

NO. **12-0118**

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 96637

STATE OF OHIO,
Plaintiff-Appellant

-vs-

IN RE J.S.,
Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This matter presents a significant question that calls for this Court's analysis of the very purpose, function, public policy behind, and practical application of Ohio's serious youthful offender blended sentencing scheme. In this case the Eighth District Court of Appeals reversed the Cuyahoga County Juvenile Court's decision to invoke an agreed upon nine-year adult prison term against serious youthful offender, J.S. After he was adjudged delinquent of rape, kidnapping and aggravated robbery with firearm specifications, J.S. and the State jointly proposed a serious youthful offender ("SYO") blended sentence that included a suspended nine-year adult prison term. After J.S. committed another act of rape while in the custody of the Ohio Department of Youth Services ("ODYS") where he was serving the juvenile portion of his sentence, the State moved the trial court to invoke J.S.'s suspended nine-year adult prison term. Despite the fact that J.S. did, in fact, commit an additional act of rape while in ODYS custody, the appellate court found "the trial court erred when it invoked the adult portion of J.S.'s SYO sentence." *In re: J.S.*, Cuyahoga App. No. 96637, 2011-Ohio-6280, ¶ 18, ("*J.S. II*").

A serious youthful offender has an adult prison term imposed upon them at the time of their sentencing disposition. However that prison term can only be invoked if the juvenile, while in ODYS custody, commits an act that is both a violation of the rules of the institution and could be charged as a felony (or as a first degree misdemeanor offense of violence) if that act were committed by an adult. R.C. § 2152.14.

This Supreme Court has upheld the imposition of blended sentences on serious youthful offenders by finding R.C. § 2152.13, Serious youthful offender dispositional sentence, to be constitutional. *In re: D.H.*, 120 Ohio St.3d 540, 901 N.E.2d 209, 2009-Ohio-9, ¶ 55. At the time of this filing, the Court is considering whether invoking the adult portion of a serious

youthful offender's sentence under R.C. § 2952.14, Invoking adult portion of sentence, bears constitutional ramifications. *In re: J.V.*, Ohio Supreme Court Case No. 2011-0107 (heard and submitted on December 9, 2011, decision pending.)

In the instant case, which is factually akin to *In re: J.V.*, the juvenile court made an error at the time of J.S.'s original sentencing disposition in January of 2007. Said error was not appealed by either party. Later that year J.S. went on to commit an act of rape while serving the juvenile portion of his blended sentence. Once the trial court invoked J.S.'s adult prison term in April of 2008, due to the rape, J.S. challenged the validity of the Juvenile Court's January 2007 sentencing journal entry. The appellate court found the original sentencing error reversible and remanded for a *de novo* disposition. *In re: J.S.*, Cuyahoga App. No. 95365, 2010-Ohio-6199, ¶ 7-9, (*"J.S. I"*).

Upon remand, the Juvenile Court held J.S.'s *de novo* disposition on February 28, 2011 and corrected the original sentencing error. On March 8, 2011 the Juvenile Court again invoked J.S.'s adult prison term based on the act of rape he committed back in 2007 while he was in ODYS custody. J.S. again appealed the trial court's decision to invoke the agreed nine-year adult prison term. Despite the fact that J.S. committed an act constituting first-degree felony rape while he was in ODYS custody, the appellate court again vacated the decision to invoke his adult prison term holding:

We are troubled by the fact that J.S. was serving a void sentence when he committed the act constituting rape. We are aware that the SYO law in Ohio is relatively new and this case appears to be one of first impression. * * *

[B]ased on these facts, the trial court erred when it invoked the adult portion of J.S.'s SYO sentence.

In re: J.S., Cuyahoga App. No. 96637, 2011-Ohio-6280, ¶ 16-18.

This case presents a critical issue regarding what constitutes a fair and just application of Ohio's serious youthful offender blended sentencing scheme. If left to stand, the Eighth District's opinion seriously risks a chilling effect on the use of blended sentences. If an appellate court's reversal of an original sentence years after it was entered can render any accompanying suspended adult prison term utterly unreachable and entirely meaningless, the Juvenile Justice system will be hard pressed to find instances where SYO blended sentences will be worth the risk of such delayed attacks.

