

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2009-0897
Plaintiff-Appellee,	:	
	:	On Appeal from the Summit
vs.	:	County Court of Appeals
	:	Ninth Appellate District
LONDEN K. FISCHER,	:	
	:	C.A. Case No. CA-24406
Defendant-Appellant.	:	

**REPLY BRIEF OF AMICI CURIAE CUYAHOGA COUNTY PUBLIC DEFENDER AND
OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF APPELLANT LONDEN K. FISCHER**

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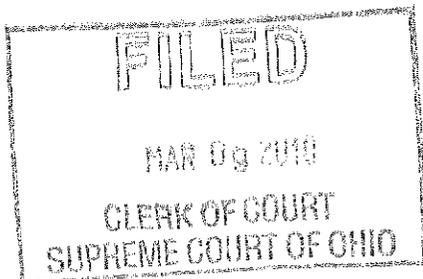
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TABLE OF CONTENTS

Page Number

ARGUMENT.....1

Proposition of Law I:

A direct appeal from a void sentence is a legal nullity; therefore, a criminal defendant’s appeal following a *Bezak* resentencing is the first direct appeal as of right from a valid sentence. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250.

CONCLUSION6

SERVICE.....7

TABLE OF AUTHORITIES

CASES:

Hernandez v. Kelly (2006), 108 Ohio St.3d 395, 2006-Ohio-1262
State v. Baker, 119 Ohio St.3d 197, 2008-Ohio 3330.....4
State v. Beasley (1984), 14 Ohio St.3d 742
State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-32501, 2
State v. Harrison, 122 Ohio St.3d 512, 2009-Ohio-35475
State v. Jordan, 104 Ohio St.3d 21, 2004-Ohio-60852, 3
State v. Simpkins, 117 Ohio St.3d 420, 2008-Ohio-11975

CONSTITUTIONAL PROVISIONS:

Fifth Amendment, United States Constitution.....2, 3

ARGUMENT

Proposition of Law I:

A direct appeal from a void sentence is a legal nullity; therefore, a criminal defendant's appeal following a *Bezak* resentencing is the first direct appeal as of right from a valid sentence. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250.

The Proposition of Law is based on four premises:

1. There is no sentence in a criminal case unless and until post-release control (PRC) is imposed.
2. There is no conviction until there has been a sentence.
3. A court of appeals has no jurisdiction over a defendant's appeal of a conviction unless the conviction, itself, exists.
4. Issue preclusion, whether characterized as collateral estoppel or the law of the case, does not apply to prior pronouncements of a court that did not have jurisdiction.

From these premises flow one conclusion: If the trial court's first attempt at sentencing is a nullity, then any appeal that follows is premature, because it is not an appeal of a conviction; and any disposition resulting from that premature appeal is also void.

The State and its amici, Ohio Prosecuting Attorneys Association (OPAA) argue, in part, that a sentence without post-release control still vests jurisdiction in a court of appeals to determine any issue that is cognizable at that time, i.e. any issue relating to the pretrial, trial or plea proceedings of the case. Further, the State and OPAA argue that adopting Mr. Fischer's proposition of law will provide Mr. Fischer, and hundreds like him, the opportunity to clog the courts of appeals with appeals that raise issues that have been, or could have been, raised earlier. These arguments are further addressed below.

1. A sentence cannot be partially void.

A criminal sentence is either void or it is not. This Court, in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-2350, determined that a sentence without post-release control is a nullity, it is “as if there had been no sentence.” *Id.* at 13 (emphasis in original). While the State contends that it is not asking this Court to reverse *Bezak*, the State’s argument contradicts the language of *Bezak* quoted ante. The State suggests that a PRC-deficient “sentence” can both exist (for purposes of triggering appellate jurisdiction) and not exist (so that it can be increased later, see *infra*). Metaphysical considerations aside, the State’s argument fundamentally misconstrues what it is to be legally “void.” See *id.*, at par. 12 (explaining nature of “void.”).

Nor can the State find support for its argument by noting that Mr. Bezak was not required to return to court for a new sentencing. The Court’s holding that Bezak need not return to court after already being released merely recognized that, having served his prior prison sentence in total, Mr. Bezak had a crystallized expectation of finality in his *completed* sentence that precluded another sentence from being imposed. *Id.*, at par. 18 (“the trial court is instructed to note on the record of Bezak’s sentence that because he has completed his sentence, Bezak will not be subject to resentencing pursuant to our decision.”). *Accord, Hernandez v. Kelly* (2006), 108 Ohio St.3d 395, 2006-Ohio-126.

2. If the PRC-deficient sentence is not void, then PRC cannot be added at a later time without violating the multiple punishment provision of the Fifth Amendment’s Double Jeopardy Clause.

The State ignores the consequences of its argument. If this Court marginalizes *Bezak*, as the State requests, then this Court will also overrule *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, on which *Bezak* is premised. When *Jordan* held that PRC-deficient sentences were void, it was (1) relied on *State v. Beasley* (1984), 14 Ohio St.3d 74, which recognized that illegal

sentences are void and (2) recognized that a sentence without PRC lacked an essential component of the punishment prescribed by the General Assembly for felonies, and was thus illegal. *Jordan* was well-supported in caselaw and logic – both as to the void nature of an illegal sentence and the need for this Court to recognize the General Assembly’s pre-eminent role in determining the limits of criminal sentences.

