[Cite as *State v. Hearn*, 2021-Ohio-594.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. 20CA7
vs.	:	
JONATHAN HEARN,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Ryan Shepler, Logan, Ohio for Appellant.[1]

Nicole Coil, Washington County Prosecuting Attorney, and Allison L. Cauthorn, Assistant Prosecuting Attorney, Marietta, Ohio, for Appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 2-22-21
ABELE, J.

{¶ 1} This is an appeal from a Washington County Common Pleas Court judgment of conviction and sentence. Jonathan Hearn, defendant below and appellant herein, assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT DID NOT HAVE JURISDICTION TO RESENTENCE DEFENDANT-APPELLANT."

SECOND ASSIGNMENT OF ERROR:

[1] Different counsel represented appellant during the trial court proceedings.

> "THE DEFENDANT APPELLANT'S PLEA WAS INVOLUNTARY AND MUST BE VACATED."
> THIRD ASSIGNMENT OF ERROR:
>
> "THE INDEFINITE SENTENCING SCHEME ADOPTED BY THE REAGAN TOKES ACT IS AN UNCONSTITUTIONAL VIOLATION OF SEPARATION OF POWERS, SUCH THAT DEFENDANT'S SENTENCE MUST BE VACATED."

{¶ 2} In December 2019, a Washington County Grand Jury returned an indictment that charged appellant with (1) two counts of felonious assault, in violation of R.C. 2903.11(A)(1), both second-degree felonies; (2) one count of endangering children, in violation of R.C. 2919.22(A), a first-degree misdemeanor, and (3) two counts of attempted murder, in violation of R.C. 2923.02(A) and 2903.02(A), first-degree felonies. All four felonies included a Repeat Violent Offender Specification. Appellant entered not guilty pleas.

{¶ 3} On February 12, 2020, appellant pleaded guilty to two felonious assault counts in violation of R.C. 2903.11(A)(1), and appellee requested a dismissal of counts three, four, and five along with the specifications. The trial court then recited the parties' agreed disposition that appellant serve a seven-year prison term on each charge, to be served consecutively. Further, the trial court notified appellant about the mandatory three-year postrelease control term and the consequences of a postrelease control violation. The trial court also discussed with appellant the implications of the Reagan Tokes Law, and explicitly stated that the Reagan Tokes Law could result in an additional "three-and-a-half years of additional prison for being bad."

{¶ 4} The February 21, 2020 sentencing entry provides:

> "[U]pon Defendant's Guilty plea to the crimes of FELONIOUS ASSAULT, a felony of the second degree, in violation of the Ohio Revised Code section 2903.11(A)(1)&(D)(1)(a), as charged in Count One; and FELONIOUS ASSAULT, a felony of the second degree, in violation of Ohio Revised Code section 2903.11(A)(1)&(D)(1)(a), as charged in Count Two of the indictment, the Defendant

> is sentenced to a mandatory sentence of fourteen (14) years in the Orient Correctional Reception Center. The maximum possible sentence is a prison term of seventeen and a half (17 ½) years under the new law:"

{¶ 5} The February 21, 2020 entry also indicated that the court notified appellant that "he will be subject to a period of mandatory postrelease control for three (3) years," and included the consequences for a postrelease control violation. Appellant filed a timely pro se notice of appeal on March 5, 2020.

{¶ 6} On May 6, 2020, the trial court issued an amended entry to correct an error in the February 21, 2020 entry and states:

> * * *
>
> the Defendant is sentenced to *prison for seven (7) years in Count One, and seven (7) years in Count Two, running consecutively to each other, with maximum possible term of ten and a half (10 ½) years, for an aggregate of seventeen and a half (17 ½ years). The mandatory sentence term is fourteen (14) years.* The maximum possible sentence is a prison term of seventeen and a half (17 ½) years under the new law:

{¶ 7} On June 22, 2020, the trial court issued a second amended entry and states:

> * * *
>
> the Defendant is sentenced to prison for a definite sentence of seven (7) years for the offense of FELONIOUS ASSAULT, as charged in Count One, with a maximum possible term of ten and a half (10 ½) years, and a definite sentence of seven (7) years for the offense of FELONIOUS ASSAULT, as charged in Count Two, to run consecutively to each other. The total sentence imposed is a prison term of fourteen (14) years, with a maximum possible term of seventeen and a half (17 ½) years under the new law:

I.

