

ORIGINAL

IN THE SUPREME COURT OF OHIO

<p>STATE OF OHIO,</p> <p style="padding-left: 100px;">Plaintiff/Appellee,</p> <p style="padding-left: 100px;">vs.</p> <p>CLINTON N. STRUNK,</p> <p style="padding-left: 100px;">Defendant/Appellant.</p>	<p>:</p>	<p>On Appeal from the Warren County Court of Appeals, Twelfth Appellate District</p> <p>Supreme Court <b>12-2080</b> Case No. _____</p> <p>Court of Appeals Case No. CA2012-03-023</p>
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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT, CLINTON N. STRUNK

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## **APPENDIX**

**Opinion of the Twelfth District Court of Appeals  
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**Amended Judgment Entry of the Twelfth District  
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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The within case involves the due process and equal protection rights of a defendant to be eligible for consideration for judicial release under the judicial release statute in effect at the time of sentencing for the offense for which he is seeking judicial release. This case further involves the appropriate definition of a defendant's "stated sentence" for purposes of determining eligibility for judicial release. Finally, this case involves procedural due process questions with regard to amendment of Appellate judgments.

This case is of great public interest as to the issue of the constitutionality of *Ohio Revised Code §2929.20(M)* as applied retroactively to a previously eligible offender and is, further, of great public interest with regard to the definition of "stated prison term."

**STATEMENT OF THE CASE AND FACTS**

In the instant case, Warren County Case Number 09CR25764, Clinton N. Strunk, Appellant, hereinafter referred to as Appellant, was indicted for aggravated robbery, in violation of *Ohio Revised Code §2911.01(A)(1)*, a felony of the first degree. The Indictment included a firearms specification pursuant to *Ohio Revised Code §2941.145(A)*. During the pendency of that case in the Common Pleas Court, Appellant was indicted for subsequent offenses, to wit: attempted murder, in violation of *Ohio Revised Code §2903.02(B)*, a felony of the first degree, and felonious assault, in violation of *Ohio Revised Code §2903.11(A)(1)*, a felony of the second degree. These cases were filed under Warren County Common Pleas Court Case No.

09CR25923 and proceeded as a case independent of Case No. 09CR25764. Although in the same Common Pleas Court, the two cases were never consolidated. Ultimately, Appellant pled guilty to the offense of felonious assault in Case No. 09CR25923 and was sentenced, therefore, under a separate Judgment Entry of Sentence. The sentence in that case was a three year term consecutive to the sentence imposed in the instant case, to wit: Case No. 09CR25764.

On November 6, 2009, Appellant was sentenced in the instant case to a one year mandatory term for the firearm specification and a two year term for the reduced offense of robbery. Subsequent to the sentencing in the instant case, Defendant received the sentence for Case No. 09CR25923.

A Judgment Entry of Sentence specific only to the instant case was filed, journalizing Appellant's sentence in that case. A separate Judgment Entry of Sentence was filed in Case No. 09CR25923. The Warren County Clerk of Courts has journalized each case under separate files and separate computer designations.

Appellant filed his Motion for Judicial Release in the instant case only (Case No. 09CR25764) on July 12, 2011. At the time of filing his Motion for Judicial Release, Appellant had served his mandatory one year sentence for the gun specification and a period in excess of six months towards the two year sentence in that case.

On July 14, 2011, State of Ohio, Appellee, hereinafter known as Appellee, filed its Memorandum opposing Appellant's Motion for Judicial Release. The Court held a conference on Appellant's motion on August 2, 2011. On August 23, 2011, Appellant filed his Memorandum in support of his Motion for Judicial Release, again, in the instant case only.

On December 19, 2011, the Trial Court filed its order finding Appellant eligible for judicial release. Its order indicated that "The Prosecutor shall prepare an order of judicial release

for Case No. 09CR25764 only.” No notice of appeal was filed as to the Court’s December 19, 2011 order.

On February 22, 2012, a video hearing on judicial release was conducted by the Trial Court. The Trial Court granted judicial release and on February 24, 2012, entered a Judgment Entry of Modification of Sentence in Case No. 09CR25764 only.

Appellee timely appealed the Trial Court’s decision to the Twelfth District Court of Appeals.

On October 8, 2012, the Twelfth District Court of Appeals issued its opinion determining that the applicable statute to Appellant’s Motion for Judicial Release was that which was in effect at the time of his sentencing. The Court further found that both of Appellant’s sentences comprised one stated sentence. Having found that the statute in effect at the time of Appellant’s sentencing rendered him eligible for judicial release in the instant case, as well as Case No. 09CR25923, the Twelfth District Court of Appeals remanded the case to the Trial Court for further findings within the context of its opinion. Appellee did not file a motion for reconsideration of the appellate decision.

On October 29, 2012, the Twelfth District Court of Appeals issued an Amended Opinion determining that Appellant’s Motion for Judicial Release was controlled by the mandates of the current version of *Ohio Revised Code* §2929.20 enacted with House Bill 86. The Court further reiterated its holding that Appellant’s sentences were one stated sentence. The amended opinion of the Court of Appeals accordingly reversed the Trial Court’s decision without remand. It is from this decision that Appellant files his notice of discretionary appeal. On November 8, 2012, Appellant timely filed his Motion to Certify a Conflict, pursuant to App. R. 25. That motion is currently pending in the Twelfth District Court of Appeals.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

### **Proposition of Law No. 1: The Appellate Court was without jurisdiction to issue an Amended Opinion unless a party filed a Motion for Reconsideration.**

