

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, :  
 :  
 -vs- : Case No. 08-1005  
 :  
 RICHARD E. JOSEPH, :  
 :  
 Defendant-Appellant. :

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ON APPEAL FROM THE COURT OF APPEALS, THIRD  
APPELLATE DISTRICT, ALLEN COUNTY APP. NO. 1-07-50

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APPELLANT RICHARD E. JOSEPH'S  
NOTICE OF CERTIFICATION OF CONFLICT

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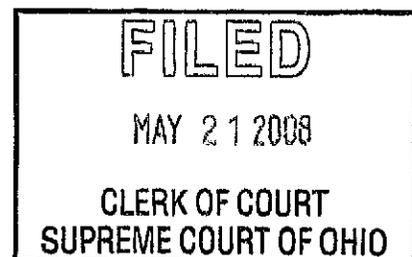
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COUNSEL FOR RICHARD E. JOSEPH



IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
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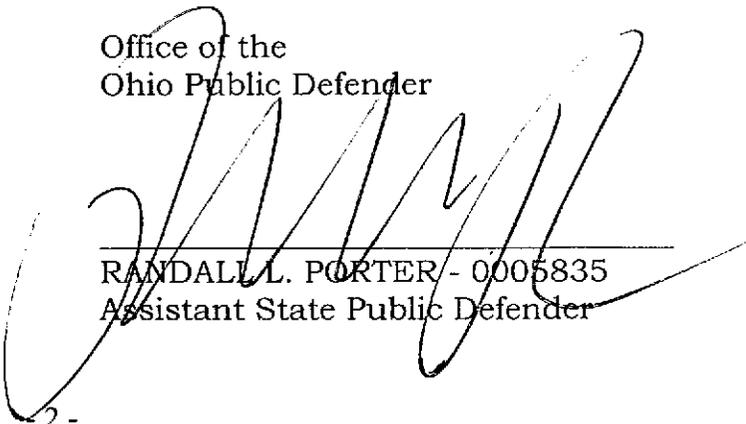
APPELLANT RICHARD E. JOSEPH'S  
NOTICE OF CERTIFICATION OF CONFLICT

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Pursuant to Article IV, Section 3(B(4) of the Ohio Constitution, Appellant Richard Joseph hereby gives notice that on April 22, 2008, the Allen County Court of Appeals, Third Appellate District, certified that its March 17, 2008, decision in this case is in conflict with the decisions in *State v. Peacock*, 11th Dist. No. 2002-L-115, 2003-Ohio-6772; *State v. Smoot*, 10th Dist. No. 05AP-104, 2005-Ohio-5326; and *State v. Triplett*, 8th Dist. No. 87788, 2007-Ohio-75. More specifically the Court of Appeals certified the following question: "May a trial court impose court costs pursuant to R.C. 2947.23 in its sentencing entry, when it did not impose the costs in open court at the sentencing hearing?"

Respectfully submitted,

Office of the  
Ohio Public Defender



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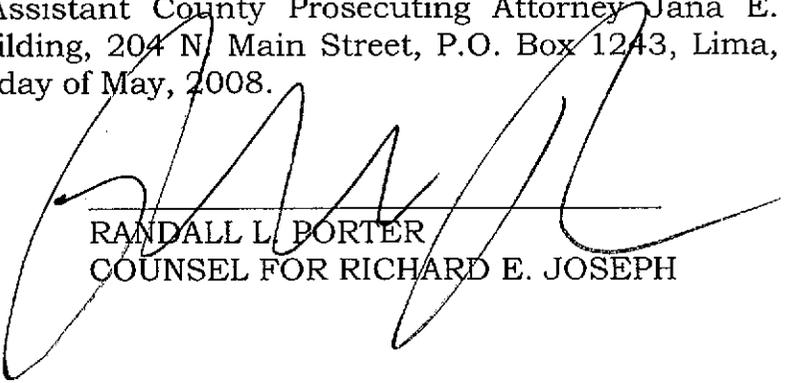
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Appellant Richard E. Joseph's Notice Of Certification Of Conflict* was forwarded by first-class, postage prepaid U.S. Mail to Allen Assistant County Prosecuting Attorney Jana E. Emerick, Court of Appeals Building, 204 N. Main Street, P.O. Box 1243, Lima, Ohio 45802-1243 on this 21st day of May, 2008.



RANDALL L. PORTER  
COUNSEL FOR RICHARD E. JOSEPH

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, : Case No.  
 :  
 -vs- :  
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 RICHARD E. JOSEPH, : ALLEN COUNTY APP. NO. 1-07-50  
 :  
 Defendant-Appellant. :

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APPENDIX TO APPELLANT RICHARD E. JOSEPH'S  
NOTICE OF CERTIFICATION OF CONFLICT

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Judgment Entry, *State v. Joseph*, 3rd Dist. No. 1-07-50  
(April 15, 2008).....A-1

Opinion and Entry, *State v. Joseph*, 3rd Dist. No. 1-07-50,  
2008-Ohio-1138 .....A-3

*State v. Peacock*, 11th Dist. No. 2002-L-115, 2003-Ohio-6772 .....A-16

*State v. Smoot*, 10th Dist. No. 05AP-104, 2005-Ohio-5326 .....A-30

*State v. Triplett*, 8th Dist. No. 87788, 2007-Ohio-75 .....A-35

COURT OF APPEALS  
FILED

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GINA C. STALEY-BURLE  
CLERK OF COURTS  
ALLEN COUNTY, OHIO

IN THE COURT OF APPEALS OF THE THIRD APPELLATE DISTRICT OF OHIO

ALLEN COUNTY

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STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO 1-07-50

v.

RICHARD E. JOSEPH,

JOURNAL  
ENTRY

DEFENDANT-APPELLANT.

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This cause comes on for determination of appellant's motion to certify a conflict as provided in App.R. 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution.

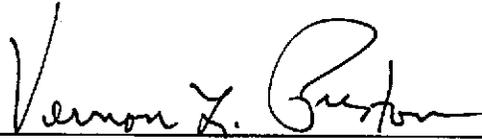
Upon consideration the court finds that the judgment in the instant case is in conflict with the judgments rendered in *State v. Peacock*, 11<sup>th</sup> Dist. No. 2002-L-115, 2003-Ohio-6772; *State v. Smoot*, 10<sup>th</sup> Dist. No. 05AP-104, 2005-Ohio-5326; and *State v. Triplett*, 8<sup>th</sup> Dist. No. 87788, 2007-Ohio-75.

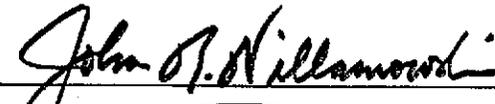
Accordingly, the motion to certify is well taken and the following issue should be certified pursuant to App.R. 25:

May a trial court impose court costs pursuant to R.C. 2947.23 in its sentencing entry, when it did not impose those costs in open court at the sentencing hearing?

79 PLC

It is therefore **ORDERED** that appellant's motion to certify a conflict be, and hereby is, granted on the certified issue set forth hereinabove.

  
\_\_\_\_\_

  
\_\_\_\_\_

  
\_\_\_\_\_

JUDGES

DATED: April 22, 2008

/jlr

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
ALLEN COUNTY**

COURT OF APPEALS  
FILED  
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JOHN D. STALEY-BURLETT  
CLERK OF COURTS  
ALLEN COUNTY, OHIO

**STATE OF OHIO,**

**CASE NUMBER 1-07-50**

**PLAINTIFF-APPELLEE,**

**v.**

**OPINION**

**RICHARD E. JOSEPH,**

**DEFENDANT-APPELLANT.**

---

**CHARACTER OF PROCEEDINGS:** Appeal from Common Pleas Court.

**JUDGMENT:** Judgment affirmed.

**DATE OF JUDGMENT ENTRY:** March 17, 2008

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**ATTORNEYS:**

**RANDALL L. PORTER**  
Assistant State Public Defender  
Reg. #0005835  
8 East Long Street, 11<sup>th</sup> Floor  
Columbus, OH 43215-2998  
For Appellant.

