

[Cite as *State v. Cunningham*, 2005-Ohio-3840.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85342

STATE OF OHIO	:	
	:	
Plaintiff-Appellant	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
KIM CUNNINGHAM	:	
	:	
Defendant-Appellee	:	

DATE OF ANNOUNCEMENT OF DECISION:	July 28, 2005
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CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court Case No. CR-441001
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JUDGMENT:	DISMISSED
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DATE OF JOURNALIZATION:	_____
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APPEARANCES:

For Plaintiff-Appellant:	WILLIAM D. MASON Cuyahoga County Prosecutor STEVEN E. GALL, Assistant 1200 Ontario Street, 8 th Floor Cleveland, Ohio 44113
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For Defendant-Appellee:	ROBERT L. TOBIK Chief Public Defender NOELLE A. POWELL, Assistant 1200 West Third Street, N.W. 100 Lakeside Place Cleveland, Ohio 44113
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ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Appellant state of Ohio (the state) appeals from the trial court's decision granting defendant-appellee Kim Cunningham's (appellee) motion for judicial release. After reviewing the facts of the case and pertinent law, we dismiss for lack of a final appealable order.

I.

{¶ 2} On December 4, 2003, appellee was sentenced to one year in prison after the court found she violated community control sanctions from a previous sentence.¹ On February 20, 2004, appellee filed a motion for judicial release pursuant to R.C. 2929.20, which she withdrew on March 1, 2004. On June 18, 2004, appellee filed a second motion for judicial release and on July 7, 2004, she filed a motion to reinstate her original motion for judicial release, to which the state objected.² The court granted appellee's motion on August 31, 2004.

{¶ 3} The state's sole assignment of error claims that the trial court erred when it granted appellee's motion for judicial

¹ Appellee was sentenced to community control sanctions after pleading guilty to theft in violation of R.C. 2913.02, a fifth degree felony.

² The state filed a motion in opposition to appellee's motion for judicial release on August 12, 2004, objecting on substantive grounds, i.e., that appellee had an extensive criminal record and that judicial release would demean the seriousness of the offense at issue. However, at the August 31, 2004 hearing regarding appellee's motion for judicial release, the state objected solely on procedural grounds, i.e., that the court lacked jurisdiction over the matter.

release. Specifically, the state argues that the court lacked jurisdiction to grant the motion because it was not timely filed.

{¶ 4} R.C. 2929.20 governs motions for judicial release, and the pertinent parts read as follows:

"Upon the filing of a motion by the eligible offender or upon its own motion, a sentencing court may reduce the offender's stated prison term through a judicial release ***. [I]f the stated prison term was imposed for a felony of the fourth or fifth degree, the eligible offender may file the motion not earlier than thirty days or later than ninety days after the offender is delivered to a state correctional institution."

R.C. 2929.20 (B) (1) (a).

{¶ 5} Putting the merits of the state's timeliness argument aside, this court is required to raise jurisdictional issues involving final appealable orders sua sponte. *In re Murray* (1990), 52 Ohio St.3d 155, 159. We have jurisdiction to review final appealable orders or judgments of lower courts within our district.

However, if the matter before us is not a final appealable order, we have no jurisdiction to review it and the case must be dismissed. *Gen. Acc. Ins. Co. v. Ins. Co. of N. America* (1989), 44 Ohio St.3d 17, 20; *Whitaker-Merrell v. Geupel Constr. Co.* (1972), 29 Ohio St.2d 184, 186.

{¶ 6} R.C. 2929.20 gives a trial court substantial discretion in deciding whether to deny or grant a motion for judicial release.

However, the statute makes no provision for appellate review. Ohio case law holds that a **denial of a motion for judicial release**

is not a final appealable order. See *State v. Coffman* (2001), 91 Ohio St.3d 125, 129 (holding that a trial court's denial of a motion for shock probation, the pre-Senate Bill 2 equivalent of judicial release, is not a final appealable order).³ See also *State v. Ingram*, Franklin App. No. 03AP-149, 2003-Ohio-5380; *State v. Jennings*, Montgomery App. No. 19287, 2002-Ohio-2585. On the other hand, the legislature has expressly authorized the state to appeal from an order **granting judicial release to an offender convicted of a first or second degree felony.** R.C. 2953.08(B)(3).

