

IN THE SUPREME COURT OF OHIO
CASE NO.

13-1299

STATE OF OHIO

Plaintiff-Appellee

vs.

DEMETRIUS RICHMOND

Defendant-Appellant,

ON APPEAL FROM THE
COURT OF APPEALS FOR
CUYAHOGA COUNTY, EIGHTH
APPELLATE DISTRICT

COURT OF APPEALS
CASE NO: 98915

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT

PAUL MANCINO, JR. (0015576)
75 Public Square
Ste. 1016
Cleveland, Ohio 44113-2098
(216) 621-1742
(216) 621-8465 (Fax)

Counsel for Defendant-Appellant

TIMOTHY J. MCGINTY
Prosecuting Attorney
Courts Tower/Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800
(216) 698-2270 (Fax)

Counsel for Plaintiff-Appellee

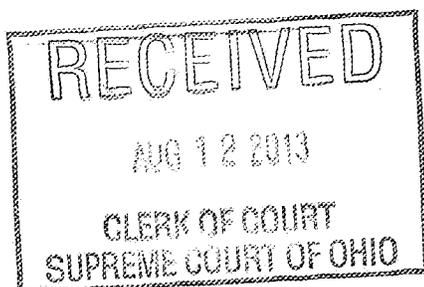
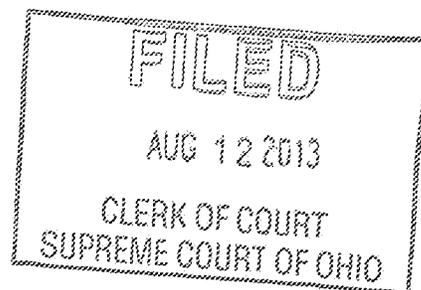


TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS ONE OF GREAT GENERAL AND PUBLIC INTEREST AND RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS.	1
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	5
<u>ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW</u>	
PROPOSITION OF LAW NO. I	7
THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT IMPOSED A CONSECUTIVE SENTENCE IN VIOLATION OF STATUTORY LAW.	
PROPOSITION OF LAW NO. II	8
A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN THE COURT IMPOSES A CONSECUTIVE SENTENCE WITHOUT MAKING REQUIRED FINDINGS	
PROPOSITION OF LAW NO. III	9
A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW AND HIS RIGHTS UNDER THE SIXTH AMENDMENT WHERE MAXIMUM CONSECUTIVE SENTENCES ARE IMPOSED BASED JUDICIAL FACTFINDING.	
PROPOSITION OF LAW NO. IV	9
A DEFENDANT HAS BEEN WAS DENIED DUE PROCESS OF LAW WHEN MAXIMUM CONSECUTIVE SENTENCES ARE IMPOSED BASED ON CONTRADICTORY FINDINGS.	
PROPOSITION OF LAW NO. V	10
A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN THE COURT FAILS TO CONSIDER DEFENDANT’S PRESENT SITUATION IN IMPOSING A MAXIMUM SENTENCES.	
PROPOSITION OF LAW NO. VI	11
A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN THE COURT IMPOSES A FIVE YEAR SENTENCE FOR ENDANGERING CHILDREN WHEN THAT MAXIMUM SENTENCE HAS BEEN REDUCED AT THE TIME OF RESENTENCING TO THIRTY-SIX (36) MONTHS	
PROPOSITION OF LAW NO. VII	12
A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN THE COURT FAILS TO PROPERLY CONSIDER A WAIVER OF COURT COSTS WHERE A DEFENDANT IS IN PRISON AND IS INDIGENT	
SERVICE	13
APPENDIX	14

APPENDIX

Appendix A	<i>State v. Richmond</i> , Case No. 98915 (July 3, 2013) Journal Entry and Opinion	14
------------	---	----

AUTHORITIES

	<u>Page</u>
<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 475-76 (2000)	9
<u>Blakely v. Washington</u> , 542 U.S. 296, 303-04 (2004).	9
<u>Cunningham v. California</u> , 549 U.S. 270, 274 (2007)	9
<u>Fiore v. White</u> , 531 U.S.225, 228-29 (2001)	7/9/12
<u>McCormick v. United States</u> , 500 U.S. 257, 270 n.8 (1991)	12
<u>Pepper v. United States</u> , 131 S.Ct. 1229 (2011),	11
<u>State v. Beasley</u> , 14 Ohio St.3d 74, 471 N.E.2d 774 (1984)	8
<u>State v. Jordan</u> , 104 Ohio St.3d 21, 27, 817 N.E.2d 864, 871 (2004)	8
<u>State v. Joseph</u> , 125 Ohio St.3d 76, 926 N.E.2d 278 (2010).	13
<u>State v. Pelfry</u> , 112 Ohio St.3d 422, 860 N.E.2d 735 (2007)	12
House Bill 86	8
<u>Ohio Revised Code:</u>	
§2905.01	7
§2907.02	7
§2929.11	10/11
§2929.12	10/11
§2929.14(C)(4)	8
§2929.14(E)	7
§2919.22(B)(4)	12
§2947.23	13
§2951.03	11
§2971.03	7
<u>United States Constitution:</u>	
Sixth Amendment	9

EXPLANATION OF WHY THIS CASE IS ONE OF GREAT GENERAL AND PUBLIC INTEREST AND RAISES A SUBSTANTIAL QUESTION.

An overriding issue in this case concerns the changing positions by the prosecutor concerning whether an additional sentence may be imposed for a repeat violent offender specification. Defendant received an additional ten (10) years for the repeat violent offender specification. The court did not make any findings justifying that sentence.

