

IN THE OHIO SUPREME COURT

08-1823

DONALD CROSSWHITE
Petitioenr,

: Case No.
: Trial No. GR-04-458947

vs.

WARDEN SAMUEL TAMBI
P.O. Box 59 - H.C.I.
Nelsonville, Ohio 45769

: PETITION FOR A WRIT OF
: HABEAS CORPUS

Respondent.

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Now comes the Petitioner, Donald Crosswhite, In Pro Se in the above-styled case, hereby petitions this Honorable Court to issue a Writ of Habeas Corpus pursuant to O.R.C. Section 2725.01 through 2725.17, and for reasons stated in the Memorandum In Support ordering his immediate release from custody.

Petitioner Prays that this Honorable Court will grant the relief he seeks.

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CLERK OF COURT
SUPREME COURT OF OHIO

Respectfully submitted,

Donald Crosswhite

Donald Crosswhite, Pro Se
#463926 - H.C.F.
P.O. Box 59
Nelsonville, Ohio 45764

FILED
SEP 15 2008
CLERK OF COURT
SUPREME COURT OF OHIO

MEMORANDUM, IN SUPPORT

In support of my Petition for a Writ of Habeas Corpus, I would like to submit the following reasons why this Honorable Court should grant said relief.

STATEMENT OF THE CASE

Petitioner was originally arrested on a ~~Seventeen~~ (17) Count Indictment. In Case No. 438480, which was the ~~Seventeen~~ (17), ~~Eight~~ (8) of the counts were nolle. Petitioner entered a plea agreement on this indictment and was sentenced to a term of incarceration of four and a half years which was Nunc Pro Tunc to a sentence of 3½ years.

While serving the sentence on Case No. 438480, Petitioner was returned to the Cuyahoga County Jail and served with another indictment for 125 counts on Case No. 454733. While waiting to go to trial on Case No. 454733, Petitioner was served with another indictment on Case No. 458947, which was one of the Nolle counts in Case No. 438480.

Petitioner went to trial on both of the indictments in Case Nos. 454733 & 458947. Petitioner entered a "No Contest" plea to both indictments. Petitioner was sentenced to serve a term of imprisonment of Eight (8) years on Case No. 454733, and Eighteen (18) months on Case No. 458947, ran concurrent to each other and also concurrent with the sentence in Case No. 438480.

Petitioner appealed the trial decision in Case Nos. 454733 & Case No. 458947. The Court of Appeals reversed the cases and remanded them back for a new trial. Petitioner picked his jury and half way through the trial, Petitioner entered a "No Contest"

plea to both indictments. Petition was resentenced on both Case numbers (Case No. 454733 & 458947). Petitioner received the following sentences: In Case No. 454733, Petitioner received a sentence of Four (4) years, and in Case No. 458947, Petitioner received a sentence of One (1) year ran consecutively to the 4 years for a total sentence of Five (5) years.

LAW & ARGUMENT

In the case at bar, Petitioner had begin to serve his sentence in Case Nos. 454733 & 458947, on March 25, 2005, which originally was for a total of 8 years on Case No. 454733 and ~~18 month~~ on Case No. 458947. Petitioner appealed the decision of the trial court and it was reversed and remanded for a new trial on both cases. Petitioner was in the Cuyahoga County Jail from April, 2006 to November 30, 2006, waiting to be retried. Petitioner entered a "No Contest " Plea and was sentenced to a term of Four (4) years on Case No. 454733, and One (1) year on Case No. 458947 ran Consecutively.

In Case No. 458947, the 18 months had been ran concurrent at the trial in March, 2005. A review of the record will show that with the time being ran concurrently to the eight (8) years in March 2005, and with the amount of time Petitioner spent in the Cuyahoga County Jail waiting for re-trial, the sentence of One (1) year was up, and therefore it should have been a moot issue.

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PETITIONER BY SENTENCING HIM ON A CHARGE THAT WAS NOLLED AS PART OF A PLEA AGREEMENT IN CASE NO. 438480.

In the case at bar, Respondent Nolled a total of from §

counts from the indictment in Case no. 438480. One of the Counts nulled was Count no 13, which the Petitioner was later reindicted and tried for and givened a sentence of One (1) year. Petitioner feels that it was prejudiciaill error for the State of Ohio to re-try him for one (1) count of the indictment that had been nulled and not trying him on the other ~~Seven~~ (7) charges that were noll-ed also in Case No. 438480.

Petitioner feels that because this one count that was nulled and he was prosecuted on it and received a one (1) year sentence in case number CR-458947, jeopardy does attach because of the fact that the State of Ohio chose to just pick one ct., out of the ones that were nulled. Petitioner feels that his Fifth Amendment rights to the United States Constitution not to be placed twice in jeopardy has been violated and his Fourteenth Amendment rights to the United States Constitution which guaran-tees him due process and equal protection of the law. See: U.S. v. Wilson, 420 U.S. 332, 95 S.Ct. 1013 (1975).