As a practical matter, if *Jordan* is overruled, i.e., if PRC-deficient sentences are not void, then trial courts will be powerless to correct a PRC-deficient sentence at a later time. *Jordan* acknowledged that the multiple punishment prohibition of the Fifth Amendment’s Double Jeopardy Clause would prohibit simply adding PRC to an already-existing sentence. It was only because the original sentence was “void,” that the defendant could be brought back to Court to be legally “sentenced” -- not “resentenced” -- to a term of imprisonment accompanied by the statutorily-mandated post-release control *Id.* at par. 25

Thus, if the State is correct, the 1,113 inmates that the OPAA cites (OPAA Amicus Brief at 3), as having been subjected to PRC-deficient sentences must be unconditionally released upon the expiration of their prison terms – because it would violate the Fifth Amendment to subsequently add PRC to a previously imposed sentence that actually existed (as opposed to a sentence that was void).

3. The OPAA’s prediction of dire consequences is inflated and speculative.

The OPAA predicts that adopting Fischer’s proposition will result in a large volume of needless litigation because appellate decisions decided years ago will be revisited *de novo*. Respectfully, the sky will not fall should Fischer’s proposition become the rule of law of this Court.

First, in most cases, it is doubtful that the defendant will want to appeal anything other than the newly imposed sentence. Most PRC-deficient sentences, like most other sentences, are the product of guilty pleas which the defense does not want to disturb; there are no issues other than sentencing. Second, in those cases where a defendant desires to appeal something other than the newly imposed sentence, responsible attorneys, aware that a court of appeals has previously rejected a defendant's appeal, will oftentimes be able to persuade a defendant not to appeal.

Third, in those cases where issues are being raised on appeal that were previously presented to the same court of appeals, raising the same issues a second time will not be particularly laborious. The transcript has already been prepared; the issues were already researched, the brief was already written (and is thus retrievable in a medium where it probably will not even be re-typed); and the opinion has already been drafted (and, again, can be recreated via a few keystrokes).

Finally, the OPAA, in setting forth its litany of horrors, includes as an additional concern that defendants whose appeals were decided despite the absence of a final judgment entry will also then try to re-open their cases. In *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, this Court recognized that the incomplete nature of a criminal judgment and commitment order was a bar to appellate jurisdiction. Thus, *Baker* has already made clear that old appeals *can* be resurrected because there has never been a final and appealable order. Yet, since *Baker* was decided in 2008, the courts of appeals have not become clogged with decades-old cases emerging from courthouse archives. Similarly, there is no reason to believe that adopting this Proposition will have any significant impact on the caseloads of courts of appeals.

4. The Proposition of Law is fundamentally fair

The State and OPAA desire to eat their cake and have it too. In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, this Court recognized that the State could wait until the defendant's last days in prison to bring to the trial court's attention a PRC deficiency. So long as the defendant had not left the prison confines, he or she could be hauled back to court and sentenced anew – with PRC as part of the sentence.

The defendant's ability to revisit an appeal from a void sentence should be concomitant with the State's ability to revisit the void sentence, itself. As a practical matter, appellate and post-conviction litigation decisions are made by defendants and their counsel on the basis, in part, of how much time (either in prison or under supervision) remains to be served. Some defendants do not desire to appeal a case where the appeal will not be decided until after the defendant is free. Other short-timers may be willing to appeal only issues that will not subject them to new trials, for example issues relating to sexual registration or fines. As a result, in some cases, appeals are never noted or raise only a limited number of the substantive issues in a case.

But these defendants may feel markedly different about what they want to do on appeal or via post-conviction litigation (either in State or federal court) if they later are subjected to PRC. The specter of supervision and additional violation time, may affect the earlier decision not to be aggressive on appeal. And issues not raised in an initial appeal under different ground rules may be defaulted.

Finally, there is no guarantee that the sentence imposed after a PRC deficiency has been identified will not include an even greater prison term. See, e.g., *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, par 37 (trial court provided defendant the choice of resentencing or plea withdrawal, described by Court as a "Morton's fork."). Thus, a defendant could be brought

back before a trial court, given a significantly greater sentence that includes PRC for the first time, and now find him- or herself unable to challenge an underlying conviction that, until then, he or she was willing to tolerate.

The State and the OPAA – while speculating about the increase in litigation that arises from the Proposition – overlook these realities. Ironically, the State’s position will spur additional appellate litigation by attorneys whose clients will want everything raised from the beginning – just to be safe.

CONCLUSION

Mr. Fischer’s first sentence was void, because it lacked a statutorily required postrelease control advisement. His void sentence did not create a final, appealable order; this deprived the court of appeals of subject-matter jurisdiction to decide his first appeal. Mr. Fischer’s “resentencing” was his first valid sentence; therefore, his “second” direct appeal must be treated as his only direct appeal as of right. As such, Mr. Fischer must be allowed to litigate any and all trial issues cognizable on direct appeal.

Respectfully submitted,

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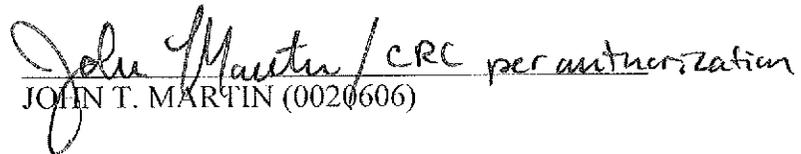
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Amici Curiae Ohio Association of Criminal Defense Lawyers and the Cuyahoga County Public Defender in Support of Appellant Londen K. Fischer was forwarded by regular U.S. Mail, postage pre-paid, to Heaven DiMartino, Summit County Assistant Prosecutor, 53 University Avenue, 7th Floor, Safety Building, Akron, Ohio 44308, on this 9th day of March, 2010.

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