

**ORIGINAL**

Nos. 2011-0008 & 2011-0010

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 95128

STATE OF OHIO

Plaintiff-Appellant

-vs-

MARIO HARRIS

Defendant-Appellee

**MERIT BRIEF OF APPELLANT**

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## **Introduction and Summary of Argument**

Before the Court is a certified conflict and a proposition of law. The State's brief will first address the proposed proposition of law as a single brief. Then the brief will focus on the questioned certified to this Court.

The proposed proposition of law asks this Court to hold that an order of forfeiture is not required in the judgment of conviction to create a final appealable order. The State's position is based on the plain language of Crim.R. 32(C), the definition of sentence in the Ohio Revised Code, and the bad public policy created by requiring the order of forfeiture in the judgment of conviction. It is for these reasons that the State asks this Court to adopt the following proposed proposition law:

**Because forfeiture of items contemplates actions and issues that extend beyond the criminal case and sentence, Crim.R. 32(C) does not require the forfeiture of items be listed in the sentencing entry.**

The brief then addresses the certified conflict question. The conflict is whether failing to impose a mandatory driver's license suspension renders the entire criminal sentence void. Based on this Court's precedent in *State v. Joseph* and *State v. Fischer*, the entire sentence is not void for failing to impose a mandatory driver's license suspension. The only part of the sentence that is void is the driver's license suspension and the

defendant is entitled to a hearing to address the sole issue of the driver's license suspension.

**Statement of the case and facts for CR-08-506498**

Harris pleaded guilty to trafficking in MDMA with a schoolyard, firearm, and forfeiture specification. Harris also pleaded guilty to having a weapon under disability.

Harris received a 1-year sentence for the firearm specification, 3 years for trafficking in MDMA, and a consecutive 1 year sentence for having a weapon under disability. The trial court did not suspend Harris driver's license.

The judgment of conviction indicated that Harris pleaded guilty to the forfeiture specification but did not order any contraband forfeited.<sup>1</sup> A subsequent entry ordered the contraband forfeited to the State.<sup>2</sup>

About 2 years after being sentenced, Harris filed a motion for resentencing arguing that his sentence was void because the trial court

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<sup>1</sup> J.E. of 6/3/2008.

<sup>2</sup> J.E. of 6/4/2008.

failed to suspend his driver's license and failed to impose a mandatory fine. The trial court denied the motion and Harris appealed.

Before addressing the purported errors raised by Harris relating to CR-08-506498, the Eighth District dismissed this portion of the appeal because there was not a final appealable order. The Eighth District held that because the order of forfeiture was not contained within the judgment of conviction there was never a final appealable order.<sup>3</sup>

This Court accepted the following proposition to address that portion of the Eighth District's opinion:

**Proposed Proposition of Law: Because forfeiture of items contemplates actions and issues that extend beyond the criminal case and sentence, Crim.R. 32(C) does not require the forfeiture of items be listed in the sentencing entry.**

#### **I. Question presented**

Crim.R. 32(C) requires the judgment of conviction to contain a disposition of all convictions and a sentence for each conviction. An order of forfeiture does not fit into this Court's definition of conviction or the legislature's definition of sentence because a forfeiture specification does

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<sup>3</sup> *State v. Harris*, 190 Ohio App.3d 417, 2010-Ohio-5374, at ¶ 7.

not create a criminal offense. Must the judgment of conviction contain the order of forfeiture to be a final appealable order?

## **II. Law and Analysis**

In criminal cases, the State may seek forfeiture of property that is an instrumentality of a criminal offense. The Eighth District requires that the order of forfeiture—the actual order forfeiting the property to the State—be in the judgment of conviction to have a final appealable order. There are two reasons why the order of forfeiture is not required to be in the judgment of conviction. First, the plain language of Crim.R. 32 does not require the order of forfeiture to make a judgment of conviction final and appealable. Second, because the forfeiture statute contemplates the possibility of continued litigation after the property is forfeited, criminal defendants may not be able to expeditiously appeal their conviction if required to have the forfeiture resolved before pursuing a direct appeal.

### **A. Crim.R. 32(C) and State v. Baker.**

In addressing this proposition of law, the starting point is the plain language of Crim.R. 32(C) as analyzed by this Court's decision in *State v.*

*Baker*. In *Baker*, this Court held that to have a final appealable order in a criminal case the judgment of conviction must contain a disposition of all convictions, a sentence for each conviction, the trial judge's signature, and a date stamp.<sup>4</sup>

The first issue to determine is whether forfeiture involves a criminal offense for which there can be a *conviction* such that the *judgment of conviction* issued under Crim.R. 32(C) must contain information about the forfeiture. In *Baker*, this Court held that a conviction is when a person is found guilty of a criminal offense.<sup>5</sup> This analysis was based on this Court's previous decision in *State v. Tuomala*. In *Tuomala*, this Court decided whether a person found not guilty by reason of insanity was entitled to jail time credit. This Court held that the person was not entitled to jail time credit because the jail time credit statute required a conviction before providing an individual with such credit.<sup>6</sup>

This Court in *State v. Ford* recently addressed this issue of what constitutes a conviction based upon a person being found guilty of a specification in the context of allied offenses. The issue in *Ford* was

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<sup>4</sup> *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, at paragraph 1 of the syllabus.

<sup>5</sup> 2008-Ohio-3330, at ¶ 11.

<sup>6</sup> *State v. Tuomala*, 104 Ohio St.3d 93, 2004-Ohio-6239.

whether a firearm specification would merge with the crime of firing a weapon into a habitation. The issue boiled down to whether a firearm specification was a criminal offense. This Court began with the definition of offense found at R.C. 2901.03(B), “An offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibition or failure to meet such duty.” In examining the firearm specification statute, this Court held that the firearm specification does not state a positive prohibition or enjoin a specific duty.<sup>7</sup> Because the firearm specification did not state a positive prohibition or enjoin a specific duty, the specification is not considered an offense.

**B. Is forfeiture a criminal offense that results in a conviction as contemplated by Crim.R. 32(C) and this Court’s precedent?**

Like the firearm specification statute, the forfeiture specification statute does not state a positive prohibition against a certain act or enjoin a specific duty. The forfeiture specification statute allows a factfinder to determine that certain property is subject to forfeiture.<sup>8</sup> The forfeiture code

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<sup>7</sup> *State v. Ford*, 128 Ohio St.3d 398, 2011-Ohio-765, at ¶s 10 and 16.

<sup>8</sup> R.C. 2941.1417.

section found at Chapter R.C. 2981 does not state a positive prohibition or enjoin a specific duty. R.C. 2981.01 indicates that forfeiture is to provide an economic disincentive to commit criminal acts by forfeiting to the state instrumentalities used to commit crimes. For a criminal forfeiture there must be a conviction for some underlying criminal offense.<sup>9</sup>

The closest that the forfeiture statute comes to requiring an order of disposition is R.C. 2981.04. In this statute, after a verdict of forfeiture, the trial court shall issue an order forfeiting the property listed in an indictment to the state. But that statute does not require the order of forfeiture be listed in the judgment of conviction.

Because forfeiture is not an offense and there can be no conviction, the plain language of Crim.R. 32(C) does not require the order of forfeiture be contained within the judgment of conviction. An additional reason that the plain language of Crim.R. 32(C) does not require the forfeiture order be in the judgment of conviction is that there is not a sentence for a forfeiture.

The Eighth District interprets the word sentence in Crim.R. 32(C) to refer to the prison sentence and the order of forfeiture. Based on the plain language of the word sentence in Crim.R. 32(C) coupled with the definition

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<sup>9</sup> R.C. 2981.02.

of sentence and sanction in the Ohio Revised Code, the Eighth District's decision creates an improper definition of sentence.

The Ohio Revised Code defines the word "sentence" as "the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense."<sup>10</sup> The word sanction "means any penalty imposed on an offender who is convicted of or pleads guilty to an offense, as punishment for the offense" and includes "any sanction imposed pursuant to any provision of sections 2929.14 to 2929.18 or 2929.24 to 2929.28 of the Revised Code."<sup>11</sup>

There is no conviction for a forfeiture. There is a verdict of forfeiture but that is not a conviction because the forfeiture specification does not create an offense. Therefore, the order of forfeiture does not equate to a sentence under the Ohio Revised Code. By the plain language of Crim.R. 32(C), a judgment of conviction must contain the sentence. But there is no sentence for the verdict of forfeiture. Because there is no sentence for the verdict of forfeiture, the order of forfeiture does not need to be in the judgment of conviction to make the judgment of conviction a final appealable order.

