

THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee

vs.

Jushua Freshwater

Defendant-Appellant

Case No.

12-1580

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

Case No. CR-507109

CA-98097

MEMORANDUM IN SUPPORT OF JURISDICTION

For the Appellee:

Cuyahoga County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

For the Appellant:

Joshua Freshwater 620-006
RiCI
1001 Olivesburg Rd.
P.O. Box 8107
Mansfield, Ohio 44901-8107

FILED
SEP 17 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

REASON FOR JURISDICTION.....1
STATEMENT OF CASE AND FACTS.....2
PROPOSITION OF LAW..... 6-9
CONCLUSION..... 10
CERTIFICATE OF SERVICE..... 11
*Opinion Cuyahoga County Court of Appeals (Eighth District.
(Aug 2, 2012)* 12-14

REASON FOR JURISDICTION

This case addresses the issue of unreasonable length of delay in the imposition of sentence.—The failure of the the Appellate Court to grant relief constitutes a denial of the rights of due process and speedy trial guarentees concerning the 6th and 14th Amendments to the U.S. Constitution as well as Article I, sec. 10616 of the Ohio Constitution.

The protection of these rights, especially in a felony case, (where the individuals life and liberty has been infringed apon) is not only of great public intrest, it is the purpose and duty of this court to defend and uphold.

For the following reasons the Appellant prays this Honorable Court accept jurisdiction of this case and resolve the issues at hand.

STATEMENT OF CASE AND FACTS

This case arises from the States failure to honor a negotiated plea agreement; the State remanding and resentencing Appellant Joshua Freshwater over 38 months after conviction and States forfeiture of jurisdiction. (as per plea agreement, reflected in the record).

In Febuary of 2008, Appellant was arrested after a traffic stop revealed that there was 6 and 1/2 pounds of marijuana in the trunk of the rental car Mr. Freshwater was driving. The Appellant was charged with possession as well as a Federal parole violation. The County Sherrif who had initial custody of Mr. Freshwater transfered that custody into Federal authority.

Counsel for Appellant, Henry Hillow represented Appellant on both counts.

Upon the State's motion Appellant was returned to State's custody, with agreement to return Appellant when "case was disposed of"-as noted in the courts docket.

Through plea negotiations State offered to allow Appellant to serve his sentence in a Federal Facility in exchange for Appellants plea to an enhanced charge of Trafficking in violation of R.C. 2925.03(A)(2), a felony of the second degree, rather than the possession which he was originaly charged with (which was an F3). This agreement was complete in May of 2008.

Appellant had reluctantly agreed to this on advice of his coun-sel. The State subsequently ordered a Post Sentencing Investigation followed by sentencing Appellant to three years.

The State followed statutes and simultaneously upheld it's agreement by not filing the sentencing entry with the Clerk of Courts (as noted in the record)-journal entry dated 06/2006, time stamped 07/2011, and immediately transferred Appellant back to Federal Custody where Appellant faced guide line range of 18-36 months for same conduct.

The State waived jurisdiction (as per agreement between prosecuting attorney Micah Alt and Appellants attorney Henry Hilow) this is supported by lack of holder/detainer or agreement to return. Appellant then plead to the parole violation and was sentenced to 18 months in Federal Penitentiary (July 2008).

In December 2008, Appellant was notified that he was going to the Federal half-way house, The Oriana House, in Cuyahoga County, Ohio. Appellant inquired about the three year State sentence, to which his Federal case worker stated to Appellant "They were notified, and would be notified prior to admission".

Upon arrival at Oriana House, Appellant was notified of warrants pertaining to traffic stops from instant offense 2008.

Upon his own initiative Appellant presented himself at the Cuyahoga County Justice Center, resulting in a court date scheduled before Judge Keough.

At the subsequent court appearance, Appellant told of his time served in a Federal facility and of his placement in The Oriana House. Judge Keough, waived fines and costs and wished the Appellant "good luck".

Upon leaving the Justice Center Appellant came upon Attorney

Henry Hillo. Appellant thanked his former counsel, who responded, "I told you it would all work out as agreed."

Appellant was granted a final release and returned to his home and family. Appellant later suffered an overdose, leading to an inquiry by Lake County Sheriff's Dept.

In the course of inquiry The Cuyahoga County Prosecutor's office was questioned about Appellants three year sentence, from 2008.

The original party to Appellant's plea agreement, Prosecutor Micha Alt was no longer involved where as Steven Szelagiewic #0074408, filed a motion to enforce sentence in May 2011.

A hearing in July of 2017, where Henry Hillo again representing Appellant stated to him "it's appealable" yet failed to file notice on behalf of Appellant. Appellant filed notice pro se, which was dismissed as untimely (08/2011)

A Motion to dismiss for lack of jurisdiction was filed pro se January 2012, was denied by Judge Annette Butler on February 14, 2012.

