

IN THE SUPREME COURT OF OHIO

**10-1203**

CITY OF CLEVELAND HEIGHTS

Appellee

vs.

WARREN LEWIS

Appellant

) On Appeal from the Ohio  
) Court of Appeals  
) Eighth Appellate District  
)  
)  
) Court of Appeals  
) Case No. CA 09-92917  
)  
)  
)

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APPELLANT THE CITY OF CLEVELAND HEIGHTS'  
NOTICE OF CERTIFIED CONFLICT

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SUPREME COURT OF OHIO

**FILED**  
JUL 09 2010  
CLERK OF COURT  
SUPREME COURT OF OHIO

EXHIBIT A

Pursuant to S. Ct. Prac. R. 4.1., appellant the City of Cleveland Heights hereby submits this notice of certified conflict for the Court's consideration.

On January 13, 2010, oral argument in the above matter was held before the Ohio Eighth District Court of Appeals. On May 15, 2010, the Eighth District issued an en banc decision in *City of Cleveland Heights v. Warren Lewis* (See attached as Exhibit A), reversing the trial court's ruling and vacating Warren Lewis' conviction for obstruction of official business. The Eighth District's holding not only addressed Lewis' appeal of his conviction, but also *sua sponte* raised the issue as to whether Lewis' appeal was moot.

In its holding, the Eighth District explored whether Lewis' payment of a court imposed fine and court costs as well as service of (a suspended) three day jail term and six months of inactive probation were voluntary, affecting whether his appeal was properly before the court. The Eighth District determined that the appeal was not moot, holding that because Lewis filed a motion to stay execution of his sentence with the trial court that was later denied, he had involuntarily complied with his sentence, entitling him to appellate review.

The Eighth District's decision was not unanimous. It included a dissenting opinion from Judge Colleen Conway Cooney regarding the issue of mootness. Judge Cooney's dissent disagreed with the majority, holding that Lewis voluntarily complied with the terms of his sentence. The dissent further provided that although Lewis filed a motion to stay execution of his sentence with the trial court, he failed to exhaust all forms of available relief, including filing a stay of execution pursuant to App. R. 8 with the Court of Appeals. Lastly, Judge Cooney's dissenting opinion emphasized the conflict that exists between the appellate court's ruling in *Lewis* and those of other Ohio appellate districts.

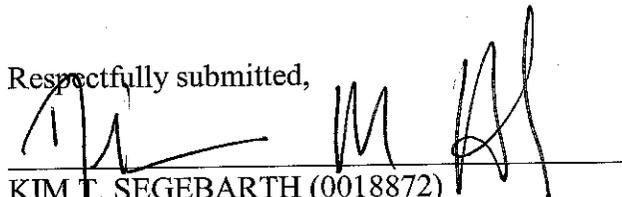
On May 28, 2010, the City of Cleveland Heights moved to certify this matter as a conflict. In its motion, the City of Cleveland Heights argued that the majority's opinion in *Lewis* was in direct conflict with the Ohio Second District Court of Appeals' decision in *Dayton v. Huber*, 2<sup>nd</sup> Dist. No. 20425, 2004-Ohio-7249 (See attached as Exhibit B) as well as the Ohio Seventh District Court of Appeals' decision in *Carroll County Bureau of Support v. Brill*, 7<sup>th</sup> Dist. No. 05CA818, 2005-Ohio-6788 (See attached as Exhibit C). In both *Huber* and *Brill*, the courts held that when individuals do not seek a stay of execution from appellate courts, but rather elect to serve a sentence, their actions are deemed voluntary.

On June 10, 2010, the Eighth District issued a decision granting the City's motion, certifying the above matter as a conflict (See attached as Exhibit D). The Eighth District held in relevant part:

This court certifies that a conflict exists between this court's en banc decision in *City of Cleveland Heights v. Lewis*, Cuyahoga App. No. 92917, 2010-Ohio-2208, and the decisions of the Second District and Seventh District in *Dayton v. Huber*, Montgomery App. No. 20425, 2004-Ohio-7249; and *Carroll City. Bur. Of Support v. Brill*, Carroll App. No. 05 CA 818, 2005-Ohio-6788. The court hereby certifies this matter to the Ohio Supreme Court pursuant to App. R. 25(A) and Article IV section 3(B)(4) of the Ohio Constitution for resolution of the following issue: "whether an appeal is rendered moot when a misdemeanor defendant serves or satisfies his sentence after unsuccessfully moving for a stay of execution in the trial court, but without seeking a stay of execution in the appellate court."

On the basis of the Eight District Court of Appeals' decision to certify the above matter as a conflict, appellant the City of Cleveland Heights hereby provides this Court with notice of a certified conflict pursuant to S. Ct. Prac. R. 4.1.

Respectfully submitted,

Handwritten signatures of Kim T. Segebath and Dierdra M. Howard, written in black ink above a horizontal line.

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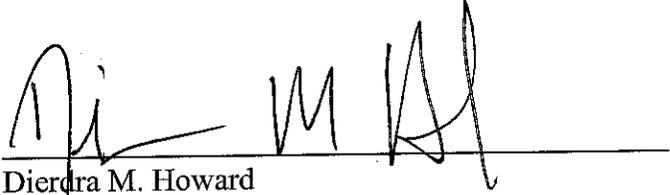
Attorneys for Appellant City of Cleveland Heights

**CERTIFICATE OF SERVICE**

Copy of the foregoing **Notice of Certified Conflict** was sent by ordinary U.S. mail this 8<sup>th</sup> day of July, 2010, to:

Kenneth D. Meyers, Esq.  
6100 Oak Tree Boulevard  
Suite 200.  
Independence, Ohio 44131

Attorney for Appellee

A handwritten signature in black ink, appearing to read 'Dierdra M. Howard', is written over a horizontal line.

Dierdra M. Howard  
Assistant Director of Law

Attorney for Appellant The City of Cleveland Heights

REQUEST PUBLICATION

# Court of Appeals of Ohio

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EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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5/29/10

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JOURNAL ENTRY AND OPINION  
EN BANC  
No. 92917

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**CITY OF CLEVELAND HEIGHTS**

PLAINTIFF-APPELLEE

vs.

**WARREN LEWIS**

DEFENDANT-APPELLANT

---

**JUDGMENT:**  
**REVERSED AND CONVICTION VACATED**

---

Criminal Appeal from the  
Cleveland Heights Municipal Court  
Case No. CRB-0801263A

**BEFORE:** En Banc Court

**RELEASED:** May 19, 2010

**JOURNALIZED:**

EXHIBIT A

PATRICIA ANN BLACKMON, J.:

Pursuant to Loc.App.R. 25.1, this court convened an en banc conference in accordance with *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672.

