

IN THE SUPREME COURT OF OHIO

IN RE: J.F.,
a minor child.

: Case No. 07-2239

: On Appeal from the Greene County
Court of Appeals

: Second Appellate District

: C.A. Case No. 06-CA-123

APPENDIX TO MERIT BRIEF OF J.F., A MINOR CHILD

THE OFFICE OF THE
OHIO PUBLIC DEFENDER

ANGELA MILLER #0064902
Assistant State Public Defender
COUNSEL OF RECORD

8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 (Facsimile)

COUNSEL FOR J.F.

STEPHEN K. HALLER #0009172
Greene County Prosecutor

ELIZABETH ELLIS #0074332
Assistant Prosecuting Attorney
COUNSEL OF RECORD

61 Greene Street, 2nd Floor
Xenia, Ohio 45385
(937) 562-5250
(937) 562-5107 (Facsimile)

COUNSEL FOR THE STATE OF OHIO

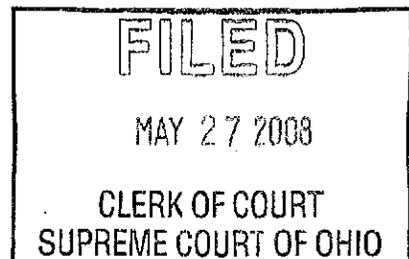


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PROPOSITION OF LAW PRESENTED FOR REVIEW

PROPOSITION OF LAW NO. 1

A juvenile's suspended commitment may not be imposed after the juvenile has successfully completed his period of probation and has been released therefrom.

STATEMENT OF FACTS

This case arises from the imposition of a suspended commitment to the Department of Youth Services almost six months after J.F. was successfully released from community control. While J.F.'s subsequent appearance in juvenile court was due to misdemeanor drug offenses, "monitored time" was used to invoke the suspended commitment.

On December 1, 2003, a complaint was filed alleging that J.F. was a delinquent child for committing five counts of theft, each a felony of the fifth degree if committed by an adult; one count of complicity to theft, a felony of the fourth degree if committed by an adult; one count of resisting arrest, a misdemeanor of the second degree if committed by an adult; and one count of domestic violence, a misdemeanor of the first degree if committed by an adult. On February 18, 2004, J.F. admitted to five counts of theft, one count of complicity to theft, and one count of resisting arrest in exchange for the State dismissing the domestic violence count.

On March 22, 2004, the court held J.F.'s disposition hearing and committed him to the Ohio Department of Youth Services for a minimum period of six months for each count of theft and complicity to theft, which were to be served consecutively, a maximum period until his twenty-first birthday. The court suspended the commitment on the condition that J.F. not violate the law in the future, successfully comply with monitored time, successfully complete the felony offender program, successfully complete community control, pay fines and court costs, and make restitution in a timely manner. (A-1; 3/22/04 Tp. 15).

Between March 2004 and March 2006, complaints were filed that alleged J.F. violated the terms of his community control.¹ J.F., however, did successfully complete community control and on March 1, 2006, his status on community control was terminated. (A-2). The court also terminated J.F.'s indefinite driver's license suspension, ordered that J.F. pay any remaining balance on his fines and court costs and complete community service. No mention of monitored time was made in the March 3, 2006 Entry. (A-2).

On August 30, 2006, a complaint was filed alleging J.F. was a delinquent child for possessing a controlled substance, a minor misdemeanor if committed by an adult, and possession of drug paraphernalia, a misdemeanor of the fourth degree if committed by an adult. On August 31, 2006, without the assistance of counsel, J.F. admitted to both misdemeanor offenses. On September 21, 2006, J.F.'s suspended commitment for felony theft (from 2004) was imposed. (A-3). This felony theft offense was the same offense on which community control was successfully completed. J.F. was then committed to the Department of Youth Services for a minimum period of six months and a maximum period of age twenty-one.

On October 23, 2006, J.F. timely appealed his adjudication and commitment. J.F. assigned error to: 1) the court's imposition of the suspended commitment; 2) the court's failure to provide him with notice and due process of law as it failed to follow the requirements of Juvenile Rule 35(B); 3) the court's failure to obtain a valid waiver of his right to counsel; and 4) the court's failure to obtain a knowing, voluntary and intelligent admission.

¹ The Greene County Juvenile Court appears to use the terms community control and probation interchangeably when discussing juvenile probation.

On October 19, 2007, the Court of Appeals issued its decision in this case. In its opinion, the court stated that the juvenile court retained jurisdiction over J.F. following the termination of his probation as J.F. had not satisfied the condition that he comply with monitored time until the age of 18. *In re J.F.*, Greene App. No. 06-CA-123, 2007-Ohio-1479 at ¶41. The appellate court also found that the juvenile court failed to provide J.F. timely notice that his probation would be revoked and to inform him of the grounds on which his probation would be revoked, pursuant to Juvenile R. 35(B). *Id.* The court did not reach Assignment of Error III (right to counsel) or Assignment of Error IV (failure to obtain a knowing, voluntary and intelligent plea). *Id.* at ¶71.

On December 3, 2007, J.F. filed a Memorandum in Support of Jurisdiction in this Court. On March 12, 2008, this Court accepted jurisdiction. The record of the instant case was filed with the Clerk on March 25, 2008. Thereafter, J.F. and the State stipulated to one extension of time. This Merit Brief timely follows.

ARGUMENT

Proposition of Law I: A juvenile's suspended commitment may not be imposed after the juvenile has successfully completed his period of probation and has been released therefrom.

A. A juvenile court lacks jurisdiction to impose a suspended commitment once a child's period of community control is successfully terminated.

"A juvenile court does not have the jurisdiction to reimpose a suspended commitment to a Department of Youth Services facility after a juvenile has been released from probation." *In re Cross*, 96 Ohio St.3d 328, 2002-Ohio-4183, 774 N.E.2d 258, syllabus. When a juvenile's probation is terminated, "there is no statutory basis for the court's continuing jurisdiction." *Id.* at ¶12.

On March 24, 2004, J.F. received a suspended commitment to the Ohio Department of Youth Services and was placed on community control. (A-1, 3/22/04 Tp. 15). On March 3, 2006, J.F.'s status on community control was successfully terminated. (A-2; 3/1/06 Tp. 7). On August 30, 2006, a complaint was filed alleging J.F. was a delinquent child for possessing a controlled substance, a minor misdemeanor if committed by an adult, and possession of drug paraphernalia, a misdemeanor of the fourth degree if committed by an adult. (8/31/06 Tp. 2-3). On August 31, 2006, J.F. admitted to both charges. (8/31/06 Tp. 4-6). On September 21, 2006, because the court could not commit J.F. to the Department of Youth Services for the misdemeanor offenses, and despite the fact that the court terminated J.F.'s community control for his felony adjudications, the court imposed J.F.'s suspended commitment. (A-3).

"[T]he completion of probation signals the end of the court's jurisdiction over a delinquent juvenile. As with adults, a 'court [loses] its jurisdiction to impose ***suspended sentences once the term of probation expire[s].'" *State v. Yates* (1991), 58

Ohio St.3d 78, 80, 567 N.E.2d 1306.” Id. at ¶28. “Pursuant to former R.C. 2151.355, and now under R.C. Chapter 2152, a court has leeway in fashioning an appropriate disposition for a delinquent child.” *Cross*, at ¶26. The former dispositional statute, R.C. 2151.355(A) utilized the term “probation.” However, when the delinquency section of the Revised Code was updated, the legislature moved toward the term “community control,” with probation becoming a condition of community control. R.C. 2152.19 (Revised 1/1/02).

Pursuant to R.C. 2152.19, the juvenile court can make any number of dispositions upon an adjudicated delinquent child. The dispositions include: commitment to a state, county or private facility; imposition of house arrest or electronic monitoring; restrictions on driving privileges; and imposition of fines, restitution and court costs. R.C. 2152.19. Community control conditions may include: intensive or basic probation; day reporting; community service; attendance at school and work; curfew; monitored time; and abiding the law. R.C. 2152.19(A)(4). “Thus, the juvenile court has very few restrictions on how it might impose probation [community control], including the behavioral requirements it deems appropriate for an individual child.” *Cross* at ¶26.

The court’s ability to impose probation in a very broad and creative way creates the tether that allows a court to maintain some connection with a juvenile delinquent. The probationary period can be indefinite. The threat of actual incarceration, however, lasts only as long as the probation lasts. This contrasts with the power granted to juvenile courts by R.C. 2151.49 to suspend indefinitely, without probation, incarceration of an adult who violates a provision of R.C. Chapter 2151. There is no similar statutory authority that allows a juvenile court to suspend a DYS commitment outside of probation.

Id. at ¶27. In *Cross*, just like the instant case, the juvenile was no longer serving a term of probation when the court imposed his suspended commitment. This Court held that

“[w]hen the court ended Cross’s probation, it ended its ability to make further dispositions as to Cross on that delinquency court. Since the juvenile court lacked jurisdiction to reimpose Cross’s suspended sentence, it had no authority to commit Cross to a DYS facility.” Id. at ¶28-29.

When the court terminated J.F.’s community control, the juvenile court lacked jurisdiction to impose his suspended sentence. Thus, the court had no authority to commit J.F. to the Department of Youth Services.

B. Monitored time cannot be used to later extend the trial court’s jurisdiction once the court chooses to terminate the child’s community control.

In J.F.’s case, the Second District upheld the trial court’s later decision to impose the suspended commitment from 2004. The appellate court determined that the jurisdiction of the trial court continued even after the community control ended on March 1, 2006. To make this finding, the appellate court pointed to: 1) the separate listing of monitored time in the original 2004 order; 2) the ordering of community service in the March 3, 2006 entry that also terminated probation and restored driving privileges; and 3) the probation officer’s recommendation at the probation termination hearing that a period of monitored time continue. According to the appellate court, these factors extended the trial court’s jurisdiction under monitored time making imposition of the suspended commitment valid. Notably, no period of monitored time was ordered in the March 3, 2006 entry, which terminated probation.

“Monitored time” means the same for juvenile defendants as it does for adults. R.C. 2152.02(U). According to R.C. 2929.01(Z), monitored time is “a period of time during which an offender continues to be under the control of the sentencing court or parole board, subject to no other conditions other than to lead a law-abiding life.” Thus,

monitored time requires a defendant to “keep his nose clean” but does not require the court to continue to invest in reporting probation.

Ohio Revised Code Section 2929.17 lists monitored time as one of many nonresidential sanctions that may be imposed where there is no mandatory prison term. Similarly, R.C. 2152.19(A)(4) (the juvenile statute), lists monitored time as an option under community control. Thus, monitored time is a condition of community control, not a disposition itself. Further, neither R.C. 2152.19, R.C. 2929.01, R.C. 2929.17 or their annotations state that monitored time can be used as a “second community control period” or a time period tacked onto the defendant after community control is successfully completed and terminated by the trial court.

Likewise, community service is listed as a nonresidential sanction and may be a condition of community control. R.C. 2929.17(C); R.C. 2152.19(4)(d). Community service that is not completed, however, does not trigger reimposition of a suspended commitment where community control was successfully terminated. Once the community control period has expired, the trial court is without subject matter jurisdiction and, as a result, any subsequent judgment of the trial court is void. *State v. Miller*, Wood App. No. WD-06-086, 2007-Ohio-6364.

In *Miller*, the defendant was placed on community control, given 100 hours of community service, a \$500.00 fine and costs. Thereafter, Miller failed to pay all of his fines or complete any of his community service and the State petitioned for a revocation of his community control. *Id.* at ¶4. While Miller’s community control was set to expire, the court maintained the original expiration date. Regardless, after the expiration date, the court extended the community control period and ordered jail time. *Id.* at ¶5.

The Sixth District Court of Appeals reversed citing this Court's decision in *Davis v. Wolfe* (2001), 92 Ohio St.3d 549, 2001 Ohio 1281, 751 N.E.2d 1051. Simply put, the trial court lost jurisdiction once community control was terminated and any subsequent judgment of the trial court was void. *Id.* at ¶9.

Thus, the juvenile court did not retain jurisdiction to impose J.F.'s suspended commitment simply because community service appeared in the order that also terminated community control. If the juvenile court was concerned about J.F.'s completion of community service it certainly did not have to terminate his community control. A court may wish to extend the community control period to see that its requirements are satisfied. *In re Cross*, 96 Ohio St.3d 328, 2002-Ohio-4183, 774 N.E.2d 258 (while the probationary period can be indefinite the threat of actual incarceration lasts only as long as the probation lasts).

In this case, J.F. had made a substantial turnaround in his life prior to the March 1, 2006 hearing. J.F. had paid the restitution that was ordered, was doing very well in school (A's and B's), terminated negative relationships in his life, completed counseling, became active in Church and had joined a band. (3/1/06 Tp. 4-5, 8). At the hearing, the court ordered payment of any remaining fines and costs through community service but also terminated community control.

The Court: Yeah, and even though, you know, 16 is young, in a couple years you'll be an adult and you'll be on your own, and you will need to be making your way in the world. So sounds like for now though even though you know what you needed to do, you've successfully completed probation, I hear that you've gone above and beyond what you need to do, so I am terminating you successfully today.

Furthermore, I am going to order you to pay off you fines and court costs that are still due, so when you get a call from the restitution department, if they haven't already done that, I want you to work the fines and court

costs off as they order you to come in and work it over Spring Break. If they give you that opportunity, it's a really important time because there is a long list of kids waiting to work and I know that is critical times (sic) because everyone wants to get their community service out of the way over Spring Break.

(3/1/06 Tp. 7-8).

Community service is not necessarily a condition of community control. Thus, contrary to the appellate court's decision, the juvenile court did not "expressly assert" its continuing control over J.F. by ordering community service. *J.F.* at ¶ 51. Rather, from the transcript it appears that community service was ordered in lieu of fines and costs as J.F. was indigent. See R.C. 2152.20(C) (the court shall consider imposing a term of community service if the child is indigent); R.C. 2951.02(F)(2) (adult version of service in lieu of costs). Indeed, there is distinction between community control and community service.

In contrast, "community service" refers to work performed in a community typically as a condition of probation (now community control), or in lieu of paying fines. For example, R.C. 2947.23(A)(1)(a), as amended effective March 23, 2003, allows courts to order community service in lieu of payment of fines, where defendants fail to pay judgments or make timely payments toward judgments under court-approved payment schedules. Consequently, "community service" is not the equivalent of "community control" and should not be used interchangeably.

Id. at ¶47. (Emphasis added).

Thus, in reading the transcript of March 1, 2006, and the entry from March 3, 2006, which terminates community control, there is no "express assertion" that the jurisdiction of the trial court continued. Indeed, in J.F.'s case restitution was paid and the only remaining monies due pertained to fines and costs. (3/1/06 Tp. 3). Community service was a means to pay the remaining balance. And, if enforcement was needed, it

could have been sought through contempt of court. See *State v. Self*, Montgomery App. No. 20370, 2005-Ohio-1120 at ¶55. The order for community service was not a means to impose a suspended commitment, which ended with the termination of community control.

C. J.F.'s March 3, 2006 entry, which terminated community control, makes no mention of monitored time.

The appellate court cited the probation officer's comment regarding monitored time at the community control termination hearing as proof that J.F. continued to be under the trial court's jurisdiction. *J.F.* at ¶51. Specifically, the probation officer stated that monitored time would continue. (3/1/06, Tp. 3). As an initial matter, the comment regarding monitored time is from a probation officer, not the court. Second, the court did not adopt or state anywhere in the record that it was adopting the probation officer's recommendation. Third, and most importantly, the court speaks through its entry, which in this case never mentions "monitored time." (A-3). The court of appeals did not address the issue of J.F.'s entry.

The entry that terminated J.F.'s community control and restored his driving privileges makes no mention of monitored time. (A-2). A trial court "speaks through its entry" and we "must accept the judgment entry as a correct and unambiguous expression of the trial court's resolution" of the case. *Norton v. Liapis*, 1999 Ohio App. LEXIS 4598, *11 (Sept. 27, 1999), Butler App. No. CA 99-03-068, unreported. See also, *State v. King* (1994), 70 Ohio St.3d 158, 637 N.E.2d 903; *State ex rel. Worcester v. Donnellon* (1990), 49 Ohio St.3d 117, 118, 551 N.E.2d 183, 184 (it is axiomatic that a court speaks through its journal). Indeed, after March 3, 2006, J.F. no longer reported to the court or the probation department. J.F. believed that his felony theft case was completed at that

point and that the suspended sentence to the Department of Youth Services could no longer be imposed.

J.F.'s probationary period ended on March 3, 2006, almost six months before the new misdemeanor offenses arose in juvenile court. The court had no inherent authority to suspend a sentence for an indefinite period of time into the future independent of probation. *City of Lakewood v. Davies* (1987), 35 Ohio App.3d 107, 219 N.E.2d 860; *State v. Sapp* (June 11, 1993), Wood County, Case No. 92WD094, 1993 Ohio App. LEXIS 2896, unreported. Had the court intended to maintain some form of continuing jurisdiction over J.F., the court should have continued him on community control.

The juvenile court lacked jurisdiction to impose J.F.'s suspended commitment six months after he was released from community control. Therefore, the court erred in committing J.F. to a minimum of six months and a maximum term of age 21 to the Department of Youth Services. The constitutional guarantees of Due Process, Notice and Equal Protection require that the threat of imposition of a suspended commitment expire upon the successful completion of a term of community control.

CONCLUSION

A juvenile's suspended commitment may not be imposed after the juvenile has successfully completed his period of community control and has been released from it. The jurisdiction of the juvenile court to commit J.F. to the Department of Youth Services on his 2004 theft case ended on March 3, 2006 when J.F. was released from community control. Accordingly, the imposition of the suspended commitment violated J.F.'s rights to due process, equal protection and the right not to be punished twice for the same

offense. Therefore, the decision below must be reversed and the case remanded to the Greene County Juvenile Court.

Respectfully submitted,

OFFICE OF THE
OHIO PUBLIC DEFENDER



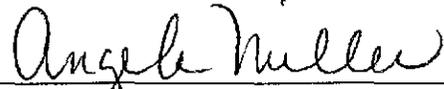
ANGELA MILLER #0064902
Assistant State Public Defender
Counsel of Record

8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 (Facsimile)
angela.wilson-miller@opd.ohio.gov

COUNSEL FOR J.F.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MERIT BRIEF OF APPELLANT J.F. was forwarded by regular U.S. mail on this 27th day of May, 2008 to the office of Elizabeth Ellis, Assistant Greene County Prosecutor, 61 Greene St., 2nd Fl., Xenia, Ohio 45385.



ANGELA MILLER #0064902
Assistant State Public Defender

COUNSEL FOR J.F.

IN THE SUPREME COURT OF OHIO

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a minor child.

: Case No. 07-2239

: On Appeal from the Greene County
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: Second Appellate District

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APPENDIX TO MERIT BRIEF OF J.F., A MINOR CHILD

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**COURT OF COMMON PLEAS
 JUVENILE DIVISION
 GREENE COUNTY, OHIO**

JUDGE JUVENILE DIVISION
 COURT OF COMMON PLEAS
Magistrate's Decision

**In the matter of
 Jeremiah Frank**

Alleged Delinquent Child

Case No. D35990

This matter came on for a hearing on March 22, 2004 upon the complaint filed December 1, 2003. Present in court were Jeremiah, his mother, Linda Lyons whom prepared the PDI, Attorney Kevin M. Hunt and Assistant Prosecutor Cheri Stout from the Greene County Prosecutor's Office.

The matter came on for a final disposition on the offense of (1) Theft, a felony of the 5th degree if committed by an adult, (2) Theft, a felony of the 5th degree if committed by an adult, (3) Theft, a felony of the 5th degree if committed by an adult, (4) Theft, a felony of the 5th degree if committed by an adult, (5) Theft, a felony of the 5th degree if committed by an adult, (6) Complicity to Theft, a felony of the 4th degree if committed by an adult and (7) Resisting Arrest, a misdemeanor of the 2nd degree if committed by an adult.

It is this Courts decision that the following be imposed:

Pine (1)\$125.00 (2)\$125.00 (3)\$125.00 (4)\$125.00 (5)\$125.00 (6)\$125.00 (7)\$100.00

Court cost \$79.00

Child placed on community control under the guidance of Linda Lyons.

