

IN THE SUPREME COURT OF OHIO

State of Ohio, : Case No. 2007-0693
Appellee : On Appeal from the Fulton
County Court of Appeals,
-vs- : Sixth Appellate District
James C. Bloomer, : Court of Appeals
Appellant. : Case No. F-06-012

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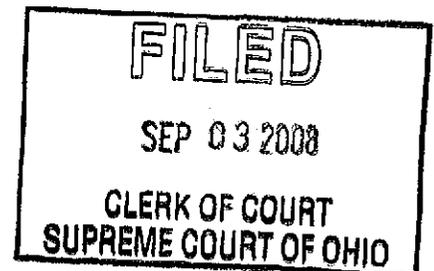


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STATEMENT OF THE CASE AND FACTS

On July 17, 2002, Appellant was indicted for two counts of Illegal Manufacture of Drugs, one count of Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs, one count of Having Weapons While Under Disability, and two counts of Endangering Children. On September 19, 2002, Appellant entered a plea of guilty to one count of Illegal Manufacture of Drugs, a felony of the second degree, in violation of R.C. 2925.04(A). At the time of his plea, Appellant signed the plea form and the "Notice pursuant to R.C. 2929.19(B)(3)," both of which set forth the mandatory three-year period of post-release control for a conviction of a felony of the second degree.

At the sentencing hearing held on November 22, 2002, the trial court imposed a mandatory prison term of four years. It did not address the issue of post-release control in the sentencing entry. Upon Appellee's motion, a resentencing hearing was held on May 23, 2006, prior to the completion of Appellant's four-year prison term. At that hearing, the trial court notified Appellant that he was subject to mandatory post-release control for a period of three years. Appellant's sentence was not modified in any other respect. The sentencing entry was filed on May 25, 2006, and journalized the following day.

Appellant then filed a timely notice of appeal to the Sixth District Court of Appeals. In a Decision and Judgment Entry filed on March 9, 2007, the appellate court affirmed the judgment of the trial court, holding that the trial court was authorized to correct Appellant's invalid sentence that had not expired. Appellant subsequently filed a notice of appeal in this Court, which accepted the case and held it for the decision in *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568. Afterwards, this Court consolidated this case for oral argument with Supreme Court Case Nos. 2007-1415, *State v. Mosmeyer*, Hamilton App. No. C-060747, and 2007-1439, *State v.*

ARGUMENT

RESPONSE TO PROPOSITION OF LAW NO. I

IN CASES IN WHICH POST-RELEASE CONTROL WAS NOT PROPERLY INCLUDED IN THE SENTENCE, THE SENTENCE IS VOID, AND RES JUDICATA DOES NOT PREVENT RESENTENCING.

In his first proposition of law, Appellant contends that a trial court may not add post-release control to a sentence except as ordered by a court of appeals on a timely direct appeal. In other words, Appellant is arguing that since Appellee did not appeal the original sentence imposed by the trial court on November 22, 2002, res judicata prevents a resentencing to impose post-release control on him. However, on the authority of *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, that argument lacks merit.

In *Simpkins*, this Court held that in cases in which post-release control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to impose post-release control on the defendant, unless the defendant has already completed his sentence. *Id.* at the syllabus. This Court also concluded that res judicata does not prevent resentencing. *Id.* at ¶24. While res judicata may prevent consideration of a collateral attack based on a claim that could have been raised on direct appeal from a voidable sentence, this Court declined to apply res judicata to a void sentence. *Id.* at ¶ 30.

Therefore, a trial court may resentence a defendant to impose post-release control, and Appellant's first proposition of law should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. II

WHEN A DEFENDANT IS ADVISED AT THE TIME OF HIS PLEA THAT HE WILL BE SUBJECT TO A MANDATORY PERIOD OF POST-RELEASE CONTROL, THE DEFENDANT DOES NOT HAVE A LEGITIMATE EXPECTATION OF FINALITY IN THE DEFENDANT'S SENTENCE WHEN THE SENTENCE IS VOID BECAUSE THE POST-RELEASE CONTROL WAS NOT INCLUDED IN THE SENTENCE.

In his second proposition of law, Appellant claims that once a defendant nears the completion of a void sentence, the State may not resentence the defendant and increase the punishment because the defendant has gained a legitimate expectation of finality in the sentence under the Fourteenth Amendment (Due Process) and Fifth Amendment (Double Jeopardy) Clauses of the United States Constitution. However, at the time of his plea, Appellant was charged with knowledge that he was subject to a mandatory period of post-release control. Thus, the imposition of post-release control at his resentencing did not offend the Double Jeopardy or Due Process Clauses.

In *Simpkins*, this Court noted that the Fifth Amendment to the United States Constitution does not impose an absolute bar against an order increasing a defendant's sentence. *Id.* at ¶ 32 (citations omitted). In the context of the Double Jeopardy Clause, the constitutional interest is limited to ensuring that the total punishment does not exceed that authorized by the legislature. *Id.* (citation omitted). In *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, this Court previously held that jeopardy did not attach to a void sentence, so the court's imposition of the correct sentence did not constitute double jeopardy.

"In cases in which the increase to the defendant's sentence is due to a 'legally incomplete' sentence rather than in response to a mistake of fact, a change of heart, or vindictiveness, we find

no due-process or other constitutional violation.” *Simpkins*, at ¶ 33 (citation omitted). In *Simpkins*, this Court held that although the defendant was near the end of a significant sentence, “we discern no unfairness in his resentencing and no violation of due process.” *Id.* at ¶ 34. This Court also noted that “due-process rights are malleable ones that are designed to ensure that individuals are treated with fundamental fairness in light of the given situation and the interests at stake.” *Id.* at ¶ 35 (citation omitted).

