[Cite as *State v. Carlisle*, 2010-Ohio-3407.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93266

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

JACK CARLISLE

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-481858

BEFORE: Stewart, J., Kilbane, P.J., and Blackmon, J.

RELEASED: July 22, 2010

JOURNALIZED:

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MELODY J. STEWART, J.:

{¶ 1} Following the affirmance of defendant-appellee Jack Carlisle's sentence on direct appeal, the trial court modified his three-year sentence for kidnapping and gross sexual imposition to a five-year term of community control. The court ordered the modification due to a change in circumstances with Carlisle's health. The state of Ohio appeals from the sentence

modification, arguing that the court lacked jurisdiction to modify a sentence that had been affirmed on direct appeal and that the court in any event failed to justify the modification as required by law.

I

{¶ 2} A jury found Carlisle guilty of kidnapping and gross sexual imposition. The victim was his six-year-old foster child. The court sentenced Carlisle to concurrent three-year terms for both counts and continued Carlisle's bond pending his appeals. We affirmed Carlisle's conviction in 2008. See *State v. Carlisle*, 8th Dist. No. 90223, 2008-Ohio-3818. The Ohio Supreme Court declined to hear his appeal. *State v. Carlisle*, 120 Ohio St.3d 1508, 2009-Ohio-361, 900 N.E.2d 624.

{¶ 3} Before the trial court could take any action to revoke Carlisle's appellate bond following the exhaustion of his direct appeals, Carlisle filed a motion to reconsider and modify his sentence to a term of community control. He sought modification for health reasons, claiming that he suffered from "an array of chronic life threatening illnesses, including end stage kidney failure, congestive heart failure, coronary artery disease, and diabetes" and argued that a three-year sentence might well prove to be "a death sentence" given his diminishing health. He offered evidence showing that he received kidney dialysis three times per week, paid for by a combination of private health insurance and Medicare. A prison term, he suggested, would cause

him to lose that coverage, requiring the state to pay his rather substantial medical costs during the term of his incarceration. Given his infirmity and the low likelihood of reoffending, Carlisle maintained that his incarceration would impose an undue financial burden on the state.

{¶ 4} The state opposed the motion, arguing that most of Carlisle's medical conditions preexisted the commission of his crimes and that community control would allow him to benefit from his medical condition. It noted the age of Carlisle's victim and cited to expert testimony at trial showing that Carlisle had, in any event, potentially exaggerated the scope of his problems. For example, Carlisle claimed that he was impotent because of his medical condition yet the state offered evidence to show the presence of semen on his trousers, thus refuting his claim. On that basis, it argued that a lighter sentence would demean the seriousness of the offense.

{¶ 5} The court conducted a hearing on the motion and considered billing statements from Carlisle's health insurance company. Carlisle's attorney told the court that she wished to "underscore the fact that this [motion to modify sentence] is really about Mr. Carlisle's health." She noted that since he committed his crimes, he began suffering from end stage kidney disease and said that his dialysis cost between $25,000 and $30,000 per month exclusive of doctors visits and tests.

{¶ 6} The court acknowledged that Carlisle committed a very serious offense and had served 278 days in jail, but posed no future threat to the community or the victim. The court also found that Carlisle's "worsening" condition would lead to financial costs that presumably outweighed any need for punishment:

{¶ 7} "We know they are cutting budgets everywhere. Not only in the County but on a state-wide level. And the costs in this situation are going to be astronomical."

{¶ 8} Finding that community control would adequately protect the public and would not demean the seriousness of Carlisle's offenses, the court modified his sentence to a term of five years of supervised community control.

II

{¶ 9} The state first argues that the trial court lacked jurisdiction to modify a sentence that had been affirmed on appeal and that modification of the sentence was barred by principles of res judicata. These arguments raise interconnected questions concerning the court's authority to modify a sentence and whether a post-appeal modification of a sentence that has been affirmed on appeal conflicts with a direct mandate of this court.

