

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

CLINTON N. STRUNK,

Defendant-Appellant.

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Case No. 2012-2080

**On Appeal from the Warren
County Court of Appeals,
Twelfth Appellate District**

**Court of Appeals Case No.
CA2012-03-023**

**STATE OF OHIO'S RESPONSE TO THE DEFENDANT-APPELLANT'S MOTION AND
MEMORANDUM IN SUPPORT OF JURISDICTION**

DAVID P. FORNSHELL, #0071582
Warren County Prosecuting Attorney
Michael Greer, #0084352 (Counsel of Record)
Assistant Prosecuting Attorney
Warren County Prosecutor's Office
500 Justice Drive
Lebanon, Ohio 45036
(513) 695-1325
Facsimile: (513) 695-2962
michael.greer@co.warren.oh.us

COUNSEL FOR PLAINTIFF-APPELLEE,
STATE OF OHIO

WILLIAM G. FOWLER, #0005254
Fowler, Demos & Stueve
12 West South Street
Lebanon, Ohio 45036
(513) 932-7444
Facsimile: (513) 934-7911

COUNSEL FOR DEFENDANT-APPELLANT,
CLINTON N. STRUNK

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EXPLANATION OF WHY THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

The Appellee, State of Ohio, herein responds to Appellant, Clinton N. Strunk, on the issue of jurisdiction, pursuant to S.Ct.Prac.R.¹ 3.2(A). This is not a case of public or great general interest. The Appellant is not a public figure, nor is this case in the public eye. In addition, this case does not pose any substantial constitutional question that would affect the public. Moreover, this Court should not grant leave to appeal this felony case since the Appellant's propositions of law simply lack merit.

STATEMENT OF THE CASE AND FACTS

In Case No. 09CR25764, the Appellant, Clinton N. Strunk, was indicted by a Warren County grand jury and charged with Aggravated Robbery, R.C.² 2911.01(A)(1), a first-degree felony, which included a gun specification. Indictment, T.d. 08-09CR25764, pp. 1-2. While the Appellant was out on bond, he committed new offenses and was indicted in Case No. 09CR25923 for Attempted Murder, R.C. 2903.02(B), a first-degree felony, and Felonious Assault, R.C. 2903.11(A)(1), a second-degree felony. Judicial Release Hearing, T.p., p. 6, & Indictment, T.d. 05-09CR25923, pp. 1-2.

On September 29, 2009, in Case No. 09CR25764, the Appellant pled guilty to a reduced charge of Robbery and to the gun specification. Change of Plea and Entry, T.d. 34-09CR25764. At the same hearing, in Case No. 09CR25923, the Appellant pled guilty to Felonious Assault. Change of Plea and Entry, T.d. 39-09CR25923.

On November 6, 2009, in Case No. 09CR25764, the Warren County Court of Common Pleas sentenced the Appellant to serve two years in prison for Robbery and to serve a one-year mandatory term for the gun specification, totaling three years.

¹ Rules of Practice of the Supreme Court of Ohio.

² Ohio Revised Code.

Judgment Entry of Sentence, T.d. 36-09CR25764. At the same hearing, in Case No. 09CR25923, the trial court sentenced him to serve three years in prison for Felonious Assault. Judgment Entry of Sentence, T.d. 41-09CR25923. The trial court ordered the three-year sentence in Case No. 09CR25923 to be served consecutively with the three-year sentence in Case No. 09CR25764, totaling six years in prison. *Id.*

On July 12, 2011, the Appellant moved for judicial release in Case No. 09CR25764 (the Robbery). Motion for Judicial Release, T.d. 39-09CR25764. The State opposed the motion, arguing that he was not eligible to seek judicial release, pursuant to R.C. 2929.20(C)(3), since he had been sentenced to an aggregate sentence of six years. Memorandum Opposing Defendant's Motion for Judicial Release, T.d. 41-09CR25764, pp. 2-3.

