

[Cite as *State v. Newell*, 2002-Ohio-1358.]

COURT OF APPEALS
ELEVENTH DISTRICT
LAKE COUNTY, OHIO

J U D G E S

STATE OF OHIO,

Plaintiff-Appellee,

HON. WILLIAM M. O'NEILL, P.J.,
HON. DONALD R. FORD, J.,
HON. DIANE V. GRENDALL, J.

– vs –

CASE NO. 98-L-166

DAVID NEWELL,

Defendant-Appellant.

OPINION

CHARACTER OF PROCEEDINGS: Criminal Appeal from the
Court of Common Pleas
Case No. 96 CR 000631

JUDGMENT: Affirmed in part; reversed in part and remanded.

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(For Defendant-Appellant)

(For Plaintiff-Appellee)

GRENDELL, J.

{¶1} This appeal stems from a criminal conviction in the Lake County Court of Common Pleas. Appellant, David Newell, requests the reversal of certain sanctions imposed by the trial court as part of his sentence.

{¶2} On September 29, 1997, appellant entered a written plea of guilty to one count of robbery, a felony of the third degree, in violation of R.C. 2911.02. After accepting the guilty plea, the trial court sentenced appellant to serve a definite term of two years, with credit for time served.

{¶3} As part of the sentencing judgment, the trial court also informed appellant that bad time may be imposed by the parole board under R.C. 2967.11 for any “violation” he may commit while in prison. The trial court further informed appellant that he could be subject to three years of post-release control following his release from prison.

{¶4} On July 15, 1998, appellant filed a timely notice of appeal with this court. Appellant contends in his sole assignment of error that the trial court erred in referring to

the possible application of bad time sanctions under R.C. 2967.11. Appellant argues that bad time is unconstitutional for a number of reasons.

{¶15} Our review of recent case law shows that appellant's arguments have already been fully considered. In *State ex rel. Bray v. Russell* (2000), 89 Ohio St.3d 132, the Supreme Court of Ohio declared that R.C. 2967.11, the bad time statute, was unconstitutional on the basis that it violated the doctrine of separation of powers. See, also, *White v. Konteh* (Mar. 23, 1999), Trumbull App. No. 99-T-0020, unreported, 1999 Ohio App. LEXIS 1230; *State v. Henton* (July 28, 2000), Lake App. No. 97-L-232, unreported, 2000 Ohio App. LEXIS 3404. Therefore, the trial court's reference to bad time in the sentencing judgment was improper. To this extent, appellant's sole assignment of error has merit.

{¶16} As part of his sole assignment, appellant also challenges the constitutionality of the procedure for the imposition of post-release control under R.C. 2967.28. Appellant asserts that this particular statutory scheme is unconstitutional for the following three reasons: (1) the scheme violates his right to due process of law; (2) the scheme violates his right to equal protection under the law; and (3) the imposition of a sanction under the scheme violates the prohibition against double jeopardy.

{¶17} In *State v. Swick* (Dec. 21, 2001), Lake App. No. 97-L-254, unreported, 2001 Ohio App. LEXIS 5857, this court rejected each of the foregoing three arguments. In regard to the due process and equal protection arguments, we disposed of these arguments by citing the recent holding of the Supreme Court of Ohio in *Woods v. Telb*

(2000), 89 Ohio St.3d 504.

{¶18} As to the double jeopardy argument, we noted that, as part of its discussion of R.C. 2967.28 in *Woods*, the Supreme Court had emphasized that the imposition of post-release control was considered to be part of the original sentence imposed upon a defendant immediately after his conviction. Based upon this, we held in *Swick* that if a defendant completes his prison term on the original offense and then commits a new act which constitutes both a new criminal offense and a violation of his post-release control, he can be subject to a new sentence on the new offense and a sanction for the violation. Under this analysis, the sanction for a post-release violation is not a second penalty for the new act because the sanction is a portion of the sentence imposed upon the defendant for the original offense.

{¶19} In light of *Swick*, all three of appellant's challenges to the constitutionality of R.C. 2967.28 have no merit. To this extent, appellant's sole assignment of error is not well taken.

