

**IN THE SUPREME COURT OF OHIO**

<b>STATE OF OHIO</b>	)	<b>SUPREME COURT CASE</b>
	)	<b>NO. 2011-0696</b>
<b>Appellee,</b>	)	
	)	<b>ON APPEAL FROM THE</b>
<b>vs.</b>	)	<b>COURT OF APPEALS,</b>
	)	<b>NINTH APPELLATE</b>
<b>RAYMONT MUNDY</b>	)	<b>DISTRICT 10CA0039-M</b>
	)	
<b>Appellant.</b>	)	<b>MEDINA COUNTY</b>
	)	<b>COURT OF COMMON PLEAS</b>
	)	<b>CASE NO. 04-CR-0551</b>

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**MEMORANDUM IN OPPOSITION TO JURISDICTION OF THE STATE OF OHIO**

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**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION AND IS NOT A CASE OF PUBLIC OR GREAT  
GENERAL INTEREST**

This Honorable Court should not accept jurisdiction for the following reasons:

1. Mundy's argument is conclusively opposite this Court's holding in *State v. Fischer*, which specifically rejected the contention that a sentence which failed to impose a statutorily-mandated term was void and therefore not a final, appealable order. To the extent that Mundy's narrow request in the instant appeal presents an issue which this Court has already decided, Mundy's appeal does not involve a substantial constitutional question.
2. This case is not of public or great general interest because Mundy's claim in his discretionary appeal has already been decided. Insofar as the conflict the Ninth District certified is the same general issue as the issue currently pending in *State v. Harris*, Supreme Court Nos. 2011-0008 and 2011-0010, the State notes that the intervening decision in *Fischer* suggests that there is no longer a conflict. Even if this Court should accept the certified conflict, the certified conflict question is not coextensive with the instant discretionary appeal. Accordingly, even if the Court were inclined to accept jurisdiction over the conflict question, jurisdiction over the instant discretionary appeal is not appropriate.

**STATEMENT OF THE CASE AND FACTS**

The essential facts in this case are not in dispute as Mundy never challenged the factual basis underlying his conviction following the jury's guilty verdicts.

The Medina County Grand Jury indicted Raymont Mundy ("Mundy") on October 27, 2004, charging him with two (2) counts of Assault on a Police Officer in violation of R.C. 2903.11(A)(2), (D), felonies of the first degree; three (3) counts of felonious assault in violation of R.C. 2903.11(A)(2), felonies of the second degree; and one (1) count of Trafficking in Drugs in violation of R.C. 2925.03(A)(1), (C)(4)(c), a felony of the third degree.

Following a jury trial, the jury returned verdicts finding Mundy guilty of all offenses except for one (1) of the two (2) counts of Assault on a Police Officer. The trial court sentenced Mundy to thirteen (13) years in prison. Mundy timely filed a notice of appeal, which resulted in an affirmed conviction. *State v. Mundy*, 9<sup>th</sup> Dist. No. 05CA0025-M, 2005 Ohio 6608.

Mundy also appealed from the trial court's denial of a motion for reconsideration and resentencing, which the Ninth District also affirmed. *State v. Mundy*, 9<sup>th</sup> Dist. No. 08CA0047-M, 2009 Ohio 1136. Mundy successfully moved the appellate court to reopen his appeal in that case. After additional review, the appellate court vacated Mundy's sentence for failure to impose correctly postrelease control and remanded to the trial court for resentencing. *Mundy*, 9<sup>th</sup> Dist. No. 08CA0047-M, 2009 Ohio 6373.

Following another resentencing, at which the trial court again imposed a thirteen (13) year sentence, the court correctly imposed postrelease control and, although it discussed the mandatory license suspension, noted that any suspension it imposed would be effectively moot and therefore credited him with the suspension. Mundy filed notice of appeal. *State v. Mundy*, 9<sup>th</sup> Dist. No. 10CA0039-M. The appellate court affirmed. *State v. Mundy*, 9<sup>th</sup> Dist. No. 10CA0039-M, 2011 Ohio 1157.

