

IN THE SUPREME COURT OF OHIO

On Appeal from the First Appellate District Court
for Hamilton County, Ohio
Case No. C 08 00095

STATE OF OHIO,

Supreme Court No. _____

* Plaintiff/Appellee,

- vs -

MICHAEL DARBY,

Defendant/Appellant.

APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

Appearances:

FOR THE DEFENDANT/APPELLANT

FOR THE PLAINTIFF/APPELLEE

MICHAEL DARBY, #547-414

('pro se')

R.I.C.I.

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HAMILTON CO. PROSECUTOR (#)

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Whether, and where a trial court fails during the plea colloquy to advise a defendant that the sentence will include a mandatory term of postrelease control, the court fails to comply with rule governing acceptance of guilty pleas, and a reviewing court must vacate the plea and remand the cause. see: O.R.C. § 2929.14(F)(1); O.R.C. § 2967.28; O.R.C. § 2943.032(E); Crim. R. 11(C)(2)(a); State v. Sarkozy, 117 Ohio St. 3d 86; and, U.S.C.A. Const. Amend. 14. 3

PROPOSITION OF LAW NO. 2

Whether defendant/appellant was deprived of both due process of law and fundamental fairness, U.S.C.A. Const. Amends. 6 and 14, where it violated the United States Supreme Court decision in: Blakely v. Washington (2004), 542 U.S. 296, by imposing 'greater than minimum and consecutive sentences' under State v. Foster (2006), 109 Ohio St. 3d 1, in the absence of findings by a jury or stipulation of any such penalty enhancing factors by defendant. . . . 6

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PROPOSITION OF LAW NO. 3

Whether defendant/appellant was deprived of his Sixth Amendment right to effective assistance of counsel on his only 'state-sponsored' appeal as of right, State v. Murnahan, 63 Ohio St. 3d 60, where appellate counsel failed to raise clear and obvious plain errors affecting substantial rights. see: Strickland v. Washington, 466 U.S. 668, and thereupon failed to challenge the constitutionality of the underlying guilty plea in light of the holding in State v. Sarkozy, supra. 8

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STATEMENT AS TO WHY THIS CASE IS OF GREAT PUBLIC INTEREST

[T]his case is of great public interests and is of precedental importance because it represents a substantive departure from well-established law as defined by the Supreme Court of Ohio in: State v. Simpkins, Slip Opinion No. 2008-Ohio-1197; and, State v. Sarkozy, 117 Ohio St. 3d 86.

The 'public policy' that all persons similarly situated by treated with both fundamental fairness and under equal application of law is clearly under siege here whereas the record in this case unquestionably reveals that appellant has been treated substantially different than all others similarly situated and accordingly, the public policy for simple justice and equal application of law stands irreparably violated.

In: Simpkins, this Court explained 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.

In: State v. Bezak, 868 N.E. 2d 961, this Court held that when a defendant pleads guilty to an offense and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void and the offender is entitled to a new sentencing hearing. see: State v. Crosier, 1988 WL 59531 (Ohio App. 5 Dist.).

Here however, appellant, whom had pled guilty to felony offenses requiring imposition of mandatory postrelease control was accorded no notification of postrelease control at the preplea colloquy and the sentencing hearing, and whom had further urged that had he know that postrelease control would be made part of his sentence for a mandatory period of years, that he would not have otherwise pled guilty and would have insisted on a trial.

The court of appeals however erroneously concluded that appellant was not entitled to relief to which the public policy of equal protection and equal treatment under the laws of this state stands irretrievably implicated therefore.

STATEMENT OF CASE AND FACTS

Appellant was indicted on January 25, 2007 on three counts alleging felonious assault; two count of rape; and one count of attempted murder.

By plea bargain, appellant pled guilty to two counts of felonious assault and was sentence ('per agreement') to (2) two consecutive (5) five year terms.

At the preplea proceedings and sentencing however the trial court failed to notify appellant that 'mandatory' postrelease control would be part of the sentence and appellant in turn appealed.

The court of appeals in turn affirmed judgment of conviction and sentence in this matter and this action does thus respectfully follow.

[R]elief is accordingly sought.

