ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	CASE NO. 14-1064
	)	
Plaintiff-Appellee,	)	
	)	On Appeal from the Lorain
- vs -	)	County Court of Appeals,
	)	Ninth Appellate District
	)	
ASIM J. TAYLOR,	)	Court of Appeals Case Nos.
	)	13CA010366
Defendant-Appellant.	)	13CA010367
	)	13CA010368
	)	13CA010369

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT ASIM J. TAYLOR

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EXPLANATION OF WHY THIS CASE RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION, IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST, AND WHY LEAVE TO APPEAL SHOULD BE GRANTED IN THIS FELONY CASE

In State v. Talty 103 Ohio St.3d 177, 2004-Ohio-4888, the Supreme Court ruled that an order stating that the defendant make all reasonable efforts to avoid procreation while on community control sanctions was over broad and provided little framework to guide behavior.

In State v. Taylor, the trial court imposed upon the Defendant the following sentencing sanctions, in part: Intensive supervised probation; obey all orders and directions of the Lorain County Probation Department; Appear at the Review Hearing, and, finally, that, Mr. Taylor "make all reasonable efforts to avoid impregnating a woman during the community control period or until such time that [he] can prove to the Court that he is able to provide support for his children he already has and is in fact supporting the children or until a change in conditions warrant the lifting of this condition." The Defendant appealed to the Ninth Judicial District Court of Appeals and the Justices held that insofar as a Pre-Sentence Report was not provided that the record was incomplete and as a result the merits could not be analyzed, affirming the order of the trial court. In the decision concurring, Justice Hensal found that through the application of the Jones three-part test, the order from the trial court was proper.

The court should take this case because the fundamental right of procreation is being attacked under the cover of enforcing financial responsibility. The equal protection implications are significant insofar as its application may be worded equally. The application of such a notion would mean that a man can go to prison for the children he fathers. The order should be tested under a strict scrutiny test in instances that mean to restrain half of the rights included in the original Bill of Rights. The order to not procreate under any circumstances

allows for the restriction of a basic human right protected by the U. S. Constitution.

STATEMENT OF THE CASE AND FACTS

Asim Taylor has been ordered to pay child support for four of his children. On August 10, 2011, Taylor was indicted on Non-Support of Dependents, in violation of O.R.C. 2919.21(B), due to his inability to maintain his obligation under those orders.

Taylor entered a plea of guilty to the above-referenced indictments. Tr. at 4 On January 23, 2013, Appellant Taylor was sentenced to Community Control Sanctions. At the sentencing, Appellant Taylor was ordered to pay restitution in the amount of $78,922.12 and maintain his court-ordered monthly child support obligations. Tr. at 5 In addition, Appellant Taylor was ordered to pay costs of prosecution. Tr. at 6 As a further condition of his community control, the trial court ordered that Mr. Taylor make all reasonable efforts to avoid impregnating a woman during community control, or until such time that Defendant can provide to the Court that he is able to provide support for his children he already has and is, in fact, supporting the children, or until a change in conditions warrant the lifting of this condition. Tr. at 6.

After the sentence of the trial court, Mr. Taylor timely appealed to the Ninth District Court of Appeals. The justices came to the same conclusion with two affirming based upon what they considered a delinquent record, and the third justice applying the Jones three-part test in State v. Jones (1990), 49 Ohio St.3d 51, as the correct standing for deciding the lawfulness of the trial court's order. As a result, Mr. Taylor appeals the lower court's decision.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

I. When a judge sentences an individual for a violation of O.R.C. 2919.21, non-support of dependents, that judge has limits on what type of sentence may be imposed. The imposition of a Community Control Sanction that calls for the Defendant to not procreate during his term of Community Control is beyond what a judge may lawfully order. State v. Talty 103 Ohio St.3d 177, 2004-Ohio-4888

On January 23, 2013, the trial court found Appellant Taylor guilty of four counts of Non-Support of Dependents, in violation of O.R.C. 2919.21. Appellant Taylor was then placed on Community Control Sanctions for five years and ordered to pay restitution in the amount of $78,922.12 and maintain his court-ordered monthly child support obligations. In addition, Appellant Taylor was ordered to pay costs of prosecution. As a further condition of his community control, the trial court ordered that Appellant make all reasonable efforts to avoid impregnating a woman during community control or until such time that Defendant can prove to the Court that he is able to provide support for his children he already has and is in fact supporting the children or until a change in conditions warrant the lifting of this condition.

Prior to the imposition of sentence, the trial court indicated to both parties that he was going to impose the above condition regarding procreation. Tr. 6. At the sentencing, the defense objected to the imposition of this condition as an infringement upon Appellant Taylor's fundamental rights. Tr.10. The trial court did not engage in any type of analysis as to the type of test for determining whether this condition was constitutional or unconstitutional. The trial court, at the same time, recommended abstinence as the only true means to ensure compliance with the trial court's condition. Tr. 13.

