

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 14-0425

STATE OF OHIO

APPELLANT

-VS-

ON APPEAL FROM THE PORTAGE  
COUNTY COURT OF APPEALS  
ELEVENTH APPELLAT DISTRICT

SHAWN WARE

APPELLEE

COURT OF APPEALS  
CASE NO. 2013-P-0011

CERTIFIED CONFLICT CASE

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MERIT BRIEF OF APPELLEE  
SHAWN WARE

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**TABLE OF CONTENTS**

|  | <u>PAGE</u> |
|--|-------------|
| TABLE OF AUTHORITIES.....  | ii          |
| STATEMENT OF FACTS .....   | 1           |
| ARGUMENT .....   | 3           |
| <u>Certified Conflict Issue</u> .....  | 3           |
| When the imposition of a mandatory prison term is statutorily mandated for a specific felony offense, is the trial court permitted to impose a total prison term within the maximum allowed, only a portion of which is mandatory under the statute  |             |
| <u>Appellee’s Proposed Finding</u> .....   | 4           |
| Other than for offenses as for which a definite mandatory prison term has been specifically set forth, a sentencing court is authorized to impose un-equivalent mandatory and stated terms of imprisonment for an offense providing for definite prison terms according to the degree of the offense as classified by statute in accordance with and by application of the overall purposes and principles of felony sentencing expressed in R.C. 2929.11 and consideration of sentencing factors set forth in R.C. 2929.13, 2929.11, and 2929.12. |             |
| CONCLUSION .....   | 12          |
| PROOF OF SERVICE .....   | 14          |

## TABLE OF AUTHORITIES

|  | <u>PAGE</u> |
|--|-------------|
| 1. R.C. 2929.01 (Y)(1) .....   | 4           |
| 2. R.C. 2929.01 (CC) .....   | 5           |
| 3. R.C. 2929.01 (GG) .....   | 5           |
| 4. <u>Yonkings v. Wilkinson</u> 86 Ohio State 3d 225 1999-Ohio-98 .....  | 6           |
| 5. R.C. 2929.12 (A) .....  | 6           |
| 6. R.C. 2929.12 (B) .....  | 6           |
| 7. <u>State v. Foster</u> 109 Ohio State 3d 1408 2006-Ohio-1703 .....  | 8           |
| 8. <u>In Re Adoption of Baby Boy Brooks</u> (2000)<br>136 Ohio App. 3d 824 .....                               | 9           |
| 9. <u>State v. Swinning</u> 2004-Ohio-5005<br>(Ohio Ct. App. 5 <sup>th</sup> Dist. Richland County 2004) ..... | 9           |
| 10. R.C. 2901.04 (A) .....   | 10          |
| 11. <u>State v. Brooks</u> 103 Ohio State 3d 134 2004-Ohio-4746 .....  | 10          |
| 12. <u>State v. May</u> 2010-Ohio-4625<br>(Ohio Ct. App. 5 <sup>th</sup> Dist. Richland County 2010) .....     | 10          |
| 13. <u>State v. Thomas</u> 2005-Ohio-4616<br>(Ohio Ct. App. 3 <sup>rd</sup> Dist. Morrow County 2005) .....    | 11          |
| 14. <u>State v. Warren</u> 2013-Ohio- 443<br>(Ohio Ct. App. 11 <sup>th</sup> Dist. Portage County 2013) .....  | 11          |

## STATEMENT OF FACTS

Appellee Shawn Ware entered pleas of guilty to violations of R.C. 2925.03 (A) (2) (C) (4) (e) – Trafficking in Cocaine, a second degree felony, and R.C. 2925.03 (A) (C) (4) (b) – Trafficking in Cocaine, a fourth degree felony, on March 30, 2010, in proceedings before the Portage County Common Pleas Court in Case No. 2009 CR 563 (T.d. 34). Remaining counts of the original indictment were dismissed by the State.

Appellee's written guilty plea to the above offenses (T.d. 34) contains a notation presumably made by the trial court indicating that the "State will concur w/min".

The sentencing hearing took place before the trial court on April 19, 2010. The trial court sentenced Appellee to a definite term of imprisonment for the second degree felony in the amount of four years, and eighteen months imprisonment for the fourth degree felony, the terms to be served concurrently. The sentencing entry did not provide for the imposition of a mandatory term of imprisonment relating to the second degree felony.

