

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

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|----------------------|---|------------------------------|
| STATE OF OHIO, | : | |
| | : | |
| Plaintiff-Appellee, | : | Case No. 22CA4 |
| | : | |
| v. | : | |
| | : | |
| JESSE E. MOORE, III, | : | <u>DECISION AND JUDGMENT</u> |
| | : | <u>ENTRY</u> |
| | : | |
| Defendant-Appellant. | : | |

APPEARANCES:

Timothy Young, Ohio Public Defender, Victoria Bader, Assistant Public Defender, Columbus, Ohio, for Appellant.

Jeffrey C. Marks, Ross County Prosecuting Attorney, Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for Appellee.

Smith, P.J.

{¶1} Jesse E. Moore, III, appeals the December 16, 2021 Judgment Entry of Sentence of the Ross County Court of Common Pleas, in which the trial court imposed an indefinite sentence under the Reagan Tokes Law. Challenging the constitutionality of the Reagan Tokes Law, Moore proffers three arguments: (1) that the law violates the separation-of-powers doctrine; (2) that the law violates due process of law; and (3) that the law violates a defendant’s right to trial by jury. For the reasons which follow, we find no

merit to Moore's arguments, which have been addressed numerous times in this court and in other appellate courts. Accordingly, we overrule the sole assignment of error and affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} On August 27, 2021, an indictment was filed in Ross County Common Pleas Court case number 21CR321 charging Appellant Jesse E. Moore, III, with three counts as follows:

Count One: Improper Handling of a Firearm in a Motor Vehicle, in violation of R.C. 2923.16, a felony of the fourth degree;

Count 2: Aggravated Possession of Drugs, in violation of R.C. 2925.11, a felony of the second degree; and,

Count 3: Possession of a Fentanyl-related Compound, in violation of R.C. 2925.11, a felony of the fifth degree.

{¶3} Moore proceeded to a jury trial and was found guilty of all counts. On December 13, 2021, the trial court imposed an indefinite prison term of five to seven and a half years on count two, aggravated possession of drugs. The sentences on the additional counts were ordered to be served concurrent to the sentence in count two. Moore's counsel did not object to the imposition of the indefinite sentence.

{¶4} This timely appeal followed. Moore filed his appellate brief on May 9, 2022. The State of Ohio filed its brief on May 31, 2022. Moore concedes that due to counsel's failure to object at sentencing, his arguments

under the sole assignment of error are subject to a plain-error standard of review.

ASSIGNMENT OF ERROR

I. THE TRIAL COURT ERRED WHEN IT SENTENCED MR. MOORE TO AN INDEFINITE SENTENCE UNDER THE UNCONSTITUTIONAL REAGAN TOKES LAW.

A. REAGAN TOKES LAW

{¶5} The Reagan Tokes Law encompasses four newly enacted statutes and amendments to 50 existing statutes. R.C. 2901.011. *See State v. Holsinger*, 4th Dist. Lawrence No. 21CA20, 2022-Ohio-4092, at ¶ 33. The Reagan Tokes Law requires that a court imposing a prison term under R.C. 2929.14(A)(1)(a) or (2)(a) for a first or second degree felony committed on or after March 22, 2019, impose a minimum prison term under that provision and a maximum prison term determined under R.C. 2929.144(B). R.C. 2929.144(A) and (C). There is a presumption that the offender “shall be released from service of the sentence on the expiration of the offender's minimum prison term or on the offender's presumptive earned early release date, whichever is earlier.” R.C. 2967.271(B). A presumptive earned early release date is a date determined under procedures described in R.C. 2967.271(F) which allow the sentencing court to reduce the minimum prison term under certain circumstances. R.C. 2967.271(A)(2).

{¶6} R.C. 2967.271(C) states that the Ohio Department of Rehabilitation and Correction (“ODRC”) may rebut the presumption in R.C. 2967.271(B) if it determines, at a hearing, that one or more of the following applies:

(1) Regardless of the security level in which the offender is classified at the time of the hearing, both of the following apply:

(a) During the offender's incarceration, the offender committed institutional rule infractions that involved compromising the security of a state correctional institution, compromising the safety of the staff of a state correctional institution or its inmates, or physical harm or the threat of physical harm to the staff of a state correctional institution or its inmates, or committed a violation of law that was not prosecuted, and the infractions or violations demonstrate that the offender has not been rehabilitated.

(b) The offender's behavior while incarcerated, including, but not limited to the infractions and violations specified in division (C)(1)(a) of this section, demonstrate that the offender continues to pose a threat to society.

