

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. : Case No. 2010-1482
GREG H. HEMSLEY :
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 Relator/Appellant, : On Direct Appeal from the Summit
 : County Court of Appeals,
 v. : Ninth Appellate District
 :
 : Court of Appeals
 Honorable Judge Brenda Burnham-Unruh : Case No. 25445
 :
 :
 Respondent/Appellee. :
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 :

AMENDED MERIT BRIEF OF APPELLANT GREG H. HEMSLEY

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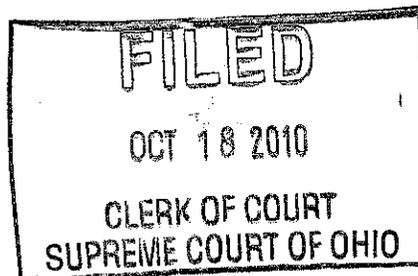
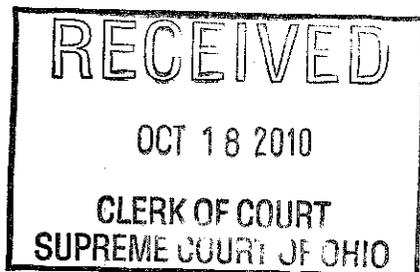


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STATEMENT OF THE CASE AND FACTS

With this appeal of right, Greg Hemsley, relator and appellant, appeals the Ninth District Court of Appeals' dismissal of his petition for writ of prohibition. Specifically, Mr. Hemsley challenges the trial court's jurisdiction to hold a community-control revocation hearing after Mr. Hemsley's period of control expired; and the trial court's authority to rule on charges that were filed after the control period expired.

I. Mr. Hemsley's community control terminated on March 24, 2010, well before a revocation hearing was scheduled.

On June 22, 2002, Mr. Hemsley was sentenced to 18 months in prison after pleading guilty to fourth and fifth degree felony theft charges and a fifth degree charge of Misuse of a Credit Card. After serving a significant portion of his prison term which included treatment for his gambling addiction, Mr. Hemsley motioned the court for judicial release. His motion was accompanied by a letter from Sergeant Garry Pryor of the Lorain Correctional Institution who had never before written a letter on a prisoners' behalf but felt so compelled because of Mr. Hemsley's exemplary behavior. (See Writ of Proh. Exh. A, Letter from Sergeant Pryor)

On March 24, 2005, Respondent Judge Unruh released Mr. Hemsley on community control for a three-year term. (Writ of Proh. Exh. B, 03/25/05 Journal Entry Granting Judicial Release) Respondent later extended Mr. Hemsley's community control for two years, to the maximum five-year limit allowed by law, providing more time for restitution payments. (Writ of Proh. Exh. C, 2/28/08 Journal Entry) Consequently, Mr. Hemsley's community control was set to terminate on March 24, 2010.

Upon release from prison, Mr. Hemsley moved to North Carolina with permission of the court and the Summit County Probation Department after his wife's job was transferred there. Consequently, Mr. Hemsley's supervision was transferred to the North Carolina Department of Corrections. (See Writ of Proh. Exh. D, Affidavit of Officer Pinner at ¶1-2) Mr. Hemsley currently resides at his home in North Carolina.

While on probation, Mr. Hemsley continually sought full-time employment in an effort to secure stable income. His felony record made this difficult and he worked primarily as a consultant to companies on an as-need basis. At one point Mr. Hemsley was offered the opportunity for full-time employment, however, the job was contingent on his being released from community control. (See Writ of Proh. Exh. E., Employers Letter) The position required extensive travel and his probation created an obstacle. *Id.* Mr. Hemsley filed a motion requesting early termination of his community control, explaining the situation to the court and how this position would have greatly increased his income and his ability to pay restitution; supporting his motion with an affidavit from his potential employer and his probation officer. (See Writ of Proh. Exh F) In fact, Mr. Hemsley even offered to sign a promissory note, promising continued payments at an increased rate, ensuring complete payment of his restitution. (Writ of Proh. Exh. G) In spite of his efforts, behavior, and willingness to sign a promissory note, Judge Unruh overruled his Motion to Terminate Community Control without a hearing, offering no reason for her decision. (See Writ of Proh. Exh I, Journal Entry) Mr. Hemsley filed a Motion for Reconsideration, which was also overruled without a hearing. (See Writ of Proh. Exh. J, Journal Entry)

Ultimately Mr. Hemsley was unable to secure a full-time position but continued to periodically do contract work for the company. Sometimes that work required travel both in and out of the country. Prior to any travel, work or personal, Mr. Hemsley diligently contacted his

community-control officer to request permission. (See Writ of Proh. Exhs. D and K , Affidavits of E.B. Pinner at ¶4-9, noting Mr. Hemsley never traveled without permission and always provided her with detailed itineraries, locations, dates and any other information she required; checking in with her immediately upon his return.) Mr. Hemsley's supervising officer attested to Mr. Hemsley's conscientious nature, explaining that Mr. Hemsley even sought permission to travel out of the State when the path of a hiking trip he was planning meandered across state lines for only a few miles. *Id* at ¶5. On January 2, 2010, Mr. Hemsley traveled to Mexico for 6 days on business. As with all his other trips, he first obtained the permission of his supervising officer and reported to her immediately upon his return. (See Writ of Proh. Exh. N)

