

ORIGINAL

IN THE SUPREME COURT OF OHIO
Case No. 12-1488

STATE OF OHIO	:	
Appellant	:	
-vs-	:	On Appeal from the
ANTWAN NASH	:	Cuyahoga County Court
Appellee	:	of Appeals, Eighth
	:	Appellate District Court
	:	of Appeals
	:	CA: 96575 (en banc)

**MEMORANDUM IN OPPOSITION TO JURISDICTIONAL MEMORANDUM
OF THE STATE OF OHIO**

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EXPLANATION OF WHY THIS FELONY CASE NEITHER RAISES SUBSTANTIAL
CONSTITUTIONAL QUESTIONS NOR PRESENTS ISSUES OF IMPORTANCE

The Eighth District Court of Appeals' en banc decision in this case was expressly limited to offense committed prior to September 30, 2011, the effective date of enactment of HB 86. Opinion Below, at n.3. Prior to September 30, 2011, *i.e.*, under the former law, the issue presented in this case rarely arose in the district courts of appeals throughout the State. Since September 30, 2011, cases with offense dates that qualify under the former law take up an increasingly smaller portion of criminal dockets. Accordingly, this case is about an issue that is becoming extinct – whether the *former* version of Ohio's sentencing law allows a trial court to sentence a person to community control sanctions that do not include supervision by a probation officer.

Review of the instant case would require this Court to examine whether, under former law, probation supervision *must* be a condition of every community control sanction imposed upon a felony offender. The range of community control sanctions includes incarceration in a local jail, confinement in a locked-down community based correction facility, and in-patient rehabilitation. None of these situations necessarily requires a court's probation department to be assigned to ensure compliance – the officials in those programs are already able to do so and report directly to the trial court if there is a problem. Other community control sanctions that are available, such as fines and the payment of restitution, may also not need supervision in every case – a defendant can be ordered to return directly to the court on a future date and show proof of compliance.

Common pleas court judges are best able to determine whether the services of the probation office are needed on a case-by-case basis. The common pleas court judge knows best

what programs can interface directly with the court as opposed to working through a probation officer. The General Assembly recognized these principles in drafting R.C. 2929.15.

The Eighth District's en banc decision in this case did more than simply resolve the intra-district split that had theretofore existed. As the Opinion Below notes, at ¶ 13, the Eighth District's opinion en banc is in keeping decisions of the Second and Ninth Appellate Districts, in *State v. Allen*, 9th Dist. Nos. 10CA 009910, and 10CA009911, 2011-Ohio-3621, and *State v. Sutherland*, 2d Dist. No. 97CA25, 1997 WL 464788 (August 15, 1997), respectively.

Finally, to the extent that the State's memorandum is drawing this Court's attention to the same issue in the context of *post*-HB 86 sentencing, this *pre*-HB 86 case is not the appropriate vehicle to decide *post*-HB 86 issues. However, the Court has the opportunity to address a similar issue in the *post*-HB 86 context in cases that have either recently been filed or are being filed at the time this memorandum is being submitted. *See, State v. Harlen Cox*, OSC Case No. 2012-1627 (Proposition of Law II); *State v. Richard Ogle*, appeal from 8th District Case No. 97926, reported at 2012-Ohio-3693 (appeal filed on October 1, 2012, OSC docket number unavailable at time the within memorandum was filed); *State v. Tyler Larsson*, appeal from 8th District Case No. 97718, reported at 2012-Ohio-3689 (appeal filed on October 1, 2012, OSC docket number unavailable at time the within memorandum was filed).

STATEMENT OF THE CASE AND FACTS

Prior to the enactment of HB 86, Defendant Antwan Nash plead guilty to a fifth-degree felony possession of drugs. Prior to the enactment of HB 86, the trial court sentenced Nash to a three-day jail term, with credit for three days already served. He was also fined \$100.00. The Eighth District Court of Appeals, en banc, held that, under the law as it existed prior to HB 86, the sentence imposed was not contrary to law. The State's appeal has followed.

ARGUMENT

In Response to Appellant State of Ohio's Proposition of Law (as posited by the State):

Trial courts in the State of Ohio have two sentencing options when imposing sentence for felony offenses: 1) impose a term of supervised community control sanctions or 2) imprisonment.

At the outset, it should be noted that this case must be, and has been to date, analyzed under the law in place at the time of the offense conduct, plea and sentence – all of which precede the passage of HB 86. Opinion Below, at n.3.

The Defendant Was Sentenced to Community Control Sanctions

Jail service is a permissible community residential sanction under R.C. 2929.16(A)(2). A fine is a financial sanction under R.C. 2929.18. A community residential sanction and a financial sanction are two forms of community control sanctions. *See*, R.C. 2929.15(A)(1) (“the court may directly impose a sentence that consists of one or more community control sanctions authorized pursuant to sections R.C. 2929.16 [residential sanctions], 2929.17 [nonresidential sanctions], or 2929.18 [financial sanctions, restitution] of the Revised Code.”). Thus, in this case, the trial judge imposed “one or more community control sanctions,” to wit: a residential sanction of three days in jail and a fine of \$100.

