirmed the decision of the trial court. *State v. Ross*, 11th



ARGUMENT

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 Opposition to Appellant's Proposition of Law

- A. **R.C. 2929.191 provides authorization to a trial court to correct a sentence "at any time before the offender is released from imprisonment."**

Appellant argues that the State failed to object to appellant's "postrelease control free" sentence and, thus, waived any future right to assert that postrelease control is part of appellant's sentence. Appellant relies on the premise that challenges to criminal sentences not raised in the trial court are waived. Appellant's memorandum at 3 citing *State v. Dudukovich*, 2006-Ohio 1309, C.A. No. 05CA008729. While this premise may be correct, R.C. 2929.191 gives authorization to a trial court to correct a sentence "at any time before the offender is released from imprisonment." *State v. Sharpless*, 11th Dist. App. No. 2006-P-0088 at ¶40, 2007-Ohio-1922 citing 2929.191(A)(1).

- B. **Res judicata does not bar a trial court from adding postrelease control to a sentence after the time for appeal has run.**

Appellant argues that the State is barred by res judicata and collateral estoppel from challenging his sentence because the State did not timely appeal appellant's original sentence, which did not include postrelease control. However, this Honorable Court recognizes an exception to the doctrine of res judicata to correct invalid sentences. *Id.* at ¶39.

In *State ex rel. Cruzado v. Zaleski* (2006), 111 Ohio St.3d 353, 2006-Ohio-5795, this Honorable Court set forth two exceptions where a trial court retains continuing jurisdiction. *Id.* at 356. The first gives a trial court authorization to correct a void sentence and the second gives a trial court authorization to correct clerical errors in its judgments. *Id.* Appellant's sentence falls under the first exception.

"Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." *Id.* at 357 quoting *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, 471 N.E.2d 774. "Where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is * * * to resentence the defendant." *Id.* quoting *State v. Jordan* (2004), 104 Ohio St.3d 21, 2004-Ohio-6085. Appellant's sentencing entry did not contain the statutorily mandated term of postrelease control. Accordingly, the proper remedy was to resentence appellant.

C. Resentencing to correct a deficient notice of postrelease control does not violate double jeopardy.

Appellant argues that adding postrelease control to his sentence violated his right to be free from double jeopardy because he had a legitimate expectation of finality in his original judgment entry. However, as discussed in the previous argument, appellant's original sentence was invalid because it did not contain the statutorily mandated term of postrelease control. Therefore, there can be no "expectation of finality to trigger the protections of the Double Jeopardy Clause." *State v. Rich*, 5th Dist. App. No. 2006 CA 00171 at ¶11, 2007-Ohio-362.

The trial court was required by statute to impose postrelease control. *Id.* citing *State v. Ramey*, 136 Ohio Misc.2d 846, 2006-Ohio-885. The original sentencing entry did not include

postrelease control and was void. *Id.* Since jeopardy does not attach to a void sentence, the trial court did not violate appellant's constitutional guarantee against double jeopardy by correcting

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his sentence. *Id.*

D. A trial court is permitted to make corrections to postrelease control sanctions while the term of imprisonment continues.

Appellant argues that the State could not add a criminal sanction to his sentence because most of it had been completed. Specifically, appellant contends that his sentence became final as he approached completion of it.

This issue was addressed in *State v. Simpkins*, 8th Dist. App. No. 87692, 2006-Ohio-6028. In *Simpkins*, the appellant argued that the trial court erred when it added postrelease control to a sentence that had been nearly served. *Id.* at ¶6. The court rejected this argument finding that the appellant's sentence was void and the trial court retained its jurisdiction to resentence appellant. *Id.* at ¶11. The court further held that the trial court did not err in resentencing appellant near the end of his sentence. *Id.* at ¶12. The court indicated that "since the trial court resented appellant prior to his release from prison, the correction was clearly made while the term of his imprisonment continued and postrelease control sanctions were still available." *Id.* at ¶13.

Appellant's case is identical to that of the appellant in *Simpkins*. In the case at bar, the trial court resented appellant prior to his release from prison, thus, the correction was clearly made while the term of his imprisonment continued and postrelease control sanctions were still available. Accordingly, it was not "too late to add punishment to Mr. Ross' sentence."

Appellant's brief at 7.

II. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio 5795, precludes relief.



- A. ***State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, abrogates standard conceptions of waiver and res judicata.**

Appellant asserts that *Cruzado* did not address whether a claim, such as appellant's, would be barred by res judicata or waiver. While this assertion is correct, numerous Ohio courts have held that res judicata does not bar resentencing to impose postrelease control. See, *Ramey, State v. Draper*, 10th Dist. App. No. 06AP-600, 2007-Ohio-1240, *State v. Broyles*, 5th Dist. App. No. 2006CA00170, 2007-Ohio-487, *Sharpless*. In doing so, each of the courts relied on the exceptions to the doctrine of res judicata set forth in *Cruzado*. It appears that the reasoning used in *Cruzado* would have led to this conclusion had the court addressed the issue of res judicata.