For third, fourth or fifth degree felony offenses, there is no express right to appeal orders granting judicial release. See *State v. Burgess* (May 22, 2002), Greene App. No. 01-CA-87.

{¶ 7} The instant case involves an order granting judicial release to an offender convicted of a fifth degree felony. The Ohio legislature is silent on the state's right to appeal granting judicial release in a fifth degree felony case. Neither the state nor appellee point to case law addressing this issue; our search revealed none as well. Additionally, the *Coffman* court held that "[i]n matters of probation and parole, we have steadfastly refused to recognize a right of appeal absent a clear directive from the General Assembly that an appeal may be prosecuted." *Coffman*, 91

³ The dissent surmises that *Coffman* is cited to support our holding in the instant case. On the contrary, *Coffman* is cited to survey the area of judicial release and lay a foundation for what amounts to an issue of first impression within our jurisdiction. As such, we agree with the dissent's conclusion that *Coffman* is inapplicable to the case at hand.

Ohio St.3d at 127. Given this, we must decide whether granting judicial release for a fifth degree felony is a final appealable order, thus giving us jurisdiction to review the instant case.

{¶ 8} A final order is defined by R.C. 2505.02, and the pertinent part of that statute reads as follows: "An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it *** **affects a substantial right made in a special proceeding** ***." R.C. 2505.02(B)(2) (emphasis added).

{¶ 9} 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." Judicial release is a statutory creature, having not existed at common law before the legislature adopted R.C. 2947.061 ("shock probation"), which was repealed and replaced by R.C. 2929.20. See *Coffman*, 91 Ohio St.3d at 127; *State v. Green*, Greene App. No. 02-CA-17, 2002-Ohio-2595. Therefore, granting or denying a motion for judicial release constitutes a "special proceeding." *Burgess*, supra, relying on *Coffman*, 91 Ohio St.3d at 127 (ruling that "the determination of a shock probation motion is a 'special proceeding' inasmuch as shock probation was a purely statutory creation and was unavailable at common law").

{¶ 10} Having determined that granting judicial release is a special proceeding, we now analyze whether it affects a substantial

right. "Substantial right" is defined in R.C. 2505.02(A)(1) 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." In criminal proceedings, a final order as envisioned by R.C. 2505.02 usually does not arise until the sentence is imposed. See *State v. Kuttie*, Harrison App. No. 01-528-CA, 2002-Ohio-1029. Thus, postconviction relief issues arise **after** a criminal defendant's substantial rights have been addressed, and are often not final appealable orders, absent statutory language designating them as such. For example, the Ohio Supreme Court has refused to recognize a right of appeal, absent an express directive from the legislature, in matters of probation and parole. *In re Varner* (1957), 166 Ohio St. 340.

{¶ 11} Our ruling in *State v. Young* further supports this point.

In *Young*, the state appealed an order granting shock probation, the statutory predecessor to judicial release. The shock probation statute, former R.C. 2947.061, made no provision for appellate review and there was no equivalent to R.C. 2953.08(B)(3), which differentiates the appealability of first and second degree felonies from third, fourth and fifth degree felonies. Citing the Ohio Supreme Court's decision in *State v. Fisher* (1988), 35 Ohio St.3d 22, we held in *Young* that although the state has no absolute right to appeal the granting of shock probation, "an appellate court may, in its discretion, grant a motion for leave to appeal an

order granting shock probation." *State v. Young* (Nov. 29, 2001), Cuyahoga App. No. 79113.

{¶ 12} As previously discussed, Ohio courts have held that the denial of a motion for judicial release does not affect a substantial right, as defined for the purposes of a final appealable order. Additionally, the Ohio legislature has specifically spoken about appealing the granting of judicial release, expressly allowing an appeal only for first and second degree felonies. R.C. 2953.08(B)(3). This has changed from the days of shock probation, when there was no express right to appeal, regardless of the degree of the offense. A maxim of statutory interpretation is applicable to this case: *expressio unius est exclusio alterius*, meaning that "the expression of one thing is the exclusion of another." *Black's Law Dictionary* (6th Ed.1990) 581. When the legislature "expressed" first and second degree felonies as appealable in terms of judicial release in R.C. 2953.08(B)(3), it excluded all other degrees of felonies from within this statutory right to appeal. Taking this framework into consideration, we conclude that granting judicial release for third, fourth or fifth degree felonies pursuant to R.C. 2929.20(B)(1)(a) is not a final appealable order.⁴