**JANA E. EMERICK**  
Assistant Prosecuting Attorney  
Reg. #0059550  
204 North Main Street  
Lima, OH 45801  
For Appellee.

**PRESTON, J.**

{¶1} Defendant-appellant, Richard E. Joseph (hereinafter “Joseph”), appeals the Allen County Court of Common Pleas judgment of sentence imposed as a result of resentencing mandated by the Federal Sixth Circuit Court of Appeals. For reasons that follow, we affirm.

{¶2} In 1990, Joseph and co-defendant Jose Bulerin were jointly indicted for the aggravated murder of Ryan Young. The indictment also provided for a death penalty specification pursuant to R.C. 2929.04(A)(7). In January 1991, a jury trial was held wherein Joseph was found guilty and sentenced to death.

{¶3} On December 23, 1993, this Court affirmed Joseph’s conviction and sentence of death. *State v. Joseph*, 3d Dist. No. 1-91-11. On August 30, 1995, the Ohio Supreme Court affirmed our decision. *State v. Joseph* (1995), 73 Ohio St.3d 450, 653 N.E.2d. 285. On March 18, 1996, the U.S. Supreme Court denied Joseph’s petition for writ of certiorari. *Joseph v. Ohio*, 516 U.S. 1178, 116 S.Ct. 1277, 134 L.Ed.2d 222.

{¶4} Thereafter, Joseph filed a writ of habeas corpus in federal district court. *Joseph v. Coyle* (N.D. Ohio Dec. 22, 2004), No. 1:98 CV 527 (Memorandum of Opinion and Order). The federal court ordered Joseph’s death sentence be set aside and that he be resentenced to life imprisonment with parole eligibility after twenty years as mandated by R.C. 2929.03(A).

{¶5} Joseph then appealed the district court's judgment with respect to his conviction. The State cross-appealed the federal district court's grant of writ of habeas corpus as to the imposed sentence of death. On November 9, 2006, the Sixth Circuit Court of Appeals affirmed the district court's issuance of the writ with respect to the death penalty but denied Joseph's remaining claims. *Joseph v. Coyle* (6<sup>th</sup> Cir. 2006), 469 F.3d 441. On March 19, 2007, the U.S. Supreme Court declined to review the Sixth Circuit's determination. *Houk v. Joseph* (2007), 127 S.Ct. 1827, 167 L.Ed.2d 321.

{¶6} On April 20th and May 31st of 2007, the Allen County Court of Common Pleas held pretrial conferences with the parties. On June 6, 2007, the trial court held a sentencing hearing wherein it sentenced Joseph to life imprisonment with eligibility for parole in twenty years per the federal court's order. On June 14, 2007, the trial court filed its judgment entry of sentence.

{¶7} Joseph appeals the trial court's sentence and asserts four assignments of error for review.

#### ASSIGNMENT OF ERROR NO. I

**THE TRIAL COURT ERRED WHEN IT INCLUDED A PUNISHMENT IN THE WRITTEN SENTENCING JUDGMENT, THAT IT HAD NOT IMPOSE [SIC] FROM THE BENCH. [SENT. TR. 22, JUDGMENT. ENTRY, P.2]**

{¶8} In his first assignment of error, Joseph argues that the trial court erred by imposing costs in its written judgment entry when it did not impose costs

on the record at the sentencing hearing. The State of Ohio conceded in its brief and at oral argument that the judgment entry was in error for the reason cited by Joseph. We disagree.

{¶9} This Court has previously held that a trial court is not required to orally address a defendant at the sentencing hearing to inform him that he is required by R.C. 2947.23 to pay for the costs of prosecution. *State v. Ward*, 3d Dist. No. 8-04-27, 2004-Ohio-6959, ¶16. At least one other appellate district has reached the same conclusion. *State v. Powell*, 2d Dist. No. 20857, 2006-Ohio-263, ¶11.

{¶10} In addition, the cases Joseph cites rely upon Crim.R. 43(A). *State v. Smoot*, 10th Dist. No. 05AP-104, 2005-Ohio-5326, ¶12; *State v. Peacock*, 11th Dist. No. 2002-L-115, 2003-Ohio-6772, ¶45; *State v. Triplett*, 8th Dist. No. 87788, 2007-Ohio-75, ¶¶28-29; *State v. Clark*, 11th Dist. No. 2006-A-0004, 2007-Ohio-1780, ¶¶35-36.<sup>1</sup> We have rejected this argument before as well and decline to overrule our precedent. *State v. Clifford*, 3d Dist. No. 11-04-06, 2005-Ohio-958, ¶18, overruled on other grounds by *In re Ohio Criminal Sentencing Statute Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174.<sup>2</sup>

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<sup>1</sup> *Clark* is currently on appeal before the Ohio Supreme Court but on a different issue. *State v. Clark*, 114 Ohio St.3d 1503, 2007-Ohio-4285, 872 N.E.2d 947; *State v. Clark*, 114 Ohio St.3d 1504, 2007-Ohio-4285, 872 N.E.2d 950.

<sup>2</sup> Our opinion in *Clifford* was overruled based on *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. However, we have since relied upon *Clifford* for propositions of law not affected by *Foster*. *State v. Didion*, 173 Ohio App.3d 130, 2007-Ohio-4494, 877 N.E.2d 725.

{¶11} Joseph's first assignment of error is, therefore, overruled.

## ASSIGNMENT OF ERROR NO. II

### THE TRIAL COURT ERRED WHEN IT INCORPORATED THE JANUARY 2, 1991 PROFFER STATEMENT INTO THE PRE-SENTENCE INVESTIGATION. [SENT. TR. 4].

{¶12} In his second assignment of error, Joseph argues that the trial court erred when it incorporated a portion of the proffer statement into the pre-sentence investigation. Specifically, Joseph argues that the statement was made only for purposes of a plea agreement in accordance with Evid.R. 410(A) and could not be used for the pre-sentence investigation. This argument lacks merit.

{¶13} The proffer statement provides the following pertinent language:

**\* \* \* the Statements are being given in furtherance of 'plea' negotiations pursuant to the rules of evidence and relevant case law, which indicates that since they are for purposes of 'plea' discussions and 'plea' negotiations, that they are *not admissible at trial*, unless one or both of the co-defendant's would take the stand in their own defense and testify differently from the facts that are about to be related. \* \* \* these statements are being made too [sic], the Prosecuting Attorney, in contemplation with the *relevant rule of evidence*.**  
\* \* \*

This has been [sic] discussion that Counsel and the clients here, as well as Mr. Berry of the Prosecutor's Office, for the purpose of furthering 'plea' negotiations in this case. Everybody understands that's the purpose of this Interview and *is not to be used for any other purpose*. And we do have some representatives of the Law Enforcement Agencies here. We're at a sensitive stage right now of this and so I ask you 'not to disclose to anyone the contents other than in the course of your official duties.' We don't want this to become public knowledge *at this point*.

(Emphasis added). (Jan. 2, 1991 Proffer Statement at 1, 24).

{¶14} Proffer agreements are similar to other plea agreements and are governed by principles of contract law. *State v. Lynch*, 10th Dist. No. 06AP-128, 2007-Ohio-294, ¶11, citing *United States v. Chiu* (C.A.9, 1997), 109 F.3d 624; *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶50. Contracts are interpreted to carry out the intent of the parties as evidenced by the contract's language. *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶9. Contracts should be interpreted as a whole, giving effect to each provision when reasonable. *Id.* at ¶16. Furthermore, courts should read provisions of a contract in harmony with one another so that each provision is given effect. *Christe v. GMS Mgt. Co.* (1997), 124 Ohio App.3d 84, 88, 705 N.E.2d 691.

{¶15} In this case, the term “any other purpose” appearing in the proffer statement should be interpreted in the context of the parties’ prior discussions relating to the “rules of evidence” and the statement’s admissibility “at trial”. (Proffer Statement at 1, 24); *Mortensen*, 2004-Ohio-24, at ¶16; *Christe*, 124 Ohio App.3d at 88. The parties’ reference to “rules of evidence” and admissibility at trial indicates their intent to prevent the proffer statement from being used against Joseph as an admission of guilt during the trial. Here, the statement was not used *at trial* against Joseph; but rather, was incorporated into the pre-sentence

investigation to aid the court in rendering its sentence. We, therefore, find Joseph's argument lacks merit.