Wherefore, because of this violation of the Petitioner's constitutional rights, this court should issue a writ at this time.

II. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PETITIONER BY SENTENCING HIM TO ONE (1) YEAR CON-SECUTIVELY WHEN THE SAME SENTENCED HAD BEEN RAN CONCURRENTLY AND ALREADY HAVE BEEN SERVED.

In the case at bar, Petitioner was originally sentenced to 18 months ran concurrently to the 8 years he received in Case No. 454733. After Petitioner appealed his cases in Case No. Cr-454733 & CR-458947, and they were reversed by the Court of Appeals, the trial Court gave him a consecutive sentence of One (1) year based upon the same indictment. Petitioner was sentenced

to Four (4) years in Case No. 454733, and One (1) year in Case No. 458947, ran Consecutive for a total sentence of Five (5) years. Petitioner was givened all time he had previously served on Case No. 454733, and should have been givened all time he had previously served on Case No. 458947. When the case of 458947, was retried by the trial court, it should have been ran concurrent as it was in the past in Case No. 454733. Petitioner time would still be up in case number 458947, because of the fact that Petitioner ~~time~~ started serving his sentences on Case No. ~~454733~~ and Case No. 458947, in March, 2005, which were ran concurrently. Petitioner was brought back to court on both of the charges ~~in~~ April, 2006, and had been in the Cuyahoga County jail waiting for trial up until November ^{em} 30, 2006, which constituted ~~another~~ another Seven (7) months toward both of the sentences.

In the case at bar, the sentence in Case No. 458947, should ~~be~~ have been completed by the fact that it was ran concurrently to Case No. 454733, and counting all the time that the Petitioner did while waiting retrial on both cases, the sentence is a moot issue. See: O.R.C. 2967.1911, State v. Piersall, 20 Ohio App. 35, 110, 485 N.E. 2d 276, 20, O.B.R. 142, which states: It is a denial of equal protection to fail to credit against sentence ultimately imposed, pretrial confinement, for whatever reason.

In the case at bar, the Respondent is trying to make the Petitioner start his time all over without him being given credit for time already spent toward his sentence in Case No. CR-458-947.

WHEREFORE, based upon the above statements and facts, this Court should issue a Writ ordering the immediate release of Petitioner.

Attachment not scanned

AFFIDAVIT OF VERIFICATION

I, hereby swear under the penalty of perjury, that the statements in this petition for a Writ of Habeas Corpus are true to the best of my knowledge, and as a result of my time being up in Case Nos. 454733 and 458947, I am being held illegally against my will. I have no pending appeals, post-convictions or any other litigation pending in these cases.

Donald Crosswhite

Donald Crosswhite, Pro Se
#463926 - HCF
Case Nos. 454733 & 458947

Sworn to and subscribed before me a Notary Public, this 10th day of September, 2008.

Ralph Evans

Notary Signature

RALPH EVANS
Notary Public, State of Ohio
My Commission Expires 12/21/10

My Commission Expires

Seal

CERTIFICATION

I hereby Certify that the Original (1) was sent to the Ohio Supreme Court Clerk of Courts 65 South Front Street, Col. Ohio 43215, on this 10th day of September, 2008, by regular U.S. Mail.



Donald Crosswhite, Pro Se
#463926

APPENDIX

PATRICIA ANN BLACKMON, J.:

Appellant Donald Crosswhite appeals his sentence rendered after a bench trial. Crosswhite assigns the following errors for our review:

"I. The trial court erred when, on the day of trial, it allowed the State of Ohio to amend the indictment, changing the identity of the alleged victim."

"II. The trial court committed reversible error when it accepted appellant's plea without first fully and adequately informing appellant that he would be subject to a mandatory five years of post-release control."

"III. Appellant was denied effective assistance of counsel in violation of his rights guaranteed to him by the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution."

Having reviewed the record and pertinent law, we reverse the trial court's decision, and remand for proceedings consistent with this opinion. The apposite facts follow.

Emanating from an identity theft ring, the Cuyahoga County Grand Jury indicted Crosswhite in two separate cases. In the first case, on September 12, 2004, the grand jury indicted Crosswhite on one count of engaging in a pattern of corrupt activity, sixteen counts of tampering with governmental records, ten counts of unauthorized access to a computer, three counts of possession of criminal tools, two counts of securing records by deception, two counts of theft, two counts of identity theft, and fifty-nine counts of forgery. In the second case, on November 18, 2004, the grand jury indicted Crosswhite on one count of identity theft, four

counts of forgery, four counts of uttering, and one count of theft.

At his arraignment Crosswhite pled not guilty. After several pretrials were held, the matter proceeded to trial, with Crosswhite waiving his right to a jury.