Instead, Ohio's SYO blended sentencing scheme should be applied in the spirit in which it was conceived. As this Court has already determined, blended sentences assist Ohio's juvenile courts in achieving their important objectives. *In re: D.H.*, 120 Ohio St.3d 540, 901 N.E.2d 209, 2009-Ohio-9, ¶ 55. Therefore the statutes must continue to be protected and enforced in a manner that encourages reliance upon blended sentences, as this sentencing format can be a highly effective tool for certain youthful offenders.

The State of Ohio respectfully urges this Honorable Court to accept this appeal and adopt the State's proposition of law: A sentencing error that is not timely appealed and is wholly unrelated to a juvenile court's decision to invoke an adult prison sentence against a serious youthful offender cannot be used to nullify the adult portion of the juvenile's blended sentence.

STATEMENT OF THE CASE AND FACTS

This case arises from a delinquency matter filed in the Cuyahoga County Juvenile Court. In 2006 J.S., a minor, was adjudged a serious youthful offender based on his commission of acts constituting rape, kidnapping, and aggravated robbery with one and three-year firearm specifications. A blended SYO sentence was imposed which included a five year period in ODYS custody and an agreed nine-year term in an adult prison facility, which was suspended.

The parties and the juvenile court judge were in agreement that J.S. would have to serve nine years in the adult prison system if he failed to be rehabilitated and continued to engage in criminal conduct while in ODYS custody. *In re: J.S.*, Cuyahoga App. No. 95365, 2010-Ohio-6199, ¶ 4. However, the journal entry of the court not only imposed the agreed-upon nine year adult prison term, but also indicated that each of J.S.'s felonies could be subject to indefinite prison terms of three to ten years. Despite the erroneous indefinite sentence language included in the entry, no appeal was taken by either party.

In 2007, while in ODYS custody, J.S. committed another act of first-degree felony rape. Based on this conduct, the State moved the juvenile court to invoke the adult portion of J.S.'s sentence. After a hearing on the matter, the suspension on the nine-year adult prison term was lifted so that J.S. was ordered to serve his agreed-upon adult prison sentence. J.S. appealed the trial court's decision to invoke the adult prison term and won reversal. The Eighth District Court of Appeals held,

[T]he adult portion of the sentence appears to impose an agreed sentence of nine years but also imposed indefinite sentences on each count, which are not authorized by law. * * * Where a sentence contains portions that are not authorized by law, the appropriate procedure to correct the error is to remand for sentencing de novo. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶ 14, 17, 35.

Because a de novo disposition must be conducted, appellant's remaining issues concerning the notification of postrelease control are moot and overruled. App. R. 12(A)(1)(c).

Appellant's assignment of error is sustained, and this matter is remanded for a de novo disposition.

In re: J.S., Cuyahoga App. No. 95365, 2010-Ohio-6199, ¶ 7-9.

Upon remand, the juvenile court held its *de novo* hearing on February 28, 2011 in which the court imposed the five year period of ODYS time, with a definite sentence of nine years adult prison time (which was suspended), and a five year period of mandatory post release control.

(2/28/11 Tr. 27-30.) At that hearing the court heard argument from the parties as to how to proceed regarding invoking the adult term based on the prior 2007 incident. The court explained to J.S.:

Now, the issue, [J.S.], is this, that when you were at ODYS you picked up another offense. They filed a motion to then invoke your adult sentence. That came in for a hearing, and I did just that.

What we were discussing why it took so long to come into court was how do we proceed? Can the court just essentially take what we did before, apply it now, and invoke your adult sentence? Your attorneys are arguing that there may be a problem because what the Court of Appeals essentially said was that your juvenile sentence hadn't been imposed properly. So we're imposing it now, I hope properly.

But does an act that occurred, a conviction or adjudication that you received while serving the juvenile sentence, form the basis for reimposing the adult sentence? So that's the issue at hand.

(2/28/11 Tr. 30-31.) Ultimately the court reset the matter for March 8, 2011 when a separate hearing on the State's motion to invoke J.S.'s adult sentence was had.