An Appellate Court lacks jurisdiction to overrule its own decision. *R.C. §2505.01 et seq.* establishes the jurisdiction of an Appellate Court. Specifically, *R.C. §2505.01* grants jurisdiction to an Appellate Court to review or retry a cause determined by another court, or by an administrative officer, agency, board, department, tribunal, commission, or other instrumentality from trial courts within the Appellate Courts geographical jurisdiction. There is no authority to review or retry a cause determined by the Appellate Court, only other courts. The Appellate Courts do have jurisdiction to reconsider their own decisions. However, this jurisdiction is controlled by App.R. 26, and with regard to the Appellate Court in the case sub judice, pursuant to Loc.R. 16 of the Twelfth District Court of Appeals of Warren County, Ohio. Both App.R. 26 and Loc.R. 16 require a motion made by a party of the case, to be filed within ten days of the filing of the judgment. In the case sub judice neither party filed a motion for reconsideration pursuant to either App.R. 26 or Loc.R. 16 of the Appellate Court's Judgment Entry and Opinion. The Appellate Court, with no motion pending before it, issued an Amended Judgment Entry and Opinion 21 days after issuing the original Judgment Entry and Opinion. The Appellate Court essentially overruled itself. There is no jurisdiction or authority to do so. Therefore, the Defendant/Appellant submits that the Appellate Court was without jurisdiction to issue the Amended Opinion and that unless one party perfected an Appeal to this Court, the original Opinion and Judgment Entry must become the final judgment on the Appellee's appeal of the trial court's decision.

**Proposition of Law No. 2: The applicable statute that controls over judicial release decisions is the judicial release statute in effect at the time of sentencing. The Appellate Court's first Opinion was a correct application of law. The Appellate Court's second Opinion prejudiced Appellant's due process and equal protection guarantees under the State and Federal Constitutions.**

The statute in effect at the time of sentencing controls any future motion by a defendant to modify the sentence. "The decision of the sentencing court to grant judicial release is part of the original sentence, albeit a reduction of the amount of prison time the offender must serve." State v. Peoples, 151 Ohio App.3d, 446, 450, 2003-Ohio-151, ¶ 21, 784 N.E.2d, 713, 716 (10<sup>th</sup> Dist.). The Peoples Court's theory was premised on the basis that if a defendant is released pursuant to a judicial release statute then that defendant must be placed on community control. Id. at ¶ 22 citing R.C. §2929.20(l). In the event that the defendant violated the terms of the community control sanctions, then the court could re-impose the original sentence. Id. Thus, because the court would be re-imposing the original sentence and not imposing an entirely new sentence, the proper judicial release statute to consider was the statute in effect at the time original sentence was imposed. In the case sub judice, the Appellate Court originally concluded correctly that the statute in effect at the time of sentencing controlled. However, the Appellate Court then issued an Amended Opinion finding that, because the judicial release statute in effect at the time of the Trial Court's decision on Appellant's Motion included a section [*O.R.C. 2929.20(M)*] that stated that the statute in effect at the time of the decision on a judicial release statute controlled any decision made after the effective date of the new version of *O.R.C. 2929.20*, the judicial release statute in effect at the time the decision on a judicial release motion is made controls, not the statute in effect at the time of sentencing. See *R.C. §2929.20(M)*. This Amended Opinion is in conflict with, and does not address, the sound reasoning of the Peoples Court. The decision to grant judicial release remains a modification of the original sentence.

Further, pursuant to *R.C. §2929.20(K)* presently in effect still requires that a defendant granted judicial release must be placed on community control. Most importantly, if a defendant violates said community control sanction, the court is limited to the re-imposition of the original sentence. See *R.C. §2929.20(K)*. Judicial release remains a modification of the original sentence. Accordingly, Appellant submits that *R.C. §2929.20* as amended offers no reason to overrule Peoples and that, under the authority of Peoples, the applicable statute when considering a motion for judicial release is the statute in effect at the time of sentencing.

**Proposition of Law No. 3: Applying *R.C. §2929.20*, as amended, to remove the privilege and/or right of judicial release from Appellant that would have otherwise been available to Appellant under the prior law prejudiced Appellant's due process and equal protection guarantees under the State and Federal Constitutions, and under the Ohio Revised Code.**

Pursuant to *R.C. §1.58*:

(A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:

(1) Affect the prior operation of the statute or any prior action taken thereunder;

(2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;

(3) Affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal;

(4) Affect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

(B) If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

Appellant submits that judicial release is either a privilege or a right, to which eligible offenders are granted to allow for a modification of their original sentence. Thus, under *R.C. §1.58*, unless the punishment for an offense is reduced, the amendment to a statute cannot adversely affect the privileges and/or rights to which a defendant would have had under the statute if the statute had not been amended. In the case sub judice, the Appellate Court originally concluded that under the judicial release statute in effect at the time of sentencing, Appellant had the ability of moving the trial court for a sentence modification after having served 180 days. The Appellate Court concluded that the judicial release statute in effect at the time of sentencing was unconstitutional as applied to Appellant pursuant to the authority of *State v. Peoples*, 102 Ohio St.3d 460, 462, 2004-Ohio-3923, ¶ 6, 812 N.E.2d 963,966. The Appellate Court then concluded that, having struck the unconstitutional language, Appellant was entitled to move for judicial release under the timelines identified by the general provisions of *R.C. §2929.20* in effect at the time of sentencing. Therefore, the Appellate Court, in the original Opinion, determined that under the statute in effect at the time of sentencing Appellant had the privilege and/or right to a reduction of the sanction imposed with respect to the violation of law to which Appellant was sentenced. The Appellate Court amended their decision in the second Opinion finding that *R.C. §2929.20*, as amended, applied to Appellant pursuant to *R.C. §2929.20(M)*. Having found that *R.C. §2929.20*, as amended, now applied to Appellant, the Appellate Court concluded that Appellant was now only entitled to move for judicial release after having served four years or having served four years following the expiration of the mandatory term. The Appellate Court concluded that, under *R.C. §2929.20* in effect at the time of sentencing, Appellant was entitled to judicial release after 180 days and under *R.C. §2929.20*, as amended, Appellant was entitled to judicial release after four years. Clearly, under the application as

ordered in the Appellate Court's second Opinion, the privilege and/or right to apply for judicial release has been adversely affected. Further, the punishment as ordered by the sentencing court has been affected by the amendment. This holding is in contradiction with *R.C. §1.58* and, therefore, Appellant asserts is in violation of his rights under the State and Federal Constitutions.

