IN THE
OHIO SUPREME COURT
COLUMBUS, OHIO

STATE OF OHIO, *ex rel.* ADEN D. FOGEL,	)	CASE NUMBER 07-1897
	)	
Relator	)	
	)	
vs.	)	Original Action In Prohibition
	)	
THE HONORABLE EDWARD M. ZALESKI,	)	
	)	
Respondent	)	

RESPONDENT'S, THE HONORABLE EDWARD M. ZALESKI'S, MOTION TO DISMISS

November 2, 2007

DENNIS P. WILL # 0038129
Prosecuting Attorney,
Lorain County, Ohio

21726

M. ROBERT FLANAGAN # ~~0019528~~*
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* *Counsel of Record*

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Counsel for Respondent,
The Honorable Edward M. Zaleski

FILED
NOV 02 2007
CLERK OF COURT
SUPREME COURT OF OHIO

MOTION TO DISMISS

Now comes the Respondent, the Honorable Edward M. Zaleski, of the Lorain County, Ohio Court Of Common Pleas, by and through his legal counsel, the Lorain County, Ohio Prosecutor's Office, pursuant to Rule 12(B)(6) of the Ohio Rules Of Civil Procedure, and hereby moves this Honorable Court to dismiss the Relator's Complaint For A Writ Of Prohibition because the Complaint fails to state a claim upon which relief can be granted.

The grounds for the within Motion To Dismiss are set forth in the Brief which is attached hereto; and is incorporated herein by reference, as if fully rewritten herein.

Respectfully submitted,

DENNIS P. WILL, # 0038129
Prosecuting Attorney
Lorain County, Ohio

M. Robert Flanagan, #0021726
Assistant Prosecuting Attorney
Lorain County, Ohio
Attorney For Respondent,
The Honorable Edward M. Zaleski
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PROOF OF SERVICE

This is to certify that one (1) copy of the foregoing Motion To Dismiss and attached Brief was served upon: Aden D. Fogel, the Relator, *Pro Se,* Inmate Number A451-382, at the Richland Correctional Institution, P.O. Box 8107, Mansfield, Ohio, 44901, by regular United States Mail, this _____ day of November, 2007.

M. Robert Flanagan #0021726
Assistant Prosecuting Attorney,
Lorain County, Ohio
Attorney For Respondent,
The Honorable Edward M. Zaleski

BRIEF

I. Introduction

The Relator, Aden D. Fogel, hereinafter "Fogel", filed an original action in prohibition against the Respondent, the Honorable Edward M. Zaleski of the Lorain County, Ohio Court Of Common Pleas, hereinafter "Judge Zaleski", seeking an order that would prohibit Judge Zaleski from re-sentencing Fogel in the underlying criminal matter of State of Ohio v. Aden Fogel, Lorain County, Ohio Court Of Common Pleas, Case Number 02CR061956, hereinafter "State v. Fogel, Case Number 02CR061956". (Complaint For A Writ Of Prohibition).

II. Undisputed Facts

As set forth in the Docket Sheet of Fogel's underlying criminal case (a true and accurate self-authenticating certified copy of which is attached to as Exhibit "A"; and is incorporated herein by reference, as if fully rewritten herein), in July of 2003, Judge Zaleski, following Fogel's plea bargain, found Fogel guilty of possession of cocaine (a first degree felony), trafficking in drugs and possession of drug abuse instruments.[1] Fogel received a five (5) year prison sentence. *Id.* During Fogel's 2003 sentencing, Judge Zaleski did not impose any mandatory post-release control sanctions. (Complaint For A Writ Of Prohibition, Exhibit A).

On October 30, 2007, Judge Zaleski re-sentenced Fogel in the matter of State v. Fogel, Case Number 02CR061956. (October 30, 2007 Sentencing Transcript in the matter of State v. Fogel, Case Number 02CR061956, a true and accurate copy of which is attached to as Exhibit "B"; and is

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1 It is appropriate for this Court to take judicial notice of documents filed in another legal proceeding without having to convert the within Motion To Dismiss into a motion for summary judgment. See, *e.g.*, *State, ex rel. Findlay Publishing Co. v. Schroeder* (1996), 76 Ohio St. 3d 580; and *Kramer v. Time Warner, Inc.*, 937 F. 2d 767 (2d Cri., 1991).

incorporated herein by reference, as if fully rewritten herein).

In his Complaint, Fogel asserts that Judge Zaleski did not have any jurisdiction to re-sentence him because Fogel had appealed Judge Zaleski's September 12, 2007 denial of Fogel's August 15, 2007 Motion For Dismissal Of Proceedings that Fogel filed in his underlying criminal case, and because Fogel had filed the instant original prohibition action. (Complaint For A Writ Of Prohibition).

When Judge Zaleski re-sentenced Fogel on October 30, 2007, Fogel was still serving his five (5) year prison term. Thus, in accordance with R.C. §§ 2967.28 and 2929.191, Judge Zaleski was able to correct Fogel's 2003 "void" sentence, and re-sentence him on October 30, 2007 in the matter of State v. Fogel, Case Number 02CR061956. *State v. Bezak* (2007), 114 Ohio St. 3d 94; *State, ex rel. Cruzado v. Zaleski* 111 Ohio st. 3d 353; and *State v. Ryan* (2007), 172 Ohio App. 3d 281.