{¶ 8} In his first assignment of error, appellant asserts that the trial court did not have

jurisdiction to resentence him. Specifically, appellant argues that the original sentencing entry incorrectly sentenced him to serve a term of fourteen years, rather than specifying that appellant serve seven years on each count, and that the trial court's two amended sentencing entries filed after appellant's notice of appeal are legal nullities.

{¶ 9} Although trial courts generally lack the authority to reconsider their own valid final judgments in criminal cases, they do retain continuing jurisdiction to correct clerical errors in judgments to reflect what the court actually decided. *State ex rel. Womack v. Marsh*, 128 Ohio St.3d 303, 2011-Ohio-229, 943 N.E.2d 1010 (corrected sentencing entry to specify three years, not five years of postrelease control permissible). *See also* 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."); *State ex rel. Plant v. Cosgrove,* 119 Ohio St.3d 264, 2008-Ohio-3838, 893 N.E.2d 485 (trial court did not patently and unambiguously lack jurisdiction to amend Plant's sentence to state that the sentence must be served consecutively to any other sentence). However, the case sub judice differs from *Womack* and *Plant* because here the trial court issued two nunc pro tunc entries after appellant filed his notice of appeal.

{¶ 10} Pursuant to R.C. 2505.04, "[a]n appeal is perfected when a written notice of appeal is filed, in the case of an appeal of a final order, judgment, or decree * * * in accordance with the Rules of Appellate Procedure." "Once a case has been appealed, the trial court loses jurisdiction except to take action in aid of the appeal." *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 8. Generally, "[w]hen a case has been appealed, the trial court retains all jurisdiction not inconsistent with the court of appeals' jurisdiction to reverse, modify or affirm the judgment." *Yee v. Erie Cty. Sheriff's Dept.*, 51 Ohio St.3d 43, 44, 553 N.E.2d 1354 (1990), citing *In re*

Kurtzhalz, 141 Ohio St. 432, 48 N.E.2d 657 (1943), paragraph two of the syllabus; *Howard v. Catholic Social Servs. of Cuyahoga Cty., Inc.,* 70 Ohio St.3d 141, 146, 637 N.E.2d 890 (1994). Thus, the central question in the case at bar is whether the trial court's amended sentencing entries are inconsistent with this court's jurisdiction to reverse, modify, or affirm the judgment.

{¶ 11} Other Ohio appellate courts have determined that, although Crim.R. 36 permits a nunc pro tunc entry to be filed "at any time," a notice of appeal will divest a trial court of jurisdiction to do so. *State v. Donley*, 2d Dist. Montgomery Nos. 26654-26656, 2017-Ohio-562, 85 N.E.3d 324. In *Donley*, the Second District explained, "the trial court is 'divested of jurisdiction' to issue a nunc pro tunc entry to correct a mistake in its judgment entry that was assigned as error on appeal. As a result, any such nunc pro tunc entry is a 'nullity.'" *State v. Alford*, 2d Dist. Montgomery No. 24368, 2012-Ohio-3490, ¶ 11, citing *State v. Ward*, 187 Ohio App.3d 384, 2010-Ohio-1794, 932 N.E.2d 374, ¶ 45 (2d Dist.).

{¶ 12} Further, in *State v. Schrader*, 12th Dist. Fayette Nos. CA2019-12-025 & CA2019-12-026, 2020-Ohio-3925, after the defendant pleaded guilty pursuant to a negotiated plea, the trial court accepted the pleas and sentenced the defendant to serve two concurrent six month prison terms. However, the sentencing entries ordered Schrader to serve consecutive prison terms. After Schrader filed his notice of appeal, the trial court filed amended sentencing entries to order concurrent prison terms. *Id*. at ¶ 3-4.

