

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

v.

TIMOTHY NEWELL,

Appellant.

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09-144 ORIGINAL
On Appeal from the Cuyahoga
County Court of Appeals,
Eighth Appellate District
Court of Appeals
Case No. 92361

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT TIMOTHY NEWELL

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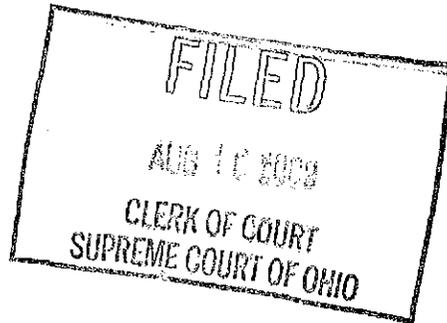


TABLE OF CONTENTS

PAGE

EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION, AND WHY LEAVE TO APPEAL SHOULD BE GRANTED.....1

STATEMENT OF THE CASE AND FACTS.....2

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....8

PROPOSITION OF LAW NO. I : Trial court is not authorized to deny a postsentence motion to vacate a void judgment that modifies a sentence, without subject-matter-jurisdiction, a violation of the Due Process and Double Jeopardy Clauses of both the United states and Ohio Constitutions.....6

Proposition of Law No. II: Appellate court abuses its discretion when it arbitrarily and capriciously, without basis in law or fact, dismisses as moot, an appeal challenging a void judgment, entered without subject matter jurisdiction, in violation of the Due Process Clause of both the Ohio and Unites States Constitutions.....9

CONCLUSION.....11

CERTIFICATE OF SERVICE.....11

APPENDIX.....Appx. Page

Journal Entry of the Cuyahoga County Court of Common Pleas (Dec. 29, 1978).....1

Journal Entry of the Cuyahoga County Court of Common Pleas (Jan. 10, 1979).....2

Opinion of the Eight District Court of Appeals (Mar. 14, 1980).....3

Journal Entry of the Cuyahoga County Court of Common Pleas (Jun. 26, 1996).....8

Journal Entry of the Eighth District Court of Appeals (July 19, 1996).....10

Opinion of the Supreme Court of Ohio (Jan. 15, 1997).....14

Journal Entry of the Cuyahoga County Court of Common Pleas (Oct. 21, 2009).....17

Journal Entry of the Eighth District Court of Appeals (July 22, 2009).....18

Journal Entry and Opinion of the Eighth District Court of Appeals (July 22, 2009).....19

EXPLANATION OF WHY THIS CASE INVOLVES
A SUBSTANTIAL CONSTITUTIONAL QUESTION,
AND WHY LEAVE TO APPEAL SHOULD BE GRANTED

The constitution provides for two levels of appeal in this state, the court of appeals and the supreme court. The Ohio Statutes provides that a convicted felon has a substantial right to appeal from the final judgment or order of the trial court, except in cases in which a death penalty is imposed for an offense committed after January 1, 1995. The procedural means and manner in which an appeal is perfected and adjudicated is procured through the Ohio Rules of Appellate Procedure.

This cause presents two critical issues for the future ability of felons to redress void judgments entered against them without subject-matter-jurisdiction: (1) whether a trial court is authorized to deny a postsentence motion to vacate a void judgment that modified a sentence; and (2) whether an appellate court abuses its discretion when it arbitrarily and capriciously, without basis in law or fact, dismisses as moot, an appeal challenging a void judgment.

In this case the court of appeals decided that because the void judgment in question involved an overall sentence, which portions thereof, were eventually modified pursuant to an appellate mandate, the issue of the void judgment is rendered moot. The court of appeals made this decision with the full knowledge that the void judgment had never been vacated, and that the appellant remained confined under the enforcement of that void judgment.

The decision of the court of appeals threatens the substantial right to appeal created by the General Assembly in R.C. Chapter 2505.02. By its ruling, the court of appeals undermines legislative intent, ignores the common law of this state, and creates its own unsupported view of both the mootness doctrine and of judgment that is void ab initio. Moreover, the court of appeals' decision establishes the illogical and untenable rule that a trial court may

exercise jurisdiction that it does not enjoy over cases that are seen as particularly repugnant, without fear of reversal.

Finally, this case involves a substantial constitutional question. The court of appeals' decision offends Ohio's constitutional prohibition against double jeopardy, which is prohibited under Article I, § 10, and under the 5th Amendment to the United States Constitution. The decision also offends the appellant's rights to due process and equal protection of law guaranteed under Article I, § 16 and § 2 of the Ohio Constitution, and under the 14th Amendment to the United States Constitution. Additionally, this Honorable Court has previously held that a court of appeals could not dismiss the appeal of a convicted felon challenging his sentence as moot. State v. Golston, (12/20/94) 71 Ohio St.3d 224, 643 N.E.2d 109.

STATEMENT OF THE CASE AND THE FACTS

The case arises from a December 12, 1978 conviction out of the Cuyahoga County Court of Common Pleas, wherein, the appellant Timothy Newell ("Newell") was convicted on multiple counts of kidnapping, rape, aggravated robbery, one count of felonious sexual penetration, one count of felonious assault, and one count of gross sexual imposition. The court ordered the sentences to be served in the Ohio State Reformatory.

After sentencing Newell was delivered to the Department of Rehabilitation and Correction by the Cuyahoga County Sheriff on December 28, 1979, and sentence commenced.

The trial court's docket erroneously indicates that Newell filed his notice of appeal on January 9, 1979. However, a thorough examination of the record on appeal (C.A. 40335) in the court of appeals demonstrates that Newell's notice of appeal and praecipe were marked "Received for Filing Jan. 5, 1979." Yet, even more baffling, the docket from the clerk of the trial court, attached to the

notice of appeal and the praecipe, states that the notice of appeal was filed on January 8, 1979. This Court will have to determine which filing date is correct and the reason(s) why there are three different filing dates.

On January 10, 1979, the clerk of the trial court received for filing, from the trial court, a journal entry modifying Newell's sentence from the Ohio State Reformatory to the Columbus Correctional Facility. Although, this journal entry was not physically received in the clerk of courts' office until January 10, 1979, the clerk of the trial court entered a notation on the trial docket, pursuant to Crim.R.55(A), that the journal entry was received for filing on January 4, 1979. Additionally, the clerk of court fraudulently transferred the January 10, 1979 modification of Newell's sentence to the court of appeals as a part of the record on appeal in (C.A. 40335), knowing that this entry was not a final appealable order on January 9, 1979, representing that modification as entered on January 4, 1979.

January 14, 1980, the Eighth District Court of Appeals consolidated Case Nos. C.A. 40334/40335, and issued a Journal Entry and Opinion in State v. Newell, C.A. Case Nos. 40334/40335, reversing all of Newell's kidnapping convictions and the sentences related to those convictions. The court affirmed the remaining convictions and the related sentences, ordering them to remain undisturbed. January 25, 1980, the appellate court issued a mandate to the trial court ordering that the trial court carry its judgment into execution.

In April, 1995, Newell commenced an action in mandamus, in the Eighth District Court of Appeals to compel the trial court to carry the appellate courts' February 25, 1980 mandate into execution. Before the respondent filed either an answer or a motion for summary judgment, Newell on June 17, 1996, moved to amend his complaint and filed his own motion for summary judgment. Pursuant to Civil R. 15(A) the court of appeals granted the motion to amend. In the amended complaint Newell alleged that he was wrongfully sent to the

penitentiary, instead of the reformatory, because his reformatory sentence could no longer be executed, his convictions or sentences were void, and he should be released.

