

IN THE SUPREME COURT OF OHIO
Case No. 2010-2158

STATE OF OHIO	:	
Appellee	:	
-vs-	:	On Appeal from the
JACK CARLISLE	:	Cuyahoga County Court
Appellant	:	of Appeals, Eighth
		Appellate District Court
		of Appeals
		CA: 93266

REPLY BRIEF OF APPELLANT JACK CARLISLE

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ARGUMENT

Reply to Proposition of Law:

THIS COURT'S HOLDING IN SPECIAL PROSECUTOR'S DOES NOT DIVEST THE TRIAL COURT OF ITS JURISDICTION TO MODIFY A SENTENCE THAT HAS NOT YET BEEN EXECUTED EVEN IF THE SENTENCE MODIFICATION OCCURS FOLLOWING THE DIRECT APPEAL

In arguing that the trial court improperly modified Jack Carlisle's sentence, the State asks this Court to adopt a rule that forbids trial courts from modifying criminal sentences after they have been pronounced in open court. Until now, no one – not the Sentencing Commission, the General Assembly, this Court, or any district court of appeals – has ever taken the position that the trial court's sentencing authority was so drastically circumscribed. This argument is largely predicated on two factors. First, it derives from a distortion of the well-settled notion that trial courts lack authority to reconsider their own valid judgments once they become final. Second, it stems from the claim, leveled here for the first time by Amicus, that since R.C. 2929.51 – the statute providing for the imposition of probation post-sentencing – has been repealed, trial courts have no power to modify a sentence, under any circumstance, after imposing it.

The State is proposing a critical limitation on the power of trial courts, which this Court should reject. Under the Ohio Constitution, trial courts possess the authority to rule on all justiciable matters before them. Prior to the modification, Mr. Carlisle's sentence was properly stayed or suspended pending resolution of his direct appeal. The judgment reflecting that sentence was not final until the trial court lifted the stay and put the sentence into execution. A sentence is put into execution when the defendant is moved from the custody and control of the judicial branch into that of the executive branch, which occurs when he is delivered to the institution where he will serve his sentence. *Columbus v. Messer* (1982), 7 Ohio App.3d 266,

268; *United States v. Davidson* (C.A.10, 1979), 597 F.2d 230, certiorari denied, 444 U.S. 861; *Santo v. State* (1910), 17 Ohio C.C. (N.S.) 110, 32 Ohio C.D. 50 (following *Lee v. State* (1877), 32 Ohio St. 113.).

In this case, before lifting the suspended sentence, and therefore before the sentence was final, the trial court modified it. The trial court still had authority to act in the case, 1) because the judgment imposing that sentence was not final until the stay was lifted; and 2) because Mr. Carlisle was still in the custody and control of the judicial, rather than executive, branch. Had Mr. Carlisle begun serving the three-year prison term initially imposed, the trial court could not have done what it did. Nevertheless, until that time it makes imminently good legal and practical sense for the trial court to retain authority to modify sentences, to either increase or decrease them, consistent with the applicable law. As discussed more fully herein, if this Court adopts Appellee's position, it will tie the trial court's hands in unprecedented, impractical and unconstitutional ways.

The Argument in Amicus Curiae's Brief is Forfeited

When it reversed the trial court's decision to modify and resentence Mr. Carlisle, the Eighth District did so after concluding that the modification violated the mandate rule. The State did not file a cross appeal from this decision – arguing that it should have been resolved on other grounds – when Mr. Carlisle sought this Court's leave to appeal it. Yet in Amicus Curiae's brief supporting the State's position here, the Attorney General argues – for the first time ever – that the Eighth District really should have concluded that the modification was improper because the trial court lacked *jurisdiction* to revisit Mr. Carlisle's sentence once a final judgment had been entered.

The purported jurisdictional challenge is grounded on the notion that the statutory basis for undertaking the modification had been repealed, and that, therefore, the trial court was prohibited from doing what it did. As detailed further in the sections that follow, that argument is grounded on several flawed propositions, which fail to contend with the practical difficulties that its adoption would necessarily engender. As an initial matter, however, this is an argument that has never been raised before and it has been forfeited or waived. *State v. Szeftcyk*, 77 Ohio St.3d 93, 1996 Ohio 337, syllabus.

