ORIGINAL

NO. 2010-2158

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO NO. 93266

STATE OF OHIO,
Plaintiff-Appellee

-vs-

JACK CARLISLE,
Defendant-Appellant

MERIT BRIEF OF APPELLEE

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I. STATEMENT OF THE CASE AND FACTS

Appellant Jack Carlisle was convicted of Kidnapping in violation of R.C. 2905.01, a felony of the first degree, and of Gross Sexual Imposition in violation of R.C. 2907.05, a felony of the third degree where the victim was less than ten years of age. On July 13, 2007, after trial, the trial court imposed the minimum prison sentences of three years on the kidnapping charge and one year on the gross sexual imposition charge. Pending his direct appeal, Appellee was granted bond. His convictions were affirmed in *State v. Carlisle*, Cuyahoga App. No. 90223, 2008-Ohio-3818, leave to appeal denied, 120 Ohio St.3d 1508, 900 N.E.2d 624, 2009-Ohio-361 (Ohio Feb 04, 2009) (Table, NO. 2008-2073).

In affirming the convictions, the appellate court found that Appellant's jury was properly convened, that the trial court did not err in evidentiary rulings, and that defense counsel was not ineffective. Id. The appellate court then explicitly mandated the following:

> It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

Id.

Upon remand, Carlisle filed a motion for reconsideration of sentence. The trial court vacated its prior sentence and imposed sentence after hearing on April 2, 2009. At hearing, Carlisle noted that he now was scheduled for frequent dialysis treatment. Tr. 13. Further, he noted that the motion for resentencing was not about the crime committed, nor was it about justice or punishment; rather it was a plea to the Court regarding Appellee's health. Tr. 13.

In changing the sentence imposed, the trial court noted that Carlisle's condition worsened since it imposed sentence. Tr. 17. It then determined that, "State and local resources are important because we need to preserve them for those serious crimes that the Court feels where the defendants cannot be out on the street." Id. The Court stated that budgets were being cut and the costs in incarceration would be "astronomical." It imposed the following sentence:

> CASE ON REMAND FROM COURT OF APPEALS AND OHIO SUPREME COURT. DEFENDANT'S CONVICTION AFFIRMED. HAVING VACATED DEFENDANT'S 7-10-2007 SENTENCE DUE TO CHANGE OF CIRCUMSTANCES, DEFENDANT IS RE-SENTENCED AS FOLLOWS. ** DEFENDANT IN COURT WITH PUBLIC DEFENDER ERICA CUNLIFFE. COURT REPORTER PRESENT. ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF GROSS SEXUAL IMPOSITION 2907.05 A(4) F3. (SVP SPECS WERE DISMISSED) ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF NOT GUILTY OF RAPE 2907.02 A(1)(B) COUNT(S) 1 OF THE INDICTMENT. ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF KIDNAPPING 2905.01 A(4) F1 WITH SEXUAL MOTIVATION SPECIFICATION 2941.147. DEFENDANT ADDRESSES THE COURT, PROSECUTOR ADDRESSES THE COURT. THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW. THE COURT FINDS THAT A COMMUNITY CONTROL SANCTION WILL ADEQUATELY PROTECT THE PUBLIC AND WILL NOT DEMEAN THE SERIOUSNESS OF THE OFFENSE. IT IS THEREFORE ORDERED THAT THE DEFENDANT IS SENTENCED TO 5 YEAR(S) OF COMMUNITY CONTROL, UNDER SUPERVISION OF THE ADULT PROBATION DEPARTMENT WITH THE FOLLOWING CONDITIONS: DEFENDANT TO ABIDE BY THE RULES AND REGULATIONS OF THE PROBATION DEPARTMENT. COURT ORDERS DEFENDANT TO BE SUPERVISED BY: THE SEX OFFENDER UNIT. SUBMIT TO RANDOM DRUG TESTING NO CONTACT WITH VICTIM/VICTIM'S FAMILY OR CHILDREN. NO JUST CAUSE FOR DECOY. VIOLATION OF THE TERMS AND CONDITIONS MAY RESULT IN MORE RESTRICTIVE SANCTIONS, OR A PRISON TERM OF 3 YEAR(S) AS APPROVED BY LAW. (3 YEARS ON COUNT 2; 1 YEAR ON COUNT 3, CONCURRENT)

The State appealed the sentence of community control sanctions in *State v. Carlisle*, Cuyahoga App. No. 93266, 2010-Ohio-3407, arguing to the appellate court that the trial court lacked jurisdiction to modify Carlisle's sentence after that sentence had been

explicitly affirmed by the appellate court and, in the alternative, if the court possessed the authority to change a sentence that was ordered into execution by the appellate court, the trial court abused its discretion in changing the sentence.

In reversing the modification of sentence, the appellate court noted that because Carlisle was on bond during the appeal, "At no point had his sentence been ordered into execution with his delivery to a penal institution, so the court had jurisdiction to address the motion to modify sentence. Id., 2010-Ohio-3407, at ¶ 12 (Citing, *State v. Dawkins*, 8th Dist. No. 88022, 2007-Ohio-1006, at ¶7.) Having determined that "in the abstract" the trial court could address the motion to modify sentence, it then determined that the trial court could not because of the mandate rule, holding that because it "specifically ordered the trial court to execute Carlisle's sentence" in the direct appeal. Id., 2010-Ohio-3407, at ¶ 21. It found that the mandate rule requires the trial court to comply with orders from an appellate court, citing, *Sprague v. Ticonic Natl. Bank* (1939), 307 U.S. 161, 168, 59 S.Ct. 777; see, also, *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, at ¶32. Because of this rule, "'a lower court on remand must implement both the letter and the spirit of the appellate court's mandate and may not disregard the explicit directives of that court.'" *Carlisle*, 2010-Ohio-3407, at ¶ 16 (Quoting, *State v. Larkins*, 8th Dist. No. 85877, 2006-Ohio-90, at ¶31.) Moreover, it noted that R.C. 2945.09 codifies the mandate rule. Id., at ¶17-18.

