

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

:

Plaintiff-Appellee,

:

-vs-

:

Case No.

08-2268

ROBERT MOSS,

:

1st Dist. No. C-080990

Defendant-Appellant.

:

MEMORANDUM IN SUPPORT OF JURISDICTION

FOR APPELLANT:

Robert Moss, #568-913
Lebanon Corr. Inst.
P.O.B. 56
Lebanon, Ohio 45036-0056

Appellant, in pro se

FOR APPELLEE:

Hamilton County Prosecutor
230 E. 9th St.
Cincinnati, Ohio 45202

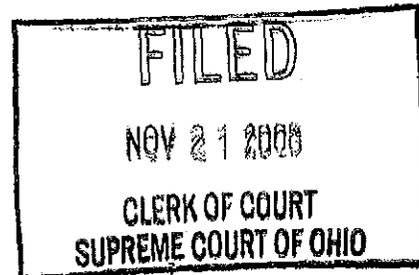


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JURISDICTIONAL STATEMENT

This case presents yet another deprivation of the due process and equal protection rights to access available appellate remedies, effected by the failure of a trial court to provide the mandatory advisement and of counsel to provide effective assistance by advising on the appeal rights.

It is well settled either of these reasons, standing alone, constitutes a constitutional deprivation. The lower court in this case held that both reasons together were insufficient. A clear ruling by this Court is necessary to not only correct the appellate courts in Ohio, but also to advise the trial courts to make the requisite advisement, and to advise counsel, the majority appointed or public defenders, to properly advise defendants of their appeal rights.

In addition, this case presents the substantial constitutional question as to the illegality of the imposition of consecutive sentences in the wake of the decision by this Court in State v Foster (2006) 109 Ohio St. 3d 1, which severed and excised, in their entirety, both statutory provisions that authorized consecutive sentences in Ohio. The absence of statutory authority to impose a sentence removes subject matter jurisdiction to do so and the fact that such a sentence is "agreed" in no way undermines the due process deprivation resulting therefrom.

This Court should accept jurisdiction and reverse the lower courts.

STATEMENT OF THE CASE

Defendant entered a guilty plea to one count each of felonious assault, child endangering and involuntary manslaughter all stemming from a single occurrence and, on January 22, 2008, was sentenced to serve stated prison terms of eight, five and ten years, respectively. Such terms were ordered to run consecutively for a total term of twenty-three years.

At no time was defendant advised by the trial court, or by counsel, of the availability of an appeals process and a timely notice of appeal was not filed by counsel.

On October 6, 2008, Appellant filed a notice of appeal and motion for leave to file delayed appeal with all other necessary accompanying filings. On October 22, 2008, the First District Court of Appeals overruled the motion. This timely appeal follows.

STATEMENT OF FACTS

Despite the assertion that the consecutive sentences in this case constitute an "agreed sentence", the record demonstrates that Appellant was never advised of the fact that there is a complete absence of statutory authority to impose consecutive sentences, rendering the court without subject matter jurisdiction to impose consecutive sentences. The record is further devoid of any advisement by court or counsel as to Appellant's appeal rights.

Appellant's sentence is demonstrably unconstitutional and the deprivation of his right to access available appellate remedies is violative of due process and equal protection as demonstrated below.

PROPOSITION OF LAW NO. I:

THE COMPLETE FAILURE OF COURT AND COUNSEL TO ADVISE A DEFENDANT OF HIS APPELLATE RIGHTS CONSTITUTES SUFFICIENT REASONS FOR A FAILURE TO TIMELY FILE A NOTICE OF APPEAL, AND THE REFUSAL TO PERMIT A DELAYED APPEAL ON SUCH GROUNDS DEPRIVES THE DEFENDANT OF DUE PROCESS AND EQUAL PROTECTION ACCESS TO AVAILABLE APPELLATE REMEDIES.

LAW AND ARGUMENT

While a state is not constitutionally required to provide appellate remedies, where such remedies are available, the proceedings thereof and access thereto must comport with the requirements of due process and equal protection of law. Griffin v Illinois (1956) 351 U.S. 12; Douglas v California (1963) 372 U.S. 335.

It is well settled that the primary requirement of due process of law is notice and opportunity to be heard. LaChance v Erickson (1998) 522 U.S. 262. As such, it is well settled that a trial court has an affirmative obligation to provide notice to a defendant of the right to an appeal and of the responsibility to file a notice of appeal within 30 days, as well as the right to have counsel appointed to do so at no cost, if necessary. Grim. R. 32. The failure to do so constitutes sufficient grounds to require that leave to file a delayed appeal be granted, and the refusal to do so deprives the prospective appellant of due process and equal protection access to available appellate remedies, Wolfe v Randle (S.D. Ohio, 2003) 267 F. Supp. 2d 743, and will not constitute a procedural bar to review of issues attempted to be raised therein on habeas review. Deitz v Money

(CA 6, 2004) 391 F3d 804.

