

ORIGINAL

NO. 2010-0906

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 94732

CUYAHOGA COUNTY
SHERIFF'S DEPARTMENT,

Appellee

-vs-

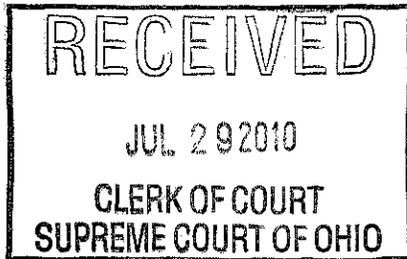
GREGORY SMITH (DEDONNO),

Appellant

MERIT BRIEF OF APPELLEE

Counsel for Plaintiff-Appellee

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR



JAMES MOSS (0061958)
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellant

GREGORY SMITH (DEDONNO)
PRO SE, INMATE# 365935
RICHLAND CORRECTIONAL INSTITUTION,
1001 OLIVESBURG RD.,
P.O. BOX 8107,
MANSFIELD, OH. 44901

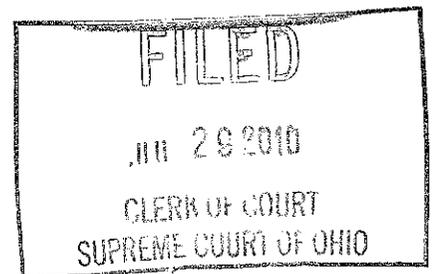


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MEMORANDUM IN SUPPORT

I. STATEMENT OF THE CASE

After entering into a plea bargain, Appellant Gregory Smith was convicted on October 13, 1998, in Cuyahoga County Court of Common Pleas Case No. CR-98-362460-A of one count of rape in violation of R.C. 2907.02, a felony of the first degree, and one count of kidnapping in violation of R.C. 2905.01, a felony of the first degree. He was sentenced to serve ten years on the charge of rape and to nine years on the charge of kidnapping to run consecutively.

On direct appeal, the Eighth District Court of Appeals affirmed Appellant's convictions. *State v. Smith* (Mar. 9, 2000), Cuyahoga App. No. 75512 (hereinafter "*Smith I*"). Subsequently, the Eighth District Court denied Appellant's application to reopen his appeal. *State v. Smith* (Feb. 5, 2002), Cuyahoga App. No. 75512 (hereinafter "*Smith II*"). In 2003, the Eighth District Court affirmed the trial court's denial of Appellant's renewed motion to vacate and/or withdraw guilty plea he had filed with the trial court in September 2002. *State v. Smith*, Cuyahoga App. No. 82062, 2003-Ohio-3675 (hereinafter "*Smith III*.")

In February 2008, Appellant moved to vacate his sentence on the basis that it did not include postrelease control. The trial court granted Appellant's motion to vacate and held a sentencing hearing on April 1, 2008, at which the trial court sentenced Appellant to an aggregate 19-year term of incarceration and imposed five years of postrelease control upon Appellant. On April 2, 2009 the Eighth District Court affirmed the trial court's April 1, 2008, resentencing. *State v. Smith*, Cuyahoga App. No. 91346, 2009-Ohio-1610 (hereinafter "*Smith IV*").

On January 14, 2010, Appellant filed a motion for resentencing under authority of *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434. On January 29, 2010, the trial court granted Appellant's motion in part, ruling that Appellant was entitled to a hearing under R.C. 2929.191 and ordered Appellant returned for a sentencing hearing.

On February 10, 2010, the trial court conducted a hearing and informed Appellant he was subject to five years of mandatory postrelease control and that the failure to abide by the terms and conditions of postrelease control would subject him to being returned to prison for up to one-half of his original sentence. On February 17, 2010, the trial court issued a nunc pro tunc journal entry that restated the means of conviction, reimposed the 19-year sentence and five years of postrelease control, and notified Appellant that violating postrelease control would allow the parole board to impose prison as part of the sentence for up to one-half of the originally stated prison term. Appellant has appealed the trial court's issuance of the journal entry on February 17, 2010, that is currently pending in the Eighth District Court of Appeals.¹ On March 8, 2010, the Eighth District Court denied Appellant's application to reopen his appeal in *Smith IV. State v. Smith*, Cuyahoga App. No. 91346, 2010-Ohio-897 (hereinafter "*Smith V*").

Meanwhile, on February 4, 2010, Appellant filed a Petition For Writ Of Habeas Corpus (Petition) asking the Eighth District Court to order him immediately discharged and to dismiss the charges in his criminal matter. On February 11, 2010, Appellees Judge Dick Ambrose, the Cuyahoga County Sheriff's Office, and the Cuyahoga County Jail filed a Motion For Summary Judgment to Appellant's Petition. On March 1, 2010, Appellant filed an Amended Complaint For Writ Of Habeas Corpus (Amended

¹ *State v. Smith*, Cuyahoga App. No. 94732.