Having found that the trial court was compelled to order into execution Carlisle's sentence upon remand, the appellate court then noted that extraordinary circumstances could serve to provide and exception to the law of the case, citing *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 5, 462 N.E.2d 410. Id., at ¶23. In explaining when extraordinary

circumstances are present, the appellate court stated, "Given the very strong requirement that a lower court follow the mandate of a superior court, we think that a deviation from an appellate mandate can only occur when external circumstances have rendered that mandate void or moot." Id. The appellate court then analyzed Carlisle's stated reasons for seeking modification of his sentence and found that they did not constitute extraordinary circumstances justifying the trial court's disregard of the appellate mandate.

II. LAW AND ARGUMENT

A. SUMMARY OF ARGUMENT.

In this matter, Carlisle has asked this Court to find that a trial court may modify a criminal sentence after it has been pronounced in court and may deviate from a mandate given by the appellate court or act contrary to the appellate court opinion. Such is not the law in Ohio, nor should it be. In this matter, the appellate court determined that in affirming Carlisle's convictions, it "specifically ordered the trial court to execute Carlisle's sentence." Id., 2010-Ohio-3407, at ¶ 21. But the trial court did not do so, rather it modified the sentence. It lacked the jurisdiction to do so for several reasons. First, a trial court does not have the authority to revisit final judgments. Second, the trial court must obey the mandate of a superior court. Third, the trial court is bound by the appellate decision on a case and cannot act in a manner inconsistent with that decision. For these reasons, the appellate court properly reversed the modification of Carlisle's sentence.

Appellant's Proposition of Law reads:

> This Court's holding in *Special Prosecutors* does not create a rule divesting the trial court of its jurisdiction to modify a sentence that has not yet been put into execution even if the sentence modification occurs following the direct appeal

Appellant has presented an analysis of the appellate opinion that is incomplete. The appellate court did not rely on *State ex rel. Special Prosecutors v. Judge, Court of Common Pleas* to reverse the trial court's action; rather the appellate court specifically found that the trial court retained jurisdiction to modify the sentence that was affirmed. *Carlisle*, 2010-Ohio-3407, at ¶ 13.

In his brief to this Court, Appellant argues that simply because the sentence was not executed in this case where he was not delivered to prison, the trial court could modify his sentence. The cases cited by Appellant at page 8 of his Merit Brief are without sound precedential value as they rely upon cases that found the authority in a prior statute to create the window in which a court could modify a sentence imposed. Thus, Appellant's current reliance on those cases to argue that a trial court retains jurisdiction to modify a sentence are in opposition to the clear statement of law by this Court, the principles of res judicata, the law of the case doctrine, and the overriding rule that a trial court must comply with the mandate of a higher court. Simply put, Appellant applies a rule of law that is without continuing foundations in the law as the stated ability of a trial court to modify a sentence prior to its execution had its authority derived from a now repealed statute.

In this matter, the trial court did not have jurisdiction to modify Carlisle's sentence once it had been imposed and finalized. More importantly, it could not ignore a mandate from the appellate court ordering the sentence into execution. For these reasons, the State asks that the judgment of the Court of Appeals be affirmed and this matter be remanded to the trial court to order the sentence into execution.

B. THE TRIAL COURT DID NOT HAVE JURISDICTION TO MODIFY THE SENTENCE AFTER IT WAS AFFIRMED ON APPEAL

In this Case, Carlisle contested his convictions on appeal. The convictions, to include his minimum concurrent sentence of three and one years' imprisonment, were affirmed and ordered into execution by the appellate court. The trial court was without jurisdiction to do anything on remand other than that ordered by this Court – to order the sentence into execution.

1. The Trial Court Did Not Have Jurisdiction to Alter the Sentence After Appeal Taken Given the Appellate Mandate and the Law of the Case Doctrine

In State ex Rel. Special Prosecutors v. Judges, Court of Common Pleas (1978), 55 Ohio St.2d 94, 378 N.E.2d 162, this Court held that, "[J]udgment of the reviewing court is controlling upon the lower court as to all matters within the compass of the judgment.." Appellee challenged his conviction, the finding of guilt and sentence, in his direct appeal and such was affirmed. The trial court was without jurisdiction to alter the mandate of the appellate court to place the sentence into execution. In *Special Prosecutors,* this Court determined that once a plea was affirmed on appeal the trial court was divested from jurisdiction to entertain a subsequent motion to withdraw plea. In this case, the appellate court affirmed the sentence imposed by the trial court, it had no jurisdiction to change the sentence.

Upon remand, the trial court was divested of jurisdiction from reconsidering its sentence in this matter. In *State v. Vild,* Cuyahoga App. Nos. 87742, 87965, 2007-Ohio-987, at ¶14, the appellate court summarized the ability a trial court has to alter its final judgment which reads:

> "A trial court has no authority to reconsider its own valid final judgments in a criminal case. "It long has been recognized that once the trial court has ordered into execution a valid sentence, it may no longer either amend or

> modify that sentence except under very limited circumstances." *State v. Clark*, Cuyahoga App. No. 82519, 2003-Ohio-3969. The court retains jurisdiction to correct a void sentencing order and to correct clerical errors, see, e.g., *State v. Garretson* (2000), 140 Ohio App.3d 554, 559, but neither of these exceptions applies here. "[T]here is no statutory authority granting a trial court the power to lessen a sentence after execution." *State v. Frazier*, Lake App. Nos.2001-L-052 and 2002-L-003, 2002-Ohio-7132, ¶ 5.

"The decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 5. In *Nolan*, the syllabus reads:

> Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case. (*State, ex rel. Potain, v. Mathews,* 59 Ohio St.2d 29, 32, 391 N.E.2d 343 [13 O.O.3d 17], approved and followed.)

In this case, the trial court issued a final judgment that was affirmed on appeal. It could not take action after the appellate court decision, unless that action was either specifically authorized by the appellate court or was specifically authorized by statute.

Although the appellate court noted that there is an exception to the law of the case doctrine, citing *Nolan*, no exceptions exist in this case. The appellate court affirmed the convictions and ordered the sentence into execution. Regardless of whether or not Carlisle had been on bond, the trial court could not simply ignore the law of the case. As stated previously by the appellate court:

> "In accordance with the law of the case doctrine, a trial court has no discretion to disregard the mandate of a reviewing court and no authority to extend or vary the mandate given." *State v. Aliane,* Franklin App. No. 03AP-881, 2004-Ohio-3698, at ¶ 16. "When a case is remanded to a trial court from an appellate court, the mandate of the appellate court must be followed." *Columbus v. Hayes* (1990), 68 Ohio App.3d 184, 186.