Restitution his share/ if any.

The Child shall attend the Stop-Shoplifting School on May 8, 2004.

The Child shall complete a Psychological Assessment. Furthermore, the child is ordered to comply with any recommended treatment.

The child's ability to obtain his drivers license is suspended indefinitely.

The Child shall be released from detention and placed on home detention.

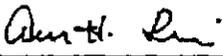
It is therefore ordered by the Court that said child Jeremiah Frank be committed to the legal custody of the Department of Youth Services for institutionalization in a secure facility for an indefinite term consisting of a minimum period of 6 months on each felony offense to run consecutively and a maximum period not to exceed the child's attainment of the age of twenty-one (21).

Permanent commitment to the DYS suspended on the following conditions:

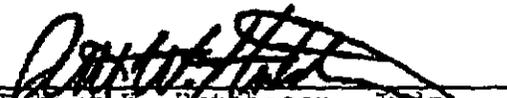
- (1) No future violation of law.
- (2) Successful Compliance with Monitored Time (Ohio R.C. Section 2152.19 (A) (3) (i), until the age of 18.
- (3) Successfully complete the Felony Offenders Program.
- (4) Successfully complete Community Control.
- (5) Pay fines, court cost and restitution in a timely manor.

A party shall not assign as error on appeal the Court's adoption of any findings of fact or conclusion of law in the Magistrate's Decision unless the party timely and specifically objects to that finding or conclusion as required by Juvenile Rule 40 (E)(3).

The Clerk shall serve upon all parties not in default for failure to appear, notice of the judgment and its date of entry upon the journal.


 Magistrate, Amy H. Lewis

Subject to Objections filed in compliance with Juvenile Rule 40(E) (3) (a), the Magistrate's Decision is hereby approved and made an Order of the Court.


 Robert W. Hutcheson, Judge

**COURT OF COMMON PLEAS
JUVENILE DIVISION
GREENE COUNTY, OHIO**

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2006 MAR -3 PM 2:31
JUDGE JUVENILE DIVISION
COURT OF COMMON PLEAS

In the matter of:

Magistrate's Decision

Jeremiah Frank

Alleged Delinquent Child

Case No. D35990

This matter came on review hearing on March 1, 2006. Present in Court were Jeremiah, his grandmother, Surveillance Officers Monty Peterson and Jodi Shellaberger, and Intensive Community Control Director Lori Buckwalter.

It is ordered that the following:

The Child's status on Intensive Community Control shall be terminated effective March 1, 2006.

The Child shall pay the balance owed for fines and costs.

The Child shall complete Community Service when scheduled through the Community Service Department.

The Child shall be permitted to obtain his drivers license.

A party shall not assign as error on appeal the Court's adoption of any findings of fact or conclusion of law in the Magistrate's Decision unless the party timely and specifically objects to that finding or conclusion as required by Juvenile Rule 40 (E)(3).

AHL

Magistrate, Amy Lewis

Subject to Objections filed in Compliance with Rule 40 (E)(3)(a), the Magistrate's Decision is hereby approved and made an order of the Court. The Clerk shall serve upon all parties not in default for failure to appear, notice of the judgment and its date of entry upon the journal.

Robert W. Hutcherson, Judge

gc

cc: /Ms. Wick and Jeremiah
/Ms. Buckwalter

COURT OF COMMON PLEAS
JUVENILE DIVISION
GREENE COUNTY, OHIO

FILED
GREENE COUNTY, OHIO
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JUDGE JUVENILE DIVISION
COURT OF COMMON PLEAS

In the matter of
Jeremiah Frank

Magistrate's Decision

Alleged Delinquent Child

Case No. D35990

This matter came on for a hearing on September 20, 2006 upon the complaint filed Cedarville Police Department on August 30, 2006. Present in court were Jeremiah, his mother, his grand mother and Renee Pinkleman, Mental Health Liaison.

The matter came on for a final disposition on the following offenses : Possession of a Controlled Substance, a minor misdemeanor if committed by an adult, O.R.C 2925.11 (A) and 2152.02 (F).

Possession of Drug Paraphernalia, a misdemeanor of the 4th degree if committed by an adult, o.R.C 2925.14 and 2152.02 (F).

It is this Courts decision that the following be imposed:

Fine (1)\$50.00 (2)\$100.00

Court cost \$57.00

It is further ordered by the Court that said child Jeremiah Frank be committed to the legal custody of the Department of Youth Services under the previous suspended commitment from the Magistrate' Decision dated March 24, 2004, on Count I of the five (5) Count complaint , Theft, a felony of the 5th degree if committed by an adult, O.R.C 2913.02 (A)((1) and 2152.02. He shall be secured in a secure facility for an indefinite term consisting of a minimum period of 6 months of incarceration and a maximum period not to exceed the child's attainment of the age of twenty-on (21).

The Child shall be remanded to detention pending being transferred to the Department of Youth Services.

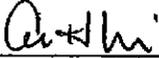
Based on the evidence, testimony and the Court's records, the Court finds that reasonable efforts have been made to prevent the removal of the child from the home, to eliminate the continued removal from the home, and to make it possible for the child to return home, to wit: probation, Intensive Probation, placement at the Boys Treatment Center and placement at the Miami Valley Rehabilitation Center have been provided.

The Court further finds that the child's continued residence in the home or his/her return to the home would be contrary to the welfare and best interest of the child because the Child continues to violate the rules at home and in the Community.

Placement at the Department of Youth Services is the least restrictive alternative placement available, in the closest proximity to the family, which meets the best interest of the child..

The Child and his parent has been given his right to appeal.

A party shall not assign as error on appeal the Court's adoption of any findings of fact or conclusion of law in the Magistrate's Decision unless the party timely and specifically objects to that finding or conclusion as required by Juvenile Rule 40 (E)(3). The Clerk shall serve upon all parties not in default for failure to appear, notice of the judgment and its date of entry upon the journal.



Magistrate, Amy H. Lewis

Subject to Objections filed in compliance with Juvenile Rule 40(E)(3)(a), the Magistrate's Decision is hereby approved and made an Order of the Court.



Robert W. Hutcheson, Judge

jad/bailiff

LEXSEE 2007 OHIO 5652

IN RE: J. F., a Minor Child

Case No. 06-CA-123

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, GREENE COUNTY

2007 Ohio 5652; 2007 Ohio App. LEXIS 4965

October 19, 2007, Rendered

SUBSEQUENT HISTORY: Discretionary appeal allowed by *In re J.F.*, 2008 Ohio 969, 2008 Ohio LEXIS 680 (Ohio, Mar. 12, 2008)

PRIOR HISTORY: [**1]

Juvenile Appeal from Common Pleas Court. Trial Court Case No. D35990.

COUNSEL: STEPHEN K. HALLER, ELIZABETH A ELLIS, Attorneys for Plaintiff-Appellee, Greene County Prosecutor's Office, Xenia, Ohio.

DAVID H. BODIKER, MOLLY J. BRUNS, ANGELA MILLER, Attorneys for Defendant-Appellant, Office of Ohio Public Defender, Columbus, Ohio.

JUDGES: BROGAN, J. WOLFF, P.J., and FAIN, J., concur.

OPINION BY: BROGAN

OPINION

BROGAN, J.

[*P1] J.F., a minor, appeals from a decision and entry of the Greene County Court of Common Pleas, Juvenile Division, committing him to the Ohio Department of Youth Services under a previously suspended commitment.

[*P2] The record reflects that J.F. was charged on December 1, 2003 with five counts of delinquency for theft, a felony of the fifth degree if committed by an adult; one count of complicity to theft, a felony of the fourth degree if committed by an adult; one count of resisting a lawful arrest, a misdemeanor of the second degree if committed by an adult; and domestic violence, a misdemeanor of the first degree if committed by an adult. Subsequently, in exchange for his admission to the

five counts of theft, one count of complicity to theft, and one count of resisting arrest, the State dismissed the domestic violence [**2] charge.

[*P3] Following a March 22, 2004 dispositional hearing, the juvenile court committed J.F. to the Department of Youth Services ("DYS") for an indefinite term consisting of a minimum period of six months on each felony offense to run consecutively and a maximum period not to exceed his twenty-first birthday. The court, however, suspended the commitment on the following conditions:

[*P4] "(1) No future violation of law.

[*P5] "(2) Successful Compliance with Monitored Time (Ohio R.C. Section 2152.19(A)[(4)](i), until the age of 18.

[*P6] "(3) Successfully complete the Felony Offenders Program.

[*P7] "(4) Successfully complete Community Control.

[*P8] "(5) Pay fines, court cost and restitution in a timely manner."

[*P9] Between March 2004 and March 2006, J.F. came before the juvenile court on a number of different occasions, including July 2004, on a claim of petty theft; December 2004, for a probation revocation hearing after being caught smoking in a school bathroom; April 2005, for a probation revocation hearing after fleeing from a residential treatment program; and June 2005, on a claim of falsification. Altogether, J.F. appeared before the juvenile court on 12 separate claims. With regard to each claim, J.F.'s probation [**3] or intensive probation was continued. In addition, J.F. was ordered by the court to attend Miami Valley Regional Rehabilitation Center, with which he successfully complied until his release from the program in November 2005. At that time, the court continued J.F. on intensive probation and further

ordered that he attend counseling with Integrated Youth Services.

[*P10] On March 1, 2006, the juvenile court held a probation termination hearing where it ordered that J.F. be released from intensive probation, that he pay off pending fines and court costs, and that his ability to obtain a driver's license be reinstated. Lori Buckwalter, the Intensive Community Control Director, recommended the termination on the condition, however, that monitored time remain in effect. The corresponding journal entry reflected the court's decision except that the following terms were used in place of "intensive probation": "The Child's status on *Intensive Community Control* shall be terminated effective March 1, 2006." (Emphasis added.) Furthermore, there was no mention of monitored time.

[*P11] On August 31, 2006, J.F. appeared before the juvenile court for a plea hearing on a complaint alleging delinquency for one count [**4] of possession of a controlled substance, a minor misdemeanor if committed by an adult, and one count of possession of drug paraphernalia, a fourth degree misdemeanor if committed by an adult. The following exchange took place at the hearing concerning J.F.'s constitutional rights:

[*P12] "[THE COURT:] You have the right to have a lawyer represent you at all stages of the proceedings, you may contact the Public Defender's Office to see if you qualify for their services which are income based, or you may contact a private attorney instead.

[*P13] "You have the right to remain silent. You have the right to trial; right to cross-examine your witnesses that are presented by the State at the trial; the right to bring in your own witnesses through subpoena at trial.

[*P14] "The consequences I could impose upon you are the same regardless of whether or not you would volunteer your admission to me today or if we would later have a trial, the Court would determine, after listening to the testimony, that you committed this offense. I could remand you to detention, I could impose a fine, Court costs, place you back on probation.

[*P15] "I'm required to suspend your driver's license if you have one for a minimum period of [**5] six months.

[*P16] "You have a suspended commitment, excuse me, to the Ohio Department of Youth Services. As you know, that commitment could be imposed and you could be placed at the Ohio Department of Youth Services, although these are misdemeanor offenses, or I can make any other order that I think would be in your best interest.

[*P17] "So, as to Count I of this complaint, do you wish to admit or deny your responsibility to the offense of possession of a controlled substance, a minor misdemeanor?"

[*P18] "A: Admit.

[*P19] "THE COURT: As to Count II of the complaint, being possession of drug paraphernalia, misdemeanor of the 4th degree, you wish to admit or deny your responsibility?"

[*P20] "A: Admit.

[*P21] "THE COURT: Do you want a lawyer to represent you?"

[*P22] "A: No, Your Honor.

[*P23] "THE COURT: If that is acceptable to your mother, I need you both to sign the waiver of summons form. Thank you.

[*P24] "If you admit, you're waiving your right to remain silent. Is that a right you wish to waive, your right to remain silent and tell me you committed these offenses?"

[*P25] "A: Yes, Your Honor.

[*P26] "THE COURT: Do you understand you're waiving your right to a trial?"

[*P27] "A: Yes, Your Honor.

[*P28] "THE COURT: So if you change your mind and you decide that you want [**6] me to hear from your witnesses or you want to question the State's witnesses, I'm not going to allow you to have that trial. Do you understand?"

[*P29] "A: Yes, Your Honor.

[*P30] "THE COURT: You have a suspended commitment to the Ohio Department of Youth Services that was suspended in March of 2004. You had six felony offenses. If I want to impose the suspended commitment, you could be placed at the Ohio Department of Youth Services for a minimum period of three years because you have six suspended commitments, or I could commit you until you turn the age of 21. Do you understand?"

[*P31] "A: Yes, Your Honor.

[*P32] "THE COURT: And you still wish to admit to these offenses?"

[*P33] "A: Yes, Your Honor.

[*P34] "THE COURT: Then based on your admission I will find you to be delinquent as alleged in the complaint." (Plea Hrg Tr. at 3-6.)

[*P35] Thereafter, the court ordered that J.F. be committed to the custody of the DYS under one count of theft from the previously suspended commitment. He was sentenced to an indefinite term of incarceration ranging from a minimum period of six months to a maximum period not to exceed his twenty-first birthday.

[*P36] [**7] J.F. filed a timely appeal and advances the following four assignments of error for our review:

[*P37] ". "THE JUVENILE COURT ERRED WHEN IT IMPOSED [J.F.'S] SUSPENDED COMMITMENT, IN VIOLATION OF *IN RE CROSS*, 96 OHIO ST.3D 328, 2002 OHIO 4183, 774 N.E.2D 258; AND THE EQUAL PROTECTION AND DOUBLE JEOPARDY CLAUSES OF THE FIFTH AND FOURTH [sic] AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 2 AND 10 OF THE OHIO CONSTITUTION."

[*P38] I. "THE JUVENILE COURT VIOLATED [J.F.'S] RIGHT TO NOTICE AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION SIXTEEN OF THE OHIO CONSTITUTION; AND JUV.R. 35, WHEN IT FAILED TO FOLLOW THE REQUIREMENTS OF JUV.R. 35(B)."

[*P39] II. "THE TRIAL COURT VIOLATED [J.F.'S] RIGHT TO COUNSEL AND RIGHT TO DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION SIXTEEN OF THE OHIO CONSTITUTION, OHIO REVISED CODE SECTION 2151.352, AND JUVENILE RULES 4, 29, AND 35."

[*P40] V. "[J.F.'S] ADMISSION WAS NOT KNOWING, VOLUNTARY, AND INTELLIGENT, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS 10 [**8] AND 16 OF THE OHIO CONSTITUTION, AND JUVENILE RULE 29."

[*P41] Upon review, we find that the juvenile court retained jurisdiction over J.F. following the termination of his status on intensive probation, where J.F. remained under community control until he satisfied the condition that he comply with monitored time until the age of 18. However, the court violated J. F.'s constitutional right to due process of law by failing to provide timely notice that his probation would be revoked and to inform him of the grounds on which his probation would be revoked, pursuant to *Juv.R. 35(B)*, before imposing J. F.'s suspended commitment. Accordingly, the judgment of the

trial court will be reversed, and this matter will be remanded for further proceedings consistent with this opinion.

I

[*P42] Under his first assignment of error, J.F. contends that the trial court violated the holding of the Supreme Court of Ohio in *In re Cross*, 96 Ohio St.3d 328, 2002 Ohio 4183, 774 N.E.2d 258, in addition to the equal protection and *double jeopardy clauses of the United States Constitution* and *Article I, sections 2 and 10 of the Ohio Constitution*, when it imposed his suspended commitment to the DYS despite having terminated [**9] his status on intensive probation on March 1, 2006. For the following reasons, we disagree with this argument.

[*P43] *R.C. 2152.19(A)* provides a court with numerous dispositional options once a child is adjudicated a delinquent child. Relevant to the present matter, a court may "[p]lace the child on community control under any sanctions, services, and conditions that the court prescribes. As a condition of community control in every case and in addition to any other condition that it imposes upon the child, the court shall require the child to abide by the law during the period of community control." In enacting this statute, it was the legislature's intent to "move away from using the term 'probation' generically in favor of the broader term 'community control.'" Ohio Criminal Sentencing Commission, *A Plan for Juvenile Sentencing in Ohio* (Fall 1999) 44. Community control, as referred to in *R.C. 2152.19*, includes, but is not limited to, a period of basic probation supervision, *R.C. 2152.19(A)(4)(a)*; a period of intensive probation supervision, *R.C. 2152.19(A)(4)(b)*; a period of community service, *R.C. 2152.19(A)(4)(d)*; and a requirement that the child serve monitored time, *R.C. 2152.19(A)(4)(i)*. [**10]¹

1 *R.C. 2152.02(U)* provides that "monitored time" is given the same meaning as in *R.C. 2929.01(Z)* -- "a period of time during which an offender continues to be under the control of the sentencing court or parole board, subject to no conditions other than leading a law-abiding life."

[*P44] In this case, the juvenile court suspended J.F.'s commitment to the DYS subject to the following conditions: (1) no violation of any laws in the future, (2) successful compliance with monitored time, (3) successful completion of the felony offender program and community control, and (4) payment of fines, costs and restitution. Each condition was listed separately and not made contingent upon one another. In its decision dated March 3, 2006, the court terminated J.F.'s status on "Intensive Community Control," ordered that he pay the balance

owed on fines and costs, imposed a period of community service, and lifted the prohibition on his obtaining a driver's license. J.F. contends that once the court terminated his status on community control, it subsequently lacked jurisdiction to impose his suspended commitment to the DYS. In support of his argument, J.F. cites *In re Cross*, 96 Ohio St.3d 328, 2002 Ohio 4183, 774 N.E.2d 258.

[*P45] [**11] In *Cross*, the Supreme Court of Ohio held that a juvenile court loses its jurisdiction to reimpose a suspended commitment to the DYS after a juvenile's term of probation has ended. *Id.* at P28. There, a juvenile was adjudicated delinquent for burglary and committed to the DYS for a minimum of six months and maximum not to exceed his twenty-first birthday. *Id.* at P2. His commitment was suspended on the condition that he commit no further violations and that he be placed on probation for an indefinite period. *Id.* As part of his probation, the juvenile was ordered to obey all probationary terms and conditions, in addition to all parental rules and laws. *Id.* at P3.

[*P46] Approximately ten months following his initial adjudication, the juvenile received a general release from probation. *Id.* at P4. However, in less than one year, he returned to the juvenile court on charges of petty theft and unruliness. *Id.* at P5. The court, consequently, ruled that the juvenile had violated the initial order from which his previous commitment had been suspended, and it reimposed the DYS commitment. *Id.* at P6. The court of appeals affirmed.

[*P47] In reversing the judgment, the Supreme Court of Ohio held that "the completion [**12] of probation signals the end of the court's jurisdiction over a delinquent juvenile." *Id.* at P28. According to the supreme court, former R.C. 2151.355 authorized courts to impose probation in "very broad and creative" ways that facilitated their ability to maintain control over juvenile delinquents. *Id.* at P27. However, the court warned that "[t]he threat of actual incarceration * * * lasts only as long as the probation lasts." *Id.*

[*P48] The State, in the present matter, distinguishes *Cross* on the fact that the juvenile's probation in that case was terminated generally, leaving no conditions with which to comply. Here, however, the State argues that the juvenile court merely terminated one condition of J.F.'s "probationary" status, i.e., intensive community control, while maintaining the condition that he comply with monitored time. According to the State, this situation more closely resembles that of *In re Walker*, *Franklin App. No. 02AP-421*, 2003 Ohio 2137.

[*P49] In *Walker*, the Tenth District found that the trial court had not relinquished jurisdiction over a juvenile adjudicated delinquent on one count of rape, where

the initial Terms and Conditions of Probation indicated that the juvenile was [**13] placed on probation for 24 months *or until all conditions had been completed*. (Emphasis added.) *Id.* at P6. Included in the list of conditions was a requirement that the juvenile complete sexual offender counseling. *Id.* Following two extensions of the juvenile's probationary period for subsequent violations, the juvenile court exercised its continuing jurisdiction a third time to extend his probation until he completed residential treatment for sexual offenders. *Id.* at P13.