On appeal the Court of Appeals ruled that defendant has to be remanded for resentencing. Thereafter the prosecutor filed an application for reconsideration arguing that a prior decision by the Supreme Court in State v. Foster, 109 Ohio St.3d 1, 845 N.E.2d 470 (2006), rendered the repeat violent offender specification statute unconstitutional as stated in the application for reconsideration:

In this case the State agreed that no findings were made and that the Court should follow the remedy stated in *State v. Warren*, 8th Dist. No. 97837, 2012-Ohio-4721. This Court reversed the repeat violent offender sentence and remanded the matter consistent with the holding in *Warren*, supra. However, after review of the statutory findings this Court has ordered to be made, the State submits that those repeat violent offender findings remain unconstitutional under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 854 N.E.2d 470. In *Foster*, the Ohio Supreme Court specifically found at syllabus paragraph 5, "Because the specifications contained in R.C.2929.14(2)(b) and (D)(3)(b) require judicial factfinding before repeat-violent-offender and major-drug-offender penalty enhancement are imposed, they are unconstitutional. (*Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct.2531, 159 L.Ed.2d 403, followed.) As a remedy, the Court severed the unconstitutional findings. *Id.*, at Syllabus, para.6.

Although the General Assembly renumbered R.C.2929.14 when it revived findings to be made for imposing consecutive sentences, renumbering former R.C. 2929.14(D)(2) as 2929.14(B0(2), the findings required for imposition of an enhanced penalty for repeat violent offenders remain unconstitutional under *Foster*. Thus, this case cannot be remanded for the trial court to make unconstitutional findings; therefore, reconsideration is warranted. Moreover, if the issue of constitutionality⁷ of R.C. 2929.14(B) findings is left unaddressed, the *Warren* and *Richmond* decisions will create confusion by requiring unconstitutional fact finding on the part of the Common Pleas Court. (State's Application for Reconsideration @ pp 2-3).

The state at that point contended that the statute was unconstitutional. If it were unconstitutional then the court could not impose any sentence because an unconstitutional is "inoperative, conferring no rights and imposing no duties, and hence affording no

basis for the challenged decree. ..." Chicote v. Drainage District v. Baxter State Bank, et al., 308 U.S.371, 374 (1940), citing Norton v. Shelby County, 118 U.S. 425, 442 (1886). ("An unconstitutional act is not a law; it confers no rights; it imposes no dates; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed").

The result of this was inconsistent positions were taken by the prosecutor. The prosecutor at the resentencing previously ordered by the Court of Appeals argued that the repeat violent offender specification should again be imposed, the same twenty-eight (28) year sentence reimposed by the court. The court agreed and imposed that sentence which included a ten (10) year sentence for the repeat violent offender specification. This was certainly a denial of due process of law as it resulted in inconsistent positions of the same subject taken by the state. The assertion of different theories can result in a due process violation. Justice Souter, in his concurring opinion in Bradshaw v. Stumpf, 125 S.Ct.2398, 2409 (2005), noted that "if a due process violation is found in the State's maintenance of such inconsistent positions, there will be remedial questions. ..."

This was improper under the judicial estoppel doctrine whose "... purpose is 'to protect the judicial process,' ... 'by prohibiting parties from deliberately changing positions according to the exigencies of the moment,' ..." New Hampshire v. Maine, 532 U.S. 368, 749-50 (2001). This doctrine applies to the government and is even applicable in a single proceeding. United States v. McCaskey, 9 F.3d 368, 378-79 (5th Cir.1992).

The Supreme Court has observed, "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954).

A second important issue is concerning the fact of the rewording of a criminal statute duly enacted by the Ohio General Assembly. This involved whether consecutive sentences were eliminated when an amendment to Ohio law was passed. The Court of Appeals

essentially engaged in legislation which is a function of the Ohio General Assembly when it ruled:

The legislative power of the state shall be vested in a general assembly consisting of a senate and a house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided.

Thus, to characterize the duly enacted statute as a “**typographical error**” exceeds the authority of this court. If that be the case, then the General Assembly did not even amend the statute because the court did that for that General Assembly. However this ruling contravenes well settled pronouncements by the Ohio Supreme Court where the Supreme Court has declared:

“In considering the statutory language, it is the duty of the court to give effect to the words used in a statute, not to delete words used or to insert words not used. ...” *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 39-40, 741 N.E.2d 121, 123 (2001).

Therefore, it is the duty of the court to apply the statute as enacted and not to amend the statute by stating that there was a “**typographical error**” in the statute. In this regard, the court usurped the authority of the Ohio General Assembly and the Ohio Constitution.

Therefore, since the Ohio General Assembly has enacted a law which precludes the imposition of consecutive sentences in this instance state law must be applied and this court is without authority to amend that law.

STATEMENT OF THE CASE

Defendant was indicted on July 10, 2010 in an eleven (11) count indictment. This was the third time defendant had been indicted in connection with the events charged in this indictment. Defendant was previously indicted under Case Nos. CR526370 and CR534693.

The indictment charged defendant with one count of felonious assault with a notice of prior conviction and a repeat violent offender specification. Defendant was charged with a count of domestic violence, five (5) counts of endangering children, one count of rape with a sexual violent predator specification, a notice of prior conviction and repeat violent offender specification. Defendant was also charged with a count of kidnapping, a misdemeanor count of endangering children, and two misdemeanor counts of endangering children.

Trial commenced on November 8, 2010.