{¶16} Joseph further contends that the proffer statement language incorporated Evid.R. 410. As such, Joseph argues that the agreement prevented the proffer statement from being used for sentencing because sentencing is a criminal proceeding under Evid.R. 410. We disagree.

{¶17} Evid.R. 101(C)(3) provides that the rules of evidence do not apply at sentencing. Therefore, even if the parties incorporated Evid.R. 410 into the agreement as Joseph argues, the trial court was not bound by Evid.R. 410 at sentencing and was within its discretion to consider the proffer statement.

{¶18} Joseph's second assignment of error is, therefore, overruled.

### ASSIGNMENT OF ERROR NO. III

#### TRIAL COURT ERRED WHEN IT PERMITTED THE VICTIMS TO MAKE ORAL SENTENCING STATEMENTS. [SENT. TR. 10].

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{¶19} In his third assignment of error, Joseph argues that the trial court erred by allowing victim impact statements at the time of sentencing because R.C. 2930.14, the statute which provides victims with the right to speak at sentencing, was not in effect at the time the crime occurred. The State argues that the assignment of error is without merit or harmless error at most. We agree.

{¶20} The current version of R.C. 2930.14(A) provides, in pertinent part:

**Before imposing sentence upon, or entering an order of disposition for, a defendant or alleged juvenile offender for the commission of a crime or specified delinquent act, the court *shall* permit the victim of the crime or specified delinquent act to make a statement.**

(Emphasis added). As Joseph argues, the original version of R.C. 2930.14 became effective on October 12, 1994 following the passage of Senate Bill 186, which was after the offense in this case occurred, 1994 Ohio Laws 172. Accordingly, Joseph argues that prior to October 12, 1994 trial courts could not allow victim statements. We disagree.

{¶21} Joseph cites *State v. Hedrick* for the proposition that “Ohio did not statutorily permit a victim impact statement to be presented orally in court during sentencing prior to 1994.” (Feb. 9, 1999), 9th Dist. No. 18955 at \*1. Although Joseph is correct that prior to 1994 Ohio did not *statutorily mandate* that trial courts allow oral victim impact statements at sentencing, the revised code did mandate that trial courts consider written victim impact statements at sentencing.

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See e.g. *State v. Bell* (May 3, 1991), 3d Dist. No. 9-90-79, at \*9, citing R.C. 2947.05.1. Since the court would have had these statements before it in written form, we fail to see the prejudice that resulted by the victim’s oral statement, and the Court’s opinion in *Hedrick* does not persuade us otherwise for several reasons.

{¶22} First, the proposition cited by Joseph from *Hedrick* is interesting but, nonetheless, dicta. Second, as the Court in *Hedrick* recognized, the U.S. Supreme

Court's decision in *Booth v. Maryland* (1987), 482 U.S. 496, 509, 107 S.Ct. 2529, 96 L.Ed.2d 440 that victim impact statements violated the Eighth Amendment was only applicable to the sentencing phase of *capital* cases. *Id.* at \*1. At the time of Joseph's resentencing, capital punishment was not an option per the federal court's writ. Consequently, we do not see any constitutional implications arising from *Booth*. Third, *Booth*, *supra*, has now been overruled by *Payne v. Tennessee* (1991), 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720. Fourth, the Court in *Hedrick* did not find that the trial court erred by allowing victim impact statements during sentencing; rather, the court *assumed* that it was error and found it harmless. 9th Dist. No. 18955 at \*2.

{¶23} *Hedrick* is persuasive to the extent that it found the possible error harmless. In this case, Joseph was resentenced following the federal court's grant of writ of habeas corpus as to the imposition of death. *Joseph v. Coyle* (N.D. Ohio Dec. 22, 2004), No. 1:98 CV 527 (Memorandum of Opinion and Order), *aff'd in Joseph v. Coyle* (6<sup>th</sup> Cir. 2006), 469 F.3d 441. The federal district court specifically ordered that Joseph "be re-sentenced according to the statutory guidelines for aggravated murder in the absence of a capital specification, as set forth in O.R.C. § 2929.03(A), which mandates a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment." *Joseph v. Coyle* (N.D. Ohio Dec. 22, 2004), No. 1:98 CV 527 (Memorandum of Opinion

and Order). The trial court below followed the federal court's ruling. (Jun. 14, 2007 JE at A-2). Therefore, even assuming that the admission of the victims' statements was in error, we fail to see how Joseph was harmed because the sentence imposed was mandatory under Ohio law and consistent with the federal court's ruling.

{¶24} Joseph's third assignment of error is, therefore, overruled.

#### ASSIGNMENT OF ERROR NO. IV

#### TRIAL COURT ERRED WHEN IT RELEASED A PORTION OF THE PRE-SENTENCE INVESTIGATION, [SIC] TO THE GENERAL PUBLIC. [SENT. TR. 24].

{¶25} In his fourth assignment of error, Joseph argues that the trial court erred when it released a portion of the pre-sentence investigation (PSI) to the public. Joseph argues that these reports are confidential. We agree that the trial court erred, but we are without an appropriate remedy and must overrule the assignment of error for mootness.

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{¶26} R.C. 2951.03(D)(1) provides, in pertinent part:

**The contents of a presentence investigation report \* \* \* are confidential information and are not a public record. The court \* \* \* may inspect, receive copies of, retain copies of, and use a presentence investigation report or a written or oral summary of a presentence investigation *only for the purposes of or only as authorized by Criminal Rule 32.2 or this section, division (F)(1) of section 2953.08, section 2947.06, or another section of the Revised Code.***

{¶27} Interpreting this revised code section, the Court of Appeals for the Eleventh District has found only three instances when a PSI's contents can be released:

**(1) pursuant to R.C. 2951.03(B), to the defendant or his counsel prior to the imposition of his sentence; (2) pursuant to R.C. 2947.06, to the trial court when it is making its sentencing determination; and (3) pursuant to R.C. 2953.08(F), to the appellate court when it is reviewing the sentencing determination on appeal.**

*State ex rel. Sharpless v. Gierke* (2000), 137 Ohio App.3d 821, 825, 739 N.E.2d 1231. Noticeably missing from this list is a release to the public. Furthermore, Crim.R. 32.2 does not authorize the release of a PSI to the public.

{¶28} We, therefore, find that Joseph's argument has merit. However, aside from our finding that the trial court was in error, any further remedies that might exist would be civil in nature and not now before us. This Court cannot provide anything further that would remedy this error; and therefore, we must overrule the assignment of error as moot.

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{¶29} Joseph's fourth assignment of error is, therefore, overruled.

{¶30} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

*Judgment Affirmed.*

**WILLAMOWSKI, J., concurs.**

**Rogers, J., Concurring in part and dissenting in part.**

{¶31} I concur with the majority's disposition of the first, third, and fourth assignments of error. However, I respectfully disagree with the majority's disposition of the second assignment of error.

{¶32} On the second assignment of error, I would find from the comments of counsel that the statements given were to be considered exclusively for the purposes of plea discussions and were "not to be used for any other purpose." (Jan. 2, 1991 Proffer Statement, pp. 1, 24). We all understand that criminal statutes are to be interpreted strictly against the State and liberally in favor of the defendant. See R.C. 2901.04(A). If there are to be meaningful negotiations between the prosecution and defense in criminal cases, the prosecution's comments as to the purpose and use of statements of defendants should also be strictly construed against the State. I would sustain the second assignment of error and direct the trial court to redact the subject statements from the presentence report.

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COURT OF APPEALS  
IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

ALLEN COUNTY

2008 MAR 17 PM 1:01

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STATE OF OHIO,

CASE NUMBER 1-07-50

PLAINTIFF-APPELLEE,

JOURNAL

v.