{¶ 13} The Twelfth District concluded in *Schrader* that the trial court lacked jurisdiction to file amended entries while the appeal was pending, and, thus, the amended entries had no legal effect. *Id.* at ¶ 11. The court also observed that other appellate districts have held that a trial court cannot file a nunc pro tunc entry while a case is pending on appeal. *Schrader* at ¶ 10, citing *State v.*

Erlandsen, 3d Dist Allen No. 1-02-46, 2002-Ohio-4884, (nunc pro tunc entry correcting jail time credit was void because the trial court no longer has jurisdiction to enter any judgment after the defendant files a notice of appeal); *State v. Reid*, 6th Dist. Lucas No. L-97-1150, 1998 WL 636789 (Sept. 18, 1998)(because the nunc pro tunc judgment entry was issued after defendant filed the notice of appeal, the trial court had no jurisdiction to take any action which might affect issues on appeal); and *State v. Biondo*, 11th Dist. Portage No. 2009-P-0009, 2009-Ohio-7005 (nunc pro tunc entry void as the trial court lacked subject matter jurisdiction over motion to correct sentence after notice of appeal filed). *See also State v. Dixon*, 9th Dist. Summit No. 21463, 2004-Ohio-1593 (pursuant to App.R. 3(D), because the trial court ruled on a motion to withdraw guilty plea after defendant filed notice of appeal and defendant did not file a new notice of appeal or seek to amend his prior notice of appeal, the appellate court lacked authority to address the assigned error); *but see State v. Anderson*, 10th Dist. Franklin No. 11AP-236, 2011-Ohio-6667 (nunc pro tunc entry to correct clerical error that did not change appellant's aggregate sentence permissible even after the notice of appeal filed).

{¶ 14} This court has also held that a trial court's ability to correct a sentencing error is inconsistent with an appellate court's jurisdiction to reverse, modify, or affirm the judgment. In *State v. Triplett*, 4th Dist. Lawrence No. 11CA3, 2011–Ohio–5431, Triplett pleaded guilty to two counts of aggravated robbery, filed a notice of appeal, and argued that the trial court failed to inform him of mandatory postrelease control at his sentencing hearing. *Id.* at ¶ 3. This court remanded for a new sentencing hearing, but during the pendency of the original appeal, the trial court resentenced Triplett, notified him of postrelease control, and issued a new judgment of conviction. *Id.* However, this court held that the trial court had no jurisdiction to correct an error concerning

postrelease control during the pending appeal. *Triplett* at ¶ 6.

{¶ 15} In the case sub judice, because the trial court issued its May 6, 2020 entry and June 22, 2020 entry after appellant filed his notice of appeal, the entries are inconsistent with the appellate court's jurisdiction to reverse, modify or affirm the trial court judgment. As such, the amended entries are legal nullities. We note, however, that generally nothing precludes a trial court from filing amended entries after a remand. *See Schrader, supra,* at ¶ 11.

{¶ 16} Accordingly, based upon the foregoing reasons, we sustain appellant's first assignment of error.

II.

{¶ 17} In his second assignment of error, appellant asserts that his plea must be vacated because the trial court did not strictly comply with Crim.R. 11(C) to ensure that he understood the maximum available penalty. In particular, appellant contends that he did not adequately understand the implications of the Reagan Tokes Law.

{¶ 18} In deciding whether to accept a guilty plea, a court must determine whether a defendant made the plea knowingly, intelligently, and voluntarily. *State v. McDaniel*, 4th Dist. Vinton No. 09CA677, 2010–Ohio–5215, ¶ 8. " 'In considering whether a guilty plea was entered knowingly, intelligently and voluntarily, an appellate court examines the totality of the circumstances through a de novo review of the record to ensure that the trial court complied with constitutional and procedural safeguards.' " (Emphasis sic.) *Id*., quoting *State v. Eckler*, 4th Dist. Adams No. 09CA878, 2009–Ohio–7064, ¶ 48; *State v. Barner,* 4th Dist. Meigs No. 10CA9, 2012-Ohio-4584, ¶ 8.

