

[Please see amended opinion at 2012-Ohio-5013.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

| | | |
|----------------------|---|------------------------|
| STATE OF OHIO, | : | |
| Plaintiff-Appellant, | : | CASE NO. CA2012-03-023 |
| - vs - | : | <u>OPINION</u> |
| | : | 10/8/2012 |
| CLINTON N. STRUNK, | : | |
| Defendant-Appellee. | : | |

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CR25764

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellant

William G. Fowler, 12 W. South Street, Lebanon, Ohio 45036, for defendant-appellee

PIPER, J.

{¶ 1} Plaintiff-appellant, the state of Ohio, appeals a decision of the Warren County Court of Common Pleas granting judicial release to defendant-appellee, Clinton Strunk.

{¶ 2} In 2009, Strunk was indicted and charged with aggravated robbery, which included a firearm specification, and was later released on bond. While Strunk was out on bond, he committed new offenses and was subsequently indicted for attempted murder and

felonious assault. Strunk later pled guilty to a reduced charge of robbery and to the related firearm specification. Before the same judge, and at the same hearing, Strunk pled guilty to felonious assault, and the attempted murder charge was dismissed.

{¶ 3} In November 2009, the trial court sentenced Strunk to two years on the robbery charge, as well as a one-year mandatory term for the firearm specification. At the same hearing, the trial court sentenced Strunk to three years for felonious assault. The trial court ordered the two-year sentence for robbery and one-year-mandatory sentence for the firearm specification to be served consecutive to the three-year sentence for felonious assault. Therefore, Strunk's aggregate sentence was six years.

{¶ 4} In July 2011, Strunk moved for judicial release under the case number associated with the robbery charge and firearm specification. The state opposed Strunk's motion, and argued that Strunk was not eligible to seek judicial release because the trial court imposed an aggregate six-year sentence, and Strunk had not served enough of his sentence to be considered eligible for judicial release. Strunk argued that he was eligible for judicial release on the robbery charge because he had been sentenced in two unrelated cases, and that the cases had never been consolidated by the court.

{¶ 5} The trial court held a hearing on the matter, and found that Strunk had served the one-year mandatory sentence for the firearm specification connected to the robbery charge. The trial court also found Strunk had filed his motion for judicial release after serving 180 days of the two-year sentence. The court granted judicial release to Strunk specific to the sentence for robbery and the accompanying firearm specification, but stated that it was not granting judicial release on the felonious assault three-year sentence. The court then modified Strunk's sentence by entry, and placed Strunk on three years of community control for the robbery. The state now appeals the trial court's decision, raising the following assignment of error:

{¶ 6} THE WARREN COUNTY COURT OF COMMON PLEAS ERRED AS A MATTER OF LAW WHEN IT HELD THAT THE APPELLEE WAS QUALIFIED TO SEEK JUDICIAL RELEASE AND ERRED WHEN IT GRANTED THE APPELLEE JUDICIAL RELEASE.

{¶ 7} The state argues in its sole assignment of error that the trial court erred by granting Strunk judicial release.

{¶ 8} We begin by noting that because this case requires us to interpret a statutory provision, we employ a de novo standard of review. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163 ¶ 8. In a de novo review, this court independently reviews the record without giving deference to the trial court's decision. *State v. Kormos*, 12th Dist. No. CA2011-08-059, 2012-Ohio-3128.

{¶ 9} According to R.C. 2929.20(B), "on the motion of an eligible offender or upon its own motion, the sentencing court may reduce the eligible offender's aggregated nonmandatory prison term or terms through a judicial release under this section." The statute then sets forth several time frames during which an eligible offender may move the court for judicial release. However, the state and Strunk do not agree on which statutory provision applies to the disposition of Strunk's appeal.

{¶ 10} R.C. 2929.20(C), the statutory provision setting forth the judicial release eligibility time frames, has changed numerous times in the past decade. The state argues that the controlling statute is the version of R.C. 2929.20(C)(3) in place at the time Strunk moved for judicial release. That statute states,

if the aggregated nonmandatory prison term or terms is five years, the eligible offender may file the motion not earlier than four years after the eligible offender is delivered to a state correctional institution or, if the prison term includes a mandatory prison term or terms, not earlier than five years after the expiration of all mandatory prison terms.

{¶ 11} Conversely, Strunk argues that the version of R.C. 2929.20(C)(2) effective at the time of his sentencing is controlling. According to that statute,

If the stated prison term is at least two years but less than five years, the eligible offender may file the motion not earlier than 180 days after the offender is delivered to a state correctional institution or, if the prison term includes a mandatory prison term or terms, not earlier than 180 days after the expiration of all mandatory prison terms.

By asking this court to apply R.C. 2929.20(C)(2) as effective in 2009, Strunk not only argues that this court should focus on the statute in place at the time of sentencing, but also that this court should consider his sentence to be two separate sentences, one of two years and a one-year mandatory sentence for the robbery and firearm specification, and the other, a three-year sentence for felonious assault.

{¶ 12} We agree with Strunk that the applicable statute is that which was in effect at the time of his sentencing. "The decision of the sentencing court to grant judicial release is part of the original sentence, albeit a reduction in the amount of prison time the offender must serve." *State v. Peoples*, 151 Ohio App.3d 446, 2003-Ohio-151, ¶ 21(10th Dist.). R.C. 2929.20 provides that if a court grants judicial release, the court must place the defendant on community control, and then reserves the right to reimpose the sentence that it reduced through judicial release. Therefore, the controlling statute is that which was in effect at the time of sentencing. *State v. Jones*, 9th Dist. No. 03CA008370, 2004-Ohio-3417, ¶ 10; see also *State v. Radcliff*, 5th Dist. No. 02CAA01004, 2002-Ohio-1837.

{¶ 13} Although we agree that the statute from 2009 applies because that is the date that Strunk received his sentence, we disagree with Strunk's assertion that for purposes of determining judicial release, he received two separate sentences. As previously stated, Strunk received an aggregate sentence of six years because his three-year sentence for the robbery and related firearm specification ran consecutive to his three-year sentence for

felonious assault. Of these six years, five were nonmandatory, and one was the mandatory year for the firearm specification in relation to the robbery charge.

{¶ 14} Given Strunk's six-year sentence, of which five years were nonmandatory, the controlling statute in effect in 2009, R.C. 2929.20(C)(3) states,

If the stated prison term is five years or more but not more than ten years, the eligible offender may file the motion not earlier than five years after the eligible offender is delivered to a state correctional institution or, if the prison term includes a mandatory prison term or terms, not earlier than five years after the expiration of all mandatory prison terms.

{¶ 15} Unlike the version currently in place, the 2009 statute does not include the term "aggregated" when referring to the total sentence if multiple sentences are given. Instead, the focus of the 2009 statute is on the "stated prison term." A review of the record indicates that Strunk's "stated prison term," was six years.

{¶ 16} As defined by R.C. 2929.01(F)(F), the stated prison terms means "the prison term, mandatory prison terms, or *combination of all prison terms and mandatory prison terms imposed by the sentencing court* * * *." (Emphasis added.)¹ Therefore, the combination of all prison terms imposed by the sentencing court in the case at bar is six years.

{¶ 17} While Strunk argues that he was sentenced in two disparate cases through separate indictments and separate case numbers, the version of R.C. 2929.20 in place at the time of Strunk's sentence specified that a stated prison term is composed of the combination of prison terms imposed by a sentencing court. The record is undisputed that the sentencing court was the Warren County Court of Common Pleas, and in fact, the same trial judge. This is not the case where two separate trial courts are imposing sentence upon the same defendant.

1. The numeration of the definition section has also changed several times since the time of Strunk's sentencing. However, the definition of "stated prison term" has remained essentially unchanged.

{¶ 18} In *State v. Smith*, 2nd Dist. No. 20172, 2004-Ohio-3573, the appellate court held that a defendant was eligible for judicial release after serving the first part of a consecutive sentence because he had been sentenced by two separate courts, from two different counties. Smith pled guilty to aggravated robbery in Montgomery County, and was sentenced to four years in prison. Smith was later sentenced to five years by a Clermont County court after pleading guilty to robbery. Although the Clermont County court ordered its five-year sentence to run consecutive to the four-year sentence from the Montgomery County court, the total nine-year sentence was not imposed by a single sentencing court. In so holding, the appellate court stated, "the sentencing court' is in the singular. Only one court is being referred to." *Id.* at ¶ 17. Therefore, the appellate court found that each sentencing court was in control of its own sentence in regard to judicial release, and the state could not combine the two separate sentences into one stated prison term.

{¶ 19} Conversely, the Second District held that consecutive sentences imposed by the same sentencing court should be treated as one "stated prison term." *State v. Anderson-Melton*, 2nd Dist. No. 18703, 2001 WL 1388442 (Nov. 9, 2001). In *Anderson-Melton*, the defendant was sentenced to three consecutive sentences for receiving stolen property, insurance fraud, and illegal use of food stamps. The court relied on the definition of "stated prison term" and concluded that the consecutive sentences imposed by the same sentencing court should be considered as a single stated prison term, not as multiple terms. In so holding, the court considered that in addition to the definition of "stated prison term" as a combination of all sentences imposed by the sentencing court, the statute provides that the time frame for judicial release begins upon delivery "to a state correctional institution." Therefore, the court concluded that a defendant is only delivered once to the prison, rather than each and every time he begins a new portion of a consecutive sentence. *Id.* at *1.

{¶ 20} While we can accept the application of the Second District's reasoning within

Anderson-Melton, we additionally find that when a person receives consecutive sentences, the trial court is deliberately having the defendant delivered to prison *once* to serve the *full sentence* it has imposed. The trial court specifically ensured that Strunk's sentence was *six years* by ordering the sentences to run consecutive. Therefore, the pronouncement of the consecutive sentence came from the "sentencing court." The current version of R.C. 2929.20 includes the word "aggregated" to clarify how the statute was designed to operate as it related to stated prison terms and multiple sentences.

{¶ 21} Strunk's six-year sentence was handed down by the sentencing court. The court made its sentencing determination after accepting Strunk's guilty pleas to robbery and felonious assault, and after the presentence investigation was completed. The sentencing court held a single sentencing hearing, heard from the affected victims, and then issued a sentence based on the circumstances of Strunk committing felonious assault while he was on bond for robbery. Moreover, the trial court ordered the sentences to run consecutive to each other, therefore demonstrating that the court took into consideration the seriousness of the charges and what total, consecutive, prison sentence the court felt justified in imposing. Therefore, Strunk's delivery to the Ohio State Correction Reception Center was the single triggering event that marked the beginning of the judicial release statute time frame regarding Strunk's stated prison term.

{¶ 22} Once more, the statute in place in 2009 states that,

If the stated prison term is five years or more but not more than ten years, the eligible offender may file the motion not earlier than five years after the eligible offender is delivered to a state correctional institution or, if the prison term includes a mandatory prison term or terms, not earlier than five years after the expiration of all mandatory prison terms.

Therefore, Strunk would have to serve his mandatory one-year firearm specification, and then wait an additional five years after the expiration of his mandatory prison term before he

is eligible for judicial release. Strunk's prison term would therefore expire on the same day that he is first eligible for judicial release. The Ohio Supreme Court has previously held that such a result creates an equal protection violation, and that such a statute is unconstitutional. *State v. Peoples*, 102 Ohio St.3d 460, 2004-Ohio-3923.

{¶ 23} In *Peoples*, the court held that the version of R.C. 2929.20(B)(3) in effect until March 23, 2000, was unconstitutional because "offenders sentenced to exactly five years are treated differently from other members of the class because they are unable to apply for judicial release." *Id.* at ¶ 6. Essentially, the language of the statute permitted defendants sentenced to more than five years to apply for judicial release, while, for all intents and purposes, the statute prohibited those sentenced to exactly five years from ever being eligible for judicial release. We find that because Strunk was required to serve five years of his nonmandatory sentences before he is eligible for judicial release, R.C. 2929.20(C)(3) as it was stated in 2009 is unconstitutional.

{¶ 24} Notwithstanding the Ohio Supreme Court's finding of unconstitutionality, and for some perplexing reason, the General Assembly amended the statute after *Peoples* was decided to once again include the offending language. The version of R.C. 2929.20 that took effect in April 2009 reverted to the time frame and language that had been held unconstitutional by the Ohio Supreme Court, although the version in the interim properly contained a four-year time frame for those sentenced to exactly five years.² Other courts have recognized this aberration as well. The Sixth District recognized that the version of R.C. 2929.20(C)(3) in effect after April 7, 2009, had the same language and effect as that which was held unconstitutional by the Ohio Supreme Court in *Peoples*. *State v. Oliver*, 6th Dist.

2. As previously stated, the statute has been amended again, so that the current version states that a person sentenced to a five-year, nonmandatory sentence must serve four years of the sentence before being eligible for judicial release. Therefore, the current version of the statute does not create the same equal protection issues because it allows those sentenced to five years to apply for judicial release after four years.

No. S-10-040, 2011-Ohio-5305. Similarly, the Second District Court of Appeals noted that the 2009 version of R.C. 2929.20(C)(3) reverted to language that had been rendered unconstitutional. *State v. Byrd*, 2nd Dist. No. 23950, 2011-Ohio-2060. In *Byrd*, the court stated, "the statute had been corrected to eliminate the five-year anomaly but inexplicably, the next revision of the statute went back to the terminology that had been found unconstitutional." *Id.* at ¶ 28. While the issue in *Byrd* did not require the court to determine what time frame was applicable once the unconstitutional provision was struck, the court nonetheless noted that once the five-year limitation is found unconstitutional, the defendant becomes eligible to move for judicial release after 180 days. *Id.*

{¶ 25} Once the five-year time frame is removed from R.C. 2929.20(C)(3), that section does not have any additional time frame during which the defendant may move for judicial release. In fact, and unlike prior and future versions of the statute, the 2009 version does not contain any general provisions regarding the applicable time frame. For example, the version of R.C. 2929.20 in place when *Peoples* was decided contained a general clause that "except as otherwise provided in division (B)(3) of this section, if the stated prison term was imposed for a felony of the first, second, or third degree, the eligible offender shall file the motion not earlier than one hundred eighty days after the offender is delivered to a state correctional institution." R.C. 2929.20(B)(2). Therefore, once section (B)(3) was struck as unconstitutional, the supreme court held *Peoples'* motion for judicial release was timely because he made the motion 180 days after serving his mandatory sentence.

{¶ 26} However, the version of R.C. 2929.20 in effect when *Strunk* was sentenced does not contain any such general provision based on the degree of felony committed. Nevertheless, the Legislature did include a 180 day *minimum* time frame before defendants sentenced to terms of more than two years, but less than five could move for judicial release. Therefore, we find that at minimum, *Strunk* was required to wait 180 days before moving for

judicial release. While Strunk waited the 180 days, this does not mean that the trial court properly granted judicial release.

{¶ 27} Instead, the record is clear that the trial court was under the assumption that it was proper to divide the stated prison term into two separate sentences, one of two years (plus the mandatory one-year firearm specification) and one of three years. The trial court granted judicial release on only the robbery charge, and did not consider whether Strunk was eligible for release on the total sentence that included the three years for felonious assault. Therefore, the trial court must decide whether to grant judicial release based on the fact that Strunk's stated prison term is not two separate sentences for purposes of judicial release determination.

{¶ 28} The trial court must also consider the fact that the version of R.C. 2929.20 in place at the time of Strunk's sentence required the court to make specific findings before granting judicial release. According to R.C. 2929.20(J)(1), the trial court has to make the two following findings before granting release.

(a) That a sanction other than a prison term would adequately punish the offender and protect the public from future criminal violations by the eligible offender because the applicable factors indicating a lesser likelihood of recidivism outweigh the applicable factors indicating a greater likelihood of recidivism;

(b) That a sanction other than a prison term would not demean the seriousness of the offense because factors indicating that the eligible offender's conduct in committing the offense was less serious than conduct normally constituting the offense outweigh factors indicating that the eligible offender's conduct was more serious than conduct normally constituting the offense.

{¶ 29} The record indicates that the trial court made these findings as they related to the robbery charge, but did not make the requisite findings when taking into consideration the felonious assault. It is altogether possible that the trial court may decide upon remand, that it can no longer make these findings based on the facts and circumstances surrounding

Strunk's felonious assault charge because perhaps granting judicial release would demean the seriousness of Strunk's actions when he committed felonious assault.

{¶ 30} Upon remand, the trial court shall consider Strunk's motion for judicial release as it relates to the entire stated prison term, which is the combination of sentences for robbery and felonious assault. The trial court may not grant judicial release on the robbery charge without also granting it on the felonious assault charge, as both sentences comprise the stated prison term referenced in the statute. Having found that the trial court erred by considering the stated prison term as two separate sentences, we sustain the state's assignment of error. As such, we reverse the trial court's judgment to the extent that we vacate the order granting judicial release and remand this matter for the trial court to consider Strunk's motion for judicial release within the context of this opinion.

{¶ 31} Judgment reversed, and cause is remanded for further consideration.

POWELL, P.J., and HENDRICKSON, J., concur.