⁴ The dissent assumes that the only redress available to the state when it questions the trial court's jurisdiction in granting judicial release for third, fourth or fifth degree felonies is a direct appeal. However, see *Mason v. Griffin*, 104 Ohio St.3d 279, 2004-Ohio-6384, where the state sought, and the Ohio Supreme Court issued, a writ of prohibition when the trial court acted without jurisdiction in holding a sentencing hearing.

{¶ 13} Accordingly, as we are without jurisdiction to hear the instant case, the state's appeal is dismissed.

Appeal dismissed.

It is ordered that appellee recover of appellant her costs herein taxed.

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

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

ANTHONY O. CALABRESE, JR.
JUDGE

JAMES J. SWEENEY, P.J., CONCURS;

CHRISTINE T. MCMONAGLE, J., DISSENTS. (SEE
SEPARATE DISSENTING OPINION.)

See, also, *State ex rel. State v. Lewis*, 99 Ohio St.3d 97, 101, 2003-Ohio-2476 (holding that “[i]n cases of a patent and unambiguous lack of jurisdiction, the requirement of a lack of an adequate remedy at law need not be proven because the availability of alternate remedies like appeal would be immaterial.”)

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85342

STATE OF OHIO,	:	
	:	
Plaintiff-Appellant	:	D I S S E N T I N G
	:	
v.	:	O P I N I O N
	:	
KIM CUNNINGHAM,	:	
	:	
Defendant-Appellee	:	

DATE: July 28, 2005

CHRISTINE T. McMONAGLE, J., Dissenting:

{¶ 14} Respectfully, I dissent. The State's position in this matter is that the trial court, in granting a motion for judicial release, acted outside its grant of jurisdiction. The majority holds that the State is prohibited from appealing this matter, citing *State v. Coffman* (2001), 91 Ohio St.3d 125, and R.C. 2953.08(B)(3).

{¶ 15} *Coffman* holds that a *defendant's* appeal of a denial of a motion for shock probation is not a final appealable order. That case is inapplicable here for two substantial reasons. First, *Coffman* involves shock probation, not judicial release. The case at bar involves judicial release. Second, *Coffman* involved an appeal by the defense, while the case at bar involves an appeal by the State. Appeals by the State are authorized, if at all, only by statute.

{¶ 16} R.C. 2953.08(B) provides, in pertinent part, the following grounds upon which the State may appeal a sentencing issue:

{¶ 17} "In addition to any other right to appeal *** a prosecuting attorney *** may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony, or in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, *on any of the following grounds:*

{¶ 18} "(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in Section 2929.13 or Chapter 2925. of the Revised Code.

{¶ 19} "(2) The sentence is contrary to law.

{¶ 20} "(3) The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was imposed for a felony of the first or second degree." (Emphasis added.)

{¶ 21} Citing the canon of construction, *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other), the majority concludes that (B)(3)'s omission of felonies of the third, fourth and fifth degrees means that judicial releases involved in such felonies are not included in the appellate grant.

{¶ 22} I believe, however, that the proper analysis involves only grammatical construction. While section (B)(3) eliminates from the appellate court's review matters of judicial release in third, fourth and fifth-degree felonies, R.C. 2953.08(B) provides that the State may appeal a sentencing issue on *any of three enumerated grounds* set forth in the statute. Section (B)(2) is one of those grounds. It contains no limitations whatsoever; it permits the State to appeal *any* sentence that is contrary to law.

{¶ 23} The opinion of the majority in this case holds in substance that a court could grant with impunity judicial release in any third, fourth or fifth-degree felony, even if it was without jurisdiction to do so (as alleged here), or even if the defendant were ineligible. (An example might be a third-degree drug felony which carried mandatory time and, hence, for which an offender was neither eligible for community control sanctions or judicial

release.) Such reading of the statute is counterintuitive. No statutory scheme would permit a court to act without jurisdiction, or in an illegal fashion, and then prohibit the aggrieved party from raising the issue.