June 26, 1996, the trial court entered a Judgment Entry Modifying Sentences in (CR-040130/040174) this matter. The trial court vacated all of Newell's kidnapping convictions, and the sentences related to those convictions.

July 19, 1996, the Eighth District Court of Appeals entered a Journal Entry in C.A. No. 68791 rendering Newell's mandamus moot on the issue of the trial court vacating the kidnapping convictions and related sentences. On the issue of Newell's reformatory sentence the court of appeals dismissed that claim.

On November 12, 1996, Mr. Newell appealed the dismissal of his mandamus to the Supreme Court of Ohio (Case No. 96-1913). In that appeal Newell alleged that the court of appeals erred in entering summary judgment against him on his amended claim for a writ of mandamus. This Honorable Court issued a ruling on January 15, 1997, affirming the judgment of the court of appeals, finding that mandamus will not lie to compel an impossible act.

Sometime in late July,, 2008, Newell determined that the trial court's journal entry modifying his sentence was physically filed in the clerk of court's office on January 10, 1979, instead of on January 4, 1979, as entered on the clerk's Appearance and Execution Criminal Docket Sheet in this matter. It was determined that his notice of appeal had been filed "prior" to January 10, 1979. Further, it was revealed that the trial court's January 10, 1979 journal entry, modifying sentence, was filed "prior" to the remand of the matter by the court of appeals. From this set of facts Newell concluded that the trial court modified his sentence without subject matter jurisdiction.

On September 7, 2008, Newell filed a motion in the trial court to vacate sentencing entry of January 10, 1979, pursuant to the inherent power of the

court and pursuant to Crim.R. 43(A) of the Ohio Rules of Criminal Procedure. Therein, Newell alleged the trial court lacked subject matter jurisdiction when it entered the modified sentence on January 10, 1979.

On October 21, 2008, the trial court refused to exercise its inherent powers and denied Newell's motion to vacate its entry of January 10, 1979, without comment.

On November 11, 2008, Newell appealed (C.A. 92361) the trial court's denial of his motion to vacate its sentence entry of January 10, 1979, to the Cuyahoga County Court of Appeals. June 25, 2009, the court of appeals dismissed as moot Newell's appeal and found: (1) "Principally, he argues that the trial court denied his motion to modify sentence on January 10, 1979, and because his appeal was taken in this matter on January 9, 1979, the trial court's order is void for lack of jurisdiction." (2) "However, a review of the docket in the underlying case reveals that the sentence being appealed was actually modified by the trial court on June 6, 1996, pursuant to an order of resentencing after the conviction in this case in 1980.¹ Therefore, the sentence Newell is attempting to appeal is moot." The case that the court of appeals references in footnote #1 is State ex rel. Newell v. Cuyahoga County Court of Common Pleas, 77 Ohio St.3d 269, 1997-Ohio-76.

The court of appeals erred when it failed to rule on Newell's two assignments of error and when it dismissed as moot his appeal. The court of appeals also erred in its obfuscated and erroneous analogy of the facts giving rise to the court's judgment. Determining that Newell was appealing the denial of a motion to modify his sentence on January 10, 1979.

In support of his positions on these issues, Newell presents the following argument.

ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: Trial court is not authorized to deny a postsentence motion to vacate a void judgment that modifies a sentence, without subject-matter-jurisdiction, a violation of the Due Process and Double Jeopardy Clauses of both the United States and Ohio Constitutions.

Matters dealing with postsentence motions to vacate void judgments, entered without subject-matter-jurisdiction, are within the sound discretion of the trial court, and are reviewed under an abuse of discretion standard. State v. Jewell (Mar. 20, 2001), Darke App. No. 1532, at 4 "In order for a trial court to have abused its discretion, the court must demonstrate an unreasonable, arbitrary, or unconscionable attitude." Id., citing State v. Adams (1980), 62 Ohio St.2d 151.

"VOID" AND "VOIDABLE"

The first thorough modern discussion about void and voidable judgments in the criminal context appears in State v. Perry(1967), 10 Ohio St.2d 175, decided two years after the adoption of Ohio's postconviction relief statute. The Supreme Court first discussed the term "void":

"Within the meaning of the statute, a judgment of conviction is void if rendered by a court having either no jurisdiction over the person of the defendant or no jurisdiction of the subject matter, i.e., jurisdiction to try the defendant and jurisdiction of the subject matter, such judgment is void ***" Id. at 178-79.

As for "voidable" the Court described it this way:

"The word 'voidable' has caused some confusion. Thus, an erroneous judgment that is not void could be considered as in effect 'voidable,' so long as it may be set aside on appeal." Id. 179.

The Court provided two examples of voidable convictions and cited two cases; interestingly, neither of those decisions use the word void or voidable to describe the claim. The first example of a voidable conviction was one where the factual basis for a constitutional claim was not known until

after the judgment of conviction. *Id.* at 179. The second example was one where the defendant was not represented by counsel at trial or plea hearing that resulted in the judgment of conviction; the judgment would be voidable at any time prior to a final judicial determination that the defendant knowingly, and intelligently waived the right to counsel. *Id.* at 179-80.

Just two months later, the Supreme Court considered another case, Romito v. Maxwell (1967), 10 Ohio St.2d 266, 267, involving void and voidable judgments, and, rather than refer to Perry, the Court cited to Tari v. State (1927), 117 Ohio St. 481, 493-94, which stated:

"This decision must turn in its last analysis upon the distinction to be made between a void and a voidable judgment. If it was a void judgment it is a mere nullity, which could be disregarded entirely, and could have been attacked collaterally, and the accused could have been discharged by any other court of competent jurisdiction in habeas corpus proceedings. If it was voidable it is not a mere nullity, but only liable to be avoided by a direct attack and the taking of proper steps to have its invalidity declared. Until annulled, it has all the ordinary consequences of a legal judgment."

In the case sub judice, after the sentence had commenced, and after the appellant had perfected an appeal, but prior to the court of appeals' remand, the trial court, sua sponte, entered an order modifying the sentence. This Honorable Court held in, State ex rel. Special Prosecutors v. Judges, Court of Common Pleas (1978), 55 Ohio St.2d 94, 97-98, 378 N.E.2d, 162 164-65:

"Yet, it has been stated that the trial court does retain jurisdiction over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment, such as the collateral issues like contempt, appointment of a receiver and injunction. In re Kurtzhalz (1943), 141 Ohio St. 432, 48 N.E.2d 657; Goode v. Wiggins (1861), 12 Ohio St. 341; Fawick Airflex Co. v. United Electrical Radio & Machine Workers (1951), 90 Ohio App. 24, 103 N.E.2d 283. However, in the instant cause, the trial court's granting of the motion to withdraw the guilty plea and the order to proceed with a new trial were

inconsistent with the judgment of the Court of Appeals affirming the trial court's conviction premised upon the guilty plea. The judgment of the reviewing court is controlling upon the lower court as to all matters within the compass of the judgment. Accordingly, we find that the trial court **lost its jurisdiction** when the appeal was taken, and, absent a remand, it did not regain jurisdiction subsequent to the Court of Appeals' decision." Id. at ¶ 1 & ¶ 2 of the Court's Per Curiam. (Emphasis added.)

