

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**MERIT BRIEF OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLANT LYNN ROBERTS**

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FILED

JUL 13 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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STATEMENT OF THE CASE AND FACTS

Amicus adopts by reference the statement of the case and facts set forth by Appellant Lynn Roberts.

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in the case sub judice insofar as this Court may be determining the proper method that the Ohio Department of Rehabilitation and Corrections (ODRC) must use when notifying a sentencing court as to its intention to place a prisoner in an intensive prison program (IPP). Moreover, in circumstances such as those presented in the case at bar, the application of the doctrine of promissory estoppel should be permitted.

Accordingly, the OPD has an enduring interest in protecting the integrity of the justice system and ensuring equal treatment under the law. To this end, the OPD supports the fair, just, and correct interpretation and application of Ohio's felony and sentencing statutes.

PROPOSITION OF LAW

When a defendant enters and completes an intensive prison program, and thereafter is released from confinement, the trial court lacks authority and subject-matter jurisdiction to resentence the defendant.

“This is a case of a promise broken—by the government.” *State v. Roberts*, 180 Ohio App.3d 216, 2008-Ohio-6827, at ¶43 (Painter, J., dissenting). Mr. Roberts was sentenced for a crime and went to prison. Subsequently, prison officials determined that he was eligible for an intensive prison program. The program provided that, if the inmate did well and completed the program, he would be released early. R.C. 5120.032(B)(b). Mr. Roberts successfully completed the program, was released, became employed, and did not get into any further trouble. *Roberts* at ¶44 (Painter, J., dissenting). However, because a clerk faxed a paper to the wrong number, Mr. Roberts was directed to complete his original five-year prison term. *Id.*

A. The principles of promissory estoppel should be applied to the case sub judice.

Promissory estoppel has been defined by the Restatement of Contracts, 2d as “[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” Restatement of the Law 2d, Contracts (1981) 242, Section 90. See, also, *McCroskey v. State* (1983), 8 Ohio St.3d 29, 30; *Hortman, et al. v. City of Miamisburg, et al.*, 110 Ohio St.3d 194, 2006-Ohio-4251, at ¶23. Accordingly, the elements necessary to establish a claim for promissory estoppel are: (1) a promise that is clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be reasonable and foreseeable; and (4) the party claiming estoppel must be injured by the reliance. *Stull v. Combustion Engineering, Inc.* (1991), 72 Ohio App.3d 553, 557.

In this case, ODRC unambiguously promised Mr. Roberts that he would be released early from prison if he successfully completed the intensive prison program. Mr. Roberts relied on that promise, as evidenced by his completion of the IPP and reintegration into society. Mr. Roberts's reliance on the information from ODRC was reasonable and foreseeable, as any defendant would reasonably believe that a state actor would be following the mandates of the Ohio Revised Code. See *Mechanical Contractors Association of Cincinnati, Inc., et al. v. University of Cincinnati*, 119 Ohio Misc.2d 109, 2002-Ohio-3506, at ¶11. And Mr. Roberts has been injured by his reliance upon ODRC's promise, as evidenced by the fact that he successfully completed an intensive prison program; was released from prison; became employed; and is now back in prison, serving out his five-year prison term.

Although "[i]t is well-settled that, as a general rule, the principle of estoppel does not apply against a state or its agencies in the exercise of a governmental function," *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145-146, in this case, "equity should prevail." *Roberts* at ¶50 (Painter, J., dissenting). See *Christensen v. Minneapolis Municipal Employees Retirement Bd.* (1983), 331 N.W.2d 740, 749 ("Promissory estoppel, like equitable estoppel, may be applied against the state to the extent that justice requires."). And "[t]he government may be estopped...when its 'wrongful conduct threatens to work a serious injustice and...the public interest would not be unduly damaged.'" *Valencia Energy Co. v. Arizona Department of Revenue* (1998), 191 Ariz. 565, 576, ¶33, 959 P.2d 1256, 1267, quoting *Freightways, Inc. v. Arizona Corp. Comm'n* (1981), 129 Ariz. 245, 248, 630 P.2d 541, 544. Accordingly, "[w]hen properly applied, it [estoppel] operates upon the highest principles of morality, and recommends itself to the common sense and justice of everyone." 20 Ohio Jurisprudence 2d 461, Estoppel and Waiver, Section 4. See, also, *Ruozzo v. Giles* (1982), 6 Ohio App.3d 8, 9.

B. The notice requirement contemplated by R.C. 5120.032 and Ohio Adm.Code 5120-11-03 is satisfied when a clerk of courts receives the IPP request, as the court of appeals' interpretation of Ohio Adm.Code 5120-11-03 promotes ex parte communications.