**Proposition of Law No. 4: Appellant's sentences constituted two separate stated prison sentences.**

The judicial release statute in effect at the time of Appellant's sentencing stated:

"If the stated prison term is at least two years but less than five years, the eligible offender may file the motion not earlier than 180 days after the offender is delivered to a state correctional institution or, if the prison term includes a mandatory prison term or terms, not earlier than 180 days after the expiration of all mandatory prison terms... If the stated prison term is five years or more and less than ten years, the eligible offender shall file the motion after the eligible offender has served five years of the stated prison term."

In the case sub judice Appellant was sentenced for a total of six years including one year of mandatory time. Appellant submits that the total sentence included two separate stated prison terms. *R.C. §2929.20(FF)* in effect at the time of sentencing defined "stated sentence" as the combination of all sentences imposed by the sentencing court. The cases to which Appellant was sentenced were under two separate indictments, with two separate case numbers, committed at two separate, distinct times. The indictments were never consolidated. The trial court issued two separate Judgment Entries of Sentence, each journalized separately. It is well settled that a court speaks through its journal entries. *State v. Harack*, 197 Ohio App.3d 157, 167 2011-Ohio-6021, ¶ 42, 966 N.E.2d 925, 932 (12<sup>th</sup> Dist.). Thus, if there was only one sentencing court the

trial court would have only issued one Judgment Entry of Sentence. In the case sub judice there were two separate sentencing courts.

A defendant can be incarcerated under more than one stated sentence. “When consecutive stated prison terms are imposed, the term is to be the aggregate of all the stated prison terms so imposed.” *O.A.C. §5120-2-03.1(F) (Appendix A-6)*. *O.A.C. §5120-2-04(G)* also makes reference to an offender who is serving more than one stated sentence. Therefore, the legislature had anticipated situations in which a defendant is sentenced to more than one stated prison sentence.

The Appellee cited *State v. Anderson-Melton*, 2<sup>nd</sup> Dist. No. 18703, 2001-Ohio-1763 in the Appellate Court as authority that Appellant’s sentencing was one stated prison sentence. However, *Anderson-Melton* is distinguishable from the case sub judice. In *Anderson-Melton* the defendant was sentenced for multiple counts under the same indictment. In the case sub judice Appellant was sentenced under different indictments. *Anderson-Melton* is not similar to the case sub judice. However, *State v. Smith* is analogous. In *Smith*, the Court held that sentences from two separate courts cannot be combined for the purpose of determining a “stated prison term”. *Smith*, 2<sup>nd</sup> Dist. No. 20172, 2004-Ohio-3573. Appellant acknowledges that the defendant in *Smith* was sentenced in separate geographical locations. However, it remains that, like the defendant in *Smith*, Appellant was sentenced under separate indictments and by separate journal entries. The Appellee contends that, because Appellant was sentenced in the same court room and that each case was docketed on the same date, there is one stated sentence. Appellant asserts that the actual geographical location of the court room where a defendant is sentenced is not relevant to the determination. Under Appellee’s theory, if Appellant was sentenced in one courtroom and was transferred to an adjacent courtroom and sentenced on the second indictment,

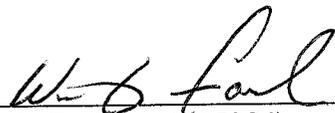
there would be two stated prison sentences, but because the sentencings all occurred in one court room, there would be one stated prison sentence. Appellant submits that "sentencing court" refers to the entity with jurisdiction to handle to conclusion a specific indictment. Appellant was sentenced under different indictments, with different case numbers, and by different journal entries. As the Court speaks through its journal entries, Appellant submits that there are two separate stated prison sentences in the case sub judice.

### **CONCLUSION**

For the reasons set out hereinabove, Appellant asserts that this case involves matters of public and great general interest, involves a felony, and further involves substantial constitutional questions. Appellant respectfully requests that this Court accept jurisdiction in this case.

Respectfully submitted,

**FOWLER, DEMOS & STUEVE**

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing has been served upon Michael Greer, Assistant Warren County Prosecuting Attorney, 500 Justice Drive, Lebanon, Ohio 45036, this 12<sup>th</sup> day of December, 2012, by regular U.S. mail.



William G. Fowler #0005254  
**COUNSEL FOR APPELLANT**

OCT - 8 2012

*James L. Spaeth*, Clerk  
LEBANON OHIO

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
WARREN COUNTY

STATE OF OHIO,

Plaintiff-Appellant,

- vs -

CLINTON N. STRUNK,

Defendant-Appellee.

CASE NO. CA2012-03-023

OPINION  
10/8/2012

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS  
Case No. 09CR25764

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**PIPER, J.**

{¶ 1} Plaintiff-appellant, the state of Ohio, appeals a decision of the Warren County Court of Common Pleas granting judicial release to defendant-appellee, Clinton Strunk.

{¶ 2} In 2009, Strunk was indicted and charged with aggravated robbery, which included a firearm specification, and was later released on bond. While Strunk was out on bond, he committed new offenses and was subsequently indicted for attempted murder and felonious assault. Strunk later pled guilty to a reduced charge of robbery and to the related

firearm specification. Before the same judge, and at the same hearing, Strunk pled guilty to felonious assault, and the attempted murder charge was dismissed.