At the March 8th hearing on the State's motion to invoke, the parties presented argument with regard to the court's ability to invoke J.S.'s adult sentence based on the rape that pre-dated his February 2011 resentencing. The trial judge noted the absurdity of the defense's contention that J.S.'s original sentence never existed by inquiring, "Well, does that mean he wasn't even there then and couldn't even have committed the rape?" (3/8/11 Tr. 9.) After consideration, the juvenile court determined:

I think that's the conclusion this Court has to reach, that the [appellate] Court was essentially sending it back for clarification of the sentence. It's a re-sentence I think to make an argument that it was an invalid sentence, and, therefore, it cannot be considered that he committed another offense and invoke that adult sentence, I think is pure legal fiction. And if there's ever a situation where somebody would have to say that there's a technicality of the law that worked to the disadvantage of the community, that would certainly be it.

So I may be wrong, but if it goes back to the Court of Appeals, I would hope that they would see it that way. So I want to make the ruling that we can consider the adjudication from Delaware County on the rape charge, [J.S.]'s admission there.

(3/8/11 Tr. 11-12.) J.S. immediately appealed the trial court's decision to invoke the adult portion of his sentence.

The Eighth District considered the procedural history of the case and reversed the juvenile court for a second time. The appellate court reasoned,

We are troubled by the fact that J.S. was serving a void sentence when he committed the act constituting rape. We are aware that the SYO law in Ohio is relatively new and this case appears to be one of first impression. An example of a similar situation is where an adult offender violates the community control sanctions portion of his or her sentence. If his or her sentence is later found to be void, can the person still be found to be a probation violator? We think not. That does not mean that the offender cannot be prosecuted for any crime he or she commits while under community control sanctions, the offender just cannot be found to have violated his or her community control sanctions in the underlying case. Likewise, in this case, J.S. could still be adjudicated delinquent for the rape case and have the appropriate disposition rendered in that case. In other words, just because J.S.'s sentence was void does not mean he cannot be held accountable for his actions in the rape case; the act constituting rape simply cannot serve as the predicate act for pursuing imposition of the adult portion of J.S.'s sentence in this case.

In re: J.S., Cuyahoga App. No. 96637, 2011-Ohio-6280, ¶ 16.

Presently, the State seeks further review in this Supreme Court and the adoption of its proposition of law that a sentencing error that is not timely appealed and is wholly unrelated to a juvenile court's decision to invoke an adult prison sentence against a serious youthful offender cannot be used to nullify the adult portion of the juvenile's blended sentence.

In support of its position on this issue, the State presents the following argument.

LAW AND ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition Of Law No. I: A Sentencing Error That Is Not Timely Appealed, And Is Unrelated To A Juvenile Court's Decision To Invoke An Adult Prison Sentence Against A Serious Youthful Offender, Cannot Be Used To Nullify The Adult Portion Of The Juvenile's Blended Sentence.

The matter of public and great general interest that this case presents is: when a re-sentencing hearing is required to correct a legal error, whether a juvenile offender can escape

serving the adult portion of a blended SYO sentence, simply because their offending conduct occurred before the error in sentencing could be corrected? The State submits that the applicable statutes and common law of this State as well as the principles of fairness and justice dictate that the answer to this question is, no. A juvenile offender who fails to timely appeal his blended sentence cannot reap the undue advantage of escaping altogether service of the adult prison term just because an unrelated sentencing error was not corrected before the juvenile re-offended.

Juvenile courts and serious youthful offenders:

The overriding purpose of establishing juvenile courts is codified at R.C. § 2152.01. The mission of juvenile courts includes providing for the care, protection, and development of children, protecting public interest and safety, holding juvenile offenders accountable and rehabilitating them, as well as restoring victims. “These purposes shall be achieved by a system of graduated sanctions and services.” R.C. § 2152.01(A).

A “serious youthful offender” is a statutorily created category of juvenile offenders who are subject to a mid-level range sanctions. R.C. § 2152.01(X). Unlike a juvenile whose entire case is transferred for prosecution in an adult criminal court, and unlike a juvenile whose conduct and rehabilitative needs can be fully addressed in the juvenile system, a serious youthful offender is subject to a blended sanction that includes both juvenile rehabilitative corrections as well as imposition of an adult prison term that is suspended. As serious youthful offenders have committed enhanced acts of criminal conduct, they are properly subject to the more restrictive SYO dispositions. R.C. § 2152.11.

