

In The Supreme Court Of Ohio

State Of Ohio, :
Appellee, :
-vs- : Case No. 2007-1741
Edward Lang, :
Appellant. : **Death Penalty Case**

On Appeal From the Court of Common Pleas
Stark County, Ohio
Case No. 2006 CR 1824A

Appellant's Supplemental Briefing

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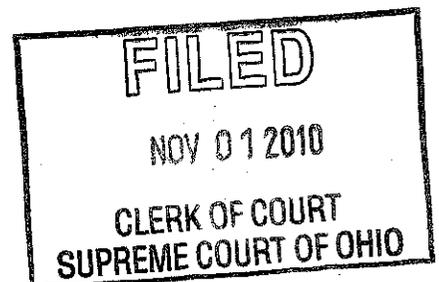


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I. Statement of the Case

Edward Lang was indicted on two counts of Aggravated Murder (R.C. § 2903.01(B)) with firearm specifications and two death penalty specifications per count. He was also indicted on one count of Aggravated Robbery (R.C. § 2911.01) with a firearm specification. The jury found Lang guilty of all counts and specifications.

Lang was sentenced to life without parole for Count One, the aggravated murder of Jaron Burditte. He was sentenced to death for Count Two, the aggravated murder of Marnell Cheek. For Count Three, Aggravated Robbery, the trial court sentenced Lang to ten years in prison. It also imposed “up to a maximum of five years” of postrelease control for Count Three, “as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code Section 2967.28.” Judgment Entry, p. 5. The court ordered Lang to “serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of post-release control.” *Id.*

Lang filed a merit brief with this Court on June 9, 2008. The State filed its brief on October 27, 2008, and Lang filed a reply brief on December 11, 2008. Upon further review of Lang’s judgment entry imposing sentence, counsel for Lang identified an additional issue: post-release control was not properly imposed in his case. *See State v. Fry*, 125 Ohio St.3d 163, 199 (2010). On October 20, 2010, this Court granted supplemental briefing on this issue.

Lang hereby incorporates the arguments from his Merit Brief as if fully rewritten herein.

Proposition of Law No. XXII

A defendant is entitled to be resentenced when the trial court fails to properly notify him of the penalty for noncompliance with the terms of post-release control. R.C. § 2967.28.

1. Introduction

The trial court improperly imposed post-release control as part of Edward Lang's sentence for Aggravated Robbery, rendering the sentence void. State v. Simpkins, 117 Ohio St. 3d 420, 421, 884 N.E.2d 568, 572 (2008). The court's entry did not accurately reflect the possible sanctions for violating his post-release control. State v. Bloomer, 122 Ohio St. 3d 200, 215-16, 909 N.E.2d 1254, 1269-70 (2009); State v. Brooks, 103 Ohio St. 3d 134, 141, 814 N.E.2d 837, 843 (2004). Because the notification failed to comply with R.C. § 2967.28, Lang must be resentenced for his Aggravated Robbery conviction. See State v. Fry, 125 Ohio St. 3d 163, 199, 926 N.E.2d 1239, 1278 (2010).

2. Factual Background

The trial court sentenced Lang to ten years in prison for Aggravated Robbery. At the sentencing hearing, the court also advised Lang that it "must impose five years of post-release control which is mandatory under Ohio law on the respective count." Sent. hrng, p. 35. The court said nothing regarding the possible penalties of Lang's failure to comply with that post-release control. See id., generally.

In the judgment entry, the court imposed "up to a maximum of five years" of post-release control for Count Three, "as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code Section 2967.28." Judgment Entry, p. 5. The court ordered Lang to "serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of post-release control." Id.

3. Standard of Review

“[T]rial courts in capital cases must scrupulously comply with the applicable statutes and rules, even those involving postrelease control.” State v. Ketterer, 2010 Ohio LEXIS 1996, 2010 Ohio 3831 P81. When a trial court imposes a sentence that includes post-release control, the trial court must “notify the offender of the mandatory nature of the term of post-release control and the length of that mandatory term and incorporate that notification into its entry.” Bloomer, 122 Ohio St. 3d at 216, 909 N.E.2d at 1269-70. And “in the absence of a proper sentencing entry imposing post-release control, the parole board’s imposition of post-release control cannot be enforced.” Id. at 216, 909 N.E.2d at 1270.

Failure to properly impose post-release control renders a sentence “void and the state is entitled to a new sentencing hearing in order to have postrelease control imposed on the defendant unless the defendant has completed his sentence.” Simpkins, 117 Ohio St. 3d at 421, 884 N.E.2d at 572. In Fry, this Court remanded the case to the trial court for the proper imposition of post-release control. Fry, 125 Ohio St. 3d at 199, 926 N.E. 2d at 1278. Fry was subject to a term of three years post-release control, but the trial court imposed ten years. Id. The sentence failed to comply with R.C. § 2967.28(B)(3). Id.

