

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

CLARENCE FRY,

Defendant-Appellant.

Case No. 2006-1502

MOTION TO DISMISS FOR
LACK OF APPEALABLE ORDER

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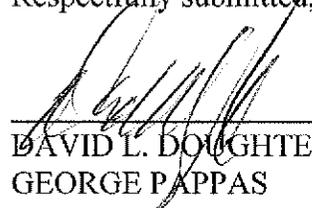
Case No. 2006-1502

MOTION TO DISMISS FOR LACK
OF FINAL APPEALABLE ORDER

Now comes the appellant, Clarence Fry, by and through undersigned counsel, and respectfully requests that this Honorable Court dismiss his appeal and remand this matter back to the trial court for purposes of correcting a void sentence. This motion is being filed in conjunction with and in response to the Summit County Prosecutor's filing of a Notice of Post-Release Control Error in Sentencing Journal Entry on November 13, 2009.

This motion is more addressed in the attached memorandum.

Respectfully submitted,

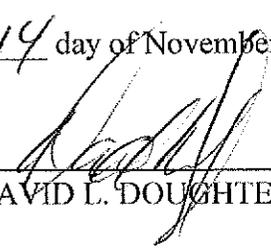


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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellant was served upon Sherry Bevan Walsh, Esq., Summit County Prosecutor, or a member of her staff, 53 University Street, 7th Floor, Akron, OH 44308-1680, by facsimile and Regular U.S. Mail on this 14 day of November, 2009.



DAVID L. DOUGHTEN

Counsel for Appellant

MEMORANDUM IN SUPPORT OF MOTION

On November 12, 2009, counsel of record Heaven DiMartino of the Summit County Prosecutor's Office contacted undersigned counsel to notify him of a sentencing error that potentially would deny this Court jurisdiction of this case. After reviewing the record and relevant case law on this issue, counsel has determined that the prosecutor is correct in this matter. The erroneous sentencing entry renders the sentence of Mr. Fry void. As a defendant may always attack the voidness of a sentencing entry, the failure to address the issue immediately would have allowed Fry to void the sentence at any time, including years down the road. This matter should be remanded to the trial court for a new sentencing hearing.

Error in Present Case

On August 30, 2005, a Summit County Grand Jury capitally indicted defendant-appellant Clarence Fry. Specifically, the grand jury charged Mr. Fry for one count of capital Aggravated Murder in violation of R. C. §2903.01(B), felony-murder. This count included two specifications for death eligibility; R. C. §2929.04(A)(7) (principle offender in commission of felony) and R. C. §2929.04(A)(8) (killing of a witness).

The indictment also included a second charge of Aggravated Murder in violation of R. C. § 2903.01(A) (prior calculation and design). This charge did not include capital murder specifications. The third count charged Fry with Involuntary Manslaughter in violation of R. C. § 2903.04(a); Count Four, Murder in violation of R. C. § 2903.02(A)/(B); and Count Five, Aggravated Burglary, in violation of R. C. § 2911.11(A)(1)/(2). Prior to the beginning of trial, the prosecutor dismissed Count 3, Involuntary Manslaughter and Count Eleven, Domestic Violence and Twelve Aggravating Menacing.

The remaining counts of the indictment included two counts of Domestic Violence in

violation of R. C. §2919.25(A); Intimidation of Crime Victim or Witness, R. C. §2921.04(B), Menacing By Stalking, R. C. §2919.25(C) and Aggravated Menacing 2903.21. It is the sentence in relation to these latter charges where the problem lies.

A jury trial began on May 30, 2006. The defendant was found guilty of all counts and specifications. Fry was subsequently sentenced to death for Count One, a conviction of capital murder with capital specifications. On July 11, 2007, the court merged the remaining counts of Aggravated Murder, Murder, Aggravated Robbery and the Domestic Violence that occurred on the date of the homicide at the final sentencing hearing.

The problem arises in the sentencing of Fry for his lesser offense convictions. As the prosecutor correctly noted, the trial court sentenced Fry to serve a ten-year period of post-release control instead of a maximum of three years. The entry thus failed to notify Fry of the proper length of his mandatory term of post-release control fo the conviction of domestic violence. R.C. §2929.191 and R.C. §2967.28(B).

The journal entry in this case is consistent with the judge's pronouncement at the sentencing hearing. After stating the terms of incarceration for each of the convictions, the court stated:

The Court indicates that I am going to impose a ten year period of post release control.

(T. Vol. XII, p.2038)

This Court has been very strict in demanding the trial courts relating post-release control requirements accurately when addressing defendants at sentencing hearings. When sentencing such an offender, a court must, pursuant to R.C. 2929.19(B)(3)(c), notify him of postrelease control both at his sentencing hearing, and in its judgment entry on sentencing. State v. Jordan,

104 Ohio St.3d 21, 2004-Ohio-6085, paragraph one of the syllabus. The remedy for failing to accurately address post-release control conditions is to remand the matter back to the trial court. The trial court may hold the requisite resentencing hearing and impose the correct period of postrelease control at any time before appellant's prison sentence is completed. See State v. Simpkins, 117 Ohio St.3d 420, 2008-Ohio-1197, syllabus. See also, State v. Bloomer, 122 Ohio St.3d 200, 2009 Ohio 2469 at ¶ 69.

Trial Court Retains Jurisdiction to Correct Sentencing Error

A trial court always has jurisdiction to correct an illegal sentence. Generally, any attempt by a court to impose a sentence *other* than one within the range of available statutory options is void for want of subject matter jurisdiction. Such a sentence may be set aside at any time because it is void *ab initio*. This Court in Colegrove v. Burns, 175 Ohio St. 437, 438 (1964), described the role of a trial judge in sentencing a convicted criminal:

. . . Crimes are statutory, as are the penalties therefor, and the only sentence which a trial judge may impose is that provided for by statute A court has no power to substitute a different sentence for that provided for by law.

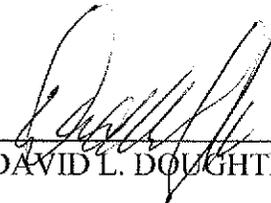
Subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court. See *e.g.*, Louisville & Nashville R. R. Co. v. Mottley, 211 U.S. 149 (1908); United States v. Cotton, 535 U.S. 625, 630 (2002).

“The Ohio Supreme Court has unequivocally stated that '[a]ny attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void.’” State v. Beasley (1984), 14 Ohio St.3d 74, 75. A trial court has authority to correct void sentencing orders. *Id.*; Brook Park v. Necak (1986), 30 Ohio App.3d 118. State v. Dickens, 41 Ohio App.3d 354, 535 N.E.2d 727 (Lorain Co. 1987).

Similarly, courts can also properly resentence the defendant to a lawful term in place of a previously journalized unlawful term. State v. McColloch (1991), 78 Ohio App. 3d 42; *see also* State v. Thomas (1996), 111 Ohio App. 3d 510, dismissed, appeal not allowed, 77 Ohio St. 3d 1469, 673 N.E.2d 135 (1996).

Wherefore, the defendant-appellant Clarence Fry respectfully requests that this Honorable Court dismiss his appeal and remand this case to the trial court for a new sentencing hearing.

Respectfully submitted,



DAVID L. DOUGHTEN



GEORGE C. PAPPAS

Counsel for Appellant