On January 28, 2010, Mr. Hemsley was called before the court and was charged with an alleged community-control violation. (See Writ of Proh. Exh. H, Notice of Charge) Mr. Hemsley pled not guilty to this charge, offering evidence from his supervising probation officer, emails, and other records. (See Writ of Proh. Exh M at 2-4, Tr. Tr. excerpt from 2/11/2010 Hearing; Exh. N at ¶9) Albeit this evidence, Judge Unruh scheduled a hearing on the alleged violation for February 4, 2010. (Writ of Proh. Exh. O, Order) Judge Unruh then proceeded to continue the hearing on at least two occasions, scheduling it finally for April 22, 2010 -- nearly a month after Mr. Hemsley probation terminated on March 24, 2010. At that hearing, counsel motioned the court for dismissal of all charges indicating the court's lack of subject matter jurisdiction. (See Writ of Proh. Exh. Q, 4/22/10 hearing transcript at 2,3,7, and 9) The court overruled that motion on the record and rescheduled the hearing for May 13, 2010; nearly two months after Mr. Hemsley's probation terminated. (See Writ of Proh. Exh. Q; Exh. R) Mr. Hemsley filed an appeal of the decision and the hearing was again stayed. The Ninth District Court of Appeals dismissed the appeal indicating the trial court's decision was not a final

appealable order (Appx. A; dismissal entry). Mr. Hemsley then filed a writ of prohibition with the court. When the court of appeals dismissed Mr. Hemsley's writ, Judge Unruh again scheduled a revocation hearing. She since sua sponte stayed the hearing awaiting a decision from this Court.

The North Carolina Department of Corrections has discharged Mr. Hemsley from supervision based on its belief that Mr. Hemsley's community control terminated on March 24, 2010.

II. Mr. Hemsley was charged with additional violations after his community control terminated.

Upon arrival at the April 22, 2010 hearing, the Summit County Adult Probation Department served Mr. Hemsley with new charges alleging additional violations of his community control. (See Writ of Proh. Exh. P, Amended Charge). Again, these charges were completely contrary to the affidavits of his supervising probation officer. Further, these were served after his probation had terminated and just moments before the hearing was to proceed.

III. Mr. Hemsley seeks Extraordinary Relief from this Court

To prevent the trial court from exercising further jurisdiction, Mr. Hemsley sought extraordinary relief from the Ninth District Court of Appeals through a petition for prohibition. The Ninth District granted Respondent's motion to dismiss, thereby denying Mr. Hemsley writ. *State ex rel. Hemsley v. Unruh*, Summit App. No. 25445, Journal Entry (Appx B) The court determined that Respondent had jurisdiction to hold the hearing because a complaint was filed before community control expired. *Id.*

This appeal is before this Court as an appeal of right from a case that originated in the court of appeals.

ARGUMENT

The appellate court's dismissal of Mr. Hemsley's writ of prohibition stating that the trial court has subject matter jurisdiction to proceed is reviewed de novo. *Washington Mutual Bank v. Beatley*, 10th Dist. No. 06AP-1189, 2008-Ohio-1679. The question of law is whether the State has alleged any community-control violations that the trial court has the authority to decide. *Rengel v. Valley Forge Insurance Co.*, 6th Dist. No. OT-03-045, 2004-Ohio-5248; Civ. R. 12(B)(1). Because Mr. Hemsley has completed his entire term of community-control sanctions, the court lacks the authority to entertain or sentence him for any alleged violations.

I. **Proposition of Law: A trial court patently and unambiguously lacks jurisdiction to hold a community-control revocation hearing once the term for community control has expired.**

The purpose of a writ of prohibition is "to restrain inferior courts and tribunals from exceeding their jurisdiction." *State ex rel. Jones v. Suster* (1998), 84 Ohio St. 3d 70, 73. A writ of prohibition serves both to prevent any future unauthorized exercise of jurisdiction and to correct the results of prior unauthorized acts. *Rosen v. Celebrezze* (2008), 117 Ohio St.3d 241, 2008-Ohio-853. (quoting *State ex rel. Mayer v. Henson*, 97 Ohio St. 3d. 276, 2002-Ohio-6323 ¶ 12.)

Courts have consistently held that in order to succeed on a writ of prohibition, the Relator must generally establish: (1) the court or office against whom it is sought is about to exercise judicial or quasi-judicial power; (2) the exercise of that power is unauthorized by law; and, (3) the action will result in injury for which no other adequate remedy exists, *State ex rel. Yates v. Court of Appeals for Montgomery Cty* (1987), 32 Ohio St.3d 30; *State ex. rel. Largent v. Fisher*, (1989), 43 Ohio St. 3d 160. However, this Court has held that where jurisdiction is patently and unambiguously lacking, it is not necessary to prove the lack of an adequate remedy at law

because the availability of alternative remedies is immaterial. *Rosen v. Celebrezze* (2008), 117 Ohio St.3d 241, 2008-Ohio-853. Therefore, because Respondent patently and unambiguously lacks jurisdiction, the adequacy of other remedies is not a consideration.

The issue in this case is not whether Respondent is about to exercise her judicial power but rather, whether that exercise of power is allowed under the law. Clearly, conducting a community-control violation hearing constitutes an exercise of judicial power. There is no doubt Mr. Hemsley has completed the maximum five years community control allowed by law. Both the Respondent and court of appeals has acknowledged that Mr. Hemsley's community-control sanction expired on March 24, 2010.¹ (Respondent's Motion to Dismiss p.2.; Appx. B Court of Appeals Journal Entry.) Yet, nearly 7 months later, Respondent argues she maintains the power to hold a revocation hearing in this case and potentially incarcerate Mr. Hemsley. This is contrary to statutory and case law and in violation of Mr. Hemsley's constitutional rights.

A. Mr. Hemsley's term of community control had, by law, terminated at the time the court scheduled and will reschedule his probation revocation hearing.

Mr. Hemsley's community control officially terminated on March 24, 2010. R.C. §2929.15 establishes the rules for community-control sanctions in felony sentencing and delineates the maximum term allowed by law. R.C. §2951.07 establishes the duration of community control. Both state that "[t]he duration of all community-control sanctions imposed upon an offender under this division shall not exceed five years." R.C. §2929.15 (emphasis added); R.C. §2951.07. Community control cannot be extended beyond this time frame and therefore, ceases. *Id.* The legislature has set a definite time limit on jurisdiction, giving a defendant the requisite definiteness and finality required to ensure his or her constitutional rights.

¹¹ This concession in and of itself is an acknowledgement that none of the statutory factors which might toll the expiration of the community control termination date were present in this case.

