

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

LESLEY L. NICKEL,

Defendant-Appellant.

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Case No. **10-2134**

On Appeal from the Ottawa
County Court of Appeals
Sixth Appellate District

C.A. Case No. OT-10-004

**NOTICE OF CERTIFICATION OF CONFLICT
OF APPELLANT LESLEY L. NICKEL**

OFFICE OF THE OHIO PUBLIC DEFENDER

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Ottawa County Prosecuting Attorney
(COUNSEL OF RECORD)

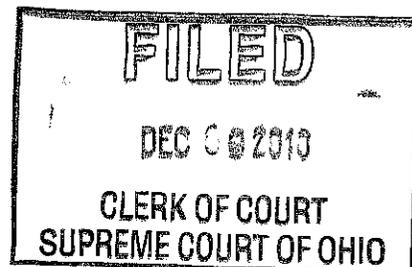
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COUNSEL FOR LESLEY L. NICKEL



NOTICE OF CERTIFIED CONFLICT

Appellant Lesley L. Nickel hereby gives notice that on November, 12, 2010, the Ottawa County Court of Appeals, Sixth Appellate District, certified its November, 12, 2010 decision in *State v. Nickel* as in conflict with the decision of the Fifth Appellate District in *State v. Rodman* (July 27, 1982), 5th Dist. No. CA-595. Section 3(B)(4), Article IV, Ohio Constitution.

The court of appeals certified the following question:

Are rape as defined in R.C. 2907.02 (A)(2) and sexual battery as defined in R.C. 2907.03 (A)(5) allied offenses of similar import pursuant to R.C. 2941.25?

Contemporaneous to this filing, Mr. Nickel filed a notice of appeal and memorandum in support of jurisdiction in this Court, arguing that rape as defined in R.C. 2907.02(A)(2) and sexual battery as defined in R.C. 2907.03(A)(5) are allied offenses of similar import under to R.C. 2941.25. Therefore, Mr. Nickel requests that this Court determine that a conflict exists, and to consolidate this case with *State v. Nickel*, Ottawa App. No. OT-10-004, 2010-Ohio-5510.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER


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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing NOTICE OF CERTIFICATION OF CONFLICT OF APPELLANT LESLEY L. NICKEL was forwarded by regular U.S. Mail, postage prepaid, to the office of Mark E. Mulligan, Ottawa County Prosecutor, Ottawa County Courthouse, 2nd Floor, 315 Madison St., Port Clinton, Ohio 43452, this 9th day of December, 2010.


TERRENCE K. SCOTT #0082019
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COUNSEL FOR LESLEY L. NICKEL

#332138

NOV 12 2010

JENNIFER L. WILKINS, CLERK
OTTAWA COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio

Court of Appeals No. GT-10-004

Appellee

Trial Court No. 07-CR-157

v.

Lesley L. Nickel

DECISION AND JUDGMENT

Appellant

Decided: NOV 12 2010

Mark E. Mulligan, Ottawa County Prosecuting Attorney,
for appellee.

Timothy Young, Ohio State Public Defender, and Terrence K. Scott,
Assistant State Public Defender, for appellant.

COSME, J.

{¶ 1} In a trial to the bench, defendant-appellant, Lesley Nickel, was found guilty by the Ottawa County Court of Common Pleas of 23 sex-related offenses, including one count of rape in violation of R.C. 2907.02(A)(2), a felony of the first degree, and one count of sexual battery in violation of R.C. 2907.03(A)(5), a felony of the third degree.

Ultimately, the trial court sentenced appellant to prison terms of ten years for the offense of rape and five years for sexual battery and ordered that they be served consecutively. Appellant argues in this appeal that the trial court committed plain error in failing to merge those offenses for sentencing, because rape and sexual battery are allied offenses of similar import and those offenses were not committed separately or with a separate animus in this case. Because we conclude that rape as defined in R.C. 2907.02(A)(2) and sexual battery as defined in R.C. 2907.03(A)(5) are not allied offenses of similar import, we affirm the trial court's judgment.