[*P50] According to the court of appeals, the lower court's extension of the juvenile's probation complied with the Terms and Conditions filed with the original order placing the juvenile on probation, as well as the principle set forth in former R.C. 2151.355 that a "juvenile court has broad discretion in fashioning orders specifically tailored to address each juvenile's particular treatment and rehabilitative needs." *Id.* at 22.

[*P51] While we do not find the facts in *Walker* or *Cross* to be directly on point, we do find these cases to be instructive in the matter before us. Here, similar to the situation in *Walker*, J.F.'s commitment to the DYS was suspended on separate and distinct conditions that he comply with monitored time [**14] and complete community control. Contextually, we believe it is reasonable to infer that the juvenile court used the term "community control" interchangeably with the term "probation," referring to the express condition listed in R.C. 2152.19(A)(4)(a). "The legal operation and effect of a judgment must be ascertained by a construction and interpretation of it. This presents a question of law for the court. Judgments must be construed as a whole, and so as to give effect to every word and part. The entire judgment roll may be looked to for the purpose of interpretation. * * * The legal effect, rather than the mere language used, governs." (Emphasis added.) *Hofer v. Hofer* (App. 1940), 35 Ohio Law Abs. 486, 42 N.E.2d 165. See, also, *Zimmerman v. Zimmerman* (Jan. 31, 1980), *Montgomery App. No. CA 6490*, 1980 Ohio App. LEXIS 13617, 1980 WL 352522, at *3. Our interpretation is strengthened by the March 3, 2006 decision terminating J.F.'s "Intensive Community Control" yet ordering that he complete a period of community service. Unlike in *Cross*, where the termination extinguished all of the conditions of the juvenile's probation, the complete record here demonstrates that the juvenile court intended to retain jurisdiction [**15] over J.F.'s initial order. First, by imposing an additional condition of community service in its March 3, 2006 decision, we find that the juvenile court expressly asserted its continuing control over J.F.'s claim until this condition and all pending conditions were completed. Moreover, at the hearing preceding this decision, Lori Buckwalter, the Intensive Community Control Director, stated on the record that she recom-

mended terminating J.F.'s status on intensive probation while continuing the requirement that he comply with monitored time. (Prob. Termination Hr'g at 3.) The action taken by the court indicates that it accepted this recommendation, clearly stating throughout the hearing that J.F.'s probation was terminated successfully. (Emphasis added.) (Id. at 2, 6, 7.) Nowhere does the record reveal, however, that the court also intended to terminate the period of monitored time.

[*P52] Thus, looking to the entire record for the purpose of our interpretation of the March 3, 2006 decision, we find that the juvenile court did not relinquish its control over the terms of J.F.'s suspended commitment when it terminated his status on "Intensive Community Control." Instead, the legal effect of [**16] this decision was to terminate the period of intensive probation while maintaining the requirement that J.F. comply with monitored time until he reached the age of 18. As a result, the juvenile court properly retained jurisdiction to impose upon J.F. a suspended commitment to the DYS.

[*P53] J.F.'s first assignment of error is overruled.

II

[*P54] In his second assignment of error, J.F. argues that the juvenile court violated his constitutional rights to notice and due process of law when it imposed his suspended commitment without the State properly invoking the jurisdiction of the court and without notice being provided that J.F. had violated a condition of his probation.

[*P55] The United States Supreme Court has held that the *Due Process Clause of the U.S. Constitution* protects juveniles as well as adults. *Schall v. Martin* (1984), 467 U.S. 253, 265, 268, 104 S.Ct. 2403, 81 L.Ed.2d 207. Thus, in a delinquency proceeding in which a juvenile may be committed to a state institution, due process of law requires that the majority of rights afforded to adult criminal defendants must be afforded to the juvenile. *In the Matter of Caruso* (May 17, 1991), *Lucas App. No. L-90-250*, 1991 Ohio App. LEXIS 2292, 1991 WL 82985, at *3, citing *Application of Gault* (1967), 387 U.S. 1, 30, 87 S.Ct. 1428, 18 L.Ed.2d 527. [**17] Pertinent to the case before this Court, due process requires that a probationer be given reasonable notice of the violation of which he is accused. 1991 Ohio App. LEXIS 2292 [WL] at *4, citing *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656. Such notice must be timely in order to be effective. *State v. Barison* (Oct. 22, 1974), *Montgomery App. No. 4464*, 1974 Ohio App. LEXIS 3488, 1974 WL 184611, at *3.

[*P56] In keeping with these rights, a juvenile court must comply with the requirements of *Juv.R. 35*

before it imposes a previously suspended commitment. *In re Royal* (1999), 132 Ohio App.3d 496, 508, 725 N.E.2d 685. *Juv.R. 35* provides the following:

[*P57] "(A) The continuing jurisdiction of the court shall be invoked by motion filed in the original proceeding, notice of which shall be served in the manner provided for the service of process.

[*P58] "(B) The court shall not revoke probation except after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to *Juv.R. 4(A)*. Probation shall not be revoked except upon a finding that the child has violated a condition of probation [**18] of which the child had, pursuant to *Juv.R. 34(C)*, been notified." 2

2 *Juv.R. 34(C)* states that a child placed on probation shall receive a written statement of the conditions of his or her probation.

[*P59] In the present matter, J.F. relies on Justice Cook's concurring opinion in *In re Cross*, *supra*, in support of his argument that the State failed to invoke the juvenile court's continuing jurisdiction before the court reinstated his suspended commitment. As we discussed above, in that case the trial court issued the appellant a general release from probation, which effectively terminated all conditions of said probation. *In re Cross*, 96 Ohio St. 3d 328, 2002 Ohio 4183 at P4, 774 N.E.2d 258. Subsequently, the court attempted to impose a suspended commitment from the original proceeding upon the filing of two new complaints. *Id.* at P5-6. Justice Cook pointed out that the case number of the original juvenile proceeding in which the trial court imposed the suspended commitment differed from the case numbers of the subsequent proceedings adjudicating the juvenile on one count of theft and one count of unruliness. *Id.* at P31-32. According to Justice Cook, the difference in case numbers was one indication that the State failed to [**19] comply with *Juv.R. 35(A)*, and, thus, invoke the court's continuing jurisdiction, because it didn't file a motion in the original proceeding. *Id.* at P33. That case, however, is distinguishable from the matter before this Court. Here, J.F.'s status on community control was not generally terminated prior to his suspended commitment being imposed. Pursuant to our finding under the first assignment of error, the juvenile court's March 3, 2006 termination entry only terminated J.F.'s status on intensive probation, not the condition that he comply with monitored time until the age of 18. Furthermore, unlike the facts in *Cross*, the new complaint against J.F. alleging delinquency for one count of possession of a controlled substance and one count of possession of drug paraphernalia was filed under the same case number as the 2003

original proceeding from which J.F.'s commitment to the DYS was suspended.

[*P60] The Ohio Supreme Court has held that "the completion of probation signals the end of the court's jurisdiction over a delinquent juvenile." We also believe the opposite to be true -- the *incompletion* of probation signals the continuation of the court's jurisdiction over a delinquent juvenile. [**20] Therefore, we find that the State had no duty to invoke the juvenile court's continuing jurisdiction where the court's jurisdiction had not yet been relinquished.

[*P61] In turning to whether the court complied with *Juv.R. 35 (B)*, however, we find that it did not satisfy that rule's requirements, where the court failed to make a finding on the record that J.F. had violated a condition of his community control or even to inform J.F. prior to or during the plea hearings held on August 31, 2006 and September 20, 2006 of the condition that he allegedly violated.

[*P62] J.F. cites *In re Royal, supra*, to support his argument that the juvenile court committed reversible error when it failed to follow the requirements of *Juv.R. 35(B)*. In that case, like here, the appellant appeared before the juvenile court on a complaint alleging criminal charges subsequent to the original proceeding in which the court suspended a commitment to the DYS and placed the appellant on intensive probation. *Id. at 500*. At a dispositional hearing with respect to the new complaint, the court summarily reviewed the substance of the hearing and the appellant's waiver of rights and admission to the charges. *Id. at 501*. However, the [**21] record, including the transcript of the dispositional hearing and the judgment entry of disposition, failed to mention a probation violation or inform the appellant of the condition of probation that he allegedly violated. *Id. at 507*. Instead of making the requisite finding that the appellant had violated a condition of his probation, the court simply asserted that a prior suspended commitment could be reimposed. *Id.* According to the Seventh District, the court's failure to comply with *Juv.R. 35(B)* amounted to a violation of the appellant's constitutional right to due process:

[*P63] "While we agree that a juvenile court may impose a previously suspended commitment under [former] *R.C. 2151.355(A)(22)* as a further disposition when it is proper and consistent with the purposes of the Juvenile Rules, the court must nonetheless comply with *Juv.R. 35(B)* before doing so to give the minor notice as to why a previously suspended commitment is ordered reinstated. * * * " *Id. at 508*.

[*P64] We find *In re Royal* analogous to the present matter. Following the 2003 original proceeding in which the court suspended his commitment to the DYS,

J.F. was brought before the juvenile court on an August 2006 complaint [**22] alleging delinquency on two additional charges. We further note that this complaint followed the March 2006 order terminating his status on intensive probation but continuing his period of monitored time.³ The record shows that at the plea hearing, the court read the complaint to J.F. and reviewed his constitutional rights. The court also informed J.F. that he had a suspended commitment that could be imposed at the court's discretion. Nowhere, however, does the transcript of the plea hearing indicate that J.F. was informed of a probation violation -- specifically, of which condition of probation he had violated. Similarly, the corresponding judgment entry simply lists the offenses with which J.F. is charged, followed by the court's order imposing fines in the amount of \$ 150.00 plus court costs and a previously suspended commitment under the original complaint. Although the court explains that reasonable efforts had been made to prevent such commitment, the entry, like the prior proceeding, does not mention a finding of a probation violation.

3 The State contends that *Juv.R. 35(B)* does not technically apply because J.F. had previously been "terminated from probation." We find this [**23] to be contradictory to the State's argument under the first assignment of error that the court retained jurisdiction to impose the suspended commitment by only terminating J.F.'s status on intensive probation but not his compliance with a period of monitored time.

[*P65] Reiterating the finding of the Seventh District, we hold that it is tantamount to the constitutional rights of a juvenile that the trial court comply with *Juv.R. 35(B)*. Due process requires (1) timely notice that a juvenile's probation will be revoked, (2) that the juvenile be informed of the grounds on which his or her probation will be revoked, and (3) that the juvenile be informed he or she will be subject to a suspended commitment of incarceration. In light of the current jurisprudence involving the rights of juvenile delinquents, such notice requirements afford the juvenile and his or her parents adequate time to meaningfully consider each case and determine whether to obtain legal counsel. See *In re C.S.*, 115 Ohio St.3d 267, 2007 Ohio 4919, 874 N.E.2d 1177, at paragraph two of the syllabus (holding that a juvenile may waive his or her constitutional right to counsel in a delinquency proceeding, subject to certain standards, [**24] if the juvenile is counseled and advised by a parent, custodian or guardian); *In re R.B.*, 166 Ohio App.3d 626, 2006 Ohio 264, 852 N.E.2d 1219, at P25 (interpreting *R.C. 2151.352* to mean that a juvenile's waiver of his or her right to counsel is knowing and voluntary only when the juvenile has some adult, i.e., a parent, guardian or custodian, to advise him or her).

[*P66] Accordingly, we find that the juvenile court violated J.F.'s constitutional right to due process when it failed to provide notice that the August 31, 2006 and September 20, 2006 dispositional hearings were, in essence, probation revocation hearings, and to specifically set forth the condition of his probation that he violated. Notice that admission to the charges in the August 30, 2006 complaint would constitute a violation of J.F.'s community control, specifically his extended period of monitored time, was imperative to J.F.'s decision to retain legal counsel.

[*P67] J.F.'s second assignment of error is sustained.

III

[*P68] J.F.'s third and fourth assignments of error are as follows:

[*P69] "THE TRIAL COURT VIOLATED [J.F.'S] RIGHT TO COUNSEL AND RIGHT TO DUE PROCESS UNDER THE *FIFTH*, *SIXTH*, AND *FOURTEENTH* AMENDMENTS TO THE UNITED STATES CONSTITUTION, [**25] *ARTICLE I, SECTION SIXTEEN OF THE OHIO CONSTITUTION, OHIO RE-*

ISED CODE SECTION 2151.352, AND JUVENILE RULES 4, 29, AND 35."

[*P70] V. "[J.F.'S] ADMISSION WAS NOT KNOWING, VOLUNTARY, AND INTELLIGENT, IN VIOLATION OF THE *FIFTH* AND *FOURTEENTH* AMENDMENTS TO THE UNITED STATES CONSTITUTION, *ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION, AND JUVENILE RULE 29.*"

[*P71] Having sustained J.F.'s second assignment of error, we find that his third and fourth assignments of error have been rendered moot. Consequently, we decline to address those assignments of error. See *App.R. 12(A)(1)(c)*.

IV

[*P72] Pursuant to our disposition of J.F.'s second assignment of error, the judgment of the trial court is reversed, and this matter is remanded for further proceedings consistent with this opinion.

[*P73] Judgment reversed and remanded.

WOLFF, P.J., and FAIN, J., concur.

LEXSEE 1999 OHIO APP LEXIS 4598

JACOB NORTON dba NORTON MANUFACTURING, Plaintiff-Appellee, - vs -
GUS LIAPIS, et al., Defendants-Appellants.

CASE NO. CA99-03-068

COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT, BUTLER
COUNTY

1999 Ohio App. LEXIS 4598

September 27, 1999, Decided

DISPOSITION: [*1] Judgment affirmed.**COUNSEL:** Jack C. McGowan, Hamilton, Ohio, for plaintiff-appellee, Jacob Norton.

Thompson, Hine & Flory, LLP, Robert A. McMahon, Cincinnati, Ohio, for defendant-appellant, Gus Liapis.

JUDGES: YOUNG, J., POWELL, P.J., and WALSH, J., concur.**OPINION BY:** YOUNG**OPINION**

OPINION

YOUNG, J. Defendant-appellant, Gus Liapis, appeals the decision of the Fairfield Municipal Court awarding plaintiff-appellee, Jacob Norton, \$ 9,700 for appellant's breach of an oral contract.

On April 20, 1998, appellee filed a complaint against appellant and On Point Packaging, Inc. ("OPP"), appellant's company, alleging breach of an oral contract and seeking to recover \$ 9,700 from appellant for unpaid balances for billed work. In his complaint, appellee alleged that he and appellant had entered into an oral contract by which appellee worked as an independently contracting machinist at OPP. On May 19, 1998, appellant filed an answer denying that appellee was an independent contractor, instead asserting that appellee had been an employee and that appellant had not breached any oral contract.

On December 29, 1998, both parties filed pretrial statements. In his pretrial statement, appellee alleged [*2] that there had been an oral contract that he would work as an independent contractor and be paid by the

part and by the hour. Appellant contested this allegation, arguing that appellee had been an employee paid according to an annual salary and that payments made to appellee reflected this arrangement.

On February 8, 1999, a bench trial was held. It was stipulated that for purposes of trial that appellee should be considered as an independent contractor. Thus, the issue was solely whether the parties had reached an agreement by which appellee was entitled to the \$ 9,700 sought. Appellee voluntarily dismissed OPP, as it had not been incorporated by appellant at the time of the alleged agreement.

The testimony established the following facts: Appellant is the owner and president of OPP, which builds machines to pack plastic and glass bottles into shipping crates. OPP has extensive need of a machinist to manufacture metal and plastic parts.

In early December 1997, appellant met with appellee about appellee becoming an in-house machinist at OPP. At this time, appellee was working as a machinist for Jotco Co., a vendor from which OPP bought parts. Appellee told appellant that he would [*3] have to make \$ 50,000 a year if he were to work at OPP. Appellant said that appellee would have to work a probationary period after which they would make a decision on employment and compensation. Appellee agreed, and he began working on December 16, 1997.

As part of the arrangement, appellee brought in his own tools and equipment. Appellant paid for all raw materials, utilities, and other overhead costs. There were discussions about charging rent for the space used by appellee, but rent was never charged, and appellant never calculated an amount for rent. Appellee was requested to keep a list of the parts he made and the time he spent making each part so that appellant could bill OPP's customers.

At the end of December 1997, appellee presented appellant with a handwritten list of the parts he had made. In this list, appellee included a fee of \$ 40 per hour for his work, but this fee was not included for all of the parts. Appellant and appellee reviewed the list, and appellant had some dispute with some of the time that appellee had taken to make certain parts. The parties agreed on a fee of \$ 2,313.25, which corresponded with the amount which appellee had billed.

At the end of [*4] January 1998, appellee gave appellant a list of parts completed in the month. This list included the \$ 40 per hour fee, and a total bill of \$ 7,620. Appellant paid appellee \$ 3,000 by check. Appellant testified that he based this amount on a \$ 50,000 per year salary, minus withholdings. He told appellee that he was interested only in the amount of time appellee had worked on parts, not a per hour fee. Appellee accepted the check and continued to work on new parts.

There was dispute as to whether appellee accepted the check as only a partial payment of his asserted bill. Appellee testified that he had received purchase orders for parts when he first started in December and in the beginning of January, but purchase orders were not issued to him beginning some time in February. After that time, OPP employees would tell him what parts to make without issuing purchase orders. Appellee did admit that he and appellant had not expressly agreed to a \$ 40 per hour fee when he presented the January list to appellant.

At the end of February 1998, appellee gave a list of parts completed that month to appellant, which again included the \$ 40 per hour fee, and a total bill of \$ 4,800. Appellant [*5] paid appellee \$ 3,500 by check. Appellant testified that he thought this amount was consistent with a \$ 50,000 salary, minus re-estimated withholdings. Again, appellant made a comment about how the \$ 40 per hour fee calculations by appellee did not help appellant in determining how to bill his clients. Appellee accepted the check and continued on new parts. At this point, no paperwork indicating that appellee was an employee had been completed.

In late March 1998, appellee presented appellant with a list of parts completed in the month, which again included the \$ 40 per hour fee, and billed a total of \$ 10,130. There was no list of time spent on each part, only a fee for each part. Appellant paid appellee \$ 3,500, and again commented that appellee's attempts to bill were not appreciated. Appellee made a demand for \$ 9,700, the amount he claimed was past due on his billings, but appellant refused to pay on the basis that appellee was an employee, not an outside vendor. The parties dispute whether appellee had made any previous demands for payment. After this final list was presented, the parties

agreed the situation was not working, and appellee removed his equipment and filed suit.

[*6] At the conclusion of testimony, both parties presented informal closing arguments. The trial court then made its judgment awarding to appellee \$ 9,700, plus pre-judgment and post-judgment interest. On March 18, 1999, the trial court filed its judgment entry finalizing the award to appellee. Appellant appeals, raising two assignments of error.

Assignment of Error No. 1:

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ENTERING JUDGMENT AGAINST APPELLANT THAT WAS CONTRARY TO ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

In his first assignment of error, appellant contends that the trial court's judgment was not supported by its findings of fact and conclusions of law. Appellant argues that the trial court found that no contract existed between the parties, and that, as a result, appellee should not have been granted relief.

In rendering its judgment, the trial court specifically stated that the parties did agree that appellee would work at the OPP premises as a parts machinist. Based upon this agreement, appellee moved in his equipment and began making parts according to the requests of appellant and the OPP employees. The trial court found that, although the parties had not [*7] expressly agreed on the appellee's compensation, they had arrived at a method of payment when appellant accepted the first bill submitted by appellee, which included the \$ 40 per hour fee. At this point, appellee had begun performance on the oral agreement, and appellant's acceptance of that partial performance was sufficient to indicate that an arrangement for compensation had been reached.

Thus, the trial court's judgment is supported by its findings of fact. Accordingly, appellant's first assignment of error is overruled.

Assignment of Error No. 2:

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY SHIFTING THE BURDEN OF PROOF TO APPELLANT AND ENTERING JUDGMENT ON A CLAIM NOT AT ISSUE IN THE PLEADINGS.

