

ORIGINAL

IN THE SUPREME COURT OF OHIO  
Case Number 14-0425

STATE OF OHIO,

Appellant

v.

SHAWN A. WARE

Appellee

On Appeal from the Hamilton  
County Court of Appeals,  
Eleventh Appellate District

C.A. No. 2013-P-0011

MERIT BRIEF OF AMICUS CURIAE  
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RECEIVED  
JUL 03 2014  
CLERK OF COURT  
SUPREME COURT OF OHIO

FILED  
JUL 03 2014  
CLERK OF COURT  
SUPREME COURT OF OHIO

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## STATEMENT OF THE CASE AND FACTS

The Appellee, Shawn A. Ware, pled guilty to two counts of trafficking in cocaine. *State v. Ware*, 11<sup>th</sup> Dist. No. 2013-P-011, 2013-Ohio-5833, ¶ 2-3. One of the counts alleged that, while in the vicinity of a juvenile, appellee sold, or offered to sell cocaine in an amount less than one gram and the other alleged that appellant prepared for distribution, or distributed, crack cocaine in an amount between ten grams and twenty-five grams. *Id.* These two crimes are felonies of the fourth and second degree, respectively. *Id.*

At the sentencing hearing, “the trial court stated that, because the second remaining trafficking charge was a second-degree felony, a mandatory prison term was required. However, when the court orally pronounced sentence, it did not refer to any mandatory term. Rather, the court said that appellee would receive a stated term of eighteen months on the fourth-degree trafficking count, a stated term of four years on the second-degree trafficking count, and the two terms would be served concurrently. As to judicial release, the trial court expressly stated at the end of the hearing that such relief would be considered if appellee could show that he was trying to change his life.” *Id.* at ¶ 4.

In the sentencing entry, the trial court again did not deem any of the four-year prison term for the second-degree trafficking offense to be mandatory, but, instead, imposed two concurrent but not mandatory prison terms of eighteen months and four years on the respective counts. *Id.* at ¶ 5. The state did not appeal. *Id.* at ¶ 5.

In 2011, trial court issued a *nunc pro tunc* entry sentencing Ware on the second-degree trafficking count, to a stated mandatory term of four years, which would make him ineligible for judicial release. *Id.* at ¶ 8. In October 2012, Ware filed a third motion for judicial release, arguing that he was now eligible for the requested relief asserting that, since the original

sentencing judgment did not deem any of his stated term as mandatory in regard to the second-degree trafficking count, the judgment should be interpreted to have only imposed a two-year mandatory term. *Id.* at ¶ 11.

The Portage County Court of Common Pleas granted judicial release to Ware. The State of Ohio appealed, seeking reversal and arguing that Ware was not eligible for judicial release because his entire four-year prison term was mandatory. *Id.* at ¶ 1.

The Eleventh District Court of Appeals affirmed the trial court's decision and ordered that upon remand of this action, the trial court must issue a *nunc pro tunc* entry which properly states its intended sentence for the second-degree trafficking offense. Specifically, the court must state that it is imposing a total definite prison term of four years for the offense, with the first two years mandatory." *Id.* at ¶ 36.

On May 14, 2011, this court accepted the following certified question: "When the imposition of a mandatory prison term is statutorily mandated for a specific offense, is the trial court permitted to issue a total prison term within the maximum allowed, only a portion of which is mandatory under the statute?" (Ohio Supreme Court Case No. 2014-0425).

## **STATEMENT OF AMICUS INTEREST**

The Ohio Prosecuting Attorneys Association (“OPAA”) offers this amicus brief in support of the State of Ohio's response to Appellant's proposition of law. The OPAA is a private non-profit membership organization that was founded in 1937 for the benefit of the eighty-eight elected county prosecutors. Its mission is to increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies that affect the office of the Prosecuting Attorney; and to aid in the furtherance of justice.

## PROPOSITION OF LAW I

**WHEN THE IMPOSITION OF A MANDATORY PRISON TERM IS STATUTORILY-MANDATED FOR A SPECIFIC FELONY OFFENSE, IS THE TRIAL COURT PERMITTED TO IMPOSE A TOTAL PRISON TERM WITHIN THE MAXIMUM ALLOWED, ONLY A PORTION OF WHICH IS MANDATORY UNDER THE STATUTE?**

## LAW AND ARGUMENT

When imposing a statutorily mandated mandatory prison term, the trial court is not permitted to impose a total prison term within the maximum sentence allowed with only a portion of the sentence being mandatory. The trial court is not permitted to impose a hybrid sentence requiring that the mandatory portion of the total prison term is shorter than the entire sentence for the offense.