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<sup>10</sup> R.C. 2929.01(E).

<sup>11</sup> R.C. 2929.01(D).

Although forfeiture is a penalty and would seem to fit under the definition of sanction, it should not be considered a sanction. For a penalty to be a sanction, the penalty must be the result of a conviction for an offense. Again, there is no conviction for an offense when dealing with a forfeiture specification. Thus, for purposes of Crim.R. 32(C), forfeiture should not be considered a sanction. Additionally, a forfeiture, for purposes of a judgment of conviction, should not be a sanction because a forfeiture is entered under R.C. 2981. Although not limited to specific code sections, sanctions include penalties found in “2929.14 to 2929.18 or 2929.24 to 2929.28.”<sup>12</sup> Because forfeiture is created in a different code section than the listed code sections for sanctions, a forfeiture is not a sanction for purposes of Crim.R. 32(C)’s judgment of conviction language.

Because an order of forfeiture is not a sentence and should not be considered a sanction for purposes of Crim.R. 32(C), an order of forfeiture should not be required in the judgment of conviction. Harris’s judgment of conviction entered on June 3, 2008 is a final appealable order because it contains the convictions, the sentences, the time stamp, and the trial judge’s signature.

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<sup>12</sup> R.C. 2929.01(DD).

**C. Should a defendant convicted of a criminal offense and sentenced to prison be forced to wait to file a direct appeal until an order of forfeiture is issued?**

The Eighth District's decision to require the order of forfeiture in the judgment of conviction is bad public policy. Criminal law and criminal procedure is concerned with allowing the State and the defendant to expeditiously litigate a case at all stages of the proceedings. This provides for swift administration of justice and quick preservation of constitutional rights. The Eighth District's decision thwarts these goals.

The forfeiture statute contemplates the possibility of continued litigation beyond a verdict of forfeiture. R.C. 2981.06 contemplates the possibility that a trial court may issue restraining orders relating to the forfeited property. And third parties may become involved in the underlying criminal action to address any forfeited property. Hearings may be held to determine the proper forfeiture of the property. An order of forfeiture cannot be fully completed until all the issues concerning any forfeited property are resolved. Under the Eighth District's decision, direct appeals of conviction could be delayed until the forfeiture issue is resolved. The criminal defendant may have little concern who is entitled to the forfeited property. In fact, the seized property may not actually belong to

the defendant and the defendant may have only forfeited his own legal interest in the property. An appeal for a criminal defendant related to guilt and punishment should not be delayed because of pending litigation concerning forfeited property. The Eighth District's decision dismissing Harris's appeal in relation to CR-08-506498 should be reversed and remanded for consideration of the assigned error in relation to CR-08-506498.

### **Conclusion**

A judgment of conviction should not require the order of forfeiture under R.C. 2981.04 to be a final appealable order. To require otherwise goes against the plain language of Crim.R. 32(C), the definition of sentence in the Ohio Revised Code, and creates bad public policy by delaying a defendant's ability to take an expeditious appeal. The Eighth District's decision should be reversed and remanded for consideration of the remaining assigned errors in relation to CR-08-506498.

## Statement of the case and facts for CR-08-510551

Harris pleaded guilty to trafficking in narcotics with a forfeiture specification and the remaining counts were nolle. He received a 6-month sentence for trafficking run consecutively with CR-08-506498.

Approximately 2-years after being sentenced, Harris filed a motion for resentencing. He argued that his sentence was void for failing to impose a driver's license suspension.<sup>13</sup> The trial court denied the motion and Harris appealed.

The Eighth District found that Harris's sentence was void because the trial court failed to impose a mandatory driver's license suspension, "when a sentence fails to impose a mandated term such as a driver's license suspension, that sentence is void."<sup>14</sup> The Eighth District remanded the case for a complete resentencing.

In relation to this holding, this Court accepted the Eighth District's certified question:

**Does the failure to include a mandatory driver's license suspension in a criminal sentence render that sentence void?**

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<sup>13</sup> Although not in the record Harris's license was already suspended.

<sup>14</sup> *State v. Harris*, 190 Ohio App.3d 417, 2010-Ohio-5374, at ¶ 3.

## **Law And Argument**

**Certified Conflict Question: Does the failure to include a mandatory driver's license suspension in a criminal sentence render that sentence void?**

### **I. Question presented**

A sentence is comprised of a combination of sanctions. When a trial court fails to impose one of those sanctions, that part of the sentence is void and subject to correction. Harris's conviction requires a prison sentence and a driver's license suspension. The trial court imposed a prison sentence but failed to impose the driver's license suspension. Is Harris's entire sentence void or is Harris only entitled to have a hearing regarding the failure to impose a driver's license suspension?

### **II. Law and Analysis**

Harris pleaded guilty to trafficking in narcotics as a fifth degree felony. For this conviction, a trial court must, if applicable, suspend a

person driver's or commercial driver's license for a period of 6 months to 5 years.<sup>15</sup>

The trial court failed to impose this sanction. The question then turns to whether this failure renders the entire sentence void and Harris is entitled to a de novo resentencing.

### A. Law

The two competing cases in this conflict paradigm are the decision in this case and *State v. Fain*. In this case, the Eighth District held that the failure to include a mandatory driver's license suspension renders the sentence void subject to a de novo resentencing.<sup>16</sup> In *State v. Fain*, the Hamilton County Court of Appeals held that improperly including a driver's license suspension for a particular conviction does not render a sentence void.<sup>17</sup>

In *Fain*, the defendant argued that his sentence for having a weapon under disability was void because the trial court imposed a 3-year driver's license suspension. The court found that the sentence was in error but was

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<sup>15</sup> R.C. 2925.03(D)(2).

<sup>16</sup> *State v. Fain*, Cuyahoga App. No. 89111, 2007-Ohio-6825, at ¶ 22.

<sup>17</sup> *State v. Fain*, Hamilton App. Nos. 080830 and 080832, 2010-Ohio-2455.

not void. The court relied on *State v. Joseph* to find that a sentence is void in a very few limited contexts. The Hamilton County Court also relied on *State v. Anthony* where this Court vacated an improper driver's license suspension but did not remand for a de novo resentencing. The Hamilton Court first addressed this Court's decision in *State v. Joseph*:

The Ohio Supreme Court has recently emphasized the fact that there are limited circumstances under which a sentence will be considered void. In *State v. Joseph*, the court addressed the issue of whether the failure to inform a defendant of mandatory court costs renders a sentence void in the way it would if there is an omission related to postrelease control. It does not. The court noted that "[t]he civil nature of the imposition of court costs does not create the taint on the criminal sentence that the failure to inform a defendant of postrelease control does. Nor does the failure to inform a defendant orally of court costs affect another branch of government. It affects only the court and the defendant."<sup>18</sup>

The Hamilton County Court of Appeals thus relied on *State v. Joseph* to find that improperly imposing a driver's license suspension does not render the entire sentence void. The Hamilton Court of Appeals then found that additional Ohio Supreme Court precedent further supported this decision:

This conclusion is buttressed by the Ohio Supreme Court's most recent case to address the issue. *State v. Anthony* involved one count of attempted felonious assault and one count of having a weapon while under a disability. Anthony was sentenced to seven years in prison and given a driver's license suspension. The Supreme Court held that the suspension was not proper because the use of a motor vehicle was not integral to the crime

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<sup>18</sup> *State v. Fain*, 2010-Ohio-2455, at ¶ 7 (quoting *State v. Joseph*, 125 Ohio St.3d 76,2010-Ohio-954).

itself. The court concluded by stating that “R.C. 4507.16(A)(1)(b) was improperly invoked and that the court of appeals erred in upholding the revocation of Anthony's driver's license. Accordingly, we reverse the decision of the court of appeals and reinstate appellant's driver's license.”<sup>19</sup>

In coming to its conclusion in this case, the Eighth District failed to consider the impact this Court's decision in *State v. Joseph* might have on the outcome and was unable to examine the decision in *State v. Fischer*, as that decision was not released until approximately 1-month after the decision in *State v. Harris*.

In *Fischer*, this Court examined whether a person that was resentenced to properly impose postrelease control was entitled to new direct appeal and would be able to raise trial errors in this new appeal.