Appellant Warren Lewis appeals his conviction for misdemeanor obstructing official business and assigns the following error for our review:

**“I. The trial court erred by overruling appellant’s Rule 29 motions and by finding appellant guilty of obstruction [sic] of official business.”**

Having reviewed the record and pertinent law, we reverse the trial court’s decision and vacate Lewis’s conviction. The apposite facts follow.

#### Procedural Facts

The trial judge found Lewis guilty of obstructing official business and sentenced him to three days in jail, \$100 fine, court costs, and six months’ inactive probation. The trial judge suspended the three days.

The next day, Lewis moved the trial judge to stay execution of his sentence pending his appeal. The trial judge denied his motion to stay execution of the sentence.

Lewis timely filed his appeal, and on March 4, 2009, he paid his fine and court costs. While his appeal was pending, he served his inactive probation, which ended in August 2009.

In his appeal, Lewis failed to address whether his appeal was rendered moot because he had completed all aspects of his sentence and failed to allege any collateral disability. We do not gather from the record any inference of a collateral disability.

During oral argument, this court raised the mootness issue with both parties. Lewis's attorney argued that the appeal was sustainable because Lewis asked the trial court for a stay of execution of his sentence before he paid the fine and court costs, but the trial court refused.

#### Mootness

The initial issue before us is whether Lewis involuntarily served or satisfied all aspects of his sentence.

In our most recent opinion on this issue, we held the following:

**“[u]nless one convicted of a misdemeanor seeks to stay the sentence imposed pending appeal or otherwise involuntarily serves or satisfies it, the case will be dismissed as moot unless the defendant can demonstrate a particular civil disability or loss of civil rights specific to him arising from the conviction.”** *Oakwood v. Pfanner*, Cuyahoga App. No. 90664, 2009-Ohio-464, citing *Cleveland v. Martin*, Cuyahoga App. No. 79896, 2002-Ohio-1652. See, also, *Cleveland v. Pavlick*, Cuyahoga App. No. 91232, 2008-Ohio-6164.

The facts show that Lewis failed to show a collateral disability, and we cannot infer the existence of one from this record. Consequently, in order for Lewis to avoid dismissal of his appeal, he has to show that his sentence was

stayed or involuntarily satisfied. The record establishes that the trial court refused to stay execution of his sentence; consequently, Lewis's appeal can only survive mootness and dismissal if he involuntarily served or satisfied all aspects of his sentence. We conclude that his sentence was involuntarily served or satisfied.

Several decisions from this court have spoken to the meaning of the phrase "unless otherwise involuntarily serves" and have held that a defendant does not voluntarily complete his sentence when he has moved for a stay of execution of the sentence, and the stay has been denied by the trial court. *Cleveland v. Burge*, Cuyahoga App. No. 83713, 2004-Ohio-5210; *Cleveland v. Townsend*, Cuyahoga App. No. 87006, 2006-Ohio-6265; and *Broadview Hts. v. Krueger*, Cuyahoga App. No. 88998, 2007-Ohio-5337.

We have suggested that the very existence of an unsuccessful motion for stay results in the sustainability of the appeal. One court made the following observation: "In such a situation, the completion of the sentence would be involuntary, and the defendant would retain his or her right to appeal the underlying conviction and sentence." *State v. Blivens* (Sept. 30, 1999), 11<sup>th</sup> Dist. No. 98-L-189, citing *State v. Harris* (1996), 109 Ohio App.3d 873, 875, 673 N.E.2d 237. The situation in that case was an unsuccessful stay of execution in the trial court.

At least one court has held that a defendant convicted of a misdemeanor must seek a stay of execution of the sentence in the appellate court to avoid dismissal of the appeal as moot. *Dayton v. Huber*, 2<sup>nd</sup> Dist. No. 20425, 2004-Ohio-7249.

We decline to follow this ruling because the reasoning does not avoid the situation where the defendant has no option but to pay the fine in order to avoid contempt of court or jail. For example, in *Broadview Hts. v. Krueger*, Cuyahoga App. No. 88998, 2007-Ohio-5337, the trial court asked defendant, after he had denied her stay of execution of the sentence, whether she was prepared to pay the fine on that day. She paid the fine. The situation in *Krueger* placed the defendant in an automatic involuntary position.

It could be argued, however, that *Krueger* should be narrowly read. But prior to *Krueger*, this court used the denial of a stay of execution as the benchmark for determining mootness. *Townsend*, Cuyahoga App. No. 87006, 2006-Ohio-6265; *Burge*, Cuyahoga App. No. 83713, 2004-Ohio-5210. In *Townsend* and *Burge*, we held that a defendant does not voluntarily complete the sentence when he has unsuccessfully moved for a stay of execution of his sentence. We believe that those cases are correct in light of *State v. Wilson* (1975), 41 Ohio St.2d 236, 325 N.E.2d 236.

In *Wilson*, the defendant pled no contest after his motion to suppress a concealed weapon was denied. The trial court found him guilty, and he promptly paid the fine and cost. In *Wilson*, there was no doubt that the defendant intended to complete his sentence.

This is not the case here. We can infer that Lewis did not intend to complete all aspects of his sentence because he requested a stay of execution of his sentence; thus payment of the fine and cost, and completion of the inactive probation were involuntary. Accordingly, we will address the merits of his appeal.

### Facts

At trial, Officer Clayburn testified that on June 21, 2008, he was dispatched to Bainbridge Road on a call regarding a juvenile fight involving three girls. Officer Clayburn testified that when he arrived on the scene, he spoke with the girls involved, including Lewis's daughter, who had an injury to her eye. Officer Clayburn also spoke with several parents, including Lewis's wife.

Officer Clayburn testified that because he received conflicting versions from each party and could not tell who was the aggressor, he decided to charge all three girls. Officer Clayburn advised the parents that all three girls would

be charged, and he began gathering information from the respective parents about their child.

Officer Clayburn testified that as he was gathering the information, Lewis arrived and began talking with the other parents in a hostile manner. Officer Clayburn testified that he asked Lewis to leave the scene, but he initially refused. Eventually, Lewis relented and walked back to his house.

Officer Clayburn testified that after he had gathered the information from the other parents, he went to Lewis's house to get information on Lewis's daughter. Officer Clayburn testified that Lewis, who was standing on the porch, refused to give him any information, and he walked back into his house.