{¶ 3} In November 2009, the trial court sentenced Strunk to two years on the robbery charge, as well as a one-year mandatory term for the firearm specification. At the same hearing, the trial court sentenced Strunk to three years for felonious assault. The trial court ordered the two-year sentence for robbery and one-year-mandatory sentence for the firearm specification to be served consecutive to the three-year sentence for felonious assault. Therefore, Strunk's aggregate sentence was six years.

{¶ 4} In July 2011, Strunk moved for judicial release under the case number associated with the robbery charge and firearm specification. The state opposed Strunk's motion, and argued that Strunk was not eligible to seek judicial release because the trial court imposed an aggregate six-year sentence, and Strunk had not served enough of his sentence to be considered eligible for judicial release. Strunk argued that he was eligible for judicial release on the robbery charge because he had been sentenced in two unrelated cases, and that the cases had never been consolidated by the court.

{¶ 5} The trial court held a hearing on the matter, and found that Strunk had served the one-year mandatory sentence for the firearm specification connected to the robbery charge. The trial court also found Strunk had filed his motion for judicial release after serving 180 days of the two-year sentence. The court granted judicial release to Strunk specific to the sentence for robbery and the accompanying firearm specification, but stated that it was not granting judicial release on the felonious assault three-year sentence. The court then modified Strunk's sentence by entry, and placed Strunk on three years of community control for the robbery. The state now appeals the trial court's decision, raising the following assignment of error:

{¶ 6} THE WARREN COUNTY COURT OF COMMON PLEAS ERRED AS A

MATTER OF LAW WHEN IT HELD THAT THE APPELLEE WAS QUALIFIED TO SEEK JUDICIAL RELEASE AND ERRED WHEN IT GRANTED THE APPELLEE JUDICIAL RELEASE.

{¶ 7} The state argues in its sole assignment of error that the trial court erred by granting Strunk judicial release.

{¶ 8} We begin by noting that because this case requires us to interpret a statutory provision, we employ a de novo standard of review. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163 ¶ 8. In a de novo review, this court independently reviews the record without giving deference to the trial court's decision. *State v. Kormos*, 12th Dist. No. CA2011-08-059, 2012-Ohio-3128.

{¶ 9} According to R.C. 2929.20(B), "on the motion of an eligible offender or upon its own motion, the sentencing court may reduce the eligible offender's aggregated nonmandatory prison term or terms through a judicial release under this section." The statute then sets forth several time frames during which an eligible offender may move the court for judicial release. However, the state and Strunk do not agree on which statutory provision applies to the disposition of Strunk's appeal.

{¶ 10} R.C. 2929.20(C), the statutory provision setting forth the judicial release eligibility time frames, has changed numerous times in the past decade. The state argues that the controlling statute is the version of R.C. 2929.20(C)(3) in place at the time Strunk moved for judicial release. That statute states,

if the aggregated nonmandatory prison term or terms is five years, the eligible offender may file the motion not earlier than four years after the eligible offender is delivered to a state correctional institution or, if the prison term includes a mandatory prison term or terms, not earlier than five years after the expiration of all mandatory prison terms.

{¶ 11} Conversely, Strunk argues that the version of R.C. 2929.20(C)(2) effective at

the time of his sentencing is controlling. According to that statute,

If the stated prison term is at least two years but less than five years, the eligible offender may file the motion not earlier than 180 days after the offender is delivered to a state correctional institution or, if the prison term includes a mandatory prison term or terms, not earlier than 180 days after the expiration of all mandatory prison terms.

By asking this court to apply R.C. 2929.20(C)(2) as effective in 2009, Strunk not only argues that this court should focus on the statute in place at the time of sentencing, but also that this court should consider his sentence to be two separate sentences, one of two years and a one-year mandatory sentence for the robbery and firearm specification, and the other, a three-year sentence for felonious assault.

{¶ 12} We agree with Strunk that the applicable statute is that which was in effect at the time of his sentencing. "The decision of the sentencing court to grant judicial release is part of the original sentence, albeit a reduction in the amount of prison time the offender must serve." *State v. Peoples*, 151 Ohio App.3d 446, 2003-Ohio-151, ¶ 21(10th Dist.). R.C. 2929.20 provides that if a court grants judicial release, the court must place the defendant on community control, and then reserves the right to reimpose the sentence that it reduced through judicial release. Therefore, the controlling statute is that which was in effect at the time of sentencing. *State v. Jones*, 9th Dist. No. 03CA008370, 2004-Ohio-3417, ¶ 10; see also *State v. Radcliff*, 5th Dist. No. 02CAA01004, 2002-Ohio-1837.

{¶ 13} Although we agree that the statute from 2009 applies because that is the date that Strunk received his sentence, we disagree with Strunk's assertion that for purposes of determining judicial release, he received two separate sentences. As previously stated, Strunk received an aggregate sentence of six years because his three-year sentence for the robbery and related firearm specification ran consecutive to his three-year sentence for felonious assault. Of these six years, five were nonmandatory, and one was the mandatory

year for the firearm specification in relation to the robbery charge.

{¶ 14} Given Strunk's six-year sentence, of which five years were nonmandatory, the controlling statute in effect in 2009, R.C. 2929.20(C)(3) states,

If the stated prison term is five years or more but not more than ten years, the eligible offender may file the motion not earlier than five years after the eligible offender is delivered to a state correctional institution or, if the prison term includes a mandatory prison term or terms, not earlier than five years after the expiration of all mandatory prison terms.

{¶ 15} Unlike the version currently in place, the 2009 statute does not include the term "aggregated" when referring to the total sentence if multiple sentences are given. Instead, the focus of the 2009 statute is on the "stated prison term." A review of the record indicates that Strunk's "stated prison term," was six years.