This Court examined the decision in *State v. Saxon* 109 Ohio St.3d 176, 846 N.E.2d 824, 2006-Ohio-1245 to arrive at its conclusion in *Fischer*. In *Saxon*, the defendant was given a 4-year sentence for a fourth degree felony. By law the maximum sentence for a fourth degree felony is 18 months. The Eighth District held that Saxon was entitled to a complete resentencing on every count, which included convictions that had proper sentences. This Court reversed. This Court held that a sentence is defined

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<sup>19</sup> *Id.* at ¶ 9 (quoting *State v. Anthony*, 96 Ohio St.3d 173, 2002-Ohio-4008).

as a combination of sanctions. And a problem with one sentence does not affect the sentence for a different count. The logic of separating sentences for separate counts was then applied to the combination of sanctions within a single sentence. This Court held in *Fischer* that a failure to impose postrelease control makes that part of the sentence void and that part of the sentence must be set aside. Thus, the remedy for improperly imposing postrelease control is not a de novo resentencing but a hearing to impose postrelease control.<sup>20</sup>

The Eighth District did not examine how this Court's decision in *State v. Joseph* might affect the proper decision in this case. In *Joseph*, this Court was required to determine whether failure to impose court costs rendered the entire sentence void and the defendant would be entitled to a de novo resentencing. The defendant had to be resentenced after his death sentence was vacated. At that resentencing, the trial court failed to impose court costs in open court but included payment of costs in the sentencing entry. The defendant argued that the failure to impose costs in open court was akin to a failure to impose postrelease control. This Court disagreed and found that court costs were distinguishable from postrelease control in three critical respects:

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<sup>20</sup> *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, at ¶s 17-29.

- 1) a trial court had the authority to waive payment of court costs but could not waive a postrelease control obligation;
- 2) the issue of costs only affected the judicial branch of government unlike postrelease control, which has an effect on the executive branch of government and;
- 3) court costs are not punishment.

The failure to include court costs did not render the sentence void and the case was remanded for the defendant to move for a waiver of costs.

## **B. Analysis**

Based on the precedent in *State v. Joseph* and *State v. Fischer* a de novo sentence is not required if a trial court fails to impose a mandatory driver's license suspension.

The decision in *State v. Joseph* is interpreted as reducing the likelihood that a sentence is void. In *State v. Jones*, the Ninth District held that in determining whether a sentencing error creates a void sentence three conditions must be met, 1) did the trial court have authority to waive the particular sanction, 2) are other branches of government affected by a courts failure to impose a particular sanction, and 3) is the particular sentencing error actually a punishment.<sup>21</sup>

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<sup>21</sup> *State v. Jones*, Wayne App. No. 10CA0022, 2011-Ohio-1450, at ¶ 7.

As to the first prong, a trial court has authority to modify the conditions of a driver's license suspension.<sup>22</sup> The legislature provides that courts can provide limited driving privileges to certain classes of driver's license suspensions. R.C. 4510.021 allows a trial court to provide limited driving privileges to certain license suspensions.

Because a trial court has authority to modify certain conditions of a driver's license suspension it is more akin to court costs than postrelease control. Like postrelease control and court costs a trial court is required impose a driver's license suspension for certain convictions. But unlike postrelease control a trial court can modify the sanctions of a driver's license suspension. This is similar to allowing a trial court to waive payment of costs. Because a trial court has authority in providing certain driving privileges after suspending a license, the failure to impose a driver's license suspension should not result in an entirely void sentence requiring a de novo resentencing.

The first prong of the *Joseph* analysis should be the most important and provide the greatest amount of weight in the analysis to determine whether an entire sentence is void. When the legislature requires a trial court to provide a particular sanction but then allows a trial court to modify

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<sup>22</sup> The State concedes that the second and third prong of the *Joseph* framework are present because a license suspension effects more than the judicial branch and the suspension meets the definition of a punishment.

that sanction under certain conditions, it is indicative of legislative intent to put the sentencing issue in front of the trial court judge. The legislature wants to have a trial court maintain continuing jurisdiction over that portion of the sentence. That portion of the sentence, by legislative intent, is malleable. The trial court judge's discretion is of utmost importance to the legislature when a trial court judge is permitted to limit certain sanctions and maintains continuing jurisdiction over portions of the sentence. By allowing trial court judges to limit certain sanctions, the legislature is expressing an intent to put the effect of certain sanctions in the sentencing judge's hands. This means that the failure to impose a driver's license suspension should not rise to the level of an error creating a void sentence that requires a de novo resentencing.

Because a trial court has discretion to limit the effect of a driver's license suspension, the failure of a trial court to impose a mandatory driver's license suspension should not render the entire sentence void. The analysis then needs to turn to *State v. Fischer* to determine the proper scope of a hearing when the trial court fails to impose a mandatory driver's license suspension.

In applying *Fischer*, Harris should not receive a de novo resentencing because the trial court failed to impose a mandatory driver's license

suspension—a part of the required sentence. Like the postrelease control issue in *Fischer*, a mandatory driver’s license suspension must be imposed for certain convictions because it is a combination of sanctions required by the legislature for the commission of certain crimes. Also like *Fischer*, the driver’s license suspension is the sole error in the sentence and the remainder of the sentence remains valid. Only the offending portion of the sentence—the failure to impose a driver’s license suspension—is subject to review and correction.

The Eighth District’s decision to provide a de novo resentencing should be reversed and the certified question answered in the negative.

### **Conclusion**

Under this Court’s decisions in *State v. Joseph* and *State v. Fischer*, the criminal sentence in this case is composed of a combination of sanctions—a prison sentence and a driver’s license suspension. The trial court failed to impose the driver’s license suspension. Only that portion of the sentence is void and subject to correction. There should not be a de novo resentencing when the prison sentence is not plagued by error. Applying this Court’s precedent in *Joseph* and *Fischer*, this Court should set forth the following rule of law:

When a trial court fails to impose a mandatory driver's license suspension only that part of the sentence is void and subject to correction.

Respectfully submitted,

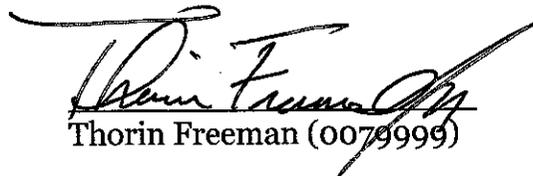
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**Certificate Of Service**

A copy of the foregoing merit brief was sent by regular U.S. mail this 1<sup>st</sup> day of May 2011 to Sarah G. LoPresti 250 East Broad Street Suite 1400 Columbus Ohio 43215.



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IN THE SUPREME COURT OF OHIO

11-0010

STATE OF OHIO )

Plaintiff-Appellant )

v. )

MARIO HARRIS )

Defendant-Appellee )

CASE NO: \_\_\_\_\_

On Appeal from the Cuyahoga  
County Court of Appeals  
Eighth Appellate District

Court of Appeals  
Case No. CA-95128

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**NOTICE OF APPEAL OF APPELLANT STATE OF OHIO**

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SUPREME COURT OF OHIO

**NOTICE OF APPEAL OF APPELLANT STATE OF OHIO**

Appellant, State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in *State v. Harris*, Appeals Case No. 95128, Cuyahoga Common Pleas Case Numbers CR-08-506498 and CR-08-510551, on November 4, 2010. The State filed a timely motion for consideration en banc on November 15, 2010 and that motion was denied on November 19, 2010. The State also filed a timely application for reconsideration that was denied by the Court on December 6, 2010.

This appeal raises a substantial constitutional question, involves a felony, or a question of public or great general interest and invokes this Court's discretionary authority under Art. IV, § 2(B)(2)(e) and S.Ct. R. II Section 1 (A)(2) and (3).

Respectfully submitted,

WILLIAM D. MASON (0037540)



By: Thorin Freeman (0079999)  
Counsel of Record  
COUNSEL FOR APPELLANT  
STATE OF OHIO

**CERTIFICATE OF SERVICE**

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail, postage prepaid, to Mario Harris A550804 P.O. Box 8107 Mansfield Ohio 44901 and the Ohio Public 250 East Broadstreet Street Suite 1400 Columbus Ohio 43215 on this 3<sup>RD</sup> day of January 2011.



Thorin Freeman (0079999)  
Assistant Prosecuting Attorney  
COUNSEL FOR APPELLANT,  
STATE OF OHIO

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION

No. 95128

---

THE STATE OF OHIO,

APPELLEE,

v.

HARRIS,

APPELLANT.