Thus, any attempt by a trial court to modify a final judgment, after the appeal has been taken and prior to the court of appeals' remand, is done so without subject-matter-jurisdiction, and is void ab initio. The judgment of the reviewing court is controlling upon the trial court as to all matters within the compass of the judgment, which includes the reformatory sentence.

In this cause the trial court sentenced Newell twice for the same crime and denied his due process of law. The Double Jeopardy Clause of both the Ohio and the United States Constitution was designed, in part, to preserve the finality and integrity of judgments. Crist v. Bretz (1978), 437 U.S. 28, 33, 98 S.Ct. 2156, 57 L.Ed.2d 24; United States v. Scott (1978), 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65.

Further, the Court in, State v. Simpkins, 117 Ohio St.3d 420, 884 N.E.2d 568, held, "A trial court's jurisdiction over a criminal case is limited after it renders judgment, but it retains jurisdiction to correct a void sentence and is authorized to do so. Cruzado, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, at ¶ 19; Jordan, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, at ¶ 23. Indeed, it has an obligation to do so when its error is apparent." Id. at ¶ 23. In this cause the trial court had a duty to vacate its order of January 10, 1979, once the error was brought to the court's attention.

Proposition of Law No. 2: Appellate court abuses its discretion when it arbitrarily and capriciously, without basis in law or fact, dismisses as moot, an appeal challenging a void judgment, entered without subject matter jurisdiction, in violation of the Due Process Clause of both the Ohio and United States Constitutions.

This Court has long held that when applying the abuse of discretion standard an appellate court is not free to substitute its judgment for that of the trial judge. Berk v. Matthews, 53 Ohio St.3d 161, 559 N.E.2d 1301. In the instant matter the record is devoid of any reason(s) given by the trial judge for entering its, October 21, 2008, decision denying Newell's postsentence motion.

The court of appeals conducted a de novo review of this cause and brought into consideration matters outside of the record producing an obfuscated and erroneous analysis of the facts, which led to its erroneous dismissal of the appeal as moot, based on that new matter. In an appeal on questions of law the reviewing court may consider only that which was considered by the trial court and nothing more. See State v. Ishamil (1979), 54 Ohio St.2d 402, 377 N.E.2d 500. Also, 2 Ohio Jurisprudence (App. Rev., Pt.1) 296, Section 150. Bennett v. Dayton Memorial Park and Cemetery Assn., 87 Ohio App. 123, 87 Ohio App. 125, 88 Ohio App. 93, 93 N.E.2d 712. In the court of appeals' de novo review it erroneously found that:

"Newell argues that the trial court lacked subject matter jurisdiction to modify his sentence after his appeal was pending. Principally, he argues that the trial court denied his motion to modify sentence on January 10, 1979, and because his appeal was taken in this matter on January 9, 1979, the trial court's order is void for lack of jurisdiction."

The court of appeals goes further and renders its judgment based on its own erroneous findings, stating:

"However, a review of the docket in the underlying case reveals that the sentence being appealed was actually modified by the trial court on June 6, 1996, pursuant to an order of resentencing after conviction in this case was affirmed in 1980.¹ Therefore, the sentence Newell is attempting to appeal is moot. Newell's appeal is dismissed."

The case that the court of appeals references in footnote #1 is, State ex rel. Newell v. Cuyahoga County Court of Common Pleas, 77 Ohio St.3d 269, 1997-Ohio-76, which is new matter. A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide appeal on basis of new matter. Ishmail, supra.

In essence, in the case sub judice, the court of appeals substituted its own judgment for the trial judge's. By so doing, the court of appeals failed to apply the appropriate standard of review. Matthews, supra. It is simply not the role of an appellate court to conduct a de novo review of a trial court's decision under circumstances that require the trial court's sound discretion.

Thus, the court of appeals' decision is without a reasonable basis and is clearly wrong. This Court decided in, Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219 N.E.2d 1140; that, "[a]n abuse of discretion connotes more than an error of judgment; it implies a decision that is arbitrary or capricious, one that is without a reasonable basis or clearly wrong." Pembaur v. Leis (1982), 1 Ohio St.3d 89, 437 N.E.2d 1199; Wise v. Ohio Motor Vehicle Dealers Bd. (1995), 106 Ohio App.3d 562, 565, 666 N.E.2d 625; and In re Ghali (1992), 83 Ohio App.3d 460, 615 N.E.2d 268.

Finally, the court of appeals' decision to dismiss Newell's appeal as moot runs afoul of this Court's decision in, State v. Golston, 71 Ohio St.3d 224, 643 N.E.2d 109, 1994-Ohio-109, Id. at ¶ 2, wherein, the Court held that, "[a]ppeal challenging felony conviction is not moot." Newell's appeal is undistinguishable from Golston, supra, whereas, Newell suffers collateral and ongoing consequences

resulting from the January 10, 1979, order of the trial court modifying his sentence. The January 10, 1979, order has never been vacated and remains the sole cause of Newell's confinement to the penitentiary.

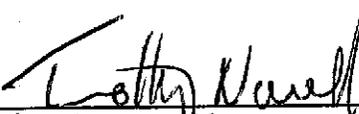
The court of appeals should have ruled on the merits of Newell's two assignments of error and rendered a decision consistent with App.R. 12(A).

CONCLUSION

For the reasons discussed above, the case involves a felony and matters of public or great general interest, and raises a substantial constitutional question. The appellant requests that the Court grant leave to appeal in this case so that the important issues presented herein will be reviewed on the merits.

Respectfully submitted,

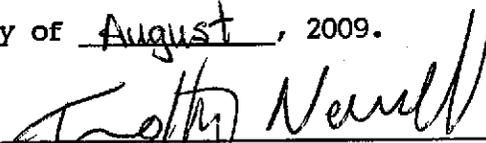
Timothy Newell, Appellant,
pro se



Timothy Newell
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum In Support of Jurisdiction was sent by ordinary U.S. Mail to counsel for appellee, State of Ohio, William D. Mason, Cuyahoga County Prosecutor, thru, Diane Smilanick, Assistant Prosecuting Attorney, at 9th Floor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, on this 7th day of August, 2009.



Timothy Newell

APPENDIX

STATE OF OHIO, }
CUYAHOGA COUNTY } ss

IN THE COURT OF COMMON PLEAS

September Term, 19 78

To-wit: December 12, 19 78

No. CR 40174

STATE OF OHIO Plaintiff

vs.

Timothy Newell

Defendant

INDICTMENT Kidnapping, etc. 1-2-3-4-5, w/cts.
Aggravated Robbery, etc. 6-7-8-9, w/ct. Gross
Sexual Imposition, ct. 10, w/ct. Felonious

Assault, ct. 11, w/cts. Rape, etc. 12-13-14-15-16-
17-18-19-20-21-22-23-24-25-26-27, w/ct. Felonious
Sexual Penetration, ct. 28.