As set forth below, Fogel's Complaint For A Writ Of Prohibition fails to state a claim upon which relief can be granted; and the October 30, 2007 re-sentencing in the underlying criminal matter of State v. Fogel, Case Number 02CR061956 was proper.

III. Law And Argument

A. Standard Of Review

Rule 12(B)(6) of the Ohio Rules Of Civil Procedure authorizes a court to dismiss a complaint that fails to state a claim upon which relief can be granted. When, as in the instant case, it appears beyond doubt that Fogel can prove no set of facts in support of his claim which would entitle him to the relief he requests, then his Complaint should be dismissed. *O'Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St. 2d 242.

B. Prohibition Does Not Lie

Prohibition is an extraordinary remedy which prevents an inferior court from acting beyond the scope of its jurisdiction. *State, ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St. 3d 70.A writ of prohibition can only be issued when: 1) a court is about to exercise judicial or quasi-judicial power; and 2) the exercise of the judicial power is clearly not authorized by law; and 3) absent the issuance of a writ of prohibition, the relator has no adequate remedy at law. *State, ex rel., Hunter v. Summit County Human Resources Commissioner* (1998), 81 Ohio St. 3d 450. Great caution is to be used when issuing a writ of prohibition. *State, ex rel. Tubbs Jones v. Suster, supra.*

When Judge Zaleski re-sentenced Fogel on October 30, 2007, Fogel was still serving his five (5) year prison term. Thus, in accordance with R.C. §§ 2967.28 and 2929.191, Judge Zaleski was able to correct Fogel's 2003 "void" sentence by re-sentencing him on October 30, 2007 in the matter of State v. Fogel, Case Number 02CR061956. *State v. Bezak* (2007), 114 Ohio St. 3d 94; *State, ex rel. Cruzado v. Zaleski* 111 Ohio St. 3d 353; and *State v. Ryan* (2007), 172 Ohio App. 3d 281. Judge Zaleski did not act in the absence of all jurisdiction when he re-sentenced Fogel.

Moreover, it is well established that prohibition **does not lie** to review an accomplished act. *State, ex rel., Flannery v. Sidwell* (1970), 24 Ohio St. 2d 74; and *State, ex rel., The Maysville Bridge Company v. Quinlan* (1931), 124 Ohio St. 658. A direct appeal is an adequate remedy at law which forecloses the issuance of a writ of prohibition. *State, ex rel., Lyons v. Zaleski* (1996), 75 Ohio St. 3d 623.

Judge Zaleski **has already re-sentenced** Fogel. Therefore, as a matter of law, a writ of prohibition cannot be issued for the purpose of reviewing an accomplished act. Accordingly, Fogel's Complaint For A Writ Of Prohibition fails to state a claim upon which relief can be granted; and should be dismissed, with prejudice.

IV. Conclusion

This action became moot on October 30, 2007 when Judge Zaleski re-sentenced Fogel. Ohio law expressly empowers a trial court to correct a "void" criminal sentence. R.C. §§ 2967.28 and 2929.191; *State, ex rel. Cruzado v. Zaleski* 111 Ohio St. 3d 353; and *State v. Ryan* (2007), 172 Ohio App. 3d 281. Prohibition does not lie to review an accomplished act.

Accordingly, for the foregoing reasons, this Honorable Court should dismiss Fogel's Complaint For A Writ Of Prohibition, with prejudice.

Respectfully submitted,

DENNIS P. WILL, # 0038129
Prosecuting Attorney
Lorain County, Ohio

M. Robert Flanagan, #0021726
Assistant Prosecuting Attorney
Lorain County, Ohio
Respondent,
The Honorable Edward M. Zaleski
225 Court Street, 3d Floor
Elyria, Ohio 44035
440-329-5454

Lorain County Court Of Common Pleas
Case Docket Sheet

CAPTION: OHIO VS FOGEL
ACTION:

CASE NUMBER: **02CR061956**
DATE FILED: 12/10/2002

JUDGE: Judge Edward M Zaleski

Parties Plaintiff(s)

STATE OF OHIO P - 1 **LORAIN COUNTY PROSECUTOR ,**
225 Court Street
3rd Floor
ELYRIA, OH 44035
() -

Defendant(s)

ADEN FOGEL, D - 1 R.J. BUDWAY, Excused: 10/22/2007
4280 BROCKLEY AVENUE
SHEFFIELD LAKE, OH 44054
4463 Oberlin Ave
LORAIN, OH 44053
(440) 988-8700

SSN : 295-86-9818 Date of Birth : 3/25/1974
Sex: UNKNOWN Race:
Bond: $25,000 CASH Other: $0
Muni Ct #:
Arrested:

WILLIAM WILLIS,
248 PARK AVE
AMHERST, OH 44001
(440) 988-2858

Entries **OHIO VS FOGEL** **02CR061956** **Date Filed: 12/10/2002**

Entry Date	*Type*	*Entry*	*Vol.*	*Page*
12/10/2002	INDICTMENT	INDICTMENT FILED. WARRANT TO ARREST W/COPY OF INDICTMENT ISSUED TO LORAIN COUNTY SHERIFF INDICTMENT FOR POSSESSION OF COCAINE,2925.11(A) F-1; TRAFFICKING IN DRUGS,2925.03(A), F-5; POSSESSING DRUG ABUSE INSTRUMENTS,2925.12 (A), M-1.		
12/12/2002	SERVICE	CERTIFICATE OF SERVICE FILED.		
12/12/2002	RETURN	SHERIFF'S RETURN - I ARRESTED DEFENDANT ON DECEMBER 11, 2002, PHIL R. STAMMITTI, SHERIFF		
12/12/2002	BOND	BOND SET AT $25,000, CASH. (MAB) VOLUME # 899 PAGE # 2269		
12/19/2002	ARRNMENT.	DEFENDANT ARRAIGNED. WAIVED READING OF INDICTMENT, ENTERED PLEA OF NOT GUILTY BOND CONTINUED. CASE ASSIGNED TO JUDGE ZALESKI PRE-TRIAL SET FOR 1/6/03 AT 8:30 A.M. DEFT. WAIVES TIME FROM 12/23/02 TO 1/6/03. (MAB) VOLUME 900 PAGE 1209		
12/20/2002	FILING	BILL OF PARTICULARS FILED BY STATE OF OHIO.		

EXHIBIT
A
PENGAD 800-631-6989

Entries

Entry Date	Type	Entry	Vol.	Page
12/20/2002	FILING	DISCOVERY FILED BY STATE OF OHIO.		
01/07/2003	ENTRY	FIRST PRETRIAL HAD. DEFT DOES REQUEST DISCOVERY AND BILL OF PARTICULARS. PROSECUTOR TO PROVIDE DISCOVERY AND BILL OF PARTICULARS ON OR BEFORE DONE DEFT TO PROVIDE PROSECUTOR WITH DISCOVERY ON OR BEFORE: DONE ALL MOTIONS SHALL BE FILED ON OR BEFORE: DONE AT THE REQUEST OF THE DEFT, CASE IS SET FOR NEXT PRETRIAL: 2/3/03 AT 8:30 AM. MEED LAB REPORT. DEFT WAIVES STATUTORY TIME PURSUANT TO R.C. 2945.71 ET SEQ. AND ALSO THE INTERSTATE AGREEMENT ON DETAINERS. (EMZ) VOLUME # 901 PAGE # 801		
02/04/2003	CONTINUED	DEFENDANT WAIVES STATUTORY TIME LIMITS FOR SPEEDY TRIAL. AT DEFENDANT'S REQUEST THE PRE-TRIAL IS CONTINUED TO 3/10/03 AT 8:30 AM. (EMZ) VOLUME # 903 PAGE # 542		
02/05/2003	FILING	NOTICE OF INTENT TO SUBMIT LAB REPORT FILED BY STATE OF OHIO		
03/11/2003	ENTRY	DEFENDANT DOES REQUEST DISCOVERY AND BILL OF PARTICULARS. ALL MOTIONS SHALL BE FILED ON OR BEFORE: DONE PROSECUTOR TO PROVIDE DISCOVERY AND BILL OF PARTICULARS ON: DONE DEFENDANT TO PROVIDE PROSECUTOR WITH DISCOVERY ON OR BEFORE DONE THE PARTIES AGREE TO EXCHANGE EXPERT REPORTS IF ANY ON: DONE AT THE DEFENDANT'S REQUEST, SECOND PRETRIAL SET FOR: 3/31/03 AT 8:30 AM. DEFENDANT WAIVES STATUTORY TIME FOR SPEEDY TRIAL PURSUANT TO RC 2945.71 ET SEQ. MERIT HEARING FOR 00CR055847 ALSO RESET FOR 3/31/03 ORIGINALLY SCHEDULED FOR 3/17/03. (EMZ) (00CR055847) VOLUME # 905 PAGE # 1869		
04/01/2003	ENTRY	DEFENDANT WAIVES STATUTORY TIME FOR SPEEDY TRIAL PURSUANT TO R.C. 2945.71 ET SEQ. PRETRIAL HAD. AT THE DEFENDANT'S REQUEST, FINAL PRETRIAL SET FOR: 5/12/03 AT 1:00 P.M. (EMZ) VOL. 907 PAGE 51		
05/13/2003	PRETRIAL	PRETRIAL HAD. FINAL PRETRIAL SET FOR: 7/7/03 AT 1:30 PM. AND JURY TRIAL SET FOR: 7/17/03 AT 8:30 AM. MERITS CONT'D IN CASE # 00CR055847 TO 7/7/03 AT 1:30 PM. PROS HAS ALREADY PROVIDED DISC AND BILL OF PARTICULARS. DEF WAIVES STATUTORY TIME FOR SPEEDY TRIAL PURSUANT TO RC 2945.71 ET SEQ. (EMZ) (00CR055847) VOLUME # 909 PAGE # 2581		
07/09/2003	PLEA/WAIVE	PLEA OF GUILTY, WAIVER OF RIGHTS FILED.		
07/09/2003	(EMZ)	DEFENDANT IN COURT WITH COUNSEL; WITHDRAWS FORMER PLEA OF NOT GUILTY AND REQUEST FOR JURY TRIAL AND ENTERS PLEA OF GUILTY TO: INDICTMENT, WHICH PLEA IS ACCEPTED. SENTENCED. AGREE SENTENCE OF 5 YRS TOTAL FOR BOTH 00CR055847 AND WITHIN CASE. SENTENCING ENRTY TO FOLLOW. VOL 913 PAGE 1673		