In this case, Mr. Hemsley served the maximum five-year community-control sanction allowed by law. On March 24, 2005, he was released from prison and placed on community control for a three-year term. On March 4, 2008, Judge Unruh extended the community control term by two years to the maximum five years allowed under R.C. §2929.15. Consequently, Mr. Hemsley's community control officially expired on March 24, 2010. By law, his sanction could not be extended beyond this point. The trial court was unable, and did not attempt, to extend this period. As confirmation and evidence of his successful completion of community control, Mr. Hemsley has been advised by his supervising probation officer in North Carolina that his community control has expired and he was released from supervision as of March 25, 2010. Further, the Ninth District Court of Appeals has acknowledged this fact. (Appx. B)

Although the term cannot be extended, it can be tolled under certain circumstances. Specifically, if an offender absconds or otherwise leaves the jurisdiction of the court without permission or if the offender is confined in any institution for the commission of any offense. R.C. §2929.15 and §2951.07. In these two specific cases, the period of community control ceases to run until the time the offender is brought before the court for further action. *Id.*

While the statute allows for tolling of the period in two situations, neither of these are applicable to Mr. Hemsley. First, Mr. Hemsley has had no conflicts with the law and consequently, has not been confined to an institution since his initial jail term. Second, he never absconded from or left the jurisdiction of the court without permission. The prosecutor has charged Mr. Hemsley with a violation for travelling to Mexico without permission of his probation officer. Mr. Hemsley did travel to Mexico on a five day business in trip from January 2, 2010 to January 7, 2010 and did so with the permission of his probation officer. (See Relator Exh N) An e-mail from Mr. Hemsley's probation officer to Mr. Hemsley granting the permission for the trip is the part of the record. *Id.*

Further Mr. Hemsley's probation officer, who is an agent of the state, provided an affidavit conclusively establishing that Mr. Hemsley did not leave the jurisdiction of the court without permission. Mr. Hemsley was diligent in seeking permission for travel and his whereabouts and location were always known to his probation officer. Mr. Hemsley never absconded nor took any action to avoid the court. He has consistently reported to his probation officer and has appeared before Respondent's court on three separate occasions since the initial charge was brought. Therefore, there is no basis for tolling the statute in this case or for even making the assertion that it should be tolled.

Further, assuming *arguendo* that the statute was tolled for the travel identified in the charge—an assertion Mr. Hemsley strongly denies—Judge Unruh still patently and unambiguously lacks jurisdiction to take further action in this case. R.C. § 2929.15 and §2929.07 clearly state that the period is tolled only until the time the offender is brought before the court. Once the person is brought before the court, tolling stops and, the term again begins to run. *State v. Wright*, 2cd Dist. No 05-CA-1678, 2006-Ohio-6067, ¶14; *Davis v. Wolfe*, 92 Ohio St.3d 549, 2001-Ohio-1051. The time begins to run when the offender is brought before the court, regardless of whether or not a hearing or sentence was imposed. In *Davis*, the Court determined the tolling ceased when Davis was brought before the trial court for a probable cause hearing and did not extend until the time the court finally revoked his probation. 2001-Ohio-1051 at ¶4

Mr. Hemsley left for Mexico on January 2, 2010 and reported to his probation officer immediately upon his return on January 7, 2010. It is undisputed that Mr. Hemsley travelled from North Carolina and appeared before the court on January 13, 2010. On this date, any possible tolling ended. At most, Mr. Hemsley would have been out of the court's jurisdiction for six days and was brought in front of the court within eleven. Even if the Court were to toll his term by the maximum

11 days, his term would have expired on April 4, 2010. It is now nearly 200 days since that time. Any argument his sanction was tolled would have no affect on the Respondent's lack of jurisdiction in this matter. Even with the addition of any tolling time, Mr. Hemsley's term of community control has well-expired.

B. The trial court patently lacks jurisdiction to hold a hearing and potentially revoke Mr. Hemsley's community control and sentence him because the term of his sanction has expired by law.

Because Mr. Hemsley's community control expired prior to the court holding a revocation hearing, the trial court lacks the requisite subject matter jurisdiction to proceed. R.C. §2951.09 specifies in relevant part that "[a]t the end or termination of the period of probation, the jurisdiction of the judge or magistrate to impose sentence ceases and the defendant shall be discharged." (repealed 01-01-04) Although repealed, this statute still applies to Mr. Hemsley's case. See R.C. § 2951.011; see also *State v. Young*, 2cd Dist No 23679, 2010-Ohio-4145 (slip copy). As the court in *Young* noted, R.C. §2951.09 remains applicable to defendants who were sentenced on their underlying offense prior to the repeal date. *Id*; See also *State v. Miller*, 6th Dist. No. WD-06-086, 2007-Ohio-6364 ¶10.

This Court has held that once a defendant's probation expires, a judge's jurisdiction to revoke the probation and impose a sentence ceases to exist. *Davis v. Wolfe*, 92 Ohio St.3d 549, 2001-Ohio-1051 (syllabus). While *Davis* involved the revocation of probation, and this case involves the revocation of community control, courts have held that the principle espoused in *Davis* is also applicable to community-control violations. *State v. Wright*, 2cd Dist. No. 05-CA-1678, 2006-Ohio-6067; *State v. Craig*, 8th Dist. No. 84861, 2005-Ohio-1194.