ENTRY

RICHARD E. JOSEPH,

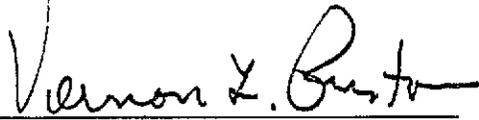
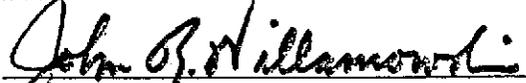
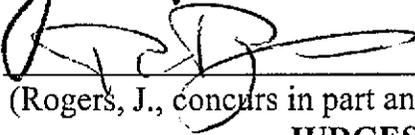
DEFENDANT-APPELLANT.

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For the reasons stated in the opinion of this Court rendered herein, the assignments of error are overruled, and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs to appellant for which judgment is rendered and the cause is remanded to that court for execution.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.

  
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(Rogers, J., concurs in part and dissents in part)  
JUDGES

DATED: March 17, 2008

THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2002-L-115
JOHN T. PEACOCK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 01 CR 000615.

Judgment: Affirmed in part; reversed in part and remanded.

*Charles E. Coulson*, Lake County Prosecutor and *Brian L. Summers*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*John T. Peacock*, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030 (Defendant, pro se).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, John T. Peacock, appeals from the trial court's judgment convicting him of one count of possession of crack cocaine in violation of R.C. 2925.11(C)(4)(c). Appellant also appeals from the trial court's sentencing entry. We affirm in part, vacate appellant's sentence and remand for resentencing.

{¶2} On the evening of November 28, 2001, Officer Eric Kacvinsky of the Painesville Police Department was on patrol in the Jefferson Street area of Painesville. Officer Kacvinsky saw appellant walking up and down Jefferson Street. Officer Kacvinsky turned his patrol car around and saw appellant talking to John Gibson. Officer Kacvinsky did not recognize appellant, but did recognize Mr. Gibson. Officer Kacvinsky testified that he knew Gibson to be involved in crime and drug trafficking.

{¶3} When Mr. Gibson saw Officer Kacvinsky he left the area. Officer Kacvinsky went around the block and stopped Mr. Gibson and spoke to him. Mr. Gibson said that he was in the area visiting relatives. Officer Kacvinsky went back around the block and saw appellant walking down Kerr Avenue. Officer Kacvinsky approached appellant to ascertain his identity.

{¶4} As Officer Kacvinsky exited his patrol car he saw a small white object fall out of appellant's right hand. The object landed on the sidewalk right on the edge of the grass. Officer Kacvinsky called appellant over to him. Officer Kacvinsky talked to appellant while waiting on other officers to arrive. After back up arrived Officer Kacvinsky retrieved the object appellant had dropped. The object was a Tylenol bottle that contained 7.1 grams of crack cocaine.

{¶5} Appellant was indicted for possession of crack cocaine in violation of R.C. 2925.11(C)(4)(c), tried by a jury and convicted. At a sentencing hearing the trial court sentenced appellant to four years in prison and imposed a fine of \$5,000.<sup>1</sup> The trial court's sentencing entry also suspended appellant's driver's license for four years,

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1. Appellant subsequently filed an affidavit of indigency and the trial court amended the sentencing entry and vacated the fine.

stated that appellant could be subject to post release control, and ordered appellant to pay court costs.

{¶6} Appellant appeals his conviction and sentence asserting three assignments of error:

{¶7} “[1.] The trial court erred by adding punishment in the judgment entry of sentence.”

{¶8} “[2.] The trial court erred by imposing costs.”

{¶9} “[3.] Defendant was denied the effective assistance of counsel when his counsel failed to file a motion to suppress evidence in violation of his constitutional rights guaranteed by the United States and Ohio Constitutions.”

{¶10} In his third assignment of error appellant argues that he was denied effective assistance of counsel because his trial counsel failed to file a motion to suppress evidence obtained as a result of his stop and arrest. Because this assignment of error relates to the underlying conviction we address it first.

{¶11} When we review an ineffective assistance claim the benchmark is, “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington* (1984), 466 U.S. 668, 686. To prevail on his claim of ineffective assistance, appellant must show that his counsel’s performance was deficient. “This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment.” *Id.* at 687. He must also show prejudice resulting from the deficient performance. *Id.* “This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* Appellant must show, “that there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. We presume that counsel's conduct was within the wide range of reasonable professional assistance. *Id.* See, also, *State v. Bradley* (1989), 42 Ohio St.3d 136, 143.

{¶12} We need not address the two prongs of appellant's ineffective assistance claim in the order set forth in *Strickland*.

{¶13} "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, at 697.

{¶14} There are three types of police-citizen encounters: consensual encounters, *Terry* stops, and arrests. *State v. Taylor* (1995), 106 Ohio App.3d 741, 747-49. A consensual encounter occurs when a police officer approaches a person in a public place, engages the person in conversation, requests information, and the person is free to refuse to answer and walk away. *Id.* at 747. A consensual encounter does not implicate the Fourth Amendment's protection against unreasonable searches and seizures unless the police officer has restrained the person's liberty by a show of authority or physical force such that a reasonable person would not feel free to decline the officer's request or otherwise terminate the encounter. *Id.* at 747-48.

{¶15} A *Terry* stop is an investigatory detention of limited duration and purpose and can last only as long as it takes the police officer to confirm or dispel his suspicions.

Id. at 748. Such a stop is valid if the officer had reasonable and articulable suspicions of criminal activity. Id. at 749.

{¶16} The final type of police-citizen encounter is an arrest. For an arrest to be valid the officer must have probable cause to believe that the individual has committed an offense. Id.

{¶17} The initial encounter between appellant and Officer Kacvinsky was consensual. Thus, there was no basis to support a motion to suppress.

{¶18} Officer Kacvinsky testified that he knew Mr. Gibson to be involved in criminal activity; he testified that the area was known for drug trafficking. Officer Kacvinsky testified that he saw appellant drop the white object and that in his experience it was common for someone to drop drugs when approached by a police officer. Officer Kacvinsky testified that he watched the white object throughout his conversation with appellant until his back up arrived. Nothing in the record indicates that the encounter ceased to be consensual until other officer's arrived on the scene.

{¶19} Officer Kacvinsky stated that after back up arrived he had other officers watch appellant while he picked up the white object. This constituted a *Terry* stop. Based on Officer Kacvinsky's training and experience he had reasonable suspicion to justify the stop, i.e., he testified that it was common for an individual to discard drugs when approached by an officer. This stop lasted only long enough for the officer to verify his suspicions. Thus, the stop provided no basis to justify a motion to suppress.

{¶20} Finally, Officer Kacvinsky retrieved the object he saw appellant drop. As Officer Kacvinsky started to pick up the bottle appellant stated, "That's not my stuff." Officer Kacvinsky shook the bottle and it rattled. The officer testified that in his experience crack cocaine was often carried in small containers. Officer Kacvinsky field

tested the substance he found in the bottle and it tested positive for crack cocaine. Thus, the arrest was supported by probable cause and provided no basis for a motion to suppress. Appellant has failed to show a reasonable probability that, but for counsel's failure to file a motion to suppress, the result of the proceeding would have been different.

{¶21} Appellant also argues that Officer Kacvinsky questioned him after he was in custody and without informing him of his *Miranda* rights; however, appellant does not direct us to any statement elicited during this questioning that was admitted at trial. Again, appellant has failed to show a reasonable probability that, but for counsel's failure to file a motion to suppress, the result of the proceeding would have been different. Appellant's third assignment of error is without merit.

{¶22} In his first assignment of error appellant argues that the trial court erred in imposing additional punishments in the sentencing entry, i.e., suspending his driver's license, subjecting him to the possibility of post release control, and requiring that he pay costs. We agree.

{¶23} We may modify a sentence or vacate a sentence and remand the matter to the sentencing court for resentencing if we find by clear and convincing evidence that the sentence is contrary to law. R.C. 2953.08(G)(2)(b).

{¶24} R.C. 2967.28 provides in relevant part:

{¶25} "(B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the

offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. \*\*\*.

{¶26} "(C) Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender."

{¶27} Thus, R.C. 2967.28(B) makes post release control mandatory for certain offenses, while R.C. 2967.28(C) grants the parole board discretion to determine if a period of post release control is necessary for other offenses. However, there is no question that post release control is a part of every sentence. See, R.C. 2929.14(F)<sup>2</sup>; *Woods v. Telb* (2001), 89 Ohio St.3d 504, 513.

