



**Ohio Attorney General's Office  
Bureau of Criminal Investigation  
Investigative Report**



2025-0854  
Officer Involved Critical Incident - 645 Hazen Avenue,  
Ravenna, OH 44266, Portage County

**Investigative Activity:** CCH and Social Media Review  
**Involves:** Shawn A. Ware (S)  
**Activity Date:** 03/24/2025  
**Activity Location:** BCI - Richfield  
**Authoring Agent:** SA Joseph Goudy

**Narrative:**

On Tuesday, March 18, 2025, Ohio Bureau of Criminal Investigation (BCI) Special Agent (SA) Joseph Goudy (Goudy) compiled background information on Shawn A. Ware (Ware), a subject involved in the incident on March 16, 2025. The information included, searching criminal history records, court records (if applicable), open/closed-source database inquiries, and social media posts. The information gathered was obtained from the BCI Criminal Intelligence Unit and the Ravenna Police Department.

SA Goudy reviewed the information and noted the following:

Computerized Criminal History (CCH) and/or Court Records:

<u>CCH Cycle</u>	<u>Date of Arrest</u>	<u>Agency</u>	<u>Charge</u>

Database Searches:

An Accurint report was obtained and reviewed. Nothing relevant to the investigation was observed. The documents received related to Ware have been attached to this

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report for further review, except for any prohibited LEADS/CCH reports which were disposed of according to applicable policies and procedures.

**SOCIAL MEDIA ACCOUNT(S):**

Type	User Name	User ID#	Link
Facebook	Shawn Ware	shawn.ware.982	<a href="https://www.facebook.com/shawn.ware.982">https://www.facebook.com/shawn.ware.982</a>
Facebook	Shawn Ware	shawn.warr.12	<a href="https://www.facebook.com/shawn.warr.12">https://www.facebook.com/shawn.warr.12</a>
Facebook	Shawn Ware	shawn12ware12	<a href="https://www.facebook.com/shawn12ware12">https://www.facebook.com/shawn12ware12</a>
Instagram	bceazz1512	bceazz1512	<a href="https://www.instagram.com/bceazz1512/">https://www.instagram.com/bceazz1512/</a>
Quora	Shawn Ware	Shawn-Ware-4	<a href="https://www.quora.com/profile/Shawn-Ware-4">https://www.quora.com/profile/Shawn-Ware-4</a>

Ware's Facebook, Instagram, Quora, and Linked In accounts appeared to have photos of him, but did not appear to have any publicly viewable posts since 2019.



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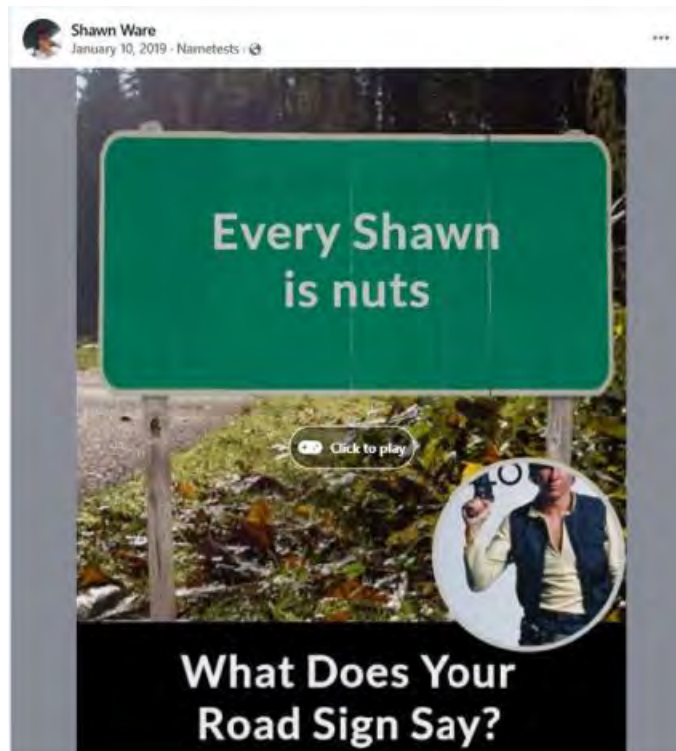
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2025-0854

Officer Involved Critical Incident - 645 Hazen Avenue,  
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One notable Facebook post was from January 10, 2019:



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2025-0854

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Another notable Facebook post was from April 1, 2017.



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Investigative Report



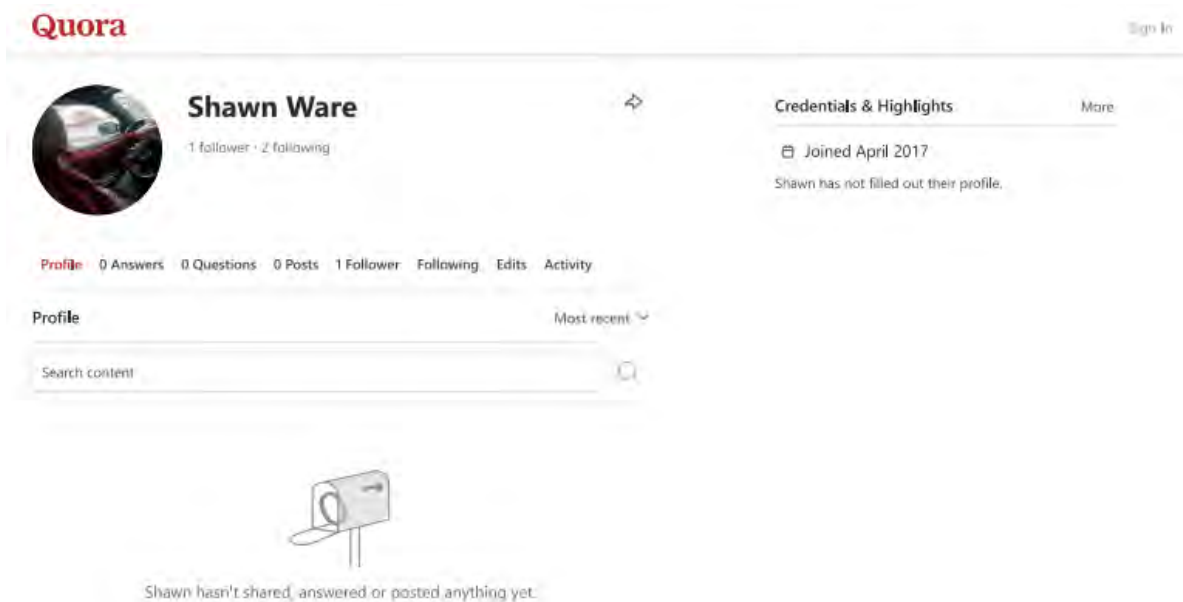
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Ware's Instagram account was listed as private:



There was no activity listed on Ware's Quora account:



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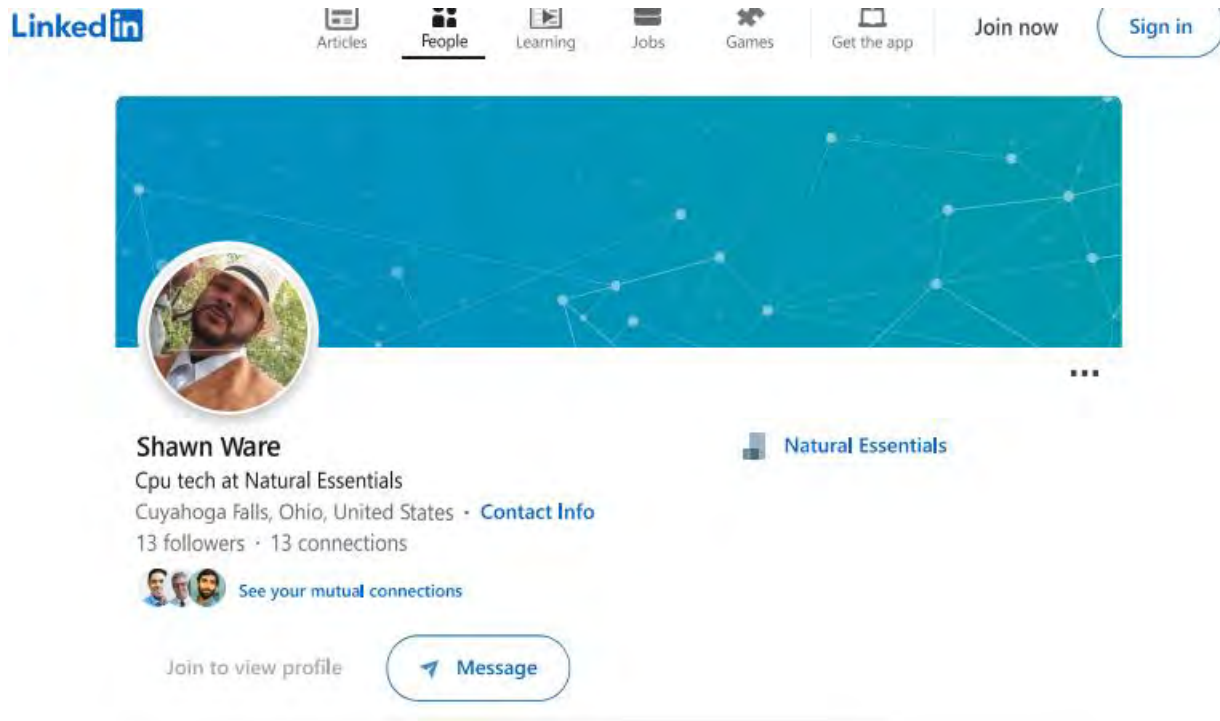
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Ravenna, OH 44266, Portage County

There was no significant activity listed on Ware's Linked In account:



The documents received relative to Shawn A. Ware are attached to this report for further review, except for any prohibited LEADS/CCH reports which were disposed of according to applicable policies and procedures.

**References:**

None

**Attachments:**

1. BCI CIU Intel Summary Sheet\_SHAWN WARE

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NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

**SLIP OPINION NO. 2014-OHIO-5201**

**THE STATE OF OHIO, APPELLANT, v. WARE, APPELLEE.**

**[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Ware*, Slip Opinion No. 2014-Ohio-5201.]**

*Prisoner is not eligible for judicial release when is entire prison sentence is mandatory pursuant to statute.*

(No. 2014-0425—Submitted September 10, 2014—Decided November 26, 2014.)

CERTIFIED by the Court of Appeals for Portage County,  
No. 2013-P-0011, 2013-Ohio-5833.

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**FRENCH, J.**

{¶ 1} R.C. 2929.20, Ohio’s judicial-release statute, allows certain offenders to apply for early release from prison. In this appeal, we conclude that appellee, Shawn Ware, was not eligible for judicial release, because his entire prison sentence was mandatory. Although the trial court later expressed its intent to impose a different sentence that would have allowed Ware to apply for early release, the court did not impose that sentence, nor could it have done so under Ohio law.

### **Background**

{¶ 2} In March 2010, Ware pleaded guilty to two counts of trafficking in crack cocaine in violation of R.C. 2925.03(A)(2).<sup>1</sup> One count was a second-degree felony, because it involved crack cocaine weighing between 10 and 25 grams. R.C. 2925.03(C)(4)(e). The other count was a fourth-degree felony, because it occurred in the vicinity of a juvenile. R.C. 2925.03(C)(4)(b). In exchange for the guilty plea, appellant, the state of Ohio, dismissed the remaining five felony counts.