A timely Appeal was filed in the Eighth district Court of Appeals.

The Eighth District Court of Appeals failed to grant relief In it's opinion, the Court of Appeals relied on several erroneous facts and improperly overlooked or perverted a number of facts, clearly and obviously stated within the record.

The Appellate Court has neglected the record and relied on

incorrect calculations and unjustifiably assigned blame for the delay-in denying relief. The Appellant now contends that there is just cause for relief. The Appellants rights as guaranteed under the 6th and 14th Amendments to the United States Constitution have been violated.

The Appellant prays this Honorable Court accept this case for review.

Proposition of law: Criminal Rule 32 (A)

States that the sentence "shall be imposed without unnecessary delay."

A number of factors come into consideration in determining if the delay in imposition of sentence constitutes an abuse of discretion by the trial court. The appellate court failed to properly consider the record, erroneously interpreted the length of delay, and neglected to consider the State's duties. Furthermore

Proposition of Law: O.R.C. 2929.1212
"Sherriff to deliver defendant to the penal institution"

In this case the penal institution was a federal facility as agrred to in plea negotiations.

Proposition of Law: O.R.C. 2949.05
"Court had duty to execute sentence"

It has been accepted that the court speaks through its journal entries. "Journalization has to occur to create valid journal entry." Also "A time-stamped date on a written decision offers some evidence of its filing." State v. McDowell, 781 N.E. 2d 1057, 150 Ohio App. 3d 413, 2002-Ohio-6712. It has been noted "that the best evidence of a prosecution and conviction is the court records." Ohio App2Dist 1935 Filichia v. State, 20 Ohio Law ABS 113. It is puzzling and a betrayal of public trust that both the trial court and the appellate court ignored or failed to question their irregularities in this case, which are clearly noted in the record. Had the court excersized any due diligence or given proper notice, the appellant could have adressed these issues had the court not improperly remanded inhim into custody when the court lacked jurisdiction, denying appellant any due process.

The State first arrested appellant and delivered him into federal custody. (as noted in docket) State later, upon its own motion requested to borrow appellant in order to adjudicate the instant offense. " Supreme court held in Ponzi v. Fessenden [258 U.S. 254, 42 S.Ct. 309, 66 L.Ed. 607 (1922)] that the first court to assume jurisdiction over a person or thing may exhaust its remedy without interference by another jurisdiction. Therefore, the federal court in this case has exclusive jurisdiction to prosecute appellee and the state court must wait to prosecute appellee after federal sentence is served unless the federal court consents to concurrent jurisdiction. State v. Yee, 55 Ohio App 3d88, 563 N.E. 2d 54 (6th Dist 1989) IN the case at bar the converse is true and the State held original jurisdiction, relinquishing it, as per plea negotiations, to federal court. The charges in federal and State court stem from the same act. The penalties in both jurisdictions were comparable, 1-5 years or 2-8 years with a presumption of a lower end of the guideline within the State, and 18 to 36 months exposure Federally. There is a presumption that the State would not act in violation of the constitution and dual prosecution would amount to a violation of the Petite Clause of the Double Jeopardy prohibition guaranteed in the Vth amendment to the U.S. Constitution. Secondly, State's freely relinquishing jurisdiction is supported by the time stamp on the sentencing journal entry from JUNE 2008. It was signed in 2008, but was never filed (as per plea agreement) Until JULY, 2011 when original prosecutor, Micah Alt was no longer available.

A simple or single discrepancy in procedure by the state could be interpreted as reason, though no necessarily justifiable, for delay. However, a closer inspection reveals numerous factors that cannot be ignored. The combination of the appellant's claim

of a negotiated plea, supported by the Federal courts returning of appellant with clear instructions to "return, when case disposed of" noted in docket, the State's delivering the appellant back to Federal custody without a holder, detainer, or agreement to return, and the State's failure to file the sentencing entry with the Clerk of courts, and finally, the refusal of the State to act on four separate occasions when notified of appellants release, can lead to but one logical conclusion. The State acted according to Law in not pursuing execution of sentence and relinquished jurisdiction to Federal court as agreed in plea agreement.

The other, not so logical, conclusion, unsupported by the record is that the State erred in imposing sentence. This proposition, while also raising Double Jeopardy issues, was the focus of the appeal. The appellate court has repeatedly held the opinion " An unreasonable delay between a plea and sentencing which cannot be attributed to the defendant, will invalidate the sentence. The remedy for an unreasonable delay in sentencing is a vacation of sentence, not a resentencing hearing. State v. Owens, 181 Ohio App. 3d. 725, 2009 Ohio 1508, 910 N.E. 2d. 1059, 2009 Ohio App Lexis 1309 (2009)

"Six and 1/2 years sentencing delay was unreasonable, divesting court of jurisdiction, where state, without explanation failed to act on court orders and final disposition requests though it was apprised defendant was jailed out of state." State v. Johnson- Ohio App 3d -, 2003, Ohio 6261-- N.E. 2d. , 2003 Ohio App. Lexis 5603 (Nov 24, 2003).