In a separate memorandum in support of his motion, the Appellant argued that Case No. 09CR25764 and Case No. 09CR25923 were unrelated, were based on separate indictments filed on different days, and were never consolidated. Memorandum, T.d. 44-09CR25764, p. 1. He argued that he was serving two stated sentences. *Id.* at 2. Despite the fact that the Appellant was sentenced by the same judge, on the same date, at the same time, and in the same courtroom, he argued that he was sentenced by two different "sentencing courts," one court in Case No. 09CR25764 and another court in Case No. 09CR25923, because "[i]n the instant case, [there were] two case numbers, two separate indictments, and, significantly, two separate Judgment Entries of Sentences[.]" *Id.* at 2. He argued that he was serving a "stated sentence" of three years in Case No. 09CR25764 and will serve another "stated sentence" of three years in Case No. 09CR25923. *Id.* Thus, the Appellant argued that he was qualified, pursuant to R.C. 2929.20(C)(2), to seek judicial release in Case No. 09CR25764 since he had served the one-year mandatory sentence and served an additional six months regarding the non-

mandatory portion of the sentence in that case. *Id.*

On February 22, 2012, the trial court held a hearing regarding the Appellant's judicial release motion. Judicial Release Hearing, T.p. The trial court granted judicial release to the Appellant in Case No. 09CR25764, and, even though he remained in prison, placed the Appellant on community control in Case No. 09CR25764. *Id.* at 7-9.

The State sought discretionary appeal from the Warren County Court of Appeals, Twelfth Appellate District. Motion for and Memorandum in Support of Discretionary Appeal, T.d. 03-2012-03-023. The Twelfth District granted discretionary appeal. Entry Granting Motion for Discretionary Appeal, T.d. 07-2012-03-023.

On October 8, 2012, the Twelfth District rejected the Appellant's argument that he was serving two separate stated sentences imposed by two different sentencing courts, holding that the Appellant was serving one six-year stated prison term and that his delivery to the Ohio State Correction Reception Center triggered the running of the time limit for judicial release. *State v. Strunk*, 12th Dist. No. CA2012-03-023, 2012-Ohio-4645, ¶¶20-21.

However, the Twelfth District agreed with the Appellant that the version of R.C. 2929.20(C)(3) that applied to the Appellant was the version from 2009, the year he was sentenced. *Id.* at ¶13. The appellate court concluded that former R.C. 2929.20(C)(3) was unconstitutional as applied to the Appellant since it prevented him from ever being eligible for judicial release. *Id.* at ¶¶23-24. The Twelfth District severed the unconstitutional provision and determined that the Appellant had been eligible to seek judicial release in both cases. *Id.* at ¶¶26-30.

On October 29, 2012, the Twelfth District issued an amended opinion. *State v. Strunk*, 12th Dist. No. CA2012-03-023, 2012-Ohio-5013. The Twelfth District reconsidered its decision that the 2009 version of R.C. 2929.20 applied to the Appellant.

Id. at ¶11. The appellate court determined that the current version of R.C. 2929.20 applied to the Appellant since that statute read that it applied to any judicial release decision made on or after the statute's effective date of September 30, 2011. *Id.* at ¶¶12-14. The trial court's decision was on February 24, 2012, after the statute's effective date. *Id.* at ¶14.

Applying the current version of R.C. 2929.20, the Twelfth District again rejected the Appellant's argument that he was serving two separate sentences imposed by two different sentencing courts. *Id.* at ¶¶16-19. Thus, the Twelfth District reversed the trial court's decision. *Id.* at ¶20.

On November 8, 2012, the Appellant moved to certify a conflict claiming that the Twelfth District's decision was in conflict with *State v. Peoples*, 151 Ohio App. 3d 446, 2003-Ohio-151, 784 N.E.2d 713 (10th Dist). Motion to Certify a Conflict, T.d. 27-2012-03-023. The Twelfth District denied his motion. Entry Denying Motion to Certify Conflict, T.d. 31-2012-03-023.

ARGUMENT

Response To Proposition Of Law I: The Warren County Court of Appeals, Twelfth Appellate District, had jurisdiction to sua sponte reconsider its decision.

In the Appellant's first proposition of law, he argues that the Twelfth District did not have jurisdiction to *sua sponte* reconsider its first opinion in this case.

Citing *Tuck v. Chapple*, 114 Ohio St. 155, 151 N.E. 48 (1926), this Court held that a court of appeal has the inherent authority, in the furtherance of justice, to *sua sponte* reconsider its judgment as long as no party has sought an appeal from this Court and the deadline to seek such an appeal has not passed. *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St. 3d 245, 249-250, 594 N.E.2d 616 (1992).

In this case, neither party had sought an appeal from this Court when the Twelfth

District reconsidered the October 8, 2010 opinion. Further, the Twelfth District issued its second opinion on October 29, 2012 well within the deadline for a party to seek an appeal from this Court. Consequently, the Twelfth District had authority to *sua sponte* reconsider its decision in this case.