{¶ 3} Ware’s second-degree felony carried a mandatory prison term—a fact Ware acknowledged when he pleaded guilty. The law in effect at the time required the sentencing court to “impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.” R.C. 2925.03(C)(4)(e). The prison terms prescribed for a second-degree felony are “two, three, four, five, six, seven, or eight years.” R.C. 2929.14(A)(2). In his written guilty plea, Ware acknowledged that his second-degree felony carried a mandatory prison term, and that “the prison term the judge imposes will be the term served.”

{¶ 4} At the April 2010 sentencing hearing, the trial court reminded Ware that his second-degree felony carried “mandatory time.” It then imposed a four-year prison term for that offense, to run concurrently with an 18-month prison term for Ware’s fourth-degree felony, for a total prison term of four years. After announcing its sentence, however, the trial court concluded the hearing by telling Ware that, if he “change[d] [his] life around while in prison,” his attorney “may petition \* \* \* for a judicial release when it’s appropriate.” The trial court’s

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<sup>1</sup> The General Assembly has since amended R.C. 2925.03 to eliminate the distinction between crack and powder cocaine. See 2011 Am.Sub.H.B. No. 86, effective September 30, 2011. All references to R.C. 2925.03 in this opinion are to the version of the statute in effect when Ware committed the offenses: former R.C. 2925.03, 2008 Sub.H.B. No. 195, effective September 30, 2008.

sentencing entry incorporated Ware's four-year prison term, but did not refer to the term as mandatory.

{¶ 5} Beginning in November 2010, Ware began filing motions for judicial release. After the trial court denied his first motion, Ware filed a second, arguing that he was eligible for release before the expiration of his four-year term because the original sentencing entry did not indicate that his four-year term was mandatory. Relying on the trial court's reference at the end of the sentencing hearing to judicial release, Ware argued that the trial court "impliedly intended the mandatory prison time for the offense to constitute two years."

{¶ 6} The trial court did not rule on the motion, but instead issued a nunc pro tunc entry, which referred to Ware's four-year prison term as "mandatory." Ware withdrew his pending motion.

{¶ 7} On October 26, 2012, Ware filed a third motion for judicial release, arguing that the original sentencing entry imposed only a "minimum mandatory sentence of two (2) years." After a hearing in February 2013, at which the state objected to Ware's early release, the trial court granted the motion and released Ware under intensive supervision for one year followed by general supervision for 48 months.

{¶ 8} Two days after it entered the final judgment granting Ware's release, the trial court held a "status hearing" to further explain its ruling. The trial court stated that it had not intended to make all four years of Ware's sentence mandatory: "My idea was if the mandatory minimum in a certain charge is two years and I gave you four, that you would be eligible after the two year period because that was the mandatory minimum."

{¶ 9} The state appealed the judgment granting Ware's release and argued that Ware was ineligible for judicial release under R.C. 2929.20 because his entire four-year prison term was mandatory. The court of appeals agreed that Ware's "entire four-year sentence was mandatory," but stated that the trial court

had intended to impose a “hybrid” prison term that was mandatory for only two of the four years. 11th Dist. Portage No. 2013-P-0011, 2013-Ohio-5833, ¶ 24, 44, 54. Based on the trial court’s postjudgment statements at the 2013 status hearing, the court of appeals remanded the case with instructions for the trial court to issue a nunc pro tunc entry that “correctly states the nature of the sentence the court intended to impose for the second-degree trafficking offense: i.e., a total stated prison term of four years, only two of which are mandatory.” *Id.* at ¶ 54.

{¶ 10} The Eleventh District certified that its judgment was in conflict with the Third District’s judgment in *State v. Thomas*, 3d Dist. Allen No. 1-04-88, 2005-Ohio-4616. In *Thomas*, the Third District held that the mandatory prison term in R.C. 2925.11(C)(4)(3) is mandatory for the “full length” of the term. *Id.* at ¶ 8. We certified that there is a conflict over the following question:

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?

138 Ohio St.3d 1491, 2014-Ohio-2021, 8 N.E.3d 962.

### Analysis

{¶ 11} Ohio law provides that a prisoner cannot apply for judicial release until a period of time “after the expiration of all mandatory prison terms” in the stated prison sentence. R.C. 2929.20(C)(1), (2), (3), and (4). The question here is whether Ware could ever apply for judicial release. He could not. All four years of his prison sentence were mandatory, and the trial court could not change this result by later expressing its intent to impose a different “hybrid” sentence.

{¶ 12} It bears repeating that judicial release is a privilege, not an entitlement. “‘There is no constitutional or inherent right \* \* \* to be

conditionally released before the expiration of a valid sentence.’ ” *State ex rel. Hattie v. Goldhardt*, 69 Ohio St.3d 123, 125, 630 N.E.2d 696 (1994), quoting *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). Courts have no inherent power to suspend execution of a sentence, and they must strictly construe statutes allowing such relief. *State v. Smith*, 42 Ohio St.3d 60, 61, 537 N.E.2d 198 (1989).

{¶ 13} In this case, Ware’s second-degree felony was statutorily ineligible for judicial release from the very beginning. When he pleaded guilty, the punishment was clear: “the court *shall* impose as *a mandatory prison term* one of the prison terms prescribed for a felony of the second degree.” (Emphasis added.) R.C. 2925.03(C)(4)(e). Under this statute, prison was mandatory—and judicial release therefore impossible—for the length of whichever “one of the prison terms” the trial court imposes for a second-degree felony, whether the term is “two, three, four, five, six, seven, or eight years.” R.C. 2925.03(C)(4)(e) and 2929.14(A)(2). More to the point is R.C. 2929.13(F)(5), which specifically prohibits judicial release for a second-degree-felony drug offense for which R.C. 2925.03 “requires the imposition of a mandatory prison term.” For such offenses, the court “shall impose a prison term” and “except as specifically provided [by statute] shall not reduce the term \* \* \* pursuant to section 2929.20.” R.C. 2929.13(F)(5).

{¶ 14} The trial court did not change this result at sentencing. It imposed a four-year prison term, and that entire prison term was mandatory by operation of law. *See* R.C. 2925.03(C)(4)(e) and 2929.13(F)(5). Even if it wanted to grant judicial release in the future, R.C. 2929.13(F)(5) explicitly prohibited it from doing so. *See State v. Taylor*, 113 Ohio St.3d 297, 2007-Ohio-1950, 865 N.E.2d 37, ¶ 11 (noting that a mandatory prison term precludes the opportunity for judicial release).

{¶ 15} The court of appeals agreed that Ware’s “entire four-year sentence was mandatory,” 2013-Ohio-5833, ¶ 24, and its analysis should have ended there. But rather than find Ware ineligible for judicial release, the court of appeals remanded for the trial court to issue a nunc pro tunc entry imposing the prison sentence that it had “intended,” that is, a “hybrid” sentence in which only two years would be mandatory. *Id.* at ¶ 44, 54.

{¶ 16} There are several problems with this analysis, starting with the court of appeals’ focus on the prison sentence the trial court “intended” instead of the one it actually imposed. Only the latter is relevant in a judicial-release analysis. The trial court never imposed or purported to impose a hybrid sentence at the sentencing hearing or in its sentencing entry, and it did not announce a subjective intent to do so until the 2013 status hearing—years after it sentenced Ware and days after it entered the final judgment underlying this appeal. This hitherto unknown intent is inappropriate for a nunc pro tunc entry. A nunc pro tunc entry reflects what a court “actually decided, not what the court might or should have decided or what the court intended to decide.” *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 164, 656 N.E.2d 1288 (1995).

{¶ 17} Regardless, such a hybrid sentence would have been legally impossible. No sentencing statute allows a court to divide a singular “mandatory prison term” into a hybrid of mandatory and discretionary *sub*-terms. R.C. 2925.03(C)(4)(e) unambiguously requires a unitary “prison term” that is “mandatory,” and R.C. 2929.13(F)(5) instructs that a court “shall not reduce” that term through judicial release. To override these legislative commands would require judicial improvisation in a legal system in which “[c]rimes are statutory, as are the penalties therefor, and the only sentence which a trial court may impose is that provided for by statute.” *Colegrove v. Burns*, 175 Ohio St. 437, 438, 195 N.E.2d 811 (1964). The trial court had “no power to substitute a different sentence for that provided for by statute.” *Id.*



{¶ 18} Ware argues that the state cannot challenge his release because it did not object to his sentence at the sentencing hearing. There was nothing objectionable at sentencing from the state’s perspective, however. The trial court imposed a four-year prison term that was mandatory by operation of law and did not allow for early release. Although the trial court mistakenly referred to a possibility of judicial release at the end of the hearing, the misstatement was exactly that—a misstatement. It did not implicitly change Ware’s sentence, or place his mandatory prison term into some default “hybrid” status. If Ware believed that the misstatement revealed intent to impose a different sentence, it was *his* duty to raise the issue at sentencing or in a direct appeal.

{¶ 19} It is also irrelevant that the original sentencing entry did not refer to the four-year term as “mandatory.” The trial court used the term “mandatory” in its subsequent nunc pro tunc entry, and even if it had not, Ware’s prison term still would have been mandatory. R.C. 2929.19(B)(7) says that “[t]he failure of the court to notify the offender that a prison term is a mandatory prison term \* \* \* or to include [that fact] in the sentencing entry \* \* \* does not affect the validity of the imposed sentence or sentences.” Even still, the omission of the word “mandatory” does not imply the inclusion of a legally impossible hybrid sentence.

{¶ 20} In the end, Ware did not qualify for judicial release under R.C. 2929.20. Although the court of appeals considers this result “inequitable,” because the trial court intended a different sentence than it imposed, 2013-Ohio-5833, ¶ 33, we reiterate that notions of equity do not empower courts to reopen final judgments without statutory authorization. *State ex rel. Chalfin v. Glick*, 172 Ohio St. 249, 252, 175 N.E.2d 68 (1961). “Clemency is a function of the Executive branch and the courts are without authority to free guilty defendants absent a specific legislative enactment.” *State v. Beasley*, 14 Ohio St.3d 74, 76, 471 N.E.2d 774 (1984).

**Conclusion**

{¶ 21} In summary, we answer the certified question in the negative and reverse the judgment of the court of appeals.

Judgment reversed.

O’CONNOR, C.J., and O’DONNELL, LANZINGER, KENNEDY, and O’NEILL, JJ., concur.

PFEIFER, J. concurs in judgment only.

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Victor V. Vigluicci, Portage County Prosecuting Attorney, and Pamela J. Holder, Assistant Prosecuting Attorney, for appellant.

Kane & Kane and Terry G. P. Kane, for appellee.

Sherri Bevan Walsh, Summit County Prosecuting Attorney, and Heaven DiMartino, Assistant Prosecuting Attorney, urging reversal for amicus curiae, Ohio Prosecuting Attorneys Association.