- B. **Constitutional challenges must first be presented in the court below.**

Appellant asserts that *Cruzado* "left the door open to constitutional challenges to postrelease control resentencing hearings." Appellant's brief at 8. While this may be true, appellant did not make this argument in the Eleventh District Court of Appeals. "[A] criminal constitutional question can not be raised in the Supreme Court unless it is presented and urged in the court below." *Williams* at 117. Accordingly, appellant's constitutional challenge should not be heard.

- C. ***Cruzado* was correctly decided in accordance with prior Ohio Supreme Court opinions regarding correction of unlawful sentences.**

Appellant relies on the decision in *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980 to support his argument that "*Cruzado* was wrongly decided because it departs from a line of

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cases in which the Supreme Court of Ohio limited the ability of trial courts to 'correct judgments' entries except on direct appeal." Appellant's argument is without merit because *Pratts* is clearly distinguishable from both *Cruzado* and the case at bar.

Pratts and Cruzado involved different statutes. *Pratts* involved a challenge to a trial court's noncompliance with R.C. 2945.05. *Id.* at 87. This Honorable Court held that the statute required strict compliance, that failure to strictly comply was an error in jurisdiction, that lack of strict compliance is reversible error on direct appeal, and that after direct appeal any error is waived. *Id.* at 88.

Cruzado involved a challenge to R.C. 2929.191, similar to the case at bar. In *Cruzado*, this Honorable Court relied on the decisions in *State v. Beasley* (1984), 14 Ohio St.3d 74, 471 N.E.2d 774 and *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085 in finding that a trial court is authorized to correct a void sentence or clerical errors in judgments, that a sentence is void when it does not contain a statutorily mandated term, and that the proper remedy for a void sentence is to resentence the defendant. *Cruzado* at 356-357.

Clearly, this Honorable Court relied its prior decisions with regard to correction of void sentences when deciding *Cruzado*. Failure to rely on the *Pratts* decision was not an error as it involved a different, unrelated statute. Accordingly, appellant's argument is without merit.

III. Am. Sub. H.B. 137 confers jurisdiction to add postrelease control after-the -fact.

A. H.B. 137 does not violate the single subject rule.

Appellant argues that House Bill 137 violates the single subject rule set forth by Section 15(D), Article II of the Ohio Constitution, in that the bill concerns both post release control and

sealing of juvenile records. The single subject rule will only cause a statute to be invalidated when the violation is manifestly gross and fraudulent. *In re Nowak*, 104 Ohio St. 3d 466, 477,

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2004-Ohio-6777. Appellant fails to explain how including postrelease control and sealing of juvenile records is a manifestly gross and fraudulent violation of the single subject rule.

Accordingly, House Bill 137 does not violate the single subject rule and appellant's argument is without merit.

B. H.B.137 does not violate the Double Jeopardy Clause of the Fifth Amendment.

As explained in previous argument, House Bill 137 does not violate double jeopardy. Appellant's original sentence was invalid because it did not contain the statutorily mandated term of postrelease control. Therefore, there can be no "expectation of finality to trigger the protections of the Double Jeopardy Clause." *State v. Rich*, 5th Dist. App. No. 2006 CA 00171 at ¶11, 2007-Ohio-362.

C. H.B. 137 does not violate the separation of powers doctrine.

Appellant argues that postrelease control no longer requires judicial authorization pursuant to R.C. 2929.14(F), therefore, House Bill 137 violates the separation of powers doctrine. This argument is without merit.

R.C. 2929.19(B)(3)(c) requires a court to include a term of postrelease control in certain sentences. This statute specifically states that if the court fails to include the required term of postrelease control in the sentence R.C. 2929.191 applies. *Id.* R.C. 2929.191 does not violate the separation of powers doctrine. *State v. Broyles*, 5th Dist. App. No. 2006CA00170 at ¶22, 2007-Ohio-487.

R.C. 2929.191 sets forth the notice requirements for postrelease control. *Id.* at ¶20. The trial court includes these notices in its sentencing entry, thus, “the determination of guilt in a criminal matter and the sentencing of a defendant convicted of a crime are solely the province of the judiciary. *Id.* at ¶21. Accordingly, the separation of powers doctrine is not violated.

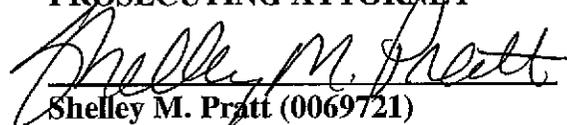
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CONCLUSION

For the foregoing reasons, the State of Ohio respectfully requests this Honorable Court to deny jurisdiction and dismiss the discretionary appeal at bar.

Respectfully submitted,

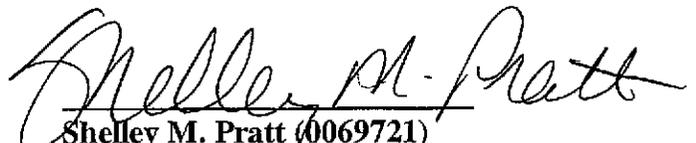
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum in Response to Jurisdiction has been served via ordinary U.S. Mail, postage prepaid, this 9th day of August, 2007, upon Marie Lane, Counsel for Appellant, at 4817 State Road, Suite 202, Ashtabula, Ohio 44004.



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