Since the appellate court had jurisdiction to reconsider its decision, the Appellant's first proposition of law is without merit and this Court should not accept jurisdiction regarding it.

Response To Proposition Of Law II: According to the plain meaning of R.C. 2929.20(M), the current version of R.C. 2929.20 applies to decisions regarding judicial release.

In the Appellant's second proposition of law, he cites *State v. Peoples*, 151 Ohio App. 3d 446, 2003-Ohio-151, 784 N.E.2d 713 (10th Dist), and argues that the version of R.C. 2929.20 that applied was the one in effect at the time he was sentenced in 2009.

While the Appellant is correct that the Tenth District did hold that the appropriate version of R.C. 2929.20 to apply to a motion for judicial release was the version that was in effect at the time the defendant was sentenced, the holding in *Peoples* is no longer the law in the State of Ohio. The General Assembly amended R.C. 2929.20 in House Bill 86 by adding subsection (M) which reads, "The changes to this section 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." With this change, the General Assembly determined that the appropriate version of R.C. 2929.20 that should apply to a judicial release motion is the one in effect at the time the sentencing court decides the motion. R.C. 2929.20(M) takes precedence over the Tenth District's holding in *Peoples* since judicial release is a creature of statute that did not exist in the common law and would not exist but for the General Assembly's enactment of R.C. 2929.20. *State v. Cunningham*, 8th Dist. No. 85342, 2005-Ohio-3840, ¶19. In effect, R.C. 2929.20(M) has

overturned the Tenth District's holding in *Peoples*.

According to R.C. 2929.20(M), the version of R.C. 2929.20 that applied in this case was the current one. Consequently, the Appellant's second proposition of law is without merit and this Court should not accept jurisdiction regarding it.

Response To Proposition Of Law III: The current version of R.C. 2929.20 does not adversely affect the Appellant's right to seek judicial release.

In his third proposition of law, the Appellant argues that judicial release is a right or privilege as contemplated by R.C. 1.58 and cannot be reduced or adversely affected by the amendment of a statute. The Appellant argues that, prior to the amended version of R.C. 2929.20, he could seek judicial release 180 days after he had served his mandatory sentence; thus, the amended version of R.C. 2929.20 adversely affected this privilege.

The current version of R.C. 2929.20 has neither reduced nor adversely affected the Appellant's ability to seek judicial release. He has not lost the statutory right to seek that postconviction relief. In fact, under the 2009 version of R.C. 2929.20, the Appellant was prevented from ever seeking judicial release while, under the current version, he can seek judicial release after serving four years. And that is the Appellant's real complaint; that he is not eligible to seek release after serving a mere 180 days. However, the 180-day time period is neither a right nor a privilege within the meaning of R.C. 1.58; it is merely procedural requirement. See *State v. Nelson*, 12th Dist. No. CA99-04-037, 1999 Ohio App. LEXIS 5120, p. *6 (Nov. 1, 1999) (A procedural requirement is neither a right nor a privilege protected by R.C. 1.58(A)).

Since the current version of R.C. 2929.20 does not adversely affect the Appellant's right to seek judicial release, his third proposition of law is without merit and this Court should not accept jurisdiction regarding it.

Response To Proposition Of Law IV: The Appellant's aggregate prison term was six years; thus, he was not eligible to seek judicial release when the Warren County Court of Common Pleas granted him judicial release.

In his fourth proposition of law, the Appellant cites *State v. Smith*, 2nd Dist. No. 20172, 2004-Ohio-3573, and argues that he was eligible to seek judicial release because he is serving two stated prison terms imposed by two different sentencing courts.

According to the version of R.C. 2929.20(C)(3) that was in effect at the time the Appellant was granted judicial release,

[i]f 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.

The State contends that the aggregate of the Appellant's prison terms is six years, including a one-year mandatory sentence, since the trial court specifically ordered the sentence in Case No. 09CR25923 to be served consecutively with the sentence in Case No. 09CR25764. Thus, the Appellant was not yet eligible to seek judicial release when he filed his motion, and he will not be eligible until he has served at least four years after the expiration of his one-year mandatory sentence. In other words, the Appellant's judicial release motion was untimely.