On November 15, 2010 defendant was found guilty on all eleven counts of the indictment. The trial court then found defendant guilty of the specifications contained in counts 1, 8 and 9 of the indictment except the sexually violent predator specification. The court immediately sentenced defendant to eight (8) years for felonious assault with an additional ten (10) year sentence for the repeat violent offender specification for a total of eighteen (18) years. Defendant received a six (6) month concurrent sentence for domestic violence and a five (5) year sentence for each of the counts of endangering children which were to be served concurrently with the eighteen (18) year sentence on count one. Defendant was sentenced to a ten (10) year term of imprisonment for rape which was consecutive to the eighteen (18) year sentence on count one. Defendant was sentenced to a ten (10) year sentence on count 9, kidnapping, five (5) years on count 10 endangering children and six (6) months on count eleven. These were to be served concurrently. Defendant's total sentence totaled twenty-eight (28) years of imprisonment.

On December 15, 2011 the Court of Appeals for Cuyahoga County affirmed the conviction but reversed and remanded on various sentencing issue. Case No. 96156, 2011-Ohio-6450. A further appeal by defendant to the Ohio Supreme Court was not accepted on May 9, 2012. 131 Ohio St.3d 1543, 966 N.E.2d 895 (2012).

STATEMENT OF FACTS

This matter came on for a resentencing on August 1, 2012 after a reversal and remand by the Court of Appeals for Cuyahoga County. Initially the court recited its recollection of the facts from the Court of Appeals opinion and the fact that defendant was found guilty and sentenced to Twenty-Eight (28) years of imprisonment. (Tr. 3-9). The court was merely reading from the opinion of the Court of Appeals noting that the court had previously stated that defendant was **“a sadistic bully who prays on weeks, defenseless individuals. You picked on a defenseless, little boy and used him as your punching bag for years.”** (Tr.9). The court noted that it was anticipated that the state would move to merge counts 3 to 7.

The prosecutor stated he would ask that counts 1, 2 and 3 be merged and that the court should sentence on count 1, felonious assault with two RVO specifications and a notice of prior conviction. In addition the prosecutor requested that the court, on counts 4, 5, 6, and 7, he merge into count 7, endangering children, a felony of the second degree. In addition the prosecutor asked that count 8 and 9 merged into count 8, the rape count and that counts 10 and 11 be merged into count 8. (Tr.10-11).

As a result, the prosecutor requested that the court sentence on count 1, felonious assault with a notice of prior conviction and RVO specifications, count 7, endangering children, count 8, rape with a notice of prior conviction and RVO specifications. The prosecutor also requested that the notices of prior conviction and the RVO specifications be merged for purposes of sentencing and that the court again impose the same eighteen (18) year concurrent sentence plus ten (10) years resulting in a Twenty-eight (28) year sentence. (Tr. 11-12).

The court noted that whether prior to or after the passage of House Bill 86 the harm was so great that a single term did not adequately reflect the seriousness of the conduct and stated:

And, Mr. Mancino, you indicated that these weren't the worst type of offenses. There was nothing about the victim's behavior, a young boy, that would have provoked anyone to harm him. However, your client not only threw him out of the shower, breaking his arm, he refused to give him the medical attention he needed afterwards for it. He then committed a rape offense something later.

And, the offense of rape, anal rape of a child is, in this Court's opinion the worst form of the offense of rape.

So, I think the behavior in this case clearly justifies consecutive sentence, necessary to protect the public from future crime by this Defendant and to punish his conduct. And is not disproportionate with other sentences. Court will note that yesterday, a former county commissioner was sentenced to 28 years and he didn't break anybody's arm and he didn't anally rape anybody. So, that sentence is okay, 28 years for anal rape and broken arm of a young victim is certainly appropriate.

So, Mr. Richmond, I'm going to impose the same sentence I imposed back in 2010. I will impose 8 years on the base count of felonious assault, Count 1, plus an additional 10 years for the RVO specification, for a total sentence on Count 1 of 18 years. I impose a ten-year sentence on the rape offense in Count 8 and that would run consecutive with Count 1 for a total sentence of 28 total years. And then I will impose a sentence of 5 years on Counts 4, 5, 6 and 7 to run concurrent to the other time, for a total sentence of 28 years.

Now, Mr. Richmond indicated that he earned 16 dollars a month pay. He's got 28 years; 16 dollars a month, to pay court costs. And, Court finds he has the ability to pay court costs. He is a Tier III sex offender/ child victim offense; lifetime in-person verification every 90 days following his release from prison.

Mr. Richmond, you are ordered remanded. Good luck. (Tr.21-23).

**ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW
PROPOSITION OF LAW NO. I
THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT
IMPOSED A CONSECUTIVE SENTENCE IN VIOLATION OF STATUTORY LAW.**

The court, on August 1, 2012, imposed exactly the same sentence of twenty-eight (28) years even noting in its journal entry that twenty-eight (28) years was “**not worst type of offenses.**”. In any event, the imposition of consecutive sentences violated current statutory law which resulted in a denial of due process of law.

Section 2929.41(A) of the Ohio Revised Code states:

“Except as provided in division (B) of this section, division (E) of section 2929.14, or division (D) or (E) of section 2971.03 of the Revised Code, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States. ...”

Section 2929.14(E) of the Ohio Revised Code only provides that certain crimes where a court can impose consecutive sentences. These crimes include a violent sex offense, a designated homicide, assault, kidnapping offense, and an offense where the offender is adjudicated to be a sexually violent predator. In addition, certain offenses under §2907.02 of the Ohio Revised Code containing certain specifications or attempted rape or convictions for a violation of §2905.01 of the Ohio Revised Code where the person is sentenced under §2971.03 of the Ohio Revised Code. Moreover, certain sentences imposed under §2971.03 of the Ohio Revised Code likewise authorize consecutive sentences. However, those provisions are totally inapplicable to the case at hand and the court was statutorily precluded from imposing a consecutive sentence.