(2) Regardless of the security level in which the offender is classified at the time of the hearing, the offender has been placed by the department in extended restrictive housing at any time within the year preceding the date of the hearing.

(3) At the time of the hearing, the offender is classified by the department as a security level three, four, or five, or at a higher security level.

{¶7} If ODRC rebuts the presumption, it “may maintain the offender's incarceration” after the expiration of the minimum prison term or presumptive earned early release date for a reasonable period

of time, determined and specified by ODRC, which “shall not exceed the offender's maximum prison term.” R.C. 2967.271(D)(1).

B. STANDARD OF REVIEW

{¶8} The constitutionality of a statute presents a question of law which we review de novo. *See State v. Holsinger, supra*, at ¶ 35, citing, *Hayslip v. Hanshaw*, 2016-Ohio-3339, 54 N.E.3d 1272, ¶ 27 (4th Dist.). “ ‘[L]aws are entitled to a strong presumption of constitutionality.’ ” *Ohio Renal Assn. v. Kidney Dialysis Patient Protection Amendment Comm.*, 154 Ohio St.3d 86, 2018-Ohio-3220, 111 N.E.3d 1139, ¶ 26, quoting *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 16. “A party may challenge a statute as unconstitutional on its face or as applied to a particular set of facts.” *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 37. “A party asserting a facial challenge * * * must prove beyond a reasonable doubt ‘that no set of circumstances exists under which the act would be valid.’ ” *Ohio Renal Assn.* at ¶ 26, quoting *Wymyslo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶ 21.

{¶9} Moore concedes that he did not raise his constitutional challenge at the trial court level. “ ‘[T]he question of the constitutionality of a statute must generally be raised at the first opportunity and, in a criminal

prosecution, this means in the trial court.’ ” *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15, quoting *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986). However, a reviewing court has “discretion to consider a forfeited constitutional challenge to a statute” and “may review the trial court decision for plain error, but we require a showing that but for a plain or obvious error, the outcome of the proceeding would have been otherwise, and reversal must be necessary to correct a manifest miscarriage of justice.” (Citation omitted.) *Id.* at ¶ 16. “The burden of demonstrating plain error is on the party asserting it.” *Id.* The Supreme Court of Ohio has also “stated that a forfeited constitutional challenge to a statute is subject to review ‘where the rights and interests involved may warrant it.’ ” *Id.*, quoting *In re M.D.*, 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), syllabus.

C. LEGAL ANALYSIS

1. Does the Reagan Tokes statute violate the Separation of Powers doctrine?

{¶10} Moore contends that the Reagan Tokes Law grants authority to the ODRC to engage in factfinding in order to extend a defendant’s prison term. Moore argues that such factfinding encroaches on the authority of the judicial branch. Moore acknowledges, however, that this court in *State v. Bontrager*, 2022-Ohio-1367, 188 N.E.3d 607, at ¶¶ 41-44

(4th Dist.), has found that the Reagan Tokes Law does not violate the separation of powers doctrine. Moore points out that this very issue is currently pending in the Supreme Court of Ohio and requests this court to reconsider its prior decision in *Bontrager*, or, in the alternative, hold his case pending the Supreme Court’s decisions in *State v. Simmons*, Sup. Ct. Case No. 2021-0532 and *State v. Hacker*, Sup. Ct. Case No. 2020-1496.¹

{¶11} Challenges to the Reagan Tokes Law do not present a matter of first impression to this Court. Since the indefinite sentencing provisions of the Reagan Tokes Law went into effect in March 2019, we have repeatedly been asked to address the constitutionality of these provisions. As the appellate court in *State v. Rice*, 3d. Dist. Marion No. 9-22-13-4, 2023-Ohio-979, at ¶ 6 recently concluded, “We have invariably concluded that the indefinite sentencing provisions of the Reagan Tokes Law do not facially violate the separation-of-powers doctrine * * * .”

{¶12} Regarding constitutional challenges to the Reagan Tokes Law, the same is true within the Fourth District. *See also State v. Alexander*, 2020-Ohio-1812, 190 N.E.3d 651, at ¶ 56; *State v. Chapman*, 2022-Ohio-2853, 195 N.E.3d 178, at ¶ 73 (Citing *Alexander* and *Bontrager*, “[w]e see

¹ A check of the Supreme Court of Ohio’s online docket, accessed March 29, 2023, reveals that oral arguments were conducted in both *State v. Simmons* and *State v. Hacker* on January 11, 2023. The status of both cases continues to be open.