Mundy filed notice of appeal from the opinion affirming his conviction and sentence and a Memorandum in Support of Jurisdiction in this Honorable Court on April 27, 2011. Mundy also filed notice in this Court of a then-pending motion to certify a conflict in the court of appeals. Mundy timely moved for the appellate court to certify a conflict on March 23, 2011, between the decision below in this case and the decision of the Eighth District Court of Appeals in *State v. Harris*, (Dec. 6, 2010), 8<sup>th</sup> Dist. No. 95128, 2010 Ohio 5374. The appellate court granted the motion, certifying a conflict on April 22, 2011. Mundy filed notice of the certified conflict on May 13, 2011. Ohio Supreme Court No. 2011-0838.

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The State hereby responds to Mundy's memorandum in support of the discretionary appeal.

## LAW AND ARGUMENT

### Response to Appellant's Proposition of Law

- I. WHEN THE TIME DURING WHICH AN OTHERWISE MANDATORY DRIVER'S LICENSE SUSPENSION HAS ALREADY PASSED, THE FAILURE TO JOURNALIZE THE SUSPENSION DOES NOT RENDER THE ENTIRE SENTENCE VOID.

A. The Court of Appeals Certified a Conflict

Initially, the State notes that Mundy asked the Court to accept his appeal and stay briefing and consideration pending disposition of the pending action in *State v. Harris*, Supreme Court No. 2011-0008 and 2011-0010. Should the Court accept jurisdiction of the instant discretionary appeal, the State would join in that request to stay briefing and consideration. Nevertheless, the Court should find that this discretionary appeal does not warrant the exercise of its discretionary jurisdiction for the meritorious reasons articulated below.

As the Court is aware, the Ninth District Court of Appeals did in fact certify a conflict on April 22, 2011, between the judgment below and the decision of the Eighth District Court of Appeals in *State v. Harris*, 8<sup>th</sup> Dist. No. 95128, 2010 Ohio 5374. *State v. Mundy* (Apr. 22, 2011), 9<sup>th</sup> Dist. No. 10CA0039-M (unreported).

The instant discretionary appeal and the filing by Mundy of the court of appeals' certified conflict, however, are separate matters. *See* S. Ct. Prac. R. 4.4. Notwithstanding any actual conflict which may or may not exist in a certified conflict case Mundy recently filed (Ohio Supreme Court No. 2011-0838), the Court's consideration of the jurisdictional memoranda in the instant discretionary appeal is contemporaneous with its consideration of the certified conflict.

S. Ct. Prac. R. 4.4(A). Even if the Court later determines that a conflict does in fact exist, the determination whether to accept the discretionary appeal remains an individual one. S. Ct. Prac. R. 4.4(C).

In this case, Mundy presents a different iteration of the certified conflict question. Rather than ask the Court to decide the specific issue he raised on appeal (whether his sentence was void for failure to impose a statutorily-mandated license suspension), however, Mundy now seeks to argue, for the first time, that he did not have a final, appealable order. For the reasons which now follow, Mundy's discretionary appeal should be denied.

B. Mundy Never Raised the Instant Argument to the Lower Courts

Mundy argues that his sentence is not a final, appealable order. As the appellate court below noted, Mundy's argument related only to whether his sentence was void. *Mundy*, 2011 Ohio 1157, at ¶ 11 ("Mr. Mundy further argues that because the court failed to include any reference to a driver's license suspension in the sentencing entry, he has once again been given a void sentence that requires remand and resentencing.") Nowhere, however, did Mundy argue that his allegedly void sentence resulted in the lack of a final, appealable order.

In failing to make the argument to the lower court, Mundy forfeited the issue. *Wooster v. Graines* (1990), 52 Ohio St. 3d 180, 185, 556 N.E.2d 1163; *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St. 3d 121, 123, 512 N.E.2d 640; *see also State v. Phillips* (1971), 27 Ohio St. 2d 294, 302, 272 N.E.2d 347. This Court should not pass on the question whether the sentence was a final, appealable order because Mundy never made the argument below. *Id.* Jurisdiction over the instant discretionary appeal would be improper.

Determination of whether the order is final and appealable under R.C. 2505.02 also raises questions regarding the Court's subject matter jurisdiction. *See State ex rel. Tollis v. Ct. of Appeals for Cuyahoga Cty.* (1988), 40 Ohio St. 3d 145, 147, 532 N.E.2d 727. While courts of general subject matter jurisdiction generally possess authority to determine their own

jurisdiction, *see State ex rel. Hamilton Cty. Bd. Comm'rs v. Hamilton Cty. Ct. Common Pleas*, 126 Ohio St. 3d 111, 2010 Ohio 2467, at ¶ 38, even assuming, *arguendo*, that Mundy is correct his order is not a final, appealable order, the Court would therefore lack jurisdiction to hear his case. Accordingly, accepting Mundy's position as correct would defeat jurisdiction in this case, making jurisdiction over this discretionary appeal would be inappropriate.

