Supreme Court of Ohio Clerk of Court - Filed May 23, 2016 - Case No. 2016-0215

IN THE SUPREME COURT OF OHIO
2016

STATE OF OHIO,	Case No. 2016-0215
Plaintiffs-Appellant,	On Appeal from the Muskingum County Court of Appeals, Fifth Appellate District
-vs-	
BRADLEY GRIMES,	
Defendant-Appellee.	Court of Appeals Case No. CT2015-0026

BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTING ATTORNEY RON O'BRIEN

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
SETH L. GILBERT 0072929
Assistant Prosecuting Attorney
(Counsel of Record)
373 South High Street–13th Floor
Columbus, Ohio 43215
Phone: 614-525-3555
Fax: 614-525-6012
Email: sgilbert@franklincountyohio.gov

Counsel for Amicus Curiae Franklin County Prosecuting Attorney Ron O'Brien

STEPHEN P. HARDWICK 0062932
Assistant Public Defender
(Counsel of record)
250 East Broad Street, Suite 1400
Columbus, Ohio 43215

Counsel for Appellee Bradley Grimes

D. MICHAEL HADDOX 0004913
Muskingum County Prosecuting Attorney
GERALD V. ANDERSON 0092567
Assistant Prosecuting Attorney
(Counsel of Record)
27 North Fifth Street, Suite 201
Zanesville, Ohio 43701

Counsel for Appellant State of Ohio

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF AMICUS INTEREST 3

STATEMENT OF THE FACTS 3

ARGUMENT 4

First Proposition of Law: While a trial court must notify a defendant at the sentencing hearing that a PRC violation may result in additional prison time of up to one-half the stated prison term, the sentencing entry need not contain such language. 4

I. R.C. 2929.19(B)(2)(e) is a notification requirement and does not govern the sentencing entry. 5

II. A trial court need not include in the sentencing entry any of the consequences for violating community control, and the same should be true for PRC. 8

III. *State v. Ketterer* is inapposite, as that capital case addressed a trial court's application of R.C. 2929.191. 9

IV. *State v. Jordan* does not require a sentencing entry to state that a PRC violation may result in additional prison time. 10

Second Proposition of Law: For any sentence imposed on or after July 11, 2006, any error in notifying the defendant of PRC or including PRC in the sentencing entry does not negate, limit, or otherwise affect the validity of the sentence. 11

I. *Singleton* did not address the "does not negate, limit, or otherwise affect" language in Am.Sub.H.B. 137. 12

II. The "does not negate, limit, or otherwise affect" language in Am.Sub.H.B. 137 is essential to achieving the General Assembly's intent. 13

Third Proposition of Law: For an inmate to challenge the legality of custody, a post-sentence motion filed in the underlying criminal case number is not a substitute for a habeas petition. 14

CONCLUSION 17

CERTIFICATE OF SERVICE 18

TABLE OF AUTHORITIES

Cases

Hernandez v. Kelly, 108 Ohio St.3d 395, 2006-Ohio-126 ..... 16, 17

Indus. Comm. v. Musselli, 102 Ohio St. 10 (1921) 6

State ex rel. Benjamin v. Ohio Dep't of Rehab. & Corr., 10th Dist. No. 06AP-158, 2007-Ohio-2471 16

State ex rel. Cruzado v. Zaleski, 111 Ohio St.3d 353, 2006-Ohio-5795 ..... 2, 14, 15

State ex rel. Geauga Cty. Bd. of Cmmrs. v. Milligan, 100 Ohio St.3d 366, 2003-Ohio-6608 6