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ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 14-0425

STATE OF OHIO

APPELLANT

-VS-

SHAWN WARE

APPELLEE

ON APPEAL FROM THE PORTAGE  
COUNTY COURT OF APPEALS  
ELEVENTH APPELLAT DISTRICT

COURT OF APPEALS  
CASE NO. 2013-P-0011

CERTIFIED CONFLICT CASE

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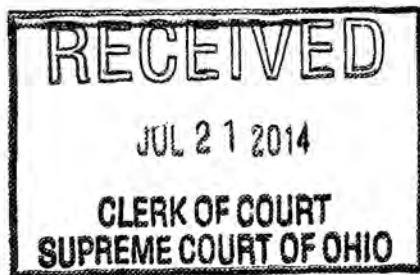
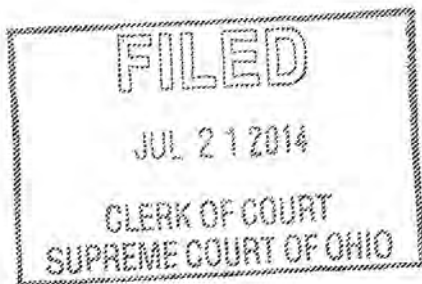
MERIT BRIEF OF APPELLEE  
SHAWN WARE

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Terry G. P. Kane, #0005016  
Attorney for Appellee  
KANE & KANE  
111 East Main Street Ste. B  
Ravenna, Ohio 44266  
Phone (330) 296-3868  
Fax (330) 296-7100  
[terry.kane@att.net](mailto:terry.kane@att.net)

Victor V. Vigluicci, #0012579  
Portage County Prosecutor  
Pamela J. Holder, #0072427  
Counsel of Record  
Attorney for Appellant  
241 South Chestnut Street  
Ravenna, Ohio 44266  
Phone (330) 297-3850  
Fax (330) 297-4594  
[pholder@portageco.com](mailto:pholder@portageco.com)

Sherri B. Walsh, #0020038  
Summit County Prosecutor  
Heaven DiMartino  
Counsel of Record  
Attorney as Amicas Curiae for  
The Ohio Prosecuting Attorneys  
Association  
53 University Ave. 6<sup>th</sup> Floor



Akron, Ohio 44308  
Phone (330) 643-2137  
Fax (330) 643-2137  
[dimartino@prosecutor.summit.oh.net](mailto:dimartino@prosecutor.summit.oh.net)

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## **STATEMENT OF FACTS**

Appellee Shawn Ware entered pleas of guilty to violations of R.C. 2925.03 (A) (2) (C) (4) (e) – Trafficking in Cocaine, a second degree felony, and R.C. 2925.03 (A) (C) (4) (b) – Trafficking in Cocaine, a fourth degree felony, on March 30, 2010, in proceedings before the Portage County Common Pleas Court in Case No. 2009 CR 563 (T.d. 34). Remaining counts of the original indictment were dismissed by the State.

Appellee's written guilty plea to the above offenses (T.d. 34) contains a notation presumably made by the trial court indicating that the "State will concur w/min".

The sentencing hearing took place before the trial court on April 19, 2010. The trial court sentenced Appellee to a definite term of imprisonment for the second degree felony in the amount of four years, and eighteen months imprisonment for the fourth degree felony, the terms to be served concurrently. The sentencing entry did not provide for the imposition of a mandatory term of imprisonment relating to the second degree felony.

At the sentencing hearing the trial court reminded counsel that ".....there is mandatory time on the felony of the second degree...." (April 19, 2010 hearing T.p. 2) and the State was asked by the trial court as to its recommendation as to the sentence to be imposed. The State responded that it concurred with the pre-sentence report and had no specific recommendation as to a jail term or other sanctions as penalties (April 19, 2010 hearing T.p. 4).

The trial court proceed to impose its sentence, again not assigning a mandatory prison term, and continued to advise Appellee as follows:

Sir, if I see that you have made every effort to change your life around while in prison, (your attorney) may petition this Court for a judicial release when it's appropriate, do you understand? (April 29, 2010 hearing T.p. 5)

Appellee filed a motion for judicial release on April 8, 2011 (T.d. 62) which was denied by the trial court without a hearing on June 1, 2011 (T.d. 68).

Appellee through counsel filed another motion for judicial release on September 26, 2011 (T.d. 74) which counsel withdrew on April 18, 2012 (T.d. 85). During the pendency of this second motion for judicial release Appellee sent the trial court a letter dated December 21, 2011, advancing his interest in being granted judicial release (T.d. 79). This letter was filed with the case docket on December 29, 2011, and on the same date the trial court filed a nunc pro tunc order imposing a mandatory prison term of four years for the second degree felony (T.d. 80). This order was filed instanter by the trial court without prior notice to Appellee or counsel and without a hearing.

Appellee through counsel filed a motion for the trial court to reconsider its nunc pro tunc order and conduct a hearing on January 18, 2012 (T.d. 81).

On October 26, 2012, counsel for Appellee filed a further motion for judicial release (T.d. 90) which motion was granted by the trial court following notice to the parties and a hearing on February 8, 2013 (T.d. 94). Appellant State of Ohio filed its Notice of Appeal to the Eleventh District Court of Appeals on February 13, 2013, and assigned Case No. 2013-P-11 (T.d. 96) and the appellate court issued its decision and opinion on December 31, 2013 (T.d. 104).

The Court of Appeals upheld the trial court's order granting judicial release but found that the trial court had omitted the statutory findings of fact in its order to warrant



early release and remanded the matter to the trial court to make the necessary findings. The Court further found that based upon the proceedings a two year mandatory sentence and four year stated term of imprisonment was proper and authorized under law. The Court further determined that the nunc pro tunc sentencing order made without notice to the parties or a hearing was unlawful and directed the trial court to correct the entry to conform to the trial court's intentions.

Appellant pursued further appeals in the matter and the proceedings are now before this Honorable Court on a certification of conflict basis of jurisdiction.

At the time of the granting of Appellee's motion for judicial release Appellee had served approximately 3 years and 5 months of his original prison sentence of four years, taking into account credit for time served awaiting sentencing, and had approximately 7 months of prison time remaining for the sentence (T.d. 81).

During Appellee's incarceration for the offenses in the within proceeding the legislature modified the penalties associated with the commission of offenses involving cocaine trafficking such that the second degree felony as for which Appellee was convicted would now be classified as a third degree felony with a no requirement for the imposition of a mandatory prison term. See House Bill 10 effective date September 30, 2011.

### **ARGUMENT**

ISSUE CERTIFIED TO THE SUPREME COURT OF OHIO BY THE  
ELEVENTH DISTRICT COURT OF APPEALS FOR RESOLUTION:

"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?”

APPELLEE’S PROPOSED FINDING:

“Other than for offenses as for which a definite mandatory prison term has been specifically set forth, a sentencing court is authorized to impose unequivocal mandatory and stated terms of imprisonment for an offense providing for definite prison terms according to the degree of the offense as classified by statute in accordance with and by application of the overall purposes and principles of felony sentencing expressed in R.C. 2929.11 and consideration of sentencing factors set forth in R.C. 2929.13, 2929.11, and 2929.12.”

When imposing a prison sentence for a conviction based upon the level of the felony offense committed pursuant to R.C. 2929.14 (A) and providing for mandatory time, the sentencing court is required to consider the application of the sentencing purposes and guidelines set forth in Chapter 2929 so as to undertake a parallel analysis for purposes of sentencing. Under the level of felony offense the sentencing court is obligated to undertake separate evaluations, one evaluation decreeing a definite prison term, the other decreeing a mandatory prison term.

The foregoing approach is evident by reference to the code’s sentencing statutes, definitions, and penalties.

The definitions set forth in R.C. 2929.01 are meaningful as far as separate determinations of imprisonment are concerned, and are straight forward and unequivocal. Subsection (Y) (1) with a few exceptions provides that a mandatory prison term “may be any term authorized for the level of offense”. Therefore a sentencing

court for a third degree felony has the option of imposing a mandatory prison term of one year, two years, etc. up to five years. Subsection (CC) defines "Prison Term" as "a stated prison term". Then further at Subsection (GG) the definition of "Stated Prison Term" means the prison term, mandatory prison term, or combination of all prison terms and mandatory prison terms imposed.....".

The Appellant State of Ohio in its argument attempts to engraft a concept which appears at no place or statute in the Revised Code and is inimicable to the purposes and directives as to sentencing factors. The State very basically asserts that a "definite" term of imprisonment based upon the level of felony is equivalent to the "mandatory" term of imprisonment. In other words the State is advancing a tautology such that "every definite term of imprisonment is the same term of a mandatory sentence, and every mandatory sentence is the same as a definite sentence". This equivalence does not appear at any place in the law; there is no formula or directive which recites that a mandatory prison term is for the same amount of years as a definite prison sentence of a term of years. In fact the Revised Code mandates the opposite; at 2929.01 (Y)(1) the rule is that a mandatory prison term may be any of the terms authorized for the level of the offense. It does not state that a mandatory prison term be the same as the definite prison term imposed, or that mandatory and definite are interchangeable.

Appellant State of Ohio attempts to create an ambiguity concerning the sentencing statutes by arguing that the term "definite" as in "definite prison term" is ambiguous and that its dictionary meaning must be sought out for purposes of interpretation of the statutory structure of sentencing contained in the Revised Code. It is obvious that resort to a dictionary definition is unnecessary and irrelevant in

determining the meaning of “definite” in sentencing purposes as this Honorable Court has already provided for the meaning of the use of the word “definite” for sentencing purposes. In Yonking v. Wilkinson 86 Ohio State 3d 225 1999-Ohio-98 the Court succinctly and plainly stated that “A definite sentence is one for a specific number of years of imprisonment, distinguished from an indeterminate sentence, which is a range defined by minimum and maximum terms”. There is no uncertainty as to “definite” in this exposition; “definite” simply means one year, two years, three years etc. as opposed to “one to three years, two to four years etc.” The only logical result of the interplay between definite and mandatory sentences is that the sentencing court by recourse to the sentencing guidelines determine how many years of imprisonment are appropriate to be mandatory, and how many years are appropriate for the entire stated prison term. “Definite” means so many years based upon the level of felony, and the mandatory amount of years may be any amount of years authorized based upon level of felony. An offender of a third degree felony may receive a prison sentence of up to five years, and the mandatory prison time may be any of one, two, three, four, or five years as the sentencing court may determine.

Section 2929.12 (A) directs that a court imposing a prison sentence possess the “discretion” to determine the best way to comply with the overriding purposes of felony sentencing which as are exhaustively referred to as being “to protect the public from future crime and to punish the offender”. Numerous “seriousness and recidivism” factors and steps of analysis are clearly and explicitly set forth in R.C. 2929.12, particularly Subsection B, and the sentencing court further has the discretion to take

any other factors into account which will serve to achieve the over-riding purpose and principles of felony sentencing.

Obviously any offense the violation as to which carries a mandatory prison term automatically fulfills the function of "punishing" the offender. If an individual has violated a statute providing for mandatory time, then that offender is subject to punishment by incarceration and the sentencing court is bound to impose a prison term. It is very simple to envision circumstances warranting the imposition of a mandatory term of prison of shorter duration of the stated-definite prison term by use of the guidelines as to felony sentencing. As an example the particular offense providing for mandatory prison time that was committed by an elected official, possibly a mayor, township trustee, etc. under the sentencing guidelines because of the offenders status as an elected official the offender's conduct would be considered more serious which seriousness would warrant a longer prison term than that warranted to "a regular citizen". However that elected official may be seen as having certain mitigating factors available for consideration by the sentencing court, and that rehabilitation of the offender would constitute a valid objective. Under such circumstances and by applying the guidelines separately and distinctly in the determination of the definite prison term to be imposed and the mandatory term, the sentencing court in the exercise of its discretion could determine that because the offender was an elected official a definite prison term of five years could be imposed, and that suitable punishment for the offender would be the one year mandatory definite term based upon the level of the felony offense. Such a sentence would fulfill the objectives of punishing the offender, ie, incarceration for one



year in prison, and also protecting the public and deterring future crimes, ie, the elected official if eligible for early release will be subject to monitoring by community control.

