

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case Nos. 2012-1325 and 2012-1441
Plaintiff-Appellee,	:	
	:	On appeal from the Wyandot
v.	:	County Court of Appeals,
	:	Third Appellate District
HENRY ALLEN HOLDCROFT,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 16-10-13

MERIT BRIEF OF APPELLANT HENRY ALLEN HOLDCROFT

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STATEMENT OF THE CASE AND FACTS

In 1999, Henry Allen Holdcroft was convicted of one count of first-degree-felony aggravated arson, a violation of R.C. 2909.02(A)(3), and one count of third-degree-felony arson, a violation of R.C. 2909.03(A)(4). (Sept. 13, 1999, Sentencing Entry). Those convictions arose from the same indictment. (Nov. 13, 1998, Indictment). Mr. Holdcroft was sentenced to a ten-year term of imprisonment regarding the aggravated-arson offense, and a five-year term of imprisonment regarding the arson offense. (Sept. 13, 1999, Sentencing Entry). According to the trial court: “[T]he sentence imposed for Count Three [arson] shall be served consecutively to the sentence imposed for Count One [aggravated arson].” (Sept. 13, 1999, Sentencing Entry). Further, Mr. Holdcroft’s ten-year sentence for first-degree-felony aggravated arson was mandatory due to his previous conviction for first-degree-felony burglary. (Sept. 13, 1999, Sentencing Entry). With regard to the imposition of postrelease control, the trial court stated that “a period of post-release control shall be imposed.” (Sept. 13, 1999, Sentencing Entry). And the trial court explained that sanctions could be imposed if Mr. Holdcroft violated his postrelease-control conditions. (Sept. 13, 1999, Sentencing Entry).

Over the next ten years, Mr. Holdcroft unsuccessfully challenged his convictions and sentences. Then, after Mr. Holdcroft served his ten-year, mandatory prison term regarding the aggravated arson offense, and while he was serving the five-year term of imprisonment for the arson offense, the State of Ohio filed a motion to correct the trial court’s erroneous imposition of postrelease control under R.C. 2929.191. (Dec. 11, 2009, State’s Motion). And less than a month later, the State filed a motion through which it requested a de novo sentencing hearing under this Court’s decision in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958. (Dec. 30, 2009, State’s Motion).

The trial court conducted a de novo sentencing hearing in January 2010. (Jan. 26, 2010, Resentencing Hearing Tr.). The trial court sentenced Mr. Holdcroft to the same terms of imprisonment, to be served consecutively. (Feb. 2, 2010, Sentencing Entry). Further, the trial court notified Mr. Holdcroft that he would be subject to five years of mandatory postrelease control regarding his first-degree-felony aggravated-arson offense, and three years of discretionary postrelease control regarding his third-degree-felony arson offense. (Feb. 2, 2010, Sentencing Entry). Finally, the trial court ordered that restitution be paid to the victims. (Feb. 2, 2010, Sentencing Entry).

Mr. Holdcroft filed a timely notice of appeal. (Feb. 12, 2010, Notice of Appeal). He presented to the Third District Court of Appeals an assignment of error that addressed the postrelease-control-imposition issue that is now before this Court. (Sept. 20, 2010, Opinion and Judgment Entry, ¶ 14). But the court of appeals dismissed Mr. Holdcroft's appeal for lack of a final appealable order because the trial court had failed to properly allocate the restitution amounts to be paid. (Sept. 20, 2010, Opinion and Judgment Entry, ¶ 14).

Thereafter, the trial court issued a nunc pro tunc sentencing entry that corrected its restitution-imposition errors. (Nov. 16, 2010, Sentencing Entry). Mr. Holdcroft filed a timely notice of appeal. (Nov. 29, 2010, Notice of Appeal).

On appeal, Mr. Holdcroft again challenged the trial court's jurisdiction to impose the five-year mandatory period of postrelease control because Mr. Holdcroft had served the ten-year prison term associated with that offense. (Feb. 18, 2011, Merit Brief, at pp. 7-8; Apr. 21, 2011, Reply Brief, at pp. 3-4). In a 2-1 decision, the court of appeals overruled that assignment of error. *See generally State v. Holdcroft*, 3d Dist. No. 16-10-13, 2012-Ohio-3066, 973 N.E.2d 334. According to the panel's majority:

For the reasons that follow, we conclude that the words “prison term” and “sentence” as used by the Ohio Supreme Court in *Hernandez* and the cases that follow it mean the entire journalized sentence for all convictions (Counts) in the case, i.e. the aggregate sentence; and therefore, the trial court sub judice had jurisdiction to impose the mandatory five-year term of PRC on Holdcroft’s aggravated arson conviction (Count One).

* * *

Since Holdcroft had not yet completed his aggregate fifteen-year sentence before the resentencing hearing was held, the trial court had jurisdiction to sentence him to five years of mandatory PRC on his aggravated arson conviction (Count One).

Holdcroft at ¶ 30, 44. But according to the dissenting judge: “I would sustain the first assignment of error and find that the trial court was without the authority to impose the mandatory five-year term of postrelease control required for the aggravated arson conviction due to the fact that Holdcroft had already served his sentence for that offense.” *Id.* at ¶ 59 (Shaw, J., dissenting). The details of the appellate court’s holdings will be discussed below. The court of appeals unanimously overruled the remainder of Mr. Holdcroft’s assignments of error. *See generally id.*

Through counsel, Mr. Holdcroft filed with the court of appeals a motion to certify a conflict and asked the court to acknowledge that its holding regarding Mr. Holdcroft’s postrelease-control-imposition issue conflicted with holdings of the Eighth District Court of Appeals. (July 11, 2012, Motion to Certify). The court of appeals agreed that its judgment in Mr. Holdcroft’s case is in conflict with the judgment rendered by the Eighth District Court of Appeals in *State v. Dresser*, 8th Dist. No. 92105, 2009-Ohio-2888, *rev’d on other grounds*, *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110. (Aug. 16, 2012, Judgment Entry). The court of appeals then certified the following question:

Does a trial court have jurisdiction to resentence a defendant for the purpose of imposing mandatory postrelease control regarding a particular conviction, when the defendant has served the stated prison term regarding that conviction, but has

yet to serve the entirety of the aggregate prison sentence, when all of the convictions which led to the aggregate sentence resulted from a single indictment?

(Aug. 16, 2012, Judgment Entry, at p. 1).

Mr. Holdcroft, through undersigned counsel, filed with this Court a notice of certified conflict regarding the certified question. (Aug. 23, 2012, Notice of Certified Conflict, Case No. 2012-1441). This Court determined that a conflict exists and ordered briefing on the certified question. (Oct. 10, 2012, Entry, Case No. 2012-1441).

Acting pro se, Mr. Holdcroft filed a notice of appeal and memorandum in support of jurisdiction that presented the certified-conflict-issue to this Court. (Aug. 8, 2012, Notice of Appeal, Case No. 2012-1325; Aug. 8, 2012, Memorandum, at pp. 13-14, Case No. 2012-1325). This Court accepted Mr. Holdcroft's discretionary appeal on that issue (Proposition of Law IX). (Oct. 10, 2012, Entry, Case No. 2012-1325). Mr. Holdcroft's motion for reconsideration regarding certain other propositions of law was overruled. (Nov. 28, 2012, Reconsideration Entry, Case No. 2012-1325).

This Court consolidated Mr. Holdcroft's certified-conflict and discretionary-appeal cases and ordered that briefing be consolidated. (Oct. 10, 2012, Entry, Case No. 2012-1325; Oct. 10, 2012, Entry, Case No. 2012-1441). Undersigned counsel now represents Mr. Holdcroft in his consolidated cases before this Court.

ARGUMENT

Certified-Conflict Question: Does a trial court have jurisdiction to resentence a defendant for the purpose of imposing mandatory postrelease control regarding a particular conviction, when the defendant has served the stated prison term regarding that conviction, but has yet to serve the entirety of the aggregate prison sentence, when all of the convictions which led to the aggregate sentence resulted from a single indictment?

Proposition of Law:¹ When convictions resulting from a single indictment lead to a defendant's aggregate prison sentence, a trial court may not resentence the defendant for the purpose of imposing mandatory postrelease control regarding a particular conviction if the defendant has finished serving the prison term for that conviction, even if the defendant has not served the entirety of the aggregate sentence that included the expired prison term.

I. Introduction.

The issues presented by the certified-conflict question and Mr. Holdcroft's proposition of law are the same. The certified-conflict question should be answered in the negative. And this Court should adopt Mr. Holdcroft's proposition of law.

In Ohio, when a defendant has been found guilty of multiple offenses, individual sentences must be given for each of the offenses. Only then can a trial court consider whether the individual sentences should be served consecutively to one another. A "lump-sum" approach to sentencing is unlawful. The General Assembly has stated so with clarity, and this Court has acknowledged that truth and the legislature's reasons for doing so. The prohibition against such sentencing is illustrative of how the trial court erred in Mr. Holdcroft's case.

¹ This Court accepted Mr. Holdcroft's ninth proposition of law for discretionary review. (See Oct. 10, 2012, Entry, Case No. 2012-1325). Mr. Holdcroft filed his memorandum in support of jurisdiction pro se, and his ninth proposition of law was presented as follows: "The Court lack [sic] jurisdiction to impose mandatory post-release control upon the Appellant." (Aug. 8, 2012, Memorandum, at pp. 13-14, Case No. 2012-1325). To reflect a proposition of law, as opposed to an assignment of error, counsel has recast Mr. Holdcroft's pro se ninth proposition of law.

It is undisputed that Mr. Holdcroft had served the entirety of his ten-year sentence for first-degree-felony aggravated arson by the time that the trial court resentenced him and imposed a five-year period of mandatory postrelease control regarding that offense. All that was left of Mr. Holdcroft's aggregate prison sentence was the remainder of his five-year prison term for third-degree-felony arson. And in Ohio, a third-degree-felony arson conviction cannot trigger the imposition of five years of mandatory postrelease control.

When the appellate court's majority held that the trial court had the authority to impose mandatory postrelease control against Mr. Holdcroft, it misconstrued the General Assembly's mandates and this Court's jurisprudence. The trial court had no jurisdiction to impose that sanction after Mr. Holdcroft had served his aggravated-arson prison sentence. Further, the court of appeals unnecessarily weighed in on the purported "policy" behind Ohio's postrelease-control statutes. Simply, in the context of the issues before this Court, the pertinent statutes were written with plain language and this Court's applicable holdings are sound.

The decisions of the Eighth District Court of Appeals regarding the issues presented herein are correct. And the dissenting judge in Mr. Holdcroft's case aptly explained why the trial court's actions were improper. The analyses employed by the Eighth District and the dissenting judge below were straight-forward, reflective of the legislature's directives, and considerate of this Court's applicable holdings. This Court should answer the certified question in the negative, adopt Mr. Holdcroft's proposition of law, and vacate the trial court's imposition of five years of mandatory postrelease control against Mr. Holdcroft.

II. Ohio's sentencing statutes demonstrate that the trial court lacked the authority to impose a mandatory five-year period of postrelease control against Mr. Holdcroft regarding his aggravated-arson offense because Mr. Holdcroft had served the prison term associated with that offense by the time that he was resentenced.

There can be no legitimate dispute whether Mr. Holdcroft had served the entirety of his ten-year sentence for aggravated arson by the time that the trial court resentenced him in 2010. (See Sept. 13, 1999, Sentencing Entry; Feb. 2, 2010, Sentencing Entry; Jan. 26, 2010, Resentencing Hearing Tr.). When the trial court originally sentenced Mr. Holdcroft, it stated: “[T]he sentence imposed for Count Three [arson] shall be served consecutively to the sentence imposed for Count One [aggravated arson].” (Sept. 13, 1999, Sentencing Entry). And Mr. Holdcroft’s ten-year sentence for first-degree-felony aggravated arson was mandatory due to his previous conviction for first-degree-felony burglary. (Sept. 13, 1999, Sentencing Entry). The trial court reiterated those facts when it sentenced Mr. Holdcroft de novo in 2010. (Feb. 2, 2010, Sentencing Entry; Nov. 16, 2010, Sentencing Entry). And the court of appeals acknowledged that Mr. Holdcroft’s ten-year sentence expired before he was resentenced. See *Holdcroft* at ¶ 28 (“Thus, over ten years but less than fifteen years transpired between the time of the sentencing and the resentencing hearings.”); *Id.* at ¶ 50 (Shaw, J., dissenting) (“My first concern is that the majority decision disregards the specific terms of the judgment entry of sentence in this case, which, as even the majority concedes, clearly indicates that the ten year prison term for count one would be served prior to the remaining prison terms. . . .”).

The court of appeals explained the issue before this Court succinctly: “The issue sub judice is whether the trial court was without jurisdiction to impose five years of mandatory PRC on Holdcroft’s aggravated arson conviction (Count One) at the resentencing hearing because Holdcroft had already served ‘the prison term ordered by the trial court.’” *Id.* at ¶ 30. But the court’s majority overcomplicated its analysis and construed Ohio’s sentencing provisions

erroneously. *See id* at ¶ 30-44. The dissenting judge, however, provided a careful analysis of those authorities. *See id* at ¶ 47-59 (Shaw, J., dissenting).

In *State v. Cook*, 128 Ohio St.3d 120, 2010-Ohio-6305, 942 N.E.2d 357, ¶ 31, this Court discussed the importance of applying plain-language analysis when reviewing a statute:

“In construing a statute, a court’s paramount concern is the legislative intent. In determining legislative intent, the court first reviews the applicable statutory language and the purpose to be accomplished.” *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, 876 N.E.2d 546, ¶ 20, quoting *State ex rel. Watkins v. Eighth Dist. Court of Appeals* (1998), 82 Ohio St.3d 532, 535, 1998-Ohio-190, 696 N.E.2d 1079. Courts are “required to apply the plain language of a statute when it is clear and unambiguous.” *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, 928 N.E.2d 434, ¶ 14, citing *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9.

A statute “may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act.” *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004-Ohio-6549, 819 N.E.2d 1079, ¶ 13, quoting *Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948), paragraph five of the syllabus. “[T]o understand a particular word used in a statute, a court is to read it in context and construe it according to the rules of grammar and common usage.” *Rhodes v. City of New Phila.*, 129 Ohio St.3d 304, 2011-Ohio-3279, 951 N.E.2d 782, ¶ 17, citing R.C. 1.42.

Ohio’s sentencing statutes provide binding authority as to why Mr. Holdcroft could not be subjected to mandatory postrelease control after he served his first-degree-felony prison sentence. Under R.C. 2929.01(DD): “‘Sanction’ means any penalty imposed upon an offender who is convicted of or pleads guilty to *an offense*, as punishment for *the offense*. ‘Sanction’ includes any sanction imposed pursuant to any provision of sections 2929.14 to 2929.18 or 2929.24 to 2929.28 of the Revised Code.” (Emphasis added.) *Id.* And under R.C. 2929.01(EE) (formerly R.C. 2929.01(FF)), “‘Sentence’ means *the sanction or combination of sanctions*

imposed by the sentencing court on an offender who is convicted of or pleads guilty to *an offense.*” (Emphasis added.) R.C. 2929.01(EE).

As such, the General Assembly plainly directed that a “sentence,” which is composed of “sanctions,” may be levied toward “an offense.” The legislature simply did not permit trial courts to impose sanctions in a lump-sum fashion and attach them across multiple offenses. And postrelease control is a “sanction” under Ohio law. *See* R.C. 2929.14(D)(1); R.C. 2929.19(B)(2)(c)-(e).

Further, the plain language of Ohio’s postrelease-control-imposition statutes reflect the errors that permeate the majority opinion in Mr. Holdcroft’s case. Under R.C. 2929.14(D):

If a court imposes a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender’s release from imprisonment, in accordance with that division.

See also R.C. 2929.19(B)(2)(c)-(e). That is, the legislature knew that under Ohio law, sentences, which are comprised of sanctions, are to be meted out for *individual offenses*. And mandatory postrelease control is one of the sanctions that attaches to felonies of the first degree. Only after a trial court hands down its sanctions for an individual offense can the trial court determine that sentences for multiple offenses are to be served consecutively. But even if a trial court determines that consecutive sentences are necessary, the law does not convert the imposition of mandatory postrelease control for *an individual offense* into the imposition of postrelease control *for all offenses* of which the defendant has been convicted. And R.C. 2967.28(B) reflects the General Assembly’s plain-language directive that postrelease control must attach to a specific, enumerated *offense*:

Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. . . . Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this division for an offender shall be of one of the following periods:

- (1) For a felony of the first degree or for a felony sex offense, five years;
- (2) For a felony of the second degree that is not a felony sex offense, three years;
- (3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years.

Because Mr. Holdcroft had served his term of imprisonment for aggravated arson, the trial court had no statutory authority to impose five years of mandatory postrelease control regarding *that offense*. And contrary to the appellate court's conclusion, the terms "prison term" and "sentence," as used by this Court in *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301 and its progeny, do *not* mean the entire journalized sentence for all offenses in a given case. See *Holdcroft* at ¶ 30-44.

III. This Court's jurisprudence interpreting Ohio's sentencing statutes precludes the holdings reached by the appellate court's majority.

According to the appellate court's majority:

For the reasons that follow, we conclude that the words "prison term" and "sentence" as used by the Ohio Supreme Court in *Hernandez* and the cases that follow it mean the entire journalized sentence for all convictions (Counts) in the case, i.e. the aggregate sentence; and therefore, the trial court sub judice had jurisdiction to impose the mandatory five-year term of PRC on Holdcroft's aggravated arson conviction (Count One).

Holdcroft at ¶ 30. The analysis conducted by the lower court's majority in coming to that conclusion was fundamentally flawed.

Under R.C. 2929.01(BB)(1), a “prison term” includes a “stated prison term.” And under R.C. 2929.01(FF), a “stated prison term” includes “the prison term, mandatory prison term, or combination of all prison terms and mandatory prison terms imposed by the sentencing court pursuant to section 2929.14, 2929.142, or 2971.03 of the Revised Code or under section 2919.25 of the Revised Code.” While the majority acknowledged those statutory definitions, it misapplied them in the context of Ohio’s postrelease-control provisions and this Court’s holdings regarding those provisions. *See Holdcroft* at ¶ 33-44.

Indeed, Ohio’s mandatory-postrelease-control-imposition statutes, R.C. 2929.14(D), R.C. 2929.19(B)(2), and R.C. 2967.28(B), employ the phrase “prison term.” But in that context, the General Assembly merely indicated that if an individual is sentenced to a “prison term” for an offense that triggers mandatory postrelease control, the mandatory postrelease control attaches to the triggering offense specifically. Moreover, the appellate court’s majority ignored this Court’s applicable postrelease-control jurisprudence.

“When sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about postrelease control and is further required to incorporate that notice into its journal entry imposing sentence.” *Hernandez* at ¶ 15, quoting *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph one of the syllabus. “A sentence that does not include the statutorily mandated term of postrelease control is void.” *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.3d 332, paragraph one of the syllabus.

Importantly, when “a defendant is convicted of or pleads guilty to *one or more offenses* and postrelease control is not properly included *in a sentence for a particular offense*, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for *that*

particular offense.” (Emphasis added.) *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, syllabus. But a defendant that “has already served the prison term ordered by the trial court . . . cannot be subject to resentencing in order to correct the trial court’s failure to impose postrelease control.” *Bezak* at ¶ 18; *see also Hernandez* at ¶ 32 (“In that his sentence has expired, Hernandez is entitled to the writ and release from prison and from further postrelease control.”); *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 28 (“Because Cruzado’s sentence had not yet been completed when he was resentenced, Judge Zaleski was authorized to correct the invalid sentence to include the appropriate, mandatory postrelease-control term.”); *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, syllabus (“In cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence.”); *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 70 (“[O]nce an offender has completed the prison term imposed in his original sentence, he cannot be subjected to another sentencing to correct the trial court’s flawed imposition of postrelease control.”).

In reaching those conclusions, this Court avoided the flaw inherent in the majority’s opinion in Mr. Holdcroft’s case. That is, in Ohio, criminal sentencing is offense specific. And the dissenting judge in Mr. Holdcroft’s case explained why this Court’s jurisprudence disallowed the holding that was reached by the lower court’s majority.

Notably, the Supreme Court also appears to apply this offense-specific approach to sentencing in the context of postrelease control. In *Bezak*, the Supreme Court expressly stated in its syllabus that “[w]hen a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included *in a sentence for a particular offense*, the sentence is void. The offender is entitled

to a new sentencing hearing *for that particular offense.*” *Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, syllabus.

It is also notable that the Supreme Court in *Fischer* limited its decision to only overrule a specific portion of *Bezak*. The Supreme Court made it clear that it revisited “*only one component of the holding in Bezak, and we overrule only that portion of the syllabus that requires a complete resentencing hearing rather than a hearing restricted to the void portion of the sentence.*” *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 36, 942 N.E.2d 332. Thus, the Supreme Court left intact its approach to analyze *a sentence for a particular offense* when reviewing whether a defendant is entitled to be resentenced for purposes of the trial court properly imposing postrelease control.

(Emphasis sic.) *Holdcroft* at ¶ 53-54 (Shaw, J., dissenting).

But further, the trial court engaged in sentence packaging, and this Court’s disapproval of a lump-sum approach to sentencing illustrates why the majority opinion below was wrong. *See State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 8-9. In *Saxon*, this Court addressed a portion of Ohio’s felony sentencing scheme that is remarkably similar to Ohio’s postrelease-control scheme:

But the rationale for “sentence packaging” fails in Ohio where there is no potential for an error in the sentence for one offense to permeate the entire multicount group of sentences. *Ohio’s felony-sentencing scheme is clearly designed to focus the judge’s attention on one offense at a time.* Under R.C. 2929.14(A), the range of available penalties depends on the degree of each offense. For instance, R.C. 2929.14(A)(1) provides that “[f]or a *felony* of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.” (Emphasis added.) R.C. 2929.14(A)(2) provides a different range for second-degree felonies. In a case in which a defendant is convicted of two first-degree felonies and one second-degree felony, the statute leaves the sentencing judge no option but to assign a particular sentence to *each* of the three offenses, *separately*. The statute makes no provision for grouping offenses together and imposing a single, “lump” sentence for multiple felonies.

(First emphasis added.) *Saxon* at ¶ 8. And “[o]nly after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively.” *Id.* at ¶ 9.

Again, Ohio's felony-sentencing scheme is offense specific, and the penalties that can be imposed change based on the degree of the felony offense. *See* R.C. 2929.14. Likewise, Ohio's postrelease-control statutes are offense specific, and the type and length of postrelease control that can be imposed shifts depending on the degree of the felony offense. *See* R.C. 2967.28(B). Not only did the appellate court's majority in Mr. Holdcroft's case vitiate this Court's jurisprudence, it did so in a way that allowed "an error in the sentence for one offense" to permeate the entire multi-count group of sentences. *See Saxon* at ¶ 8.

That is, the appellate court's majority held that even though Mr. Holdcroft was serving only the remainder of his third-degree-felony arson sentence—which subjected him to only three years of optional postrelease control—the trial court's 1999 errors regarding the first-degree-felony could be corrected. Under R.C. 2929.01, R.C. 2929.14, R.C. 2929.19, R.C. 2967.28, and this Court's holdings in *Hernandez*, *Jordan*, *Fischer*, *Bezack*, *Cruzado*, *Simpkins*, *Bloomer*, and *Saxon*, that conclusion cannot be upheld.

Further, this Court has already rejected the lower court's interpretation of Ohio's plainly-worded sentencing definitions:

R.C. 2929.01(FF) defines a sentence as "the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense." Appellee in the case at bar points to the "combination of sanctions" language in this definition and urges us to find that that language necessarily indicates that a "sentence" includes all sanctions given for all offenses and is not limited to the sanction given for just one offense. But a trial court may impose a combination of sanctions on a single offense, for example, a fine and incarceration. *See* R.C. 2929.15 to 2929.18; *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶45. Therefore, appellee's insistence that the "combination of sanctions" language supports his contentions is misplaced. This language merely recognizes the availability of multiple sanctions for a single offense.

Further, the statute explicitly defines "a sentence" as those sanctions imposed for "an offense." (Emphasis added.) The use of the articles "a" and "an" modifying "sentence" and "offense" denotes the singular and does not allow for the position

urged by appellee. A finding that the statute intended to package the sanctions for all sentences into one, appealable bundle would ignore the plain meaning of the statutory language: a sentence is the sanction or combination of sanctions imposed on each separate offense. If the legislature had intended to package sentencing together, it easily could have defined “sentence” as the sanction or combination of sanctions imposed for all offenses.

Saxon at ¶ 11-12.

Indeed, “[n]owhere in R.C. 2967.28 does the legislature direct a court to treat a ‘sentence’ or a ‘prison term’ as the aggregate sentence arising from the case for purposes of imposing postrelease control.” *Holdcroft* at ¶ 56 (Shaw, J., dissenting). Rather, the General Assembly enacted the opposite. The majority’s holding violated this Court’s proper acknowledgement that sentencing in Ohio is offense specific. This Court’s answer to the certified-conflict question should be “no.” And this Court should adopt Mr. Holdcroft’s proposition of law and reverse the judgment of the court of appeals.

IV. The appellate court’s majority focused on inapposite case law and expressed unnecessary policy concerns in reaching its erroneous decision. The decision of the Eighth District Court of Appeals in *Dresser* was correct.

Under Ohio’s statutory sentencing scheme and this Court’s jurisprudence, the trial court lacked jurisdiction to impose mandatory postrelease control against Mr. Holdcroft regarding his aggravated-arson conviction because Mr. Holdcroft had completed the prison sentence associated with that conviction by the time that the postrelease control was imposed. But further, the appellate court’s attempts to distinguish the issues involved in Mr. Holdcroft’s case from those that prompted this Court’s holdings in *Hernandez*, *Bezak*, and *Bloomer*, were unavailing. *See Holdcroft* at ¶ 31-36.

In those cases, this Court acknowledged the fact that Ohio’s sentencing scheme is offense specific. *See Bezak* ¶ 18 (holding that when a defendant that “has already served the prison term ordered by the trial court . . . cannot be subject to resentencing in order to correct the trial court’s

failure to impose postrelease control”); *Hernandez* at ¶ 32 (“In that his sentence has expired, Hernandez is entitled to the writ and release from prison and from further postrelease control.”); *Bloomer* at ¶ 70 (“[O]nce an offender has completed the prison term imposed in his original sentence, he cannot be subjected to another sentencing to correct the trial court’s flawed imposition of postrelease control.”). Moreover, the issue before this Court is well-framed. And as demonstrated herein, appellate districts that have ruled similarly to the court’s majority in *Holdcroft* were wrong.

But further, the court of appeals erroneously shifted its analysis to “policy” considerations regarding the imposition of postrelease control in Ohio, when again, Ohio’s sentencing statutes speak for themselves. *See Holdcroft* at ¶ 32-43. True, Ohio has substantial interests in assuring that defendants serve mandated postrelease control, and that defendants receive notice of the potential consequences of violating postrelease control before release from imprisonment. *See id.* at ¶ 35-43; *see also* R.C. 2929.19; R.C. 2929.191. But that is not the issue before this Court. Rather, this case is about a trial court’s authority to *impose* postrelease control at all, and when it must do so. *See* R.C. 2929.14; R.C. 2967.28; *Bezak* ¶ 18; *Hernandez* at ¶ 32; *Bloomer* at ¶ 70; *Simpkins* at syllabus. And because Ohio’s sentencing statutes and this Court’s holdings make clear that sentencing is offense specific, and that postrelease control must be imposed regarding a particular conviction before the prison sentence has expired regarding that particular conviction, the appellate court’s policy-based analysis was misplaced.

Finally, the decision of the Eight District Court of Appeals in *Dresser* was correct. *See Dresser* at ¶ 7-11; *see also State v. Cobb*, 8th Dist. No. 93404, 2010-Ohio-5118, ¶ 13-17; *State v. O’Hara*, 8th Dist. No. 95575, 2011-Ohio-3060, ¶ 4-11. As noted by the appellate court in *Dresser*:

The State also argues, however, that the trial court can impose postrelease control because Dresser is still in prison on the rape charges. In support of its argument, the State cites to R.C. 2967.28(D)(1), which states in pertinent part:

“Before the prisoner is released from imprisonment, the parole board shall impose upon a prisoner . . . one or more postrelease control sanctions upon a prisoner.” (Emphasis added).

This section dictates when the parole board must advise the defendant of the length of his postrelease control, *not when the court must notify the defendant that postrelease control is part of the sentence. The prisoner obviously must be informed prior to being released of the length of his or her postrelease control. However, unless a trial court includes notice of postrelease control in its sentence, the Adult Parole Authority is without authority to impose it.* Consequently, we conclude this section does not impact the holding set forth by the Ohio Supreme Court that for the sentence to be valid, the trial court must notify the defendant of postrelease control at the sentencing hearing and include postrelease control in the sentencing entry, prior to the completion of the sentence.

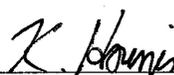
(Emphasis added.) (Footnotes omitted.) *Dresser* at ¶ 9-10; *see also Holdcroft* at ¶ 57-59 (Shaw, J., dissenting). Thus, the court in *Dresser* correctly identified that the pertinent consideration was a trial court’s jurisdiction to *impose* postrelease control. *See Dresser* at ¶ 9-10; *see also* R.C. 2929.14; R.C. 2967.28; *Bezak* ¶ 18; *Hernandez* at ¶ 32; *Bloomer* at ¶ 70; *Simpkins* at syllabus. That is also the pertinent consideration here. Under Ohio’s sentencing provisions and this Court’s case law, Mr. Holdcroft was erroneously subjected to five years of mandatory postrelease control because he had already served the prison sentence associated with that postrelease control by the time that it was imposed.

CONCLUSION

The trial court lacked jurisdiction to impose mandatory postrelease control against Mr. Holdcroft regarding his aggravated-arson conviction. This Court should answer the certified-conflict question in the negative, adopt Mr. Holdcroft's proposition of law, and reverse the judgment of the court of appeals.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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Assistant State Public Defender

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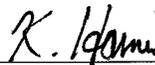
kristopher.haines@opd.ohio.gov

COUNSEL FOR APPELLANT,

HENRY ALLEN HOLDCROFT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MERIT BRIEF OF APPELLANT HENRY ALLEN HOLDCROFT was sent by regular U.S. mail to Jonathan K. Miller, Wyandot County Prosecuting Attorney, 137 South Sandusky Avenue, Upper Sandusky, Ohio 43351, on this 7th day of January, 2013.



KRISTOPHER A. HAINES (0080558)

Assistant State Public Defender

COUNSEL FOR APPELLANT,

HENRY ALLEN HOLDCROFT

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case Nos. 2012-1325 and 2012-1441
Plaintiff-Appellee,	:	
	:	On appeal from the Wyandot
v.	:	County Court of Appeals,
	:	Third Appellate District
HENRY ALLEN HOLDCROFT,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 16-10-13

APPENDIX TO

MERIT BRIEF OF APPELLANT HENRY ALLEN HOLDCROFT

IN THE SUPREME COURT OF OHIO

ORIGINAL

12-1325

STATE OF OHIO

Case No.

Plaintiff- Appellee,

ON APPEAL FROM THE
WYANDOT COUNTY COURT
OF APPEALS, THIRD
APPELLATE DISTRICT

-VS-

HENRY ALLEN HOLDCROFT

Defendant-Appellant.

C.A. Case No.16-10-13

NOTICE OF APPEAL OF HENRY ALLEN HOLDCROFT

Henry Allen Holdcroft, A381-888
Hocking Correctional Facility
16759 Snake Hollow Road
P.O. Box 59 A-2
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DEFENDANT-APPELLANT, PRO-SE

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COUNSEL FOR APPELLEE, STATE OF OHIO

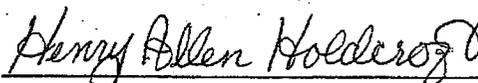
FILED
AUG 06 2012
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellant , Henry Allen Holdcroft

Appellant Henry Allen Holdcroft hereby gives Notice of appeal of the Supreme Court for the judgment of the Wyandot County Court of Appeals, Third District, entry in Court of Appeal case no. 16-10-13 on July 2, 2012.

The case raises a substantial constitutional question and is one pf public or great general interest.

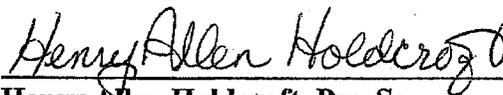
Respectfully Submitted,



Henry Allen Holdcroft, Pro-Se
Hocking Correctional Facility
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P.O. Box 59 A-2
Nelsonville, Ohio 45764

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. Mail to Jonathan K. Miller (0064743) for Appellee, at Wyandot County Prosecuting Attorney Offices 137 South Sandusky Avenue P.O. Box 26 Upper Sandusky, Ohio 43351 on this 1 day of August, 2012.



Henry Allen Holdcroft, Pro-Se

COUNSEL FOR APPELLANT

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 12-1441
vs.	:	On appeal from the Wyandot
	:	County Court of Appeals,
HENRY ALLEN HOLDCROFT,	:	Third Appellate District
	:	Case No. 16-10-13
Defendant-Appellant.	:	

NOTICE OF CERTIFIED CONFLICT

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COUNSEL FOR HENRY ALLEN HOLDCROFT

FILED

AUG 23 2012

CLERK OF COURT
 SUPREME COURT OF OHIO

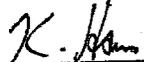
NOTICE OF CERTIFIED CONFLICT

Under S.Ct.Prac.R. 4.1, Defendant-Appellant Henry Allen Holdcroft gives notice that the Third District Court of Appeals, Wyandot County, has certified that its decision in *State v. Holdcroft*, 3d Dist. No. 16-10-13; 2012-Ohio-3066, is in conflict with the decision of the Eighth District Court of Appeals, Cuyahoga County, in *State v. Dresser*, 8th Dist. No. 92105, 2009-Ohio-2888. The judgment entry reflecting the appellate court's determination that a conflict exists and the conflicting decisions of the appellate courts are attached. The certified question is:

Does a trial court have jurisdiction to resentence a defendant for the purpose of imposing mandatory post-release control regarding a particular conviction, when the defendant has served the stated prison term regarding that conviction, but has yet to serve the entirety of his aggregate prison sentence, when all of the convictions which led to the aggregate sentence resulted from a single indictment?

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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COUNSEL FOR
HENRY ALLEN HOLDCROFT

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing NOTICE OF CERTIFIED CONFLICT was sent by regular U.S. mail to Jonathan K. Miller, Wyandot County Prosecuting Attorney, 137 South Sandusky Avenue, Upper Sandusky, Ohio 43351, on this 23rd day of August, 2012.



KRISTOPHER A. HAINES (0080558)
Assistant State Public Defender

COUNSEL FOR
HENRY ALLEN HOLDCROFT

#375011

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
WYANDOT COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 16-10-13

v.

HENRY ALLEN HOLDCROFT,

JUDGMENT
ENTRY

DEFENDANT-APPELLANT.

This cause comes on for determination of Appellant' motion to certify a conflict as provided in App.R. 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution.

Upon consideration the Court finds that the judgment in the instant case is in conflict with the judgment rendered in *State v. Dresser*, 8th Dist. No. 92105, 2009-Ohio-2888.

Accordingly, the motion to certify is well taken and only the following issue should be certified pursuant to App.R. 25:

Does a trial court have jurisdiction to resentence a defendant for the purpose of imposing mandatory post-release control regarding a particular conviction, when the defendant has served the stated prison term regarding that conviction, but has yet to serve the entirety of his aggregate prison sentence, when all of the convictions which led to the aggregate sentence resulted from a single indictment?

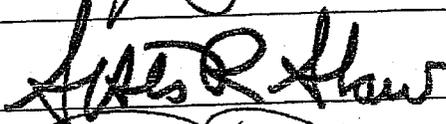
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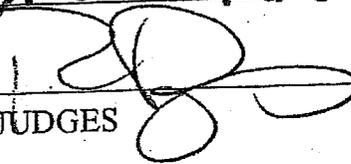
AUG 16 2012

Ann K. Danbar
CLERK OF COURTS
WYANDOT CO., OHIO

It is therefore **ORDERED** that Appellant's motion to certify a conflict be,
and hereby is, granted on the certified issue set forth hereinabove.







JUDGES

DATED: AUGUST 15, 2012
/hlo

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
WYANDOT COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 16-10-13

v.

HENRY ALLEN HOLDCROFT,

OPINION

DEFENDANT-APPELLANT.

Appeal from Wyandot County Common Pleas Court
Trial Court No. 98 CR 0044

Judgment Affirmed

Date of Decision: July 2, 2012

APPEARANCES:

Kristopher A. Haines for Appellant

Jonathan K. Miller for Appellee

COURT OF APPEALS
WYANDOT CO., OHIO
FILED

JUL - 2 2012

Ann K. Danbar
CLERK OF COURTS
WYANDOT CO., OHIO

PRESTON, J.

{¶1} Defendant-appellant, Henry Allen Holdcroft (hereinafter "Holdcroft"), appeals the November 16, 2010 judgment of the Wyandot County Court of Common Pleas resentencing him to include post-release control ("PRC") for a mandatory period of five years for aggravated arson and a discretionary period of up to three years for arson to be run concurrently to one another.

{¶2} On November 13, 1998, the Wyandot County Grand Jury indicted Holdcroft on three counts: Count One, aggravated arson in violation of R.C. 2909.02(A)(3), a first degree felony; Count Two, complicity to commit aggravated arson in violation of R.C. 2923.03(A)(1), a first degree felony; and Count Three, arson in violation of R.C. 2909.03(A)(4), a third degree felony. (Doc. No. 1). The charges stemmed from an incident where Holdcroft hired a third party to set fire to his then-wife's automobile and home.

{¶3} On June 9, 1999, the State filed a motion to dismiss Count Two of the indictment on the basis that the charge was an allied offense of similar import to Count One, aggravated arson. (Doc. No. 58). The trial court granted the State's motion to dismiss Count Two on June 25, 1999. (Doc. No. 79). On July 6-9, 1999, a jury trial was held on the remaining two counts of the indictment against Holdcroft. The jury returned guilty verdicts on both counts. (Doc. Nos. 106-07).

On July 29, 1999, the trial court filed a judgment entry of conviction. (Doc. No. 114).

{¶4} On September 10, 1999, the trial court sentenced Holdcroft to ten years imprisonment on Count One, aggravated arson, and five years imprisonment on Count Three, arson. The trial court ordered "that the sentence imposed for Count Three shall be served consecutively to the sentence imposed in Count One." (Sept. 13, 1999 JE, Doc. No. 116). Holdcroft was ordered to make restitution to the victim, Kathy Hurst, or the insurance carrier, in the sum of \$5,775.00, and \$400.00 to Eric Goodman. The trial court also notified Holdcroft "that a period of post-release control shall be imposed," and that if he violated his post-release control further restrictions upon his liberty could follow as a consequence. (*Id.*) Holdcroft was also taxed with the costs of prosecution and all other fees permitted under R.C. 2929.18(A)(4). This entry was journalized on September 13, 1999. (*Id.*)

{¶5} On September 14, 1999, Holdcroft, pro se, filed a notice of appeal. (Doc. No. 117). The trial court appointed appellate counsel, and the appeal was assigned case no. 16-99-04. (Doc. No. 124). On appeal, Holdcroft asserted one assignment of error, arguing that his convictions were against the manifest weight of the evidence. *State v. Holdcroft* (Mar. 31, 2000), 3d Dist. No. 16-99-04. The State also appealed the judgment of the trial court regarding "other acts" evidence

that was excluded from trial. This Court subsequently overruled Holdcroft's assignment of error, sustained the State's assignment of error, and upheld the convictions. *Id.*

{¶6} While his direct appeal was pending before this Court, Holdcroft filed a motion for the appointment of counsel in order to pursue post-conviction relief (Doc. No. 131). The trial court granted the motion and appointed counsel on February 3, 2000. (Doc. No. 132).

{¶7} On May 5, 2000, Holdcroft, pro se, filed a notice of appeal to the Ohio Supreme Court from this Court's March 31, 2000 decision. (Doc. No. 134). The Ohio Supreme Court, however, declined review. *State v. Holdcroft*, 89 Ohio St.3d 1464 (2000).

{¶8} On June 9, 2000, Holdcroft, through appointed appellate counsel, filed a motion for a new trial, along with a motion to withdraw as appellate counsel. (Doc. No. 135-136). The trial court granted the motion to withdraw but denied the motion for a new trial. (Doc. Nos. 138, 141). On June 26, 2000, Holdcroft filed a motion for judicial release, which the trial court also denied. (Doc. Nos. 137, 139).

{¶9} On July 13, 2006, Holdcroft filed a "motion to vacate or set aside and modify sentence pursuant to R.C. 2945.25(A) & Crim.R. 52(B)." (Doc. No. 161.) On July 20, 2006, the trial court overruled this motion, finding it was untimely and lacked substantive merit "as the Defendant was not convicted of allied offenses of

similar import. There were separate and distinct felonies committed by the Defendant, one involving a dwelling and the other involving an automobile.” (Doc. No. 163.)

{¶10} On August 16, 2006, Holdcroft, pro se, filed a notice of appeal from the trial court’s denial of his motion. (Doc. No. 165). On appeal, Holdcroft argued that his sentence was void because he was sentenced on two offenses that were allied offenses of similar import. This Court overruled Holdcroft’s assignment of error, finding that his motion was an untimely post-conviction motion, and, under a plain error analysis, that the offenses were not allied offenses of similar import. *State v. Holdcroft*, 3d Dist. No. 16-06-07, 2007-Ohio-586.