Officer Clayburn testified that he then approached Lewis's wife to obtain the information. Officer Clayburn testified that Lewis's wife, a U.S. postal worker, was seated in her postal vehicle when he approached. Officer Clayburn stated that while he was talking with Lewis's wife, Lewis told his wife not to give him any information. Officer Clayburn stated that Lewis's wife then indicated that she could not give him any information and then drove away.

Officer Clayburn testified that he again approached Lewis and told him that he needed the information. Officer Clayburn testified about the ensuing events as follows:

"Q. What happened next?"

A. He was still upset. I then approached him and told him I needed the address and needed the information on his daughter. And if he didn't give me the information on the address, I would look for the address. I couldn't locate the address on the residence. And I told him I need the address. And he told me to find it myself.

Q. You mean the house itself had no number?

A. Right.

Q. It was on Bainbridge, but it had no number?

A. No.

Q. So you asked him for the daughter's information and he did not provide any information on the daughter?

A. Right.

Q. You asked him the address of the house and he said find it yourself?

A. Yes, more or less, figure it out yourself. That's what it was.

Q. What happened next?

A. At that point in time I advised him, I said, you are going to be arrested if you don't give me the information, because I need that information to complete the investigation and the charge. And he said you do what you have to do, arrest me. And I went over and I arrested him and placed him in handcuffs. He cooperated, placing his hands behind his back." Tr. 24-25.

Officer Clayburn charged Lewis with obstructing official business and resisting arrest.

Lewis testified that he is employed by the U.S. Postal Service as a letter carrier. Lewis testified that when he arrived on the scene, he learned from his wife that two girls, who had attacked their daughter two days earlier, had attacked her again. Lewis also learned that Officer Clayburn intended to charge all three girls with disorderly conduct. Lewis testified that as he was about to talk with the other parents, Officer Clayburn told him he had to leave because he did not want a riot. Lewis testified that he initially refused, but walked back to his house.

Lewis testified that when Officer Clayburn came to his house to inquire about the address, he told him he did not have anything to say. Lewis denied that he told his wife not to speak to Officer Clayburn. Lewis testified that after he refused to give Officer Clayburn the house number, Officer Clayburn spoke with his wife who was parked across the street.

Lewis testified that at the time that Officer Clayburn approached his wife, who is also U.S. postal employee, she was leaving to go back to work. Lewis testified that because Officer Clayburn was leaning into the vehicle, he told his wife that Officer Clayburn could not detain her because she was in a federal vehicle.

Lewis's wife, Noelle Eberhart Lewis ("Mrs. Lewis"), testified that she is also employed by the U.S. postal service as a letter carrier. Mrs. Lewis testified

that two days prior to the incident, the same two girls had attacked her daughter at Cleveland Heights High School. Mrs. Lewis testified that she had filed an incident report with the Cleveland Heights Police Department.

Mrs. Lewis testified that when Officer Clayburn approached her postal vehicle, she was about to return to work and Officer Clayburn positioned himself in a manner that prevented her from leaving. Mrs. Lewis testified that she attempted to show Officer Clayburn a copy of the police report, but he was not receptive and would not take the report. Mrs. Lewis testified it was at that point that her husband, who was standing on the porch, said "don't you have to go back to work? You need to go back to work." Tr. 176.

### Motion for Acquittal

In the sole assigned error, Lewis argues the trial court erred in overruling his motion for acquittal. We agree.

Crim.R. 29(A), which governs motions for acquittal, states:

**"The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."**

The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus:

“Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.” See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394; *State v. Davis* (1988), 49 Ohio App.3d 109, 113, 550 N.E.2d 966.

*Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, in which the Ohio Supreme Court held:

“An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)”

In the instant case, the trial court found Lewis guilty of obstructing official business in violation of R.C. 2921.31(A), which provides in pertinent part as follows:

“(A) No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties.”

After reviewing the record, we find that the evidence is insufficient to support a conviction for obstructing official business. The complaint stated and Officer Clayburn testified that the sole reason that he arrested and charged Lewis with obstructing official business was for the refusal to give information on his daughter. Officer Clayburn testified in pertinent part as follows:

**“Q. And you arrested him because he refused to give you his address?”**

**A. He wouldn't give me any information at all.**

**Q. That's [the] act of obstruction that you arrested him for?”**

**A. Yes.**

**“\* \* \***

**Q. That the act of obstructing official business and impeding you was the refusal to give information on his daughter who was being charged?”**

**A. Correct.” Tr. 39-41.**

Courts have generally required an affirmative act for the offense of obstructing official business. *Cleveland v. Weems*, Cuyahoga App. No. 82752, 2004-Ohio-476, citing *N. Ridgeville v. Reichbaum* (1996), 112 Ohio App.3d 79, 84, 677 N.E.2d 1245; *Hilton v. Hamm* (1986), 33 Ohio App.3d 175, 176, 514 N.E.2d 942. Mere failure to obey a law enforcement officer's request does not bring a defendant within the ambit of this offense. *Id.*, citing *Garfield Hts. v. Simpson* (1992), 82 Ohio App.3d 286, 611 N.E.2d 892. Similarly, refusal to

provide information to police does not render one guilty of that offense. *Parma v. Campbell* (Nov. 1, 2001), Cuyahoga App. Nos. 79041 and 79042, citing *State v. McCrone* (1989), 63 Ohio App.3d 831, 580 N.E.2d 468.

Officer Clayburn admitted that he was not impeded by Lewis's refusal to provide the requested information. Officer Clayburn testified as follows:

**“Q. So, Mr. Lewis's refusal to give you any information on his daughter, including his address, didn't really impede you or obstruct you, because you were able to get the same information from the computer, correct?”**

**A. Correct.**

**Q. And in fact, his refusal to give you his address didn't impede or obstruct you, because there's numerous other ways for you to have gotten that address, correct?”**

**A. Correct.” Tr. 58-59.**

We conclude that Lewis's conviction for obstructing official business is not supported by the record. When viewed in the light most favorable to the prosecution, the evidence could not convince a reasonable trier of fact beyond a reasonable doubt that Lewis unlawfully hampered and impeded Officer Clayburn in the performance of his official duties. Accordingly, we sustain Lewis's sole assigned error.

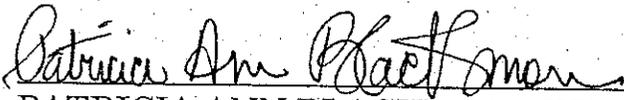
Judgment reversed and conviction vacated.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.