4.1 Argument

The trial court erred in its imposition of post-release control for Lang’s aggravated robbery conviction. At Lang’s sentencing hearing, the court said nothing regarding the possible penalties of Lang’s failure to comply with the post-release control portion of his sentence. Sent. hrng, p. 35. The court’s judgment entry then stated that Lang “is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and *any prison term* for violation of post-release control.” Entry, p. 5 (emphasis added).

Lang was not properly advised that upon violating supervision or a condition of post-release control, “the parole board may impose a prison term of up to one-half of the prison term originally imposed upon the offender.” R.C. § 2967.28(D)(1). Lang’s trial court employed the same language in its judgment entry that this Court found to be incorrect in State v. Ketterer, 2010 Ohio LEXIS 1996, 2010 Ohio 3831 P80: “the nunc pro tunc entry *incorrectly states*, ‘The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and *any prison term* for violation of that post release control.’” Id. at P80 (emphasis added).

In sentencing Lang to post-release control, the trial court failed to comply with the mandate of R.C. 2967.28. Fry, 125 Ohio St. 3d at 199, 926 N.E. 2d at 1278. Accordingly, like Fry and Ketterer, Lang must be resentenced for the proper imposition of post-release control.

V. Conclusion

This Court should vacate Lang’s Aggravated Robbery sentence. The trial court improperly imposed post-release control, rendering the sentence void. Following this Court’s decisions in *Fry* and *Ketterer*, the proper remedy is to resentence Lang.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true copy of **Appellant's Supplemental Briefing** was forwarded by regular U.S. Mail to John D. Ferrero, Prosecutor and Mark Caldwell, Assistant Prosecutor, Stark County, 110 Central Plaza South, Suite 510, Canton, Ohio 44702, this 1st day of November, 2010.



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Appendix to Appellant's Supplemental Briefing

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2903. HOMICIDE AND ASSAULT
HOMICIDE

ORC Ann. 2903.01 (2010)

§ 2903.01. Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

(1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.

(2) It is the offender's specific purpose to kill a law enforcement officer.

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(G) As used in this section:

(1) "Detention" has the same meaning as in section 2921.01 of the Revised Code.

(2) "Law enforcement officer" has the same meaning as in section 2911.01 of the Revised Code.

OHIO REVISED CODE
TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
ROBBERY

ORC Ann. 2911.01 (2010)

§ 2911.01. Aggravated robbery

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
- (2) Have a dangerous ordnance on or about the offender's person or under the offender's control;
- (3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

- (1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;
- (2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) As used in this section:

- (1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.
- (2) "Law enforcement officer" has the same meaning as in section 2901.01 of the Revised Code and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2967. PARDON; PAROLE; PROBATION

ORC Ann. 2967.28 (2010)

§ 2967.28. Period of post-release control for certain offenders; sanctions; proceedings upon violation

(A) As used in this section:

(1) "Monitored time" means the monitored time sanction specified in section 2929.17 of the Revised Code.

(2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(3) "Felony sex offense" means a violation of a section contained in Chapter 2907. of the Revised Code that is a felony.

(B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a sentencing court to notify the offender pursuant to division (B)(3)(c) of section 2929.19 of the Revised Code of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under this division. Section 2929.191 [2929.19.1] of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(c) of section 2929.19 of the Revised Code regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section 2929.14 of the Revised Code a statement regarding

post-release control. Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this division for an offender shall be of one of the following periods:

(1) For a felony of the first degree or for a felony sex offense, five years;

(2) For a felony of the second degree that is not a felony sex offense, three years;

(3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years.

(C) Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender. Section 2929.191 [2929.19.1] of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(d) of section 2929.19 of the Revised Code regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(2) of section 2929.14 of the Revised Code a statement regarding post-release control. Pursuant to an agreement entered into under section 2967.29 of the Revised Code, a court of common pleas or parole board may impose sanctions or conditions on an offender who is placed on post-release control under this division.