The imposition of the condition to avoid procreation is a direct infringement upon

Taylor's fundamental rights. Taylor asserts that when dealing with conditions of Community Control Sanctions as they relate to a fundamental right, the court should be able to demonstrate the reasonableness of the condition. State v. Jones (1990), 49 Ohio St.3d 51. If it is determined to be reasonable, then the court should construe the order as tightly as possible to achieve a legitimate State interest. In this instance, the trial court also neglected to engage in any reasoning as to whether there were less restrictive means to achieve a legitimate State interest.

II. De Novo review of Constitutional questions

Appellant Taylor preserved his right to oppose the imposition of the order "to make all reasonable efforts to avoid impregnating a woman" while on Community Control. State ex rel. Specht v. Oregon City Bd. of Ed. (1981), 66 Ohio St.2d 178, 182, citing Clarington v. Althar (1930), 122 Ohio St. 608. Counsel for Appellant raised objections as to the anti-procreation order during the sentencing. Tr.10. The constitutionality of government action as it concerns a fundamental right are questions of law requiring review de novo. Ohio Bell Tel. Co. v. Pub. Util. Comm. (1992), 64 Ohio St.3d 145, 147.

III. Under strict scrutiny analysis, Appellant Taylor's probation condition is invalid

The Appellant asserts that a two-part analysis takes place prior to infringement upon a fundamental right. As it applies to a fundamental right, a condition will only be deemed reasonable if it passes strict scrutiny. This proposition stands regardless of its popularity. Responding to the one instance where the trial court noted that one permissible infringement upon fundamental rights was gun ownership by a convicted felon, the right to procreate is questioned in People v. Pointer (1984), 151 Cal. App.3d 1128, 1138-1139, where the court held a condition of probation denying procreation was constitutional insofar as it was the most narrow construction of the condition as it related to avoiding future criminal liability. The Pointer court

was confronted with a mother's dieting habits and the negative impact it was having on her child.

In Pointer, after the court determined that the condition was reasonable, it analyzed whether the condition survived strict scrutiny and served the dual purposes of rehabilitation and public safety. Pointer at 1139. The decision cited a three-part test from Parrish v. Civil Service Commission (1967), 66 Cal.2d 260, which held that:

> "When a court seeks to impose conditions that infringe upon a citizen's fundamental rights, it must establish:
>
> 1) That the conditions reasonably relate to the purposes sought by the legislation which confers the benefit;
>
> 2) That the value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights; and
>
> 3) That there are available no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit."

People v. Pointer, at 1140, footnote 11.

In Pointer, the court found no rehabilitative purpose, but more so protection for any unborn children. Considering the defendant's willful disregard, it is more than an assumption that an unborn child may actually be harmed.

The Pointer court, however, found that less restrictive conditions could achieve the same end. The Trial Court in Mr. Taylor's instance did not mention less restrictive means let alone try to fashion less restrictive means to allow it's sought after resolution. Mr. Taylor cites Trammell v. State (Ind.App. 2001), 751 N.E.2d 283, 288-289, which struck down an anti-procreation order that the defendant not conceive a child, finding the condition unreasonable because it was tailored to the particular crime, but avoided the more severe punitive alternative of the full statutory prison term through the rehabilitative tool of probation. State v. Oakley, 245 Wis.2d at 463. This Court in Talty rejected the "Act of Grace" by a judge as an alternative to a

constitutionally invalid condition. The test in Oakley, while the Wisconsin Court found as it did, used a form of strict scrutiny based on the narrowness of the order. No matter the order put forth by the court, it provides for no structure for its application and it cannot stand under strict scrutiny and by the very nature is overbroad. If this was the intent of the legislation behind the statute which Mr. Taylor was convicted, it would have made such a provision, especially considering the fundamental right involved. The child support orders that were used as a predicate for the underlying crime is a statutory creation. Nowhere in the support orders does it provide that penalties for non-payment would include divesting Mr. Taylor of his right to procreate. R.C. 2919.21(B) provides: "No person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support". The orders of support do not provide any notice to obligor that should the obligor fail to make payments on the order, they shall be restricted in their ability to procreate. Strict liability is not generally appropriate when an offense is punishable by imprisonment. U.S. v. U.S. Gypsom Co. (1978), 438 U.S. 422, 443, fn.18, citing Sayre, Public Welfare Offenses (1933), 33 Colum.L.Rev. 55, 72; see, also, State v. Brewer (1994), 96 Ohio App.3d 413, 416. Mr. Taylor contends that limiting a fundamental right, such as procreation under a strict liability offense, goes beyond what sentence the Court may impose, other than what the statute provides is applicable under R.C. 2919.21.