By recognizing the ability to provide for differing definite terms of incarceration for an offense with mandatory time the discretion of the sentencing court is fully preserved while the over-riding purposes and principles of felony sentencing are attained. The sentencing court is not under the burden of making intricate and meticulous findings to justify such a varying sentence and the end result of fairness and justice are preserved and maintained, and the court's discretion is retained. State v. Foster 109 Ohio State 3d 1408 2006-Ohio-1703.

In addition to preserving the exercise of judicial discretion in sentencing the dichotomy of the definite/mandatory elements concerning prison sentencing based on the levels of felony offenses finds support in the practical construction of the statutes. As set forth above, the sentencing court based upon the purposes and principles of sentencing under the Revised Code is guided by two directives. One is the range of prison terms comprising the imposition of a definite sentence, the other the range for the mandatory sentences. The determination as to each is separate and distinct, with one independent of the other, the end result being the imposition of the stated prison term. Any confusion or uncertainty as to the fact that two statutes provide for prison sentences is resolved through recognition of established rules of judicial review, the concept of which is clearly and directly set forth as follows:

In interpreting related and co-existing statutes, courts must harmonize and give full application to all such statutes unless they are irreconcilable and

in hopeless conflict. In Re Adoption of Baby Boy Brooks (2000) 136 Ohio App. 3d 824.

Obviously the interplay of the definite/mandatory levels of felony sentencing is neither irreconcilable nor hopeless.

It should further be noted that the sentencing court's discretion as to definite/mandatory prison terms is not limited to the imposition of prison terms for each. A definite stated prison term coupled with a mandatory prison term is not the sole and exclusive sentencing option available as under the sentencing guidelines. An offender may be faced with a mandatory prison term and otherwise be eligible for community control sanctions. As an example, when an offender is subject to a mandatory prison sentence based upon a firearm specification, the court has the discretion to impose a prison term based upon the specification and authorize a community control sanction as a sentence for the principal felony. State v. Swinning, 2004-Ohio-5005, 2004 WL 2260589 (Ohio Ct. App. 5<sup>th</sup> Dist. Richland County 2004).

The trial court in the present matter and the Eleventh District Court of Appeals properly applied the law in granting Appellee Shawn Ware judicial release. At Ware's sentencing hearing the trial court explicitly announced that Ware would have the opportunity to be afforded early release from his four year stated prison sentence if he rehabilitated himself to the satisfaction of the court. The trial court in its enforceable sentencing order imposed a four year prison sentence but did not specify the term of the mandatory sentence which could be not less than two years under the levels of prison terms for a violation of a second degree felony statute. Appellee was a first time offender and in the absence of an explicit mandatory prison sentence, together with the

clear intent of the court to consider judicial release at some point, a mandatory prison term of less than four years was clearly evinced under law. R.C. 2901.04 (A) mandates this result, the statute stating that "statutes defining penalties shall be strictly construed against the state, and liberally construed in favor of the accused".

The fact that Appellee's written guilty plea contained language describing the minimum and maximum stated and mandatory prison sentences for the offenses does not operate to remedy or cure any deficiencies in the sentencing order due to the absence of the imposition of a mandatory prison term. Disclosures of maximum-minimum prison terms in a plea hearing pursuant to Rule 11 (c) do not satisfy the requirement that a sentencing order set forth a definite term of mandatory imprisonment. State v. Brooks 103 Ohio State 3d 134 2004-Ohio-4746.

It should further be noted that the cases in the within matter as to which the Eleventh District Court of Appeals certified a conflict may be distinguished upon their underlying factual bases.

In State v. May 5<sup>th</sup> Dist. No. 2010CA2, 2010-Ohio-4625, the trial court sentenced the offender to a two year prison term and specified that one year was mandatory. The State appealed the sentence asserting that "hybrid" sentences were unlawful and the Fifth District Court of Appeals found that the sentence was in fact lawful and authorized under the sentencing guidelines and mandates of Revised Code Chapter 2929. The decision reflects the analysis presented above in this brief regarding the independency of the sentencing court's determinations as to the imposition of a stated prison term and a mandatory prison term, and the decision further upholds the exercise of judicial discretion under the sentencing statutes.



The facts underlying State v. Thomas 3<sup>rd</sup> Dist. No. 1-04-88 2005-Ohio-4616 are clearly different from those of May above. In Thomas the offender received a seven year prison sentence the entirety as to which was declared mandatory. The offender sought review of the sentence on appeal and maintained that the trial court abused its discretion by imposing a mandatory prison sentence which deprived him of the opportunity to seek judicial release. In essence the offender argued that the trial court erred in imposing a straightforward mandatory prison term. The reviewing court noted that there as nothing in the record indicating that the trial court intended to impose a sentence in such form as to have application of the judicial release statutes available to the offender and that the sentencing court did not abuse its discretion in decreeing seven years mandatory prison time. Basically the reviewing court decided that the offender was sentenced to prison for seven years, all of which were mandatory, and that the trial court was within its rights to make such order. The case did not involve different prison terms, one stated, the other mandatory, such as May above. The reviewing court ruled that the trial court was justified in its particular sentence, and that "mandatory" clearly and unambiguously means "mandatory". The reviewing court simply stated that when a sentencing order specifies a prison term to be mandatory, then the offender must serve the mandatory sentence. See Also State v. Warren 2012-P-0069, 2013-Ohio-443.

The circumstances underlying Appelle Shawn Ware's matter comport with the conclusion that it is lawful for a trial court to impose a prison sentence with a mandatory term component less than the stated term. The trial court did not specify a mandatory prison term in its sentencing order and expressly told Appelle that if he demonstrated

good citizenship while in prison he would be amenable to be granted judicial release. The state did not object to such exposition and did not take a firm position at the sentencing hearing; the state solely stated that it concurred with the pre-sentence report. Appelle Ware was a first time offender with no prior felony background and had a family to maintain and support and was eventually successful in obtaining early release. As noted the balance of his four year prison term upon release consists of solely around seven months and were he to have been charged with the same offense today he would have been subject to a conviction of third degree felony with no mandatory prison term. As far as Appellee's standing in the within matter is concerned, it is evident that the trial court properly granted him judicial release.

#### **CONCLUSION**

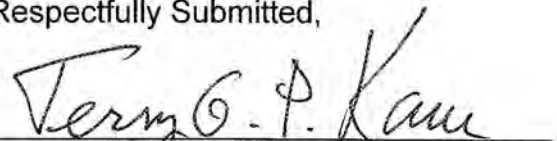
Appellee asserts that the statutory framework for the imposition of mandatory prison time based upon the degree of the offense clearly authorizes and permits a sentencing court to impose a mandatory prison sentence for a length of time different from the stated term. In arriving at a just sentence the sentencing court must consider the over-riding purposes and principles of felony sentencing and application of other statutory factors concerning the seriousness of the offense or those factors showing conduct of less serious character and mitigating circumstances for each component of the sentence, ie, to determine the length of a mandatory sentence and to also determine the length of the non-mandatory/stated prison sentence. Such approach maintains and preserves the discretion of the sentencing court and assures that a just and equitable prison sentence be imposed by the trial court. Nothing appears in the criminal penalty code requiring the direct correspondence of a stated prison term. The code merely states that some offenses carry a mandatory prison term of definite length

based upon the level of felony involved. The code does not affirmatively state that any prison term imposed be completely mandatory, only that a mandatory term be imposed for one of the definite prison terms for that particular felony. For numerous offenses the code explicitly states the mandatory term of incarceration, such as for certain firearms cases and impaired driving, and had the enactors of the code intended for mandatory prison sentences based upon the level of the felony to constitute the entirety of a prison sentence, that intention would have been explicitly set forth in the penalty statutes.

WHEREFORE Appellee Shawn Ware prays that this Honorable Court determine that when the plain language of a sentencing statute requires the imposition of a mandatory prison term that such mandatory term does not comprise the entire length of the prison term and that a sentencing court retains the discretion and authority to impose stated and mandatory prison terms of differing duration for the commission of the pertinent offense.

Appellee further prays that this Honorable court affirm the decision of the Eleventh District Court of Appeals upholding the granting of judicial release and remanding the matter to the trial court to amend its nunc pro tunc sentencing order to properly reflect the intention of the court as to sentence and to further make the statutory findings for the issuance of the order for judicial release based upon either the court's recollection of the matter or if necessary with the conduct of a further hearing.

Respectfully Submitted,

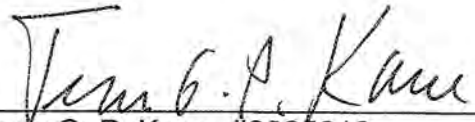
A handwritten signature in black ink, reading "Terry G. P. Kane". The signature is written in a cursive, flowing style. The first name "Terry" is written with a large, stylized 'T'. The last name "Kane" is written with a large, stylized 'K'.

Terry G. P. Kane, #0005016  
Attorney for Appellee Shawn Ware

KANE & KANE  
111 East Main Street Ste. B  
Ravenna, Ohio 44266  
Phone (330) 296-3868  
Fax (330) 296-7100

**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing was sent by Regular U.S. Mail to Attorneys Victor V. Vigluicci and Pamela J. Holder at 241 South Chestnut Street Ravenna, Ohio 44266 and Attorney Heaven DiMartino at 53 University Avenue 6<sup>th</sup> Floor Akron, Ohio 44308-1608 this 18 day of July 2014.

  
\_\_\_\_\_  
Terry G. P. Kane, #0005016

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO

Appellant,

v.

SHAWN A. WARE

Appellee.

CASE NO. 14-0425

On Appeal From the Portage  
County Court of Appeals,  
Eleventh Appellate District

Court of Appeals  
Case No. 2013-P-0011

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NOTICE OF CERTIFIED CONFLICT

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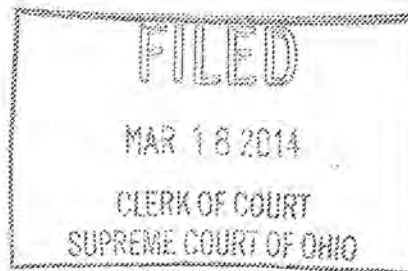
VICTOR V. VIGLIUCCI (0012579)  
Portage County Prosecuting Attorney

PAMELA J. HOLDER (0072427)  
Assistant Prosecuting Attorney  
Counsel of Record  
241 South Chestnut Street  
Ravenna, Ohio 44266  
(330) 297-3850  
(330) 297-3856 (fax)  
[pholder@portageco.com](mailto:pholder@portageco.com)

ATTORNEYS FOR APPELLANT

TERRY G.P. KANE (0005016)  
111 East Main Street, Suite B  
P.O. Box 167  
Ravenna, Ohio 44266  
(330) 296-3868

ATTORNEY FOR APPELLEE



NOTICE

Now comes State of Ohio, by and through the undersigned counsel, and notifies this Court that the Eleventh District Court of Appeals filed an order on March 5, 2014, certifying a conflict with the present case, *State v. Ware*, 11th Dist. No. 2013-P-0011, 2013-Ohio-5833 and *State v. Thomas*, 3d Dist. No. 1-04-88, 2005-Ohio-4616. S.Ct.Prac.R. 8.02(A), (B). Specifically, the Eleventh District certified the following issue to this Court:

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?