(D) (1) Before the prisoner is released from imprisonment, the parole board or, pursuant to an agreement under section 2967.29 of the Revised Code, the court shall impose upon a prisoner described in division (B) of this section, may impose

upon a prisoner described in division (C) of this section, and shall impose upon a prisoner described in division (B)(2)(b) of section 5120.031 [5120.03.1] or in division (B)(1) of section 5120.032 [5120.03.2] of the Revised Code, one or more post-release control sanctions to apply during the prisoner's period of post-release control. Whenever the board or court imposes one or more post-release control sanctions upon a prisoner, the board or court, in addition to imposing the sanctions, also shall include as a condition of the post-release control that the offender not leave the state without permission of the court or the offender's parole or probation officer and that the offender abide by the law. The board or court may impose any other conditions of release under a post-release control sanction that the board or court considers appropriate, and the conditions of release may include any community residential sanction, community nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to sections 2929.16, 2929.17, and 2929.18 of the Revised Code. Prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board or court shall review the prisoner's criminal history, all juvenile court adjudications finding the prisoner, while a juvenile, to be a delinquent child, and the record of the prisoner's conduct while imprisoned. The parole board or court shall consider any recommendation regarding post-release control sanctions for the prisoner made by the office of victims' services. After considering those materials, the board or court shall determine, for a prisoner described in division (B) of this section, division (B)(2)(b) of section 5120.031 [5120.03.1], or division (B)(1) of section 5120.032 [5120.03.2] of the Revised Code, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances or, for a prisoner described in division (C) of this section, whether a post-release control sanction is necessary and, if so, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances. In the case of a prisoner convicted of a felony of the fourth or fifth degree other than a felony sex offense, the board or court shall presume that monitored time is the appropriate post-release control sanction unless the board or court determines that a more restrictive sanction is warranted. A post-release control sanction imposed under this division takes effect upon the prisoner's release from imprisonment.

Regardless of whether the prisoner was sentenced to the prison term prior to, on, or after July 11, 2006, prior to the release of a prisoner for whom it will

impose one or more post-release control sanctions under this division, the parole board shall notify the prisoner that, if the prisoner violates any sanction so imposed or any condition of post-release control described in division (B) of section 2967.131 [2967.13.1] of the Revised Code that is imposed on the prisoner, the parole board may impose a prison term of up to one-half of the stated prison term originally imposed upon the prisoner.

(2) At any time after a prisoner is released from imprisonment and during the period of post-release control applicable to the releasee, the adult parole authority or, pursuant to an agreement under section 2967.29 of the Revised Code, the court may review the releasee's behavior under the post-release control sanctions imposed upon the releasee under this section. The authority or court may determine, based upon the review and in accordance with the standards established under division (E) of this section, that a more restrictive or a less restrictive sanction is appropriate and may impose a different sanction. The authority also may recommend that the parole board or court increase or reduce the duration of the period of post-release control imposed by the court. If the authority recommends that the board or court increase the duration of post-release control, the board or court shall review the releasee's behavior and may increase the duration of the period of post-release control imposed by the court up to eight years. If the authority recommends that the board or court reduce the duration of control for an offense described in division (B) or (C) of this section, the board or court shall review the releasee's behavior and may reduce the duration of the period of control imposed by the court. In no case shall the board or court reduce the duration of the period of control imposed for an offense described in division (B)(1) of this section to a period less than the length of the stated prison term originally imposed, and in no case shall the board or court permit the releasee to leave the state without permission of the court or the releasee's parole or probation officer.

(E) The department of rehabilitation and correction, in accordance with Chapter 119. of the Revised Code, shall adopt rules that do all of the following:

(1) Establish standards for the imposition by the parole board of post-release control sanctions under this section that are consistent with the overriding purposes and sentencing principles set forth in section 2929.11 of the Revised Code and that are appropriate to the needs of releasees;

(2) Establish standards by which the parole board

can determine which prisoners described in division (C) of this section should be placed under a period of post-release control;

(3) Establish standards to be used by the parole board in reducing the duration of the period of post-release control imposed by the court when authorized under division (D) of this section, in imposing a more restrictive post-release control sanction than monitored time upon a prisoner convicted of a felony of the fourth or fifth degree other than a felony sex offense, or in imposing a less restrictive control sanction upon a releasee based on the releasee's activities including, but not limited to, remaining free from criminal activity and from the abuse of alcohol or other drugs, successfully participating in approved rehabilitation programs, maintaining employment, and paying restitution to the victim or meeting the terms of other financial sanctions;

(4) Establish standards to be used by the adult parole authority in modifying a releasee's post-release control sanctions pursuant to division (D)(2) of this section;

(5) Establish standards to be used by the adult parole authority or parole board in imposing further sanctions under division (F) of this section on releasees who violate post-release control sanctions, including standards that do the following:

(a) Classify violations according to the degree of seriousness;

(b) Define the circumstances under which formal action by the parole board is warranted;

(c) Govern the use of evidence at violation hearings;

(d) Ensure procedural due process to an alleged violator;

(e) Prescribe nonresidential community control sanctions for most misdemeanor and technical violations;

(f) Provide procedures for the return of a releasee to imprisonment for violations of post-release control.