State v. McCauley, Cuyahoga App. No. 86671, 2006-Ohio-2875, at ¶11.

The trial court committed error when it disregarded the mandate from the appellate court that created the law of the case. The appellate opinion gave no authority to the trial court to alter its judgment, thus it could not do so. Moreover, there are no extraordinary circumstances that would alter the appellate mandate in this matter.

Appellant argued to the trial court that his medical condition would preclude imposition of his sentence and the medical costs would be too high for incarceration. Those issues are not extraordinary – when sentence was imposed in this matter, the trial court was aware of Appellant's medical condition and need for dialysis. There were no extraordinary circumstances presented; criminal defendants may be sentenced when ill or injured. Accordingly, the trial court erred when it disregarded the law of the case and modified its final judgment that had been affirmed on appeal.

2. The Trial Court Could Not Alter the Sentence Based on the Doctrine of Res Judicata

In addition to the trial court's lack of jurisdiction in this matter, the court was further barred from modifying its final judgment by the principle of res judicata. Appellee was able to challenge the aggregate three-year sentence imposed based on the extensive medical conditions he suffers; he did not. "Res judicata applies to "any proceeding" initiated after a final judgment of conviction and direct appeal." *State v. Gaston*, Cuyahoga App. No. 82628, 2003-Ohio-5825, at¶ 8 (Citing, *State v. Szefcyk*, 77 Ohio St.3d 93, 1996-Ohio-337, 671 N.E.2d 233, syllabus.) As the Eighth District noted in *State v. Moviel*, Cuyahoga App. No. 88984, 2007-Ohio-5947, res judicata would apply to bar a subsequent Crim.R. 32.1 motion to withdraw plea after the plea was challenged upon appeal, "The principles of res judicata may be applied to bar the further litigation in a criminal case of issues which were raised or could have been raised previously in an appeal. See, generally,

State v. Perry (1967), 10 Ohio St.2d 175; *State v. Szefcyk* (1996), 77 Ohio St.3d 93; and *State v. Gaston,* 8th Dist. No. 82628, 2003-Ohio-5825." In this matter, the sentence imposed was final; it could have been challenged by Appellee on direct appeal on the grounds he attacked it after his direct appeal. He did not do so. Accordingly, any litigation regarding the sentence imposed was barred by the principles of res judicata. For these reasons, the modified sentence of community control imposed in this matter was properly vacated by the appellate court.

3. The Trial Court Cannot Alter a Final Sentence Absent Specific Authority

Criminal sentences are final. In *State ex rel. Cruzado v. Zaleski,* 111 Ohio St.3d 353, 2006–Ohio–5795, this Court examined the ability of a trial court to modify or alter a sentence. First, this Court noted the general rule that a trial court is without authority to modify a valid, final judgment in a criminal case. Id., at ¶18 (Citing, *State ex rel. White v. Junkin* (1997), 80 Ohio St.3d 335, 338, 686 N.E.2d 267; *State ex rel. Hansen v. Reed* (1992), 63 Ohio St.3d 597, 599, 589 N.E.2d 1324.) That general rule is subject to two exceptions:

- A trial court may correct a void sentence.
- A trial court may correct a clerical error.

Id,. at ¶19.

Neither of those exceptions existed in Carlisle's case after it was affirmed on appeal. The journal entry of conviction was proper; Appellant did not cite error to the appellate court and does not now complain his criminal sentence was void or abhorrent in any manner. Appellant does not complain of any clerical error in the sentence imposed and affirmed upon appeal. Appellant notes that a trial court may modify a criminal sentence only as authorized by statute. See, Appellant's Merit Brief, at p. 8 ("Thus, once a defendant

has been delivered into the custody do the penal institution in which he is to serve his sentence, a trial court's authority to suspend or to modify a sentence is limited to those instances specifically provided by the General Assembly.")

However, Appellant cites several cases which have determined that a court may modify a sentence that is final, yet not executed. He relies solely in his argument to this Court upon cases that have allowed reconsideration of a final criminal sentence where a defendant is not yet imprisoned. See, Appellant's Merit Brief, at p. 8. Specifically, Appellant relies on *State v. Ballard* (1991), 77 Ohio App.3d 595, 602 N.E.2d 1234 for the general proposition that a court may modify a sentence prior to its execution. In *Ballard*, the court cited to *Columbus v. Messer* (1982), 7 Ohio App.3d 266, 7 OBR 347, 455 N.E.2d 519, for that rule of law. Howver, in *Messer*, the court was concerned with double jeopardy issues and stated that a court could modify its sentence before execution; however, that statement of law was dicta as the *Messer* court found that the trial court's original sentence was not complete, thus it was not final and could be modified. Id., 7 Ohio App.3d., at 522 ("There was no final judgment until the sentencing had been completed. See Crim.R. 32(B). Therefore, the trial judge retained authority to modify an incomplete sentence, where the original order expressly designated that sentencing would be completed at a later time, and where the deferred completion of the sentence was undertaken at defendant's behest.")

Additionally, Appellant cites to cases from several of the appellate districts to support his contention that a trial court may modify a final sentence. However, those cases rely upon *State v. Addison* (1987), 40 Ohio App.3d 7, 530 N.E.2d 1335, a Tenth Appellate District Case that held in its syllabus that, "Once a valid sentence has been executed, a trial court no longer has the power to modify the sentence except as provided by the General

Assembly." In *Addison*, after denying a motion for shock probation, the trial court sua sponte modified the original sentence. That modification was reversed. However, the appellant court noted that a trial court was granted specific authority to modify a sentence of a defendant *prior* to delivery of that defendant to the institution in which he is to serve his sentence by virtue of former R.C. 2929.51(A). That statute, repealed in 2004, specifically provided that a trial court could modify a felony sentence at any time prior to delivery of the offender to the prison. There now exists no analogous or similar statutory authority which would allow the trial court the ability to revisit its sentence.