The Court, in its dissent in State v. Collins, 89 Ohio St.3d 524, 733 N.E.2d 1118, 2000-Ohio-231, Supreme Court of Ohio, September 6, 2000, stated :

> "In addition, newly enacted R.C. 2919.21(D) creates an affirmative defense when the failure to provide support established by court order under section (B) is due to lack of ability or means. These statutory changes remove the state's burden to prove the inadequacy of the support when a court order has already established the legal obligation to pay. The state need only establish the violation of a court order. It is apparent that R.C. 2919.21(B) expands the scope of criminal liability beyond what is "adequate" support, and that the

> new affirmative defense recognizes situations where the obligor lacks that means or ability to pay. These changes plainly indicate a purpose to impose strict liability as the culpable mental state for a violation of R.C. 2919.21(B)."

The reasonableness of the order is seriously in contention, but for the sake of argument, if it is found to be reasonable, the Court must then move on to the second part of the test.

Ms. Pointer's diet consisted of high sodium and low protein that left her children with severe malnutrition. Doctors ordered that the mother modify her diet to allow for her underage sons to get proper nutrition. Refusing to do so, the mother ran off with the boys and was charged with Child Endangering as she indicated that she would never comply with the order. The Court ordered she not procreate during her probationary period.

The Jones test was used to determine the reasonableness of the condition in Pointer. The Court found the crime of child endangering is directly related to the condition. The rationale was that if the mother adhered to her current diet, then by conceiving, she would endanger her unborn child, essentially making pregnancy a crime for her.

Mr. Taylor argues that his circumstances are much different insofar as his condition is not the narrowest construction. In the case at bar, Mr. Taylor's criminal conduct is not directly related to procreation. The act of conceiving a child is not the cause of one's ability or failure to pay court ordered support.

In Mr. Taylor's instance, he cannot pay based not on an unwillingness to pay, but on inability. Mr. Taylor was not questioned on his job search efforts, his participation in work-training programs, and/or whether he made efforts to support his children outside the court's order. The criminal conduct is unlike Pointer insofar as Pointer conceiving a child based on her demonstrated disregard of a court order would be in violation of not only the law, but also the probation condition. The condition in Mr. Taylor's case is that if he procreates, the Court has

made it illegal. There is no statute, state or federal, that makes conception a crime. There is no relation between the condition and prevention of a crime.

The Trial Court pointed to the rehabilitation of the Defendant. This should be an area where the wisdom of a court is required to achieve specific benefits. The Court did not discuss alternatives to the order. The rehabilitative nature of an order must not run afoul of the Constitution.

The Supreme Court of Wisconsin analyzed the question in State v. Oakley (2001), 245 Wis.2d at 454, with the dissent citing that: "the procreation condition failed to achieve a rehabilitative purpose and that less restrictive measures were available to the court". Appellant also recognizes the intrusion on his right to privacy and enumerated in State v. Mosburg (1989), 13 Kan.App.2d 257, 260. In the Mosburg case, the defendant was ordered to not conceive during her probationary period as a result of a child endangering. The Court felt that the intrusion would not withstand strict scrutiny.

The right to procreate is fundamental regardless of whether or not one is on probation. Strict scrutiny is the correct test as such when framing the question of reasonableness and employment of the narrowest denial of a fundamental right. In Talty, the Court rejected the "Grace of God" notion placing one on a community control sanction that was the cornerstone of the Oakley decision. Once an individual is determined to be appropriate for community control sanctions, those sanctions cannot deny a fundamental right simply as an alternative to prison.

A. The Supreme Court has identified numerous fundamental rights which are not listed in the Constitution but still are subject to strict scrutiny

When infringement upon fundamental rights are in question, the United States Supreme Court designated a strict scrutiny analysis be used to determine if it is appropriate. San Antonio Independent School District v. Rodriguez (1973), 411 U.S. 1, 17. What constitutes a

fundamental right has evolved throughout our country's history. In Moore v. City of East Cleveland, Ohio (1977), 431 U.S. 494,503, the Court held that fundamental rights "are deeply rooted in this Nation's history and tradition". The rights also provide "a scheme of ordered liberty." Palko v. Connecticut (1937), 302 U.S. 319, 325.

As the facts of the case at bar provide an examination of rights to procreate, Taylor points to the holding in Skinner v. State of Okl. (1942), 316 US 535. In this case, an Oklahoma statute was examined that required sterilization of anyone "convicted of crimes of moral turpitude". In Skinner, the right to procreate was designated a fundamental right. The court in Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L.ed. 2d 349 (1972) made clear the notion "any" individual, single or married has the right to decide whether or not to have a child and that right is to be free of government infringement". Eisenstadt at 453.

