

IN THE SUPREME COURT OF OHIO
2016

STATE OF OHIO,

Case No.

Plaintiff-Appellant

-vs-

On Appeal from the
Fifth District Court
of Appeals, Muskingum
County

TROY G. KEPLER,

Court of Appeals

Defendant-Appellee

Case No. CT2015-0021

**MEMORANDUM OF PLAINTIFF-APPELLANT IN SUPPORT OF
JURISDICTION**

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EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

Ohio lower courts need further guidance on what language is required in sentencing entries when imposing proper post release control (“PRC”). This Court has addressed PRC many times over the years, even the language used in the sentencing entry specifying the term of PRC. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332 (2010); *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718 (2012); *State v. Ketterer*, 126 Ohio St. 3d 448, 2010-Ohio-3831, 935 N.E.2d 9 (2010). However, the issue of consequence language in the sentencing entry is being ruled on inconsistently by the lower courts and further guidance is warranted.

In just the Fifth District Court of Appeals, the panel of appellate judges has been unable to consistently decide the issue. Recently, the Fifth District has heard a number of cases with sentencing entries which have identical or similar language and found both that the language is sufficient to impose valid PRC and also insufficient to impose PRC. *State v. Kepler*, 2015-Ohio-3291(5th Dist.); *State v. Moore*, 2015-Ohio-3435 (5th Dist.); and *State v. Grimes*, 2015-Ohio-3497 (5th Dist.). First, the Fifth District ruled that the sentencing entry in *Kepler* was insufficient, then just days later it ruled that an almost identical sentencing entry in *Moore* (Jaryd Moore) was sufficient, and a few days later still it ruled in *Grimes* that the sentencing entry was insufficient.

To arrive at these conflicting decisions, the Fifth District relied on one of two prior cases. In *Kepler* and *Grimes* the Fifth District panel relied on *State v. Richard-*

Bey, 2014-Ohio-2923 (5th Dist.), which states that “the entry was silent as to the consequences of violating 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(B)(3)(e) [now R.C. 2929.19(B)(2)(e)].” In *Moore* (Jaryd Moore) the Fifth District panel relied on *State v. Ball*, 2013-Ohio-3443 (5th Dist.), which was decided before *Richard-Bey* but had not been cited or discussed when deciding *Richard Bey*, *Kepler*, or *Grimes*. The panel in the Fifth District had independently discovered *Ball* before deciding *Moore*; furthermore, *Ball* is binding precedent in the Fifth District. *Ball* said that after a defendant is notified during the sentencing hearing, a simple reference to the applicable statutes in the sentencing entry is sufficient to impose valid PRC. *Id.*

After these conflicting rulings, the State of Ohio requested an en banc consideration pursuant to App.R. 26(A), and even after holding an en banc consideration “a majority of the full-time judges of the appellate district [was] unable to concur in a decision.” (En Banc Judgment Entry, January 11, 2016).

This issue is not limited to the intra-district conflict of the Fifth District; other districts are split on the issue. In the Second, Sixth, and Tenth districts the courts have taken a more totality approach when ruling on what sentencing entry language is sufficient to impose proper PRC. “[W]hen oral notice is given at the sentencing hearing, a simple reference to the applicable statutes in the sentencing entry is sufficient to authorize post release control.” *State v. Murray*, 2012-Ohio-4996 (6th Dist.). *See also State v. Clark*, 2013-Ohio-299 (2nd Dist.) (“[A] judgment entry need

not be corrected to include the specific consequences for violating post-release control conditions, if the trial court imposes a lawful sentence of post-release control, properly notifies the defendant regarding post-release control and the specific consequences of a violation during the sentencing hearing, and the sentencing entry contains notification regarding the fact that post-release control is being imposed and that a prison term could be ordered for any violation.”); *State v. Holloman*, 2011-Ohio-6138 (10th Dist.) (“Post-release control may be properly imposed when the "applicable periods" language in the trial court's sentencing entry is combined with other written or oral notification of the imposition of post-release control”); *State v. Chandler*, 10th Dist. No. 10AP-369, 2010-Ohio-6534.

The Seventh, Eighth, and Ninth districts have ruled narrowly on what language is required in the sentencing entry to impose proper PRC. “Sufficient notification to a defendant regarding postrelease control includes notification of the consequences for violating postrelease control. Thus, in the Eighth Appellate District, where a trial court fails to include the consequences of violating postrelease control in the sentencing entry, that portion of the sentence is void. Furthermore, the mere reference to the postrelease control statute in the sentencing entry does not provide the offender with adequate notice of the consequences of violating postrelease control.” *State v. Martin*, 2015-Ohio-2865 (8th Dist.). *See also State v. Holsinger*, 2014-Ohio-2523 (7th Dist.) (“Here, during the sentencing hearing, the trial court properly notified Holsinger about his five-year post-release control term, along with the consequences of violating post-release control. The sentencing entry included the length of the term, but failed to include information regarding the consequences of

violating post-release control. The entry merely stated: ‘The Defendant was advised upon being released from prison he will be supervised by the parole board on Post Release Control for 5 years. The notification of Post Release Control was made at the sentencing hearing pursuant to R.C. 2929.19.’”); *State v. Adams*, 2016-Ohio-336 (9th Dist.) (“[The] sentencing entry acknowledges that the court told him about the consequences of violating post-release control at the sentencing hearing. It does not, however, provide what those consequences are. We, therefore, conclude that it ‘does not contain proper language explaining the consequences’ of violating post-release control.”).