PATRICIA ANN BLACKMON, JUDGE

Concurring:

MARY J. BOYLE, J.,  
FRANK D. CELEBREZZE, JR., J.,  
ANN DYKE, J.,  
SEAN C. GALLAGHER, A.J.,  
LARRY A. JONES, J.,  
MARY EILEEN KILBANE, J.,  
KENNETH A. ROCCO, J.,  
MELODY J. STEWART, J., and  
JAMES J. SWEENEY, J.

CHRISTINE T. McMONAGLE, J., CONCURS WITH  
SEPARATE CONCURRING OPINION

Concurring in  
Separate Concurring Opinion:

PATRICIA A. BLACKMON, J.,  
MARY J. BOYLE, J.,  
SEAN C. GALLAGHER, A.J.,  
MARY EILEEN KILBANE, J.,  
KENNETH A. ROCCO, J., and  
MELODY J. STEWART, J.

COLLEEN CONWAY COONEY, J., DISSENTS WITH  
DISSENTING OPINION

CHRISTINE T. McMONAGLE, J., CONCURRING:

I concur with the majority opinion in this case, but write separately to emphasize my belief that any criminal conviction, whether felony or misdemeanor, results in a “collateral disability.” See my dissent in *State v. McGrath*, 8<sup>th</sup> Dist. No. 85046, 2005-Ohio-4420. I would hold it appropriate to review *any* timely filed appeal from a criminal conviction without necessity of alleging or proving a “collateral disability” resulting from the conviction.

For instance, in the recent case of *State v. Robinson*, 1st Dist. Nos. C-081084 and C-081141, 2010-Ohio-543, ¶20, the appellate court held that “conviction for a **minor-misdemeanor** violation of R.C. 2925.11 [marijuana possession] creates a disability prohibiting the possession of a firearm or dangerous ordnance, even though the conviction may not constitute a ‘criminal record’ for background checks involved in licensing.” (Emphasis added.) Penalties escalate for subsequent OVI offense convictions, see R.C. 4511.99, to say nothing of insurance rates. Misdemeanor assault convictions are non-expungeable. R.C. 2953.31. Any misdemeanor conviction prevents a subsequent request for expungement, whether felony or misdemeanor. *Chillicothe v. Herron* (1982), 3 Ohio App.3d 468, 445 N.E.2d 1171.<sup>1</sup> Under the Adam Walsh Act, many

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<sup>1</sup>“In order for one to be a ‘first offender’ as such term is defined in R.C. 2953.31, and entitled to expungement under R.C. 2953.32, the applicant must be a person with no other criminal convictions, including traffic offenses.” *Id.* at syllabus.

misdemeanor sex offenses result in labeling and reporting requirements. R.C. 2929.23. All applicants for the Ohio Bar examination must report any misdemeanor convictions; indeed, a misdemeanor conviction could form the basis of a suspension from the practice of law. *Disciplinary Counsel v. Gross* (1984), 11 Ohio St.3d 48, 463 N.E.2d 382. In short, there is a palpable collateral disability to any misdemeanor conviction.

In 1975, when the Ohio Supreme Court decided *State v. Wilson* (1975), 41 Ohio St.2d 236, 325 N.E.2d 236, the Court recognized numerous instances where convictions resulted in disabilities: under state law, as a result of a conviction, a defendant could not engage in certain businesses, serve as an official of a labor union, vote in elections, or serve as a juror.<sup>2</sup> Even in cases where a disability *might* occur, courts have decided that cases should not be rendered moot on appeal where: a prisoner was eligible for parole on another sentence and a misdemeanor conviction might have an adverse effect on granting such parole, a defendant's employer instituted proceedings that might result in suspending the defendant from work without pay if the conviction stood, and a conviction of an alien could weaken a defense to deportation proceedings.<sup>3</sup>

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<sup>2</sup>*United States v. Morgan* (1954), 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248; *Byrnes v. United States* (C.A.9, 1969), 408 F.2d 599; *Carafas v. LaVallee* (1968), 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554.

<sup>3</sup>*Cordle v. Woody* (D.C. Va. 1972), 350 F.Supp. 479; *Street v. New York* (1969), 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572; *Fiswick v. United States* (1946), 329 U.S.

Nonetheless, the law that has evolved essentially states that felons may obtain the ear of the appellate court even if they complete their sentence before appellate review; misdemeanants may not unless they specifically show a "collateral disability" resulting from their conviction, or jump through the "request for stay" hoops (either one or two, depending upon whether one "sides with" the majority or the dissent in this matter). I think it is time for the courts to review this issue. Many, if not all of the disabilities mentioned above, e.g., the effect of a minor misdemeanor conviction upon the right to possess firearms, the prohibition against expungement of certain offenses, etc., came into law well beyond the time for appeal of the conviction had run.

Again, while I believe that **any** criminal conviction creates collateral disabilities and hence upon timely request should be reviewed by appellate courts, we are asked to address here only whether one or two requests for stay are necessary in order to preserve appellate review for misdemeanants.

The issue has been framed as one of the "voluntariness" of the defendant's serving his sentence.<sup>4</sup> Both the majority and the dissent would hold that a

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211, 67 S.Ct. 224, 91 L.Ed.2d 196.

<sup>4</sup>I note with some amusement that the Black's Law Dictionary definition of "voluntary" reads as follows: "Unconstrained by interference; unimpelled by another's influence; spontaneous, acting of one's self \* \* \* proceeding from the free and unrestrained will of the person."

What jail sentence and/or monetary fine could accordingly, ever be termed "voluntarily served?"

defendant who completes his sentence and does not request a stay in either the trial or the appellate court, absent a showing upon the record that the defendant was **forced** to serve his sentence before he could reasonably file a request for stay,<sup>5</sup> has rendered his appeal moot. The majority would simply hold that a request for stay made (and denied) in the trial court before the sentence is served is sufficient evidence that the sentence was involuntarily served. The dissent would hold that unless the request for stay was repeated to the appellate court before the sentence was served, it would be presumed the sentence was served voluntarily. I concur with the majority that "once is enough." Actually, as articulated herein, I believe that "once is more-than-enough."

While it is true, of course, that stays of misdemeanor sentences are rarely granted by trial courts,<sup>6</sup> I believe the request therefor is sufficient indicia that any sentence subsequently served is being served involuntarily. Accordingly, I would review the merits of this matter.

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In short, people pay fines and serve sentences because they believe something much worse will happen if they do not. This is duress and coercion (albeit legal), not a voluntary act.