Accordingly, the failure to follow the applicable law in imposing a sentence violated due process of law. *Fiore v. White*, 531 U.S.225, 228-29 (2001). As a result, the sentence in this case was illegal and one clearly not authorized by law. Therefore, the sentence under review has to be vacated.

... Crimes are statutory, as are penalties therefor, and the only sentence that a trial court judge may impose is that provided for by

statute. A court has no power to substitute a different sentence for that provided for by statute or one that is either greater or lesser than that provided for by law. ... *Colegrove v. Burns*, 175 Ohio St. 437, 438, 195 N.E.2d 811, 812 (1964).

If a statutorily incorrect sentence is imposed that sentence may be corrected at any time. *State v. Beasley*, 14 Ohio St.3d 74, 471 N.E.2d 774 (1984). See *State v. Jordan*, 104 Ohio St.3d 21, 27, 817 N.E.2d 864, 871 (2004) (holding that “*where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is, likewise, to resentence the defendant. ...*”) In *Beasley*, the court ruled:

that any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void. ... In doing so the trial court exceeded its authority and this sentence must be considered void. Jeopardy did not attach to the void sentence and therefore, the court's imposition of the correct sentence did not constitute double jeopardy. 14 Ohio St. 3d at 75, 471 N.E.2d at 774.

**PROPOSITION OF LAW NO. II
A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN THE COURT
IMPOSES A CONSECUTIVE SENTENCE WITHOUT MAKING REQUIRED
FINDINGS**

At the resentencing, the court imposed the same sentence noting that a former county commissioner had been sentenced to the same sentence of twenty-eight (28) years and he did not break anybody's arm and did not anally rape anybody. (Tr.22). The court then went on to note that consecutive sentences were necessary to protect the public from future crime by the defendant to punish his conduct. This sentence was not disproportionate with other sentences. (Tr.22). However, effective September 30, 2011, as required by House Bill 86, a court must make specific findings before imposing consecutive sentences authorized by §2929.14(C)(4) of the Ohio Revised Code:

- (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

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.

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

Consequently the court's rote recitation as to whether it was necessary to impose consecutive sentences was improper. It did not comply with the law. Therefore, it violated due process of law. *Fiore v. White*, 531 U.S. 225, 228-29 (2001).

**PROPOSITION OF LAW NO. III
A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW AND HIS RIGHTS
UNDER THE SIXTH AMENDMENT WHERE MAXIMUM CONSECUTIVE SENTENCES
ARE IMPOSED BASED JUDICIAL FACTFINDING.**

At the resentencing hearing the court based its decision upon factfindings in this case. Defendant was convicted of various offenses and the only additional specifications of the some of the counts was that there was serious physical harm which would elevate the degree of the offense of child endangering. Thus the court stated:

And, Mr. Mancino, you indicated that these weren't the worst type of offenses. There was nothing about the victim's behavior, a young boy, that would have provoked anyone to harm him. However, your client not only threw him out of the shower, breaking his arm, he refused to give him the medical attention he needed afterwards for it. He then committed a rape offense something later.

And, the offense of rape, anal rape of a child is, in this Court's opinion the worst form of the offense of rape. (Tr.21-22)

None of these improper sentencing considerations are authorized by statute. This also constituted judicial factfinding prohibited by the Sixth Amendment. *Apprendi v. New Jersey*, 530 U.S. 466, 475-76 (2000). See *Cunningham v. California*, 549 U.S. 270, 274 (2007); *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).

**PROPOSITION OF LAW NO. IV
A DEFENDANT HAS BEEN WAS DENIED DUE PROCESS OF LAW WHEN
MAXIMUM CONSECUTIVE SENTENCES ARE IMPOSED BASED ON
CONTRADICTORY FINDINGS.**

The court, at resentencing, only stated it was going to impose the same sentence

that he had imposed in 2010. (Tr.21-23). However this was based on contradictory statements.

This sentence reflected a total disregard of the felony sentencing statutes. Section 2929.11 of the Ohio Revised Code provides what must be considered in a felony sentence:

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentence court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

In addition to these considerations the court is required to consider additional factors set forth in §2929.12 of the Ohio Revised Code in imposing a sentence. There was absolutely nothing considered in this case.

Moreover, there was a complete contradiction in this case because the court, in its journal entry of sentencing stated that these offenses were “ ‘ **NOT WORST TYPE OF OFFENSES.**’ ” As a result they are not the worst type of offenses then imposing the worst type or maximum sentence was certainly improper and contrary to law.

**PROPOSITION OF LAW NO. V
A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN THE COURT
FAILS TO CONSIDER DEFENDANT'S PRESENT SITUATION IN IMPOSING A
MAXIMUM SENTENCES.**

The current sentence under review was imposed by the court on August 1, 2012. Defendant had been originally arrested in this case on September 14, 2009. Even at the time of the original sentencing in this case the court proceeded to impose sentence without even a presentence investigation report. (Tr.21-23). Consequently the court had no

information concerning defendant, his history, family situation and other matters that would be provided for in a presentence investigation report. Ohio Revised Code §2951.03

Some three (3) years later when the resentencing occurred defendant had been in prison and the court again had no current information as to what defendant was doing, whether he was being rehabilitated and what programs he may have engaged in while in prison. This would be a proper consideration and the failure to do so constituted denial of due process of law.