In reviewing the cases cited by Appellant decided after 2004, courts finding that a criminal sentence may be modified prior to execution of sentence do not show any specific statutory authority for that ability – as was found in *Addison*. Rather, they cite to *Addison* directly or to cases which cite to *Addison*, or to no cases at all. In *State v. Cossack*, Mahoning App. No. 08 MA 1561, 2009-Ohio-3327, at ¶ 13, the court cites to *State v. Evans*, 161 Ohio App.3d 24, 2005-Ohio-2337, at ¶15-17, which in turn cites to *State v. Lambert*, Richland App. No. 03-CA-65, 2003-Ohio-6791, at ¶14, which in turn cites to no authority for a court's ability to modify a final judgment, but it does discuss the process of sentence modification available to a court under former R.C. 2929.51. Similarly, the case of *State v. Hundzsa*, Portage App. No. 2008-P-0012, 2008-Ohio-4985, at ¶25 which cites to *Evans*, supra, *Lambert*, supra.

There is no longer statutory authority in Ohio that would allow for a trial court to modify a final judgment in a criminal case simply because the offender has not been delivered to the institution in which his sentence will be served. As stated by this Court, a sentence in a criminal case may *only* be modified when two conditions exist; either 1) there

is an error in the journal entry subject to correction by a nunc pro tunc order or 2) there is no final judgment as the judgment is void. *Cruzado*, supra. Those conditions are not present in this case and as such, the trial court had not authority to modify the sentence imposed and affirmed in this case and the appellate court did not err in reversing the modified sentence.

B. The Appellate Court Properly Reversed the Court's Imposition of Community Control Sanctions

If this Court were to find that the trial court did in fact have jurisdiction and was able to resentence Appellant in the manner it did, the trial court failed to make the requisite findings in order to overcome the presumption of prison in this case and the sentence of community control should be reversed as an abuse of discretion. R.C. 2929.13(D) provides the mechanism by which a trial court may deviate from a presumed prison sentence. In this case, Ap was convicted of a felony of the first degree and subject to a presumption of a prison sentence. R.C. 2929.13(D) reads:

> D)(1) Except as provided in division (E) or (F) of this section, **for a felony of the first or second degree**, for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, and for a violation of division (A)(4) or (B) of section 2907.05 of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, **it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code.** Division (D)(2) of this section does not apply to a presumption established under this division for a violation of division (A)(4) of section 2907.05 of the Revised Code.
>
> (2) Notwithstanding the presumption established under division (D)(1) of this section for the offenses listed in that division other than a violation of division (A)(4) or (B) of section 2907.05 of the Revised Code, **the sentencing court may impose a community control sanction or a combination of community control sanctions instead of a prison term on an offender for a felony of the first or second degree** or for a felony drug offense that is

a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable **if it makes both of the following findings:**

> **(a) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.**
>
> **(b) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense.**

(Emphasis Added.)

This Court reiterated the necessity of findings in *State v. Mathis*, 109 Ohio St.3d 54, 846 N.E.2d 1, 2006 -Ohio- 855, at the syllabus, which reads:

> 1. A trial court at sentencing is required to make judicial findings only for a downward departure pursuant to R.C. 2929.13(D) or a judicial release pursuant to 2929.20(H). (*State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, followed.)

The journal entry resentencing Appellant does not address the requisite findings required by R.C. 2929.13(D). The trial court journalized only the following findings in deviating from the presumption of prison:

> THE COURT FINDS THAT A COMMUNITY CONTROL SANCTION WILL ADEQUATELY PROTECT THE PUBLIC AND WILL NOT DEMEAN THE SERIOUSNESS OF THE OFFENSE.

The trial court did not address the issue of adequate punishment in pronouncing sentence. In court, the trial court did not also address whether the sentence would adequately punish

the offender; moreover, the trial court did not allude to the issue of adequate punishment when pronouncing sentence in open court. Tr. 17-18. Further, the trial court did not relate any of its findings to any of the factors under R.C. 2929.12 as required.

In addition to the lack of adherence to statutory sentencing requirements, the trial court abused its discretion by modifying the sentence in this matter by finding that the cost of incarceration outweighed the need to punish him where he was convicted of the sexual molestation and kidnapping of a member of his family, a child of tender years. The appellate court noted the facts as adduced at trial in its opinion affirming the convictions. Carlisle, 2010-Ohio-3407, at ¶ 38-40. The victim was forced on a bed and Carlisle molested her; she reported the incident immediately; it was witnessed by her brother; and medical evidence corroborated the crimes. Id. Further, Carlisle attempted to use his medical condition to absolve him of the crime by stating he couldn't have committed the crime due to impotence. Id.

Both physical and medical testimony refuted and proved Carlisle's statements to be lies. Immediately after he was arrested in this matter, he chose to use his medical condition to evade prosecution. Now, he uses his medical condition to evade punishment for his acts. At the resentencing hearing, Appellant presented evidence to the trial court that he suffered numerous maladies and was undergoing dialysis on a regular basis. Counsel indicated to the trial court that the cost of care was in the hundreds of thousands into the millions. The State argued that although a consideration, that consideration should not be preeminent in the Court's determination; rather the Court should focus on the facts of the crime, Carlisle's actions, and the necessity of punishment. Specifically, the assistant prosecuting attorney noted the aggravating factors listed in R.C. 2929.12 as

applicable to this matter. Tr. 4-5. She also asked the court to place the language of R.C. 2929.13(A) into its proper perspective; reminding it that its sentence should not be driven by cost considerations, but that the statute requires the court to determine whether the sentence imposes an "unnecessary" burden on resources. The appellate court did not find that burden in this matter unnecessary; moreover it noted that the law provides a mechanism for release if such costs do burden the state. *Carlisle*, 2010-Ohio-3407, at ¶ 43 (Citing R.C. 2967.03, a statute allowing for medical release of prisoners.)

By considering cost in this matter, the trial court premised the sentence not on justice for the victims, protection of society, or punishment of the offender, but made a monetary determination, reducing the sentencing determination to an economic calculus. A prison sentence is not an "unnecessary" burden, simply because it costs more money than others' to do so relegates a judge's role to that of accountant and would provide incentive, not deterrence, for those with medical conditions to break laws and not obey them.