In the present case, as procreation is a fundamental right, the probation condition certainly cannot stand. Procreation is one of the most sacred liberties in our society. Any condition or order from a court that destroys that right to privacy is unconstitutional. Eisenstadt extends these rights beyond the marital relationship and stands for the proposition that a person is free to procreate and use birth control regardless of whether the person is married. The court-imposed order strips not only Mr. Taylor of his right to procreate, but it also strips the rights of any women with whom Mr. Taylor may be involved. If the probation condition stands, the court would indirectly burden another innocent individual's rights. See, also, Note, Court-Ordered Contraception: Norplant as a Probation Condition in Child Abuse (1992), 44 Fla.L.Rev. 379 [reviewing the right to procreate, its limits, and use as a probation condition].

Other rights deemed fundamental by the Supreme Court include the right to direct the education and upbringing of one's children, Meyer v. Nebraska (1923), 262 U.S. 390; to marital

privacy and to use contraception, Griswold v. Connecticut (1965), 381 U.S. 479; to bodily integrity, Rochin v. California (1952), 342 U.S. 165; and to abortion, Planned Parenthood v. Casey (1992), 505 U.S. 833.

B. If the Court views a probationer's rights as limited, the order fails under the Jones three-part test.

The Supreme Court of Ohio considered whether it was constitutional to order married individuals to have no contact while the defendant was on Community Control Sanctions in State v. Conkle, 129 Ohio App.3d at 179. The court used the rational basis test put forward in State v. Jones (1990), 49 Ohio St.3d 51. The Jones three-part test considers whether the condition "(1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation." Jones at 53.

The defendant in Conkle was charged with domestic violence and was ordered to stay away from his wife, the victim. Relying on the Jones three-part test, the Court in Conkle noted the "trial court has broad discretion to fashion the conditions of probation." State v. Conkle, 129 Ohio App.3d at 179, citing State v. Donnelly (1996), 109 Ohio App.3d 604.

In applying the three-part test to Appellant Taylor and the order to avoid impregnating women, the order fails based on the fact that Appellant Taylor was not being charged with having children; but with not following a court order to support them. The lack of a direct relation to the harm caused, coupled with a number of other means to force adherence to the court order of support, shows this order fails the three-part test. This differs from Conkle as the victim was directly protected by the order which would prevent future crime against her by denying contact. One direct relation between contact and the crime in Conkle allows the order to withstand the Jones test based on contact and the crime being directly related.

While Appellant Taylor insists that the trial court's probation conditions would not stand under the Jones three-part test, he argues that the conditions should be reviewed under a strict scrutiny standard as it directly impacts a fundamental right.

C. The Trial Court, by requiring that the Appellant prove to the Court his ability to provide support for his children infringed upon his Constitutional right in violation of the Equal Protection Rights.

As referenced earlier, the court was given information about Mr. Taylor's efforts to obtain employment and support his children. His inability to pay support is not voluntary. In Oakley, the Wisconsin Supreme Court held that a probationer's rights as they pertain to procreation should be viewed under the Jones three-part test which considers whether the condition "(1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation." Jones at 53. In a subsequent ruling on the same case, [motion to reconsider] the court held that Oakley's non-payment was completely voluntary on his part, in other words, it was not that he could not pay. In previous court appearances, Mr. Oakley demonstrated that he refused to pay for the nine children he fathered. It should be noted that in the case at bar, Justice Hensal's assessment that Mr. Taylor has demonstrated a long-term refusal to pay child support is incorrect. Mr. Taylor is unable to pay child support whereas in the Oakley court, Mr. Oakley refused to pay his child support.

Mr. Taylor also suggests that he is being denied a fundamental right based on the notion that he is in a particular financial situation. The case at bar could result in his imprisonment and there is a mechanism by which that could happen. The trial court cited a specific fundamental right that the law allows to be curtailed; the right to own a weapon. Tr. 15. The Appellant does

not disagree, but points out that this right is directly impacted by both state and federal legislation, and provides a method to alleviate the restriction if certain criteria are met, and none are based on the movant's financial well-being.

In Williams v. Illinois, (1970), 399 U.S. 235, a defendant could not be imprisoned based on an inability to pay. In this instance, the court held the denial of a fundamental right regardless of the offender's criminal status was impermissible. Mr. Taylor notes there are exceptions. The court in San Antonio Independent School District v. Rodriguez (1973), 411 U.S. 1, would not recognize the "poor" as a specific enough class to apply the equal protection of the law. Mr. Taylor asserts in his specific instance, he has been deemed too poor by the trial court to procreate. Mr. Taylor sees this issue, as simply put, that one would be offended if a court told Mr. Taylor, you are too poor to be a Christian, Muslim, or Jewish. The denial of a fundamental right requires the law to jump up and require the absolute narrowest infringement upon it, if at all, to achieve a legitimate state interest. The holding in Skinner adds the right to procreate to the list of those rights requiring strict scrutiny. The observation of Skinner's holding combined with the equal protection regardless of "class" if one is either poor or a convict, makes no difference. The trial court mentioned, at length, Mr. Taylor's financial situation and directly tied Mr. Taylor's right to procreate on his net worth, ignoring the Ohio Supreme Court in Talty.