Invoking the suspended adult prison terms on SYOs:

The decision of whether or not to invoke the adult portion of a serious youthful offender's suspended sentence is a decision that is best left to the expertise of the juvenile judge—who is familiar not only with the facts of each case, but is also familiar with the juvenile justice system. *In re: D.H.*, 120 Ohio St.3d 540, 901 N.E.2d 209, 2009-Ohio-9, ¶ 55. With regard to blended SYO sentences this Court has noted:

The statutory scheme establishes that a juvenile subject to serious-youthful-offender status, despite the carrot/stick of the possible imposition of an adult sentence, remains squarely in the juvenile court system. The juvenile cannot be sent directly to an adult facility for the acts that led to his serious-youthful-offender status. The juvenile court retains jurisdiction. The juvenile would have to engage in separate conduct detrimental to his own rehabilitation in the juvenile system to be committed to an adult facility. The aims of the juvenile system--and its heightened goals of rehabilitation and treatment--control his disposition. To get the rehabilitative benefit of the juvenile system, the juvenile's case must remain in juvenile court.

Id. at 38.

J.S.'s adult prison term was properly invoked:

The juvenile court, which is in the best position to weigh the facts and circumstances of each case, did not err in invoking J.S.'s nine year adult prison term because J.S. committed an additional act of rape while he was in an ODYS institution where he was serving the juvenile portion of his blended sentence. R.C. § 2152.14 allows juvenile courts to invoke adult prison terms against SYOs under these sorts of circumstances.

J.S. was advised at the time of his original disposition that, if he continued to engage in criminal conduct while serving the juvenile portion of his sentence, the court would send him to adult prison for nine years. In fact, the parties had jointly proposed to the court the nine-year adult term. However, a discrepancy occurred in the court's original journal entry in that, with regard to the adult portion of the sentence, it referred not only to the nine-years of agreed time,

but also referred to indefinite terms of three to ten years for each of J.S.'s felonies. This error went unnoticed and was not appealed by the parties until more than a year later when the adult portion of J.S.'s sentence was invoked.

In *J.S. I*, the appellate court never considered the appropriateness of the juvenile court's invoking of J.S.'s suspended prison term, rather the court found the original dispositional entry *void* based on its reference to indefinite prison terms. *In re: J.S.*, Cuyahoga App. No. 95365, 2010-Ohio-6199, ¶ 7-9. The appellate court gave no direction to the juvenile court in its remand with regard to the decision to invoke the adult prison sentence.

Upon remand, the juvenile court resentenced J.S. and, after hearing arguments on the matter, made its interpretation of the law quite clear:

[T]o make an argument that it was an invalid sentence, and, therefore, it cannot be considered that he committed another offense and invoke that adult sentence, I think is pure legal fiction. And if there's ever a situation where somebody would have to say that there's a technicality of the law that worked to the disadvantage of the community, that would certainly be it.

(3/8/11 Tr. 11-12.) Despite the record created by the juvenile court on remand, the appellate court again reversed. The appellate court reasoned,

We are troubled by the fact that J.S. was serving a void sentence when he committed the act constituting rape. * * * [T]he act constituting rape simply cannot serve as the predicate act for pursuing imposition of the adult portion of J.S.'s sentence in this case.

In re: J.S., Cuyahoga App. No. 96637, 2011-Ohio-6280, ¶ 16. This contorted interpretation of the law cannot be left to stand.

Once J.S. was transferred to the ODYS institution after his original dispositional sentence, there can be no debate that he was serving the juvenile portion of a blended SYO sentence. While there, J.S. committed an act of rape that not only constituted a violation of the rules of the institution, but which also was charged as first degree felony. J.S.'s conduct at the

institution created a substantial risk to the safety and security of the institution and his victim. Accordingly, the necessary conditions of R.C. § 2952.14, Invoking adult portion of sentence, were met.

The error found in *J.S. I*, regarding the combined definite and indefinite sentences, was wholly unrelated to the applicability of R.C. § 2152.14 to J.S. Allowing the appellate court to use the indefinite sentence error to create the undue windfall for J.S. of escaping any adult prison term at all, flies in the face of justice. The indefinite sentencing error in the court's original entry should not be exploited to this degree.