no reason to depart from these holdings,"); *State v. Long*, 4th Dist. Pickaway No. 20CA9, 2022-Ohio-3212, at ¶ 8, ("For the reasons stated in [*Bontrager*] we find the Reagan Tokes Law does not violate * * * the constitutional requirement of separations of powers" and "note that the Reagan Tokes Law has been found constitutional by the Second, Third, Fifth, Sixth, and Twelfth Districts and also by the Eighth District sitting en banc."); *State v. Drennen*, 4th Dist. Gallia No. 21CA10, 2022-Ohio-3413, at ¶ 23, (Referencing *Alexander*, "[w]e therefore find Reagan Tokes Law does not run afoul of the separation-of-powers doctrine * * *."); *State v. Wells*, 4th Dist. Washington No. 21CA16, 2022-Ohio-3793, at ¶ 39; and *State v. Holsinger*, 4th Dist. Lawrence No. 21CA20, 2022-Ohio-4092, at ¶ 40 ("[Holsinger's] separation of powers argument is similar to the one we rejected in *Bontrager* * * *.") Succinctly put, in *Bontrager*, borrowing reasoning from our sister districts, we concluded that because the Reagan Tokes Law does not allow the ODRC to lengthen a defendant's sentence beyond the maximum sentence imposed by the trial court, the law does not violate separation of powers.

{¶13} Moore's separation of powers argument is similar to the one we rejected in *Bontrager*. Moore does not distinguish *Bontrager* or offer any reason for us to revisit that decision and depart from it. Our prior reasoning has been set forth at length in *Bontrager* at ¶¶ 41-44 and is equally

applicable herein. Moore has failed in his burden to show that the Reagan Tokes Law violates the separation of powers doctrine on its face. Based on our prior precedent, we find no merit to Moore's separation of powers argument herein.

2. Does the Reagan Tokes law violate due process rights?

{¶14} Moore contends that the procedures set forth in the Reagan Tokes Law fail to adequately protect a defendant's liberty interest. First, Moore asserts the law places the authority to extend one's prison term in the hands of executive branch officials, as opposed to a neutral magistrate. Second, he asserts the law fails to provide a guarantee of a fair hearing before the ODRC decides whether to extend one's prison term. He contends that the law establishes no structure for a hearing nor does it grant a person subject to the Reagan Tokes sentence to any rights in such a hearing. He concludes that the law violates due process for its failure to provide notice and an opportunity to respond.²

{¶15} We rejected the same due process argument Moore makes here in *Bontrager*, and again, our reasoning is fully set forth therein at ¶¶ 45-48. Not long ago we also rejected the argument in *State v. Drennen*, 4th Dist.

²Moore again requests this court to revisit its decision in *State v. Bontrager* or to hold this decision pending the outcome of *State v. Simmons* and *State v. Hacker*.

Gallia No. 21CA10, 2022-Ohio-3413, which, along with our prior precedent, borrowed the reasoning of the Twelfth District Court of Appeals in *State v. Guyton*, 12th Dist. Butler No. CA2019-12-203, 2020-Ohio-3837, at ¶ 17.

Simply put:

The hearings conducted by the ODRC under R.C. 2967.271(C) are analogous to parole revocation proceedings, probation revocation proceedings, and post-release control violation hearings * * *. This is because, as noted by the state as part of its appellate brief, “[a]ll three situations concern whether a convicted felon has committed violations while under the control and supervision of the [ODRC].” Therefore, because due process does not require the sentencing court to conduct parole revocation proceedings, probation revocation proceedings, or post-release control violation hearings, we likewise conclude that due process does not require the sentencing court to conduct a hearing under R.C. 2967.271(C) to determine whether the ODRC has rebutted the presumption set forth in R.C. 2967.271(B). (Alterations sic.)

Drennen at ¶ 21; *Alexander* at ¶ 60. See also, *Bontrager, supra*, at ¶¶ 45-48;

Long, supra, at ¶ 8; and *Wells, supra*, at ¶ 40. Furthermore, “[T]he extension of a defendant’s sentence beyond the presumptive minimum period is akin to the decision to grant or deny parole,” and, “the parole decision in Ohio is an executive function that does not involve the judiciary.” *Alexander, supra*, at ¶ 60, quoting *State v. Barnes*, 2d Dist.

Montgomery No. 28613, at ¶ 38, fn 2.

{¶16} Based on the reasoning set forth in our prior precedent, we find that the Reagan Tokes Law does not violate Moore's right to due process.

3. Does the Reagan Tokes law violate the right to trial by jury?

{¶17} Moore asserts that the Reagan Tokes Law also provides that a person's sentence may be increased by findings made by the executive branch, here the ODRC, instead of a jury. Thus, he argues, the indefinite sentences imposed under the Reagan Tokes Law also violate the right of a defendant to have all the facts increasing one's sentence to be found by a jury.