A

{¶ 10} As a general proposition, a court has no authority to reconsider its own valid final judgments. *Brook Park v. Necak* (1986), 30 Ohio App.3d

118, 120, 506 N.E.2d 936. In criminal cases, a judgment is not considered final until the sentence has been ordered into execution. In *State v. Garretson* (2000), 140 Ohio App.3d 554, 558-559, 748 N.E.2d 560, the court of appeals stated:

{¶ 11} "In *Columbus v. Messer* (1982), 7 Ohio App.3d 266, 7 OBR 347, 455 N.E.2d 519, the Court of Appeals for Franklin County addressed the question of exactly when the execution of the sentence has begun: 'Where the full sentence involves imprisonment, *the execution of the sentence is commenced when the defendant is delivered from the temporary detention facility of the judicial branch to the penal institution of the executive branch*.' (Emphasis added.) As a result, a trial court does not have jurisdiction to modify a valid sentence of imprisonment once imprisonment has begun. Should a trial court retain jurisdiction to modify an otherwise valid sentence 'the defendant would have no assurance about the punishment's finality.' *Brook Park v. Necak* (1986), 30 Ohio App.3d 118, 120, 30 OBR 218, 220, 506 N.E.2d 936, 938."

{¶ 12} In other words, a criminal judgment is not final and the court retains the authority to modify the sentence until the defendant is delivered to a penal institution to start serving a sentence.[1] The court granted Carlisle

[1]The finality of a criminal case for purposes of modifying an order is separate and distinct from a final, appealable order under R.C. 2505.02.

appellate bond throughout the appeals process, and he remained on bond at the time he filed his motion to modify his sentence. At no point had his sentence been ordered into execution with his delivery to a penal institution, so the court had jurisdiction to address the motion to modify sentence. See *State v. Dawkins*, 8th Dist. No. 88022, 2007-Ohio-1006, at ¶7.

B

{¶ 13} Even though the court had the authority, in the abstract, to modify Carlisle's sentence because he had not yet been delivered to a prison facility to begin serving his sentence, we must consider the effect of our affirmance of his direct appeal. The state argues that regardless of whether the sentence had been ordered into execution, the court lacked authority to modify the sentence because it was affirmed on direct appeal by this court. It cites to *State ex rel. Special Prosecutors v. Judge, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97, 378 N.E.2d 162, for the proposition that a judgment of a reviewing court is "controlling upon the lower court as to all matters within the compass of the judgment."

{¶ 14} Principles of res judicata state that "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E.2d 226, syllabus. These principles apply to

appellate review, and state that "issues that could have been raised on direct appeal and were not are res judicata and not subject to review in subsequent proceedings." *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221, at ¶6.

{¶ 15} For purposes of appellate review, res judicata incorporates two separate doctrines: the law of the case and the mandate rule. The "law of the case" is a judicially crafted policy that "expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power." *Messenger v. Anderson* (1912), 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152. As such, law of the case is necessarily "amorphous" in that it "directs a court's discretion," but does not restrict its authority. *Arizona v. California* (1983), 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318. It is a rule of practice that is not considered substantive, but merely discretionary. *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329, at ¶22.

{¶ 16} The law of the case is not to be confused with the "mandate rule." An appellate mandate works in two ways: it vests the lower court on remand with jurisdiction and it gives the lower court on remand the authority to render judgment consistent with the appellate court's judgment. Under the "mandate rule," a lower court must "carry the mandate of the upper court into execution and not consider the questions which the mandate laid at rest." *Sprague v. Ticonic Natl. Bank* (1939), 307 U.S. 161, 168, 59 S.Ct. 777; see,

also, *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, at ¶32 ("We have expressly held that the Ohio Constitution does not grant to a court of common pleas jurisdiction to review a prior mandate of a court of appeals."). The lower court may, however, rule on issues left open by the mandate. Id. But when the mandate leaves nothing left to decide, the lower court is bound to execute it. Id. We have stated that the mandate rule "provides that a lower court on remand must implement both the letter and the spirit of the appellate court's mandate and may not disregard the explicit directives of that court." *State v. Larkins*, 8th Dist. No. 85877, 2006-Ohio-90, at ¶31.