---

JUDGMENT:

REVERSED IN PART AND REMANDED FOR  
RESENTENCING; DISMISSED IN PART

---

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case Nos. CR-506498 and CR-510551

BEFORE: Stewart, J., Rocco, P.J., and Dyke, J.

RELEASED AND JOURNALIZED: November 4, 2010

APPEARANCES:

William D. Mason, Cuyahoga County Prosecuting Attorney, and Thorin Freeman, Assistant Prosecuting Attorney, for appellee.

Mario Harris, pro se.

MELODY J. STEWART, Judge.

{¶ 1} Defendant-appellant, Mario Harris, appeals the orders in two criminal cases that deny his motions for sentencing. Appellant argues that because the trial court failed to impose the driver's license suspension and

fine mandated by statute for drug-trafficking convictions, his sentences are void and he must be resentenced. Because this appeal challenges the denial of appellant's motions for sentencing filed in two separate criminal cases, we will address each case separately.

Case No. CR-510551

{¶ 2} In case No. CR-510551, appellant was charged in a three-count indictment for drug possession in violation of R.C. 2925.11(A), drug trafficking in violation of R.C. 2925.03(A)(2), and possession of criminal tools in violation of R.C. 2923.24(A).<sup>1</sup> Each count included a forfeiture specification for a vehicle used in the commission of the offense. On May 27, 2008, appellant entered a guilty plea to the trafficking offense with the forfeiture specification. The remaining counts were nolle.

{¶ 3} In the judgment entry dated May 27, 2008, the trial court imposed a prison term of six months, to be served consecutively to the sentence in case No. CR-506498, and ordered forfeiture of the vehicle. However, the trial court neglected to suspend appellant's driver's license. Pursuant to statute, appellant's fifth-degree felony-trafficking conviction carries with it a mandatory driver's license suspension of between six months

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<sup>1</sup> All documents and journal entries subsequent to the indictment show the defendant's name as "Mario Harris," while the indictment shows the defendant's name as "Calvin Harris."

and five years. R.C. 2925.03(G). When a sentence fails to impose a mandated term such as a driver's license suspension, that sentence is void. *State v. Donahue*, 8th Dist. No. 89111, 2007-Ohio-6825, at ¶22. When a sentence is void because it does not contain a statutorily mandated term, the proper remedy is to resentence the defendant. *Id.*, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 471 N.E.2d 774. Therefore, we reverse the judgment in case No. CR-510551 and remand for resentencing.

Case No. CR-506498

¶ 4} In case No. CR-506498, the grand jury indicted appellant on multiple counts, including drug trafficking, drug possession, possession of criminal tools, and having a weapon while under disability. The trafficking offenses included a schoolyard specification, a one-year firearm specification, and a forfeiture specification for cash, cell phones, and a Smith & Wesson revolver. The weapons-under-disability offense included a forfeiture specification for the revolver.

¶ 5} On May 27, 2008, appellant entered a guilty plea to one count of drug trafficking in violation of R.C. 2925.03(A)(1) with the schoolyard, firearm, and forfeiture specifications (a third-degree felony), and one count of having a weapon while under disability in violation of R.C. 2923.13(A)(3) with the forfeiture specification. The remaining counts were nolle. The

guilty pleas, disposition of the remaining counts, and order of forfeiture were recorded in a judgment entry dated May 27, 2008.

{¶ 6} By a separate entry dated June 3, 2008, the court sentenced appellant to a mandatory one-year prison term on the firearm specification, to be served consecutively to a three-year term on the trafficking offense, and a one-year term on the weapons-under-disability offense, for a total of five years. However, the court neglected to suspend appellant's driver's license or to impose a fine. Pursuant to statute, a third-degree felony drug-trafficking conviction carries with it a mandatory fine and driver's license suspension. R.C. 2925.03(D)(1)(2) and (G).

{¶ 7} While this case presents the same error as the one involved in the prior case, a procedural error by the trial court in announcing its judgment mandates that we reach a different result. In issuing judgment, the trial court employed two separate journal entries to record appellant's plea and sentence. However, only one document can constitute a final, appealable order. *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, ¶17. Since the second judgment entry fails to account for the order of forfeiture recorded in the first entry, it is not a final, appealable order. As a result, we are without jurisdiction to review any order of the trial court relating to case No. CR-506498, including the trial court's denial of appellant's motion to resentence. While our disposition of the prior case

suggests the proper course of action for the trial court, we find that we have no choice but to dismiss the appeal in this case for lack of a final, appealable order.

{¶ 8} Accordingly, appellant's single assignment of error is sustained in part. The judgment in case No. CR-510551 is reversed, and the cause is remanded for resentencing. The appeal in case No. CR-506498 is dismissed for lack of a final, appealable order.

Judgment accordingly.

ROCCO, P.J., and DYKE, J., concur.

NO.

11-0008

ORIGINAL

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IN THE SUPREME COURT OF OHIO

---

APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 95128

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STATE OF OHIO

Plaintiff-Appellant

-vs-

MARIO HARRIS

Defendant-Appellee

---

**NOTICE OF CERTIFIED CONFLICT**

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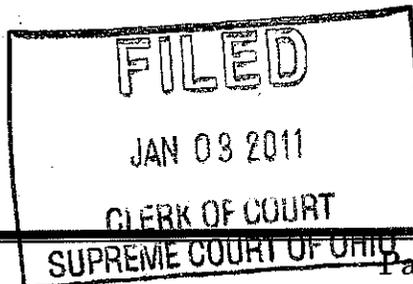
Counsel for Plaintiff-Appellee

**WILLIAM D. MASON (0037540)**  
**CUYAHOGA COUNTY PROSECUTOR**

**THORIN FREEMAN (0079999)**  
Assistant Prosecuting Attorney  
The Justice Center, 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7800

Defendant-Appellee

Mario Harris Pro Se A550804  
Richland Correctional Inst.  
P.O. Box 8107  
Mansfield Ohio 44905



**Notice of Certified Conflict**

Appellant, The State of Ohio, gives notice of a certified conflict to the Ohio Supreme Court from the Cuyahoga Court of Common Pleas, Eighth Appellate District, CA 95128 (2010-Ohio-5374) decided and journalized on November 4, 2010, timely reconsideration denied on December 6, 2010. The Eighth District has certified the following question to this Court:

Does the failure to include a mandatory driver's license suspension in a criminal sentence render that sentence void?

The Eighth District has declared that its decision in *State v. Harris* is in conflict with the First District's decision in *State v. Thomas*.

Under Sup.Ct.R. IV Section 1, a copy of the Eighth District's order certifying the conflict and copies of all decisions determined to be in conflict are attached in the accompanying appendix.

Respectfully submitted,

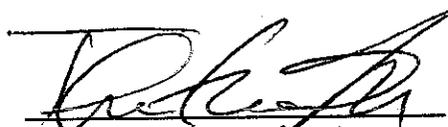
WILLIAM D. MASON  
CUYAHOGA COUNTY PROSECUTOR

By:

  
THORIN FREEMAN (0079999)  
The Justice Center, 8th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-78000

**CERTIFICATE OF SERVICE**

A copy of the foregoing Merit Brief of Appellant has been mailed this 3<sup>rd</sup> day of January, 2011 to Mario Harris A550804 P.O. Box 8107 Mansfield Ohio 44901 and the Ohio Public Defender.

  
Assistant Prosecuting Attorney

Appendix

Order of the Eighth District Court of Appeals certifying a conflict in *State v. Harris*, Cuyahoga App. No. 95128, issued December 6, 2010.

Decision of the Eighth District Court of Appeals in *State v. Harris*, Cuyahoga App. No. 95128, 2010-Ohio-5374.

**Conflicting cases:**

*State v. Thomas*, 1st District App. Nos. C-090716 and C-090463, 2010-ohio-4856.

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.  
95128

LOWER COURT NO.  
CP CR-506498  
CP CR-510551

COMMON PLEAS COURT

-vs-

MARIO HARRIS

Appellant

MOTION NO. 439304

Date 12/06/2010

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Journal Entry

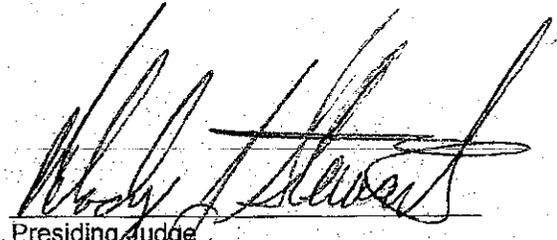
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MOTION BY APPELLEE TO CERTIFY CONFLICT IS GRANTED. SEE JOURNAL ENTRY OF SAME DATE.