{¶ 19} "Before accepting a guilty plea, the trial court should engage in a dialogue with the

defendant as described in Crim.R. 11(C)." *McDaniel* at ¶ 8, citing *State v. Morrison*, 4th Dist. No. 07CA854, 2008–Ohio–4913, ¶ 9. Crim.R. 11(C)(2) provides:

> In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
>
> * * *

{¶ 20} Substantial compliance with Crim.R. 11(C)(2)(a) is sufficient for a valid plea with respect to nonconstitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008–Ohio–5200, 897 N.E.2d 621, ¶ 14. " 'Substantial compliance means that, under the totality of the circumstances, appellant subjectively understood the implications of his plea and the rights he waived.' " *McDaniel* at ¶ 13, quoting *State v. Vinson*, 10th Dist. No. 08AP–903, 2009–Ohio–3240, ¶ 6.

{¶ 21} As the Supreme Court of Ohio explained in *State v. Clark*, 119 Ohio St.3d 239, 2008–Ohio–3748, 893 N.E.2d 462, ¶ 32:

> When the trial judge does not substantially comply with Crim.R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court partially complied or failed to comply with the rule. If the trial judge partially complied, e.g., by mentioning mandatory postrelease control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect. The test for prejudice is "whether the plea would have otherwise been made." If the trial judge completely failed to comply with the rule, e.g., by not informing the defendant of a mandatory period of postrelease control, the plea must be vacated. "A complete failure to comply with the rule does not implicate an analysis of prejudice." (Emphasis sic.) (Citations omitted.)

{¶ 22} Appellant points out that, after he questioned whether the Reagan Tokes Law applied to him, his counsel advised him incorrectly. The transcript reflects:

THE COURT: As I indicated, there's an agreed disposition that upon this plea, the other counts and the specifications will be dismissed. You're going to get seven years on each of the two counts. It'll be consecutive. So it'll be fourteen years. There's an issue with current law, a law that's called Reagan Tokes, that essentially says that if during the time you're serving your prison, you don't comply with all of their rules and they have appropriate hearings and so on, that under that particular law, they could add up to three-and-a-half years of additional prison, essentially for being a bad behavior in prison.

You understand the agreement is - - is seven years on each?

THE DEFENDANT: I - - yes. I know - - yeah, the seven years on each.

THE COURT: Okay. And your attorney's explained to you that at some point here, we're going to talk about the Reagan Tokes and the three-and-a-half years. That particular statute is - -

THE DEFENDANT: Does that even apply to me?

THE COURT: It's currently being litigated, as to its Constitutionality. Your attorney's going to raise that issue here, but I've got to make sure that you understand, the deal here is fourteen years. I don't have anything to do with the future and what the Parole Board -

THE DEFENDANT: My behavior here.

MR. BAUMGARTEL: They can add three-and-a-half years.

THE COURT: - – and what – - what the DRC would do while you're in prison. Okay? You understand that?

MR. BAUMGARTEL: This is the part we talked about, you get - - you're going to get fourteen years from this judge, but that also means that if you don't behave yourself, basically, the way the system - - prison system wants you to, they could add three-and-a-half years to your sentence. That's the part I've told you, that's, they're arguing it in the courts - -

THE DEFENDANT: So like, if I refuse to - -

MR. BAUMGARTEL: Whatever.

THE DEFENDANT: - - follow - -

MR. BAUMGARTEL: I - - for the record, Your Honor, I - - I've explained to my

client that that has actually been - - I know at least one court has already found it to be unconstitutional; it's being litigated. I told my client, in my opinion, it will not survive a legal challenge, but I can't guarantee that.

THE COURT: Right. None of us can guarantee what's going to happen with the future of that particular law. But as it stands right now, if you are bad in prison, they could add three-and-a-half years of additional prison for being bad. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: Okay.

THE DEFENDANT: But you're, being a judge, couldn't you make the ruling on that?

THE COURT: I can't make it now, because it's something that until you're in prison and you're serving your time and you're either being a good prisoner or a bad prisoner, only sometime in the future will they determine whether that - - and we're - - we're not here - -

THE DEFENDANT: By whose standards?

THE COURT: - - we're not here today to determine whether Reagan Tokes is Constitutional.

MR. BAUMGARTEL: Those - - the questions you have, are the reason we're arguing it's not Constitutional, and that will be decided a year or two from now.
THE COURT: Yeah.

MR. BAUMGARTEL: The Ohio Supreme Court's going to hear that?