LAW AND ARGUMENT:

PROPOSITION OF LAW NO. 1

Whether, and where a trial court fails during the plea colloquy to advise a defendant that the sentence will include a mandatory term of postrelease control, the court fails to comply with rule governing acceptance of guilty pleas, and a reviewing court must vacate the plea and remand the cause. see: O.R.C. § 2929.14(F)(1); O.R.C. § 2967.28; O.R.C. § 2943.032(E); Crim. R. 11(C)(2)(a); State v. Sarkozy, 117 Ohio St. 3d 86; **and**, U.S.C.A. Const. Amend. 14. *

[I]n raising this constitutional proposition, appellant does so from the position that when, and during a pre-plea colloquy, a trial court fails to inform a criminal defendant of mandatory post-release control, the plea is involuntary and must be vacated therefore. see: State v. Sarkozy, 117 Ohio St. 3d 86; State v. Cleland, 2008 WL 754762 (Ohio App. 9 Dist.), 2008-Ohio-1319; **and**, State v. Bezak, 114 Ohio St. 3d 94, 2007-Ohio-3250.

As a threshold matter, this Court has explicitly held, that:

"When a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, **the sentence for that offense is void**. The offender is entitled to a new sentencing hearing for that particular offense." see: State v. Bezak, supra.

[a]nd that:

"[w]hen a trial court fails to notify an offender about postrelease control at the sentencing hearing but incorporates that notice into its journal entry imposing sentence, **it fails to comply with the mandatory**

provisions of R.C. 2929.19(B)(3)(c) and (d), and, therefore, the sentence must be vacated and the matter remanded to the trial court for resentencing." id., quoting: State v. Jordan, 104 Ohio St. 3d 21, 817 N.E. 2d 864, at: para. two of the syllabus.

" ... where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is *** to resentence the defendant." Jordan, at: 817 N.E. 2d 864, at: ¶23. see also: U.S.C.A. Const. Amend. 14.

In: State v. Sarkozy, 117 Ohio St. 3d 86, this Court clearly made manifest that:

" ... if a trial court fails during a plea colloquy to advise a defendant that sentence will include mandatory term of postrelease control, defendant may dispute the knowing, intelligent and voluntary nature of plea by filing a motion to withdraw plea or upon direct appeal; and

... if the trial court fails to give that advisement, the court fails to comply with rule governing acceptance of guilty pleas, and reviewing court must vacate plea and remand the cause." id. see also: Crim. R. 11(C)(2)(a); and, O.R.C. § 2943.032(E).

Under the above analysis, ... the court of appeals was completely without discretion to refuse to vacate appellant's guilty pleas and especially so where, as here, had appellant known that postrelease control would be part of his sentence for a mandatory term of multiple year, *he would not have pled guilty and would have insisted on a trial in the matter therefore, in recognition that the 'test' for prejudice, is:

"whether the plea would have otherwise been made." see: Sarkozy, supra, Crim. R. 11; and, State v. Nero (1990), 56 Ohio St. 3d 106, 108, 564 N.E. 2d 474.

In the instant case, *** the inescapable conclusion is and remains that: (1) appellant's sentence is 'declared void' ('as a matter of law') under the

Bezak-rule; and, (2) appellant's guilty pleas are facially unconstitutional under Sarkozy; Crim. R. 11(C)(2)(a); and, O.R.C. § 2943.032(E).

In addition to the above, it must also be remembered that at no time did the trial court ever advise appellant of any of the 'maximum penalties involved' with a violation of a post-release control sanction as required in: O.R.C. § 2943.032(E) ['up to nine months'] and in: Woods v. Telb (2000), 89 Ohio St. 3d 504, 511 ['up to fifty percent of the original sentence'] and accordingly, again, the sentences and the guilty pleas in this matter **must be vacated** as a matter of law. id.

In light of the above, *** it is unquestionably clear that the court of appeals' judgment was/is 'clearly erroneous,' offends due process and equal protection of law and is the very antithesis of those controlling authorities referenced above to which appellant is clearly entitled to relief.

To have it otherwise would be to permit an unconstitutional confinement predicated on a facially void sentence resulting in daily violations ['daily trespass'] of appellant's civil rights for 'false imprisonment.'

In then the context of appellant's underlying guilty pleas, this Court has made it perfectly clear that under such circumstances as are redolent here, appellant's guilty pleas are unconstitutional, they must be vacated, and this matter must be remanded for further proceedings therefore.

So says basic fairness. see: U.S.C.A. Const. Amends. 6 and 14.

Appellant in turn hereby respectfully moves this Honorable Court to accept jurisdiction in and over this matter where there clearly appears on the record an irreconcilable conflict of law adversely affecting substantial rights.

[R]elief is accordingly sought.

PROPOSITION OF LAW NO. 2

Whether defendant/appellant was deprived of both due process of law and fundamental fairness, U.S.C.A. Const. Amends. 6 and 14, where it violated the United States Supreme Court decision in: Blakely v. Washington (2004), 542 U.S. 296, by imposing 'greater than minimum and consecutive sentences' under State v. Foster (2006), 109 Ohio St. 3d 1, in the absence of findings by a jury or stipulation of any such penalty enhancing factors by defendant.