RECEIVED FOR FILING

DEC 06 2010  
GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY GMB DEP.

Judge KENNETH A. ROCCO, Concur

  
Presiding Judge  
MELODY J. STEWART

Appendix

THORIN O. FREEMAN  
ASST. COUNTY PROSECUTOR  
8TH FLOOR, JUSTICE CENTER  
1200 ONTARIO STREET  
CLEVELAND, OH 44113

CA 95128

Page 12

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.  
95128

LOWER COURT NO.  
CP CR-506498  
CP CR-510551

-vs-

COMMON PLEAS COURT

MARIO HARRIS

Appellant

MOTION NO. 439304

Date 12/06/2010

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Journal Entry

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APPELLEE, THE STATE OF OHIO, HAS FILED A MOTION TO CERTIFY A CONFLICT BETWEEN THE JUDGMENT IN THE ABOVE CAPTIONED CASE AND THAT IN *STATE V. THOMAS*, 1ST DIST. NOS. C-090716 AND C-090463. IN THE ABOVE-CAPTIONED CASE, THIS COURT HELD: "WHEN A SENTENCE FAILS TO IMPOSE A MANDATED TERM SUCH AS A DRIVER'S LICENSE SUSPENSION, THAT SENTENCE IS VOID." IN *THOMAS*, THE FIRST DISTRICT COURT OF APPEALS HELD THE OPPOSITE AND FOUND THAT THE "OMISSION OF A STATUTORILY MANDATED DRIVER'S LICENSE SUSPENSION DOES NOT RENDER VOID AN OTHERWISE LAWFUL SENTENCE." ID. AT ¶11. THE *THOMAS* COURT, FOLLOWING A PRIOR DECISION, STATED, "THIS COURT HAS PREVIOUSLY HELD THAT ALTHOUGH A SENTENCE IS VOID WHEN IT DOES NOT CONTAIN A STATUTORILY MANDATED TERM LIKE POSTRELEASE-CONTROL NOTIFICATION, A DRIVER'S LICENSE SUSPENSION IS NOT A 'STATUTORILY MANDATED TERM' AKIN TO POSTRELEASE CONTROL." ID., CITING *STATE V. FAIN*, 1ST DIST. NOS. C-080830 AND C-080832, 2010-OHIO-2455.

UPON REVIEW, WE GRANT APPELLEE'S MOTION AND CERTIFY THE RECORD IN THE ABOVE-CAPTIONED CASE TO THE SUPREME COURT OF OHIO FOR REVIEW AND FINAL DETERMINATION DUE TO A CONFLICT BETWEEN THE UNDERLYING JUDGMENT IN THE CASE AT HAND AND THE JUDGMENT IN *STATE V. THOMAS*, 1ST DIST. NOS. C-090716 AND C-090463 ON THE FOLLOWING



[Cite as *State v. Harris*, 2010-Ohio-5374.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 95128

---

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**MARIO HARRIS**

DEFENDANT-APPELLANT

---

**JUDGMENT:  
REVERSED IN PART AND REMANDED FOR  
RESENTENCING; DISMISSED IN PART**

---

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case Nos. CR-506498 and CR-510551

**BEFORE:** Stewart, J., Rocco, P.J., and Dyke, J.

**RELEASED AND JOURNALIZED:** November 4, 2010

## FOR APPELLANT

Mario Harris, Pro Se  
Inmate No. 550-804  
Richland Correctional Institution  
P.O. Box 8107  
Mansfield, OH 44901

## ATTORNEYS FOR APPELLEES

William D. Mason  
Cuyahoga County Prosecutor

BY: Thorin Freeman  
Assistant County Prosecutor  
The Justice Center  
1200 Ontario Street, 8th Floor  
Cleveland, OH 44113

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Mario Harris, appeals the orders in two criminal cases that deny his motions for sentencing. Appellant argues that because the trial court failed to impose the driver's license suspension and fine mandated by statute for drug trafficking convictions, his sentences are void and he must be resentenced. Because this appeal challenges the denial of appellant's motions for sentencing filed in two separate criminal cases, we will address each case separately.

Case No. CR-510551

{¶ 2} In Case No. CR-510551, appellant was charged in a three-count indictment with drug possession in violation of R.C. 2925.11(A), drug trafficking in violation of R.C. 2925.03(A)(2), and possession of criminal tools in violation of R.C. 2923.24(A).<sup>1</sup> Each count included a forfeiture specification for a vehicle used in the commission of the offense. On May 27, 2008, appellant entered a guilty plea to the trafficking offense with the forfeiture specification. The remaining counts were nolle.

{¶ 3} In the judgment entry dated May 27, 2008, the trial court imposed a prison term of six-months, to be served consecutive to the sentence in Case No. CR-506498, and ordered forfeiture of the vehicle. However, the trial court neglected to suspend appellant's driver's license. Pursuant to statute, appellant's fifth degree felony trafficking conviction carries with it a mandatory driver's license suspension of between six months and five years. R.C. 2925.03(G). When a sentence fails to impose a mandated term such as a driver's license suspension, that sentence is void. *State v. Donahue*, 8th Dist. No. 89111, 2007-Ohio-6825, at ¶22. Where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is to resentence the defendant. *Id.*, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 471

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<sup>1</sup> We call attention to the fact that all documents and journal entries subsequent to the indictment show the defendant's name as "Mario Harris," while the indictment shows the defendant's name as "Calvin Harris."

N.E.2d 774. Therefore, we reverse the judgment in Case No. CR-510551 and remand for resentencing.

Case No. CR-506498

{¶ 4} In Case No. CR-506498, the grand jury indicted appellant on multiple counts including drug trafficking, drug possession, possession of criminal tools, and having a weapon while under disability. The trafficking offenses included a schoolyard specification, a one-year firearm specification, and a forfeiture specification for cash, cell phones, and a Smith & Wesson revolver. The weapons under disability offense included a forfeiture specification for the revolver.

{¶ 5} On May 27, 2008, appellant entered a guilty plea to one count of drug trafficking in violation of R.C. 2925.03(A)(1) with the schoolyard, firearm, and forfeiture specifications (a third degree felony), and one count of having a weapon while under disability in violation of R.C. 2923.13(A)(3) with the forfeiture specification. The remaining counts were nolle. The guilty pleas, disposition of the remaining counts, and order of forfeiture were recorded in a judgment entry dated May 27, 2008.

{¶ 6} By separate entry dated June 3, 2008, the court sentenced appellant to a mandatory one-year prison term on the firearm specification, to be served consecutive to a three-year term on the trafficking offense, and a one-year term on the weapons under disability offense, for a total of five

years. However, the court neglected to suspend appellant's driver's license or to impose a fine. Pursuant to statute, a third-degree felony drug trafficking conviction carries with it a mandatory fine and driver's license suspension. R.C. 2925.03(D)(1)(2) and (G).

{¶ 7} While this case presents the same error as in the prior case, a procedural error by the trial court in announcing its judgment mandates we reach a different result. In issuing judgment, the trial court employed two separate journal entries to record appellant's plea and sentence. However, only one document can constitute a final appealable order. *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, at ¶17. Since the second judgment entry fails to account for the the order of forfeiture recorded in the first entry, it is not a final appealable order. As a result, we are without jurisdiction to review any order of the trial court relating to Case No. CR-506498, including the trial court's denial of appellant's motion to resentencing. While our disposition of the prior case suggests the proper course of action for the trial court, we find we have no choice but to dismiss the appeal in this case for lack of a final appealable order.

{¶ 8} Accordingly, appellant's single assignment of error is sustained in part. The judgment in Case No. CR-510551 is reversed and remanded for resentencing. The appeal in Case No. CR-506498 is dismissed for lack of a final appealable order.

It is ordered that the parties bear their own costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and  
ANN DYKE, J., CONCUR

[Cite as *State v. Thomas*, 2010-Ohio-4856.]

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-090716
	:	C-090463
Plaintiff-Respondent-Appellee,	:	TRIAL NO. B-0801083
vs.	:	
	:	<i>DECISION.</i>
AKO THOMAS,	:	
Defendant-Petitioner-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in C-090716; Appeal Dismissed in C-090463

Date of Judgment Entry on Appeal: October 6, 2010

*Joseph T. Deters*, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*,  
Assistant Prosecuting Attorney, for Plaintiff-Respondent-Appellee,

*Ako Thomas*, pro se.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} Petitioner-appellant Ako Thomas has taken these consolidated appeals from the Hamilton County Common Pleas Court's judgments denying his R.C. 2953.21 petition for postconviction relief and overruling his "Motion Requesting Resentencing to Correct a Void Sentence." We affirm.