A similar issue was considered by the United States Supreme Court where the issue of whether post-sentencing behavior could be considered at a resentencing hearing. In an unusual case, Pepper v. United States, 131 S.Ct. 1229 (2011), defendant appeared for several resentencing hearings after resentencing as the result of various appeals. The federal sentencing statutes require a court to consider basically similar information and impose a sentence consistent with Ohio's similar purposes and principles of sentencing contained in §§2929.11 and 2929.12 of the Ohio Revised Code.

**PROPOSITION OF LAW NO. VI
A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN THE COURT
IMPOSES A FIVE YEAR SENTENCE FOR ENDANGERING CHILDREN WHEN THAT
MAXIMUM SENTENCE HAS BEEN REDUCED AT THE TIME OF RESENTENCING
TO THIRTY-SIX (36) MONTHS**

At the resentencing hearing, counsel did not believe that the endangering children conviction was a felony of the second degree. At most, it was a felony of the third degree which would carry a maximum sentence of thirty-six (36) months. (Tr.12). However, the court proceeded to sentence defendant on count seven to a term of five (5) years while merging counts 4, 5, and 6 into count 7. (Tr.21-23).

This sentence was improper and contrary to law. The court, in instructing the jury at the original trial on count 7, stated:

Count 7, endangering children. Before you can find Demetrius Richmond guilty of child endangering in Count 7, you must find beyond a reasonable doubt that on or about the dates August 22nd through the 25th, did to Carl Fountain, a child under 18 years of age, recklessly repeatedly

administered unwarranted disciplinary measures to the child, when there was a substantial risk that such contact if continued would seriously impair or retard the child's mental health and development.

All the definitions that have been previously given for you apply to this count. (Tr.642).

Although the jury verdict reflected that the serious physical harm resulted from child endangering, there was no finding as to the age of the child under the age of eighteen (18) years which would elevate this offense to a felony of the second degree under §2919.22(B)(4) of the Ohio Revised Code. Lacking that finding, the court could not sentence for a felony of the second degree. State v. Pelfry, 112 Ohio St.3d 422, 860 N.E.2d 735 (2007).

The constitutional right violated by the sentence imposed was "... **that in a criminal case a defendant is constitutionally entitled to have the issue of criminal liability determined by a jury in the first instance. ...**" McCormick v. United States, 500 U.S. 257, 270 n.8 (1991). Further:

This court had never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory presented to the jury. McCormick v. United States, 500 U.S. 257, 270 n.8 (1991)
See Fiore v. White, 531 U.S. 225, 228-29 (2001).

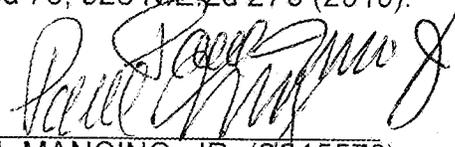
**PROPOSITION OF LAW NO. VII
A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN THE COURT
FAILS TO PROPERLY CONSIDER A WAIVER OF COURT COSTS WHERE A
DEFENDANT IS IN PRISON AND IS INDIGENT**

At the resentencing hearing counsel moved that the court consider a waiver of court costs as defendant was indigent and had been in prison for some three and a half (3½) years. (Tr.14-15). All that the court responded was that inmates can be paid for some of their work therefore the court stated:

Now, Mr. Richmond indicated that he earned 16 dollars a month pay. He's got 28 years; 16 dollars a month, to pay court costs. And, Court finds he has the ability to pay court costs. He is a Tier III sex offender/ child victim offense; lifetime in-person verification every 90 days following his release from prison. (Tr.23).

Section 2947.23 of the Ohio Revised Code requires that a court at sentencing to notify the defendant that if the defendant fails to pay the judgment for costs or make timely payments the court may order the defendant to perform community service in a specified amount until the costs are paid.

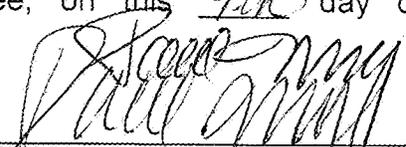
The failure of the court to advised defendant concerning costs but yet entering costs in sentencing entry is error. **State v. Joseph**, 125 Ohio St.3d 76, 926 N.E.2d 278 (2010).



PAUL MANCINO, JR. (0015576)
Attorney for Defendant-Appellant
75 Public Square, #1016
Cleveland, Ohio 44113-2098
(216) 621-1742
(216) 621-8465 (Fax)

SERVICE

A copy of the foregoing **Memorandum in Support of Jurisdiction** has been sent to Timothy J. McGinty, Attorney for Plaintiff-Appellee, on this 9th day of AUGUST, 2013.



PAUL MANCINO, JR. (0015576)
Attorney for Defendant-Appellant

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
98915

LOWER COURT NO.
CP CR-540291

COMMON PLEAS COURT

-vs-

DEMETRIUS RICHMOND

Appellant

MOTION NO. 465712

Date 7/03/2013

Journal Entry

Motion by appellee for reconsideration is granted. Sua sponte, the journal entry and decision released and journalized June 6, 2013, 2013-Ohio-2333, is hereby vacated and substituted with the journal entry and opinion issued this same date.