[I]n raising this constitutional proposition appellant hereby adopts each of the arguments and factual allegations ('by reference') as tendered by appellant in the proceedings below, however, and because appellant's underlying sentence is '**declared void**' under this Court's decision in: State v. Bezak, 114 Ohio St. 3d 94, 2007-Ohio-3250, it is arguably clear that the matters herein tendered are not ('in and of themselves') properly before this court for want of a valid and enforceable judgment of sentence and/or a final appealable order. see: State v. Baker, 119 Ohio St. 3d 197, 893 N.E. 2d 163; O.R.C. § 2505.02; and, Section 3(B)(2), Article IV, Ohio Constitution.

In this constitutional proposition, appellant alleges that multiple Amendments of the United States Constitution stand violated by reason is the imposition of maximum and/or consecutive sentences in this case where no facts were submitted to a jury or proven beyond a reasonable doubt upon which such 'enhanced sentences' might otherwise be imposed. see: Blakely v. Washington, supra.

However, *** and because the underlying sentences are '**declared void**' under State v. Bezak, 868 N.E. 2d 961, it is the position of appellant that questions surrounding the constitutionality of those 'enhanced penalties' ('being set upon a facially and declared void sentence') is simply premature in recognition, that:

"When a defendant is convicted of or pleads guilty to one or more

offenses and postrelease control is not properly included in a sentence for a particular offense, **the sentence for that offense is void**. The offender is entitled to a new sentencing hearing for that particular offense." see: State v. Bezak, supra.

[a]nd that:

"[w]hen a trial court fails to notify an offender about postrelease control at the sentencing hearing but incorporates that notice into its journal entry imposing sentence, it fails to comply with the mandatory provisions of R.C. 2929.19(B)(3)(c) and (d), and, therefore, the sentence must be vacated and the matter remanded to the trial court for resentencing." id., quoting: State v. Jordan, 104 Ohio St. 3d 21, 817 N.E. 2d 864, at: para. two of the syllabus.

" ... where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is *** to resentence the defendant." Jordan, at: 817 N.E. 2d 864, at: ¶23. see also: U.S.C.A. Const. Amend. 14.

It is therefore irrefutable that defendant/appellant's sentence is absolutely void for a variety of statutory and constitutional reasons and in each case, it must be vacated and this matter remanded for 'sentencing' [as] prescribed in and under: State v. Crosier, 1988 WL 59531 (Ohio App. 5 Dist.).

* * *

Wherefore, *** and for each of those reasons stated above and made evident on Propostion No. 1, this Court should accept jurisdiction in and over this matter and extend to appellant those prescribed forms and modes of law made manifest above.

[R]elief is accordingly sought.

PROPOSITION OF LAW NO. 3

Whether defendant/appellant was deprived of his Sixth Amendment right to effective assistance of counsel on his only 'state-sponsored' appeal as of right, State v. Murnahan, 63 Ohio St. 3d 60, where appellate counsel failed to raise clear and obvious plain errors affecting substantial rights. see: Strickland v. Washington, 466 U.S. 668, and thereupon failed to challenge the constitutionality of the underlying guilty plea in light of the holding in State v. Sarkozy, supra.

[I]n raising this constitutiona proposition, appellant does so under the provisions of: State v. Murnahan, 63 Ohio St. 3d 60; and, Strickland v. Washington, 466 U.S. 668.

It is clear that the Sixth Amendment guarantees to all criminal defendants the right to effective assistance of counsel, Cuyler v. Sullivan, ___ U.S. ___ (citation omitted) and that both the Sixth Amendment and Crim. R. 44(A) extends that protected right through 'appeal as of right.' id.

Appellant strongly avers that his appellate counsel failed to raise an identifiable claim under State v. Bezak, 868 N.E. 2d 961; O.R.C. § 2943.032(E) and, Woods v. Telb, supra, therein attacking appellant's 'facially' void sentence.

This clear error was only compounded where appellate counsel failed to raise [his] Sarkozy-claim(s) in a clearly recognizable federal constitutional context and thereupon forwarding a specific statutory and constitutional challenge to defendant's sentences and guilty pleas under: O.R.C. § 2943.032(E); and, Woods v. Telb, supra.

In failing to raise such claims, appellate counsel failed to recognize the inherent value and import of the penalty phase errors to which the prejudice did systemically attach.

This action does thus follow.