{¶11} On December 11, 2009, the State filed a motion to correct Holdcroft’s sentence pursuant to R.C. 2929.191. (Doc. No. 186). On December 30, 2009, the State filed a motion for a de novo sentencing hearing to correct Holdcroft’s sentence pursuant to *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434. (Doc. No. 195). The trial court granted this motion and conducted a de novo sentencing on January 26, 2010. (Doc. No. 198). Once again, the trial court sentenced Holdcroft to ten years on Count One and five years on Count Three. The trial court further ordered that Count Three be served consecutively to Count One for an aggregate term of fifteen years. The trial court notified Holdcroft that he would be subject to five years of mandatory post-release control

as to Count One and three years of discretionary post-release control as to Count Three. The trial court also noted that the terms of post-release control would not be served consecutively to each other. The trial court further ordered that Holdcroft "pay restitution to Kathy Hurst, or the insurance carrier, in the sum of \$5,775.00; and make restitution to Eric Goodman in the amount of \$400.00." (Feb. 2, 2010 JE, Doc. No. 205)

{¶12} On February 12, 2010, Holdcroft filed a notice of appeal from the trial court's judgment entry of sentence. (Doc. No. 210). On May 26, 2010, while the appeal was pending, Holdcroft, pro se, filed a petition for post-conviction relief and various motions relating to that petition. (Doc. Nos. 223-26). The trial court noted that Holdcroft was appointed counsel to handle the direct appeal of his conviction, which was pending before this Court. (Doc. No. 227). The trial court subsequently dismissed Holdcroft's petition, concluding that it lacked jurisdiction to rule because his appeal was pending before this Court. (*Id.*).

{¶13} However, on September 13, 2010, this Court dismissed Holdcroft's direct appeal from the trial court's de novo resentencing in January of 2010. *State v. Holdcroft*, 3d Dist. No. 16-10-01, 2010-Ohio-4290. As the basis for dismissing the case, we determined that the judgment entry imposing Holdcroft's sentence and conviction did not constitute a final appealable order. *Id.* at ¶ 19. More specifically, we found that the trial court's de novo sentencing entry failed to

allocate the amount of restitution between the victim, Kathy Hurst, and the insurance company and that an order of restitution must set forth the amount or method of payment as to each victim receiving restitution in order to be a final appealable order. *Id.*, citing *State v. Kuhn*, 3d Dist. No. 4-05-23, 2006-Ohio-1145, ¶ 8; *State v. Hartley*, 3d Dist. No. 14-09-42, 2010-Ohio-2018, ¶ 5. Because Section 3(B)(2), Article IV of the Ohio Constitution limits our jurisdiction to reviewing “final appealable orders,” we remanded Holdcroft’s appeal of his *de novo* sentence to the trial court to resolve the restitution issue.¹

{¶14} Subsequently, on November 16, 2010, the trial court issued a new judgment entry pursuant to our decision. (Doc. No. 238). In this entry, the trial court ordered Holdcroft to pay \$5,775.00 to Kathy Hurst and also noted that certain portions of the record supported this sum and that “Ms. Hurst will be obligated to reimburse her insurance carrier for any money paid to her by it over and above that which she spent for repairing the vehicle.” (*Id.*) The trial court further noted that “[t]he defense interposed no objection to the restitution figures offered.” (*Id.*)

¹ As a result of this dismissal, on December 20, 2010, we found that the trial court incorrectly concluded that it lacked jurisdiction to rule on Holdcroft’s petition for post-conviction relief. Nevertheless, we found that the trial court correctly dismissed the petition and the motions related to it because a final order of conviction and sentence had not been filed in the case. *State v. Holdcroft*, 3d Dist. No. 16-10-04, 2010-Ohio-6262, ¶ 21.

{¶15} On November 29, 2010, Holdcroft filed a notice of appeal. (Doc. No. 240). Holdcroft asserts nine assignments of error for our review. We elect to address Holdcroft's first assignment of error last and to combine his other eight assignments of error for discussion.

SECOND ASSIGNMENT OF ERROR

THE CONSECUTIVE, MAXIMUM SENTENCES VIOLATED THE 6TH AMENDMENT TO THE U.S. CONSTITUTION, AND THE DUE PROCESS CLAUSES CONTAINED IN THE OHIO AND U.S. CONSTITUTIONS.

THIRD ASSIGNMENT OF ERROR

THE MAXIMUM, CONSECUTIVE SENTENCES AND THE RESTITUTION ORDER WERE CONTRARY TO LAW AND ABUSIVE.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN CONVICTING AND SENTENCING THE APPELLANT ON AGGRAVATED ARSON AND ARSON COUNTS IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE 5TH AMENDMENT OF THE U.S. CONSTITUTION, ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND OHIO'S MULTIPLE-COUNT STATUTE.

FIFTH ASSIGNMENT OF ERROR

THE SENTENCE SHOULD BE REVERSED AS IT VIOLATES CRIMINAL RULE 32, AND THE 5TH, 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, BECAUSE IT WAS IMPOSED OVER TEN YEARS AFTER THE GUILTY VERDICT.

SIXTH ASSIGNMENT OF ERROR

THE COURT ERRED WHEN IT FAILED TO CHANGE THE VENUE OR GRANT A MISTRIAL DUE TO JURY TAIN T AND JURY MISCONDUCT THAT VIOLATED THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

SEVENTH ASSIGNMENT OF ERROR

THE COURT ERRED IN ADMITTING OTHER ACTS EVIDENCE IN VIOLATION OF EVID.R. 403 AND 404, THUS DEPRIVING APPELLANT OF A FAIR TRIAL UNDER THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

EIGHTH ASSIGNMENT OF ERROR

APPELLANT'S CONVICTION WAS NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION, AND THE CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

NINTH ASSIGNMENT OF ERROR

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10, 16 OF THE OHIO CONSTITUTION.

{¶16} Initially, we must determine the scope of our review of these assignments of error and whether they are properly before this Court. The State

asserts that the only issues Holdcroft may now raise on appeal are those related to PRC pursuant to *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238. Thus, the State contends that Holdcroft is precluded from challenging the merits of his conviction, including the determination of guilt and the lawful elements of his sentence. In response, Holdcroft argues that unlike the facts at issue in *Fischer*, which addressed sentences that were void for lacking proper PRC notification, his case involves a sentencing entry that did not constitute a final, appealable order because of the trial court's restitution order. As such, he maintains that our prior decisions are nullities because we did not have jurisdiction until a final appealable order was rendered, i.e. on November 16, 2010, and that each of his assignments of error is properly before this Court as if this were his first direct appeal.

{¶17} After reviewing the convoluted procedural history of this case, we conclude that addressing Holdcroft's assignments of error furthers the interests of justice here. That being said, this Court is very familiar with this case and our analysis of Holdcroft's assignments of error will be done summarily.

{¶18} In his eighth assignment of error, Holdcroft argues that his conviction was not supported by sufficient evidence and against the manifest weight of the evidence. We disagree. After reviewing the record herein under the applicable standards, we conclude that the State presented sufficient evidence and that Holdcroft's convictions were not against the manifest weight of the evidence.

{¶19} In his second assignment of error, Holdcroft argues that *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711 (2009) abrogated *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856; and therefore, the trial court was required to make factual findings before imposing consecutive sentences. This Court has rejected this argument before, and we reject it again. *State v. Taylor*, 3d Dist. No. 9-10-44, 2011-Ohio-1866, ¶ 90. We also reject Holdcroft's argument that the trial court's application of *Foster* operated as an *ex post facto* law in violation of the Due Process Clause. *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, paragraph one of the syllabus.

{¶20} In his third assignment of error, Holdcroft first argues that the trial court erred in taking judicial notice of the same factual findings it had made at the original sentencing hearing (pre-*Foster*) for the resentencing hearing (post-*Foster*). We disagree. *Foster* simply stated that the trial courts were no longer required to make factual findings; *Foster* did not forbid trial courts from considering the relevant factors when sentencing. *State v. Smith*, 11th Dist. No. 2006-A-0082, 2007-Ohio-4772, ¶ 24. We also reject Holdcroft's argument that his sentence was not consistent with other sentences for similar arson convictions. Finally, we reject his argument relative to the trial court's restitution figure since Holdcroft did not object to the same at the resentencing hearing. We cannot

conclude that the trial court's restitution order amounted to plain error when the record supported its order herein.

{¶21} In his fourth assignment of error, Holdcroft argues that the trial court erred by imposing sentences upon both his aggravated arson and arson convictions since they constituted allied offenses of similar import. We disagree. The evidence presented demonstrated that Holdcroft set two separate fires (one upon the vehicle and one upon the porch); and therefore, separate animus exists for each separate conviction. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 49.

{¶22} In his fifth assignment of error, Holdcroft argues that the unreasonable delay between his conviction in 1999 and his final sentence in 2010 violated Crim.R. 32 and the 5th, 6th, and 14th Amendments to the U.S. Constitution. We reject this argument as well. The trial court here did not simply refuse to sentence Holdcroft; rather, it was subsequently determined upon appeal (almost ten years later) that Holdcroft's sentencing entry was non-final. Holdcroft was also resentenced to correct a PRC notification issue. Consequently, we must reject his arguments of unreasonable delay. *See e.g. State v. Spears*, 9th Dist. No. 24953, 2010-Ohio-1965.

{¶23} In his sixth assignment of error, Holdcroft argues that the trial court erred when it failed to change the venue or grant a mistrial due to jury misconduct. Since the record fails to indicate that any of the jurors who read the pretrial

newspaper article were actually biased in this case, Holdcroft's arguments lack merit. *State v. Wegmann*, 3d Dist. No. 1-06-98, 2008-Ohio-622, ¶ 34-35.

{¶24} In his seventh assignment of error, Holdcroft argues that the trial court erred by admitting other acts evidence in violation of Evid.R. 403 and 404, and thereby, depriving him of a fair trial. We disagree. The evidence of Holdcroft's previous threat to his wife, Kathy Hurst, that he would burn her house down if she ever left, and Holdcroft's solicitation of Joshua Shula to burn his wife's car and trailer were admissible to show Holdcroft's motive, intent, plan, and identity under Evid.R. 404(B) and R.C. 2945.59. Furthermore, the trial court's admission of this evidence would be harmless error *at most* in light of the other evidence presented.

{¶25} In his ninth assignment of error, Holdcroft argues that trial counsel was ineffective for various reasons. A defendant asserting a claim of ineffective assistance of counsel must establish: (1) the counsel's performance was deficient or unreasonable under the circumstances; and (2) the deficient performance prejudiced the defendant. *State v. Kole*, 92 Ohio St.3d 303, 306 (2001), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). Prejudice results when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Bradley*, 42 Ohio St. 3d 136, 142 (1989), citing *Strickland* at 691. "A

reasonable probability is a probability sufficient to undermine confidence in the outcome." *Bradley* at 142; *Strickland* at 694. Even if we assume that trial counsel was ineffective as Holdcroft argues, he has failed to demonstrate prejudice.

{¶26} Holdcroft's eighth, second, third, fourth, fifth, sixth, seventh, and ninth assignments of error are, therefore, overruled.

FIRST ASSIGNMENT OF ERROR

THE COURT LACKED JURISDICTION TO IMPOSE MANDATORY POST-RELEASE CONTROL UPON THE APPELLANT.

{¶27} In his first assignment of error, Holdcroft asserts that the trial court lacked jurisdiction to impose the mandatory, five-year term of PRC for his aggravated arson conviction (Count One) because, by the time of the resentencing hearing, he had already completed his ten-year-sentence on that conviction and was serving the remainder of his five-year-sentence for his arson conviction (Count Two). In response, the State contends that, at the time of the resentencing hearing, Holdcroft was still serving his aggregate fifteen-year sentence in the case; and therefore, the trial court has jurisdiction to impose PRC on both convictions.

{¶28} The relevant procedural history in this case is undisputed. On September 13, 1999, the trial court ordered that Holdcroft serve ten years on Count One, aggravated arson, and five years on Count Three, arson. The trial court further ordered that the term of imprisonment for Count Three be served

consecutively to the term for Count One, for an aggregate term of fifteen years. The trial court resentenced Holdcroft to impose the proper terms of PRC in January of 2010,² imposing five years of mandatory PRC for Count One and up to three years of discretionary PRC for Count Three. Thus, over ten years but less than fifteen years transpired between the time of the sentencing and the resentencing hearings.

{¶29} “When sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about postrelease control and is further required to incorporate that notice into its journal entry imposing sentence.” *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, ¶ 15, quoting *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph one of the syllabus. A trial court’s failure to incorporate the proper notice of post-release control—whether PRC is mandatory or discretionary, the duration of PRC, and the possible consequences for violating PRC—renders the trial court’s sentencing entry *partially* void. *Fischer*, 2010-Ohio-6238, at ¶ 27-29. Generally speaking, the appropriate remedy to correct the trial court’s partially void sentencing entry is to resentence the offender. *Jordan*, 2004-Ohio-6085, at ¶ 23;

² The resentencing hearing was held on January 26, 2010, but the resentencing entry was not filed until February 2, 2010.

State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250, ¶ 16-17.³ However, an offender that “has already served the prison term ordered by the trial court * * * cannot be subject to resentencing in order to correct the trial court’s failure to impose postrelease control.” *Bezak*, 2007-Ohio-3250, at ¶ 18. *See also Hernandez*, 2006-Ohio-126, at ¶ 32 (“In that his journalized sentence has expired, Hernandez is entitled to the writ and release from prison and from further postrelease control.”); *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, ¶ 28 (“Because Cruzado’s sentence had not yet been completed when he was resentenced, Judge Zaleski was authorized to correct the invalid sentence to include the appropriate, mandatory postrelease-control term.”); *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, syllabus (“In cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence.”); *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶ 70 (“[O]nce an offender has

³ The nature of the resentencing hearing depends upon when the partially void sentence was entered. For sentences entered on or after July 11, 2006, R.C. 2929.191 prescribes the resentencing hearing and remedial mechanism to correct such sentencing entries. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph two of the syllabus. For sentences entered prior to July 11, 2006, the proper remedy is a resentencing hearing “limited to [the] proper imposition of postrelease control.” *Fischer*, 2010-Ohio-6238, at ¶ 29. Although the majority in *Fischer* did not explicitly state that this limited resentencing hearing is an R.C. 2929.191 hearing, it appears that an R.C. 2929.191 hearing would meet the majority’s requirements. *See Fischer*, 2010-Ohio-6238, at ¶ 43, Fn. 3 (Lanzinger, J., dissenting) (noting that the majority’s opinion effectively overruled paragraph one of the syllabus in *Singleton*, 2009-Ohio-6434, requiring a de novo resentencing hearing).

completed the prison term imposed in his original sentence, he cannot be subjected to another sentencing to correct the trial court's flawed imposition of postrelease control.").

{¶30} The issue sub judice is whether the trial court was without jurisdiction to impose five years of mandatory PRC on Holdcroft's aggravated arson conviction (Count One) at the resentencing hearing because Holdcroft had already served "the prison term ordered by the trial court." Specifically, the issue concerns whether the words "prison term" and "sentence" used by the Ohio Supreme Court in *Bezak*, *Hernandez*, *Cruzado*, *Simpkins*, and *Bloomer* mean the prison term the trial court ordered for each conviction (Count) or whether these words refer to the entire term of imprisonment for all convictions (Counts) in the case, i.e. the aggregate sentence imposed for the entire case. If the words have the former meaning, the trial court was without jurisdiction to impose five years of mandatory PRC on Holdcroft's aggravated arson conviction (Count One) since Holdcroft had already served his ten-year sentence on that conviction (Count). If the words have the latter meaning, the trial court had jurisdiction to impose the five years of mandatory PRC on Holdcroft's aggravated arson conviction (Count One) since Holdcroft was still incarcerated on his total aggregate sentence at the time of the resentencing hearing. For the reasons that follow, we conclude that the words "prison term" and "sentence" as used by the Ohio Supreme Court in

Hernandez and the cases that follow it mean the entire journalized sentence for all convictions (Counts) in the case, i.e. the aggregate sentence; and therefore, the trial court sub judge had jurisdiction to impose the mandatory five-year term of PRC on Holdcroft's aggravated arson conviction (Count One).

{¶31} The answer to our inquiry is not directly revealed by the Ohio Supreme Court's decisions in *Hernandez*, *Bezak*, or *Bloomer* because the defendants in those cases were serving terms of imprisonment stemming from single-count indictments. 2006-Ohio-126, at ¶ 4; 2007-Ohio-3250, at ¶ 1; 2009-Ohio-2462, at ¶ 22. Comparison to the Court's decision in *Cruzado* is also inapposite since the offender was sentenced on two counts from two separate indictments; the trial court ordered that the sentences be served concurrently; and, the offender was resentenced prior to the expiration of the concurrent terms of imprisonment. 2006-Ohio-5795, at ¶ 2, 8-9. Similarly, the offender in *Simpkins* was sentenced to three concurrent terms of imprisonment stemming from a single indictment, and the offender was resentenced prior to the expiration of the concurrent terms of imprisonment. 2008-Ohio-1197, at ¶ 1-3.

{¶32} While the aforementioned cases do not directly answer the specific question presented here, they do provide the policy lens through which similar cases ought to be viewed. The Court in *Hernandez* explained that notifying an offender of his post-release control obligations after he has already served the term

of imprisonment “would circumvent the objective behind R.C. 2929.14(F) and 2967.28 to notify defendants of the imposition of postrelease control at the time of their sentencing.” 2006-Ohio-126, at ¶ 28. Significant to the Court’s decision in *Hernandez* was the fact that the offender had already been released from his original term of imprisonment and had unknowingly violated his PRC. *Id.* at ¶ 5-6. See also *Simpkins*, 2008-Ohio-1197, at ¶ 17. When the prison warden argued that the trial court’s failure to properly notify the offender of PRC could be corrected by simply holding a resentencing hearing, the Court rejected that argument—comparing an after-the-fact PRC notification to an after-the-fact community control notification. *Hernandez*, 2006-Ohio-126, at ¶ 31, citing *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746; *Simpkins*, 2008-Ohio-1197, at ¶ 17. The Court in *Hernandez* observed that the purpose of R.C. 2929.19(B)(5), which requires that the trial court provide offenders sentenced to community control with notice of the possible consequences for violating their community control, is to provide offenders with the notice *before a violation* of their community control. 2006-Ohio-126, at ¶ 31, citing *Brooks*, 2004-Ohio-4746, at ¶ 33. Similarly, the purpose of R.C. 2929.19(B)(2)(c)-(e), formerly R.C. 2929.19(B)(3)(c)-(e), is to provide the offender with notice of the possible consequences if he violates the terms of post-release control *before a violation* of his post-release control has actually occurred. Interpreting the terms “prison term” and “sentence” used in the

aforementioned cases as the aggregate sentence on all convictions (Counts) in the case is consistent with the purpose behind R.C. 2929.19(B)(2)(c)-(e), because the offender would be notified about his PRC before his release from prison and, consequently, before a violation of PRC could ever occur.

{¶33} Interpreting “prison term” and “sentence” used in the aforementioned cases as the aggregate sentence on all convictions in the case is also consistent with Ohio Revised Code Chapter 2929. For purposes of Chapter 2929, “prison term” includes “[a] stated prison term,” and the “stated prison term” includes the “combination of all prison terms and mandatory prison terms imposed by the sentencing court.” R.C. 2929.01(BB), (FF). Similarly, the term “sentence” includes the “*combination of sanctions* imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense.” R.C. 2929.01(EE) (emphasis added). Possible “sanction[s]” include terms of imprisonment imposed under 2929.14. R.C. 2929.01(DD). Moreover, R.C. 2929.14(C)(6) provides that “[w]hen consecutive prison terms are imposed pursuant to * * * [R.C. 2929.14], the term to be served is the aggregate of all of the terms so imposed.” *See also* Ohio Adm. Code § 5120-2-03.1 (“When consecutive stated prison terms are imposed, the term to be served is the aggregate of all of the stated prison terms so imposed.”). Consequently, throughout Chapter 2929, the words “prison term” and

“sentence” can refer to multiple terms of imprisonment (sanctions under R.C. 2929.14) imposed by the sentencing court, i.e. the aggregate sentence.

{¶34} Interpreting the words “prison term” and “sentence” used in the aforementioned cases as the aggregate sentence imposed on all convictions (Counts) in the case is also consistent with R.C. 2929.191. In response to *Jordan* and *Hernandez*, the General Assembly enacted H.B. 137, which provided, in relevant part:

(A)(1) If, prior to the effective date of this section, a court imposed a *sentence* including a *prison term* of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section 2929.14 of the Revised Code, at any time before the offender is released from imprisonment under that term * * *

(2) If a court prepares and issues a correction to a judgment of conviction as described in division (A)(1) of this section before the offender is released from imprisonment under the prison term the court imposed prior to the effective date of this section, the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. * * *

R.C. 2929.191(A)(1), (2) (emphasis added) (eff. 7-11-06).⁴ As we alluded to above, the words “prison term” and “sentence” in R.C. 2929.191 have been expressly defined in R.C. 2929.01 to include the combination of prison terms, i.e. the aggregate sentence, imposed upon an offender by the sentencing court.

{¶35} Moreover, R.C. 2929.191’s language must be interpreted in light of the history in which it was enacted, the General Assembly’s response to *Jordan* and *Hernandez*, and in light of its remedial purpose. *Singleton*, 2009-Ohio-6434, at ¶ 48 (Pfeifer, J., dissenting) (R.C. 2929.191 was enacted in response to *Jordan* and *Hernandez*); *Id.* at ¶ 65 (Lanzinger and Stratton, J.J., concurring in part, dissenting in part) (same); *Id.* at ¶ 23 (describing R.C. 2929.191 as remedial); (H.B. 137 Final Bill Analysis) (“amendments made in the act concerning post-release control are non-substantive and merely clarify the prior law and thus are remedial in nature”). Remedial laws are to be liberally construed to give effect to their legislative purpose and to promote justice. R.C. 1.11. *See also Clark v. Scarpelli*, 91 Ohio St.3d 271, 275 (2001), citing *Curran v. State Auto. Mut. Ins. Co.*, 25 Ohio St.2d 33, 38 (1971). The General Assembly’s purpose in enacting R.C. 2929.191 was, in part, “to reaffirm that, prior to [the statute’s] effective date, an offender subject to post-release control sanctions was always subject to the post-release control sanctions after the offender’s release from imprisonment

⁴ R.C. 2929.191 was recently amended by H.B. 86 (eff. 9-30-11) to reflect changes in the sentencing statutes, however, the changes to R.C. 2929.191 were not substantive and do not affect the analysis herein.

without the need for any prior notification or warning * * *.” (H.B. 137 Final Bill Analysis). The General Assembly also declared that it intended R.C. 2929.191 to apply “regardless of whether [the offenders] were sentenced prior to, or are sentenced on or after, the act’s effective date * * *.” (*Id.*). See also *Singleton*, 2009-Ohio-6434, at ¶ 65 (Lanzinger and Stratton, J.J., concurring in part, dissenting in part). In light of the foregoing, we conclude that interpreting the words “prison term” and “sentence” as the aggregate sentence for all convictions (Counts) in the case better effectuates the legislative purpose of R.C. 2929.191 by ensuring that offenders are serving post-release control upon their release from prison as required under R.C. 2967.28(B).

{¶36} The Court of Appeals, for its part, has taken different positions on this precise issue. The Eighth District has held that it is the expiration of the sentence on the specific conviction (Count) for which post-release control is applicable, and not the offender’s ultimate release from prison, that determines whether a court may correct a sentencing error and impose post-release control at resentencing. *State v. Dresser*, 8th Dist. No. 92105, 2009-Ohio-2888, ¶ 11, reversed on other grounds in *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671. The defendant in *Dresser* pled guilty to two counts of rape and two counts of pandering sexually-oriented material involving a minor in 2000. 2009-Ohio-2888, at ¶ 3. The trial court imposed an indefinite concurrent sentence

of ten years to life on the rape charges and a concurrent sentence of five years on the pandering charges. *Id.* The trial court further ordered that the concurrent rape sentence was to run consecutive to the five-year concurrent sentence for pandering; however, the trial court failed to impose post-release control on the pandering counts. *Id.* In July 2007, the trial court held a hearing and advised the defendant of his mandatory five-year term of PRC on the pandering convictions. *Id.* at ¶ 4. The defendant appealed and argued that he could not be given PRC on the pandering convictions since he had already served his five year concurrent terms on those convictions by the time of the hearing. *Id.* at ¶ 5. The Eighth District determined that, because the defendant had failed to file the original sentencing transcript, there was no evidence as to which order the offenses were to be served, and, in the absence of evidence to the contrary, the sentence for the rape charges was to be served first. *Id.*, citing *State v. Dresser*, 8th Dist. No. 90305, 2008-Ohio-3541 (*Dresser I*). Nevertheless, the Eighth District concluded the trial court erred by failing to conduct a de novo hearing and remanded the matter for a new sentencing hearing. *Id.*

{¶37} On remand, the trial court conducted a de novo sentencing hearing and ordered the concurrent five-year sentence on the pandering charges be served prior to the indefinite rape sentences. *Id.* at ¶ 6. The trial court then concluded that post-release control could not be imposed on the pandering convictions,

because the defendant had already served the five-year sentence on those convictions. *Id.* Thereafter, the State appealed and argued that the trial court erred by failing to impose the mandatory term of PRC. *Id.* at ¶ 7. The Eighth District rejected the State's argument, however, and concluded that the trial court could not retroactively impose the mandatory PRC upon the defendant for his pandering convictions since he had already served the sentence for those convictions by the time of the resentencing hearing. *Id.* at ¶ 8.

{¶38} In reaching its decision in *Dresser*, the Eighth District stated that "other districts have also considered this issue and have concluded that it is the expiration of the prisoner's journalized sentence, rather than the offender's ultimate release from prison that is determinative of the trial court's authority to resentence." *Id.* at ¶ 11, citing *State v. Bristow*, 6th Dist. No. L-06-1230, 2007-Ohio-1864; *State v. Turner*, 10th Dist. No. 06AP-491, 2007-Ohio-2187; and *State v. Ferrell*, 1st Dist. No. C-070799, 2008-Ohio-5280. Although the Eighth District correctly stated the general proposition of law from those cases, the appellate court failed to apply the proposition of law correctly in *Dresser*. The facts of *Dresser* are easily distinguishable from the facts in *Bristow*, *Turner*, and *Ferrell*. All of the defendants in those cases, unlike *Dresser*, were sentenced to consecutive sentences for convictions in *separate cases* stemming from *separate indictments*. *Bristow*, 2007-Ohio-1863, at ¶ 2; *Turner*, 2007-Ohio-2187, at ¶ 4; *Ferrell*, 2008-Ohio-

5280, at ¶ 1. In fact, the defendants' convictions in *Turner* and *Ferrell* were from different counties. 2007-Ohio-2187, at ¶ 4; 2008-Ohio-5280, at ¶ 1. Consequently, the "journalized sentence" to which the Courts in *Bristow*, *Turner*, and *Ferrell* were referring to was the journalized sentence for an entire case—not the sentence for a single conviction (Count) in a single case. Therefore, the specific rule of law from *Bristow*, *Turner*, and *Ferrell* was that a trial court lacks jurisdiction to impose PRC upon an offender when the sentence for *the entire case* has been already served, even though the offender is still incarcerated on a different case and the sentence in the second case was ordered to be served consecutive to the first (now finished) case. This rule has been followed by several other districts besides the first, sixth,⁵ and tenth, including this district. *State v. Arnold*, 189 Ohio App.3d 238, 2009-Ohio-3636 (2nd Dist.); *State v. Ables*, 3d Dist. No. 10-11-03, 2011-Ohio-5873; *State v. Henry*, 5th Dist. No. 2006-CA-00245, 2007-Ohio-5702; *State v. Rollins*, 5th Dist. No. 10CA74, 2011-Ohio-2652. Despite the obvious differences between the facts and procedural history in *Bristow*, *Turner*, *Ferrell*, and the facts and procedural history in *Dresser*, the Eighth District still follows *Dresser* and continues to examine sentences on

⁵ The Sixth District does have one case not following this rule. *State v. Lathan*, 6th Dist. No. L-10-1359, 2011-Ohio-4136. This appears to be the only case that has held that consecutive sentences in separate cases constitute one aggregate sentence for purposes of resentencing for proper imposition of PRC. The Sixth District has other cases following the rule it previously set forth in *Bristow*, *supra*. *State v. Larkins*, 6th Dist. No. H-10-010, 2011-Ohio-2573; *State v. Helms*, 6th Dist. No. L-10-1079, 2010-Ohio-6520.

specific convictions (Counts) for purposes of determining whether a trial court has jurisdiction to impose PRC at a resentencing hearing. *State v. Cobb*, 8th Dist. No. 93404, 2010-Ohio-5118; *State v. O'Hara*, 8th Dist. No. 95575, 2011-Ohio-3060.

{¶39} The Ninth District, on the other hand, has concluded that, for purposes of determining whether a trial court has jurisdiction to resentence an offender to properly impose PRC under *Hernandez* and its progeny, a “journalized sentence that includes consecutive sentences does not expire until the aggregate time of the consecutive sentences expires.” *State v. Deskins*, 9th Dist. No. 10CA009875, 2011-Ohio-2605, ¶ 19. The defendant in that case pled guilty to five counts of rape, and, in September 2003, the trial court sentenced him to serve five years imprisonment on each count and further order that the terms be served consecutively for an aggregate term of twenty-five years. *Id.* at ¶ 2-3.⁶ In April 2010, the trial court held a resentencing hearing and resented the defendant to the same twenty-five-year aggregate prison term, but this time properly imposed the mandatory five-year term of PRC. *Id.* at ¶ 4. Like Holdcroft herein, the defendant in *Deskins* argued that the trial court lacked jurisdiction to impose PRC on at least one of his convictions since he had already served seven years by the

⁶ It is not clear from the appellate court's decision whether or not the trial court specified the order in which the defendant was to serve the consecutive prison terms, i.e. count one first, count two second, etc. *Deskins*, 2011-Ohio-2605, at ¶ 2-3.

time of the resentencing hearing, but the Ninth District rejected this argument and found that the defendant's journalized sentence had not expired. *Id.* at ¶ 19.

{¶40} To reach its decision, the Ninth District relied upon the Fifth District's decision in *State v. Tharp*, 5th Dist. No. 07-CA-9, 2008-Ohio-3995. The defendant in *Tharp* pled no contest and was found guilty of two counts of burglary, second degree felonies; one count of theft of a motor vehicle, a fourth degree felony; two counts of theft of a firearm, fourth degree felonies; one count of breaking and entering, a fifth degree felony; and two counts of theft in violation, fifth degree felonies. *Id.* at ¶ 2. On November 1, 2000, the trial court sentenced the defendant to two years on each of the two burglary convictions, one year on the theft of a motor vehicle conviction, one year on the breaking and entering conviction, six months on each of the two theft of a firearm convictions, and six months on each of the two theft convictions. *Id.* at ¶ 3. The trial court ordered that the terms of imprisonment be served consecutively for an aggregate eight years imprisonment, but the trial court did not specify which term of imprisonment was to be served first. *Id.* at ¶ 3, 11. On October 16, 2006, the trial court held a resentencing hearing to properly impose PRC. *Id.* at ¶ 4. On appeal, the defendant argued that the trial court lacked jurisdiction to impose PRC upon his burglary convictions (Counts One and Two) since the termination judgment entry listed the burglary convictions first, and he had already served the four years

for those convictions by the time of the resentencing hearing. *Id.* at ¶ 12. The Fifth District rejected the defendant's argument, reasoning as follows:

The charges for which Appellant was found guilty and sentenced to arise from a single indictment issued on February 24, 2000. The trial court's sentencing entry stated that each term was to be served consecutively, but the trial court generally stated as to each count that, "said period of incarceration to be served consecutive to the time herein imposed." The trial court did not specify that certain counts were to be served consecutively to another. Accordingly, we find Appellant's journalized sentence for an aggregate term of eight years does not expire until November 2008. The trial court did not lack jurisdiction to correct Appellant's invalid sentence to include post release control because Appellant's journalized sentence had not yet expired when he was resentenced.

Id. at ¶ 14.

{¶41} While the trial court sub judice did specify that Holdcroft's ten-year aggravated arson sentence be served first, we do not think this fact, alone, sufficiently distinguishes our case from *Deskins* and *Tharp*, supra. Although the Fifth District did rely upon this fact, in part, when it reached its decision, it also specifically noted that the defendant's sentence arose from a single indictment. *Id.* Since its decision in *Tharp*, the Fifth District has distinguished *Turner*, *Ferrell*, and *Arnold*, at least in part, on the basis that the defendants in those cases were sentenced in separate cases. *State v. Booth*, 5th Dist. No. 2010CA00155, 2011-Ohio-2557, ¶ 12-13. The Fifth District has also more recently clarified the applicable rule to be gleaned from *Bristow*, *Turner*, *Ferrell*, and *Arnold* as

follows: “where an offender has completed his sentence on the case for which the court has resentenced him under R.C. 2929.191, the resentencing entry is void for lack of jurisdiction even if the offender remains incarcerated on another case at the time of the resentencing.” *Id.*, at ¶ 12, citing *State v. Henry*, 5th Dist. No. 2006-CA-00245, 2007-Ohio-5702. *See also Rollins*, 2011-Ohio-2652, at ¶ 10 (“the language of R.C. 2929.191(A)(1) which permits resentencing “at any time before the offender is released from prison on that term” refers to the Richland County sentence. The sentence from Paulding County is a completely separate term of imprisonment, imposed by a different court under a separate indictment and case, and imposed roughly ten months after appellant began to serve his term of imprisonment from Richland County.”).

{¶42} After reviewing the aforementioned cases, we agree with the Fifth District that the rule in *Bristow*, *Turner*, *Ferrell*, and *Arnold* applies where the offender has been sentenced in *separate cases* and the *separate cases* have been ordered to be served consecutively. We do not agree with the Eighth District’s expansion of this rule to include convictions (Counts) in a single case arising from a single indictment like the case herein. Therefore, we hold that, for purposes of determining whether a trial court has jurisdiction to resentence a defendant to properly include PRC, a journalized sentence *for a single case* that includes consecutive sentences on separate convictions (Counts) does not expire until the

aggregate time of the consecutive sentences for all the convictions (Counts) expires. *Deskins*, 2011-Ohio-2605, at ¶ 19.

{¶43} Our holding here is not only consistent with the Ohio Revised Code and the applicable case law but is also consistent with public policy. As we previously mentioned, our conclusion here is consistent with the policy of notifying the offender of his PRC *prior to* a possible violation of the same. Moreover, our conclusion here ensures that offenders are actually serving their PRC—PRC, which was determined to be appropriate as a matter of public policy as evidenced in R.C. 2967.28. This strong public policy of ensuring that offenders are serving post-release control was further expressed when the General Assembly promptly passed of H.B. 137 (enacting R.C. 2929.191) in response to the Ohio Supreme Court's decisions in *Jordan* and *Hernandez*. The Ohio Supreme Court has also recognized this same public policy in its post-release control cases. *See Simpkins*, 2010-Ohio-1197, at ¶ 26 (“Although *res judicata* is an important doctrine, it is not so vital that it can override ‘society’s interest in enforcing the law, and in meting out the punishment the legislature has deemed just.’”) (quoting *State v. Beasley*, 14 Ohio St.3d 74, 75 (1984)); *Fischer*, 2010-Ohio-6238, at ¶ 21-23. Finally, our decision encourages multi-count indictments (a single case) rather than separate indictments (separate cases), which enhances judicial economy, diminishes inconvenience to witnesses, and minimizes the possibility of

incongruous results for the defendant. *See State v. Schaim*, 65 Ohio St.3d 51, 58 (1992) (joinder under Crim.R. 8(A)).

{¶44} Since Holdcroft had not yet completed his aggregate fifteen-year sentence before the resentencing hearing was held, the trial court had jurisdiction to sentence him to five years of mandatory PRC on his aggravated arson conviction (Count One).

{¶45} Holdcroft's first assignment of error is, therefore, overruled.

{¶46} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

ROGERS, P.J. concurs.

/jlr

SHAW, P.J., Concurs in Part and Dissents in Part.

{¶47} In its decision to overrule the first assignment of error, the majority acknowledges that the Supreme Court of Ohio has not resolved the issue presented of whether a trial court has the authority to impose postrelease control on a defendant who has already completed his or her prison term for a particular offense, but remains imprisoned on another offense arising from the same case. In proposing its resolution of this issue, the majority sets forth a statutory and case

analysis that the majority believes precludes the reviewing court from considering the specific sentence ordered by the trial court directed to each individual offense charged within an indictment. Instead the majority would require the reviewing court to base its decision only upon a "lump-sum," aggregate analysis which essentially forges the entire "indictment," or "indictments" and the aggregate "sentence" or "sentences" into a single, overall "prison term."

{¶48} According to the majority, the multiple or consecutive sentences contained within this single "prison term" are then always capable of later being parsed and interpreted in favor of the state, for purposes of interpreting prison time served and cleaning up PRC errors, (or perhaps even for interpreting double jeopardy implications), without regard to how many different individual offenses are involved, without regard to the specific terms of any individual sentencing orders contained within each judgment entry and without regard to how many of these individual sentences, according to the specific terms of the judgment entry, have in fact been completely served at the time any of these other issues are raised. As a consequence, the majority effectively rules in the case before us that where there are multiple sentences within a single case, the trial court does not have the authority to specify which individual sentence is to be served first, regardless of what it states in the judgment entry.

{¶49} Because I believe the majority's proposal to shift our analysis of these cases from the specific sentence imposed by the trial court pertaining to each individual offense in any given indictment, toward an analysis based only upon the overall aggregate sentence and aggregate prison term is problematic in general and unwarranted in this particular case, I respectfully dissent from the disposition of the first assignment of error. I concur in the disposition of the remaining assignments of error.

{¶50} My first concern is that the majority decision disregards the specific terms of the judgment entry of sentence in this case, which, as even the majority concedes, clearly indicates that the ten year prison term for count one would be served prior to the remaining prison terms, and hence the sentence for count one would have been completed at the time the PRC issue regarding count one arose. I see no sound reason for disregarding the specific language of a trial court's own judgment entry of sentence in interpreting matters pertaining to that sentence.

Thus, even if the majority rationale were to be considered as a viable "default" alternative employed to determine the order of sentences in those cases where the sentencing entry is silent on the nature of the consecutive sentences, there is no reason to apply it in the present case where the trial court itself has given us all the information we need to decide the question. And as noted above, it seems to me that by disregarding the trial court's specific sentencing language in

this case, we are effectively ruling that trial courts in general do not have the authority to specify the order of consecutive sentences in a judgment entry of sentence; something that I question whether we have the authority to do.

{¶51} Second, and perhaps more importantly, beyond merely deviating from what I believe to be the sounder appellate approach of addressing each specific offense, conviction and sentence for each count in the indictment, I believe the position taken by the majority runs counter to fundamental sentencing principles in Ohio jurisprudence which *require* courts to separately analyze the *specific sentence imposed for each offense*. The Supreme Court of Ohio has stated the following with regard to the purpose underpinning Ohio felony-sentencing statutes.

Ohio's felony-sentencing scheme is clearly designed to focus the judge's attention on one offense at a time. Under R.C. 2929.14(A), the range of available penalties depends on the degree of each offense. For instance, R.C. 2929.14(A)(1) provides that "[f]or a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years."⁷ (Emphasis added.) R.C. 2929.14(A)(2) provides a different range for second-degree felonies. In a case in which a defendant is convicted of two first-degree felonies and one second-degree felony, the statute leaves the sentencing judge no option but to assign a particular sentence to each of the three offenses, separately. The statute makes no provision for grouping offenses

⁷ We note that the legislature has since amended the felony-sentencing statutes to include new ranges of available penalties for some offenses. For example, R.C. 2929.14(A)(1) now provides, "[f]or a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, ten, or eleven years." However, the overriding offense-specific approach to the felony-sentencing scheme remains the same.

together and imposing a single, "lump" sentence for multiple felonies.

Although imposition of concurrent sentences in Ohio may appear to involve a "lump" sentence approach, the opposite is actually true. Instead of considering multiple offenses as a whole and imposing one, overarching sentence to encompass the entirety of the offenses as in the federal sentencing regime, a judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense. See R.C. 2929.11 through 2929.19. * * * Only after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively. * * * *Under the Ohio sentencing statutes, the judge lacks the authority to consider the offenses as a group and to impose only an omnibus sentence for the group of offenses.*

State v. Saxon, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶¶ 8-9. (Internal Citations Omitted) (Emphasis added).

{¶52} In addition, the Supreme Court in *Saxon* specifically addressed the term "sentence" as defined in R.C. 2929.01(E)(E), the former R.C. 2929.01(F)(F), and reached a conclusion that appears to be inconsistent with majority's regarding how the term "sentence" is applicable to Ohio's felony-sentencing scheme.

[Revised Code Section] 2929.01(FF) defines a sentence as "the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense."⁸ [The State] in the case at bar points to the "combination of sanctions" language in this definition and urges us to find that that [sic] language necessarily indicates that a "sentence" includes all sanctions given for all offenses and is not

⁸ The term sentence is now codified under R.C. 2929.01(FF) which provides the same definition stated above.

limited to the sanction given for just one offense. But a trial court may impose a combination of sanctions on a single offense, for example, a fine and incarceration. See R.C. 2929.15 to 2929.18 * * *. Therefore, [the State's] insistence that the "combination of sanctions" language supports [it's] contentions is misplaced. This language merely recognizes the availability of multiple sanctions for a single offense.

Further, the statute explicitly defines "a sentence" as those sanctions imposed for "an offense." The use of the articles "a" and "an" modifying "sentence" and "offense" denotes the singular and does not allow for the position urged by [the State]. A finding that the statute intended to package the sanctions for all sentences into one, appealable bundle would ignore the plain meaning of the statutory language: *a sentence is the sanction or combination of sanctions imposed on each separate offense*. If the legislature had intended to package sentencing together, it easily could have defined "sentence" as the sanction or combination of sanctions imposed for all offenses.