THE COURT: The Court of Appeals and the Supreme Court are ultimately going to decide whether Reagan Tokes is a valid law. I'm not going to decide it here today. But your attorney's going to make a record during the sentencing part of this, objecting to the Reagan Tokes application. Nothing I can do about it until the higher courts make that decision.

MR. BAUMGARTEL: But the sentence he's giving you today is what we agreed on, which is fourteen years.

THE DEFENDANT: Yeah. All right.

{¶ 23} Appellant points to the portion of the transcript where his attorney concludes, "[b]ut

the sentence he's giving you today is what we agreed on, which is fourteen years," as evidence that appellant did not properly understand his sentence and plea. However, a review of the complete transcript reveals that the trial court and counsel advised appellant several times about the Reagan Tokes Law's implications and that appellant could receive an additional three-and-one-half years for bad behavior during his term of imprisonment. Thus, we find no merit in appellant's argument. We believe that the trial court complied with Crim.R. 11. Moreover, appellant failed to show that, but for the alleged inaccuracy, he would not have otherwise entered his plea.

{¶ 24} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error.

III.

{¶ 25} In his third assignment of error, appellant asserts that we must vacate his sentence because the Reagan Tokes Law's indefinite sentencing scheme violates the separation of powers doctrine. The Reagan Tokes Law, enacted in 2018, became effective on March 22, 2019. R.C. 2901.011.

{¶ 26} 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(C). A presumption exists that an 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. 2967.27(F), which allows the sentencing court to reduce the minimum prison term under certain

circumstances. R.C. 2967.271(A)(2). The Department of Rehabilitation and Correction (DRC) may rebut the presumption if it determines that one or more statutorily numerated factors apply. R.C. 2967.271(C). If DRC rebuts the presumption, it may maintain the offender's incarceration after the expiration of the minimum prison term, or the presumptive earned early release date, for a reasonable period, determined and specified by DRC, that "shall not exceed the offender's maximum prison term." R.C. 2967.271(D)(1). *See State v. Conant,* 4th Dist. Adams No. 20CA1108, 2020-Ohio-4319, ¶ 36.

{¶ 27} Appellant argues that in *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 729 N.E.2d 359 (2000), the Supreme Court of Ohio held that former R.C. 2967.11 violated the separation of powers doctrine because trying, convicting, and sentencing inmates for crimes committed while incarcerated is not an exercise of executive power. Thus, appellant contends that this court must declare R.C. 2967.271 unconstitutional and vacate appellant's additional three-and-one-half year sentence.

{¶ 28} The constitutionality of a statute presents a question of law we review de novo. *Hayslip v. Hanshaw*, 2016-Ohio-3339, 54 N.E.3d 1272, ¶ 27 (4th Dist.)

{¶ 29} As we outlined in *State v. Ramey*, 4th Dist. Washington Nos. 20CA1, 20CA2, 2020-Ohio-6733, at least five appellate districts have addressed the constitutionality of the Reagan Tokes Law:

> In our district and in the Eighth District Court of Appeals, the defendant failed to raise constitutional objections in the trial court and both appellate courts refused to conduct a plain error analysis of the issue. *State v. Conant*, 4th Dist. Adams No. 20CA1108, 2020-Ohio-4319, ¶ 40 ("we decline to construct a plain error argument on his behalf, particularly when R.C. 2967.271(C)(1) has not been and might never be applied to him, and he has not responded to the state's standing argument"); *State v. Young,* 8th Dist. Cuyahoga No. 108868, 2020-Ohio-4135, ¶ 21 ("Young failed to raise a constitutional challenge to the Reagan Tokes Act in the trial court, and we decline to

address the issue for the first time on appeal").

> The Fifth District Court of Appeals has twice held that constitutional challenges to the Reagan Tokes Law are not yet ripe for review because the appellant has not yet been subject to the application of those provisions. It determined that the appropriate method to challenge the constitutionality of the Reagan Tokes Law is by filing a petition for a writ of habeas corpus if the defendant is not released at the conclusion of the minimum term of incarceration. *State v. Downard*, 5th Dist. Muskingum No. CT2019-0079, 2020-Ohio-4227, ¶ 7-12; *State v. Manion*, 5th Dist. Tuscarawas No. 2020AP030009, 2020-Ohio-4230, ¶ 7-12.