Entries

Entry Date	Type	Entry	Vol.	Page
07/10/2003	SENTENCING	DEFENDANT IN COURT WITH COUNSEL FOR SENTENCING DEFENDANT SENTENCED AFTER HAVING PLEAD GUILTY TO THE FOLLOWING CHARGES: COUNT 1: POSSESSION OF COCAINE, A VIOLATION OF O.R.C. 2925.11(A) A 1ST DEGREE FELONY. COUNT 2: TRAFFICKING IN DRUGS, A VIOLATION OF O.R.C. 2925.03(A) A 5TH DEGREE FELONY. COUNT 3: POSSESSION OF DRUG ABUSE INSTRUMENTS A VIOLATION OF O.R.C. 2925.12(A) A 1ST DEGREE MISD. THE SENTENCES ARE CONCURRENT TO EACH OTHER AND CONCURRENT TO CASE NUMBER 00CR055847. UPON CONSIDERATION OF ALL MATTERS, DEFENDANT SENTENCED TO: COUNT 1: 5 YEARS IN LCI: COUNT 2: 1 YEAR IN LCI: COUNT 3: 30 DAYS IN LCCF. CREDIT FOR ALL DAYS SERVED ALONG WITH FUTURE CUSTODY DAYS WHILE AWAITING TRANSPORT. DEFENDANT'S DRIVERS LICENSE SUSPENDED FOR 6 MONTHS. SEE SENTENCING ENTRY. VOL 913 PAGE 1674		
07/10/2003	WRIT	FI FA ISSUED TO LORAIN COUNTY SHERIFF.		
07/10/2003	FI FA	FI FA RETURNED - NOTHING FOUND, NOT SATISFIED PHIL R. STAMMITTI, SHERIFF		
07/10/2003	SENT/CONV	C/C OF INDICTMENT, JOURNAL ENTRY, AND SENTENCE ISSUED TO LORAIN COUNTY SHERIFF ALONG WITH WARRANT TO CONVEY TO: LORAIN CORRECTIONAL INSTITUTION		
07/15/2003	RETURN	SHERIFF'S RETURN - I CONVEYED THE DEFENDANT TO PLACE DESIGNATED ON JULY 15, 2003 PHIL R. STAMMITTI, SHFF		
07/15/2003	REPORT	REPORT OF DRUG OFFENSE CONVICTION SENT TO OHIO BUREAU OF MOTOR VEHICLES		
07/23/2003	REPORT	OHIO DEPARTMENT OF REHABILITATION & CORRECTION NOTICE OF COMMITMENT & CALCULATION OF SENTENCE RECEIVED & FILED.		
08/06/2003	MOTION	MOTION FILED BY DEFT. FOGEL, PRO SE FOR JAIL-TIME CREDIT. (AND 00CR055847)		
08/21/2003	(EMZ)	DEFT IS GRANTED 217 DAYS JAIL TIME CREDIT IN THIS CASE FROM THE LORAIN COUNTY JAIL VOL. 916 PAGE 940		
02/02/2004	(EMZ)	UPON ORAL MOTION OF THE STATE AND PURSUANT TO DEFENDANT'S PLEA SHEET OF 7/7/2003 AND SENTENCING ENTRY, THE FOLLOWING FORFEITED ITEMS(LCDTF CASE #02-1592) SHALL BE FOR THE USE OR SALE BY THE LORAIN COUNTY DRUG TASK FORCE FOR LAW ENFORCEMENT USE: ELECTRONIC GRAM SCALE, 2 CAMERAS AND A RADIOSHACK SCANNER. THE FORFEITED $4,270.00 IN CASH IS ORDERED DEPOSITED INTO LAW ENFORCEMENT TRUST ACCOUNTS AS FOLLOWS: 75% LORAIN COUNTY DRUG TASK FORCE AND 25% LORAIN COUNTY PROSECUTOR. ALL REMAINING CONTRABAND AND EVIDENCE IS ORDERED DESTROYED. JOURNAL 927 PAGE 101		
02/11/2004	FILING	AS PER DEFT'S REQUEST OF 2/8/04, CLERK/RECORDS MAILED DEFT COPIES OF SENTENCING ENTRIES (00CR055847).		