<sup>5</sup>Presumably a three day sentence issued on a Friday afternoon that culminated in "Officer, take him away."

<sup>6</sup>If only for the difficulty in a trial court's tracking a case in order to ascertain whether an appeal was actually filed and actually prosecuted to conclusion.

COLLEEN CONWAY COONEY, J., DISSENTING:

I respectfully dissent. I would dismiss the within appeal as moot because Lewis has completed his sentence, including six months' probation.

App.R. 8 provides:

- “(A) **Discretionary right of court to release pending appeal.** The discretionary right of the trial court or the court of appeals to admit a defendant in a criminal action to bail and to suspend the execution of his sentence during the pendency of his appeal is as prescribed by law.
- “(B) **Release on bail and suspension of execution of sentence pending appeal from a judgment of conviction.** Application for release on bail and for suspension of execution of sentence after a judgment of conviction shall be made in the first instance in the trial court. Thereafter, if such application is denied, a motion for bail and suspension of execution of sentence pending review may be made to the court of appeals or to two judges thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee.”

The majority correctly notes that Lewis was denied a stay by the trial court. However, our record shows he failed to request a stay from our court during the six months he was on probation. Therefore, I would find that Lewis voluntarily completed his sentence and his appeal is moot.

Two districts have followed this principle. The majority has cited the well-reasoned opinion in *Dayton v. Huber*, 2<sup>nd</sup> Dist. No. 20425, 2004-Ohio-7249. However, the Seventh District has also held that an appellant must seek a stay at the court of appeals to preserve his issues on appeal. See *Carroll Cty. Bur. of Support v. Brill*, 7<sup>th</sup> Dist. No. 05CA818, 2005-Ohio-6788, ¶20, 30, 33.

Two of the cases from this court on which the majority relies are easily distinguishable. A stay was denied by both the trial court and the court of appeals in *Cleveland v. Townsend*, Cuyahoga App. No. 87006, 2006-Ohio-6265. And *Cleveland v. Burge*, Cuyahoga App. No. 83713, 2004-Ohio-5210, involved a conviction for assault that by its very nature carried obvious collateral consequences.

While I agree with this court's analysis in *Broadview Hts. v. Krueger*, Cuyahoga App. No. 88998, 2007-Ohio-5337, a defendant who is given a fine and costs and asked "Can you pay today?" does not have much choice but to pay that day, at the trial court's urging.<sup>7</sup> Under that circumstance, clearly a defendant has not "voluntarily" paid or served his or her sentence. But when the defendant has time and opportunity to comply with App.R. 8 and seek a stay pending appeal, after filing a notice of appeal and before the sentence is completed, he must do so in order to demonstrate he did not voluntarily serve his sentence. That is the scenario presented in the instant case.

---

<sup>7</sup>The trial court in *Krueger* denied the defendant's request for a stay pending appeal, stating, "What's to appeal? You just pled no contest." *Krueger* paid her fine to the Parma Municipal Court that day. *Id.* at ¶4.

Not Reported in N.E.2d, 2004 WL 3561217 (Ohio App. 2 Dist.), 2004 -Ohio- 7249

Judges and Attorneys

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,  
Second District, **Montgomery** County.  
CITY OF **DAYTON** Plaintiff-Appellee  
v.  
John **HUBER** Defendant-Appellant.

No. **20425**.  
Decided Dec. 17, 2004.

**Background:** Defendant was convicted in the **Dayton** Municipal Court, No.2002-CRM-12704, of minor misdemeanor charge of failure to maintain the exterior of his premises. Defendant appealed pro se.

**Holding:** The Court of Appeals, **Montgomery** County, Brogan, J., held that defendant's appeal from his conviction was mooted by his voluntary payment of fine imposed following his conviction.  
Appeal dismissed.

West Headnotes



KeyCite Citing References for this Headnote

◀ 110 Criminal Law

◀ 110XXIV Review

◀ 110XXIV(J) Dismissal

◀ 110k1131 In General

◀ 110k1131(4) k. Grounds of Dismissal in General. Most Cited Cases  
(Formerly 110k1134(3))

Defendant's appeal from his conviction for minor misdemeanor charge of failure to maintain the exterior of his residence was mooted by his voluntary payment of fine imposed following his conviction; defendant failed to follow proper procedure for obtaining appeal bond from trial court and instead paid his fine, and defendant failed to present any evidence that he would suffer collateral legal consequences from his conviction.

(Criminal Appeal from **Dayton** Municipal Court).

Patrick J. Bonfield, Director of Law, Deirdre E. Logan, Chief Prosecutor, By: Mary E. Welsh, Assistant Prosecutor, Atty. Reg. # 0067542, **Dayton**, for Plaintiff-Appellee.

John **Huber**, Columbus, Defendant-Appellant, pro se.

BROGAN, J.

\*1 {¶ 1} Jonn **Huber** appeals pro se following his conviction and sentence in **Dayton** Municipal Court on a minor misdemeanor charge of failure to maintain the exterior of his premises at 259 Lorenz Avenue in **Dayton**.

{¶ 2} Although **Huber** advances numerous assignments of error, we have no occasion to address them because the present appeal is moot. The record reflects that **Huber** was convicted of the

EXHIBIT B

foregoing charge following a bench trial. The trial court imposed a fine and ordered **Huber** to pay court costs. **Huber** subsequently moved for a stay of execution of sentence in the trial court and also moved for a new trial. After the trial court denied the stay request, **Huber** paid his fine and court costs on March 10, 2003. He filed a notice of appeal to this court the same day.

{¶ 3} On December 12, 2003, we dismissed **Huber's** appeal for lack of jurisdiction because the motion for a new trial remained pending in the trial court. In our ruling, we also pointed out that **Huber's** appeal was moot:

{¶ 4} " \* \* \* [T]he state has correctly identified another problem with **Huber's** appeal. Even if we had jurisdiction to consider it, we would be compelled to conclude that the appeal was moot. 'Where a defendant, convicted of a criminal offense, has voluntarily paid the fine or completed the sentence for that offense, an appeal is moot when no evidence is offered from which an inference can be drawn that the defendant will suffer some collateral disability or loss of civil rights from such judgment or conviction.' *State v. Berndt* (1987), 29 Ohio St.3d 3, 4, 504 N.E.2d 712, citing *State v. Wilson* (1975), 41 Ohio St.2d 236, 325 N.E.2d 236, syllabus.