State ex rel. Jackson v. McFaul, 73 Ohio St.3d 185 (1995) 17

State ex rel. White v. Junkin, 80 Ohio St.3d 335 (1997) 14

State v. Batty, 15 N.E.3d 347, 2014-Ohio-2826 (4th Dist.) 8

State v. Beasley, 14 Ohio St.3d 74 (1984) 14

State v. Billiter, 134 Ohio St.3d 103, 2012-Ohio-5144 17

State v. Brooks, 103 Ohio St.3d 134, 2004-Ohio-4746 8

State v. Bybee, 28 N.E.3d 149, 2015-Ohio-878 (8th Dist.) 5

State v. Clinkscale, 122 Ohio St.3d 351, 2009-Ohio-2746 10

State v. Comer, 99 Ohio St.3d 463, 2003-Ohio-4165 6

State v. DeMastry, 5th Dist. No. 05CA15, 2005-Ohio-5175 16

State v. Fischer, 128 Ohio St.3d 92, 2010-Ohio-6238 ..... 12, 14

State v. Fry, 125 Ohio St.3d 163, 2010-Ohio-1017 9

State v. Garretson, 140 Ohio Aapp.3d 554 (12th Dist.2000) 14

State v. Grimes, 5th Dist. No. CT2015-0026, 2015-Ohio-3497 ..... 4, 5, 9

State v. Guilkey, 4th Dist. No. 04CA9432, 2005-Ohio-3501 8

State v. Holdcroft, 137 Ohio St.3d 526, 2013-Ohio-5014 14

State v. Jordan, 104 Ohio St.3d 21, 2004-Ohio-6085 ..... 6, 10, 11

State v. Jordan, 8th Dist. No. 80675, 2002-Ohio-4587 10

State v. Ketterer, 126 Ohio St.3d 448, 2010-Ohio-3831 ..... 9, 10

State v. Simpkins, 117 Ohio St.3d 420, 2008-Ohio-1197 14

State v. Singleton, 124 Ohio St.3d 173, 2009-Ohio-6434 ..... 12, 13

State v. Thoman, 10th Dist. No. 05AP-817, 2006-Ohio-1651 16

Watkins v. Collins, 111 Ohio St.3d 425, 2006-Ohio-5082 17

Woods v. Telb, 89 Ohio St.3d 504 (2000) 12

Woods v. Telb, 89 Ohio St.3d 504, 508 (2000) 3

Statutes

R.C. 2907.04(A) 3

R.C. 2929.14(D)(1) 7, 10, 11

R.C. 2929.14(D)(2) 7, 10, 11

R.C. 2929.141(A)(1) 1, 3

R.C. 2929.19(B)(2)(c) 6, 11

R.C. 2929.19(B)(2)(d) 6, 11

R.C. 2929.19(B)(2)(e) ..... passim

R.C. 2929.19(B)(4) 8

R.C. 2929.191 ..... passim

R.C. 2929.191(B)(1) 9

R.C. 2929.191(C) 9

R.C. 2967.01(N) 3

R.C. 2967.28(B) 7, 10, 11

R.C. 2967.28(C) 7, 10, 11

R.C. 2967.28(D)(1) 7

Rules

Civ.R. 3(A) 16

Civ.R. 4.1 16

Crim.R. 43(A) 5, 6

INTRODUCTION

Defendant Bradley Grimes was convicted in 2011 of robbery, a third-degree felony, and vandalism, a fifth-degree felony. The trial court sentenced Grimes to a total of 18 months in prison, along with a mandatory three years of post-release control (PRC). While on PRC, Grimes committed a new offense—this time unlawful sexual conduct with a minor. Grimes pleaded guilty to this offense, and the trial court sentenced him to a year in prison. Because this new offense violated Grimes's PRC in the earlier case, the trial court imposed an additional, consecutive prison term consisting of the remainder of the PRC term (719 days). *See*, R.C. 2929.141(A)(1).

Grimes later filed a motion with the trial court in the second case, requesting his release from prison. Grimes argued that the sentencing entry in the first case failed to properly impose PRC because it did not explicitly state the consequences for violating PRC. The trial court overruled the motion. Grimes appealed to the Fifth District, which reversed the trial court's judgment. This Court accepted the State's discretionary appeal.

Franklin County Prosecutor Ron O'Brien respectfully submits this amicus brief in support of appellant State of Ohio. This case provides this Court an opportunity to bring needed clarity to PRC litigation. Specifically, this case implicates three key PRC-related distinctions that have confounded lower courts.

First, this case implicates the distinction between a trial court's obligation to notify a defendant of a sentence at the sentencing hearing and the trial court's obligation to include the sentence in the sentencing entry. The former is a procedural requirement governing how the sentence is imposed, whereas the latter determines the actual terms of the sentence itself. While R.C. 2929.19(B)(2)(e) requires a trial court to notify a defendant at the sentencing hearing that

the parole board may impose additional prison time of up to one-half the stated prison term for a PRC violation, the sentencing entry need not contain such language.

Second, this case implicates the distinction between sentences imposed before July 11, 2006, and sentences imposed on or after that date. In Am.Sub.H.B. 137, the General Assembly added language to the relevant PRC statutes stating that any error in imposing mandatory PRC "does not negate, limit, or otherwise affect" the validity of PRC if the sentence was imposed on or after July 11, 2006. Am.Sub.H.B. 137 also enacted R.C. 2929.191, which creates a limited correction procedure for sentences imposed before that date. Thus, the General Assembly established July 11, 2006, as a clear demarcation point: Errors in imposing PRC that occur before that date are subject to correction under R.C. 2929.191, while errors in imposing mandatory PRC that occur on or after that date do not need correction at all, or at a minimum, do not rise to the level of "void sentence" error that might require correction or release from prison years later.