"An unjustified and lengthy delay between finding of guilt and the sentencing divests the court of jurisdiction to sentence the defendant." Willoughby v. Lukeheart, 39 Ohio App 3d 74, 529 N.e. 2d 206, 1987, Ohio App. Lexis 10657 (1987).

"The unjustified 3 year delay between defendant's guilty plea and imposition of sentence invalidated the sentence. State v. Brown (2003, Columbus co.) 152 Ohio App 3d 8, 786 N.E.2d 492 "After his release the trial court lacked jurisdiction to order defendant returned to prison to serve 8 months because he had mistakenly been given good time credit under former sentencing laws, as the trial courts authority over the sentence ended when the defendant was delivered to the penal institution. Also " When an offender was apparently released due to miscalculation by the Dept. of Rehabilitation and Correction, the sentencing court lacked subject matter jurisdiction to order that offender be returned to prison. State v. Garretson. 140 Ohio App 3d 554. 748 N.E. 2d 560. 2000 Ohio App. Lexis 3016 (2000).

The appellee claims 3 factors in determining if the trial court abused discretion. Appellee failed to consider facts of record or consider the States intentional waiver of jurisdiction. Notwithstanding this failure, appellant addresses each factor as erroneously presented by appellee and unacceptably reiterated by appellate court with no regard to the record and facts.

Proposition of Law: Criminal Rules of Procedure
Rule 32(c)

Rule under which a judgement in a criminal case is effective only when entered on a journal by clerk of courts reflects the axiom that courts speak only through their journal entries.

The sentencing entry of June 2008 as represented in the record is not stamped by the clerk until July 2011. This not only illustrates the courts original waiver of jurisdiction, it also unequivocally refutes appellee's statement of a 35 month delay. As the appellant pled in May 2008 and sentence was in July 2011 it is clearly a 38 month delay, and subsequently greater than the 36

sentence.

Secondly, the appellee's contention that appellant's Federal incarceration constitutes any culpability in the delay is absurd. In light of the State's request to transfer from Federal custody, the negotiated agreement--to return "when cased disposed of" absence of any state detainer, holder, or agreement to return, consequential double jeopardy violation in enforcing both state and federal sentences on same act, and finally state's in-action on 4 separate occasions, upon notification of appellants release absolutely no blame can be placed on appellant for over 3 year delay.

Finally, there can be no benefit to society when the state renegs on an agreement and in doing so an individuals Constitutional rights and depriving appellant of life and liberty years after appellant had served the agreed upon punishment and was lawfully released with the state's full knowledge and consent.

It is a gross miscarriage of justice as well as a betrayal of the public trust and an affront to liberty. It is a precisely the inappropriate judicial behavior for which the Supreme Court exists.

Conclusion

The trial court abused discretion by disregarding a prior agreement and in violation of Constitutional Protections, when it another sentence over 38 months after appellant pled guilty and had already served a prison term and was lawfully released for same act. The trial courts disregard for original agreement and the appellate courts acceptance of appellee's erroneous arguments in light of evidence to the contrary so evident in the record constitutes not only an obvious miscarriage of justice and a perversity of the facts and record, but the essence of the Supreme Courts purpose.

NOTICE OF APPEAL OF APPEALANT JOSHUA FRESHWATER

Appellant Joshua Freshwater hereby gives notice of appeal to the Supreme Court of Ohio from the judgement of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals case number 98097 on August 2, 2012.

This case raises a substantial constitutional question and is one of public or great general interest. This case also involves a felony conviction.

Respectfully submitted


Joshua Freshwater
RiCI
1001 Olivesburg Rd.
P.O. Box 8107
Mansfield, Ohio 44901
Pro se

CERTIFICATE OF SERVICE

A copy of the foregoing has been mailed to the Cuyahoga County Prosecutor's Office at 8th Floor Justice Center, 1200 Ontario St. Cleveland, Ohio 44113 on this day 12th of September 2012


Joshua Freshwater

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98097

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSHUA FRESHWATER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-507109

BEFORE: Cooney, J., Blackmon, A.J., and Rocco, J.

RELEASED AND JOURNALIZED: August 2, 2012

ATTORNEY FOR APPELLANT

Jesse M. Schmidt
Jesse M. Schmidt Co., L.P.A.
614 W. Superior Avenue
Suite 1402
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Mary H. McGrath
Assistant County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

FILED AND JOURNALIZED
PER APP.R. 22(C)

AUG 02 2012

WORLD D. FUERST
CLERK OF THE COURT OF APPEALS


COLLEEN CONWAY COONEY, J.:

{¶1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Defendant-appellant, Joshua Freshwater (“Freshwater”), appeals the denial of his motion to dismiss the execution of his prison sentence for lack of jurisdiction. We find no merit to the appeal and affirm.

