ORIGINAL

Case No. 2012-1707

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
STARK COUNTY, OHIO
CASE NO. 2011CA00271

STATE OF OHIO,
Plaintiff-Appellee,
v.
KORVON KELLEY,
Defendant-Appellant

MEMORANDUM IN RESPONSE OF PLAINTIFF-APPELLEE, THE STATE OF OHIO

JOHN D. FERRERO, #0018590
PROSECUTING ATTORNEY,
STARK COUNTY, OHIO

By: RENEE M. WATSON
Sup. Ct. Reg. No. 0072906
Assistant Prosecuting Attorney
Appellate Section
110 Central Plaza, South - Suite 510
Canton, Ohio 44702-1413
(330) 451-7897
FAX: (330) 451-7965

Counsel for Appellee

STEPHEN P. HARDWICK
Sup. Ct. Reg. No. 0062932
Office of the Ohio Public Defender
250 East Broad Street
Suite 1400
Columbus, Ohio 43215
(614) 466-5394

Counsel for Appellant

FILED
NOV 01 2012
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
NOV 01 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

WHY THE CASE SHOULD NOT BE ACCEPTED FOR REVIEW 1

STATEMENT OF THE CASE AND FACTS 3

ARGUMENT

PROPOSITION OF LAW

A PERIOD OF COMMUNITY CONTROL BEGINS WHEN THE JUDGMENT ENTRY OF SENTENCE IS FILED WITH THE CLERK 5

PROOF OF SERVICE 10

WHY THIS CASE SHOULD NOT BE ACCEPTED FOR REVIEW

This Court should not accept this case for review because it does not involve a substantial constitutional question, and is not of great public or general interest. First, Kelley raises no constitutional issue. Second, this is a fact-specific case and does not therefore meet the threshold test for discretionary appeals of cases of great public or general interest.

In September 2011, Kelley pled guilty to one count of burglary, a felony of the second degree and one count of domestic violence, a felony of the third degree. Kelley was sentenced in October 11, 2011, after a pre-sentence investigation. The court suspended an eight-year prison term and granted Kelley a term of community control. On the record, Kelley was advised that he was not to contact the victim of his crimes directly or indirectly and if he did, the court could impose the sentence it had suspended. Kelley indicated he understood this condition. He was then remanded to the county jail to await a bed at a community-based treatment facility. Kelley's sentencing judgement entry was filed six days later, on October 17, 2011.

While at the jail, Kelley immediately disregarded the court's order. He placed a total of 18 calls to the victim, three of which were completed and recorded. The completed calls were placed before Kelley's sentencing entry had been filed with the clerk. He made the calls using other inmate's PIN numbers in an attempt to hide his flagrant disregard of the court's order. During one call, which was played for the court during the hearing to revoke Kelley's community control, Kelley told the victim several times he was aware he was not to be contacting her.

The victim reported the harassment the probation department and the department filed a motion to revoke or modify Kelley's community control. After a hearing on the matter, the trial

court imposed the previously suspended eight-year sentence.

Kelley appealed arguing in part that since his judgement entry had not yet been filed when he made the calls, he was not actually on community control when he made the calls and the trial court therefore erred in revoking his community control.

In a unanimous decision, the Fifth District Court of Appeals disagreed. Following decisions from the First and Ninth District Courts of Appeal, the court found that because the trial court had the power to revoke Kelley's grant of community control at any time before the judgement entry was filed, Kelley's argument was self-defeating. Citing *State v. Wetzel*, 9th Dist. No. 16407, 1994 WL 45791 and *State v. Henderson*, 62 Ohio App.3d 848, 577 N.E.2d 710 (1st Dist. 1989). The court concluded that any error in labeling the imposition of the suspended sentence as a revocation of probation was thus harmless beyond a reasonable doubt. *State v. Kelley*, 5th Dist App. No. 2011CA00271, 2012-Ohio-3938 ¶ 36-37.

Regardless of when Kelley's judgement entry was filed, Kelley went out of his way to demonstrate he was not an appropriate candidate for community control. The trial court had the power to reconsider it's decision to grant community control before the entry was filed and did not err in imposing the 8-year prison sentence regardless of whether it was done before or after the judgment entry was filed as the result would have been identical. Kelley attempts to convince this Court that the trial court increased his sentence after it had been journalized in contravention of this court's opinion in *State v. Carlisle*, 131 Ohio St.3d 127, 2011-Ohio-6553, but his argument is disingenuous. The trial court suspended an eight-year sentence and imposed an eight-year sentence. Because the Fifth District correctly affirmed the trial court's decision in this fact-intensive case, this court should deny jurisdiction.

