
IN THE SUPREME COURT OF OHIO

DISCRETIONARY APPEAL FROM THE
LUCAS COUNTY COURT OF APPEALS,
SIXTH APPELLATE DISTRICT,
CASE NO. G-4801-CL-0201401228-000

STATE OF OHIO,
Plaintiff-Appellee,

v.

JAMES SCHROEDER,
Defendant-Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JAMES SCHROEDER

Lucas County Prosecutor's Office

Evy Jarrett, 0062485
Assistant Prosecuting Attorney

Lucas County Courthouse
700 Adams Street
Toledo, Ohio 43604
419-213-4700
419-213-4595, fax
EJarrett@co.lucas.oh.us

Counsel for Appellee, State of Ohio

Office of the Ohio Public Defender

Stephen P. Hardwick, 0062932
Assistant Public Defender

250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167, fax
stephen.hardwick@opd.ohio.gov

Counsel for Appellant, James Schroeder

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**THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION
AND IS OF PUBLIC AND GREAT GENERAL INTEREST**

I. This Court should accept this case and hold it for the decision in *State v. Grimes*, Case No. 2016-0215.

This Court should either accept this case for briefing or accept it and hold it for the decision in *State v. Grimes*, Case No. 2016-0215. This Court accepted *Grimes* after the Fifth District, sitting en banc, could not reach a majority decision resolving the same issue this case presents. In both *Grimes* and this case, the issue is whether postrelease control can be properly imposed in an entry that doesn't mention the duration of the sanction, the mandatory or discretionary nature of the sanction, or the consequences for violating the sanction. In both *Grimes* and this case, an entry merely incorporated by reference postrelease control that was correctly imposed at the sentencing hearing.

II. The issue in this case has split the Fifth District judges sitting en banc, and has caused a conflict among other districts.

Not only has this issue split the judges of the Fifth District, it has caused a conflict between First and Eighth Districts on one side and the Sixth District on the other. Unlike the Sixth District, the First and Eighth District unequivocally hold that a sentencing entry only imposes valid postrelease control when the entry properly imposes the sanction. And this is true even if the trial court perfectly imposes the sanction at the sentencing hearing. *State v. Duncan*, 1st Dist. Hamilton No. C-120324, 2013-Ohio-381; *State v. Middleton*, 8th Dist. Cuyahoga No. 99979, 2013-Ohio-5591; *State v. Mace*, 8th Dist. Cuyahoga No. 100779, 2014-Ohio-5036 (en banc opinion),

A. The Sixth District clearly held that an entry need not set forth the duration or discretionary/mandatory nature of postrelease control.

After Mr. Schroeder pleaded no contest, the trial court sentenced him to seven total years in prison for two counts of unlawful sexual conduct with a minor, both third-degree felonies. R.C. 2907.04(A) and (B)(3); Apx. A-8. The October 2, 2007 sentencing judgment entry states only, "Defendant given notice of appellate rights under R.C. 2953.08 and post release control notice under * * * R.C. 2967.28." Mr. Schroeder signed a plea form and a "Notice Pursuant to R.C. 2929.19(B)(3)," which explained the various terms that could be imposed under difference circumstances.

After his release from prison, Mr. Schroeder filed a motion to vacate his postrelease control, which the trial court denied. The Sixth District affirmed. *State v. Schroeder*, 6th Dist. Lucas No. L-14-1228, 2016-Ohio-1228, Apx. A-1. The Sixth District noted that Mr. Schroeder did not submit one part of the transcript sentencing hearing, so regularity at that hearing was presumed. *Id.* at ¶ 18. The Sixth District then held that regardless of what was said at the sentencing hearing, "a simple reference to the applicable statutes is sufficient to give the offender the required notice that the court authorized a post-release control sanction." *Id.* at ¶ 17, quoting *State v. Murray*, 6th Dist. Lucas No. L-10-1059, 2012-Ohio-4996, ¶ 24.

The Sixth District has therefore clearly held that postrelease control can be properly imposed by an entry that does not set forth the duration or mandatory/discretionary nature of the sanction.

B. The First and Eighth Districts clearly hold that an entry must set forth the duration or discretionary/mandatory nature of postrelease control.

In addressing the same question of law, the First and Eighth Districts determined that a simple reference to the postrelease control statutes in a defendant's sentencing entry is not sufficient to impose valid postrelease control, even where, as in Mr. Schroeder's case, the defendant did not provide a transcript of his sentencing hearing.