Courts throughout Ohio have applied *Davis* as such that it is now "... well settled law that a trial court loses jurisdiction to impose any penalty for a defendant's violation of his community-

control sanction once the defendant's term of community control has expired." *State v. Craig*, 8th Dist. No. 84861, 2005-Ohio-1194 ¶7 (vacating a sentence that occurred 22 days after the expiration of the defendant's community control term calling the sentence invalid), citing *State v. Lawless*, 5th Dist. No. 03 CA 30, 2004-Ohio-5344, relying on *Davis v. Wolfe*, 92 Ohio St.3d 549, 2001-Ohio-1051 and *State v. Yates* (1991), 58 Ohio St.3d. 78, 567 N.E.2d. 1306; See also *Hilton v. Osterud* (2009), 6th Dist. No WD-08-082, 2009-Ohio-1741 (granting a writ of prohibition against the judge after finding that the judge does not possess the requisite subject matter jurisdiction to commence a probation violation hearing after Defendant's term of probation has expired); *State v. McKinney*, 5th Dist. No. 03CA083, 2004-Ohio-4035; *State v. Justice*, 5th Dist. No. 08 CA 47, 2009-Ohio-2064, 2064 WL 1175150; *State v. Wright*, 2cd Dist. No. 05-CA-1678, 2006-Ohio-6067; *State v. Miller*, 6th Dist. No. WD-06-086, 2007-Ohio-6364; 29B Ohio Jurisprudence 3d. (2010), Criminal Law §3382.

In *State v. McKinney* the defendant was convicted of involuntary manslaughter and sentenced to three years in prison. After serving several months, he was granted judicial release and placed on five years community control. A few weeks prior to the expiration of his community control the State filed a motion to revoke his community control. The defendant appeared before the court and the trial court scheduled a revocation hearing just three days after his term expired. The Fifth District Court of Appeals held *Davis* applied and the trial court erred in revoking the defendant's probation and sentencing him because the court lacked the jurisdiction to do so. *State v. McKinney*, 5th Dist. No. 03CA083, 2004-Ohio-4035. The facts and procedure are strikingly on point to Mr. Hemsley's case.

In *Hilton v. Osterud*, 6th Dist. No WD-08-082, 2009-Ohio-1741, the Sixth District Court of Appeals conducted a detailed statutory analysis of the language in R.C. §2929.15 and §2951.07 before coming to the same result. The defendant filed a writ of prohibition when the judge

scheduled a probation revocation hearing after his term of probation had expired. *Id.* The court found §2951.07 determinative of the issue and stated, "the language [of §2951.07] is indisputably clear, precise and unambiguous ***. The language establishes that a term of probation continues only for the duration of the precise term initially imposed and for the precise term of any timely imposed extensions, conditioned solely upon the total aggregate term of probation not exceeding a five-year period." *Id.* at ¶11. The court held that reasonable minds can only conclude that once the term of probation/community control expires, the judge loses subject matter jurisdiction in the case. *Id.* at ¶14. This holds true regardless of whether or not the revocation procedure was instituted prior to the expiration of the term. *Id.* at ¶13. Consequently, the court granted the writ of prohibition.

The same statutory analysis and result occurred in the Fifth District Court of Appeals in *State v. Justice*, 5th Dist. No. 08 CA 47, 2009-Ohio-2064. Here the court analyzed both the language contained R.C. §2951.07 and relevant case law including *Davis v. Wolfe*. Like the Sixth District, the court concluded that once the period of community control expires, the jurisdiction of the judge ceases and the defendant must be discharged. *Id.* at p.14. Further, in *State of Ohio v. Powell* (2000), 4th Dist. Case. No. 99-CA-15, 2000 WL 331593, the Fourth District Court of Appeals noted "RC §2951.07 provides in unequivocal mandatory language that the total period of probation shall not exceed five years. The court has no authority to impose sentence in an alleged probation violation after the term of probation has expired where there is no showing that the period of probation was suspended ****" FN. 3.

C. The fact that the State initiated violation proceedings prior to the expiration of Mr. Hemsley's community control is irrelevant.

The Court of Appeals has mistakenly relied on *State v. McQuade*, 9th Dist. Case. No. 08CA0081-M, 2009-Ohio-4795, for its determination. The fact that the State initiated probation proceedings or filed a charge before the expiration of Mr. Hemsley's community control does not toll the term, change the outcome or give the trial court jurisdiction. As this Court has held, "At the end or termination of the period of probation, the jurisdiction of the judge or magistrate to impose sentence cease[s] and the defendant shall be discharged, ... it matters not that the alleged violation of probation occurred during the period of probation and could have resulted, if timely prosecuted, in a revocation of probation and imposition of sentence." *Kaine v. Marion Prison Warden* (2000), 88 Ohio St.3d 454, 455, 727 N.E.2d 907; quoting *State v. Jackson* (1995), 106 Ohio App.3d 345, 348. See also, *Davis v. Wolfe*, 92 Ohio St.3d 549, 2001-Ohio-1051.

In line with these holdings and reasonings, appellate courts throughout the state have applied this law. For example, in *State v. Miller*, (2007) Ohio 6364 WL 4216142 ¶13-15 (Ohio App. 6 Dist. Nov. 30, 2007), the State argued that the sanction revocation proceeding was instituted prior to the expiration of the community-control sanction. The Court of Appeals, citing *Davis v. Wolfe*, stated that the court is required to follow *Davis*, and that they could "only conclude that the trial court acted without subject matter jurisdiction when it extended, then revoked, appellant's community-control sanction after the expiration of its initial period." *Id.* This was regardless of whether the charge was filed before the term expired. The same was true in *State v. McKinney*, 5th Dist. No. 03CA083, 2004-Ohio-4035, where the Fifth District Court of Appeals stated, "the fact that the State initiated the probation violation proceedings during the original probation period does not extend the trial court's jurisdiction once the term of probation has expired". See also *State v. Justice*, 5th Dist. No. 08

CA 47, 2009-Ohio-2064; *Hilton v. Osterud* (2009), 6th Dist. court of appeals case no WD-08-082; *State v. Young*, 2nd Dist. Co. of Appeals No. 23679, 2010-Ohio-4145.

State v. McQuade, supra, is not applicable to this case. *McQuade* was a case where the statute was tolled because the offender absconded resulting in the issuance of a capias. The court issued a capias before McQuade's community control expired and after McQuade failed to report to her supervising officer on two separate occasions. The appellate court acknowledged that a community-control sanction terminates after five years absent a tolling event. However, in *McQuade*, the issuance of a capias after the defendant absconded was a tolling event. The issuance of the complaint or charge was not a tolling event, as it should not be. The clear language of R.C. §2929.15 and §2951.07 specifies the tolling events and makes no mention of the filing of the charge. Had the legislature intended for a filing or a charge to serve as a tolling event it could have been easily stated in the legislation. The absence of such language supports the conclusion that the legislature did not intend that the filing of a charge would toll the five year maximum limit.

