

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO. 2009-0299
Plaintiff-Appellee : On Appeal from the Hamilton County
Court of Appeals, First Appellate
vs. : District
LYNN ROBERTS : Court of Appeals
Case Number C-080571
Defendant-Appellant :

MEMORANDUM IN RESPONSE

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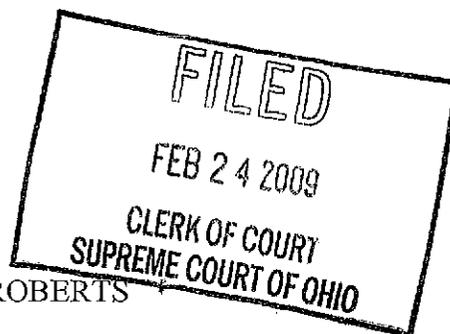


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| STATE OF OHIO | : | NO. 2009-0299 |
| Plaintiff-Appellee | : | |
| vs. | : | |
| LYNN ROBERTS | : | <u>MEMORANDUM IN RESPONSE</u> |
| Defendant-Appellant | : | |

Explanation of why this case is not a case of public or great general interest and does not involve a substantial constitutional question

There is no real question that the Department of Corrections failed to follow the Ohio Administrative Code and failed to properly notify the sentencing judge of its intent to place Lynn Roberts into an intensive program prison. The First District properly reviewed the applicable law and found that the DOC's failure to follow the law rendered its placement of Roberts into an IPP a nullity. Further, even though he had been released from prison, Roberts was placed on postrelease control, which meant that his sentence was not final. Thus, even though he had been released from prison, nothing prevented Roberts from being resentenced to a term of incarceration.

Though not addressed by the First District, its decision is correct for two other reasons. First, by failing to follow the law, the DOC's actions were an unconstitutional violation of the separation of powers doctrine. Because Roberts' early release was unconstitutional, the trial court had the authority to return him to prison.

Second, Roberts chose to keep the finality of his sentence in doubt by continuing to pursue his direct appeal even after he was improperly released from prison. By doing so, Roberts kept the finality of his sentence in doubt, thus ensuring that the trial court had the authority to resentence him.

The First District properly applied the law to the circumstances of this case. As such, this is not a matter that this Court should accept jurisdiction over.

Statement of the case and facts

Lynn Roberts was sentenced to serve a total of five years in prison after he was found guilty of possession and trafficking in heroin. While his direct appeal was pending before the First District Court of Appeals, the Department of Corrections placed Roberts into an intensive program prison. Roberts was released from the IPP and placed on postrelease control. While still serving the postrelease control portion of his sentence, the First District vacated his convictions and remanded the matter to the trial court.

The trial court held a new sentencing hearing after the date Roberts' postrelease control would have ended. Roberts attempted to prevent the trial court from resentencing him by filing a petition for a writ of prohibition in the First District. After his writ was denied, the trial court held a new sentencing hearing.

Prior to sentencing him, the trial court held hearing on Roberts' motion to dismiss the matter against him. At that hearing, representatives from the Ohio Department of Corrections offered testimony in support of Roberts' motion.

That testimony revealed that, after Roberts was admitted into prison, Kelly Taynor-Arledge, who screens inmates for placement into intensive program prisons, checked to see if he was eligible

for an IPP. She found that he was. She checked to see what judge was responsible for Roberts' case and found that it was Judge Fred Cartolano, but she could not find him in her judge directory.

Unable to find Judge Cartolano, Taynor-Arledge called and spoke to someone that worked for the Clerk of Courts. This person apparently told her that the correct judge was Judge Fred Nelson. She then contacted yet another person that worked for the Clerk of Courts and was apparently told the same thing. At no point in time was Taynor-Arledge able to say who these people were.

Taynor-Arledge then faxed a notice of intent to place Roberts into an IPP to Judge Nelson. The notice, however, said that it was being sent via certified mail, return receipt requested. Other than assuming that if she got a fax confirmation sheet that it must have made it to Judge Nelson, Taynor-Arledge had no knowledge about whether the fax was ever received by anyone.

Judge Nelson's bailiff, Richard McIntyre, testified that he will occasionally receive faxes that should have gone to other judges and that when this happens he will redirect the fax to the proper judge. McIntyre, however, had no recollection of ever receiving any faxes related to Roberts.