{¶ 5} "**Huber** failed to present any evidence that he would suffer collateral legal consequences from his conviction. Although he did request a stay in the trial court, that request was denied. The trial court informed **Huber** that he could 'post an appeal bond if [he] want[ed] to.' **Huber** contends that he inquired about doing so at the clerk's office, but did not receive any helpful information, and was left with 'no other choice' but to pay the fine. It is clear that **Huber** did not follow the appropriate procedure for obtaining an appeal bond from this court or the trial court. The usual procedure is to move the court to set an appeal bond. **Huber** was not unfamiliar with motion procedure, having filed numerous motions in these proceedings. The fact that the clerk was unhelpful did not render his decision to pay the fine and court costs involuntary. As such, his payment of the fine would be dispositive of his appeal in the absence of evidence of collateral legal consequences flowing from his conviction." *City of Dayton v. Huber, Montgomery App.* No. 19838, 2003-Ohio-6667.

{¶ 6} Following our dismissal of **Huber's** appeal, the trial court denied his motion for a new trial. He then re-filed his appeal, advancing thirteen assignments of error. Although the trial court's disposition of **Huber's** motion for a new trial removes the jurisdictional impediment to our review of his appeal, it remains moot for the reasons set forth in our December 12, 2003, ruling. As we explained in that decision, **Huber** failed to follow the procedure for obtaining an appeal bond from the trial court and instead paid his fine. We note too that he failed to seek a stay in this court. In our view, when a trial court denies a stay, a defendant convicted of a misdemeanor must seek a stay of execution of sentence in the appellate court in order to avoid a finding that his appeal is moot. Indeed, it reasonably follows that when a defendant chooses to pay his fine rather than availing himself of potential relief in the appellate court, such payment is voluntary.

\*2 {¶ 7} We realize a number of Ohio appellate districts have opined that a defendant may avoid a finding of mootness by seeking a stay "in either the trial court or the appellate court." See, e.g., *State v. Perry*, Washington App. No. 01CA35, 2002-Ohio-4822; *State v. Irwin* (May 23, 2001), Medina App. No. 3073-M; *State v. Harris* (1996), 109 Ohio App.3d 873, 673 N.E.2d 237; *City of Cleveland v. Wirtz* (June 17, 1993), Cuyahoga App. No. 62751. In all but one of the foregoing cases, however, the defendant failed to seek a stay anywhere. Thus, those courts had no occasion to consider whether a defendant must seek a stay in the appellate court after being denied a stay in the trial court.<sup>FN1</sup> In the remaining case, *Harris*, the defendant sought a stay in the trial court and then sought similar relief in the court of appeals. Thus, the *Harris* court also had no occasion to consider whether an appeal is moot when a misdemeanor offender pays his fine without seeking a stay in the court of appeals following the trial court's denial of such relief. We note too that each of the foregoing cases cites *State v. Conliff* (1978), 61 Ohio App.2d 185, 401 N.E.2d 469, for the proposition that a defendant may avoid a finding of mootness by seeking a stay "in either the trial court or the appellate court." *Conliff* actually says no such thing and cites nothing to support such a proposition.<sup>FN2</sup>

FN1. Likewise, in *Wilson*, supra, and *Berndt*, supra, two leading Ohio Supreme Court cases dealing with mootness, the defendant failed to seek a stay from either the trial

court or the appellate court.

**FN2.** If anything, the Tenth District's discussion in *Conliff* suggests that a request for a stay in the court of appeals would have been necessary if the trial court had denied a stay. The *Conliff* court stated: "Defendant secondly contends that the payment of the fine and costs on the day of conviction was not voluntary, in that the trial court conditioned his release upon such payment as well as the appeal bond, which was set to stay the imposition of the jail sentence. The record, however, does not support that contention. In any event, had the trial court refused a stay, upon proper application to this court, a stay would have been granted pending an appeal in order to prevent the appeals from becoming moot in the interim." *Conliff, supra, at 193, 401 N.E.2d 469.*

{¶ 8} In any event, as we explained in our December 12, 2003, ruling, **Huber** paid his fine and failed to follow the proper procedure for obtaining an appeal bond in either the trial court or this court. He also has failed to present any evidence that he would suffer collateral legal consequences from his conviction. As a result, we once again find that his appeal must be dismissed, as moot.

Appeal dismissed.

GRADY, J., and YOUNG, J., concur.

Ohio **App.** 2 Dist., 2004.

**Dayton v. Huber**

Not Reported in N.E.2d, 2004 WL 3561217 (Ohio App. 2 Dist.), 2004 -Ohio- 7249

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Judges

- **Brogan, Hon. James Austin**

State of Ohio Court of Appeals, 2nd District  
Ohio

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Judicial Expert Challenge Report](#) | [Profiler](#)

- **Grady, Hon. Thomas Joseph**

State of Ohio Court of Appeals, 2nd District  
Ohio

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- **Bonfield, Patrick J.**

Dayton, Ohio

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Not Reported in N.E.2d, 2005 WL 3489763 (Ohio App. 7 Dist.), 2005 -Ohio- 6788

Judges and Attorneys

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,  
Seventh District, **Carroll** County.  
**CARROLL COUNTY BUREAU OF SUPPORT** and Sheryl Walker, Plaintiffs-Appellees,  
v.  
Terry **BRILL**, Defendant-Appellant.

No. **05 CA 818**.  
Decided Dec. 15, **2005**.

Civil Appeal from Common Pleas Court, Juvenile Division, Case No.2004 4034, Dismissed.  
Attorney Donald R. Burns, Jr., Prosecuting Attorney, Attorney John C. Childers, Assistant Prosecuting Attorney, Carrollton, for Plaintiffs-Appellees.

Attorney John M. Gartrell, Public Defender, Dover, for Defendant-Appellant.

DEGENARO, J.

\*1 {¶ 1} This timely appeal comes for consideration upon the record in the trial court and the parties' briefs. Appellant Terry **Brill** appeals the decision of the **Carroll** County Court of Common Pleas, Juvenile Division, finding him in contempt of his child **support** order and sentencing him to thirty days in jail. However, we conclude that **Brill** has already voluntarily served his sentence as he did not appeal the trial court's entry finding him in contempt and removing the opportunity to purge, nor did he file a motion to stay execution of his sentence with this court. Thus, we dismiss this appeal as moot.

{¶ 2} On March 9, **2005**, the **Carroll** County Child **Support** Enforcement Agency filed a Motion in Contempt claiming that **Brill** had failed to comply with an administrative order issued by the **Carroll** County Child Enforcement agency. More specifically, he was charged with failing to make his full monthly payments of \$240 per month, failing to provide proof of medical insurance, and failing to appear at the Bureau of **Support** for an Office Review Hearing. Attached to the motion was a Notice of Hearing directing **Brill** to appear before the court on April 21, **2005**.