Further, even assuming arguendo that the filing of a charge alone tolls the statute, the Ninth District failed to consider the clear language of the statute that states that after specific tolling events the statute ceases to run only "until the time the offender is brought before the court for further action." R.C. §2951.07. It does not state that the time runs indefinitely or until the court makes a determination on the charge. The Ninth District gave no consideration to the fact that Mr. Hemsley was brought before the court on January 13, 2010. This would have stopped any possible tolling. As noted previously, the Respondent is now months beyond the termination date even with the addition of any tolling time and therefore, lacks jurisdiction to take further action.

D. The appellate court's decision violates Mr. Hemsley's constitutional rights.

While Mr. Hemsley is not required to prove the lack of availability of or adequacy of another remedy, the absence of such in the case speaks volumes to the urgency and necessity of Mr. Hemsley's writ and puts Mr. Hemsley at risk of losing his constitutional rights. If Judge Unruh is allowed to continue with a community-control revocation hearing, Mr. Hemsley faces the risk of incarceration. He would certainly serve most, if not all of his remaining sentence before his appeal could be heard. His liberty and right to due process are at stake.

In *City of Lakewood v. Davies* (1987), 35 Ohio App.3d 107, 108; 19 N.E.2d 860, the Eighth District Court of Appeals spoke to the lack of finality in sentencing, noting such indefiniteness "create[s] a government of men not of law, plac[ing] the accused at the caprice of the judge, and lead[s] to abuse, or otherwise adversely affect[s] the judicial system." quoting Annotation (1976), 73 A.L.R.3d 474, 486, Section 4[a] and discussing a case where the judge suspended execution of a jail sentence indefinitely. In order to avoid such an adverse affect and to protect a defendant's rights, the jurisdiction of the court cannot exceed the authority expressly prescribed by the law.

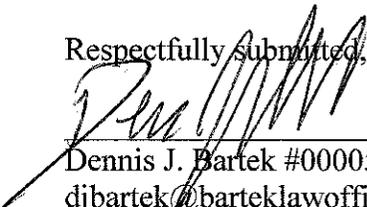
2. Proposition of Law: A defendant cannot be charged with a community-control violation after he or she has served his entire term of community control.

On April 22, 2010, at the onset of his scheduled community-control violation hearing, the prosecutor served Mr. Hemsley with additional charges of violations. (See Writ of Proh, Exh P) These charges were filed after Mr. Hemsley's community control terminated, even if the court were to apply tolling time. Charges cannot be filed against an offender after the offender's community control has terminated even if the alleged violation(s) occurred during the period of community control. *State v. Jackson* (1988), 5th Dist. No. CA-7567, 56 Ohio App.3d 141¶2

CONCLUSION

Mr. Hemsley has served, in its entirety, the maximum allowable five year community-control sanction which expired on March 24, 2010. The trial court patently and unambiguously lacks subject matter jurisdiction, and therefore the authority, to impose a sentence in this case. For the foregoing reasons Mr. Hemsley requests that you reverse the judgment of the appellate court and order the case dismissed for lack of subject matter jurisdiction.

Respectfully submitted,


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ATTORNEYS FOR APPELLANT,
GREG H. HEMSLEY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appeal Brief was served on Richard Kasay, Esq. 53 University Ave. 6th Floor, Akron, Ohio 44310 by first class mail as set forth below on October 14, 2010:


Natalie Niese

APPENDIX

IN THE SUPREME COURT OF OHIO

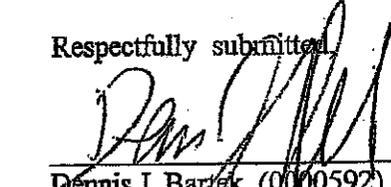
State of Ohio ex rel. :
GREG H. HEMSLEY :
Relator/Appellant, :
v. : On Appeal from the Summit
County Court of Appeals,
Ninth Appellate District
Honorable Judge Brenda Burnham-Unruh : Court of Appeals
Case No. 25445
Respondent/Appellee. :

NOTICE OF APPEAL OF APPELLANT GREG H. HEMSLEY

Appellant Greg H. Hemsley hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of Summit County Court of Appeals, Ninth Appellate District, entered on August 4, 2010 in the matter of *State of Ohio Ex Rel. Greg H. Hemsley v. Honorable Judge Brenda Burnham-Unruh*, Summit County Court of Appeals Case No. 25445. A date-stamped copy of the Court of Appeals' judgment entry is attached hereto, pursuant to S. Ct. Prac. R. II, Section 2(B)(2).

This case originated in the Court of Appeals. Accordingly, this is an appeal of right under S. Ct. Prac. R. II, Section 1(A)(1) invoking the appellate jurisdiction of the Supreme Court of Ohio.

Respectfully submitted,


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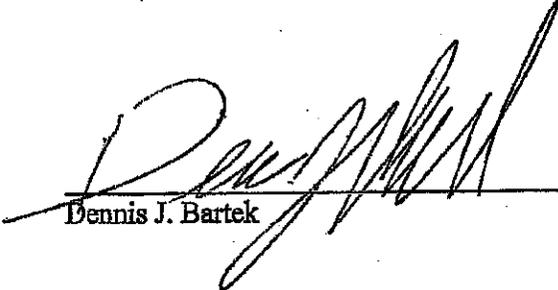
Counsel for Appellant Greg H. Hemsley

CERTIFICATE OF SERVICE

A true copy of the foregoing Notice of Appeal of Appellant Greg H. Hemsley was served
this 19th day of August, 2010 by regular U.S. Mail, postage prepaid, upon:

Richard S. Kasay
Assistant Prosecuting Attorney
Appellate Division
Summit County Safety Building
53 University Avenue, 6th Floor
Akron, Ohio 44308
(330) 643-2800

Counsel for Appellee
Judge Brenda Burnham-Unruh


Dennis J. Bartek

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
COURT OF APPEALS
DANIEL M. HORRIGAN

STATE OF OHIO EX REL. GREG H.
HEMSLEY

2010 AUG -4 AM 9:45
C.A. No. 25445

SUMMIT COUNTY
CLERK OF COURTS

Relator

Appx B

v.