{¶2} In 2008, Thomas was convicted upon his guilty plea to cocaine trafficking and sentenced to four years in prison. We affirmed his conviction on appeal.<sup>1</sup>

{¶3} In March 2009, while his appeal was pending, Thomas filed with the common pleas court his motion requesting resentencing and a Crim.R. 32.1 motion to withdraw his guilty plea. In April, he filed his postconviction petition. The court overruled the motions and denied the petition, and these appeals followed.

***Appeal No. C-090463***

{¶4} We note preliminarily that, in the appeal numbered C-090463, Thomas appeals from the judgment overruling his motion requesting resentencing. But in his brief, he does not assign as error the overruling of the motion. We, therefore, dismiss as abandoned the appeal numbered C-090463.<sup>2</sup>

***Appeal No. C-090716***

{¶5} In the appeal numbered C-090716, Thomas appeals from, and advances a single assignment of error challenging, the denial of his postconviction petition without a hearing. This challenge is untenable.

{¶6} To prevail on a postconviction claim, the petitioner must demonstrate an infringement of his rights in the proceedings resulting in his conviction that

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<sup>1</sup> See *State v. Thomas* (Oct. 7, 2009), 1st Dist. No. C-080940.

<sup>2</sup> See *State v. Johnson*, 1st Dist. Nos. C-080156 and C-080158, 2009-Ohio-2568, ¶19; *State v. Perez*, 1st Dist. Nos. C-040363, C-040364, and C-040365, 2005-Ohio-1326, ¶24; *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693, ¶18.

rendered the conviction void or voidable under the state or federal constitution.<sup>3</sup> The petitioner bears the initial burden of demonstrating, through his petition, supporting affidavits, and the case record, “substantive grounds for relief.”<sup>4</sup> A common pleas court may dismiss a postconviction claim without a hearing if the petitioner has failed to submit with his petition evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief.<sup>5</sup>

**{¶7} First postconviction claim: ineffective assistance of trial counsel.**

In his first postconviction claim, Thomas contended that he had been denied his constitutional right to the effective assistance of counsel, when his trial counsel had failed to move to suppress the cocaine seized incident to his arrest on an outstanding warrant, following a traffic stop. Thomas supported his claim with outside evidence in the form of his and his girlfriend’s affidavits. The pair averred that a police officer had stopped the girlfriend’s car and had arrested Thomas, the car’s passenger, on an outstanding warrant. The officer, they asserted, did not give them a reason for stopping the car, did not tell Thomas “exactly what [he] was being arrest[ed] for,” and did not cite Thomas’s girlfriend for a traffic violation. Thus, Thomas argued, the stop was not consistent with the Fourth Amendment to the United States Constitution, effected upon “probable cause,” and his trial counsel was ineffective in refusing to accede to his request to move to suppress the fruits of the stop.

**{¶8}** A knowing, voluntary, and intelligent guilty plea waives any “independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea,”<sup>6</sup> including a challenge to trial counsel’s failure to

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<sup>3</sup> See R.C. 2953.21(A)(1); *State v. Powell* (1993), 90 Ohio App.3d 260, 264, 629 N.E.2d 13.

<sup>4</sup> See R.C. 2953.21(C).

<sup>5</sup> See id.; *State v. Pankey* (1981), 68 Ohio St.2d 58, 59, 428 N.E.2d 413; *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819, syllabus.

<sup>6</sup> *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130, 595 N.E.2d 351, quoting *Tollett v. Henderson* (1973), 411 U.S. 258, 267, 93 S.Ct. 1602; accord *State v. Morgan*, 1st Dist. No. C-080011, 2009-Ohio-1370, ¶25.

file a pretrial motion to suppress.<sup>7</sup> Thomas's direct appeal was submitted, and we determined the appeal, consistent with the procedure set forth in *Anders v. California*.<sup>8</sup> Thus, in affirming Thomas's conviction, we necessarily concluded that Thomas had entered his guilty plea knowingly, voluntarily, and intelligently.

{¶9} The affidavits offered by Thomas in support of his first postconviction claim may fairly be read to allege otherwise. But his self-serving suggestion that his guilty plea was unknowing or involuntary because his counsel had disregarded his request to move for suppression is discredited by his confirmation, both in his plea form and during the Crim.R. 11 colloquy at the plea hearing, that he was entering his plea knowingly and voluntarily.<sup>9</sup>

{¶10} Thomas thus failed to sustain his burden of submitting evidentiary material setting forth sufficient operative facts to demonstrate that his guilty plea had been the unknowing or involuntary product of his trial counsel's ineffectiveness in failing to file a motion to suppress.<sup>10</sup> Therefore, Thomas's guilty plea waived his first postconviction claim, and the common pleas court properly denied the claim without an evidentiary hearing.

{¶11} **Second postconviction claim: void sentence.** In his second postconviction claim, Thomas sought relief from his sentence on the ground that the sentence was void because it did not include a statutorily mandated driver's license suspension. This court has previously held that although a sentence is void when it does not contain a statutorily mandated term like postrelease-control notification, a driver's license suspension is not a "statutorily mandated term" akin to postrelease control.<sup>11</sup> Consequently, under *State v. Fain*, a trial court's omission of a statutorily

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<sup>7</sup> See *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶116.

<sup>8</sup> (1967), 386 U.S. 738, 87 S.Ct. 1396.

<sup>9</sup> See *State v. Calhoun*, 86 Ohio St.3d 279, 284-285, 1999-Ohio-102, 714 N.E.2d 905.

<sup>10</sup> See R.C. 2953.21(C); *Strickland v. Washington* (1984), 466 U.S. 668, 694, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

<sup>11</sup> See *State v. Fain*, 1st Dist. Nos. C-080830 and C-080832, 2010-Ohio-2455.

mandated driver's license suspension does not render void an otherwise lawful sentence. We conclude that the trial court properly denied Thomas's postconviction claim contending that his sentence was void because the doctrine of res judicata applied to bar that claim.

{¶12} "Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding[,] except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial [that] resulted in that judgment of conviction[] or on an appeal from that judgment."<sup>12</sup> Thus, res judicata bars a postconviction claim that could fairly have been determined in the direct appeal, based upon the trial record and without resort to evidence outside the record.<sup>13</sup> Thomas's second postconviction claim could fairly have been determined in Thomas's direct appeal from his conviction, and the claim was accordingly barred by res judicata in this case.

{¶13} **Conclusion.** The common pleas court properly denied Thomas's postconviction petition. We, therefore, overrule the assignment of error and affirm the common pleas court's judgment denying the petition.

Judgment accordingly.

**SUNDERMANN, P.J., HENDON and MALLORY, JJ.**

Please Note:

The court has recorded its own entry on the date of the release of this decision.

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<sup>12</sup> *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

<sup>13</sup> See *id.*; *State v. Cole* (1982), 2 Ohio St.3d 112, 114, 443 N.E.2d 169.

**C**

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Criminal Procedure (Refs &amp; Annos)

→ **Crim R 32 Sentence****(A) Imposition of sentence**

Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

- (1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.
- (2) Afford the prosecuting attorney an opportunity to speak;
- (3) Afford the victim the rights provided by law;
- (4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.

**(B) Notification of right to appeal**

- (1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.
- (2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.
- (3) If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court also shall advise the defendant of all of the following:
  - (a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;
  - (b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

(c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

(d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

Upon defendant's request, the court shall forthwith appoint counsel for appeal.