{¶28} R.C. 2929.19(B)(3) states:

{¶29} "\*\*\*\* if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

{¶30} "\*\*\*\*

{¶31} "\*\*\*\*

---

2. R.C. 2929.14(F) provides:

"If a court imposes a prison term of a type described in division (B) of section 2967.28 of the Revised Code, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a prison term of a type described in division (C) of that section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary."

{¶32} "(c) Notify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree, for a felony sex offense, or for a felony of the third degree in the commission of which the offender caused or threatened to cause physical harm to a person;

{¶33} "(d) Notify the offender that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth, or fifth degree \*\*\*.

{¶34} R.C. 2929.19(B)(3) grants the trial court no discretion. The trial court is required to notify the defendant at the sentencing hearing that post release control will be or may be imposed. *Woods, supra*. Placing the required notice in the sentencing entry is insufficient. Thus, in the instant case the trial court erred when it failed to notify appellant of the possibility of post release control at his sentencing hearing and simply placed the notice in the sentencing entry. R.C. 2929.19(B)(3)(c) and (d); R.C. 2967.28(B) and (C); *Woods, supra* at 513 (stating, "Further, we hold that pursuant to R.C. 2967.28(B) and (C), a trial court must inform the offender at sentencing or at the time of a plea hearing that post-release control is part of the offender's sentence.)

{¶35} What is not clear is the appropriate remedy when the trial court fails to inform the defendant that post release control is part of the sentence. Some cases have held that when the trial court fails to notify the defendant of post release control at the sentencing hearing, but includes post release control in the sentencing entry, post release control is not a part of the sentence. See, e.g., *State v. McAninch*, 1st Dist. No. C-010456, 2002-Ohio-2347; *State v. Morrissey* (Dec. 18, 2000), 8th Dist. No. 77179, 2000 Ohio App. LEXIS 5963; *State v. Hart* (May 31, 2001), 8th Dist. No. 78170, 2001

Ohio App. LEXIS 2428; *State v. Stell* (May 16, 2002), 8th Dist. No. 79850, 2002 WL 999306; *State v. Fitch*, 8th Dist. No. 79937, 2002-Ohio-4891; *State v. Colbert*, 8th Dist. No. 80631, 2002-Ohio-6315.

{¶36} Other cases have held that the sentence should be vacated and the matter remand for resentencing. *State v. Lattimore*, 1st Dist. No. C-010488, 2002-Ohio-723; *State v. Brooks* (Dec. 1, 1999), 3rd Dist. No. 9-99-40, 1999 WL 1076135; *State v. Miller* (Dec. 22, 2000), 6th Dist. No. L-00-1037, 2000 WL 1867274; *State v. Shine* (Apr. 29, 1999), 8th Dist. No. 74053, 1999 WL 258193; *State v. Williams* (Dec. 7, 2000), 8th Dist. No. 76816, 2000 WL 1800609; *State v. Rashad* (Nov. 8, 2001), 8th Dist. No. 79051, 2001 WL 1400013; *State v. Mallet* (Nov. 15, 2001), 8th Dist. No. 79306, 2001 WL 1456479; *State v. Bryant*, 8th Dist. No. 79841, 2002-Ohio-2136; *State v. Johnson*, 8th Dist. No. 80459, 2002-Ohio-4581; *State v. Jordan*, 8th Dist. No. 80675, 2002-Ohio-4587. We agree with the latter.

{¶37} R.C. 2953.08(G)(2)(b) permits us to remand a matter for resentencing if we find by clear and convincing evidence that the sentence was contrary to law. Further, “[c]rimes are statutory, as are the penalties therefor, and the only sentence which a trial judge may impose is that provided for by statute \*\*\*. A court has no power to substitute a different sentence for that provided by law.” *State v. Beasley* (1984), 14 Ohio St.3d 74, 75. When a trial court fails to impose a sentence as mandated by statute, the trial court exceeds its authority and the sentence is void. *Id.* Resentencing an offender to correct a void sentence does not constitute double jeopardy. *Id.*

{¶38} Appellant also contends that remanding for resentencing in this situation chills a defendant’s right to appeal. We disagree. While the state could have appealed the error in sentencing, R.C. 2953.08(B)(2), we may also recognize plain error.

{¶39} Were we to simply vacate the sentencing entry's reference to post release control, we would be usurping the power of both the legislative and executive branches of our government in violation of the separation of powers doctrine. The legislature has mandated post release control, or at least the possibility of post release control, for certain offenses. R.C. 2967.28(B) and (C). Courts have no authority to alter this mandate. The legislature has also granted the executive branch the discretion to determine if certain offenders will be subject to post release control. R.C. 2967.28(C). Courts have no authority to deprive the executive branch of this discretion. By vacating the sentence without remanding for resentencing we would return to courts discretion the sentencing guidelines were to eliminate.

{¶40} Finally, Crim.R. 43(A) requires the defendant to be present at sentencing except in limited circumstances. When a sentencing court imposes additional sanctions in its sentencing entry it violates Crim.R. 43(A). See *State v. Bryant* (May 2, 2002), 8th Dist. No. 79841, 2002 WL 962687, at ¶61 (stating "\*\*\*\* the inclusion of post-release control in the journal entry constituted a modification of [the defendant's] sentence outside [the defendant's] presence. The courts have consistently held that it is reversible error to modify a defendant's sentence in his absence pursuant to Criminal Rule 43(A).") (Internal quotations and citations omitted.)

{¶41} Here, the trial court disregarded the mandates of R.C. 2929.19(B)(3) and Crim.R.43(A) when it failed to inform appellant that he was subject to post release control at his sentencing hearing. Therefore, the sentence is void.

{¶42} Appellant also argues that the trial court violated Crim.R.43(A) when it failed to inform him at the sentencing hearing that his driver's license was to be suspended and that he was required to pay court costs.

{¶43} R.C. 2925.11(E)(2) mandated a driver's license suspension for appellant's conviction. Former R.C. 2947.23 stated:

{¶44} "In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. If a jury has been sworn at the trial of a case, the fees of the jurors shall be included in the costs, which shall be paid to the public treasury from which the jurors were paid."

{¶45} Thus, the trial court was required to suspend appellant's driver's license and impose costs; however, Crim.R.43(A) required that appellant be present for his sentencing. The trial court erred by imposing these additional sanctions in the judgment entry. See, *Bryant*, supra. Thus, we hold that Crim.R.43(A) requires the trial court to inform the defendant, at his sentencing hearing, that his driver's license will be suspended and that he is required to pay costs. Simply adding these sanctions in the sentencing entry violates Crim.R.43(A). Appellant's first assignment of error has merit.

{¶46} In his second assignment of error appellant contends that the trial court cannot impose costs on him because he is indigent. We disagree.

{¶47} As discussed above, former R.C. 2947.23 required the court to impose costs. However, appellant contends that R.C. 2949.14 prohibits a court from imposing costs on an indigent defendant. This section provides:

{¶48} "Upon conviction of a *nonindigent* person for a felony, the clerk of the court of common pleas shall make and certify under his hand and seal of the court, a complete itemized bill of the costs made in such prosecution, including the sum paid by the board of county commissioners, certified by the county auditor, for the arrest and return of the person on the requisition of the governor, or on the request of the governor

to the president of the United States, or on the return of the fugitive by a designated agent pursuant to a waiver of extradition except in cases of parole violation. Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged and certify to it if correct and legal. Upon certification by the prosecuting attorney, the clerk shall attempt to collect the costs from the person convicted." (Emphasis added.)

{¶49} We agree with the reasoning of the Fifth District Court of Appeals, which held:

{¶50} "R.C. 2949.14 does not govern the court's ability to order costs. The statute is directed at the ability of the clerk of courts to collect the costs from the person convicted. While R.C. 2949.14 provides a collection mechanism only for non-indigent defendants, nothing in R.C. 2947.23 prohibits the court from assessing costs to an indigent defendant as part of the sentence. In the event the indigent defendant at some point ceases to be indigent, the clerk could then collect costs pursuant to the procedure outlined in R.C. 2949.14. Ohio law does not prohibit a judge from including costs as part of the sentence of an indigent defendant." *State v. White*, 5th Dist. No. 02CA23, 2003-Ohio-2289, ¶9. See, also, *State v. Roux*, 154 Ohio App.3d 360, 2003-Ohio-5155.