Saxon at ¶¶ 12-13. (Emphasis in original).

{¶53} Notably, the Supreme Court also appears to apply this offense-specific approach to sentencing in the context of postrelease control. In *Bezak*, the Supreme Court expressly stated in its syllabus that "[w]hen a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included *in a sentence for a particular offense*, the sentence is void. The offender is entitled to a new sentencing hearing *for that particular offense*." *Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, syllabus.

{¶54} It is also notable that the Supreme Court in *Fischer* limited its decision to only overrule a specific portion of *Bezak*. The Supreme Court made it

clear that it revisited “*only* one component of the holding in *Bezak*, and we overrule *only* that portion of the syllabus that requires a complete resentencing hearing rather than a hearing restricted to the void portion of the sentence.” *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 36. Thus, the Supreme Court left intact its approach to analyze *a sentence for a particular offense* when reviewing whether a defendant is entitled to be resentenced for purposes of the trial court properly imposing postrelease control.

{¶55} In addition, the statutory scheme for imposing postrelease control in R.C. 2967.28 appears to mimic the felony-sentencing statute analyzed by the Supreme Court in *Saxon*. In particular, the terms “sentence” and “prison term” are used to refer to the individual sanction imposed by the trial court for *a particular offense*. Like the felony-sentencing scheme, the statute governing postrelease control assigns specific terms of postrelease control according to the degree of felony or category of offense—i.e., felony sex offense. For instance, R.C. 2967.28(B) provides that

Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender’s release from imprisonment. * * * Unless reduced by the parole board pursuant to division (D) of this section when authorized under

that division, a period of post-release control required by this division for an offender shall be of one of the following periods:

(1) For a felony of the first degree or for a felony sex offense, five years;

(2) For a felony of the second degree that is not a felony sex offense, three years;

(3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years.

(C) Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender * * *.

{¶56} Nowhere in R.C. 2967.28 does the legislature direct a court to treat a "sentence" or a "prison term" as the aggregate sentence arising from the case for purposes of imposing postrelease control. In fact, the statute makes no provisions for grouping offenses together and *imposing* a single aggregate term of postrelease control for multiple felonies, despite the fact that one or more periods of postrelease control are to be *served* concurrently. See R.C. 2967.28(F)(4)(c).⁹ Rather, the legislature in R.C. 2967.28 chose to consistently use the terms

⁹ Revised Code Section R.C. 2967.28(F)(4)(c) states, "[i]f an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board or court. Periods of post-release control shall be served concurrently and shall not be imposed consecutively to each other."

“sentence” and “prison term” to refer to *a sentence for a particular offense* for purposes of imposing postrelease control.

{¶57} Finally, as noted earlier, I find it significant in this case that the trial court specifically ordered Holdcroft to serve the ten-year sentence for the aggravated arson conviction first, with the five-year sentence for the arson conviction to be served consecutive to the aggravated arson sentence. The Eighth District in *State v. Dresser* also found this fact persuasive in resolving the precise issue before us. *See State v. Dresser*, 8th Dist. No. 92105, 2009-Ohio-2888, ¶ 11, reversed on other grounds in *State ex re. Carnail v. McCormick*, 126 Ohio St.3d 124-2010-Ohio-2671. The court in *Dresser* found dispositive the fact that the trial court had ordered the defendant to serve his five-year sentence for pandering *prior* to his indefinite ten-year to life sentence for rape. *Id.* The court relied on *Bezak* and concluded the following:

Once an offender has served the prison term ordered by the trial court, he or she cannot be subject to resentencing in order to correct the trial court’s failure to impose postrelease control at the original hearing. *State v. Bezak*, 114 Ohio St.3d 420, 2008-Ohio-3250. Here, Dresser had completed his [five-year pandering] sentence; consequently, the trial court could not impose postrelease control, after the fact, on the pandering charges.

Dresser at ¶ 8.

{¶58} The majority cites decisions from two other appellate districts in support of its position that the “aggregate sentence,” and not the sentence imposed for a particular offense, is to be considered when a defendant is resentenced to properly impose postrelease control. *Supra* at ¶¶ 39-42. However, as noted by the majority, the trial courts in both of those cases did not specify the order in which the consecutive sentences were to be served.

{¶59} For all of these reasons, I would sustain the first assignment of error and find that the trial court was without the authority to impose the mandatory five-year term of postrelease control required for the aggravated arson conviction due to the fact that Holdcroft had already served his sentence for that offense.

/jlr

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
WYANDOT COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 16-10-13

v.

HENRY ALLEN HOLDCROFT,

JUDGMENT
ENTRY

DEFENDANT-APPELLANT.

For the reasons stated in the opinion of this Court, the assignments of error are overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellant for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

COURT OF APPEALS
WYANDOT CO., OHIO
FILED

JUL - 2 2012

Ann K. Embree
CLERK OF COURTS
WYANDOT CO., OHIO

[Signature]

[Signature]

JUDGES

SHAW, P.J., Dissents in Part and Concurs
In Part

DATED: July 2, 2012



Caution
As of: Aug 20, 2012

STATE OF OHIO, PLAINTIFF-APPELLANT vs. KENNETH DRESSER, DEFENDANT-APPELLEE

No. 92105

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2009 Ohio 2888; 2009 Ohio App. LEXIS 2428

June 18, 2009, Released

PRIOR HISTORY: [**1]

Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-384324.
State v. Dresser, 2008 Ohio 3541, 2008 Ohio App. LEXIS 2997 (Ohio Ct. App., Cuyahoga County, July 17, 2008)

DISPOSITION: AFFIRMED.

COUNSEL: FOR APPELLANT: William D. Mason, Cuyahoga County Prosecutor, By: T. Allan Regas, Assistant County Prosecutor, Cleveland, Ohio.

FOR APPELLEE: Robert Tobik, Cuyahoga County Public Defender, By: Cullen Sweeney, Assistant Public Defender, Cleveland, Ohio.

JUDGES: BEFORE: Blackmon, J., Rocco, P.J., and Dyke, J. KENNETH A. ROCCO, P.J., and ANN DYKE, J., CONCUR.

OPINION BY: PATRICIA ANN BLACKMON

OPINION

JOURNAL ENTRY AND OPINION

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)* and *26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(C)*

unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(C)*. See, also, *S.Ct. Prac.R. II, Section 2(A)(1)*.

PATRICIA ANN BLACKMON, J.:

[*P1] The State of Ohio appeals the trial court's decision to not impose postrelease control on appellee Kenneth [**2] Dresser. The State argues that this court in our remand order required the trial court to impose postrelease control at Dresser's resentencing hearing. The State assigns the following two errors for our review:

"I. The trial court erred by not imposing postrelease control upon sentencing on counts 39 and 40 as it has a statutory duty to do so."

"II. The trial court erred by not imposing postrelease control because this court ordered the trial court impose postrelease control in sentencing on counts 39 and 40."

[*P2] Having reviewed the record and pertinent law, we affirm Dresser's sentence. The apposite facts follow.

Procedural History

[*P3] In 2000, Dresser pled guilty to two counts of rape and two counts of pandering sexually-oriented material involving a minor. The trial court imposed an indefinite concurrent sentence of ten years to life on the rape charges and a concurrent sentence of five years on the pandering charges. The trial court further provided that the concurrent rape sentence was to run consecutive to the five-year concurrent sentence for pandering. The trial court failed to impose postrelease control on the pandering counts. Postrelease control was not necessary for the rape counts [**3] because they are indefinite sentences that carry a life parole tail.¹

¹ *State v. Linen* (Dec. 15, 2000), *Cuyahoga App. Nos. 74070 and 74071*, 2000 Ohio App. LEXIS 5939; *R.C. 2967.28(F)(4)*.

[*P4] In May 2007, the Ohio Bureau of Sentence Computation notified the trial court that it failed to notify Dresser that the pandering counts required the imposition of postrelease control. The trial court ordered Dresser's return from the penal institution to notify him of postrelease control. In July 2007, the trial court held a hearing at which Dresser and his counsel were present. The trial court did not conduct a de novo sentencing hearing but instead merely advised Dresser that the court was adding five years of postrelease control to the pandering sentence. Dresser objected to the trial court's imposition of postrelease control.

[*P5] Dresser filed an appeal arguing the trial court improperly imposed postrelease control because although he was still in prison on the rape charges, he had already served the five-year sentence for the pandering charges; he also argued the trial court erred by failing to conduct a de novo hearing. This court concluded that because Dresser failed to file the original sentencing transcript there was no [**4] evidence as to which order the offenses were to be served; we concluded that in the absence of evidence to the contrary, the sentence for the rape charges was to be served first.² However, this court also concluded the trial court erred by failing to conduct a de novo hearing and remanded the matter for a new sentencing hearing.

² *Cuyahoga App. No. 90305*, 2008 Ohio 3541 (*Dresser I*).

[*P6] On remand, the trial court conducted a de novo hearing. It ordered the concurrent five-year sentence on the pandering charges be served prior to the indefinite rape sentence. The court concluded that because Dresser had completed serving the five-year sen-

tence on the pandering charges, postrelease control could not be imposed.

Postrelease Control

[*P7] In its first assigned error, the State contends Dresser's sentence for the pandering charges does not contain the mandatory imposition of postrelease control as mandated by law. We agree that postrelease control is mandatory for the pandering charges, which are second degree felonies.³ However, at the resentencing hearing, the trial court ordered the pandering charges to be served first; consequently, since Dresser had completed his sentence on those charges, therefore, [**5] the trial court could not retroactively impose postrelease control.

³ *R.C. 2967.28(B)*.

[*P8] As the Ohio Supreme Court in *State v. Simpkins*⁴ held, "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence."⁵ Once an offender has served the prison term ordered by the trial court, he or she cannot be subject to resentencing in order to correct the trial court's failure to impose postrelease control at the original hearing.⁶ Here, Dresser had completed his sentence; consequently, the trial court could not impose postrelease control, after the fact, on the pandering charges.

⁴ *117 Ohio St.3d 420*, 2008 Ohio 1197, 884 N.E.2d 568.

⁵ *Id.* at syllabus.

⁶ *State v. Bezak*, *114 Ohio St.3d 94*, 2007 Ohio 3250, 868 N.E.2d 961.

[*P9] The State also argues, however, that the trial court can impose postrelease control because Dresser is still in prison on the rape charges. In support of its argument, the State cites to *R.C. 2967.28(D)(1)*, which states in pertinent part:

"Before [**6] the prisoner is released from imprisonment, the parole board shall impose upon a prisoner *** one or more postrelease control sanctions upon a prisoner." (Emphasis added).

[*P10] This section dictates when the parole board must advise the defendant of the length of his postrelease control, not when the court must notify the defendant that postrelease control is part of the sentence.

The prisoner obviously must be informed prior to being released of the length of his or her postrelease control. However, unless a trial court includes notice of postrelease control in its sentence, the Adult Parole Authority is without authority to impose it.⁷ Consequently, we conclude this section does not impact the holding set forth by the Ohio Supreme Court that for the sentence to be valid, the trial court must notify the defendant of postrelease control at the sentencing hearing and include postrelease control in the sentencing entry, prior to the completion of the sentence.⁸

⁷ *Woods v. Telb*, 89 Ohio St.3d 504, 2000 Ohio 171, 733 N.E.2d 1103.

⁸ *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006 Ohio 5795, 856 N.E.2d 263; *State v. Bezak*, *supra*; *State v. Simpkins*, *supra*.

[*P11] Although this is the first time this district has addressed this [**7] issue, other districts have also considered this issue and have concluded that it is the expiration of the prisoner's journalized sentence, rather than the offender's ultimate release from prison that is determinative of the trial court's authority to resentence.⁹ Accordingly, the State's first assigned error is overruled.

⁹ *State v. Bristow*, 6th Dist. No. L-06-1230, 2007 Ohio 1864; *State v. Turner*, 10th Dist. No. 06AP-491, 2007 Ohio 2187; *State v. Ferrell*, 1st Dist. No. C-070799, 2008 Ohio 5280.

Sentence Violates Remand Order

[*P12] In its second assigned error, the State contends the trial court violated the remand order in *Dresser I* by ordering the pandering charges be served first. As a result, the State argues because *Dresser* completed serving the five-year sentence for the pandering charges, the trial court circumvented our remand to impose postrelease control.

[*P13] In *Dresser I*, we concluded that because *Dresser* failed to file the original sentencing transcript, and because there was no evidence to the contrary, the five-year concurrent sentence for the pandering charges was to be served after the indefinite sentence for rape. Thus, our conclusion was based on the state of the record. We [**8] then remanded the matter for a de novo sentencing hearing in order for the court to impose mandatory postrelease control on the pandering charges. Upon remand, the trial court clarified that it entered the definite sentence for the pandering charges prior to the indefinite sentence for the rape charges. Because more than eight years had elapsed, the trial court concluded it could no longer impose postrelease control on *Dresser's* five-year sentence for pandering.

[*P14] We conclude the trial court did not violate our remand order by ordering the pandering charges to be served prior to the rape charges. Once we declared the sentence was void in *Dresser I*, it was as if the sentence was never entered. "The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment."¹⁰ Thus, our conclusion in *Dresser I* regarding the order in which the charges were to be served was mere dicta, as the prior void sentence no longer exists.

¹⁰ *Bezak*, *supra* at P12, 13, quoting *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268, 227 N.E.2d 223.

[*P15] The State contends *Dresser* [**9] I constitutes the "law of the case." Under the law-of-the-case doctrine, the decision of a reviewing court in a case remains the law of the case on legal questions involved for all subsequent proceedings at both trial and reviewing levels.¹¹ The law-of-the-case doctrine is a rule of practice, rather than a binding rule of substantive law, and will not be applied so as to achieve an unjust result.¹²

¹¹ *State, ex rel. Dannaher v. Crawford*, 78 Ohio St.3d 391, 394, 1997 Ohio 72, 678 N.E.2d 549.

¹² *Porter v. Litigation Mgmt., Inc.*, 146 Ohio App.3d 558, 2001 Ohio 4298, 767 N.E.2d 735; *State v. Tanner* (1993), 90 Ohio App.3d 761, 767, 630 N.E.2d 751.

[*P16] In *Dresser I*, our conclusion that the pandering charges should be served prior to the rape charges was not based upon a legal point of law, but was based upon the fact there was an insufficient record on appeal. Requiring the trial court to impose the sentence in the order directed in *Dresser I* would violate the principles of a de novo sentencing hearing because the sentence would be dependent on the previous sentence, which is now null and void. Thus, even if our directive mandated the imposition of the sentence in a certain order, we conclude applying the law-of-the-case doctrine would be [**10] counter-intuitive to our remand for a "de novo" hearing.¹³

¹³ But, see, *State v. Moore*, *Cuyahoga App. No. 83703*, 2004 Ohio 6303, affirmed by and remanded by *State v. Moore*, 113 Ohio St. 3d 254, 2007 Ohio 1788, 864 N.E.2d 629 in which this court held that the law of the case applied to cases in which the matter is remanded for resentencing for an incorrectly imposed specification, i.e. repeat violent offender specification, as the court

can only resentence on the invalid specification and does not conduct a de novo resentencing. This case is different because the Ohio Supreme Court has held the failure to include postrelease control constitutes a "void" sentence requiring a de novo resentencing hearing. *State v. Simpkins, supra*; *State v. Bezak, supra*; *State ex. rel. Cruzado v. Zaleski, supra*.

[*P17] Accordingly, we conclude the trial court did not violate our remand order by conducting a de novo hearing. The State's second assigned error is overruled.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified [**11] copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and

ANN DYKE, J., CONCUR

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
WYANDOT COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 16-10-13

v.

HENRY ALLEN HOLDCROFT,

JUDGMENT
ENTRY

DEFENDANT-APPELLANT.

This cause comes on for determination of Appellant' motion to certify a conflict as provided in App.R. 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution.

Upon consideration the Court finds that the judgment in the instant case is in conflict with the judgment rendered in *State v. Dresser*, 8th Dist. No. 92105, 2009-Ohio-2888.

Accordingly, the motion to certify is well taken and only the following issue should be certified pursuant to App.R. 25:

Does a trial court have jurisdiction to resentence a defendant for the purpose of imposing mandatory post-release control regarding a particular conviction, when the defendant has served the stated prison term regarding that conviction, but has yet to serve the entirety of his aggregate prison sentence, when all of the convictions which led to the aggregate sentence resulted from a single indictment?

COURT OF APPEALS
WYANDOT CO., OHIO
FILED

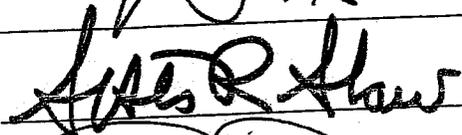
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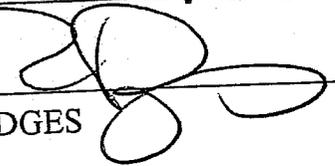
Ann K. Embrey
CLERK OF COURTS
WYANDOT CO., OHIO

Case No. 16-10-13

It is therefore **ORDERED** that Appellant's motion to certify a conflict be,
and hereby is, granted on the certified issue set forth hereinabove.







JUDGES

DATED: AUGUST 15, 2012
/hlo

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
WYANDOT COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 16-10-13

v.

HENRY ALLEN HOLDCROFT,

OPINION

DEFENDANT-APPELLANT.

Appeal from Wyandot County Common Pleas Court
Trial Court No. 98 CR 0044

Judgment Affirmed

Date of Decision: July 2, 2012

APPEARANCES:

Kristopher A. Haines for Appellant

Jonathan K. Miller for Appellee

COURT OF APPEALS
WYANDOT CO., OHIO
FILED

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Ann K. Donbar
CLERK OF COURTS
WYANDOT CO., OHIO

PRESTON, J.

{¶1} Defendant-appellant, Henry Allen Holdcroft (hereinafter "Holdcroft"), appeals the November 16, 2010 judgment of the Wyandot County Court of Common Pleas resentencing him to include post-release control ("PRC") for a mandatory period of five years for aggravated arson and a discretionary period of up to three years for arson to be run concurrently to one another.

{¶2} On November 13, 1998, the Wyandot County Grand Jury indicted Holdcroft on three counts: Count One, aggravated arson in violation of R.C. 2909.02(A)(3), a first degree felony; Count Two, complicity to commit aggravated arson in violation of R.C. 2923.03(A)(1), a first degree felony; and Count Three, arson in violation of R.C. 2909.03(A)(4), a third degree felony. (Doc. No. 1). The charges stemmed from an incident where Holdcroft hired a third party to set fire to his then-wife's automobile and home.

{¶3} On June 9, 1999, the State filed a motion to dismiss Count Two of the indictment on the basis that the charge was an allied offense of similar import to Count One, aggravated arson. (Doc. No. 58). The trial court granted the State's motion to dismiss Count Two on June 25, 1999. (Doc. No. 79). On July 6-9, 1999, a jury trial was held on the remaining two counts of the indictment against Holdcroft. The jury returned guilty verdicts on both counts. (Doc. Nos. 106-07).

On July 29, 1999, the trial court filed a judgment entry of conviction. (Doc. No. 114).

{¶4} On September 10, 1999, the trial court sentenced Holdcroft to ten years imprisonment on Count One, aggravated arson, and five years imprisonment on Count Three, arson. The trial court ordered “that the sentence imposed for Count Three shall be served consecutively to the sentence imposed in Count One.” (Sept. 13, 1999 JE, Doc. No. 116). Holdcroft was ordered to make restitution to the victim, Kathy Hurst, or the insurance carrier, in the sum of \$5,775.00, and \$400.00 to Eric Goodman. The trial court also notified Holdcroft “that a period of post-release control shall be imposed,” and that if he violated his post-release control further restrictions upon his liberty could follow as a consequence. (*Id.*) Holdcroft was also taxed with the costs of prosecution and all other fees permitted under R.C. 2929.18(A)(4). This entry was journalized on September 13, 1999. (*Id.*)

{¶5} On September 14, 1999, Holdcroft, pro se, filed a notice of appeal. (Doc. No. 117). The trial court appointed appellate counsel, and the appeal was assigned case no. 16-99-04. (Doc. No. 124). On appeal, Holdcroft asserted one assignment of error, arguing that his convictions were against the manifest weight of the evidence. *State v. Holdcroft* (Mar. 31, 2000), 3d Dist. No. 16-99-04. The State also appealed the judgment of the trial court regarding “other acts” evidence

that was excluded from trial. This Court subsequently overruled Holdcroft's assignment of error, sustained the State's assignment of error, and upheld the convictions. *Id.*

{¶6} While his direct appeal was pending before this Court, Holdcroft filed a motion for the appointment of counsel in order to pursue post-conviction relief. (Doc. No. 131). The trial court granted the motion and appointed counsel on February 3, 2000. (Doc. No. 132).

{¶7} On May 5, 2000, Holdcroft, pro se, filed a notice of appeal to the Ohio Supreme Court from this Court's March 31, 2000 decision. (Doc. No. 134). The Ohio Supreme Court, however, declined review. *State v. Holdcroft*, 89 Ohio St.3d 1464 (2000).

{¶8} On June 9, 2000, Holdcroft, through appointed appellate counsel, filed a motion for a new trial, along with a motion to withdraw as appellate counsel. (Doc. No. 135-136). The trial court granted the motion to withdraw but denied the motion for a new trial. (Doc. Nos. 138, 141). On June 26, 2000, Holdcroft filed a motion for judicial release, which the trial court also denied. (Doc. Nos. 137, 139).

{¶9} On July 13, 2006, Holdcroft filed a "motion to vacate or set aside and modify sentence pursuant to R.C. 2945.25(A) & Crim.R. 52(B)." (Doc. No. 161.) On July 20, 2006, the trial court overruled this motion, finding it was untimely and lacked substantive merit "as the Defendant was not convicted of allied offenses of

similar import. There were separate and distinct felonies committed by the Defendant, one involving a dwelling and the other involving an automobile.” (Doc. No. 163.)

{¶10} On August 16, 2006, Holdcroft, pro se, filed a notice of appeal from the trial court’s denial of his motion. (Doc. No. 165). On appeal, Holdcroft argued that his sentence was void because he was sentenced on two offenses that were allied offenses of similar import. This Court overruled Holdcroft’s assignment of error, finding that his motion was an untimely post-conviction motion, and, under a plain error analysis, that the offenses were not allied offenses of similar import. *State v. Holdcroft*, 3d Dist. No. 16-06-07, 2007-Ohio-586.

{¶11} On December 11, 2009, the State filed a motion to correct Holdcroft’s sentence pursuant to R.C. 2929.191. (Doc. No. 186). On December 30, 2009, the State filed a motion for a de novo sentencing hearing to correct Holdcroft’s sentence pursuant to *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434. (Doc. No. 195). The trial court granted this motion and conducted a de novo sentencing on January 26, 2010. (Doc. No. 198). Once again, the trial court sentenced Holdcroft to ten years on Count One and five years on Count Three. The trial court further ordered that Count Three be served consecutively to Count One for an aggregate term of fifteen years. The trial court notified Holdcroft that he would be subject to five years of mandatory post-release control

as to Count One and three years of discretionary post-release control as to Count Three. The trial court also noted that the terms of post-release control would not be served consecutively to each other. The trial court further ordered that Holdcroft “pay restitution to Kathy Hurst, or the insurance carrier, in the sum of \$5,775.00; and make restitution to Eric Goodman in the amount of \$400.00.” (Feb. 2, 2010 JE, Doc. No. 205)

{¶12} On February 12, 2010, Holdcroft filed a notice of appeal from the trial court’s judgment entry of sentence. (Doc. No. 210). On May 26, 2010, while the appeal was pending, Holdcroft, pro se, filed a petition for post-conviction relief and various motions relating to that petition. (Doc. Nos. 223-26). The trial court noted that Holdcroft was appointed counsel to handle the direct appeal of his conviction, which was pending before this Court. (Doc. No. 227). The trial court subsequently dismissed Holdcroft’s petition, concluding that it lacked jurisdiction to rule because his appeal was pending before this Court. (*Id.*).

{¶13} However, on September 13, 2010, this Court dismissed Holdcroft’s direct appeal from the trial court’s de novo resentencing in January of 2010. *State v. Holdcroft*, 3d Dist. No. 16-10-01, 2010-Ohio-4290. As the basis for dismissing the case, we determined that the judgment entry imposing Holdcroft’s sentence and conviction did not constitute a final appealable order. *Id.* at ¶ 19. More specifically, we found that the trial court’s de novo sentencing entry failed to

allocate the amount of restitution between the victim, Kathy Hurst, and the insurance company and that an order of restitution must set forth the amount or method of payment as to each victim receiving restitution in order to be a final appealable order. *Id.*, citing *State v. Kuhn*, 3d Dist. No. 4-05-23, 2006-Ohio-1145, ¶ 8; *State v. Hartley*, 3d Dist. No. 14-09-42, 2010-Ohio-2018, ¶ 5. Because Section 3(B)(2), Article IV of the Ohio Constitution limits our jurisdiction to reviewing “final appealable orders,” we remanded Holdcroft’s appeal of his de novo sentence to the trial court to resolve the restitution issue.¹

{¶14} Subsequently, on November 16, 2010, the trial court issued a new judgment entry pursuant to our decision. (Doc. No. 238). In this entry, the trial court ordered Holdcroft to pay \$5,775.00 to Kathy Hurst and also noted that certain portions of the record supported this sum and that “Ms. Hurst will be obligated to reimburse her insurance carrier for any money paid to her by it over and above that which she spent for repairing the vehicle.” (*Id.*) The trial court further noted that “[t]he defense interposed no objection to the restitution figures offered.” (*Id.*)

¹ As a result of this dismissal, on December 20, 2010, we found that the trial court incorrectly concluded that it lacked jurisdiction to rule on Holdcroft’s petition for post-conviction relief. Nevertheless, we found that the trial court correctly dismissed the petition and the motions related to it because a final order of conviction and sentence had not been filed in the case. *State v. Holdcroft*, 3d Dist. No. 16-10-04, 2010-Ohio-6262, ¶ 21.

{¶15} On November 29, 2010, Holdcroft filed a notice of appeal. (Doc. No. 240). Holdcroft asserts nine assignments of error for our review. We elect to address Holdcroft's first assignment of error last and to combine his other eight assignments of error for discussion.

SECOND ASSIGNMENT OF ERROR

THE CONSECUTIVE, MAXIMUM SENTENCES VIOLATED THE 6TH AMENDMENT TO THE U.S. CONSTITUTION, AND THE DUE PROCESS CLAUSES CONTAINED IN THE OHIO AND U.S. CONSTITUTIONS.

THIRD ASSIGNMENT OF ERROR

THE MAXIMUM, CONSECUTIVE SENTENCES AND THE RESTITUTION ORDER WERE CONTRARY TO LAW AND ABUSIVE.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN CONVICTING AND SENTENCING THE APPELLANT ON AGGRAVATED ARSON AND ARSON COUNTS IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE 5TH AMENDMENT OF THE U.S. CONSTITUTION, ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND OHIO'S MULTIPLE-COUNT STATUTE.

FIFTH ASSIGNMENT OF ERROR

THE SENTENCE SHOULD BE REVERSED AS IT VIOLATES CRIMINAL RULE 32, AND THE 5TH, 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, BECAUSE IT WAS IMPOSED OVER TEN YEARS AFTER THE GUILTY VERDICT.

SIXTH ASSIGNMENT OF ERROR

THE COURT ERRED WHEN IT FAILED TO CHANGE THE VENUE OR GRANT A MISTRIAL DUE TO JURY TAIN T AND JURY MISCONDUCT THAT VIOLATED THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

SEVENTH ASSIGNMENT OF ERROR

THE COURT ERRED IN ADMITTING OTHER ACTS EVIDENCE IN VIOLATION OF EVID.R. 403 AND 404, THUS DEPRIVING APPELLANT OF A FAIR TRIAL UNDER THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

EIGHTH ASSIGNMENT OF ERROR

APPELLANT'S CONVICTION WAS NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION, AND THE CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

NINTH ASSIGNMENT OF ERROR

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10, 16 OF THE OHIO CONSTITUTION.

{¶16} Initially, we must determine the scope of our review of these assignments of error and whether they are properly before this Court. The State

asserts that the only issues Holdcroft may now raise on appeal are those related to PRC pursuant to *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238. Thus, the State contends that Holdcroft is precluded from challenging the merits of his conviction, including the determination of guilt and the lawful elements of his sentence. In response, Holdcroft argues that unlike the facts at issue in *Fischer*, which addressed sentences that were void for lacking proper PRC notification, his case involves a sentencing entry that did not constitute a final, appealable order because of the trial court's restitution order. As such, he maintains that our prior decisions are nullities because we did not have jurisdiction until a final appealable order was rendered, i.e. on November 16, 2010, and that each of his assignments of error is properly before this Court as if this were his first direct appeal.

{¶17} After reviewing the convoluted procedural history of this case, we conclude that addressing Holdcroft's assignments of error furthers the interests of justice here. That being said, this Court is very familiar with this case and our analysis of Holdcroft's assignments of error will be done summarily.

{¶18} In his eighth assignment of error, Holdcroft argues that his conviction was not supported by sufficient evidence and against the manifest weight of the evidence. We disagree. After reviewing the record herein under the applicable standards, we conclude that the State presented sufficient evidence and that Holdcroft's convictions were not against the manifest weight of the evidence.

{¶19} In his second assignment of error, Holdcroft argues that *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711 (2009) abrogated *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856; and therefore, the trial court was required to make factual findings before imposing consecutive sentences. This Court has rejected this argument before, and we reject it again. *State v. Taylor*, 3d Dist. No. 9-10-44, 2011-Ohio-1866, ¶ 90. We also reject Holdcroft's argument that the trial court's application of *Foster* operated as an *ex post facto* law in violation of the Due Process Clause. *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, paragraph one of the syllabus.

{¶20} In his third assignment of error, Holdcroft first argues that the trial court erred in taking judicial notice of the same factual findings it had made at the original sentencing hearing (pre-*Foster*) for the resentencing hearing (post-*Foster*). We disagree. *Foster* simply stated that the trial courts were no longer *required* to make factual findings; *Foster* did not forbid trial courts from considering the relevant factors when sentencing. *State v. Smith*, 11th Dist. No. 2006-A-0082, 2007-Ohio-4772, ¶ 24. We also reject Holdcroft's argument that his sentence was not consistent with other sentences for similar arson convictions. Finally, we reject his argument relative to the trial court's restitution figure since Holdcroft did not object to the same at the resentencing hearing. We cannot

conclude that the trial court's restitution order amounted to plain error when the record supported its order herein.

{¶21} In his fourth assignment of error, Holdcroft argues that the trial court erred by imposing sentences upon both his aggravated arson and arson convictions since they constituted allied offenses of similar import. We disagree. The evidence presented demonstrated that Holdcroft set two separate fires (one upon the vehicle and one upon the porch); and therefore, separate animus exists for each separate conviction. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 49.

{¶22} In his fifth assignment of error, Holdcroft argues that the unreasonable delay between his conviction in 1999 and his final sentence in 2010 violated Crim.R. 32 and the 5th, 6th, and 14th Amendments to the U.S. Constitution. We reject this argument as well. The trial court here did not simply refuse to sentence Holdcroft; rather, it was subsequently determined upon appeal (almost ten years later) that Holdcroft's sentencing entry was non-final. Holdcroft was also resentenced to correct a PRC notification issue. Consequently, we must reject his arguments of unreasonable delay. *See e.g. State v. Spears*, 9th Dist. No. 24953, 2010-Ohio-1965.

{¶23} In his sixth assignment of error, Holdcroft argues that the trial court erred when it failed to change the venue or grant a mistrial due to jury misconduct. Since the record fails to indicate that any of the jurors who read the pretrial

newspaper article were actually biased in this case, Holdcroft's arguments lack merit. *State v. Wegmann*, 3d Dist. No. 1-06-98, 2008-Ohio-622, ¶ 34-35.

{¶24} In his seventh assignment of error, Holdcroft argues that the trial court erred by admitting other acts evidence in violation of Evid.R. 403 and 404, and thereby, depriving him of a fair trial. We disagree. The evidence of Holdcroft's previous threat to his wife, Kathy Hurst, that he would burn her house down if she ever left, and Holdcroft's solicitation of Joshua Shula to burn his wife's car and trailer were admissible to show Holdcroft's motive, intent, plan, and identity under Evid.R. 404(B) and R.C. 2945.59. Furthermore, the trial court's admission of this evidence would be harmless error *at most* in light of the other evidence presented.

{¶25} In his ninth assignment of error, Holdcroft argues that trial counsel was ineffective for various reasons. A defendant asserting a claim of ineffective assistance of counsel must establish: (1) the counsel's performance was deficient or unreasonable under the circumstances; and (2) the deficient performance prejudiced the defendant. *State v. Kole*, 92 Ohio St.3d 303, 306 (2001), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). Prejudice results when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Bradley*, 42 Ohio St. 3d 136, 142 (1989), citing *Strickland* at 691. "A

reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Bradley* at 142; *Strickland* at 694. Even if we assume that trial counsel was ineffective as Holdcroft argues, he has failed to demonstrate prejudice.

{¶26} Holdcroft’s eighth, second, third, fourth, fifth, sixth, seventh, and ninth assignments of error are, therefore, overruled.

FIRST ASSIGNMENT OF ERROR

THE COURT LACKED JURISDICTION TO IMPOSE MANDATORY POST-RELEASE CONTROL UPON THE APPELLANT.

{¶27} In his first assignment of error, Holdcroft asserts that the trial court lacked jurisdiction to impose the mandatory, five-year term of PRC for his aggravated arson conviction (Count One) because, by the time of the resentencing hearing, he had already completed his ten-year-sentence on that conviction and was serving the remainder of his five-year-sentence for his arson conviction (Count Two). In response, the State contends that, at the time of the resentencing hearing, Holdcroft was still serving his aggregate fifteen-year sentence in the case; and therefore, the trial court has jurisdiction to impose PRC on both convictions.

{¶28} The relevant procedural history in this case is undisputed. On September 13, 1999, the trial court ordered that Holdcroft serve ten years on Count One, aggravated arson, and five years on Count Three, arson. The trial court further ordered that the term of imprisonment for Count Three be served

consecutively to the term for Count One, for an aggregate term of fifteen years. The trial court resentenced Holdcroft to impose the proper terms of PRC in January of 2010,² imposing five years of mandatory PRC for Count One and up to three years of discretionary PRC for Count Three. Thus, over ten years but less than fifteen years transpired between the time of the sentencing and the resentencing hearings.

{¶29} “When sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about postrelease control and is further required to incorporate that notice into its journal entry imposing sentence.” *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, ¶ 15, quoting *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph one of the syllabus. A trial court’s failure to incorporate the proper notice of post-release control—whether PRC is mandatory or discretionary, the duration of PRC, and the possible consequences for violating PRC—renders the trial court’s sentencing entry *partially* void. *Fischer*, 2010-Ohio-6238, at ¶ 27-29. Generally speaking, the appropriate remedy to correct the trial court’s partially void sentencing entry is to resentence the offender. *Jordan*, 2004-Ohio-6085, at ¶ 23;

² The resentencing hearing was held on January 26, 2010, but the resentencing entry was not filed until February 2, 2010.

State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250, ¶ 16-17.³ However, an offender that “has already served the prison term ordered by the trial court * * * cannot be subject to resentencing in order to correct the trial court’s failure to impose postrelease control.” *Bezak*, 2007-Ohio-3250, at ¶ 18. *See also Hernandez*, 2006-Ohio-126, at ¶ 32 (“In that his journalized sentence has expired, Hernandez is entitled to the writ and release from prison and from further postrelease control.”); *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, ¶ 28 (“Because Cruzado’s sentence had not yet been completed when he was resentenced, Judge Zaleski was authorized to correct the invalid sentence to include the appropriate, mandatory postrelease-control term.”); *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, syllabus (“In cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence.”); *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶ 70 (“[O]nce an offender has

³ The nature of the resentencing hearing depends upon when the partially void sentence was entered. For sentences entered on or after July 11, 2006, R.C. 2929.191 prescribes the resentencing hearing and remedial mechanism to correct such sentencing entries. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph two of the syllabus. For sentences entered prior to July 11, 2006, the proper remedy is a resentencing hearing “limited to [the] proper imposition of postrelease control.” *Fischer*, 2010-Ohio-6238, at ¶ 29. Although the majority in *Fischer* did not explicitly state that this limited resentencing hearing is an R.C. 2929.191 hearing, it appears that an R.C. 2929.191 hearing would meet the majority’s requirements. *See Fischer*, 2010-Ohio-6238, at ¶ 43, Fn. 3 (Lanzinger, J., dissenting) (noting that the majority’s opinion effectively overruled paragraph one of the syllabus in *Singleton*, 2009-Ohio-6434, requiring a de novo resentencing hearing).

completed the prison term imposed in his original sentence, he cannot be subjected to another sentencing to correct the trial court's flawed imposition of postrelease control.").

{¶30} The issue sub judice is whether the trial court was without jurisdiction to impose five years of mandatory PRC on Holdcroft's aggravated arson conviction (Count One) at the resentencing hearing because Holdcroft had already served "the prison term ordered by the trial court." Specifically, the issue concerns whether the words "prison term" and "sentence" used by the Ohio Supreme Court in *Bezak*, *Hernandez*, *Cruzado*, *Simpkins*, and *Bloomer* mean the prison term the trial court ordered for each conviction (Count) or whether these words refer to the entire term of imprisonment for all convictions (Counts) in the case, i.e. the aggregate sentence imposed for the entire case. If the words have the former meaning, the trial court was without jurisdiction to impose five years of mandatory PRC on Holdcroft's aggravated arson conviction (Count One) since Holdcroft had already served his ten-year sentence on that conviction (Count). If the words have the latter meaning, the trial court had jurisdiction to impose the five years of mandatory PRC on Holdcroft's aggravated arson conviction (Count One) since Holdcroft was still incarcerated on his total aggregate sentence at the time of the resentencing hearing. For the reasons that follow, we conclude that the words "prison term" and "sentence" as used by the Ohio Supreme Court in

Hernandez and the cases that follow it mean the entire journalized sentence for all convictions (Counts) in the case, i.e. the aggregate sentence; and therefore, the trial court sub judice had jurisdiction to impose the mandatory five-year term of PRC on Holdcroft's aggravated arson conviction (Count One).

{¶31} The answer to our inquiry is not directly revealed by the Ohio Supreme Court's decisions in *Hernandez*, *Bezak*, or *Bloomer* because the defendants in those cases were serving terms of imprisonment stemming from single-count indictments. 2006-Ohio-126, at ¶ 4; 2007-Ohio-3250, at ¶ 1; 2009-Ohio-2462, at ¶ 22. Comparison to the Court's decision in *Cruzado* is also inapposite since the offender was sentenced on two counts from two separate indictments; the trial court ordered that the sentences be served concurrently; and, the offender was resentenced prior to the expiration of the concurrent terms of imprisonment. 2006-Ohio-5795, at ¶ 2, 8-9. Similarly, the offender in *Simpkins* was sentenced to three concurrent terms of imprisonment stemming from a single indictment, and the offender was resentenced prior to the expiration of the concurrent terms of imprisonment. 2008-Ohio-1197, at ¶ 1-3.

{¶32} While the aforementioned cases do not directly answer the specific question presented here, they do provide the policy lens through which similar cases ought to be viewed. The Court in *Hernandez* explained that notifying an offender of his post-release control obligations after he has already served the term

of imprisonment “would circumvent the objective behind R.C. 2929.14(F) and 2967.28 to notify defendants of the imposition of postrelease control at the time of their sentencing.” 2006-Ohio-126, at ¶ 28. Significant to the Court’s decision in *Hernandez* was the fact that the offender had already been released from his original term of imprisonment and had unknowingly violated his PRC. *Id.* at ¶ 5-6. *See also Simpkins*, 2008-Ohio-1197, at ¶ 17. When the prison warden argued that the trial court’s failure to properly notify the offender of PRC could be corrected by simply holding a resentencing hearing, the Court rejected that argument—comparing an after-the-fact PRC notification to an after-the-fact community control notification. *Hernandez*, 2006-Ohio-126, at ¶ 31, citing *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746; *Simpkins*, 2008-Ohio-1197, at ¶ 17. The Court in *Hernandez* observed that the purpose of R.C. 2929.19(B)(5), which requires that the trial court provide offenders sentenced to community control with notice of the possible consequences for violating their community control, is to provide offenders with the notice *before a violation* of their community control. 2006-Ohio-126, at ¶ 31, citing *Brooks*, 2004-Ohio-4746, at ¶ 33. Similarly, the purpose of R.C. 2929.19(B)(2)(c)-(e), formerly R.C. 2929.19(B)(3)(c)-(e), is to provide the offender with notice of the possible consequences if he violates the terms of post-release control *before a violation* of his post-release control has actually occurred. Interpreting the terms “prison term” and “sentence” used in the

aforementioned cases as the aggregate sentence on all convictions (Counts) in the case is consistent with the purpose behind R.C. 2929.19(B)(2)(c)-(e), because the offender would be notified about his PRC before his release from prison and, consequently, before a violation of PRC could ever occur.