In his second assignment of error, appellant contends that the trial court erroneously shifted onto him the burden of proving whether the \$ 40 fee charged by appellee was unreasonable. Appellant further contends that the trial court further erred by entering judgment on an account, not breach of an oral contract.

In rendering its judgment, the trial court found that appellant had failed to demonstrate that the \$ 40 per hour fee charged by appellee was unreasonable. Appellant [*8] argues that in making this finding, the trial court shifted the burden of proof so that appellee was not required to first prove that the fee was reasonable or that the parties had agreed that the fee was reasonable.

Appellant is correct that appellee was first required to prove that the fee charged was either reasonable or agreed upon. See *Gioffre v. Simakis* (1991), 72 Ohio App. 3d 424, 594 N.E.2d 1013. Nothing in the trial court's judgment indicates otherwise. Instead, all indications are that the trial court believed that appellee had proven that the \$ 40 fee was found reasonable by the parties. Upon being presented with appellee's first bill at the end of December, a bill which included the \$ 40 per hour fee, appellant paid this bill without disagreeing to the charged fee, only some of the time worked. Thus, appellee provided evidence which established that the fee was reasonable. It was incumbent upon appellant to refute this evidence, and the trial court found that he had failed to do so.

As to the account/oral contract issue presented by appellant, in its judgment entry, the trial court ruled that "the plaintiff [appellee] has sustained his burden of proof as to the essential [*9] allegations of his cause of action." The only cause of action before the trial court was that included in appellee's complaint -- breach of an oral contract. A review of the transcript of the proceedings makes it clear that the trial court did rely heavily upon the bills submitted by appellee in making its decision. It is also clear that the trial court believed that these bills could be considered an account.

The trial court determined that the parties had reached an agreement as to how appellee would work for appellant, and that they had established by conduct a method of payment, not that there was a claim founded upon an account. An agreement to agree, like that initially entered into by the parties, is enforceable, and the issue of intention to be bound by such an agreement is a question of fact to be resolved by the trier of fact. *Oglebay Norton Co. v. Armco, Inc.* (1990), 52 Ohio St. 3d 232, 235, 556 N.E.2d 515 (*per curiam*). Where the price term is left undecided in the original agreement, it may be established through the course of dealing between the parties, or supplied by the court if a fair and equitable result is possible. *Id.* at 236-237. [*10]

In the present case, the trial court found that the essential elements of an oral contract were established, and appellant was found to have breached that contract by refusing to pay in full appellee's submitted bills. A court speaks through its entry, and the trial court found that appellee had proven the essential elements of his claim for breach of an oral contract. The evidence presented would support such a result, as appellee demonstrated that the parties had entered into an agreement that he would work for OPP as an independent contractor, that appellant's conduct in paying the first bill submitted by appellee established a reasonable value for appellee's services, and that appellant later refused to pay for these services.

If appellant had believed that the trial court entered its judgment based upon a claim other than that included in the complaint, it was incumbent upon appellant to request findings of fact and conclusions of law from the trial court pursuant to *Civ.R. 52*.¹ By such a request, if the trial court had entered judgment upon a claim not before it, as appellant suggests happened, any alleged defect in the judgment could be highlighted or corrected. In the instant [*11] case, the trial court's judgment entry does not indicate that the trial court rendered its judgment upon a claim not properly before the court. We must accept the judgment entry as a correct and unambiguous expression of the trial court's resolution of appellee's breach of an oral contract claim.

1 *Civ.R. 52* states:

When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to *Civ.R. 58*, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.

Therefore, we find that the trial court did not err in finding that appellant had failed to disprove the reasonableness of appellee's fee, and the trial court did not enter judgment upon a claim not before the court. [*12] Accordingly, appellant's second assignment of error is overruled.

Judgment affirmed.

POWELL, P.J., and WALSH, J., concur.

LEXSEE 2007 OHIO 6364

State of Ohio, Appellee v. John Miller, Appellant

Court of Appeals No. WD-06-086

COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, WOOD COUNTY

2007 Ohio 6364; 2007 Ohio App. LEXIS 5579

November 30, 2007, Decided

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *State v. Miller, 2008 Ohio 1841, 2008 Ohio LEXIS 1143 (Ohio, Apr. 23, 2008)*

PRIOR HISTORY: [**1]
Trial Court No. 03 CR 85.

DISPOSITION: JUDGMENT REVERSED.

COUNSEL: Raymond Fischer, Wood County Prosecuting Attorney, and Paul Dobson and Jacqueline M. Kirian, Assistant Prosecuting Attorneys, for appellee.

Wendell R. Jones, for appellant.

JUDGES: Peter M. Handwork, J., Arlene Singer, J., Thomas J. Osowik, J., CONCUR.

OPINION BY: Arlene Singer

OPINION

DECISION AND JUDGMENT ENTRY

SINGER, J.

[*P1] Appellant appeals the sentence issued by the Wood County Court of Common Pleas, on a violation of the terms of his community control sanction. Because we conclude that the trial court acted without subject matter jurisdiction when it extended, then revoked, appellant's community control sanction after its expiration, we reverse.

[*P2] On August 14, 2002, appellant, John Miller, obtained an analgesic prescription from a Bowling Green dentist. Appellant filled the original prescription at one pharmacy, but made a copy which he attempted to fill at a second pharmacy. When a pharmacist at the second

pharmacy attempted to verify the prescription with the dentist, he was informed that it was a forgery.

[*P3] Appellant was charged with and eventually pled guilty to a violation of *R.C. 2925.23(B)(1)*, use or possession of a false or forged prescription, a fifth degree felony. [**2] On September 24, 2003, the trial court sentenced appellant to a two-year period of community control, including 100 hours of community service, a \$ 500 fine and costs. The court advised appellant that a violation of the conditions of his community control sanction could result in an extension of the order, more restrictive conditions or as much as 11 months imprisonment.

[*P4] On June 20, 2005, the state petitioned the court for revocation of appellant's community control sanction for failure to pay all of his fines and failure to complete any of his community service. At an August 15, 2005 hearing, appellant stipulated to the violation that had been alleged in the revocation petition. At that hearing, the court ordered appellant's bond continued and set October 3, 2005, as the date for resentencing. The state reminded the court that appellant's community control was set to expire prior to that date, but following some discussion, the court maintained the original stated date.

[*P5] At the October 3, 2005 resentencing hearing, the court extended community control for one year and ordered appellant to serve 12 days in the Wood County Justice Center. This, however, was followed by two more petitions [**3] for revocation, the last resulting in an order that appellant serve 180 days in the Wood County Justice Center and extending community control sanctions for another year. From this order, appellant now brings this appeal, setting forth the following three assignments of error:

[*P6] "I. The Trial Court lacked subject matter jurisdiction to initially extend Appellant's term of commu-

nity control, and then to subsequently impose a term of incarceration after that extended term of community control had expired.

[*P7] "II. The Trial Court erred to the prejudice of Appellant by imposing a prison sentence contrary to law and provisions of *O.R.C. 2929.15(B) & 2929.19(B)(5)*.

[*P8] "III. Appellant received ineffective assistance of counsel in violation of his rights under the *Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §10 of the Constitution of the State of Ohio*."

[*P9] In his first assignment of error, citing former *R.C. 2951.09* and *Davis v. Wolfe (2001)*, 92 Ohio St.3d 549, 2001 Ohio 1281, 751 N.E.2d 1051, appellant insists that, when the trial court failed to impose an extension to his community control sanction prior to the expiration of the time imposed under the community control sanction, [*4] it lost the subject matter jurisdiction and, as a result, any subsequent judgment of the court was void.

[*P10] The parties do not dispute that appellant's sentence is subject to the provisions of *R.C. 2951.09* (repealed 1-1-04). See *R.C. 2951.011(B)(1)*. The statute authorized certain remedies in the event of a probation violation, but provided that "[a]t the end or termination of the period of probation, the jurisdiction of the judge or magistrate to impose sentence ceases and the defendant shall be discharged."¹

1 Although community control sanctions are not exactly the same as probation, see *State v. Griffin (1998)*, 131 Ohio App.3d 696, 697-698, 723 N.E.2d 606, when a court imposes community control sanctions in felony sentencing, the same principles apply. See *State v. Talty, 9th Dist. No. 02CA0087-M, 2003 Ohio 3161, P 13*.

[*P11] In 1993, Richard Davis was convicted of multiple counts of criminal damaging and vandalism for which he received a six and one-half year sentence in a county jail. On March 26, 1993, the court suspended the sentence, placing Davis on probation for five years. On November 12, 1997, the state moved to revoke Davis' probation after he was arrested on a domestic violence charge. On March [*5] 9, 1998, two weeks prior to the expiration of Davis' probation, the court continued the probation revocation matter, pending final disposition of the domestic violence charge.

[*P12] The domestic violence charge was eventually dismissed following Davis' completion of a diversion program. When Davis' probation was later revoked for failure to pay restitution, his original sentence was reinstated. In 2000, Davis petitioned for habeas corpus, contending that the trial court lacked jurisdiction to re-

voke his probation after the expiration of the probationary period. The court of appeals agreed and granted the writ. On the state's appeal, the Ohio Supreme Court affirmed, holding that once the probationary period expired without having been extended, the sentencing court was divested of subject matter jurisdiction. *Davis at 552*. Absent subject matter jurisdiction, the sentencing court was simply without authority to either extend or revoke Davis' probation. *Id.*

[*P13] The state responds, citing *State v. Harrington, 3d Dist. No. 14-03-34, 2004 Ohio 1046*, in which the appeals court held, at P15, that a sentencing court possessed inherent power to enforce its own order and that it was sufficient that a [*6] probation revocation proceeding had been instituted prior to expiration. The state insists that since the sanction revocation proceeding here was instituted prior to the expiration of the community control sanction, we should follow *Harrington* and find that the sentencing court acted within its inherent authority. But, see, *State v. Lawless, 5th Dist. No. 03 CA 30, 2004 Ohio 5344* and *State v. McKinney, 5th Dist. No. 03 CA 083, 2004 Ohio 4035*, following *Davis*.

[*P14] This court's adherence to the pronouncements of the Supreme Court of Ohio are not optional. *Bisel v. Ward (Mar. 24, 1996)*, 6th Dist No. H-95-046, 1996 Ohio App. LEXIS 1123. We are bound to follow the dictates of that court when it has addressed an issue. *Gray v. Estate of Barry (1995)*, 101 Ohio App.3d 764, 767, 656 N.E.2d 729.

[*P15] We find nothing to distinguish the present matter from *Davis*, or for that matter, *Harrington*. In each instance, the revocation procedure was instituted prior to the expiration of the probationary period, but not extended or revoked until after the period expired. Following *Davis*, as we must, we can only conclude that the trial court acted without subject matter jurisdiction when it extended, then revoked, appellant's community control sanction after [*7] the expiration of its initial period. Accordingly, appellant's first assignment of error is well-taken. As a result, his remaining assignments of error are moot.

[*P16] On consideration whereof, the judgment of the Wood County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to *App.R. 24*. Judgment for the clerk's expense in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Wood County.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to *App.R. 27*. See, also, *6th Dist.Loc.App.R. 4*.

Peter M. Handwork, J.

Arlene Singer, J.

Thomas J. Osowik, J.

CONCUR.

LEXSEE 1993 OHIO APP. LEXIS 2896

State of Ohio, Appellee v. Victor Sapp, Appellant

Court of Appeals No. 92WD094

COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, WOOD COUNTY

1993 Ohio App. LEXIS 2896

June 11, 1993, Decided

PRIOR HISTORY: [*1] Trial Court No. 23122**COUNSEL:** Alan Mayberry, prosecuting attorney, and Gary Bishop, for appellee.

Kathleen Culkowski, for appellant.

JUDGES: George M. Glasser, P.J., Peter M. Handwork, J., Charles D. Abood, J., CONCUR.**OPINION****DECISION AND JUDGMENT ENTRY**

This is an accelerated appeal from a judgment of the Wood County Court of Common Pleas, Juvenile Division, which ordered appellant, Victor Sapp, to "* * * continue in counseling until successfully completed or released by the therapist as previously ordered (not as a condition of probation-separate order)." Appellant has appealed this order setting forth the following assignment of error:

"The Court was without jurisdiction or the statutory authority to order a misdemeanor offender to participate in mental health counseling independent of the period of probation."

On April 19, 1991, appellant was found guilty of two counts of gross sexual imposition. On May 24, 1991, the trial court filed its judgment entry in which it imposed a sentence of sixty days incarceration, suspended all but five of those days, placed appellant on probation for a period of one year, ordered that appellant undergo and complete treatment at the Wood [*2] County Mental Health Center until released by the therapist, ordered that appellant have no contact with the victims or their families while on probation, and ordered that he participate in forty hours of community service in lieu of fines and costs.

On August 10, 1992, appellee filed a motion to modify appellant's sentence in which it requested that the court extend the probationary period for an additional year. On September 28, 1992, the trial court filed a judgment entry in which it found that appellant had observed the terms of his probation and terminated the probation. On October 1, 1992, the trial court filed a judgment entry in which it denied appellee's motion to extend the probation but ordered that appellant was to continue with his counseling "until successfully completed or released by the therapist as previously ordered." The trial court indicated that that order was separate from, and not a condition of, probation.

Upon consideration of the record and the pertinent statutory provisions, this court finds that the trial court's original order for counseling was clearly imposed as a condition of probation and, as such, could not be extended for an indefinite period of [*3] time into the future. We find that, since the term of probation had expired prior to the filing of appellee's motion to modify and the trial court had already discharged appellant from his probation at the time it entered the order, the court did not have the jurisdiction to subsequently order appellant to continue his counseling. Accordingly, appellant's sole assignment of error is found well-taken.

On consideration whereof, the judgment of the Wood County Court of Common Pleas is reversed. It is ordered that appellee pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to *App.R.* 27. See also *6th Dist.Loc.App.R.* 4, amended 1/1/80.

George M. Glasser, P.J.

Peter M. Handwork, J.

Charles D. Abood, J.

CONCUR.

LEXSEE 2005 OHIO 1120

STATE OF OHIO, Plaintiff-Appellee v. KEVIN M. SELF, JR., Defendant-Appellant

Appellate Case No. 20370

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY

2005 Ohio 1120; 2005 Ohio App. LEXIS 1123

March 14, 2005, Decided

PRIOR HISTORY: [**1] Trial Court Case No. 01-TRD-5820.

State v. Self, 2005 Ohio 310, 2005 Ohio App. LEXIS 278 (Ohio Ct. App., Montgomery County, Jan. 28, 2005)

DISPOSITION: On reconsideration, previously issued opinion vacated. Appeal reinstated and case remanded for further proceedings.

COUNSEL: Carlo McGinnis, Dayton OH.

Mont. Co. Public Defender's Office, Attention - Glen Dewar, Dayton, OH.

Carlo McGinnis, Dayton OH.

JUDGES: JAMES A. BROGAN, Presiding and Administrative Judge. THOMAS J. GRADY, Judge. MARY E. DONOVAN, Judge.

OPINION

DECISION AND ENTRY

PER CURIAM:

[*P1] This matter is before us on a motion for reconsideration filed by Appellant, Kevin Self. Self was originally charged in Montgomery County Court Area Two, Traffic Division, with driving under suspension (DUS) and failing to obey a red light. See *State v. Self*, *Montgomery App. No. 20370*, 2005 Ohio 310, at P1. After Self pled no contest, the trial court found him guilty and eventually sentenced him to thirty days in jail on the DUS charge, plus \$ 100 and costs. The court then suspended thirty days of the sentence. In addition, the court sentenced Self to \$ 10 and costs for the red light violation.

[*P2] Ultimately, after failing either to pay fines or perform community service, Self was ordered to serve thirty days in jail. Self then appealed, alleging that: 1) that the trial court erred in sentencing him to thirty days in jail for [**2] non-payment of combined fines and court costs totaling \$ 253; and 2) that the trial court failed to follow *R.C. 2947.14* when it ordered him to serve a term of incarceration for non-payment of fines. We rejected both assignments of error, stating that:

[*P3] "a review of the record reveals that the court ordered Self to serve the previously suspended sentence not for failure to pay, but for failure to comply with community control sanctions by choosing to ignore court orders, including the court's order to perform court-ordered community service." *Id. at P13*.

[*P4] We also commented that:

[*P5] "In a case such as this, where a defendant chooses not to comply with any of the conditions of his community control sanctions, the trial court has the authority to reinstate the previously suspended sentence. *R.C. 2929.25*. Moreover, pursuant to *R.C. §§ 2705.02(A)* and *2705.05(A)*, the trial court had the authority to sentence Self to thirty days in jail for contempt. Self's first assignment of error is overruled.

[*P6] "Furthermore, because the trial court did not order [**3] Self's incarceration for non-payment, but for repeated contempt of court and violation of community control sanctions, *R.C. 2947.14* is inapplicable. Accordingly, Self's second assignment of error is without merit and is overruled." *Id. at Ps 16-17*.

[*P7] The test applied to motions for reconsideration is whether they alert a court to obvious errors in its decision or raise issues that the court either failed to consider or did not fully address. *City of Columbus v. Hodge (1987)*, 37 Ohio App.3d 68, 523 N.E.2d 515. In this regard, Self claims that our opinion contains two errors.

The first pertains to our statements about community control sanctions. Specifically, Self contends that he was never sentenced to community control sanctions nor was he ever placed on probation. The second alleged error involves our comment that the trial court sentenced Self to jail for contempt. Again, Self claims that the trial court never mentioned contempt and never initiated any contempt action.

I

[*P8] In order to properly evaluate Self's request, we must first outline the procedural history of this case, which is somewhat complicated. As we mentioned, Self was [**4] charged with violating *R.C. 4705.02(A)(1)* or driving without a valid operator's license (DUS). An individual who violates this statute is guilty of a misdemeanor of the first degree. Under *R.C. 2929.24(A)(1)*, 180 days in jail is the maximum possible sentence that may be imposed for a misdemeanor of the first degree.

[*P9] Self was originally charged with DUS on November 16, 2001, and was summoned to appear in court on November 27, 2001. When he failed to appear, a bench warrant was issued. The record does not indicate precisely when Self was arrested on the bench warrant, but he did sign an "acknowledgment of release" with Montgomery County Pretrial Services on January 4, 2002, agreeing to appear for a scheduled court date on January 8, 2002.

[*P10] Self appeared in court on January 8, 2002, and pled no contest to the DUS and red light violations. After Self explained the circumstances surrounding his offenses, the court gave him 45 days to return to court with his operator's license reinstated. Self returned on the appointed day, and explained why he had not been able to complete the necessary papers. The court then gave [**5] Self 45 more days to complete paperwork, and set the matter for sentencing on April 16, 2002.

[*P11] Self did not appear in court on April 16, 2002, and a bench warrant for his arrest was issued on April 29, 2002. However, the failure to appear at that point was apparently not Self's fault. The record indicates that Self was in Montgomery County Jail, and someone at the jail failed to put Self on video for the court appearance. The error was acknowledged when Self subsequently appeared before the court on April 30, 2002. At that time, the court withdrew the bench warrant. Before imposing sentence, the court asked Self if he had obtained an operator's license. Self explained that he had not been successful, due to the high amount of the reinstatement fee (\$ 1,500). The court stated that it was aware of the difficulty in paying such a high fee. The court then sentenced Self to thirty days for driving under suspension, with thirty days suspended, plus \$ 100 for the fine and \$ 80 in costs. Additionally, the court sen-

tenced Self to a \$ 10 fine, plus \$ 33 in costs for the red light violation, for a total in fines and costs of \$ 223. Nothing was said in the hearing, nor was anything [**6] filed with the court, indicating that Self was being placed on community control sanctions or on probation.

[*P12] Self signed a document agreeing to pay the fines and costs in total by May 28, 2002. However, Self failed to pay. As a result, the court filed an order on June 7, 2002, stating that Self was to pay \$ 223 before June 27, 2002 or report for community service at the courthouse on June 28, 2002. A bench warrant was then issued on July 3, 2002, for Self's arrest, due to his failure to appear for community service or to pay all past due fines and costs.

