[Cite as *State v. McBroom*, 2015-Ohio-4719.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

THE STATE OF OHIO	:	Appellate Case No. 26578
	:	
Plaintiff-Appellee	:	Trial Court Case No. 1989 CR 00268
	:	
v.	:	
	:	
LEONARD MCBROOM	:	
	:	(Criminal Appeal from
Defendant-Appellant	:	Common Pleas Court)

DECISION AND FINAL JUDGMENT ENTRY
November 5, 2015

FROELICH, P.J.

{¶ 1} This matter is before the court on the State of Ohio's motion to dismiss the appeal. The State asserts that the order on appeal is not final and appealable. Leonard McBroom did not file a response to the motion. For the reasons that follow, we sustain the motion and dismiss the appeal.

{¶ 2} McBroom appeals the trial court's January 8, 2015 order overruling his motion for shock probation. We do not have the full record before us, but note that the underlying case bears a 1989 case number. The statute under which McBroom sought shock probation, R.C. 2947.061, has been repealed. During the time it was in effect, this court had, for several years, held that the denial of a motion for shock probation is a final appealable order. *See, e.g., State v. Brandon*, 86 Ohio App.3d 671, 621 N.E.2d 776 (2d Dist.1993); *State v. Kelly*, 2d Dist. Montgomery No. 18170, 2000 WL 1644134 (Sep. 25, 2000). We said in *Brandon* that:

> denial of a motion for shock probation * * * is made in a special proceeding and it is "an order that affects a substantial right." * * * The "substantial right" affected is the

> right of an offender to have the trial court exercise its discretion in ruling upon the motion for shock probation in a nonarbitrary and rational manner. In short, it is about the right of the offender to procedural due process.

Brandon at 675-676 (citations omitted).

{¶ 3} After the General Assembly amended the definition of a final appealable order, we continued to find that such decisions satisfied the definition:

> In 1998, the final order statute was amended, but the amendments did not affect our decision in *Brandon*. Under R.C. 2505.02(B)(2), an order is final and appealable if it "affects a substantial right made in a special proceeding or upon a summary application in an action after judgment." A "substantial right" is now defined by statute as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). Additionally, the Ohio Supreme Court's test for whether a substantial right is affected was not disturbed by the amended statute. "An order affects a substantial right if, in the absence of an immediate appeal, one of the parties would be foreclosed from relief in the future." *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63. Clearly, the procedural due process right we mentioned in *Brandon* is an affected substantial right.
>
> Further, a motion for shock probation may be considered either a special proceeding or a summary application in an action after judgment. In this regard, R.C. 2505.02(A)(2) defines "special proceeding" as "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity." Generally, civil and criminal cases do not fit within the category

> of "special proceedings," because they were known at common law. *Polikoff v. Adam* (1993), 67 Ohio St.3d 100, 104-05. However, the "shock probation" procedure was specially created by statute and was not known at common law, i.e., trial courts do not have inherent power to suspend execution of sentences. *See Toledo Mun. Ct. v. State ex rel. Platter* (1933), 126 Ohio St. 103, paragraph three of the syllabus; *State v. Steffen* (1994), 70 Ohio St.3d 399; and *State v. West* (1993), 66 Ohio St.3d 508, 513 (Moyer, C.J., concurring in judgment only).
>
> Alternatively, motions for shock probation can be considered summary applications in an action after judgment. The term "summary application" is not specifically defined in the statute, but it seems to fit situations like the present, which arise after judgment and do not involve lengthy trial court proceedings. *Compare State v. Branham* (Nov. 27, 1995), Huron App. No. H-95-066, [1995 WL 704100] (holding that denial of defendant's post-judgment motion to take polygraph exam is an order made upon summary application in an action after judgment).

State v. Wilkinson, 2d Dist. Montgomery No. 18286, 2000 WL 1644135, *1-2 (Sept. 25, 2000).