On its merits, however, Mundy's argument is fatally flawed.

C. Mundy's Argument is Contrary to the Holding in *State v. Fischer*

In this case, Mundy argues that the trial court's failure to include a statutorily-mandated driver's license suspension in his sentence rendered the sentence void. He then argues that because the sentence was void, it was not a final, appealable order within the ambit of R.C. 2505.02. Specifically, he relies on *State ex rel. Carnail v. McCormick*, 126 Ohio St. 3d 124, 2010 Ohio 2671, for his proposition that a void judgment is not a final, appealable order. Memorandum in Support of Jurisdiction at 4.

As for his argument in this discretionary appeal that his sentencing entry is not a final, appealable order, Mundy's reliance on *McCormick* is misplaced. While the *McCormick* Court opined that sentences journalized before July 11, 2006 (the effective date of R.C. 2929.191, *see State v. Singleton*, 124 Ohio St. 3d 173, 2009 Ohio 6434) which failed to impose correctly postrelease control were void and did not constitute final, appealable orders under R.C. 2505.02, the Court's more recent opinions in *State v. Fischer*, 128 Ohio St. 3d 92, 2010 Ohio 6238, and *State ex. rel. DeWine v. Burge*, 128 Ohio St. 3d 235, 2011 Ohio 235, together with the explicit language of R.C. 2953.08(G)(2)(b) compel the opposite conclusion.

This Court in *Fischer* specifically rejected the argument that because the sentence was void it was not a final appealable order. 128 Ohio St. 3d 92, at ¶ 37 (“In so holding, we reject Fischer’s claim that there was no final, appealable order in this case.”) Instead, this Court in *Fischer* held that, notwithstanding the failure of the trial court to impose correctly postrelease control, the only portion of the sentence which was void was the portion relating to postrelease control. *Id.* at ¶ 1 of the syllabus (“A sentence that does not include the statutorily mandated term of postrelease control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack.”). The *Fischer* Court also noted in its opinion that:

[t]he fact that the sentence was illegal does not deprive the appellate court of jurisdiction to consider and correct the error. In fact, R.C. 2953.08(G)(2)(b) expressly authorizes a reviewing court to modify or vacate any sentence that is “contrary to law.” Clearly, no such authority could exist if an unlawful sentence rendered a judgment nonfinal and unappealable.

*Id.* at ¶ 39. The Court reaffirmed this understanding in *Burge*, 128 Ohio St. 3d 236, 2011 Ohio 235, at ¶ 19, citing *Fischer*, 128 Ohio St. 3d 92, at ¶ 39, when it noted that the fact a sentence was illegal did not deprive the appellate court of jurisdiction to consider and correct the error.

Thus, since the appellate courts have jurisdiction to consider and correct the error about which Mundy complains, it necessarily follows that the underlying sentencing entry constitutes a final, appealable order. R.C. 2953.08(G)(2); R.C. 2505.02. Therefore, even assuming, *arguendo*, that the failure of the trial court to impose the mandatory license suspension rendered the sentence *void in part* (the part relating to the required imposition of the driver’s license suspension), *Fischer*, 128 Ohio St. 3d 92, at ¶ 3 of the syllabus, the error did not deprive the appellate court of jurisdiction to consider and/or correct the error, *id.* at ¶ 39.

Mundy's sole proposition of law in this discretionary appeal asserts that his conviction was not a final, appealable order because the trial court failed to impose a mandatory license suspension. As just shown, his argument is contrary to this Court's recent holdings in *Fischer* and *Burge*. Insofar as Mundy challenges recently-decided, binding authority of this Court, Mundy does not present a convincing position; he fails to show that a substantial constitutional question or question of great general or public interest exists warranting the exercise of this Court's jurisdiction. Therefore, the Court should dismiss this discretionary appeal as not involving a substantial constitutional question or question of great general or public interest.