{¶33} Interpreting “prison term” and “sentence” used in the aforementioned cases as the aggregate sentence on all convictions in the case is also consistent with Ohio Revised Code Chapter 2929. For purposes of Chapter 2929, “prison term” includes “[a] stated prison term,” and the “stated prison term” includes the “combination of all prison terms and mandatory prison terms imposed by the sentencing court.” R.C. 2929.01(BB), (FF). Similarly, the term “sentence” includes the “*combination of sanctions* imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense.” R.C. 2929.01(EE) (emphasis added). Possible “sanction[s]” include terms of imprisonment imposed under 2929.14. R.C. 2929.01(DD). Moreover, R.C. 2929.14(C)(6) provides that “[w]hen consecutive prison terms are imposed pursuant to * * * [R.C. 2929.14], the term to be served is the aggregate of all of the terms so imposed.” *See also* Ohio Adm. Code § 5120-2-03.1 (“When consecutive stated prison terms are imposed, the term to be served is the aggregate of all of the stated prison terms so imposed.”). Consequently, throughout Chapter 2929, the words “prison term” and

“sentence” can refer to multiple terms of imprisonment (sanctions under R.C. 2929.14) imposed by the sentencing court, i.e. the aggregate sentence.

{¶34} Interpreting the words “prison term” and “sentence” used in the aforementioned cases as the aggregate sentence imposed on all convictions (Counts) in the case is also consistent with R.C. 2929.191. In response to *Jordan* and *Hernandez*, the General Assembly enacted H.B. 137, which provided, in relevant part:

(A)(1) If, prior to the effective date of this section, a court imposed a *sentence* including a *prison term* of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section 2929.14 of the Revised Code, at any time before the offender is released from imprisonment under that term * * *

(2) If a court prepares and issues a correction to a judgment of conviction as described in division (A)(1) of this section before the offender is released from imprisonment under the prison term the court imposed prior to the effective date of this section, the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. * * *

R.C. 2929.191(A)(1), (2) (emphasis added) (eff. 7-11-06).⁴ As we alluded to above, the words “prison term” and “sentence” in R.C. 2929.191 have been expressly defined in R.C. 2929.01 to include the combination of prison terms, i.e. the aggregate sentence, imposed upon an offender by the sentencing court.

{¶35} Moreover, R.C. 2929.191’s language must be interpreted in light of the history in which it was enacted, the General Assembly’s response to *Jordan* and *Hernandez*, and in light of its remedial purpose. *Singleton*, 2009-Ohio-6434, at ¶ 48 (Pfeifer, J., dissenting) (R.C. 2929.191 was enacted in response to *Jordan* and *Hernandez*); *Id.* at ¶ 65 (Lanzinger and Stratton, J.J., concurring in part, dissenting in part) (same); *Id.* at ¶ 23 (describing R.C. 2929.191 as remedial); (H.B. 137 Final Bill Analysis) (“amendments made in the act concerning post-release control are non-substantive and merely clarify the prior law and thus are remedial in nature”). Remedial laws are to be liberally construed to give effect to their legislative purpose and to promote justice. R.C. 1.11. *See also Clark v. Scarpelli*, 91 Ohio St.3d 271, 275 (2001), citing *Curran v. State Auto. Mut. Ins. Co.*, 25 Ohio St.2d 33, 38 (1971). The General Assembly’s purpose in enacting R.C. 2929.191 was, in part, “to reaffirm that, prior to [the statute’s] effective date, an offender subject to post-release control sanctions was always subject to the post-release control sanctions after the offender’s release from imprisonment

⁴ R.C. 2929.191 was recently amended by H.B. 86 (eff. 9-30-11) to reflect changes in the sentencing statutes, however, the changes to R.C. 2929.191 were not substantive and do not affect the analysis herein.

without the need for any prior notification or warning * * *.” (H.B. 137 Final Bill Analysis). The General Assembly also declared that it intended R.C. 2929.191 to apply “regardless of whether [the offenders] were sentenced prior to, or are sentenced on or after, the act’s effective date * * *.” (*Id.*). See also *Singleton*, 2009-Ohio-6434, at ¶ 65 (Lanzinger and Stratton, J.J., concurring in part, dissenting in part). In light of the foregoing, we conclude that interpreting the words “prison term” and “sentence” as the aggregate sentence for all convictions (Counts) in the case better effectuates the legislative purpose of R.C. 2929.191 by ensuring that offenders are serving post-release control upon their release from prison as required under R.C. 2967.28(B).

{¶36} The Court of Appeals, for its part, has taken different positions on this precise issue. The Eighth District has held that it is the expiration of the sentence on the specific conviction (Count) for which post-release control is applicable, and not the offender’s ultimate release from prison, that determines whether a court may correct a sentencing error and impose post-release control at resentencing. *State v. Dresser*, 8th Dist. No. 92105, 2009-Ohio-2888, ¶ 11, reversed on other grounds in *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671. The defendant in *Dresser* pled guilty to two counts of rape and two counts of pandering sexually-oriented material involving a minor in 2000. 2009-Ohio-2888, at ¶ 3. The trial court imposed an indefinite concurrent sentence

of ten years to life on the rape charges and a concurrent sentence of five years on the pandering charges. *Id.* The trial court further ordered that the concurrent rape sentence was to run consecutive to the five-year concurrent sentence for pandering; however, the trial court failed to impose post-release control on the pandering counts. *Id.* In July 2007, the trial court held a hearing and advised the defendant of his mandatory five-year term of PRC on the pandering convictions. *Id.* at ¶ 4. The defendant appealed and argued that he could not be given PRC on the pandering convictions since he had already served his five year concurrent terms on those convictions by the time of the hearing. *Id.* at ¶ 5. The Eighth District determined that, because the defendant had failed to file the original sentencing transcript, there was no evidence as to which order the offenses were to be served, and, in the absence of evidence to the contrary, the sentence for the rape charges was to be served first. *Id.*, citing *State v. Dresser*, 8th Dist. No. 90305, 2008-Ohio-3541 (*Dresser I*). Nevertheless, the Eighth District concluded the trial court erred by failing to conduct a de novo hearing and remanded the matter for a new sentencing hearing. *Id.*

{¶37} On remand, the trial court conducted a de novo sentencing hearing and ordered the concurrent five-year sentence on the pandering charges be served *prior to* the indefinite rape sentences. *Id.* at ¶ 6. The trial court then concluded that post-release control could not be imposed on the pandering convictions,

because the defendant had already served the five-year sentence on those convictions. *Id.* Thereafter, the State appealed and argued that the trial court erred by failing to impose the mandatory term of PRC. *Id.* at ¶ 7. The Eighth District rejected the State's argument, however, and concluded that the trial court could not retroactively impose the mandatory PRC upon the defendant for his pandering convictions since he had already served the sentence for those convictions by the time of the resentencing hearing. *Id.* at ¶ 8.

{¶38} In reaching its decision in *Dresser*, the Eighth District stated that “other districts have also considered this issue and have concluded that it is the expiration of the prisoner’s journalized sentence, rather than the offender’s ultimate release from prison that is determinative of the trial court’s authority to resentence.” *Id.* at ¶ 11, citing *State v. Bristow*, 6th Dist. No. L-06-1230, 2007-Ohio-1864; *State v. Turner*, 10th Dist. No. 06AP-491, 2007-Ohio-2187; and *State v. Ferrell*, 1st Dist. No. C-070799, 2008-Ohio-5280. Although the Eighth District correctly stated the general proposition of law from those cases, the appellate court failed to apply the proposition of law correctly in *Dresser*. The facts of *Dresser* are easily distinguishable from the facts in *Bristow*, *Turner*, and *Ferrell*. All of the defendants in those cases, unlike *Dresser*, were sentenced to consecutive sentences for convictions in *separate cases* stemming from *separate indictments*. *Bristow*, 2007-Ohio-1863, at ¶ 2; *Turner*, 2007-Ohio-2187, at ¶ 4; *Ferrell*, 2008-Ohio-

5280, at ¶ 1. In fact, the defendants' convictions in *Turner* and *Ferrell* were from different counties. 2007-Ohio-2187, at ¶ 4; 2008-Ohio-5280, at ¶ 1. Consequently, the "journalized sentence" to which the Courts in *Bristow*, *Turner*, and *Ferrell* were referring to was the journalized sentence for an entire case—not the sentence for a single conviction (Count) in a single case. Therefore, the specific rule of law from *Bristow*, *Turner*, and *Ferrell* was that a trial court lacks jurisdiction to impose PRC upon an offender when the sentence for *the entire case* has been already served, even though the offender is still incarcerated on a different case and the sentence in the second case was ordered to be served consecutive to the first (now finished) case. This rule has been followed by several other districts besides the first, sixth,⁵ and tenth, including this district. *State v. Arnold*, 189 Ohio App.3d 238, 2009-Ohio-3636 (2nd Dist.); *State v. Ables*, 3d Dist. No. 10-11-03, 2011-Ohio-5873; *State v. Henry*, 5th Dist. No. 2006-CA-00245, 2007-Ohio-5702; *State v. Rollins*, 5th Dist. No. 10CA74, 2011-Ohio-2652. Despite the obvious differences between the facts and procedural history in *Bristow*, *Turner*, *Ferrell*, and the facts and procedural history in *Dresser*, the Eighth District still follows *Dresser* and continues to examine sentences on

⁵ The Sixth District does have one case not following this rule. *State v. Lathan*, 6th Dist. No. L-10-1359, 2011-Ohio-4136. This appears to be the only case that has held that consecutive sentences in separate cases constitute one aggregate sentence for purposes of resentencing for proper imposition of PRC. The Sixth District has other cases following the rule it previously set forth in *Bristow*, supra. *State v. Larkins*, 6th Dist. No. H-10-010, 2011-Ohio-2573; *State v. Helms*, 6th Dist. No. L-10-1079, 2010-Ohio-6520.

specific convictions (Counts) for purposes of determining whether a trial court has jurisdiction to impose PRC at a resentencing hearing. *State v. Cobb*, 8th Dist. No. 93404, 2010-Ohio-5118; *State v. O'Hara*, 8th Dist. No. 95575, 2011-Ohio-3060.

{¶39} The Ninth District, on the other hand, has concluded that, for purposes of determining whether a trial court has jurisdiction to resentence an offender to properly impose PRC under *Hernandez* and its progeny, a “journalized sentence that includes consecutive sentences does not expire until the aggregate time of the consecutive sentences expires.” *State v. Deskins*, 9th Dist. No. 10CA009875, 2011-Ohio-2605, ¶ 19. The defendant in that case pled guilty to five counts of rape, and, in September 2003, the trial court sentenced him to serve five years imprisonment on each count and further order that the terms be served consecutively for an aggregate term of twenty-five years. *Id.* at ¶ 2-3.⁶ In April 2010, the trial court held a resentencing hearing and resented the defendant to the same twenty-five-year aggregate prison term, but this time properly imposed the mandatory five-year term of PRC. *Id.* at ¶ 4. Like Holdcroft herein, the defendant in *Deskins* argued that the trial court lacked jurisdiction to impose PRC on at least one of his convictions since he had already served seven years by the

⁶ It is not clear from the appellate court’s decision whether or not the trial court specified the order in which the defendant was to serve the consecutive prison terms, i.e. count one first, count two second, etc. *Deskins*, 2011-Ohio-2605, at ¶ 2-3.

time of the resentencing hearing, but the Ninth District rejected this argument and found that the defendant's journalized sentence had not expired. *Id.* at ¶ 19.

{¶40} To reach its decision, the Ninth District relied upon the Fifth District's decision in *State v. Tharp*, 5th Dist. No. 07-CA-9, 2008-Ohio-3995. The defendant in *Tharp* pled no contest and was found guilty of two counts of burglary, second degree felonies; one count of theft of a motor vehicle, a fourth degree felony; two counts of theft of a firearm, fourth degree felonies; one count of breaking and entering, a fifth degree felony; and two counts of theft in violation, fifth degree felonies. *Id.* at ¶ 2. On November 1, 2000, the trial court sentenced the defendant to two years on each of the two burglary convictions, one year on the theft of a motor vehicle conviction, one year on the breaking and entering conviction, six months on each of the two theft of a firearm convictions, and six months on each of the two theft convictions. *Id.* at ¶ 3. The trial court ordered that the terms of imprisonment be served consecutively for an aggregate eight years imprisonment, but the trial court did not specify which term of imprisonment was to be served first. *Id.* at ¶ 3, 11. On October 16, 2006, the trial court held a resentencing hearing to properly impose PRC. *Id.* at ¶ 4. On appeal, the defendant argued that the trial court lacked jurisdiction to impose PRC upon his burglary convictions (Counts One and Two) since the termination judgment entry listed the burglary convictions first, and he had already served the four years

for those convictions by the time of the resentencing hearing. *Id.* at ¶ 12. The Fifth District rejected the defendant's argument, reasoning as follows:

The charges for which Appellant was found guilty and sentenced to arise from a single indictment issued on February 24, 2000. The trial court's sentencing entry stated that each term was to be served consecutively, but the trial court generally stated as to each count that, "said period of incarceration to be served consecutive to the time herein imposed." The trial court did not specify that certain counts were to be served consecutively to another. Accordingly, we find Appellant's journalized sentence for an aggregate term of eight years does not expire until November 2008. The trial court did not lack jurisdiction to correct Appellant's invalid sentence to include post release control because Appellant's journalized sentence had not yet expired when he was resentenced.

Id. at ¶ 14.

{¶41} While the trial court sub judice did specify that Holdcroft's ten-year aggravated arson sentence be served first, we do not think this fact, alone, sufficiently distinguishes our case from *Deskins* and *Tharp*, supra. Although the Fifth District did rely upon this fact, in part, when it reached its decision, it also specifically noted that the defendant's sentence arose from a single indictment. *Id.* Since its decision in *Tharp*, the Fifth District has distinguished *Turner*, *Ferrell*, and *Arnold*, at least in part, on the basis that the defendants in those cases were sentenced in separate cases. *State v. Booth*, 5th Dist. No. 2010CA00155, 2011-Ohio-2557, ¶ 12-13. The Fifth District has also more recently clarified the applicable rule to be gleaned from *Bristow*, *Turner*, *Ferrell*, and *Arnold* as

follows: “where an offender has completed his sentence on the case for which the court has resentenced him under R.C. 2929.191, the resentencing entry is void for lack of jurisdiction even if the offender remains incarcerated on another case at the time of the resentencing.” *Id.*, at ¶ 12, citing *State v. Henry*, 5th Dist. No. 2006-CA-00245, 2007-Ohio-5702. *See also Rollins*, 2011-Ohio-2652, at ¶ 10 (“the language of R.C. 2929.191(A)(1) which permits resentencing “at any time before the offender is released from prison on that term” refers to the Richland County sentence. The sentence from Paulding County is a completely separate term of imprisonment, imposed by a different court under a separate indictment and case, and imposed roughly ten months after appellant began to serve his term of imprisonment from Richland County.”).

{¶42} After reviewing the aforementioned cases, we agree with the Fifth District that the rule in *Bristow*, *Turner*, *Ferrell*, and *Arnold* applies where the offender has been sentenced in *separate cases* and the *separate cases* have been ordered to be served consecutively. We do not agree with the Eighth District’s expansion of this rule to include convictions (Counts) in a single case arising from a single indictment like the case herein. Therefore, we hold that, for purposes of determining whether a trial court has jurisdiction to resentence a defendant to properly include PRC, a journalized sentence *for a single case* that includes consecutive sentences on separate convictions (Counts) does not expire until the

aggregate time of the consecutive sentences for all the convictions (Counts) expires. *Deskins*, 2011-Ohio-2605, at ¶ 19.

{¶43} Our holding here is not only consistent with the Ohio Revised Code and the applicable case law but is also consistent with public policy. As we previously mentioned, our conclusion here is consistent with the policy of notifying the offender of his PRC *prior to* a possible violation of the same. Moreover, our conclusion here ensures that offenders are actually serving their PRC—PRC, which was determined to be appropriate as a matter of public policy as evidenced in R.C. 2967.28. This strong public policy of ensuring that offenders are serving post-release control was further expressed when the General Assembly promptly passed of H.B. 137 (enacting R.C. 2929.191) in response to the Ohio Supreme Court’s decisions in *Jordan* and *Hernandez*. The Ohio Supreme Court has also recognized this same public policy in its post-release control cases. See *Simpkins*, 2010-Ohio-1197, at ¶ 26 (“Although *res judicata* is an important doctrine, it is not so vital that it can override ‘society’s interest in enforcing the law, and in meting out the punishment the legislature has deemed just.’”) (quoting *State v. Beasley*, 14 Ohio St.3d 74, 75 (1984)); *Fischer*, 2010-Ohio-6238, at ¶ 21-23. Finally, our decision encourages multi-count indictments (a single case) rather than separate indictments (separate cases), which enhances judicial economy, diminishes inconvenience to witnesses, and minimizes the possibility of

incongruous results for the defendant. *See State v. Schaim*, 65 Ohio St.3d 51, 58 (1992) (joinder under Crim.R. 8(A)).

{¶44} Since Holdcroft had not yet completed his aggregate fifteen-year sentence before the resentencing hearing was held, the trial court had jurisdiction to sentence him to five years of mandatory PRC on his aggravated arson conviction (Count One).

{¶45} Holdcroft's first assignment of error is, therefore, overruled.

{¶46} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

ROGERS, P.J. concurs.

/jlr

SHAW, P.J., Concurs in Part and Dissents in Part.

{¶47} In its decision to overrule the first assignment of error, the majority acknowledges that the Supreme Court of Ohio has not resolved the issue presented of whether a trial court has the authority to impose postrelease control on a defendant who has already completed his or her prison term for a particular offense, but remains imprisoned on another offense arising from the same case. In proposing its resolution of this issue, the majority sets forth a statutory and case

analysis that the majority believes precludes the reviewing court from considering the specific sentence ordered by the trial court directed to each individual offense charged within an indictment. Instead the majority would require the reviewing court to base its decision only upon a "lump-sum," aggregate analysis which essentially forges the entire "indictment," or "indictments" and the aggregate "sentence" or "sentences" into a single, overall "prison term."

{¶48} According to the majority, the multiple or consecutive sentences contained within this single "prison term" are then always capable of later being parsed and interpreted in favor of the state, for purposes of interpreting prison time served and cleaning up PRC errors, (or perhaps even for interpreting double jeopardy implications), without regard to how many different individual offenses are involved, without regard to the specific terms of any individual sentencing orders contained within each judgment entry and without regard to how many of these individual sentences, according to the specific terms of the judgment entry, have in fact been completely served at the time any of these other issues are raised. As a consequence, the majority effectively rules in the case before us that where there are multiple sentences within a single case, the trial court does not have the authority to specify which individual sentence is to be served first, regardless of what it states in the judgment entry.

{¶49} Because I believe the majority's proposal to shift our analysis of these cases from the specific sentence imposed by the trial court pertaining to each individual offense in any given indictment, toward an analysis based only upon the overall aggregate sentence and aggregate prison term is problematic in general and unwarranted in this particular case, I respectfully dissent from the disposition of the first assignment of error. I concur in the disposition of the remaining assignments of error.

{¶50} My first concern is that the majority decision disregards the specific terms of the judgment entry of sentence in this case, which, as even the majority concedes, clearly indicates that the ten year prison term for count one would be served prior to the remaining prison terms, and hence the sentence for count one would have been completed at the time the PRC issue regarding count one arose. I see no sound reason for disregarding the specific language of a trial court's own judgment entry of sentence in interpreting matters pertaining to that sentence.

Thus, even if the majority rationale were to be considered as a viable "default" alternative employed to determine the order of sentences in those cases where the sentencing entry is silent on the nature of the consecutive sentences, there is no reason to apply it in the present case where the trial court itself has given us all the information we need to decide the question. And as noted above, it seems to me that by disregarding the trial court's specific sentencing language in

this case, we are effectively ruling that trial courts in general do not have the authority to specify the order of consecutive sentences in a judgment entry of sentence; something that I question whether we have the authority to do.

{¶51} Second, and perhaps more importantly, beyond merely deviating from what I believe to be the sounder appellate approach of addressing each specific offense, conviction and sentence for each count in the indictment, I believe the position taken by the majority runs counter to fundamental sentencing principles in Ohio jurisprudence which *require* courts to separately analyze the *specific sentence imposed for each offense*. The Supreme Court of Ohio has stated the following with regard to the purpose underpinning Ohio felony-sentencing statutes.

Ohio's felony-sentencing scheme is clearly designed to focus the judge's attention on one offense at a time. Under R.C. 2929.14(A), the range of available penalties depends on the degree of each offense. For instance, R.C. 2929.14(A)(1) provides that "[f]or a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years."⁷ (Emphasis added.) R.C. 2929.14(A)(2) provides a different range for second-degree felonies. In a case in which a defendant is convicted of two first-degree felonies and one second-degree felony, the statute leaves the sentencing judge no option but to assign a particular sentence to each of the three offenses, separately. The statute makes no provision for grouping offenses

⁷ We note that the legislature has since amended the felony-sentencing statutes to include new ranges of available penalties for some offenses. For example, R.C. 2929.14(A)(1) now provides, "[f]or a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, ten, or eleven years." However, the overriding offense-specific approach to the felony-sentencing scheme remains the same.

together and imposing a single, "lump" sentence for multiple felonies.

Although imposition of concurrent sentences in Ohio may appear to involve a "lump" sentence approach, the opposite is actually true. Instead of considering multiple offenses as a whole and imposing one, overarching sentence to encompass the entirety of the offenses as in the federal sentencing regime, a judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense. See R.C. 2929.11 through 2929.19. * * * Only after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively. * * * Under the Ohio sentencing statutes, the judge lacks the authority to consider the offenses as a group and to impose only an omnibus sentence for the group of offenses.

State v. Saxon, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶¶ 8-9. (Internal Citations Omitted) (Emphasis added).

{¶52} In addition, the Supreme Court in *Saxon* specifically addressed the term "sentence" as defined in R.C. 2929.01(E)(E), the former R.C. 2929.01(F)(F), and reached a conclusion that appears to be inconsistent with majority's regarding how the term "sentence" is applicable to Ohio's felony-sentencing scheme.

[Revised Code Section] 2929.01(FF) defines a sentence as "the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense."⁸ [The State] in the case at bar points to the "combination of sanctions" language in this definition and urges us to find that that [sic] language necessarily indicates that a "sentence" includes all sanctions given for all offenses and is not

⁸ The term sentence is now codified under R.C. 2929.01(FF) which provides the same definition stated above.

limited to the sanction given for just one offense. But a trial court may impose a combination of sanctions on a single offense, for example, a fine and incarceration. See R.C. 2929.15 to 2929.18 * * *. Therefore, [the State's] insistence that the "combination of sanctions" language supports [it's] contentions is misplaced. This language merely recognizes the availability of multiple sanctions for a single offense.

Further, the statute explicitly defines "a sentence" as those sanctions imposed for "an offense." The use of the articles "a" and "an" modifying "sentence" and "offense" denotes the singular and does not allow for the position urged by [the State]. A finding that the statute intended to package the sanctions for all sentences into one, appealable bundle would ignore the plain meaning of the statutory language: *a sentence is the sanction or combination of sanctions imposed on each separate offense*. If the legislature had intended to package sentencing together, it easily could have defined "sentence" as the sanction or combination of sanctions imposed for all offenses.

Saxon at ¶¶ 12-13. (Emphasis in original).

{¶53} Notably, the Supreme Court also appears to apply this offense-specific approach to sentencing in the context of postrelease control. In *Bezak*, the Supreme Court expressly stated in its syllabus that "[w]hen a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included *in a sentence for a particular offense*, the sentence is void. The offender is entitled to a new sentencing hearing *for that particular offense*." *Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, syllabus.

{¶54} It is also notable that the Supreme Court in *Fischer* limited its decision to only overrule a specific portion of *Bezak*. The Supreme Court made it

clear that it revisited “*only* one component of the holding in *Bezak*, and we overrule *only* that portion of the syllabus that requires a complete resentencing hearing rather than a hearing restricted to the void portion of the sentence.” *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 36. Thus, the Supreme Court left intact its approach to analyze *a sentence for a particular offense* when reviewing whether a defendant is entitled to be resentenced for purposes of the trial court properly imposing postrelease control.

{¶55} In addition, the statutory scheme for imposing postrelease control in R.C. 2967.28 appears to mimic the felony-sentencing statute analyzed by the Supreme Court in *Saxon*. In particular, the terms “sentence” and “prison term” are used to refer to the individual sanction imposed by the trial court for *a particular offense*. Like the felony-sentencing scheme, the statute governing postrelease control assigns specific terms of postrelease control according to the degree of felony or category of offense—i.e., felony sex offense. For instance, R.C. 2967.28(B) provides that

Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender’s release from imprisonment. * * * Unless reduced by the parole board pursuant to division (D) of this section when authorized under

that division, a period of post-release control required by this division for an offender shall be of one of the following periods:

(1) For a felony of the first degree or for a felony sex offense, five years;

(2) For a felony of the second degree that is not a felony sex offense, three years;

(3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years.

(C) Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender * * *.

{¶56} Nowhere in R.C. 2967.28 does the legislature direct a court to treat a “sentence” or a “prison term” as the aggregate sentence arising from the case for purposes of imposing postrelease control. In fact, the statute makes no provisions for grouping offenses together and *imposing* a single aggregate term of postrelease control for multiple felonies, despite the fact that one or more periods of postrelease control are to be *served* concurrently. See R.C. 2967.28(F)(4)(c).⁹ Rather, the legislature in R.C. 2967.28 chose to consistently use the terms

⁹ Revised Code Section R.C. 2967.28(F)(4)(c) states, “[i]f an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board or court. Periods of post-release control shall be served concurrently and shall not be imposed consecutively to each other.”

“sentence” and “prison term” to refer to *a sentence for a particular offense* for purposes of imposing postrelease control.

{¶57} Finally, as noted earlier, I find it significant in this case that the trial court specifically ordered Holdcroft to serve the ten-year sentence for the aggravated arson conviction first, with the five-year sentence for the arson conviction to be served consecutive to the aggravated arson sentence. The Eighth District in *State v. Dresser* also found this fact persuasive in resolving the precise issue before us. *See State v. Dresser*, 8th Dist. No. 92105, 2009-Ohio-2888, ¶ 11, reversed on other grounds in *State ex re. Carnail v. McCormick*, 126 Ohio St.3d 124-2010-Ohio-2671. The court in *Dresser* found dispositive the fact that the trial court had ordered the defendant to serve his five-year sentence for pandering *prior* to his indefinite ten-year to life sentence for rape. *Id.* The court relied on *Bezak* and concluded the following:

Once an offender has served the prison term ordered by the trial court, he or she cannot be subject to resentencing in order to correct the trial court’s failure to impose postrelease control at the original hearing. *State v. Bezak*, 114 Ohio St.3d 420, 2008-Ohio-3250. Here, Dresser had completed his [five-year pandering] sentence; consequently, the trial court could not impose postrelease control, after the fact, on the pandering charges.

Dresser at ¶ 8.

{¶58} The majority cites decisions from two other appellate districts in support of its position that the “aggregate sentence,” and not the sentence imposed for a particular offense, is to be considered when a defendant is resentenced to properly impose postrelease control. *Supra* at ¶¶ 39-42. However, as noted by the majority, the trial courts in both of those cases did not specify the order in which the consecutive sentences were to be served.

{¶59} For all of these reasons, I would sustain the first assignment of error and find that the trial court was without the authority to impose the mandatory five-year term of postrelease control required for the aggravated arson conviction due to the fact that Holdcroft had already served his sentence for that offense.

/jlr

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
WYANDOT COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 16-10-13

v.

HENRY ALLEN HOLDCROFT,

JUDGMENT
ENTRY

DEFENDANT-APPELLANT.

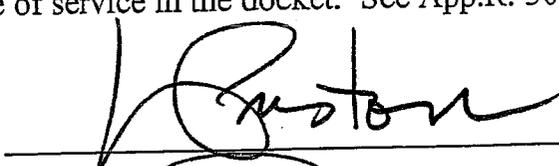
For the reasons stated in the opinion of this Court, the assignments of error are overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellant for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

COURT OF APPEALS
WYANDOT CO., OHIO
FILED

JUL - 2 2012

Ann K. Dunbar
CLERK OF COURTS
WYANDOT CO., OHIO



JUDGES

SHAW, P.J., Dissents in Part and Concurs
In Part

DATED: July 2, 2012 A - 97

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
WYANDOT COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 16-10-01

v.

HENRY ALLEN HOLDCROFT,

OPINION

DEFENDANT-APPELLANT.

Appeal from Wyandot County Common Pleas Court
Trial Court No. 98-CR-0044

Appeal Dismissed

Date of Decision: September 13, 2010

APPEARANCES:

Keith O'Korn for Appellant

Jonathan K. Miller for Appellee

COURT OF APPEALS
WYANDOT CO., OHIO
FILED

SEP 20 2010

Ann K. Danbar
CLERK OF COURTS
WYANDOT CO., OHIO

PRESTON, J.

{¶1} Defendant-appellant, Henry Allen Holdcroft (hereinafter “Holdcroft”), appeals the Wyandot County Court of Common Pleas’ judgment of conviction and sentence. For the reasons stated herein, we dismiss the appeal.

{¶2} On November 13, 1998, the Wyandot County Grand Jury indicted Holdcroft on three (3) counts, including: count one (1) of aggravated arson in violation of R.C. 2909.02(A)(3), a first degree felony; count two (2) of complicity to commit aggravated arson in violation of R.C. 2923.03(A)(1), a first degree felony; and count three (3) of arson in violation of R.C. 2909.03(A)(4), a third degree felony. (Doc. No. 1).

{¶3} On June 9, 1999, the State filed a motion to dismiss count two of the indictment on the basis that the charge was an allied offense of similar import to count one, aggravated arson. (Doc. No. 58). The trial court granted the State’s motion to dismiss count two on June 25, 1999. (Doc. No. 79).

{¶4} On July 6-9, 1999, a jury trial was held on the remaining two counts of the indictment against Holdcroft. (Scheduling Order, Doc. No. 49). The jury returned guilty verdicts on both counts. (Doc. Nos. 106-107). On July 29, 1999, the trial court filed a judgment entry of conviction. (Doc. No. 114).

{¶5} On September 10, 1999, the trial court sentenced Holdcroft to ten (10) years imprisonment on count one, aggravated arson, and five (5) years

imprisonment on count three, arson. (Sept. 13, 1999 JE, Doc. No. 116). The trial court ordered “that the sentence imposed for Count Three shall be served consecutively to the sentence imposed in Count One.” (Id.). Holdcroft was ordered to make restitution to Kathy Hurst (the victim), or the insurance carrier, in the sum of \$5,775.00, and \$400.00 to Eric Goodman. (Id.). The trial court also notified Holdcroft “that a period of post-release control shall be imposed,” and that if he violated his post-release control further restrictions upon his liberty could follow as a consequence. (Id.). Holdcroft was also taxed with the costs of prosecution and all other fees permitted under R.C. 2929.18(A)(4). (Id.).

{¶6} On September 14, 1999, Holdcroft filed a notice of appeal pro se. (Doc. No. 117). The trial court thereafter appointed appellate counsel, and the appeal was assigned case no. 16-99-04. (Doc. Nos. 124, 125). The State filed a notice of cross-appeal on October 13, 1999 related to the trial court’s judgment entry concerning the admission of other acts evidence under Evid.R. 404(B).¹ (Doc. No. 130). On appeal, Holdcroft asserted one assignment of error arguing that his convictions were against the manifest weight of the evidence. *State v. Holdcroft* (Mar. 31, 2000), 3d Dist. No. 16-99-04, at *1. This Court overruled Holdcroft’s assignment of error, sustained the State’s assignment of error, and upheld the convictions. Id.

¹ This Court granted the State leave to file this appeal in the interests of justice even though the State mistakenly filed the appeal with this Court rather than the trial court. (See Oct. 29, 1999 JE, Doc. No. 130).

{¶7} While his direct appeal was pending before this Court, Holdcroft filed a motion for the appointment of counsel in order to pursue post-conviction relief. (Doc. No. 131). The trial court granted Holdcroft's motion and appointed counsel on February 3, 2000. (Doc. No. 132).

{¶8} On May 5, 2000, Holdcroft, pro se, filed a notice of appeal to the Ohio Supreme Court from this Court's March 31, 2000 decision. (Doc. No. 134). The Ohio Supreme Court, however, declined review. *State v. Holdcroft* (2000), 89 Ohio St.3d 1464, 732 N.E.2d 997.

{¶9} On June 9, 2000, Holdcroft, through appointed appellate counsel, filed a motion for a new trial, along with a motion to withdraw as appellate counsel. (Doc. Nos. 135-36). The trial court granted the motion to withdraw but denied the motion for a new trial. (Doc. Nos. 138, 141). On June 26, 2000, Holdcroft filed a motion for judicial release, which the trial court also denied. (Doc. Nos. 135, 139).

{¶10} On July 13, 2006, Holdcroft filed a "motion to vacate or set aside and modify sentence pursuant to R.C. 2945.25 (A) & Crim.R. 52(B)." (Doc. No. 161). On July 20, 2006, the trial court overruled the motion, finding it was untimely and lacked substantive merit "as the Defendant was not convicted of allied offenses of similar import. There were separate and distinct felonies

committed by the Defendant, one involving a dwelling and the other involving an automobile.” (Doc. No. 163).

{¶11} On August 16, 2006, Holdcroft, pro se, filed a notice of appeal from the trial court’s denial of his motion. (Doc. No. 165). On appeal, Holdcroft argued that his sentence was void because he was sentenced on two offenses that were allied offenses of similar import. This Court overruled Holdcroft’s assignment of error, finding that his motion was an untimely post-conviction motion, and, under a plain error analysis, that the offenses were not allied offenses of similar import. *State v. Holdcroft*, 3d Dist. No. 16-06-07, 2007-Ohio-586.

{¶12} On December 11, 2009, the State filed a motion to correct Holdcroft’s sentence pursuant to R.C. 2929.191. (Doc. No. 186). On December 30, 2009, the State filed a motion for a de novo sentencing hearing to correct Holdcroft’s sentence pursuant to *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958. (Doc. No. 195). On January 5, 2010, the trial court granted the State’s motion for a de novo sentencing hearing. (Doc. No. 198).

{¶13} On January 26, 2010, the trial court conducted a de novo sentencing hearing. (Feb. 2, 2010 JE, Doc. No. 205). The trial court sentenced Holdcroft to ten (10) years on count one and five (5) years on count three. (Id.). The trial court further ordered that the term of imprisonment imposed on count three be served consecutively to the term of imprisonment imposed on count one for an aggregate

term of fifteen (15) years. (Id.). The trial court notified Holdcroft that he would be subject to five (5) years of mandatory post-release control as to count one and three (3) years of optional post-release control as to count three after imprisonment. (Id.); (Jan. 26, 2010 Tr. at 23). The trial court noted that the terms of post-release control would not be served consecutively to each other. (Feb. 2, 2010 JE, Doc. No. 205); (Jan. 26, 2010 Tr. at 23). The trial court also ordered that Holdcroft “pay restitution to Kathy Hurst, or the insurance carrier, in the sum of \$5,775.00; and make restitution to Eric Goodman in the amount of \$400.00.” (Feb. 2, 2010 JE, Doc. No. 205).

{¶14} On February 12, 2010, Holdcroft filed a notice of appeal from the trial court’s judgment entry of sentence, which is the present appeal. (Doc. No. 210). Holdcroft now appeals raising the following nine (9) assignments of error:

ASSIGNMENT OF ERROR NO. I

THE COURT LACKED JURISDICTION TO IMPOSE MANDATORY POST-RELEASE CONTROL UPON THE APPELLANT.

ASSIGNMENT OF ERROR NO. II

THE CONSECUTIVE, MAXIMUM SENTENCES VIOLATED THE 6TH AMENDMENT TO THE U.S. CONSTITUTION, AND THE DUE PROCESS CLAUSES CONTAINED IN THE OHIO AND U.S. CONSTITUTIONS.

ASSIGNMENT OF ERROR NO. III

THE MAXIMUM, CONSECUTIVE SENTENCES AND THE RESTITUTION ORDER WERE CONTRARY TO LAW AND ABUSIVE.

ASSIGNMENT OF ERROR NO. IV

THE TRIAL COURT ERRED IN CONVICTING AND SENTENCING THE APPELLANT ON AGGRAVATED ARSON AND ARSON COUNTS IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE 5TH AMENDMENT OF THE U.S. CONSTITUTION, ARTICLE 1 SECTION 10 OF THE OHIO CONSTITUTION AND OHIO'S MULTIPLE-COUNT STATUTE.

ASSIGNMENT OF ERROR NO. V

THE SENTENCE SHOULD BE REVERSED AS IT VIOLATES CRIMINAL RULE 32, AND THE 5TH, 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, BECAUSE IT WAS IMPOSED OVER TEN YEARS AFTER THE GUILTY VERDICT.

ASSIGNMENT OF ERROR NO. VI

THE COURT ERRED WHEN IT FAILED TO CHANGE THE VENUE OR GRANT A MISTRIAL DUE TO JURY TAIN T AND JURY MISCONDUCT THAT VIOLATED THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE 1, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. VII

THE COURT ERRED IN ADMITTING OTHER ACTS EVIDENCE IN VIOLATION OF EVID.R. 403 AND 404, THUS DEPRIVING APPELLANT OF A FAIR TRIAL UNDER THE 6TH AND 14TH AMENDMENTS TO THE U.S.

**CONSTITUTION, AND ARTICLE 1, SECTIONS 10 AND 16
OF THE OHIO CONSTITUTION.**

ASSIGNMENT OF ERROR NO. VIII

**APPELLANT'S CONVICTION WAS NOT SUPPORTED BY
THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION
OF THE DUE PROCESS CLAUSE OF THE 14TH
AMENDMENT TO THE U.S. CONSTITUTION, AND
ARTICLE 1, SECTIONS 1 & 16 OF THE OHIO
CONSTITUTION, AND THE CONVICTIONS WERE
AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.**

ASSIGNMENT OF ERROR NO. IX

**TRIAL COUNSEL RENDERED INEFFECTIVE
ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH
AMENDMENT TO THE U.S. CONSTITUTION AND
ARTICLE 1, SECTIONS 10, 16 OF THE OHIO
CONSTITUTION.**

{¶15} Before this Court may address Holdcroft's assignments of error, we must first determine whether jurisdiction exists to hear this appeal.

{¶16} The Courts of Appeals in Ohio has appellate jurisdiction over "final appealable orders." Section 3(B)(2), Article IV of the Ohio Constitution. If an appealed judgment is not a final order, the Appellate Court has no jurisdiction to consider it and the appeal must be dismissed. *State v. Sandlin*, 4th Dist. No. 05CA23, 2006-Ohio-5021, ¶9, citing *Davison v. Rini* (1996), 115 Ohio App.3d 688, 692, 686 N.E.2d 278; *Prod. Credit Assn. v. Hedges* (1993), 87 Ohio App.3d 207, 210, 621 N.E.2d 1360; *Kouns v. Pemberton* (1992), 84 Ohio App.3d 499, 501, 617 N.E.2d 701. Moreover, this Court must raise jurisdictional issues sua

sponte. *Sandlin*, 2006-Ohio-5021, at ¶9. See, also, *In re Murray* (1990), 52 Ohio St.3d 155, 159-60, 556 N.E.2d 1169, at fn. 2; *Whitaker-Merrell Co. v. Geupel Const. Co.* (1972), 29 Ohio St.2d 184, 186, 280 N.E.2d 922.

{¶17} R.C. 2505.02 defines a final order, in relevant part, as: “[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment.” R.C. 2505.02(B)(1). Since R.C. 2505.02(B)(1) requires a final order to “determine[] the action” and “prevent[] a judgment,” “[a] judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order.” *State ex rel. Keith v. McMonagle*, 103 Ohio St.3d 430, 2004-Ohio-5580, 816 N.E.2d 597, ¶4, quoting *Bell v. Horton* (2001), 142 Ohio App.3d 694, 696, 756 N.E.2d 1241. Furthermore, “[f]or an order to determine the action and prevent a judgment for the party appealing, it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for determination of the court.” *State ex rel. Bd. of State Teachers Retirement Sys. of Ohio v. Davis*, 113 Ohio St.3d 410, 2007-Ohio-2205, 865 N.E.2d 1289, ¶45, quoting *State ex rel. Downs v. Panioto*, 107 Ohio St.3d 347, 2006-Ohio-8, 839 N.E.2d 911, ¶20.

{¶18} In pertinent part, the trial court ordered that Holdcroft “pay restitution to Kathy Hurst, or the insurance carrier, in the sum of \$5,775.00.” (Feb. 2, 2010 JE, Doc. No. 205) (Emphasis added). In *State v. Kuhn*, we found that a

restitution order must set forth “the amount of restitution [or] the method of payment” in order to be a final appealable order under R.C. 2505.02. 3d Dist. No. 4-05-23, 2006-Ohio-1145, ¶8, citing *In re Holmes* (1980), 70 Ohio App.2d 75, 77, 434 N.E.2d 747 and *In re Zakov* (1995), 107 Ohio App.3d 716, 669 N.E.2d 344. More recently, in *State v. Hartley* this Court was presented with a judgment entry that ordered the defendant to pay restitution “to the victims herein in the total amount of \$32,275.57.” 3d Dist. No. 14-09-42, 2010-Ohio-2018, ¶5. This Court determined that the judgment entry in *Hartley* was not a final appealable order under R.C. 2505.02(B)(1), reasoning as follows:

[T]he November 2009 Judgment Entry did not list any victims, did not describe how the restitution would be allocated among the victims, and did not incorporate any document providing this information. Accordingly, we find that the judgment entry appealed from left unresolved issues and contemplated further action. As such, the judgment entry was not a final appealable order, and this Court is without jurisdiction to determine this appeal.

Id. (emphasis added).