Judge KATHLEEN ANN KEOUGH, Concur

Judge EILEEN T. GALLAGHER, Concur

RECEIVED FOR FILING

JUL X 3 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By [Signature] Deputy

[Signature]
SEAN C. GALLAGHER
Presiding Judge

APPENDIX
A

14

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98915

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEMETRIUS RICHMOND

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART,
REVERSED IN PART, AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-540291

BEFORE: S. Gallagher, P.J., Keough, J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: July 3, 2013

15

+

ATTORNEY FOR APPELLANT

Paul Mancino, Jr.
75 Public Square
Suite 1016
Cleveland, OH 44113-2098

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

By: William Leland
Daniel T. Van
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

FILED AND JOURNALIZED
PER APP.R. 22(C)

JUL X 3 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By SMH Deputy

16

ON RECONSIDERATION¹

SEAN C. GALLAGHER, P.J.:

{¶1} Appellant Demetrius Richmond appeals from the sentence that was imposed by the trial court following a remand for merger of offenses in *State v. Richmond*, 8th Dist. No. 96155, 2011-Ohio-6450 (*Richmond I*). For the reasons stated herein, we affirm Richmond's sentence, except with regard to the repeat violent offender specification, which we remand for a limited sentencing hearing.

{¶2} In July 2010, Richmond was charged under an 11-count indictment with offenses that arose from Richmond's physical and sexual abuse of his girlfriend's son over a period of several years. The charges included domestic violence, multiple counts of endangering children, felonious assault, rape, and kidnapping. The indictment also included sexually violent predator, repeat violent predator, and sexual motivation specifications. Richmond was found guilty of all counts and sentenced to an aggregate term of 28 years in prison.

{¶3} On direct appeal in *Richmond I*, this court affirmed in part, reversed in part, and remanded for a limited sentencing hearing to address the issues of

¹ The original decision in this appeal, *State v. Richmond*, 8th Dist. No. 98915, 2013-Ohio-2333, released June 6, 2013, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(C); see also S.Ct.Prac.R. 7.01.

17

merger of allied offenses and court costs. The underlying facts of the case are detailed in *Richmond I* and incorporated herein.

{¶4} Richmond also filed a petition for postconviction relief relating to his speedy trial rights that was denied by the trial court. This court affirmed that ruling in *State v. Richmond*, 8th Dist. No. 97616, 2012-Ohio-2511.

{¶5} Upon remand from *Richmond I*, the state elected to merge Counts 1 through 3 into Count 1, Counts 4 through 7 into Count 7, and Counts 8 through 11 into Count 8. The trial court sentenced Richmond to eight years on Count 1, felonious assault, plus an additional ten years for the repeat violent offender specification; a consecutive ten-year sentence on Count 8, rape; and a concurrent five-year sentence on Count 7. The court imposed an aggregate term of 28 years in prison, included mandatory 5 years of postrelease control, imposed court costs, and classified Richmond as a Tier III sex offender.

{¶6} Richmond timely filed this appeal from the sentence imposed upon remand. He raises nine assignments of error for our review. His first assignment of error provides as follows:

I. Defendant was denied due process of law when the court imposed consecutive sentence in violation of statutory law.

{¶7} Richmond asserts that the trial court was statutorily precluded from imposing consecutive sentences. He asserts that none of the provisions that authorize consecutive sentences are applicable and, therefore, his sentence is not

18

authorized by law. At the time of Richmond's sentencing in August 2012, R.C. 2929.41(A), provided as follows:

Except as provided in division (B) of this section, division (E) of section 2929.14, or division (D) or (E) of section 2971.03 of the Revised Code, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States. Except as provided in division (B)(3) of this section, a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution.

{¶8} This court has previously found the statute's failure to reflect the renumbering of the judicial fact-finding requirements for consecutive sentencing from R.C. 2929.14(E) to R.C. 2929.14(C) is a typographical error. *State v. Simonoski*, 8th Dist. No. 98496, 2013-Ohio-1031, ¶ 6; *State v. Walker*, 8th Dist. No. 97648, 2012-Ohio-4274, ¶ 81, fn. 2; *State v. Ryan*, 8th Dist. No. 98005, 2012-Ohio-5070, 980 N.E.2d 553. "In fact, the legislature made its intent clear by recently amending the section in September 2012, to change the (E) to (C)." *Simonoski* at ¶ 7.

{¶9} Accordingly, we overrule Richmond's first assignment of error.

{¶10} Richmond's second assignment of error provides as follows:

II. Defendant was denied due process of law when the court imposed consecutive sentences without appropriate findings.

{¶11} Richmond claims that the trial court failed to comply with H.B. 86 when it imposed consecutive sentences and asserts that the trial court was

required to make specific findings pursuant to R.C. 2929.14(C)(4). R.C. 2929.14(C)(4) provides that a court may issue consecutive prison terms if the court finds (1) “the consecutive service is necessary to protect the public from future crime or to punish the offender,” (2) “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 (3) one of three enumerated factors applies to the offender. R.C. 2929.14(C)(4)(a)–(c).

{¶ 12} Richmond acknowledges that the trial court found the requirements for consecutive sentences were met, but complains that the court failed to articulate specific findings. We find no merit to this argument. Although R.C. 2929.14(C)(4), as amended by H.B. 86, requires the court to make certain findings before issuing consecutive prison terms, “a sentencing judge need only make the required statutory findings under R.C. 2929.14(C)(4) — there is no need for the court to state the reasons underlying those findings.” *State v. Jarrett*, 8th Dist. No. 98759, 2013-Ohio-1663, ¶ 5. As this court recognized in *Simonoski*, 8th Dist. No. 98496, 2013-Ohio-1031, at ¶ 20:

There was no reason for the court to state its reasons for the findings. The General Assembly deleted R.C. 2929.19(B)(2)(c) in H.B. 86. This was the provision in S.B. 2 that had required sentencing courts to state their reasons for imposing consecutive sentences on the record. Accordingly, a trial court is not required to articulate and justify its findings at the sentencing hearing. Thus, although a trial court is free to articulate or justify its findings, there is no statutory requirement that it do so. *State v. Goins*, 8th Dist. No. 98256, 2013-Ohio-263, ¶ 11.