The State, public, and defendants all have an interest in post release control and whether it is imposed properly or not. Each defendant should be aware of their PRC, what it entails, and what it requires of them. Defendants should also be accountable on PRC uniformly across the state. The State and the public have an interest that offenders be properly placed on PRC, held responsible for complying, and held accountable for violating it when reoffending with a new felony.

Currently, whether PRC is valid or not depends on what appellate court reviews the appeal, and in the Fifth District, it actually depends on the panel members. This is not what the General Assembly intended in the Ohio Revised Code. Furthermore, imposing PRC and the consequences for non-compliance or reoffending should be consistent in each district and across the state. If the Supreme Court of Ohio does not address this issue, inconsistent rulings will plague the Fifth District and the State. It is an injustice when some defendants must serve PRC and others are free from it simply because of the district or panel of judges. It is an injustice to the defendants, the State,

and the public.

STATEMENT OF THE CASE AND THE FACTS

Appellee, Troy Kepler, 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 filed a motion on March 25, 2015, to vacate judicial sanction sentence because he was not advised of the consequences for violating PRC, specifically, that he faced up to one half his original sentence if he violated PRC, making his original PRC void. The motion was denied and he appealed to the Fifth District Court of Appeals.

The Muskingum County Court of Common Pleas advised Appellee of the consequences of violating PRC during the sentencing hearing and incorporated that advisement into its sentencing entry with the following language:

The Court further notified the Defendant that “Post Release Control” is optional in this case for up to three (03) years 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.

(Sentencing Entry from August 2, 2011).

The Fifth District Court of Appeals found that the language in the sentencing

entry was not sufficient to impose valid PRC and reversed his PRC sentence on August 14, 2015. *State v. Kepler*, 2015-Ohio-3291(5th Dist.). However, just a few days after finding that Kepler's PRC was void, the Fifth District found that the same language was sufficient to impose PRC in *State v. Moore*, 2015-Ohio-3435 (5th Dist.). Therefore, on August 24, 2015, the State requested that the Fifth District hold an en banc consideration to resolve these inconsistent rulings. On August 24, 2015, another decision, *State v. Grimes*, 2015-Ohio-3497 (5th Dist.), with the same or similar language as contained in *Kepler* and *Moore* came out from the Fifth District that again said PRC was void. The State also requested an en banc consideration of that case.

The Fifth District held an en banc consideration consisting of the entire appellate panel, but ultimately was unable to concur in a decision. (En Banc Judgment Entry on January 11, 2016). Without a clear decision, the original ruling of the panel in Appellee's case remains intact pursuant to App.R. 26(A)(2). The appellate panel found the same in the *Grimes* en banc consideration. Therefore, the inconsistent rulings are still in effect and the Fifth District is now split on the issue.

The State now appeals to the Supreme Court of Ohio for further guidance on how to address what language is required in the sentencing entry to adequately incorporate the advisements given during the sentencing hearing for valid PRC imposition.

ARGUMENT

Proposition of Law No. I: To impose valid post release control, the language in the sentencing entry may incorporate the advisements given during the sentencing hearing by referencing the post release control sections of the Ohio Revised Code and do not need to repeat what was said during the sentencing hearing.

The standard when it comes to PRC notifications is that the sentencing hearing is where the court must notify the defendant about the consequences of violating PRC, and then that notification must be incorporated into the sentencing entry. *State v. Jordan*, 104 Ohio St.3d 21, 25 (2004) (“a trial court is required to notify the offender at the sentencing hearing about postrelease control and is further required to incorporate that notice into its journal entry imposing sentence”); *see also State v. Qualls*, 131 Ohio St.3d 499, 504 (2012) (“a trial court must incorporate into the sentencing entry the postrelease-control notice to reflect the notification that was given at the sentencing hearing”); *State v. Singleton*, 124 Ohio St. 3d 173, 177 (2009) (“because the separation-of-powers doctrine precludes the executive branch of government from impeding the judiciary's imposition of a sentence, the Adult Parole Authority may impose postrelease-control sanctions only if a trial court incorporates postrelease control into its original sentence”); *Hernandez v. Kelly*, 108 Ohio St. 3d 395, 397 (2006) (“The trial court in Hernandez's case committed error because it did not notify him at his sentencing hearing that he would be subject to mandatory postrelease control and did not incorporate postrelease control into its sentencing entry”). The entry does not need to repeat what occurred in the hearing, but it must correctly reflect what occurred in the hearing. *State v. Qualls*, 131 Ohio St.3d 499, 506 (2012).