In *State v. Anderson-Melton*, 2nd Dist. No. 18703, 2001 Ohio App. LEXIS 5030 (Nov. 9, 2001), the Second Appellate District addressed what constituted an offender's prison term in the context of judicial release and when an offender can file for judicial release. In *Anderson-Melton*, the defendant was sentenced in September 1998 to three consecutive sentences: 12 months for Receiving Stolen Property; 11 months for Insurance Fraud; and 12 months for Illegal Use of Food Stamps. *Id.* at *1. The defendant, in September 2000, moved for judicial release. *Id.* In January 2001, the trial court granted

the defendant judicial release, and the State appealed. *Id.*

On appeal, the State argued that the trial court erred in granting judicial release since the defendant had failed to file her motion for judicial release within the required statutory time period. *Id.* The defendant argued before the trial court and the Second District that R.C. 2929.20(B)(1) provided a 60-day window in which to file a motion for judicial release that began 30 days after the commencement of each of her three consecutive sentences. *Id.* at *2. The State argued that the trial court erred when it adopted the defendant's position because the term "stated prison sentence" used in R.C. 2929.20 and defined in R.C. 2929.01(H)(H)³ included the combined prison terms such as the defendant's consecutive sentences. *Id.* at *3. Thus, the State argued that defendant had been required to seek judicial release no earlier than 30 days and no later than 90 days after she had been delivered to a state correctional institution to begin her sentence, rendering her judicial release motion in September 2000 untimely. *Id.*

The Second District rejected the defendant's argument, holding

R.C. 2929.01(HH) defines "stated prison term" as "the prison term, mandatory prison term, or combination of all prison terms and mandatory prison terms imposed by the sentencing court ***." In our view, the R.C. 2929.20(B)(1) provision for judicial release, when read in conjunction with R.C. 2929.01(HH), clearly does not allow for the filing of motions for judicial release at the outset of each sentence in a string of consecutive sentences. It expressly provides that a combination of prison terms, such as a series of consecutive sentences, be treated as one "stated prison term," not as multiple terms. Moreover, in R.C. 2929.20(B)(1), the time for filing a motion for judicial release is triggered by delivery to a state correctional institution, and we cannot reasonably conclude that [the defendant] was "delivered" to prison each time she began a new portion of her sentence. We have reached similar conclusions in analogous shock probation cases in the past. See, e.g., *State v. Hatfield* (1990), 61 Ohio App. 3d 427, 572 N.E.2d 842; *State v. Hartzell*, 1998 Ohio App. LEXIS 2834 (June 26, 1998) Montgomery App. No. 16879, unreported; *State v. Humphrey*, 1992 Ohio App. LEXIS 1579 (Mar. 25, 1992) Montgomery App. No. 12952,

³ In 2000, "stated prison term" was defined in R.C. 2929.01(H)(H). In 2011, when the Appellant filed his judicial release motion, "stated prison term" was defined in R.C. 2929.01(F)(F). The definitions in 2000 and in 2011 were the same.

unreported. Although the legislature could have chosen to provide a mechanism whereby those serving consecutive sentences could file a motion for judicial release after some of the sentences had been served, rather than at the outset, it has not done so. We are unpersuaded that the statute is ambiguous or subject to multiple interpretations, as [the defendant] suggests. Thus, the trial court erred in granting [the defendant's] motion for judicial release.

Id. at *4-*5 (emphasis added.).

In light of *Anderson-Melton* and the plain meaning of R.C. 2929.01(F)(F), the Appellant's stated prison term was the combination of all prison terms and mandatory prison terms that were imposed by the Warren County Court of Common Pleas on November 6, 2009. See also O.A.C.⁴ 5120-2-03.1(F) ("When consecutive stated prison terms are imposed, the term to be served is the aggregate of all of the stated prison terms so imposed."). In other words, the Appellant's stated prison term was six years: two years for Robbery in 09CR25764; one mandatory year for the gun specification in 09CR25764; and three years for Felonious Assault in 09CR25923, all to be served consecutively. Since the Appellant's stated prison term was six year, he was not yet eligible to seek judicial release when he filed his motion in July 2011, rendering his motion premature. Thus, the trial court misinterpreted R.C. 2929.01(F)(F), misapplied R.C. 2929.20, erred when it found that the Appellant was eligible to seek judicial release, and erred when it granted the Appellant judicial release.