DEC 29 1978

JOURNAL ENTRY

The defendant herein having, on a former day of Court, having been found guilty by a Jury of Kidnapping, RC 2905.01, as charged in the first (1), second (2), third (3) and fourth (4) counts and guilty of Aggravated Robbery, RC 2911.01, as charged in the sixth (6), eighth (8) and ninth (9) counts and guilty of Gross Sexual Imposition, RC 2907.05, as charged in the tenth (10) count and guilty of Felonious Assault, RC 2903.11, as charged in the eleventh (11) count and guilty of Rape, RC 2907.02, as charged in the following counts, twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17) eighteen (18), nineteen (19), twenty (20) and twenty-one (21) and guilty of Felonious Sexual Penetration, RC 2907.12, as charged in the twenty-eighth (28) count of the indictment, was this day brought into Court with his counsel present.

Also on a former day, counts five (5) and twenty-two (22) thru twenty-seven (27) were nolle, acquittal as to count seven (7).

Psychiatric hearing having been waived, the Court inquired of the said defendant if he had anything to say why Judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why Judgment should not be pronounced:

It is therefore ordered and adjudged by the Court that defendant, Timothy Newell be imprisoned and confined in the Ohio State Reformatory, Mansfield, Ohio, with sentences as follows:

Count one (1), seven (7) years to twenty-five (25) years; Count two (2), seven (7) years to twenty-five (25) years; Count three (3), seven (7) years to twenty-five (25) years; Count four (4), seven (7) years to twenty-five (25) years; Count six (6), seven (7) years to twenty-five (25) years; Count eight (8), seven (7) years to twenty-five (25) years; Count nine (9) seven (7) years to twenty-five (25) years; Count ten (10), two (2) years to five (5) years; Count eleven (11), five (5) years to fifteen (15) years; Count twelve (12), seven (7) years to twenty-five (25) years; Count thirteen (13), seven (7) years to twenty-five (25) years; Count fourteen (14), seven (7) years to twenty-five (25) years; Count fifteen (15), seven (7) years to twenty-five (25) years; Count sixteen (16), seven (7) years to twenty-five (25) years; Count seventeen (17), seven (7) years to twenty-five (25) years; Count eighteen (18), seven (7) years to twenty-five (25) years; Count nineteen (19), seven (7) years to twenty-five (25) years; Count twenty (20), seven (7) years to twenty-five (25) years; Count twenty-one (21), seven (7) years to twenty-five (25) years; and Count twenty-eight (28), seven (7) years to twenty-five (25) years, according to law and that he pay the cost of this prosecution for which execution is awarded.

These sentences to run consecutively, however, by reason of RC 2929.41 (c) (2), the aggregate minimum shall be fifteen (15) years; to wit: fifteen (15) years to four hundred and seventy (470) years.

Ann McManamon, Judge
bac 12-27-78
(notes of 12-26)

(A-1)

STATE OF OHIO, }
GUYAHOGA COUNTY } SS.

IN THE COURT OF COMMON PLEAS

January TERM. 1979

January 4, 1979

STATE OF OHIO

vs.

Timothy Newell

PLAINTIFF

TO-WIT:

NO. CR 40174

INDICTMENT

DEFENDANT

Kidnapping, w/ct. Aggravated Robbery, w/ct.
Gross Sexual Imposition, w/ct. Felonious Assault,
w/ct. Rape, w/ct. Felonious Sexual Penetration

JOURNAL ENTRY

Entry of December 12, 1978, modified in part-Should read Columbus Correctional Facility, Columbus, Ohio instead of Ohio State Reformatory, Mansfield, Ohio.

Ann McManamon, Judge
bac 1-5-79 n-r

RECEIVED FOR FILING

JAN 10 1979

GERALD E. FUERST

C of C 131

VOL 343 PG 14 JUDGE *[Signature]*

EXHIBIT
"A"

THE STATE OF OHIO }
Cuyahoga County } SS. I. GERALD E. FUERST, CLERK OF
THE COURT OF COMMON PLEAS
WITHIN AND FOR SAID COUNTY.

HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY
TAKEN AND COPIED FROM THE ORIGINAL *Criminal*

Journal Entry CR 40174
NOW ON FILE IN MY OFFICE.

WITNESS MY HAND AND SEAL OF SAID COURT THIS *6*
DAY OF *June* A.D. 20 *05*

GERALD E. FUERST, Clerk

By *Cheryl A. Kist* Deputy

(A-2)

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

FEE
4
TAXED

FEE
4
TAXED

NOS 40334
40335

STATE OF OHIO

APPEAL FROM

APPELLEE

COMMON PLEAS COURT

-vs-

Nos. CR-40130 (C.A. 40334)
CR-40174 (C.A. 40355)

TIMOTHY NEWELL

JOURNAL ENTRY

APPELLANT

AND
OPINION

DATE FEB 14 1980

RECEIVED FOR FILING
MAR 14 1980
KURTLE E. FURST, CLERK

PATTON, P. J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the judgment of the Common Pleas Court is modified and as modified is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

This appeal arises from two separate trials of defendant. In Case No. 40334, defendant was indicted for two counts of kidnapping (R.C. 2905.01), three counts of rape (R.C. 2907.02), two counts of felonious assault (R.C. 2903.11), and two counts of aggravated robbery (R.C. 2911.01). Defendant was found guilty by a jury of both counts of kidnapping, all counts of rape, and one count of aggravated robbery. The defendant was sentenced on each count to the Ohio State Reformatory, each sentence to run consecutively.

EXHIBIT

(A-3)

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VOL 384 PG 367

In Case No. 40335, defendant was indicted for four counts of kidnapping, 17 counts of rape, four counts of aggravated robbery, one count of felonious assault, one count of gross sexual imposition (R.C. 2907.05), and one count of felonious sexual penetration (R.C. 2907.12). Due to the granting of a defense motion to suppress the identification testimony of one witness, the following counts relating to that witness were nolle: One count of kidnapping and five counts of rape. In addition, the defense motion for judgment of acquittal was granted with respect to one count of aggravated robbery. Defendant was found guilty by a jury of the remaining charges. Defendant was sentenced to the Ohio State Reformatory, the sentences for each count to run consecutively.

Defendant appeals from his convictions and submits the identical assignment of error in both cases:

KIDNAPPING AS DEFINED BY SECTION 2905.01 OHIO REVISED CODE, IS AN "OFFENSE OF SIMILAR IMPORT" TO RAPE, AS DEFINED BY SECTION 2907.02 OHIO REVISED CODE, FOR THE PURPOSES OF APPLICATION OF SECTION 2941.25(A) OHIO REVISED CODE.

Relying on State v. Donald (1979), 57 Ohio St. 2d 73, the defendant argues that kidnapping and rape are allied offenses of similar import, and that therefore, defendant could be convicted of only one or the other pursuant to R.C. 2941.25(A).

In Donald, the Ohio Supreme Court held that the defendant in that case could only be convicted of either rape or kidnapping because the two crimes were committed with the same purpose and were therefore allied offenses of similar import. Recently, the Ohio Supreme Court has clarified its position in State v. Logan (1979),

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VOL 384 PC 368

60 Ohio St. 2d 126. Logan makes it clear that kidnapping and rape will not automatically be considered allied offenses of similar import. Rather, the circumstances surrounding the incident, particularly the defendant's intent, must be examined. The court in Logan established the following guidelines to aid in determining whether a defendant acted with the same or a separate animus when he committed the kidnapping and the rape:

(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;

(b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

In the two cases concerned here, defendant raped seven different women. In each instance, he restrained them of their liberty only as long as necessary to complete the rapes and other crimes charged (aggravated robbery, gross sexual imposition, etc.). The restraint or movements of the victims was "merely incidental" to the separate underlying crime; thus, there existed no separate animus to sustain the kidnapping convictions. Logan, supra.

