ORIGINAL

IN THE OHIO SUPREME COURT

No. 2006-1502

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
-vs-	:	
CLARENCE FRY,	:	MOTION FOR REHEARING AND TO STAY THE ISSUANCE OF MANDATE
Defendant-Appellant.	:	
	:	**DEATH PENALTY APPEAL**

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Now comes the appellant, Clarence Fry, by and through his attorneys, David L. Doughten and George Pappas, and pursuant to Supreme Court Rule of Practice IX, §1 and 2, and respectfully moves this Honorable Court to rehear the above captioned case and to stay the issuance of the mandate. Specifically the appellant asks the Court to address the resolution to the post- release control issue; must there be a full sentencing hearing conducted on a remand from this Court? Does whether R.C. §2929.191 or R.C. §2953.08 applies for resentencing on postrelease control error?

Respectfully submitted,

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Counsel for Appellant

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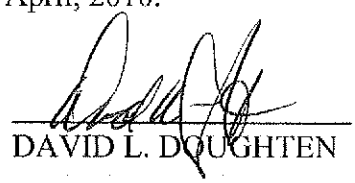
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Reconsider 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 Regular U.S. Mail on this 1 day of April, 2010.



DAVID L. DOUGHTEN

Counsel for Appellant

ARGUMENT

Proposition of Law.

> **Ohio Revised Code Section 2929.191 provides the State with a means of collateral relief from a void sentence and is therefore inapplicable on direct appeal. On direct appeal, the remedy for improperly imposed postrelease control is a resentencing *de novo* under R.C. 2953.08, State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250, and State v. Saxon, 109 Ohio St.3d 176, 2006-Ohio-1245.**

Overview

This case presents a critical issue for not only this particular matter but to all postrelease control cases in Ohio. The issue is how this Court's splintered 2-3-2 decision in State v. Singleton, Slip Opinion No. 2009-Ohio-6434, applies to cases on direct appeal. This case is ideal for resolving the postrelease control confusion because this is a direct appeal case involving improperly imposed postrelease control. Further, because there was no objection in the trial court this case also presents the issue of whether a sentence that illegally imposes postrelease control is *void ab initio* or voidable under R.C. 2929.191.

Procedural History

On August 30, 2005, a Summit County Grand Jury capitally indicted defendant-appellant Clarence Fry. The jury found Fry guilty of all counts and specifications. Fry was subsequently sentenced to death for Count One, a conviction of capital murder with capital specifications.

The problem arises in the sentencing of Fry for his lesser offense convictions. 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)

On November 16, 2009, Fry filed a motion to dismiss the direct appeal in this Court. On that same date, this Court denied the motion without comment.

On March 23, 2010, this Court affirmed Fry's convictions and sentences. State v. Fry, Slip Opinion No. 2010-Ohio-1017. This court agreed that the trial court failed to properly sentence Fry on a number of convictions. Fry should have been subject to postrelease control for the third degree convictions of domestic violence, tampering with evidence, intimidation of a crime victim or witness and menacing by stalking. R.C. §2967.28(B)(3). Fry at ¶ 213. This Court ordered Fry resentenced on the relevant counts pursuant to R.C. §2929.191.

A. This Court has not issued binding case law as to how trial and appellate courts should treat illegal post-HB137 sentences on direct appeal.

1. On their face, Singleton and R.C. 2929.191 affect only collateral challenges, not direct appeals under R.C. 2953.08.

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 Court held that Fry was not properly notified of postrelease control requirements. The

question here is whether R.C. §2929.191 or R.C. §2953.08 applies for the sentencing correction. This Court's fractured 2-3-2 decision in Singleton leaves many questions unanswered. Most importantly, even if the fractured opinions are binding on post-HB137 sentences, does R.C. §2929.191 eliminate the appellate remedy the General Assembly created in R.C. §2953.08? The Sixth District has ruled that postrelease control errors can no longer be raised on direct appeal. State v. Noe, 6th Dist. Nos. L-06-1393, L-09-1193, 2009-Ohio-6978, ¶143-7 (sentencing error on direct appeal rejected because the only remedy is R.C. 2929.191).

At first impression, it may appear that Singleton undercuts the argument that a remand to the trial court is required to add a correct term of postrelease control. But that impression would be wrong for two reasons: because 1) Singleton and R.C. 2929.191 concern only a collateral action in a trial court to correct an illegal sentence, not a remedy on direct appeal; and 2) the only binding precedent in Singleton is paragraph one of the syllabus and the portion of the lead opinion that holds that R.C. 2929.191 does not apply retroactively.

In other words, nothing in Singleton or R.C. 2929.191 eliminates the contrary-to-law review of R.C. §2953.08. The Singleton syllabus and R.C. 2929.191 concern only trial court, as opposed to appellate, action to correct illegal sentences. "For criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. §2929.191." Singleton, at paragraph two of the syllabus. Further, R.C. §2929.191(A)(1) gives authority only to "a court [that] imposed a sentence[.]" The section gives authority to trial courts, not appellate courts.

