

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
GALLIA COUNTY

|                      |   |                         |
|----------------------|---|-------------------------|
| STATE OF OHIO,       | : | Case No. 09CA4          |
|                      | : |                         |
| Plaintiff-Appellee,  | : |                         |
|                      | : |                         |
| v.                   | : | <u>DECISION AND</u>     |
|                      | : | <u>JUDGMENT ENTRY</u>   |
|                      | : |                         |
| ROBERT A. GULLETT,   | : |                         |
|                      | : |                         |
| Defendant-Appellant. | : | <b>Released 6/11/10</b> |

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APPEARANCES:

Timothy Young, Public Defender, and Stephen P. Hardwick, Assistant Public Defender, Office of the Ohio Public Defender, Columbus, Ohio, for appellant.

C. Jeffrey Adkins, Gallia County Prosecutor, and Eric R. Mulford, Gallia County Assistant Prosecutor, Gallipolis, Ohio, for appellee.

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Harsha, J.

{¶1} Robert A. Gullett appeals his sentence for operating a motor vehicle to willfully elude or flee a police officer, a third degree felony. Gullett complains that after notifying him that the parole board could impose up to three years of post-release control after the completion of his prison term, the trial court erroneously included a requirement “to pay all unpaid supervisory fees and court costs before any post release control is terminated in less than the maximum time allowed by law.” We do not share Gullett’s interpretation of this language as an order directed toward the parole board. However, we do agree with his alternative interpretation of this language as an order directing him to comply with some type of payment schedule or deadline to satisfy his financial obligations. Because the trial court had the inherent power to establish a timeline for compliance with its own order, this portion of Gullett’s sentence is not clearly

and convincingly contrary to law. However, the court abused its discretion in crafting Gullett's sentence because one cannot discern from the judgment entry what the payment schedule or deadline is. Accordingly, we reverse the trial court's judgment in part and remand solely for the purpose of addressing the payment of unpaid fees and costs.

### I. Facts

{¶2} In December 2006, Gullett pleaded guilty to one count of operating a motor vehicle to willfully elude or flee a police officer in violation of R.C. 2921.331(B), which is a third degree felony because Gullett caused a substantial risk of serious physical harm to persons or property. R.C. 2921.331(C)(5)(a)(ii). The trial court sentenced him to four years in prison and ordered him to pay all costs of prosecution. After Gullett served part of his prison term, the trial court granted one of his motions for judicial release, suspended his sentence, and placed him on community control. The court ordered him to pay a community control supervision fee of \$50.00 per month and ordered him to pay his court costs within the first six months of community control supervision.

{¶3} Subsequently, Gullett's probation officer alleged that he violated nine conditions of his community control. In August 2008, Gullett pleaded guilty to four of the violations, and the State dismissed the remaining allegations, including charges that Gullett failed to pay his supervision fees and court costs. The court revoked Gullett's community control and again sentenced him to four years in prison, less time already served, for the willfully eluding or fleeing charge. The court advised Gullett that the parole board could impose post-release control for up to three years after the

completion of his prison term. The court also ordered him “to pay all unpaid supervisory fees and court costs before any post release control is terminated in less than the maximum time allowed by law.” Subsequently, Gullett filed this appeal.

## II. Assignments of Error

{¶4} Gullett assigns the following errors for our review:

Assignment of Error No. 1: The trial court’s August 20, 2008 entry revoking judicial release is void ab initio because it imposes an illegal restriction on the Parole Board’s imposition of postrelease control. R.C. 2967.28, Entry, Aug. 20, 2008.

Assignment of Error No. 2: The trial court erred by adding sanctions in the judgment entry that the trial court did not impose in open court. T.p. (Aug. 19, 2008); Entry, Aug. 20, 2008.

## III. Sentencing

{¶5} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Supreme Court of Ohio announced the standard for appellate review of felony sentences. We must employ a two-step analysis to review sentences. First, we “must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law.” *Kalish* at ¶4. If the sentence is not clearly and convincingly contrary to law, we review the trial court’s sentence for an abuse of discretion. *Id.* The term “abuse of discretion” implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶6} Here, the trial court included the following provision in its sentencing entry: “Defendant is [o]rdered to pay all unpaid supervisory fees and court costs before any post release control is terminated in less than the maximum time allowed by law.” Contrary to the State’s argument, Gullett does not contest the court’s authority to

impose these fees and costs. Instead, Gullett argues that his sentence is void because of the manner in which the court linked the payment of his financial obligations to post-release control.<sup>1</sup>

{¶17} Gullett offers two competing interpretations of the court's statement. First, Gullett argues that we might interpret the court's statement as an order directed toward the parole board, in which case Gullett contends that the court usurped the board's authority to make decisions regarding the imposition and length of post-release control. Alternatively, Gullett claims that we might interpret the court's statement as an order directed toward him. In that case, Gullett argues that it is impossible for him to comply with the court's order and that the court lacks authority to "micromanage the terms of collection of court costs and supervisory fees when imposing a prison term."