In his fourth proposition, the Appellant relies on *State v. Smith*, 2004-Ohio-3573. In *Smith*, the Montgomery County Court of Common Pleas sentenced the defendant to serve four years in prison for two counts of Aggravated Robbery in December 2000. *Id.* at ¶3. At the time, the defendant had charges pending in Clermont County. *Id.* The defendant pled guilty to Robbery in Clermont County and was sentenced to five years in prison. *Id.* The Clermont County Court of Common Pleas ordered the defendant's five-

⁴ Ohio Administrative Code.

year sentence to be served consecutively with his four-year sentence from Montgomery County, totaling nine years in prison. *Id.*

In May 2003, the defendant moved the Montgomery County Court of Common Pleas for judicial release. *Id.* at ¶4. The State objected, arguing that the defendant was not yet eligible to seek judicial release since he had yet to serve five years of his nine-year sentence. *Id.* The Montgomery County Court of Common Pleas disagreed with the State and granted the defendant judicial release. *Id.*

On appeal to the Second Appellate District, the State argued that the trial court should have combined the prison terms imposed by Montgomery County and Clermont County in order to determine the defendant's "stated prison term," which would have resulted in the defendant's judicial release motion being premature. *Id.* at ¶16.

The Second District rejected the State's argument, holding

[w]e cannot give the statute this construction. Both in R.C. 2929.20 and in R.C. 2929.01(GG) the phrase "the sentencing court" is in the singular. Only one court is being referred to. Furthermore, we doubt that the General Assembly intended to give any trial court other than the trial court that imposed the sentence the authority to reduce the offender's stated prison term. If we were to give the statute the construction the State is seeking, in which the phrase "the sentencing court" is construed as including all courts that have imposed sentences upon the offender, then we could contemplate a situation where one court, the Montgomery County Common Pleas Court, for example, has imposed a one-year sentence of imprisonment, and another court, the Clermont County Common Pleas Court, for example, has imposed an eight-year sentence of imprisonment, with the sentences to be served consecutively, then, five years into the offender's sentence, either court, including, for example, the Montgomery County Common Pleas Court, could reduce the aggregate prison term imposed by both courts, and release the offender. We cannot believe that the General Assembly intended that result.

Id. at ¶17.

The holding in *Smith* does not apply since this present case is significantly different. In *Smith*, the defendant's consecutive sentences originated from two different counties, Montgomery and Clermont. In this case, the Appellant's consecutive sentences originated,

on the same day at the same hearing, from one county and from one court. Further, the *Smith* Court rejected the prosecution's argument since adopting it would have resulted in one county's common pleas court being able to reduce a sentence imposed by another county's common pleas court, which the *Smith* Court concluded was contrary to the General Assembly's intent. However, the *Smith* Court's concern is not present in this case since only one court, the Warren County Court of Common Pleas, imposed the Appellant's consecutive sentences. Given the differences, the *Smith* case simply does not offer the Appellant any relief in this case.

Since the Warren County Court of Common Pleas sentenced the Appellant in both Case No. 09CR25764 and Case No. 09CR25923 and specifically ordered the sentence in 09CR25923 to run consecutively with the sentences in 09CR25764, there was only one sentencing court in this case. So the Appellant's "stated prison term" was six years, including a one-year mandatory sentence. Since the nonmandatory part of his sentence was five years, the Appellant is required, pursuant to R.C. 2929.20(C)(3), to serve four years after the expiration of his one-year mandatory sentencing before he will be eligible to seek judicial release.

Since the Appellant was not eligible to seek judicial release when he filed his motion, his fourth proposition of law is without merit and this Court should not accept jurisdiction regarding it.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Warren County Court of Appeals, Twelfth Appellate District, and neither accept jurisdiction nor grant leave for the appeal of Clinton N. Strunk since his propositions of law lack merit. Moreover, this Court should not accept jurisdiction over this appeal because the Appellant has neither raised a substantial constitutional question nor presented an issue of public or great general interest.

Respectfully submitted,



MICHAEL GREER, #0084352

Assistant Prosecuting Attorney
Warren County Prosecutor's Office
500 Justice Drive
Lebanon, Ohio 45036
(513) 695-1325

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing was mailed by Ordinary mail to the Defendant-Appellant's counsel, Mr. William G. Fowler, Fowler, Demos, & Stueve, 12 West South Street, Lebanon, Ohio 45036 on this 31st day of December, 2012.



MICHAEL GREER, #0084352
Assistant Prosecuting Attorney