STATEMENT OF THE CASE AND FACTS

In 2011, the Stark County Grand Jury returned an indictment charging Korvon Kelley with one count of burglary, a felony of the second degree and one count of domestic violence, a felony of the third degree.

On September 19, 2011, Kelley pled guilty as charged and the court ordered a pre-sentence investigation. On October 11, 2011, Kelley returned to court for sentencing. The court granted Kelley a five-year period of community control and reserved an eight-year prison term in the event Kelley violated the terms and conditions of his community control.

The court went over the conditions of Kelley's community control on the record. Conditions included that he have no contact, either directly or indirectly, with the victim of the burglary and domestic violence, Ladonna Wilson. Kelley indicated that he understood that his failure to follow the court's orders would result in more restrictive sanctions or the revocation of his community control.

Following sentencing, Kelley was remanded to the Stark County Jail to await a bed at the Stark Regional Community Corrections Center. The judgment entry reflecting the imposition of community control and the conditions set by the court was filed on October 17, 2011.

While housed at the jail, Kelley almost immediately violated the conditions of his community control. Beginning on October 13, 2011, he began attempting to contact Wilson from the jail via telephone. To place the calls, Kelley used the PIN number of other inmates apparently believing his disregard of the court's order would go undetected. Between October 13 and October 21, 2011 he made eighteen calls to Wilson. Three calls, one on October 13 and two on October 15 were completed. This information was relayed to Kelley's probation officer

Rachel Carosello who subsequently filed a motion to revoke or modify Kelley's community control.

On November 11, 2011, Kelley was returned to court for a probation violation hearing. The state presented one witness – Carosello – who identified the calls Kelley made from the jail. The three completed calls were played for the court. In the call Kelley made on October 13, 2011, he told Wilson three times that he knew he was not to contact her. During the second call on October 15, Kelley apologized for victimizing Wilson and Wilson informed Kelley that she was going to report the fact that he was disregarding the no contact order.

On cross-exam, Carosello indicated that she had not met with Kelley to review the rules of his community control before Kelley made the phone calls, nor had his judgment entry been filed with the clerk until October 17, 2011. Given these factors, Kelley then argued that he was not on probation when he made the calls and therefore could not have violated something that did not exist.

The trial court disagreed noting that Kelley had been advised to refrain from contacting the victim during his sentencing hearing and what the consequences would be if he chose to do so. The court therefore revoked Kelley's community control and imposed the previously suspended eight-year sentence.

Kelley appealed the trial court's decision arguing that because he violated the court's order before his judgement entry was filed and because Carosello never reviewed the rules of his community control with him, he did not actually violate the court's order. The Fifth District Court of Appeals disagreed finding that because the trial court could have revoked Kelley's grant of probation at any time before the judgement entry was filed, the trial court's finding that Kelley

had violated his probation and reinstating the term of imprisonment were one in the same. The court therefore found that any error in labeling the imposition of the suspended sentence as a revocation of probation was harmless beyond a reasonable doubt.

ARGUMENT

PROPOSITION OF LAW

A PERIOD OF COMMUNITY CONTROL BEGINS WHEN THE JUDGMENT ENTRY OF SENTENCE IS FILED WITH THE CLERK.

Essentially, Kelly argues he was not actually on community control when he made the completed calls because his sentencing entry had not yet been filed and the trial court was therefore without authority to impose its previously suspended sentence. In other words, Kelley argues that he could do as he pleased, free of consequence, so long as his sentencing entry had not been filed. But in similar cases, Ohio's courts of appeal have disagreed.

In *State v. Henderson*, 62 Ohio App.3d 848, (1st Dist. 1989), appellant Henderson argued that he was not on community control when he allegedly violated that sanction because the judgment entry had not yet been filed. The First District disagreed noting that even if that were true, Henderson's argument was self-defeating because: "...the trial judge had the option at any time before execution to modify the sentence by withdrawing the oral pronouncement of probation and committing [Henderson] to the penitentiary." *Id.* at 843 citing *State v. Harris*, 2 Ohio App.3d 48, 440 N.E.2d 572 (10th Dist. 1981).

In *State v. Wetzel*, 9th Dist. No. 16407, 1994 WL 45791, Wetzel was convicted of corruption of a minor and placed on probation. The trial court suspended a two-year sentence. Wetzel violated his probation on June 26, 1993 but judgement entry placing him on probation

was not filed until July 8, 1993. His probation was revoked on July 16, 1993. Wetzel appealed advancing the same argument Kelley makes here. The 9th District affirmed the trial court's revocation of Wetzel's probation finding:

> In this case, Appellant's argument is self-defeating. The oral pronouncement of probation was journalized after the alleged probation violation occurred. Following Appellant's argument, he could not have begun to serve a sentence which was not yet valid. As the sentence had not been executed, the trial court could have amended the sentence, by withdrawing the granting of probation and sentencing him to a term of imprisonment.
> The net result of the trial court's finding that Appellant was in violation of probation and reinstating the term of imprisonment is the same. While it may have been error for the court to find a violation of the terms of probation when the order imposing probation had not yet been journalized, we find that the error was harmless beyond a reasonable doubt. Crim.R. 52(A); State v. Williams (1988), 38 Ohio St.3d 346, 349.