I. BACKGROUND

{¶ 2} In September 2007, an Ottawa County Grand Jury returned a 50 count indictment of appellant, including one count of rape in violation of R.C. 2907.02(A)(2) and one count of sexual battery in violation of R.C. 2907.03(A)(5). The charges generally stem from an ongoing series of sexual improprieties by appellant with the daughter of his live-in girlfriend, which allegedly occurred during the period from December 1, 2006, through September 13, 2007. The rape and sexual battery charges in particular concerned a single act of sexual conduct that occurred sometime during the period of March 23 through September 13, 2007, while the child was 14 years of age.

{¶ 3} Appellant waived his right to a jury trial and the matter proceeded to a six day bench trial commencing on September 23, 2008. At the conclusion of the trial, the court found appellant guilty of 23 offenses, including one count of rape and one count of sexual battery. In subsequent rulings, the trial court dismissed all but the sexual battery

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count and sentenced appellant to five years on that offense. The state filed an appeal and in *State v. Nickel*, 6th Dist. No. OT-09-001, 2009-Ohio-5996, this court reversed the trial court's judgment as to dismissing the rape count and remanded the cause for further proceedings. Upon remand, the trial court imposed a prison term of ten years for the rape and ordered that it be served consecutively to the five year term for sexual battery.

{¶ 4} It is from this judgment that appellant now appeals.

II. ALLIED OFFENSES

{¶ 5} Appellant asserts the following assignment of error:

{¶ 6} "The trial court erred in convicting Mr. Nickel of both rape and sexual battery, as those offenses are allied offenses of similar import, and were committed with a single animus and must merge under R.C. 2941.25."

{¶ 7} Appellant argues that he "could not have committed the offense of sexual battery under R.C. 2907.03(A)(5), without also committing the offense of rape under R.C. 2907.02(A)(2)." According to appellant, the elements of those offenses correspond to such a degree that the commission of one offense results in the commission of the other, thus making them allied offenses of similar import.

{¶ 8} Ohio's multiple-count statute, R.C. 2941.25, provides:

{¶ 9} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶ 10} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 11} The Ohio Supreme Court has articulated a two-step analysis in applying R.C. 2941.25:

{¶ 12} "In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses." (Emphasis sic.) *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶ 13} In this case, the state is not contending that the rape and sexual battery were committed separately or with a separate animus, and concedes that the convictions for these offenses "arose from the same sexual conduct with one victim." Thus, only the first step of the *Blankenship* test need be considered.

{¶ 14} In *State v. Rance* (1999), 85 Ohio St.3d 632, paragraph one of the syllabus, the Ohio Supreme Court held, "Under an R.C. 2941.25(A) analysis, the statutorily

defined elements of offenses that are claimed to be of similar import are compared *in the abstract.*" (Emphasis sic.) In so holding, the court considered whether to "contrast the statutory elements in the abstract or consider the particular facts of the case" and found that "comparison of the statutory elements in the abstract is the more functional test, producing 'clear legal lines capable of application in particular cases.'" *Id.* at 636, quoting *Kumho Tire Co., Ltd. v. Carmichael* (1999), 526 U.S. 137, 148, 119 S.Ct. 1167, 143 L.Ed.2d 238.

{¶ 15} In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, the court clarified that *Rance* had never required an exact alignment of statutory elements for the compared offenses to be considered allied under R.C. 2941.25(A). Rejecting such a "strict textual comparison" of statutory elements, the court held:

{¶ 16} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import." *Id.* at paragraph one of the syllabus. See, also, *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, ¶ 22.

{¶ 17} R.C. 2907.02(A)(2) provides:

{¶ 18} "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶ 19} R.C. 2907.03(A)(5) provides:

{¶ 20} "(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

{¶ 21} "* * *

{¶ 22} "(5) The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person."

{¶ 23} We have found only two cases in which an appellate court has considered the issue of whether rape under R.C. 2907.02(A)(2) and sexual battery under R.C. 2907.03(A)(5) are allied offenses of similar import.¹ In *State v. Rodman* (July 27, 1982),