{¶19} Like the judgment entry in *Hartley*, the judgment entry here fails to allocate the \$5,775.00 in restitution between the victim, Kathy Hurst, and the insurance company or incorporate any document reflecting the allocation. While the total amount of restitution ordered by the trial court is equal to the amount of damage sustained by the Hurst’s vehicle as a direct result of Holdcroft’s criminal conduct, the record indicates that Hurst’s insurance company compensated her for

the damages (or paid for the repairs), minus her deductible. (Estimate, State's Ex. 60); (See, e.g., PSI at 7). Therefore, the judgment entry leaves unresolved the exact amount owed to Hurst and the insurance company, respectively. As such, the judgment entry appealed from is not a final appealable order as provided in R.C. 2505.02(B)(1) over which this Court may exercise jurisdiction. *Hartley*, 2010-Ohio-2018, at ¶5.

{¶20} Holdcroft's appeal is, therefore, dismissed for lack of jurisdiction.

Appeal Dismissed

WILLAMOWSKI, P.J. and ROGERS, J., concur.

/jlr

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
WYANDOT COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 16-10-01

v.

HENRY ALLEN HOLDCROFT,

JUDGMENT
ENTRY

DEFENDANT-APPELLANT.

For the reasons stated in the opinion of this Court, the instant appeal is dismissed with costs assessed to Appellant for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

COURT OF APPEALS
WYANDOT CO., OHIO
FILED

SEP 20 2010

Anna K. Dunbar
CLERK OF COURTS
WYANDOT CO., OHIO

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JUDGES

DATED: September 13, 2010

IN THE COURT OF COMMON PLEAS, WYANDOT COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,

Plaintiff,

vs.

HENRY A. HOLDCROFT,

Defendant.

Case No. 98-CR-0044

Count One - Aggravated Arson, Sec. 2909.02 (A) (3), first degree felony;
Count Three - Arson, Sec. 2909.03 (A) (4), third degree felony.

JUDGMENT ENTRY

.....
In accordance with the directions of the Third Appellate District the Court HEREBY revises its Judgment Entry of February 2, 2010.

This matter came on before the Court on the 26th day of January, 2010, for purposes of a re-sentencing hearing, pursuant to the Supreme Court Decision in State v. Bloomer, (2009) 122 Ohio State 3d 200. Jonathan K. Miller, Prosecuting Attorney, Wyandot County, appeared for and on behalf of the State of Ohio. Also present was the Defendant, in the custody of the Wyandot County Sheriff, and who was afforded all rights pursuant to Criminal Rule 32. Scott B. Johnson, Attorney at Law, Ada, Ohio, was notified and present in Court in case the Defendant requested an Attorney. Marnie Hahn, Victim Advocate, was also present in Court.

No legal reason was advanced as to why sentence should not now be pronounced.

Page 1 of 7

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WYANDOT CO., OHIO
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ANN K. DUNBAR
CLERK

The Court advised Defendant of his rights under the Fifth Amendment to the Constitution of the United States; of his right to Counsel, pursuant to Criminal Rule 44; and of the hearing procedures in this matter. Said Defendant requested Court appointed Counsel.

The Court examined Defendant as to his financial circumstances and, thereafter, made a determination that Defendant is in indigent circumstances at this time; Defendant executed a written Affidavit of Indigence.

Thereafter, pursuant to House Bill 66, Defendant was advised of the \$25.00 Indigent Application Fee, payable within seven (7) days of this appointment, to the Clerk of Courts. The Court thereupon appointed Scott B. Johnson, Attorney at Law, Ada, Ohio, to represent Defendant in this matter.

The Court Ordered that the \$25.00 Indigent Application Fee shall be waived.

The Court finds that the Defendant was found Guilty by a jury on Count One- Aggravated Arson, as set forth in the Indictment, a violation of Section 2909.02 (A)(3) of the Revised Code of Ohio, being a felony of the first degree and Count Three - Arson, a violation of Section 2909.03 (A)(4) of the Revised Code of Ohio, being a felony of the third degree.

The Court further finds that the Defendant was originally Ordered to serve a mandatory prison term of ten (10) years on Count One and a basic prison term of five (5) years on Count Three. The sentence imposed for Count Three was Ordered to be served consecutively to the sentence

imposed for Count One.

The Court notes that there is a pending Motion, Memorandum and Supplemental Motion filed by the Defendant, Pro Se. Attorney Johnson spoke as to these issues; read the Institutional Summary Report as it relates to Defendant's conduct and behavior while incarcerated; and, spoke in mitigation of sentencing. Attorney Johnson requested that the Court waive the court costs, and further read off numerous certificates of completion that the Defendant has received while he has been incarcerated; and stated that the Defendant has a good work ethic. As per Defendant's request, Attorney Johnson further read a one and one-half page "oral argument" prepared by Defendant, so it would be "on the record." Defendant made a statement in his own behalf.

The State made a statement and advised that jail time credit shall be as of the original date of the sentencing. Further, the Defendant is subject to a mandatory period of five (5) years post release control on Count One and an optional period of three (3) years post release control on Count Three.

The Victim Advocate advised the Court that in speaking with the victim, Kathy Hurst, she requested that the last paragraph of her Victim Impact Statement written in 1999, be read to the Court. The Victim Advocate read the paragraph to the Court.

The Court fully considered the record, the statements made, and the information contained in the pre-sentence investigation report prepared by the Adult Parole Authority, which shall be

marked as Court's Exhibit "1" and admitted into evidence and made part of the record herein. Said report was made available to Defense Counsel and the Office of the Prosecuting Attorney for review prior to this hearing.

The Court, being fully informed of the circumstances surrounding the within charges and finding no cause which would preclude pronouncement of sentence, and after considering the factors pertaining to the seriousness of the offense and whether the Defendant is likely to recidivate, found that the said Defendant is not amenable to community control, and that prison is consistent with the purposes and principles of sentencing set forth in Section 2929.11 of the Revised Code of Ohio.

The Court makes the same factual finding as contained in Defendant's original Judgment Entry of sentencing of September 13, 1999, and additionally notes that the offenses, according to the Jury, were committed for hire with the Defendant hiring people to commit these offenses; and if successful, a woman and her minor child would have died in a house fire. Luckily, Defendant's attempts even though fires were set, were not successful.

It is therefore, the sentence of this Court that the Defendant shall serve, as to Count One, a mandatory prison term of ten (10) years in the custody of the Ohio Department of Rehabilitation and Correction, and as to Count Three, a basic prison term of five (5) years in the custody of the Ohio Department of Rehabilitation and Correction. It is further Ordered that Count Three shall be served

consecutively to the sentence imposed for Count One. The Court finds that Defendant shall receive jail time credit as of the original date of sentencing.

The Defendant was notified that he will be supervised for a mandatory period of five (5) years after he is released from prison, pursuant to Section 2967.28 of the Ohio Revised Code, as to Count One. The Defendant was further notified that he may be supervised for a period of three (3) years after he is released from prison, pursuant to Section 2967.28 of the Ohio Revised Code, as to Count Three. The Court notes that the terms of PRC are not to run consecutively.

The Defendant was further notified that when the period of supervision is imposed and he violates said supervision, the parole board may impose a prison term as part of the sentence of up to one-half of the stated prison term originally imposed upon the Defendant.

The Defendant was advised that if the violation results from a conviction for a new felony offense, the Court may impose a prison term for the violation up to the remaining period of post release control or one (1) year, whichever is greater, together with the sentence for the new felony offense, pursuant to Section 2929.141 of the Ohio Revised Code.

The Defendant was further advised that under federal law, persons convicted of felonies of the second degree can never lawfully possess a firearm and that if Defendant was ever found with a firearm, even one belonging to someone else he would be prosecuted by federal authorities and subject to imprisonment.

The Court further ORDERED that the Defendant shall pay restitution to Kathy Hurst* in the sum of \$5,775.00; and make restitution to Eric Goodman in the amount of \$400.00.**

The Court further ORDERED that Court costs shall be taxed to Defendant up to today's hearing and then this hearing's Court costs shall be waived.

The Court ORDERED that Defendant shall have no contact, direct or indirect, with Kathy Hurst and/or her family, or be on her property; and further have no contact, direct or indirect, with Eric Goodman.

The Defendant was advised of his right to appeal the sentence imposed, and that any appeal must be filed within thirty (30) days of sentencing; he was further advised, pursuant to Criminal Rule 32, of his right to appeal his conviction, and of his right to Counsel for purposes of this appeal; that he has the right to have the necessary documents for an appeal furnished without cost, if he cannot afford same; and of his right to have a timely notice of appeal filed for him.

* Trial transcript page 149, Pre-sentence report page 7, State's Exhibit 60, support restitution in the sum of \$5,775.00 to Kathy Hurst. Ms. Hurst will be obligated to reimburse her insurance carrier for any money paid to her by it over and above that which she spent for repairing the vehicle.

** Trial transcript page 646, Prosecutor's representation page 851, support restitution to Eric Goodman in the sum of \$400.00

The defense interposed no objection to the restitution figures offered.

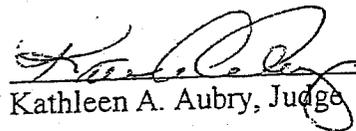
Page 6 of 7

Defendant remanded.

Defendant made a statement pursuant to UCC Rules and accepting charges for value. His statements were duly noted by the Court.

Costs waived for this hearing.

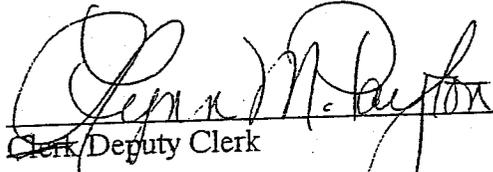
IT IS SO ORDERED.


Kathleen A. Aubry, Judge

11/16/10
Date signed

CERTIFICATION

The undersigned does hereby certify that a file-stamped copy of the foregoing was sent to the parties and/or counsel of record by ordinary U. S. Mail this 16th day of November, 2010.


Clerk/Deputy Clerk

Mr. Jonathan K. Miller
Prosecuting Attorney

Mr. Scott B. Johnson
Attorney for the Defendant

Mr. Henry Holdcroft
Defendant

Mr. Keith O'Korn
Appellate Counsel for Defendant

Bureau of Sentence Computation

IN THE COURT OF COMMON PLEAS OF WYANDOT COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

-vs-

HENRY HOLDCROFT

Defendant.

Case No. 98-CR-0044

Count One - Aggravated Arson, Sec. 2909.02 (A)(3), first degree felony; Count Three - Arson, Sec. 2909.03 (A)(4), third degree felony.

JUDGMENT ENTRY

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ANN K. DUNBA
CLERK
CLERK'S OFFICE
WYANDOT CO., OHIO
FILED

This matter came on before the Court on the 26th day of January, 2010, for

purposes of a re-sentencing hearing, pursuant to the Supreme Court Decision in State v. Bloomer, (2009) 122 Ohio State 3d 200. Jonathan K. Miller, Prosecuting Attorney, Wyandot County, appeared for and on behalf of the State of Ohio. Also present was the Defendant, in the custody of the Wyandot County Sheriff, and who was afforded all rights pursuant to Criminal Rule 32. Scott B. Johnson, Attorney at Law, Ada, Ohio, was notified and present in Court in case the Defendant requested an Attorney. Marnie Hahn, Victim Advocate, was also present in Court.

No legal reason was advanced as to why sentence should not now be pronounced.

The Court advised Defendant of his rights under the Fifth Amendment to the Constitution of the United States; of his right to Counsel, pursuant to Criminal Rule 44; and of the hearing procedures in this matter. Said Defendant requested Court appointed Counsel.

4445
Miller
Johnson
Marnie Hahn
Victim Advocate

0136-964

The Court examined Defendant as to his financial circumstances and, thereafter, made a determination that Defendant is in indigent circumstances at this time; Defendant executed a written Affidavit of Indigence.

Thereafter, pursuant to House Bill 66, Defendant was advised of the \$25.00 Indigent Application Fee, payable within seven (7) days of this appointment, to the Clerk of Courts. The Court thereupon appointed Scott B. Johnson, Attorney at Law, Ada, Ohio, to represent Defendant in this matter.

The Court Ordered that the \$25.00 Indigent Application Fee shall be waived.

The Court finds that the Defendant was found Guilty by a jury on Count One – Aggravated Arson, as set forth in the Indictment, a violation of Section 2909.02 (A)(3) of the Revised Code of Ohio, being a felony of the first degree and Count Three – Arson, a violation of Section 2909.03 (A) (4) of the Revised Code of Ohio, being a felony of the third degree.

The Court further finds that the Defendant was originally Ordered to serve a mandatory prison term of ten (10) years on Count One and a basic prison term of five (5) years on Count Three. The sentence imposed for Count Three was Ordered to be served consecutively to the sentence imposed for Count One.

The Court notes that there is a pending Motion, Memorandum and Supplemental Motion filed by the Defendant, Pro Se. Attorney Johnson spoke as to these issues; read the Institutional Summary Report as it relates to Defendant's conduct and behavior while incarcerated; and, spoke in mitigation of sentencing. Attorney Johnson requested that the Court waive the court costs, and further read off numerous certificates

of completion that the Defendant has received while he has been incarcerated; and stated that the Defendant has a good work ethic. As per Defendant's request, Attorney Johnson further read a one and one-half page "oral argument" prepared by Defendant, so it would be "on the record." Defendant made a statement in his own behalf.

The State made a statement and advised that jail time credit shall be as of the original date of the sentencing. Further, the Defendant is subject to a mandatory period of five (5) years post release control on Count One and an optional period of three (3) years post release control on Count Three.

The Victim Advocate advised the Court that in speaking with the victim, Kathy Hurst, she requested that the last paragraph of her Victim Impact Statement written in 1999, be read to the Court. The Victim Advocate read the paragraph to the Court.

The Court fully considered the record, the statements made, and the information contained in the pre-sentence investigation report prepared by the Adult Parole Authority, which shall be marked as Court's Exhibit "1" and admitted into evidence and made part of the record herein. Said report was made available to Defense Counsel and the Office of the Prosecuting Attorney for review prior to this hearing.

The Court, being fully informed of the circumstances surrounding the within charges and finding no cause which would preclude pronouncement of sentence, and after considering the factors pertaining to the seriousness of the offense and whether the Defendant is likely to recidivate, found that the said Defendant is not amenable to community control, and that prison is consistent with the purposes and principles of sentencing set forth in Section 2929.11 of the Revised Code of Ohio.

The Court makes the same factual finding as contained in Defendant's original Judgment Entry of sentencing of September 13, 1999, and additionally notes that the offenses, according to the Jury, were committed for hire with the Defendant hiring people to commit these offenses; and if successful, a woman and her minor child would have died in a house fire. Luckily, Defendant's attempts even though fires were set, were not successful.

It is therefore, the sentence of this Court that the Defendant shall serve, as to Count One, a mandatory prison term of ten (10) years in the custody of the Ohio Department of Rehabilitation and Correction, and as to Count Three, a basic prison term of five (5) years in the custody of the Ohio Department of Rehabilitation and Correction. It is further Ordered that Count Three shall be served consecutively to the sentence imposed for Count One. The Court finds that Defendant shall receive jail time credit as of the original date of sentencing.

The Defendant was notified that he will be supervised for a mandatory period of five (5) years after he is released from prison, pursuant to Section 2967.28 of the Ohio Revised Code, as to Count One. The Defendant was further notified that he may be supervised for a period of three (3) years after he is released from prison, pursuant to Section 2967.28 of the Ohio Revised code, as to Count Three. The Court notes that the terms of PRC are not to run consecutively.

The Defendant was further notified that when the period of supervision is imposed and he violates said supervision, the parole board may impose a prison term as part of the sentence of up to one-half of the stated prison term originally imposed upon the Defendant.

The Defendant was advised that if the violation results from a conviction for a new felony offense, the Court may impose a prison term for the violation up to the remaining period of post release control or one (1) year, whichever is greater, together with the sentence for the new felony offense, pursuant to Section 2929.141 of the Ohio Revised Code.

The Defendant was further advised that under federal law, persons convicted of felonies of the second degree can never lawfully possess a firearm and that if Defendant was ever found with a firearm, even one belonging to someone else he would be prosecuted by federal authorities and subject to imprisonment.

The Court further ORDERED that the Defendant shall pay restitution to Kathy Hurst, or the insurance carrier, in the sum of \$5,775.00; and make restitution to Eric Goodman in the amount of \$400.00.

The Court further ORDERED that Court costs shall be taxed to Defendant up to today's hearing and then this hearing's Court costs shall be waived.

The Court ORDERED that Defendant shall have no contact, direct or indirect, with Kathy Hurst and/or her family, or be on her property; and further have no contact, direct or indirect, with Eric Goodman.

The Defendant was advised of his right to appeal the sentence imposed, and that any appeal must be filed within thirty (30) days of sentencing; he was further advised, pursuant to Criminal Rule 32, of his right to appeal his conviction, and of his right to Counsel for purposes of this appeal; that he has the right to have the necessary documents for an appeal furnished without cost, if he cannot afford same; and of his right to have a timely notice of appeal filed for him.

Defendant remanded.

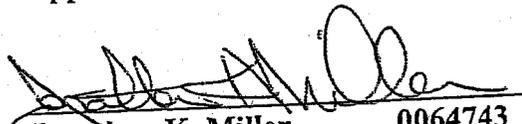
Defendant made a statement pursuant to UCC Rules and accepting charges for value. His statements were duly noted by the Court.

Costs waived for this hearing.



JUDGE
Date signed 2/02/10

Approved:


Jonathan K. Miller 0064743
Prosecuting Attorney
Wyandot County, Ohio

/s/ Scott B. Johnson, per email approval 1/30/2010
Scott B. Johnson 0077462
Attorney for Defendant

rc



11/27/2009
To Prosecutor
WYANDOT County Courthouse
109 S SANDUSKY STREET County Courthouse
UPPER SANDUSKY , OH 43351

RE: A381888
HOLDCROFT, HENRY A
WYANDOT County Case No. 98CR0044, 98CR0044
Admitted to DRC: 09/13/1999
End of Stated Term: 07/07/2014

Dear Prosecutor,

Upon reviewing the attached entry, it was discovered that it did not include a sufficient notification regarding post-release control.

- In *State v. Jordan*, the Ohio Supreme Court held that when sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about post-release control and is further required to incorporate that notice into its journal entry imposing sentence.
- In *Gensley v. Eberlin*, the Ohio Supreme Court ruled that an entry that does not contain post-release control notification in the part of the entry imposing sentence is insufficient.
- In *State v. Barnes*, the Ohio Supreme Court held that in order to impose a mandatory term of post-release control the sentencing court must notify the defendant at a sentencing hearing of the mandatory nature of the post-release control and the duration of post-release control supervision.

As the journal entry in this case does not meet the requirements of 2929.14, 2929.19, 2929.191 regarding post-release control, as explained in the *Jordan*, *Gensley* and/or *Barnes* decision referenced above. Corrective action may be necessary. The Parole Board has no authority to consider the offender for post-release control supervision unless a corrective journal entry is filed in advance of the end of stated term date noted above. Pursuant to R.C. §2929.191(C), the court is required to have a hearing before issuing a corrective entry. Please send any entries to:

Bureau of Sentence Computation
P.O. Box 450
Orient, OH 43146

Thank you for your consideration in this matter.

Lora Toliss

cc: Prosecutor
File



IN THE COURT OF COMMON PLEAS OF WYANDOT COUNTY, OHIO

STATE OF OHIO,

Case No. 98-CR-0044

Plaintiff,

-vs-

HENRY A. HOLDCROFT
S. S. #292-56-9132
D.O.B. 2/03/1957,

Defendant.

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Count One - Aggravated Arson, Sec. 2909.02 (A) (3) O.R.C., first degree felony; Count Three-Arson, Sec. 2909.03 (A) (4) O.R.C., third degree felony

JUDGMENT ENTRY

This matter came on before the Court on September 10, 1999, for purposes of a sentencing hearing, pursuant to Section 2929.19 of the Revised Code of Ohio. Charles L. Bartholomew, Prosecuting Attorney, Wyandot County, appeared for and on behalf of the State of Ohio. Retained Counsel, Ryan A. Zerby, Attorney at Law, Kenton, Ohio, appeared on behalf of the Defendant. Also present was the Defendant, who was afforded all rights, pursuant to Criminal Rule 32. No legal reason was advanced as to why sentence should not be pronounced.

The Court finds that the Defendant has been convicted of Aggravated Arson, Count One, a violation of Section 2909.02 (A) (3) of the Revised Code of Ohio, being a felony of the first degree; and of Arson, Count Three, a violation of Section 2909.03 (A) (4) of the Revised Code of Ohio, being a felony of the third degree.

Thereafter, Counsel for Defendant made a statement in mitigation of sentence. Defendant made a statement in his own behalf. A brief statement was made by the Victim Advocate on behalf of the victim, Kathy Hurst.

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The Court considered the record, the pre-sentence report prepared, and the Victim Impact Statement, as well as the principles and purposes of sentencing under Sec. 2929.11 O.R.C., and the seriousness and recidivism factors under Sec. 2929.12 O.R.C., Sec. 2929.13 O.R.C., and oral statements. The Court made specific findings that the within offenses constituted an attempt of harm; that the Defendant has a prior conviction for Assault; that the within offenses were committed for hire; that the offenses were committed while the Defendant was under a suspended sentence for Violation of Civil Protection Order; that Defendant's relationship with the victim facilitated the offenses; that the Defendant has a prior criminal history, all rendering him most likely to recidivate; that the Defendant has failed to respond to past sanctions in previous criminal sentencings; that the Defendant showed no remorse for the offenses committed; that the Defendant had previously served a term of imprisonment; and that the Defendant committed the worst form of the offenses, and showed the greatest likelihood of recidivism.

The sentence herein is hereby ORDERED to be a mandatory term of imprisonment, based upon the Defendant's prior conviction for Aggravated Burglary, a felony of the first degree. The Court, therefore, having considered the factors under Sec. 2929.13 O.R.C., ORDERED that the Defendant serve a term, as to Count One, of ten (10) years at the Ohio Dept. of Correction and Rehabilitation, Orient, Ohio. The Court further Ordered that Defendant serve a term, as to Count Three, of five (5) years. The Court further found that the Defendant committed the worst form of the offenses, and he posed the greatest likelihood of recidivism, and that consecutive sentences are necessary

to protect the public. It is, therefore, ORDERED that the sentence imposed for Count Three shall be served consecutively to the sentence imposed for Count One. The Defendant was further notified that the prison sentence previously pronounced will be served without credit for "good time", and the parole board may extend that prison term if he commits any criminal offense while in prison; that the extension will be done administratively as part of his sentence, and may accumulate up to an additional fifty percent of previously stated basic prison sentence.

The Defendant was further notified that a period of post-release control ~~may~~ ^{shall} be imposed.

The Defendant was further notified that if he violated a post-release control sanction, then for each violation, the Adult Parole Authority may: impose a more restrictive sanction, increase the duration of post-release control; impose an additional prison term of up to nine additional months; and prosecute him for any additional felony offenses committed while on post-release control, and impose a prison term for the violation as well as for the new felony.

Defendant was further granted credit for sixty-one (61) days served in the Wyandot County Jail, awaiting disposition of this matter. The Court further ORDERED that Defendant make restitution to Kathy Hurst, or the insurance carrier, in the sum of \$5,775.00, and make restitution to Eric Goodman in the amount of \$400.00. Defendant was further taxed the costs of this prosecution, and any other fees permitted, pursuant to R.C. 2929.18 (A) (4).

The Defendant was advised of his right to appeal the maximum sentences imposed, and that any appeal must be filed within thirty (30) days of sentencing; he was further advised, pursuant to Criminal Rule

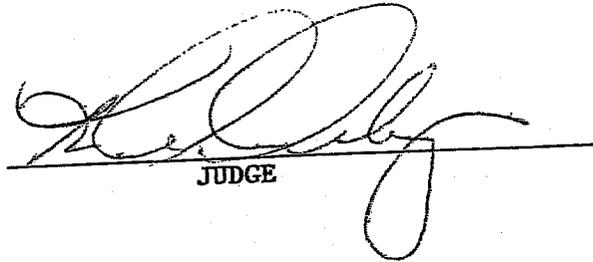
32, of his right to appeal his convictions, and of his right to Counsel for purposes of this appeal.

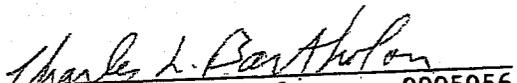
Whereupon, Counsel for Defendant moved the Court for a stay of execution, and for bond pending appeal.

Upon consideration of same, the Court found said Motions not to be well-taken, and the same were denied. Defendant was remanded to the custody of the Wyandot County Sheriff, pending transportation to the aforementioned penal institution.

Costs taxed to Defendant.

Approved:


JUDGE


Charles L. Bartholomew 0005056
Prosecuting Attorney
Wyandot County, Ohio

/s/ Ryan A. Zerby, per telephone approval of 9/10/1999
Ryan A. Zerby
Attorney for Defendant

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OHIO REVISED CODE GENERAL PROVISIONS
CHAPTER 1. DEFINITIONS; RULES OF CONSTRUCTION
CONSTRUCTION

Go to the Ohio Code Archive Directory

ORC Ann. 1.42 (2012)

§ 1.42. Common and technical use

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

HISTORY:

134 v H 607. Eff 1-3-72.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2909. ARSON AND RELATED OFFENSES

Go to the Ohio Code Archive Directory

ORC Ann. 2909.02 (2012)

§ 2909.02. Aggravated arson

(A) No person, by means of fire or explosion, shall knowingly do any of the following:

- (1) Create a substantial risk of serious physical harm to any person other than the offender;
- (2) Cause physical harm to any occupied structure;
- (3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of physical harm to any occupied structure.

(B) (1) Whoever violates this section is guilty of aggravated arson.

- (2) A violation of division (A)(1) or (3) of this section is a felony of the first degree.
- (3) A violation of division (A)(2) of this section is a felony of the second degree.

HISTORY:

134 v H 511 (Eff 1-1-74); 136 v S 282 (Eff 5-21-76); 139 v S 199 (Eff 1-5-83); 146 v S 2 (Eff 7-1-96); 146 v S 269. Eff 7-1-96.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2909. ARSON AND RELATED OFFENSES

Go to the Ohio Code Archive Directory

ORC Ann. 2909.03 (2012)

§ 2909.03. Arson

(A) No person, by means of fire or explosion, shall knowingly do any of the following:

(1) Cause, or create a substantial risk of, physical harm to any property of another without the other person's consent;

(2) Cause, or create a substantial risk of, physical harm to any property of the offender or another, with purpose to defraud;

(3) Cause, or create a substantial risk of, physical harm to the statehouse or a courthouse, school building, or other building or structure that is owned or controlled by the state, any political subdivision, or any department, agency, or instrumentality of the state or a political subdivision, and that is used for public purposes;

(4) Cause, or create a substantial risk of, physical harm, through the offer or the acceptance of an agreement for hire or other consideration, to any property of another without the other person's consent or to any property of the offender or another with purpose to defraud;

(5) Cause, or create a substantial risk of, physical harm to any park, preserve, wildlands, brush-covered land, cut-over land, forest, timberland, greenlands, woods, or similar real property that is owned or controlled by another person, the state, or a political subdivision without the consent of the other person, the state, or the political subdivision;

(6) With purpose to defraud, cause, or create a substantial risk of, physical harm to any park, preserve, wildlands, brush-covered land, cut-over land, forest, timberland, greenlands, woods, or similar real property that is owned or controlled by the offender, another person, the state, or a political subdivision.

(B) (1) Whoever violates this section is guilty of arson.

(2) A violation of division (A)(1) of this section is one of the following:

(a) Except as otherwise provided in division (B)(2)(b) of this section, a misdemeanor of the first degree;

(b) If the value of the property or the amount of the physical harm involved is one thousand dollars or more, a felony of the fourth degree.

(3) A violation of division (A)(2), (3), (5), or (6) of this section is a felony of the fourth degree.

(4) A violation of division (A)(4) of this section is a felony of the third degree.

HISTORY:

134 v H 511 (Eff 1-1-74); 136 v S 282 (Eff 5-21-76); 139 v S 199 (Eff 1-1-83); 144 v H 675 (Eff 3-19-93); 146 v S 2. Eff 7-1-96; 2011 HB 86, § 1, eff. Sept. 30, 2011.

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2919. OFFENSES AGAINST THE FAMILY
 DOMESTIC VIOLENCE

Go to the Ohio Code Archive Directory

ORC Ann. 2919.25 (2012)

§ 2919.25. Domestic violence

(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.

(B) No person shall recklessly cause serious physical harm to a family or household member.

(C) No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member.

(D) (1) Whoever violates this section is guilty of domestic violence, and the court shall sentence the offender as provided in divisions (D)(2) to (6) of this section.

(2) Except as otherwise provided in divisions (D)(3) to (5) of this section, a violation of division (C) of this section is a misdemeanor of the fourth degree, and a violation of division (A) or (B) of this section is a misdemeanor of the first degree.

(3) Except as otherwise provided in division (D)(4) of this section, if the offender previously has pleaded guilty to or been convicted of domestic violence, a violation of an existing or former municipal ordinance or law of this or any other state or the United States that is substantially similar to domestic violence, a violation of *section 2903.14, 2909.06, 2909.07, 2911.12, 2911.211 [2911.21.1], or 2919.22 of the Revised Code* if the victim of the violation was a family or household member at the time of the violation, a violation of an existing or former municipal ordinance or law of this or any other state or the United States that is substantially similar to any of those sections if the victim of the violation was a family or household member at the time of the commission of the violation, or any offense of violence if the victim of the offense was a family or household member at the time of the commission of the offense, a violation of division (A) or (B) of this section is a felony of the fourth degree, and, if the offender knew that the victim of the violation was pregnant at the time of the violation, the court shall impose a mandatory prison term on the offender pursuant

to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the second degree.

(4) If the offender previously has pleaded guilty to or been convicted of two or more offenses of domestic violence or two or more violations or offenses of the type described in division (D)(3) of this section involving a person who was a family or household member at the time of the violations or offenses, a violation of division (A) or (B) of this section is a felony of the third degree, and, if the offender knew that the victim of the violation was pregnant at the time of the violation, the court shall impose a mandatory prison term on the offender pursuant to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the first degree.

(5) Except as otherwise provided in division (D)(3) or (4) of this section, if the offender knew that the victim of the violation was pregnant at the time of the violation, a violation of division (A) or (B) of this section is a felony of the fifth degree, and the court shall impose a mandatory prison term on the offender pursuant to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the third degree.

(6) If division (D)(3), (4), or (5) of this section requires the court that sentences an offender for a violation of division (A) or (B) of this section to impose a mandatory prison term on the offender pursuant to this division, the court shall impose the mandatory prison term as follows:

(a) If the violation of division (A) or (B) of this section is a felony of the fourth or fifth degree, except as otherwise provided in division (D)(6)(b) or (c) of this section, the court shall impose a mandatory prison term on the offender of at least six months.

(b) If the violation of division (A) or (B) of this section is a felony of the fifth degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, the court shall impose a mandatory prison term on the offender of twelve months.

(c) If the violation of division (A) or (B) of this section is a felony of the fourth degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, the court shall impose a mandatory prison term on the offender of at least twelve months.

(d) If the violation of division (A) or (B) of this section is a felony of the third degree, except as otherwise provided in division (D)(6)(e) of this section and notwithstanding the range of prison terms prescribed in *section 2929.14 of the Revised Code* for a felony of the third degree, the court shall impose a mandatory prison term on the offender of either a definite term of six months or one of the prison terms prescribed in *section 2929.14 of the Revised Code* for felonies of the third degree.

(e) If the violation of division (A) or (B) of this section is a felony of the third degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, notwithstanding the range of prison terms prescribed in *section 2929.14 of the Revised Code* for a felony of the third degree, the court shall impose a mandatory prison term on the offender of either a definite term of one year or one of the prison terms prescribed in *section 2929.14 of the Revised Code* for felonies of the third degree.

(E) Notwithstanding any provision of law to the contrary, no court or unit of state or local government shall charge any fee, cost, deposit, or money in connection with the filing of charges against a person alleging that the person violated this section or a municipal ordinance substantially similar to this section or in connection with the prosecution of any charges so filed.

(F) As used in this section and *sections 2919.251 [2919.25.1] and 2919.26 of the Revised Code*:

(1) "Family or household member" means any of the following:

(a) Any of the following who is residing or has resided with the offender:

(i) A spouse, a person living as a spouse, or a former spouse of the offender;

(ii) A parent, a foster parent, or a child of the offender, or another person related by consanguinity or affinity to the offender;

(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender.

(b) The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent.

(2) "Person living as a spouse" means a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.

(3) "Pregnant woman's unborn" has the same meaning as "such other person's unborn," as set forth in *section 2903.09 of the Revised Code*, as it relates to the pregnant woman. Division (C) of that section applies regarding the use of the term in this section, except that the second and third sentences of division (C)(1) of that section shall be construed for purposes of this section as if they included a reference to this section in the listing of Revised Code sections they contain.

(4) "Termination of the pregnant woman's pregnancy" has the same meaning as "unlawful termination of another's pregnancy," as set forth in *section 2903.09 of the Revised Code*, as it relates to the pregnant woman. Division (C) of that section applies regarding the use of the term in this section, except that the second and third sentences of division (C)(1) of that section shall be construed for purposes of this section as if they included a reference to this section in the listing of Revised Code sections they contain.

HISTORY:

137 v H 835 (Eff 3-27-79); 138 v H 920 (Eff 4-9-81); 140 v H 587 (Eff 9-25-84); 142 v S 6 (Eff 6-10-87); 142 v H 172 (Eff 3-17-89); 143 v S 3 (Eff 4-11-91); 144 v H 536 (Eff 11-5-92); 145 v H 335 (Eff 12-9-94); 146 v S 2 (Eff 7-1-96); 147 v S 1 (Eff 10-21-97); 147 v H 238 (Eff 11-5-97); 149 v H 327 (Eff 7-8-2002); 149 v H 548. Eff 3-31-2003; 150 v S 50, § 1, eff. 1-8-04; 152 v H 280, § 1, eff. 4-7-09; 153 v H 10, § 1, eff. 6-17-10; 153 v S 58, § 1, eff. 9-17-10.

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 *** Annotations current through September 28, 2012 ***

TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2929. PENALTIES AND SENTENCING
 IN GENERAL

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ORC Ann. 2929.01 (2012)

Legislative Alert: LEXSEE 2011 Ohio HB 334 -- See sections 1 and 2.

§ 2929.01. Definitions

As used in this chapter:

(A) (1) "Alternative residential facility" means, subject to division (A)(2) of this section, any facility other than an offender's home or residence in which an offender is assigned to live and that satisfies all of the following criteria:

(a) It provides programs through which the offender may seek or maintain employment or may receive education, training, treatment, or habilitation.

(b) It has received the appropriate license or certificate for any specialized education, training, treatment, habilitation, or other service that it provides from the government agency that is responsible for licensing or certifying that type of education, training, treatment, habilitation, or service.

(2) "Alternative residential facility" does not include a community-based correctional facility, jail, halfway house, or prison.

(B) "Basic probation supervision" means a requirement that the offender maintain contact with a person appointed to supervise the offender in accordance with sanctions imposed by the court or imposed by the parole board pursuant to *section 2967.28 of the Revised Code*. "Basic probation supervision" includes basic parole supervision and basic post-release control supervision.

(C) "Cocaine," "hashish," "L.S.D.," and "unit dose" have the same meanings as in *section 2925.01 of the Revised Code*.

(D) "Community-based correctional facility" means a community-based correctional facility and program or district community-based correctional facility and program developed pursuant to *sections 2301.51 to 2301.58 of the Revised Code*.

(E) "Community control sanction" means a sanction that is not a prison term and that is described in *section 2929.15, 2929.16, 2929.17, or 2929.18 of the Revised Code* or a sanction that is not a jail term and that is described in *section 2929.26, 2929.27, or 2929.28 of the Revised Code*. "Community control sanction" includes probation if the sentence involved was imposed for a felony that was committed prior to July 1, 1996, or if the sentence involved was imposed for a misdemeanor that was committed prior to January 1, 2004.

(F) "Controlled substance," "marihuana," "schedule I," and "schedule II" have the same meanings as in *section 3719.01 of the Revised Code*.

(G) "Curfew" means a requirement that an offender during a specified period of time be at a designated place.

(H) "Day reporting" means a sanction pursuant to which an offender is required each day to report to and leave a center or other approved reporting location at specified times in order to participate in work, education or training, treatment, and other approved programs at the center or outside the center.

(I) "Deadly weapon" has the same meaning as in *section 2923.11 of the Revised Code*.

(J) "Drug and alcohol use monitoring" means a program under which an offender agrees to submit to random chemical analysis of the offender's blood, breath, or urine to determine whether the offender has ingested any alcohol or other drugs.

(K) "Drug treatment program" means any program under which a person undergoes assessment and treatment designed to reduce or completely eliminate the person's physical or emotional reliance upon alcohol, another drug, or alcohol and another drug and under which the person may be required to receive assessment and treatment on an outpatient basis or may be required to reside at a facility other than the person's home or residence while undergoing assessment and treatment.

(L) "Economic loss" means any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes any loss of income due to lost time at work because of any injury caused to the victim, and any property loss, medical cost, or funeral expense incurred as a result of the commission of the offense. "Economic loss" does not include non-economic loss or any punitive or exemplary damages.

(M) "Education or training" includes study at, or in conjunction with a program offered by, a university, college, or technical college or vocational study and also includes the completion of primary school, secondary school, and literacy curricula or their equivalent.

(N) "Firearm" has the same meaning as in *section 2923.11 of the Revised Code*.

(O) "Halfway house" means a facility licensed by the division of parole and community services of the department of rehabilitation and correction pursuant to *section 2967.14 of the Revised Code* as a suitable facility for the care and treatment of adult offenders.

(P) "House arrest" means a period of confinement of an offender that is in the offender's home or in other premises specified by the sentencing court or by the parole board pursuant to *section 2967.28 of the Revised Code* and during which all of the following apply:

(1) The offender is required to remain in the offender's home or other specified premises for the specified period of confinement, except for periods of time during which the offender is at the offender's place of employment or at other premises as authorized by the sentencing court or by the parole board.

(2) The offender is required to report periodically to a person designated by the court or parole board.

(3) The offender is subject to any other restrictions and requirements that may be imposed by the sentencing court or by the parole board.

(Q) "Intensive probation supervision" means a requirement that an offender maintain frequent contact with a person appointed by the court, or by the parole board pursuant to *section 2967.28 of the Revised Code*, to supervise the offender while the offender is seeking or maintaining necessary employment and participating in training, education, and treatment programs as required in the court's or parole board's order. "Intensive probation supervision" includes intensive parole supervision and intensive post-release control supervision.

(R) "Jail" means a jail, workhouse, minimum security jail, or other residential facility used for the confinement of alleged or convicted offenders that is operated by a political subdivision or a combination of political subdivisions of this state.

(S) "Jail term" means the term in a jail that a sentencing court imposes or is authorized to impose pursuant to *section 2929.24 or 2929.25 of the Revised Code* or pursuant to any other provision of the Revised Code that authorizes a term in a jail for a misdemeanor conviction.

(T) "Mandatory jail term" means the term in a jail that a sentencing court is required to impose pursuant to division (G) of *section 1547.99 of the Revised Code*, division (E) of *section 2903.06* or division (D) of *section 2903.08 of the Revised Code*, division (E) or (G) of *section 2929.24 of the Revised Code*, division (B) of *section 4510.14 of the Revised Code*, or division (G) of *section 4511.19 of the Revised Code* or pursuant to any other provision of the Revised Code that requires a term in a jail for a misdemeanor conviction.

(U) "Delinquent child" has the same meaning as in *section 2152.02 of the Revised Code*.

(V) "License violation report" means a report that is made by a sentencing court, or by the parole board pursuant to *section 2967.28 of the Revised Code*, to the regulatory or licensing board or agency that issued an offender a professional license or a license or permit to do business in this state and that specifies that the offender has been convicted of or pleaded guilty to an offense that may violate the conditions under which the offender's professional license or license or permit to do business in this state was granted or an offense for which the offender's professional license or license or permit to do business in this state may be revoked or suspended.

(W) "Major drug offender" means an offender who is convicted of or pleads guilty to the possession of, sale of, or offer to sell any drug, compound, mixture, preparation, or substance that consists of or contains at least one thousand grams of hashish; at least one hundred grams of cocaine; at least two thousand five hundred unit doses or two hundred fifty grams of heroin; at least five thousand unit doses of L.S.D. or five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form; or at least one hundred times the amount of any other schedule I or II controlled substance other than marihuana that is necessary to commit a felony of the third degree

pursuant to *section 2925.03, 2925.04, 2925.05, or 2925.11 of the Revised Code* that is based on the possession of, sale of, or offer to sell the controlled substance.

(X) "Mandatory prison term" means any of the following:

(1) Subject to division (X)(2) of this section, the term in prison that must be imposed for the offenses or circumstances set forth in divisions (F)(1) to (8) or (F)(12) to (18) of *section 2929.13* and division (B) of *section 2929.14 of the Revised Code*. Except as provided in *sections 2925.02, 2925.03, 2925.04, 2925.05, and 2925.11 of the Revised Code*, unless the maximum or another specific term is required under *section 2929.14 or 2929.142 of the Revised Code*, a mandatory prison term described in this division may be any prison term authorized for the level of offense.

(2) The term of sixty or one hundred twenty days in prison that a sentencing court is required to impose for a third or fourth degree felony OVI offense pursuant to division (G)(2) of *section 2929.13* and division (G)(1)(d) or (e) of *section 4511.19 of the Revised Code* or the term of one, two, three, four, or five years in prison that a sentencing court is required to impose pursuant to division (G)(2) of *section 2929.13 of the Revised Code*.

(3) The term in prison imposed pursuant to division (A) of *section 2971.03 of the Revised Code* for the offenses and in the circumstances described in division (F)(11) of *section 2929.13 of the Revised Code* or pursuant to division (B)(1)(a), (b), or (c), (B)(2)(a), (b), or (c), or (B)(3)(a), (b), (c), or (d) of *section 2971.03 of the Revised Code* and that term as modified or terminated pursuant to *section 2971.05 of the Revised Code*.