[*P13] Subsequently, on October 8, 2002, Self appeared again before the court. The record does not indicate when or if Self was arrested, or how he came before the court, but one would assume he was arrested pursuant to the bench warrant issued on July 3, 2002. In any event, Self appeared on October 8, 2002, before a different judge than the one who had previously handled the case. When this judge asked Self why he had not paid, Self explained that he had lost his job and had just begun working. The judge did not mention community service. At that time, the judge told Self to return to court on October 15, 2002. The [**7] judge noted that if Self did not have the fine paid before then, Self was to come back on October 15 to show cause.

[*P14] Self returned to court as instructed on October 15, 2002. No record was made of that hearing. However, Self signed agreements on October 15, stating that he would pay the amounts due by October 29, 2002. These agreements contained the following language:

[*P15] "Failure to follow this payment agreement could result in a license forfeiture, a warrant block preventing you from renewing your driver's license, or a warrant for your arrest. Failure to provide the court with current addresses at any time while this payment agreement is in effect may result in you being held in contempt of court."

[*P16] Also on the agreements were statements that:

[*P17] "It is THEREFORE, ORDERED, that the fine and cost owing on this case be paid accordingly, or if not paid in the manner agreed upon, defendant shall appear before this Court and show cause why he/she should not be held in Contempt of Court and/or why any portion of the Sentence which was suspended should not be imposed."

[*P18] Both payment agreements (one for each violation) were also signed [**8] by the trial court judge. Each agreement contained a hand-written notation

at the top, stating that: "Per Judge Piergies Pay in full by 10/29/02 or 30 jail days." The record does not reveal when these notations were written on the agreements or whether they were on the copy given to Self. To the extent any inference exists, however, it is that the notations were not on the agreements when they were file-stamped or when they may have been given to Self. Specifically, the handwriting on the agreements is in different colored ink than the file-stamp, and the writing on one agreement covers part of the file-stamped date. Accordingly, the Judge's note on at least one agreement was made after the clerk time-stamped the document.

[*P19] It is possible that the agreements with the notations were mailed to Self, but the record before us does not contain any information about when or if any documents in the file were mailed to the Defendant. In any event, Self again failed to pay the fines, and another bench warrant was filed on November 16, 2002. Subsequently, Self appeared at another hearing before a third judge on March 27, 2003. The court bailiff indicated at the hearing that Self [**9] had been picked up by the Sheriff's office on a warrant. However, the record does not indicate when that occurred, or how long Self had been in jail. During the hearing, Self stated that he was not trying to avoid paying, but that he had a child at home, and found it hard to pay bills and take care of her. At that point, the following exchange occurred:

[*P20] "The Court: Well, we've had over a year. I can't make this go away. How about some community service.

[*P21] "The Defendant: I (indiscernible) community service.

[*P22] "The Court: Yeah, let me explain this to you, okay? Because I'm not going to let you shuck and jive me and then not show up. I promise you I will send you to jail for a long while if you don't follow through with this.

[*P23] "The Defendant: (Indiscernible)

[*P24] "The Court: I'm not trying to be hard. I just can't keep -- I just can't keep playing with it, okay? Somebody out front will talk to you."

[*P25] No entry was filed regarding this hearing, other than an entry that was file-stamped almost a year later, after Self had filed his notice of appeal. We will discuss that entry later.

[*P26] The next document in the [**10] court file is from the Adult Probation Department and is labeled "Community Service Work." This document is not time-stamped, but has a hand-written notation on the top that says "4/29/03." Self's name is written on the document, and the document also says, "No Show."

[*P27] Subsequently, on May 23, 2003, the trial court filed a document entitled "Show Cause Hearing." This document stated as follows:

[*P28] "It appearing to the Court, **KEVIN M. SELF, JR.**, Defendant, in the above captioned case/cases has failed to appear for community service work in lieu of fine and court costs.

[*P29] "IT IS SO ORDERED that **KEVIN M. SELF, JR.**, appear before this Court on Thursday, May 29, 2003 1:00 P.M. for a Show Cause Hearing to show why he/she should not be held in Contempt of Court pursuant to *section 2705.02(A) of the Ohio Revised Code.*" (Bolding in original).

[*P30] When Self failed to appear for this hearing, the court issued another bench warrant on June 6, 2003. At some later point, Self was arrested again, and came before the court for a hearing on February 3, 2004. This time, the original judge who had heard the case was on the [**11] bench, and the following discussion transpired:

[*P31] "The Court: Sir, you are charged with failing to appear at a hearing for fines and costs. We had a show cause hearing on May 29th of 2003 and we sent you notice of that on some fines and court costs that go back to January of 2002.

[*P32] "I'll refresh your recollection. Back on October 15th you indicated that you would be able to pay off your fines and court costs in full within two weeks or 30 days and that you worked at L&L Construction. You promised me that one, so I let you out of jail on condition that you pay it off and you haven't done that. Do you remember that promise you made, sir?

[*P33] "The Defendant: Yes, sir.

[*P34] "The Court: Do you know what's coming?

[*P35] "The Defendant: Sir?

[*P36] "The Court: Do you know what's going to happen now?

[*P37] "The Defendant: You gave me a few days of restitution time (indiscernible). I had got a sheriff's release and I was done here the whole weekend and you had gave me a restitution for three days. (Indiscernible) restitution somewhere down the line, and I went and did them. And I (indiscernible) and I did that.

[*P38] "The Court: [**12] Hey, Kevin, you got me confused with somebody else because we never did that.

[*P39] "The Defendant: (Indiscernible) I seen the probation officer and did that. (Indiscernible) I went to

the front office and did three days of community service with a guy eight hours every day. I had did that.

[*P40] "The Court: Sir, I didn't do that. I never did that to you and it's never been written down and there's no notice here of anyone ever doing that, so that -- you got us mixed up with a different court.

[*P41] "So I'll sentence you to 30 days, suspend the fines and court costs and close the case."

[*P42] The court then filed a "sentencing entry" on February 3, 2004, ordering an "indirect sentence" and stating that the sentence was to be "30 days, of which 30 are statutorily mandated." The court also did not credit any days of time previously served toward the sentence.

[*P43] On February 11, 2004, Self filed a motion for stay of execution pending appeal, but the trial court denied the motion the next day. Self then filed a notice of appeal on February 13, 2004, and asked that the record and transcript be forwarded to the court of appeals. On the same day, we granted [**13] a stay of execution pending appeal.

[*P44] On March 5, 2004, the court filed several entries that were time-stamped as of that date. However, the entries were added to the trial court file and given docket numbers as if they had actually been filed as of the date a particular hearing occurred. These entries included: 1) an entry for Self's plea of no contest and finding of guilty on January 8, 2002 (Doc. # 5); 2) the sentencing entry for April 30, 2002, where Self was sentenced on the DUS and red light violation (Doc. # 10); 3) an entry regarding a show cause hearing on October 15, 2002, in which Self was ordered to "pay off all fines and costs within two weeks or 30 days jail imposed" (Doc. # 16); and 4) an order regarding the court appearance on March 23, 2003, ordering Self to "set up community service in lieu of fines and costs owed" (Doc. # 20). None of the entries was designated "nunc pro tunc." The docket and journal entries were then forwarded to our court, along with the transcripts of the hearings.

[*P45] In responding to the motion for reconsideration, the State claims that the imposition of "community control" was mentioned in several contexts, including two [**14] entries that ordered Self to report for and set up community service. The State also contends that the contempt process was mentioned in numerous places throughout the trial court record. However, the fact that the trial court may have mentioned these items does not mean that the court complied with requirements for imposing contempt or community control sanctions.

[*P46] As a preliminary point, we must distinguish between "community control" and "community service," which the State seems to use interchangeably. "Community control" is a term of art added to criminal statutes in

recent years to replace probation and parole, meaning that a defendant stays in the community, under certain "controls," rather than being sent to prison. Until amendments to the criminal code in January, 2004, community control sanctions were not used in connection with misdemeanor crimes. However, effective January 1, 2004, the definition of community control was changed to include probation for misdemeanors. See, e.g., *R.C. 2929.01(F)*, as amended by 2002 H.B. 490, effective January 1, 2004 (defining "community control" to include probation if the sentence in question was [**15] imposed for a misdemeanor committed before January 1, 2004).

[*P47] In contrast, "community service" refers to work performed in a community, typically as a condition of probation (now community control), or in lieu of paying fines. For example, *R.C. 2947.23(A)(1)(a)*, as amended effective March 23, 2003, allows courts to order community service in lieu of payment of fines, where defendants fail to pay judgments or make timely payments toward judgments under court-approved payment schedules. Consequently, "community service" is not the equivalent of "community control" and should not be used interchangeably.

[*P48] Putting the idea of community control aside for a moment, we note that trial courts "do not have inherent power to suspend execution of a sentence in a criminal case and may order such suspension only as authorized by statute." *State v. Smith (1989)*, 42 Ohio St. 3d 60, 537 N.E.2d 198, paragraph one of the syllabus, approving and following *Municipal Court v. State ex rel. Platter (1933)*, 126 Ohio St. 103, 184 N.E. 1, paragraph three of the syllabus. The controlling statute at the time of Self's original [**16] sentence was *R.C. 2929.51*, which provided, in pertinent part, that:

[*P49] "at the time of sentencing and after sentencing, when imprisonment is imposed for a misdemeanor, the court may do any of the following:

[*P50] "(1) Suspend the sentence and place the offender on probation pursuant to section 2951.02 of the Revised Code;

[*P51] "(2) Suspend the sentence pursuant to section 2951.02 of the Revised Code upon any terms that the court considers appropriate * * *." *R.C. 2951.02(A)(1)* and (2)(1996 S. 223).

[*P52] At the time Self was sentenced, *R.C. 2951.02* outlined various factors for courts to consider in deciding whether to suspend a misdemeanor sentence, including the risk to the public in releasing the individual, whether the defendant is a repeat offender, and so forth. See *R.C. 2951.02(A)(1)* and (2). The trial court did not discuss these factors, and did not impose probation,

as the term was not even mentioned. Instead, the court appears to have suspended the sentence under *R.C. 2929.51(A)(2)* [**17], which allows the court to suspend a sentence on any conditions the court considers appropriate. The trial court did not expressly connect any terms to the suspension. To the contrary, the court simply suspended the sentence and ordered Self to pay fines and costs. Therefore, the most that could be inferred is that payment may have been a condition of suspension.

[*P53] Based on the above review of the record, we agree with Self that our prior opinion was incorrect. Contrary to what we said in our opinion, the transcript of the final hearing indicates that the trial court did not sentence Self to thirty days in jail for violation of community control sanctions or for failure to perform community service. Instead, the trial court indicated that the sentence was for nonpayment of fines. In fact, when Self claimed that he had performed community service in lieu of payment, the trial court emphatically denied ever giving Self that option.

[*P54] As a further matter, we were also incorrect when we said that the trial court had imposed sentence for repeated contempt of court orders. *Self, 2002 Ohio 310, at P16*. The record is devoid of any properly conducted contempt [**18] proceedings. We were additionally incorrect when we referred to *R.C. 2929.25(A)(1)* and *R.C. 2929.27(A)(3)* as authority for the court's imposition of community service as a condition of "community control sanctions." *Self, 2005 Ohio 310, at P13*. Both of these sections, as pertaining to misdemeanor sentencing, did not come into existence until January 1, 2004, well after the time Self was originally sentenced. See 2002 H. 490, effective January 1, 2004. And, finally, we have already noted that the term "community control sanctions" did not include misdemeanors until January 1, 2004.

[*P55] Even though *R.C. 2929.25* and *R.C. 2929.27* were not available, the trial court did have several options when Self failed to pay. For example, the court could have either revoked the suspension or initiated contempt proceedings. However, the court did neither. Under *Crim. R. 32.3*, courts may not impose a prison term for violations of community control sanctions, nor may it revoke probation except after a hearing at which the defendant is [**19] present and is apprised of the grounds for the revocation. In addition, the defendant has the right to be represented by counsel and must be advised of that fact. *Crim. R. 32.3(B)*.

[*P56] Although Self was not technically on "probation," revoking the suspended sentence had the same effect as revoking probation, because Self was then subject to being imprisoned, just as a probationer is subject to being imprisoned for a probation violation. Despite

this fact, Self was not informed at any point of his right to be represented by counsel. Therefore, if what the trial court intended to do was to revoke the suspended sentence, it failed to comply with legal requirements. Compare *State v. Kling, Stark App. No. 2002CA00433, 2003 Ohio 2127, at Ps 6 and 24* (trial court violated due process by failing to inform defendant of right to counsel and to an evidentiary hearing when defendant's suspended sentence for driving under the influence was revoked at show cause hearing).

[*P57] The trial court could also have cited and punished Self for contempt. Under *R.C. 2705.02*, "[a] person guilty of any of the following acts [**20] may be punished as for a contempt:

[*P58] (A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer * * *." Failure to obey a court order is considered indirect contempt. *State v. Shoup (Apr. 15, 1988), Wood App. No. WD-87-48, 1988 Ohio App. LEXIS 1336, *3, 1988 WL 37585, *1*. In such situations, "constitutional due process requires that one charged with contempt of court be advised of the charge against him, have an opportunity to present a defense or explanation, have the right to call witnesses on his behalf, and know of his or her right to counsel." *Id. 1998 Ohio App. LEXIS 1336 at *5, 1998 WL 37585, *2*. See, also, *State v. Belcastro (2000), 139 Ohio App.3d 498, 501, 744 N.E.2d 271, and In re Contempt Citation of Lewis (Mar. 31, 1999), Greene App. 98CA29, 1999 Ohio App. LEXIS 1373, *2*. Again, however, the trial court did not comply with these requirements. At no time was Self told that he had a right to present a defense, to call witnesses, or to be represented by counsel.

[*P59] As we mentioned before, one of the hearings was held on March 27, 2003. At that point, *R.C. 2947.23* had been amended, effective March 23, 2003, to allow for hearings on [**21] a defendant's failure to pay a judgment for court costs. In this regard, the amended statute provided that:

[*P60] "if a judge or magistrate has reason to believe that a defendant has failed to pay the judgment described in division (A) of this section or has failed to timely make payments towards that judgment under a payment schedule approved by the judge or magistrate, the judge or magistrate shall hold a hearing to determine whether to order the offender to perform community service for that failure. The judge or magistrate shall notify both the defendant and the prosecuting attorney of the place, time, and date of the hearing and shall give each an opportunity to present evidence. If, after the hearing, the judge or magistrate determines that the defendant has failed to pay the judgment or to timely make payments under the payment schedule and that imposi-

tion of community service for the failure is appropriate, the judge or magistrate may order the offender to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the judge or magistrate is satisfied that the offender is in compliance with the approved payment schedule. [**22] If the judge or magistrate orders the defendant to perform community service under this division, the defendant shall receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed shall reduce the judgment by that amount. Except for the credit and reduction provided in this division, ordering an offender to perform community service under this division does not lessen the amount of the judgment and does not preclude the state from taking any other action to execute the judgment." *R.C. 2947.23(B)*.

[*P61] Again, the court did not comply with this statute. No notice was issued to the prosecutor and defendant, and the court did not give Self an opportunity to present evidence. In addition, the court never entered an order regarding this hearing until March 5, 2004, i.e., after Self filed his notice of appeal. Even then, the court failed to make its orders *nunc pro tunc*. Under the law, courts of record speak only through their journal entries. *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 163, 656 N.E.2d 1288, 1995 Ohio 278. As a result, [**23] even if we could somehow overlook the other failures to comply with *R.C. 2947.23*, there is simply no legitimate journal entry from March 27, 2003, ordering Self to perform community service.

[*P62] In view of the preceding discussion, we conclude that the motion for reconsideration has merit and should be granted. Accordingly, the appeal is reinstated and our opinion of January 28, 2005 is hereby vacated.

II

[*P63] Turning now to the merits of the underlying case, Self raised two assignments of error in his brief. The first was that the trial court erred in failing to separate court costs from fines, and by jailing Self for non-payment of court costs. As a second assignment of error, Self contends that the trial court erred by failing to follow *R.C. 2947.14* when it ordered Self to serve a term of incarceration for non-payment of a fine.

[*P64] In the present case, the court did combine court costs and fines. To the extent that Self was imprisoned for non-payment of the costs as well as fines, it was error. Specifically, the Ohio Supreme Court has held that courts may not confine defendants to work off court costs [**24] in order to satisfy the government's contractual interest. See, e.g., *Strattman v. Studt* (1969), 20 Ohio

St. 2d 95, 103, 253 N.E.2d 749, paragraphs six and seven of the syllabus.

[*P65] Both the State and Self agree that *Strattman* prohibits imprisonment of defendants for non-payment of court costs. The State argues, however, as it did in connection with the motion for reconsideration, that Self was imprisoned for failure to comply with "community control sanctions" and for contempt. For the reasons previously mentioned, we disagree. Without in any way condoning the actions of a defendant who fails to pay fines as ordered, the fact is that the trial court did not follow legal requirements in dealing with the matter. Accordingly, the first assignment of error has merit and is sustained.

II

[*P66] In the second assignment of error, Self contends that the trial court should have relied on the procedures in *R.C. 2947.14* when it ordered incarceration in lieu of payment of a fine. *R.C. 2947.14* states in pertinent part that:

[*P67] "(A) If a fine is imposed as a sentence or a part of a sentence, the court [**25] or magistrate that imposed the fine may order that the offender be committed to the jail or workhouse until the fine is paid or secured to be paid, or the offender is otherwise legally discharged, if the court or magistrate determines at a hearing that the offender is able, at that time, to pay the fine but refuses to do so. The hearing required by this section shall be conducted at the time of sentencing.

[*P68] "(B) At the hearing, the offender has the right to be represented by counsel and to testify and present evidence as to the offender's ability to pay the fine. If a court or magistrate determines after considering the evidence presented by an offender, that the offender is able to pay a fine, the determination shall be supported by findings of fact set forth in a judgment entry that indicate the offender's income, assets, and debts, as presented by the offender, and the offender's ability to pay.

[*P69] "(C) If the court or magistrate has found the offender able to pay a fine at a hearing conducted in compliance with divisions (A) and (B) of this section, and the offender fails to pay the fine, a warrant may be issued for the arrest of the offender. Any offender [**26] held in custody pursuant to such an arrest shall be entitled to a hearing on the first regularly scheduled court day following the date of arrest in order to inform the court or magistrate of any change of circumstances that has occurred since the time of sentencing and that affects the offender's ability to pay the fine. The right to the hearing on any change of circumstances may be waived by the offender.

[*P70] "At the hearing to determine any change of circumstances, the offender has the right to testify and present evidence as to any portion of the offender's income, assets, or debts that has changed in such a manner as to affect the offender's ability to pay the fine. If a court or magistrate determines, after considering any evidence presented by the offender, that the offender remains able to pay the fine, that determination shall be supported by a judgment entry that includes findings of fact upon which such a determination is based.

[*P71] "(D) No person shall be ordered to be committed to a jail or workhouse or otherwise be held in custody in satisfaction of a fine imposed as the whole or a part of a sentence except as provided in this section. Any person imprisoned [**27] pursuant to this section shall receive credit upon the fine at the rate of fifty dollars per day or fraction of a day. If the unpaid fine is less than fifty dollars, the person shall be imprisoned one day."

[*P72] "By requiring a hearing prior to incarceration for nonpayment of fines, *R.C. 2947.14(A)* protects the right of a criminal defendant not to be imprisoned for nonpayment of a fine due to indigency. * * * An offender may be incarcerated for his unwillingness to pay a fine, but not, consistent with the constitutional principles of due process and equal protection, for his inability to pay." *State v. Meyer (1997), 124 Ohio App.3d 373, 376-377, 706 N.E.2d 378* (citations omitted).

[*P73] Moreover, while the statute says that the hearing "must be held 'at the time of sentencing,' Ohio's courts have read *R.C. 2947.14* in its entirety and concluded that the hearing requirement 'does not arise until the trial court decides to incarcerate the offender for failure to pay.'" *State v. Perkins, 154 Ohio App. 3d 631, 798 N.E.2d 646, 2003 Ohio 5092, at P26*, quoting from *Meyer, 124 Ohio App.3d at 375*. [**28] Again, the trial court did not comply with the requirements of *R.C. 2947.14*, as it did not inform Self of the right to counsel,

did not take evidence on Self's ability to pay, and made no findings about credit Self would receive for time served. In this latter regard, counsel for Self points out that he has been incarcerated eight days already, meaning that the total amount of his fines would have been paid (based on a rate of \$ 50 per day). We express no opinion in this regard, as the record does not clearly indicate how many days Self has been in jail.