At the sentencing hearing the trial court reminded counsel that ".....there is mandatory time on the felony of the second degree...." (April 19, 2010 hearing T.p. 2) and the State was asked by the trial court as to its recommendation as to the sentence to be imposed. The State responded that it concurred with the pre-sentence report and had no specific recommendation as to a jail term or other sanctions as penalties (April 19, 2010 hearing T.p. 4).

The trial court proceed to impose its sentence, again not assigning a mandatory prison term, and continued to advise Appellee as follows:

Sir, if I see that you have made every effort to change your life around while in prison, (your attorney) may petition this Court for a judicial release when it's appropriate, do you understand? (April 29, 2010 hearing T.p. 5)

Appellee filed a motion for judicial release on April 8, 2011 (T.d. 62) which was denied by the trial court without a hearing on June 1, 2011 (T.d. 68).

Appellee through counsel filed another motion for judicial release on September 26, 2011 (T.d. 74) which counsel withdrew on April 18, 2012 (T.d. 85). During the pendency of this second motion for judicial release Appellee sent the trial court a letter dated December 21, 2011, advancing his interest in being granted judicial release (T.d. 79). This letter was filed with the case docket on December 29, 2011, and on the same date the trial court filed a nunc pro tunc order imposing a mandatory prison term of four years for the second degree felony (T.d. 80). This order was filed instanter by the trial court without prior notice to Appellee or counsel and without a hearing.

Appellee through counsel filed a motion for the trial court to reconsider its nunc pro tunc order and conduct a hearing on January 18, 2012 (T.d. 81).

On October 26, 2012, counsel for Appellee filed a further motion for judicial release (T.d. 90) which motion was granted by the trial court following notice to the parties and a hearing on February 8, 2013 (T.d. 94). Appellant State of Ohio filed its Notice of Appeal to the Eleventh District Court of Appeals on February 13, 2013, and assigned Case No. 2013-P-11 (T.d. 96) and the appellate court issued its decision and opinion on December 31, 2013 (T.d. 104).

The Court of Appeals upheld the trial court's order granting judicial release but found that the trial court had omitted the statutory findings of fact in its order to warrant

early release and remanded the matter to the trial court to make the necessary findings. The Court further found that based upon the proceedings a two year mandatory sentence and four year stated term of imprisonment was proper and authorized under law. The Court further determined that the nunc pro tunc sentencing order made without notice to the parties or a hearing was unlawful and directed the trial court to correct the entry to conform to the trial court's intentions.

Appellant pursued further appeals in the matter and the proceedings are now before this Honorable Court on a certification of conflict basis of jurisdiction.

At the time of the granting of Appellee's motion for judicial release Appellee had served approximately 3 years and 5 months of his original prison sentence of four years, taking into account credit for time served awaiting sentencing, and had approximately 7 months of prison time remaining for the sentence (T.d. 81).

During Appellee's incarceration for the offenses in the within proceeding the legislature modified the penalties associated with the commission of offenses involving cocaine trafficking such that the second degree felony as for which Appellee was convicted would now be classified as a third degree felony with a no requirement for the imposition of a mandatory prison term. See House Bill 10 effective date September 30, 2011.

### **ARGUMENT**

ISSUE CERTIFIED TO THE SUPREME COURT OF OHIO BY THE  
ELEVENTH DISTRICT COURT OF APPEALS FOR RESOLUTION:

"When the imposition of a mandatory prison term is statutorily mandated for a specific felony offense, is the trial court permitted to impose a total prison term

within the maximum allowed, only a portion of which is mandatory under the statute?”

APPELLEE'S PROPOSED FINDING:

“Other than for offenses as for which a definite mandatory prison term has been specifically set forth, a sentencing court is authorized to impose unequivocal mandatory and stated terms of imprisonment for an offense providing for definite prison terms according to the degree of the offense as classified by statute in accordance with and by application of the overall purposes and principles of felony sentencing expressed in R.C. 2929.11 and consideration of sentencing factors set forth in R.C. 2929.13, 2929.11, and 2929.12.”

When imposing a prison sentence for a conviction based upon the level of the felony offense committed pursuant to R.C. 2929.14 (A) and providing for mandatory time, the sentencing court is required to consider the application of the sentencing purposes and guidelines set forth in Chapter 2929 so as to undertake a parallel analysis for purposes of sentencing. Under the level of felony offense the sentencing court is obligated to undertake separate evaluations, one evaluation decreeing a definite prison term, the other decreeing a mandatory prison term.

The foregoing approach is evident by reference to the code's sentencing statutes, definitions, and penalties.