Even when a cost calculus is made and a prison sentence is deemed a burden on society, economic burden is not the overriding factor to consider. As noted by the appellate court in this case, there are other important factors to consider. "Carlisle was convicted for committing very grave acts of sexual abuse against a child less than ten years of age — acts that society has deemed worthy of significant

In this matter, the sentence imposed was not lengthy. It is not in and of itself burdensome. Appellee's medical conditions may cost dollars; however, it is even more important to uphold justice for the victims, protection of society, or punishment of the offender. The appellate court noted these reasons and found that the reasons advanced for

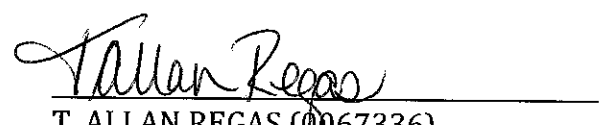
modification of the sentence were not extraordinary circumstances as envisioned in *Nolan*, supra. The trial court, even if with jurisdiction was without justification for ignoring the mandate in this case and modifying that which could have, and should have been litigated on direct appeal. As such, the appellate court properly reversed the modified sentence.

III. CONCLUSION

Appellant has asked this Court to find that a trial court has inherent authority to alter a final judgment in a criminal case; regardless of whether that judgment has been appealed and affirmed; regardless of whether the appellate court specifically ordered the sentence into execution; and regardless of whether there exists any specific statutory authority to modify the final judgment. Because final judgments are to be final; because appellate mandates are to be followed; and because there was no statutory authority authorizing the modification of a final judgment after appellate remand, the State asks that this Court affirm the Eighth District Court of Appeals opinion in this matter and remand this case to the trial court for execution of sentence.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

BY: 

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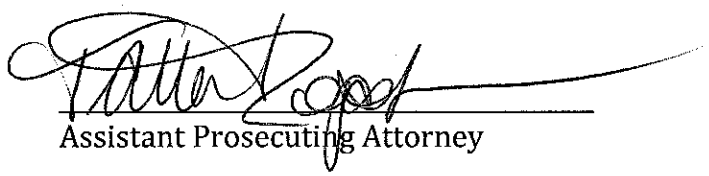
SERVICE

A copy of the foregoing Merit Brief of Appellee has been mailed this 1st day of July, 2011, to Attorney for Appellant, Erika Cunliffe, 310 Lakeside Avenue, 2nd Floor, Cleveland, Ohio 44113 and to Amicus Curiae on behalf of Appellee, Alexander Schimmer, Richard DeWine and David Lieberman, Office of Attorney General Michael DeWine, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215.



Assistant Prosecuting Attorney

Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2929. Penalties and Sentencing (Refs & Annos)
Felony Sentencing
2929.12 Factors to consider in felony sentencing

(A) Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the of- fense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

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(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong provocation.

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of section 2967.16 or section 2929.141 of the Revised Code.

(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

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(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal of- fense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

CREDIT(S)

(2002 H 327, eff. 7-8-02; 2000 S 179, § 3, eff. 1-1-02; 1999 S 107, eff. 3-23-00; 1999 S 9, eff. 3-8-00; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96)

Current through 2011 Files 1 - 19, of the 129th GA (2011-2012), apv. by 5/24/11, and filed with the Secretary of State by 5/27/11.

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Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2929. Penalties and Sentencing (Refs & Annos)
Felony Sentencing
2929.13 Sentencing guidelines for various specific offenses and degrees of offenses

(A) Except as provided in division (E), (F), or (G) of this section and unless a specific sanction is required to be imposed or is precluded from being imposed pursuant to law, a court that imposes a sentence upon an offender for a felony may impose any sanction or combination of sanctions on the offender that are provided in sections 2929.14 to 2929.18 of the Revised Code. The sentence shall not impose an unnecessary burden on state or local government resources.

If the offender is eligible to be sentenced to community control sanctions, the court shall consider the appropriateness of imposing a financial sanction pursuant to section 2929.18 of the Revised Code or a sanction of community service pursuant to section 2929.17 of the Revised Code as the sole sanction for the offense. Except as otherwise provided in this division, if the court is required to impose a mandatory prison term for the offense for which sentence is being imposed, the court also shall impose any financial sanction pursuant to section 2929.18 of the Revised Code that is required for the offense and may impose any other financial sanction pursuant to that section but may not impose any additional sanction or combination of sanctions under section 2929.16 or 2929.17 of the Revised Code.

If the offender is being sentenced for a fourth degree felony OVI offense or for a third degree felony OVI offense, in addition to the mandatory term of local incarceration or the mandatory prison term required for the offense by division (G)(1) or (2) of this section, the court shall impose upon the offender a mandatory fine in accordance with division (B)(3) of section 2929.18 of the Revised Code and may impose whichever of the following is applicable:

(1) For a fourth degree felony OVI offense for which sentence is imposed under division (G)(1) of this section, an additional community control sanction or combination of community control sanctions under section 2929.16 or 2929.17 of the Revised Code. If the court imposes upon the offender a community control sanction and the offender violates any condition of the community control sanction, the court may take any action prescribed in division (B) of section 2929.15 of the Revised Code relative to the offender, including imposing a prison term on the offender pursuant to that division.

(2) For a third or fourth degree felony OVI offense for which sentence is imposed under division (G)(2) of this section, an additional prison term as described in division (D)(4) of section 2929.14 of the Revised Code or a community control sanction as described in division (G)(2) of this section.

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(B)(1) Except as provided in division (B)(2), (E), (F), or (G) of this section, in sentencing an offender for a felony of the fourth or fifth degree, the sentencing court shall determine whether any of the following apply:

(a) In committing the offense, the offender caused physical harm to a person.

(b) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.

(c) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person, and the offender previously was convicted of an offense that caused physical harm to a person.

(d) The offender held a public office or position of trust and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.

(e) The offender committed the offense for hire or as part of an organized criminal activity.

(f) The offense is a sex offense that is a fourth or fifth degree felony violation of section 2907.03, 2907.04, 2907.05, 2907.22, 2907.31, 2907.321, 2907.322, 2907.323, or 2907.34 of the Revised Code.