{¶ 17} In criminal cases, the mandate rule is set forth in R.C. 2949.05, which states:

{¶ 18} "If no appeal is filed, if leave to file an appeal or certification of a case is denied, if the judgment of the trial court is affirmed on appeal, or if post-conviction relief under section 2953.21 of the Revised Code is denied, the trial court or magistrate shall carry into execution the sentence or judgment which had been pronounced against the defendant."

{¶ 19} Likewise, App.R. 27 states in part: "A court of appeals may remand its final decrees, judgments, or orders, in cases brought before it on appeal, to the court or agency below for specific or general execution thereof, or to the court below for further proceedings therein." Pursuant to App.R.

27, this court issues a special mandate in all of its decisions, whether civil or criminal. In our opinion affirming Carlisle's conviction and sentence, we gave the following mandate:

{¶ 20} "It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence."

{¶ 21} Our mandate specifically ordered the trial court to execute Carlisle's sentence. Both the letter and spirit of the mandate required the court to execute Carlisle's sentence; that is, remand him to a penal institution. By modifying Carlisle's sentence, the court did not execute the sentence and therefore failed to obey our mandate. See *State v. Craddock*, 8th Dist. No. 91766, 2009-Ohio-1616, at ¶15.

{¶ 22} In reaching this conclusion, we note that our decision to stay execution of sentence and grant Carlisle's motion for bond pending appeal to the Ohio Supreme Court did not affect the validity of our mandate. As a general rule, the the trial court is divested of jurisdiction when an appeal is taken, except to take action in aid of the appeal. See *Special Prosecutors*, 55 Ohio St.2d at 97. Our order staying execution of our mandate ordering Carlisle's sentence into execution had no affect on the validity of our mandate. The mandate remained in full force and effect — our stay simply

delayed execution of the mandate pending appeal. The trial court had no authority to countermand our mandate, even if that mandate had been stayed pending further appeal to the supreme court.

C

{¶ 23} There is an exception to the law of the case doctrine for extraordinary circumstances, such as an intervening decision by a superior court. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 5, 462 N.E.2d 410. The supreme court has not defined the term "extraordinary circumstances" in this instance, so we give that term its plain meaning as something exceptional in character, amount, extent, or degree. Given the very strong requirement that a lower court follow the mandate of a superior court, we think that a deviation from an appellate mandate can only occur when external circumstances have rendered that mandate void or moot. For example, the basis cited in *Nolan* as an exception to the law of the case doctrine — an "intervening decision by a superior court" — is one that would plainly supersede an appellate mandate. This is because supreme court decisions are binding and no lower court is entitled to deviate from them, even if the mandate of an intermediate court was to require otherwise. *Thacker v. Bd. of Trustees of Ohio* (1971), 31 Ohio App.2d 17, 21, 285 N.E.2d 380.

{¶ 24} Carlisle's motion to modify his sentence was based on two factors: his medical condition and the cost of providing his treatment while

imprisoned. He claimed to have a "debilitating illness" that required dialysis and left his prognosis "questionable." He further claimed that the cost of his medical treatment would place an undue burden on state resources given the very low likelihood of harm he posed to the public.

{¶ 25} Carlisle's medical condition did not constitute an extraordinary circumstance justifying modification of his sentence in the face of our mandate on appeal. Nor did his medical condition serve to vitiate this court's mandate. In fact, Carlisle's medical condition was known to the court months in advance of his sentencing: a November 2006 pretrial order reducing Carlisle's bond noted that he was "presently undergoing dialysis three times weekly." The court imposed a three-year sentence despite knowing that Carlisle had been in renal failure. Plainly, the court did not consider Carlisle's need for dialysis at the time of sentencing to be a debilitating medical condition sufficient to rule out a prison term.

{¶ 26} Carlisle offered nothing in his motion to modify sentence that would suggest that his condition had significantly deteriorated from the time of sentencing to the time of his motion. The most current of the medical records submitted with the motion were from March 2008. A doctor's progress note on Carlisle's medical condition described Carlisle as well-developed, well-nourished, not in apparent distress, alert, cogent, and without a foul or unpleasant smell associated with kidney failure. The

doctor further noted that Carlisle's medical history showed him "doing well at HD [hemodialysis]" and his "dialysis going fine." The note further stated that Carlisle had no chest pain or shortness of breath. The note concluded by stating: "Patient is stable on hemodialysis and plan is to continue current treatment approach[.]"