The definitions set forth in R.C. 2929.01 are meaningful as far as separate determinations of imprisonment are concerned, and are straight forward and unequivocal. Subsection (Y) (1) with a few exceptions provides that a mandatory prison term “may be any term authorized for the level of offense”. Therefore a sentencing

court for a third degree felony has the option of imposing a mandatory prison term of one year, two years, etc. up to five years. Subsection (CC) defines "Prison Term" as "a stated prison term". Then further at Subsection (GG) the definition of "Stated Prison Term" means the prison term, mandatory prison term, or combination of all prison terms and mandatory prison terms imposed.....".

The Appellant State of Ohio in its argument attempts to engraft a concept which appears at no place or statute in the Revised Code and is inimicable to the purposes and directives as to sentencing factors. The State very basically asserts that a "definite" term of imprisonment based upon the level of felony is equivalent to the "mandatory" term of imprisonment. In other words the State is advancing a tautology such that "every definite term of imprisonment is the same term of a mandatory sentence, and every mandatory sentence is the same as a definite sentence". This equivalence does not appear at any place in the law; there is no formula or directive which recites that a mandatory prison term is for the same amount of years as a definite prison sentence of a term of years. In fact the Revised Code mandates the opposite; at 2929.01 (Y)(1) the rule is that a mandatory prison term may be any of the terms authorized for the level of the offense. It does not state that a mandatory prison term be the same as the definite prison term imposed, or that mandatory and definite are interchangeable.

Appellant State of Ohio attempts to create an ambiguity concerning the sentencing statutes by arguing that the term "definite" as in "definite prison term" is ambiguous and that its dictionary meaning must be sought out for purposes of interpretation of the statutory structure of sentencing contained in the Revised Code. It is obvious that resort to a dictionary definition is unnecessary and irrelevant in

determining the meaning of “definite” in sentencing purposes as this Honorable Court has already provided for the meaning of the use of the word “definite” for sentencing purposes. In Yonking v. Wilkinson 86 Ohio State 3d 225 1999-Ohio-98 the Court succinctly and plainly stated that “A definite sentence is one for a specific number of years of imprisonment, distinguished from an indeterminate sentence, which is a range defined by minimum and maximum terms”. There is no uncertainty as to “definite” in this exposition; “definite” simply means one year, two years, three years etc. as opposed to “one to three years, two to four years etc.” The only logical result of the interplay between definite and mandatory sentences is that the sentencing court by recourse to the sentencing guidelines determine how many years of imprisonment are appropriate to be mandatory, and how many years are appropriate for the entire stated prison term. “Definite” means so many years based upon the level of felony, and the mandatory amount of years may be any amount of years authorized based upon level of felony. An offender of a third degree felony may receive a prison sentence of up to five years, and the mandatory prison time may be any of one, two, three, four, or five years as the sentencing court may determine.

Section 2929.12 (A) directs that a court imposing a prison sentence possess the “discretion” to determine the best way to comply with the overriding purposes of felony sentencing which as are exhaustively referred to as being “to protect the public from future crime and to punish the offender”. Numerous “seriousness and recidivism” factors and steps of analysis are clearly and explicitly set forth in R.C. 2929.12, particularity Subsection B, and the sentencing court further has the discretion to take

any other factors into account which will serve to achieve the over-riding purpose and principles of felony sentencing.

Obviously any offense the violation as to which carries a mandatory prison term automatically fulfills the function of "punishing" the offender. If an individual has violated a statute providing for mandatory time, then that offender is subject to punishment by incarceration and the sentencing court is bound to impose a prison term. It is very simple to envision circumstances warranting the imposition of a mandatory term of prison of shorter duration of the stated-definite prison term by use of the guidelines as to felony sentencing. As an example the particular offense providing for mandatory prison time that was committed by an elected official, possibly a mayor, township trustee, etc. under the sentencing guidelines because of the offenders status as an elected official the offender's conduct would be considered more serious which seriousness would warrant a longer prison term than that warranted to "a regular citizen". However that elected official may be seen as having certain mitigating factors available for consideration by the sentencing court, and that rehabilitation of the offender would constitute a valid objective. Under such circumstances and by applying the guidelines separately and distinctly in the determination of the definite prison term to be imposed and the mandatory term, the sentencing court in the exercise of its discretion could determine that because the offender was an elected official a definite prison term of five years could be imposed, and that suitable punishment for the offender would be the one year mandatory definite term based upon the level of the felony offense. Such a sentence would fulfill the objectives of punishing the offender, ie, incarceration for one

year in prison, and also protecting the public and deterring future crimes, ie, the elected official if eligible for early release will be subject to monitoring by community control.