(g) The offender at the time of the offense was serving, or the offender previously had served, a prison term.

(h) The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance.

(i) The offender committed the offense while in possession of a firearm.

(2)(a) If the court makes a finding described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a prison term is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code and finds that the offender is not amenable to an available community control sanction, the court shall impose a prison term upon the offender.

(b) Except as provided in division (E), (F), or (G) of this section, if the court does not make a finding described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a community control sanction or combination of community control sanctions is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code, the court shall impose a community control sanction or combination of com-

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munity control sanctions upon the offender.

(C) Except as provided in division (D), (E), (F), or (G) of this section, in determining whether to impose a prison term as a sanction for a felony of the third degree or a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to this division for purposes of sentencing, the sentencing court shall comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code and with section 2929.12 of the Revised Code.

(D)(1) Except as provided in division (E) or (F) of this section, for a felony of the first or second degree, for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, and for a violation of division (A)(4) or (B) of section 2907.05 of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code. Division (D)(2) of this section does not apply to a presumption established under this division for a violation of division (A)(4) of section 2907.05 of the Revised Code.

(2) Notwithstanding the presumption established under division (D)(1) of this section for the offenses listed in that division other than a violation of division (A)(4) or (B) of section 2907.05 of the Revised Code, the sentencing court may impose a community control sanction or a combination of community control sanctions instead of a prison term on an offender for a felony of the first or second degree or for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable if it makes both of the following findings:

(a) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.

(b) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense.

(E)(1) Except as provided in division (F) of this section, for any drug offense that is a violation of any provision of Chapter 2925. of the Revised Code and that is a felony of the third, fourth, or fifth degree, the applicability of a presumption under division (D) of this section in favor of a prison term or of division (B) or (C) of this section in determining whether to impose a prison term for the offense shall be determined as specified in section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, or 2925.37 of the Revised Code, whichever is applicable regarding the violation.

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(2) If an offender who was convicted of or pleaded guilty to a felony violates the conditions of a community control sanction imposed for the offense solely by reason of producing positive results on a drug test, the court, as punishment for the violation of the sanction, shall not order that the offender be imprisoned unless the court determines on the record either of the following:

(a) The offender had been ordered as a sanction for the felony to participate in a drug treatment program, in a drug education program, or in narcotics anonymous or a similar program, and the offender continued to use illegal drugs after a reasonable period of participation in the program.

(b) The imprisonment of the offender for the violation is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code.

(3) A court that sentences an offender for a drug abuse offense that is a felony of the third, fourth, or fifth degree may require that the offender be assessed by a properly credentialed professional within a specified period of time. The court shall require the professional to file a written assessment of the offender with the court. If the offender is eligible for a community control sanction and after considering the written assessment, the court may impose a community control sanction that includes treatment and recovery support services authorized by section 3793.02 of the Revised Code. If the court imposes treatment and recovery support services as a community control sanction, the court shall direct the level and type of treatment and recovery support services after considering the assessment and recommendation of treatment and recovery support services providers.

(F) Notwithstanding divisions (A) to (E) of this section, the court shall impose a prison term or terms under sections 2929.02 to 2929.06, section 2929.14, section 2929.142, or section 2971.03 of the Revised Code and except as specifically provided in section 2929.20 or 2967.191 of the Revised Code or when parole is authorized for the offense under section 2967.13 of the Revised Code shall not reduce the term or terms pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code for any of the following offenses:

(1) Aggravated murder when death is not imposed or murder;

(2) Any rape, regardless of whether force was involved and regardless of the age of the victim, or an attempt to commit rape if, had the offender completed the rape that was attempted, the offender would have been guilty of a violation of division (A)(1)(b) of section 2907.02 of the Revised Code and would be sentenced under section 2971.03 of the Revised Code;

(3) Gross sexual imposition or sexual battery, if the victim is less than thirteen years of age and if any of the following applies:

(a) Regarding gross sexual imposition, the offender previously was convicted of or pleaded guilty to rape, the former offense of felonious sexual penetration, gross sexual imposition, or sexual battery, and the victim of the previous offense was less than thirteen years of age;

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(b) Regarding gross sexual imposition, the offense was committed on or after August 3, 2006, and evidence other than the testimony of the victim was admitted in the case corroborating the violation.

(c) Regarding sexual battery, either of the following applies:

(i) The offense was committed prior to August 3, 2006, the offender previously was convicted of or pleaded guilty to rape, the former offense of felonious sexual penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age.

(ii) The offense was committed on or after August 3, 2006.

(4) A felony violation of section 2903.04, 2903.06, 2903.08, 2903.11, 2903.12, 2903.13, or 2907.07 of the Revised Code if the section requires the imposition of a prison term;

(5) A first, second, or third degree felony drug offense for which section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, 2925.37, 3719.99, or 4729.99 of the Revised Code, whichever is applicable regarding the violation, requires the imposition of a mandatory prison term;

(6) Any offense that is a first or second degree felony and that is not set forth in division (F)(1), (2), (3), or (4) of this section, if the offender previously was convicted of or pleaded guilty to aggravated murder, murder, any first or second degree felony, or an offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to one of those offenses;

(7) Any offense that is a third degree felony and either is a violation of section 2903.04 of the Revised Code or an attempt to commit a felony of the second degree that is an offense of violence and involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person if the offender previously was convicted of or pleaded guilty to any of the following offenses:

(a) Aggravated murder, murder, involuntary manslaughter, rape, felonious sexual penetration as it existed under section 2907.12 of the Revised Code prior to September 3, 1996, a felony of the first or second degree that resulted in the death of a person or in physical harm to a person, or complicity in or an attempt to commit any of those offenses;

(b) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense listed in division (F)(7)(a) of this section that resulted in the death of a person or in physical harm to a person.