Taynor-Arledge also testified that three notices should have been sent, but that she only attempted to send one of those notices. James Richard Guy, staff counsel for the DOC, also testified that the DOC is required to give three different notices about placing an inmate into an IPP and that he could only find one notice in the DOC's files.

Guy also testified that the DOC is required to follow the Ohio Administrative Code when it wants to place someone into an IPP, more specifically OAC 5120:11-03(D). That section of the OAC reads as follows: "(D) If an applicant is eligible pursuant to paragraph (E) and either paragraph (C)(3) or (C)(2) of this rule and the sentencing entry is silent on the prisoner's placement in an

intensive program prison, then the warden or contract monitor, if applicable, shall notify, by certified or electronic mail, the sentencing judge of its intention to place the applicant in a [sic] intensive program prison. If the judge notifies the warden or contract monitor, if applicable, within ten days after the mail receipt, that the judge does not approve intensive program prison for the prisoner, then the warden or contract monitor, if applicable, shall notify, in writing, the prisoner of the disapproved placement. If the sentencing judge does approve intensive program prison for the prisoner or does not notify the warden or contract monitor, if applicable, of the disapproved placement within ten days after the mail receipt, then the director may place the prisoner in the program. This notification process does not apply if the sentencing court finds statutory eligibility for the prisoner's placement in an intensive program prison and/or the sentencing entry either approves or recommends such placement."

Before ruling on Roberts' motion to dismiss, Judge Winkler stated that "[t]his court, myself, personally never received anything as to the defendant being granted this early release program, and there's no evidence or information that convinces the court that Judge Cartolano, the judge that I assigned the case to, received the notice either."

The trial court denied Roberts' motion and sentenced him to the original five years in prison with credit for time served. Roberts appealed and the First District ruled that the trial court had the authority to resentence him due to the DOC's failure to follow the law.

State's First Proposition of Law: To properly place a defendant into an intensive program prison, the Department of Corrections must properly notify the sentencing judge of its intent to place the defendant into the program and must also comply with the Ohio Administrative Code.

Though it failed to send notice to either of the judges that handled his case and failed to follow the Ohio Administrative Code, Roberts argues that the Department of Corrections properly placed him into an intensive program prison. A review of the record and the law shows that he is wrong.

A. The Department of Corrections did not properly notify anyone of its intention to place Roberts into an intensive program prison.

There was no evidence presented that showed the DOC properly placed Roberts into an IPP. Instead, the evidence presented showed that the DOC did not properly inform anyone of its intent to place Roberts into an IPP.

1. There was no evidence showing that the DOC notified the sentencing court of its intent to place Roberts into an IPP.

Kelly Joan Taynor-Arledge testified that she spoke to two different employees of the Clerk of Courts. She had no clue, however, who those people were. Based off of what two people who don't even work for the Court of Common Pleas apparently told her, she faxed a notice of the DOC's intention to place Roberts into an intensive prison program to Judge Fred Nelson. Oddly, the notification stated not that it was being faxed, but that it was being sent via certified mail. Regardless, other than relying upon a confirmation sheet that her fax machine printed, she had no idea whether the notice was received by anyone in the Court of Common Pleas. She just assumed that if the fax went through that it must have been received by Judge Nelson.

Richard McIntyre, Judge Nelson's bailiff, testified that he will occasionally get things that are in no way related to anything that Judge Nelson is handling. When that happens, he redirects whatever he received to the proper judge. He had no recollection of receiving the notice related to Roberts, let alone delivering it to either Judge Ralph E. Winkler or Judge Fred Cartolano.

As the First District correctly found, there is no evidence that either Judge Winkler or Judge Cartolano, the two judges who handled Roberts' case, were notified that the DOC wanted to place Roberts into an IPP.

2. The term "sentencing court" refers to the judge that was assigned Roberts' case, not the entire Court of Common Pleas.

Overlooking the fact that there is no evidence that anyone in the Court of Common Pleas received the DOC's notice, let alone a judge, Roberts argued below that the definition of "sentencing court" should be stretched to mean any judge that is sitting on the Court of Common Pleas. The First District properly rejected Roberts' proposed definition of the term for two reasons.

First, if it were given that meaning then it would be possible for judges that do not even handle criminal cases – such as probate or domestic relations judges – to allow changes to a defendant's sentence.