Entries

Entry Date	Type	Entry	Vol.	Page
02/19/2004	FILING	AS PER DEFT'S REQUEST OF 2/13/04, CLERK/RECORDS MAILED DEFT A COPY OF CONVICTION/SENTENCING JOURNAL ENTRY.		
03/23/2004	MOTION	MOTION ALLEGING SEIZURE WAS UNLAWFULL: RETURN OF PROPERTY PURSUANT TO R.C. 2925.45, FILED BY THE DEFENDANT PRO SE.		
04/07/2004	FILING	SUPPLEMENT TO MOTION FILED ON MARCH23, 2004 ALLEGING SEIZURE WAS UNLAWFULL: RETURN OF PROPERTY PURSUANT TO R.C. 2925.45 FILED BY THE DEFENDANT PRO SE.		
04/12/2004	FILING	AS PER DEFT'S REQUEST, CLERK/RECORDS MAILED DEFT A COPY OF JOURNEL ENTRY (JOURNAL 927, PAGE 101).		
04/28/2004	(EMZ)	DEFENDANT'S MOTION FOR RETURN OF PROPERTY IS GRANTED. THE PROPERTY TO BE RETURNED IS A COMPUTER SYSTEM, PHOTOGRAPHS AND FILMS THAT WERE TAKEN DURING THE SEARCH OF HIS PREMISES THE PORPERTY SHALL BE RETURNED TO HIS ATTORNEY, RJ. BUDWAY, AT 1958 KRESGE DRIVE, AMHERST, OHIO 44001. (EMZ) JOURNAL 932 PAGE 2549		
05/19/2004	FILING	AS PER DEFT'S REQUEST RECEIVED ON 5/19/04, CLERK/RECORDS MAILED DEFT A COPY OF PLEA AGREEMENT.		
05/25/2004	FILING	AS PER DEFT'S REQUEST RECEIVED 5/24/40, CLERK/RECORDS MAILED DEFT COPY OF APPEALS DOCKETING PACKET AND JOURNAL ENTRY (VOL. 932, PAGE 2549).		
05/26/2004	APPEAL	NOTICE OF APPEAL TO THE COURT OF APPEALS FILED. BY ADEN D. FOGEL. (04CA008498)		
08/02/2004	MOTION	MOTION TO PRESERVE EVIDENCE FILED BY THE DEFENDANT PRO SE.		
08/03/2004	(EMZ)	DEFENDANT'S MOITON TO PRESERVE EVIDENCE IS DENIED JOURNAL 939 PAGE 426		
08/12/2004	FILING	AS PER DEFT'S REQUEST RECEIVED ON 8/10/04, CLERK/RECORDS MAILED DEFT A TIME-STAMPED COPY OF JOURNAL ENTRY DENYING MOTION TO PRESERVE EVIDENCE		
10/22/2004	MOTION	MOTION TO COMPEL COURT ORDER FILED BY DEFT, PRO SE.		
11/24/2004	DECISION	(04CA008498) DECISION AND JOURNAL ENTRY. JUDGMENT AFFIRMED. SEE JOURNAL. COSTS TAXED TO APPELLANT. VOL. 98 PG. 28		
12/06/2004	MOTION	MOTION TO SUSPEND FURTHER EXECUTION OF SENTENCE PER O.R.C. 2929.20 (B), (C) AND REQUEST FOR ORAL HEARING FILED BY THE DEFENDANT PRO SE		
12/10/2004	(EMZ)	DEFT MOTION TO SUSPEND FURTHER EXECUTION OF SENTENCE IS DENIED. VOL 947 PAGE 2268		
05/25/2005	FILING	NOTICE OF MOOTNESS FILED BY THE STATE OF OHIO.		