{¶18} We interpret the court's language as an order directed toward Gullett, not the parole board. The court did not prohibit the parole board from terminating Gullett's post-release control before the end of three years, i.e. the "maximum time allowed by law," if he had not paid the supervision fees and court costs. The court clearly directs the "[d]efendant," not the parole board, to take certain action. And other provisions in the judgment entry indicate that the court recognized the parole board's authority to decide whether and for how long to impose post-release control and to determine the

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<sup>1</sup> Although neither party raises the issue, Gullett filed his notice of appeal in February 2009 and indicated that he was appealing a February 3, 2009 judgment entry. However, the court did not enter a judgment on that date, and Gullett failed to attach a judgment entry to his notice of appeal. Subsequently, Gullett filed a pro se motion in the trial court, asking the court to set aside the "costs, fine[s] and or restitution" in his case. Before the court ruled on the motion, Gullett filed a copy of the August 2008 judgment entry with this court, and we granted his motion to file a delayed appeal of that judgment on May 4, 2009. On May 8, 2009, the trial court entered a judgment vacating Gullett's court costs. Because the trial court lacked jurisdiction to modify the court costs at that time, we must disregard that entry. See *State v. Scheutzman*, Athens App. 07CA22, 2008-Ohio-6096, at ¶6 ("[t]he filing of a notice of appeal deprives a trial court of jurisdiction to grant any relief inconsistent with an appellate court's ability to affirm, modify or reverse the judgment being appealed.")

conditions of that control. For instance, the court stated that post-release control “is optional for up to three (3) years as determined by the Parole Board[,]” and the court “requested” that the parole board monitor Gullett’s drug usage and provide him with drug treatment if appropriate. Thus, we interpret the court’s payment language as an attempt to set a deadline or create some type of payment schedule for Gullett to satisfy his financial obligations.

{¶9} Nonetheless, Gullett contends that the trial court lacked authority to “micromanage the terms of collection of court costs and supervisory fees” in this manner. But a trial court has the inherent power to set a deadline or a schedule for compliance with its own orders. Thus the trial court could in its discretion create a timeline for Gullett to comply with its order directing him to pay his unpaid supervisory fees and court costs. Accordingly, we conclude that the payment provision is not clearly and convincingly contrary to law.

{¶10} However, the terms of Gullett’s payment schedule or deadline are uncertain. The court ordered Gullett to pay his financial obligations “before any post release control is terminated in less than the maximum time allowed by law.” But, Gullett does not know whether the parole board will impose post-release control at the end of his prison term. If the parole board does not impose post-release, the court’s entry does not explain when Gullett should pay his debts. If the parole board does impose it, Gullett still cannot predict if or when the parole board might terminate post-release control early. Therefore, he might inadvertently violate the court’s order. And the court does not explain when Gullett should pay his debts if his post-release control lasts for the maximum time allowed by law. Thus, we conclude that the trial court

abused its discretion by crafting an ambiguous deadline or payment schedule as part of Gullett's sentence.

{¶11} Accordingly, we sustain Gullett's first assignment of error. We vacate the portion of the judgment entry that orders him "to pay all unpaid supervisory fees and court costs before any post release control is terminated in less than the maximum time allowed by law" and remand for resentencing on the issue of the payment of costs and fees. Because this decision renders moot Gullett's second assignment of error, in which he argues that the payment provision is void because the court failed to mention it in open court, we need not address it. Accordingly, we reverse the trial court's judgment in part and remand this matter to the trial court for further proceedings. In doing so, we implicitly conclude the court's error in adopting an unworkable payment schedule does not render the entire sentence void. Because fees and costs are distinct from criminal punishment and because the trial court did not act outside its jurisdiction in attempting to impose a payment schedule, it did not taint the criminal sentence. See *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278.<sup>2</sup>

JUDGMENT AFFIRMED IN PART  
AND REVERSED IN PART  
AND CAUSE REMANDED.

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<sup>2</sup> In its August 2008 judgment entry, the court wrote "Upon completion of the prison term, the Defendant shall be subject to a period of post release control is optional for up to three (3) years as determined by the Parole Board pursuant to Ohio Revised Code Section 2967.28." Read in isolation, this statement appears somewhat ambiguous about whether post-release control is mandatory or discretionary. However, at the sentencing hearing, the trial court stated that upon the completion of his prison term, Gullett would "be subject to a period of post-release control of *up to three years as determined by the Parole Board*." (Emphasis added). So presumably, the trial court intended to advise Gullett on a discretionary term of post-release control in its judgment entry and mistakenly omitted a word from its statement, e.g. Upon completion of the prison term, the Defendant shall be subject to a period of post release control *which* is optional for up to three (3) years as determined by the Parole Board pursuant to Ohio Revised Code Section 2967.28. On remand, we suggest the trial court revise this portion of its entry accordingly under Crim.R. 36 ("Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time."). See App.R. 9(E).

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallia County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, P.J. & Kline, J.: Concur in Judgment and Opinion.

For the Court

BY: \_\_\_\_\_  
William H. Harsha, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**