The State's argument to the contrary, this case does not present a jurisdictional question. The trial court had authority to take action in a case before it where its jurisdiction had not yet passed to the executive branch. The State's disagreement with that decision is not a jurisdictional concern. Rather, it is a question of whether the court's actions were procedurally wrong. As this Court has noted in the past, there is a distinction between a court that lacks subject-matter jurisdiction over a case and a court that improperly exercises that subject-matter jurisdiction once conferred upon it. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶ 10.

Jurisdiction refers to the court's statutory or constitutional authority to hear a case. *Pratts*, 102 Ohio St.3d 81 at ¶ 11. The term includes jurisdiction over the subject matter and person at hand. *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833, ¶ 20 (Cook, J., dissenting); *State v. Swiger* (1998), 125 Ohio App.3d 456, 462. Jurisdiction - in the sense of jurisdiction over the particular case - implicates the trial court's authority to determine a specific case within that class of cases within its subject matter jurisdiction.

It is true that questions of subject-matter jurisdiction, which involve the court's power to hear a case in the first instance and may render a judgment void, can never be waived or forfeited and may be raised at anytime. *Pratts*, 102 Ohio St.3d 81 at ¶11. Other jurisdictional questions,

however – those about personal jurisdiction or the authority to act within a particular class of cases over which the court does have subject matter jurisdiction – address the court’s discretionary authority. Accordingly, a lack of jurisdiction over a particular person or case merely renders the judgment voidable.’ ” *Parker* at ¶ 22 (Cook, J., dissenting), quoting *Swiger*, 125 Ohio App.3d at 462.

The State objection in this case is a question of whether the trial court abused its discretion in a case over which Article IV of the Ohio Constitution explicitly accords it subject matter and personal jurisdiction. This Court’s resolution of this issue will not render the underlying judgment void, and this not a jurisdictional argument that the State can raise anytime. The argument is, therefore, forfeited or waived.

The State, through its Amicus, tries to resurrect a garden variety procedural objection by dressing it up as a jurisdiction challenge. The question for this Court is whether the mandate rule, *res judicata*, or the law of the case doctrine prevented the trial court from modifying Mr. Carlisle’s sentence, and the extent to which *State ex rel. Special Prosecutors v. Judges of Belmont Cty. Court of Common Pleas*, 55 Ohio St. 2d 94 (1978) has any bearing on that determination. It should direct itself to those issues exclusively.

Appellee seeks an Impermissible and Unconstitutional Restriction on the Trial Court’s Authority to Address the Matters before it.

In support of the State’s position before this Court, Amicus contends the sentence modification was invalid, because the statutory underpinning for that modification was repealed in 2004. Given this logic, all post sentencing modifications after the statute’s 2004 repeal, including Mr. Carlisle’s, are necessarily void. The reasoning is flawed on several levels. First, it assumes that all of the trial court’s authority to address the matters before it derives entirely from legislative enactments. Second, it never addresses the underlying legal and policy reasons for the

repeal, which undercut the idea that the change in law was intended to restrict, rather than expand, judicial authority. Third, the State and Amicus fail to confront the consequences that logically stem from the position they take here. If trial courts have had no jurisdiction to modify their unexecuted sentences, and yet, have continued to modify them, then hundreds of modified sentences are now void, and subject to challenge.

The sentence modification was well within the trial court's discretionary authority.

Article IV of the Ohio Constitution confers jurisdiction upon the court of common pleas to entertain all adult criminal matters that come before it. Section 4(B), Article IV, Ohio Constitution. The trial court is imbued with subject matter jurisdiction over the defendant upon the indictment's filing, retains it throughout the trial proceedings and sentencing. See, R.C. 2935.09. The court of common pleas only loses that jurisdiction after the defendant is transferred to the prison where he is to serve out whatever sentence the court imposes. *Columbus v. Messer*, supra citing *United States v. Benz*, supra. Undoubtedly, the trial court had jurisdiction to address this case.

According to the State, the trial judge's jurisdiction evaporates once it pronounces sentence. Amicus maintains that the trial court loses jurisdiction upon final judgment. Neither position accounts for the reality that, after sentencing, defendants regularly spend between five and ten days in the county jail before transfer to the institution. Both positions, therefore, create the absurd situation where no branch of government has jurisdiction over defendants in that period of time between sentencing and arrival at the institution.