¹Appellant cites the following cases for the proposition that "other courts have held that rape and sexual battery are allied offenses of similar import under circumstances similar to that of the present case." See *State v. Ferguson*, 11th Dist. No. 2007-A-0059, 2008-Ohio-2392, ¶ 24; *State v. Lindsay*, 3d Dist. No. 8-06-24, 2007-Ohio-4490, ¶ 8; *State v. Goff*, 9th Dist. No. 23292, 2007-Ohio-2735, ¶ 63; *State v. Williams*, 11th Dist. Nos. 2005-L-213, 2005-L-214, 2007-Ohio-212, ¶ 10, 13, 71; *State v. Doup*, 5th Dist. No. 02CA000008, 2002-Ohio-6981, ¶ 20, 76; *State v. Barnett* (Mar. 16, 1999), 3d Dist. No. 4-98-14; *State v. Coffey* (Oct. 16, 1995), 5th Dist. No. 94CAA11036; *State v. Collins* (Sept. 22, 1995), 4th Dist. No. 94CA1639; *State v. Roberson* (Feb. 10, 1988), 1st Dist. No. C-870148; *State v. Pierson* (Sept. 16, 1987), 9th Dist. No. 4197. However, none of the appellate courts in those cases determined or affirmed any determination that rape under R.C. 2907(A)(2) and sexual battery under R.C. 2907.03(A)(5) are allied offenses of similar import. Instead, to the extent that the cited cases involved the specific statutes at issue in this case, the appellate decisions in those cases simply relayed or accepted as fact that the respective trial courts had merged the offenses. No assignment of error was

5th Dist. No. CA-595, the Fifth District Court of Appeals held those offenses to be allied offenses of similar import under R.C. 2941.25, finding it "obvious that the conduct in the two counts is, within the meaning of the statute, 'two or more allied offenses of similar import' if not the same identical act."

{¶ 24} In *State v. Royal* (Apr. 8, 1987), 1st Dist. Nos. C-860369, C-860371, the First Appellate District reached the opposite conclusion, explaining:

{¶ 25} "Application of the [allied-offenses] test to the crimes for which Royal was convicted reveals that sexual conduct is an element common to both crimes. However, rape has the element of a purposeful state of mind, whereas sexual battery has no state-of-mind element. Sexual battery requires the existence of a familial relationship, which rape does not. The rape statute is designed to proscribe nonconsensual sexual relations, and the sexual battery section prohibits incest. * * * The commission of one of these offenses will not result necessarily in the commission of the other. We hold that rape (R.C. 2907.02[A][2]) and sexual battery (R.C. 2907.03[A][5]) are not allied offenses of similar import."

{¶ 26} We agree with the court of appeals in *Royal*. An abstract comparison of the statutory elements reveals that a defendant who commits rape in violation of R.C. 2907.02(A)(2) does not necessarily commit sexual battery under R.C. 2907.03(A)(5). Obviously, an offender can compel another to submit to sexual conduct by the use or threat of force without being the victim's parent, stepparent, guardian, custodian, or other

raised in those appeals in regard to the present issue, and no such issue was determined by the appellate courts in any of those cases.

comparable caregiver. Conversely, a defendant who commits sexual battery in violation of R.C. 2907.03(A)(5) does not necessarily commit rape under R.C. 2907.02(A)(2). We recognize that the element of force or threat of force required for rape under R.C. 2907.02(A)(2) is generally inferred where a person in a position of authority engages in sexual conduct with a young child. See *State v. Dye* (1998), 82 Ohio St.3d 323; *State v. Eskridge* (1998), 38 Ohio St.3d 56. However, "[t]he same rationale does not apply to an adult," *State v. Schaim* (1992), 65 Ohio St.3d 51, 55, and R.C. 2907.03(A)(5) "does not limit its reach to children * * * [and] is not limited to protecting minors from those in a position of authority over them." *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶ 10. Thus, an offender can engage in sexual conduct that violates R.C. 2907.03(A)(5) without compelling the victim to submit by force or threat of force as required under R.C. 2907.02(A)(2).

{¶ 27} In order to find otherwise, we would have to eschew the abstract-comparison test. Specifically, we would have to compare the elements of R.C. 2907.02(A)(2) and 2907.03(A)(5) in light of the particular evidence in this case and conclude that rape and sexual battery are allied offenses of similar import because their elements were satisfied by the singular conduct of this particular defendant.

{¶ 28} We hold that rape as defined in R.C. 2907.02(A)(2) and sexual battery as defined in R.C. 2907.03(A)(5) are not allied offenses of similar import pursuant to R.C. 2941.25 and, therefore, a defendant may be convicted of both offenses without a finding that they were committed separately or with a separate animus.

{¶ 29} Accordingly, appellant's sole assignment of error is not well-taken.