[*P74] As we pointed out, the trial court had several options in the present case. The court could have revoked Self's suspended sentence by following the procedures in *Crim. R. 32.3*. It could also have held Self in contempt of court by complying with the legal requirements for contempt. Another alternative was to correctly impose community service under *R.C. 2947.23*. An additional choice would have been to incarcerate Self, for non-payment of fines only, after a hearing conducted in accordance with *R.C. 2947.14*. However, the [**29] trial court failed to comply with legal requirements for any of these options. As we said, we certainly do not condone a defendant's failure to pay fines or comply with court orders. Nonetheless, courts should follow the procedures mandated by the law.

[*P75] Based on the preceding discussion, the motion for reconsideration is granted. Our prior judgment of January 28, 2005 is hereby vacated, and the appeal is reinstated. Further, both assignments of error in the appeal are sustained. Accordingly, the judgment of the trial court is reversed, and this case is remanded for further proceedings.

[*P76] IT IS SO ORDERED.

JAMES A. BROGAN,

Presiding and Administrative Judge

THOMAS J. GRADY, Judge

MARY E. DONOVAN, Judge

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
 WITH THE SECRETARY OF STATE THROUGH MAY 6, 2008 ***
 *** ANNOTATIONS CURRENT THROUGH APRIL 1, 2008 ***
 *** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MAY 6, 2008 ***

TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2951. PROBATION

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§ 2951.02. Authorized searches during offender's misdemeanor community control sanction or felony nonresidential sanction; community service; ignition interlock devices

(A) During the period of a misdemeanor offender's community control sanction or during the period of a felony offender's nonresidential sanction, authorized probation officers who are engaged within the scope of their supervisory duties or responsibilities may search, with or without a warrant, the person of the offender, the place of residence of the offender, and a motor vehicle, another item of tangible or intangible personal property, or other real property in which the offender has a right, title, or interest or for which the offender has the express or implied permission of a person with a right, title, or interest to use, occupy, or possess if the probation officers have reasonable grounds to believe that the offender is not abiding by the law or otherwise is not complying with the conditions of the misdemeanor offender's community control sanction or the conditions of the felony offender's nonresidential sanction. If a felony offender who is sentenced to a nonresidential sanction is under the general control and supervision of the adult parole authority, as described in division (A)(2)(a) of *section 2929.15 of the Revised Code*, adult parole authority field officers with supervisory responsibilities over the felony offender shall have the same search authority relative to the felony offender during the period of the sanction that is described under this division for probation officers. The court that places the misdemeanor offender under a community control sanction pursuant to *section 2929.25 of the Revised Code* or that sentences the felony offender to a nonresidential sanction pursuant to *section 2929.17 of the Revised Code* shall provide the offender with a written notice that informs the offender that authorized probation officers or adult parole authority field officers with supervisory responsibilities over the offender who are engaged within the scope of their supervisory duties or responsibilities may conduct those types of searches during the period of community control sanction or the nonresidential sanction if they have reasonable grounds to believe that the offender is not abiding by the law or otherwise is not complying with the conditions of the offender's community control sanction or nonresidential sanction.

(B) If an offender is convicted of or pleads guilty to a misdemeanor, the court may require the offender, as a condition of the offender's sentence of a community control sanction, to perform supervised community service work in accordance with this division. If an offender is convicted of or pleads guilty to a felony, the court, pursuant to *sections 2929.15 and 2929.17 of the Revised Code*, may impose a sanction that requires the offender to perform supervised community service work in accordance with this division. The supervised community service work shall be under the authority of health districts, park districts, counties, municipal corporations, townships, other political subdivisions of the state, or agencies of the state or any of its political subdivisions, or under the authority of charitable organizations that render services to the community or its citizens, in accordance with this division. The court may require an offender who is ordered to perform the work to pay to it a reasonable fee to cover the costs of the offender's participation in the work, including, but not limited to, the costs of procuring a policy or policies of liability insurance to cover the period during which the offender will perform the work.

A court may permit any offender convicted of a felony or a misdemeanor to satisfy the payment of a fine imposed for the offense pursuant to *section 2929.18 or 2929.28 of the Revised Code* by performing supervised community service work as described in this division if the offender requests an opportunity to satisfy the payment by this means and if the court determines that the offender is financially unable to pay the fine.

The supervised community service work that may be imposed under this division shall be subject to the following limitations:

(1) The court shall fix the period of the work and, if necessary, shall distribute it over weekends or over other appropriate times that will allow the offender to continue at the offender's occupation or to care for the offender's family. The period of the work as fixed by the court shall not exceed in the aggregate the number of hours of community service imposed by the court pursuant to *section 2929.17 or 2929.27 of the Revised Code*.

(2) An agency, political subdivision, or charitable organization must agree to accept the offender for the work before the court requires the offender to perform the work for the entity. A court shall not require an offender to perform supervised community service work for an agency, political subdivision, or charitable organization at a location that is an unreasonable distance from the offender's residence or domicile, unless the offender is provided with transportation to the location where the work is to be performed.

(3) A court may enter into an agreement with a county department of job and family services for the management, placement, and supervision of offenders eligible for community service work in work activities, developmental activities, and alternative work activities under *sections 5107.40 to 5107.69 of the Revised Code*. If a court and a county department of job and family services have entered into an agreement of that nature, the clerk of that court is authorized to pay directly to the county department all or a portion of the fees collected by the court pursuant to this division in accordance with the terms of its agreement.

(4) Community service work that a court requires under this division shall be supervised by an official of the agency, political subdivision, or charitable organization for which the work is performed or by a person designated by the agency, political subdivision, or charitable organization. The official or designated person shall be qualified for the supervision by education, training, or experience, and periodically shall report, in writing, to the court and to the offender's probation officer concerning the conduct of the offender in performing the work.

(5) The total of any period of supervised community service work imposed on an offender under division (B) of this section plus the period of all other sanctions imposed pursuant to *sections 2929.15, 2929.16, 2929.17, and 2929.18 of the Revised Code* for a felony, or pursuant to *sections 2929.25, 2929.26, 2929.27, and 2929.28 of the Revised Code* for a misdemeanor, shall not exceed five years.

(C) (1) If an offender is convicted of a violation of *section 4511.19 of the Revised Code*, a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of them, or a municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the whole blood, blood serum or plasma, breath, or urine, the court may require, as a condition of a community control sanction, any suspension of a driver's or commercial driver's license or permit or nonresident operating privilege, and all other penalties provided by law or by ordinance, that the offender operate only a motor vehicle equipped with an ignition interlock device that is certified pursuant to *section 4510.43 of the Revised Code*.

(2) If a court requires an offender, as a condition of a community control sanction pursuant to division (C)(1) of this section, to operate only a motor vehicle equipped with an ignition interlock device that is certified pursuant to *section 4510.43 of the Revised Code*, the offender immediately shall surrender the offender's driver's or commercial driver's license or permit to the court. Upon the receipt of the offender's license or permit, the court shall issue an order authorizing the offender to operate a motor vehicle equipped with a certified ignition interlock device, deliver the offender's license or permit to the bureau of motor vehicles, and include in the abstract of the case forwarded to the bureau pursuant to *section 4510.036 [4510.03.6] of the Revised Code* the conditions of the community control sanction imposed pursuant to division (C)(1) of this section. The court shall give the offender a copy of its order, and that copy shall be used by the offender in lieu of a driver's or commercial driver's license or permit until the bureau issues a restricted license to the offender.

(3) Upon receipt of an offender's driver's or commercial driver's license or permit pursuant to division (C)(2) of this section, the bureau of motor vehicles shall issue a restricted license to the offender. The restricted license shall be identical to the surrendered license, except that it shall have printed on its face a statement that the offender is prohibited

from operating a motor vehicle that is not equipped with an ignition interlock device that is certified pursuant to *section 4510.43 of the Revised Code*. The bureau shall deliver the offender's surrendered license or permit to the court upon receipt of a court order requiring it to do so, or reissue the offender's license or permit under *section 4510.52 of the Revised Code* if the registrar destroyed the offender's license or permit under that section. The offender shall surrender the restricted license to the court upon receipt of the offender's surrendered license or permit.

(4) If an offender violates a requirement of the court imposed under division (C)(1) of this section, the court may impose a class seven suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from the range specified in division (A)(7) of *section 4510.02 of the Revised Code*. On a second or subsequent violation, the court may impose a class four suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from the range specified in division (A)(4) of *section 4510.02 of the Revised Code*.

HISTORY:

134 v H 511 (Eff 1-1-74); 136 v S 144 (Eff 8-27-75); 137 v S 119 (Eff 8-30-78); 138 v H 892 (Eff 10-10-80); 138 v H 682 (Eff 4-9-81); 139 v H 1 (Eff 8-5-81); 139 v S 432 (Eff 3-16-83); 140 v S 210 (Eff 7-1-83); 142 v H 429 (Eff 6-20-88); 142 v H 322 (Eff 9-9-88); 143 v H 381 (Eff 7-1-89); 143 v S 258 (Eff 11-20-90); 145 v H 152 (Eff 7-1-93); 145 v H 571 (Eff 10-6-94); 145 v H 687 (Eff 10-12-94); 145 v H 687 (Eff 10-17-94); 146 v H 4 (Eff 11-9-95); 146 v H 167 (Eff 11-15-95); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 147 v H 408 (Eff 10-1-97); 148 v S 9 (Eff 3-8-2000); 148 v S 107 (Eff 3-23-2000); 148 v H 471 (Eff 7-1-2000); 148 v H 349. Eff 9-22-2000; 149 v S 123, § 1, eff. 1-1-04; 149 v H 490, § 1, eff. 1-1-04; 151 v S 8, § 1, eff. 8-17-06.

LEXSTAT ORC ANN.. 2151.355

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*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2008 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MAY 6, 2008 ***

TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2151. JUVENILE COURT.
SEALING AND EXPUNGEMENT OF RECORDS CONCERNING DELINQUENT AND UNRULY CHILDREN
AND JUVENILE TRAFFIC OFFENDERS

Go to the Ohio Code Archive Directory

ORC Ann. 2151.355 (2008)

§ 2151.355. Definitions

As used in *sections 2151.356 [2151.35.6] to 2151.358 [2151.35.8] of the Revised Code:*

(A) "Expunge" means to destroy, delete, and erase a record, as appropriate for the record's physical or electronic form or characteristic, so that the record is permanently irretrievable.

(B) "Seal a record" means to remove a record from the main file of similar records and to secure it in a separate file that contains only sealed records accessible only to the juvenile court.

HISTORY:

151 v H 137, § 1, eff. 10-12-06.

LEXSTAT ORC ANN. 2152.02

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TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2152. DELINQUENT CHILDREN; JUVENILE TRAFFIC OFFENDERS

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ORC Ann. 2152.02 (2008)

§ 2152.02. Definitions

As used in this chapter:

(A) "Act charged" means the act that is identified in a complaint, indictment, or information alleging that a child is a delinquent child.

(B) "Admitted to a department of youth services facility" includes admission to a facility operated, or contracted for, by the department and admission to a comparable facility outside this state by another state or the United States.

(C) (1) "Child" means a person who is under eighteen years of age, except as otherwise provided in divisions (C)(2) to (6) of this section.

(2) Subject to division (C)(3) of this section, any person who violates a federal or state law or a municipal ordinance prior to attaining eighteen years of age shall be deemed a "child" irrespective of that person's age at the time the complaint with respect to that violation is filed or the hearing on the complaint is held.

(3) Any person who, while under eighteen years of age, commits an act that would be a felony if committed by an adult and who is not taken into custody or apprehended for that act until after the person attains twenty-one years of age is not a child in relation to that act.

(4) Any person whose case is transferred for criminal prosecution pursuant to *section 2152.12 of the Revised Code* shall be deemed after the transfer not to be a child in the transferred case.

(5) Any person whose case is transferred for criminal prosecution pursuant to *section 2152.12 of the Revised Code* and who subsequently is convicted of or pleads guilty to a felony in that case, and any person who is adjudicated a delinquent child for the commission of an act, who has a serious youthful offender dispositional sentence imposed for the act pursuant to *section 2152.13 of the Revised Code*, and whose adult portion of the dispositional sentence is invoked pursuant to *section 2152.14 of the Revised Code*, shall be deemed after the transfer or invocation not to be a child in any case in which a complaint is filed against the person.

(6) The juvenile court has jurisdiction over a person who is adjudicated a delinquent child or juvenile traffic offender prior to attaining eighteen years of age until the person attains twenty-one years of age, and, for purposes of that jurisdiction related to that adjudication, a person who is so adjudicated a delinquent child or juvenile traffic offender shall be deemed a "child" until the person attains twenty-one years of age.

(D) "Chronic truant" means any child of compulsory school age who is absent without legitimate excuse for absence from the public school the child is supposed to attend for seven or more consecutive school days, ten or more school days in one school month, or fifteen or more school days in a school year.

(E) "Community corrections facility," "public safety beds," "release authority," and "supervised release" have the same meanings as in *section 5139.01 of the Revised Code*.

(F) "Delinquent child" includes any of the following:

(1) Any child, except a juvenile traffic offender, who violates any law of this state or the United States, or any ordinance of a political subdivision of the state, that would be an offense if committed by an adult;

(2) Any child who violates any lawful order of the court made under this chapter or under Chapter 2151. of the Revised Code other than an order issued under *section 2151.87 of the Revised Code*;

(3) Any child who violates division (C) of section 2907.39, division (A) of section 2923.211 [2923.21.1], or division (C)(1) or (D) of *section 2925.55 of the Revised Code*;

(4) Any child who is a habitual truant and who previously has been adjudicated an unruly child for being a habitual truant;

(5) Any child who is a chronic truant.

(G) "Discretionary serious youthful offender" means a person who is eligible for a discretionary SYO and who is not transferred to adult court under a mandatory or discretionary transfer.

(H) "Discretionary SYO" means a case in which the juvenile court, in the juvenile court's discretion, may impose a serious youthful offender disposition under *section 2152.13 of the Revised Code*.

(I) "Discretionary transfer" means that the juvenile court has discretion to transfer a case for criminal prosecution under division (B) of *section 2152.12 of the Revised Code*.

(J) "Drug abuse offense," "felony drug abuse offense," and "minor drug possession offense" have the same meanings as in *section 2925.01 of the Revised Code*.

(K) "Electronic monitoring" and "electronic monitoring device" have the same meanings as in *section 2929.01 of the Revised Code*.

(L) "Economic loss" means any economic detriment suffered by a victim of a delinquent act or juvenile traffic offense as a direct and proximate result of the delinquent act or juvenile traffic offense and includes any loss of income due to lost time at work because of any injury caused to the victim and any property loss, medical cost, or funeral expense incurred as a result of the delinquent act or juvenile traffic offense. "Economic loss" does not include non-economic loss or any punitive or exemplary damages.

(M) "Firearm" has the same meaning as in *section 2923.11 of the Revised Code*.

(N) "Juvenile traffic offender" means any child who violates any traffic law, traffic ordinance, or traffic regulation of this state, the United States, or any political subdivision of this state, other than a resolution, ordinance, or regulation of a political subdivision of this state the violation of which is required to be handled by a parking violations bureau or a joint parking violations bureau pursuant to Chapter 4521. of the Revised Code.

(O) A "legitimate excuse for absence from the public school the child is supposed to attend" has the same meaning as in *section 2151.011 [2151.01.1] of the Revised Code*.

(P) "Mandatory serious youthful offender" means a person who is eligible for a mandatory SYO and who is not transferred to adult court under a mandatory or discretionary transfer.

(Q) "Mandatory SYO" means a case in which the juvenile court is required to impose a mandatory serious youthful offender disposition under *section 2152.13 of the Revised Code*.

(R) "Mandatory transfer" means that a case is required to be transferred for criminal prosecution under division (A) of *section 2152.12 of the Revised Code*.

(S) "Mental illness" has the same meaning as in *section 5122.01 of the Revised Code*.

(T) "Mentally retarded person" has the same meaning as in *section 5123.01 of the Revised Code*.

(U) "Monitored time" and "repeat violent offender" have the same meanings as in *section 2929.01 of the Revised Code*.

(V) "Of compulsory school age" has the same meaning as in *section 3321.01 of the Revised Code*.

(W) "Public record" has the same meaning as in *section 149.43 of the Revised Code*.

(X) "Serious youthful offender" means a person who is eligible for a mandatory SYO or discretionary SYO but who is not transferred to adult court under a mandatory or discretionary transfer.

(Y) "Sexually oriented offense," "juvenile offender registrant," "child-victim oriented offense," "tier I sex offender/child-victim offender," "tier II sex offender/child-victim offender," "tier III sex offender/child-victim offender," and "public registry-qualified juvenile offender registrant" have the same meanings as in *section 2950.01 of the Revised Code*.

(Z) "Traditional juvenile" means a case that is not transferred to adult court under a mandatory or discretionary transfer, that is eligible for a disposition under *sections 2152.16, 2152.17, 2152.19, and 2152.20 of the Revised Code*, and that is not eligible for a disposition under *section 2152.13 of the Revised Code*.

(AA) "Transfer" means the transfer for criminal prosecution of a case involving the alleged commission by a child of an act that would be an offense if committed by an adult from the juvenile court to the appropriate court that has jurisdiction of the offense.

(BB) "Category one offense" means any of the following:

- (1) A violation of *section 2903.01 or 2903.02 of the Revised Code*;
- (2) A violation of *section 2923.02 of the Revised Code* involving an attempt to commit aggravated murder or murder.

(CC) "Category two offense" means any of the following:

- (1) A violation of *section 2903.03, 2905.01, 2907.02, 2909.02, 2911.01, or 2911.11 of the Revised Code*;
- (2) A violation of *section 2903.04 of the Revised Code* that is a felony of the first degree;
- (3) A violation of *section 2907.12 of the Revised Code* as it existed prior to September 3, 1996.

(DD) "Non-economic loss" means nonpecuniary harm suffered by a victim of a delinquent act or juvenile traffic offense as a result of or related to the delinquent act or juvenile traffic offense, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss.

HISTORY:

148 v S 179, § 3 (Eff 1-1-2002); 149 v S 3 (Eff 1-1-2002); 149 v H 400, Eff 4-3-2003; 149 v H 490, § 1, eff. 1-1-04; 150 v S 5, § 1, eff. 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 151 v S 53, § 1, eff. 5-17-06; 151 v H 23, § 1, eff. 8-17-06; 152 v S 10, § 1, eff. 1-1-08.