(Y) "Monitored time" means a period of time during which an offender continues to be under the control of the sentencing court or parole board, subject to no conditions other than leading a law-abiding life.

(Z) "Offender" means a person who, in this state, is convicted of or pleads guilty to a felony or a misdemeanor.

(AA) "Prison" means a residential facility used for the confinement of convicted felony offenders that is under the control of the department of rehabilitation and correction but does not include a violation sanction center operated under authority of *section 2967.141 of the Revised Code*.

(BB) "Prison term" includes either of the following sanctions for an offender:

(1) A stated prison term;

(2) A term in a prison shortened by, or with the approval of, the sentencing court pursuant to *section 2929.143, 2929.20, 2967.26, 5120.031, 5120.032, or 5120.073 of the Revised Code*.

(CC) "Repeat violent offender" means a person about whom both of the following apply:

(1) The person is being sentenced for committing or for complicity in committing any of the following:

(a) Aggravated murder, murder, any felony of the first or second degree that is an offense of violence, or an attempt to commit any of these offenses if the attempt is a felony of the first or second degree;

(b) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense described in division (CC)(1)(a) of this section.

(2) The person previously was convicted of or pleaded guilty to an offense described in division (CC)(1)(a) or (b) of this section.

(DD) "Sanction" means any penalty imposed upon an offender who is convicted of or pleads guilty to an offense, as punishment for the offense. "Sanction" includes any sanction imposed pursuant to any provision of *sections 2929.14 to 2929.18 or 2929.24 to 2929.28 of the Revised Code*.

(EE) "Sentence" means the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense.

(FF) "Stated prison term" means the prison term, mandatory prison term, or combination of all prison terms and mandatory prison terms imposed by the sentencing court pursuant to *section 2929.14, 2929.142, or 2971.03 of the Revised Code* or under *section 2919.25 of the Revised Code*. "Stated prison term" includes any credit received by the offender for time spent in jail awaiting trial, sentencing, or transfer to prison for the offense and any time spent under house arrest or house arrest with electronic monitoring imposed after earning credits pursuant to *section 2967.193 of the Revised Code*. If an offender is serving a prison term as a risk reduction sentence under *sections 2929.143 and 5120.036 of the Revised Code*, "stated prison term" includes any period of time by which the prison term imposed upon the offender is shortened by the offender's successful completion of all assessment and treatment or programming pursuant to those sections.

(GG) "Victim-offender mediation" means a reconciliation or mediation program that involves an offender and the victim of the offense committed by the offender and that includes a meeting in which the offender and the victim may discuss the offense, discuss restitution, and consider other sanctions for the offense.

(HH) "Fourth degree felony OVI offense" means a violation of division (A) of *section 4511.19 of the Revised Code* that, under division (G) of that section, is a felony of the fourth degree.

(II) "Mandatory term of local incarceration" means the term of sixty or one hundred twenty days in a jail, a community-based correctional facility, a halfway house, or an alternative residential facility that a sentencing court may impose upon a person who is convicted of or pleads guilty to a fourth degree felony OVI offense pursuant to division (G)(1) of *section 2929.13 of the Revised Code* and division (G)(1)(d) or (e) of *section 4511.19 of the Revised Code*.

(JJ) "Designated homicide, assault, or kidnapping offense," "violent sex offense," "sexual motivation specification," "sexually violent offense," "sexually violent predator," and "sexually violent predator specification" have the same meanings as in *section 2971.01 of the Revised Code*.

(KK) "Sexually oriented offense," "child-victim oriented offense," and "tier III sex offender/child-victim offender" have the same meanings as in *section 2950.01 of the Revised Code*.

(LL) An offense is "committed in the vicinity of a child" if the offender commits the offense within thirty feet of or within the same residential unit as a child who is under eighteen years of age, regardless of whether the offender knows the age of the child or whether the offender knows the offense is being committed within thirty feet of or within the same residential unit as the child and regardless of whether the child actually views the commission of the offense.

(MM) "Family or household member" has the same meaning as in *section 2919.25 of the Revised Code*.

(NN) "Motor vehicle" and "manufactured home" have the same meanings as in *section 4501.01 of the Revised Code*.

(OO) "Detention" and "detention facility" have the same meanings as in *section 2921.01 of the Revised Code*.

(PP) "Third degree felony OVI offense" means a violation of division (A) of *section 4511.19 of the Revised Code* that, under division (G) of that section, is a felony of the third degree.

(QQ) "Random drug testing" has the same meaning as in *section 5120.63 of the Revised Code*.

(RR) "Felony sex offense" has the same meaning as in *section 2967.28 of the Revised Code*.

(SS) "Body armor" has the same meaning as in *section 2941.1411 of the Revised Code*.

(TT) "Electronic monitoring" means monitoring through the use of an electronic monitoring device.

(UU) "Electronic monitoring device" means any of the following:

(1) Any device that can be operated by electrical or battery power and that conforms with all of the following:

(a) The device has a transmitter that can be attached to a person, that will transmit a specified signal to a receiver of the type described in division (UU)(1)(b) of this section if the transmitter is removed from the person, turned off, or altered in any manner without prior court approval in relation to electronic monitoring or without prior approval of the department of rehabilitation and correction in relation to the use of an electronic monitoring device for an inmate on transitional control or otherwise is tampered with, that can transmit continuously and periodically a signal to that receiver when the person is within a specified distance from the receiver, and that can transmit an appropriate signal to that receiver if the person to whom it is attached travels a specified distance from that receiver.

(b) The device has a receiver that can receive continuously the signals transmitted by a transmitter of the type described in division (UU)(1)(a) of this section, can transmit continuously those signals by a wireless or landline telephone connection to a central monitoring computer of the type described in division (UU)(1)(c) of this section, and can transmit continuously an appropriate signal to that central monitoring computer if the device has been turned off or altered without prior court approval or otherwise tampered with. The device is designed specifically for use in electronic monitoring, is not a converted wireless phone or another tracking device that is clearly not designed for electronic monitoring, and provides a means of text-based or voice communication with the person.

(c) The device has a central monitoring computer that can receive continuously the signals transmitted by a wireless or landline telephone connection by a receiver of the type described in division (UU)(1)(b) of this section and can monitor continuously the person to whom an electronic monitoring device of the type described in division (UU)(1)(a) of this section is attached.

(2) Any device that is not a device of the type described in division (UU)(1) of this section and that conforms with all of the following:

(a) The device includes a transmitter and receiver that can monitor and determine the location of a subject person at any time, or at a designated point in time, through the use of a central monitoring computer or through other electronic means.

(b) The device includes a transmitter and receiver that can determine at any time, or at a designated point in time, through the use of a central monitoring computer or other electronic means the fact that the transmitter is turned off or altered in any manner without prior approval of the court in relation to the electronic monitoring or without prior approval of the department of rehabilitation and correction in relation to the use of an electronic monitoring device for an inmate on transitional control or otherwise is tampered with.

(3) Any type of technology that can adequately track or determine the location of a subject person at any time and that is approved by the director of rehabilitation and correction, including, but not limited to, any satellite technology, voice tracking system, or retinal scanning system that is so approved.

(VV) "Non-economic loss" means nonpecuniary harm suffered by a victim of an offense as a result of or related to the commission of the offense, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss.

(WW) "Prosecutor" has the same meaning as in *section 2935.01 of the Revised Code*.

(XX) "Continuous alcohol monitoring" means the ability to automatically test and periodically transmit alcohol consumption levels and tamper attempts at least every hour, regardless of the location of the person who is being monitored.

(YY) A person is "adjudicated a sexually violent predator" if the person is convicted of or pleads guilty to a violent sex offense and also is convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment, count in the indictment, or information charging that violent sex offense or if the person is convicted of or pleads guilty to a designated homicide, assault, or kidnapping offense and also is convicted of or pleads guilty to both a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information charging that designated homicide, assault, or kidnapping offense.

(ZZ) An offense is "committed in proximity to a school" if the offender commits the offense in a school safety zone or within five hundred feet of any school building or the boundaries of any school premises, regardless of whether the offender knows the offense is being committed in a school safety zone or within five hundred feet of any school building or the boundaries of any school premises.

(AAA) "Human trafficking" means a scheme or plan to which all of the following apply:

(1) Its object is to subject a victim or victims to involuntary servitude, as defined in *section 2905.31 of the Revised Code*, to compel a victim or victims to engage in sexual activity for hire, to engage in a performance that is obscene, sexually oriented, or nudity oriented, or to be a model or participant in the production of material that is obscene, sexually oriented, or nudity oriented.

(2) It involves at least two felony offenses, whether or not there has been a prior conviction for any of the felony offenses, to which all of the following apply:

(a) Each of the felony offenses is a violation of section 2905.01, 2905.02, 2905.32, 2907.21, 2907.22, or 2923.32, division (A)(1) or (2) of section 2907.323, or division (B)(1), (2), (3), (4), or (5) of *section 2919.22 of the Revised Code* or is a violation of a law of any state other than this state that is substantially similar to any of the sections or divisions of the Revised Code identified in this division.

(b) At least one of the felony offenses was committed in this state.

(c) The felony offenses are related to the same scheme or plan and are not isolated instances.

(BBB) "Material," "nudity," "obscene," "performance," and "sexual activity" have the same meanings as in *section 2907.01 of the Revised Code*.

(CCC) "Material that is obscene, sexually oriented, or nudity oriented" means any material that is obscene, that shows a person participating or engaging in sexual activity, masturbation, or bestiality, or that shows a person in a state of nudity.

(DDD) "Performance that is obscene, sexually oriented, or nudity oriented" means any performance that is obscene, that shows a person participating or engaging in sexual activity, masturbation, or bestiality, or that shows a person in a state of nudity.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 445 (Eff 9-3-96); 146 v H 480 (Eff 10-16-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 147 v H 378 (Eff 3-10-98); 147 v S 111 (Eff 3-17-98); 148 v S 9 (Eff 3-8-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 349 (Eff 9-22-2000); 148 v S 222 (Eff 3-22-2001); 148 v S 179, § 3 (Eff 1-1-2002); 149 v H 327 (Eff 7-8-2002); 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v S 5, § 1, Eff 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v S 57, § 1, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v H 162, § 1, eff. 10-12-06; 151 v S 260, § 1, eff. 1-2-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08; 152 v S 220, § 1, eff. 9-30-08; 152 v H 280, § 1, eff. 4-7-09; 152 v H 130, § 1, eff. 4-7-09; 153 v S 162, § 1, eff. 9-13-10; 153 v S 235, § 1, eff. 3-24-11; 2011 HB 86, § 1, eff. Sept. 30, 2011; 2012 HB 487, § 101.01, eff. Sept. 10, 2012.

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Current through Legislation passed by the 129th Ohio General Assembly
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 *** Annotations current through September 28, 2012 ***

TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2929. PENALTIES AND SENTENCING
 PENALTIES FOR FELONY

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ORC Ann. 2929.14 (2012)

§ 2929.14. Basic prison terms

(A) Except as provided in division (B)(1), (B)(2), (B)(3), (B)(4), (B)(5), (B)(6), (B)(7), (B)(8), (E), (G), (H), or (J) of this section or in division (D)(6) of *section 2919.25 of the Revised Code* and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, ten, or eleven years.

(2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.

(3) (a) For a felony of the third degree that is a violation of *section 2903.06, 2903.08, 2907.03, 2907.04, or 2907.05 of the Revised Code* or that is a violation of *section 2911.02 or 2911.12 of the Revised Code* if the offender previously has been convicted of or pleaded guilty in two or more separate proceedings to two or more violations of *section 2911.01, 2911.02, 2911.11, or 2911.12 of the Revised Code*, the prison term shall be twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months.

(b) For a felony of the third degree that is not an offense for which division (A)(3)(a) of this section applies, the prison term shall be nine, twelve, eighteen, twenty-four, thirty, or thirty-six months.

(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

(5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

(B) (1) (a) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in *section 2941.141, 2941.144, or 2941.145 of the Revised Code*, the court shall impose on the offender one of the following prison terms:

(i) A prison term of six years if the specification is of the type described in *section 2941.144 of the Revised Code* that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or silencer on or about the offender's person or under the offender's control while committing the felony;

(ii) A prison term of three years if the specification is of the type described in *section 2941.145 of the Revised Code* that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;

(iii) A prison term of one year if the specification is of the type described in *section 2941.141 of the Revised Code* that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony.

(b) If a court imposes a prison term on an offender under division (B)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2967.19, section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. Except as provided in division (B)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (B)(1)(a) of this section for felonies committed as part of the same act or transaction.

(c) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of *section 2923.161 of the Revised Code* or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in *section 2941.146 of the Revised Code* that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of *section 2923.161 of the Revised Code* or for the other felony offense under division (A), (B)(2), or (B)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (B)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (B)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (B)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in *section 2941.1411 of the Revised Code* that charges the offender with wearing or carrying body armor while

committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed, subject to divisions (C) to (I) of *section 2967.19 of the Revised Code*, shall not be reduced pursuant to *section 2929.20*, *section 2967.19*, *section 2967.193*, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (B)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (B)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (B)(1)(a) of this section or any of the additional prison terms described in division (B)(1)(c) of this section upon an offender for a violation of *section 2923.12* or *2923.123 of the Revised Code*. The court shall not impose any of the prison terms described in division (B)(1)(a) or (b) of this section upon an offender for a violation of *section 2923.122* that involves a deadly weapon that is a firearm other than a dangerous ordnance, *section 2923.16*, or *section 2923.121 of the Revised Code*. The court shall not impose any of the prison terms described in division (B)(1)(a) of this section or any of the additional prison terms described in division (B)(1)(c) of this section upon an offender for a violation of *section 2923.13 of the Revised Code* unless all of the following apply:

(i) The offender previously has been convicted of aggravated murder, murder, or any felony of the first or second degree.

(ii) Less than five years have passed since the offender was released from prison or post-release control, whichever is later, for the prior offense.

(f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1412 of the Revised Code* that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in *section 2935.01 of the Revised Code* or a corrections officer, as defined in *section 2941.1412 of the Revised Code*, the court, after imposing a prison term on the offender for the felony offense under division (A), (B)(2), or (B)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to *section 2929.20*, *section 2967.19*, *section 2967.193*, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. If an offender is convicted of or pleads guilty to two or more felonies that include, as an essential element, causing or attempting to cause the death or physical harm to another and also is convicted of or pleads guilty to a specification of the type described under division (B)(1)(f) of this section in connection with two or more of the felonies of which the offender is convicted or to which the offender pleads guilty, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(f) of this section for each of two of the specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications. If a court imposes an additional prison term on an offender under division (B)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (B)(1)(a) or (c) of this section relative to the same offense.

(g) If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to

a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

(2) (a) If division (B)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in *section 2941.149 of the Revised Code* that the offender is a repeat violent offender.

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

(iv) The court finds that the prison terms imposed pursuant to division (B)(2)(a)(iii) of this section and, if applicable, division (B)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under *section 2929.12 of the Revised Code* indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(v) The court finds that the prison terms imposed pursuant to division (B)(2)(a)(iii) of this section and, if applicable, division (B)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under *section 2929.12 of the Revised Code* indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

(b) The court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in *section 2941.149 of the Revised Code* that the offender is a repeat violent offender.

(ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (CC)(1) of *section 2929.01 of the Revised Code*, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that divi-

sion of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

(iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(c) For purposes of division (B)(2)(b) of this section, two or more offenses committed at the same time or as part of the same act or event shall be considered one offense, and that one offense shall be the offense with the greatest penalty.

(d) A sentence imposed under division (B)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20, section 2967.19, or section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under this section consecutively to and prior to the prison term imposed for the underlying offense.

(e) When imposing a sentence pursuant to division (B)(2)(a) or (b) of this section, the court shall state its findings explaining the imposed sentence.

(3) Except when an offender commits a violation of *section 2903.01* or *2907.02 of the Revised Code* and the penalty imposed for the violation is life imprisonment or commits a violation of *section 2903.02 of the Revised Code*, if the offender commits a violation of *section 2925.03* or *2925.11 of the Revised Code* and that section classifies the offender as a major drug offender, if the offender commits a felony violation of *section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161, 4729.37, or 4729.61, division (C) or (D) of section 3719.172, division (C) of section 4729.51, or division (J) of section 4729.54 of the Revised Code* that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marijuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in *section 2941.1410 of the Revised Code* charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of *section 2907.02 of the Revised Code* and, had the offender completed the violation of *section 2907.02 of the Revised Code* that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of *section 2907.02 of the Revised Code*, the court shall impose upon the offender for the felony violation a mandatory prison term of the maximum prison term prescribed for a felony of the first degree that, subject to divisions (C) to (I) of *section 2967.19 of the Revised Code*, cannot be reduced pursuant to section 2929.20, section 2967.19, or any other provision of Chapter 2967. or 5120. of the Revised Code.

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of *section 2929.13 of the Revised Code*, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory

prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (B)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (B)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (B)(4) of this section, the court also may sentence the offender to a community control sanction under *section 2929.16 or 2929.17 of the Revised Code*, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of *section 2929.13 of the Revised Code* and the court imposes a mandatory term of local incarceration, the court may impose a prison term as described in division (A)(1) of that section.

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1414 of the Revised Code* that charges that the victim of the offense is a peace officer, as defined in *section 2935.01 of the Revised Code*, or an investigator of the bureau of criminal identification and investigation, as defined in *section 2903.11 of the Revised Code*, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (B)(5) of this section, the prison term, subject to divisions (C) to (I) of *section 2967.19 of the Revised Code*, shall not be reduced pursuant to *section 2929.20*, *section 2967.19*, *section 2967.193*, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1415 of the Revised Code* that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of *section 4511.19 of the Revised Code* or an equivalent offense, as defined in *section 2941.1415 of the Revised Code*, or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (B)(6) of this section, the prison term, subject to divisions (C) to (I) of *section 2967.19 of the Revised Code*, shall not be reduced pursuant to *section 2929.20*, *section 2967.19*, *section 2967.193*, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(6) of this section for felonies committed as part of the same act.

(7) (a) If an offender is convicted of or pleads guilty to a felony violation of section 2905.01, 2905.02, 2907.21, 2907.22, or 2923.32, division (A)(1) or (2) of section 2907.323, or division (B)(1), (2), (3), (4), or (5) of *section 2919.22 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1422 of the Revised Code* that charges that the offender knowingly committed the offense in furtherance of human trafficking, the court shall impose on the offender a mandatory prison term that is one of the following:

(i) If the offense is a felony of the first degree, a definite prison term of not less than five years and not greater than ten years;

(ii) If the offense is a felony of the second or third degree, a definite prison term of not less than three years and not greater than the maximum prison term allowed for the offense by division (A) of *section 2929.14 of the Revised Code*;

(iii) If the offense is a felony of the fourth or fifth degree, a definite prison term that is the maximum prison term allowed for the offense by division (A) of *section 2929.14 of the Revised Code*.

(b) Subject to divisions (C) to (I) of *section 2967.19 of the Revised Code*, the prison term imposed under division (B)(7)(a) of this section shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(7)(a) of this section for felonies committed as part of the same act, scheme, or plan.

(8) If an offender is convicted of or pleads guilty to a felony violation of *section 2903.11, 2903.12, or 2903.13 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1423 of the Revised Code* that charges that the victim of the violation was a woman whom the offender knew was pregnant at the time of the violation, notwithstanding the range of prison terms prescribed in division (A) of this section for felonies of the same degree as the violation, the court shall impose on the offender a mandatory prison term that is either a definite prison term of six months or one of the prison terms prescribed in *section 2929.14 of the Revised Code* for felonies of the same degree as the violation.

(C) (1) (a) Subject to division (C)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (B)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(b) If a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (B)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A),

(B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(c) If a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(f) of this section, the offender shall serve the mandatory prison term so imposed consecutively to and prior to any prison term imposed for the underlying felony under division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(d) If a mandatory prison term is imposed upon an offender pursuant to division (B)(7) or (8) of this section, the offender shall serve the mandatory prison term so imposed consecutively to any other mandatory prison term imposed under that division or under any other provision of law and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates *section 2917.02, 2917.03, or 2921.35 of the Revised Code* or division (A)(1) or (2) of *section 2921.34 of the Revised Code*, if an offender who is under detention at a detention facility commits a felony violation of *section 2923.131 of the Revised Code*, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of division (A)(1) or (2) of *section 2921.34 of the Revised Code*, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

(3) If a prison term is imposed for a violation of division (B) of *section 2911.01 of the Revised Code*, a violation of division (A) of *section 2913.02 of the Revised Code* in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of *section 2921.331 of the Revised Code*, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to *section 2929.16, 2929.17, or 2929.18 of the Revised Code*, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

(5) If a mandatory prison term is imposed upon an offender pursuant to division (B)(5) or (6) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 of the Revised Code*. If a mandatory prison term is imposed upon an offender pursuant to division (B)(5) of this section, and if a mandatory prison term also is imposed upon the offender pursuant to division (B)(6) of this section in relation to the same violation, the offender shall serve the mandatory prison term imposed pursuant to division (B)(5) of this section consecutively to and prior to the mandatory prison term imposed pursuant to division (B)(6) of this section and consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 of the Revised Code*.

(6) When consecutive prison terms are imposed pursuant to division (C)(1), (2), (3), (4), or (5) or division (H)(1) or (2) of this section, the term to be served is the aggregate of all of the terms so imposed.

(D) (1) If a court imposes a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of *section 2967.28 of the Revised Code*. *Section 2929.191 of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (D)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. *Section 2929.191 of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(E) The court shall impose sentence upon the offender in accordance with *section 2971.03 of the Revised Code*, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment if any of the following apply:

(1) A person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, and, in relation to that offense, the offender is adjudicated a sexually violent predator.

(2) A person is convicted of or pleads guilty to a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* committed on or after January 2, 2007, and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of *section*

2907.02 of the Revised Code, or division (B) of section 2907.02 of the Revised Code provides that the court shall not sentence the offender pursuant to section 2971.03 of the Revised Code.

(3) A person is convicted of or pleads guilty to attempted rape committed on or after January 2, 2007, and a specification of the type described in section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code.

(4) A person is convicted of or pleads guilty to a violation of section 2905.01 of the Revised Code committed on or after January 1, 2008, and that section requires the court to sentence the offender pursuant to section 2971.03 of the Revised Code.

(5) A person is convicted of or pleads guilty to aggravated murder committed on or after January 1, 2008, and division (A)(2)(b)(ii) of section 2929.022, division (A)(1)(e), (C)(1)(a)(v), (C)(2)(a)(ii), (D)(2)(b), (D)(3)(a)(iv), or (E)(1)(d) of section 2929.03, or division (A) or (B) of section 2929.06 of the Revised Code requires the court to sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code.

(6) A person is convicted of or pleads guilty to murder committed on or after January 1, 2008, and division (B)(2) of section 2929.02 of the Revised Code requires the court to sentence the offender pursuant to section 2971.03 of the Revised Code.

(F) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a prison term or term of imprisonment under this section, sections 2929.02 to 2929.06 of the Revised Code, section 2929.142 of the Revised Code, section 2971.03 of the Revised Code, or any other provision of law, section 5120.163 of the Revised Code applies regarding the person while the person is confined in a state correctional institution.

(G) If an offender who is convicted of or pleads guilty to a felony that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.142 of the Revised Code that charges the offender with having committed the felony while participating in a criminal gang, the court shall impose upon the offender an additional prison term of one, two, or three years.

(H) (1) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.143 of the Revised Code that charges the offender with having committed the offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

(2) (a) If an offender is convicted of or pleads guilty to a felony violation of section 2907.22, 2907.24, 2907.241, or 2907.25 of the Revised Code and to a specification of the type described in section 2941.1421 of the Revised Code and if the court imposes a prison term on the offender for the felony violation, the court may impose upon the offender an additional prison term as follows:

(i) Subject to division (H)(2)(a)(ii) of this section, an additional prison term of one, two, three, four, five, or six months;

(ii) If the offender previously has been convicted of or pleaded guilty to one or more felony or misdemeanor violations of section 2907.22, 2907.23, 2907.24, 2907.241, or 2907.25 of the Revised Code and also was convicted of or pleaded guilty to a specification of the type de-

scribed in *section 2941.1421 of the Revised Code* regarding one or more of those violations, an additional prison term of one, two, three, four, five, six, seven, eight, nine, ten, eleven, or twelve months.

(b) In lieu of imposing an additional prison term under division (H)(2)(a) of this section, the court may directly impose on the offender a sanction that requires the offender to wear a real-time processing, continual tracking electronic monitoring device during the period of time specified by the court. The period of time specified by the court shall equal the duration of an additional prison term that the court could have imposed upon the offender under division (H)(2)(a) of this section. A sanction imposed under this division shall commence on the date specified by the court, provided that the sanction shall not commence until after the offender has served the prison term imposed for the felony violation of *section 2907.22, 2907.24, 2907.241, or 2907.25 of the Revised Code* and any residential sanction imposed for the violation under *section 2929.16 of the Revised Code*. A sanction imposed under this division shall be considered to be a community control sanction for purposes of *section 2929.15 of the Revised Code*, and all provisions of the Revised Code that pertain to community control sanctions shall apply to a sanction imposed under this division, except to the extent that they would by their nature be clearly inapplicable. The offender shall pay all costs associated with a sanction imposed under this division, including the cost of the use of the monitoring device.

(I) At the time of sentencing, the court may recommend the offender for placement in a program of shock incarceration under *section 5120.031 of the Revised Code* or for placement in an intensive program prison under *section 5120.032 of the Revised Code*, disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no recommendation on placement of the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in *section 5120.031 or 5120.032 of the Revised Code*, whichever is applicable, that the offender is eligible for the placement.

If the court disapproves placement of the offender in a program or prison of that nature, the department of rehabilitation and correction shall not place the offender in any program of shock incarceration or intensive program prison.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison, and if the offender is subsequently placed in the recommended program or prison, the department shall notify the court of the placement and shall include with the notice a brief description of the placement.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison and the department does not subsequently place the offender in the recommended program or prison, the department shall send a notice to the court indicating why the offender was not placed in the recommended program or prison.

If the court does not make a recommendation under this division with respect to an offender and if the department determines as specified in *section 5120.031 or 5120.032 of the Revised Code*, whichever is applicable, that the offender is eligible for placement in a program or prison of that nature, the department shall screen the offender and determine if there is an available program of shock incarceration or an intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is

suiting, the department shall notify the court of the proposed placement of the offender as specified in *section 5120.031* or *5120.032 of the Revised Code* and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

(J) If a person is convicted of or pleads guilty to aggravated vehicular homicide in violation of division (A)(1) of *section 2903.06 of the Revised Code* and division (B)(2)(c) of that section applies, the person shall be sentenced pursuant to *section 2929.142 of the Revised Code*.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 88 (Eff 9-3-96); 146 v H 445 (Eff 9-3-96); 146 v H 154 (Eff 10-4-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 147 v H 151 (Eff 9-16-97); 147 v H 32 (Eff 3-10-98); 147 v S 111 (Eff 3-17-98); 147 v H 2 (Eff 1-1-99); 148 v S 1 (Eff 8-6-99); 148 v H 29 (Eff 10-29-99); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v S 222 (Eff 3-22-2001); 149 v H 485 (Eff 6-13-2002); 149 v H 327 (Eff 7-8-2002); 149 v H 130. Eff 4-7-2003; 149 v S 123, § 1, eff. 1-1-04; 150 v H 12, §§ 1, 3, eff. 4-8-04*; 150 v H 52, § 1, eff. 6-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v H 137, § 1, eff. 7-11-06; 151 v H 137, § 3, eff. 8-3-06; 151 v S 260, § 1, eff. 1-2-07; 151 v S 281, § 1, eff. 1-4-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08; 152 v S 184, § 1, eff. 9-9-08; 152 v S 220, § 1, eff. 9-30-08; 152 v H 280, § 1, eff. 4-7-09; 152 v H 130, § 1, eff. 4-7-09; 2011 HB 86, § 1, eff. Sept. 30, 2011; 2012 SB 337, § 1, eff. Sept. 28, 2012.

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Current through Legislation passed by the 129th Ohio General Assembly
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*** Annotations current through September 28, 2012 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR FELONY

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ORC Ann. 2929.142 (2012)

§ 2929.142. Mandatory prison term for aggravated vehicular homicide where offender has previous OVI-type convictions

Notwithstanding the definite prison term specified in division (A) of *section 2929.14 of the Revised Code* for a felony of the first degree, if an offender is convicted of or pleads guilty to aggravated vehicular homicide in violation of division (A)(1) of *section 2903.06 of the Revised Code*, the court shall impose upon the offender a mandatory prison term of ten, eleven, twelve, thirteen, fourteen, or fifteen years if any of the following apply:

(A) The offender previously has been convicted of or pleaded guilty to three or more prior violations of *section 4511.19 of the Revised Code* or of a substantially equivalent municipal ordinance within the previous six years.

(B) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A) of *section 1547.11 of the Revised Code* or of a substantially equivalent municipal ordinance within the previous six years.

(C) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A)(3) of *section 4561.15 of the Revised Code* or of a substantially equivalent municipal ordinance within the previous six years.

(D) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A)(1) of *section 2903.06 of the Revised Code*.

(E) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A)(1) of *section 2903.08 of the Revised Code*.

(F) The offender previously has been convicted of or pleaded guilty to three or more prior violations of *section 2903.04 of the Revised Code* in circumstances in which division (D) of that section applied regarding the violations.

(G) The offender previously has been convicted of or pleaded guilty to three or more violations of any combination of the offenses listed in division (A), (B), (C), (D), (E), or (F) of this section.

(H) The offender previously has been convicted of or pleaded guilty to a second or subsequent felony violation of division (A) of *section 4511.19 of the Revised Code*.

HISTORY:

151 v H 461, § 1, eff. 4-4-07.

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ORC Ann. 2929.15 (2012)

§ 2929.15. Community control sanctions

(A) (1) If in sentencing an offender for a felony the court is not required to impose a prison term, a mandatory prison term, or a term of life imprisonment upon the offender, the court may directly impose a sentence that consists of one or more community control sanctions authorized pursuant to *section 2929.16, 2929.17, or 2929.18 of the Revised Code*. If the court is sentencing an offender for a fourth degree felony OVI offense under division (G)(1) of *section 2929.13 of the Revised Code*, in addition to the mandatory term of local incarceration imposed under that division and the mandatory fine required by division (B)(3) of *section 2929.18 of the Revised Code*, the court may impose upon the offender a community control sanction or combination of community control sanctions in accordance with *sections 2929.16 and 2929.17 of the Revised Code*. If the court is sentencing an offender for a third or fourth degree felony OVI offense under division (G)(2) of *section 2929.13 of the Revised Code*, in addition to the mandatory prison term or mandatory prison term and additional prison term imposed under that division, the court also may impose upon the offender a community control sanction or combination of community control sanctions under *section 2929.16 or 2929.17 of the Revised Code*, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

The duration of all community control sanctions imposed upon an offender under this division shall not exceed five years. If the offender absconds or otherwise leaves the jurisdiction of the court in which the offender resides without obtaining permission from the court or the offender's probation officer to leave the jurisdiction of the court, or if the offender is confined in any institution for the commission of any offense while under a community control sanction, the period of the community control sanction ceases to run until the offender is brought before the court for its further action. If the court sentences the offender to one or more nonresidential sanctions under *section 2929.17 of the Revised Code*, the court shall impose as a condition of the nonresidential sanctions that, during the period of the sanctions, the offender must abide by the law and must not leave the

state without the permission of the court or the offender's probation officer. The court may impose any other conditions of release under a community control sanction that the court considers appropriate, including, but not limited to, requiring that the offender not ingest or be injected with a drug of abuse and submit to random drug testing as provided in division (D) of this section to determine whether the offender ingested or was injected with a drug of abuse and requiring that the results of the drug test indicate that the offender did not ingest or was not injected with a drug of abuse.

(2) (a) If a court sentences an offender to any community control sanction or combination of community control sanctions authorized pursuant to *section 2929.16, 2929.17, or 2929.18 of the Revised Code*, the court shall place the offender under the general control and supervision of a department of probation in the county that serves the court for purposes of reporting to the court a violation of any condition of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer. Alternatively, if the offender resides in another county and a county department of probation has been established in that county or that county is served by a multicounty probation department established under *section 2301.27 of the Revised Code*, the court may request the court of common pleas of that county to receive the offender into the general control and supervision of that county or multicounty department of probation for purposes of reporting to the court a violation of any condition of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer, subject to the jurisdiction of the trial judge over and with respect to the person of the offender, and to the rules governing that department of probation.

If there is no department of probation in the county that serves the court, the court shall place the offender, regardless of the offender's county of residence, under the general control and supervision of the adult parole authority for purposes of reporting to the court a violation of any of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer.

(b) If the court imposing sentence upon an offender sentences the offender to any community control sanction or combination of community control sanctions authorized pursuant to *section 2929.16, 2929.17, or 2929.18 of the Revised Code*, and if the offender violates any condition of the sanctions, any condition of release under a community control sanction imposed by the court, violates any law, or departs the state without the permission of the court or the offender's probation officer, the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction shall report the violation or departure directly to the sentencing court, or shall report the violation or departure to the county or multicounty department of probation with general control and supervision over the offender under division (A)(2)(a) of this section or the officer of that department who supervises the offender, or, if there is no such department with general control and supervision over the offender under that division, to the adult parole authority. If the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction reports the violation or departure to the county or multicounty department of probation or the adult parole authority, the department's or authority's officers may treat the offender as if the offender were on probation and in violation of the probation, and shall report the violation of the condition of the sanction, any condition of release under a commu-

nity control sanction imposed by the court, the violation of law, or the departure from the state without the required permission to the sentencing court.

(3) If an offender who is eligible for community control sanctions under this section admits to being drug addicted or the court has reason to believe that the offender is drug addicted, and if the offense for which the offender is being sentenced was related to the addiction, the court may require that the offender be assessed by a properly credentialed professional within a specified period of time and shall require the professional to file a written assessment of the offender with the court. If a court imposes treatment and recovery support services as a community control sanction, the court shall direct the level and type of treatment and recovery support services after consideration of the written assessment, if available at the time of sentencing, and recommendations of the professional and other treatment and recovery support services providers.

(4) If an assessment completed pursuant to division (A)(3) of this section indicates that the offender is addicted to drugs or alcohol, the court may include in any community control sanction imposed for a violation of *section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, or 2925.37 of the Revised Code* a requirement that the offender participate in a treatment and recovery support services program certified under *section 3793.06 of the Revised Code* or offered by another properly credentialed program provider.

(B) (1) If the conditions of a community control sanction are violated or if the offender violates a law or leaves the state without the permission of the court or the offender's probation officer, the sentencing court may impose upon the violator one or more of the following penalties:

(a) A longer time under the same sanction if the total time under the sanctions does not exceed the five-year limit specified in division (A) of this section;

(b) A more restrictive sanction under *section 2929.16, 2929.17, or 2929.18 of the Revised Code*;

(c) A prison term on the offender pursuant to *section 2929.14 of the Revised Code*.

(2) The prison term, if any, imposed upon a violator pursuant to this division shall be within the range of prison terms available for the offense for which the sanction that was violated was imposed and shall not exceed the prison term specified in the notice provided to the offender at the sentencing hearing pursuant to division (B)(2) of *section 2929.19 of the Revised Code*. The court may reduce the longer period of time that the offender is required to spend under the longer sanction, the more restrictive sanction, or a prison term imposed pursuant to this division by the time the offender successfully spent under the sanction that was initially imposed.

(C) If an offender, for a significant period of time, fulfills the conditions of a sanction imposed pursuant to *section 2929.16, 2929.17, or 2929.18 of the Revised Code* in an exemplary manner, the court may reduce the period of time under the sanction or impose a less restrictive sanction, but the court shall not permit the offender to violate any law or permit the offender to leave the state without the permission of the court or the offender's probation officer.

(D) (1) If a court under division (A)(1) of this section imposes a condition of release under a community control sanction that requires the offender to submit to random drug testing, the department of probation or the adult parole authority that has general control and supervision of the offender under division (A)(2)(a) of this section may cause the offender to submit to random drug testing performed by a laboratory or entity that has entered into a contract with any of the govern-

mental entities or officers authorized to enter into a contract with that laboratory or entity under *section 341.26, 753.33, or 5120.63 of the Revised Code*.

(2) If no laboratory or entity described in division (D)(1) of this section has entered into a contract as specified in that division, the department of probation or the adult parole authority that has general control and supervision of the offender under division (A)(2)(a) of this section shall cause the offender to submit to random drug testing performed by a reputable public laboratory to determine whether the individual who is the subject of the drug test ingested or was injected with a drug of abuse.

(3) A laboratory or entity that has entered into a contract pursuant to *section 341.26, 753.33, or 5120.63 of the Revised Code* shall perform the random drug tests under division (D)(1) of this section in accordance with the applicable standards that are included in the terms of that contract. A public laboratory shall perform the random drug tests under division (D)(2) of this section in accordance with the standards set forth in the policies and procedures established by the department of rehabilitation and correction pursuant to *section 5120.63 of the Revised Code*. An offender who is required under division (A)(1) of this section to submit to random drug testing as a condition of release under a community control sanction and whose test results indicate that the offender ingested or was injected with a drug of abuse shall pay the fee for the drug test if the department of probation or the adult parole authority that has general control and supervision of the offender requires payment of a fee. A laboratory or entity that performs the random drug testing on an offender under division (D)(1) or (2) of this section shall transmit the results of the drug test to the appropriate department of probation or the adult parole authority that has general control and supervision of the offender under division (A)(2)(a) of this section.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 166 (Eff 10-17-96); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 349. Eff 9-22-2000; 149 v S 123, § 1, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 152 v H 130, § 1, eff. 4-7-09; 153 v H 338, § 1, eff. 9-17-10; 2011 HB 86, § 1, eff. Sept. 30, 2011.

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ORC Ann. 2929.16 (2012)

§ 2929.16. Residential sanctions

(A) Except as provided in this division, the court imposing a sentence for a felony upon an offender who is not required to serve a mandatory prison term may impose any community residential sanction or combination of community residential sanctions under this section. The court imposing a sentence for a fourth degree felony OVI offense under division (G)(1) or (2) of *section 2929.13 of the Revised Code* or for a third degree felony OVI offense under division (G)(2) of that section may impose upon the offender, in addition to the mandatory term of local incarceration or mandatory prison term imposed under the applicable division, a community residential sanction or combination of community residential sanctions under this section, and the offender shall serve or satisfy the sanction or combination of sanctions after the offender has served the mandatory term of local incarceration or mandatory prison term required for the offense. Community residential sanctions include, but are not limited to, the following:

(1) A term of up to six months at a community-based correctional facility that serves the county;

(2) Except as otherwise provided in division (A)(3) of this section and subject to division (D) of this section, a term of up to six months in a jail;

(3) If the offender is convicted of a fourth degree felony OVI offense and is sentenced under division (G)(1) of *section 2929.13 of the Revised Code*, subject to division (D) of this section, a term of up to one year in a jail less the mandatory term of local incarceration of sixty or one hundred twenty consecutive days of imprisonment imposed pursuant to that division;

(4) A term in a halfway house;

(5) A term in an alternative residential facility.

(B) The court that assigns any offender convicted of a felony to a residential sanction under this section may authorize the offender to be released so that the offender may seek or maintain employment, receive education or training, or receive treatment. A release pursuant to this division shall be only for the duration of time that is needed to fulfill the purpose of the release and for travel that reasonably is necessary to fulfill the purposes of the release.

(C) If the court assigns an offender to a county jail that is not a minimum security misdemeanor jail in a county that has established a county jail industry program pursuant to *section 5147.30 of the Revised Code*, the court shall specify, as part of the sentence, whether the sheriff of that county may consider the offender for participation in the county jail industry program. During the offender's term in the county jail, the court shall retain jurisdiction to modify its specification upon a reassessment of the offender's qualifications for participation in the program.

(D) If a court sentences an offender to a term in jail under division (A)(2) or (3) of this section and if the sentence is imposed for a felony of the fourth or fifth degree that is not an offense of violence, the court may specify that it prefers that the offender serve the term in a minimum security jail established under *section 341.34 or 753.21 of the Revised Code*. If the court includes a specification of that type in the sentence and if the administrator of the appropriate minimum security jail or the designee of that administrator classifies the offender in accordance with *section 341.34 or 753.21 of the Revised Code* as a minimal security risk, the offender shall serve the term in the minimum security jail established under *section 341.34 or 753.21 of the Revised Code*. Absent a specification of that type and a finding of that type, the offender shall serve the term in a jail other than a minimum security jail established under *section 341.34 or 753.21 of the Revised Code*.

(E) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a community residential sanction as described in division (A) of this section, at the time of reception and at other times the person in charge of the operation of the community-based correctional facility, jail, halfway house, alternative residential facility, or other place at which the offender will serve the residential sanction determines to be appropriate, the person in charge of the operation of the community-based correctional facility, jail, halfway house, alternative residential facility, or other place may cause the convicted offender to be examined and tested for tuberculosis, HIV infection, hepatitis, including but not limited to hepatitis A, B, and C, and other contagious diseases. The person in charge of the operation of the community-based correctional facility, jail, halfway house, alternative residential facility, or other place at which the offender will serve the residential sanction may cause a convicted offender in the community-based correctional facility, jail, halfway house, alternative residential facility, or other place who refuses to be tested or treated for tuberculosis, HIV infection, hepatitis, including but not limited to hepatitis A, B, and C, or another contagious disease to be tested and treated involuntarily.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 480 (Eff 10-16-96); 146 v S 166 (Eff 10-17-96); 146 v H 72 (Eff 3-18-97); 147 v S 111 (Eff 3-17-98); 148 v S 22. Eff 5-17-2000; 149 v S 123, § 1, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04.