{¶ 27} The March 2008 progress note was consistent with an October 2007 progress note that stated Carlisle's medical history as "overall doing well, no problems with dialysis." The note indicated that Carlisle had no complaints of chest pain or shortness of breath, and that he had good energy and had been eating well.

{¶ 28} The court heard no evidence to contradict the medical records offered with the motion to modify the sentence. While Carlisle undeniably suffers from very serious medical conditions, those conditions, with the exception of his dialysis, predated his crimes. And the record plainly shows that the court knew at the time it originally imposed sentence that Carlisle had been receiving dialysis. The only evidence in the record at the time of the hearing showed that Carlisle remained stable on dialysis. Indeed, Carlisle's motion for release on bond pending appeal made no mention of any ill health; in fact, the motion mentioned that he had been employed at the time of his initial incarceration that "it is entirely possible that defendant could immediately re-enter the work force upon the decision of this appeal if

favorable to defendant." There was no evidence to prove a deterioration of his condition sufficient to qualify as an extraordinary circumstance requiring deviation from our mandate to execute sentence.

{¶ 29} Carlisle's primary basis for seeking modification of his sentence was that it would be prohibitively expensive for the state to imprison him. In his motion he claimed that his dialysis alone cost at least $51,152 annually and that the cost was currently borne through a combination of Medicare and private insurance. At the hearing on the motion to modify, Carlisle offered statements from his health insurer showing the cost of dialysis to be between $25,000-$30,000 per month. He maintained that if imprisoned, the state would be required to assume the cost of his treatment. Claiming to pose no risk of reoffending due to the court's refusal to classify him as a sexual predator, he said that the need to forcefully punish him became "less weighty [ ] when considered in light of the financial burden of medically caring for him * * *."

{¶ 30} The state conceded that it would be expensive to imprison Carlisle but said that it was willing to absorb that cost. While noting that "nothing has changed except for the economy[,]" it argued that it would otherwise demean the seriousness of Carlisle's offenses to permit him to avoid prison time.

{¶ 31} The court appeared to agree with Carlisle's claim that his incarceration would place an undue burden on state financial resources. It noted that apart from the cost of dialysis, the state would be required to provide transportation to dialysis and assign a corrections officer to monitor Carlisle while he received treatment. The court acknowledged the seriousness of Carlisle's offenses and the "worsening" of his medical condition. It then stated that "while not the only factor I considered," that state and local resources were important "because we need to preserve them for those serious crimes that the Court feels where [sic] the defendant cannot be out on the street." It acknowledged that "they are cutting budgets everywhere" and that "the costs in this situation are going to be astronomical." Finding that Carlisle did not pose a threat to the community, it modified his sentence to community control.

{¶ 32} It is true that the special medical needs of some inmates make the cost of their incarceration significantly higher than those of other inmates. The cost of incarceration can be a relevant factor for the court to consider at sentencing. See R.C. 2929.13(A) (a "sentence shall not impose an unnecessary burden on state or local government resources."). Yet it is undeniably self-serving for Carlisle to seek to avoid a prison term on the basis that it would cost too much to incarcerate him. Carlisle has offered evidence to show that his medical treatment is extremely costly. But the court was

aware of Carlisle's medical condition at the time it originally sentenced him, and it ordered a prison term despite knowing of his need for dialysis and, presumably, the substantial costs associated with that treatment. With no new evidence to show that these costs had escalated beyond what it had been at the time of the original sentence, the cost of Carlisle's treatment could not have been an extraordinary circumstance justifying deviation from our mandate to execute his sentence.