By way of analogy, criminal defendants do not escape having to serve prison terms just because their original sentence failed to include post release control. Rather, where a sentence is *void* for lack of post release control, the case is remanded to the trial court for rehearing. See, R.C. § 2929.191 ("Correction to judgment of conviction concerning post-release control"); *State v. Singleton*, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, at ¶ 26. In *State v. Fischer*, 128 Ohio St.3d 92, 942 N.E.2d 332, 2010-Ohio-6238 this Court made it abundantly clear that, "when a judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence is void and must be set aside. Neither the Constitution nor common sense commands anything more." *Id.* at 26. Applied herein, neither the Constitution nor common sense commands that J.S. should evade service of the adult portion of his SYO sentence simply because his original dispositional journal entry erroneously referred to both definite and indefinite prison terms.

SYO blended sentences can be an effective mid-level rehabilitative and correctional tool when used with certain juvenile offenders. In order to continue to encourage Ohio's juvenile

courts to rely upon SYO blended sentences, this Court should review this case and adopt the State's proposition of law.

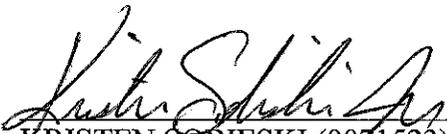
CONCLUSION

A sentencing error that is not timely appealed and is wholly unrelated to a juvenile court's decision to invoke an adult prison sentence against a serious youthful offender, must not be contorted to nullify the adult portion of the juvenile's blended sentence.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

BY:

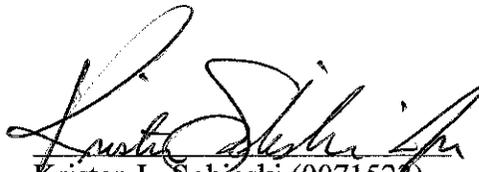

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A true and accurate copy of the foregoing Memorandum in Support of Jurisdiction has been sent by regular United States Mail on this 20th day of January, 2012 to the following:

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96637

**IN RE: J.S.
A Minor Child**

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL 06104651

BEFORE: Jones, J., Boyle, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: December 8, 2011
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LARRY A. JONES, J.:

{¶ 1} Appellant, J.S.,¹ appeals the judgment of the Cuyahoga County Court of Common Pleas, Juvenile Court Division, that invoked the adult portion of a serious youthful offender (“SYO”) sentence. For the reasons stated herein, we reverse.

{¶ 2} In 2006, the juvenile court adjudicated J.S. delinquent and guilty as to two counts of aggravated robbery, one count of kidnapping, and one count of rape, all with firearm specifications.

{¶ 3} The state sought a SYO dispositional sentence pursuant to R.C. 2152.13. The trial court found J.S. to be a SYO and ordered him to serve five years on the juvenile portion of his sentence and further ordered into effect an agreed-upon nine years in prison on the adult portion of his sentence. The adult sentence was stayed on condition that J.S. successfully complete the juvenile portion of the sentence. In 2007, while committed to the Ohio Department of Youth Services (“ODYS”), J.S. committed another act that constituted first-degree felony rape. The state subsequently moved to invoke the adult portion of his SYO sentence pursuant to R.C. 2152.14. The juvenile court held a hearing and ordered the adult portion of his SYO disposition into effect.

{¶ 4} J.S. subsequently appealed, raising sentencing issues. This court reversed and remanded the case for a de novo resentencing, finding there were a number of inconsistencies within the SYO disposition journal entry and J.S. was sentenced to prison terms that were not

¹ Appellant is referred to herein by his initials in accordance with this court’s established

authorized by law because the trial court imposed the agreed sentence of nine years but also imposed indefinite sentences on each count. *In re J.S.*, Cuyahoga App. No. 95365, 2010-Ohio-6199 (“*J.S. I*”). This court further noted that J.S.’s remaining issues concerning the notification of postrelease control were moot. *Id.*

{¶ 5} In February 2011, the trial court held a resentencing hearing and again sentenced J.S. to a juvenile sentence of five years and imposed the agreed-upon sentence of nine years in prison for the adult portion of the sentence. The state again moved to invoke the adult portion of the sentence based upon J.S.’s adjudication of delinquent for the 2007 rape. The trial court granted the motion and invoked the adult part of J.S.’s sentence.