Thus, all counts of kidnapping of which defendant was convicted and the sentences relating to these counts (one count had been nolle) are hereby reversed. The remaining convictions and the accompanying sentences shall remain undisturbed. Accordingly, the judgment is so modified.

VOL 384 PG 359 COPY 1 1 1 PAGE 689

In Case No. 40334, defendant raises the following additional assignment of error:

THE TRIAL COURT VIOLATED CRIMINAL RULE 12 OF
THE OHIO RULES OF CRIMINAL PROCEDURE.

Defendant filed a motion to suppress the identification testimony of various witnesses. The motion was untimely under Crim. R. 12(C). Thus, the trial court overruled the motion. Defendant argues that the trial court should have heard the motion pursuant to Crim. R. 12(C), i.e. "in the interest of justice".

Criminal Rule 12(C) requires any motion to suppress to be filed 35 days after arraignment or seven days before trial, whichever is earlier. Defendant filed the motion to dismiss approximately 89 days after his arraignment. Criminal Rule 12(C) allows the court, however, to extend the time for the filing of any pre-trial motions where it is in the interest of justice to do so. The trial court in this case did not extend the time for the filing of the motion but overruled it due to its untimeliness. We must presume that the trial court did not think it in the interest of justice to extend the time.

Defendant-appellant has not provided this court with any support for his position that the motion should have been heard in the interest of justice. That is, defendant does not argue that had the motion been heard, the identification testimony would have been suppressed. This court can find no basis to support defendant's argument. The rule sets time limits for the filing of various motions. Defendant-appellant did not comply with the rule, and the trial court was justified in overruling the motion.

The second assignment of error is overruled.

FILED 670
VOL 384 PG 370

JOURNALIZED

FEB 25 1980

GERALD E. FUERST, Clerk of Courts

By [Signature] Deputy

The cases, therefore, are affirmed as modified herein,

It is ordered that appellant recover of appelleehis..... costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the

Common Pleas..... 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. Exceptions.

RECEIVED FOR FILING

FEB 14 1980

DAY, J.

GERALD E. FUERST
[Signature] Dep.

CORRIGAN, J. CONCUR.

[Signature]
PRESIDING JUDGE
JOHN T. PATTON

ALL PARTIES. - COSTS TAXED.

For plaintiff-appellee: John T. Corrigan,

For defendant-appellant: Walter Haffner,
Milt Schulman.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and the period for review will begin to run.

VOL 384 PC 371

111 671

THE STATE OF OHIO }
Cuyahoga County }

ss I, GERALD E. FUERST, CLERK OF
THE COURT OF COMMON PLEAS
WITHIN AND FOR SAID COUNTY,

HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY
TAKEN AND COPIED FROM THE ORIGINAL Criminal

J.E. V384 P367 to 371

NOW ON FILE IN MY OFFICE.

(A-7)

WITNESS BY HAND AND SEAL OF SAID COURT THIS 18

DAY OF May A.D. 1980

GERALD E. FUERST, Clerk

By

[Signature] Deputy

JUN 26 1996
 GERALD E. FUERST
 CLERK OF COURTS
 CUYAHOGA COUNTY, OHIO

IN THE COMMON PLEAS COURT OF CUYAHOGA COUNTY, OHIO

STATE OF OHIO,	:	
	:	Case Nos. 040130/040174
Plaintiff,	:	
	:	JUDGE DANIEL GAUL
vs.	:	
	:	
TIMOTHY NEWELL,	:	JUDGMENT ENTRY
	:	MODIFYING SENTENCES
Defendant.	:	

This matter came before the Court as a result of a decision from the Court of Appeals of Ohio, Eighth District. *State v. Newell*, (Feb. 25, 1980), Cuyahoga App. Nos. 40334/40335, unreported, mandates this Court to modify the Defendant's sentences in the above captioned cases by vacating the two (2) kidnapping counts in CR 040130 and vacating the four (4) kidnapping counts in CR 040174.

IT IS THEREFORE ORDERED that in CR 040130, the Defendant's sentences of five (5) to fifteen (15) years on each of the two (2) kidnapping counts are hereby vacated.

IT IS FURTHER ORDERED that in CR 040174, the Defendant's sentences of seven (7) to twenty-five (25) years on each of the four (4) kidnapping counts are hereby vacated.

IT IS FURTHER ORDERED that the Defendant's remaining sentences in CR 040130 and CR 040174 are as follows:

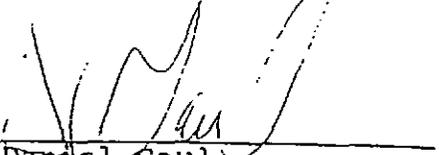
<u>CR 040130</u>	
Rape (3 Cts.)	7-25 yrs.
Agg. Robbery	7-25 yrs.

Each of the above listed counts are ordered to be served consecutively.

CR 040174

Agg. Robbery (3 Cts.)	7-25 yrs.
Gross Sexual Imposition	2-5 yrs.
Rape (10 Cts.)	7-25 yrs.
Fel. Sexual Penetration	7-25 yrs.
Fel. Assault	5-15 yrs.

Each of the above listed counts are ordered to be served consecutively.



Judge Daniel Gaul

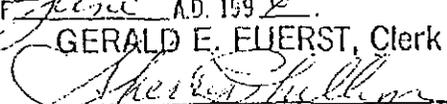
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Judgment Entry was sent by regular U.S. Mail, this 21th day of June, 1996, to the following:

Timothy Newell, #153-518
 Grafton Correctional Institution
 2500 South Avon Belden Road
 Grafton, OH 44044

Karen Vilevac, supervisor
 Records Office
 Grafton Correctional Institution
 2500 South Avon Belden Road
 Grafton, OH 44044

I further certify that a true and accurate copy of the foregoing Judgement Entry was hand-delivered this 26th day of June, 1996, to Rhonda M. O'Neal, Assistant Prosecuting Attorney, Cuyahoga County Prosecutor's Office.

THE STATE OF OHIO Cuyahoga County	ss	I, GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY,
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL <u>CR040130</u> <u>CR040174 Judgment Entry</u>		
NOW ON FILE IN MY OFFICE.		
WITNESS MY HAND AND SEAL OF SAID COURT THIS <u>28</u> DAY OF <u>June</u> A.D. 199 <u>6</u> .		
GERALD E. FUERST, Clerk		
By		Deputy



Mary Jo Simmerly
Bailliff to Judge Daniel Gaul

(A-9)

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST, CLERK OF COURTS

S/O EX REL. TIMOTHY NEWELL

Relator

COURT OF APPEALS NO. 68791

-VS-

ORIGINAL ACTION

COURT OF COMMON PLEAS

Respondent

MOTION NO. 73870 and 74512

Date JULY 19, 1996

Journal Entry



In 1978 in the two underlying cases, *State of Ohio v. Timothy Newell*, Cuyahoga County C.P. Case Nos. CR-40130 and CR-40174, a jury convicted the relator, Timothy Newell, on five counts of kidnapping, fifteen counts of rape, five counts of aggravated robbery, one count of gross sexual imposition and one count of felonious sexual penetration. The trial court imposed consecutive sentences for each count to be served at the reformatory. On appeal, *State v. Newell* (Feb. 25, 1980), Cuyahoga App. Nos. 40334 and 40335, unreported, this court ruled that the charges of kidnapping and rape were offenses of similar import. Thus, this court reversed the convictions and sentences for kidnapping and left the other convictions and sentences undisturbed. This court concluded its opinion with the following: "It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution. *** The cases, therefore, are affirmed as modified herein."