Respectfully submitted,

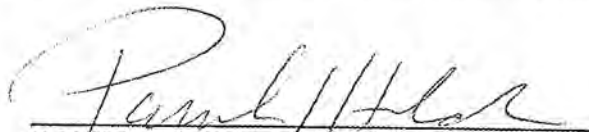
VICTOR V. VIGLUICCI (0012579)  
Portage County Prosecuting Attorney



PAMELA J. HOLDER (0072427)  
Assistant Prosecuting Attorney  
Attorney for State of Ohio  
Counsel of Record  
241 South Chestnut Street  
Ravenna, Ohio 44266  
(330) 297-3850/(330) 297-3856 (fax)  
[pholder@portageco.com](mailto:pholder@portageco.com)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been sent regular U.S. mail to Terry G.P. Kane at 111 Eat Main Street, Suite B, P.O. Box 167, Ravenna, Ohio 44266, this 10<sup>th</sup> day of March 2014.



PAMELA J. HOLDER  
Assistant Prosecuting Attorney

### ATTACHMENTS

Attachment A: Eleventh District Court of Appeal's March 5, 2014 Order Certifying a Conflict

Attachment B: *State v. Ware*, 11th Dist. No. 2013-P-0011, 2013-Ohio-5833

Attachment C: *State v. Thomas*, 3d Dist. No. 1-04-88, 2005-Ohio-4616



STATE OF OHIO                    )  
  )SS.  
COUNTY OF PORTAGE            )

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

STATE OF OHIO,

JUDGMENT ENTRY

Plaintiff-Appellant,

- vs -

SHAWN A. WARE,

Defendant-Appellee.

CASE NO. 2013-P-0011  
FILED  
COURT OF APPEALS

MAR 05 2014

LINDA K FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

Appellant, the State of Ohio, moves this court to certify this appeal to the Supreme Court of Ohio on the basis of a conflict, pursuant to Section 3(B)(4), Article IV of the Ohio Constitution and App.R. 25(A). As part of our decision in *State v. Ware*, 11th Dist. Portage No. 2013-P-0011, 2013-Ohio-5833, this court held that a trial court is permitted to impose a "hybrid" sentence when a mandatory prison term is required for a felony of a specific degree; i.e., the imposed mandatory term can be shorter in length than the imposed stated sentence for a specific offense. The state contends that this aspect of our decision directly conflicts with Third Appellate District's opinion in *State v. Thomas*, 3rd Dist. Allen No. 1-04-88, 2005-Ohio-4616.

In analyzing the limited case law on this issue, our opinion expressly notes that the *Thomas* court previously rejected the proposition that a "hybrid" sentence is permissible under R.C. Chapter 2929. *Ware* at ¶42. According to the Third Appellate District, when a trial court is statutorily required to impose a mandatory prison, the length of the mandatory term must be the same as the length of the

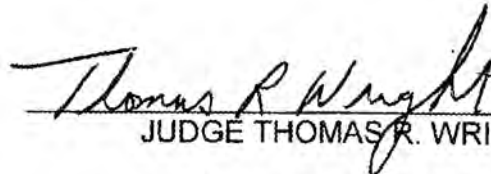


stated term. *Thomas* at ¶8. Therefore, there is a direct conflict between our holding and *Thomas*.

When there a conflict between two appellate districts on a rule of law, certification is warranted. *Whitlock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, paragraph one of the syllabus (1993).

Accordingly, the state's motion to certify this appeal is granted. This case is hereby certified to the Supreme Court of Ohio for consideration of the following issue:

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?

  
JUDGE THOMAS R. WRIGHT

FOR THE COURT

FILED  
COURT OF APPEALS

MAR 05 2014

LINDA K FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO

FILED  
COURT OF APPEALS  
DEC 31 2013  
LINDA K FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2013-P-0011
SHAWN A. WARE,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2009 CR 0563.

Judgment: Reversed and remanded.

*Victor V. Vigluicci*, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellant).

*Terry G.P. Kane*, Kane & Kane, 111 East Main Street, Suite B, P.O. Box 167, Ravenna, OH 44266 (For Defendant-Appellee).

THOMAS R. WRIGHT, J.

{¶1} This accelerated-calendar appeal is from a final judgment of the Portage County Court of Common Pleas, granting judicial release to appellee, Shawn A. Ware. Appellant, the State of Ohio, seeks reversal contending that appellee is not eligible for judicial release because his entire four-year prison term is mandatory.

{¶2} In September 2009, the Portage County Grand Jury indicted appellee on six counts of trafficking in cocaine and one count of possession of cocaine. The fifth

count alleged that, while in the vicinity of a juvenile, appellee sold, or offered to sell, cocaine in an amount less than one gram. The sixth count alleged that appellant prepared for distribution, or distributed, crack cocaine in an amount between ten grams and twenty-five grams. These two crimes are felonies of the fourth and second degree, respectively.

{¶3} Ultimately, appellee pled guilty to counts five and six, and the state dismissed the remaining counts. The trial court accepted the guilty plea and referred the case to the county adult probation department for preparation of a presentencing report.

{¶4} At the outset of the April 2010 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.

{¶5} In its April 23, 2010 sentencing entry, the trial court again did not deem any of the four-year prison term for the second-degree trafficking offense as mandatory. Instead, the court imposed two concurrent stated, but not mandatory, prison terms of eighteen months and four years on the respective counts. The state did not appeal.

{¶6} Over the next seventeen months, appellee twice moved for judicial

release. The first motion was filed in November 2010, approximately six months following the imposition of sentence. After an oral hearing on the matter, the trial court denied the first motion without addressing its substance. Three months later, in September 2011, appellee submitted his second motion for judicial release.

{¶7} While the second motion remained pending, appellee filed a pro se letter with the trial court, stating that he was confused as to the nature of his sentence on the second-degree trafficking count. Specifically, he noted that, even though the court said during the sentencing hearing that a mandatory term was required, the sentencing judgment did not impose mandatory time. In light of this, appellee asserted that he was uncertain as to when it would be permissible for him to move for judicial release.

{¶8} At approximately the same time appellee sent his pro se letter, his counsel submitted a motion for "leave" raising the same issue as the letter: i.e., the proper interpretation of the final sentencing judgment. The trial court did not issue a ruling on this motion, but instead rendered a nunc pro tunc entry in December 2011. The wording of the nunc pro tunc entry was virtually identical to that of the April 2010 sentencing judgment, with one significant exception. Regarding the second-degree trafficking count, the nunc pro tunc entry sentenced appellee to a stated mandatory term of four years, which would make him ineligible for judicial release.

{¶9} Through his trial counsel, appellee immediately requested the trial court to reconsider the nunc pro tunc entry, arguing that the new mandatory term on the second-degree trafficking count was inconsistent with the court's oral pronouncement during the sentencing hearing and her original sentencing entry. Citing the court's statement as to the potential for judicial release, appellee contended that the court intended to impose a

stated four-year term, with only the first two years being mandatory. He further argued that if the trial court intended for all four years to be mandatory, he would never be eligible for judicial release under the governing statutory law.

{¶10} The trial court did not render a written ruling on the motion to reconsider. On April 13, 2012, the court conducted an oral hearing on the second motion for judicial release. According to the court's subsequent judgment, appellee withdrew the second motion at that time.

{¶11} In October 2012, appellee filed his third motion for judicial release, arguing that he was now eligible for the requested relief. In support, he asserted 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. In making this argument, appellee did not refer to the trial court's nunc pro tunc entry.

{¶12} The state did not submit a written response to appellee's third motion for judicial release. On February 8, 2013, an oral hearing was held on the pending motion. Appellant did not assert any challenge to appellee's eligibility for judicial release. Instead, the state only argued that the motion should be denied because the trial court had already shown leniency to appellee by imposing a four-year term opposed to a possible eight-year term. The trial court rejected this argument, stating on the record that it would be in the best interest of society to release appellee early so that he could have an opportunity to change his life for the better.

{¶13} On February 11, 2013, the trial court rendered its final judgment granting appellee early judicial release. Two days later, and one day before the official date of



appellee's release from the county jail, the trial court conducted a second hearing on the third "release" motion. At the outset of this proceeding, the trial court informed appellee that this court had recently issued an opinion on the issue of judicial release, and that the state was now contesting whether he was eligible for the requested relief. The trial court further indicated that, even though it agreed with the state concerning the proper interpretation of our recent opinion, it was still going to allow appellee's release because its decision on appellee's third motion was rendered before it had knowledge of the new appellate precedent. In light of this, the court also overruled the state's motion to stay appellee's release while it appealed.

{¶14} In contesting the "release" judgment, the state asserts two assignments of error for review:

{¶15} "[1.] The Portage County Court of Common Pleas erred in finding an inmate imprisoned on a mandatory four year sentence was eligible for judicial release and erred in granting the same inmate judicial release.

{¶16} "[2.] Assuming arguendo Ware is an eligible offender, the Portage County Court of Common Pleas erred in granting Ware judicial release without making the findings required under R.C. 2929.20(J)(1)(a), (b) and (2)."

{¶17} Under its initial assignment, the state first challenges the legal propriety of the sentence that the trial court imposed for the second-degree trafficking offense in its original sentencing judgment of April 2010. The state maintains that, regardless of the total length of the sentence given for the second-degree offense, the court was required to make the entire prison term mandatory; i.e., according to the state, the trial court did not have the discretion to make only a portion of the total term mandatory. Based on

second hearing on the motion, this did not occur until after the trial court had rendered its written judgment ordering appellee's early release. Under these circumstances, the state waived the question of appellee's eligibility for judicial release. Nevertheless, given that a serious issue exists regarding whether the trial court has rendered a final judgment that properly sets forth the intended sentence on the second-degree trafficking offense, this court will address the merits of the state's first assignment.

{¶21} Appellee 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."

{¶22} Thus, the state submits that the trial court was required to impose a mandatory term for appellee's second-degree trafficking offense, and that the court failed to fulfill this requirement in imposing the stated four-year term. In support, the state refers solely to the trial court's original sentencing judgment of April 2010.

{¶23} As noted above, the original sentencing judgment imposed a stated term of four years for the second-degree trafficking offense; none of the term was deemed mandatory despite the requirement for a mandatory term. In presenting its argument,

the state ignores the trial court's nunc pro tunc entry, issued on December 29, 2011, in which the entire four-year term for the second-degree offense is deemed mandatory. Although this court ultimately concludes that the nunc pro tunc entry, like the original sentencing judgment, is technically flawed, the wording of the nunc pro tunc imposes a mandatory term in compliance with R.C. 2925.03(C)(4)(e). Therefore, the issue before this court becomes whether, despite the imposition of the stated four-year mandatory term, appellee is eligible for judicial release under R.C. 2929.20.

{¶24} Under the definition of "eligible offender" in R.C. 2929.20(A)(1)(a), a prison inmate is not eligible for judicial release until after he has served the mandatory time imposed. Accordingly, if an inmate's entire prison term is mandatory, he will never be eligible for judicial release. *See State v. Warren*, 11th Dist. Portage No. 2012-P-0069, 2013-Ohio-443. Even though the trial court also imposed a nonmandatory eighteen-month term for the fourth-degree trafficking offense, the court further ordered the shorter term to run concurrently with the four-year term. As a result, pursuant to the specific language used in the trial court's nunc pro tunc entry, appellee's entire four-year sentence was mandatory.