Entries

Entry Date	Type	Entry	Vol.	Page
05/27/2005	(EMZ)	DEFT'S MOTION TO COMPEL IS MOOT IN AS MUCH AS THIS COURT ORDERED THE STATE RETURN DEFT'S COMPUTER TO HIS ATTY R.J. BUDWAY ON 4/28/04. VOLUME # 958 PAGE # 2950		
06/02/2005	(EMZ)	THIS COURT'S JOURNAL ENTRY DOCKETED 5/27/05 IS HEREBY AMENDED NUNC PRO TUNC TO READ THAT DEFT'S MOTION TO COMPEL IS MOOT BECAUSE THE STATE HAS ALREADY RETURNED THE DEFT'S COMPUTER TO HIS ATTY. VOL 959 PAGE 295		
06/06/2005	FILING	REPLY TO NOTICE OF MOOTNESS FILED BY THE DEFENDANT PRO SE.		
06/23/2005	APPEAL	NOTICE OF APPEAL TO THE COURT OF APPEALS FILED. BY ADEN D. FOGEL. (05CA008746)		
06/22/2006	DECISION	DECISION AND JOURNAL ENTRY. JUDGMENT AFFIRMED. COSTS TAXED TO APPELLANT. SEE JOURNAL. (05CA008746) VOLUME # 108 PAGE # 52		
08/15/2007	MOTION	MOTION FILED BY DEFT, PRO SE, FOR DISMISSAL OF PROCEEDINGS DATED OCTOBER 22, 2007, PURSUANT TO O.R.C. 2929.191		
09/10/2007	FILING	SUPPLEMENTAL EVIDENTIARY SUBMISSION IN SUPPORT OF DEFT'S MOTION FOR DISMISSAL OF PROCEEDINGS FILED BY DEFT, PRO SE		
09/12/2007	(EMZ)	DEFT'S MOTION FOR DISMISSAL OF PROCEEDINGS IS DENIED.	1013	2101
10/03/2007	APPEAL	NOTICE OF APPEAL TO THE COURT OF APPEALS FILED. (07CA009261)		
10/19/2007	MOTION	MOTION FILED BY DEFT, PRO SE, FOR STAY OF PROCEEDINGS CURRENTLY SCHEDULED FOR 10/22/07		
10/22/2007	(EMZ)	CASE SCHEDULED FOR RE-SENTENCING OF 10/29/07 AT 10:30 A.M. PURSUANT TO R.C. 2929.191. THE LORAIN COUNTY SHERIFF'S DEPT IS HEREBY ORDERED TO CONVEY ADEN FOGEL, INMATE #A451382 FROM THE RICHLAND CORRECTIONAL INST., 1001 OLIVESBURG RD, MANSFIELD, OH TO THE LORAIN COUNTY JUSTICE DENTER, 225 COURT ST., ELYRIA, OH ON THE ABOVE DATE. ATTORNEY WILLIAM WILLIS IS APPOINTED TO REPRESENT DEFT FOR PURPOSES OF RE-SENTENCING.	1016	1810
10/22/2007	WARRANT	WARRANT TO CONVEY TO LCCF		
10/29/2007	Journal Entry	SENTENCING HAS BEEN SCHEDULED FOR 10/30/07 AT 10:00 A.M.	1016	3224
10/30/2007	RETURN	SHERIFF'S RETURN - I CONVEYED THE DEFENDANT TO PLACE DESIGNATED ON 10/29/07. PHIL R. STAMMITTI, SHERIFF.		

Entries

Entry Date	Type	Entry	Vol.	Page
10/31/2007	(EMZ)	DEFT IN COURT WITH COUNSEL FOR RE-SENTENCING AFTER HAVING WITHDRAWN HIS PREVIOUSLY ENTERED PLEA OF NOT GUILTY AND HAVING NOW ENTERED A PLEA OF GUILTY TO, AND HAVING BEEN FOUND GUILTY BY THE COURT OF THE FOLLOWING CHARGES: POSSESSION OF COCAINE, 2925.11(A), F-1; TRAFFICKING IN DRUGS, 2925.03(A), F-5; POSSESSION OF DRUG ABUSE PARAPHERNALIA, 2925.12(A), M-1; AND SENTENCED TO 5 YEARS IN LCI ON COUNT 1, 1 YEAR IN LCI ON COUNT 2 AND 30 DAYS IN LCCF ON COUNT 3. POST RELEASE CONTROL IS MANDATORY FOR 5 YEARS. SEE JOURNAL.	1016	3522

I HEREBY CERTIFY THIS TO BE A TRUE COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.
as of 11-1-07
RON NABAKOWSKI, LORAIN COUNTY CLERK OF THE COURT OF COMMON PLEAS
BY Pamela A Perkins DEPUTY

State of Ohio,)
) SS:
County of Lorain.)

IN THE COURT OF COMMON PLEAS

The State of Ohio,)
Plaintiff,)
vs.) NO. 02CR061956
Aden Fogel,)
Defendant.)

* * *

COMPLETE TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-ENTITLED MATTER ON THE 30TH DAY OF OCTOBER, 2007, BEFORE THE HONORABLE EDWARD M. ZALESKI, PRESIDING JUDGE OF SAID COURT.

* * *

APPEARANCES:

Appearing on behalf of the State of Ohio:

Lorain County Prosecutor's Office
By: Peter Gauthier, Assistant Prosecuting Attorney

Appearing on behalf of the Defendant:

William Willis, Esq.

* * *

PENGAD 800-631-6989
EXHIBIT
B

1 P R O C E E D I N G S

2 MR. GAUTHIER: Your Honor, this is State of Ohio
3 versus Aden Fogel, Case Number 02CR061956. We are here for
4 resentencing for the proper imposition of post-release
5 control. I have the old journal entry there, your Honor.
6 THE COURT: Sure. Counsel.
7 MR. WILLIS: Your Honor, if it please the Court.
8 The Court had appointed me for purposes of resentencing
9 today. I would like the record to note that Mr. Fogel has
10 forwarded copies of various motions to me; some of which I
11 I do have in my file, some I do not. We were just
12 discussing this matter this morning before the Court took
13 the bench.
14 Your Honor, it appears, from what Mr. Fogel has
15 advised me, that he has filed several motions which may not
16 grant, in his opinion, the Court jurisdiction over this
17 matter, including a notice of appeal to the Court of
18 Appeals here, as well as a writ of prohibition, your Honor.
19 That is my understanding. I have not seen those documents,
20 but I am taking him at his word.
21 THE COURT: The Court has seen those documents.
22 And the mere fact that he filed a writ of prohibition does
23 not preclude the Court from hearing this matter unless
24 there would be an order from the Supreme Court telling me I
25 can't do it. The mere fact that it was filed means