Ramey, *supra,* at ¶ 14-15.

{¶ 30} In *State v. Oneal*, Hamilton C.P. No. 1903562, 2019 WL 7670061 (Nov. 20, 2019) (currently pending in the First District Court of Appeals), the Hamilton County Court of Common Pleas Court found the Reagan Tokes Law violates the separation of powers doctrine and the lack of due process "causes S.B. 201 [Reagan Tokes Law] to appear far worse than the previous 'Bad Time' statute." *Id.* at 7. However, the Second, Third, and Twelfth Districts have upheld the Reagan Tokes Law as constitutional without addressing the ripeness issue. *State v. Ferguson*, 2d Dist. Montgomery No. 28644, 2020-Ohio-4153 (specifically discussing the *State v. Oneal*, *supra*, decision from the Hamilton County Court of Common Pleas); *State v. Barnes*, 2d Dist. Montgomery No. 28613, 2020-Ohio-4150 (conducting a plain error review of the Reagan Tokes Law's constitutionality and rejecting *State v. Oneal*'s reasoning); *State v. Hacker*, 2020-Ohio-5048, __ N.E.3d __ (3d. Dist.)(conducting a de novo review of the Reagan Tokes Law's constitutionality and rejecting *O'Neal*'s reasoning).

{¶ 31} On October 9, 2020, the Sixth District certified a conflict to the Supreme Court of Ohio on the issue of whether the Reagan Tokes Law is ripe for review in a direct appeal, and cited the Second and Twelfth Districts as implicitly determining the issue to be ripe for review and finding the law constitutional based on separation of powers and due process. *State v. Velliquette,* 6th Dist.

Lucas No. L-19-1232, 2020-Ohio-4855, citing *State v. Barnes*, 2d Dist. Montgomery No. 28613, 2020-Ohio-4150; *State v. Leet*, 2d Dist. Montgomery No. 28670, 2020-Ohio-4592, *State v. Ferguson,* 2d Dist. Montgomery No. 28644, 2020-Ohio-4153, *State v. Guyton*, 12th Dist. Butler No. CA2019-12-203, 2020-Ohio-3837; *State v. Rogers,* 12th Dist. Butler No. CA2019-11-194, 2020-Ohio-4102, and *State v. Morris*, 12th Dist. Butler No. CA2019-12-205, 2020-Ohio-4103.

{¶ 32} Further, on December 28, 2020, the Supreme Court of Ohio accepted a certified conflict in *State v. Maddox,* 6th Dist. Lucas No. L-19-1253, 2020-Ohio-4702 (Supreme Court Case Number 2020-1266), in which the court ordered the parties to brief the following issue:

> "Is the constitutionality of the provisions of the Reagan Tokes Act, which allow the Department of Rehabilitation and Correctio[n] to administratively extend a criminal defendant's prison term beyond the presumptive minimum term, ripe for review on direct appeal from sentencing, or only after the defendant has served the minimum term and been subject to extension by application of the Act?"

{¶ 33} In *Ramey*, *supra,* although this court found the analysis of the Second, Third, and Twelfth District Courts of Appeals persuasive on the merits, we did not reach the merits because, like the analysis of the Fifth District, this court found the issue not yet ripe for review. *Ramey* at ¶ 20. "The appellant 'has not yet been subject to the application of these provisions, as he has not yet served his minimum term, and therefore has not been denied release at the expiration of his minimum term of incarceration." *Ramey* at ¶ 16, quoting *Downard* at ¶ 7; *Manion* at ¶ 7.

{¶ 34} As such, in the case sub judice because we conclude that the constitutionality of the Reagan Tokes Law is not yet ripe for review, we overrule appellant's third assignment of error.

IV.

{¶ 35} In conclusion, based on the foregoing, we sustain appellant's first assignment of error, reverse appellant's sentence and remand the matter for purposes of re-sentencing. In all other

respects, we affirm the trial court's judgment.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Appellant shall recover of appellee the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington 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 the 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 that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hess, J. & Wilkin, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, 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.