1. State v. Duncan, First Appellate District.

In *Duncan*, the defendant pleaded guilty to a felony offense and was sentenced to prison. *State v. Duncan*, 1st Dist. Hamilton No. C-120324, 2013-Ohio-381, ¶ 2. Following his release from prison, he filed a motion in the trial court seeking to vacate his postrelease control. *Id.* ¶ 2-4. Mr. Duncan did not include a transcript of his sentencing hearing with his motion, so proper oral notice was presumed. *Id.* at ¶ 10. However, his sentencing judgment entry simply stated that "the defendant is subject to the post release [sic] control supervision of R.C. 2967.28." *Id.* at ¶ 11. The First District held that the simple reference to R.C. 2967.28 was not sufficient to impose valid postrelease control because "it did not specify the duration or the mandatory nature of postrelease-control supervision." *Id.* at ¶ 16.

The First District was thus presented with precisely the same situation the Sixth District faced in Mr. Schroeder's case. In the absence of a transcript, the *Duncan* Court presumed correct oral notice, just as the Sixth District did. But while the Sixth District found a simple reference to R.C. 2967.28 in Mr. Schroeder's sentencing entry sufficient to impose postrelease control, the *Duncan* Court reached precisely the opposite holding and declared Mr. Duncan's postrelease control void. *Duncan* at ¶ 16. The Sixth District's decision conflicts with the First District's decision in *Duncan* on the rule of law at issue in this case.

2. *State v. Middleton, Eighth Appellate District.*

State v. Middleton, 8th Dist. Cuyahoga No. 99979, 2013-Ohio-5591, involved facts indistinguishable from those in *Duncan* and Mr. Schroeder's case. Following his release from prison, Mr. Middleton filed a motion to vacate his postrelease control, but did not include a transcript of his sentencing hearing with his motion. *Id.* at ¶ 3, 9. Without that transcript, the Eighth District presumed correct oral notification. *Id.* at ¶ 9. Mr. Middleton's sentencing entry stated that "post release control is part of this prison sentence for the maximum period allowed for the above felony under R.C. 2967.28." *Id.* at ¶ 2. The Eighth District had to decide whether Mr. Middleton's postrelease control was "void for referencing the postrelease control statute, R.C. 2967.28, to establish notice of the duration, rather than being more specific and stating the five-year term of postrelease control." *Id.* at ¶ 5. The court held that it was. *Id.* at ¶ 10.

In contrast to *Middleton*, the Sixth District held in this case that “a simple reference to the applicable statutes is sufficient to give the offender the required notice that the court authorized a post-release control sanction.” *Schroeder* at ¶ 17. The *Middleton* Court held that “referencing the postrelease control statute, R.C. 2967.28, to establish notice” was not sufficient to impose valid postrelease control. *Middleton* at ¶ 5, 10. As a result, the Sixth District’s decision is thus in conflict with the Eighth District’s decision in *Middleton* on precisely the same rule of law.

3. *State v. Mace*, Eighth Appellate District.

The en banc opinion in *State v. Mace*, 8th Dist. Cuyahoga No. 100779, 2014-Ohio-5036, presented essentially the same facts as *Middleton* and this case. Mr. Mace challenged his postrelease control based on a sentencing entry containing the same language as in *Middleton*, but did not include a transcript of his sentencing hearing with the motion. *State v. Mace*, 8th Dist. Cuyahoga No. 100779, 2014-Ohio-3040, ¶ 2, 8, *affirmed en banc*, 2014-Ohio-5036. The Eighth District held that Mr. Mace’s postrelease control was void, but recognized an intra-district conflict and reviewed the case *en banc*. *Mace*, 2014-Ohio-5036, ¶ 1. The *en banc* court reviewed the following question:

[W]hether a sentencing journal entry that states that the appellant is subject to postrelease control for the “maximum period allowed” for that felony is void, even if the court informed the defendant at the sentencing hearing of the specific period of post-release control imposed.

Id. The *en banc* court affirmed the panel decision, concluding that Mr. Mace’s postrelease control was void. *Id.* The Eighth District has thus consistently held that a

simple reference to postrelease control in a defendant's sentencing entry is not sufficient to impose enforceable postrelease control, even if the defendant received correct oral notification as his sentencing hearing. *Id.*; *Middleton* at ¶ 5, 10.

III. A journal entry of sentence always reports what happened at the sentencing hearing, regardless of whether it does so expressly.

The purpose of a sentencing entry is to document and make enforceable what happened at the sentencing hearing. As this Court has explained, "a court speaks through its journal. Accordingly, it is imperative that the court's journal reflect the truth." *State ex rel. Worcester v. Donnellon*, 49 Ohio St.3d 117, 118, 551 N.E.2d 183 (1990), citing *In Hollister v. Judges of Dist. Court*, 8 Ohio St. 201 (1857). *Accord State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 19.