Moreover, it is the practice of some trial courts to impose sentence in a case, then permit the defendant to surrender at a later date. According to the state, such a practice would be improper, because after sentencing, the executive, rather than the judge, has exclusive control of

the inmate. More importantly, the General Assembly provides for the suspension of a defendant's sentence and admission to bail while the defendant pursues an appeal. See, R.C. 2953.09 and 2953.10. In the event the defendant were to commit additional misconduct or new facts about the underlying case were to come to light during that period, the judge would be powerless to modify the sentence to account for that new information. Oftentimes, it is the State that asks the trial court to increase a sentence based on post sentencing misconduct or information. See, e.g., *State v. Teets* (9th Dist, 2000), Medina App. No. 3022-M, 2000 WL 34337703. Now that same body insists that courts lack the power it has previously demanded them to exercise.

In this case, the trial court imposed a three-year sentence on Mr. Carlisle, but then suspended that sentence and allowed him to remain on bond while he appealed. See, R.C. 2953.09. That suspension remained in place until Mr. Carlisle asked the trial court to modify it. During that time, Mr. Carlisle remained in the community under the trial judge's control and authority. The decision to modify the sentence was taken before that suspension was lifted, and before Mr. Carlisle was turned over to the executive branch, i.e. transferred to the prison where he would have served his sentence. Under the circumstance, the judgment was not final when the modification was undertaken, and it was, therefore, proper.

R.C. 2929.51's repeal was effectuated by Senate Bill 2 in 1996

The State's insistence on the notion that R.C. 2929.51 was repealed in 2004 is inaccurate. Analysis of the law's enactment and repeal actually reflects that, to the extent that R.C. 2929.51 addressed the trial court's modification of sentences, that provision was repealed by Senate Bill (SB) 2 in 1996. According to the State, then, every single sentence modified - post-sentence - since 1996 is void.

R.C. 2929.51 was enacted in 1974 under House Bill (HB) 511. H.B. was enacted to provide a compact yet complete substantive criminal code, easier to understand and apply, meeting modern needs and providing the necessary foundation for effective crime prevention, law enforcement, and treatment of offenders.¹ In relevant part, R.C. 2929.51 initially provided for the modification of a prison sentence to probation as follows:

At or after the time of sentencing for felony, and up to the time the offender is delivered to the institution where he is to serve his sentence, the court may suspend sentence and place the offender on probation . . . “Split” sentencing is specifically permitted. That is, one of the conditions of probation may be that the offender serve a definite term of not more than 6 months in the county jail or workhouse. If a “split” sentence is imposed, it may be served intermittently, that is on weekends, or over night, so as to permit the offender to continue working and caring for his family.

Also in the case of felony, the trial court may impose “shock” probation under R.C. 2967.061. Under this procedure, the offender is actually committed to a penitentiary or reformatory. After he has served not less than 30 days but not more than 90 days, he . . . may make a motion to have the rest of his sentence suspended and probation granted.

R.C. 2929.51 also addressed the post sentence imposition of probation in misdemeanor cases.

The statute was amended from time to time, until the 1995 passage of SB 2, when all reference to the modification of felony sentences was removed from that provision permanently.

The General Assembly enacted SB 2 largely due to concerns about prison overcrowding.² The General Assembly created a Criminal Sentencing Commission to examine the problem and make recommendations to address it. S.B. 258 (Establishing the Commission). With some revision, SB 2 enacted most of the Commission’s recommendations. Critically, SB 2 shifted sentencing power from the parole board to the sentencing judge.³ The statutes providing for

¹ See, Am.Sub. 511, 109th General Assembly, Introduction.

² Interim Report of the Governor’s Committee on Prison Crowding, 12-24, 50; Report of the Governor’s Committee on Prison Crowding (1988).

³ Griffin, Katz, *Ohio Felony Sentencing Law*, Overview VIII, p. 11 (1996-1997 ed.)

sentence modification to probation, shock probation, or super shock, were replaced by R.C. 2929.20, which set out the procedures for seeking and granting Judicial Release.⁴ This change was intended to *expand* the eligibility for controlled release into the community and the trial judge's authority to grant or deny it.⁵

Following SB 2's changes to Ohio's Sentencing Law, the Revised Code is now silent regarding the judge's ability to modify sentences before they are put into execution. That silence has been in place for 15 years. Nevertheless, nowhere in SB 2 or anywhere else in the Revised Code, is there an express intention to bar the trial court from taking such action. And trial courts continue to believe that they possess the authority to modify sentence – up or down – prior to their execution. See, e.g., *State v. Cossack* (2009), Mahoning App. No. 08 MA 161, 2009 WL 1915139 (7th District) ; *State v. Evans* (2005), 161 Ohio App.3d 24 (4th District) and the other cases cited in Mr. Carlisle's initial brief.