{¶25} However, despite the express wording of the nunc pro tunc entry, the trial court always intended for appellee to be eligible for judicial release. During the sentencing hearing on April 19, 2010, the trial court twice informed appellee that he would be subject to a mandatory prison term as a consequence of pleading guilty to a second-degree felony. Nevertheless, at the end of the proceeding, the court also told appellee that it would consider releasing him early if he made a true effort to alter his way of life.



{¶26} At first blush, the foregoing statements by the trial court would appear to be contradictory; i.e., how could the trial court conclude that appellee would be eligible for judicial release if his entire four year stated term is mandatory? Although the trial court did not attempt to provide any explanation for its various statements during the April 2010 sentencing hearing, explanation was given as part of the second hearing on appellee's third "judicial release" motion in February 2013. Specifically, in discussing the possible effect of this court's recent holding in *Warren*, the trial court indicated that its sentencing order was based upon the following logic:

{¶27} "My idea was if the mandatory minimum in a certain charge is two years and I gave you four, that you would be eligible after the two year period because that was the mandatory minimum."

{¶28} Pursuant to R.C. 2929.14(A)(2), the permissible range of a prison term for a second-degree felony is between two years and eight years. Hence, notwithstanding the specific language used in the nunc pro tunc entry, the trial court appears to have believed that, since two years was the shortest term that can be imposed for a second-degree trafficking charge, only that amount of appellee's sentence would be mandatory regardless of whether a total of four years was imposed.

{¶29} In the nunc pro tunc entry, the trial court employed the following language: "IT IS THEREFORE ORDERED that the Defendant is sentenced \* \* \* to a definite term of eighteen (18) months to be served for the felony four and **a mandatory** four (4) years to be served for the felony two, \* \* \*." (Emphasis sic.) Given the lack of reference to any two-year minimum, the trial court's language did not convey that which the court intended: a four-year stated sentence of which the first two years are mandatory.

{¶30} This court was faced with a somewhat similar situation in *Warren*, 2013-Ohio-443. Initially, the original trial judge in *Warren* verbally sentenced the defendant to a stated four-year term for aggravated vehicular homicide, but only two of the four years would be mandatory. However, the original final judgment imposed a mandatory four-year term for aggravated vehicular homicide and a consecutive mandatory one-year term for aggravated vehicular assault. As a result of the discrepancy, the *Warren* defendant moved to vacate the final judgment. After conducting a separate “resentencing” hearing, the original judge issued a second judgment in which the defendant was ordered to serve a mandatory four-year prison term for aggravated vehicular homicide and a consecutive one-year prison term for aggravated vehicular assault. Approximately three years after her resentencing, the *Warren* defendant moved for judicial release. During the ensuing “motion” hearing, the new trial judge indicated that she had spoken to the original trial judge about the matter, and that the original judge stated that he had intended for the defendant to be eligible for judicial release at that time. Based upon this, the new judge ordered the defendant’s immediate release.

{¶31} On appeal in *Warren*, the state asserted that the defendant was ineligible for judicial release because the second sentencing judgment imposed a mandatory prison term of at least four years. *Id.* at ¶9. In response, the defendant argued that the new trial judge’s decision should be upheld because there was nothing in the record to refute the possibility that the original trial judge did not order a four-year mandatory term in open court during the “resentencing” hearing. *Id.* In reversing the trial court’s ruling on the “eligibility” issue, this court concluded that, as to the imposition of the mandatory

term, the unequivocal language of the second sentencing judgment was controlling over the new trial judge's statements regarding the original trial judge's intent. *Id.* at ¶14. As to the defendant's argument, we held that the lack of a transcript of the "resentencing" hearing precluded her from arguing that the original trial judge had only intended for two years of the four-year term to be mandatory. *Id.* at ¶15-16.

{¶32} The facts of our case are readily distinguishable from those in *Warren*. First, the trial record in *Warren* did not contain a transcript of the "resentencing" hearing; thus, it could not be determined whether the original trial judge's oral pronouncement at the "resentencing" hearing as to the length of the mandatory term conflicted with the wording of the second sentencing judgment. Second, unlike the trial judge in our case, the first trial judge in *Warren* was not present at the hearing on the motion for judicial release, and thus could not provide a proper explanation concerning whether part or all of the four-year term was intended to be mandatory.

{¶33} In our case, despite acknowledging during the sentencing hearing that a mandatory prison term had to be imposed for the second-degree trafficking offense, the trial court still indicated that appellee would be eligible to move for early judicial release. It is clear that neither judgment entry captured the trial court's intent: to impose a stated four-year sentence, with the first two years mandatory. Under these circumstances, it would be inequitable to deny appellee eligibility for judicial release simply because the trial court did not order the intended sentence.

{¶34} More importantly, though, since neither the original sentencing judgment nor the nunc pro tunc entry actually impose a stated four-year sentence with the first two years mandatory, a second nunc pro tunc order is in order. First, the original

sentencing judgment is flawed because it does not impose any mandatory term, as the trial court clearly intended and as is expressly mandated in R.C. 2925.03(C)(4)(e). Second, the nunc pro tunc entry is flawed because it too does not state the sentence the trial court intended to impose for the second-degree trafficking offense.

{¶35} As to the latter point, the only function of a nunc pro tunc entry “is not to correct or modify an existing judgment, but rather to make the record conform to that which has already occurred.” *State v. Zawitz*, 8th Dist. Cuyahoga No. 99179, 2013-Ohio-2540, ¶13. Based upon the trial court’s statements during the sentencing hearing and the second hearing on appellee’s third “judicial release” motion, there is no dispute that the court intended to impose a stated prison term of four years for the second-degree trafficking offense, with only the first two years being mandatory. As noted above, the wording of the nunc pro tunc entry does not impose this sentence, but rather imposes a stated mandatory term of four years. To this extent, the nunc pro tunc does not adequately reflect what the trial court intended.

{¶36} Accordingly, 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.

{¶37} Given that the length of the mandatory term will not be equal to the total stated prison term for the second-degree trafficking offense, the trial court intended to impose a hybrid sentence. As part of its argument under its first assignment, the state contends that a hybrid sentence is impermissible. According to the state, regardless of how many years a trial court imposes for a second-degree felony, the entire term must

be mandatory in order to satisfy the statutory scheme.

{¶38} In support, the state submits that our *Warren* decision stands for the basic proposition that a “hybrid” sentence cannot be imposed under Ohio law. However, the state has clearly misinterpreted *Warren*, which does not even address the legal propriety of a hybrid sentence. The basic issue in *Warren* concerned whether the new trial judge could rely upon an off-the-record discussion with the original trial judge when the wording of the second sentencing judgment was unequivocal in regard to the length of the mandatory sentence.

{¶39} A review of the relevant case law indicates that the legality of hybrid prison sentences has been considered by a few Ohio appellate courts. In *State v. May*, 5th Dist. Morrow No. 2010 CA 2, 2010-Ohio-4625, 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. As the primary basis for its holding, the *May* court noted that the statutory sentencing scheme has provisions differentiating between a “stated prison term” and a “mandatory prison term.” *Id.* at ¶13. The principal example is R.C. 2929.01(FF), which provides:

{¶40} “‘Stated prison term’ means the prison term, mandatory prison term, or combination of all prison terms and mandatory prison terms imposed by the sentencing court pursuant to section 2929.14, 2929.142, or 2971.03 of the Revised Code or under 2919.25 of the Revised Code, \* \* \*.”

{¶41} The logic of the *May* court is that the language of R.C. 2929.01(FF) and other statutes shows that the phrase “stated term” was not intended by the legislature to be synonymous with the phrase “mandatory term.” *Id.* at ¶18. In turn, the length of a



mandatory term does not have to necessarily coincide with the total "stated" term for one offense. In support of its holding, the *May* court also emphasized that the Ohio sentencing scheme does not have any provision that expressly prohibits the use of hybrid sentences. *Id.* Additionally, the *May* court emphasized that the allowance of a hybrid sentence is consistent with the general tenet that criminal statutes must be construed liberally in favor of the accused and strictly against the state. *Id.*, citing *State v. Fanti*, 147 Ohio App.3d 27, 30 (5th Dist.2001).

{¶42} Although at least one appellate district has rejected the contention that a hybrid sentence is permissible, see *State v. Thomas*, 3rd Dist. Allen No. 1-04-88, 2005-Ohio-4616, this court finds the logic of *May* to be persuasive. In addition to the reasons set forth in *May*, this court would indicate that the use of a hybrid sentence gives a trial court a degree of flexibility which can aid in the rehabilitation of the offender. By imposing a mandatory prison term which is shorter than the stated term for a particular offense, thereby making the offender eligible for early judicial release, the trial court can provide incentive to rehabilitate and modify behavior during the period of incarceration.

{¶43} In this case, the trial court sought to impose a mandatory term of two years for the second-degree trafficking offense, while imposing a stated term of four years. Given that a two-year term is a permissible sentence for a second-degree felony under R.C. 2929.12(A)(2), the trial court would not exceed the scope of its discretion should it impose the intended sentence. Furthermore, since appellee's "stated prison term" for the second-degree trafficking offense included a two-year nonmandatory term, he would be an "eligible offender" for judicial release under R.C. 2929.20(A)(1)(a).

{¶44} Even though the trial court intended to impose a hybrid sentence on the

second-degree trafficking offense, the trial court has not issued a sentencing order imposing such a sentence. Thus, to the extent that this case must be remanded so that the trial court can render a new nunc pro tunc entry with the necessary language for a hybrid sentence, the state's first assignment has merit. However, to the extent that the state has challenged the trial court's authority to impose a hybrid sentence, its first assignment is not well-taken.

{¶45} Under its second assignment, the state contends that the decision to grant appellee judicial release must be reversed because the trial court failed to make certain findings of fact. Citing R.C. 2929.20(J), the state asserts that appellee's release could not be justified unless the trial court made specific findings regarding the likelihood of recidivism and the seriousness of appellee's two convictions.

{¶46} R.C. 2929.20(J)(1) states that if an eligible offender's incarceration stems from a conviction for a first or second-degree felony, he cannot be given relief under the statute unless the trial court finds both of the following:

{¶47} "(a) That a sanction other than a prison term would adequately punish the offender and protect the public from future criminal violations by the eligible offender because the applicable factors indicating a lesser likelihood of recidivism outweigh the applicable factors indicating a greater likelihood of recidivism;

{¶48} "(b) That a sanction other than a prison term would not demean the seriousness of the offense because factors indicating that the eligible offender's conduct in committing the offense was less serious than conduct normally constituting the offense outweigh factors indicating that the eligible offender's conduct was more serious than conduct normally constituting the offense."

{¶49} In relation to these two findings, R.C. 2929.20(J)(2) states that, in granting judicial release to an eligible offender covered under division (J)(1), the trial court must “specify on the record both findings required in [division (J)(1)] and also shall list all the factors described in that division that were presented at the hearing.”

{¶50} As previously discussed, one of the two trafficking counts covered under appellee’s guilty plea was a second-degree felony under R.C. 2925.03(C)(4); thus, the requirements of R.C. 2929.20(J) had to be met before appellee’s third motion for judicial release could be granted. During the first hearing on the third motion, the trial court only made two findings in support of its decision: (1) appellee had tried to change his way of life while incarcerated; and (2) it would be in the best interest of the community to grant appellee early release. While these two points may have been relevant to the ultimate ruling on the third motion, no required findings were made either orally or in the trial court’s final judgment on the third motion. Hence, the trial court did not comply with R.C. 2929.20(J) in rendering its decision.