### (C) Judgment

A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence. Multiple judgments of conviction may be addressed in one judgment entry. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

### CREDIT(S)

(Adopted eff. 7-1-73; amended eff. 7-1-92, 7-1-98, 7-1-04, 7-1-09)

### HISTORICAL AND STATUTORY NOTES

**Ed. Note:** Crim R 32 contains provisions somewhat analogous to former 2947.05, repealed by 1995 S 2, eff. 7-1-96.

**Amendment Note:** The 7-1-04 amendment added new division (A)(4) and made other nonsubstantive changes.

**Amendment Note:** The 7-1-98 amendment rewrote former division (A) and split it into new divisions (A) and (B); and redesignated former division (B) as new division (C). Prior to amendment, former division (A) read:

#### “(A) Sentence

“(1) *Imposition of sentence.* Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and also shall address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

“(2) *Notification of right to appeal.* After imposing sentence in a serious offense that has gone to trial on a plea of not guilty, the court shall advise the defendant of all of the following:

**C**

Baldwin's Ohio Revised Code Annotated Currentness

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

Chapter 2981. Forfeiture of Property

→ **2981.04 Specification concerning forfeiture; petitions**

(A)(1) Property described in division (A) of section 2981.02 of the Revised Code may be forfeited under this section only if the complaint, indictment, or information charging the offense or municipal violation, or the complaint charging the delinquent act, contains a specification of the type described in section 2941.1417 of the Revised Code that sets forth all of the following to the extent it is reasonably known at the time of the filing:

(a) The nature and extent of the alleged offender's or delinquent child's interest in the property;

(b) A description of the property;

(c) If the property is alleged to be an instrumentality, the alleged use or intended use of the property in the commission or facilitation of the offense.

(2) If any property is not reasonably foreseen to be subject to forfeiture at the time of filing the indictment, information, or complaint, the trier of fact still may return a verdict of forfeiture concerning that property in the hearing described in division (B) of this section if the prosecutor, upon discovering the property to be subject to forfeiture, gave prompt notice of this fact to the alleged offender or delinquent child under Criminal Rule 7(E) or Juvenile Rule 10(B).

(3) For good cause shown, the court may consider issues of the guilt of the alleged offender or the delinquency of the alleged delinquent child separate from whether property specified as subject to forfeiture should be forfeited.

(B) If a person pleads guilty to or is convicted of an offense or is adjudicated a delinquent child for committing a delinquent act and the complaint, indictment, or information charging the offense or act contains a specification covering property subject to forfeiture under section 2981.02 of the Revised Code, the trier of fact shall determine whether the person's property shall be forfeited. If the state or political subdivision proves by a preponderance of the evidence that the property is in whole or part subject to forfeiture under section 2981.02 of the Revised Code, after a proportionality review under section 2981.09 of the Revised Code when relevant, the trier of fact shall return a verdict of forfeiture that specifically describes the extent of the property subject to forfeiture. If the trier of fact is a jury, on the offender's or delinquent child's motion, the court shall make the determination of whether the property shall be forfeited.

(C) If the court enters a verdict of forfeiture under this section, the court imposing sentence or disposition, in addition to any other sentence authorized by Chapter 2929. of the Revised Code or any disposition authorized by Chapter 2152. of the Revised Code, shall order that the offender or delinquent child forfeit to the state or political subdivision the offender's or delinquent child's interest in the property. The property vests with the state or political subdivision subject to the claims of third parties. The court may issue any additional order to affect the forfeiture, including, but not limited to, an order under section 2981.06 of the Revised Code.

(D) After the entry of a forfeiture order under this section, the prosecutor shall attempt to identify any person with an interest in the property subject to forfeiture by searching appropriate public records and making reasonably diligent inquiries. The prosecutor shall give notice of the forfeiture that remains subject to the claims of third parties and proposed disposal of the forfeited property to any person known to have an interest in the property. The prosecutor also shall publish notice of the forfeiture that remains subject to the claims of third parties and proposed disposal of the forfeited property once each week for two consecutive weeks in a newspaper of general circulation in the county in which the property was seized.

(E)(1) Any person, other than the offender or delinquent child whose conviction or plea of guilty or delinquency adjudication is the basis of the forfeiture order, who asserts a legal interest in the property that is the subject of the order may petition the court that issued the order for a hearing under division (E)(3) of this section to adjudicate the validity of the person's alleged interest in the property. All of the following apply to the petition:

(a) It shall be filed within thirty days after the final publication of notice or the person's receipt of notice under division (D) of this section.

(b) It shall be signed by the petitioner under the penalties for falsification specified in section 2921.13 of the Revised Code.

(c) It shall describe the nature and extent of the petitioner's interest in the property, the time and circumstances of the petitioner's acquisition of that interest, any additional facts supporting the petitioner's claim, and the relief sought.

(2)(a) In lieu of filing a petition as described in division (E)(1) of this section, a person, other than the offender or delinquent child whose conviction or plea of guilty or delinquency adjudication is the basis of the forfeiture order, may file an affidavit as described in this division to establish the validity of the alleged right, title, or interest in the property that is the subject of the forfeiture order if the person is a secured party or other lienholder of record that asserts a legal interest in the property, including, but not limited to, a mortgage, security interest, or other type of lien. The affidavit shall contain averments that the secured party or other lienholder acquired its alleged right, title, or interest in the property in the regular course of its business, for a specified valuable consideration, without actual knowledge of any facts pertaining to the offense that was the basis of the forfeiture order, in good faith, and without the intent to prevent or otherwise impede the state or political subdivision from seizing or obtaining a forfeiture of the property. The person shall file the affidavit within thirty days after the earlier of the final publication of notice or the receipt of notice under division (D) of this section.

(b) Except as otherwise provided in this section, the affidavit shall constitute prima-facie evidence of the validity of the affiant's alleged interest in the property.

(c) Unless the prosecutor files a motion challenging the affidavit within ten days after its filing and unless the prosecutor establishes by a preponderance of the evidence at the hearing held under division (E)(3) of this section that the affiant does not possess the alleged interest in the property or that the affiant had actual knowledge of facts pertaining to the offense or delinquent act that was the basis of the forfeiture order, the affidavit shall constitute conclusive evidence of the validity of the affiant's interest in the property.

(d) Any subsequent purchaser or other transferee of property pursuant to forfeiture under this section shall take the property subject to the continued validity of the interest of the affiant.

(3) Upon receipt of a petition or affidavit filed under division (E)(1) or (2) of this section, the court shall hold a hearing to determine the validity of the petitioner's interest in the property that is the subject of the forfeiture order or, if the affidavit was challenged, to determine the validity of the affiant's interest in the property. To the extent practicable and consistent with the interests of justice, the court shall hold the hearing within thirty days after the filing of the petition or within thirty days after the prosecutor files the motion challenging the affidavit. The court may consolidate the hearing with a hearing on any other petition or affidavit that is filed by a person other than the offender or delinquent child whose conviction or plea of guilty or delinquency adjudication is the basis of the forfeiture order and that relates to the property that is the subject of the forfeiture order.

At the hearing, the petitioner or affiant may testify, present evidence and witnesses on the petitioner's or affiant's behalf, and cross-examine witnesses for the state or political subdivision. In regards to a petition, the state or political subdivision may present evidence and witnesses in rebuttal and in defense of its claim to the property and may cross-examine witnesses for the petitioner. In regards to an affidavit, the prosecutor may present evidence and witnesses and cross-examine witnesses for the affiant.

In addition to the evidence and testimony presented at the hearing, the court also shall consider the relevant portions of the record in the criminal or delinquent child case that resulted in the forfeiture order.

(F)(1) If the hearing involves a petition, the court shall amend its forfeiture order if it determines at the hearing held pursuant to division (E)(3) of this section that the petitioner has established either of the following by a preponderance of the evidence:

(a) The petitioner has a legal interest in the property that is subject to the forfeiture order that renders the order completely or partially invalid because the legal interest in the property was vested in the petitioner, rather than the offender or delinquent child whose conviction or plea of guilty or delinquency adjudication is the basis of the order, or was superior to any interest of that offender or delinquent child, at the time of the commission of the offense or delinquent act that is the basis of the order.

(b) The petitioner is a bona fide purchaser for value of the interest in the property that is subject to the forfeiture

order and was, at the time of the purchase, reasonably without cause to believe that it was subject to forfeiture.

(2) The court also shall amend its forfeiture order to reflect any interest of a secured party or other lienholder of record in the property subject to forfeiture who prevails at a hearing on the petition or affidavit filed pursuant to division (E)(1) or (2) of this section.

(G) If the court disposes of all petitions or affidavits timely filed under this section in favor of the state or political subdivision, the state or political subdivision shall have clear title to the property that is the subject of a forfeiture order issued under this section, but only to the extent that other parties' lawful interests in the property are not infringed. To the extent that the state or political subdivision has clear title to the property, the state or political subdivision may warrant good title to any subsequent purchaser or other transferee.

#### CREDIT(S)

(2006 H 241, eff. 7-1-07)

#### RESEARCH REFERENCES

##### Encyclopedias

OH Jur. 3d Forfeitures & Penalties § 16, Property Subject to Forfeiture.