{¶ 3} The trial court sent an additional notice setting a show cause hearing for April 21, **2005**. The notice stated that the court could impose penalties of increasing severity for the first offense, second offense, and third offense. Notably, the court could impose for a first offense a fine of not more than \$250.00, a definite term of imprisonment of not more than 30 days in jail or both. A hearing was conducted on the matter.

{¶ 4} At the hearing, Brill's attorney explained to the court that Brill was suffering from Crohn's disease and was unable to work except for odd jobs. Brill was going to process a claim for disability based upon the disease. He testified that he was not totally disabled by the disease but was barely supporting himself at the time. He explained that the condition changes based on changes of stress level and diet. In response to Brill's explanation of his disease, the following exchange occurred:

{¶ 5} Court: "You know he could have submitted that information to the Child Support Enforcement Agency a long time ago and probably kept them abreast of whatever applications were pending. But when you ignore any correspondence that comes from the Bureau then you do so at your own risk Mr. Brill."

{¶ 6} Attorney: "Would the court consider giving him a month to see if he makes any progress on

EXHIBIT C

the claim?

{¶ 7} Court: "I'm not interested in progress on the claim. I(sic) interested in payment toward child support."

{¶ 8} Attorney: "I understand."

{¶ 9} Court: "It will be my finding, indeed, that Mr. Brill is in contempt of court for having failed to make any payments. And inasmuch as he claims an excuse, not providing that information to the Child Support Enforcement Agency. Now, he's made all kinds of allegations about the child's mother in trying to secure all kinds of reviews involving this particular case; but he's shown no interest in supporting the children. Now that speaks pretty strongly of his commitment. It will be my sentence today that you will serve thirty days in the Carroll County Jail, Mr. Brill. I'm not sure what the occupancy is now, so I'll give you thirty days to get your house in order. But you be prepared on May 21 to begin serving your jail time. Is that clear?"

\*2 {¶ 10} Mr. Brill: "Yes, sir."

{¶ 11} Attorney: "If he should get some positive word on his disability claim, just give that to the support bureau?"

{¶ 12} Court: "Uh-huh or money."

{¶ 13} Attorney: "Okay."

{¶ 14} Mr. Wells: "We will also need medical verification from his doctor that he says he is unable to work."

{¶ 15} Attorney: "You understand that?"

{¶ 16} Mr. Brill: "Uh-huh."

{¶ 17} Attorney: "Do that."

{¶ 18} Court: "And any time you don't make the full payment, you need to be down at the bureau talking to them and making suitable arrangements for some alternative. Don't ignore it. Because when you ignore it, you leave me little choice in terms of consequence. Very well. You better go home and mark May 21 on your calendar, Mr. Brill. Don't let it pass."

{¶ 19} Brill was found in contempt of court. On April 26, 2005, a judgment entry was filed by the court finding Brill guilty and sentencing him to 30 days in the county jail. However, the last sentence of the entry explains that the jail sentence would be suspended if Brill complied with the Bureau of Support thus affording Brill an opportunity to purge.

{¶ 20} On May 21, 2005, Brill began his sentence and completed it upon 30 days. On May 26, 2005 his attorney filed both a stay of execution with the trial court, which was denied, and an appeal with this court. Brill did not attempt to seek a stay of execution from this court pursuant to our Local Rule 1(B) or App. R.7.

{¶ 21} Notably, the judgment entry denying the stay of execution once again explains that Brill was given the opportunity to purge his contempt by providing the Bureau a doctor's verification that Brill was unable to work due to his physical condition and to bring himself into compliance with the Bureau. The court concluded that Brill had failed to comply. Consequently, it was ordering him to serve his 30 day sentence at the county jail.

{¶ 22} Although it is from the April 26, 2005 judgment entry that Brill now appeals, the actual final appealable order was the May 26, 2005 entry stating that Brill had failed to purge and would now be ordered to serve his sentence. The law is clear: a contempt citation is not a final appealable order

if it only imposes a conditional punishment coupled with an opportunity to purge the contempt. *Board of Trustees of Concord Twp. V. Baumgardner*, 11th Dist. No.2002-G-2430, 2003-Ohio-4361, ¶ 12. Until the opportunity to purge has been removed, there is no final appealable order." *Davis v. Davis* (Aug. 20, 2004), 11th Dist. No.2004-G-2572 at ¶ 6.

{¶ 23} Although it would appear that **Brill** has filed a premature notice of appeal under the *Davis* holding, pursuant to App.R. 4(C), we will treat **Brill's** notice of appeal as having been filed immediately after the issuance of the May 26, 2005 judgment. See *Buoscio v. Macejko* (Feb. 14, 2003), 7th Dist. No. 00-CA-00138. We will next proceed to address **Brill's** sole assignment of error which states:

\*3 {¶ 24} "Whether the trial court did err and prejudice Appellant by ordering him to appear at **Carroll** County Jail on May 21, 2005 without scheduling a second hearing to determine whether or not he had complied with orders of the court issued in the contempt findings of April 21, 2005."

{¶ 25} As a preliminary matter, we must determine whether this case is in fact moot. The State of Ohio argues that since **Brill** has served his 30 days in jail, an argument that they **support** with an affidavit signed by the sheriff who was in charge of administering the jail sentence, that **Brill's** argument is now moot. However, the law regarding mootness appears to differ slightly in a civil versus criminal context. Thus, we must first examine whether **Brill's** jail sentence was a result of civil or criminal contempt.

{¶ 26} Contempt proceedings can be described as primarily either civil or criminal, although the proceedings themselves are sui generis. *Brown v. Executive 200* (1980), 64 Ohio St.2d 250, 253. Civil and criminal contempt proceedings can be distinguished by the purpose and character of the punishment meted out. *Carroll v. Detty* (1996), 113 Ohio App.3d 708, 711. In civil contempt, the purpose of the punishment is to coerce the contemnor to obey a judicial order for the benefit of a third party. Id. In civil contempt, the, "contemnor is said to carry the keys of his prison in his own pocket [citation omitted] \* \* \* since he will be freed if he agrees to do as ordered." *Pugh v. Pugh* (1984), 15 Ohio St.3d 136, 139, quoting *Brown v. Executive 200, Inc.*, 253. Because civil contempt sanctions are only conditional sanctions, a civil contempt conviction must provide a means for the contemnor to purge his contempt. *State v. Kilbane* (1980), 61 Ohio St.2d 201, 206-207; *Carroll* at 712. To find civil contempt, a trial court needs only to do so by clear and convincing evidence. *Carroll* at 711.