(8) Any offense, other than a violation of section 2923.12 of the Revised Code, that is a felony, if the offender had a firearm on or about the offender's person or under the offender's control while committing the felony, with respect to a portion of the sentence imposed pursuant to division (D)(1)(a) of section 2929.14 of the Revised

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Code for having the firearm;

(9) Any offense of violence that is a felony, if the offender wore or carried body armor while committing the felony offense of violence, with respect to the portion of the sentence imposed pursuant to division (D)(1)(d) of section 2929.14 of the Revised Code for wearing or carrying the body armor;

(10) Corrupt activity in violation of section 2923.32 of the Revised Code when the most serious offense in the pattern of corrupt activity that is the basis of the offense is a felony of the first degree;

(11) Any violent sex offense or designated homicide, assault, or kidnapping offense if, in relation to that offense, the offender is adjudicated a sexually violent predator;

(12) A violation of division (A)(1) or (2) of section 2921.36 of the Revised Code, or a violation of division (C) of that section involving an item listed in division (A)(1) or (2) of that section, if the offender is an officer or employee of the department of rehabilitation and correction;

(13) A violation of division (A)(1) or (2) of section 2903.06 of the Revised Code if the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, or an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, with respect to the portion of the sentence imposed pursuant to division (D)(5) of section 2929.14 of the Revised Code;

(14) A violation of division (A)(1) or (2) of section 2903.06 of the Revised Code if the offender has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of section 4511.19 of the Revised Code or an equivalent offense, as defined in section 2941.1415 of the Revised Code, or three or more violations of any combination of those divisions and offenses, with respect to the portion of the sentence imposed pursuant to division (D)(6) of section 2929.14 of the Revised Code;

(15) Kidnapping, in the circumstances specified in section 2971.03 of the Revised Code and when no other provision of division (F) of this section applies;

(16) Kidnapping, abduction, compelling prostitution, promoting prostitution, engaging in a pattern of corrupt activity, illegal use of a minor in a nudity-oriented material or performance in violation of division (A)(1) or (2) of section 2907.323 of the Revised Code, or endangering children in violation of division (B)(1), (2), (3), (4), or (5) of section 2919.22 of the Revised Code, if the offender is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense;

(17) A felony violation of division (A) or (B) of section 2919.25 of the Revised Code if division (D)(3), (4), or (5) of that section, and division (D)(6) of that section, require the imposition of a prison term;

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(18) A felony violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code, if the victim of the offense was a woman that the offender knew was pregnant at the time of the violation, with respect to a portion of the sentence imposed pursuant to division (D)(8) of section 2929.14 of the Revised Code.

(G) Notwithstanding divisions (A) to (E) of this section, if an offender is being sentenced for a fourth degree felony OVI offense or for a third degree felony OVI offense, the court shall impose upon the offender a mandatory term of local incarceration or a mandatory prison term in accordance with the following:

(1) If the offender is being sentenced for a fourth degree felony OVI offense and if the offender has not been convicted of and has not pleaded guilty to a specification of the type described in section 2941.1413 of the Revised Code, the court may impose upon the offender a mandatory term of local incarceration of sixty days or one hundred twenty days as specified in division (G)(1)(d) of section 4511.19 of the Revised Code. The court shall not reduce the term pursuant to section 2929.20, 2967.193, or any other provision of the Revised Code. The court that imposes a mandatory term of local incarceration under this division shall specify whether the term is to be served in a jail, a community-based correctional facility, a halfway house, or an alternative residential facility, and the offender shall serve the term in the type of facility specified by the court. A mandatory term of local incarceration imposed under division (G)(1) of this section is not subject to any other Revised Code provision that pertains to a prison term except as provided in division (A)(1) of this section.

(2) If the offender is being sentenced for a third degree felony OVI offense, or if the offender is being sentenced for a fourth degree felony OVI offense and the court does not impose a mandatory term of local incarceration under division (G)(1) of this section, the court shall impose upon the offender a mandatory prison term of one, two, three, four, or five years if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or shall impose upon the offender a mandatory prison term of sixty days or one hundred twenty days as specified in division (G)(1)(d) or (e) of section 4511.19 of the Revised Code if the offender has not been convicted of and has not pleaded guilty to a specification of that type. The court shall not reduce the term pursuant to section 2929.20, 2967.193, or any other provision of the Revised Code. The offender shall serve the one-, two-, three-, four-, or five-year mandatory prison term consecutively to and prior to the prison term imposed for the underlying offense and consecutively to any other mandatory prison term imposed in relation to the offense. In no case shall an offender who once has been sentenced to a mandatory term of local incarceration pursuant to division (G)(1) of this section for a fourth degree felony OVI offense be sentenced to another mandatory term of local incarceration under that division for any violation of division (A) of section 4511.19 of the Revised Code. In addition to the mandatory prison term described in division (G)(2) of this section, the court may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve the prison term prior to serving the community control sanction. The department of rehabilitation and correction may place an offender sentenced to a mandatory prison term under this division in an intensive program prison established pursuant to section 5120.033 of the Revised Code if the department gave the sentencing judge prior notice of its intent to place the offender in an intensive program prison established under that section and if the judge did not notify the department that the judge disapproved the placement. Upon the establishment of the initial intensive program prison pursuant to section 5120.033 of the Revised Code that is privately operated and managed by a contractor pursuant to a contract entered into under section 9.06 of the Revised Code, both of the following apply:

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(a) The department of rehabilitation and correction shall make a reasonable effort to ensure that a sufficient number of offenders sentenced to a mandatory prison term under this division are placed in the privately operated and managed prison so that the privately operated and managed prison has full occupancy.

(b) Unless the privately operated and managed prison has full occupancy, the department of rehabilitation and correction shall not place any offender sentenced to a mandatory prison term under this division in any intensive program prison established pursuant to section 5120.033 of the Revised Code other than the privately operated and managed prison.

(H) If an offender is being sentenced for a sexually oriented offense or child-victim oriented offense that is a felony committed on or after January 1, 1997, the judge shall require the offender to submit to a DNA specimen collection procedure pursuant to section 2901.07 of the Revised Code.

(I) If an offender is being sentenced for a sexually oriented offense or a child-victim oriented offense committed on or after January 1, 1997, the judge shall include in the sentence a summary of the offender's duties imposed under sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code and the duration of the duties. The judge shall inform the offender, at the time of sentencing, of those duties and of their duration. If required under division (A)(2) of section 2950.03 of the Revised Code, the judge shall perform the duties specified in that section, or, if required under division (A)(6) of section 2950.03 of the Revised Code, the judge shall perform the duties specified in that division.