III. CERTIFICATION OF CONFLICT

{¶ 30} We sua sponte certify a conflict between our holding in this case and the Fifth District Court of Appeals' decision in *State v. Rodman* (July 27, 1982), 5th Dist. No. CA-595.

{¶ 31} Section 3(B)(4), Article IV of the Ohio Constitution states:

{¶ 32} "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

{¶ 33} Given this actual conflict between our district and the Fifth Appellate District, we hereby certify the record of this case to the Supreme Court of Ohio for review and final determination on the following question:

{¶ 34} Are rape as defined in R.C. 2907.02(A)(2) and sexual battery as defined in R.C. 2907.03(A)(5) allied offenses of similar import pursuant to R.C. 2941.25?

{¶ 35} The parties are directed to S.Ct.Prac.R. IV for guidance in how to proceed.

IV. CONCLUSION

{¶ 36} The judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

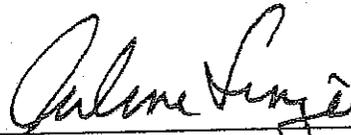
JUDGMENT AFFIRMED.

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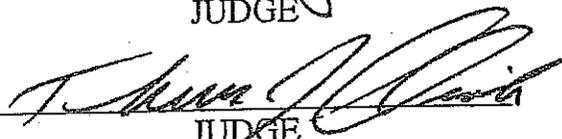
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J.



JUDGE

Thomas J. Osowik, P.J.



JUDGE

Keila D. Cosme, J.
CONCUR.



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.



5 of 6 DOCUMENTS

STATE OF OHIO, Plaintiff-Appellee, -vs- VERNON RODMAN, Defendant-Appellant

No. CA-595

COURT OF APPEALS, FIFTH APPELLATE DISTRICT, MORROW COUNTY, OHIO

1982 Ohio App. LEXIS 14012

July 27, 1982

COUNSEL: [*1] VIRGIL L. GUIHER, MORROW COUNTY PROSECUTING ATTORNEY

STEPHEN E. WEITHMAN, ASSISTANT COUNTY PROSECUTOR, Morrow County Court House, Mt. Gilead, Ohio 43338, ATTORNEY FOR PLAINTIFF-APPELLEE

JOHN L. SPIEGEL, 222 West Charles, P.O. Box 1024, Bucyrus, Ohio 44820, ATTORNEY FOR DEFENDANT-APPELLANT

JUDGES: Henderson, P.J., and McKee J., concur

OPINION BY: PUTMAN, J.

OPINION

OPINION

The appellant was indicted, convicted and sentenced for one count of rape of his thirteen and one-half year old natural daughter (*R.C. 2907.02*) and one count of sexual battery by vaginal intercourse with the same victim (*R.C. 2907.03(A)(5)*). The date of the crime was on or about August 17, 1976 for both counts.

It is obvious from the evidence and the Bill of Particulars that the two separate counts of the indictment were simply separate ways of charging crime with respect to one act of vaginal intercourse on August 17, 1976 between the parties above named.

The second count alleges that the victim, Monica R. Rodman, was a person who was not Vernon Rodman's

spouse at the time. The first count alleges in addition thereto that the act was purposely compelled by force or threat of force "and/or for the [*2] purpose of preventing resistance, the said Vernon Rodman did substantially impair Monica R. Rodman's judgment by deception."

We note at the outset that we are compelled by act of the legislature (*R.C. 2941.25*) to vacate the conviction and sentence for Count Two.

R.C. 2941.25, dealing with multiple counts, provides as follows:

"(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

It is obvious that the conduct in the two counts is, within the meaning of that statute, "two or more allied offenses of similar import" if not the same identical act. In either case, the legislature of our state has changed the common law and provided that the [*3] defendant may be convicted of only one of the counts.

Accordingly, the conviction and sentence of Count Two is vacated.

The sixth Assignment of Error is thereby sustained.