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ORC Ann. 2929.17 (2012)

§ 2929.17. Nonresidential sanctions

Except as provided in this section, the court imposing a sentence for a felony upon an offender who is not required to serve a mandatory prison term may impose any nonresidential sanction or combination of nonresidential sanctions authorized under this section. If the court imposes one or more nonresidential sanctions authorized under this section, the court shall impose as a condition of the sanction that, during the period of the nonresidential sanction, the offender shall abide by the law and shall not leave the state without the permission of the court or the offender's probation officer.

The court imposing a sentence for a fourth degree felony OVI offense under division (G)(1) or (2) of *section 2929.13 of the Revised Code* or for a third degree felony OVI offense under division (G)(2) of that section may impose upon the offender, in addition to the mandatory term of local incarceration or mandatory prison term imposed under the applicable division, a nonresidential sanction or combination of nonresidential sanctions under this section, and the offender shall serve or satisfy the sanction or combination of sanctions after the offender has served the mandatory term of local incarceration or mandatory prison term required for the offense. The court shall not impose a term in a drug treatment program as described in division (D) of this section until after considering an assessment by a properly credentialed treatment professional, if available. Nonresidential sanctions include, but are not limited to, the following:

(A) A term of day reporting;

(B) A term of house arrest with electronic monitoring or continuous alcohol monitoring or both electronic monitoring and continuous alcohol monitoring, a term of electronic monitoring or continuous alcohol monitoring without house arrest, or a term of house arrest without electronic monitoring or continuous alcohol monitoring;

(C) A term of community service of up to five hundred hours pursuant to division (B) of *section 2951.02 of the Revised Code* or, if the court determines that the offender is financially incapable of fulfilling a financial sanction described in *section 2929.18 of the Revised Code*, a term of community service as an alternative to a financial sanction;

(D) A term in a drug treatment program with a level of security for the offender as determined by the court;

(E) A term of intensive probation supervision;

(F) A term of basic probation supervision;

(G) A term of monitored time;

(H) A term of drug and alcohol use monitoring, including random drug testing;

(I) A curfew term;

(J) A requirement that the offender obtain employment;

(K) A requirement that the offender obtain education or training;

(L) Provided the court obtains the prior approval of the victim, a requirement that the offender participate in victim-offender mediation;

(M) A license violation report;

(N) If the offense is a violation of *section 2919.25* or a violation of *section 2903.11, 2903.12, or 2903.13 of the Revised Code* involving a person who was a family or household member at the time of the violation, if the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and if the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children, a requirement that the offender obtain counseling. This division does not limit the court in requiring the offender to obtain counseling for any offense or in any circumstance not specified in this division.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 166 (Eff 10-17-96); 148 v S 9 (Eff 3-8-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 349. Eff 9-22-2000; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 152 v H 130, § 1, eff. 4-7-09.

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ORC Ann. 2929.18 (2012)

§ 2929.18. Financial sanctions; restitution; reimbursements

(A) Except as otherwise provided in this division and in addition to imposing court costs pursuant to *section 2947.23 of the Revised Code*, the court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section or, in the circumstances specified in *section 2929.32 of the Revised Code*, may impose upon the offender a fine in accordance with that section. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

(1) Restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by the victim or any survivor of the victim against the offender.

If the court imposes restitution, the court may order that the offender pay a surcharge of not more than five per cent of the amount of the restitution otherwise ordered to the entity responsible for collecting and processing restitution payments.

The victim or survivor may request that the prosecutor in the case file a motion, or the offender may file a motion, for modification of the payment terms of any restitution ordered. If the court grants the motion, it may modify the payment terms as it determines appropriate.

(2) Except as provided in division (B)(1), (3), or (4) of this section, a fine payable by the offender to the state, to a political subdivision, or as described in division (B)(2) of this section to one or more law enforcement agencies, with the amount of the fine based on a standard percentage of the offender's daily income over a period of time determined by the court and based upon the seriousness of the offense. A fine ordered under this division shall not exceed the maximum conventional fine amount authorized for the level of the offense under division (A)(3) of this section.

(3) Except as provided in division (B)(1), (3), or (4) of this section, a fine payable by the offender to the state, to a political subdivision when appropriate for a felony, or as described in division (B)(2) of this section to one or more law enforcement agencies, in the following amount:

- (a) For a felony of the first degree, not more than twenty thousand dollars;
- (b) For a felony of the second degree, not more than fifteen thousand dollars;
- (c) For a felony of the third degree, not more than ten thousand dollars;
- (d) For a felony of the fourth degree, not more than five thousand dollars;
- (e) For a felony of the fifth degree, not more than two thousand five hundred dollars.

(4) A state fine or costs as defined in *section 2949.111 of the Revised Code*.

(5) (a) Reimbursement by the offender of any or all of the costs of sanctions incurred by the government, including the following:

(i) All or part of the costs of implementing any community control sanction, including a supervision fee under *section 2951.021 of the Revised Code*;

(ii) All or part of the costs of confinement under a sanction imposed pursuant to *section 2929.14, 2929.142, or 2929.16 of the Revised Code*, provided that the amount of reimbursement ordered under this division shall not exceed the total amount of reimbursement the offender is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement;

(iii) All or part of the cost of purchasing and using an immobilizing or disabling device, including a certified ignition interlock device, or a remote alcohol monitoring device that a court orders an offender to use under *section 4510.13 of the Revised Code*.

(b) If the offender is sentenced to a sanction of confinement pursuant to *section 2929.14 or 2929.16 of the Revised Code* that is to be served in a facility operated by a board of county commissioners, a legislative authority of a municipal corporation, or another local governmental entity, if, pursuant to *section 307.93, 341.14, 341.19, 341.23, 753.02, 753.04, 753.16, 2301.56, or 2947.19 of the Revised Code* and *section 2929.37 of the Revised Code*, the board, legislative authority, or other local governmental entity requires prisoners to reimburse the county, municipal corporation, or other entity for its expenses incurred by reason of the prisoner's confinement, and if the court does not impose a financial sanction under division (A)(5)(a)(ii) of this section, confinement costs may be assessed pursuant to *section 2929.37 of the Revised Code*. In addition, the offender may be required to pay the fees specified in *section 2929.38 of the Revised Code* in accordance with that section.

(c) Reimbursement by the offender for costs pursuant to *section 2929.71 of the Revised Code*.

(B) (1) For a first, second, or third degree felony violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code, the sentencing court shall impose upon the offender a mandatory fine of at least one-half of, but not more than, the maximum statutory fine amount authorized for the level of the offense pursuant to division (A)(3) of this section. If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender.

(2) Any mandatory fine imposed upon an offender under division (B)(1) of this section and any fine imposed upon an offender under division (A)(2) or (3) of this section for any fourth or fifth degree felony violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code shall be paid to law enforcement agencies pursuant to division (F) of *section 2925.03 of the Revised Code*.

(3) For a fourth degree felony OVI offense and for a third degree felony OVI offense, the sentencing court shall impose upon the offender a mandatory fine in the amount specified in division (G)(1)(d) or (e) of *section 4511.19 of the Revised Code*, whichever is applicable. The mandatory fine so imposed shall be disbursed as provided in the division pursuant to which it is imposed.

(4) Notwithstanding any fine otherwise authorized or required to be imposed under division (A)(2) or (3) or (B)(1) of this section or *section 2929.31 of the Revised Code* for a violation of *section 2925.03 of the Revised Code*, in addition to any penalty or sanction imposed for that offense under *section 2925.03* or *sections 2929.11 to 2929.18 of the Revised Code* and in addition to the forfeiture of property in connection with the offense as prescribed in Chapter 2981. of the Revised Code, the court that sentences an offender for a violation of *section 2925.03 of the Revised Code* may impose upon the offender a fine in addition to any fine imposed under division (A)(2) or (3) of this section and in addition to any mandatory fine imposed under division (B)(1) of this section. The fine imposed under division (B)(4) of this section shall be used as provided in division (H) of *section 2925.03 of the Revised Code*. A fine imposed under division (B)(4) of this section shall not exceed whichever of the following is applicable:

(a) The total value of any personal or real property in which the offender has an interest and that was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of *section 2925.03 of the Revised Code*, including any property that constitutes proceeds derived from that offense;

(b) If the offender has no interest in any property of the type described in division (B)(4)(a) of this section or if it is not possible to ascertain whether the offender has an interest in any property of that type in which the offender may have an interest, the amount of the mandatory fine for the offense imposed under division (B)(1) of this section or, if no mandatory fine is imposed under division (B)(1) of this section, the amount of the fine authorized for the level of the offense imposed under division (A)(3) of this section.

(5) Prior to imposing a fine under division (B)(4) of this section, the court shall determine whether the offender has an interest in any property of the type described in division (B)(4)(a) of this section. Except as provided in division (B)(6) or (7) of this section, a fine that is authorized and

imposed under division (B)(4) of this section does not limit or affect the imposition of the penalties and sanctions for a violation of *section 2925.03 of the Revised Code* prescribed under those sections or *sections 2929.11 to 2929.18 of the Revised Code* and does not limit or affect a forfeiture of property in connection with the offense as prescribed in Chapter 2981. of the Revised Code.

(6) If the sum total of a mandatory fine amount imposed for a first, second, or third degree felony violation of *section 2925.03 of the Revised Code* under division (B)(1) of this section plus the amount of any fine imposed under division (B)(4) of this section does not exceed the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or *section 2929.31 of the Revised Code*, the court may impose a fine for the offense in addition to the mandatory fine and the fine imposed under division (B)(4) of this section. The sum total of the amounts of the mandatory fine, the fine imposed under division (B)(4) of this section, and the additional fine imposed under division (B)(6) of this section shall not exceed the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or *section 2929.31 of the Revised Code*. The clerk of the court shall pay any fine that is imposed under division (B)(6) of this section to the county, township, municipal corporation, park district as created pursuant to *section 511.18 or 1545.04 of the Revised Code*, or state law enforcement agencies in this state that primarily were responsible for or involved in making the arrest of, and in prosecuting, the offender pursuant to division (F) of *section 2925.03 of the Revised Code*.

(7) If the sum total of the amount of a mandatory fine imposed for a first, second, or third degree felony violation of *section 2925.03 of the Revised Code* plus the amount of any fine imposed under division (B)(4) of this section exceeds the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or *section 2929.31 of the Revised Code*, the court shall not impose a fine under division (B)(6) of this section.

(8) (a) If an offender who is convicted of or pleads guilty to a violation of *section 2905.01, 2905.02, 2907.21, 2907.22, or 2923.32, division (A)(1) or (2) of section 2907.323, or division (B)(1), (2), (3), (4), or (5) of section 2919.22 of the Revised Code* also is convicted of or pleads guilty to a specification of the type described in *section 2941.1422 of the Revised Code* that charges that the offender knowingly committed the offense in furtherance of human trafficking, the sentencing court shall sentence the offender to a financial sanction of restitution by the offender to the victim or any survivor of the victim, with the restitution including the costs of housing, counseling, and medical and legal assistance incurred by the victim as a direct result of the offense and the greater of the following:

- (i) The gross income or value to the offender of the victim's labor or services;
- (ii) The value of the victim's labor as guaranteed under the minimum wage and overtime provisions of the "Federal Fair Labor Standards Act of 1938," *52 Stat. 1060, 20 U.S.C. 207*, and state labor laws.

(b) If a court imposing sentence upon an offender for a felony is required to impose upon the offender a financial sanction of restitution under division (B)(8)(a) of this section, in addition to that financial sanction of restitution, the court may sentence the offender to any other financial sanction or combination of financial sanctions authorized under this section, including a restitution sanction under division (A)(1) of this section.

(C) (1) The offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by the department of rehabilitation and correction

in operating a prison or other facility used to confine offenders pursuant to sanctions imposed under *section 2929.14, 2929.142, or 2929.16 of the Revised Code* to the treasurer of state. The treasurer of state shall deposit the reimbursements in the confinement cost reimbursement fund that is hereby created in the state treasury. The department of rehabilitation and correction shall use the amounts deposited in the fund to fund the operation of facilities used to confine offenders pursuant to *sections 2929.14, 2929.142, and 2929.16 of the Revised Code*.

(2) Except as provided in *section 2951.021 of the Revised Code*, the offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by a county pursuant to any sanction imposed under this section or *section 2929.16 or 2929.17 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.16 of the Revised Code* to the county treasurer. The county treasurer shall deposit the reimbursements in the sanction cost reimbursement fund that each board of county commissioners shall create in its county treasury. The county shall use the amounts deposited in the fund to pay the costs incurred by the county pursuant to any sanction imposed under this section or *section 2929.16 or 2929.17 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.16 of the Revised Code*.

(3) Except as provided in *section 2951.021 of the Revised Code*, the offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by a municipal corporation pursuant to any sanction imposed under this section or *section 2929.16 or 2929.17 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.16 of the Revised Code* to the treasurer of the municipal corporation. The treasurer shall deposit the reimbursements in a special fund that shall be established in the treasury of each municipal corporation. The municipal corporation shall use the amounts deposited in the fund to pay the costs incurred by the municipal corporation pursuant to any sanction imposed under this section or *section 2929.16 or 2929.17 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.16 of the Revised Code*.

(4) Except as provided in *section 2951.021 of the Revised Code*, the offender shall pay reimbursements imposed pursuant to division (A)(5)(a) of this section for the costs incurred by a private provider pursuant to a sanction imposed under this section or *section 2929.16 or 2929.17 of the Revised Code* to the provider.

(D) Except as otherwise provided in this division, a financial sanction imposed pursuant to division (A) or (B) of this section is a judgment in favor of the state or a political subdivision in which the court that imposed the financial sanction is located, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of reimbursement imposed pursuant to division (A)(5)(a)(ii) of this section upon an offender who is incarcerated in a state facility or a municipal jail is a judgment in favor of the state or the municipal corporation, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of reimbursement imposed upon an offender pursuant to this section for costs incurred by a private provider of sanctions is a judgment in favor of the private provider, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of restitution imposed pursuant to division (A)(1) or (B)(8) of this section is an order in favor of the victim of the offender's criminal act that can be collected through a certificate of judgment as described in division (D)(1) of this section, through execution as described in division (D)(2) of this section, or through an order as described in division (D)(3) of this

section, and the offender shall be considered for purposes of the collection as the judgment debtor. Imposition of a financial sanction and execution on the judgment does not preclude any other power of the court to impose or enforce sanctions on the offender. Once the financial sanction is imposed as a judgment or order under this division, the victim, private provider, state, or political subdivision may do any of the following:

(1) Obtain from the clerk of the court in which the judgment was entered a certificate of judgment that shall be in the same manner and form as a certificate of judgment issued in a civil action;

(2) Obtain execution of the judgment or order through any available procedure, including:

(a) An execution against the property of the judgment debtor under Chapter 2329. of the Revised Code;

(b) An execution against the person of the judgment debtor under Chapter 2331. of the Revised Code;

(c) A proceeding in aid of execution under Chapter 2333. of the Revised Code, including:

(i) A proceeding for the examination of the judgment debtor under *sections 2333.09 to 2333.12 and sections 2333.15 to 2333.27 of the Revised Code*;

(ii) A proceeding for attachment of the person of the judgment debtor under *section 2333.28 of the Revised Code*;

(iii) A creditor's suit under *section 2333.01 of the Revised Code*.

(d) The attachment of the property of the judgment debtor under Chapter 2715. of the Revised Code;

(e) The garnishment of the property of the judgment debtor under Chapter 2716. of the Revised Code.

(3) Obtain an order for the assignment of wages of the judgment debtor under *section 1321.33 of the Revised Code*.

(E) A court that imposes a financial sanction upon an offender may hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it.

(F) Each court imposing a financial sanction upon an offender under this section or under *section 2929.32 of the Revised Code* may designate the clerk of the court or another person to collect the financial sanction. The clerk or other person authorized by law or the court to collect the financial sanction may enter into contracts with one or more public agencies or private vendors for the collection of, amounts due under the financial sanction imposed pursuant to this section or *section 2929.32 of the Revised Code*. Before entering into a contract for the collection of amounts due from an offender pursuant to any financial sanction imposed pursuant to this section or *section 2929.32 of the Revised Code*, a court shall comply with *sections 307.86 to 307.92 of the Revised Code*.

(G) If a court that imposes a financial sanction under division (A) or (B) of this section finds that an offender satisfactorily has completed all other sanctions imposed upon the offender and that all restitution that has been ordered has been paid as ordered, the court may suspend any financial

sanctions imposed pursuant to this section or *section 2929.32 of the Revised Code* that have not been paid.

(H) No financial sanction imposed under this section or *section 2929.32 of the Revised Code* shall preclude a victim from bringing a civil action against the offender.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 480 (Eff 10-16-96); 146 v S 166 (Eff 10-17-96); 147 v H 122 (Eff 7-29-98); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 528 (Eff 2-13-2001); 149 v H 170. Eff 9-6-2002; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 151 v H 461, § 1, eff. 4-4-07; 151 v H 241, § 1, eff. 7-1-07; 152 v S 17, § 1, eff. 9-30-08; 152 v H 280, § 1, eff. 4-7-09; 2011 HB 5, § 1, eff. Sept. 23, 2011.

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2929. PENALTIES AND SENTENCING
 PENALTIES FOR FELONY

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ORC Ann. 2929.19 (2012)

§ 2929.19. Sentencing hearing

(A) The court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony and before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded pursuant to *section 2953.07 or 2953.08 of the Revised Code*. At the hearing, the offender, the prosecuting attorney, the victim or the victim's representative in accordance with *section 2930.14 of the Revised Code*, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case. The court shall inform the offender of the verdict of the jury or finding of the court and ask the offender whether the offender has anything to say as to why sentence should not be imposed upon the offender.

(B) (1) At the sentencing hearing, the court, before imposing sentence, shall consider the record, any information presented at the hearing by any person pursuant to division (A) of this section, and, if one was prepared, the presentence investigation report made pursuant to *section 2951.03 of the Revised Code* or *Criminal Rule 32.2*, and any victim impact statement made pursuant to *section 2947.051 of the Revised Code*.

(2) Subject to division (B)(3) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

(a) Impose a stated prison term and, if the court imposes a mandatory prison term, notify the offender that the prison term is a mandatory prison term;

(b) In addition to any other information, include in the sentencing entry the name and section reference to the offense or offenses, the sentence or sentences imposed and whether the sentence or sentences contain mandatory prison terms, if sentences are imposed for multiple counts whether the sentences are to be served concurrently or consecutively, and the name and section ref-

erence of any specification or specifications for which sentence is imposed and the sentence or sentences imposed for the specification or specifications;

(c) Notify the offender that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person. This division applies with respect to all prison terms imposed for an offense of a type described in this division, including a term imposed for any such offense that is a risk reduction sentence, as defined in *section 2967.28 of the Revised Code*. If a court imposes a sentence including a prison term of a type described in division (B)(2)(c) of this section on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(2)(c) of this section that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under division (B) of *section 2967.28 of the Revised Code*. *Section 2929.191 of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(2)(c) of this section and failed to notify the offender pursuant to division (B)(2)(c) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(d) Notify the offender that the offender may be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth, or fifth degree that is not subject to division (B)(2)(c) of this section. This division applies with respect to all prison terms imposed for an offense of a type described in this division, including a term imposed for any such offense that is a risk reduction sentence, as defined in *section 2967.28 of the Revised Code*. *Section 2929.191 of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(2)(d) of this section and failed to notify the offender pursuant to division (B)(2)(d) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(e) Notify the offender that, if a period of supervision is imposed following the offender's release from prison, as described in division (B)(2)(c) or (d) of this section, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of *section 2967.131 of the Revised Code*, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender. If a court imposes a sentence including a prison term on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(2)(e) of this section that the parole board may impose a prison term as described in division (B)(2)(e) of this section for a violation of that supervision or a condition of post-release control imposed under division (B) of *section 2967.131 of the Revised Code* or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the authority of the parole board to so impose a prison term for a violation of that nature if, pursuant to division (D)(1) of *section 2967.28 of the Revised Code*, the parole board notifies the offender prior to the offender's release of the board's authority to so impose a prison term. *Section 2929.191 of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division

(B)(2)(e) of this section regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control.

(f) Require that the offender not ingest or be injected with a drug of abuse and submit to random drug testing as provided in *section 341.26, 753.33, or 5120.63 of the Revised Code*, whichever is applicable to the offender who is serving a prison term, and require that the results of the drug test administered under any of those sections indicate that the offender did not ingest or was not injected with a drug of abuse.

(g) (i) Determine, notify the offender of, and include in the sentencing entry the number of days that the offender has been confined for any reason arising out of the offense for which the offender is being sentenced and by which the department of rehabilitation and correction must reduce the stated prison term under *section 2967.191 of the Revised Code*. The court's calculation shall not include the number of days, if any, that the offender previously served in the custody of the department of rehabilitation and correction arising out of the offense for which the prisoner was convicted and sentenced.

(ii) In making a determination under division (B)(2)(g)(i) of this section, the court shall consider the arguments of the parties and conduct a hearing if one is requested.

(iii) The sentencing court retains continuing jurisdiction to correct any error not previously raised at sentencing in making a determination under division (B)(2)(g)(i) of this section. The offender may, at any time after sentencing, file a motion in the sentencing court to correct any error made in making a determination under division (B)(2)(g)(i) of this section, and the court may in its discretion grant or deny that motion. If the court changes the number of days in its determination or redetermination, the court shall cause the entry granting that change to be delivered to the department of rehabilitation and correction without delay. *Sections 2931.15 and 2953.21 of the Revised Code* do not apply to a motion made under this section.

(iv) An inaccurate determination under division (B)(2)(g)(i) of this section is not grounds for setting aside the offender's conviction or sentence and does not otherwise render the sentence void or voidable.

(3) (a) The court shall include in the offender's sentence a statement that the offender is a tier III sex offender/child-victim offender, and the court shall comply with the requirements of *section 2950.03 of the Revised Code* if any of the following apply:

(i) The offender is being sentenced for a violent sex offense or designated homicide, assault, or kidnapping offense that the offender committed on or after January 1, 1997, and the offender is adjudicated a sexually violent predator in relation to that offense.

(ii) The offender is being sentenced for a sexually oriented offense that the offender committed on or after January 1, 1997, and the offender is a tier III sex offender/child-victim offender relative to that offense.

(iii) The offender is being sentenced on or after July 31, 2003, for a child-victim oriented offense, and the offender is a tier III sex offender/child-victim offender relative to that offense.

(iv) The offender is being sentenced under *section 2971.03 of the Revised Code* for a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* committed on or after January 2, 2007.

(v) The offender is sentenced to a term of life without parole under division (B) of *section 2907.02 of the Revised Code*.

(vi) The offender is being sentenced for attempted rape committed on or after January 2, 2007, and a specification of the type described in *section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code*.

(vii) The offender is being sentenced under division (B)(3)(a), (b), (c), or (d) of *section 2971.03 of the Revised Code* for an offense described in those divisions committed on or after January 1, 2008.

(b) Additionally, if any criterion set forth in divisions (B)(3)(a)(i) to (vii) of this section is satisfied, in the circumstances described in division (E) of *section 2929.14 of the Revised Code*, the court shall impose sentence on the offender as described in that division.

(4) If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to *section 2929.14 of the Revised Code*.

(5) Before imposing a financial sanction under *section 2929.18 of the Revised Code* or a fine under *section 2929.32 of the Revised Code*, the court shall consider the offender's present and future ability to pay the amount of the sanction or fine.

(6) If the sentencing court sentences the offender to a sanction of confinement pursuant to *section 2929.14 or 2929.16 of the Revised Code* that is to be served in a local detention facility, as defined in *section 2929.36 of the Revised Code*, and if the local detention facility is covered by a policy adopted pursuant to *section 307.93, 341.14, 341.19, 341.21, 341.23, 753.02, 753.04, 753.16, 2301.56, or 2947.19 of the Revised Code* and *section 2929.37 of the Revised Code*, both of the following apply:

(a) The court shall specify both of the following as part of the sentence:

(i) If the offender is presented with an itemized bill pursuant to *section 2929.37 of the Revised Code* for payment of the costs of confinement, the offender is required to pay the bill in accordance with that section.

(ii) If the offender does not dispute the bill described in division (B)(6)(a)(i) of this section and does not pay the bill by the times specified in *section 2929.37 of the Revised Code*, the clerk of the court may issue a certificate of judgment against the offender as described in that section.

(b) The sentence automatically includes any certificate of judgment issued as described in division (B)(6)(a)(ii) of this section.

(7) The failure of the court to notify the offender that a prison term is a mandatory prison term pursuant to division (B)(2)(a) of this section or to include in the sentencing entry any infor-

mation required by division (B)(2)(b) of this section does not affect the validity of the imposed sentence or sentences. If the sentencing court notifies the offender at the sentencing hearing that a prison term is mandatory but the sentencing entry does not specify that the prison term is mandatory, the court may complete a corrected journal entry and send copies of the corrected entry to the offender and the department of rehabilitation and correction, or, at the request of the state, the court shall complete a corrected journal entry and send copies of the corrected entry to the offender and department of rehabilitation and correction.

(C) (1) If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of *section 2929.13 of the Revised Code*, the court shall impose the mandatory term of local incarceration in accordance with that division, shall impose a mandatory fine in accordance with division (B)(3) of *section 2929.18 of the Revised Code*, and, in addition, may impose additional sanctions as specified in *sections 2929.15, 2929.16, 2929.17, and 2929.18 of the Revised Code*. The court shall not impose a prison term on the offender except that the court may impose a prison term upon the offender as provided in division (A)(1) of *section 2929.13 of the Revised Code*.

(2) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of *section 2929.13 of the Revised Code*, the court shall impose the mandatory prison term in accordance with that division, shall impose a mandatory fine in accordance with division (B)(3) of *section 2929.18 of the Revised Code*, and, in addition, may impose an additional prison term as specified in *section 2929.14 of the Revised Code*. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may impose a community control sanction on the offender, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(D) The sentencing court, pursuant to division (I)(1) of *section 2929.14 of the Revised Code*, may recommend placement of the offender in a program of shock incarceration under *section 5120.031 of the Revised Code* or an intensive program prison under *section 5120.032 of the Revised Code*, disapprove placement of the offender in a program or prison of that nature, or make no recommendation. If the court recommends or disapproves placement, it shall make a finding that gives its reasons for its recommendation or disapproval.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 349 (Eff 9-22-2000); 149 v H 485 (Eff 6-13-2002); 149 v H 327 (Eff 7-8-2002); 149 v H 170. Eff 9-6-2002; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v S 5, § 1, Eff 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 137, § 1, eff. 7-11-06; 151 v S 260, § 1, eff. 1-2-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08; 152 v H 130, § 1, eff. 4-7-09; 2011 HB 86, § 1, eff. Sept. 30, 2011; 2012 HB 487, § 101.01, eff. Sept. 10, 2012; 2012 SB 337, § 1, eff. Sept. 28, 2012.

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ORC Ann. 2929.191 (2012)

§ 2929.191. Correction to judgment of conviction concerning post-release control

(A) (1) If, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(2)(c) of *section 2929.19 of the Revised Code* and failed to notify the offender pursuant to that division that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (D)(1) of *section 2929.14 of the Revised Code*, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison.

If, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(2)(d) of *section 2929.19 of the Revised Code* and failed to notify the offender pursuant to that division that the offender may be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (D)(2) of *section 2929.14 of the Revised Code*, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender may be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison.

(2) If a court prepares and issues a correction to a judgment of conviction as described in division (A)(1) of this section before the offender is released from imprisonment under the prison term the court imposed prior to July 11, 2006, the court shall place upon the journal of the court an

entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. If the court sends a copy of the entry to the department, the department promptly shall deliver a copy of the entry to the offender. The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the sentence and the judgment of conviction entered on the journal and had notified the offender that the offender will be so supervised regarding a sentence including a prison term of a type described in division (B)(2)(c) of *section 2929.19 of the Revised Code* or that the offender may be so supervised regarding a sentence including a prison term of a type described in division (B)(2)(d) of that section.

(B) (1) If, prior to July 11, 2006, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division (B)(2)(e) of *section 2929.19 of the Revised Code* regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control or to include in the judgment of conviction entered on the journal a statement to that effect, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that if a period of supervision is imposed following the offender's release from prison, as described in division (B)(2)(c) or (d) of *section 2929.19 of the Revised Code*, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of *section 2967.131 of the Revised Code* the parole board may impose as part of the sentence a prison term of up to one-half of the stated prison term originally imposed upon the offender.

(2) If the court prepares and issues a correction to a judgment of conviction as described in division (B)(1) of this section before the offender is released from imprisonment under the term, the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. If the court sends a copy of the entry to the department, the department promptly shall deliver a copy of the entry to the offender. The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the judgment of conviction entered on the journal and had notified the offender pursuant to division (B)(2)(e) of *section 2929.19 of the Revised Code* regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control.

(C) On and after July 11, 2006, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division. Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction. The offender has the right to be physically present at the hearing, except that, upon the court's own motion or the motion of the offender or the prosecuting attorney, the court may permit the offender to appear at the hearing by

video conferencing equipment if available and compatible. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if the offender were physically present at the hearing. At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction.

HISTORY:

151 v H 137, § 1, eff. 7-11-06; 2011 HB 86, § 1, eff. Sept. 30, 2011.

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ORC Ann. 2929.24 (2012)

§ 2929.24. Definite jail terms for misdemeanor; eligibility for county jail industry program; reimbursement sanction; costs of confinement

(A) Except as provided in *section 2929.22 or 2929.23 of the Revised Code* or division (E) or (F) of this section and unless another term is required or authorized pursuant to law, if the sentencing court imposing a sentence upon an offender for a misdemeanor elects or is required to impose a jail term on the offender pursuant to this chapter, the court shall impose a definite jail term that shall be one of the following:

- (1) For a misdemeanor of the first degree, not more than one hundred eighty days;
- (2) For a misdemeanor of the second degree, not more than ninety days;
- (3) For a misdemeanor of the third degree, not more than sixty days;
- (4) For a misdemeanor of the fourth degree, not more than thirty days.

(B) (1) A court that sentences an offender to a jail term under this section may permit the offender to serve the sentence in intermittent confinement or may authorize a limited release of the offender as provided in division (B) of *section 2929.26 of the Revised Code*. The court retains jurisdiction over every offender sentenced to jail to modify the jail sentence imposed at any time, but the court shall not reduce any mandatory jail term.

(2) (a) If a prosecutor, as defined in *section 2935.01 of the Revised Code*, has filed a notice with the court that the prosecutor wants to be notified about a particular case and if the court is considering modifying the jail sentence of the offender in that case, the court shall notify the prosecutor that the court is considering modifying the jail sentence of the offender in that case. The prosecutor may request a hearing regarding the court's consideration of modifying the jail sentence of the offender in that case, and, if the prosecutor requests a hearing, the court shall notify the eligible offender of the hearing.

(b) If the prosecutor requests a hearing regarding the court's consideration of modifying the jail sentence of the offender in that case, the court shall hold the hearing before considering whether or not to release the offender from the offender's jail sentence.

(C) If a court sentences an offender to a jail term under this section and the court assigns the offender to a county jail that has established a county jail industry program pursuant to *section 5147.30 of the Revised Code*, the court shall specify, as part of the sentence, whether the offender may be considered for participation in the program. During the offender's term in the county jail, the court retains jurisdiction to modify its specification regarding the offender's participation in the county jail industry program.

(D) If a person is sentenced to a jail term pursuant to this section, the court may impose as part of the sentence pursuant to *section 2929.28 of the Revised Code* a reimbursement sanction, and, if the local detention facility in which the term is to be served is covered by a policy adopted pursuant to *section 307.93, 341.14, 341.19, 341.21, 341.23, 753.02, 753.04, 753.16, 2301.56, or 2947.19 of the Revised Code* and *section 2929.37 of the Revised Code*, both of the following apply:

(1) The court shall specify both of the following as part of the sentence:

(a) If the person is presented with an itemized bill pursuant to *section 2929.37 of the Revised Code* for payment of the costs of confinement, the person is required to pay the bill in accordance with that section.

(b) If the person does not dispute the bill described in division (D)(1)(a) of this section and does not pay the bill by the times specified in *section 2929.37 of the Revised Code*, the clerk of the court may issue a certificate of judgment against the person as described in that section.

(2) The sentence automatically includes any certificate of judgment issued as described in division (D)(1)(b) of this section.

(E) If an offender who is convicted of or pleads guilty to a violation of division (B) of *section 4511.19 of the Revised Code* also is convicted of or also pleads guilty to a specification of the type described in *section 2941.1416 of the Revised Code* and if the court imposes a jail term on the offender for the underlying offense, the court shall impose upon the offender an additional definite jail term of not more than six months. The additional jail term shall not be reduced pursuant to any provision of the Revised Code. The offender shall serve the additional jail term consecutively to and prior to the jail term imposed for the underlying offense and consecutively to any other mandatory term imposed in relation to the offense.

(F) (1) If an offender is convicted of or pleads guilty to a misdemeanor violation of *section 2907.23, 2907.24, 2907.241, or 2907.25 of the Revised Code* and to a specification of the type described in *section 2941.1421 of the Revised Code* and if the court imposes a jail term on the offender for the misdemeanor violation, the court may impose upon the offender an additional definite jail term as follows:

(a) Subject to division (F)(1)(b) of this section, an additional definite jail term of not more than sixty days;

(b) If the offender previously has been convicted of or pleaded guilty to one or more misdemeanor or felony violations of *section 2907.22, 2907.23, 2907.24, 2907.241, or 2907.25 of the Revised Code* and also was convicted of or pleaded guilty to a specification of the type described in

section 2941.1421 of the Revised Code regarding one or more of those violations, an additional definite jail term of not more than one hundred twenty days.

(2) In lieu of imposing an additional definite jail term under division (F)(1) of this section, the court may directly impose on the offender a sanction that requires the offender to wear a real-time processing, continual tracking electronic monitoring device during the period of time specified by the court. The period of time specified by the court shall equal the duration of an additional jail term that the court could have imposed upon the offender under division (F)(1) of this section. A sanction imposed under this division shall commence on the date specified by the court, provided that the sanction shall not commence until after the offender has served the jail term imposed for the misdemeanor violation of *section 2907.23, 2907.24, 2907.241, or 2907.25 of the Revised Code* and any residential sanction imposed for the violation under *section 2929.26 of the Revised Code*. A sanction imposed under this division shall be considered to be a community control sanction for purposes of *section 2929.25 of the Revised Code*, and all provisions of the Revised Code that pertain to community control sanctions shall apply to a sanction imposed under this division, except to the extent that they would by their nature be clearly inapplicable. The offender shall pay all costs associated with a sanction imposed under this division, including the cost of the use of the monitoring device.

(G) If an offender is convicted of or pleads guilty to a misdemeanor violation of *section 2903.13 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1423 of the Revised Code* that charges that the victim of the violation was a woman whom the offender knew was pregnant at the time of the violation, the court shall impose on the offender a mandatory jail term that is a definite term of at least thirty days.

(H) If a court sentences an offender to a jail term under this section, the sentencing court retains jurisdiction over the offender and the jail term. Upon motion of either party or upon the court's own motion, the court, in the court's sole discretion and as the circumstances warrant, may substitute one or more community control sanctions under *section 2929.26 or 2929.27 of the Revised Code* for any jail days that are not mandatory jail days.

HISTORY:

149 v H 490, § 1, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 152 v S 220, § 1, eff. 9-30-08; 152 v H 280, § 1, eff. 4-7-09; 153 v H 338, § 1, eff. 9-17-10; 2011 HB 5, § 1, eff. Sept. 23, 2011.

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ORC Ann. 2929.25 (2012)

§ 2929.25. Community control sanctions

(A) (1) Except as provided in *sections 2929.22 and 2929.23 of the Revised Code* or when a jail term is required by law, in sentencing an offender for a misdemeanor, other than a minor misdemeanor, the sentencing court may do either of the following:

(a) Directly impose a sentence that consists of one or more community control sanctions authorized by *section 2929.26, 2929.27, or 2929.28 of the Revised Code*. The court may impose any other conditions of release under a community control sanction that the court considers appropriate. If the court imposes a jail term upon the offender, the court may impose any community control sanction or combination of community control sanctions in addition to the jail term.

(b) Impose a jail term under *section 2929.24 of the Revised Code* from the range of jail terms authorized under that section for the offense, suspend all or a portion of the jail term imposed, and place the offender under a community control sanction or combination of community control sanctions authorized under *section 2929.26, 2929.27, or 2929.28 of the Revised Code*.

(2) The duration of all community control sanctions imposed upon an offender and in effect for an offender at any time shall not exceed five years.

(3) At sentencing, if a court directly imposes a community control sanction or combination of community control sanctions pursuant to division (A)(1)(a) or (B) of this section, the court shall state the duration of the community control sanctions imposed and shall notify the offender that if any of the conditions of the community control sanctions are violated the court may do any of the following:

(a) Impose a longer time under the same community control sanction if the total time under all of the offender's community control sanctions does not exceed the five-year limit specified in division (A)(2) of this section;

(b) Impose a more restrictive community control sanction under *section 2929.26, 2929.27, or 2929.28 of the Revised Code*, but the court is not required to impose any particular sanction or sanctions;

(c) Impose a definite jail term from the range of jail terms authorized for the offense under *section 2929.24 of the Revised Code*.

(B) If a court sentences an offender to any community control sanction or combination of community control sanctions pursuant to division (A)(1)(a) of this section, the sentencing court retains jurisdiction over the offender and the period of community control for the duration of the period of community control. Upon the motion of either party or on the court's own motion, the court, in the court's sole discretion and as the circumstances warrant, may modify the community control sanctions or conditions of release previously imposed, substitute a community control sanction or condition of release for another community control sanction or condition of release previously imposed, or impose an additional community control sanction or condition of release.

(C) (1) If a court sentences an offender to any community control sanction or combination of community control sanctions authorized under *section 2929.26, 2929.27, or 2929.28 of the Revised Code*, the court shall place the offender under the general control and supervision of the court or of a department of probation in the jurisdiction that serves the court for purposes of reporting to the court a violation of any of the conditions of the sanctions imposed. If the offender resides in another jurisdiction and a department of probation has been established to serve the municipal court or county court in that jurisdiction, the sentencing court may request the municipal court or the county court to receive the offender into the general control and supervision of that department of probation for purposes of reporting to the sentencing court a violation of any of the conditions of the sanctions imposed. The sentencing court retains jurisdiction over any offender whom it sentences for the duration of the sanction or sanctions imposed.

(2) The sentencing court shall require as a condition of any community control sanction that the offender abide by the law and not leave the state without the permission of the court or the offender's probation officer. In the interests of doing justice, rehabilitating the offender, and ensuring the offender's good behavior, the court may impose additional requirements on the offender. The offender's compliance with the additional requirements also shall be a condition of the community control sanction imposed upon the offender.

(D) (1) If the court imposing sentence upon an offender sentences the offender to any community control sanction or combination of community control sanctions authorized under *section 2929.26, 2929.27, or 2929.28 of the Revised Code*, and if the offender violates any of the conditions of the sanctions, the public or private person or entity that supervises or administers the program or activity that comprises the sanction shall report the violation directly to the sentencing court or to the department of probation or probation officer with general control and supervision over the offender. If the public or private person or entity reports the violation to the department of probation or probation officer, the department or officer shall report the violation to the sentencing court.

(2) If an offender violates any condition of a community control sanction, the sentencing court may impose upon the violator one or more of the following penalties:

(a) A longer time under the same community control sanction if the total time under all of the community control sanctions imposed on the violator does not exceed the five-year limit specified in division (A)(2) of this section;

- (b) A more restrictive community control sanction;
- (c) A combination of community control sanctions, including a jail term.

(3) If the court imposes a jail term upon a violator pursuant to division (D)(2) of this section, the total time spent in jail for the misdemeanor offense and the violation of a condition of the community control sanction shall not exceed the maximum jail term available for the offense for which the sanction that was violated was imposed. The court may reduce the longer period of time that the violator is required to spend under the longer sanction or the more restrictive sanction imposed under division (D)(2) of this section by all or part of the time the violator successfully spent under the sanction that was initially imposed.

(E) Except as otherwise provided in this division, if an offender, for a significant period of time, fulfills the conditions of a community control sanction imposed pursuant to *section 2929.26, 2929.27, or 2929.28 of the Revised Code* in an exemplary manner, the court may reduce the period of time under the community control sanction or impose a less restrictive community control sanction. Fulfilling the conditions of a community control sanction does not relieve the offender of a duty to make restitution under *section 2929.28 of the Revised Code*.

HISTORY:

149 v H 490 § 1, Eff. 1-1-04; 150 v S 57, § 1, eff. 1-1-04; 153 v H 338, § 1, eff. 9-17-10; 2011 HB 5, § 1, eff. Sept. 23, 2011.

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ORC Ann. 2929.26 (2012)

§ 2929.26. Community residential sanctions; testing and treatment for contagious diseases; use of halfway house

(A) Except when a mandatory jail term is required by law, the court imposing a sentence for a misdemeanor, other than a minor misdemeanor, may impose upon the offender any community residential sanction or combination of community residential sanctions under this section. Community residential sanctions include, but are not limited to, the following:

(1) A term of up to one hundred eighty days in a halfway house or community-based correctional facility or a term in a halfway house or community-based correctional facility not to exceed the longest jail term available for the offense, whichever is shorter, if the political subdivision that would have responsibility for paying the costs of confining the offender in a jail has entered into a contract with the halfway house or community-based correctional facility for use of the facility for misdemeanor offenders;

(2) If the offender is an eligible offender, as defined in *section 307.932 of the Revised Code*, a term of up to sixty days in a community alternative sentencing center or district community alternative sentencing center established and operated in accordance with that section, in the circumstances specified in that section, with one of the conditions of the sanction being that the offender complete in the center the entire term imposed.