The State may argue that there is a substantive difference between an entry that expressly incorporates what happened in the sentencing hearing and one that does not. And it's true that the entries in the First and Eighth District purport to impose postrelease control without mentioning the sentencing hearing whereas Mr. Schroeder's entry purports to impose the sanction while mentioning the sentencing hearing. But the State misses that a journal entry is the enforceable documentation of what occurred in open court. There is no difference between an entry that says, "Defendant is sentenced to five years in prison" and one that says, "At the sentencing hearing, this Court sentenced Defendant to five years in prison." Likewise, there is no difference between an entry that says, "Defendant is sentenced to five years of postrelease control" and one

that says, “At the sentencing hearing, this Court sentenced Defendant to five years of postrelease control.” In all of those cases, the court speaks through the journal. And in Mr. Schroeder’s case, the journal entry does not mention the term of postrelease control or state that the sanction is mandatory.

Further, like this case, in all three conflict cases from the First and Eighth Districts, the sentencing transcript was not provided, so the trial court’s actions at sentencing were presumed to be correct. *Duncan* at ¶ 11, *Middleton* at ¶ 9; or post *State v. Mace*, 8th Dist. Cuyahoga No. 100779, 2014-Ohio-3040, ¶ 8-9, adopted by the en banc court in *Mace*, 2014-Ohio-5036 at ¶ 2.

IV. This Court should accept this case to avoid confusion when released prisoners cross county lines.

This Court should accept this case so that the postrelease control status of a defendant does not change when that defendant crosses a county line. As this Court has held, “a court may refuse to enforce the void judgment of another court or prevent a party from executing upon the judgment.” *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, ¶ 47. This Court distinguished *the refusal to enforce* a void judgment from the *power to vacate* a void judgment, which the Court held belonged only to the court that issued a judgment or courts on direct review from that judgment. *Id.* at 48. The enforceability of defendant’s postrelease control should not change when a defendant crosses a county line.

V. Conclusion.

This Sixth District held that “a simple reference to the applicable statutes is sufficient to give the offender the required notice that the court authorized a post-release control sanction.” *Schroeder* at ¶ 17. The First and Eighth Districts have reached the opposite conclusion in three indistinguishable cases. Further, as the *Grimes* case shows, a majority of Fifth District judges cannot come to a common solution to the issue. This Court should accept this case and either receive briefs or hold it for the decision in *State v. Grimes*, Case No. 2016-0215.

STATEMENT OF THE CASE AND THE FACTS

After Mr. Schroeder pleaded no contest, the trial court sentenced him to seven total years in prison for two counts of unlawful sexual conduct with a minor, both third-degree felonies. R.C. 2907.04(A) and (B)(3). A complete transcript of the sentencing hearing was not provided to the court of appeals, so it is presumed that the trial court properly imposed the sanction in open court, but the October 2, 2007 judgment entry states only, "Defendant given notice of appellate rights under R.C. 2953.08 and post release control notice under * * * R.C. 2967.28."

After he completed his prison term, he the Adult Parole Authority began to supervise him on postrelease control. The trial court denied his motion to vacate postrelease control, and the Sixth District affirmed. This timely discretionary appeal follows.

ARGUMENT

Proposition of Law:

To impose valid post release control, the language in the sentencing must correctly state the duration and mandatory or discretionary nature of the sanction. The entry may not simply incorporate the advisements given during the sentencing hearing by referencing the post release control statute.

I. A trial court must properly *impose* all criminal sanctions, including postrelease control.

This Court has repeatedly held that, for postrelease control to be enforceable, a trial court must correctly *impose* that sanction both at the sentencing hearing and in the sentencing entry. In order to properly impose postrelease control, and to authorize the APA to enforce the sanction, the sentencing entry must correctly state the term of postrelease control and state whether the term is discretionary or mandatory. *See, e.g., State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, ¶ 7, 1 N.E.3d 382 (“when a judge fails to properly impose statutorily mandated postrelease control as part of a defendant’s sentence, the postrelease-control sanction is void”); *State v. Billiter*, 134 Ohio St.3d 103, 2012-Ohio-5144, 980 N.E.2d 960, ¶ 1 (postrelease control is not enforceable when “a trial court improperly sentences a defendant to” the sanction); *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 71 (“in the absence of a proper *sentencing entry* imposing postrelease control, the parole board’s imposition of post-release control cannot be enforced”) (Emphasis added.); and *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 16 (“without the trial court’s proper

imposition of postrelease control, the Adult Parole Authority remains powerless to implement it"). See also, *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, ¶ 47 (holding that a "court speaks through its journal").

More recently, this Court emphasized that a court must actually *impose* postrelease control for the sanction to be enforceable:

We have previously explained that terms of postrelease control are "part of the actual sentence" and that *the court* must inform the offender regarding these terms, because *sentencing is a judicial function* and a sentence cannot be imposed by the executive branch of government. *Woods v. Telb*, 89 Ohio St.3d 504, 511, 512, 2000 Ohio 171, 733 N.E.2d 1103; see also *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 23 ("*a judge must conform to the General Assembly's mandate in imposing postrelease-control sanctions as part of a criminal sentence*"). (Emphasis added.)