{¶2} In February 2008, Freshwater was charged with one count of drug trafficking, two counts of possession of drugs, and one count of possession of criminal tools. At the time of the indictment, he was in federal custody awaiting trial on a federal case. In May, he was transferred to the Cuyahoga Common Pleas Court and pled guilty to one count of drug trafficking with forfeiture and schoolyard specifications, a second degree felony. The court sentenced him to a three-year prison term and three years’ postrelease control.

{¶3} Following sentencing, Freshwater was returned to federal custody. One month later, the federal court sentenced him to an 18-month prison term to be served consecutive to his state sentence. He served the sentence and was released from federal prison in June 2009, but had not yet served his state prison term.

{¶4} In June 2011, the State filed a motion to enforce Freshwater’s sentence. After a hearing, the trial court ordered Freshwater’s sentence into execution beginning July 21, 2011, allowing credit for time served (475 days as

of July 2011). Freshwater filed a notice of appeal on August 30, 2011, which this court dismissed as untimely. *State v. Freshwater*, 8th Dist. No. 97225 (Sept. 9, 2011).

{¶5} In January 2012, Freshwater filed a motion to dismiss execution of his sentence, claiming the trial court lost jurisdiction to order execution of the sentence due to the delay between his release from federal custody and the trial court's ordering his sentence into execution. The court denied his motion to dismiss, and this appeal followed.

{¶6} In his sole assignment of error, Freshwater argues the trial court lost jurisdiction to order execution of judgment after a three-year delay between the pronouncement of sentence and its execution. He also argues that because the three-year delay was unreasonable, the enforcement of his state sentence is unconstitutional.

{¶7} Crim.R. 32(A) states that a sentence "shall be imposed without unnecessary delay." In general, a reasonable delay in the execution of a sentence does not render the sentence unenforceable. *State v. James*, 179 Ohio App.3d 633, 2008-Ohio-6139, 903 N.E.2d 340, ¶ 12 (8th Dist.); *Neal v. Maxwell*, 175 Ohio St. 201, 202, 192 N.E.2d 782 (1963). However, it is possible for a delay in the execution of a sentence to become so unreasonable that it raises constitutional issues. *Id.*; *State v. Zucal*, 82 Ohio St.3d 215, 219, 1998-Ohio-377, 694 N.E.2d 1341. Whether a delay in execution violates due process is

determined on a case-by-case basis. *State v. Lovell*, 12th Dist. Nos. CA2006-06-138 and CA2006-07-158, 2007-Ohio-4352, ¶ 17.

{¶8} In determining whether the delay between the pronouncement of sentence and the execution of sentence is unreasonable, courts consider factors including, but not limited to: (1) whether society will derive a benefit from enforcing the sentence, *James* at ¶ 13; (2) whether the defendant contributed to the delay through his own wrongful actions, *United States v. Fisher*, 895 F.2d 208, 211 (5th Cir.1990); *United States v. Hill*, 719 F.2d 1402, 1405 (9th Cir.1983); and (3) the length of the sentence relative to the length of the delay. *State v. Moore*, 8th Dist. No. 47284, 1984 WL 5025, citing *Shotkin v. Buchanan*, 149 So.2d 574 (Fla. App.1963) (holding that five-year delay in imposing two sentences of 60 days and ten days was unreasonable).

{¶9} In the case at bar, there was a 35-month delay between the pronouncement of sentence and its execution. The delay was caused, in part, by Freshwater's first serving an 18-month sentence in federal prison during that time. Although there remained a two-year delay between Freshwater's release from federal prison and execution of his state sentence, the delay is still not unreasonable. The period of delay does not exceed the length of the prison term, and society will still derive a benefit from his serving his three-year sentence, which will punish him for committing a drug offense near a school, and hopefully deter future criminal behavior.

{¶10} A motion to dismiss or prevent execution of sentence is akin to other motions to dismiss criminal charges, which we review for an abuse of discretion. *State v. Carver*, 8th Dist. No. 91443, 2009-Ohio-1272; *State v. White*, 8th Dist. No. 90544, 2008-Ohio-4228, ¶ 19. Because the delay in executing Freshwater's sentence was caused, in part, by his serving a federal prison sentence and because society would still benefit from his serving his state prison sentence on a serious felony, we find no abuse of discretion.

{¶11} Accordingly, the sole assignment of error is overruled.

{¶12} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.


COLLEEN CONWAY COONEY, JUDGE

PATRICIA ANN BLACKMON, A.J., and
KENNETH A. ROCCO, J., CONCUR