(B) A sentence to a community residential sanction under division (A)(3) of this section shall be in accordance with *section 307.932 of the Revised Code*. In all other cases, the court that sentences an offender to a community residential sanction under this section may do either or both of the following:

(1) Permit the offender to serve the offender's sentence in intermittent confinement, overnight, on weekends or at any other time or times that will allow the offender to continue at the offender's occupation or care for the offender's family;

(2) Authorize the offender to be released so that the offender may seek or maintain employment, receive education or training, receive treatment, perform community service, or otherwise fulfill an obligation imposed by law or by the court. A release pursuant to this division shall be only for the duration of time that is needed to fulfill the purpose of the release and for travel that reasonably is necessary to fulfill the purposes of the release.

(C) The court may order that a reasonable portion of the income earned by the offender upon a release pursuant to division (B) of this section be applied to any financial sanction imposed under *section 2929.28 of the Revised Code*.

(D) No court shall sentence any person to a prison term for a misdemeanor or minor misdemeanor or to a jail term for a minor misdemeanor.

(E) If a court sentences a person who has been convicted of or pleaded guilty to a misdemeanor to a community residential sanction as described in division (A) of this section, at the time of reception and at other times the person in charge of the operation of the halfway house, community alternative sentencing center, district community alternative sentencing center, or other place at which the offender will serve the residential sanction determines to be appropriate, the person in charge of the operation of the halfway house, community alternative sentencing center, district community alternative sentencing center, or other place may cause the convicted offender to be examined and tested for tuberculosis, HIV infection, hepatitis, including, but not limited to, hepatitis A, B, and C, and other contagious diseases. The person in charge of the operation of the halfway house, community alternative sentencing center, district community alternative sentencing center, or other place at which the offender will serve the residential sanction may cause a convicted offender in the halfway house, community alternative sentencing center, district community alternative sentencing center, or other place who refuses to be tested or treated for tuberculosis, HIV infection, hepatitis, including, but not limited to, hepatitis A, B, and C, or another contagious disease to be tested and treated involuntarily.

(F) A political subdivision may enter into a contract with a halfway house for use of the halfway house to house misdemeanor offenders under a sanction imposed under division (A)(1) of this section.

HISTORY:

149 v H 490, § 1, eff. 1-1-04; 2011 HB 86, § 1, eff. Sept. 30, 2011; 2012 HB 509, § 1, eff. Sept. 28, 2012; 2012 SB 337, § 1, eff. Sept. 28, 2012.

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ORC Ann. 2929.27 (2012)

§ 2929.27. Nonresidential and other sanctions; community service

(A) Except when a mandatory jail term is required by law, the court imposing a sentence for a misdemeanor, other than a minor misdemeanor, may impose upon the offender any nonresidential sanction or combination of nonresidential sanctions authorized under this division. Nonresidential sanctions include, but are not limited to, the following:

- (1) A term of day reporting;
- (2) A term of house arrest with electronic monitoring or continuous alcohol monitoring or both electronic monitoring and continuous alcohol monitoring, a term of electronic monitoring or continuous alcohol monitoring without house arrest, or a term of house arrest without electronic monitoring or continuous alcohol monitoring;
- (3) A term of community service of up to five hundred hours for a misdemeanor of the first degree or two hundred hours for a misdemeanor of the second, third, or fourth degree;
- (4) A term in a drug treatment program with a level of security for the offender as determined necessary by the court;
- (5) A term of intensive probation supervision;
- (6) A term of basic probation supervision;
- (7) A term of monitored time;
- (8) A term of drug and alcohol use monitoring, including random drug testing;
- (9) A curfew term;
- (10) A requirement that the offender obtain employment;

(11) A requirement that the offender obtain education or training;

(12) Provided the court obtains the prior approval of the victim, a requirement that the offender participate in victim-offender mediation;

(13) If authorized by law, suspension of the offender's privilege to operate a motor vehicle, immobilization or forfeiture of the offender's motor vehicle, a requirement that the offender obtain a valid motor vehicle operator's license, or any other related sanction;

(14) A requirement that the offender obtain counseling if the offense is a violation of section 2919.25 or a violation of *section 2903.13 of the Revised Code* involving a person who was a family or household member at the time of the violation, if the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and if the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children. This division does not limit the court in requiring that the offender obtain counseling for any offense or in any circumstance not specified in this division.

(B) If the court imposes a term of community service pursuant to division (A)(3) of this section, the offender may request that the court modify the sentence to authorize the offender to make a reasonable contribution, as determined by the court, to the general fund of the county, municipality, or other local entity that provides funding to the court. The court may grant the request if the offender demonstrates a change in circumstances from the date the court imposes the sentence or that the modification would otherwise be in the interests of justice. If the court grants the request, the offender shall make a reasonable contribution to the court, and the clerk of the court shall deposit that contribution into the general fund of the county, municipality, or other local entity that provides funding to the court. If more than one entity provides funding to the court, the clerk shall deposit a percentage of the reasonable contribution equal to the percentage of funding the entity provides to the court in that entity's general fund.

(C) In addition to the sanctions authorized under division (A) of this section, the court imposing a sentence for a misdemeanor, other than a minor misdemeanor, upon an offender who is not required to serve a mandatory jail term may impose any other sanction that is intended to discourage the offender or other persons from committing a similar offense if the sanction is reasonably related to the overriding purposes and principles of misdemeanor sentencing.

(D) The court imposing a sentence for a minor misdemeanor may impose a term of community service in lieu of all or part of a fine. The term of community service imposed for a minor misdemeanor shall not exceed thirty hours. After imposing a term of community service, the court may modify the sentence to authorize a reasonable contribution, as determined by the court, to the appropriate general fund as provided in division (B) of this section.

HISTORY:

149 v H 490, § 1, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 2011 HB 5, § 1, eff. Sept. 23, 2011.

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ORC Ann. 2929.28 (2012)

§ 2929.28. Financial sanctions; court costs

(A) In addition to imposing court costs pursuant to *section 2947.23 of the Revised Code*, the court imposing a sentence upon an offender for a misdemeanor, including a minor misdemeanor, may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section. If the court in its discretion imposes one or more financial sanctions, the financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

(1) Unless the misdemeanor offense is a minor misdemeanor or could be disposed of by the traffic violations bureau serving the court under *Traffic Rule 13*, restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. The court may not impose restitution as a sanction pursuant to this division if the offense is a minor misdemeanor or could be disposed of by the traffic violations bureau serving the court under *Traffic Rule 13*. If the court requires restitution, the court shall order that the restitution be made to the victim in open court or to the adult probation department that serves the jurisdiction or the clerk of the court on behalf of the victim.

If the court imposes restitution, the court shall determine the amount of restitution to be paid by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold an evidentiary hearing on restitution if the offender, victim, or survivor disputes the amount of restitution. If the court holds an evidentiary

hearing, at the hearing the victim or survivor has the burden to prove by a preponderance of the evidence the amount of restitution sought from the offender.

All restitution payments shall be credited against any recovery of economic loss in a civil action brought by the victim or any survivor of the victim against the offender. No person may introduce evidence of an award of restitution under this section in a civil action for purposes of imposing liability against an insurer under *section 3937.18 of the Revised Code*.

If the court imposes restitution, the court may order that the offender pay a surcharge, of not more than five per cent of the amount of the restitution otherwise ordered, to the entity responsible for collecting and processing restitution payments.

The victim or survivor may request that the prosecutor in the case file a motion, or the offender may file a motion, for modification of the payment terms of any restitution ordered. If the court grants the motion, it may modify the payment terms as it determines appropriate.

(2) A fine of the type described in divisions (A)(2)(a) and (b) of this section payable to the appropriate entity as required by law:

(a) A fine in the following amount:

- (i) For a misdemeanor of the first degree, not more than one thousand dollars;
- (ii) For a misdemeanor of the second degree, not more than seven hundred fifty dollars;
- (iii) For a misdemeanor of the third degree, not more than five hundred dollars;
- (iv) For a misdemeanor of the fourth degree, not more than two hundred fifty dollars;
- (v) For a minor misdemeanor, not more than one hundred fifty dollars.

(b) A state fine or cost as defined in *section 2949.111 of the Revised Code*.

(3) (a) Reimbursement by the offender of any or all of the costs of sanctions incurred by the government, including, but not limited to, the following:

- (i) All or part of the costs of implementing any community control sanction, including a supervision fee under *section 2951.021 of the Revised Code*;
- (ii) All or part of the costs of confinement in a jail or other residential facility, including, but not limited to, a per diem fee for room and board, the costs of medical and dental treatment, and the costs of repairing property damaged by the offender while confined;
- (iii) All or part of the cost of purchasing and using an immobilizing or disabling device, including a certified ignition interlock device, or a remote alcohol monitoring device that a court orders an offender to use under *section 4510.13 of the Revised Code*.

(b) The amount of reimbursement ordered under division (A)(3)(a) of this section shall not exceed the total amount of reimbursement the offender is able to pay and shall not exceed the actual cost of the sanctions. The court may collect any amount of reimbursement the offender is required to pay under that division. If the court does not order reimbursement under that division, confinement costs may be assessed pursuant to a repayment policy adopted under *section 2929.37 of the Revised Code*. In addition, the offender may be required to pay the fees specified in *section 2929.38 of the Revised Code* in accordance with that section.

(B) If the court determines a hearing is necessary, the court may hold a hearing to determine whether the offender is able to pay the financial sanction imposed pursuant to this section or court costs or is likely in the future to be able to pay the sanction or costs.

If the court determines that the offender is indigent and unable to pay the financial sanction or court costs, the court shall consider imposing and may impose a term of community service under division (A) of *section 2929.27 of the Revised Code* in lieu of imposing a financial sanction or court costs. If the court does not determine that the offender is indigent, the court may impose a term of community service under division (A) of *section 2929.27 of the Revised Code* in lieu of or in addition to imposing a financial sanction under this section and in addition to imposing court costs. The court may order community service for a minor misdemeanor pursuant to division (D) of *section 2929.27 of the Revised Code* in lieu of or in addition to imposing a financial sanction under this section and in addition to imposing court costs. If a person fails to pay a financial sanction or court costs, the court may order community service in lieu of the financial sanction or court costs.

(C) (1) The offender shall pay reimbursements imposed upon the offender pursuant to division (A)(3) of this section to pay the costs incurred by a county pursuant to any sanction imposed under this section or *section 2929.26 or 2929.27 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.26 of the Revised Code* to the county treasurer. The county treasurer shall deposit the reimbursements in the county's general fund. The county shall use the amounts deposited in the fund to pay the costs incurred by the county pursuant to any sanction imposed under this section or *section 2929.26 or 2929.27 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.26 of the Revised Code*.

(2) The offender shall pay reimbursements imposed upon the offender pursuant to division (A)(3) of this section to pay the costs incurred by a municipal corporation pursuant to any sanction imposed under this section or *section 2929.26 or 2929.27 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.26 of the Revised Code* to the treasurer of the municipal corporation. The treasurer shall deposit the reimbursements in the municipal corporation's general fund. The municipal corporation shall use the amounts deposited in the fund to pay the costs incurred by the municipal corporation pursuant to any sanction imposed under this section or *section 2929.26 or 2929.27 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.26 of the Revised Code*.

(3) The offender shall pay reimbursements imposed pursuant to division (A)(3) of this section for the costs incurred by a private provider pursuant to a sanction imposed under this section or *section 2929.26 or 2929.27 of the Revised Code* to the provider.

(D) Except as otherwise provided in this division, a financial sanction imposed under division (A) of this section is a judgment in favor of the state or the political subdivision that operates the court that imposed the financial sanction, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of reimbursement imposed pursuant to division (A)(3)(a)(i) of this section upon an offender is a judgment in favor of the entity administering the community control sanction, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of reimbursement imposed pursuant to division (A)(3)(a)(ii) of this section upon an offender confined in a jail or other residential facility is a judgment in favor of the entity operating the jail or other residential facility, and the offender subject to the financial sanction is the judgment

debtor. A financial sanction of restitution imposed pursuant to division (A)(1) of this section is an order in favor of the victim of the offender's criminal act that can be collected through a certificate of judgment as described in division (D)(1) of this section, through execution as described in division (D)(2) of this section, or through an order as described in division (D)(3) of this section, and the offender shall be considered for purposes of the collection as the judgment debtor.

Once the financial sanction is imposed as a judgment or order under this division, the victim, private provider, state, or political subdivision may do any of the following:

(1) Obtain from the clerk of the court in which the judgment was entered a certificate of judgment that shall be in the same manner and form as a certificate of judgment issued in a civil action;

(2) Obtain execution of the judgment or order through any available procedure, including any of the procedures identified in divisions (D)(1) and (2) of *section 2929.18 of the Revised Code*.

(3) Obtain an order for the assignment of wages of the judgment debtor under *section 1321.33 of the Revised Code*.

(E) The civil remedies authorized under division (D) of this section for the collection of the financial sanction supplement, but do not preclude, enforcement of the criminal sentence.

(F) Each court imposing a financial sanction upon an offender under this section may designate the clerk of the court or another person to collect the financial sanction. The clerk, or another person authorized by law or the court to collect the financial sanction may do the following:

(1) Enter into contracts with one or more public agencies or private vendors for the collection of amounts due under the sanction. Before entering into a contract for the collection of amounts due from an offender pursuant to any financial sanction imposed pursuant to this section, a court shall comply with *sections 307.86 to 307.92 of the Revised Code*.

(2) Permit payment of all or any portion of the sanction in installments, by financial transaction device if the court is a county court or a municipal court operated by a county, by credit or debit card or by another electronic transfer if the court is a municipal court not operated by a county, or by any other reasonable method, in any time, and on any terms that court considers just, except that the maximum time permitted for payment shall not exceed five years. If the court is a county court or a municipal court operated by a county, the acceptance of payments by any financial transaction device shall be governed by the policy adopted by the board of county commissioners of the county pursuant to *section 301.28 of the Revised Code*. If the court is a municipal court not operated by a county, the clerk may pay any fee associated with processing an electronic transfer out of public money or may charge the fee to the offender.

(3) To defray administrative costs, charge a reasonable fee to an offender who elects a payment plan rather than a lump sum payment of any financial sanction.

(G) No financial sanction imposed under this section shall preclude a victim from bringing a civil action against the offender.

HISTORY:

149 v H 490 § 1, Eff. 1-1-04; 150 v S 57, § 1, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 152 v S 17, § 1, eff. 9-30-08; 2011 HB 5, § 1, eff. Sept. 23, 2011.

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Current through Legislation passed by the 129th Ohio General Assembly
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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2967. PARDON; PAROLE; PROBATION

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ORC Ann. 2967.28 (2012)

Legislative Alert: LEXSEE 2011 Ohio SB 160 -- See sections 1 and 2.

§ 2967.28. Period of post-release control for certain offenders; sanctions; proceedings upon violation

(A) As used in this section:

(1) "Monitored time" means the monitored time sanction specified in *section 2929.17 of the Revised Code*.

(2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in *section 2923.11 of the Revised Code*.

(3) "Felony sex offense" means a violation of a section contained in Chapter 2907. of the Revised Code that is a felony.

(4) "Risk reduction sentence" means a prison term imposed by a court, when the court recommends pursuant to *section 2929.143 of the Revised Code* that the offender serve the sentence under *section 5120.036 of the Revised Code*, and the offender may potentially be released from imprisonment prior to the expiration of the prison term if the offender successfully completes all assessment and treatment or programming required by the department of rehabilitation and correction under *section 5120.036 of the Revised Code*.

(B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. This division applies with respect to all prison terms of a type described in this division, including a term of any such type that is a risk reduction sentence. If a court imposes a sentence including a prison term of a type described

in this division on or after July 11, 2006, the failure of a sentencing court to notify the offender pursuant to division (B)(2)(c) of *section 2929.19 of the Revised Code* of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under this division. *Section 2929.191 of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(2)(c) of *section 2929.19 of the Revised Code* regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (D)(1) of *section 2929.14 of the Revised Code* a statement regarding post-release control. Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this division for an offender shall be of one of the following periods:

- (1) For a felony of the first degree or for a felony sex offense, five years;
- (2) For a felony of the second degree that is not a felony sex offense, three years;
- (3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years.

(C) Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender. This division applies with respect to all prison terms of a type described in this division, including a term of any such type that is a risk reduction sentence. *Section 2929.191 of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(2)(d) of *section 2929.19 of the Revised Code* regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (D)(2) of *section 2929.14 of the Revised Code* a statement regarding post-release control. Pursuant to an agreement entered into under *section 2967.29 of the Revised Code*, a court of common pleas or parole board may impose sanctions or conditions on an offender who is placed on post-release control under this division.

(D) (1) Before the prisoner is released from imprisonment, the parole board or, pursuant to an agreement under *section 2967.29 of the Revised Code*, the court shall impose upon a prisoner described in division (B) of this section, shall impose upon a prisoner described in division (C) of this section who is to be released before the expiration of the prisoner's stated prison term under a risk reduction sentence, may impose upon a prisoner described in division (C) of this section who is not to be released before the expiration of the prisoner's stated prison term under a risk reduction sentence, and shall impose upon a prisoner described in division (B)(2)(b) of *section 5120.031* or in division (B)(1) of *section 5120.032 of the Revised Code*, one or more post-release control sanctions to apply during the prisoner's period of post-release control. Whenever the board or court imposes one or more post-release control sanctions upon a prisoner, the board or court, in addition to imposing the sanctions, also shall include as a condition of the post-release control that the offender not leave the state without permission of the court or the offender's parole or probation officer and that the offender abide by the law. The board or court may impose any other conditions of release under a post-release control sanction that the board or court considers appropriate, and the conditions of

release may include any community residential sanction, community nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to *sections 2929.16, 2929.17, and 2929.18 of the Revised Code*. Prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board or court shall review the prisoner's criminal history, results from the single validated risk assessment tool selected by the department of rehabilitation and correction under *section 5120.114 of the Revised Code*, all juvenile court adjudications finding the prisoner, while a juvenile, to be a delinquent child, and the record of the prisoner's conduct while imprisoned. The parole board or court shall consider any recommendation regarding post-release control sanctions for the prisoner made by the office of victims' services. After considering those materials, the board or court shall determine, for a prisoner described in division (B) of this section, division (B)(2)(b) of section 5120.031, or division (B)(1) of *section 5120.032 of the Revised Code* and for a prisoner described in division (C) of this section who is to be released before the expiration of the prisoner's stated prison term under a risk reduction sentence, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances or, for a prisoner described in division (C) of this section who is not to be released before the expiration of the prisoner's stated prison term under a risk reduction sentence, whether a post-release control sanction is necessary and, if so, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances. In the case of a prisoner convicted of a felony of the fourth or fifth degree other than a felony sex offense, the board or court shall presume that monitored time is the appropriate post-release control sanction unless the board or court determines that a more restrictive sanction is warranted. A post-release control sanction imposed under this division takes effect upon the prisoner's release from imprisonment.

Regardless of whether the prisoner was sentenced to the prison term prior to, on, or after July 11, 2006, prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board shall notify the prisoner that, if the prisoner violates any sanction so imposed or any condition of post-release control described in division (B) of *section 2967.131 of the Revised Code* that is imposed on the prisoner, the parole board may impose a prison term of up to one-half of the stated prison term originally imposed upon the prisoner.

(2) If a prisoner who is placed on post-release control under this section is released before the expiration of the prisoner's stated prison term by reason of credit earned under *section 2967.193 of the Revised Code* and if the prisoner earned sixty or more days of credit, the adult parole authority shall supervise the offender with an active global positioning system device for the first fourteen days after the offender's release from imprisonment. This division does not prohibit or limit the imposition of any post-release control sanction otherwise authorized by this section.

(3) At any time after a prisoner is released from imprisonment and during the period of post-release control applicable to the releasee, the adult parole authority or, pursuant to an agreement under *section 2967.29 of the Revised Code*, the court may review the releasee's behavior under the post-release control sanctions imposed upon the releasee under this section. The authority or court may determine, based upon the review and in accordance with the standards established under division (E) of this section, that a more restrictive or a less restrictive sanction is appropriate and may impose a different sanction. The authority also may recommend that the parole board or court increase or reduce the duration of the period of post-release control imposed by the court. If the authority recommends that the board or court increase the duration of post-release control, the board or court shall review the releasee's behavior and may increase the duration of the period of

post-release control imposed by the court up to eight years. If the authority recommends that the board or court reduce the duration of control for an offense described in division (B) or (C) of this section, the board or court shall review the releasee's behavior and may reduce the duration of the period of control imposed by the court. In no case shall the board or court reduce the duration of the period of control imposed for an offense described in division (B)(1) of this section to a period less than the length of the stated prison term originally imposed, and in no case shall the board or court permit the releasee to leave the state without permission of the court or the releasee's parole or probation officer.

(E) The department of rehabilitation and correction, in accordance with Chapter 119. of the Revised Code, shall adopt rules that do all of the following:

(1) Establish standards for the imposition by the parole board of post-release control sanctions under this section that are consistent with the overriding purposes and sentencing principles set forth in *section 2929.11 of the Revised Code* and that are appropriate to the needs of releasees;

(2) Establish standards that provide for a period of post-release control of up to three years for all prisoners described in division (C) of this section who are to be released before the expiration of their stated prison term under a risk reduction sentence and standards by which the parole board can determine which prisoners described in division (C) of this section who are not to be released before the expiration of their stated prison term under a risk reduction sentence should be placed under a period of post-release control;

(3) Establish standards to be used by the parole board in reducing the duration of the period of post-release control imposed by the court when authorized under division (D) of this section, in imposing a more restrictive post-release control sanction than monitored time upon a prisoner convicted of a felony of the fourth or fifth degree other than a felony sex offense, or in imposing a less restrictive control sanction upon a releasee based on the releasee's activities including, but not limited to, remaining free from criminal activity and from the abuse of alcohol or other drugs, successfully participating in approved rehabilitation programs, maintaining employment, and paying restitution to the victim or meeting the terms of other financial sanctions;

(4) Establish standards to be used by the adult parole authority in modifying a releasee's post-release control sanctions pursuant to division (D)(2) of this section;

(5) Establish standards to be used by the adult parole authority or parole board in imposing further sanctions under division (F) of this section on releasees who violate post-release control sanctions, including standards that do the following:

(a) Classify violations according to the degree of seriousness;

(b) Define the circumstances under which formal action by the parole board is warranted;

(c) Govern the use of evidence at violation hearings;

(d) Ensure procedural due process to an alleged violator;

(e) Prescribe nonresidential community control sanctions for most misdemeanor and technical violations;

(f) Provide procedures for the return of a releasee to imprisonment for violations of post-release control.

(F) (1) Whenever the parole board imposes one or more post-release control sanctions upon an offender under this section, the offender upon release from imprisonment shall be under the general jurisdiction of the adult parole authority and generally shall be supervised by the field services section through its staff of parole and field officers as described in *section 5149.04 of the Revised Code*, as if the offender had been placed on parole. If the offender upon release from imprisonment violates the post-release control sanction or any conditions described in division (A) of *section 2967.131 of the Revised Code* that are imposed on the offender, the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction shall report the violation directly to the adult parole authority or to the officer of the authority who supervises the offender. The authority's officers may treat the offender as if the offender were on parole and in violation of the parole, and otherwise shall comply with this section.

(2) If the adult parole authority or, pursuant to an agreement under *section 2967.29 of the Revised Code*, the court determines that a releasee has violated a post-release control sanction or any conditions described in division (A) of *section 2967.131 of the Revised Code* imposed upon the releasee and that a more restrictive sanction is appropriate, the authority or court may impose a more restrictive sanction upon the releasee, in accordance with the standards established under division (E) of this section or in accordance with the agreement made under *section 2967.29 of the Revised Code*, or may report the violation to the parole board for a hearing pursuant to division (F)(3) of this section. The authority or court may not, pursuant to this division, increase the duration of the releasee's post-release control or impose as a post-release control sanction a residential sanction that includes a prison term, but the authority or court may impose on the releasee any other residential sanction, nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to *sections 2929.16, 2929.17, and 2929.18 of the Revised Code*.

(3) The parole board or, pursuant to an agreement under *section 2967.29 of the Revised Code*, the court may hold a hearing on any alleged violation by a releasee of a post-release control sanction or any conditions described in division (A) of *section 2967.131 of the Revised Code* that are imposed upon the releasee. If after the hearing the board or court finds that the releasee violated the sanction or condition, the board or court may increase the duration of the releasee's post-release control up to the maximum duration authorized by division (B) or (C) of this section or impose a more restrictive post-release control sanction. When appropriate, the board or court may impose as a post-release control sanction a residential sanction that includes a prison term. The board or court shall consider a prison term as a post-release control sanction imposed for a violation of post-release control when the violation involves a deadly weapon or dangerous ordnance, physical harm or attempted serious physical harm to a person, or sexual misconduct, or when the releasee committed repeated violations of post-release control sanctions. Unless a releasee's stated prison term was reduced pursuant to *section 5120.032 of the Revised Code*, the period of a prison term that is imposed as a post-release control sanction under this division shall not exceed nine months, and the maximum cumulative prison term for all violations under this division shall not exceed one-half of the stated prison term originally imposed upon the offender as part of this sentence. If a releasee's stated prison term was reduced pursuant to *section 5120.032 of the Revised Code*, the period of a prison term that is imposed as a post-release control sanction under this division and the maximum cumulative prison term for all violations under this division shall not exceed the period of time not served in prison under the sentence imposed by the court. The period of a prison term that is imposed as a post-release control sanction under this division shall not count as, or be credited toward, the remaining period of post-release control.

If an offender is imprisoned for a felony committed while under post-release control supervision and is again released on post-release control for a period of time determined by division (F)(4)(d) of this section, the maximum cumulative prison term for all violations under this division shall not exceed one-half of the total stated prison terms of the earlier felony, reduced by any prison term administratively imposed by the parole board or court, plus one-half of the total stated prison term of the new felony.

(4) Any period of post-release control shall commence upon an offender's actual release from prison. If an offender is serving an indefinite prison term or a life sentence in addition to a stated prison term, the offender shall serve the period of post-release control in the following manner:

(a) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under a life sentence or an indefinite sentence, and if the period of post-release control ends prior to the period of parole, the offender shall be supervised on parole. The offender shall receive credit for post-release control supervision during the period of parole. The offender is not eligible for final release under *section 2967.16 of the Revised Code* until the post-release control period otherwise would have ended.

(b) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under an indefinite sentence, and if the period of parole ends prior to the period of post-release control, the offender shall be supervised on post-release control. The requirements of parole supervision shall be satisfied during the post-release control period.

(c) If an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board or court. Periods of post-release control shall be served concurrently and shall not be imposed consecutively to each other.

(d) The period of post-release control for a releasee who commits a felony while under post-release control for an earlier felony shall be the longer of the period of post-release control specified for the new felony under division (B) or (C) of this section or the time remaining under the period of post-release control imposed for the earlier felony as determined by the parole board or court.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 147 v S 111 (Eff 3-17-98); 148 v S 107 (Eff 3-23-2000); 149 v H 327 (Eff 7-8-2002); 149 v H 510; Eff 3-31-2003; 151 v H 137, § 1, eff. 7-11-06; 152 v H 130, § 1, eff. 4-7-09; 2011 HB 86, § 1, eff. Sept. 30, 2011; 2012 HB 487, § 101.01, eff. Sept. 10, 2012.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2971. SENTENCING OF SEXUALLY VIOLENT PREDATORS

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ORC Ann. 2971.03 (2012)

§ 2971.03. Sentencing of sexually violent offender with predator specification

(A) Notwithstanding divisions (A) and (D) of section 2929.14, section 2929.02, 2929.03, 2929.06, 2929.13, or another section of the Revised Code, other than divisions (B) and (C) of *section 2929.14 of the Revised Code*, that authorizes or requires a specified prison term or a mandatory prison term for a person who is convicted of or pleads guilty to a felony or that specifies the manner and place of service of a prison term or term of imprisonment, the court shall impose a sentence upon a person who is convicted of or pleads guilty to a violent sex offense and who also is convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment, count in the indictment, or information charging that offense, and upon a person who is convicted of or pleads guilty to a designated homicide, assault, or kidnapping offense and also is convicted of or pleads guilty to both a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information charging that offense, as follows:

(1) If the offense for which the sentence is being imposed is aggravated murder and if the court does not impose upon the offender a sentence of death, it shall impose upon the offender a term of life imprisonment without parole. If the court sentences the offender to death and the sentence of death is vacated, overturned, or otherwise set aside, the court shall impose upon the offender a term of life imprisonment without parole.

(2) If the offense for which the sentence is being imposed is murder; or if the offense is rape committed in violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* when the offender purposely compelled the victim to submit by force or threat of force, when the victim was less than ten years of age, when the offender previously has been convicted of or pleaded guilty to either rape committed in violation of that division or a violation of an existing or former law of this state, another state, or the United States that is substantially similar to division (A)(1)(b) of *section 2907.02 of the Revised Code*, or when the offender during or immediately after the commission of

the rape caused serious physical harm to the victim; or if the offense is an offense other than aggravated murder or murder for which a term of life imprisonment may be imposed, it shall impose upon the offender a term of life imprisonment without parole.

(3) (a) Except as otherwise provided in division (A)(3)(b), (c), (d), or (e) or (A)(4) of this section, if the offense for which the sentence is being imposed is an offense other than aggravated murder, murder, or rape and other than an offense for which a term of life imprisonment may be imposed, it shall impose an indefinite prison term consisting of a minimum term fixed by the court from among the range of terms available as a definite term for the offense, but not less than two years, and a maximum term of life imprisonment.

(b) Except as otherwise provided in division (A)(4) of this section, if the offense for which the sentence is being imposed is kidnapping that is a felony of the first degree, it shall impose an indefinite prison term as follows:

(i) If the kidnapping is committed on or after January 1, 2008, and the victim of the offense is less than thirteen years of age, except as otherwise provided in this division, it shall impose an indefinite prison term consisting of a minimum term of fifteen years and a maximum term of life imprisonment. If the kidnapping is committed on or after January 1, 2008, the victim of the offense is less than thirteen years of age, and the offender released the victim in a safe place unharmed, it shall impose an indefinite prison term consisting of a minimum term of ten years and a maximum term of life imprisonment.

(ii) If the kidnapping is committed prior to January 1, 2008, or division (A)(3)(b)(i) of this section does not apply, it shall impose an indefinite term consisting of a minimum term fixed by the court that is not less than ten years and a maximum term of life imprisonment.

(c) Except as otherwise provided in division (A)(4) of this section, if the offense for which the sentence is being imposed is kidnapping that is a felony of the second degree, it shall impose an indefinite prison term consisting of a minimum term fixed by the court that is not less than eight years, and a maximum term of life imprisonment.

(d) Except as otherwise provided in division (A)(4) of this section, if the offense for which the sentence is being imposed is rape for which a term of life imprisonment is not imposed under division (A)(2) of this section or division (B) of *section 2907.02 of the Revised Code*, it shall impose an indefinite prison term as follows:

(i) If the rape is committed on or after January 2, 2007, in violation of division (A)(1)(b) of *section 2907.02 of the Revised Code*, it shall impose an indefinite prison term consisting of a minimum term of twenty-five years and a maximum term of life imprisonment.

(ii) If the rape is committed prior to January 2, 2007, or the rape is committed on or after January 2, 2007, other than in violation of division (A)(1)(b) of *section 2907.02 of the Revised Code*, it shall impose an indefinite prison term consisting of a minimum term fixed by the court that is not less than ten years, and a maximum term of life imprisonment.

(e) Except as otherwise provided in division (A)(4) of this section, if the offense for which sentence is being imposed is attempted rape, it shall impose an indefinite prison term as follows:

(i) Except as otherwise provided in division (A)(3)(e)(ii), (iii), or (iv) of this section, it shall impose an indefinite prison term pursuant to division (A)(3)(a) of this section.

(ii) If the attempted rape for which sentence is being imposed was committed on or after January 2, 2007, and if the offender also is convicted of or pleads guilty to a specification of the type described in *section 2941.1418 of the Revised Code*, it shall impose an indefinite prison term consisting of a minimum term of five years and a maximum term of twenty-five years.

(iii) If the attempted rape for which sentence is being imposed was committed on or after January 2, 2007, and if the offender also is convicted of or pleads guilty to a specification of the type described in *section 2941.1419 of the Revised Code*, it shall impose an indefinite prison term consisting of a minimum term of ten years and a maximum of life imprisonment.

(iv) If the attempted rape for which sentence is being imposed was committed on or after January 2, 2007, and if the offender also is convicted of or pleads guilty to a specification of the type described in *section 2941.1420 of the Revised Code*, it shall impose an indefinite prison term consisting of a minimum term of fifteen years and a maximum of life imprisonment.

(4) For any offense for which the sentence is being imposed, if the offender previously has been convicted of or pleaded guilty to a violent sex offense and also to a sexually violent predator specification that was included in the indictment, count in the indictment, or information charging that offense, or previously has been convicted of or pleaded guilty to a designated homicide, assault, or kidnapping offense and also to both a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information charging that offense, it shall impose upon the offender a term of life imprisonment without parole.

(B) (1) Notwithstanding section 2929.13, division (A) or (D) of section 2929.14, or another section of the Revised Code other than division (B) of section 2907.02 or divisions (B) and (C) of *section 2929.14 of the Revised Code* that authorizes or requires a specified prison term or a mandatory prison term for a person who is convicted of or pleads guilty to a felony or that specifies the manner and place of service of a prison term or term of imprisonment, if a person is convicted of or pleads guilty to a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* committed on or after January 2, 2007, if division (A) of this section does not apply regarding the person, and if the court does not impose a sentence of life without parole when authorized pursuant to division (B) of *section 2907.02 of the Revised Code*, the court shall impose upon the person an indefinite prison term consisting of one of the following:

(a) Except as otherwise required in division (B)(1)(b) or (c) of this section, a minimum term of ten years and a maximum term of life imprisonment.

(b) If the victim was less than ten years of age, a minimum term of fifteen years and a maximum of life imprisonment.

(c) If the offender purposely compels the victim to submit by force or threat of force, or if the offender previously has been convicted of or pleaded guilty to violating division (A)(1)(b) of *section 2907.02 of the Revised Code* or to violating an existing or former law of this state, another state, or the United States that is substantially similar to division (A)(1)(b) of that section, or if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, a minimum term of twenty-five years and a maximum of life imprisonment.

(2) Notwithstanding section 2929.13, division (A) or (D) of section 2929.14, or another section of the Revised Code other than divisions (B) and (C) of *section 2929.14 of the Revised Code* that authorizes or requires a specified prison term or a mandatory prison term for a person who is

convicted of or pleads guilty to a felony or that specifies the manner and place of service of a prison term or term of imprisonment and except as otherwise provided in division (B) of *section 2907.02 of the Revised Code*, if a person is convicted of or pleads guilty to attempted rape committed on or after January 2, 2007, and if division (A) of this section does not apply regarding the person, the court shall impose upon the person an indefinite prison term consisting of one of the following:

(a) If the person also is convicted of or pleads guilty to a specification of the type described in *section 2941.1418 of the Revised Code*, the court shall impose upon the person an indefinite prison term consisting of a minimum term of five years and a maximum term of twenty-five years.

(b) If the person also is convicted of or pleads guilty to a specification of the type described in *section 2941.1419 of the Revised Code*, the court shall impose upon the person an indefinite prison term consisting of a minimum term of ten years and a maximum term of life imprisonment.

(c) If the person also is convicted of or pleads guilty to a specification of the type described in *section 2941.1420 of the Revised Code*, the court shall impose upon the person an indefinite prison term consisting of a minimum term of fifteen years and a maximum term of life imprisonment.

(3) Notwithstanding section 2929.13, division (A) or (D) of section 2929.14, or another section of the Revised Code other than divisions (B) and (C) of *section 2929.14 of the Revised Code* that authorizes or requires a specified prison term or a mandatory prison term for a person who is convicted of or pleads guilty to a felony or that specifies the manner and place of service of a prison term or term of imprisonment, if a person is convicted of or pleads guilty to an offense described in division (B)(3)(a), (b), (c), or (d) of this section committed on or after January 1, 2008, if the person also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging that offense, and if division (A) of this section does not apply regarding the person, the court shall impose upon the person an indefinite prison term consisting of one of the following:

(a) An indefinite prison term consisting of a minimum of ten years and a maximum term of life imprisonment if the offense for which the sentence is being imposed is kidnapping, the victim of the offense is less than thirteen years of age, and the offender released the victim in a safe place unharmed;

(b) An indefinite prison term consisting of a minimum of fifteen years and a maximum term of life imprisonment if the offense for which the sentence is being imposed is kidnapping when the victim of the offense is less than thirteen years of age and division (B)(3)(a) of this section does not apply;

(c) An indefinite term consisting of a minimum of thirty years and a maximum term of life imprisonment if the offense for which the sentence is being imposed is aggravated murder, when the victim of the offense is less than thirteen years of age, a sentence of death or life imprisonment without parole is not imposed for the offense, and division (A)(2)(b)(ii) of section 2929.022, division (A)(1)(e), (C)(1)(a)(v), (C)(2)(a)(ii), (D)(2)(b), (D)(3)(a)(iv), or (E)(1)(d) of section 2929.03, or division (A) or (B) of *section 2929.06 of the Revised Code* requires that the sentence for the offense be imposed pursuant to this division;

(d) An indefinite prison term consisting of a minimum of thirty years and a maximum term of life imprisonment if the offense for which the sentence is being imposed is murder when the victim of the offense is less than thirteen years of age.

(C) (1) If the offender is sentenced to a prison term pursuant to division (A)(3), (B)(1)(a), (b), or (c), (B)(2)(a), (b), or (c), or (B)(3)(a), (b), (c), or (d) of this section, the parole board shall have control over the offender's service of the term during the entire term unless the parole board terminates its control in accordance with *section 2971.04 of the Revised Code*.

(2) Except as provided in division (C)(3) of this section, an offender sentenced to a prison term or term of life imprisonment without parole pursuant to division (A) of this section shall serve the entire prison term or term of life imprisonment in a state correctional institution. The offender is not eligible for judicial release under *section 2929.20 of the Revised Code*.

(3) For a prison term imposed pursuant to division (A)(3), (B)(1)(a), (b), or (c), (B)(2)(a), (b), or (c), or (B)(3)(a), (b), (c), or (d) of this section, the court, in accordance with *section 2971.05 of the Revised Code*, may terminate the prison term or modify the requirement that the offender serve the entire term in a state correctional institution if all of the following apply:

(a) The offender has served at least the minimum term imposed as part of that prison term.

(b) The parole board, pursuant to *section 2971.04 of the Revised Code*, has terminated its control over the offender's service of that prison term.

(c) The court has held a hearing and found, by clear and convincing evidence, one of the following:

(i) In the case of termination of the prison term, that the offender is unlikely to commit a sexually violent offense in the future;

(ii) In the case of modification of the requirement, that the offender does not represent a substantial risk of physical harm to others.

(4) An offender who has been sentenced to a term of life imprisonment without parole pursuant to division (A)(1), (2), or (4) of this section shall not be released from the term of life imprisonment or be permitted to serve a portion of it in a place other than a state correctional institution.

(D) If a court sentences an offender to a prison term or term of life imprisonment without parole pursuant to division (A) of this section and the court also imposes on the offender one or more additional prison terms pursuant to division (B) of *section 2929.14 of the Revised Code*, all of the additional prison terms shall be served consecutively with, and prior to, the prison term or term of life imprisonment without parole imposed upon the offender pursuant to division (A) of this section.

(E) If the offender is convicted of or pleads guilty to two or more offenses for which a prison term or term of life imprisonment without parole is required to be imposed pursuant to division (A) of this section, divisions (A) to (D) of this section shall be applied for each offense. All minimum terms imposed upon the offender pursuant to division (A)(3) or (B) of this section for those offenses shall be aggregated and served consecutively, as if they were a single minimum term imposed under that division.

(F) (1) If an offender is convicted of or pleads guilty to a violent sex offense and also is convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment, count in the indictment, or information charging that offense, or is convicted of or pleads

guilty to a designated homicide, assault, or kidnapping offense and also is convicted of or pleads guilty to both a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information charging that offense, the conviction of or plea of guilty to the offense and the sexually violent predator specification automatically classifies the offender as a tier III sex offender/child-victim offender for purposes of Chapter 2950. of the Revised Code.

(2) If an offender is convicted of or pleads guilty to committing on or after January 2, 2007, a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* and either the offender is sentenced under *section 2971.03 of the Revised Code* or a sentence of life without parole is imposed under division (B) of *section 2907.02 of the Revised Code*, the conviction of or plea of guilty to the offense automatically classifies the offender as a tier III sex offender/child-victim offender for purposes of Chapter 2950. of the Revised Code.

(3) If a person is convicted of or pleads guilty to committing on or after January 2, 2007, attempted rape and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code*, the conviction of or plea of guilty to the offense and the specification automatically classify the offender as a tier III sex offender/child-victim offender for purposes of Chapter 2950. of the Revised Code.

(4) If a person is convicted of or pleads guilty to one of the offenses described in division (B)(3)(a), (b), (c), or (d) of this section and a sexual motivation specification related to the offense and the victim of the offense is less than thirteen years of age, the conviction of or plea of guilty to the offense automatically classifies the offender as a tier III sex offender/child-victim offender for purposes of Chapter 2950. of the Revised Code.

HISTORY:

146 v H 180. Eff 1-1-97; 150 v H 473, § 1, eff. 4-29-05; 151 v S 260, § 1, eff. 1-2-07; 152 v S 10, § 1, eff. 1-1-08; 2011 HB 86, § 1, eff. Sept. 30, 2011.