{¶ 16} As defined by R.C. 2929.01(F)(F), the stated prison terms means "the prison term, mandatory prison terms, or *combination of all prison terms and mandatory prison terms imposed by the sentencing court* \* \* \*." (Emphasis added.)<sup>1</sup> Therefore, the combination of all prison terms imposed by the sentencing court in the case at bar is six years.

{¶ 17} While Strunk argues that he was sentenced in two disparate cases through separate indictments and separate case numbers, the version of R.C. 2929.20 in place at the time of Strunk's sentence specified that a stated prison term is composed of the combination of prison terms imposed by a sentencing court. The record is undisputed that the sentencing court was the Warren County Court of Common Pleas, and in fact, the same trial judge. This is not the case where two separate trial courts are imposing sentence upon the same defendant.

{¶ 18} In *State v. Smith*, 2nd Dist. No. 20172, 2004-Ohio-3573, the appellate court

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1. The numeration of the definition section has also changed several times since the time of Strunk's sentencing. However, the definition of "stated prison term" has remained essentially unchanged.

held that a defendant was eligible for judicial release after serving the first part of a consecutive sentence because he had been sentenced by two separate courts, from two different counties. Smith pled guilty to aggravated robbery in Montgomery County, and was sentenced to four years in prison. Smith was later sentenced to five years by a Clermont County court after pleading guilty to robbery. Although the Clermont County court ordered its five-year sentence to run consecutive to the four-year sentence from the Montgomery County court, the total nine-year sentence was not imposed by a single sentencing court. In so holding, the appellate court stated, "'the sentencing court' is in the singular. Only one court is being referred to." *Id.* at ¶ 17. Therefore, the appellate court found that each sentencing court was in control of its own sentence in regard to judicial release, and the state could not combine the two separate sentences into one stated prison term.

{¶ 19} Conversely, the Second District held that consecutive sentences imposed by the same sentencing court should be treated as one "stated prison term." *State v. Anderson-Melton*, 2nd Dist. No. 18703, 2001 WL 1388442 (Nov. 9, 2001). In *Anderson-Melton*, the defendant was sentenced to three consecutive sentences for receiving stolen property, insurance fraud, and illegal use of food stamps. The court relied on the definition of "stated prison term" and concluded that the consecutive sentences imposed by the same sentencing court should be considered as a single stated prison term, not as multiple terms. In so holding, the court considered that in addition to the definition of "stated prison term" as a combination of all sentences imposed by the sentencing court, the statute provides that the time frame for judicial release begins upon delivery "to a state correctional institution." Therefore, the court concluded that a defendant is only delivered once to the prison, rather than each and every time he begins a new portion of a consecutive sentence. *Id.* at \*1.

{¶ 20} While we can accept the application of the Second District's reasoning within *Anderson-Melton*, we additionally find that when a person receives consecutive sentences,

the trial court is deliberately having the defendant delivered to prison *once* to serve the *full sentence* it has imposed. The trial court specifically ensured that Strunk's sentence was *six years* by ordering the sentences to run consecutive. Therefore, the pronouncement of the consecutive sentence came from the "sentencing court." The current version of R.C. 2929.20 includes the word "aggregated" to clarify how the statute was designed to operate as it related to stated prison terms and multiple sentences.

{¶ 21} Strunk's six-year sentence was handed down by the sentencing court. The court made its sentencing determination after accepting Strunk's guilty pleas to robbery and felonious assault, and after the presentence investigation was completed. The sentencing court held a single sentencing hearing, heard from the affected victims, and then issued a sentence based on the circumstances of Strunk committing felonious assault while he was on bond for robbery. Moreover, the trial court ordered the sentences to run consecutive to each other, therefore demonstrating that the court took into consideration the seriousness of the charges and what total, consecutive, prison sentence the court felt justified in imposing. Therefore, Strunk's delivery to the Ohio State Correction Reception Center was the single triggering event that marked the beginning of the judicial release statute time frame regarding Strunk's stated prison term.

{¶ 22} Once more, the statute in place in 2009 states that,

If the stated prison term is five years or more but not more than ten years, the eligible offender may file the motion not earlier than five years after the eligible offender is delivered to a state correctional institution or, if the prison term includes a mandatory prison term or terms, not earlier than five years after the expiration of all mandatory prison terms.

Therefore, Strunk would have to serve his mandatory one-year firearm specification, and then wait an additional five years after the expiration of his mandatory prison term before he is eligible for judicial release. Strunk's prison term would therefore expire on the same day

that he is first eligible for judicial release. The Ohio Supreme Court has previously held that such a result creates an equal protection violation, and that such a statute is unconstitutional. *State v. Peoples*, 102 Ohio St.3d 460, 2004-Ohio-3923.

{¶ 23} In *Peoples*, the court held that the version of R.C. 2929.20(B)(3) in effect until March 23, 2000, was unconstitutional because "offenders sentenced to exactly five years are treated differently from other members of the class because they are unable to apply for judicial release." *Id.* at ¶ 6. Essentially, the language of the statute permitted defendants sentenced to more than five years to apply for judicial release, while, for all intents and purposes, the statute prohibited those sentenced to exactly five years from ever being eligible for judicial release. We find that because Strunk was required to serve five years of his nonmandatory sentences before he is eligible for judicial release, R.C. 2929.20(C)(3) as it was stated in 2009 is unconstitutional.