Wetzel, supra at 2.

So too here. Even if Kelley's entry had not yet been filed, per *Henderson* and *Wetzel*, the trial court could have sentenced Kelley to prison during that interim period.

Moreover, Kelley's argument makes no logical sense from a public policy standpoint. Courts outside Ohio have examined and rejected similar arguments based on public policy and the court's inherent power to revoke probation when a defendant demonstrates he is unsuitable for community control. A Florida appellate court held that the trial court had jurisdiction to revoke community control even though the written probation order was entered after the defendant violated the terms and conditions of her community control. The court noted that community control was part of a negotiated plea agreement which was signed by the defendant and recited in detail during the sentencing hearing. *Matthews v. State*, 736 So.2d 72 (Fla. 4th

Dist Dist. Ct. App.1999).

In *Pickett v. State*, 751 So.2d 1031 (Miss. 1999), a Mississippi court held that Pickett's suspended sentence could be imposed even though he had never been placed on community control. The court noted that the suspension of the sentence was conditioned on Pickett's good behavior and Pickett was aware of the condition.

Recently this Court held that a defendant correctly informed of post-release control during his sentencing hearing is not entitled to a de novo sentencing hearing when the judgment entry inadvertently omits mention of post-release control and a nunc pro tunc entry is sufficient to correct the omission. *State v. Qualls*, 131 Ohio St.3d 499, 967 N.E.2d 718, 2012 -Ohio- 1111, syllabus. This Court reasoned that a trial court retains continuing jurisdiction to correct clerical errors in judgments to reflect what the court actually decided. *Id* at ¶13. This would appear to suggest that a defendant is bound by what is ordered on the record even if the sentencing entry is silent as to a given condition.

Here, during sentencing the court recited on the record the condition that Kelley have no contact with Wilson. Kelley made it clear that he had actual knowledge of this condition when he told Wilson during the phone calls he knew he was not to be speaking with her. Even if Kelley's sentencing entry had been filed but omitted the condition of no contact, per *Qualls*, that clerical error would not mean Kelley was free to disregard what the court actually decided on the record until the sentencing entry was filed.

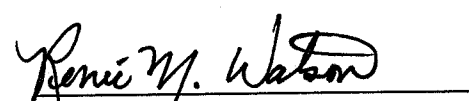
Finally, Kelley attempts to manufacture a greater question than what is actually presented in the record by claiming that the alleged error cannot be harmless because the trial court increased the orally pronounced sentence. That is simply inaccurate. The court orally

pronounced a suspended sentence of 8 years and imposed a sentence of 8 years. Thus Kelley's argument that the trial court has "blank slate from which to impose harsher sanctions" holds no water in this case.

CONCLUSION

Evidence presented at Kelley's community control violation hearing demonstrated that he was unsuitable for the privilege of community control. Although Kelley's sentencing entry had not yet been filed when the three completed calls were made, Kelley had actual notice that he was to refrain from contacting Wilson. Further, because per Kelley's own argument, since the sentence had not yet been executed, the trial court did not err in impose its previously suspended sentence in the interim, nor did the court of appeals err in affirming that decision. This court should deny jurisdiction.

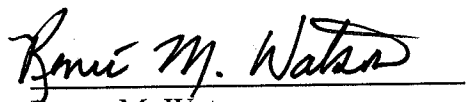
JOHN D. FERRERO, #0018590
PROSECUTING ATTORNEY,
STARK COUNTY, OHIO

By: 
Renee M. Watson
Ohio Sup. Ct. Reg. No. 0072906
Assistant Prosecuting Attorney
Appellate Section
P.O. Box 20049
Canton, Ohio 44701-0049
(330) 451-7897
FAX: (330) 451-7965

Counsel for Plaintiff-Appellee

PROOF OF SERVICE

A copy of the foregoing MEMORANDUM IN RESPONSE was sent by ordinary U.S. mail this 26th day of October, 2012, to STEPHEN P. HARDWICK, Office of The Ohio Public Defender - 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.



Renee M. Watson
Ohio Sup. Ct. Reg. No. 0072906
Assistant Prosecuting Attorney
Appellate Section
P.O. Box 20049
Canton, Ohio 44701-0049
(330) 451-7897
FAX: (330) 451-7965

Counsel for Plaintiff-Appellee