{¶18} This court also addressed a similar argument in *State v. Chapman*, 2022-Ohio-2853, 195 N.E.3d 178 (4th Dist.). There, Chapman argued that the sentencing provisions permit the ODRC to increase a defendant's sentence based upon fact-finding and that this fact-finding violates the principles outlined in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004). The principles set forth in *Apprendi*, *Ring*, and *Blakely* generally prohibit increasing a defendant's sentence beyond the maximum term based upon facts that did not form part of the jury's verdict. *See Chapman, supra*, at ¶ 74. In *Chapman*, we explained:

The Reagan Tokes sentencing scheme is unlike those involved in *Apprendi*, *Ring*, and *Blakely*. Under the Reagan Tokes Law, the trial court imposes both a minimum and a maximum term, and the indefinite prison sentence must be included in the final entry of conviction. R.C. 2929.14 and 2929.144. The only sentencing discretion provided to the trial court lies with the length of the minimum term under R.C. 2929.14(A)(1)(a) and (A)(2)(a); the maximum term is determined based upon a mathematical formula as applied to the minimum term of imprisonment. The maximum prison term component of a Reagan Tokes indefinite sentence is therefore authorized by the jury's guilty verdict and is not based upon factors not submitted to the jury. The defendant is not exposed to greater punishment than that authorized by the jury's verdict.

Chapman, at ¶ 76. We continued:

Once imposed by the trial court, the indefinite sentence is then implemented by ODRC. ODRC simply enforces the sentence imposed by the trial court and its review is limited to determining the offender's release date. R.C. 2967.271 establishes a presumptive release date upon completion of the minimum term. Once the minimum term is served, ODRC may rebut the presumption of release under certain conditions and enforce the remainder of the maximum term already imposed by the trial court. R.C. 2967.271(B). However, “[t]hat codified process does not alter the fact that the trial court imposed a maximum term as calculated under R.C. 2929.144.” *State v. Gamble*, 8th Dist., 2021-Ohio-1810, 173 N.E.3d 132, ¶ 35. In rebutting the presumption of release, ODRC “is not extending the defendant's prison term or imposing its own sentence for violations that occur while the offender is serving the imposed term of imprisonment.” *Id.* at ¶ 7. In other words, ODRC does not “increase” a penalty based upon facts not found by a jury but merely administers the sentence already imposed by the trial court for conviction of an offense for which the offender has the right to a jury trial.

Chapman, supra. We concluded:

Unlike the sentencing scheme in *Apprendi* and *Ring*, there is “no discretion exercised by the trial court in imposing the maximum term” under the Reagan Tokes Law, and “nothing within any provision codified under the Reagan Tokes Law permits any branch of government to impose a sentence beyond the maximum term as defined under R.C. 2929.144.” *Gamble*, 2021-Ohio-1810, 173 N.E.3d 132 at ¶ 44. The Reagan Tokes Law therefore does not violate an offender's constitutional rights to trial by jury.

Chapman, supra. See also *Drennen, supra*, at ¶¶ 23-27; *Holsinger, supra*, at ¶ 54, 57.³

{¶19} Consequently, based upon the foregoing analysis, we likewise conclude that the Reagan Tokes Law does not violate the constitutional right to a jury trial.

{¶20} In conclusion, Moore has failed to show that the Reagan Tokes Law is unconstitutional on its face. Thus, he has not shown that the trial court committed error, let alone plain error, when it sentenced him under the Reagan Tokes Law. Accordingly, we overrule the sole assignment of error and affirm the judgment of the trial court.

³*But see contra State v. DeVallie*, 8th Dist. Cuyahoga No. 109315, 2021-Ohio-1809[173 N.E.3d 544], [opinion vacated on reh’g en banc, 8th Dist. No. 109315, 2022-Ohio-470, 185 N.E.3d 536, appeal allowed, 166 Ohio St.3d 1496, 2022-Ohio-1485, 186 N.E.3d 830]. According to the Supreme Court of Ohio’s online docket accessed March 29, 2023, the appeal having been accepted is being held pending the decisions in *Simmons*, and *Hacker*, see Case Announcements, 2022-Ohio-1485. See also *State v. Whetstone*, 8th Dist. Cuyahoga No. 109671, 2022-Ohio-800, also being held pending those decisions. Case Announcements, 2022-Ohio-1485.

JUDGMENT AFFIRMED.**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross 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 60 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 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-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 60 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.

Abele, J. and Hess, J. concur in Judgment and Opinion.

For the Court,

Jason P. Smith
Presiding 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.