OH Jur. 3d Forfeitures & Penalties § 19, Generally; Relief from Seizure.

OH Jur. 3d Forfeitures & Penalties § 22, Action to Obtain Property to Enforce Security Interest.

OH Jur. 3d Forfeitures & Penalties § 23, Generally; Initiation of Action.

OH Jur. 3d Forfeitures & Penalties § 24, Criminal Forfeiture.

OH Jur. 3d Forfeitures & Penalties § 25, Criminal Forfeiture--Notice of Forfeiture; Determining Interest in Property.

OH Jur. 3d Forfeitures & Penalties § 27, Issuance of Orders to Seize Property.

OH Jur. 3d Forfeitures & Penalties § 28, Unreachable Property.

##### Forms

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**C**

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

Chapter 2981. Forfeiture of Property

→ **2981.06 Issuance of orders; unreadable property**

(A) Upon the entry of a forfeiture order under section 2981.04 or 2981.05 of the Revised Code, if necessary, the court shall order an appropriate law enforcement officer to seize the forfeited property on conditions that the court considers proper. If necessary, the court shall order the person in possession of the property to deliver the property by a specific date to the law enforcement agency involved in the initial seizure of the property. The court shall deliver the order by personal service or certified mail.

(B) With respect to property that is the subject of a forfeiture order issued under section 2981.04 or 2981.05 of the Revised Code, the court that issued the order, upon petition of the prosecutor who prosecuted the underlying offense or act or brought the civil forfeiture action, may do any of the following:

(1) Enter any appropriate restraining orders or injunctions; require execution of satisfactory performance bonds; appoint receivers, conservators, appraisers, accountants, or trustees; or take any other action necessary to safeguard and maintain the forfeited property;

(2) Authorize the payment of rewards to persons who provide information resulting in forfeiture of the property under this chapter from funds provided under division (F) of section 2981.12 of the Revised Code;

(3) Authorize the prosecutor to settle claims;

(4) Restore forfeited property to victims and grant petitions for mitigation or remission of forfeiture;

(5) Authorize a stay of the forfeiture order pending appeal or resolution of any claim to the property if requested by a person other than the defendant or a person acting in concert with, or on behalf of, the defendant.

(C) To facilitate the identification and location of property that is the subject of a forfeiture order and to facilitate the disposition of petitions for remission or mitigation issued under this section, after the issuance of a forfeiture order and upon application by the prosecutor, the court, consistent with the Civil Rules, may order that the testimony of any witness relating to the forfeited property be taken by deposition and that any designated material that is not privileged be produced at the same time and place as the testimony.

(D) The court shall order forfeiture of any other property of the offender or delinquent child up to the value of the unreachable property if any of the following describe any property subject to a forfeiture order under section 2981.04 or 2981.05 of the Revised Code:

(1) It cannot be located through due diligence.

(2) It has been transferred, sold, or deposited with a third party.

(3) It has been placed beyond the jurisdiction of the court.

(4) It has been substantially diminished in value or has been commingled with other property and cannot be divided without difficulty or undue injury to innocent persons.

(E) After the state or political subdivision is granted clear title under section 2981.04 or 2981.05 of the Revised Code, the prosecutor shall direct disposition of the property pursuant to this chapter, making due provisions for the rights of innocent persons.

(F) Any interest in property not exercisable by, or transferable for value to, the state or political subdivision shall expire and shall not revert to the offender or delinquent child who forfeited the property. The offender or delinquent child is not eligible to purchase the property at a sale under this chapter.

(G) Any income accruing to or derived from forfeited property may be used to offset ordinary and necessary expenses related to the property that are required by law or necessary to protect the interest of the state, political subdivision, or third parties.

#### CREDIT(S)

(2006 H 241, eff. 7-1-07)

#### RESEARCH REFERENCES

Encyclopedias

OH Jur. 3d Forfeitures & Penalties § 24, Criminal Forfeiture.

OH Jur. 3d Forfeitures & Penalties § 26, Civil Forfeiture.

OH Jur. 3d Forfeitures & Penalties § 27, Issuance of Orders to Seize Property.

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R.C. § 2981.06

OH Jur. 3d Forfeitures & Penalties § 28, Unreachable Property.

Treatises and Practice Aids

Katz & Giannelli, Baldwin's Ohio Practice Criminal Law § 129:7, Criminal Forfeiture.

Katz & Giannelli, Baldwin's Ohio Practice Criminal Law § 129:10, Disposition of Forfeited Property-  
-Unreachable Property.

R.C. § 2981.06, OH ST § 2981.06

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Title XLV. Motor Vehicles--Aeronautics--Watercraft

Chapter 4510. Driver's License Suspension and Cancellation (Refs &amp; Annos)

→ **4510.021 Limited driving privileges**

(A) Unless expressly prohibited by section 2919.22, section 4510.13, or any other section of the Revised Code, a court may grant limited driving privileges for any purpose described in division (A)(1), (2), or (3) of this section during any suspension imposed by the court. In granting the privileges, the court shall specify the purposes, times, and places of the privileges and may impose any other reasonable conditions on the person's driving of a motor vehicle. The privileges shall be for any of the following limited purposes:

- (1) Occupational, educational, vocational, or medical purposes;
- (2) Taking the driver's or commercial driver's license examination;
- (3) Attending court-ordered treatment.

(B) Unless expressly authorized by a section of the Revised Code, a court may not grant limited driving privileges during any suspension imposed by the bureau of motor vehicles. To obtain limited driving privileges during a suspension imposed by the bureau, the person under suspension may file a petition in a court of record in the county in which the person resides. A person who is not a resident of this state shall file any petition for privileges either in the Franklin county municipal court or in the municipal or county court located in the county where the offense occurred. If the person who is not a resident of this state is a minor, the person may file the petition either in the Franklin county juvenile court or in the juvenile court with jurisdiction over the offense. If a court grants limited driving privileges as described in this division, the privileges shall be for any of the limited purposes identified in division (A) of this section.

(C) When the use of an immobilizing or disabling device is not otherwise required by law, the court, as a condition of granting limited driving privileges, may require that the person's vehicle be equipped with an immobilizing or disabling device, except as provided in division (C) of section 4510.43 of the Revised Code. When the use of restricted license plates issued under section 4503.231 of the Revised Code is not otherwise required by law, the court, as a condition of granting limited driving privileges, may require that the person's vehicle be equipped with restricted license plates of that nature, except as provided in division (B) of that section.

(D) When the court grants limited driving privileges under section 4510.31 of the Revised Code or any other provision of law during the suspension of the temporary instruction permit or probationary driver's license of a

person who is under eighteen years of age, the court may include as a purpose of the privilege the person's practicing of driving with the person's parent, guardian, or other custodian during the period of the suspension. If the court grants limited driving privileges for this purpose, the court, in addition to all other conditions it imposes, shall impose as a condition that the person exercise the privilege only when a parent, guardian, or custodian of the person who holds a current valid driver's or commercial driver's license issued by this state actually occupies the seat beside the person in the vehicle the person is operating.

(E) Before granting limited driving privileges under this section, the court shall require the offender to provide proof of financial responsibility pursuant to section 4509.45 of the Revised Code.

CREDIT(S)

(2004 H 52, eff. 6-1-04; 2002 S 123, eff. 1-1-04)

HISTORICAL AND STATUTORY NOTES

**Amendment Note:** 2004 H 52 rewrote division (B), which prior thereto read:

“(B) Unless expressly authorized by a section of the Revised Code, a court may not grant limited driving privileges during any suspension imposed by the bureau of motor vehicles. To obtain limited driving privileges during a suspension imposed by the bureau, a petition may be filed in a court of record in the county in which the person under suspension resides. A person who is not a resident of this state shall file any petition for privileges in the Franklin county municipal court, or, if the person is a minor, in the Franklin county juvenile court. If a court grants limited driving privileges as described in this division, the privileges shall be for any of the limited purposes identified in division (A) of this section.”

CROSS REFERENCES

- Appeal of suspension, see 4511.197
- Driving under the influence of alcohol or drugs, see 4511.19

LIBRARY REFERENCES

- Automobiles ↪ 144.2(14).
- Westlaw Topic No. 48A.
- C.J.S. Motor Vehicles §§ 290 to 296, 336 to 338, 341 to 346.

RESEARCH REFERENCES

- Encyclopedias
- OH-Jur. 3d Automobiles & Other Vehicles § 19, Limited Driving Privileges.

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