Here, Ware was “sentenced to two concurrent terms of four years and eighteen months. The four-year term was predicated upon his conviction pursuant to R.C. 2925.03(A)(2), which forbids a person from knowingly preparing for distribution, or actually distributing, a controlled substance. According to the allegations under the sixth count, the controlled substance distributed was crack cocaine, and the amount of the substance involved was greater than ten grams, but less than twenty-five grams. Under the version of R.C. 2925.03(C)(4)(e) in effect when appellee was sentenced in April 2010, where the substance being distributed was crack cocaine at the prescribed amount, a trial court is required to impose “as a mandatory term one of the prison terms prescribed for a felony of the second degree.” *Ware*, at ¶ 21.

On appeal, the Eleventh District Court of Appeals determined that the trial court imposed a total definite prison term of four years for the offense, with the first two years mandatory and noted that, because, the length of the mandatory term was not equal to the total stated prison term

for the second-degree trafficking offense, the trial court intended to impose a “hybrid sentence.” *Ware*, at ¶ 36-37.

The permissible range of a prison term for a second-degree felony is between two years and eight years. R.C. 2929.14(A)(2). However, “[i]f the amount of the drug involved equals or exceeds twenty grams but is less than twenty-seven grams of cocaine, possession of cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.” R.C. 2925.11(C)(4)(d). Thus, the statutory range authorized by law for the offense at issue is a minimum mandatory sentence of three years and a maximum mandatory sentence of eight years.

The court imposed a hybrid sentence by ordering a “mandatory term” of two years for the second-degree trafficking offense, while imposing a “stated term” of four years. The Eleventh District Court of Appeals affirmed the trial court’s sentence and adopted the analysis of the Fifth District Court of Appeals. *Ware*, at 38-39, citing *State v. May*, 5th Dist. Morrow No.2010 CA 2, 2010-Ohio-4625, wherein the Fifth Appellate District concluded that a trial court has the discretion to impose a mandatory term that is shorter in length than the stated sentence for a specific offense, noting that the statutory sentencing scheme has provisions differentiating between a “stated prison term” and a “mandatory prison term.”

The OPAA contends that a hybrid sentence such as this is not permissible and is not authorized by statute. *State v. Thomas*, 3rd Dist. Allen No. 1-04-88, 2005-Ohio-4616. When a trial court imposes a sentence for a second-degree felony, the entire term, not just a portion thereof, must be mandatory in order to satisfy the statutory scheme. *Thomas*, at ¶8.

Judicial authority to sentence in criminal cases is limited by the Ohio Constitution and the Ohio Revised Code. Judges have no inherent power to create sentences and are duty-bound to

apply sentencing laws as they are written. See *State v. Thomas*, 111 Ohio App.3d 510, 512, 676 N.E.2d 903 (1996). “[T]he only sentence which a trial court may impose is that provided for by statute. A court has no power to substitute a different sentence for that provided for by statute or one that is either greater or lesser than that provided for by law.” *Colegrove v Burns*, 175 Ohio St. 437, 438 195 N.E.2d 811.

The Ohio Revised Code does not provide the trial court with the discretion to make only a portion of a mandatory sentence mandatory. Instead, the statute states that the “court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.” R.C. 2925.11(C)(4)(d). Thus, the statute does not allow for such hybrid sentencing. If the legislature had intended for the trial courts to have the discretion to order that just a portion of a mandatory sentence is mandatory, the legislature would have expressly provided for that in the statute—just as it specifically removed the trial court’s discretion to impose prison “any one” of the prison terms prescribed for a specific felony a mandatory term when the amount of the drug involved equals or exceeds one hundred grams of cocaine by stating that possession of cocaine is a felony of the first degree, requiring that the court “shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.” R.C. 2925.11(C)(4)(f). The legislature did not expressly provide the court with the discretion to order a hybrid sentence. The plain and unambiguous language of R.C. 2925.11(C)(4)(d) requires imposition of a mandatory prison term.

Consequently, in this case, the entire four-year term was mandatory. The trial court therefore erred in imposing a hybrid sentence, ordering that two of the four years were mandatory. Since the entire four years sentence was mandatory, Ware was not eligible for early release from prison. R.C. 2929.20(A)(1)(a).

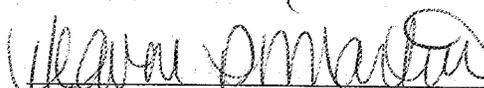
**CONCLUSION**

The Ohio Prosecuting Attorneys Association respectfully submits, pursuant to the argument offered, that the trial court erred in determining that Ware was eligible for judicial release because his entire-four year prison term was mandatory.

The Ohio Prosecuting Attorneys Association, therefore, contends that the judgment of the trial court should be reversed.

Respectfully submitted,

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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* was forwarded by regular U.S. First Class Mail to: Attorney Terry G.P. Kane, 111 East Main Street, Suite B, P. O. Box 167, Ravenna, Ohio 44266, Counsel for Appellee, Shawn A. Ware; and to Pamela J. Holder, Assistant Portage County Prosecutor, 241 South Chestnut Street, Ravenna, Ohio 44266, Counsel for Appellant State of Ohio; on this 2nd day of July, 2014.



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