In the case at bar, at the time of his plea Appellant signed a plea form and a “Notice pursuant to R.C. 2929.19(B)(3),” both of which informed him that he would be subject to a mandatory period of post-release control. Thus, he was charged with knowledge of that sanction, and he may not now claim that he had a legitimate expectation of finality in his void sentence under the Due Process and Double Jeopardy Clauses of the United States Constitution. Therefore, this proposition of law should be overruled, and his resentencing should be affirmed.

RESPONSE TO PROPOSITION OF LAW NO. III

A DEFENDANT WHO IS RESENTENCED PRIOR TO THE EFFECTIVE DATE OF R.C. 2929.191 LACKS STANDING TO CLAIM THAT THE STATUTE VIOLATES THE DOUBLE JEOPARDY CLAUSE.

Appellant mistakenly claims that his resentencing to impose post-release control occurred after the effective date of R.C. 2929.191. In fact, the resentencing hearing was held on May 23, 2006, prior to the statute’s effective date of July 11, 2006. Thus, Appellant’s resentencing occurred in accordance with this Court’s decisions in *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, and *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301,

rather than pursuant to the procedure codified in R.C. 2929.191. In other words, the constitutionality of the statute is not at issue in this case, and Appellant lacks standing to attack it.

In addition, the trial court did, contrary to Appellant's assertion, conduct a de novo sentencing. (Tr. pp. 5-6; Judgment Entry of Resentence, filed May 25, 2006). The court did not simply add post-release control to the original sentence. Therefore, Appellant was not punished twice for the same offense in successive proceedings, and there was no double jeopardy violation.

For those reasons, this proposition of law should be rejected.

RESPONSE TO PROPOSITION OF LAW NO. IV

AM. SUB. H.B. 137 DOES NOT VIOLATE THE ONE-SUBJECT RULE OF THE OHIO CONSTITUTION BECAUSE ITS PROVISIONS INVOLVE A COMMON THEME.

The one-subject rule of Section 15(D), Article II, of the Ohio Constitution provides, "No bill shall contain more than one subject, which shall be clearly expressed in its title." Appellant contends that Am. Sub. H.B. 137 violates that rule because it added post-release control provisions to measures regarding the sealing of juvenile records. However, the bill's provisions involve a common theme, and it is therefore constitutional.

The Third District Court of Appeals rejected the same argument in *State v. Powell*, 3rd Dist. No. 10-07-12, 2008-Ohio-1012, and *State v. Lange*, 3rd Dist. 10-07-11, 2008-Ohio-1011. The court held that "[a]lthough the bill contains provisions regarding both juvenile delinquency matters and adult criminal matters, they involve a common theme -- criminal justice matters -- and are all

procedural or remedial in nature. *Powell*, at ¶ 28; *Lange*, at ¶ 26. The court then found that R.C. 2929.191 does not violate the one-subject rule. *Id.*

For the same reasons expressed by the Third District Court of Appeals, this proposition of law should be overruled.

RESPONSE TO PROPOSITION OF LAW NO. V

AM. SUB. H.B. 137 DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

In his last proposition of law, Appellant argues that Am. Sub. H.B. 137 renders post-release control unconstitutional because it permits the executive branch of government to impose the sanction without a court order. Specifically, Appellant challenges the constitutionality of R.C. 2929.14(F)(1), asserting that the statute, which was amended by Am. Sub. H.B. 137, impedes the judiciary's ability to impose a sentence. However, Appellant's argument lacks merit.

He cites language from R.C. 2929.14(F)(1) which states that "the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender ***." He fails to cite the preceding phrase in division (F)(1), which states that the above-quoted language applies to prison terms imposed on or after the effective date of the amendment, July 11, 2006. In the case at bar, Appellant was sentenced prior to July 11, 2006, so this portion of the amended statute is inapplicable to his case.

In any event, Am. Sub. H.B. 137 does not allow the executive branch to encroach upon any judicial powers. In *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171, this Court held that the

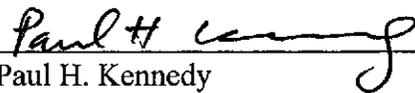
delegation of power associated with post-release control to the Adult Parole Authority is no different in terms of the separation of powers doctrine than it was under the former system of parole. *Id.* at 511. The legislature created the statutory obligation of trial courts to notify defendants of post-release control. There was no violation of the separation of powers doctrine when the legislature chose to allow for the imposition of a mandatory period of post-release control in the absence of notice from the trial court.

Therefore, Appellant's fifth proposition of law should be rejected.

CONCLUSION

For those reasons, Appellant's five propositions of law should be overruled and the judgment of the Sixth District Court of Appeals should be affirmed.

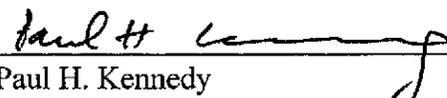
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Merit Brief of Appellee was sent by ordinary U.S. mail to counsel for Appellant, Stephen P. Hardwick, Assistant Public Defender, Office of the Ohio Public Defender, 8 East Long Street - 11th floor, Columbus, Ohio 43215, this 25th day of September 2008.



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