Second, it ignores the Ohio Administrative Code, which specifies that the DOC's notice is to be sent "by certified or electronic mail, [to] the sentencing *judge*."¹ It continues to refer to the "judge" three more times: "If the *judge* notifies the warden or contract monitor, if applicable, within ten days after the mail receipt, that the *judge* does not approve intensive program prison for the prison, then the warden or contract monitor, if applicable, shall notify, in writing, the prison of the

¹OAC 5120:11-03(D) (emphasis added.)

disapproved placement. If the sentencing *judge* does approve intensive prison program for the prisoner or does not notify the warden or contract monitor, if applicable, of the disapproved placement within ten days after the mail receipt, then the director may place the prisoner in the program."² The OAC only refers to the sentencing court once: "This notification process does not apply if the sentencing court finds statutory eligibility for the prisoner's placement in an intensive program prison and/or the sentencing entry either approves or recommends such placement."

The OAC shows that the DOC's notice was to be sent to the sentencing judge, not any judge who happens to sit on the Court of Common Pleas. But even if Roberts' definition had been adopted it would not matter because there was never any proof that anyone on the Court of Common Pleas received the DOC's notice.

Instead of relying on evidence, Roberts wanted everyone to just assume that a lot of things happened. He wanted everyone to assume that the DOC faxed the notice to the wrong judge, assume that the wrong judge actually received the notice, assume that the wrong judge's staff forwarded the fax onto the correct judge, assume that the correct judge actually received the notice, and assume that the correct judge then ignored the notice.

Something that no one has to make any assumptions about, however, is whether the DOC followed either its own procedures or the Ohio Administrative Code. It followed neither.

²*Id.*

B. The Ohio Department of Corrections did not follow its own procedures nor did it comply with the Ohio Administrative Code.

Both Taynor-Arledge and the DOC's staff counsel, James Guy, testified that according to its own procedures the DOC should have sent three notices to the sentencing court. Both testified that only one of the three notices had been sent. Yet even if it had followed its own procedures and sent three faxes it still would not have meant that it properly placed Roberts into an IPP. This is because faxes are not an acceptable means issuing the DOC's notice and because the DOC never received a mail receipt that would allow it to place Roberts into an IPP.

Ohio Administrative Code 5120:11-03(D) requires the DOC to "notify, by certified or electronic mail, the sentencing judge of its intention to place the applicant in an intensive program prison." The OAC allows the DOC to notify the sentencing court either by certified mail or by electronic mail. It does not give the option of sending a fax. As the First District correctly ruled, by failing to follow the OAC the DOC lacked the authority to place Roberts into an IPP and to grant him an early release from prison.

Roberts could try to argue that a fax is a form of electronic mail, but the two are different. The OAC shows that there is a difference and that faxes are only permitted when they have been specifically authorized. For example, OAC 126:1-1-01 allows the Ohio Office of Budget and Management to issue public notice of its public meetings by sending a copy of the notice "by United States mail, electronic mail, or facsimile (FAX) to each person whose name is included on the mailing list." The OAC also recognizes the difference in 1301:5-1-12, which authorizes charging people who have requested notice of the Ohio Real Estate Commission's hearings be faxed to them while not allowing fees to be assessed against people who request electronic mail notification. And

OAC 3745:89-08 allows notice of laboratory testing of public water to be sent either "by fax or by electronic mail."

The OAC does not allow the DOC to send notice of its intent to place inmates into an IPP via facsimile. This is likely because, as this case demonstrates, it is not possible to know who actually receives a fax or if it was even received. Someone has to sign for certified mail and return receipts can be requested for electronic mail. Neither can be done with a fax.

Further, the OAC states that a mail receipt triggers when the 10-day period begins to run: "If the judge notifies the warden or contract monitor, if applicable, within *ten days after the mail receipt*, that the judge does not approve intensive program prison for the prison, then the warden or contract monitor, if applicable, shall notify, in writing, the prison of the disapproved placement."³ Because the notice was not sent in a means that allowed for a mail receipt the 10-day period never began and the DOC improperly placed Roberts into an IPP.

The DOC did not follow its own procedures and, more importantly, did not follow the OAC when it apparently attempted to notify the sentencing court. Because of this, Roberts was not properly placed into an IPP.

State's Second Proposition of Law: The Department of Corrections violated the separation of powers doctrine by placing Roberts into an IPP without properly notifying the sentencing judge of its intent to do so.