The opportunity to seek collateral relief under R.C. §2953.21 does not eliminate the availability of relief on direct appeals under R.C. §2953.08. Likewise, the opportunity to seek

collateral relief under R.C. §2929.191 does not eliminate the right to direct appeal relief under R.C. §2953.08. The two statutes provide different relief for cases in different procedural positions.

On direct appeal, R.C. §2953.08 and State v. Saxon, 109 Ohio St.3d 176, 2006-Ohio-1245, remain binding. Nothing in R.C. §2929.191 changes the rule that courts in direct appeal cases look at the combination of sanctions count-by-count instead of sanction-by-sanction.

2. The only binding parts of Singleton are the first paragraph of the syllabus and the portion of the lead opinion holding that R.C. 2929.191 does not apply to pre-HB137 sentences.

a. Dicta cannot overrule prior binding case law.

This Court has issued decisions with clear majorities that include binding precedent as to how trial and appellate courts should treat illegal sentences. The only binding precedent in Singleton is paragraph one of the syllabus and the portion of the lead opinion that holds that R.C. 2929.191 does not apply retroactively. No other part of the opinions had four votes. The second paragraph of the syllabus has four votes, but it concerns post-HB137 sentences, and Mr. Singleton was sentenced before HB137.

Paragraph two of the Singleton syllabus is not binding because it addresses "hypothetical questions of law not involved in a judicial proceeding in a cause before" this Court. State v. Baughman (1882), 38 Ohio St. 455, 459. See also, State ex rel. Keyes v. Ohio Pub. Emps. Retirement Sys., 123 Ohio St.3d 29, 2009-Ohio-4052, at ¶29 (this Court "cannot review" an issue that would result in an "advisory opinion"); and Ingerson v. Marlow (1863), 14 Ohio St. 568, 569 (when this court has "no case before [it] involving [a] question, . . . any expression of opinion . . . would be mere obiter dicta").

Even though dicta from this Court is not binding, lower courts might normally treat it with "a healthy regard[.]" Wright v. Wright (Nov. 10, 1994), Hocking County App. No. 94CA2, 1994 Ohio App. LEXIS 5207, citing State v. Boggs (10th Dist. 1993), 89 Ohio App.3d 206, 213.

Trial Court Retains Jurisdiction to Correct Sentencing Error

On the issue of illegal sentences, this Court has issued binding precedent. 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).

This 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). Thus, under State v. Beasley, supra, State v. Jordan, 104

Ohio St.3d 21, 2004-Ohio-6085, State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250, and Saxon, the binding law of this Court remains that the remedy for an illegal sentence is a *de novo* hearing.

Similarly, courts may 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).

Intermediate appellate courts should follow binding case law when it conflicts with dicta. See e.g., State ex rel. DaimlerChrysler v. Industrial Commission, 10th Dist No. 06AP-968, 2007-Ohio-4799, at ¶4 ("the language relator relies on in Advantage is dicta [but the] holding in Vulcan is controlling"). Accordingly, Singleton leaves lower courts in the awkward position of following binding precedent that members of this Court have opined may be wrong. This Court should accept this case to either clearly reject or accept its previous rulings that an illegal sentence is void ab initio.

b. Plurality decisions do not create binding law.

Although four justices joined paragraph two of the Singleton syllabus, no signed opinion relating to post-HB137 sentences drew the support of four justices. Under Kraly v. Vannewkirk (1994), 69 Ohio St.3d 627, 633, a plurality decision is "of questionable precedential value inasmuch as it was a plurality opinion which failed to receive the requisite support of four justices of this court in order to constitute controlling law."[1] This Court has agreed to reconsider how

[1] Appellant notes that the Ohio Supreme Court has agreed to reconsider how lower courts should interpret its fractured opinions. In State v. Kupay-Zimmerman, Case No. 2009-1520, the question accepted is "When there is no majority opinion in a case decided by the Supreme Court of Ohio, lower court judges are to apply the narrowest principle of law to which the opinions in the case indicate that a majority of the Justices assented."

lower courts should interpret its fractured opinions. State v. Kupay-Zimmerman, Case No. 2009-1520. But the current law is that fractured opinions do not create binding law, so the three signed opinions in Singleton do not create any binding law as to post-HB137 sentences.

B. Conclusion

The trial court must hold a new sentencing hearing in relation to the relevant convictions. R.C. §2929.191 specifically says "If . . . a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division . . . the court may prepare and issue a correction to the judgment . . . ." So it authorizes only action by the trial court, i.e., the court that "imposed a sentence[,]" not a court of appeals.

R.C. §2953.08(G)(2) still determines what an appeals court may to remedying an illegal sentence. This statute reads in relevant part:

> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

None of these options include remanding the matter to the trial court for the purpose of merely tacking on the proper postrelease control wording in the sentencing journal entry. Under Saxon and Bezak, the whole sentence for a count must be vacated.

Respectfully submitted,

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