While the majority decision cites the lack of a Presentence report to get the merits, Justice Hensal examines the situation affirming the trial court's order. In examining Justice Hansel's analysis, it reveals a limited view of a broader problem. The first is the automatic application of the Jones test over a strict scrutiny analysis. One argument that is overlooked is the notion that the duration of the sanction could potentially exceed the maximum amount of time this Court could imprison the probationer. The court, if given the ability to curtail significantly the right to

procreate, invites the potential for judicial abuse in light of the unpopularity of an individual who fails to provide adequate care for their offspring. Judges need to consider the religious infringements, right to associate, other reproductive decisions, other affected individuals, and not just concern themselves with the structure of the order, but how it may be applied in regards to equal protection considerations. So, addressing the concurring decision allowing such an order to stand really requires the court to consider all the factors starting with the Right to Privacy.

However, if assuming strict scrutiny does not apply, please revisit Justice Black's dissent from Griswold v. Connecticut (1965), 381 U.S. 479:

> "The due process argument which my Brothers HARLAN and WHITE adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this Court's belief that a particular state law under scrutiny has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." If these formulas based on "natural justice," or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous."

The Right to Privacy has been recognized by the U.S. Supreme Court as a fundamental right in Griswold v. Connecticut. The language of the decision, as well as that of the dissent is profound and almost sounds as if justices felt ashamed that they had to dirty their hands with the emanation of the affects of a Connecticut statute that forbade the use of contraceptives. The court all felt the notion was abominable in the different ways this law attacked several "fundamental Constitutional guarantees". The decision put forthwith by the majority cites the Constitutional protections of the First, Third, Fourth, Fifth and Ninth Amendments when constricting the right to privacy. While Justice Hensal is correct, no one particular right supersedes another. The

Appellant hardly believes that he can trade half of the original Bill of Rights for a probationary term and all conditions contained therein for longer than Community Control Sanctions then he could be incarcerated by the court. It is under this analysis that the right to privacy, regardless of who invokes it deserves to be examined under strict scrutiny. Justice Hensal stated:

> "Trial courts enjoy broad discretion in fashioning community control sanctions, but that discretion is not boundless. See State v. Jones, 49 Ohio St.3d 51, 52 (1990). See also State v. Talty, 103 Ohio St.3d 177, 2004-Ohio-4888, ¶ 16. A trial court must determine community control conditions with reference to the purposes of community control and the circumstances of the underlying case. See Talty at ¶ 12. In so doing, "courts must 'consider whether the condition (1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation.'" *Id.*, quoting Jones at 53. When an appellant challenges the reasonableness of community control conditions, this Court must determine whether the trial court abused its discretion with these considerations in view. Talty at ¶ 10-12. As the Ohio Supreme Court clarified in Talty, Jones addressed nonconstitutional challenges to community control conditions. Talty at ¶ 11."

Assuming Jones is appropriate here, let us consider the overbroad nature of the order. Justice Hensal also stated that:

> "The lower court found that the circumstances for lifting the condition of Taylor's procreation rights, coupled with the requirement that Taylor merely "make all reasonable efforts to avoid impregnating a woman" and not that he ensure that he does not impregnate a woman, narrowly limit, rather than terminate, his procreation rights."

The order leaves too many legitimate interests at issue. This order does not contemplate Mr. Taylor's relationships insofar as it may require a woman to be forced to make a decision whether or not to see a pregnancy to its full term or potentially see Mr. Taylor go to prison. The order remains vague. Does the order mean that if Mr. Taylor gets a job earning minimum wage and a small portion of those wages are applied to his support obligation, the order will be lifted? If Mr. Taylor becomes involved with a woman who can afford to raise a child and wants to have

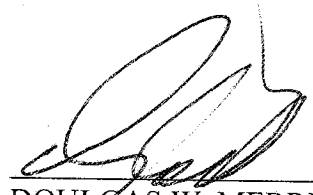
a child with him, is the order lifted?

Is "future criminality" assumed if Mr. Taylor obtains a well-paying job, becomes involved in a relationship, has a child with her and supports that household and makes an effort to support his other children, but falls grossly short?

Is it "future criminality," based on debt, or based on having a child while on probation, with this order in place.

CONCLUSION

For the foregoing reasons, this felony case raises a substantial constitutional question, and involves matters of public and great general interest. Appellant requests that this court accept jurisdiction in this case so that this important issue will be reviewed on the merits.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief and Assignments of Error was served upon the Office of the Lorain County Prosecutor, 225 Court Street, 3rd Floor, Elyria, Ohio, 44035, this 25 day of June 2014.