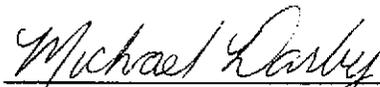
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CONCLUSION:

[W]herefore, *** and for each of those reasons stated above, defendant/appellant hereby respectfully moves this Honorable Court to accept jurisdiction in and over this matter where clearly the intermediate state appellate court has misinterpreted this court's controlling mandate *in: State v. Sarkozy, supra, and the resulting guilty plea is therefore unconstitutional as a matter of law and fact.

[R]elief is accordingly sought.

[E]xecuted this 2 day of December, 2008.



Michael Darby, #547-414

R.I.C.I.

P.O. Box 8107

Mansfield, Ohio

44901

CERTIFICATE OF SERVICE:

This is to certify that the foregoing was duly served by United States Mail on the Office of the Hamilton County Prosecutor, at: 270 East Ninth Street, Cincinnati, Ohio, 45202, on this 2 day of December, 2008.



Michael Darby, #547-414

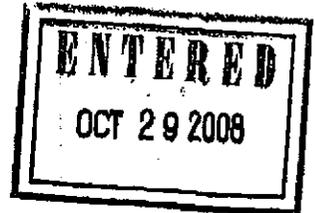
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44901

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



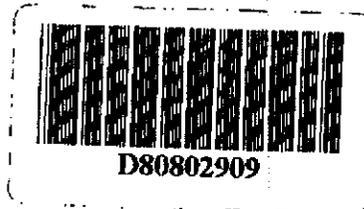
STATE OF OHIO,
Plaintiff-Appellee,

vs.

MICHAEL DARBY,
Defendant-Appellant.

APPEAL NO. C-080095
TRIAL NO. B-0700574

JUDGMENT ENTRY.



We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Michael Darby appeals his convictions for felonious assault. We conclude that his two assignments of error do not have merit, so we affirm the judgment of the trial court.

Darby was indicted for three counts of felonious assault, two counts of rape, and one count of attempted murder. He pleaded guilty to two counts of felonious assault, and the state dismissed the remaining counts. After conducting a hearing, the trial court accepted Darby's guilty pleas. The court then sentenced him to two consecutive five-year terms of incarceration.

In his first assignment of error, Darby asserts that the trial court erred when it accepted his guilty pleas. Because Darby was convicted of two second-degree

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

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felonies, he was subject to mandatory post-release control for three years. But during the sentencing hearing, the trial court told Darby, “[Y]ou may be placed on a period of post-release control. * * * It may last for up to five years.” Darby argues that, under the Ohio Supreme Court’s decision in *State v. Sarkozy*,² the incorrect information rendered his plea involuntary, unknowing, and unintelligent. His reliance on *Sarkozy* is misplaced.

In *Sarkozy*, the court held that where the trial court failed to inform the defendant that he would be subject to post-release control, it did not comply with Crim.R. 11.³ But the court did acknowledge that the situation differed from that in which the trial court incorrectly informs a defendant that post-release control is discretionary, rather than mandatory.⁴ Where the trial court has informed the defendant that he faces post-release control, but has provided incorrect information about the duration or the mandatory nature of the control, “some compliance prompts a ‘substantial compliance’ analysis and the corresponding ‘prejudice analysis.’”⁵ Here, we conclude that the trial court substantially complied with Crim.R. 11, and that Darby was not prejudiced by the trial court’s incorrect statement. The first assignment of error is overruled.

In his second assignment of error, Darby asserts that the trial court erred when it sentenced him to more-than-the-minimum, consecutive sentences without a jury having made finding of facts. As Darby acknowledges, we have determined this issue in *State v. Bruce*.⁶ We overrule the second assignment of error based on that authority.

² 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224.

³ *Id.*, paragraph two of the syllabus.

⁴ *Id.* at ¶¶22-23.

⁵ *Id.* at ¶23. See, also, *State v. Alfarano*, 1st Dist. No. C-061030, 2008-Ohio-3476; *State v. Torres*, 6th Dist. No. L-07-1036, 2008-Ohio-815.

⁶ 170 Ohio App.3d 92, 2007-Ohio-175, 866 N.E.2d 44.

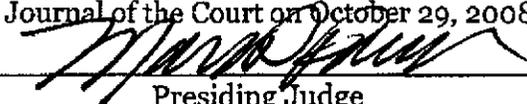
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We, therefore, affirm the judgment of the trial court.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., PAINTER and HENDON, JJ.

To the Clerk:

Enter upon the Journal of the Court on October 29, 2008
per order of the Court 
Presiding Judge

STATE OF OHIO COURT OF APPEALS
THIS IS TO CERTIFY THAT THE ABOVE IS A TRUE AND CORRECT COPY OF THE ORIGINAL AS FILED IN THE COURT OF APPEALS FOR THE FIRST DISTRICT OF OHIO.
BY _____
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