LEXSTAT ORC ANN. 2152.19

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TITLE 21. COURTS -- PROBATE -- JUVENILE
 CHAPTER 2152. DELINQUENT CHILDREN; JUVENILE TRAFFIC OFFENDERS

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ORC Ann. 2152.19 (2008)

§ 2152.19. Additional orders of disposition; motor vehicle license suspension; victim restitution, impact statement; truancy warnings; searches

(A) If a child is adjudicated a delinquent child, the court may make any of the following orders of disposition, in addition to any other disposition authorized or required by this chapter:

(1) Any order that is authorized by *section 2151.353 [2151.35.3] of the Revised Code* for the care and protection of an abused, neglected, or dependent child;

(2) Commit the child to the temporary custody of any school, camp, institution, or other facility operated for the care of delinquent children by the county, by a district organized under *section 2152.41 or 2151.65 of the Revised Code*, or by a private agency or organization, within or without the state, that is authorized and qualified to provide the care, treatment, or placement required, including, but not limited to, a school, camp, or facility operated under *section 2151.65 of the Revised Code*;

(3) Place the child in a detention facility or district detention facility operated under *section 2152.41 of the Revised Code*, for up to ninety days;

(4) Place the child on community control under any sanctions, services, and conditions that the court prescribes. As a condition of community control in every case and in addition to any other condition that it imposes upon the child, the court shall require the child to abide by the law during the period of community control. As referred to in this division, community control includes, but is not limited to, the following sanctions and conditions:

(a) A period of basic probation supervision in which the child is required to maintain contact with a person appointed to supervise the child in accordance with sanctions imposed by the court;

(b) A period of intensive probation supervision in which the child is required to maintain frequent contact with a person appointed by the court to supervise the child while the child is seeking or maintaining employment and participating in training, education, and treatment programs as the order of disposition;

(c) A period of day reporting in which the child is required each day to report to and leave a center or another approved reporting location at specified times in order to participate in work, education or training, treatment, and other approved programs at the center or outside the center;

(d) A period of community service of up to five hundred hours for an act that would be a felony or a misdemeanor of the first degree if committed by an adult, up to two hundred hours for an act that would be a misdemeanor of

the second, third, or fourth degree if committed by an adult, or up to thirty hours for an act that would be a minor misdemeanor if committed by an adult;

(e) A requirement that the child obtain a high school diploma, a certificate of high school equivalence, vocational training, or employment;

(f) A period of drug and alcohol use monitoring;

(g) A requirement of alcohol or drug assessment or counseling, or a period in an alcohol or drug treatment program with a level of security for the child as determined necessary by the court;

(h) A period in which the court orders the child to observe a curfew that may involve daytime or evening hours;

(i) A requirement that the child serve monitored time;

(j) A period of house arrest without electronic monitoring or continuous alcohol monitoring;

(k) A period of electronic monitoring or continuous alcohol monitoring without house arrest, or house arrest with electronic monitoring or continuous alcohol monitoring or both electronic monitoring and continuous alcohol monitoring, that does not exceed the maximum sentence of imprisonment that could be imposed upon an adult who commits the same act.

A period of house arrest with electronic monitoring or continuous alcohol monitoring or both electronic monitoring and continuous alcohol monitoring, imposed under this division shall not extend beyond the child's twenty-first birthday. If a court imposes a period of house arrest with electronic monitoring or continuous alcohol monitoring or both electronic monitoring and continuous alcohol monitoring, upon a child under this division, it shall require the child: to remain in the child's home or other specified premises for the entire period of house arrest with electronic monitoring or continuous alcohol monitoring or both except when the court permits the child to leave those premises to go to school or to other specified premises. Regarding electronic monitoring, the court also shall require the child to be monitored by a central system that can determine the child's location at designated times; to report periodically to a person designated by the court; and to enter into a written contract with the court agreeing to comply with all requirements imposed by the court, agreeing to pay any fee imposed by the court for the costs of the house arrest with electronic monitoring, and agreeing to waive the right to receive credit for any time served on house arrest with electronic monitoring toward the period of any other dispositional order imposed upon the child if the child violates any of the requirements of the dispositional order of house arrest with electronic monitoring. The court also may impose other reasonable requirements upon the child.

Unless ordered by the court, a child shall not receive credit for any time served on house arrest with electronic monitoring or continuous alcohol monitoring or both toward any other dispositional order imposed upon the child for the act for which was imposed the dispositional order of house arrest with electronic monitoring or continuous alcohol monitoring. As used in this division and division (A)(4)(I) of this section, "continuous alcohol monitoring" has the same meaning as in *section 2929.01 of the Revised Code*.

(l) A suspension of the driver's license, probationary driver's license, or temporary instruction permit issued to the child for a period of time prescribed by the court, or a suspension of the registration of all motor vehicles registered in the name of the child for a period of time prescribed by the court. A child whose license or permit is so suspended is ineligible for issuance of a license or permit during the period of suspension. At the end of the period of suspension, the child shall not be reissued a license or permit until the child has paid any applicable reinstatement fee and complied with all requirements governing license reinstatement.

(5) Commit the child to the custody of the court;

(6) Require the child to not be absent without legitimate excuse from the public school the child is supposed to attend for five or more consecutive days, seven or more school days in one school month, or twelve or more school days in a school year;

(7) (a) If a child is adjudicated a delinquent child for being a chronic truant or an habitual truant who previously has been adjudicated an unruly child for being a habitual truant, do either or both of the following:

(i) Require the child to participate in a truancy prevention mediation program;

(ii) Make any order of disposition as authorized by this section, except that the court shall not commit the child to a facility described in division (A)(2) or (3) of this section unless the court determines that the child violated a lawful court order made pursuant to division (C)(1)(e) of *section 2151.354 [2151.35.4] of the Revised Code* or division (A)(6) of this section.

(b) If a child is adjudicated a delinquent child for being a chronic truant or a habitual truant who previously has been adjudicated an unruly child for being a habitual truant and the court determines that the parent, guardian, or other person having care of the child has failed to cause the child's attendance at school in violation of *section 3321.38 of the Revised Code*, do either or both of the following:

(i) Require the parent, guardian, or other person having care of the child to participate in a truancy prevention mediation program;

(ii) Require the parent, guardian, or other person having care of the child to participate in any community service program, preferably a community service program that requires the involvement of the parent, guardian, or other person having care of the child in the school attended by the child.

(8) Make any further disposition that the court finds proper, except that the child shall not be placed in any of the following:

(a) A state correctional institution, a county, multicounty, or municipal jail or workhouse, or another place in which an adult convicted of a crime, under arrest, or charged with a crime is held;

(b) A community corrections facility, if the child would be covered by the definition of public safety beds for purposes of *sections 5139.41 to 5139.43 of the Revised Code* if the court exercised its authority to commit the child to the legal custody of the department of youth services for institutionalization or institutionalization in a secure facility pursuant to this chapter.

(B) If a child is adjudicated a delinquent child, in addition to any order of disposition made under division (A) of this section, the court, in the following situations and for the specified periods of time, shall suspend the child's temporary instruction permit, restricted license, probationary driver's license, or nonresident operating privilege, or suspend the child's ability to obtain such a permit:

(1) If the child is adjudicated a delinquent child for violating *section 2923.122 [2923.12.2] of the Revised Code*, impose a class four suspension of the child's license, permit, or privilege from the range specified in division (A)(4) of *section 4510.02 of the Revised Code* or deny the child the issuance of a license or permit in accordance with division (F)(1) of *section 2923.122 [2923.12.2] of the Revised Code*.

(2) If the child is adjudicated a delinquent child for committing an act that if committed by an adult would be a drug abuse offense or for violating division (B) of *section 2917.11 of the Revised Code*, suspend the child's license, permit, or privilege for a period of time prescribed by the court. The court, in its discretion, may terminate the suspension if the child attends and satisfactorily completes a drug abuse or alcohol abuse education, intervention, or treatment program specified by the court. During the time the child is attending a program described in this division, the court shall retain the child's temporary instruction permit, probationary driver's license, or driver's license, and the court shall return the permit or license if it terminates the suspension as described in this division.

(C) The court may establish a victim-offender mediation program in which victims and their offenders meet to discuss the offense and suggest possible restitution. If the court obtains the assent of the victim of the delinquent act committed by the child, the court may require the child to participate in the program.

(D) (1) If a child is adjudicated a delinquent child for committing an act that would be a felony if committed by an adult and if the child caused, attempted to cause, threatened to cause, or created a risk of physical harm to the victim of the act, the court, prior to issuing an order of disposition under this section, shall order the preparation of a victim impact statement by the probation department of the county in which the victim of the act resides, by the court's own probation department, or by a victim assistance program that is operated by the state, a county, a municipal corporation, or another governmental entity. The court shall consider the victim impact statement in determining the order of disposition to issue for the child.

(2) Each victim impact statement shall identify the victim of the act for which the child was adjudicated a delinquent child, itemize any economic loss suffered by the victim as a result of the act, identify any physical injury suffered by the victim as a result of the act and the seriousness and permanence of the injury, identify any change in the victim's

personal welfare or familial relationships as a result of the act and any psychological impact experienced by the victim or the victim's family as a result of the act, and contain any other information related to the impact of the act upon the victim that the court requires.

(3) A victim impact statement shall be kept confidential and is not a public record. However, the court may furnish copies of the statement to the department of youth services if the delinquent child is committed to the department or to both the adjudicated delinquent child or the adjudicated delinquent child's counsel and the prosecuting attorney. The copy of a victim impact statement furnished by the court to the department pursuant to this section shall be kept confidential and is not a public record. If an officer is preparing pursuant to *section 2947.06* or *2951.03 of the Revised Code* or *Criminal Rule 32.2* a presentence investigation report pertaining to a person, the court shall make available to the officer, for use in preparing the report, a copy of any victim impact statement regarding that person. The copies of a victim impact statement that are made available to the adjudicated delinquent child or the adjudicated delinquent child's counsel and the prosecuting attorney pursuant to this division shall be returned to the court by the person to whom they were made available immediately following the imposition of an order of disposition for the child under this chapter.

The copy of a victim impact statement that is made available pursuant to this division to an officer preparing a criminal presentence investigation report shall be returned to the court by the officer immediately following its use in preparing the report.

(4) The department of youth services shall work with local probation departments and victim assistance programs to develop a standard victim impact statement.

(E) If a child is adjudicated a delinquent child for being a chronic truant or a habitual truant who previously has been adjudicated an unruly child for being a habitual truant and the court determines that the parent, guardian, or other person having care of the child has failed to cause the child's attendance at school in violation of *section 3321.38 of the Revised Code*, in addition to any order of disposition it makes under this section, the court shall warn the parent, guardian, or other person having care of the child that any subsequent adjudication of the child as an unruly or delinquent child for being a habitual or chronic truant may result in a criminal charge against the parent, guardian, or other person having care of the child for a violation of division (C) of *section 2919.21* or *section 2919.24 of the Revised Code*.

(F) (1) During the period of a delinquent child's community control granted under this section, authorized probation officers who are engaged within the scope of their supervisory duties or responsibilities may search, with or without a warrant, the person of the delinquent child, the place of residence of the delinquent child, and a motor vehicle, another item of tangible or intangible personal property, or other real property in which the delinquent child has a right, title, or interest or for which the delinquent child has the express or implied permission of a person with a right, title, or interest to use, occupy, or possess if the probation officers have reasonable grounds to believe that the delinquent child is not abiding by the law or otherwise is not complying with the conditions of the delinquent child's community control. The court that places a delinquent child on community control under this section shall provide the delinquent child with a written notice that informs the delinquent child that authorized probation officers who are engaged within the scope of their supervisory duties or responsibilities may conduct those types of searches during the period of community control if they have reasonable grounds to believe that the delinquent child is not abiding by the law or otherwise is not complying with the conditions of the delinquent child's community control. The court also shall provide the written notice described in division (E)(2) of this section to each parent, guardian, or custodian of the delinquent child who is described in that division.

(2) The court that places a child on community control under this section shall provide the child's parent, guardian, or other custodian with a written notice that informs them that authorized probation officers may conduct searches pursuant to division (E)(1) of this section. The notice shall specifically state that a permissible search might extend to a motor vehicle, another item of tangible or intangible personal property, or a place of residence or other real property in which a notified parent, guardian, or custodian has a right, title, or interest and that the parent, guardian, or custodian expressly or impliedly permits the child to use, occupy, or possess.

(G) If a juvenile court commits a delinquent child to the custody of any person, organization, or entity pursuant to this section and if the delinquent act for which the child is so committed is a sexually oriented offense or is a child-victim oriented offense, the court in the order of disposition shall do one of the following:

(1) Require that the child be provided treatment as described in division (A)(2) of *section 5139.13 of the Revised Code*;

(2) Inform the person, organization, or entity that it is the preferred course of action in this state that the child be provided treatment as described in division (A)(2) of *section 5139.13 of the Revised Code* and encourage the person, organization, or entity to provide that treatment.

HISTORY:

148 v S 179, § 3 (Eff 1-1-2002); 149 v S 3 (Eff 1-1-2002); 149 v H 247 (Eff 5-30-2002); 149 v H 393 (Eff 7-5-2002); 149 v H 400, § 1. Eff 4-3-2003; 149 v S 123, § 1, eff. 1-1-04; 149 v H 490, § 1, eff. 1-1-04; 150 v S 5, § 1, eff. 7-31-03; 150 v H 95, § 1, eff. 9-26-03; 150 v H 95, § 3.13, eff. 1-1-04; 150 v S 5, § 3, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 152 v S 10, § 1, eff. 1-1-08.

LEXSTAT ORC ANN. 2152.20

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TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2152. DELINQUENT CHILDREN; JUVENILE TRAFFIC OFFENDERS

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ORC Ann. 2152.20 (2008)

§ 2152.20. Fines; costs; restitution; order of criminal forfeiture; community service

(A) If a child is adjudicated a delinquent child or a juvenile traffic offender, the court may order any of the following dispositions, in addition to any other disposition authorized or required by this chapter:

(1) Impose a fine in accordance with the following schedule:

- (a) For an act that would be a minor misdemeanor or an unclassified misdemeanor if committed by an adult, a fine not to exceed fifty dollars;
- (b) For an act that would be a misdemeanor of the fourth degree if committed by an adult, a fine not to exceed one hundred dollars;
- (c) For an act that would be a misdemeanor of the third degree if committed by an adult, a fine not to exceed one hundred fifty dollars;
- (d) For an act that would be a misdemeanor of the second degree if committed by an adult, a fine not to exceed two hundred dollars;
- (e) For an act that would be a misdemeanor of the first degree if committed by an adult, a fine not to exceed two hundred fifty dollars;
- (f) For an act that would be a felony of the fifth degree or an unclassified felony if committed by an adult, a fine not to exceed three hundred dollars;
- (g) For an act that would be a felony of the fourth degree if committed by an adult, a fine not to exceed four hundred dollars;
- (h) For an act that would be a felony of the third degree if committed by an adult, a fine not to exceed seven hundred fifty dollars;
- (i) For an act that would be a felony of the second degree if committed by an adult, a fine not to exceed one thousand dollars;
- (j) For an act that would be a felony of the first degree if committed by an adult, a fine not to exceed one thousand five hundred dollars;
- (k) For an act that would be aggravated murder or murder if committed by an adult, a fine not to exceed two thousand dollars.

(2) Require the child to pay costs;

(3) Unless the child's delinquent act or juvenile traffic offense would be a minor misdemeanor if committed by an adult or could be disposed of by the juvenile traffic violations bureau serving the court under *Traffic Rule 13.1* if the court has established a juvenile traffic violations bureau, require the child to make restitution to the victim of the child's delinquent act or juvenile traffic offense or, if the victim is deceased, to a survivor of the victim in an amount based upon the victim's economic loss caused by or related to the delinquent act or juvenile traffic offense. The court may not require a child to make restitution pursuant to this division if the child's delinquent act or juvenile traffic offense would be a minor misdemeanor if committed by an adult or could be disposed of by the juvenile traffic violations bureau serving the court under *Traffic Rule 13.1* if the court has established a juvenile traffic violations bureau. If the court requires restitution under this division, the restitution shall be made directly to the victim in open court or to the probation department that serves the jurisdiction or the clerk of courts on behalf of the victim.

If the court requires restitution under this division, the restitution may be in the form of a cash reimbursement paid in a lump sum or in installments, the performance of repair work to restore any damaged property to its original condition, the performance of a reasonable amount of labor for the victim or survivor of the victim, the performance of community service work, any other form of restitution devised by the court, or any combination of the previously described forms of restitution.

If the court requires restitution under this division, the court may base the restitution order on an amount recommended by the victim or survivor of the victim, the delinquent child, the juvenile traffic offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and any other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the delinquent act or juvenile traffic offense. If the court decides to order restitution under this division and the amount of the restitution is disputed by the victim or survivor or by the delinquent child or juvenile traffic offender, the court shall hold a hearing on the restitution. If the court requires restitution under this division, the court shall determine, or order the determination of, the amount of restitution to be paid by the delinquent child or juvenile traffic offender. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by or on behalf of the victim against the delinquent child or juvenile traffic offender or the delinquent child's or juvenile traffic offender's parent, guardian, or other custodian.

If the court requires restitution under this division, the court may order that the delinquent child or juvenile traffic offender pay a surcharge, in an amount not exceeding five per cent of the amount of restitution otherwise ordered under this division, to the entity responsible for collecting and processing the restitution payments.

The victim or the survivor of the victim may request that the prosecuting authority file a motion, or the delinquent child or juvenile traffic offender may file a motion, for modification of the payment terms of any restitution ordered under this division. If the court grants the motion, it may modify the payment terms as it determines appropriate.

(4) Require the child to reimburse any or all of the costs incurred for services or sanctions provided or imposed, including, but not limited to, the following:

(a) All or part of the costs of implementing any community control imposed as a disposition under *section 2152.19 of the Revised Code*, including a supervision fee;

(b) All or part of the costs of confinement in a residential facility described in *section 2152.19 of the Revised Code* or in a department of youth services institution, including, but not limited to, a per diem fee for room and board, the costs of medical and dental treatment provided, and the costs of repairing property the delinquent child damaged while so confined. The amount of reimbursement ordered for a child under this division shall not exceed the total amount of reimbursement the child is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement. The court may collect any reimbursement ordered under this division. If the court does not order reimbursement under this division, confinement costs may be assessed pursuant to a repayment policy adopted under *section 2929.37 of the Revised Code* and division (D) of section 307.93, division (A) of section 341.19, division (C) of section 341.23 or 753.16, division (C) of section 2301.56, or division (B) of *section 341.14, 753.02, 753.04, or 2947.19 of the Revised Code*.

(B) Chapter 2981. of the Revised Code applies to a child who is adjudicated a delinquent child for violating *section 2923.32 or 2923.42 of the Revised Code* or for committing an act that, if committed by an adult, would be a felony drug abuse offense.

(C) The court may hold a hearing if necessary to determine whether a child is able to pay a sanction under this section.

(D) If a child who is adjudicated a delinquent child is indigent, the court shall consider imposing a term of community service under division (A) of *section 2152.19 of the Revised Code* in lieu of imposing a financial sanction under this section. If a child who is adjudicated a delinquent child is not indigent, the court may impose a term of community service under that division in lieu of, or in addition to, imposing a financial sanction under this section. The court may order community service for an act that if committed by an adult would be a minor misdemeanor.

If a child fails to pay a financial sanction imposed under this section, the court may impose a term of community service in lieu of the sanction.

(E) The clerk of the court, or another person authorized by law or by the court to collect a financial sanction imposed under this section, may do any of the following:

(1) Enter into contracts with one or more public agencies or private vendors for the collection of the amounts due under the financial sanction, which amounts may include interest from the date of imposition of the financial sanction;

(2) Permit payment of all, or any portion of, the financial sanction in installments, by credit or debit card, by another type of electronic transfer, or by any other reasonable method, within any period of time, and on any terms that the court considers just, except that the maximum time permitted for payment shall not exceed five years. The clerk may pay any fee associated with processing an electronic transfer out of public money and may charge the fee to the delinquent child.

(3) To defray administrative costs, charge a reasonable fee to a child who elects a payment plan rather than a lump sum payment of a financial sanction.

HISTORY:

148 v S 179, § 3 (Eff 1-1-2002); 149 v H 170. Eff 9-6-2002; 149 v H 490, § 1, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 151 v H 162, § 1, eff. 10-12-06; 151 v H 241, § 1, eff. 7-1-07; 152 v H 120, § 1, eff. 7-1-07.

LEXSTAT ORC ANN. 2929.01

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
 WITH THE SECRETARY OF STATE THROUGH MAY 6, 2008 ***
 *** ANNOTATIONS CURRENT THROUGH APRIL 1, 2008 ***
 *** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MAY 6, 2008 ***

TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2929. PENALTIES AND SENTENCING
 IN GENERAL

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ORC Ann. 2929.01 (2008)

§ 2929.01. Definitions

As used in this chapter:

(A) (1) "Alternative residential facility" means, subject to division (A)(2) of this section, any facility other than an offender's home or residence in which an offender is assigned to live and that satisfies all of the following criteria:

(a) It provides programs through which the offender may seek or maintain employment or may receive education, training, treatment, or habilitation.

(b) It has received the appropriate license or certificate for any specialized education, training, treatment, habilitation, or other service that it provides from the government agency that is responsible for licensing or certifying that type of education, training, treatment, habilitation, or service.

(2) "Alternative residential facility" does not include a community-based correctional facility, jail, halfway house, or prison.