Mr. Newell, however, could not confirm that the trial court had entered an order vacating his convictions and sentences for kidnapping. Nor could he convince the officials at the penitentiary, where he had been sent, that this court had removed those sentences. Therefore, in April, 1995, he commenced this mandamus action against the respondent, the Cuyahoga County Common Pleas Court, to compel the court to correct his sentence and forward that information to the Ohio Adult Parole Authority. The respondent moved to dismiss the mandamus action. On April 30, 1996, this court denied that motion because the respondent had not sustained the requisites for a motion to dismiss. This court was not convinced that its February 25, 1980 mandate had been followed. This court invited the respondent to move for summary judgment establishing that it had corrected the sentence or that the Ohio Adult Parole Authority recognized the corrected sentence.

VOLO 402 730069

Before the respondent filed either an answer or a motion for summary judgment, Mr. Newell on June 17, 1996, moved to amend his complaint and filed his own motion for summary judgment. Pursuant to Civil Rule 15(A) this court granted the motion to amend.

The amended complaint adds the following persons as respondents: Margarette T. Ghee, Chairperson of the Ohio Adult Parole Authority; Reginald Wilkinson, Director of the Ohio Department of Rehabilitation and Correction; and Ralph Coyle, Warden of the Grafton Correctional Institute. The gravamen of his new claim is that he was wrongfully sent to the penitentiary when his sentence specified the reformatory. This deprived him of rehabilitation opportunities, quicker parole reviews and better conditions. Because he can no longer be sent to a reformatory, his convictions or sentences are void, and he should be released.

On July 11, 1996, the respondent moved for summary judgment on the grounds of mootness. Attached to this motion is a copy of a properly executed order vacating the sentences for kidnapping. On July 16, 1996, Mr. Newell filed his opposition to the respondent's motion for summary judgment. For the following reasons, this court grants the respondent's motion for summary judgment, denies Mr. Newell's motion for summary judgment and dismisses this mandamus action.

In his original mandamus petition Mr. Newell sought to have the common pleas court "make the appropriate correction in Relator's sentence and *** forward that information to the Ohio Adult Parole Authority as soon as practical." The entry attached to the respondent's motion for summary judgment grants that specific relief. It vacates the sentences for kidnapping, following the mandate of this court. Accordingly, Mr. Newell has received the requested relief for his original mandamus, and this court is now satisfied that its mandate has been followed. Thus, Mr. Newell's first claim is moot and dismissed.

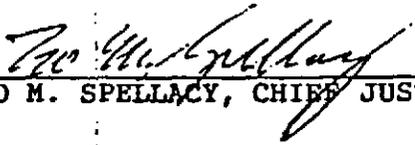
R.C. 5120.03(B) provides that an executive order from the director of rehabilitation and correction issued by December 31, 1988, "shall eliminate the distinction between penal institutions and reformatory institutions. *** any distinction made between the types of prisoners sentenced to or otherwise assigned to the institutions under the control of the department shall be discontinued." Therefore, the respondents have no clear legal duty and Mr. Newell has no clear legal right either to send Mr. Newell to a reformatory or to release him because he cannot be sent to a reformatory. Cf. *State v. Reynolds* (Aug. 17, 1987), Cuyahoga App. No. 52461, rehearing disallowed (Aug. 26, 1993), Motion No. 42173. This court, sua sponte, dismisses Mr. Newell's amended complaint.

Accordingly, the respondent's motion for summary judgment

Y10402 PG0070

(Motion No. 74512) is granted, Mr. Newell's motion for summary judgment (Motion No. 73870) is denied, and this mandamus action is dismissed. Respondent Cuyahoga County Common Pleas Court to pay costs.

JAMES D. SWEENEY, JUDGE, CONCURS


LEO M. SPELLACY, CHIEF JUSTICE

FILED AND JOURNALIZED

JUL 19 1996

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY  DEP.

COPIES MAILED TO COUNSEL FOR
ALL PARTIES. — COSTS TAXED.

Y10402 P80071

The State of Ohio, }
Cuyahoga County. } ss.

I, GERALD E. FUERST, Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are

required by the laws of the State of Ohio, to be kept, hereby certify that the foregoing is taken and copied

from the Journal Vol 402 p 69 Date July 19, 1996 in CA 68791

of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing

copy has been compared by me with the original entry on said Journal Vol 402 p 69 Date

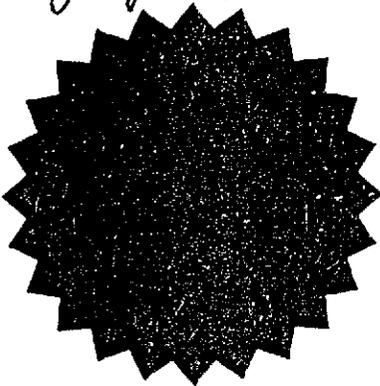
July 19, 1996 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially,
and affix the seal of said court, at the Court House in the City of
Cleveland, in said County, this _____

day of December A.D. 20 06

GERALD E. FUERST, Clerk of Courts

By [Signature] Deputy Clerk



the reasonable attorney fees incurred by ap- 2. Mandamus ⇨12
 pellee.

Mandamus will not lie to compel an im-
 possible act.

STRATTON, J., concurs in the foregoing
 concurring opinion.

3. Prisons ⇨14

Petitioner was not entitled to be re-
 leased from prison on ground that he could
 not be sent to reformatory institution as had
 been ordered by Court of Appeals, as peti-
 tioner failed to establish that if he had been
 sent to reformatory institution from the be-
 ginning of his sentences as had been ordered
 that he would have been released; at best,
 petitioner might have been entitled to earlier
 parole consideration, which was not tanta-
 mount to clear legal right to release from
 prison. R.C. § 2967.03.

4. Constitutional Law ⇨315

Judgment ⇨183

Although only one defendant moved for
 summary judgment against mandamus peti-
 tioner, entry of summary judgment against
 petitioner and in favor of nonmoving defen-
 dants did not prejudice petitioner's due pro-
 cess rights. Rules Civ.Proc., Rule 56.

5. Judgment ⇨183

While rule governing summary judg-
 ment does not ordinarily authorize courts to
 enter summary judgment in favor of nonmov-
 ing party, entry of summary judgment
 against moving party does not prejudice his
 due process rights where all relevant evi-
 dence is before court, no genuine issue as to
 any material fact exists, and nonmoving par-
 ty is entitled to judgment as matter of law.
 Rules Civ.Proc., Rule 56.