{¶ 6} J.S. appeals, raising the following assignment of error for our review:

“I. The juvenile court erred and violated statutory requirements when it invoked [J.S.’s] SYO prison terms based on conduct that occurred before [J.S.] was serving a legally-valid SYO disposition, and as [J.S.] had insufficient notice of the prison term he would serve if he did not successfully complete his juvenile disposition. R.C. 2152.12, R.C. 2152.14; Fifth and [Fourteenth] Amendments to the United States Constitution, Article I, Section 16 of the Ohio Constitution.”

{¶ 7} J.S. raises two issues on appeal. First, J.S. contends that the trial court erred when it imposed the adult portion of his SYO sentence because he committed the act constituting rape while under a void sentence. Because this court found his original sentence void in *J.S. I*, he argues, any act committed before he was legally sentenced on his crimes could not be used to invoke the adult portion of his SYO sentence.

policy regarding nondisclosure of identities of juveniles.

{¶ 8} R.C. 2152.13 allows for a juvenile court to impose a blended sentence upon a SYO. *In re Wells*, Allen App. No. 1-05-30, 2005-Ohio-6861. A “serious youthful offender” is defined as “a person who is eligible for a mandatory SYO or discretionary SYO but who is not transferred to the adult court under the mandatory or discretionary transfer.” *Id.*, R.C. 2152.02(X).

{¶ 9} R.C. 2152.14 governs the circumstances under which a juvenile court may invoke the adult portion of a SYO sentence. *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶31. The statute provides that upon a proper motion and after a hearing has been held, a court may invoke the adult portion of a SYO sentence if certain factors are shown by clear and convincing evidence. R.C. 2152.14(E) provides those factors as follows:

“The juvenile court may invoke the adult portion of a person’s serious youthful offender dispositional sentence if the juvenile court finds all of the following on the record by clear and convincing evidence:

“(a) The person is serving the juvenile portion of a serious youthful offender dispositional sentence.

“(b) The person is at least fourteen years of age and has been admitted to a department of youth services facility, or criminal charges are pending against the person.

“(c) The person engaged in the conduct or acts charged under division (A), (B), or (C) of this section, and the person’s conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.”

{¶ 10} As it relates to this case, “[t]he conduct that can result in the enforcement of an adult sentence includes committing, while in custody or on parole, an act that is a violation of

the rules of the institution or the conditions of supervision and that could be charged as any felony.” *D.H.* at ¶136.

¶11} Thus, R.C. 2152.14(E) provides that the adult portion of a SYO sentence may be invoked only if the child is serving the juvenile portion of the SYO sentence. In this case, J.S. argues, he was not serving the juvenile portion of his sentence because he had not yet been properly sentenced at the time he committed the rape offense. Therefore, according to J.S., the trial court did not have the authority to invoke the adult portion of his sentence.

¶12} The state argues that J.S.’s original sentence was remanded for resentencing pursuant to R.C. 2929.191, which involves resentencing when the trial court fails to properly advise a defendant on postrelease control. But this case does not concern postrelease control. Therefore, R.C. 2929.191 is inapposite.

¶13} As an initial matter, we note that this court remanded J.S.’s case for a de novo sentencing, finding his sentence was “void” because it was contrary to law.² In Ohio, the effect of determining that a judgment is void is well established. “It is as though such proceedings had never occurred; the judgment is a mere nullity * * * and the parties are in the same position as if there had been no judgment.” *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267, 227 N.E.2d 223 (internal citations omitted).

² R.C. 2929.14(A)(1) requires the imposition of a definite sentence for felonies of the first degree.

{¶ 14} Since J.S.’s entire original sentence was contrary to law, he was entitled to a de novo resentencing. See *J.S. I*. A discussion of dates relative to his resentencing is important. On February 28, 2011, the trial court resentenced J.S. to the juvenile portion of his SYO sentence. On March 1, 2011, the state moved to invoke the adult portion of his sentence. On March 2, the trial court ordered J.S. be returned from ODYS and set the motion for a hearing on March 8. On March 8, the trial court held a hearing on the state’s motion and invoked the adult portion of J.S.’s SYO sentence.³ But it was not until March 8, the day the court invoked the adult sentence, that the trial court journalized the February 28 sentencing journal entry.