At this point, it cannot be overlooked that the trial court's authority to modify sentences in such a way that the prison term or punishment is increased was not explicitly set out under the Revised Code. Before its effective repeal, R.C. 2929.51 only provided for post sentence modifications to probation. Yet the practice of increasing a sentence has been deemed both constitutional and permissible. *United States v. Lundien* (C.A. 4, 1985), 769 F.2d 981, 985 (post sentencing/pre execution sentencing modifications upward do not violate the double jeopardy and due process clause of the Constitution); citing, *United States v. DiFrancesco*, 449 U.S. 117, 134. If trial courts possess the power to modify an unexecuted sentence upward, even though the

⁴ Griffin, Katz, *Ohio Felony Sentencing Law*, App. B-24.

⁵ Ibid. It is important to note that SB 2 gave trial courts veto power over independent Parole Board decisions to grant furloughs or boot camp. See, R.C. 2967.23, 2967.26, 5120.031, & 5120.032.

General Assembly has not expressly conferred that power upon them, then surely that silence equally permits modifications downward where otherwise justified.

The State's Position Violates the Separation of Powers Doctrine

Though the Constitution does not explicitly set out a separation of powers doctrine, it is imbedded in the government's constitutional framework. *State v. Sterling* (2007), 113 Ohio St.3d 255, ¶ 22. The Ohio Constitution applies this doctrine in its definition of the nature and scope of powers designated to the three branches of the government. *State v. Warner* (1990), 55 Ohio St.3d 31, 43-44. This Court has further recognized that it is inherent in our theory of government that each of the three grand divisions of the government must be protected from the encroachments of the others, so far that its integrity and independence may be preserved. *South Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 159 (citations and quotations omitted).

The underlying premise of this separation principle is that powers properly belonging to one of the branches ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others. *State ex rel. Bryant v. Akron Metro. Park Distr.* (1929), 120 Ohio St. 464, 473. Accordingly, this Court has held that "the administration of justice by the judicial branch . . . cannot be impeded by the other branches . . . in the exercise of their respective powers." *State ex rel. Johnston v. Taulbee* (1981) 66 Ohio St. 2d 417, para. one of the syllabus.

The State claims that the trial court had no power to modify Mr. Carlisle's sentence once it was imposed. Amicus contends that such authority vanished when the sentence became final. Their respective positions appear to be grounded on the notion that since the General Assembly does not explicitly permit sentencing modifications outside of the judicial release statute, it necessarily prohibits them. That assumption is false.

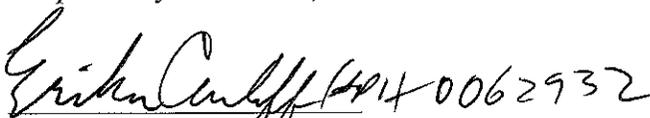
Mr. Carlisle does not dispute that the trial court's authority to impose sentence derives from the statutes enacted by the General Assembly. *State v. Bates* (2008), Ohio St.3d 174, 177. Nevertheless, the Constitution accords the trial court authority to address the adult criminal matters properly appearing before it. Article VI, Ohio Constitution. When the trial court suspended sentence in Mr. Carlisle's case, it did so according to the statutory provision that permitted it to do so. See, R.C. 2953.09. Nothing in the Revised Code prohibited the trial court from modifying Mr. Carlisle's sentence before the suspension was lifted and before the sentence was put into execution. Construing the General Assembly's silence on this issue as a blanket prohibition would impinge on the trial court's authority to address the matters properly before it, and thereby violate the separation of powers principle. See, *State v. Hochhausler* (1996), 76 Ohio St.3d 455 (General Assembly violated separation of powers by forbidding the trial court from staying its own judgments pending resolution of administrative proceedings).

The two propositions on which the State's argument to this Court is founded fundamentally alter the jurisdictional boundaries between trial and appellate courts – dramatically narrowing one while expanding the other. The State's position is one that this Court should reject.

CONCLUSION

Based on the foregoing discussion, as well as the arguments set forth in Mr. Carlisle's initial brief in this Court, this Court should reverse the Court of Appeals' decision and reinstate the sentence, as modified, that the trial court imposed in this matter.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

A copies of the foregoing Brief was served upon William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113; and Michael Dewine, Attorney General of Ohio, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215 on this 25th day of July, 2011.


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