HONORABLE JUDGE BRENDA
BURNHAM-UNRUH

JOURNAL ENTRY

Respondent

Greg H. Hemsley was placed on community control by Judge Brenda Burnham Unruh. Later, he was charged with violating the conditions of his community control. He moved to dismiss the community control violation complaint because he had completed five years of community control supervision, the maximum authorized by statute. After Judge Unruh denied his motion, Mr. Hemsley appealed. Following this Court's dismissal of his appeal for lack of a final appealable order, Mr. Hemsley petitioned this Court for a writ of prohibition seeking to prevent Judge Unruh from proceeding with the hearing on the community control violation. Judge Unruh has moved to dismiss the complaint. Because Judge Unruh has jurisdiction to consider the community control violation complaint, this Court grants her motion and dismisses Mr Hemsley's complaint.

For this Court to issue a writ of prohibition, Mr. Hemsley must establish that: (1) Judge Unruh is about to exercise judicial power, (2) the exercise of that power is unauthorized by law, and (3) the denial of the writ will result in injury for which no other adequate remedy exists. *State ex rel Jones v. Garfield His. Mun. Court*, 77 Ohio St. 3d 447, 448 (1997). Unless the trial court unambiguously lacks jurisdiction to proceed, a court having general jurisdiction of the subject matter has the authority to determine its

own jurisdiction to hear a cause, and the party challenging the court's jurisdiction has an adequate remedy through an appeal. *Brooks v. Gaul*, 89 Ohio St.3d 202, 203 (2000).

Mr. Hemsley cannot prevail on the facts he has alleged in his complaint. He has alleged that Judge Unruh lacks jurisdiction because the maximum term of his community control period has expired. Mr. Hemsley was placed on community control for three years in March 2005. In March 2008, his community control period was extended for two additional years, to the maximum five-year period authorized by statute. As a result of the extension, Mr. Hemsley's community control continued until March 24, 2010.

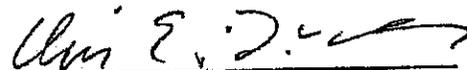
The complaint was filed when Judge Unruh had jurisdiction to act.

Mr. Hemsley was charged with a community control violation in January 2010, while he was still serving his term of community control. He has argued that Judge Unruh lost jurisdiction when she continued the community control violation hearing beyond the March 24, 2010, expiration of his five-year community control term.

Judge Unruh did not lose jurisdiction to continue with the community control violation hearing. The complaint was filed prior to the expiration of Mr. Hemsley's community control term. Judge Unruh had jurisdiction over Mr. Hemsley at the time the complaint was filed, and she retained jurisdiction over the complaint after the expiration of the community control period. *State v. Johnson*, 7th Dist. No. 09-MA-94, 2010-Ohio-2533, ¶31 ("Because appellant's probation officer began the probation violation proceedings before appellant's community control period expired, the trial court retained jurisdiction over appellant."); see, also, *State v. McQuade*, 9th Dist. No. 08CA0081-M, 2009-Ohio-4795.

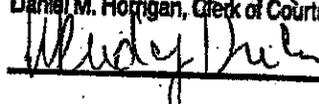
Conclusion

Because Mr. Hemsley is not entitled to a writ of prohibition, Judge Unruh's motion to dismiss is granted and this case is dismissed. Costs taxed to Mr. Hemsley. The clerk of courts is hereby directed to serve upon all parties not in default notice of this judgment and its date of entry upon the journal. See Civ.R. 58(B).



Judge

Concur:
Whitmore, J.
Moore, J.

I certify this to be a true copy of the original
Daniel M. Horigan, Clerk of Courts.


Deputy

COPY

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)
STATE OF OHIO

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COURT OF APPEALS
DANIEL M. HOFFIGAN C.A. No. 25388
2010 JUN -3 PM 2:28
SUMMIT COUNTY
CLERK OF COURTS

Appellee

v.

GREG H. HEMLSEY

JOURNAL ENTRY

Appellee

The State of Ohio has moved to dismiss this appeal for lack of a final, appealable order. The State explains that Greg Hemlsey has appealed an oral denial of an oral motion to dismiss. Mr. Hemsley has responded, arguing that the order affects a substantial right and that no written entry is necessary.

The denial of a motion to dismiss, whether written or oral, however, is not a final, appealable order. See e.g., *Ashtabula v. Pub. Utilities Comm.*, 139 Ohio St. 213 (1942); *Paulson v. Seifert*, 2d Dist. No. 90 CA 115 (July 16, 1993). Accordingly, the appeal is dismissed for lack of jurisdiction. Costs are taxed to Mr. Hemlsey.

The clerk of courts is ordered to mail a notice of entry of this judgment to the parties and make a notation of the mailing in the docket, pursuant to App.R. 30, and to provide a certified copy of the order to the clerk of the trial court. The clerk of the trial court is ordered to provide a copy of this order to the judge who presided over the trial court action.


Judge

Concur:
Whitmore, J.
Moore, J.

APPX C

Collapse Prelim

Baldwin's Ohio Revised Code Annotated

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2951. Probation (Refs & Annos)

R.C. § 2951.07

2951.07 Duration of community control sanction

Currentness

A community control sanction continues for the period that the judge or magistrate determines and, subject to the five-year limit specified in section 2929.15 or 2929.25 of the Revised Code, may be extended. If the offender under community control absconds or otherwise leaves the jurisdiction of the court without permission from the probation officer, the probation agency, or the court to do so, or if the offender is confined in any institution for the commission of any offense, the period of community control ceases to run until the time that the offender is brought before the court for its further action.