Complaint). Appellees filed a Motion to Dismiss Appellant's Amended Complaint on the basis that Appellant filed his Amended Complaint without leave of court as required by Civ.R. 15(A). On March 15, 2010, Appellant filed a Motion To Strike Appellees' Motion To Dismiss Appellant's Amended Complaint.

On April 24, 2010, the Eighth District Court denied Appellees' Motion to Dismiss Appellant's Amended Complaint, denied Appellant's Motion To Strike, and granted Appellees' Motion For Summary Judgment. *Smith v. Cuyahoga Cty. Sheriff's Dept. et al.*, Cuyahoga App. No. 94626, 2010-Ohio-1763 (hereinafter "*Smith VI*"). Appellant subsequently filed an appeal of the Eighth District Court's judgment in *Smith VI* that is currently before this Court.

II. LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1: THE TEN AND TWELVE-YEAR DELAY BETWEEN MR. DEDONNO'S FINDING OF GUILT TO THE IMPOSITION OF SENTENCE ESSENTIALLY DEPRIVED THE TRIAL COURT OF JURISDICTION TO SENTENCE. (CRIM.R. 32(A), ARTIAGA V. MONEY, N.D. OHIO NO. 3:04 CV 7121).

In his Merit Brief Appellant claims that the Eighth District Court erred when it granted Appellees' Motion For Summary Judgment to Appellant's Petition For Writ Of Habeas Corpus in *Smith v. Cuyahoga Cty. Sheriff's Dept.*, Cuyahoga App. No. 94626, 2010-Ohio-1763 ("*Smith VI*"). In *Smith VI* the Eighth District Court found that the trial court had jurisdiction to resentence Appellant under *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, and that Appellant had an adequate remedy at law that precludes the issuance of a writ of habeas corpus.

Appellant contends in his Merit Brief that the trial court did not have jurisdiction to resentence him on February 10, 2010, due to the delay between his plea on September

22, 1998, and his resentence on February 10, 2010. Appellant relies primarily upon *State v. Mack*, Cuyahoga App. No. 92606, 2009-Ohio-6460, in support of his proposition that the trial court did not have jurisdiction to resentence him on February 10, 2010, because the delay in imposing postrelease control violated Crim. R. 32(A).

But *Mack* is distinguishable from the instant case. In *Mack* the defendant was sentenced to eight months incarceration and, upon completion of his sentence, a term of community control. But upon completion of his sentence, defendant was released without having been placed upon community control. Once it was determined that defendant was never placed on community control, the trial court held a hearing 18 months after defendant's release and placed him on community control. The Eighth District Court in *Mack* found that the trial court violated Crim.R. 32(A) because of the long delay between the finding of guilt and the pronouncement of sentence. *State v. Mack*, Cuyahoga App. No. 92606, 2009-Ohio-6460, at ¶ 14. In the instant case there was no unnecessary delay between Appellant's plea on September 22, 1998, and his sentence on October 13, 1998.

Consequently, the Eighth District Court in *Smith VI* correctly determined that Appellant's reliance on *Mack* was misplaced. *Smith v. Cuyahoga Cty. Sheriff's Dept.*, Cuyahoga App. No. 94626, 2010-Ohio-1763, at ¶ 11. The court in *Smith VI* found that the proper imposition of postrelease control has been addressed by this Court in *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197. *Smith VI, supra* at ¶11. In *Simpkins* this Court held that "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed

his sentence.” *Simpkins, supra* at syllabus. Similarly, in *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, this Court denied relator’s petition for writ of prohibition because relator’s sentence had not yet been completed when he was resentenced and, therefore, the trial judge was authorized to correct the invalid sentence to include the appropriate, mandatory postrelease control term. *Id.* at ¶ 28. Therefore, contrary to Appellant’s claim in his Merit Brief, the trial court has jurisdiction to resentence Appellant to include the appropriate postrelease control until the expiration of his sentence.

Moreover, Crim.R. 32(A) is not applicable when an offender must be resentenced to include the proper imposition of postrelease control. *State v. Culgan*, Medina App. No. 09CA0060-M, 2010-Ohio-2992 at ¶ 35 (court found that seven years between the time defendant pled guilty to the time at which he was resentenced to include postrelease control did not implicate Crim.R. 32(A) since trial court did not refuse to sentence the offender, but merely improperly sentenced offender); *State v. Barnes*, Portage App. No. 2006-P-0089, 2007-Ohio-3362 at ¶ 56 (Crim. R. 32(A) does not apply to resentencing to impose postrelease control).