1 absolutely nothing. It's like filing an injunction,
2 pending the appeal.
3 MR. WILLIS: Your Honor, also, I believe he's
4 filed a motion to stay these proceedings.
5 THE COURT: That will be denied. We're here for
6 resentencing. Do you have anything to say?
7 MR. WILLIS: Your Honor, again, with regard to the
8 Court proceeding on this matter, the Court has denied
9 certain motions here. We would object to the Court
10 proceeding in this matter. We would like to preserve any
11 constitutional rights that he's entitled to, to appeal
12 these matters.
13 It's my understanding that Mr. Fogel would object
14 to the resentencing; inasmuch as, it will subject him to
15 apparently a post-release control sanction, which he's
16 already been advised of by the appropriate authorities in
17 the Department of Rehabilitations and Corrections.
18 Again, your Honor, we would preserve any
19 constitutional arguments through the State or U.S.
20 Constitution on his behalf, so that he could effectively
21 pursue any appeal of resentencing. I do understand, your
22 Honor, and appreciate, at least my belief, his out date is
23 set for tomorrow.
24 THE DEFENDANT: November 1st.
25 MR. WILLIS: November 1st, your Honor. And that

1 it appears that the sole purpose here is to resentence him,
2 to advise him of a post-release control sanction. Again,
3 on behalf of Mr. Fogel, we would object to the Court doing
4 that and ask the Court to preserve any appeal for
5 Mr. Fogel concerning his constitutional rights concerning
6 the resentencing, your Honor.
7 THE COURT: Very well. Do you have anything to
8 say, Mr. Fogel --
9 THE DEFENDANT: Yes, sir, your Honor.
10 THE COURT: -- before the Court pronounces
11 sentence?
12 THE DEFENDANT: Well, like I had discussed with
13 Mr. Willis, I'd like to ask the Court at this time to
14 withdraw Mr. Willis as my counsel, appoint new counsel,
15 continue this matter at a later date.
16 THE COURT: That won't happen. Absolutely not.
17 THE DEFENDANT: As I had said to Willis, this is
18 the first chance I have had to speak with him. This -- I
19 received notice of this hearing on July 25th.
20 THE COURT: Let me stop you there. You've been
21 doing everything pro se.
22 THE DEFENDANT: Yes, sir.
23 THE COURT: I'm surprised I'm even appointing an
24 attorney here for you because you both cannot act as an
25 attorney. Either you're going to do it or he's going to do

1 it. What's it going to be? He's going to be off and
2 you're going to do it?
3 THE DEFENDANT: I mean, if that's --
4 THE COURT: You can't have co-counsel. You're
5 either the counsel. You filed writs, you filed motion's to
6 stay, you filed prohibition, you file other things. And so
7 I'm here to proceed for sentencing.
8 Do you have anything to say before the Court
9 pronounces sentence?
10 THE DEFENDANT: Yes, sir. As Mr. Wills said,
11 there's certain issues that I want to preserve for appeal.
12 I'm know I'm required to raise those issues at sentencing
13 today specifically.
14 THE COURT: Go ahead. He has.
15 THE DEFENDANT: We discussed the writ of
16 prohibition, the stay. I have the appeal pending.
17 THE COURT: I understand the appeal is pending.
18 THE DEFENDANT: There's a issue here as far as a
19 delay in sentencing, a reasonable delay in sentencing.
20 It's been over four years since this case has been -- since
21 I was pronounced guilty. I haven't been sentenced yet.
22 You know, the State -- I don't see any argument that the
23 State could raise they didn't know of my whereabouts or
24 that I was out of reach of this court for sentencing.
25 I had an expectation of finality in the penalty

1 phase of this case, which is a 6th and 14th Amendment to
2 the United States Constitution; a double jeopardy issue as
3 far as expectation of finality; due process; 5th and 14th
4 Amendments to the United States Constitution; res judicata
5 because the State failed to perfect an appeal. They had 30
6 days to appeal this; they chose not to. They should have
7 been judicially stopped from even having this hearing.
8 This is an unconstitutional ex post facto exercise of
9 Revised Code 2929.191.
10 This is a clear -- I mean, I know that the Court
11 is authorized under 2929.191 to hold this hearing, but it's
12 a retroactive application or imposition of post-release
13 control. The State of Ohio and the United States
14 Constitution prohibition against ex post facto is
15 controlling here. And I would just ask the Court to
16 dismiss this proceeding --
17 THE COURT: It will be --
18 THE DEFENDANT: -- and choose not to impose
19 post-release control.
20 THE COURT: Well, that will be denied.
21 I want to tell you, Mr. Fogel, at the time you
22 were sentenced, we were perfectly within our right. Since
23 that time, the Supreme Court has said something different
24 and we had to come back and resentence you. The Supreme
25 Court told us we had to bring you back and resentence you.