In 1978, in two separate cases, appellee,
 Cuyahoga County Court of Common Pleas,
 convicted appellant, Timothy Newell, of five
 counts of kidnapping, fifteen counts of rape,
 five counts of aggravated robbery, one count
 of gross sexual imposition, and one count of
 felonious sexual penetration. The common
 pleas court imposed consecutive sentences on
 each count and ordered that Newell serve his
 sentences in the state reformatory. On ap-
 peal, the Court of Appeals for Cuyahoga
 County reversed Newell's kidnapping convic-
 tions and sentences and directed the common
 pleas court to execute its judgment. *State v.*



77 Ohio St.3d 269

1269The STATE ex rel. NEWELL,
 Appellant,

v.

CUYAHOGA COUNTY COURT
 OF COMMON PLEAS et
 al., Appellees.

No. 96-1913.

Supreme Court of Ohio.

Submitted Nov. 12, 1996.

Decided Jan. 15, 1997.

Petitioner sought writ of mandamus to
 compel Court of Common Pleas to execute
 judgment of Court of Appeals. After Court
 of Common Pleas corrected sentences, the
 Court of Appeals, Cuyahoga County, granted
 Common Pleas Court's motion for summary
 judgment. Petitioner appealed. The Su-
 preme Court held that: (1) petitioner was not
 entitled to be transferred from prison to
 reformatory institution, and (2) petitioner
 was not entitled to be released from prison.

Affirmed.

1. Prisons ⇨13.5(2, 3)

Petitioner was not entitled to writ of
 mandamus to compel court of common pleas
 to execute judgment of Court of Appeals that
 required petitioner to be transferred from
 prison to reformatory institution, as distinc-
 tions between penal institutions and reforma-
 tory institutions had been eliminated, and
 thus petitioner could no longer be sent to
 reformatory. R.C. § 5120.03(B).

Newell (Feb. 14, 1980), Cuyahoga App. Nos. 40334 and 40335, unreported. After the common pleas court failed to execute the judgment of the court of appeals, Newell filed a complaint in 1995 in the court of appeals for a writ of mandamus to compel the common pleas court to correct his sentence. Newell later amended his complaint to add a claim for a writ of mandamus to compel appellees, the common pleas court and various public officials, to send him to a reformatory or release him from prison. In June 1996, the common pleas court corrected Newell's sentences by vacating his kidnapping convictions and sentences. The court of appeals subsequently granted the common pleas court's motion for summary judgment and dismissed Newell's mandamus action.

This cause is now before the court upon an appeal as of right.

Timothy Newell, pro se.

Stephanie Tubbs Jones, Cuyahoga County Prosecuting Attorney, and Rhonda M. O'Neal, Assistant Prosecuting Attorney, for appellee, Cuyahoga County Court of Common Pleas.

PER CURIAM.

Newell contends that the court of appeals erred in entering summary judgment against him on his amended claim for a writ of mandamus. ¹²⁰In his amended complaint and motion for summary judgment, Newell asserted that he was entitled to a writ of mandamus to compel either his transfer to a reformatory or, if no longer possible, to void his sentence and release him from prison.

[1, 2] However, as the court of appeals correctly determined, the distinctions between penal institutions and reformatory institutions have been eliminated. See R.C.

1. The appellees other than the common pleas court did not move for summary judgment against Newell. However, "[w]hile Civ.R. 56 does not ordinarily authorize courts to enter summary judgment in favor of a non-moving party, * * * an entry of summary judgment against the moving party does not prejudice his due process rights where all relevant evidence is before the court, no genuine issue as to any material fact exists, and the non-moving party is entitled to judgment as a matter of law." *State ex rel. Cuyahoga Cty. Hosp. v. Bur. of Workers'*

5120.03(B) ("The director of rehabilitation and correction, by executive order, issued on or before December 31, 1988, shall eliminate the distinction between penal institutions and reformatory institutions. Notwithstanding any provision of the Revised Code or the Administrative Code to the contrary, upon the issuance of the executive order, any distinction made between the types of prisoners sentenced to or otherwise assigned to the institutions under the control of the department shall be discontinued."). Newell conceded below that he could no longer be sent to a reformatory. Therefore, Newell is not entitled to transfer to a reformatory institution. Mandamus will not lie to compel an impossible act. *State ex rel. Brown v. Franklin Cty. Bd. of Commrs.* (1970), 21 Ohio St.2d 62, 50 O.O.2d 159, 255 N.E.2d 244.

[3] Newell alternatively asserted below that since he could no longer be sent to a reformatory institution, he was entitled to be released from prison. However, Newell failed to establish that if he had been sent to a reformatory institution that he would have been released. At best, according to Newell's claims, he might have been entitled to earlier parole consideration if he had been incarcerated in a reformatory institution from the beginning of his sentences. However, earlier consideration of parole is not tantamount to a clear legal right to release from prison. *State ex rel. Hattie v. Goldhardt* (1994), 69 Ohio St.3d 123, 125-126, 630 N.E.2d 696, 698 (Under R.C. 2967.03, the parole decision is discretionary, and there is no constitutional or inherent right to be conditionally released before the expiration of a valid sentence.).

[4, 5] Based on the foregoing, the court of appeals properly entered summary judgment ¹ against Newell and denied the writ of

Comp. (1986), 27 Ohio St.3d 25, 28, 27 OBR 442, 444, 500 N.E.2d 1370, 1373; *State ex rel. Lowery v. Cleveland* (1993), 67 Ohio St.3d 126, 128, 616 N.E.2d 233, 234; *Houk v. Ross* (1973), 34 Ohio St.2d 77, 63 O.O.2d 119, 296 N.E.2d 266, paragraph one of the syllabus; see, generally, 2 Fink, Wilson & Greenbaum, Ohio Civil Rules of Procedure with Commentary (1992) 782-785, Section 56-6. Here, the entry of summary judgment against Newell and in favor of the nonmoving

mandamus. The judgment of the court of appeals is affirmed.

Judgment affirmed

MOYER, C.J., and RESNICK, FRANCIS J., PFEIFER, COOK and concur.



77 Ohio

¹²⁷¹The STATE et al., A

INDUSTRIAL OF OHIO,

No. 94

Supreme Court

Submitted September 11, 1996

Decided January 10, 1997

Workers filed claim for specific safety requirements they suffered while employed by various companies' worksites. The Commission refused to issue findings with respect to the customer companies. The court of appeals filed a joint writ of mandamus. The court of appeals adopted its findings and granted the writ of mandamus. The customer companies appealed. The Supreme Court, Francis J. Resnick, J., held that the customer companies were entitled to summary judgment in favor of VSSR claims.

Judgment affirmed

Stratton, J., concurring opinion.

appellees did not prejud

mandamus. The judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., and DOUGLAS, RESNICK, FRANCIS E. SWEENEY, Sr., PFEIFER, COOK and STRATTON, JJ., concur.



77 Ohio St.3d 271

127The STATE ex rel. NEWMAN et al., Appellees,

v.

INDUSTRIAL COMMISSION OF OHIO, Appellant.

No. 94-1675.

Supreme Court of Ohio.

Submitted Sept. 24, 1996.

Decided Jan. 15, 1997.

Workers filed claims for violation of specific safety requirements (VSSR) for injuries they suffered while employed by temporary employment services and working at customer companies' worksites. The Industrial Commission refused to take action or make findings with respect to the claims against the customer companies, and the workers filed a joint writ of mandamus. The Court of Appeals adopted its referee's report and granted the writ of mandamus. The customer companies appealed as of right. The Supreme Court, Francis E. Sweeney, Sr., J., held that the customer companies of temporary service agencies were "employers" subject to VSSR claims.

