Supreme Court of Ohio Clerk of Court - Filed February 11, 2016 - Case No. 2016-0213

IN THE SUPREME COURT OF OHIO
2016

STATE OF OHIO, Plaintiff-Appellant, -vs- TROY G. KEPLER, Defendant-Appellee	Case No. On Appeal from the Fifth District Court of Appeals, Muskingum County Court of Appeals Case No. CT2015-0021

MOTION TO STAY

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MOTION TO STAY

Plaintiff-appellant, the State of Ohio, requests that the Supreme Court of Ohio stay the decision of the Court of Appeals, Fifth Appellate District, entered in *State v. Kepler*, Court of Appeals No. CT2015-0021, on August 14, 2015, and maintained pursuant to Appellate Rule 26(A)(2) when the panel of appellate judges was unable to concur in a decision during their en banc consideration.

Appellee was sentenced in the Muskingum County Court of Common Pleas to two years for Failure to Register Change of Address in August of 2011. He was placed on Post Release Control ("PRC") after being released from prison, and while on PRC he committed a new offense. He was sentenced to one year of incarceration for Failure to Register Change of Address on December 16, 2013, and another consecutive year was imposed for violating his PRC.

He appealed, claiming that his original PRC was not imposed correctly and therefore, the consecutive one year sentence was void. The Fifth District Court of Appeals reversed his PRC sentence, agreeing that the requisite language to impose PRC was not in the sentencing entry for his 2011 Failure to Register Change of Address sentence. However, in *State v. Moore*, 2015-Ohio-3435, the Fifth District Court of Appeals found that the same language found in Appellee's case, was sufficient to impose valid PRC in *Moore*. Therefore, the State requested that the Fifth District hold an en banc consideration to resolve these inconsistent rulings.

The Fifth District held an en banc consideration consisting of the entire appellate panel, but ultimately was unable to concur in a decision. Without a clear decision, the original ruling of the panel in Appellee's case remains intact pursuant to App.R.

26(A)(2).

Before prematurely raising an intra-district conflict in an appeal to the Supreme Court of Ohio, the State waited for the decision of the en banc consideration. Appellate Rule 26(A)(2)(d) states that "[t]he decision of the en banc court shall become the decision of the court."

CONCLUSION

THEREFORE, the State asks that the Supreme Court of Ohio stay the decision of the Court of Appeals, Fifth District, until it has issued a final judgment by decision on the merits or declines to accept jurisdiction of the appeal.

Respectfully submitted,

D. MICHAEL HADDOX 0004913
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/s Gerald Anderson

GERALD V. ANDERSON II 0092567
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Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular US mail on this ____ day of February, 2016, to Katherine R. Ross-Kinzie, at 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, Counsel for Defendant-Appellee.

____/s Gerald Anderson_____
GERALD V. ANDERSON II 0092567
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COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES: Hon. W. Scott Gwin, P.J. Hon. Patricia A. Delaney, J. Hon. Craig R. Baldwin, J.
Plaintiff-Appellee	:	
-vs-	:	
	:	Case No. CT2015-0021
TROY G. KEPLER	:	
Defendant-Appellant	:	OPINION

FILED
FIFTH DISTRICT
COURT OF APPEALS
AUG 14 2015
MUSKINGUM COUNTY, OHIO
TODD A. RICHARD, CLERK

CHARACTER OF PROCEEDING: Criminal appeal from the Muskingum County Court of Common Pleas, Case No. 2013-0225

JUDGMENT: Reversed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

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Gwin, P.J.

{¶1} Appellant Troy G. Kepler appeals the April 3, 2015 judgment entry of the Muskingum County Court of Common Pleas denying his motion to vacate sentence. Appellee is the State of Ohio.

Facts & Procedural History

{¶2} On August 1, 2011, appellant entered a negotiated plea to two counts of Failure to Register as a Sexual Offender, felonies of the fourth degree, in violation of R.C. 2950.05(A) and R.C. 2950.06(A) in the Muskingum County Court of Common Pleas, Case No. CR2011-0064. Appellant was sentenced to a total of two years incarceration.