Appellant also claims, for the first time in his appeal to this Court, that the trial court’s delay in resentencing Appellant to include postrelease control violated the Confrontation Clause of the United States Constitution and his constitutional speedy trial rights. But Appellant waived these new claims by failing to raise them in the Petition For Writ Of Habeas Corpus he filed on February 4, 2010, that is at issue before this Court. *State ex rel. Scruggs v. Sadler*, 102 Ohio St.3d 160, 2004-Ohio-2054, at ¶ 6 (Court found relator waived new claims he raised on appeal by failing to raise them in his petition for writ of mandamus).

In addition, Appellant's contention that the trial court violated his constitutional right to a speedy trial cannot be raised by extraordinary writ. *Brown v. Leonard*, 86 Ohio St.3d 593, 1999-Ohio-214 (a claimed violation of constitutional right to a speedy trial is not cognizable in habeas corpus). Moreover, Appellant has failed to provide any analysis or legal support for his claims that the trial court's delay in resentencing Appellant to include postrelease control violated the Confrontation Clause of the United States Constitution and his constitutional speedy trial rights.

Furthermore, a habeas corpus is not available when there is an adequate remedy at law. *In re Coleman*, 95 Ohio St.3d 284, 2002-Ohio-1804, at ¶ 4. Since Appellant could have appealed his sentences that he claims improperly included post-release control, he is precluded from raising the issue by way of petition for writ of habeas corpus. *Patterson v. Ohio Adult Parole Authority*, 120 Ohio St.3d 311, 2008-Ohio-6147, ¶ 8 (petition for writ of habeas corpus not available remedy since petitioner had adequate remedy by way of direct appeal to raise his claim that he did not receive proper notification of post-release control at his sentencing hearing).

The Eighth District Court in *Smith VI* correctly determined that Appellant had an adequate remedy at law through appeal that precludes the issuance of a writ of habeas corpus. *Smith v. Cuyahoga Cty. Sheriff's Dept.*, Cuyahoga App. No. 94626, 2010-Ohio-1763, at ¶ 12 (*Smith VI*) In fact, Appellant appealed the trial court's resentence of April 1, 2008, but failed to raise claims concerning the imposition of postrelease control in his appeal. *State v. Smith*, Cuyahoga App. No. 91346, 2009-Ohio-1610 (*Smith V*). In addition, Appellant has appealed the trial court's most recent issuance of a journal entry

on February 17, 2010, in which postrelease control was imposed.² Since Appellant has an adequate remedy to appeal the trial court's imposition of postrelease control he is not entitled to a remedy by way of a writ of habeas corpus.

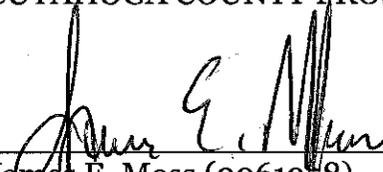
Therefore, Appellees respectfully request that this Court affirm the judgment of the Eighth District Court of Appeals that granted Appellees' Motion For Summary Judgment to Appellant's Petition For Writ Of Habeas Corpus.

III. CONCLUSION

For the foregoing reasons, Appellees Judge Dick Ambrose, the Cuyahoga County Sheriff's Office, and the Cuyahoga County Jail respectfully request that this Honorable Court affirm the judgment of the Eighth District Court of Appeals granting Appellees' Motion For Summary Judgment to Appellant's Petition For Writ Of Habeas Corpus.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

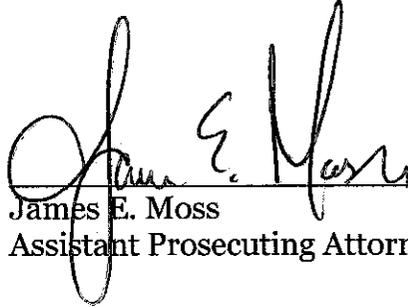


James E. Moss (0061958)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800

² *State v. Smith*, Cuyahoga App. No. 94732 (pending).

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellees Judge Dick Ambrose, Cuyahoga County Sheriff's Office, and Cuyahoga County Jail was sent this 28th day of August, 2010, by regular U.S. Mail to Gregory Smith Dedonno, Inmate # 365935, at Richland Correctional Institution, 1001 Olivesburg Road, P.O. Box 8107, Mansfield, Ohio 44905.



James E. Moss
Assistant Prosecuting Attorney