{¶10} Pursuant to our holding as to the bad time issue, the judgment of trial court is reversed in part, and the matter is remanded for further proceedings consistent with this opinion. Specifically, upon remand, the trial court shall vacate its prior sentencing judgment and issue a new judgment which does not contain any reference to the imposition of bad time. In all other respects, the judgment of the trial court is affirmed.

JUDGE DIANE V. GRENDALL

O'NEILL, P.J., concurs in judgment only with Concurring Opinion,

FORD, J., concurs.

O'NEILL, P.J.

{¶11} Although I concur in the ultimate judgment reached by the majority, I cannot agree with one aspect of the analysis the majority has adopted in regard to the imposition of post-release control. In rejecting appellant's double jeopardy argument, the majority essentially holds that there are no circumstances under which a violation of a criminal defendant's constitutional rights will occur when a sanction for a post-release violation is imposed. With all due respect, I believe that there is one instance when a post-release sanction does constitute a second sentence for one criminal act. As a result, I concur in judgment only.

{¶12} In *State v. Hathy* (Apr. 20, 2001), Ashtabula App. No. 2000-A-0003, unreported, 2001 WL 409503, a panel of this court, including myself, held that a double jeopardy violation does not occur when: (1) a defendant is discharged from prison on post-release control without having served his entire sentence on the original offense; (2) while on post-release control, the defendant commits a new act which constitutes both a violation of post-release control and a separate criminal offense; (3) as the sanction for the post-release violation, the defendant is sentenced to a term which is smaller in duration than the time he had remaining on his original sentence; and (4) in a separate criminal action, the defendant is found guilty of committing the new offense and is given a new

sentence which is distinct from the post-release sanction. As the basis for this conclusion, we emphasized that the imposition of the two separate penalties was permissible because, under these specific circumstances, the post-release sanction had the same effect as the revocation of parole or probation under the prior laws of this state; *i.e.*, by serving the time imposed under the post-release sanction, the defendant was merely completing the sentence which had been imposed for the original offense.

{¶13} On the same day the *Hathy* opinion was released, the identical panel of this court also issued our opinion in *State v. Martello* (Apr. 20, 2001), Ashtabula App. No. 2000-A-0026, unreported, 2001 WL 409508. The only pertinent factual distinction between *Hathy* and *Martello* was that the defendant in the latter case had completed his entire sentence on the original sentence before he was released on post-release control. Based upon this distinction, we held that the defendant could not be sanctioned twice for the new criminal act:

{¶14} “However, this case presents a factual predicate with one significant difference. Appellant had already served his full six-month original sentence prior to violating the terms of his post-release control. Thus, when he was sentenced to an additional ninety-one days, those days cannot be considered a mere reinstatement of a term of his original sentence because he already served his original sentence in its entirety. Instead, we hold that when a defendant is sentenced for a violation of his post-release control, and imposition of the sentence creates a situation where the defendant is forced to serve more than his original sentence, jeopardy attaches and precludes a conviction on [the new criminal act].” *Martello*, 2001 WL 409508, at *3.

{¶15} In *State v. Swick* (Dec. 21, 2001), Lake App. No. 97-L-254, unreported, 2001 Ohio App. LEXIS 5857, a different panel of this court overturned the *Martello*

holding. To this limited extent, I believe the *Swick* decision is wrong. Even if the final judgment on the original offense informed the defendant that he could be subject to a new prison term for a violation of post-release control, that new term constitutes a new sanction for the new criminal act if the defendant has already served his entire original sentence.

{¶16} The instant appeal stems from the final judgment in which appellant was given his original sentence and was informed that he will be subject to post-release control after his release from prison; therefore, at this juncture of the case, appellant's constitutional rights have not been violated as a result of the imposition of post-release control. To this extent, I agree that the trial court's judgment must be affirmed in regard to the issue of post-release control. However, since the majority opinion relies upon the holding in *Swick*, I disagree with the logic employed to dispose of the double jeopardy question. Therefore, I concur in judgment only.

PRESIDING JUDGE WILLIAM M. O'NEILL