{¶ 15} In its sentencing journal entry, the trial court found as follows:

“The Court finds by clear and convincing evidence that J.S. is at least [14] years of age, is serving the juvenile portion of a [SYO] dispositional sentence, and is in the institutional custody of or an escapee from the custody of [ODYS]; and that there is reasonable cause to believe that after the child reached [14] years of age: The child committed an act that is a violation of the rules of the institution and that could be charged as a felony or as a first degree misdemeanor offense of violence if committed by an adult and/or engaged in conduct that created a substantial risk to the safety or security of the institution, the community, or the victim.

“The Court further finds by clear and convincing evidence that the child has been admitted to a[n] [ODYS] facility or criminal charges are pending against the child, and the child’s conduct demonstrates that the child is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.”

³ The journal entry from this hearing was filed and journalized on March 11, 2011.

{¶ 16} We are troubled by the fact that J.S. was serving a void sentence when he committed the act constituting rape. We are aware that the SYO law in Ohio is relatively new and this case appears to be one of first impression. An example of a similar situation is where an adult offender violates the community control sanctions portion of his or her sentence. If his or her sentence is later found to be void, can the person still be found to be a probation violator? We think not. That does not mean that the offender cannot be prosecuted for any crime he or she commits while under community control sanctions, the offender just cannot be found to have violated his or her community control sanctions in the underlying case. Likewise, in this case, J.S. could still be adjudicated delinquent for the rape case and have the appropriate disposition rendered in that case. In other words, just because J.S.'s sentence was void does not mean he cannot be held accountable for his actions in the rape case; the act constituting rape simply cannot serve as the predicate act for pursuing imposition of the adult portion of J.S.'s sentence in this case.

{¶ 17} Another somewhat analogous example occurs when an offender is charged with escape but the evidence affirmatively demonstrates that the adult parole authority lacked the authority to supervise the accused due to a faulty imposition of postrelease control; in this instance, the offender cannot be convicted of escape. Said another way, one cannot commit the crime of escape when the criminal act is predicated on the violation of a void sentence. See *State v. Cash*, Cuyahoga App. No. 95158, 2011-Ohio-938, cf., *State v. Billiter*, Stark App.

No. 2010CA00292, 2011-Ohio-2230 and *State v. Huber*, Cuyahoga App. No. 94382, 2010-Ohio-5598.

{¶ 18} Therefore, based on these facts, the trial court erred when it invoked the adult portion of J.S.'s SYO sentence.

{¶ 19} Second, J.S. argues that he did not have sufficient notice of the prison term he faced when he committed the rape offense. J.S. cites *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, in support of his contention. In *Brooks*, the sentencing journal entry provided that a violation of the defendant's community control sanctions could lead to a "prison term of 6 to 12 months." The *Brooks* court held that a defendant must be notified of the "definite prison term that awaits if community control is violated." *Id.* at ¶ 25. The court noted that "the purpose behind R.C. 2929.19(B)(5) notification * * * [is] to make the offender aware before a violation of the specific term that he or she will face for a violation." *Id.* at ¶33.

{¶ 20} In *Brooks*, the court held that a trial court may not imprison an offender unless, before the violation, he has been warned of the specific term that will be imposed. But *Brooks* is inapposite to this case. *Brooks* dealt with a violation of community control sanctions and the court noted that its decision was based on "the particular nature of community control." *Id.* Here, J.S. was not sentenced to community control sanctions; rather, he was sentenced to confinement in ODYS. And although the trial court originally

improperly sentenced J.S. to an indefinite prison term as part of his adult sentence, the trial court did inform J.S. that his maximum sentence could be ten years in prison. Moreover, the trial court notified J.S. that the actual prison term, should the adult portion be invoked, would be the agreed-upon sentence of nine years in prison. Thus, J.S. had notice of the potential prison term he faced if the adult portion of his SYO sentence was invoked. Based on the foregoing, we find no merit to this claim.

{¶ 21} Therefore, the assignment of error is sustained in part and overruled in part.

{¶ 22} Accordingly, judgment is reversed and case is remanded for proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

LARRY A. JONES, JUDGE

MARY J. BOYLE, P.J., and
JAMES J. SWEENEY, J., CONCUR