{¶51} Appellant also argues in his second assignment of error that O.A.C. 5120-5-03 violates the due process and equal protection clauses of the United States Constitution. This administrative code section provides a mechanism:

{¶52} "\*\*\*\* for withdrawing money that belongs to an inmate and that is in an account kept for the inmate by the department of rehabilitation and correction (DRC), upon receipt of a certified copy of a judgment of a court of record in an action in which

an inmate was a party that orders an inmate to pay a stated obligation. \*\*\*." Ohio Adm.Code 5120-5-03(A).

{¶53} The Fourteenth Amendment to the United States Constitution prohibits a state from denying a person within its jurisdiction equal protection of the laws. Because no suspect class or fundamental right is involved in this case we apply a rational basis analysis, i.e., whether there exists a permissible governmental objective and whether the means employed is rationally related to the achievement of that objective.

{¶54} Here the objective is the collection of a valid judgment. This is a permissible governmental objective. The means chosen to achieve that objective is the garnishment of an inmate's account. The procedures adopted parallel the collection procedures for non-inmate debtors but are adapted to fit the special problems associated with pursuing collections from inmates and their accounts. *Bell v. Beightler* (Jan. 14, 2003), 10th Dist. No. 02AP-569, 2003 WL 116146, ¶50. Thus, Ohio Adm.Code 5120-5-03 passes the rational basis test and does not violate the equal protection clause.

{¶55} Appellant also contends that Ohio Adm.Code 5120-5-03 violates his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. Garnishment procedures must afford the debtor procedural due process. *Id.*, citing *Peebles v. Clement* (1980), 63 Ohio St.2d 314; *Community Physical Therapy v. Wayt* (1994), 93 Ohio App.3d 612. Due process is a flexible concept that depends on the demands of the particular situation. *Bell*, at ¶51, quoting *Morrissey v. Brewer* (1972), 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484. Due process generally requires a right to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Bell*, at ¶51, citing *State v. Hochhausler* (1996), 76 Ohio St.3d 455.

"In cases of garnishment or attachment, this specifically includes the opportunity to present objections and exemptions to the garnishment order." *Bell*, at ¶51.

{¶56} Ohio Adm.Code 5120-5-03 provides a detailed garnishment procedure. It requires the warden's designee to determine whether "the judgment and other relevant documents are facially valid." Ohio Adm.Code 5120-5-03(C). The warden's designee then provides notice to the inmate of the debt and its intent to seize money from the inmate's account. *Id.* The notice must inform the inmate of a right to claim exemptions and the type of exemptions available under R.C. 2329.66. *Id.* Only after the inmate has had an opportunity to assert any exemption or defense, may money be withdrawn from the inmate's account. *Id.* Finally, only the amount of monthly income received in the inmate's account that exceeds ten dollars may be withdrawn to satisfy the judgment. Ohio Adm.Code 5120-5-03(E). There is no evidence in the record that this amount is insufficient to meet appellant's needs while incarcerated. Ohio AdmCode 5120-5-03 comports with the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution. Appellant's second assignment of error is without merit.

{¶57} For the foregoing reasons appellant's second and third assignments of error are without merit. Appellant's first assignment of error has merit. Appellant's sentence is vacated and this matter is remanded to the Lake County Court Common Pleas for resentencing consistent with this opinion.

JUDITH A. CHRISTLEY and DIANE V. GRENDALL, JJ., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 05AP-104
	:	(C.P.C. No. 03CR10-6727)
Mark L. Smoot,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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O P I N I O N

Rendered on October 6, 2005

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*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

*Yeura R. Venters*, Public Defender, and *Paul Skendelas*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Mark L. Smoot, appeals from the judgment of the Franklin County Court of Common Pleas, whereby the trial court sentenced appellant on his forgery and engaging in a pattern of corrupt activity convictions.

{¶2} On December 30, 2004, appellant pled guilty to forgery, in violation of R.C. 2913.31, a fourth-degree felony, and engaging in a pattern of corrupt activity, in violation of R.C. 2923.32, a second-degree felony. At the sentencing hearing, appellant and plaintiff-appellee, the State of Ohio, jointly recommended, in pertinent part, that the trial court impose consecutive sentences of two years on the corrupt activity count and 14 months on the forgery count. The trial court accepted the joint recommendation and imposed the sentence. Next, the trial court mentioned statutory factors and reasons to support the sentence. Although the trial court did not impose court costs at the sentencing hearing, it did order court costs when it issued its judgment entry journalizing the sentence.

{¶3} Appellant appeals, raising two assignments of error in his merit brief:

FIRST ASSIGNMENT OF ERROR

The trial court erred in imposing consecutive terms of imprisonment, in violation of R.C. 2929.14(E)(4).

SECOND ASSIGNMENT OF ERROR

The trial court erred in imposing a term greater than the minimum sentence for a person with no prior history of imprisonment based on facts not found by a jury or admitted by Appellant. This omission violated Appellant's rights to a trial by jury and due process under the state and federal Constitutions.

{¶4} Appellant raises the following supplemental assignment of error in a supplemental brief:

The trial court erred in ordering Appellant to pay court costs through the Judgment Entry when the penalty was not pronounced in Appellant's presence in court.

{¶5} In his first assignment of error, appellant claims that the trial court failed to make the requisite findings and reasons under R.C. 2929.14(E)(4) and 2929.19(B)(2)(c) when imposing consecutive sentences. Thus, according to appellant, we must reverse his sentences because the trial court erred when it imposed consecutive prison terms. We disagree.

{¶6} The trial court imposed a jointly recommended sentence. Under R.C. 2953.08(D):

A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge. \* \* \*

{¶7} Under R.C. 2953.08(D), a sentence is "authorized by law" if it falls within the statutory range of available sentences. *State v. Atchley*, Franklin App. No. 04AP-841, 2005-Ohio-1124, at ¶8, citing *State v. Harris* (Dec. 31, 2001), Franklin App. No. 01AP-340; *State v. Gray*, Belmont App. No. 02 BA 26, 2003-Ohio-805, at ¶10. Here, the range for appellant's second-degree corrupt activity conviction is two to eight years imprisonment. R.C. 2929.14(A). Thus, the two-year sentence that the trial court imposed on the second-degree felony falls within the statutory range of available prison terms and is "authorized by law[.]" The range for appellant's fourth-degree forgery conviction is six to 18 months. R.C. 2929.14(A). Thus, the 14-month sentence that the trial court imposed on the fourth-degree felony falls within the statutory range of available prison terms and is "authorized by law[.]"

{¶8} Because the above sentences are "authorized by law," and because the trial court imposed the sentences on appellant and appellee's joint recommendation,

R.C. 2953.08(D) precludes our reviewing appellant's claim that the trial court failed to make the statutory findings and explanations when imposing consecutive sentences. See *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, at ¶26; *State v. Dingess*, Franklin App. No. 02AP-150, 2002-Ohio-6450, at ¶48. Thus, we overrule appellant's first assignment of error.

{¶9} In his second assignment of error, appellant contends that the trial court erred by imposing a sentence without the jury finding, or appellant admitting to, the requisite factors in Ohio's felony sentencing statute. In support, appellant relies on *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531; and *Apprendi v. New Jersey* (2000), 530 U.S. 466. In *Apprendi*, the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Otherwise, the sentence violates a defendant's right to a jury trial under the Sixth Amendment to the United States Constitution and Fourteenth Amendment due process guarantees. *Apprendi* at 476-478, 497. In *Blakely*, the United States Supreme Court defined "'statutory maximum' for *Apprendi* purposes" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (Emphasis sic.) *Blakely* at 2537.

{¶10} However, irrespective of R.C. 2953.08(D), appellant waived arguments under *Apprendi* and *Blakely* through the jointly recommended sentencing agreement. *State v. Tillman*, Huron App. No. H-04-040, 2005-Ohio-2347, at ¶5, citing *Blakely* at 2541. Accordingly, we overrule appellant's second assignment of error.