Third, this case implicates the distinction between asking a trial court to correct a sentence and asking it to order a defendant's release from prison. Trial courts retain jurisdiction to correct a "void" sentence. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, ¶ 19. But asking a trial court to correct a void sentence is entirely different from asking a trial court to release a defendant due to a void sentence. In the former scenario, the purpose of the request is to ensure that the trial court fulfills its obligation to impose a valid sentence. In the latter scenario, the trial court is asked to resolve a dispute between the defendant and his custodian (usually the prison warden). The dispute arises because the defendant thinks that the sentencing entry does not impose a valid sentence, whereas the warden thinks that it does. The proper forum to resolve such disputes is a habeas petition against the custodian.

The Fifth District's decision should be reversed. Grimes's sentence was not defective at all, let alone void. But even if the sentencing entry was defective, the sentencing occurred long after July 11, 2006, so any PRC errors in the entry do not affect the validity of the sentence. And Grimes's argument that the sentencing entry does not authorize his incarceration should be raised via a habeas petition—not a motion filed with the trial court that oversaw his criminal case. This Court's resolution on these issues will go a long way in clarifying PRC litigation going forward.

STATEMENT OF AMICUS INTEREST

Ron O'Brien has served as the Franklin County Prosecutor since 1996. Every year, the office of the Franklin County Prosecutor handles thousands of felony prosecutions, many of which result in prison terms that include a period of post-release control (PRC). Being a "period of supervision by the adult parole authority after a prison's release from imprisonment that includes one or more post-release control sanctions imposed under section 2967.28 of the Revised Code," R.C. 2967.01(N), PRC is a "hallmark" of the sentencing structure enacted by Am.Sub.S.B. 2, *Woods v. Telb*, 89 Ohio St.3d 504, 508 (2000). Prosecutor Ron O'Brien has a substantial interest in ensuring that courts do not unnecessarily vacate PRC terms. Ron O'Brien therefore offers the following amicus brief in support of Plaintiff-Appellant State of Ohio.

STATEMENT OF THE FACTS

In September 2013, defendant Bradley Grimes was indicted in CR2013-0198 on two counts of unlawful sexual conduct with a minor under R.C. 2907.04(A). R. 1. Grimes later pleaded guilty to one of the counts, and the trial court sentenced him to one year in prison. R. 25. The trial court further found that, at the time of the offense, Grimes was serving a PRC term in CR2011-0150. The trial court terminated the PRC term in CR2011-0150 and ordered Grimes to serve the remainder of that PRC term in prison (719 days), consecutively to a one-year prison term imposed in CR2013-0198. R. 25; see, R.C. 2929.141(A)(1).

In April 2015, Grimes filed a "Motion to Vacate Judicial Sanction Sentence (Subject to Immediate Release)." R. 37. In the motion, Grimes argued that the trial court did not properly impose PRC in CR2011-0150. Specifically, Grimes argued that the sentencing entry in CR2011-0150 failed to include the specific consequences of violating PRC, and that as a result the PRC portion of the sentence in CR2011-0150 was void. The sentencing entry in CR2011-0150 states:

> The Court further notified the Defendant that **"Post Release Control"** is **mandatory** in this case for **<u>three (03) years</u>** as well as the consequences for violating conditions of post release control imposed by the 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.

Id., Exh. A (emphasis sic). Grimes continued that, because he had already completed the one-year prison term in CR2013-0198—i.e., he had already begun serving the prison term from CR2011-0150—that the trial court was required to order his release from prison. The trial court denied the motion. R. 40.

Grimes appealed to the Fifth District, and that court reversed. After quoting the sentencing entry in CR2011-0150, the court held that "[t]he trial court failed to inform Appellant 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." *State v. Grimes*, 5th Dist. No. CT2015-0026, 2015-Ohio-3497, ¶ 12.

ARGUMENT

> **<u>First Proposition of Law</u>:** While a trial court must notify a defendant at the sentencing hearing that a PRC violation may result in additional prison time of up to one-half the stated prison term, the sentencing entry need not contain such language.

Grimes never argued that the trial court failed to notify him of PRC at the sentencing hearing in CR2011-0150. Indeed, there is no transcript of the sentencing hearing in CR2011-0150 in the record. With no record proof to the contrary, the trial court in CR2011-0150 is

presumed to have fully complied with the notification requirements. *State v. Bybee*, 28 N.E.3d 149, 2015-Ohio-878, ¶11 (8th Dist.), n. 2. Rather than claim that the trial court's notification at the sentencing hearing in CR2011-0150 was deficient, Grimes's complaint was directed at the sentencing entry in that case. Grimes argued that "there was no notification of the specific consequences of violating postrelease control in the sentencing entry." R. 37, p. 5.