1 This is what we're doing.
2 So the Court has considered your record, oral
3 statements, any victim impact statement and the agreement
4 that was made to you at sentencing. You agreed to a five
5 year period of time.
6 THE DEFENDANT: Yes, sir.
7 THE COURT: And that was to run concurrent to a
8 merits violation at that time.
9 THE DEFENDANT: Yes, sir.
10 THE COURT: And the Court will honor that
11 agreement.
12 THE DEFENDANT: Thank you, your Honor.
13 THE COURT: And so you've been -- you've pled
14 guilty to possession of cocaine, a felony of the first
15 degree; trafficking in drugs, a felony of the fifth degree;
16 possession of drug abuse paraphernalia, a misdemeanor of
17 the first degree. And you've been found guilty of the
18 possession of cocaine, felony of the first degree;
19 trafficking in drugs, felony of the fifth degree; and
20 possession of drug abuse paraphernalia, misdemeanor of the
21 first degree.
22 It's going to be the judgment and sentence of this
23 Court you be senetenced to five years at the Lorain
24 Correctional Institute on Count 1; one year on trafficking
25 in drugs; 30 days on possession of drug abuse

1 paraphernalia. Those counts will run concurrent to each,
2 for a total of five years, which will run concurrent to the
3 merits violation in Case Number 00CR055847.
4 And you need to be aware that you will be
5 supervised after you leave prison, which is referred to as
6 post-release control, for a period of five years. This is
7 mandatory.
8 Before you are released, the Parole Board shall
9 determine your post-release control sanctions. Part of
10 those sanctions will include the condition that you shall
11 not leave the state without permission of the Court or your
12 parole or probation officer and that you abide by the law
13 at all times.
14 The Parole Board may impose any other conditions
15 of post-release control that the Board considers
16 appropriate, and the conditions of release may include any
17 community residential sanction, community non-residential
18 sanction, or financial sanction that this Court was
19 authorized to impose.
20 If you are on post-release control, and you
21 violate post-release control or any condition of that
22 post-release control, the Parole Board may impose a prison
23 term, as part of the sentence, for up to nine months for
24 each violation, with a maximum for repeated violations of
25 50 percent of the stated prison term.

1 If you commit a new felony while subject to
2 post-release control, you may be sent to prison for the
3 remaining post-release control period or twelve months,
4 whichever is greater. This prison term shall be served
5 consecutively to any term imposed for the new felony of
6 which you are convicted.
7 I don't know what the court of appeals is going to
8 do in these matters. So you've preserved your right for an
9 appeal. Let's see what they say.
10 THE DEFENDANT: Your Honor, I have one other
11 issue.
12 THE COURT: Yes.
13 THE DEFENDANT: Actually, two issues. What about
14 the court costs, can you waive the court costs because I'm
15 an indigent defendant?
16 THE COURT: Did you hear me assess the court
17 costs? I don't think I did.
18 THE DEFENDANT: Well, they will assess the court
19 costs afterwards, so I just wanted to make sure --
20 THE COURT: I didn't put it in this entry.
21 THE DEFENDANT: Okay. And I had a matter of
22 forfeiture. Now, I know with the resentencing that's going
23 to probably --
24 THE COURT: Well, they gave you your computer
25 back, or they should have given your computer back.

1 THE DEFENDANT: Well, there were certain things
2 that were ordered to be returned that were destroyed and
3 never returned. I don't know if this is going to have any
4 bearing on the appeal.
5 THE COURT: No, it shouldn't have any bearing on
6 the appeal whatsoever.
7 THE DEFENDANT: All right.
8 THE COURT: Okay?
9 MR. WILLIS: Your Honor, he is indigent. For the
10 record, should he choose to appeal this matter, which seems
11 to be his desire --
12 THE COURT: He needs to get ahold of the public
13 defender, I would imagine.
14 THE DEFENDANT: I have.
15 THE COURT: Good luck, Mr. Fogel, and see you on
16 the streets this weekend.
17 THE DEFENDANT: Thank you, your Honor.
18 * * *
19 HEARING CONCLUDED
20 * * *
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23
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1 C E R T I F I C A T E

2 The State of Ohio,)
) SS:
3 County of Lorain.)

4

5 I, Cathlene M. Camp, Official Court Reporter of
6 the Court of Common Pleas, Lorain County, Ohio, do hereby
7 certify that this is a correct transcript of the
8 proceedings in this case on October 30, 2007.
9 I further certify that this is a complete
10 transcript of the proceedings on that date.
11 IN WITNESS WHEREOF, I have subscribed my name
12 this 30th day of October, 2007.
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16
17
18
19
20
21 Cathlene M. Camp
22 Cathlene M. Camp, RPR
Official Court Reporter
Court of Common Pleas
23 Lorain County Justice Center
Elyria, Ohio 44035
24 (440) 329-5564
25

Cathlene M. Camp
Notary Public, State of Ohio
My Commission Expires
August 3, 2010