{¶51} By including division (J) in the judicial release statute, the state legislature clearly intended to place a burden upon eligible offenders who were convicted of first or second-degree felonies. Accordingly, even if other factors weighed in favor of releasing appellee prior to the completion of his entire term, he still would not be entitled to the requested relief unless the trial court also made findings in his favor on the two specific factors listed in division (J). For this reason, this case must be remanded so that a new oral hearing can be held if the trial court concludes additional evidence or arguments is needed on the two statutory factors. Based upon that proceeding, the trial court must render findings on the two listed factors in division (J), and render a new determination



regarding appellee's judicial release.

{¶52} As the trial court failed to make the necessary findings for granting judicial release to a second-degree felon, the state's second assignment is well-taken.

{¶53} Pursuant to the foregoing discussion, the state's second assignment has merit, and its first assignment has merit in part.

{¶54} The judgment of the Portage County Court of Common Pleas is reversed, and the case is hereby remanded for further proceedings. Specifically, the trial court shall first issue a new nunc pro tunc entry which correctly states the nature of the sentence the court intended to impose for the second-degree trafficking offense: i.e., a total stated prison term of four years, only two of which are mandatory. Second, the trial court shall make the necessary findings of fact under R.C. 2929.20(J), holding a new hearing if necessary, and then render a new judgment on the merits of appellee's third motion for judicial release.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.

STATE OF OHIO

COUNTY OF PORTAGE

)  
)SS.  
)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

STATE OF OHIO,

JUDGMENT ENTRY

Plaintiff-Appellant,

COURT OF APPEALS

CASE NO. 2013-P-0011

- vs -

DEC 31 2013

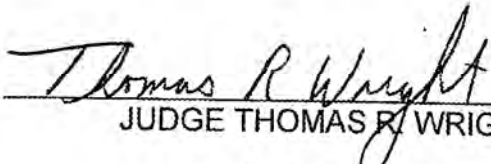
SHAWN A. WARE,

LINDA K. FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

Defendant-Appellee.

For the reasons stated in the opinion of this court, appellant's second assignment has merit. Therefore, it is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is reversed, and the case is hereby remanded for further proceedings. Specifically, the trial court shall first issue a new nunc pro tunc entry which correctly states the nature of the sentence the court intended to impose for the second-degree trafficking offense: i.e., a total stated prison term of four years, only two of which are mandatory. Second, the trial court shall make the necessary findings of fact under R.C. 2929.20(J), holding a new hearing if necessary, and then render a new judgment on the merits of appellee's third motion for judicial release.

Costs are taxed against appellee.

  
JUDGE THOMAS R. WRIGHT  
FOR THE COURT

Court of Appeals of Ohio, Third District, Allen County.

STATE of Ohio Plaintiff-Appellee  
v.  
Marvin THOMAS Defendant-Appellant

No. 1-04-88.

Sept. 6, 2005.

Criminal Appeal from Common Pleas Court, Judgment Affirmed.

Kenneth J. Rexford, Attorney at Law, Reg. # 0064500, Lima, Ohio, for Appellant.

Jana E. Gutman, Asst. Allen Co. Prosecutor, Reg. # 0059550, Lima, Ohio, for Appellee.

#### OPINION

SHAW, J.

{¶ 1} Appellant, Marvin L. Thomas, appeals from the March 29, 2004 judgment and sentencing of the Court of Common Pleas, Allen County, Ohio, sentencing him to a mandatory prison term of seven years for possession of crack cocaine in violation of R.C. 2925.11(A) & (C)(4)(e).

{¶ 2} Thomas was charged by Bill of Information on February 23, 2004 with one count of possession of crack cocaine, a first degree felony. He subsequently pled guilty to the charge pursuant to a negotiated plea whereby the State of Ohio agreed to recommend an eight year prison sentence. A sentencing hearing was held on March 29, 2004, and the trial court imposed a mandatory prison sentence of seven years pursuant to R.C. 2925.11(C)(4)(e).

Thomas now appeals, asserting the following assignment of error:

ATTACHMENT C

The trial court erred in sentencing the defendant by imposing the entire sentence as mandatory time, without considering the merits of part-mandatory, part-non-mandatory sentencing.

{¶ 3} In his sole assignment of error, Thomas contends that the trial court erred in imposing a mandatory prison term. We review the sentencing decision of a trial court to determine whether the court's findings are supported by the record, and we may not substitute our judgment for that of the trial court without clear and convincing evidence of one of the errors described in R.C. 2953.08. *State v. Martin* (1999), 136 Ohio App.3d 355, 361, 736 N.E.2d 907. Clear and convincing evidence is that "which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, 477, 120 N.E.2d 118.

{¶ 4} Thomas does not assert that the trial court lacked the authority to sentence him to a mandatory prison term. Rather, Thomas argues that the trial court was not required to impose mandatory prison time for the *entire* length of the sentence imposed under R.C. 2925.11(C)(4)(e) and that judicial release should have been available after Thomas served the minimum term required for a first degree felony. He interprets R.C. 2925.11 and 2929.20 as allowing a trial court to impose a mandatory prison term of three years, the shortest term available for a first degree felony pursuant to R.C. 2929.14(A)(1), while making any additional prison time non-mandatory. This practice, he argues, is the better policy in that it would allow courts to promote offender rehabilitation.

{¶ 5} Thomas' arguments are not well-taken for several reasons. First, he does not assert any error on the part of the trial court in imposing the entire term as mandatory. Thomas concedes that R.C. 2925.11(C)(4)(e), at a minimum, authorizes a court to impose a

mandatory prison term. Thus, he does not claim that the trial court acted improperly, and has failed to demonstrate by clear and convincing evidence that the trial court's sentence was in error.

{¶ 6} Second, Thomas has not provided any evidence that the trial court wished to impose a portion of his sentence as non-mandatory time but felt constrained by the statute. On the contrary, the trial court's judgment entry includes specific findings that Thomas was not amenable to community control sanctions and that such sanctions would demean the seriousness of Thomas' conduct. Accordingly, he presents no justification for remanding his case for consideration of a sentence that allows for community control sanctions.

\*2 {¶ 7} Finally, the plain and unambiguous language of R.C. 2925.11(C)(4)(e) requires imposition of a mandatory prison term. That section provides: "possession of [25-99 grams of crack cocaine] is a felony of the first degree, and the court *shall* impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree." R.C. 2925.11(C)(4)(e). Ohio courts have consistently read this language as requiring the implementation of a mandatory sentence. As a result, courts in Ohio have found that a trial court errs when it accepts a guilty plea to an offense under R.C. 2925.11 after indicating to the defendant that community control sanctions are available. *State v. Ruby*, 4th Dist. No. 03CA780, 2004-Ohio-3708, ¶ 11; see also *State v. Davis*, 2nd Dist. No.2003-CA-87, 2004-Ohio-5979.

{¶ 8} Accordingly, we hold that R.C. 2925.11(C)(4)(e) required the trial court to impose a mandatory term for the full length of the sentence imposed. Appellant's public policy arguments in favor of promoting criminal rehabilitation are better addressed to the legislature.

When faced with a clear statutory directive we must refrain from interfering with the policy determinations of the legislative branch.

{¶ 9} Appellant's assignment of error is overruled, and the judgment and sentence of the Court of Common Pleas, Allen County, is affirmed.

*Judgment Affirmed.*

BRYANT and ROGERS, J.J., concur.

Ohio App. 3 Dist., 2005.

State v. Thomas

Not Reported in N.E.2d, 2005 WL 2129914 (Ohio App. 3 Dist.), 2005 -Ohio- 4616



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  
OHIO PROSECUTING ATTORNEYS ASSOCIATION

**SHERRI BEVAN WALSH #0030038**

Summit County Prosecuting Attorney

**HEAVEN DIMARTINO #0073423**

Assistant Prosecuting Attorney

Appellate Division

Summit County Safety Building

53 University Avenue

Akron, Ohio 44308

(330) 643-7459

Fax (330) 643 2137

Email: dimartino@prosecutor.summitoh.net

Attorney as Amicus Curiae For The  
Ohio Prosecuting Attorneys Association

**VICTOR V. VIGLUICCI #0012579**

Portage County Prosecuting Attorney

**PAMELA J. HOLDER #0072427**

Assistant Prosecuting Attorney

Counsel of Record

241 South Chestnut Street

Ravenna, Ohio 44266

(330) 297-3850

Attorney for Appellant  
State of Ohio

**TERRY G.P. KANE #0005016**

Attorney at Law

Counsel of Record

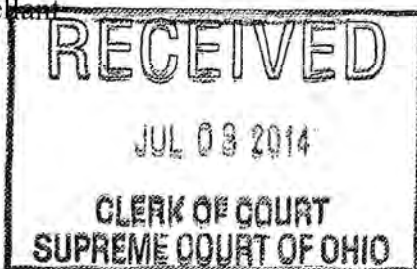
111 East Main Street

Suite B

P. O. Box 167

Ravenna, Ohio 44266

Attorney for Appellee  
Shawn A. Ware



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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,

**SHERRI BEVAN WALSH**  
Prosecuting Attorney



**HEAVEN DIMARTINO**  
Assistant Prosecuting Attorney  
Appellate Division  
Summit County Safety Building  
53 University Avenue, 6<sup>th</sup> Floor  
Akron, Ohio 44308  
(330) 643-7459  
Reg. No. 0073423

*Attorney as Amicus Curiae For The  
Ohio Prosecuting Attorneys Association*



**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.

A handwritten signature in black ink, appearing to read "Heaven Dimartino", written over a horizontal line.

**HEAVEN DIMARTINO**  
Assistant Prosecuting Attorney

*Counsel as Amicus Curiae For The  
Ohio Prosecuting Attorneys Association*



**Shawn Ware**  
325 friends

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**About**

[Overview](#)

Work and education

Places lived

Contact and basic info

Family and relationships

Details About Shawn

No workplaces to show

Went to Ravenna High School

Lives in **Ravenna, Ohio**

From **Maple Heights, Ohio**

No relationship info to show



**Shawn Ware**  
325 friends

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**Intro**

- Went to Ravenna High School
- Lives in Ravenna, Ohio
- From Maple Heights, Ohio

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**Shawn Ware** updated his profile picture.  
February 22, 2019



8

8 comments

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- 📍 Went to Ravenna High School
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Shawn Ware  
January 10, 2019 · Nametests · 🌐



Nametests

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4

1 comment



### Intro

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- Lives in Ravenna, Ohio
- From Maple Heights, Ohio

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Jo David

Call me Lil dude you know I love Brother's Auntie said she ain't seen in awhile  
Grandma number 242-8175 Big Brother call me man so you doing

5y Like Reply



Shawn Ware updated his profile picture  
January 10, 2019 · 🌐



1

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Share



Shawn Ware

January 10, 2019 · 🌐

Asked for help wit my car sito. The few that got real shit going in there lives respect. Everybody  
elses you know what it is.BIG FACTS. #illdoitthehardway!!!

1

3 comments



Intro

Went to Ravenna High School

Lives in Ravenna, Ohio

From Maple Heights, Ohio

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Shawn Ware

January 10, 2019 · 🌐

Asked for help wit my car sito. The few that got real shit going in there lives respect. Everybody eles you know what it is.BIG FACTS. [#ilddoitthehardway!!!](#)

1

3 comments

Like

Comment

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Ti Jones

U fucked yase!!! Nigga u the catalyst!!! U fucked over a the one woman who was extremely loyal and true to ya ass to sell ya soul for a cartl You the liar and the thief both the things u claim to hate! Shoulda just let me finish dinner! But because yo...