{¶11} In his supplemental assignment of error, appellant asserts that the trial court erred in ordering court costs in the judgment entry because the trial court did not order court costs in appellant's presence. Appellee concedes error, and we agree.

{¶12} Pursuant to Crim.R. 43(A), "[t]he defendant shall be present at \* \* \* the imposition of sentence[.]" Likewise, trial courts impose costs as part of a sentence. R.C. 2947.23(A)(1). Thus, in *State v. Murphy* (Aug. 11, 1998), Franklin App. No. 97APA10-1357, we reversed a trial court's decision to impose court costs outside of a defendant's presence. We remanded the matter to the trial court to allow it to impose, "if it deem[ed] appropriate," such costs in accordance with Crim.R. 43(A). *Murphy*.

{¶13} Accordingly, here, Crim.R. 43(A) required the trial court to impose court costs in appellant's presence. However, the trial court did not mention in appellant's presence that it was imposing court costs. Therefore, the trial court erred by subsequently imposing court costs in the judgment entry without having imposed such costs in appellant's presence. See *Murphy*. As such, we sustain appellant's supplemental assignment of error.

{¶14} In summary, we overrule appellant's first and second assignments of error, but sustain appellant's supplemental assignment of error. The judgment of the Franklin County Court of Common Pleas is affirmed in part, reversed in part as to the court costs imposed outside of appellant's presence, and this matter is remanded to the trial court for proceedings on court costs consistent with this opinion.

*Judgment affirmed in part, reversed  
in part, and cause remanded.*

McGRATH and TRAVIS, JJ., concur.

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 87788

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**KONSHAWNTE TRIPPLETT**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-461216

**BEFORE:** Blackmon, J., Gallagher, P.J., and Corrigan, J.

**RELEASED:** January 11, 2007

**JOURNALIZED:**

[Cite as *State v. Triplett*, 2007-Ohio-75.]

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[Cite as *State v. Triplett*, 2007-Ohio-75.]  
PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Konshawnte Triplett appeals his conviction and sentence.

Triplett assigns the following errors for our review:

“I. The State failed to produce sufficient evidence to prove that Mr. Triplett was guilty of possession of criminal tools as alleged in the indictment. This deprived Mr. Triplett of his right to due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Section 16, Article I of the Ohio Constitution.”

“II. The trial court erred by imposing sentences in its journal entry when it did not impose those sentences in Mr. Triplett’s presence, in violation of Crim.R. 43(A), and the Fifth and Fourteenth Amendments to the United States Constitution, and Section 16, Article I of the Ohio Constitution.”

“III. The trial court erred by imposing court costs in its entry, but not in Mr. Triplett’s presence at sentencing, in violation of Crim.R. 43(A), and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Section 16, Article I of the Ohio Constitution.”

“IV. Konshawnte Triplett was deprived of his right to the effective assistance of counsel, in contravention of the Sixth and Fourteenth Amendments to the United States Constitution, and Section 10, Article I of the Ohio Constitution.”

{¶ 2} Having reviewed the record and pertinent law, we affirm Triplett’s conviction, but remand for re-sentencing to comport with the requirements of Crim.R. 43(A). The apposite facts follow.

{¶ 3} On January 20, 2005, the Cuyahoga County Grand Jury indicted Triplett on one count each of drug possession, corrupting another with drugs, tampering with evidence, and possession of criminal tools. Triplett pled not guilty at his arraignment. After numerous pre-trial conferences were conducted, a jury trial

commenced on April 26, 2005.

### Jury Trial

{¶ 4} Detective David Sims of the Cleveland Police Department testified that on December 1, 2004, he arranged for a confidential reliable informant to make a controlled drug buy with marked money at 1010 East 70<sup>th</sup> Street, apartment #4, Cleveland, Ohio. The informant made the buy of one rock of crack cocaine and indicated he had purchased it from a female occupant at that address. Therefore, the officer obtained a search warrant for the residence.

{¶ 5} Two days later, Detective Sims arranged for a second controlled drug buy at the same residence. The same confidential informant returned with one rock of crack cocaine, which he claimed to have purchased from a female occupant. Detective Sims stated after the second controlled buy, the Cleveland Police SWAT unit executed the search warrant.

{¶ 6} Detective Sims testified he entered the apartment after the SWAT unit had secured it. He found Tripplett, a young girl named Cecelia Marks, and three other adults in the apartment. Detective Sims stated that he observed a camera that was pointed at the street, which he later learned was connected to a television monitor and video recording equipment located in Tripplett's bedroom. Detective Sims testified that the police recovered a rock of crack cocaine from a shelf in the bathtub and also recovered a bag of marijuana, along with several pieces of mail addressed to Tripplett.

{¶ 7} Swat Officer Jose Delgado testified that he was assigned the duty of breaching the front door of the residence. Officer Delgado stated that upon entering the apartment, he proceeded to the bathroom, but found the door locked. He then broke the door down and found Triplet and Marks hiding in the bathtub behind the shower curtain. Officer Delgado stated that the water in the toilet bowl was swirling and he saw a rock of crack cocaine floating in the water. Officer Delgado further stated that Triplet's arm and shirt sleeve were wet.

{¶ 8} Sergeant Fred Mone, another member of the SWAT unit, testified that he found a rock of crack cocaine in the bathtub.

{¶ 9} Cecelia Marks, age fourteen, testified that at the time the police executed the search warrant, she had been living with Triplet for several months. Marks testified that during this time, Triplet had given her drugs to sell. Marks stated that when the SWAT unit arrived, she hid with Triplet in the bathroom, and Triplet unsuccessfully tried to flush the crack cocaine down the toilet.

{¶ 10} Marks testified that at the time of her arrest, she told the police that the drugs belonged to her and not to Triplet. She also stated that she had indicated to Triplet's attorney, by telephone and in writing, that the charges against Triplet were false.

{¶ 11} Marks admitted that in exchange for her testimony against Triplet, her juvenile court charges for tampering with evidence, a third degree felony, would be reduced to obstruction of official business, a misdemeanor charge, for which she

was promised probation. Finally, Marks admitted, in attempting to help Tripplett, she had lied both to the police and to Tripplett's attorney.

{¶ 12} At the conclusion of the trial, the jury returned guilty verdicts on all charges. On May 26, 2005, the trial court sentenced Tripplett to a concurrent prison term of five years.

### Sufficiency of Evidence

{¶ 13} In the first assigned error, Tripplett argues the evidence was insufficient to sustain a conviction for possession of criminal tools. We disagree.

{¶ 14} A challenge to the sufficiency of the evidence supporting a conviction requires the appellate court to determine whether the State met its burden of production at trial.<sup>1</sup> On review for legal sufficiency, the appellate court's function is to examine evidence admitted at trial and determine whether such evidence, if believed, would convince the average person of the defendant's guilt beyond a reasonable doubt.<sup>2</sup> In making its determination, an appellate court must view the evidence in a light most favorable to the prosecution.<sup>3</sup>

{¶ 15} Tripplett was convicted of possession of criminal tools in violation of R.C. 2923.24, which provides in pertinent part as follows:

“(A) No person shall possess or have under the person's control any

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<sup>1</sup>*State v. Thompkins* (1997), 78 Ohio St.3d 380.

<sup>2</sup>*Id.*; *State v. Fryer* (1993), 90 Ohio App.3d 37.

<sup>3</sup>*Id.* at 43.

substance, device, instrument, or article, with purpose to use it criminally.

(C) Whoever violates this section is guilty of possessing criminal tools. Except as otherwise provided in this division, possessing criminal tools is a misdemeanor of the first degree. If the circumstances indicate that the substance, device, instrument, or article involved in the offense was intended for use in the commission of a felony, possessing criminal tools is a felony of the fifth degree.”

{¶ 16} In the instant case, Tripplett specifically contends that the video camera located outside his apartment, which was connected to a video recorder and television in his bedroom was not used to commit a felony. We are not persuaded.

{¶ 17} Detective Sims testified in pertinent part as follows:

“A. Once we – once I entered the premises, one of the SWAT members told me: He’s got a video hookup where you can see the street, people coming, people leaving the house. I entered the bedroom; you can see people driving down the street, walking down the street, right on the TV, the monitor.