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APPENDIX

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

ASIM J. TAYLOR

Appellant

C.A. Nos. 13CA010366
13CA010367
13CA010368
13CA010369

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE Nos. 11CR083327
11CR083328
11CR083329
11CR083330

DECISION AND JOURNAL ENTRY

Dated: May 12, 2014

MOORE, Presiding Judge.

{¶1} Appellant, Asim Taylor, appeals the judgment of the Lorain County Court of Common Pleas that sentenced him to community control for failure to pay child support. This Court affirms.

I.

{¶2} Mr. Taylor failed to pay child support with respect to his four children, resulting in an arrearage. He pleaded guilty to four charges of felony nonpayment of child support, and the trial court sentenced him to five years of community control. Over Mr. Taylor's objection, the trial court imposed the condition that Mr. Taylor "make all reasonable efforts to avoid impregnating a woman during the community control period or until such time that [he] can prove to the Court that he is able to provide support for his children he already has and is in fact

supporting the children or until a change in conditions warrant the lifting of this condition." Mr. Taylor filed this appeal challenging the community control condition.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT INFRINGED [MR.] TAYLOR'S DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION AND ARTICLE I, SECTIONS ONE, TWO AND SIXTEEN OF THE OHIO CONSTITUTION AND [MR.] TAYLOR'S RIGHT TO PRIVACY UNDER THE NINTH AMENDMENT TO THE CONSTITUTION AND ARTICLE I, SECTION TWENTY OF THE OHIO CONSTITUTION WHEN IT IMPOSED A PROBATION CONDITION ON [MR.] TAYLOR TO TAKE REASONABLE STEPS TO AVOID CONCEIVING ANOTHER CHILD WHILE HE IS ON PROBATION. SINCE THIS PROBATION CONDITION INFRINGED ON MR. TAYLOR'S FUNDAMENTAL RIGHTS, THE COURT SHOULD HAVE FIRST DETERMINED THE REASONABLENESS OF THE CONDITION UNDER A RATIONAL BASIS TEST AND THEN APPLIED STRICT SCRUTINY ANALYSIS TO DETERMINE IF THE CONDITION WAS OVERBROAD. UNDER STRICT SCRUTINY ANALYSIS, THIS CONDITION VIOLATES [MR.] TAYLOR'S CONSTITUTIONAL RIGHTS TO PRIVACY, DUE PROCESS, AND EQUAL PROTECTION.

{¶3} Mr. Taylor's single assignment of error argues that the condition attached to his community control sanction is unreasonable and unconstitutional. Because Mr. Taylor did not provide this Court with the record considered by the trial court in connection with his sentencing, however, we are unable to review the merits of his assignment of error.

{¶4} Trial courts enjoy broad discretion in fashioning community control sanctions, but that discretion is not boundless. *See State v. Jones*, 49 Ohio St.3d 51, 52 (1990). *See also State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, ¶ 16. A trial court must determine community control conditions with reference to the purposes of community control and the circumstances of the underlying case. *See Talty* at ¶ 12. In so doing, "courts must 'consider whether the condition (1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of

which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation.'" *Id.*, quoting *Jones* at 53. When an appellant challenges the reasonableness of community control conditions, this Court must determine whether the trial court abused its discretion with these considerations in view. *Talty* at ¶ 10-12. As the Ohio Supreme Court clarified in *Talty*, *Jones* addressed nonconstitutional challenges to community control conditions. *Talty* at ¶ 11.

{¶5} Few cases analyze the constitutional implications of similar community control conditions, however, and the parties' analysis diverges at this point. Mr. Taylor seems to maintain that constitutional challenges implicating fundamental rights should be subject to a hybrid level of analysis that incorporates strict scrutiny review into *Jones.* The State, on the other hand, argues that whether or not fundamental rights are implicated, this Court should review the community control condition for an abuse of discretion under the guidance provided by *Jones.* We need not resolve the issue at this time, however, because either analysis requires this Court to examine the circumstances surrounding the trial court's imposition of community control, and Mr. Taylor has not provided us with a record adequate to complete this review.

{¶6} When an appellant does not provide a complete record to facilitate our review, we must presume regularity in the trial court's proceedings and affirm. *State v. Jalwan*, 9th Dist. Medina No. 09CA0065-M, 2010-Ohio-3001, ¶ 12, citing *Knapp v. Edwards Labs.*, 61 Ohio St.2d 197, 199 (1980). Consequently, when the contents of a presentence investigation report are necessary to review the appropriateness of a sentence, an appellant must move to supplement the record on appeal with the report to enable our review. *See State v. Banks*, 9th Dist. Summit No. 24259, 2008-Ohio-6432, ¶ 14.

{¶7} The absence of the presentence investigation report leaves this Court with little to consider. Because Mr. Taylor pleaded guilty, there is no trial record before us, and but for vague references to consideration of the presentence investigation, the record of sentencing is minimal. Indeed, we have little to go on other than what the trial court said in its journal entries, which is itself limited. We therefore have no choice in this case but to presume the regularity of the community control sanctions and to affirm. *See Banks* at ¶ 14.