{¶ 24} Notwithstanding the Ohio Supreme Court's finding of unconstitutionality, and for some perplexing reason, the General Assembly amended the statute after *Peoples* was decided to once again include the offending language. The version of R.C. 2929.20 that took effect in April 2009 reverted to the time frame and language that had been held unconstitutional by the Ohio Supreme Court, although the version in the interim properly contained a four-year time frame for those sentenced to exactly five years.<sup>2</sup> Other courts have recognized this aberration as well. The Sixth District recognized that the version of R.C. 2929.20(C)(3) in effect after April 7, 2009, had the same language and effect as that which was held unconstitutional by the Ohio Supreme Court in *Peoples*. *State v. Oliver*, 6th Dist. No. S-10-040, 2011-Ohio-5305. Similarly, the Second District Court of Appeals noted that

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2. As previously stated, the statute has been amended again, so that the current version states that a person sentenced to a five-year, nonmandatory sentence must serve four years of the sentence before being eligible for judicial release. Therefore, the current version of the statute does not create the same equal protection issues because it allows those sentenced to five years to apply for judicial release after four years.

the 2009 version of R.C. 2929.20(C)(3) reverted to language that had been rendered unconstitutional. *State v. Byrd*, 2nd Dist. No. 23950, 2011-Ohio-2060. In *Byrd*, the court stated, "the statute had been corrected to eliminate the five-year anomaly but inexplicably, the next revision of the statute went back to the terminology that had been found unconstitutional." *Id.* at ¶ 28. While the issue in *Byrd* did not require the court to determine what time frame was applicable once the unconstitutional provision was struck, the court nonetheless noted that once the five-year limitation is found unconstitutional, the defendant becomes eligible to move for judicial release after 180 days. *Id.*

{¶ 25} Once the five-year time frame is removed from R.C. 2929.20(C)(3), that section does not have any additional time frame during which the defendant may move for judicial release. In fact, and unlike prior and future versions of the statute, the 2009 version does not contain any general provisions regarding the applicable time frame. For example, the version of R.C. 2929.20 in place when *Peoples* was decided contained a general clause that "except as otherwise provided in division (B)(3) of this section, if the stated prison term was imposed for a felony of the first, second, or third degree, the eligible offender shall file the motion not earlier than one hundred eighty days after the offender is delivered to a state correctional institution." R.C. 2929.20(B)(2). Therefore, once section (B)(3) was struck as unconstitutional, the supreme court held *Peoples'* motion for judicial release was timely because he made the motion 180 days after serving his mandatory sentence.

{¶ 26} However, the version of R.C. 2929.20 in effect when *Strunk* was sentenced does not contain any such general provision based on the degree of felony committed. Nevertheless, the Legislature did include a 180 day *minimum* time frame before defendants sentenced to terms of more than two years, but less than five could move for judicial release. Therefore, we find that at minimum, *Strunk* was required to wait 180 days before moving for judicial release. While *Strunk* waited the 180 days, this does not mean that the trial court

properly granted judicial release.

{¶ 27} Instead, the record is clear that the trial court was under the assumption that it was proper to divide the stated prison term into two separate sentences, one of two years (plus the mandatory one-year firearm specification) and one of three years. The trial court granted judicial release on only the robbery charge, and did not consider whether Strunk was eligible for release on the total sentence that included the three years for felonious assault. Therefore, the trial court must decide whether to grant judicial release based on the fact that Strunk's stated prison term is not two separate sentences for purposes of judicial release determination.

{¶ 28} The trial court must also consider the fact that the version of R.C. 2929.20 in place at the time of Strunk's sentence required the court to make specific findings before granting judicial release. According to R.C. 2929.20(J)(1), the trial court has to make the two following findings before granting release.

(a) That a sanction other than a prison term would adequately punish the offender and protect the public from future criminal violations by the eligible offender because the applicable factors indicating a lesser likelihood of recidivism outweigh the applicable factors indicating a greater likelihood of recidivism;

(b) That a sanction other than a prison term would not demean the seriousness of the offense because factors indicating that the eligible offender's conduct in committing the offense was less serious than conduct normally constituting the offense outweigh factors indicating that the eligible offender's conduct was more serious than conduct normally constituting the offense.

{¶ 29} The record indicates that the trial court made these findings as they related to the robbery charge, but did not make the requisite findings when taking into consideration the felonious assault. It is altogether possible that the trial court may decide upon remand, that it can no longer make these findings based on the facts and circumstances surrounding Strunk's felonious assault charge because perhaps granting judicial release would demean

the seriousness of Strunk's actions when he committed felonious assault.

{¶ 30} Upon remand, the trial court shall consider Strunk's motion for judicial release as it relates to the entire stated prison term, which is the combination of sentences for robbery and felonious assault. The trial court may not grant judicial release on the robbery charge without also granting it on the felonious assault charge, as both sentences comprise the stated prison term referenced in the statute. Having found that the trial court erred by considering the stated prison term as two separate sentences, we sustain the state's assignment of error. As such, we reverse the trial court's judgment to the extent that we vacate the order granting judicial release and remand this matter for the trial court to consider Strunk's motion for judicial release within the context of this opinion.

{¶ 31} Judgment reversed, and cause is remanded for further consideration.

POWELL, P.J., and HENDRICKSON, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
WARREN COUNTY

COURT OF APPEALS  
WARREN COUNTY  
FILED

OCT - 8 2012

James L. Spaeth, Clerk  
LEBANON OHIO

STATE OF OHIO, :

Plaintiff-Appellant, :

CASE NO. CA2012-03-023

JUDGMENT ENTRY

- VS - :

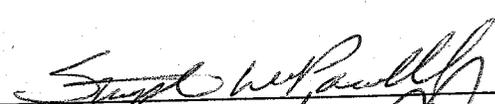
CLINTON N. STRUNK, :

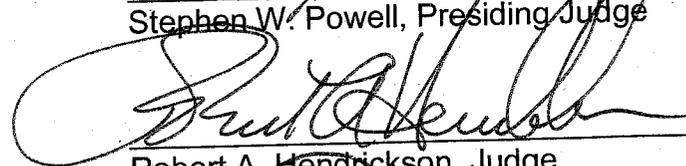
Defendant-Appellee. :

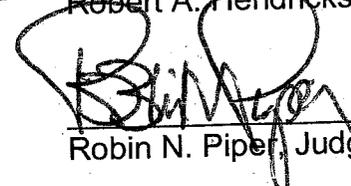
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed and this cause is remanded for further proceedings according to law and consistent with the Opinion filed the same date as this Judgment Entry.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

  
Stephen W. Powell, Presiding Judge

  
Robert A. Hendrickson, Judge

  
Robin N. Piper, Judge

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
WARREN COUNTY

COURT OF APPEALS  
WARREN COUNTY  
FILED

OCT 29 2012

James L. Spaeth, Clerk  
LEBANON OHIO

STATE OF OHIO,

Plaintiff-Appellant,

- vs -

CLINTON N. STRUNK,

Defendant-Appellee.