While R.C. 5120.032 requires that the ODRC notify the sentencing court of its proposed placement of a prisoner in an IPP, Ohio Adm.Code 5120-11-03(D) further states that if a prisoner is eligible for an IPP and, as here, the sentencing entry is silent on the prisoner's placement, ODRC "shall notify, by certified or electronic mail, the sentencing judge of its intention to place the applicant in an intensive program prison." That section of the administrative code also requires the judge to notify ODRC of his or her approval or disapproval "within thirty days after the mail receipt." However, R.C. 5120.032(B)(1)(a) requires the judge to voice his or her disapproval "within ten days of the mail receipt."

In Mr. Roberts's case, ODRC personnel faxed the communication to the wrong sentencing judge. The court of appeals focused on this fact when it determined that Mr. Roberts was improperly placed into the prison program. Specifically, the court of appeals found:

The notice contemplated under R.C. 5120.032 and Ohio Adm.Code 5120-11-01 et seq. must be delivered either to the court that actually imposed the stated prison term and journalized the sentencing entry or to its duly designated successor court.

The language employed in the Revised Code and the Ohio Administrative Code to identify the entity empowered to approve or to disapprove a prisoner's eligibility for an IPP and entitled to receive notice of an IPP placement is confusing and inconsistent. That entity is referred to by a hodgepodge of terms: "the court" [R.C. 2929.14(K); see, also, Ohio Adm.Code 5120-11-03(B)]; "the sentencing court" [Ohio Adm.Code 5120-11-03(D)]; "the judge" [R.C. 2929.19(D) and 5120.032]; and "the sentencing judge" [See R.C. 2929.01(CC); see, also, Ohio Adm.Code 5120-11-03(D)].

For example, R.C. 2929.19(D) and 5120.032 each state that “the sentencing court” shall give or withhold permission for an offender to enter an IPP. And R.C. 5120.032 provides that “the sentencing court” must be notified of a prisoner’s proposed placement in an IPP.” [R.C. 5120.032(B)(1)(a)]. While the term “sentencing court” is not explicitly defined in the Revised Code, R.C. 2929.11(A), which identifies the purposes of felony sentencing, equates the “court that sentences an offender for a felony” with “the sentencing court.”

Other code sections and administrative rules maintain that “the court,” in its sentencing entry, “expresses disapproval...approval or [remains] silent regarding [a prisoner’s] placement” in an IPP. [Ohio Adm.Code 5120-11-03(B)]. R.C. 2929.14(K) also provides that “[a]t the time of sentencing, the court may recommend the offender for” IPP placement, may “disapprove placement,” or may “make no recommendation.”

Still other portions of the administrative code dictate that the “sentencing judge” may “disapprove [or] approve intensive program prison for the prisoner.” [Ohio Adm.Code 5120-11-03(D)]. Ohio Adm.Code 5120-11-03(G) provides that “[i]f the prisoner meets the eligibility criteria...of this rule...and, if applicable, the sentencing judge has not disapproved intensive program prison, the director shall review all relevant information...and approve or disapprove the prisoner’s placement in the program.” And the Revised Code provides for the stated prison term to be “shortened by, or with the approval of, the sentencing judge pursuant to section ...5120.032.” [R.C. 2929.01(CC)].

But there is one constant in each of the various statutes and regulations. No matter how they identify the court empowered to approve or disapprove IPP placement, by whatever name the court is described, it is clear that the General Assembly intended to have the court that imposed the stated prison term and journalized the sentencing entry receive the veto letter and decide whether to permit an otherwise eligible prisoner to participate in an IPP.

R.C. 2929.19 identifies the “sentencing court” as the entity that determines, at the sentencing hearing, whether a prison term is necessary or required, that imposes a stated prison term, that notifies the offender of postrelease control, that journalizes the sentencing entry, and that approves or disapproves placement by “mak[ing] a finding that gives its reasons for its recommendation or disapproval.” [R.C. 2929.19(D)]. Internal citations omitted. Each of these functions is accomplished by a single judge, or by a

judge working with a visiting judge, and not by the common pleas court at large. Since only one judge of the common pleas court is acting “at the time of sentencing” to impose a stated prison term and to approve or disapprove placement, only one judge of the court is the proper recipient of the veto letter.

The administrative code also tracks this interpretation. Ohio Adm.Code 5120-11-03(D) states that if a prisoner’s “sentencing entry is silent” on placement in an IPP, the ODRC shall notify “the sentencing judge” of its intention to place the applicant in such a prison. The sentencing judge has ten days after receiving notice to grant or withhold approval. [Ohio Adm.Code 5120-11-03(D)]. The next sentence of the regulation employs the term “sentencing court,” but only to identify the sentencing court as the court that prepared the entry and stated its intention vis-a-vis IPP placement in its sentencing entry: “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.” *Id.*; see, also, Ohio Adm.Code 5120-11-03(B).

