

ORIGINAL

IN THE SUPREME COURT OF OHIO

09-2149

STATE OF OHIO

SUPREME COURT CASE NO.

Plaintiff-Appellant,

ON APPEAL FROM THE
MONTGOMERY COUNTY COURT OF
APPEALS, SECOND APPELLATE
DISTRICT

vs.

DANNY HALL

COURT OF APPEALS CASE NO.
CA022901

Defendant-Appellee.

MEMORANDUM CONTRA JURISDICTION OF APPELLEE,
DANNY HALL

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SUPREME COURT OF OHIO

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**WHY THIS CASE DOES NOT INVOLVE SUBSTANTIAL CONSTITUTIONAL ISSUES
AND IS NOT OF GREAT PUBLIC INTEREST**

This matter raises the issue of whether nurses who steal drugs are eligible for treatment in lieu of conviction. While the Appellee is cognizant of the certification of a conflict concerning this issue in State v. France 2006 Ohio 1204, Franklin App. No. 04AP-1124 and State v. Massien Summit App. No. 24369, 2009 Ohio 1521, as noted in France itself such an interpretation would preclude health care providers at all levels from getting intervention in such instances. Therefore, for policy reasons, if nothing else, this could not be the intent of the statute and its application. Accordingly, the Appellee requests that the Court decline jurisdiction in this matter.

Statement of the Case

The Appellee was indicted on May 14, 2008 on two counts of theft of drugs contrary to R. C. 2913.02(A)(1). Appellant had requested Diversion but was made to plead no contest to Count One of the indictment. A Termination Entry sentencing the Appellant to five years of community control was filed on July 28, 2008. Notice of Appeal was filed on August 18, 2008.

Statement of the Facts

Appellee has no previous felony record and requested intervention in lieu of conviction in this matter. The request was made at the status conference in chambers but the Court would not accept a filing in this matter based upon State v. France 2006 Ohio 1204, Franklin App. No. 04AP-1124. The Appellant pled no contest to Count One as a result. The Seconddistrict Court of Appeals reversed this matter on

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW:

Proposition of Law No. 1: A Person Who Does Not Hold a Public Position of Trust is not Subject to Provisions Barring him from Receiving Intervention in Lieu of Conviction

In denying intervention in lieu of conviction, the trial court relied upon the Franklin County decision in State v. France, supra. France held that since theft of drugs by a nurse is facilitated by that position, such a person could not be sentenced under R. C. 2929.13(B)(2)(b) and thus R.C. 2951.041(B) would not be applicable. As noted by the Second District Court of Appeals, this issue is currently before this Court in State v. Massien Summit App. No. 24369, 2009 Ohio 1521.

It is to be noted that no other court in the State of Ohio has followed or applied this reasoning and, the France court relied on its previous decision in State v. Wiley 2003 Ohio 6835, Franklin App. No. 03AP-362, 03AP-363. However, the Franklin Appeals Court has itself inconsistently applied this statute, permitting such consideration in State v. McLaughlin 2004 Ohio 1780, 157 Ohio App. 3d 1.

In France, the Court itself noted that such an interpretation would preclude health care providers at all levels from getting intervention in such instances. The paucity, indeed, the total absence of any cases following France indicates that for policy reasons, if nothing else, this could not be the intent of the statute and its application.

R. C. 2929.13(B)(1)(d) is the clause at issue in this matter. It states:

(d) The offender held a public office or position of trust and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future

conduct of others.

As can be seen, this clause is directed at those in a public position, rather than those who simply hold jobs that provide mere access. Specific professions are guided by their own licensing and disciplinary statutes. To extend a general statute relating to public officials is to interpret a general statute to take precedence over a specific statute.

Therefore, for reasons of policy and, because there exist specific statutes regulating the practice and conduct of nurses, the decision in France should not be applied in this matter.

CONCLUSION

Although this Court has certified a conflict concerning this issue, for the reasons stated, this Court should decline jurisdiction of this matter.