D. Even if the Court Recognizes a Conflict in Mundy's Notice of the Appellate Court's Decision Certifying a Conflict, the Instant Discretionary Appeal is a Separate Matter from the Certified Conflict.

In this case, the Ninth District certified the question: "Whether a trial court's failure to impose the statutorily mandated driver's license suspension under R.C. 2925.03(G) when required for drug trafficking convictions renders the sentence void." *Mundy* (Apr. 22, 2011), 9<sup>th</sup> Dist. No. 10CA0039-M. Like the Ninth District in this case, the Eighth District in *Harris* certified a conflict on the question: "Does the failure to include a mandatory driver's license suspension in a criminal sentence render the sentence void?" *State v. Harris* (Dec. 6, 2010), 8<sup>th</sup> Dist. No. 95128 (attached to "Copy of court of appeals order certifying a conflict" filed by the State in Supreme Court No. 2011-0008). Mundy filed notice of the certified conflict on May 13, 2011. Ohio Supreme Court No. 2011-0838.

Mundy's instant discretionary appeal, however, is NOT co-extensive with his notice of a certified conflict. In this discretionary appeal, Mundy asks the Court to declare his sentencing entry a non-final order as a result of it being entirely void. As described above, however, his

position is directly opposite the Court's recent holdings in *Fischer* and *Burge*. In the certified conflict case, however, the issue merely centers on whether his sentence is void. Even assuming, *arguendo*, that the Court will recognize the conflict,<sup>1</sup> these issues are not coextensive and thus do not require the Court to accept the discretionary appeal. S. Ct. Prac. R. 4.4(C). Specifically, even if the Court were to recognize a conflict and then hold Mundy's sentence void in part for failure to impose a statutorily-mandated license suspension, it does not automatically follow from those decisions that the void-in-part sentence rendered the order non-final or non-appealable. *Fischer*, 128 Ohio St. 3d 92, at ¶ 39; *Burge*, 128 Ohio St. 3d 236, at ¶ 19.

If the Court decides that a conflict exists, the Court should stay *that* action pending the outcome of *Harris*, Supreme Court Nos. 2011-0008 and 2011-0010. The Court should decline jurisdiction over the instant discretionary appeal, however, as not involving a substantial constitutional question or issue of great general or public interest.

E. If the Court Accepts This Appeal, It Should Hold the Matter in Abeyance Until a Decision in *State v. Harris*.

Insofar as the Court may determine that a conflict exists between the various appellate districts in the Certified Conflict Case, Ohio Supreme Court Number 2011-0838, and assuming, *arguendo*, it were to further accept the instant discretionary appeal, the State respectfully asks that the Court consolidate the matters for joint disposition as the cases together present the somewhat related questions of what the failure to impose a mandatory license suspension

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<sup>1</sup> The State notes that, at least in Mundy's case, there is no conflict. Specifically, the intervening decision of this Court in *State v. Fischer* compels the appellate court's determination that the trial court's failure to include the mandatory driver's license suspension does not render the sentence entirely void. 128 Ohio St. 3d 92, at ¶ 3 of the syllabus. Only the part of the sentence which failed to impose the license suspension is void. The rest of the sentence remains intact. Accordingly, the most which can be said of Mundy's sentence is that it is void-in-part.

represents and whether a defendant may appeal such a determination. Furthermore, assuming the Court will recognize the conflict and accept the instant appeal, the State respectfully asks that the Court stay briefing and disposition in both of Mundy's cases until and unless the Court resolves the voidness issue in *State v. Harris*, # 2011-0008 and 2011-0010.

**CONCLUSION**

For all of the foregoing reasons, the State of Ohio respectfully requests that this Honorable Court decline jurisdiction over the instant discretionary appeal. Should the Court decide to accept jurisdiction, however, the Court should consolidate the action with Mundy's Certified Conflict filing (assuming the Court chooses to recognize a conflict in that case) and stay both actions pending the outcome in *State v. Harris*, Supreme Court Nos. 2011-0008 and 2011-0010.

Respectfully submitted,

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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction of the State of Ohio was sent regular U.S. mail to Raymont Mundy, Appellant, #481-658, Richland Correctional Institution, 1001 Olivesburg Road, P.O. Box 8107, Mansfield, Ohio 44901-8107, this 25<sup>th</sup> day of May, 2011.

  
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