CASE NO. CA2012-03-023

AMENDED  
OPINION  
10/29/2012

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS  
Case No. 09CR25764

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive,  
Lebanon, Ohio 45036, for plaintiff-appellant

William G. Fowler, 12 W. South Street, Lebanon, Ohio 45036, for defendant-appellee

**PIPER, J.**

{¶ 1} This amended opinion clarifies and supersedes this court's previous opinion in *State v. Strunk*, Warren CA2012-03-023, 2012-Ohio-4645, released on October 8, 2012.

{¶ 2} Plaintiff-appellant, the state of Ohio, appeals a decision of the Warren County Court of Common Pleas granting judicial release to defendant-appellee, Clinton Strunk.

{¶ 3} In 2009, Strunk was indicted and charged with aggravated robbery, which included a firearm specification, and was later released on bond. While Strunk was out on bond, he committed new offenses and was subsequently indicted for attempted murder and

felonious assault. Strunk later pled guilty to a reduced charge of robbery and to the related firearm specification. Before the same judge, and at the same hearing, Strunk pled guilty to felonious assault, and the attempted murder charge was dismissed.

{¶ 4} In November 2009, the trial court sentenced Strunk to two years on the robbery charge, as well as a one-year mandatory term for the firearm specification. At the same hearing, the trial court sentenced Strunk to three years for felonious assault. The trial court ordered the two-year sentence for robbery and one-year mandatory sentence for the firearm specification to be served consecutive to the three-year sentence for felonious assault. Therefore, Strunk's aggregate sentence was six years.

{¶ 5} In July 2011, Strunk moved for judicial release under the case number associated with the robbery charge and firearm specification. The state opposed Strunk's motion, and argued that Strunk was not eligible to seek judicial release because the trial court imposed an aggregate six-year sentence, and Strunk had not served enough of his sentence to be considered eligible for judicial release. Strunk argued that he was eligible for judicial release on the robbery charge because he had been sentenced in two unrelated cases, and that the cases had never been consolidated by the court.

{¶ 6} The trial court held a hearing on the matter, and found that Strunk had served the one-year mandatory sentence for the firearm specification connected to the robbery charge. The trial court also found Strunk had filed his motion for judicial release after serving 180 days of the two-year sentence. The court granted judicial release to Strunk specific to the sentence for robbery and the accompanying firearm specification, but stated that it was not granting judicial release on the felonious assault three-year sentence. The court then modified Strunk's sentence by entry, and placed Strunk on three years of community control for the robbery. The state now appeals the trial court's decision, raising the following assignment of error.

{¶ 7} THE WARREN COUNTY COURT OF COMMON PLEAS ERRED AS A MATTER OF LAW WHEN IT HELD THAT THE APPELLEE WAS QUALIFIED TO SEEK JUDICIAL RELEASE AND ERRED WHEN IT GRANTED THE APPELLEE JUDICIAL RELEASE.

{¶ 8} The state argues in its sole assignment of error that the trial court erred by granting Strunk judicial release.

{¶ 9} We begin by noting that because this case requires us to interpret a statutory provision, we employ a de novo standard of review. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163 ¶ 8. In a de novo review, this court independently reviews the record without giving deference to the trial court's decision. *State v. Kormos*, 12th Dist. No. CA2011-08-059, 2012-Ohio-3128.

{¶ 10} According to R.C. 2929.20(B), "on the motion of an eligible offender or upon its own motion, the sentencing court may reduce the eligible offender's aggregated nonmandatory prison term or terms through a judicial release under this section." The statute then sets forth several time frames during which an eligible offender may move the court for judicial release. However, the state and Strunk do not agree on which statutory provision applies to the disposition of Strunk's appeal.

{¶ 11} R.C. 2929.20(C), the statutory provision setting forth the judicial release eligibility time frames, has changed numerous times in the past decade. The state argues that the controlling statute is the version of R.C. 2929.20(C)(3) in place at the time Strunk moved for judicial release. Conversely, Strunk argues that the version of R.C. 2929.20(C)(2) effective at the time of his sentencing is controlling. According to that statute,

If the stated prison term is at least two years but less than five years, the eligible offender may file the motion not earlier than 180 days after the offender is delivered to a state correctional institution or, if the prison term includes a mandatory prison term or terms, not earlier than 180 days after the expiration of all mandatory prison terms.

By asking this court to apply R.C. 2929.20(C)(2) as effective in 2009, Strunk not only argues that this court should focus on the statute in place at the time of sentencing, but also that this court should consider his sentence to be two separate sentences, one of two years and a one-year mandatory sentence for the robbery and firearm specification, and the other, a three-year sentence for felonious assault.

{¶ 12} However, the Ohio Legislature enacted H.B. 86, which made several changes to the criminal code, including prison terms imposed before the effective date of the statute, September 30, 2011. Specific to the case at bar, the Legislature determined that the changes to the judicial release statute would be effective as to inmates serving a prison term on September 30, 2011, as well as future inmates who would be conferred to a correctional institution after September 30, 2011, even if the inmate committed the crime or was sentenced prior to September 30, 2011. Even though neither party argued H.B. 86's applicability, we nonetheless determine that the current provisions apply to the case at bar.