(J)(1) Except as provided in division (J)(2) of this section, when considering sentencing factors under this section in relation to an offender who is convicted of or pleads guilty to an attempt to commit an offense in violation of section 2923.02 of the Revised Code, the sentencing court shall consider the factors applicable to the felony category of the violation of section 2923.02 of the Revised Code instead of the factors applicable to the felony category of the offense attempted.

(2) When considering sentencing factors under this section in relation to an offender who is convicted of or pleads guilty to an attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense, the sentencing court shall consider the factors applicable to the felony category that the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt.

(K) As used in this section, "drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code.

(L) At the time of sentencing an offender for any sexually oriented offense, if the offender is a tier III sex offender/child-victim offender relative to that offense and the offender does not serve a prison term or jail term, the court may require that the offender be monitored by means of a global positioning device. If the court requires such monitoring, the cost of monitoring shall be borne by the offender. If the offender is indigent, the cost

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of compliance shall be paid by the crime victims reparations fund.

CREDIT(S)

(2010 S 58, eff. 9-17-10; 2008 H 130, eff. 4-7-09; 2008 H 280, eff. 4-7-09; 2008 S 183, eff. 9-11-08; 2007 S 10, eff. 1-1-08; 2006 S 281, eff. 4-5-07; 2006 H 461, eff. 4-4-07; 2006 S 260, eff. 1-2-07; 2006 H 95, eff. 8-3-06; 2004 H 473, eff. 4-29-05; 2004 H 163, eff. 9-23-04; 2004 H 52, eff. 6-1-04; 2003 S 5, § 3, eff. 1-1-04; 2003 S 5, § 1, eff. 7-31-03; 2002 S 123, eff. 1-1-04; 2002 H 485, eff. 6-13-02; 2002 H 327, eff. 7-8-02; 2000 S 222, eff. 3-22-01; 2000 H 528, eff. 2-13-01; 1999 S 22, eff. 5-17-00; 1999 S 107, eff. 3-23-00; 1999 S 142, eff. 2-3-00; 1998 H 122, eff. 7-29-98; 1998 H 293, eff. 3-17-98; 1997 S 111, eff. 3-17-98; 1997 H 32, eff. 3-10-98; 1996 H 180, eff. 1-1-97; 1996 S 166, eff. 10-17-96; 1996 S 269, eff. 7-1-96; 1996 H 445, eff. 9-3-96; 1995 S 2, eff. 7-1-96)

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Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2967. Pardon; Parole; Probation (Refs & Annos)
2967.03 Pardon, commutation, medical release, or reprieve

The adult parole authority may exercise its functions and duties in relation to the pardon, commutation of sentence, or reprieve of a convict upon direction of the governor or upon its own initiative. It may exercise its functions and duties in relation to the parole of a prisoner who is eligible for parole upon the initiative of the head of the institution in which the prisoner is confined or upon its own initiative. When a prisoner becomes eligible for parole, the head of the institution in which the prisoner is confined shall notify the authority in the manner prescribed by the authority. The authority may investigate and examine, or cause the investigation and examination of, prisoners confined in state correctional institutions concerning their conduct in the institutions, their mental and moral qualities and characteristics, their knowledge of a trade or profession, their former means of livelihood, their family relationships, and any other matters affecting their fitness to be at liberty without being a threat to society.

The authority may recommend to the governor the pardon, commutation of sentence, medical release, or reprieve of any convict or prisoner or grant a parole to any prisoner for whom parole is authorized, if in its judgment there is reasonable ground to believe that granting a pardon, commutation, medical release, or reprieve to the convict or paroling the prisoner would further the interests of justice and be consistent with the welfare and security of society. However, the authority shall not recommend a pardon, commutation of sentence, or medical release of, or grant a parole to, any convict or prisoner until the authority has complied with the applicable notice requirements of sections 2930.16 and 2967.12 of the Revised Code and until it has considered any statement made by a victim or a victim's representative that is relevant to the convict's or prisoner's case and that was sent to the authority pursuant to section 2930.17 of the Revised Code, any other statement made by a victim or a victim's representative that is relevant to the convict's or prisoner's case and that was received by the authority after it provided notice of the pendency of the action under sections 2930.16 and 2967.12 of the Revised Code, and any written statement of any person submitted to the court pursuant to division (G) of section 2967.12 of the Revised Code. If a victim, victim's representative, or the victim's spouse, parent, sibling, or child appears at a full board hearing of the parole board and gives testimony as authorized by section 5149.101 of the Revised Code, the authority shall consider the testimony in determining whether to grant a parole. The trial judge and prosecuting attorney of the trial court in which a person was convicted shall furnish to the authority, at the request of the authority, a summarized statement of the facts proved at the trial and of all other facts having reference to the propriety of recommending a pardon , commutation, or medical release, or granting a parole, together with a recommendation for or against a pardon, commutation, medical release, or parole, and the reasons for the recommendation. The trial judge, the prosecuting attorney, specified law enforcement agency members, and a representative of the prisoner may appear at a full board hearing of the parole board and give testimony in regard to the grant of a parole to the prisoner as authorized by section 5149.101 of the Revised Code. All state and local officials shall furnish information to the authority, when so requested by it in the performance of its duties.

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The adult parole authority shall exercise its functions and duties in relation to the release of prisoners who are serving a stated prison term in accordance with section 2967.28 of the Revised Code.

CREDIT(S)

(2008 H 130, eff. 4-7-09; 2005 H 15, eff. 11-23-05; 2004 H 375, eff. 4-29-05; 1995 S 2, eff. 7-1-96; 1994 S 186, eff. 10-12-94; 1994 H 571, eff. 10-6-94; 1987 S 6, § 1, eff. 6-10-87; 1987 S 6, § 3; 1984 S 172, § 1, 3; 130 v Pt 2, H 28)

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C
Baldwin's Ohio Revised Code Annotated Currentness
Rules of Criminal Procedure (Refs & 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;

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(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)

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C
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Rules of Criminal Procedure (Refs & Annos)
→ **Crim R 32.1 Withdrawal of guilty plea**

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

CREDIT(S)

(Adopted eff. 7-1-73; amended eff. 7-1-98)

Current with amendments received through 2/1/11.

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