(F) (1) Whenever the parole board imposes one or more post-release control sanctions upon an offender under this section, the offender upon release from imprisonment shall be under the general jurisdiction of the adult parole authority and generally shall be

supervised by the field services section through its staff of parole and field officers as described in section 5149.04 of the Revised Code, as if the offender had been placed on parole. If the offender upon release from imprisonment violates the post-release control sanction or any conditions described in division (A) of section 2967.131 [2967.13.1] of the Revised Code that are imposed on the offender, 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 directly to the adult parole authority or to the officer of the authority who supervises the offender. The authority's officers may treat the offender as if the offender were on parole and in violation of the parole, and otherwise shall comply with this section.

(2) If the adult parole authority or, pursuant to an agreement under section 2967.29 of the Revised Code, the court determines that a releasee has violated a post-release control sanction or any conditions described in division (A) of section 2967.131 [2967.13.1] of the Revised Code imposed upon the releasee and that a more restrictive sanction is appropriate, the authority or court may impose a more restrictive sanction upon the releasee, in accordance with the standards established under division (E) of this section or in accordance with the agreement made under section 2967.29 of the Revised Code, or may report the violation to the parole board for a hearing pursuant to division (F)(3) of this section. The authority or court may not, pursuant to this division, increase the duration of the releasee's post-release control or impose as a post-release control sanction a residential sanction that includes a prison term, but the authority or court may impose on the releasee any other residential sanction, nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to sections 2929.16, 2929.17, and 2929.18 of the Revised Code.

(3) The parole board or, pursuant to an agreement under section 2967.29 of the Revised Code, the court may hold a hearing on any alleged violation by a releasee of a post-release control sanction or any conditions described in division (A) of section 2967.131 [2967.13.1] of the Revised Code that are imposed upon the releasee. If after the hearing the board or court finds that the releasee violated the sanction or condition, the board or court may increase the duration of the releasee's post-release control up to the maximum duration authorized by division (B) or (C) of this section or impose a more restrictive post-release control sanction. When appropriate, the board or court may impose as a post-release control

sanction a residential sanction that includes a prison term. The board or court shall consider a prison term as a post-release control sanction imposed for a violation of post-release control when the violation involves a deadly weapon or dangerous ordnance, physical harm or attempted serious physical harm to a person, or sexual misconduct, or when the releasee committed repeated violations of post-release control sanctions. Unless a releasee's stated prison term was reduced pursuant to section 5120.032 [5120.03.2] of the Revised Code, the period of a prison term that is imposed as a post-release control sanction under this division shall not exceed nine months, and the maximum cumulative prison term for all violations under this division shall not exceed one-half of the stated prison term originally imposed upon the offender as part of this sentence. If a releasee's stated prison term was reduced pursuant to section 5120.032 [5120.03.2] of the Revised Code, the period of a prison term that is imposed as a post-release control sanction under this division and the maximum cumulative prison term for all violations under this division shall not exceed the period of time not served in prison under the sentence imposed by the court. The period of a prison term that is imposed as a post-release control sanction under this division shall not count as, or be credited toward, the remaining period of post-release control.

If an offender is imprisoned for a felony committed while under post-release control supervision and is again released on post-release control for a period of time determined by division (F)(4)(d) of this section, the maximum cumulative prison term for all violations under this division shall not exceed one-half of the total stated prison terms of the earlier felony, reduced by any prison term administratively imposed by the parole board or court, plus one-half of the total stated prison term of the new felony.

(4) Any period of post-release control shall commence upon an offender's actual release from

prison. If an offender is serving an indefinite prison term or a life sentence in addition to a stated prison term, the offender shall serve the period of post-release control in the following manner:

(a) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under a life sentence or an indefinite sentence, and if the period of post-release control ends prior to the period of parole, the offender shall be supervised on parole. The offender shall receive credit for post-release control supervision during the period of parole. The offender is not eligible for final release under section 2967.16 of the Revised Code until the post-release control period otherwise would have ended.

(b) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under an indefinite sentence, and if the period of parole ends prior to the period of post-release control, the offender shall be supervised on post-release control. The requirements of parole supervision shall be satisfied during the post-release control period.

(c) If an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board or court. Periods of post-release control shall be served concurrently and shall not be imposed consecutively to each other.

(d) The period of post-release control for a releasee who commits a felony while under post-release control for an earlier felony shall be the longer of the period of post-release control specified for the new felony under division (B) or (C) of this section or the time remaining under the period of post-release control imposed for the earlier felony as determined by the parole board or court.