Q. Which TV? You said you recovered a smaller monitor and a 19-inch I believe it was.

A. Yes.

Q. Which monitor was showing you what you just described?

A. Both of the TVs were on.”

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“Q. Now, based on your knowledge and experience as a Cleveland vice detective, what does a set-up such as the one you just describe in Exhibits 14 through 20 indicate to you?

A. This set-up indicates to me that this person knew what he was doing. He was trying to prevent being captured from doing what he was doing

and it was a good set-up.”

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“Q. Okay. Thank you. How would it prevent someone who used that set-up from being caught by the police?

A. Well, if he can see us coming, they can get rid of the drugs or they can even escape from the location.”<sup>4</sup>

{¶ 18} After viewing the evidence in the light most favorable to the State, we conclude the testimony supports a determination that Tripplett possessed criminal tools. Detective Sims’ testimony revealed an elaborate video surveillance system, which was monitored from Tripplett’s bedroom. Detective Sims also testified that two controlled drug buys were effected at the residence including one that occurred shortly before the police executed the search warrant.

{¶ 19} Further, Officer Delgado testified that when he entered the bathroom, the toilet had just been flushed and he saw a rock of crack cocaine floating in the water. The totality of the circumstances indicate that the video surveillance equipment was being used for a criminal purpose. As such, the State presented sufficient evidence to convict Tripplett of possessing criminal tools. Accordingly, we overrule the first assigned error.

#### **Ineffective Assistance of Counsel**

{¶ 20} In his fourth assigned error, Tripplett argues his counsel was ineffective

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<sup>4</sup>Tr. at 219-221.

for allegedly conceding that he was guilty of drug possession. We disagree.

{¶ 21} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington*.<sup>5</sup> Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the lawyer's deficient performance.<sup>6</sup> To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different.<sup>7</sup> Judicial scrutiny of a lawyer's performance must be highly deferential.<sup>8</sup>

{¶ 22} In his closing argument, Tripplett's trial counsel made the following statement:

"If you want to find Mr. Tripplett guilty of possession of drugs, if you think the State proved that because he was in the bathroom with these rocks of crack cocaine, please go ahead. I don't have a big problem with that. It's everything else that is real distasteful to me. I'm very serious. And I don't think it's been proven beyond a reasonable doubt."<sup>9</sup>

Admittedly, the above statement is not the most artful. However, we decline to

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<sup>5</sup>(1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052.

<sup>6</sup>*State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph one of syllabus.

<sup>7</sup>*Id.* at paragraph two of syllabus.

<sup>8</sup>*State v. Sallie* (1998), 81 Ohio St.3d 673, 674.

<sup>9</sup>Tr. at 361-362.

conclude that trial counsel conceded Tripplett's guilt to the charge of drug possession. The record before us reveals that Tripplett's trial counsel expended a considerable effort and time discrediting Marks' testimony that the drugs did not belong to her. The following exchange took place during cross examination of Marks:

"Q. Cecelia, you're telling us that you're telling the truth today?

A. Yes.

Q. So in other words, when you told the police back at the time of your arrest, that was a lie?

A. Yes.

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"Q. Do you remember calling me on the phone to tell me about Shawn, Konshawnte?

A. Yes.

Q. Do you remember telling me that the charges were all false?

A. Yes.

Q. Were you lying then?

A. Yes.

Q. Were you telling the truth?

A. I was lying."<sup>10</sup>

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<sup>10</sup>Tr. at 282-283.

{¶ 23} Here, Tripplett’s trial counsel elicited three separate admissions from Marks that she was lying. The record also reveals that Tripplett’s trial counsel continued to attack Marks’ credibility during closing argument. During closing argument Tripplett’s trial counsel stated:

“Before you can find the defendant guilty you must find beyond a reasonable doubt, you’ll read the rest, to commit a felony drug abuse offense, to-wit possession of drugs; it flies in the face of reason. She’s in the bathroom. She’s now denying all possession of drugs.”<sup>11</sup>

{¶ 24} We decline to view the statement at issue in a vacuum. We conclude that when Tripplett’s trial counsel’s attack on Marks’ credibility is juxtaposed with the statement he made during closing argument, a rational juror would not infer that the statement was made as a concession of guilt to drug possession.

{¶ 25} We also conclude that Tripplett was not prejudiced by trial counsel’s statement because there was sufficient evidence that Tripplett constructively possessed the drugs. Possession may be actual or constructive.<sup>12</sup> To establish constructive possession, the evidence must prove that the defendant was able to exercise dominion and control over the contraband.<sup>13</sup> Dominion and control may be proven by circumstantial evidence alone.<sup>14</sup> Circumstantial evidence that the

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<sup>11</sup>Tr. at 355.

<sup>12</sup>*State v. Trembly* (2000), 137 Ohio App.3d 134. See also *State v. Haynes* (1971), 25 Ohio St.2d 264; *State v. Hankerson* (1982), 70 Ohio St.2d 87.

<sup>13</sup>*State v. Wolery* (1976), 46 Ohio St.2d 316, 332.

<sup>14</sup>*State v. Taylor* (1997), 78 Ohio St.3d 15.

defendant was located in very close proximity to readily usable drugs may constitute constructive possession.<sup>15</sup>

{¶ 26} In the case herein, viewing the evidence presented in a light most favorable to the prosecution, the testimony of Detective Sim, Officer Delgado and Sergeant Mone supports the determination by the jury that Tripplett did, in fact, constructively possess crack cocaine at the time of his arrest. A review of the record demonstrates that the State established that Tripplett exercised both dominion and control over the crack cocaine discovered in the bathroom. Detective Sims testified the officers found a rock of crack cocaine on the shelf in the bathtub where Tripplett was attempting to hide. Office Delgado also testified that a rock of crack cocaine was floating in the toilet. Clearly, the State established that the crack cocaine was within arms length of Tripplett at the time the search warrant was executed.

{¶ 27} Under the circumstances presented herein, any rational trier of fact could have found from the evidence presented that the essential elements of the offense of drug possession were proven beyond a reasonable doubt.<sup>16</sup> As such, the outcome of the trial would not have been different, despite trial counsel's statement. When viewed in its entirety, Tripplett was not denied the effective assistance of

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<sup>15</sup>*State v. Barr* (1993), 86 Ohio App.3d 227, 235; *Wolery*, supra; *State v. Bell* (May 14, 1998), Cuyahoga App. No.72691.

<sup>16</sup>*State v. Lundy* (June 25, 1998), Cuyahoga App. No. 71849; *State v. Jimenez* (Nov. 25, 1998), Cuyahoga App. No. 73804.

counsel. Accordingly, we overrule the fourth assigned error.

### Sentencing

{¶ 28} We sustain Tripplett's second and third assigned errors. The State concedes that the trial court erred when it sentenced Tripplett without informing him of the specific sentence imposed for each individual count for which the jury found him guilty and the trial court erred in imposing court costs outside Tripplett's presence.

{¶ 29} At sentencing, a trial court has no option but to assign a particular sentence to each offense, separately.<sup>17</sup> Further, Crim.R. 43(A) requires the physical presence of a defendant during sentencing.<sup>18</sup> Moreover, a trial court cannot abrogate the defendant's right of allocution by imposing its sentence in the defendant's absence.<sup>19</sup>

{¶ 30} Based on the above authority, we vacate the journal entry in its entirety and remand the matter for the limited purpose of re-sentencing Tripplett in conformity with Crim.R. 43(A).

Conviction affirmed, remanded for re-sentencing.

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

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<sup>17</sup>*State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245.

<sup>18</sup>*State v. Bell* (1990), 70 Ohio App.3d 765.

<sup>19</sup>*State v. Pavone* (June 21, 1984), Cuyahoga App. No. 47700.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P. J., and  
MICHAEL J. CORRIGAN, J.\*, CONCUR

(\*SITTING BY ASSIGNMENT: JUDGE MICHAEL J. CORRIGAN, RETIRED, OF THE EIGHTH DISTRICT COURT OF APPEALS.)