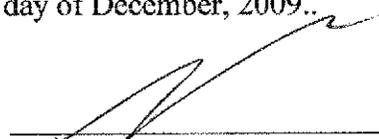
Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the above was delivered to the Prosecutor at 301 West Third Street, Dayton, Ohio 45402 by regular U. S. Mail this 16th day of December, 2009..



George A. Katchmer (0005031)

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Case No. 09-

v.

On Appeal from the
Montgomery County Court
of Appeals, Second
Appellate District
Court of Appeals
Case No. 22901

DANNY HALL

NOTICE OF APPEAL

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ATTORNEY FOR
DANNY HALL,
APPELLEE

ATTORNEY FOR THE STATE OF OHIO,
APPELLANT

NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

Appellant, the State of Ohio, through the Office of the Prosecuting Attorney for Montgomery County, hereby gives notice of appeal to the Supreme Court of Ohio, from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *State v. Hall*, on November 13, 2009.

This felony case presents a question of public or great general interest.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

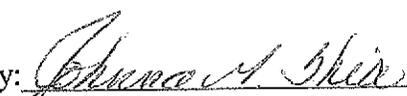
BY 
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was sent by first class mail on this 23rd day of November, 2009, to the following: George A. Katchmer, Attorney for Hall, 115 Brookside Drive, Yellow Springs, Ohio 45387, and Timothy Young, Ohio Public Defender Commission, 250 E. Broad Street, Suite 1400, Columbus, OH 43215-9311.

MATHIAS H. HECK, JR.
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IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

DANNY HALL

Defendant-Appellant

Appellate Case No. 22901

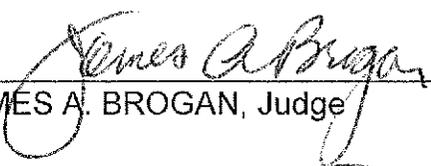
Trial Court Case No. 08-CR-1520

(Criminal Appeal from
Common Pleas Court)

FINAL ENTRY

Pursuant to the opinion of this court rendered on the 13th day
of November, 2009, the judgment of the trial court is **Reversed**, and the cause
is **Remanded** for further proceedings consistent with the opinion.

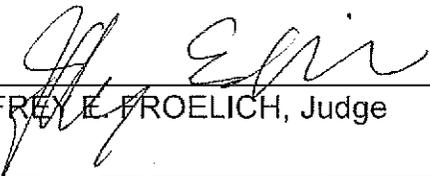
Costs to be paid as stated in App.R. 24.



JAMES A. BROGAN, Judge



MIKE FAIN, Judge



JEFFREY E. FROELICH, Judge

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Hon. Timothy N. O'Connell
Montgomery County Common Pleas Court
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In his sole assignment of error, Hall contends the trial court erred in not considering him for intervention in lieu of conviction (ILC). During oral argument, we pointed out the absence of anything in the record showing that Hall ever sought ILC and that the trial court denied it. Shortly after oral argument, Hall presented us with a motion to file an App.R. 9 statement. Therein, he claimed to have raised the ILC issue during an unrecorded status conference. He further claimed that the trial court had indicated its unwillingness to consider ILC, relying on *State v. France*, Franklin App. No. 04AP-1124, 2006-Ohio-1204, which held that a nurse who stole drugs from the hospital where she worked was ineligible for ILC.

While keeping Hall's appeal pending on our docket, we remanded the case on October 8, 2009, to allow the trial court to resolve the issue raised in his App.R. 9 motion. Thereafter, counsel for both parties met in open court and agreed that, during a prior status conference, defense counsel had expressed a desire to seek ILC. They further agreed that the State had indicated its opposition to ILC, citing *France*. They also agreed that the trial court had stated, based on *France*, that it believed Hall was ineligible for ILC. Therefore, defense counsel never formally moved for ILC. Instead, Hall entered a no-contest plea to the charges set forth above. During the on-the-record proceeding on October 8, 2009, the trial court agreed that the foregoing version of events was accurate. That proceeding was recorded on an audio-video disk and made part of the appellate record.

