

**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

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**REPLY BRIEF OF APPELLANT HENRY ALLEN HOLDCROFT**

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## STATEMENT OF THE CASE AND FACTS

Mr. Holdcroft adheres to the statement of the case and facts contained in his previously filed merit brief. (Jan. 7, 2013, Merit Brief, at pp. 1-4).

### 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: 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. This Court should answer the certified-conflict question in the negative and adopt Mr. Holdcroft's proposition of law.

In Ohio, felony sentencing is offense specific. When a defendant has been found guilty of multiple offenses in a given case, individual sanctions must be given for each of the offenses. A "lump-sum" approach to sentencing is unlawful. Mr. Holdcroft was sentenced to prison terms regarding two specific offenses—aggravated arson and arson. And the aggravated-arson prison sentence was ordered to be served before the arson prison sentence. The plain language used by the General Assembly in Ohio's postrelease-control-imposition statutes, and this Court's jurisprudence interpreting those statutes, reveal that Mr. Holdcroft could not have been subjected to a five-year term of mandatory postrelease control regarding his aggravated-arson offense

because he had finished serving the prison sentence associated with that offense by the time that he was resentenced.

In essence, the State of Ohio has adopted and reiterated the holding of the panel's majority in *State v. Holdcroft*, 3d Dist. No. 16-10-13, 2012-Ohio-3066, 973 N.E.2d 334, at ¶ 27-46. (See Feb. 25, 2013, Brief of Appellee, at pp. 3-12). But the reasoning of the panel's majority below was flawed. Mr. Holdcroft addressed the flaws in that holding in his previously filed merit brief. (See Jan. 17, 2013, Merit Brief, Case No. 2012-1325, at pp. 5-17; Jan. 17, 2013, Merit Brief, Case No. 2012-1441, at pp. 5-17). But reply to the State's arguments is necessary.

## **II. Reply to the State's arguments.**

The State has submitted 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 had jurisdiction to impose PRC on both convictions." (Feb. 25, 2013, Brief of Appellee, at p. 2). The State has supported that assertion by incorporating by reference the conclusions reached by the panel's majority below. (Feb. 25, 2013, Brief of Appellee, at p. 3).

The State has adopted the reasoning of the panel's majority 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)." (Feb. 25, 2013, Brief of Appellee, at pp. 4-9); *see also Holdcroft* at ¶ 30. But the court of appeals was wrong. Ohio's sentencing statutes and this Court's authority show 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)), “[s]entence’ 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). Thus, the legislature mandated that a criminal “sentence,” which is composed of “sanctions,” must correspond to “an offense.” It did not permit a lump-sum approach to imposing sanctions or allow any one sanction to attach across multiple offenses.

Further, 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). The legislature’s language states its intention that criminal 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 such as aggravated arson. 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 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 conclusion of the panel's majority and the State, 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.

The majority's interpretation of the terms "prison term" and "sentence," as used in Ohio's sentencing statutes, was erroneous. (See Feb. 25, 2013, Brief of Appellee, at pp. 8-9). 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." Further, Ohio's mandatory-postrelease-control-imposition statutes, R.C. 2929.14(D), R.C. 2929.19(B)(2), and R.C. 2967.28(B), use the phrase "prison term." Ohio's corrective postrelease-control statute, R.C. 2929.191, also uses that term. But in those contexts, 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. 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; *see also State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.3d 332, paragraph one of the 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."). And

while those cases might have involved distinguishable facts—e.g., single-count indictments or multiple counts from multiple indictments—this Court’s holdings are still applicable.

Further, the State has approved of the majority’s opinion that this Court’s postrelease-control decisions provide the “policy lens” through which the issue before this Court should be decided. (Feb. 25, 2013, Brief of Appellee, at pp. 7); *see also Holdcroft* at ¶ 29-34. True, Ohio has laudable interests in assuring that defendants receive notice of postrelease control and the potential consequences of violating postrelease control. *See* R.C. 2929.19; R.C. 2929.191. But more importantly, 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* at ¶ 18; *Hernandez* at ¶ 32; *Bloomer* at ¶ 70; *Simpkins* at the syllabus.

As noted 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, R.C. 2967.28 is appropriately interpreted as follows:

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 ¶ 10. And as this Court noted in *Bloomer*:

In *Woods [v. Telb]*, we held that because postrelease control is part of the original judicially imposed sentence, the parole board’s discretionary ability to impose postrelease control sanctions does not impede the function of the judicial branch and does not violate the separation of powers doctrine. *This is so because the sentencing court made the decision to impose the penalty of postrelease control and the executive officers carried out that judgment.*

(Citation omitted.) *Bloomer* at ¶ 71, citing *Woods v. Telb*, 89 Ohio St.3d 504, 733 N.E.2d 1103 (2000) (holding that the parole board’s statutory authority to impose postrelease control did not violate the separation of powers doctrine, *as long as the trial court incorporated postrelease control into its entry at the time of sentencing*). That is, Ohio’s postrelease control statutes are not merely about notification that postrelease control will occur. They are about the trial court’s actual imposition of postrelease control which permits the Adult Parole Authority to undertake that supervision. 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 wrong.

The State has conceded that “it is difficult to distinguish this Court’s holding in *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, from the issues at bar. (Feb. 25, 2013, Brief of Appellee, at p. 9). That is true. This Court’s reasoning in *Saxon* is directly on point.

In Mr. Holdcroft’s case, 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 Saxon* at ¶ 8-9; *see also Holdcroft* at ¶ 51-55 (Shaw, J., dissenting). In *Saxon*, this Court addressed a portion of Ohio’s felony-sentencing scheme that is similar to Ohio’s postrelease-control-imposition 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.

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 changes based on the degree of the underlying felony offense. *See* R.C. 2967.28(B). The lower Court’s majority ignored this Court’s guidance in that regard. Under R.C. 2929.01, R.C. 2929.14, R.C. 2929.19, R.C. 2967.28, and this Court’s holdings in *Hernandez*, *Fischer*, *Bezak*, *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.

Further, “[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).

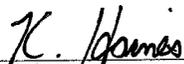
Finally, as the panel’s majority did below, the State has cited to multiple appellate court decisions that addressed issues similar to that which faces this Court. (Feb. 25, 2013, Brief of Appellee, at pp. 9-11); *see also Holdcroft* at ¶ 36-42. For the reasons discussed in Mr. Holdcroft’s previously filed merit brief and herein, the decision of the Eighth District in *Dresser* was correct. Moreover, while the decisions of other lower courts might have been factually distinguishable—e.g., they involved multiple indictments or sentences from different jurisdictions—it remains that the reasoning of the Eighth District in *Dresser* and the dissenting judge below were straight-forward, reflective of the legislature’s directives, and considerate of this Court’s applicable holdings.

### CONCLUSION

The trial court lacked jurisdiction to impose mandatory postrelease control against Mr. Holdcroft regarding his aggravated-arson conviction. For the reasons discussed in Mr. Holdcroft’s previously filed merit brief and herein, 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,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing REPLY 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 15th day of March, 2013.



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