By placing Roberts into an IPP without properly sending notice of its intent to do so, the DOC violated the separation of powers doctrine by usurping judicial power.

³OAC 5120:11-03(D) (emphasis added.)

Though not found in the Ohio Constitution, the separation of powers doctrine is inherent in the constitutional framework that defines the scope of authority conferred upon the three separate governmental branches.⁴ This Court has long held that no branch of the government should have an overruling influence over another branch: "The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others."⁵ This Court has, on at least four occasions, considered whether statutes have run afoul of the separation of powers doctrine.

In *State v. Sterling*, it considered a statute that required prosecuting attorneys to file a statement that indicated whether they agreed that an inmate should be allowed to request DNA testing.⁶ If the prosecutor disagreed with the inmate then the courts were given no authority to permit DNA testing. It was ruled that the statute was unconstitutional because it allowed the executive branch to prevent 'the court's function in determining guilt, which is solely the province of the judicial branch of government."⁷

In *S. Euclid v. Jemison*,⁸ it considered a statute that allowed the Registrar of Motor Vehicles to review and reverse a trial-court order that suspended a driver's license, certificate of registration, or registration plates upon failure to provide proof of financial responsibility. It was found that the

⁴*State v. Sterling*, 113 Ohio St. 3d 255, 2007-Ohio-1790, 864 N.E.2d 630, ¶ 22.

⁵*State ex rel. Bryant v. Akron Metro Park Dist.* (1929), 120 Ohio St. 424, 473, 166 N.E.2d 407.

⁶*Sterling*, supra, 2007-Ohio-179.

⁷*Id.* at ¶ 35.

⁸*S. Euclid v. Jemison* (1986), 28 Ohio St. 3d 157, 503 N.E.2d 136.

statute could not withstand constitutional scrutiny because it "grant[ed] appellate review to an executive administrator, in a manner that conflicts with the constitutional powers of the courts of appeals."⁹

In *State v. Hochhausler*, it considered a statute that specified that after a driver received an administrative license suspension following a DUI violation that no court had jurisdiction to grant a stay of the suspension and that any order issued purporting to do so would not be given any administrative effect.¹⁰ It was ruled that the statute violated the separation of powers doctrine because "[t]he legislative branch has no right to limit the inherent powers of the judicial branch of the government" and that by removing the ability to grant a stay the statute "improperly interfere[d] with the exercise of a court's judicial functions."¹¹

And in *State ex rel. Bray v. Russell*, it considered a challenge to a statute that allowed the executive branch to impose "bad time" on a prisoner's original prison term for offenses that would constitute a crime, regardless of whether the prisoner was actually prosecuted for the offense.¹² It was found that the statute violated the separation of powers doctrine because it allowed the executive branch to take on functions reserved for the judiciary: "In our constitutional scheme, the judicial power resides in the judicial branch. The determination of guilt in a criminal matter and the sentencing of a defendant convicted of a crime are solely the province of the judiciary."¹³

In this matter, the DOC attempted to reduce Roberts' sentence without first receiving authority to do so. While the Legislature has chosen to allow the judicial branch's silence to be

⁹*Id.* at 161.

¹⁰*State v. Hochhausler*, 76 Ohio St. 3d 455, 1996-Ohio-374, 668 N.E.2d 457.

¹¹*Id.* at 463-464 citing *Hale v. State* (1896), 55 Ohio St. 210, 212-213, 45 N.E. 199.

¹²*State ex rel. Bray v. Russell* (2000), 89 Ohio St. 3d 132, 729 N.E.2 359.

¹³*Id.* at 136 (internal citations omitted.)

taken as assent, it still has required giving the judicial branch a chance to say no. The DOC did not properly give that chance, thus it never received the authority to reduce Roberts' sentence. By reducing it anyway, the DOC usurped the sentencing powers given to the judicial branch.

Because it did not properly send notice of its intent, the DOC was not authorized to place Roberts into an IPP and doing so was unconstitutional. Therefore, the trial court was vested with the authority to resentence Roberts.

State's Third Proposition of Law: A defendant who is on postrelease control has not served his entire prison sentence.

Despite still being on postrelease control when his case was remanded back for resentencing, Roberts argues that the trial court should not have resentedenced him because he believed he had served his entire prison sentence. Roberts is wrong.