Having reviewed the audio-video disk, we believe Hall sufficiently raised the issue of ILC to preserve it for appellate review. Although Hall did not file a written motion, his counsel essentially requested ILC during the status conference. As set forth above, the trial court responded by expressing its belief that Hall was ineligible for ILC based on *France*.

In light of that response, there would have been no purpose in Hall following up with a written motion.¹ Therefore, we conclude that the issue of Hall's eligibility for ILC properly is before us.

On the merits of the ILC issue, we note the existence of conflicting views. In *France*, the Tenth District held that a nurse who stole drugs in the course of her employment was not eligible for ILC because she occupied a "position of trust" within the meaning of R.C. 2929.13(B)(1)(d) and the offense related to the position. *France*, supra, at ¶¶8-12. More recently, in *State v. Massien*, Summit App. No. 24369, 2009-Ohio-1521, the Ninth District held that a nurse who stole drugs from her employer was eligible for ILC. It reasoned that the phrase "position of trust" in R.C. 2929.13(B)(1)(d) is intended "to apply predominantly to the offender's public standing[.]" *Id.* at ¶17. While not foreclosing the possibility "that in limited circumstances, a private individual in a private setting may be found to have occupied a 'position of trust,'" the Ninth District held that a nurse did not hold such a position. *Id.* at ¶17-19.

On July 1, 2009, the Ohio Supreme Court certified a conflict between *Massien* and *France*. The certified issue is "[w]hether a nurse employed by a hospital who in the course of her employment steals drugs from the hospital holds 'a position of trust' under R.C. 2929.13(B)(1)(d) thus making the nurse ineligible for intervention in lieu of conviction[.]"

¹Although the trial court's oral pronouncement on ILC bears some similarity to a ruling on a motion in limine, which is tentative and not appealable, we see at least one notable distinction. A trial court's decision on a motion in limine is anticipatory and unappealable because the preliminary ruling may change when the evidence is presented in its actual context at trial. In the present case, however, the trial court was confronted with a legal question, namely whether a nurse who steals drugs from his employer is eligible for ILC. The trial court resolved the issue by relying on *France*. No subsequent events were likely to change the trial court's legal opinion. Therefore, there is no reason to require Hall to have re-raised the issue in a written motion for ILC.

State v. Massien, 122 Ohio St.3d 1453, 2009-Ohio-3131.

Although the Ohio Supreme Court has not yet resolved the certified conflict, we too have addressed the scope of R.C. 2929.13(B)(1)(d). In *State v. Jones* (Nov. 13, 1998), Greene App. No. 98CA009, we held:

“We believe the trial court misconstrued R.C. 2929.13(B)(1)(d) to apply it to Defendant Jones. It applies to offenders who hold ‘a public office or position of trust and (when) the offense related to that office or position.’ Such persons are a ‘public official’ or a ‘public servant,’ as those terms are defined by R.C. 2921.01(A) and (B), who commits offenses such as theft in office, R.C. 2921.41, or bribery, R.C. 2921.02. R.C. 2929.13(B)(1)(d) does not apply to a private person who abuses a position of trust into which he is put by another private person which is the case here.” (Emphasis added).

Based on *Jones*, we hold that Hall did not occupy a “position of trust” within the meaning of R.C. 2929.13(B)(1)(d). The statute applies to public officials and public servants, not to a private person such as Hall who abuses a position of trust granted to him by his private-hospital employer. As a result, the trial court erred in finding Hall ineligible for ILC on the basis of R.C. 2929.13(B)(1)(d). The question remains, however, whether Hall should receive ILC. “[E]ven when a defendant satisfies all of the statutory requirements, a trial court has discretion to determine whether the particular defendant is a good candidate for ILC.” *State v. Schmidt*, 149 Ohio App.3d 89, 91, 2002-Ohio-3923, ¶19. As a result, we must remand the cause for the trial court to determine, in its discretion, whether Hall is a suitable candidate for ILC. *Id.* at ¶12.

Hall’s sole assignment of error is sustained, the judgment of the Montgomery County Common Pleas court is reversed, and the cause is remanded for further proceedings

consistent with this opinion.

.....

FAIN and FROELICH, JJ., concur.

Copies mailed to:

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