By recognizing the ability to provide for differing definite terms of incarceration for an offense with mandatory time the discretion of the sentencing court is fully preserved while the over-riding purposes and principles of felony sentencing are attained. The sentencing court is not under the burden of making intricate and meticulous findings to justify such a varying sentence and the end result of fairness and justice are preserved and maintained, and the court's discretion is retained. State v. Foster 109 Ohio State 3d 1408 2006-Ohio-1703.

In addition to preserving the exercise of judicial discretion in sentencing the dichotomy of the definite/mandatory elements concerning prison sentencing based on the levels of felony offenses finds support in the practical construction of the statutes. As set forth above, the sentencing court based upon the purposes and principles of sentencing under the Revised Code is guided by two directives. One is the range of prison terms comprising the imposition of a definite sentence, the other the range for the mandatory sentences. The determination as to each is separate and distinct, with one independent of the other, the end result being the imposition of the stated prison term. Any confusion or uncertainty as to the fact that two statutes provide for prison sentences is resolved through recognition of established rules of judicial review, the concept of which is clearly and directly set forth as follows:

In interpreting related and co-existing statutes, courts must harmonize and give full application to all such statutes unless they are irreconcilable and

in hopeless conflict. In Re Adoption of Baby Boy Brooks (2000) 136 Ohio App. 3d 824.

Obviously the interplay of the definite/mandatory levels of felony sentencing is neither irreconcilable nor hopeless.

It should further be noted that the sentencing court's discretion as to definite/mandatory prison terms is not limited to the imposition of prison terms for each. A definite stated prison term coupled with a mandatory prison term is not the sole and exclusive sentencing option available as under the sentencing guidelines. An offender may be faced with a mandatory prison term and otherwise be eligible for community control sanctions. As an example, when an offender is subject to a mandatory prison sentence based upon a firearm specification, the court has the discretion to impose a prison term based upon the specification and authorize a community control sanction as a sentence for the principal felony. State v. Swinning, 2004-Ohio-5005, 2004 WL 2260589 (Ohio Ct. App. 5<sup>th</sup> Dist. Richland County 2004).

The trial court in the present matter and the Eleventh District Court of Appeals properly applied the law in granting Appellee Shawn Ware judicial release. At Ware's sentencing hearing the trial court explicitly announced that Ware would have the opportunity to be afforded early release from his four year stated prison sentence if he rehabilitated himself to the satisfaction of the court. The trial court in its enforceable sentencing order imposed a four year prison sentence but did not specify the term of the mandatory sentence which could be not less than two years under the levels of prison terms for a violation of a second degree felony statute. Appellee was a first time offender and in the absence of an explicit mandatory prison sentence, together with the

clear intent of the court to consider judicial release at some point, a mandatory prison term of less than four years was clearly evinced under law. R.C. 2901.04 (A) mandates this result, the statute stating that “statutes defining penalties shall be strictly construed against the state, and liberally construed in favor of the accused”.

The fact that Appellee’s written guilty plea contained language describing the minimum and maximum stated and mandatory prison sentences for the offenses does not operate to remedy or cure any deficiencies in the sentencing order due to the absence of the imposition of a mandatory prison term. Disclosures of maximum-minimum prison terms in a plea hearing pursuant to Rule 11 (c) do not satisfy the requirement that a sentencing order set forth a definite term of mandatory imprisonment. State v. Brooks 103 Ohio State 3d 134 2004-Ohio-4746.

It should further be noted that the cases in the within matter as to which the Eleventh District Court of Appeals certified a conflict may be distinguished upon their underlying factual bases.

In State v. May 5<sup>th</sup> Dist. No. 2010CA2, 2010-Ohio-4625, the trial court sentenced the offender to a two year prison term and specified that one year was mandatory. The State appealed the sentence asserting that “hybrid” sentences were unlawful and the Fifth District Court of Appeals found that the sentence was in fact lawful and authorized under the sentencing guidelines and mandates of Revised Code Chapter 2929. The decision reflects the analysis presented above in this brief regarding the independency of the sentencing court’s determinations as to the imposition of a stated prison term and a mandatory prison term, and the decision further upholds the exercise of judicial discretion under the sentencing statutes.