The Jail Sentence Was Served in Full and thus Supervision Was Not Required

The defendant was sentenced to three days in county jail but had already served three days in the county jail. R.C. 2949.08(C)(2), requires that “[a]ny term in a jail shall be reduced ... by the total number of days” the person was already confined. Thus, the trial court was correct in reducing the number of jail days by the time served.

This resulted in the residential sanction having been completely served at the time the defendant was still in the courtroom. There was nothing illegal about this under R.C. 2929.16.

Moreover, while there is a maximum period of time for community control sanctions, there is no minimum. R.C. 2929.15 (pre-HB 86).

The State has argued that, even though this residential sanction had been satisfied in full, additional supervision was required. The State fails to recognize that the supervision requirement in R.C. 2929.15 is not a general supervision requirement – it is tied to a specific function: supervision is required under R.C. 2929.15(A)(2). Community control sanctions “shall” be required for one reason only: “*for the purpose of reporting to the court a violation of any conditions of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender’s probation officer.*” *Id.* (emphasis added).

Thus, the requirement of supervision is only existent to the extent that it can achieve its stated purpose. Where, as here, community control has been discharged in full at the time of the sentencing, there can be no supervision – because there are no remaining “conditions of the sanctions” or “conditions of release.”

The trial court’s decision not to have the defendant report to probation reflects an understanding of R.C. 2929.15 and R.C. 2929.16 which takes into account the plain language of these provisions, and gives meaning to the “for the purpose of” prepositional phrase quoted above. This was correct for three reasons.

First, the trial court was required to give meaning to every word of R.C. 2929.15(A)(2) and could not ignore this key prepositional phrase. *D.A.B.E. Inc. v. Toledo-Lucas County Board of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶ 19, 773 N.E.2d 536; R.C. 1.47(B).

Second, the trial court’s interpretation was in keeping with the mandate of R.C. 2929.13 that the “sentence shall not impose an unnecessary burden on state or local government

resources.” This is also in keeping with R.C. 2901.04’s provision that criminal statutes be interpreted, inter alia, to promote the “efficient” administration of justice. R.C. 2901.04. Nothing could be more wasteful of resources or inefficient than to require supervision to ensure compliance with conditions that the trial court already knew had been met within the record of the case. Evid. R. 201 (court can judicially notice indisputable facts known within its jurisdiction).

Third, the trial court’s interpretation avoided the absurd consequences of a probation officer seeing the defendant, reading the journal entry, and then discharging the defendant because there is nothing else that can be done – the trial court’s journal entry of sentencing (by which the probation officer and the parties are bound as law of the case) having already stated that the sentence had been served in full. Statutes should be interpreted to avoid such absurd consequences. See, *In re Senders*, 110 Ohio App.3d 199, 673 N.E.2d 959 (8th Dist. 1996), appeal not allowed, 77 Ohio St.3d 1416, 670 N.E.2d 1004 (table) (strong presumption that General Assembly does not intend absurd results.).

Moreover, if the State is correct, then probation supervision is required even when the defendant is sentenced to a lengthy residential sanction such as confinement in a community based correction facility (CBCF) for as long as 18 months. There is nothing for the probation office to do in such a situation – the CBCF professionals are already supervising the defendant.

One additional example of absurdity becomes apparent under the State’s analysis. Assume that, instead of having been incarcerated for three days prior to sentencing, the defendant had been incarcerated in the County Jail for six months awaiting trial in the instant case. Clearly, the trial court would be able to sentence the defendant to six months imprisonment as a prison sentence under R.C. 2929.14, and then give the defendant credit for time served,

resulting in his immediate release. But, under the State's analysis, if the same trial court gives the defendant six months of jail as a residential sanction, with the corresponding credit for time served, the defendant cannot be released on the spot because, under the State's view, supervision is required – even though community control sanctions with residential sanctions is considered a less severe form of punishment than imprisonment. This simply makes no sense.

The Trial Court Was Not Required to Impose Supervision To Ensure Payment of a Fine and Costs

Similarly, the trial court was not required to impose supervision to ensure that a \$100 fine was paid. The imposition of a fine constituted a judgment in the amount of \$100 for the State and created for the State the ability, independent of the sentencing court, to obtain execution of that judgment. R.C. 2929.18(D)(1). Thus, there was no need for the trial court to involve probation department supervision “for the purpose of” ensuring compliance.

Moreover, the efficiency and economy requirements of R.C. 2929.13 and R.C. 2901.04, discussed *supra*, compelled the trial court *not* to impose supervision – nothing could be more wasteful than to require the cost of supervision to monitor payment of a \$100 fine. Indeed, requiring such enforcement would be absurd – and as discussed *supra*, the General Assembly does not intend absurdities.

Finally, court costs are not a sanction under R.C. 2929.16 through 2929.18 and thus supervision is not available to ensure compliance with the imposition of court costs.

R.C. 2929.13(A)

Finally, R.C. 2929.13(A) (both before and after the passage of HB 86) requires trial courts to first consider whether a fine or community work service is a sufficient community control sanction, alone. That the General Assembly would recognize that a fine could be a sole

community control sanction further evinces the legislative desire to avoid needless supervision – a defendant can simply return to court and show proof of payment.

CONCLUSION

Wherefore, this Court should decline to consider the instant case.

Respectfully submitted,


JOHN T. MARTIN, ESQ.
Assistant Public Defender

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon William Mason, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 1st day of October, 2012.


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