Thus we hold that, under R.C. 5120.032, if a prisoner’s sentencing entry is silent on IPP placement, the ODRC must provide notice or seek approval from the court that imposed the stated prison term and journalized the entry, or from its duly designated successor court. [Mr.] Roberts, forced to defend policies and procedures that he had no part in creating or carrying out, nonetheless did not demonstrate that the ODRC had provided notice to the court that had imposed his stated prison term and journalized his sentencing entry before his selection for placement in an IPP. The only evidence of record is that Taynor-Arledge sent notice to Judge Nelson and not to the proper sentencing judges.

State v. Roberts, 2008-Ohio-6827 at ¶22-30.

The court of appeals erroneously mandated that in order to comply with the Ohio Administrative Code’s and the Ohio Revised Code’s notification requirements regarding IPPs, ODRC should send such notice to the specific sentencing judge that imposed the stated prison term. But doing so is an *ex parte* communication. Ohio Code of Judicial Conduct Canon 3(B)(7) provides that, except in certain situations, “[a] judge shall not initiate, receive, permit, or consider communications as to substantive matters or issues on the merits made to the judge

outside the presence of the parties or their representatives concerning a pending or impending proceeding.”

As noted by the court of appeals’ opinion, the “hodgepodge of terms” regarding the correct method of serving the IPP notice to the proper authority caused confusion among the parties. *Roberts* at ¶23. And the court of appeals’ own misunderstanding of the “hodgepodge” is evidenced by its conclusion that ODRC should communicate directly with a judge as to a substantive matter outside of the presence of the parties or their representatives. The proper way for ODRC to notify the sentencing judge regarding an inmate’s possibility of attending an IPP program is by sending the notification to the county clerk of courts, who would then file stamp the notification and give it to the correct sentencing judge, along with ODRC’s sending copies of the notice to the parties. By sending the notification to the clerk of courts, rather than directly to the judge, no ex parte communication occurs. Also, all of the parties could view the request, as it would be a public record. Although in the case sub judice, ODRC sent the prosecuting attorney a copy of its intention to place Mr. Roberts in an IPP, neither the Administrative Code nor the Ohio Revised Code has codified that such a procedure must be followed.

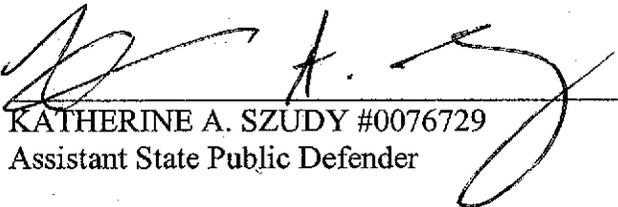
Furthermore, sending the notification to the clerk of courts would prevent situations such as the one that has occurred in this case. See *Priddy v. Ferguson*, 3rd Dist. No. 14-99-38, 1999-Ohio-957, 1999 Ohio App. LEXIS 5973, *9 (“filing” generally means that documents such as pleadings must be filed with the clerk of court); App.R. 13(A) (Documents required or permitted to be filed in a court of appeals shall be filed with the clerk); Crim.R. 12(A) (“The filing of documents with the court, as required by these rules, shall be made by filing them with the clerk of court, except that the judge may permit the documents to be filed with the judge, in which event the judge shall note the filing date on the documents and transmit them to the clerk.”).

CONCLUSION

Although promissory estoppel is generally not applied against a state or its agencies, in this case equity should prevail and the doctrine should be employed. Additionally, the proper way for ODRC to notify a sentencing judge of an inmate's proposed entrance to an IPP is by sending the communication to the clerk of courts, who would then deliver the notification to the proper sentencing judge. Accordingly, this Court should reverse the judgment of the court below.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



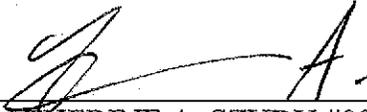
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Brief of Amicus Curiae Office of the Ohio Public Defender in Support of Appellant Lynn Roberts** was forwarded by regular U.S. Mail, postage prepaid to Scott M. Heenan, Assistant Hamilton County Prosecutor, addressed to his office at 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202; and Robert R. Hastings, Jr., addressed to his office at the Hamilton County Public Defender's Office, 230 East Ninth Street, Suite 2000, Cincinnati, Ohio 45202, on this 13th day of July, 2009.


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