{¶13} In any event, a review of the record herein shows that the trial court articulated its findings:

[E]ither pre or post H.B. 86, [the] Court does find the harm was so great that a single term does not adequately reflect the seriousness of the conduct.

And, [defense counsel], you indicated that these weren't the worst type of offenses. There was nothing about the victim's behavior, a young boy, that would have provoked anyone to harm him. However, your client not only threw him out of the shower, breaking his arm, he refused to give him the medical attention he needed afterwards for it. He then committed a rape offense sometime later.

And, the offense of rape, anal rape of a child is, in this Court's opinion, the worst form of the offense of rape.

So, I think the behavior in this case clearly justifies consecutive sentences, necessary to protect the public from future crime by this Defendant and to punish his conduct. And is not disproportionate with other sentences. * * * 28 years for anal rape and broken arm of a young victim is certainly appropriate.

{¶14} Because the trial court made appropriate findings in compliance with R.C. 2929.14(C), we overrule Richmond's second assignment of error.

{¶15} Richmond's third assignment of error provides as follows:

III. Defendant was denied due process of law when the court imposed maximum consecutive sentences along with an additional sentence for repeat violent offender specification and failing to make the required statutory findings.

{¶16} The trial court imposed a sentence of eight years on Count 1 for felonious assault, which was a maximum sentence, plus an additional ten years on the repeat violent offender specification. Richmond argues that the trial

court failed to make the necessary findings for imposing the sentence on the repeat violent offender specification.

{¶17} We recognize that the state initially conceded that the trial court erred. However, in a motion for reconsideration of this court's original opinion, the state raised concerns regarding the validity of the reenacted "findings" required for the imposition of additional prison time for repeat violent offenders under R.C. 2929.14(B)(2)(a)(iv) and (v) as enacted under H.B. 86. We issue this revised opinion to provide clarity on the process moving forward to ensure both this opinion and *State v. Warren*, 8th Dist. No. 97837, 2012-Ohio-4721, are not misunderstood on this subject.

{¶18} The state reads the Supreme Court of Ohio's decision in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768 (putting the ball back in the legislature's hands with respect to required "findings"), to be narrowly confined to consecutive sentences. Thus, it views the enactment in H.B. 86 reviving the required "findings" for repeat violent offenders to be unconstitutional pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶19} The state failed to raise this issue in the trial court below and failed to raise this issue in the initial appeal. Arguably, R.C. 2953.08(B) authorizes the state to appeal sentences that are "contrary to law." Whether the renewed "findings" requirement for repeat violent offenders under H.B. 86 runs afoul of

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), or *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and is thus “contrary to law,” is an argument for another day.

{¶20} Because the constitutionality of the revised portions of R.C. 2929.14(B)(2)(a)(iv) and (v) following the enactment of H.B. 86 was not raised by Richmond or properly asserted by the state, we have limited our review and need not reach an ultimate determination of the issue. We shall proceed to address the trial court’s compliance with the requirements of R.C. 2929.14(B)(2)(a).

{¶21} Pursuant to R.C. 2929.14(B)(2)(a), in addition to the longest prison term authorized for the offense, the sentencing court may impose an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years for the repeat violent offender specification, 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 * * * 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.

(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 * * * 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 * * * 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.

{¶22} In this case, Richmond was convicted of felonious assault, a first-degree felony that is an offense of violence, and its accompanying repeat violent offender specification. The trial court sentenced Richmond to the maximum term of imprisonment on the felonious assault count. Because the trial court failed to address the finding requirements of R.C. 2929.14(B)(2)(a)(iv) and (v), we must reverse and remand for a resentencing hearing on the repeat violent offender specification only. *See State v. Warren*, 8th Dist. No. 97837, 2012-Ohio-4721, ¶ 12.

{¶23} Richmond's fourth assignment of error provides as follows:

IV. Defendant was denied due process of law when the court imposed a maximum consecutive sentence based upon an unconstitutional judicial fact-finding.

{¶24} Richmond claims the trial court's statements with regard to his conduct against the young victim constituted unconstitutional judicial fact-finding. The subject statements are contained in the dialogue set forth under

24

the second assignment of error and were made in the context of justifying the court's findings supporting the imposition of consecutive sentences. While trial courts are no longer required to articulate reasons for imposing consecutive sentences, they are free to do so. *State v. Goins*, 8th Dist. No. 98256, 2013-Ohio-263, ¶ 11. Accordingly, we overrule Richmond's fourth assignment of error.

{¶25} Richmond's fifth assignment of error provides as follows:

V. Defendant was denied due process of law when the court imposed maximum consecutive sentences based upon contradicting findings.

{¶26} Richmond claims the trial court failed to make the requisite considerations under R.C. 2929.11 and 2929.12. He further claims that a contradiction is present in the court's journal entry that contains the remark "not worst type of offenses."

{¶27} R.C. 2929.11(A) provides that when a trial court sentences an offender for a felony conviction, it must be guided by the "overriding purposes of felony sentencing." Those purposes are "to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.11(B) requires a felony sentence to be reasonably calculated to achieve the purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim and consistent with sentences imposed for similar crimes committed by similar offenders. R.C.

25

2929.12 provides a nonexhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses.

{¶28} In this case, the transcript reflects that the trial court found consecutive sentences were necessary to protect the public from future crime by Richmond and to punish his conduct. The court also found the sentence was not disproportionate to other sentences. The court also stated in its journal entry that “prison is consistent with the purpose of R.C. 2929.11.”