Credits

(2002 H 490, eff. 1-1-04; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1990 S 258, eff. 11-20-90; 1953 H 1; GC 13452-5)

Notes of Decisions (155)

Current through 2010 Files 1 to 42, and 44, 46, 48 to 51, 53 and 54 of the 128th GA (2009-2010), apv. 6/12/10, and filed with the Secretary of State by 6/13/10.

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APPK D

Baldwin's Ohio Revised Code Annotated

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2951. Probation (Refs & Annos)

R.C. § 2951.011

2951.011 Effect of amendments to chapter

Currentness

(A)(1) Chapter 2951. of the Revised Code, as it existed prior to July 1, 1996, applies to a person upon whom a court imposed a term of imprisonment prior to July 1, 1996, and a person upon whom a court, on or after July 1, 1996, and in accordance with law existing prior to July 1, 1996, imposed a term of imprisonment for an offense that was committed prior to July 1, 1996.

(2) Chapter 2951. of the Revised Code as it exists on and after July 1, 1996, applies to a person upon whom a court imposed a stated prison term for an offense committed on or after July 1, 1996.

(B)(1) Except as provided in division (A)(1) of this section, Chapter 2951. of the Revised Code, as it existed prior to January 1, 2004, applies to a person upon whom a court imposed a sentence for a misdemeanor offense prior to January 1, 2004, and a person upon whom a court, on or after January 1, 2004, and in accordance with law existing prior to January 1, 2004, imposed a sentence for a misdemeanor offense that was committed prior to January 1, 2004.

(2) Except as provided in division (A)(2) of this section, Chapter 2951. of the Revised Code as it exists on and after January 1, 2004, applies to a person upon whom a court imposes a sentence for a misdemeanor offense committed on or after January 1, 2004.

Credits

(2003 S 57, eff. 1-1-04; 2002 H 490, eff. 1-1-04; 1995 S 2, eff. 7-1-96)

Current through 2010 File 54 of the 128th GA (2009-2010), apv. by 10/06/10 and filed with the Secretary of State by 10/06/10.

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APPK E

Appx F

KeyCite Red Flag - Severe Negative Treatment
Legislative Action Amended

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

Collapse Prelim

Baldwin's Ohio Revised Code Annotated

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2929. Penalties and Sentencing (Refs & Annos)

Felony Sentencing

R.C. § 2929.15

2929.15 Community control sanctions

Currentness

(A)(1) If in sentencing an offender for a felony the court is not required to impose a prison term, a mandatory prison term, or a term of life imprisonment upon the offender, the court may directly impose a sentence that consists of one or more community control sanctions authorized pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code. If the court is sentencing an offender for a fourth degree felony OVI offense under division (G)(1) of section 2929.13 of the Revised Code, in addition to the mandatory term of local incarceration imposed under that division and the mandatory fine required by division (B)(3) of section 2929.18 of the Revised Code, the court may impose upon the offender a community control sanction or combination of community control sanctions in accordance with sections 2929.16 and 2929.17 of the Revised Code. If the court is sentencing an offender for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, in addition to the mandatory prison term or mandatory prison term and additional prison term imposed under that division, the court also may impose upon the offender a community control sanction or combination of community control sanctions under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

The duration of all community control sanctions imposed upon an offender under this division shall not exceed five years. If the offender absconds or otherwise leaves the jurisdiction of the court in which the offender resides without obtaining permission from the court or the offender's probation officer to leave the jurisdiction of the court, or if the offender is confined in any institution for the commission of any offense while under a community control sanction, the period of the community control sanction ceases to run until the offender is brought before the court for its further action. If the court sentences the offender to one or more nonresidential sanctions under section 2929.17 of the Revised Code, the court shall impose as a condition of the nonresidential sanctions that, during the period of the sanctions, the offender must abide by the law and must not leave the state without the permission of the court or the offender's probation officer. The court may impose any other conditions of release under a community control sanction that the court considers appropriate, including, but not limited to, requiring that the offender not ingest or be injected with a drug of abuse and submit to random drug testing as provided in division (D) of this section to determine whether the offender ingested or was injected with a drug of abuse and requiring that the results of the drug test indicate that the offender did not ingest or was not injected with a drug of abuse.

(2)(a) If a court sentences an offender to any community control sanction or combination of community control sanctions authorized pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, the court shall place the offender under the general control and supervision of a department of probation in the county that serves the court for purposes of reporting to the court a violation of any condition of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer. Alternatively, if the offender resides in another county and a county department of probation has been established in that county or that county is served by a multicounty probation department established under section 2301.27 of the Revised Code, the court may request the court of common pleas of that county to receive the offender into the general control and supervision of that county or multicounty department of probation for purposes of reporting to the court a violation of any condition of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer, subject to the jurisdiction of the trial judge over and with respect to the person of the offender, and to the rules governing that department of probation.

If there is no department of probation in the county that serves the court, the court shall place the offender, regardless of the offender's county of residence, under the general control and supervision of the adult parole authority for purposes of reporting to the court a violation of any of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer.

(b) If the court imposing sentence upon an offender sentences the offender to any community control sanction or combination of community control sanctions authorized pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, and if the offender violates any condition of the sanctions, any condition of release under a community control sanction imposed by the court, violates any law, or departs the state without the permission of the court or the offender's probation officer, the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction shall report the violation or departure directly to the sentencing court, or shall report the violation or departure to the county or multicounty department of probation with general control and supervision over the offender under division (A)(2)(a) of this section or the officer of that department who supervises the offender, or, if there is no such department with general control and supervision over the offender under that division, to the adult parole authority. If the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction reports the violation or departure to the county or multicounty department of probation or the adult parole authority, the department's or authority's officers may treat the offender as if the offender were on probation and in violation of the probation, and shall report the violation of the condition of the sanction, any condition of release under a community control sanction imposed by the court, the violation of law, or the departure from the state without the required permission to the sentencing court.