{¶3} At the plea and sentencing hearing on August 1, 2011, appellant was informed he could be placed on post-release control for up to three years, that he would be required to follow certain rules and regulations, and that if he failed to follow them he could be sent back to prison for up to nine months for each violation with the total amount of time being up to half his original prison sentence. The trial court also issued a sentencing entry on August 2, 2011.

{¶4} Appellant did not appeal or otherwise challenge his conviction and sentence. Appellant completed his prison sentence with regards to Case Number CR2011-0064 on June 9, 2013 and was placed on post-release control for one year. While on post-release control from the 2011 case, appellant was indicted with one count of Failure to Register as a Sexual Offender, a felony of the third degree, in violation of R.C. 2950.05(A). On December 16, 2013, in Case Number CR2013-0225, the trial court sentenced appellant to one year of incarceration on the 2013 case. Further, since

appellant was on post-release control for the 2011 case at the time of the 2013 offense, the trial court terminated the post-release control of the 2011 case and ordered appellant to serve a stated prison term of one (1) year, consecutive to the sentence in the 2013 case, for the violation of the 2011 post-release control. Appellant completed his one year prison term for the 2013 case and is currently incarcerated solely on the one year sentence for the violation of the 2011 post-release control.

{¶5} On March 25, 2015, appellant filed a motion to vacate judicial sanction sentence. Appellant argued that the judgment entry in Case No. CR2011-0064 failed to include the consequences of violating post-release control and failed to notify appellant that he faced a prison term of up to half his original sentence if he violated post-release control. Appellee filed a memorandum contra on April 1, 2015. The trial court issued a judgment entry on April 3, 2015 denying appellant's motion to vacate sentence.

{¶6} Appellant appeals from the April 3, 2015 judgment and assigns the following as error:

{¶7} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED TROY KEPLER'S MOTION TO VACATE HIS JUDICIAL-SANCTION SENTENCE."

I.

{¶8} Preliminarily, we note this case comes to this Court on the accelerated calendar. App.R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

(E) Determination and judgment on appeal.

> The appeal will be determined as provided by App.R. 11.1. It shall be sufficient compliance with App.R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form.

{¶9} One of the important purposes of the accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts, and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn.*, 11 Ohio App.3d 158, 463 N.E.2d 655 (10th Dist. 1983).

{¶10} This appeal shall be considered in accordance with the aforementioned rules.

{¶11} In his sole assignment of error, appellant claims the trial court erred in denying his motion to vacate because the 2011 sentencing entry was void. Appellant argues the trial court failed to notify him of the consequences of violating post-release control.

{¶12} In sentencing appellant in Case No. CR2011-0064, the trial court stated in its sentencing entry filed August 2, 2011 the following with regards to post-release control:

> The Court further notified the Defendant that "**Post Release Control**" is **optional** in this case for **<u>up to three (03) years</u>** as well as the consequences for violating conditions of post release control imposed by Parole Board under Revised Code §2967.28. The Defendant is ordered to serve as part of this sentence any term for violation of that post release control.

{¶13} In *State v. Richard-Bey*, 5th Dist Muskingum Nos. CR2004-119A & CR2013-0037, 2014-Ohio-2923, this Court considered whether similar language as is used in the sentencing entry in CR2011-0064 regarding post-release control rendered the appellant's post-release control void. We noted that while the sentencing entry properly notified the appellant of the correct term of post-release control, it was "silent as to the consequences of post-release control." *Id.*

{¶14} This Court determined in *Richard-Bey* that the trial court erred in denying the appellant's motion to vacate void post-release control violations because, "[a]ppellant was not informed that if he violated his supervision or a condition of post-release control, the parole board could impose a maximum prison term of up to one-half of the prison term originally imposed pursuant to R.C. 2929.19(B)(3)(e) [now R.C. 2929.19(B)(2)(e)]." *Id.*, citing *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9. We further stated that, "[a] sentence that does not include the statutorily mandated term of post-release control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack." *Id.*, quoting *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.3d 332.