The facts underlying State v. Thomas 3<sup>rd</sup> Dist. No. 1-04-88 2005-Ohio-4616 are clearly different from those of May above. In Thomas the offender received a seven year prison sentence the entirety as to which was declared mandatory. The offender sought review of the sentence on appeal and maintained that the trial court abused its discretion by imposing a mandatory prison sentence which deprived him of the opportunity to seek judicial release. In essence the offender argued that the trial court erred in imposing a straightforward mandatory prison term. The reviewing court noted that there as nothing in the record indicating that the trial court intended to impose a sentence in such form as to have application of the judicial release statutes available to the offender and that the sentencing court did not abuse its discretion in decreeing seven years mandatory prison time. Basically the reviewing court decided that the offender was sentenced to prison for seven years, all of which were mandatory, and that the trial court was within its rights to make such order. The case did not involve different prison terms, one stated, the other mandatory, such as May above. The reviewing court ruled that the trial court was justified in its particular sentence, and that “mandatory” clearly and unambiguously means “mandatory”. The reviewing court simply stated that when a sentencing order specifies a prison term to be mandatory, then the offender must serve the mandatory sentence. See Also State v. Warren 2012-P-0069, 2013-Ohio-443.

The circumstances underlying Appelle Shawn Ware’s matter comport with the conclusion that it is lawful for a trial court to impose a prison sentence with a mandatory term component less than the stated term. The trial court did not specify a mandatory prison term in its sentencing order and expressly told Appelle that if he demonstrated

good citizenship while in prison he would be amenable to be granted judicial release. The state did not object to such exposition and did not take a firm position at the sentencing hearing; the state solely stated that it concurred with the pre-sentence report. Appellee Ware was a first time offender with no prior felony background and had a family to maintain and support and was eventually successful in obtaining early release. As noted the balance of his four year prison term upon release consists of solely around seven months and were he to have been charged with the same offense today he would have been subject to a conviction of third degree felony with no mandatory prison term. As far as Appellee's standing in the within matter is concerned, it is evident that the trial court properly granted him judicial release.

#### **CONCLUSION**

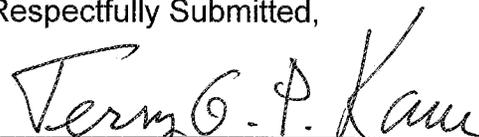
Appellee asserts that the statutory framework for the imposition of mandatory prison time based upon the degree of the offense clearly authorizes and permits a sentencing court to impose a mandatory prison sentence for a length of time different from the stated term. In arriving at a just sentence the sentencing court must consider the over-riding purposes and principles of felony sentencing and application of other statutory factors concerning the seriousness of the offense or those factors showing conduct of less serious character and mitigating circumstances for each component of the sentence, ie, to determine the length of a mandatory sentence and to also determine the length of the non-mandatory/stated prison sentence. Such approach maintains and preserves the discretion of the sentencing court and assures that a just and equitable prison sentence be imposed by the trial court. Nothing appears in the criminal penalty code requiring the direct correspondence of a stated prison term. The code merely states that some offenses carry a mandatory prison term of definite length

based upon the level of felony involved. The code does not affirmatively state that any prison term imposed be completely mandatory, only that a mandatory term be imposed for one of the definite prison terms for that particular felony. For numerous offenses the code explicitly states the mandatory term of incarceration, such as for certain firearms cases and impaired driving, and had the enactors of the code intended for mandatory prison sentences based upon the level of the felony to constitute the entirety of a prison sentence, that intention would have been explicitly set forth in the penalty statutes.

WHEREFORE Appellee Shawn Ware prays that this Honorable Court determine that when the plain language of a sentencing statute requires the imposition of a mandatory prison term that such mandatory term does not comprise the entire length of the prison term and that a sentencing court retains the discretion and authority to impose stated and mandatory prison terms of differing duration for the commission of the pertinent offense.

Appellee further prays that this Honorable court affirm the decision of the Eleventh District Court of Appeals upholding the granting of judicial release and remanding the matter to the trial court to amend its nunc pro tunc sentencing order to properly reflect the intention of the court as to sentence and to further make the statutory findings for the issuance of the order for judicial release based upon either the court's recollection of the matter or if necessary with the conduct of a further hearing.

Respectfully Submitted,



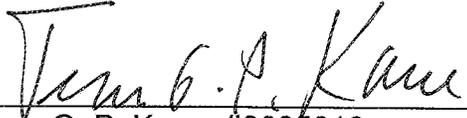
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