It is further well settled that counsel has a duty to ensure that a defendant is properly advised of his appellate rights and the failure to even consult with a client regarding an appeal, or even to timely file a notice of appeal absent such consultation, where a reasonable person in the defendant's position would reasonably want to appeal, constitutes ineffective counsel and sufficient grounds to require a delayed appeal to be permitted. See, e.g. Roe v Flores-Ortega (2000) 528 U.S. 470.

In this case, the appellant presented both of these reasons to the court of appeals as grounds for failing to timely file a notice of appeal. The court of appeals erroneously held that "appellant has failed to provide sufficient reasons for failure to perfect an appeal as of right." (Entry, attached) This conclusion is contrary to clearly established U.S. Supreme Court case law and requires reversal.

This Court should accept jurisdiction in this case to regularize the practices of Ohio Courts of Appeals and to align such practices with the constitution as determined by the U.S. Supreme Court.

PROPOSITION OF LAW NO. II:

A SENTENCING COURT IS WITHOUT SUBJECT MATTER JURISDICTION TO IMPOSE A SENTENCE THAT IS NOT EXPRESSLY AUTHORIZED BY LAW, AND SUBJECT MATTER JURISDICTION MAY NOT BE OBTAINED BY WAIVER, AND A SENTENCE SO IMPOSED IS VOID AND VIOLATIVE OF DUE PROCESS OF LAW.

LAW AND ARGUMENT

Article IV, Section 4(B) of the Ohio Constitution delimits the jurisdiction of common pleas courts to that "as may be

provided by law". Such jurisdiction is fixed by legislative enactment. Mattone v Argentina (1931) 123 Ohio St. 393; Cox v Stolle Corp. (1990) 56 Ohio App. 3d 79.

The jurisdiction of a court is that power conferred upon it by which the court is authorized to hear, determine and render final judgment in an action and to enforce its judgment by legal process. State ex rel Ellis v Board of Deputy State Supervisors of Cuyahoga County (1904) 70 Ohio St. 341.

It is axiomatic that criminal laws and sentences derive from statutes enacted by the legislature. No cat can be punished except by statute. O.R.C. §2901.03; Mitchell v State (1884) 42 Ohio St. 383. As such, the sentencing authority of a trial court is limited to terms expressly authorized by statute. In State v Beasley (1984) 14 Ohio St. 3d 74, this Court struck down a sentence imposed in a criminal case as void where it was not specifically authorized by statute. Quoting itself from Colegrove v Burns (1964) 175 Ohio St. 437, this Court held that "Crimes are statutory, as are the penalties therefor, and the only sentence which a trial court may impose is that provided for by statute.*||*A court has no power to substitute a different sentence for that provided for by law."

A court, therefore, lacks subject matter jurisdiction to impose a sentence that is not expressly authorized by statute.
(id)

In State v Foster (2006) 109 Ohio St. 3d 1, this Court excised "in their entirety" and "rendered of no further effect" both Section 2929.14(E)||4) and Section 2929.41(A)|| of the Ohio

Revised Code. These two sections constituted the only legislatively enacted provisions granting subject matter jurisdiction to a trial court to impose consecutive sentences for base offenses. [additional terms related to specifications are governed by separate statutes which have no effect on this case]

The severance and excision, in their entirety, and "rendering of no further effect" of both statutory provisions that vested subject matter jurisdiction in a trial court to impose consecutive sentences removed such subject matter jurisdiction to do so from the trial court in this case, rendering the resulting sentence void ab initio for lack of such subject matter jurisdiction.

The court of appeals erroneously held that the void sentence in this case, being an "agreed" sentence, was immune from appellate review. However, subject matter jurisdiction is not subject to waiver and can be raised at any time, in any step of a proceeding. U.S. v Cotton (2002) 535 U.S. 262. See also Patton v Deimer (1988) 35 Ohio St. 3d 68, State v Swiger (1998) 125 Ohio App. 3d 456.

A sentence imposed in the absence of subject matter jurisdiction is violative of due process of law and the lower court must be reversed.

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction and reverse, and Appellant so prays.

Respectfully submitted,

Robert Moss

Robert Moss, #568-913
Lebanon Corr. Inst.
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Lebanon, Ohio 45036-0056
Appellant, in pro se

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent to the office of the Hamilton County Prosecutor, 230 E. 9th St., Cincinnati, Ohio 45202, via regular U.S. Mail, on this 18 day of November, 2008.

Robert Moss

Robert Moss
Appellant, in pro se

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,

APPEAL NO. C-080990
TRIAL NO. B-0701127-B

Appellee,

vs.

ENTRY OVERRULING MOTION
FOR LEAVE TO APPEAL

ROBERT MOSS,

Appellant.

This cause came on to be considered upon the *pro se* motion of the appellant for leave to file a delayed appeal.

The Court finds that the motion is not well taken and is overruled as the appellant has failed to provide sufficient reasons for failure to perfect an appeal as of right. In addition, there was an agreed sentence [see R.C. 2953.08 (D)].

Further, all other pending motions are overruled as being moot.

To The Clerk:

Enter upon the Journal of the Court on OCT 22 2008 per order of the Court.

By: _____


Presiding Judge

(Copies sent to all counsel)