(B) "Bad time" means the time by which the parole board administratively extends an offender's stated prison term or terms pursuant to *section 2967.11 of the Revised Code* because the parole board finds by clear and convincing evidence that the offender, while serving the prison term or terms, committed an act that is a criminal offense under the law of this state or the United States, whether or not the offender is prosecuted for the commission of that act.

(C) "Basic probation supervision" means a requirement that the offender maintain contact with a person appointed to supervise the offender in accordance with sanctions imposed by the court or imposed by the parole board pursuant to *section 2967.28 of the Revised Code*. "Basic probation supervision" includes basic parole supervision and basic post-release control supervision.

(D) "Cocaine," "crack cocaine," "hashish," "L.S.D.," and "unit dose" have the same meanings as in *section 2925.01 of the Revised Code*.

(E) "Community-based correctional facility" means a community-based correctional facility and program or district community-based correctional facility and program developed pursuant to *sections 2301.51 to 2301.58 of the Revised Code*.

(F) "Community control sanction" means a sanction that is not a prison term and that is described in *section 2929.15, 2929.16, 2929.17, or 2929.18 of the Revised Code* or a sanction that is not a jail term and that is described in *section 2929.26, 2929.27, or 2929.28 of the Revised Code*. "Community control sanction" includes probation if the sen-

tence involved was imposed for a felony that was committed prior to July 1, 1996, or if the sentence involved was imposed for a misdemeanor that was committed prior to January 1, 2004.

(G) "Controlled substance," "marihuana," "schedule I," and "schedule II" have the same meanings as in *section 3719.01 of the Revised Code*.

(H) "Curfew" means a requirement that an offender during a specified period of time be at a designated place.

(I) "Day reporting" means a sanction pursuant to which an offender is required each day to report to and leave a center or other approved reporting location at specified times in order to participate in work, education or training, treatment, and other approved programs at the center or outside the center.

(J) "Deadly weapon" has the same meaning as in *section 2923.11 of the Revised Code*.

(K) "Drug and alcohol use monitoring" means a program under which an offender agrees to submit to random chemical analysis of the offender's blood, breath, or urine to determine whether the offender has ingested any alcohol or other drugs.

(L) "Drug treatment program" means any program under which a person undergoes assessment and treatment designed to reduce or completely eliminate the person's physical or emotional reliance upon alcohol, another drug, or alcohol and another drug and under which the person may be required to receive assessment and treatment on an outpatient basis or may be required to reside at a facility other than the person's home or residence while undergoing assessment and treatment.

(M) "Economic loss" means any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes any loss of income due to lost time at work because of any injury caused to the victim, and any property loss, medical cost, or funeral expense incurred as a result of the commission of the offense. "Economic loss" does not include non-economic loss or any punitive or exemplary damages.

(N) "Education or training" includes study at, or in conjunction with a program offered by, a university, college, or technical college or vocational study and also includes the completion of primary school, secondary school, and literacy curricula or their equivalent.

(O) "Firearm" has the same meaning as in *section 2923.11 of the Revised Code*.

(P) "Halfway house" means a facility licensed by the division of parole and community services of the department of rehabilitation and correction pursuant to *section 2967.14 of the Revised Code* as a suitable facility for the care and treatment of adult offenders.

(Q) "House arrest" means a period of confinement of an offender that is in the offender's home or in other premises specified by the sentencing court or by the parole board pursuant to *section 2967.28 of the Revised Code* and during which all of the following apply:

(1) The offender is required to remain in the offender's home or other specified premises for the specified period of confinement, except for periods of time during which the offender is at the offender's place of employment or at other premises as authorized by the sentencing court or by the parole board.

(2) The offender is required to report periodically to a person designated by the court or parole board.

(3) The offender is subject to any other restrictions and requirements that may be imposed by the sentencing court or by the parole board.

(R) "Intensive probation supervision" means a requirement that an offender maintain frequent contact with a person appointed by the court, or by the parole board pursuant to *section 2967.28 of the Revised Code*, to supervise the offender while the offender is seeking or maintaining necessary employment and participating in training, education, and treatment programs as required in the court's or parole board's order. "Intensive probation supervision" includes intensive parole supervision and intensive post-release control supervision.

(S) "Jail" means a jail, workhouse, minimum security jail, or other residential facility used for the confinement of alleged or convicted offenders that is operated by a political subdivision or a combination of political subdivisions of this state.

(T) "Jail term" means the term in a jail that a sentencing court imposes or is authorized to impose pursuant to *section 2929.24 or 2929.25 of the Revised Code* or pursuant to any other provision of the Revised Code that authorizes a term in a jail for a misdemeanor conviction.

(U) "Mandatory jail term" means the term in a jail that a sentencing court is required to impose pursuant to division (G) of *section 1547.99 of the Revised Code*, division (E) of *section 2929.24 of the Revised Code*, division (E) of *section 2903.06* or division (D) of *section 2903.08 of the Revised Code*, division (B) of *section 4510.14 of the Revised Code*, or division (G) of *section 4511.19 of the Revised Code* or pursuant to any other provision of the Revised Code that requires a term in a jail for a misdemeanor conviction.

(V) "Delinquent child" has the same meaning as in *section 2152.02 of the Revised Code*.

(W) "License violation report" means a report that is made by a sentencing court, or by the parole board pursuant to *section 2967.28 of the Revised Code*, to the regulatory or licensing board or agency that issued an offender a professional license or a license or permit to do business in this state and that specifies that the offender has been convicted of or pleaded guilty to an offense that may violate the conditions under which the offender's professional license or license or permit to do business in this state was granted or an offense for which the offender's professional license or license or permit to do business in this state may be revoked or suspended.

(X) "Major drug offender" means an offender who is convicted of or pleads guilty to the possession of, sale of, or offer to sell any drug, compound, mixture, preparation, or substance that consists of or contains at least one thousand grams of hashish; at least one hundred grams of crack cocaine; at least one thousand grams of cocaine that is not crack cocaine; at least two thousand five hundred unit doses or two hundred fifty grams of heroin; at least five thousand unit doses of L.S.D. or five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form; or at least one hundred times the amount of any other schedule I or II controlled substance other than marihuana* that is necessary to commit a felony of the third degree pursuant to *section 2925.03, 2925.04, 2925.05, or 2925.11 of the Revised Code* that is based on the possession of, sale of, or offer to sell the controlled substance.

(Y) "Mandatory prison term" means any of the following:

(1) Subject to division (Y)(2) of this section, the term in prison that must be imposed for the offenses or circumstances set forth in divisions (F)(1) to (8) or (F)(12) to (14) of *section 2929.13* and division (D) of *section 2929.14 of the Revised Code*. Except as provided in *sections 2925.02, 2925.03, 2925.04, 2925.05, and 2925.11 of the Revised Code*, unless the maximum or another specific term is required under *section 2929.14 or 2929.142 [2929.14.2] of the Revised Code*, a mandatory prison term described in this division may be any prison term authorized for the level of offense.

(2) The term of sixty or one hundred twenty days in prison that a sentencing court is required to impose for a third or fourth degree felony OVI offense pursuant to division (G)(2) of *section 2929.13* and division (G)(1)(d) or (e) of *section 4511.19 of the Revised Code* or the term of one, two, three, four, or five years in prison that a sentencing court is required to impose pursuant to division (G)(2) of *section 2929.13 of the Revised Code*.

(3) The term in prison imposed pursuant to division (A) of *section 2971.03 of the Revised Code* for the offenses and in the circumstances described in division (F)(11) of *section 2929.13 of the Revised Code* or pursuant to division (B)(1)(a), (b), or (c), (B)(2)(a), (b), or (c), or (B)(3)(a), (b), (c), or (d) of *section 2971.03 of the Revised Code* and that term as modified or terminated pursuant to *section 2971.05 of the Revised Code*.

(Z) "Monitored time" means a period of time during which an offender continues to be under the control of the sentencing court or parole board, subject to no conditions other than leading a law-abiding life.

(AA) "Offender" means a person who, in this state, is convicted of or pleads guilty to a felony or a misdemeanor.

(BB) "Prison" means a residential facility used for the confinement of convicted felony offenders that is under the control of the department of rehabilitation and correction but does not include a violation sanction center operated under authority of *section 2967.141 of the Revised Code*.

(CC) "Prison term" includes any of the following sanctions for an offender:

(1) A stated prison term;

(2) A term in a prison shortened by, or with the approval of, the sentencing court pursuant to *section 2929.20, 2967.26, 5120.031 [5120.03.1], 5120.032 [5120.03.2], or 5120.073 [5102.07.3] of the Revised Code*;

(3) A term in prison extended by bad time imposed pursuant to *section 2967.11 of the Revised Code* or imposed for a violation of post-release control pursuant to *section 2967.28 of the Revised Code*.

(DD) "Repeat violent offender" means a person about whom both of the following apply:

(1) The person is being sentenced for committing or for complicity in committing any of the following:

(a) Aggravated murder, murder, any felony of the first or second degree that is an offense of violence, or an attempt to commit any of these offenses if the attempt is a felony of the first or second degree;

(b) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense described in division (DD)(1)(a) of this section.

(2) The person previously was convicted of or pleaded guilty to an offense described in division (DD)(1)(a) or (b) of this section.

(EE) "Sanction" means any penalty imposed upon an offender who is convicted of or pleads guilty to an offense, as punishment for the offense. "Sanction" includes any sanction imposed pursuant to any provision of *sections 2929.14 to 2929.18 or 2929.24 to 2929.28 of the Revised Code*.

(FF) "Sentence" means the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense.

(GG) "Stated prison term" means the prison term, mandatory prison term, or combination of all prison terms and mandatory prison terms imposed by the sentencing court pursuant to *section 2929.14, 2929.142 [2929.14.2], or 2971.03 of the Revised Code*. "Stated prison term" includes any credit received by the offender for time spent in jail awaiting trial, sentencing, or transfer to prison for the offense and any time spent under house arrest or house arrest with electronic monitoring imposed after earning credits pursuant to *section 2967.193 [2967.19.3] of the Revised Code*.

(HH) "Victim-offender mediation" means a reconciliation or mediation program that involves an offender and the victim of the offense committed by the offender and that includes a meeting in which the offender and the victim may discuss the offense, discuss restitution, and consider other sanctions for the offense.

(II) "Fourth degree felony OVI offense" means a violation of division (A) of *section 4511.19 of the Revised Code* that, under division (G) of that section, is a felony of the fourth degree.

(JJ) "Mandatory term of local incarceration" means the term of sixty or one hundred twenty days in a jail, a community-based correctional facility, a halfway house, or an alternative residential facility that a sentencing court may impose upon a person who is convicted of or pleads guilty to a fourth degree felony OVI offense pursuant to division (G)(1) of *section 2929.13 of the Revised Code* and division (G)(1)(d) or (e) of *section 4511.19 of the Revised Code*.

(KK) "Designated homicide, assault, or kidnapping offense," "violent sex offense," "sexual motivation specification," "sexually violent offense," "sexually violent predator," and "sexually violent predator specification" have the same meanings as in *section 2971.01 of the Revised Code*.

(LL) "Sexually oriented offense," "child-victim oriented offense," and "tier III sex offender/child-victim offender," have the same meanings as in *section 2950.01 of the Revised Code*.

(MM) An offense is "committed in the vicinity of a child" if the offender commits the offense within thirty feet of or within the same residential unit as a child who is under eighteen years of age, regardless of whether the offender knows the age of the child or whether the offender knows the offense is being committed within thirty feet of or within the same residential unit as the child and regardless of whether the child actually views the commission of the offense.

(NN) "Family or household member" has the same meaning as in *section 2919.25 of the Revised Code*.

(OO) "Motor vehicle" and "manufactured home" have the same meanings as in *section 4501.01 of the Revised Code*.

(PP) "Detention" and "detention facility" have the same meanings as in *section 2921.01 of the Revised Code*.

(QQ) "Third degree felony OVI offense" means a violation of division (A) of *section 4511.19 of the Revised Code* that, under division (G) of that section, is a felony of the third degree.

(RR) "Random drug testing" has the same meaning as in *section 5120.63 of the Revised Code*.

(SS) "Felony sex offense" has the same meaning as in *section 2967.28 of the Revised Code*.

(TT) "Body armor" has the same meaning as in *section 2941.1411 [2941.14.11] of the Revised Code*.

(UU) "Electronic monitoring" means monitoring through the use of an electronic monitoring device.

(VV) "Electronic monitoring device" means any of the following:

(1) Any device that can be operated by electrical or battery power and that conforms with all of the following:

(a) The device has a transmitter that can be attached to a person, that will transmit a specified signal to a receiver of the type described in division (VV)(1)(b) of this section if the transmitter is removed from the person, turned off, or altered in any manner without prior court approval in relation to electronic monitoring or without prior approval of the department of rehabilitation and correction in relation to the use of an electronic monitoring device for an inmate on transitional control or otherwise is tampered with, that can transmit continuously and periodically a signal to that receiver when the person is within a specified distance from the receiver, and that can transmit an appropriate signal to that receiver if the person to whom it is attached travels a specified distance from that receiver.

(b) The device has a receiver that can receive continuously the signals transmitted by a transmitter of the type described in division (VV)(1)(a) of this section, can transmit continuously those signals by telephone to a central monitoring computer of the type described in division (VV)(1)(c) of this section, and can transmit continuously an appropriate signal to that central monitoring computer if the receiver is turned off or altered without prior court approval or otherwise tampered with.

(c) The device has a central monitoring computer that can receive continuously the signals transmitted by telephone by a receiver of the type described in division (VV)(1)(b) of this section and can monitor continuously the person to whom an electronic monitoring device of the type described in division (VV)(1)(a) of this section is attached.

(2) Any device that is not a device of the type described in division (VV)(1) of this section and that conforms with all of the following:

(a) The device includes a transmitter and receiver that can monitor and determine the location of a subject person at any time, or at a designated point in time, through the use of a central monitoring computer or through other electronic means.

(b) The device includes a transmitter and receiver that can determine at any time, or at a designated point in time, through the use of a central monitoring computer or other electronic means the fact that the transmitter is turned off or altered in any manner without prior approval of the court in relation to the electronic monitoring or without prior approval of the department of rehabilitation and correction in relation to the use of an electronic monitoring device for an inmate on transitional control or otherwise is tampered with.

(3) Any type of technology that can adequately track or determine the location of a subject person at any time and that is approved by the director of rehabilitation and correction, including, but not limited to, any satellite technology, voice tracking system, or retinal scanning system that is so approved.

(WW) "Non-economic loss" means nonpecuniary harm suffered by a victim of an offense as a result of or related to the commission of the offense, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss.

(XX) "Prosecutor" has the same meaning as in *section 2935.01 of the Revised Code*.

(YY) "Continuous alcohol monitoring" means the ability to automatically test and periodically transmit alcohol consumption levels and tamper attempts at least every hour, regardless of the location of the person who is being monitored.

(ZZ) A person is "adjudicated a sexually violent predator" if the person is convicted of or pleads guilty to a violent sex offense and also is convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment, count in the indictment, or information charging that violent sex offense or if the person is convicted of or pleads guilty to a designated homicide, assault, or kidnapping offense and also is convicted of or pleads guilty to both a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information charging that designated homicide, assault, or kidnapping offense.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 445 (Eff 9-3-96); 146 v H 480 (Eff 10-16-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 147 v H 378 (Eff 3-10-98); 147 v S 111 (Eff 3-17-98); 148 v S 9 (Eff 3-8-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 349 (Eff 9-22-2000); 148 v S 222 (Eff 3-22-2001); 148 v S 179, § 3 (Eff 1-1-2002); 149 v H 327. Eff 7-8-2002; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v S 5, § 1, Eff 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v S 57, § 1, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v H 162, § 1, eff. 10-12-06; 151 v S 260, § 1, eff. 1-2-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08.

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
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*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MAY 6, 2008 ***

TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2929. PENALTIES AND SENTENCING
 PENALTIES FOR FELONY

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§ 2929.17. Nonresidential sanctions

Except as provided in this section, the court imposing a sentence for a felony upon an offender who is not required to serve a mandatory prison term may impose any nonresidential sanction or combination of nonresidential sanctions authorized under this section. If the court imposes one or more nonresidential sanctions authorized under this section, the court shall impose as a condition of the sanction that, during the period of the nonresidential sanction, the offender shall abide by the law and shall not leave the state without the permission of the court or the offender's probation officer.

The court imposing a sentence for a fourth degree felony OVI offense under division (G)(1) or (2) of *section 2929.13 of the Revised Code* or for a third degree felony OVI offense under division (G)(2) of that section may impose upon the offender, in addition to the mandatory term of local incarceration or mandatory prison term imposed under the applicable division, a nonresidential sanction or combination of nonresidential sanctions under this section, and the offender shall serve or satisfy the sanction or combination of sanctions after the offender has served the mandatory term of local incarceration or mandatory prison term required for the offense. Nonresidential sanctions include, but are not limited to, the following:

(A) A term of day reporting;

(B) A term of house arrest with electronic monitoring or continuous alcohol monitoring or both electronic monitoring and continuous alcohol monitoring, a term of electronic monitoring or continuous alcohol monitoring without house arrest, or a term of house arrest without electronic monitoring or continuous alcohol monitoring;

(C) A term of community service of up to five hundred hours pursuant to division (B) of *section 2951.02 of the Revised Code* or, if the court determines that the offender is financially incapable of fulfilling a financial sanction described in *section 2929.18 of the Revised Code*, a term of community service as an alternative to a financial sanction;

(D) A term in a drug treatment program with a level of security for the offender as determined necessary by the court;

(E) A term of intensive probation supervision;

(F) A term of basic probation supervision;

(G) A term of monitored time;

(H) A term of drug and alcohol use monitoring, including random drug testing;

(I) A curfew term;

(J) A requirement that the offender obtain employment;

(K) A requirement that the offender obtain education or training;

(L) Provided the court obtains the prior approval of the victim, a requirement that the offender participate in victim-offender mediation;

(M) A license violation report;

(N) If the offense is a violation of section 2919.25 or a violation of *section 2903.11, 2903.12, or 2903.13 of the Revised Code* involving a person who was a family or household member at the time of the violation, if the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and if the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children, a requirement that the offender obtain counseling. This division does not limit the court in requiring the offender to obtain counseling for any offense or in any circumstance not specified in this division.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 166 (Eff 10-17-96); 148 v S 9 (Eff 3-8-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 349, Eff 9-22-2000; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04.

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OHIO RULES OF COURT SERVICE
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*** RULES CURRENT THROUGH APRIL 1, 2008 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***

Ohio Rules Of Juvenile Procedure

Ohio Juv. R. 35 (2008)

Rule 35. Proceedings after judgment

(A) Continuing jurisdiction; invoked by motion.

The continuing jurisdiction of the court shall be invoked by motion filed in the original proceeding, notice of which shall be served in the manner provided for the service of process.

(B) Revocation of probation.

The court shall not revoke probation except after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to *Juv. R. 4(A)*. Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to *Juv. R. 34(C)*, been notified.

(C) Detention.

During the pendency of proceedings under this rule, a child may be placed in detention in accordance with the provisions of Rule 7.

HISTORY: Amended, eff 7-1-94.

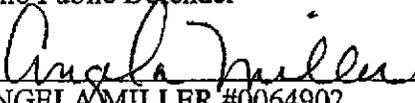
NOTICE OF APPEAL OF APPELLANT J. F.

Appellant J. F. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Greene County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. 06-CA-123 on October 19, 2007.

This case raises a substantial constitutional question, involves a felony, and is of public or great general interest.

Respectfully submitted,

DAVID H. BODIKER #0016590
Ohio Public Defender


ANGELA MILLER #0064902
Assistant State Public Defender
(Counsel of Record)

Office of the Ohio Public Defender
8 E. Long Street – 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 – Fax

COUNSEL FOR J. F.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing NOTICE OF APPEAL OF APPELLANT JEREMIAH F. was forwarded by regular U.S. Mail this 3rd day of December, 2007 to the office of Elizabeth Ellis, Assistant Greene County Prosecutor, 61 Greene St., 2nd Fl., Xenia, Ohio 45385.


ANGELA MILLER #0064902
Assistant State Public Defender