The Fifth District, however, conflated the contents of the notification with the contents of the sentencing entry. The court first referred to the entry, stating that "the entry is silent as to the consequences of violating post-release control." *Grimes* at ¶ 12. But in explaining this conclusion, the court stated that "[t]he trial court failed to inform Appellant 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." *Id*.

Presumably, the court intended the phrase "inform Appellant" to refer to the contents of the sentencing entry and not the trial court's notification at the sentencing hearing. Nonetheless, Fifth District's reference to "inform[ing] Appellant" is indicative of the confusion that can result when notification requirements are seen as synonymous with the requirements of a sentencing entry. While a trial court must notify the defendant at the sentencing hearing that a PRC violation may result in additional prison time of one-half the stated prison term, such language need not be included in the sentencing entry.

I. R.C. 2929.19(B)(2)(e) is a notification requirement and does not govern the sentencing entry.

Generally, notification requirements ensure a defendant is present when a trial court imposes sentence. *See* Crim.R. 43(A). But the actual terms of the sentence are not governed by the trial court's notification; they are governed by the sentencing entry. This follows the axiomatic rule that "[a] court of record speaks only through its journal entries." *State ex rel.*

Geauga Cty. Bd. of Cmmrs. v. Milligan, 100 Ohio St.3d 366, 2003-Ohio-6608, ¶ 20. Thus, in determining a defendant's sentence, the Department of Rehabilitations and Corrections looks to the sentencing entry, not to what the trial court said at the sentencing hearing. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, ¶ 33 (Grady, J., dissenting) (when a sentencing entry conflicts with a trial court's verbal pronouncement of sentence, the entry controls). "Were the rule otherwise it would provide a wide field for controversy as to what the court actually decided." *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶ 6, quoting *Indus. Comm. v. Musselli*, 102 Ohio St. 10, 15 (1921).

While Crim.R. 43(A) requires a trial court to impose a sentence in a defendant's presence, a statute may require a trial court to notify a defendant of matters that are not required to be included in the sentencing entry. Such is the case with PRC.

PRC notification is governed by R.C. 2929.19(B)(2)(c), (d), and (e). These statutes "alleviate[] any potential problems pursuant to Crim.R. 43(A), which requires a defendant to be present at sentencing." *Jordan* at ¶ 17, n. 2 (referring to former R.C. 2929.19(B)(3)). R.C. 2929.19(B)(2)(c) and (d) codify Crim.R. 43(A) by requiring the trial court to notify the defendant that PRC is a part of the sentence—(B)(2)(c) addresses mandatory PRC, while (B)(2)(d) addresses discretionary PRC. But R.C. 2929.19(B)(2)(e) goes one step further and requires a trial court to "[n]otify the offender" at the sentencing hearing that if he or she is subject to a mandatory or discretionary PRC term and violates PRC, then "the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender."

It is worth noting here that R.C. 2929.19(B)(2)(e) requires notification if only *one* potential consequence of a PRC violation—i.e., prison imposed by the parole board. It does not require a trial court to notify a defendant of *all* the potential consequences of a PRC violation.

In contrast, whether the sentencing entry properly includes PRC in the sentence is governed by R.C. 2929.14(D)(1) and (2). Under these statutes, a trial court "shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment." Notably, neither R.C. 2929.14(D)(1) nor (2) contains any requirement that the trial court "include in the sentence" the fact that the parole board may impose additional prison time for violating PRC.

Similarly, R.C. 2967.28(B) and (C) state that a prison term "shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment." There is nothing in R.C. 2967.28(B) or (C) that requires the sentence to "include" any mention of the parole board's authority to sentence a defendant to additional prison time for violating PRC.

True, R.C. 2967.28(D)(1) states that the "parole board shall notify the prisoner that, if the prisoner violates any sanction so imposed or any condition of post-release control * * * that is imposed on the prisoner, the parole board may impose a prison term of up to one-half of the stated prison term originally imposed upon the prisoner." But this is just another notification requirement. The General Assembly apparently wanted defendants to have one last reminder before their release from prison that a failure to comply with PRC terms could result in additional prison time. This additional notification requirement, however, does not govern the sentencing entry.