Altogether the appellant through counsel has assigned seven errors as follows:

I. THE INDICTMENT IN THE CASE IS FATALLY DEFECTIVE.

II. THE DEFENDANT'S RIGHT TO A SPEEDY TRIAL HAS BEEN VIOLATED.

III. THE DEFENDANT WAS NOT SHOWN TO BE GUILTY OF THE OFFENSES CHARGED BEYOND A REASONABLE DOUBT.

IV. THE DEFENDANT WAS DENIED A FAIR TRIAL BY THE TESTIMONY OF "OTHER ACTS."

V. THE DEFENDANT WAS DENIED A FAIR TRIAL BY THE TESTIMONY OF AN ALLEGED POLYGRAPH TEST.

VI. THE DEFENDANT WAS IMPROPERLY CONVICTED ON BOTH COUNTS OF THE INDICTMENT IN DEROGATION OF *OHIO REVISED CODE 2941.25*.

VII. THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN HIS FORMER DEFENSE COUNSEL PARTICIPATED IN THE PROSECUTION OF HIM.

We deal with each in turn.

I.

The first assignment of Error is overruled. The indictment is in the words of the statute and the Bill of Particulars is patently clear. The time set is on or about a single specified day.

II.

There is no violation of the speedy trial requirements [*4] of *R.C. 2945.71 et seq.*

The defendant was indicted on February 24, 1977, arrested the following day, and released on bail six days later, March 3, 1977. Applying the triple count provisions of *R.C. 2945.71(D)*, 9 days have rung up on the meter, so to speak. After another 227 days the defendant signed a motion for continuance which, in part, reads:

"Vernon Rodman further states that he has been advised of his right to a speedy trial and that he acknowledges that the request for a continuance waives his right to a speedy trial."

Thereafter, his counsel requested permission to withdraw, a hearing was set upon the motion of the accused to be adjudged indigent, and the accused did not appear for a hearing of June 8, 1978 of which he was

notified. He later failed to appear for a hearing on June 23, 1978 and a bench warrant was issued for his arrest. Many things occurred on the record after that, including a plea of guilty to a lesser included offense of gross sexual imposition, a successful motion to vacate the plea, more hearings at which the accused did not appear, further warrants issued for his arrest, and, finally, his arrest on September 15, 1980. In all, the defendant [*5] made himself unavailable from June 8, 1978 to September 15, 1980. See *State v. Bauer, 61 Ohio St. 2d 83 (1980)*.

The second Assignment of Error is overruled.

III.

The third Assignment of Error goes to the weight of the evidence and zeros in on the fact that the sole witness for the State was the prosecuting witness, the daughter of the accused. Her testimony is sufficient and explicit. It satisfies every element of the crimes charged if believed.

IV.

The testimony of other acts was invited by defense counsel on cross-examination as a trial stratagem for the apparently sound purpose of inducing her to give incredible testimony, thus destroying her credibility.

The fourth Assignment of Error is overruled.

V.

This case does not involve the results of a polygraph test. What is involved is a response by the prosecuting witness to a defense lawyer's question on cross examination as to whether she had discussed this case with anybody else. Her answer was "No, except I had a polygraph test." The subject was promptly dropped, and there was no request for any ruling by the trial court, no objection, and no motion for a mistrial.

We repeat, we do [*6] not have a case of the results of a polygraph test. *State v. Souel, 53 Ohio St. 2d 123 (1978)*.

Nothing having been called to the attention of the trial court in this matter, it cannot be raised for the first time on direct appeal.

VI.

We have already sustained the sixth Assignment of Error, and struck the conviction and sentence on Count Two.

VII.

The testimony that the Prosecuting Attorney who signed the indictment formerly represented the accused when he was attempting to get custody of the same daughter involved in this case was given by the daughter on cross examination. Nothing was called to the attention

of the trial court, and there is no ruling before us upon which to predicate error.

We have carefully considered the invitation of the energetic counsel for the appellant to consider "plain error" in this case. In this connection, we observe that the case of *State v. Long* (1978), 53 Ohio St. 2d 91, paragraph three of the syllabus states:

"Notice of plain error under *Crim. R. 52(B)* is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."

Upon a careful consideration [*7] of the entire record in this case, we find this is not a case calling for the application of the "plain error" rule.

Accordingly, the sixth Assignment of Error is sustained and all others overruled. The conviction and sentence of the Second Count are each vacated, the conviction and sentence of the First Count is affirmed, and this cause is remanded to the Court of Common Pleas of Morrow County for execution of that sentence.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the conviction and sentence of the Second Count is vacated, the conviction and sentence of the First Count are affirmed, and this cause is remanded to the Court of Common Pleas of Morrow County, Ohio, for execution of that sentence.