Roberts was on postrelease control when the First District vacated his convictions and remanded this matter to the trial court. Postrelease control is part of a defendant's sentence.¹⁴ Thus Roberts was still serving his sentence when the First District vacated and remanded his case.¹⁵ It does not matter that Roberts' postrelease control was scheduled to end between the time that he won his appeal and when the trial court scheduled his new sentencing hearing because the First District's remand vacated his sentence before his postrelease control ended.

Over 150 years ago, this Court ruled that when a case is remanded it returns to the trial court at the point in time just before the error occurred: "Where a judgment is reversed, for error, and remanded for further proceedings, the cause may be taken up, by the court below, at the point where

¹⁴See *Woods v. Telb*, 89 Ohio St. 3d 504, 2001-Ohio-171, 733 N.E.2d 1103.

¹⁵*State v. Roberts*, 1st Dist. No. C060756, ¶ 10.

the first error was committed, and be proceeded with, as in other cases, to final judgment."¹⁶ Thus, Roberts' case was returned to the point in time just before he had been sentenced.

This Court recently dealt with a similar situation. In *State v. Danny Roberts*,¹⁷ Danny had successfully argued to the First District that his sentence should have been reduced to two years (to avoid confusion with the appellant in this matter, the state is using Danny Robert's first name). Despite a stay and an appeal to this Court, the DOC released Danny. After he was released, this Court found that reducing Danny's sentence to two years was erroneous and remanded the matter back to the trial court for resentencing.

Danny argued that it was unconstitutional to return him to prison. This Court disagreed. Though it also found that a stay provided an additional reason for Danny to not have a reasonable expectation of finality,¹⁸ it also ruled that an active appeal also removed any expectation of finality: "An inmate's release from prison does not necessarily vest him or her with an expectation of finality regarding his or her sentence if the length of the sentence is currently an issue on appeal."¹⁹

Just like the appeals in Danny's case did, Roberts own appeal placed his convictions in doubt. Though advancing his argument on weight and sufficiency grounds, he successfully argued that his convictions should be overturned. Roberts could have chosen to abandon his appeal after he was placed (albeit improperly) on postrelease control. But he didn't. He chose to continue to pursue having his convictions vacated. By doing so he chose to keep the finality of his sentence in doubt.

¹⁶*Montgomery Cty. Com'rs v. Carey* (1853), 1 Ohio St. 463. See also, *Wilson v. Kreuzsch* (1996), 111 Ohio App. 3d 47, 51.

¹⁷*State v. Danny Roberts*, Slip Opinion No. 2008-Ohio-3835.

¹⁸*Id.* at ¶ 24-26.

¹⁹*Id.* at ¶ 20.

When the matter was returned to the trial court it was as if Roberts had never been sentenced. While Roberts was entitled to credit for the time he served, he is not entitled to claim that he served his entire sentence. Therefore, trial court had jurisdiction to sentence Roberts.

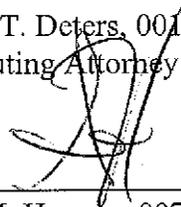
Conclusion

Though the First District only relied one of them, there are three reasons why the trial court had the authority to resentence Roberts to prison after the Department of Corrections improperly placed him into an intensive program prison and granted him early release. First, the DOC failed to properly follow the Ohio Administrative Code and failed to properly notify the sentencing judge of its intent to place Roberts into the program. By failing to do those things, Roberts was improperly released from prison and had no expectation that his sentence was final. Second, by placing Roberts into an IPP and by granting him early release, the DOC violated the separation of powers doctrine by usurping judicial power, thus rendering Roberts' early release unconstitutional. Finally, because Roberts had an ongoing appeal at the time he was released any finality in his sentence was in doubt.

For any one or all of those reasons, the trial court retained the authority to resentence Roberts to a term of incarceration. As such, the First District properly affirmed this matter and this Court, therefore, should decline jurisdiction over this matter.

Respectfully,

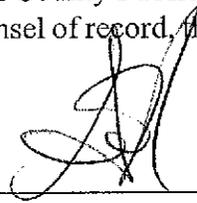
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I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Robert R. Hastings Jr., Hamilton County Public Defender's Office, 230 East Ninth Street, Suite 2000, Cincinnati, Ohio 45202, counsel of record, this 23rd day of February, 2009.



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