Accordingly, while R.C. 2929.19(B)(2)(e) requires a trial court to notify the defendant at the sentencing hearing that the parole board could impose additional prison time of up to one-half the stated prison term for a PRC violation, such language need not be included in the sentencing entry. And because the parole board's legal authority to enforce PRC comes from the sentencing entry—and not from the trial court's notification at the sentencing hearing—the absence of such language in the sentencing entry has no effect on the validity of a prison term imposed by the parole board for a PRC violation.

II. A trial court need not include in the sentencing entry any of the consequences for violating community control, and the same should be true for PRC.

This issue is analogous to a community-control revocation. A trial court imposing community control must notify the offender that a violation of community-control could result in various consequences, including a prison term, and the trial court must "indicate the specific prison term that may be imposed as a sanction for the violation." R.C. 2929.19(B)(4). The trial court must give this notification at the sentencing hearing; providing the notification in the sentencing entry is insufficient. *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, ¶¶ 14-18; *State v. Batty*, 15 N.E.3d 347, 2014-Ohio-2826, ¶ 35 (4th Dist.). Indeed, even if a sentencing entry contains *erroneous* language concerning the prison term that could be imposed for a community-control violation, it does not affect the validity of the sentence if proper notice was given at the sentencing hearing. *Batty* at ¶ 35, citing *State v. Guilkey*, 4th Dist. No. 04CA9432, 2005-Ohio-3501.

Likewise with PRC. R.C. 2929.19(B)(2)(e)—like R.C. 2929.19(B)(4)—is a notification statute. While it governs what the trial court must do at the sentencing hearing, it does not govern what must be stated in the sentencing entry. So just as a sentencing entry need not state

all the possible consequences of violating community control, nor does a sentencing entry need to state that a violation of PRC may result in additional prison time.

III. *State v. Ketterer* is inapposite, as that capital case addressed a trial court's application of R.C. 2929.191.

The Fifth District relied on this Court's decision in *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831. *Grimes* at ¶ 12. This reliance was misplaced. In *Ketterer*—a death-penalty case—the trial court held a resentencing hearing pursuant to remand of this Court. *Ketterer* at ¶ 4. The trial court later filed a nunc pro tunc entry to correct PRC-related errors in the resentencing entry. *Id*. at ¶ 5. This Court held that, because the resentencing hearing took place after July 11, 2006, any correction to the resentencing entry was governed by R.C. 2929.191. *Id*. at ¶ 69, citing *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶ 214. This Court further held that the nunc pro tunc entry did not comply with R.C. 2929.191 because (1) the trial court did not hold a hearing, as required by R.C. 2929.191(C); and (2) the nunc pro tunc entry did not state that the parole board could impose additional prison time of up to one-half the stated prison term for a PRC violation, as required by R.C. 2929.191(B)(1). *Ketterer* at ¶¶ 76-77.

Thus, at most, *Ketterer* stands for the proposition that a nunc pro tunc entry under R.C. 2929.191 must state that if the defendant violates PRC "the parole board may impose as part of the sentence a prison term of up to one-half of the stated prison term." R.C. 2929.191(B)(1). *Ketterer* did not address what an *original* sentencing entry must state in order to impose PRC.

To be sure, R.C. 2929.19(B)(2)(e) and R.C. 2929.191(B)(1) authorize a trial court to correct a sentencing entry if the trial court failed to notify a defendant under R.C. 2929.19(B)(2)(e) or to "include in the judgment of conviction entered on the journal a statement to that effect." But neither R.C. 2929.19(B)(2)(e) nor R.C. 2929.191(B)(1) states that a "statement to that effect" is required to be in the original sentencing entry in the first place. The

contents of the original sentencing entry are governed by R.C. 2929.14(D)(1) and (2) and R.C. 2967.28(B) and (C), and none of those provisions requires a sentencing entry to state that a PRC violation may result in additional prison time.

One final point about *Ketterer*: This Court emphasized that "the court must conduct proceedings in capital cases with a strict level of care that comports with their unique status." *Ketterer* at ¶ 78, quoting *State v. Clinkscale*, 122 Ohio St.3d 351, 2009-Ohio-2746, ¶ 23. If *Ketterer* really does stand for the proposition that an original sentencing entry—as opposed to a nunc pro tunc entry under R.C. 2929.191—requires a statement that a violation of PRC may result in additional prison time, then such requirement should be limited to capital cases.

IV. *State v. Jordan* does not require a sentencing entry to state that a PRC violation may result in additional prison time.

In *Jordan*, this Court held: "When sentencing a felony offender to a term of imprisonment, 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." *Jordan* at paragraph one of the syllabus. This passage is often cited as authority for the proposition that a trial court's notification under R.C. 2929.19(B)(2)(e) must be incorporated into the sentencing entry.