Judgment affirmed.

Stratton, J., concurred separately with opinion.

appellees did not prejudice Newell's due process

1. Workers' Compensation ⇐941

Award by Industrial Commission for violations of specific safety requirements (VSSR) is additional award over and above standard workers' compensation benefits if worker's injury or death is found to have been caused by employer's violation of specific safety requirement; VSSR award is not modification of a previous award, but is new, separate, and distinct award paid by employer directly. Const. Art. 2, § 35.

2. Workers' Compensation ⇐941

Claimant who seeks to recover on claim for violation of specific safety requirements (VSSR) must show more than violation and proximate causation; claimant must also show that his or her employer is the party that violated specific safety requirement. Const. Art. 2, § 35.

3. Workers' Compensation ⇐205, 941

Customer companies of temporary service agencies are "employers" subject to claims for violations of specific safety requirements (VSSR); customer companies control manner or means of performing work and contrary result would permit customers of temporary agencies to avoid requirements of VSSR laws by making contracts with temporary agency which let agency "employ" workers on companies' worksites and would have no incentive to provide safe workplaces. Const. Art. 2, § 35.

See publication Words and Phrases for other judicial constructions and definitions.

4. Workers' Compensation ⇐941

Worker who is injured while working for customer of temporary service agency can pursue violation of specific safety requirements (VSSR) claim against that customer company. Const. Art. 2, § 35.

Syllabus by the Court

Customer companies of temporary service agencies are "employers" subject to claims for violations of specific safety requirements.

rights.



54082507

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO
Plaintiff

TIMOTHY NEWELL
Defendant

2008 OCT 21 A 8:53

WILLO E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

Case No: CR-78-040174-ZA

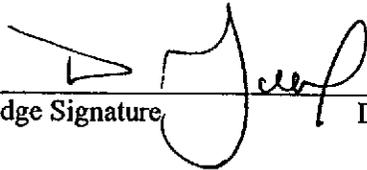
Judge: DANIEL GAUL

INDICT: 2905.01 KIDNAPPING
2905.01 KIDNAPPING
2905.01 KIDNAPPING
ADDITIONAL COUNTS...

JOURNAL ENTRY

MOTION TO VACATE SENTENCING ENTRY OF JANUARY 10, 1979 PURSUANT TO THE INHERENT POWER OF THE COURT AND PURSUANT TO CRIMINAL RULE 43(A) OF OHIO RULES OF CRIMINAL PROCEDURE IS DENIED. CLERK ORDERED TO SEND A COPY OF THIS ORDER TO: DEFENDANT, TIMOTHY NEWELL; #A153-518, GRAFTON CORRECTIONAL INSTITUTION, 2500 SOUTH AVON-BELDEN ROAD, GRAFTON, OHIO 44044

10/17/2008
CPMJS 10/17/2008 11:15:18



Judge Signature Date 10/17/08

(A-17)

T Newell # 153518
Grafton CI M 10-21-08

HEAR
10/17/2008

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
92361

LOWER COURT NO.
CP CR-040174

-vs-

COMMON PLEAS COURT

TIMOTHY NEWELL

Appellant

MOTION NO. 423758

Date 07/22/2009

Journal Entry

MOTION BY APPELLANT, PRO SE, FOR RECONSIDERATION IS DENIED.

RECEIVED FOR FILING

JUL 22 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *G. E. Fuerst* DEP.

Judge CHRISTINE T. MCMONAGLE, Concur _____

Judge MELODY J. STEWART, Concur _____

Mary Eileen Kilbane

Presiding Judge
MARY EILEEN KILBANE

CA08092361

58672832



(A-18)

VOL 0686 PG 0429

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92361

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TIMOTHY NEWELL

DEFENDANT-APPELLANT

**JUDGMENT:
DISMISSED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-040174

BEFORE: Kilbane, P.J., McMonagle, J., and Stewart, J.

RELEASED: June 25, 2009

JOURNALIZED: JUL 22 2009

(A-19)

CA08092361

58672846



ATTORNEY FOR APPELLANT

Timothy Newell, pro se
Inmate No. 153-518
Grafton Correctional Institution
2500 South Avon Belden Road
Grafton, Ohio 44044

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Diane Smilanick
Assistant Prosecuting Attorney
The Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

**FILED AND JOURNALIZED
PER APP. R. 22(E)**

JUL 22 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *[Signature]* DEP.

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

JUN 25 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *[Signature]* DEP.



N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, P.J.:

Appellant, Timothy Newell (Newell), pro se, filed the instant appeal requesting that this court reverse the trial court's denial of his motion to vacate the trial court's sentencing entry of January 10, 1979. After reviewing the record and the applicable law, we dismiss Newell's appeal as moot.

Because they are interrelated, we address Newell's assignments of error together.

Assignment of Error One

"The trial court lacked subject matter jurisdiction to modify Mr. Newell's sentence after his appeal was pending and prior to remand, that sentence is void judgment, and failure to vacate said modification of sentence deprived Mr. Newell of due process and equal protection of law."

Assignment of Error Two

"The trial court abused its discretion when it denied Mr. Newell's motion to vacate sentencing entry of January 10, 1979 pursuant to the inherent power of the court and pursuant to the Crim.R. 43(A) of the Ohio Rules of Criminal Procedure [sic]."

We review the denial of a postsentence motion to vacate a sentence under an abuse of discretion standard. *State v. Jewell* (Mar. 30, 2001), Darke App. No. 1532, at 4. "In order for a trial court to have abused its discretion, the court

must demonstrate an unreasonable, arbitrary, or unconscionable attitude." *Id.*, citing *State v. Adams* (1980), 62 Ohio St.2d 151.

Newell argues that the trial court lacked subject matter jurisdiction to modify his sentence after his appeal was pending. Principally, he argues that the trial court denied his motion to modify sentence on January 10, 1979, and because his appeal was taken in this matter on January 9, 1979, the trial court's order is void for lack of jurisdiction.

However, a review of the docket in the underlying case reveals that the sentence being appealed was actually modified by the trial court on June 6, 1996, pursuant to an order of resentencing after the conviction in this case was affirmed in 1980.¹ Therefore, the sentence Newell is attempting to appeal is moot.

Newell's appeal is dismissed.

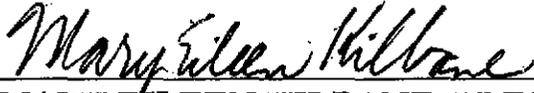
It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

¹The reason for the delay is that initially, the common pleas court failed to execute the judgment of the court of appeals. In 1995, Newell filed a complaint in the court of appeals for a writ of mandamus to compel the common pleas court to correct his sentence. In June 1996, the common pleas court corrected Newell's sentences by vacating his kidnapping convictions and sentences. The court of appeals subsequently granted the common pleas court's motion for summary judgment and dismissed Newell's mandamus action. See *State ex rel. Newell v. Cuyahoga County Court of Common Pleas*, 77 Ohio St.3d 269, 1997-Ohio-76.

It is ordered that a special mandate issue out of this court directing the common pleas 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.



MARY EILEEN KILBANE, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and
MELODY J. STEWART, J., CONCUR