{¶ 33} Moreover, to the extent that Carlisle's medical treatment would be a financial burden to the state, the court was required to find that the cost of treatment was an "unnecessary" burden. "Just what constitutes a 'burden' on state resources is undefined by the statute, but the plain language suggests that the costs, both economic and societal, should not outweigh the benefit that the people of the state derive from an offender's incarceration." *State v. Vlahopoulos*, 154 Ohio App.3d 450, 2003-Ohio-5070, 797 N.E.2d 580, at ¶5. The trial courts are not required to elevate resource conservation above seriousness and recidivism factors, *State v. Wolfe*, Columbiana App. No. 03 CO 45, 2004-Ohio-3044, at ¶15, and apart from financial considerations relating to the burden of incarcerating an offender, "[t]he court must also consider the benefit to society in assuring that an offender will not be free to reoffend." *Vlahopoulos*, 154 Ohio App.3d at ¶5.

{¶ 34} The court found that Carlisle's current medical condition made him no reasonable threat to the community or the victim's family, but that conclusion found no support in the record. The state correctly notes that apart from a need for dialysis that arose after the offense had been committed, the bulk of Carlisle's physical maladies were manifest prior to the commission of his crimes. Those maladies did not deter his actions. And it bears noting that Carlisle himself overstated his medical condition when first questioned by claiming that his medical condition had for years left him impotent — his wife contradicted that claim by saying that they engaged in intercourse several months earlier. The presence of semen on pants worn by Carlisle on the night of the offense appeared to remove all doubt about his impotency. Tellingly, Carlisle did not reassert a claim of impotence as proof of his inability to reoffend for purposes of his motion to modify his sentence, and none of his medical records showed any complaint of impotence. With the most recent medical information available to the court suggesting that Carlisle's condition remained stable on dialysis, the court's conclusion that Carlisle posed no threat to the community lacked a basis in evidence.

{¶ 35} We likewise reject Carlisle's argument that the court's refusal to classify him as a sexual predator constituted a finding that he was no threat to reoffend because those findings are conceptually distinct. A sexual predator classification under former R.C. 2950.01(E) was a finding that clear

and convincing evidence showed that the offender was "likely to engage in the future in one or more sexually oriented offenses." This was a much different standard than the R.C. 2929.11(A) sentencing factor requiring the court to protect the public from "future crimes of the offender[.]" Cf. *State v. Futo*, 8th Dist. No. 89791, 2008-Ohio-3360 (rejecting argument that court acted inconsistently by ordering offender to serve mandatory maximum sentences consecutively despite refusing to classify him as a sexual predator).

{¶ 36} Finally, to the extent that Carlisle's need for treatment while imprisoned would impose a burden on the state's financial resources, there was no basis for finding that burden to be "unnecessary." The prosecuting attorney told the court that "the State is willing to absorb the cost" of Carlisle's incarceration. This position was entitled to significant weight because the prosecuting attorney is the elected representative of the state of Ohio and is entitled to voice an opinion on behalf of the people of this state. See R.C. 309.08(A).

{¶ 37} It requires no citation to authority for the proposition that acts of sexual abuse committed against children are considered among the most heinous of crimes. The current registration requirements for sexual offenders were motivated by child sexual abuse cases. See *State v. Williams*, 88 Ohio St.3d 513, 516-517, 2000-Ohio-428, 728 N.E.2d 342. "Although Ohio's version [of Megan's Law], R.C. Chapter 2950, does not differentiate

between crimes against children and crimes against adults, recidivism among pedophile offenders is highest." *State v. Eppinger*, 91 Ohio St.3d 158, 160, 2001-Ohio-247, 743 N.E.2d 881. The current sexual offender registration laws are based on the federal Adam Walsh Child Protection and Safety Act of 2006. "The General Assembly's stated purpose in enacting the Adam Walsh Act [was] 'to provide increased protection and security for the state's residents from persons who have been convicted of, or found to be delinquent children for committing, a sexually oriented offense or a child-victim oriented offense[.],'" *Adamson v. State*, 11th Dist. No. 2008-L-045, 2009-Ohio-6996, at ¶93.

{¶ 38} Carlisle was convicted of committing an act of gross sexual imposition against his six-year-old foster child. Our statement of facts in Carlisle's direct appeal is as follows:

{¶ 39} "K.C. testified that Carlisle entered the room, closed the door behind him, sat on his bed and told her to come to him, but she continued to watch television. K.C. testified that Carlisle came over to her, picked her up, and placed her on the bed. K.C. testified that Carlisle laid her on her back, then removed his pants, put lotion on his penis, climbed on top of her, and inserted his penis inside her." *Carlisle*, 2008-Ohio-3818, at ¶7.