{¶ 4} The plain language of the statute notwithstanding, the Supreme Court of Ohio has held "that a trial court's denial of a motion for shock probation is never a final appealable order." *State v. Coffman*, 91 Ohio St.3d 125, 126, 742 N.E.2d 644 (2001). As a result, defendants lack the ability to challenge any facet of a trial court's decision on shock probation, regardless of whether it contains legal error, factual error, or an abuse of discretion. A trial court's decision, for example, that erroneously holds a defendant to be statutorily ineligible for shock probation, but which expresses a willingness to have allowed it, is entirely – and, in our opinion, unfairly – unreviewable. In contrast, some courts permit the State to appeal a trial court's decision granting shock probation,

affording to it the due process denied to defendants. *E.g.*, *State v. Young*, 8th Dist. Cuyahoga No. 79113, 2001 WL 1671431, *2 (Nov. 29, 2001); *State v. Moore*, 2013-Ohio-4454, 999 N.E.2d 223, ¶ 27-28 (7th Dist.).

{¶ 5} The *Coffman* decision focused on the fact that a judge has discretion in deciding motions for shock probation, noting that "[a]s with any decision to award probation or suspend sentence, the decision to grant shock probation came as an act of grace to one convicted of a crime." *Coffman* at 128. Yet, even probationers have the right to some review of that judicial discretion. *See State v. Tooley*, 9th Dist. Medina Nos. 09CA0098-M, 09CA0099-M, 09CA0100-M, 2011-Ohio-2449, ¶ 21, citing *State v. Miller*, 42 Ohio St.2d 102, 326 N.E.2d 259 (1975) (recognizing that probationers have certain due process rights). Courts of appeals routinely review sentencing determinations, including community control and community control violation orders, because those judgments are statutorily-defined final orders. *See* R.C. 2953.02 ("in any other criminal case * * * the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals"). And, the fact that a trial court decision requires the exercise of judicial discretion does not automatically insulate it from appellate scrutiny. *See, e.g.*, *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 23 ("we conclude that an appellate court is to apply an abuse-of-discretion standard of review when considering an assignment of error" concerning other-acts evidence).

{¶ 6} As we have said previously,

> We invite the Ohio Supreme Court to revisit this issue. The result in the case before us illustrates what we see to be the fallacy in the holding in *State v. Coffman, supra*. Although Ross, like the defendant in *Coffman*, has no substantial right in any particular result of the trial court's exercise of its discretion, he has the right to have

> that discretion exercised, free of prejudicial legal error, in the determination whether he will be released from incarceration, a matter of great importance to him.

In re Ross, 2d Dist. Montgomery No. 18847, 2001 WL 815043, *3 (July 20, 2001). Just as the Ohio Supreme Court revisited the question of whether the denial of a motion to dismiss on double jeopardy grounds provides defendants adequate review, we invite the court to reevaluate *Coffman's* complete bar to review of shock probation decisions, except when sought by the State. *See State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 33-40, 57, 60 (departing from the court's prior decisions in *State v. Crago*, 53 Ohio St.3d 243, 559 N.E.2d 1353 (1990) and *Wenzel v. Enright*, 68 Ohio St.3d 63, 623 N.E.2d 69 (1993) to find double jeopardy decisions reviewable).

{¶ 7} Today, however, because we are bound to follow the holding of *Coffman*, we must hold that the order on appeal here is not final and appealable. This court has jurisdiction to review only final orders or judgments of the lower courts in its district. Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02. We have no jurisdiction to review an order or judgment that is not final, and an appeal therefrom must be dismissed. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989).

{¶ 8} Accordingly, we SUSTAIN the motion to dismiss and DISMISS this appeal for lack of jurisdiction. We note that Appellant's only immediate remedy is to seek an appeal of this decision to the Supreme Court of Ohio. *See* S.Ct.Prac.R. 5.02.

{¶ 9} Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

SO ORDERED.

FAIN, J., concurs.

HALL, J., concurring:

{¶ 10} I agree that *State v. Coffman, supra*, held that the denial of shock probation is never a final appealable order and therefore not subject to appellate review. Although shock probation has been replaced by judicial release, Ohio appellate courts have universally held the denial of judicial release is also not appealable.

{¶ 11} If the Supreme Court of Ohio were to revisit the issue, in my view it should only consider whether to allow appeal of a trial court's determination that an offender is not statutorily eligible for judicial release when that determination is contrary to law. That would preserve the notion that judicial release is an act of grace, as opposed to a right, but it would also allow consideration of judicial release when the trial court erroneously concluded only that an offender is statutorily ineligible.

JEFFREY E. FROELICH, Presiding Judge

MIKE FAIN, Judge

MICHAEL T. HALL, Judge

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