But such reading of *Jordan* is erroneous. This Court specifically stated that the requirement that a trial court notify a defendant that a PRC violation may result in additional prison time of up to one-half the stated prison term—which at the time was codified in former R.C. 2929.19(B)(3)(e)—"is not at issue in the present cases." *Id*. at ¶ 15, n. 1. This qualification to the holding in *Jordan* is significant. In one of the two cases at issue in *Jordan*, the sentencing entry contained no mention of the consequences for violating PRC. *State v. Jordan*, 8th Dist. No. 80675, 2002-Ohio-4587, ¶ 7. This Court, however, stated that in both cases, the trial court

"properly incorporated postrelease control into the respective sentencing entries." *Jordan* at ¶ 4. Thus, this Court *approved* the sentencing entry in Jordan's case, even though the entry said nothing about the parole board's authority to impose additional prison time for violating PRC. In other words, the error in *Jordan* was the trial court's failure to notify at the sentencing hearing, not the absence of language in the sentencing entry. If this Court had intended for a sentencing entry to incorporate the notice under former R.C. 2929.19(B)(3)(e), it would not have expressly stated that that statute was "not at issue in the present cases."

In short, the sentencing entry in CR2011-0150 was not defective at all, let alone void. The Fifth District's conclusion to the contrary should be reversed.

> **Second Proposition of Law:** For any sentence imposed on or after July 11, 2006, any error in notifying the defendant of PRC or including PRC in the sentencing entry does not negate, limit, or otherwise affect the validity of the sentence.

In Am.Sub.H.B. 137, the General Assembly amended R.C. 2929.14, R.C. 2929.19, and R.C. 2967.28 to include language that for any sentence imposed on or after July 11, 2006, any error in imposing mandatory PRC—be it an error in notification or an error in the sentencing entry—"does not negate, limit, or otherwise affect" the validity of the PRC term. R.C. 2929.14(D)(1) (formerly (E)(1)); R.C. 2929.19(B)(2)(c), (e); R.C. 2967.28(B). The bill did not include such "does not negate, limit, or otherwise affect" language with respect to the provisions dealing exclusively with discretionary PRC. R.C. 2929.14(D)(2) (formerly (E)(2)); R.C. 2929.19(B)(2)(d); R.C. 2967.28(C). As for PRC errors occurring before July 11, 2006, Am.Sub.H.B. 137 created a special statutory procedure to correct such sentences. R.C. 2929.191.

Thus, the plain language of these statutes establishes July 11, 2006, as a clear divide. For sentences imposed before July 11, 2006, trial courts can correct PRC errors using the procedures

set forth in R.C. 2929.191. But for sentences imposed on or after July 11, 2006, any error in imposing mandatory PRC has no effect on the validity of the PRC term and thus do not need correcting. And any failure to properly impose discretionary PRC on or after July 11, 2006, is subject to correction under the trial court's inherent authority to correct void sentences. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, paragraph one of the syllabus.

I. *Singleton* did not address the "does not negate, limit, or otherwise affect" language in Am.Sub.H.B. 137.

This Court has stated that, for sentences imposed on or after July 11, 2006, a trial court that fails to properly impose PRC shall apply R.C. 2929.191 to correct the sentence. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph two of the syllabus. In reaching this conclusion, this Court held that retrospective application of R.C. 2929.191 is unconstitutional, because "for sentences imposed prior to the effective date of the statute, there is no existing judgment for a sentencing court to correct. H.B. 137 cannot retrospectively alter the character of sentencing entries issued prior to its effective date that were nullities at their inception." *Id*. at ¶ 26. This Court stated that uncodified language in Am.Sub.H.B. 137 evinces the General Assembly's intent to apply R.C. 2929.191 prospectively. *Id*. at ¶¶ 27-34. This interpretation of the statute "preserves the constitutionality of H.B. 137 against a separation-of-powers challenge by requiring the trial court to conduct a hearing to add postrelease control to the offender's existing sentence." *Id*. at ¶ 32, citing *Woods* at 512.

Singleton was a fractured opinion. Only two justices agreed with the lead opinion. Three justices concurred with "the portion of the opinion addressing the retrospective application of R.C. 2929.191" but dissented with "the portion of the opinion addressing the prospective application of R.C. 2929.191." *Id*. at ¶ 36 (Moyer, C.J., Pfeifer, J., and O'Connor, J, dissenting in part). These same dissenters also noted that the holding in *Singleton* that R.C. 2929.191

applies prospectively is mere dicta. *Id*. at ¶ 38 (Pfeifer, J., dissenting in part). Two other justices would have held that R.C. 2929.191 applies both retrospectively and prospectively. *Id*. (Lundberg Stratton, J. and Lanzinger, J., dissenting in part).