{¶8} Mr. Taylor's assignment of error is overruled.

III.

{¶9} Mr. Taylor's assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

HENSAL, J.
CONCURS.

CARR, J.
CONCURRING IN JUDGMENT ONLY.

{¶10} Taylor owes almost $100,000.00 in arrearages for back child support for four children by four different women, and he pleaded guilty to four felony charges of failure to pay child support. Based on the facts in the record, I would uphold the trial court's community control condition.

{¶11} For context, the condition imposed by the trial court reads in full, as follows:

> Defendant is ordered to make all reasonable efforts to avoid impregnating a woman during the community control period or until such time that Defendant can prove to the Court that he is able to provide support for his children he already has and is in fact supporting the children or until a change in conditions warrant the lifting of this condition.

{¶12} The trial court found that this condition was reasonably related to rehabilitating Taylor, had a relationship to the crimes committed, and served the statutory ends of community control. This Court has previously upheld this type of condition. In *State v. Talty*, 9th Dist. Medina No. 02CA0087-M, 2003-Ohio-3161, we held that the community control condition that required Talty to use reasonable efforts to avoid conceiving another child was constitutional. *Id.* at ¶ 34. Although the Ohio Supreme Court accepted a discretionary appeal and reversed, it did not strike down antiprocreation conditions per se. *State v. Talty*, 103 Ohio St.3d 177, 2004-

Ohio-4888. Instead, it examined the condition and held that, by its specific terms, it was overly broad on nonconstitutional grounds because it did not contain any provision for lifting the proscription against procreation even if Talty became current on his child support payments. *Id.* at ¶ 21, 25.

{¶13} The leading case relating to community control conditions limiting the right to procreate was decided by the Supreme Court of Wisconsin in 2001. In *State v. Oakley*, 245 Wis.2d 447, 2001 WI 103, the court upheld a condition of probation that limited Oakley's freedom to procreate. The condition prohibited Oakley from having any more children during the five-year term of probation unless he could demonstrate that he had the ability to support the new children and that he was supporting the children he already had. *Id.* at ¶ 6. The Wisconsin high court concluded that the trial court properly exercised its discretion in crafting an individualized condition that was not overly broad, that reasonably furthered the objectives of rehabilitation, and that served to protect both society and potential victims from future wrongful conduct. *Id.* at ¶ 1, 13 (further citing at ¶ 10 the long term consequences of a parent's failure to support "such as poor health, behavioral problems, delinquency and low educational attainment, * * * [and] childhood poverty.").

{¶14} The Wisconsin Supreme Court recognized that "convicted individuals do not enjoy the same degree of liberty as citizens who have not violated the law." *Id.* at ¶ 17, citing *State v. Evans*, 77 Wis.2d 225, 230 (1977) (asserting that "liberty enjoyed by a probationer is, under any view, a conditional liberty" and that a probationer's "position is not that of a non-convicted citizen"). The high court reasoned, therefore, that "'conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related

to the person's rehabilitation.'" *Oakley* at ¶ 19, quoting *Edwards v. State*, 74 Wis.2d 84-85 (1976).

{¶15} Bearing in mind the societal interests and the discretion retained by the trial court in crafting a sentence that reflects the gravity of the offense, protects the public and potential victims, and facilitates rehabilitation, the Wisconsin Supreme Court upheld the antiprocreation order as valid based on the trial judge's familiarity with the egregious facts of the case. In that case, the trial court was aware of Oakley's history of refusing to support his nine children despite having been employed and being able to work. *Id.* at ¶ 14. Those facts, coupled with the limitations on the duration of the condition, resulted in a condition of probation that was held not to be overly broad. *Id.* at ¶ 20. For example, the condition would expire upon the termination of the probation period, or sooner if Oakley could demonstrate that he was no longer intentionally refusing to support his children, making it narrowly tailored to serve the purposes enunciated above. *Id.*

{¶16} In discussing the *Oakley* decision, the Ohio Supreme Court determined that the antiprocreation provision in that case differed significantly from the condition in *Talty* because "the antiprocreation condition in *Oakley* included the stipulation that the court would terminate the condition if the defendant could prove to the court that he had supported his children." *Talty* at ¶ 19. Although the Ohio Supreme Court did not reach the issue of whether a provision within the antiprocreation condition supporting the lifting of the condition would have rendered the condition valid, it did not foreclose that possibility. *Id.* at ¶ 21. As I earlier noted, although the high court invalidated the antiprocreation condition as overbroad on nonconstitutional grounds, it did not hold such antiprocreation conditions invalid per se. In fact, the high court in *Talty* merely held the community control condition specific to that case to be nonconstitutionally

overly broad within the context of the probationary goals of "doing justice, rehabilitating the offender, and insuring good behavior" because of the lack of any limitations on the condition, save for the term of the probationary period. *See id.* at ¶ 12. Therefore, the viability of this Court's decision regarding the constitutionality of antiprocreation conditions stands, as the Ohio Supreme Court did not strike down that conclusion.