{¶15} Based upon our decision in *State v. Richard-Bey*, we find the trial court erred in denying appellant's motion to vacate in the instant case. In this case, like in *Richard-Bey*, while the sentencing entry properly notified appellant of the correct term of post-release control, appellant was not informed that if he violated his supervision or a condition of post-release control, the parole board could impose a maximum prison term of up to one-half of the prison term originally imposed pursuant to R.C. 2929.19.

Further, appellant has finished his sentence in Case No. CR2011-0064. Because the trial court did not properly impose post-release control in its August 2, 2011 entry, the trial court cannot terminate appellant's 2011 post-release control in Case No. CR2013-0225 and order the remaining time be imposed.

{¶16} Appellant's assignment of error is sustained. The portion of the December 16, 2013 sentencing entry of the Muskingum County Court of Common Pleas dealing with the imposition of the remaining time of post-release control from Case No. 2011-0064 is reversed.

By Gwin, P.J.,

Delaney, J., and

Baldwin, J., concur

HON. W. SCOTT GWIN

HON. PATRICIA A. DELANEY

HON. CRAIG R. BALDWIN

WSG:clw 0730

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED
FIFTH DISTRICT
COURT OF APPEALS

AUG 14 2015

MUSKINGUM COUNTY, OHIO
TERRI A. DIGKLE, CLERK

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
TROY G. KEPLER	:	
Defendant-Appellant	:	CASE NO. CT2015-0021

For the reasons stated in our accompanying Memorandum-Opinion, the portion of the December 16, 2013 sentencing entry of the Muskingum County Court of Common Pleas dealing with the imposition of the remaining time of post-release control from Case No. 2011-0064 is reversed. Costs to appellee.

HON. W. SCOTT GWIN

HON. PATRICIA A. DELANEY

HON. CRAIG R. BALDWIN

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED
FIFTH DISTRICT
COURT OF APPEALS

JAN 11 2016

MUSKINGUM COUNTY, OHIO
TODD A. BICKLE, CLERK

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
TROY KEPLER	:	(22/465-467)
Defendant-Appellant	:	CASE NO. CT2015-0021

This matter came before the Court upon the State of Ohio's application for en banc consideration filed on August 24, 2015. Defendant filed a memorandum in opposition on September 2, 2015. The State of Ohio filed a reply on September 15, 2015.

In the above-captioned case, we found that, based upon the language contained in the trial court's sentencing entry, defendant's post-release control was void because the trial court's sentencing entry was silent as to the consequences of violating post-release control. The State of Ohio argues that the above-captioned decision is in conflict with our decision in *State v. Moore*, 5th Dist. Muskingum No. CT2015-0027, 2015-Ohio-3435, in which we found the same language in the sentencing entry, coupled with the presumption of regularity regarding the oral notification during the sentencing hearing, was sufficient to give the defendant notice of the post-release control sanction and thus the post-release control was valid.

Appellate Rule 26(A)(2) provides that, "upon a determination that two or more decisions of the court * * * are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc." Further, that en banc consideration will be ordered only when "necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed." *Id.* The en banc court consists of "all fulltime judges of the appellate district who have not recused themselves or otherwise been disqualified from the case." *Id.*

Upon review, we find that a conflict exists between the panel decision in this case and our decision in *State v. Moore*. Accordingly, we GRANT en banc consideration in this matter.

Thus, this Court convened an en banc conference in accordance with App.R. 26(A)(2) as to the conflict between the above-captioned case and *State v. Moore*.

However, a majority of the full-time judges of the appellate district is unable to concur in a decision.

Accordingly, pursuant to App.R. 26(A)(2), the decision of the original panel remains the decision in this case.

IT IS SO ORDERED.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY

HON. CRAIG R. BALDWIN