State v. Schleiger, 2014-Ohio-3970, 141 Ohio St. 3d 67, 21 N.E.3d 1033, ¶ 15. In *Schleiger*, this Court repeatedly referred to the imposition of postrelease control, not mere notice.

"[B]ecause sentencing is a judicial function and a sentence cannot be *imposed* by the executive branch of government."

"[I]f a court improperly *imposes* postrelease control. . . ."

"[A] resentencing hearing to *impose* a mandatory term of postrelease control requires the court to adhere to R.C. 2929.191[.]"

Id. at ¶ 15, 16 (Emphasis added in all quotations.)

Even the dissenting opinion in *Schleiger* used the language of *imposition*, not notice:

"The General Assembly has created a statutory procedure to remedy a sentencing court's mistake in failing to properly *impose* a term of postrelease control."

Schleiger has not shown how he was prejudiced by a correction that did not change his sentence other than to *impose* postrelease control that was always mandated by statute.

Id. at ¶ 24, 26 (Lanzinger, J., dissenting).

Once a defendant has completed his prison term the remedy for improper postrelease control is discharge. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 70-72.

II. This Court’s extraordinary writ decisions apply only to extraordinary writs.

The Sixth District relied on its opinion in *State v. Murray*, 6th Dist. Lucas No. L-10-1059, 2012-Ohio-4996 for the proposition that a reference to the applicable statute in a sentencing entry is sufficient to impose a criminal sanction. However, in *Murray* relied on a doctrine that this Court has applied only in the context of extraordinary writ cases. *State v. Murray*, 6th Dist. Lucas No. L-10-1059, 2012-Ohio-4996 ¶ 23; citing *Watkins v. Collins*, 111 Ohio St. 3d 425, 2006-Ohio-5082, ¶ 51, 857 N.E.2d 78. In *Watkins*, this Court held that a defendant cannot obtain a writ of mandamus or prohibition if the defendant had sufficient notice of postrelease control to raise the issue on direct appeal.

The Sixth District’s reliance on *Watkins* is misplaced. In *Billiter*, this Court recognized that the Fifth District erred when it applied the holding of *Watkins* to an escape-from-postrelease control case. *Billiter* at ¶ 5. And the Second District has directly addressed the tension between the Ohio Supreme Court’s signed opinions and it’s per curium writ decisions by holding that *the dissenting opinion* in *Watkins* “is in line with

subsequent Supreme Court decisions regarding post-release control.” *State v. Robinson*, 2d Dist. Clark No. 2010 CA 30, 2011-Ohio-1737, p. 7, citing *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 71, and *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332.

III. Postrelease control is either a criminal sanction or it is not.

If postrelease control is a criminal sanction, it must be imposed like any other criminal sanction. Sentencing is a judicial function. As this Court has recognized, “the sentencing of a defendant convicted of a crime [is] solely the province of the judiciary.” *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 136, 729 N.E.2d 359 (2000), citing *State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 648, 4 N.E. 81 (1885); *Stanton v. Tax Comm.*, 114 Ohio St. 658, 672, 151 N.E. 760 (1926) (“the primary functions of the judiciary are to declare what the law is and to determine the rights of parties conformably thereto”); and *Fairview v. Giffie*, 73 Ohio St. 183, 190, 76 N.E. 865 (“It is indisputable that it is a judicial function to hear and determine a controversy between adverse parties, to ascertain the facts, and, applying the law to the facts, to render a final judgment.”).

Even if only one punishment were possible, this Court would never continece an entry that simply sentenced a defendant to prison for a firearm specification and then required the Department of Rehabilitation and Correction calculate proper prison term. The same rule should apply to postrelease control.

Contrary to at least 130 years of this Court's case law, the Sixth District's decision in this case requires the Adult Parole Authority, not a trial judge, to calculate a defendant's criminal sentence. This Court should accept this case and return sentencing authority to where it belongs—the trial court.

CONCLUSION

This Court should accept this case and hold it for the resolution of *State v. Grimes*, Case No. 2016-0215.

Respectfully submitted,

Office of the Ohio Public Defender

/s/ Stephen P. Hardwick _____

By: Stephen P. Hardwick (0062932)
Assistant Public Defender

250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (fax)
stephen.hardwick@opd.ohio.gov

Counsel for Appellant James Schroeder

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was filed electronically and a copy was forwarded by electronic mail to Assistant Prosecuting Attorney Evy Jarrett, EJarrett@co.lucas.oh.us, on this 15th day of April, 2016.

/s/ Stephen P. Hardwick

Stephen P. Hardwick (0062932)
Assistant Public Defender

#463815