Although this Court in *Singleton* stated that R.C. 2929.191 applies prospectively only, this Court has yet to directly address the "does not negate, limit, or otherwise affect" language of Am.Sub.H.B. 137. This language is clear: For any sentence imposed on or after July 11, 2006, any error in imposing mandatory PRC does not need correcting at all. The mandatory PRC term is valid and may be enforced against the defendant, despite any errors in notifying the defendant of PRC at the sentencing hearing or in including PRC in the sentencing entry. The General Assembly determined that, for sentences imposed on or after July 11, 2006, any error in imposing mandatory PRC did not make the sentence void. *Id*. at ¶ 26 (General Assembly may prospectively alter caselaw's characterization of what constitutes a nullity). There is no other way to interpret the "does not negate, limit, or otherwise affect" language in Am.Sub.H.B. 137 except "to make prospective post-release control sentencing errors basically irrelevant." *Id*. at ¶¶ 49-50 (Pfeifer, J., dissenting in part).

II. The "does not negate, limit, or otherwise affect" language in Am.Sub.H.B. 137 is essential to achieving the General Assembly's intent.

This Court should "return logic and order to this area of law," *id*. at ¶ 65 (Lanzinger, J., dissenting in part), and hold that for any sentence imposed on or after July 11, 2006, any error in imposing mandatory PRC does not "negate, limit, or otherwise affect" the validity of the PRC term. As for sentences imposed before July 11, 2006, this Court should modify *Singleton* and hold that trial courts may apply the corrective procedures set forth in R.C. 2929.191. Alternatively, if this Court adheres to the statement in *Singleton* that R.C. 2929.191 does not apply retrospectively, a trial court can nonetheless correct a pre-July 11, 2006, sentencing using

its inherent authority to correct void sentences. *Fischer* at paragraph one of the syllabus; *see, also, State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, ¶ 27 (Lanzinger, J., concurring in judgment only) (explaining that *Fischer* implicitly adopted the procedure required in R.C. 2929.191 without explicitly overruling the first paragraph of *Singleton*).

By enacting Am.Sub.H.B. 137, "the General Assembly clearly intended to abrogate this court's decisions on postrelease-control sentencing error." *Id*. at ¶ 23 (Lanzinger, J., concurring in judgment only). In 2010, this Court predicted that, "[i]n light of the General Assembly's enactment of R.C. 2929.191, it is likely that our work in this regard is drawing to a close, at least for purposes of void sentences." *Fischer* at ¶ 31. Yet, nearly 10 years after Am.Sub.H.B. 137, Ohio courts are still grappling with PRC issues. A large reason why PRC litigation simply will not go away is that courts have yet to give full effect to the "does not negate, limit, or otherwise effect" language in Am.Sub.H.B. 137. This Court should hold once and for all that, for any sentence imposed on or after July 11, 2006, any error in imposing mandatory PRC does not affect the validity of the PRC term and does not create a "void sentence" problem.

> **Third Proposition of Law:** For an inmate to challenge the legality of custody, a post-sentence motion filed in the underlying criminal case number is not a substitute for a habeas petition.

"[T]rial courts lack authority to reconsider their own valid final judgments in criminal cases." *Cruzado* at ¶ 18, quoting *State ex rel. White v. Junkin*, 80 Ohio St.3d 335, 338 (1997). One exception to this rule is that a trial court is authorized to correct a void sentence. *Cruzado* at ¶ 19, citing *State v. Garretson*, 140 Ohio Aapp.3d 554, 559 (12th Dist.2000), citing *State v. Beasley*, 14 Ohio St.3d 74, 75 (1984). A sentencing entry that does not include the appropriate PRC term is void and is thus subject to correction. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, syllabus.

Even if the sentencing entry in PRC in CR2011-0150 were void, and even if the error were relevant despite the "does not negate, limit, or otherwise affect" language in Am.Sub.H.B. 137, Grimes would still not be entitled to the relief he requested. Grimes did not ask the trial court to *correct* his sentence. Just the opposite, Grimes *relied* on his sentence in arguing that he was entitled to release from prison. In other words, Grimes wants the sentence in CR2011-0150 to remain exactly as it is. He believes the sentencing entry in that case does not properly contain PRC and that, as a result, the Department of Rehabilitations and Corrections no longer has any legal authority to incarcerate him. In short, Grimes does not want the trial court to correct the alleged PRC error; he wants to take advantage of it.