{¶29} Although the journal entry contains the statement “not worst type of offenses,” it is apparent from the transcript that the trial court found otherwise. At the sentencing hearing, the trial court disagreed with defense counsel’s position that “these weren’t the worst type of offenses.” Upon reviewing Richmond’s conduct against the young victim, the court specifically found that “the offense of rape, anal rape of a child is, in this Court’s opinion, the worst form of the offense of rape.” Upon remand, the trial court may amend the sentencing entry nunc pro tunc to reflect that which transpired at the sentencing hearing.

{¶30} Upon the record before us, we cannot conclude that the sentence was improper or contrary to law. Richmond’s fifth assignment of error is overruled.

{¶31} Richmond’s sixth assignment of error provides as follows:

VI. Defendant was denied due process of law when the court failed to consider defendant's situation in imposing maximum sentences.

{¶32} Richmond claims that the trial court should have considered his behavior during the intervening period from his original sentencing and his resentencing. The record reflects that both defense counsel and Richmond were afforded the opportunity to address the court and offer circumstances for the court's consideration. Further, there is nothing in the record to support Richmond's assertion. Under similar circumstances, we found no merit to a similar argument in *State v. Sutton*, 8th Dist. No. 97132, 2012-Ohio-1054, ¶ 31.

{¶33} Richmond also complains that the trial court imposed the sentence without a presentence investigation report. Crim.R. 32.2(A) provides that "in felony cases the court shall, and in misdemeanor cases may, order a presentence investigation and report before granting probation." The trial court did not impose probation and was not obligated to order a presentence investigation report prior to imposing a prison term. See *State v. Davis*, 8th Dist. No. 95722, 2011-Ohio-1377, ¶ 9; R.C. 2951.03.

{¶34} Accordingly, we reject Richmond's sixth assignment of error.

{¶35} Richmond's seventh assignment of error provides as follows:

VII. Defendant was denied due process of law when the court imposed a five year sentence for endangering children on count seven.

{¶36} Richmond argues that his sentence for endangering children under R.C. 2919.22(B)(4) should have been for a felony of the third degree, rather than second degree, because there was no finding that the child was under the age of 18.

{¶37} R.C. 2919.22(B)(4) provides as follows:

No person shall do any of the following to a child under eighteen years of age: * * * (4) Repeatedly administer unwarranted disciplinary measures to the child, when there is a substantial risk that such conduct, if continued, will seriously impair or retard the child's mental health or development.

A violation of this section is a felony of the second degree if "the violation results in serious physical harm to the child involved." R.C. 2919.22(E)(3).

{¶38} Under R.C. 2919.22(B)(4), the victim being under 18 years old is an element of the crime. It is not an aggravating factor for purposes of elevating the offense, as argued by Richmond.

{¶39} Our review reflects that the jury was properly instructed on Count 7 for endangering children, which included that the victim was a child under 18. Because the jury verdict reflected serious physical harm, Richmond was found guilty of the offense as a felony of the second degree. Therefore, his five-year sentence on this count was properly imposed. Richmond's seventh assignment of error is overruled.

{¶40} Richmond's eighth assignment of error provides as follows:

28

VIII. Defendant was denied due process of law when the court failed to properly consider a waiver of court costs as defendant was indigent.

{¶41} “[A] trial court may assess court costs against a convicted indigent defendant” who has been convicted of a felony. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. Further, while waiver of court costs against an indigent defendant is permissible, it is not required. *Id.* at ¶ 14; *State v. Perry*, 8th Dist. No. 97696, 2012-Ohio-3573, ¶ 10. The decision to impose costs will not be reversed absent an abuse of discretion. *Perry* at ¶ 12.

{¶42} In imposing court costs in this case, the trial court indicated that Richmond would be in prison for 28 years and would be earning \$16 a month in pay. Insofar as Richmond claims that the court failed to notify him that the failure to make timely payments could result in an order that he perform community service, such an advisement would have been impractical given Richmond’s lengthy prison term. Further, then R.C. 2947.23(A)(1)(a) had indicated “the failure to give this notice does not affect the court’s ability to require community service and, effective March 22, 2013, the trial court is no longer required to give this notice to offenders who receive a prison sentence. *See* 2012 Sub.H.B. 247.” *State v. Haney*, 2d Dist. No. 25344, 2013-Ohio-1924, ¶ 21.

{¶43} Finding no abuse of discretion or error by the trial court, we overrule Richmond’s eighth assignment of error.

{¶44} Richmond's ninth assignment of error provides as follows:

IX. Defendant was denied due process of law and subjected to multiple punishments when the court failed to grant defendant appropriate jail time credit.

{¶45} Richmond argues that the trial court failed to give him appropriate jail-time credit, reflecting the time between his original sentencing and the time of his resentencing. After this appeal was filed, Richmond filed a motion for jail-time credit that was granted by the trial court and has rendered this assignment of error moot.

{¶46} In conclusion, we affirm the judgment of the trial court except with regard to the repeat violent offender specification. Because the trial court failed to address the finding requirements of R.C. 2929.14(B)(2)(a)(iv) and (v), we must reverse and remand for a resentencing hearing on the repeat violent offender specification only.

{¶47} Judgment affirmed in part, reversed in part; case remanded.

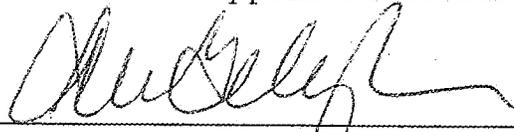
It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to

Rule 27 of the Rules of Appellate Procedure.



SEAN C. GALLAGHER, PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and
EILEEN T. GALLAGHER, J., CONCUR