{¶ 27} On the other hand, criminal contempt sentences, " \* \* \* are punitive in nature and are designed to vindicate the authority of the court [citations omitted]." *Kilbane* at 205. Criminal contempt sentences are also, " \* \* \* usually characterized by an unconditional prison sentence." *Brown* at 254. A trial court must find proof of criminal contempt beyond a reasonable doubt. *Schader v. Huff* (1983), 8 Ohio App.3d 111, 112.

{¶ 28} In the present case, it is unclear whether the court imposed a sentence for civil contempt or criminal contempt. Failure to pay child **support** usually involves a finding of civil contempt. *Carroll* at 712. Moreover, contempt in the context of a hearing pursuant to R.C. § 2705.05 is essentially civil in nature. *Brown* at 253. However, despite the fact that **Brill** was given an opportunity to purge, when the time came for **Brill** to serve his sentence, the trial court stated in its judgment entry denying a stay of execution that Mr. **Brill** had failed to purge by communicating with the Bureau. Therefore, the court denied the motion to stay.

\*4 {¶ 29} This action by the court could potentially mean two things. First, it could mean that **Brill** could be released from prison if he communicated with the Bureau while serving his sentence. Or, alternatively, it could mean that the trial court would be sending him to jail regardless of what actions **Brill** took in jail. In the first instance, the court would still be finding **Brill** guilty of civil contempt. And in the second instance, the court would be punishing **Brill** with no further opportunity to purge which arguably could be considered criminal contempt.

{¶ 30} Regardless of which type of contempt was involved in this case, we conclude that **Brill** completed his jail sentence voluntarily as he never motioned the trial court to set a hearing regarding

whether or not he purged, nor did he attempt to stay the execution of his sentence by motioning for relief from this court. For example, the Ohio Supreme Court has held, that "[w]here a defendant, convicted of a criminal offense, has voluntarily paid the fine or completed the sentence for that offense, an appeal is moot when no evidence is offered from which an inference can be drawn that the defendant will suffer some collateral disability or loss of civil rights from such judgment or conviction." *State v. Wilson* (1975), 41 Ohio St.2d 236, syllabus.

{¶ 31} Arguably, Brill could be prejudiced by the fact that each additional finding of contempt made by a court brings harsher and harsher penalties. However, the Ohio Supreme Court rejected this argument in *State v. Berndt* (Ohio 1987), 29 Ohio St.3d 3, where the appellee argued that the existence of this conviction would enhance his penalty in the event he is again convicted of the same offense. The court responded that "this cannot fairly be described as a collateral disability within the meaning of *Wilson*, supra, since no such disability will exist if appellee remains within the confines of the law." *Id.* at 4-5.

{¶ 32} Similarly, if this court determined that the contempt was civil in nature, courts generally will exercise jurisdictional restraint in cases that do not present actual controversies. *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14. An appeal will be dismissed when, without the fault of any party, circumstances preclude the reviewing court from granting effective relief. *James v. Keller, Inc. v. Flaherty* (1991), 74 Ohio App.3d 788, 791. An appellate court is not required to render an advisory opinion on a moot question or to rule on a question of law that cannot affect matters at issue in a case. *Miner v. Witt* (1910), 82 Ohio St. 237, 238.

{¶ 33} Here, Brill is challenging the fact that he was ordered to report to jail without being given a second hearing to demonstrate that he had in fact purged himself of the contempt. However, since he has already reported to jail and served the entire sentence, there is nothing this court could do to provide relief to Brill on remand. Because this court cannot undo the fact that he has served his sentence, any decision regarding whether or not he was properly ordered to serve his jail sentence would be purely academic. Accordingly, this appeal is dismissed as moot.

DONOFRIO, P.J., concurs.

VUKOVICH, J., concurs.

Ohio App. 7 Dist., 2005.

Carroll Cty. Bur. of Support v. Brill

Not Reported in N.E.2d, 2005 WL 3489763 (Ohio App. 7 Dist.), 2005 -Ohio- 6788

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Judges

• **DeGenaro, Hon. Mary**

State of Ohio Court of Appeals, 7th District  
Ohio

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• **Donofrio, Hon. Gene**

State of Ohio Court of Appeals, 7th District  
Ohio

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• **Vukovich, Hon. Joseph J.**

State of Ohio Court of Appeals, 7th District  
Ohio

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# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

CITY OF CLEVELAND HEIGHTS

Appellee

COA NO.  
92917

LOWER COURT NO.  
CRB 0801263A

CLEVELAND HTS. MUNI.

-vs-

WARREN LEWIS

Appellant

MOTION NO. 434409

Date 06/10/2010

Journal Entry

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MOTION BY APPELLEE TO CERTIFY A CONFLICT IS GRANTED. THIS COURT CERTIFIES THAT A CONFLICT EXISTS BETWEEN THIS COURT'S EN BANC DECISION IN CITY OF CLEVELAND HEIGHTS V. LEWIS, CUYAHOGA APP. NO. 92917, 2010-OHIO-2208, AND THE DECISIONS OF THE SECOND DISTRICT AND SEVENTH DISTRICT IN DAYTON V. HUBER, MONTGOMERY APP. NO. 20425, 2004-OHIO-7249; AND CARROLL CTY. BUR. OF SUPPORT V. BRILL, CARROLL APP. NO. 05 CA 818, 2005-OHIO-6788.

THE COURT HEREBY CERTIFIES THIS MATTER TO THE OHIO SUPREME COURT PURSUANT TO APP.R. 25(A) AND ARTICLE IV, SECTION 3(B)(4) OF THE OHIO CONSTITUTION FOR RESOLUTION OF THE FOLLOWING ISSUE:

"WHETHER AN APPEAL IS RENDERED MOOT WHEN A MISDEMEANOR DEFENDANT SERVES OR SATISFIES HIS SENTENCE AFTER UNSUCCESSFULLY MOVING FOR A STAY OF EXECUTION IN THE TRIAL COURT, BUT WITHOUT SEEKING A STAY OF EXECUTION IN THE APPELLATE COURT."

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JUN 10 2010

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

Judge MARY EILEEN KILBANE, Concur

[Signature]  
Administrative Judge  
SEAN C. GALLAGHER

EXHIBIT D