But a motion filed with the trial court that presided over his criminal case is the wrong vehicle for the remedy Grimes is seeking. At this point in the proceedings—i.e., years after sentencing—the trial court's jurisdiction is limited to correcting a void sentence or a clerical error. *Cruzado* at ¶ 19. Grimes, however, did not ask for either of these forms of relief. Instead, Grimes asked the trial court to do something far different: For the trial court to order his release from prison.

True, Grimes's sentence is not subject to correction now because he has already served the prison-term component to this sentence in CR2011-0150. But the inability to correct the sentence only means that the trial court has no jurisdiction at all. It does not vest the trial court with the entirely separate power of ordering the Department of Rehabilitations and Corrections to release him from prison. The Department of Rehabilitations and Corrections was not a party in Grimes's criminal case. Unless a complaint is filed and properly served, the trial court has no personal jurisdiction over the Department such that it can order it to release Grimes from prison. *State ex rel. Benjamin v. Ohio Dep't of Rehab. & Corr.*, 10th Dist. No. 06AP-158, 2007-Ohio-

2471, ¶ 4; Civ.R. 3(A); Civ.R. 4.1. Although the trial court presided over Grimes's criminal case, it does not serve as Grimes's all-purpose civil court to adjudicate all disputes relating to his criminal conviction.

Put differently, a criminal court does not have a roving commission to right all the wrongs perceived by a defendant vis-à-vis how Executive Branch agencies are dealing with his conviction. *State v. Thoman*, 10th Dist. No. 05AP-817, 2006-Ohio-1651, ¶ 11 (criminal court's order issued against Children's Services vacated; "nowhere in the applicable statutes is the court given authority to order parties *other than the offender* to do any acts as a condition of the offender's community control sanction.") (emphasis sic); *State v. DeMastry*, 5th Dist. No. 05CA15, 2005-Ohio-5175, ¶ 26, n. 4 ("even when an agency of the State is bound by a plea agreement, the criminal trial court that presided over the criminal matter has no authority over that agency unless that agency was a party to the criminal case.").

To obtain the relief Grimes seeks—i.e., ordering the Department of Rehabilitations and Corrections to release him—Grimes must file a habeas petition. The very case that started the explosion of PRC litigation—*Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126—is instructive in this regard. There, the inmate claimed that the Adult Parole Authority had no authority to incarcerate him for violating his PRC because the trial court failed to properly impose PRC. But rather than filing in his criminal case a post-judgment motion seeking his release, the inmate pursued a civil habeas case. This Court held that habeas was the proper procedural vehicle because "Hernandez is not challenging his sentencing entry. He is instead challenging the Adult Parole Authority's decision—not a court's decision—to place him on postrelease control and the APA's subsequent decision to sanction him for violating the terms of that control." *Id.* at ¶ 12. "Habeas corpus will lie to challenge certain decisions of the Adult

Parole Authority because there is no remedy of appeal available." *Id.*, citing *State ex rel. Jackson v. McFaul*, 73 Ohio St.3d 185, 187 (1995); *see also*, *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082 (inmates incarcerated for PRC violations challenged confinement through habeas petitions).

Although the trial court (and not the APA) sentenced Grimes to prison for violating PRC, Grimes's argument is in substance no different than the inmates in *Hernandez* and *Watkins*. Grimes is incarcerated due to a PRC violation. And like the inmates in *Hernandez* and *Watkins*, Grimes is not challenging the sentencing entry in CR2011-0150, but rather he is relying on this entry in arguing that he never should have been placed him on PRC in CR2011-0150. In other words, Grimes is not challenging his conviction or sentence; he is challenging his *custody*. *Compare*, *State v. Billiter*, 134 Ohio St.3d 103, 2012-Ohio-5144 (defendant can collaterally attack a *conviction* by seeking to withdraw guilty plea when trial court bases a sentence on the defendant being on PRC in another case). To seek release from prison, the proper mechanism for Grimes is to follow the *Hernandez/Watkins* model and file a habeas petition against his custodian.

CONCLUSION

For the foregoing reasons, Franklin County Prosecutor Ron O'Brien respectfully submits that the judgment of the Fifth District be reversed.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney

Seth L. Gilbert
Seth L. Gilbert 0072929
Assistant Prosecuting Attorney
Counsel for Amicus-Curiae Franklin County
Prosecutor Ron O'Brien

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day May 23, 2016, to:

Gerald V. Anderson
Assistant Prosecuting Attorney
27 North Fifth Street, Suite 201
Zanesville, Ohio 43701
Counsel for Plaintiff-Appellant

Stephen P. Hardwick
Assistant Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
Counsel for Defendant-Appellee

Seth L. Gilbert
Seth L. Gilbert 0072929
Assistant Prosecuting Attorney