(3) If an offender who is eligible for community control sanctions under this section admits to being drug addicted or the court has reason to believe that the offender is drug addicted, and if the offense for which the offender is being sentenced was related to the addiction, the court may require that the offender be assessed by a properly credentialed professional within a specified period of time and shall require the professional to file a written assessment of the offender with the court. If a court imposes treatment and recovery support services as a community control sanction, the court shall direct the level and type of treatment and recovery support services after consideration of the written assessment, if available at the time of sentencing, and recommendations of the professional and other treatment and recovery support services providers.

(4) If an assessment completed pursuant to division (A)(3) of this section indicates that the offender is addicted to drugs or alcohol, the court may include in any community control sanction imposed for a violation of section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, or 2925.37 of the Revised Code a requirement that the offender participate in a treatment and recovery support services program certified under section 3793.06 of the Revised Code or offered by another properly credentialed program provider.

(B) If the conditions of a community control sanction are violated or if the offender violates a law or leaves the state without the permission of the court or the offender's probation officer, the sentencing court may impose a longer time under the same sanction if the total time under the sanctions does not exceed the five-year limit specified in division (A) of this section, may impose a more restrictive sanction under section 2929.16, 2929.17, or 2929.18 of the Revised Code, or may impose a prison term on the offender pursuant to section 2929.14 of the Revised Code. The prison term, if any, imposed upon a violator pursuant to this division shall be within the range of prison terms available for the offense for which the sanction that was violated was imposed and shall not exceed the prison term specified in the notice provided to the offender at the sentencing hearing pursuant to division (B)(3)¹ of section 2929.19 of the Revised Code. The court may reduce the longer period of time that the offender is required to spend under the longer sanction, the more restrictive sanction, or a prison term imposed pursuant to this division by the time the offender successfully spent under the sanction that was initially imposed.

(C) If an offender, for a significant period of time, fulfills the conditions of a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code in an exemplary manner, the court may reduce the period of time under the sanction or impose a less restrictive sanction, but the court shall not permit the offender to violate any law or permit the offender to leave the state without the permission of the court or the offender's probation officer.

(D)(1) If a court under division (A)(1) of this section imposes a condition of release under a community control sanction that requires the offender to submit to random drug testing, the department of probation or the adult parole authority that has general control and supervision of the offender under division (A)(2)(a) of this section may cause the offender to submit to random drug testing performed by a laboratory or entity that has entered into a contract with any of the governmental entities or officers authorized to enter into a contract with that laboratory or entity under section 341.26, 753.33, or 5120.63 of the Revised Code.

(2) If no laboratory or entity described in division (D)(1) of this section has entered into a contract as specified in that division, the department of probation or the adult parole authority that has general control and supervision of the offender under division (A)(2)(a) of this section shall cause the offender to submit to random drug testing performed by a reputable public laboratory to determine whether the individual who is the subject of the drug test ingested or was injected with a drug of abuse.

(3) A laboratory or entity that has entered into a contract pursuant to section 341.26, 753.33, or 5120.63 of the Revised Code shall perform the random drug tests under division (D)(1) of this section in accordance with the applicable standards that are included in the terms of that contract. A public laboratory shall perform the random drug tests under division (D)(2) of this section in accordance with the standards set forth in the policies and procedures established by the department of rehabilitation and correction pursuant to section 5120.63 of the Revised Code. An offender who is required under division (A)(1) of this section to submit to random drug testing as a condition of release under a community control sanction and whose test results indicate that the offender ingested or was injected with a drug of abuse shall pay the fee for the drug test if the department of probation or the adult parole authority that has general control and supervision of the offender requires payment of a fee. A laboratory or entity that performs the random drug testing on an offender under division (D)(1) or (2) of this section shall transmit the results of the drug test to the appropriate department of probation or the adult parole authority that has general control and supervision of the offender under division (A)(2)(a) of this section.

Credits

(2008 H 130, eff. 4-7-09; 2004 H 163, eff. 9-23-04; 2002 S 123, eff. 1-1-04; 2000 H 349, eff. 9-22-00; 1999 S 22, eff. 5-17-00; 1999 S 107, eff. 3-23-00; 1996 S 166, eff. 10-17-96; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96)

Notes of Decisions (155)

Current through 2010 Files 1 to 42, and 44, 46, 48 to 51, 53 and 54 of the 128th GA (2009-2010), apv. 6/12/10, and filed with the Secretary of State by 6/13/10.

Footnotes

- 1 The reference to subsection (B)(3) is held to be a typographical error in *State v Virasaychack*, No. 76782, 2000 WL 1144880 (8th Dist Ct App, Cuyahoga, 8-21-2000), wherein the court states: "[W]e take the extraordinary step of correcting R.C. 2929.15(B) to refer to R.C. 2929.19(B)(5) rather than R.C. 2929.19(B)(3)."

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Ohio Statutes

Title 29. CRIMES - PROCEDURE

Chapter 2951. Probation

Current through 2004 Legislative Session

§ 2951.09. Proceedings after arrest of probationer.

When a defendant on probation is brought before the judge or magistrate under section 2951.08 of the Revised Code, the judge or magistrate immediately shall inquire into the conduct of the defendant, and may terminate the probation and impose any sentence that originally could have been imposed or continue the probation and remand the defendant to the custody of the probation authority, at any time during the probationary period. When the ends of justice will be served and the good conduct of the defendant so held warrants it, the judge or magistrate may terminate the period of probation. At the end or termination of the period of probation, the jurisdiction of the judge or magistrate to impose sentence ceases and the defendant shall be discharged.

A probation officer shall receive necessary expenses in the performance of the officer's duties.

History. GC § 13452-7; 113 v 123(202), ch 31, § 7; 115 v 532; Bureau of Code Revision, 10-1-53; 143 v S 258 (Eff 11-20-90); 146 v S 2. Eff 7-1-96.

Archive

Appx G