{¶ 40} At trial, the jury heard that Carlisle committed these acts despite knowing that the victim's nine-year-old brother had been hiding in the closet

of the victim's bedroom at the time. Id. at ¶10 ("Carlisle said 'get out of the closet,' but [the brother] remained hidden under some clothes"). So apart from the seriousness of committing an act of sexual abuse with a child less than ten years of age, Carlisle abused his position of trust as a foster parent and molested the victim despite knowing that there was a potential witness in the closet. Although acquitted of rape charges, medical evidence showed that the victim's "entire vaginal area was swollen, severely red and irritated." Id. at ¶25.

{¶ 41} Carlisle was convicted for committing very grave acts of sexual abuse against a child less than ten years of age — acts that society has deemed worthy of significant punishment. As the representative of the people of Ohio, the state's desire to bear the cost of Carlisle's medical care in order to see him punished for his crime was reasonable.

{¶ 42} Moreover, the costs of Carlisle's imprisonment, while potentially substantial, were limited. The court imposed a three-year sentence and noted during the modification proceedings that Carlisle "served 278 days incarceration in the County Jail." With a credit for time held in confinement pending trial, see R.C. 2967.191, the term of Carlisle's imprisonment would be considerably less than three years. The state could rationally have concluded that Carlisle's imprisonment would not subject the state to an indefinite financial burden.

{¶ 43} And even if the state was to change its mind as to post-execution of sentence about Carlisle's need for imprisonment due to the cost of his medical care, R.C. 2967.03 creates a mechanism for medical release. The statute allows a medical release if the adult parole authority finds the release to be in "the interests of justice and be consistent with the welfare and security of society" and the governor so agrees. A "Fiscal Note & Local Impact Statement" for then-pending HB 130, prepared by the Ohio Legislative Service Commission, states:

{¶ 44} "The bill streamlines the process for obtaining the medical release of an inmate facing serious illnesses. There is a procedure under current law for the release of inmates in imminent danger of death within six months. This process, however, tends to be procedurally time consuming and the inmate often dies before the release is granted. DRC estimates that such a streamlined program would affect between 20 and 50 inmates annually and could save over $1 million in operational expenditures. Depending on the medical condition of the inmate and the specific treatment regimen required, streamlined release procedures could save the Department even more in medical expenditures."

{¶ 45} R.C. 2967.03 plainly envisions that the cost of inmate care can become so burdensome that a medical release is advised. The availability of an early medical release in conjunction with the very limited time Carlisle

had left to serve shows that the cost of Carlisle's imprisonment would be contained to a relatively short period of time.

{¶ 46} In the end, the court could only deviate from our mandate to order Carlisle's sentence into execution by showing that extraordinary circumstances existed that would nullify or otherwise render our mandate imperfect. We find no such circumstances existed. There was no evidence that Carlisle's medical condition, while serious, had significantly deteriorated from the time of the original sentencing to the time of modification. Moreover, while Carlisle's imprisonment would place a financial burden on the state, the short and definite nature of that term of imprisonment would not create an unnecessary financial burden.

D

{¶ 47} We stress that nothing in our holding should be construed as a limitation on a trial judge's ability to modify a sentence prior to execution of sentence when no direct appeal is taken from the conviction. Once a notice of appeal is filed, however, the trial court is divested of jurisdiction and can only take action in aid of the appeal. And when an appeal has been decided and a mandate is issued ordering a sentence into execution, the mandate rule requires execution of the sentence. The only applicable exception to the mandate rule is when "extraordinary circumstances" exist that would render the appellate mandate void or otherwise imperfect. But an extraordinary

circumstances exception is not intended as a means of second-guessing a sentence that has been affirmed on appeal and ordered into execution by mandate of a superior court.

{¶ 48} With those caveats, we sustain the state's second assignment of error and reverse the court's modification of sentence.

{¶ 49} This cause is reversed and remanded for proceedings consistent with this opinion.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR