

[Please see original opinion at 2012-Ohio-4645.]

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

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	CASE NO. CA2012-03-023
- vs -	:	<u>AMENDED</u>
	:	<u>OPINION</u>
	:	10/29/2012
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} This amended opinion clarifies and supersedes this court's previous opinion in
State v. Strunk, Warren CA2012-03-023, 2012-Ohio-4645, released on October 8, 2012.

{¶ 2} 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.

{¶ 3} 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.

{¶ 4} 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.

{¶ 5} 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.

{¶ 6} 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.

{¶ 7} 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.

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

{¶ 9} 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.

{¶ 10} 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.

{¶ 11} 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. 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} However, the Ohio Legislature enacted H.B. 86, which made several changes to the criminal code, including prison terms imposed before the effective date of the statute, September 30, 2011. Specific to the case at bar, the Legislature determined that the changes to the judicial release statute would be effective as to inmates serving a prison term on September 30, 2011, as well as future inmates who would be conferred to a correctional institution after September 30, 2011, even if the inmate committed the crime or was sentenced prior to September 30, 2011. Even though neither party argued H.B. 86's applicability, we nonetheless determine that the current provisions apply to the case at bar.

{¶ 13} The change to the judicial release statute was necessary in regard to inmates who had received a flat, five-year nonmandatory sentence because prior to the change, inmates who had a five-year sentence were not eligible for judicial release until they had served all five years of their sentence. Essentially, a five-year sentence made the inmates ineligible for judicial release, and the Ohio Supreme Court has in the past determined that such a result violates equal protection. *State v. Peoples*, 102 Ohio St.3d 460, 2004-Ohio-3923. Therefore, and in order to rectify any due process issues, the Legislature modified the statute so that an inmate sentenced to five years is now eligible for judicial release after serving four years. This change applies to Strunk.

{¶ 14} Specifically, and according to R.C. 2929.20(M), the changes to the judicial release statute "that are made on the effective date of this division apply to any judicial release *decision* made on or after the effective date of this division for any eligible offender." (Emphasis added.) We have emphasized "decision" in the statute because while Strunk moved for judicial release in July 2011, prior to the effective date of H.B. 86, the trial court's *decision* was not until February 24, 2012, after the effective date. Therefore, and according to R.C. 2929.20(M), the changes to the judicial release statute in R.C. 2929.20 would be applicable to the disposition of Strunk's motion.

{¶ 15} According to R.C. 2929.20(3), in place as of September 30, 2011, "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 four years after the expiration of all mandatory prison terms."

{¶ 16} We disagree with Strunk's assertion that for purposes of determining judicial release, he received two separate sentences.¹ 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.

{¶ 17} While Strunk argues that he was sentenced in two disparate cases through separate indictments and separate case numbers, R.C. 2929.20(M) specifies that the qualifying timeframe for determining judicial release is predicated on the "aggregated

1. Another change to the judicial release statute over the years has centered on the use of "aggregate" to describe the prison term that must be taken into consideration when determining what amount of nonmandatory time an inmate must serve before he is eligible for judicial release. In past versions of the statute, the statute required an inmate to serve a certain percentage of his "stated prison term," which was essentially a combination of all sentences imposed. The Legislature saw fit to clarify the statute by focusing on an aggregate sentence, rather than on a stated prison term.

nonmandatory prison term." The record is undisputed that Strunk received an aggregated nonmandatory prison term of five years as handed down by the trial court. This is not the case where two separate trial courts are imposing sentence upon the same defendant. The court made its sentencing determination after accepting Strunk's guilty pleas to robbery and felonious assault, and after the pre-sentence investigation was completed.

{¶ 18} 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 aggregate 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 aggregated sentence.

{¶ 19} Here, the record is clear that the trial court was under the assumption that it was proper to divide the aggregate sentence 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 the robbery charge alone, and did not consider whether Strunk was eligible for release on the aggregated sentence that included the three years for felonious assault. Therefore, the trial court erroneously found that Strunk was eligible for judicial release after serving only the one-year mandatory sentence for the firearm specification plus 180 days of the two-year sentence for the robbery. Given Strunk's five-year nonmandatory aggregate sentence, he is not eligible to apply for judicial release until he has served four years of his nonmandatory sentence. As such, the trial court's judgment and order granting judicial release is reversed and vacated, and the state's single assignment of error is sustained.

{¶ 20} Judgment reversed.

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