There is no dispute that Appellee was orally advised at his sentencing hearing of PRC, its term, and the consequences for violating it. (Sentencing Hearing Tr. 6). Specifically, he was informed that a violation could result in additional time up to one-half his original sentence. The issue is what language is required in the sentencing entry to incorporate the advisement given at the hearing in order to impose valid PRC. Appellee argues that the sentencing entry must contain language stating that the consequences of violating PRC include that the parole board may impose “a maximum prison term of up to one-half of the prison term originally imposed.” He claims this language is required in the sentencing entry regardless of any oral advisements made at the sentencing hearing or language in the sentencing entry citing to the Ohio Revised Code (“ORC”) section authorizing PRC. He relies on *State v. Richard-Bey*, a Fifth District case decided in 2014, which states:

However, the entry was silent as to the consequences of violating 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(B)(3)(e) [now R.C. 2929.19(B)(2)(e)].

State v. Richard-Bey, 2014-Ohio-2923 (5th Dist.).

The decision of *Richard-Bey* relied heavily on *State v. Ketterer*, 126 Ohio St.3d 448 (2010), a case decided in the Supreme Court of Ohio in 2010. In *Ketterer*, there were a number of issues with sentencing and resentencing. Even excluding the other mistakes involved in *Ketterer*'s sentencing and looking just at his PRC, some mistakes

were made during the sentencing hearing, some in the sentencing entry, and still others in the nunc pro tunc resentencing entry. When ruling on *Ketterer*, the Supreme Court addressed an issue that even Ketterer did not raise, which directly influenced the *Richard-Bey* decision, and therefore, the current case.

The nunc pro tunc entry contains another error, which Ketterer does not raise. The nunc pro tunc entry does not state that Ketterer was informed that if he violated his supervision or a condition of postrelease control, the parole board could impose a maximum prison term of up to one-half of the prison term originally imposed, which here is an aggregate 11 years. See R.C. 2929.19(B)(3)(e). Ketterer was correctly advised of this condition of postrelease control during the resentencing hearing.

However, the nunc pro tunc entry incorrectly states, "The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and *any prison term* for violation of that post release control." Thus, the nunc pro tunc entry should be amended to incorporate the correct language of this rule. See R.C. 2929.191(B)(1).

State v. Ketterer, 126 Ohio St.3d 448, 463 (2010).

Some courts have used *Ketterer* to support that specific language is required in the sentencing entry in order to impose valid PRC. Yet, *Ketterer* only says that "the nunc pro tunc entry should be amended to *incorporate* the correct language of this rule. See R.C. 2929.191(B)(1)." *Id.* (Emphasis added). There is still not a clear rule on what "incorporate" means pursuant to *Ketterer*; is *Ketterer* following the standard established by case law or is it creating a new one where the sentencing

entry must incorporate certain language from the Ohio Revised Code? The other cases from the Supreme Court have established that the standard to impose valid PRC is that notification is to be given at the sentencing hearing and that the sentencing entry is to *incorporate* that notification. *State v. Jordan*, 104 Ohio St.3d 21, 24 (2004); *State v. Qualls*, 131 Ohio St.3d 499, 504 (2012); *State v. Singleton*, 124 Ohio St. 3d 173, 177 (2009); *Hernandez v. Kelly*, 108 Ohio St. 3d 395, 397 (2006). “A trial court must incorporate into the sentencing entry the postrelease-control notice to reflect the notification that was given at the sentencing hearing. . . . But our main focus in interpreting the sentencing statutes regarding postrelease control has always been on the notification itself and not on the sentencing entry.” *Qualls* at 504. Additionally, “incorporate” does not mean to regurgitate, replicate, or repeat. “Incorporate” is defined as “to unite or work into something already existent so as to form an indistinguishable whole.” *Merriam-Webster Dictionary*. This is the approach used by the Second, Sixth, Tenth, and sometimes Fifth, districts.

Furthermore, the decision in *Ketterer* was specifically talking about a nunc pro tunc entry and cited to R.C. §2929.191(B)(1), which also deals specifically with nunc pro tunc entries of sentences that were imposed prior to July 11, 2006. Cases that are not dealing with nunc pro tunc entries on sentences prior to July 11, 2006, are governed by R.C. §2929.19(B)(2)(e), which does not specify that the “up to one-half the original sentence” language must be put in the sentencing entry. Therefore, in cases where the sentence occurred after July 11, 2006, R.C. §2929.191(B)(1) does not apply, these cases are distinguished from *Ketterer*, and *Ketterer* does not control.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal presents questions of public or great general interest as would warrant further review by this Court. Review is also warranted upon leave granted in a felony case. It is respectfully submitted that jurisdiction should be accepted.

Respectfully submitted,
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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.

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