On March 3, 2005, after three days of trial, and after the State had examined its fifth witness, Crosswhite pled no contest to the indictments. On March 25, 2005, the trial court sentenced Crosswhite to a prison term of eight years.

POST-RELEASE CONTROL

We address only the second assigned error, because it disposes of the case. Here, Crosswhite argues the trial court erred by accepting his plea without adequately informing him that he would be subject to a mandatory five year period of post-release control. We agree.

R.C. 2943.032(E) requires that, prior to accepting a guilty plea for which a term of imprisonment will be imposed, the trial court must inform a defendant regarding post-release control sanctions in a reasonably thorough manner.¹ Post-release control constitutes a portion of the maximum penalty involved in an offense for which a prison term will be imposed.²

Directly pertinent to this assigned error is that a defendant must know the maximum penalty involved before the trial court may

¹See *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171.

²*Id.*

accept his guilty plea.³ The following excerpt is from the plea colloquy:

"The Court: You understand that if you were sent to prison and you completed whatever term that I gave you, you might be released on what is called post-release control, which is similar to parole, and that if you violated the terms and condition of post-release control you could receive up to one-half of your sentence for such a violation; do you understand that?"

The Defendant: Yes, Your Honor."⁴

Here, the trial court informed Crosswhite that he "might" be released on post-release control. Yet, by operation of law, Crosswhite was subject to a mandatory five years of post-release control.⁵

Crim.R. 11(C)(2) requires the court to first address a defendant who would enter a guilty plea, personally, and determine, inter alia, that the defendant is making the plea with an understanding of the maximum penalty involved. Compliance with Crim.R. 11(C)(2) need not be exact; substantial compliance is sufficient.⁶ The test is whether an error the court committed so prejudiced the defendant that he would not have pled guilty had the

³State v. Corbin, 141 Ohio App.3d 381, 387, 2001-Ohio-4140.

⁴Tr. at 279.

⁵See R.C. 2929.19(B)(3)(c) and 2967.28(B); see, also, State v. Madaris, 156 Ohio App.3d 211, 2004-Ohio-653.

⁶State v. Caplinger (1995), 105 Ohio App.3d 567.

error not been made.⁷ Substantial compliance is not shown where the court gives the defendant incorrect information on what the maximum sentence may be.⁸

The Ohio Supreme Court has noted that a trial court's failure to provide post-release notification before accepting a guilty or no-contest plea may form the basis to vacate the plea.⁹ Further, this court and the courts of eight other appellate districts agree that where the trial court failed to personally address a defendant and inform him of the maximum length of the post-release-control period before accepting his guilty plea, the court fails to substantially comply with Ohio R. Crim. P. 11(C)(2(a) and R.C. 2943.032(E).¹⁰

Because Crosswhite was not given accurate information about the consequences of his plea, we hold, under the totality of the

⁷Id.

⁸*State v. Carroll* (1995), 104 Ohio App.3d 372.

⁹*State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085.

¹⁰See *State v. Pendleton* (June 23, 2005), Cuyahoga App. No. 84514, 2005-Ohio-3126; *State v. Brown* (Nov. 1, 2002), 1st Dist. NOS. C-020162, C-020163, C-020164, 2002-Ohio-5983; *State v. Carnicom* (Sept. 5, 2003), 2nd Dist. No. 2003-CA-4, 2003-Ohio-4711; *State v. Haynie* (May 17, 2004), 3rd Dist. No. 9-03-52 157, Ohio App. 3d 708, 2004-Ohio-2452; *State v. Windle* (Dec. 15, 2004), 4th Dist. No. 03CA16, 2004-Ohio-6827; *State v. Lamb* (Feb. 6, 2004), 6th Dist. No. OT-03-003, 156 Ohio App.3d 128, 2004-Ohio-474; *State v. Tucci* (Dec. 11, 2002), 7th Dist. No. 01 CA 234, 2002-Ohio-6903; *State v. Johnson* (Jan. 16, 2004), 11th Dist. No. 2002-L-024, 2004-Ohio-331; and *State v. Prom* (Dec. 8, 2003), 12th Dist. No. CA2002-01-007, 2003-Ohio-6543.

circumstances, that the trial court did not substantially comply with the requirements of Crim.R. 11(C)(2)(a) and R.C. 2943.032(E). As a result, the trial court erred when it accepted Crosswhite's no contest plea. Accordingly, we sustain the second assigned error.

Our disposition of the second assigned error, renders the remaining errors moot.¹¹

Judgment reversed and remanded for proceedings consistent with this opinion.

¹¹App.R. (12)(A)(1)(C).

This cause is reversed and remanded.

It is, therefore, ordered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, A.J., and

FRANK D. CELEBREZZE, JR., J., CONCUR.


PATRICIA ANN BLACKMON
JUDGE

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
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MAR - 9 2006

GERALD E. FVERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).