{¶ 13} The change to the judicial release statute was necessary in regard to inmates who had received a flat, five-year nonmandatory sentence because prior to the change, inmates who had a five-year sentence were not eligible for judicial release until they had served all five years of their sentence. Essentially, a five-year sentence made the inmates ineligible for judicial release, and the Ohio Supreme Court has in the past determined that such a result violates equal protection. *State v. Peoples*, 102 Ohio St.3d 460, 2004-Ohio-3923. Therefore, and in order to rectify any due process issues, the Legislature modified the statute so that an inmate sentenced to five years is now eligible for judicial release after serving four years. This change applies to Strunk.

{¶ 14} Specifically, and according to R.C. 2929.20(M), the changes to the judicial release statute "that are made on the effective date of this division apply to any judicial release *decision* made on or after the effective date of this division for any eligible offender."

(Emphasis added.) We have emphasized "decision" in the statute because while Strunk moved for judicial release in July 2011, prior to the effective date of H.B. 86, the trial court's *decision* was not until February 24, 2012, after the effective date. Therefore, and according to R.C. 2929.20(M), the changes to the judicial release statute in R.C. 2929.20 would be applicable to the disposition of Strunk's motion.

{¶ 15} According to R.C. 2929.20(3), in place as of September 30, 2011, "if the aggregated nonmandatory prison term or terms is five years, the eligible offender may file the motion not earlier than four years after the eligible offender is delivered to a state correctional institution or, if the prison term includes a mandatory prison term or terms, not earlier than four years after the expiration of all mandatory prison terms."

{¶ 16} We disagree with Strunk's assertion that for purposes of determining judicial release, he received two separate sentences.<sup>1</sup> As previously stated, Strunk received an *aggregate* sentence of six years because his three-year sentence for the robbery and related firearm specification ran consecutive to his three-year sentence for felonious assault. Of these six years, five were nonmandatory.

{¶ 17} While Strunk argues that he was sentenced in two disparate cases through separate indictments and separate case numbers, R.C. 2929.20(M) specifies that the qualifying timeframe for determining judicial release is predicated on the "aggregated nonmandatory prison term." The record is undisputed that Strunk received an aggregated nonmandatory prison term of five years as handed down by the trial court. This is not the case where two separate trial courts are imposing sentence upon the same defendant. The

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1. Another change to the judicial release statute over the years has centered on the use of "aggregate" to describe the prison term that must be taken into consideration when determining what amount of nonmandatory time an inmate must serve before he is eligible for judicial release. In past versions of the statute, the statute required an inmate to serve a certain percentage of his "stated prison term," which was essentially a combination of all sentences imposed. The Legislature saw fit to clarify the statute by focusing on an aggregate sentence, rather than on a stated prison term.

court made its sentencing determination after accepting Strunk's guilty pleas to robbery and felonious assault, and after the pre-sentence investigation was completed.

{¶ 18} The sentencing court held a single sentencing hearing, heard from the affected victims, and then issued a sentence based on the circumstances of Strunk committing felonious assault while he was on bond for robbery. Moreover, the trial court ordered the sentences to run consecutive to each other, therefore demonstrating that the court took into consideration the seriousness of the charges and what aggregate prison sentence the court felt justified in imposing. Therefore, Strunk's delivery to the Ohio State Correction Reception Center was the single triggering event that marked the beginning of the judicial release statute time frame regarding Strunk's aggregated sentence.

{¶ 19} Here, the record is clear that the trial court was under the assumption that it was proper to divide the aggregate sentence into two separate sentences, one of two years (plus the mandatory one year firearm specification) and one of three years. The trial court granted judicial release on the robbery charge alone, and did not consider whether Strunk was eligible for release on the aggregated sentence that included the three years for felonious assault. Therefore, the trial court erroneously found that Strunk was eligible for judicial release after serving only the one-year mandatory sentence for the firearm specification plus 180 days of the two-year sentence for the robbery. Given Strunk's five-year nonmandatory aggregate sentence, he is not eligible to apply for judicial release until he has served four years of his nonmandatory sentence. As such, the trial court's judgment and order granting judicial release is reversed and vacated, and the state's single assignment of error is sustained.

{¶ 20} Judgment reversed.

POWELL, P.J., and HENDRICKSON, J., concur. .

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

IN THE COURT OF APPEALS  
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WARREN COUNTY

COURT OF APPEALS  
WARREN COUNTY  
FILED

OCT 29 2012

James L. Spaeth, Clerk  
LEBANON OHIO

STATE OF OHIO,

Plaintiff-Appellant,

- vs -

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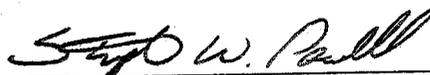
CASE NO. CA2012-03-023

AMENDED  
JUDGMENT ENTRY

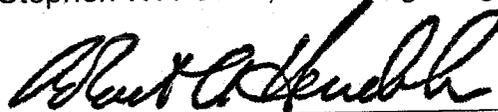
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order granting judicial release is hereby reversed and vacated consistent with the amended opinion filed the same date as this amended Judgment Entry.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this amended Judgment Entry shall constitute the mandate pursuant to App.R. 27.

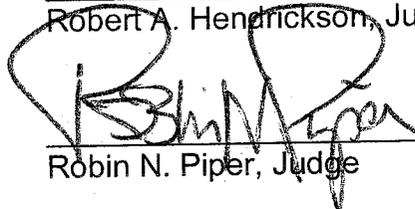
Costs to be taxed in compliance with App.R. 24.



Stephen W. Powell, Presiding Judge



Robert A. Hendrickson, Judge



Robin N. Piper, Judge