See more

5y

Like

Reply

Edit

Write a comment...

Shawn Ware

January 9, 2019 · 🌐

Intro

Went to Ravenna High School

Lives in Ravenna, Ohio

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ShawnWare1913

ShawnWare1913

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1

Write a comment...

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Shawn Ware

January 9, 2019 · 🌐

5 comments

Like

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Shawn Ware

January 9, 2019 · 🌐

Sarah McKinney lol my grand mas better than urs punk

5 comments

Like

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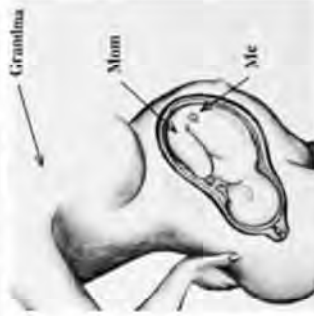


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**Shawn Ware**  
January 9, 2019 · 🌐

Sarah McKinney lol my grand mas better than urs punk



This is so amazing. Did you know that your grandmother carried part of you inside her womb? But how? Well, a female fetus is born with all the eggs she will ever have in her lifetime. So when your Grandmother was carrying your Mother in her womb, you were a tiny egg in your Mother's ovaries. The three of you have been connected for a very long time. Women are amazing!

12 comments



0 1



Intro

- Went to Ravenna High School
- Lives in Ravenna, Ohio
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View more comments

Shawn Ware  
Literally? ??

by Like Reply

Sarah Meade  
Shawn Ware yes

by Like Reply

Write a comment...

...

Shawn Ware  
January 9, 2019 · 🌐

Is it bad? If Jesus wasnt available that i put the devil on hold and called Earl.ijs

1 comment

Like Comment Send Share

Teisha Gibson

by Like Reply

Write a comment...

...

Shawn Ware  
January 9, 2019 · 🌐

Never has he backed out on his WORD

— GOD —

Intro

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- Lives in Ravenna, Ohio
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**SURROUNDS ME**  
**WITH HIS**  
*favor*  
**PSALM 5:12**

Instagram.com

2

Like Comment Send Share

1 comment

Shawn Ware updated his status.  
January 9, 2019

**This content isn't available right now**  
When this happens, it's usually because the owner only shared it with a small group of people, changed who can see it or it's been deleted.

3

Like Comment Send Share

1 comment 1 share

Shawn Ware

6y Like Reply



Shawn Ware

114 friends



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Intro

I'm a muthafucking nightmare, so keep ya shoes tied tight!@!

Joined March 2017

Photos

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Shawn Ware

April 1, 2017 · 6

Woke up to the sheriff's pulling up cuz this broad... playing scared to come pick her shot up. Guess that's what's happens when u play to hard. So now I'm on some other shit. Girls u the won fucking everyone why u made at me. Fucking it Let's Eat!!!

1

Like

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Matthew Hollis

Bro whatever getting at you probably ain't worth going back and forth on here. You got my number if you need an ear. You know that always bro.

7y Like Reply

Write a comment...

22 comments



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Vicki Boyd



Roy McKinney Davis



Jason Bew



Richard Calhoun



Zatraey Longmire



Christopher Taylor



Christina Griffin



Mallie Mall



Brenda M. Ware-Abrams



Shawn Ware

April 1, 2017 · 🌐

She was salty cuz I was late, but had a ball, the only needed the luv not hair a be cut tomorrow



+1



Like



Comment



Send



Share

Write a comment







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Vicki Boyd



Roy McKinney-Davis



Jason Biew



Richard Calhoun



Zatraey Longmire



Christopher Taylor



Christina Griffin

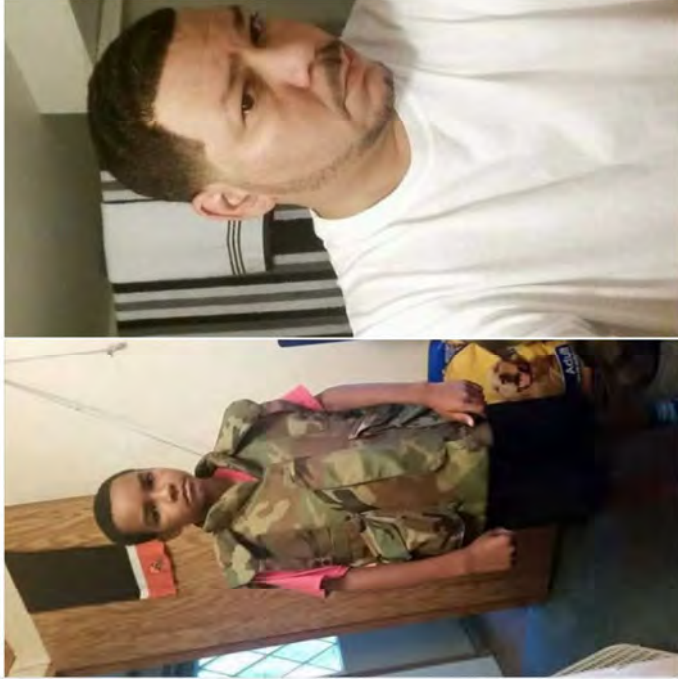


Mallie Mail



Brenda M. Ware-Abrams

**Shawn Ware**  
March 31, 2017 · 🌐



9

👍 Like

💬 Comment

📧 Send

🔗 Share

1 comment

**Lanesa Bristow**  
Awww how cute look like his daddy



Brenda M. Ware-Abrams

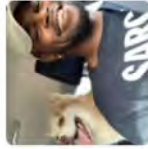


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Vicki Boyd



Roy McKinney-Davis



Jason Bew



Richard Callhoun



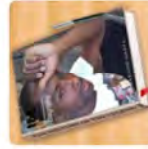
Zatraey Longmire



Christopher Taylor




Christina Griffin




Mallie Mail



Brenda M. Ware-Abrams



**Shawn Ware** was live.  
March 31, 2017



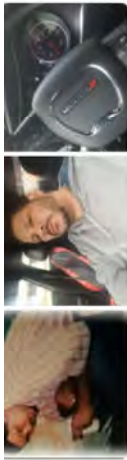
0:03 / 0:08

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1





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Roy McKinney-Davis



Jason Bew



Richard Calhoun



Zatraey Longmire



Christopher Taylor



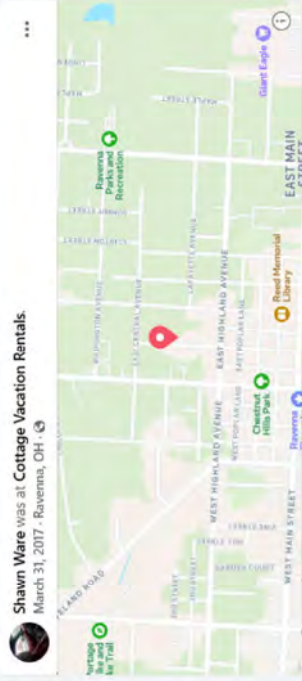
Christina Griffin



Mallie Mall



Brenda M. Ware-Abrams



**HOTEL RESORT**  
**Cottage Vacation Rentals**

2

Like Comment Send Share

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**Shawn Ware**  
I'm straight, get that dirt off ya shouldas  
7y Like Reply

Write a comment...

4 comments

**Shawn Ware** is with **Angel Lynette**.  
March 31, 2017

These days is over.







**Friends**  
114 friends

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Vicki Boyd



Roy McKinney-Davis



Jason Bew



Richard Calhoun



Zatraey Longmire



Christopher Taylor



Christina Griffin



Mallie Mall



Brenda M. Ware-Abrams



3

Like

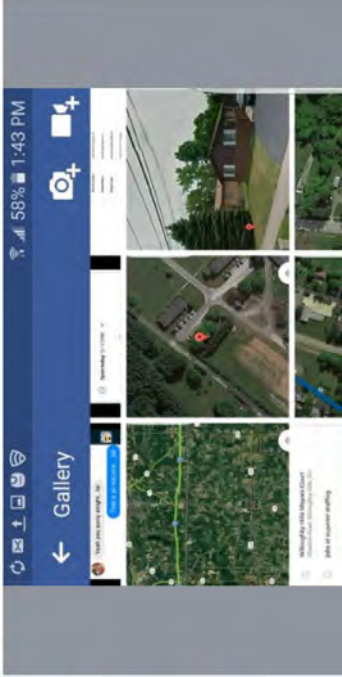
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Write a comment...

Shawn Ware  
March 31, 2017  
Angel Lynette how u explain this for a month n some straight!!!!














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- |  |   |  |
|--|---|--|
| <br>Vicki Boyd          | <br>Roy McKinney-Davis | <br>Jason Bew               |
| <br>Richard Calhoun     | <br>Zatracoy Longmire  | <br>Christopher Taylor      |
| <br>Christina Griffin | <br>Mallie Mall      | <br>Brenda M. Ware-Abrams |

**Shawn Ware**  
March 31, 2017

Angel Lynette how u explain this for a month n some straight!!!!

58% 1:43 PM



 Gallery



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## Shawn Ware

680 friends

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 **Shawn Ware** updated his profile picture.

March 8, 2019 - 4



16

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Intro



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7

1 share


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May 14, 2018 · 🌐



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21

1 comment



Larry Lewis

Men what's up with that outfit lol

6y



Shawn Ware created a **fundraiser** for N A A C P Legal Defense and Educational Fund Inc.

October 3, 2017 · Facebook fundraisers ·

Give the gift of a donation, and help me reach my goal.



I'm Donating My Birthday to Naacp Legal Defense & Educ Fund Inc

Fundraiser for N A A C P Legal Defense and Educational Fund Inc by Shawn Ware

Instagram



bceazz1512

Follow

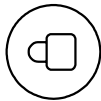


533 posts

283 followers

434 following

Shawn Ware




This account is private


Follow to see their photos and videos.

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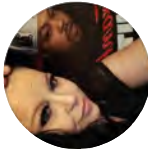




**itchypalms216**  
Itchypalms216


Follow






**frankwhite7714**  
Frank White


Follow






**trapped\_out\_queeno...**  
Wyshuna Herron


Follow






**bigchucc21**  
Chuck Wilson

Follow





**cruella\_de\_v**  
Essence TooReal 3ini

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Instagram







## Shawn Ware

1 follower · 2 following



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Joined April 2017

Shawn has not filled out their profile.

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Shawn hasn't shared, answered or posted anything yet.



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## Shawn Ware

Cpu tech at Natural Essentials

Cuyahoga Falls, Ohio, United States · [Contact Info](#)

13 followers · 13 connections



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Message

 Natural Essentials

## Activity

+ Follow



**Hiring Smart**  
Liked by Shawn Ware

SHINE SO  
BRIGHTLY THAT  
OTHERS HAVE  
NO CHOICE  
**BUT**  
TO LIGHT UP  
WITH YOU.

**Great thought!**  
Liked by Shawn Ware

Liked by Shawn Ware

---

Experience

Cpu tech  
Natural Essentials

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Get introduced

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### Shawn Ware

Director of Operations

New York, NY

### Shawn Ware

Software Engineer at Empact Engineering

United States

### Shawn Ware

Apprentice - Landscape Design and Installation at Don Owen Landscaping, LLC

Galesburg, IL

### Shawn Ware

Newark, DE

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