{¶17} As to the considerations in this case, I disagree with the majority's conclusion that the absence of the presentence investigation report from the record prevents us from substantively reviewing the issue. A sentencing hearing was held wherein the trial court addressed the egregious facts in this case, just as in *Oakley*. The record provides the necessary insight into the facts and circumstances to allow me to conclude that Taylor's conduct rises to a level warranting imposition of a narrowly crafted antiprocreation order. Taylor was convicted for failing to pay child support for four children. From the record, we know that one child was 17 years old and another was 15 at the time of sentencing, although the ages of the other two children were not mentioned. From the sentencing hearing, we learn that there were four children from four different mothers and that Taylor was unmarried. At the time of the indictment, Taylor owed arrearages in the respective amounts of $29,555.00, $27,639.90, $10,807.14, and $10,920.08 for the children, for a total arrearage amount of $78,922.12. He was indicted for failing to pay support for a two-year period from June 1, 2009 through June 1, 2011. As of the date of sentencing, Taylor's arrearages had grown to $96,115.24, indicating his continued refusal to pay child support notwithstanding the filing of four felonies against him. In fact, the sentencing court noted that "we haven't gotten any payments in a year" since the case was initiated. The trial court referenced the presentence investigation report, noting that it "indicates that he's at least out there earning some money. He has some jobs somewhere or is

doing some kind of work. Once again, we are not receiving anything." Next, the record is clear that Taylor had retained private counsel to represent himself in the case below, indicating his ability to pay his legal fees in defense of his failure to pay support for his children. Finally, when asked by the trial court whether he would like to make a statement, Taylor declined and remained silent for the entirety of the hearing. Accordingly, he showed no remorse and offered nothing in mitigation of his failure to support his children. Defense counsel argued that the community control condition was unconstitutional but did not dispute any of the facts relied on by the trial court.

{¶18} Given the number of children by multiple mothers, the high amount of the arrearages, Taylor's ability to work, the fact that he was actually earning enough money to retain counsel below, his continued refusal to make any payments toward the support of his children notwithstanding his notice of the charges against him, and his complete lack of remorse or justification for his actions, I would conclude that an antiprocreation condition of community control was not unwarranted under these facts. Moreover, I would conclude that the condition was narrowly tailored to serve the purposes of community control.

{¶19} The majority cites the considerations relevant to a determination of whether a condition of community control comports with both the purposes of community control and the circumstances of the underlying case. *See State v. Talty*, 2004-Ohio-4888, at ¶ 12. Those considerations include whether the condition "(1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation." *Id.*, quoting *State v. Jones*, 49 Ohio St.3d 51, 53 (1990). In addition to those considerations regarding the reasonable relationship between the condition and

the statutory goals of community control, the high court held that the condition must not be overbroad. *Talty* at ¶ 16, construing *Jones*. Moreover, the *Talty* court recognized that the conclusions that the condition is reasonable and that the condition is not overbroad are necessarily intertwined. ¶ 14.

{¶20} At the end of the day, the *Talty* court seems to have premised its conclusion that the antiprocreation condition was overbroad on a finding that the condition was not reasonably related to rehabilitating the offender. I reach this conclusion because the plain language of the condition did not provide for its modification or abatement even if Talty embraced his responsibilities as a parent and became current in his child support obligation. Moreover, the high court couched its analysis within the context of Talty's argument that, notwithstanding any future full compliance with his support orders, evidencing his rehabilitated attitude of embracing parental responsibility, he would not be free from the condition restricting his right to procreate. On the other hand, Talty neither argued nor did the Supreme Court dispute that the antiprocreation condition had some relationship to the crime of nonsupport and was reasonably related to future criminality in that the birth of future children would necessarily implicate the need for future support.

{¶21} In this case, I would conclude that there is a relationship between a prohibition against the creation of additional children who will require support and the failure to pay support for children already in existence. In addition, where, as here, the defendant has demonstrated a long-term refusal to support multiple children by multiple women notwithstanding his ability to work and contribute something for their care, an antiprocreation condition is reasonably related to future criminality. Taylor has here demonstrated that he is not inclined to support any of his children. There is no reason to believe that he would be inclined to support any future children.

The relevant question in this case, then, is whether the condition was narrowly tailored to be reasonably related to Taylor's rehabilitation.

{¶22} In analyzing this point, I would reject Taylor's argument that this community control condition is subject to a strict scrutiny review. Ohio courts have rejected the application of a strict scrutiny analysis to probation conditions affecting fundamental rights. *E.g., State v. Conkle*, 129 Ohio App.3d 177, 179 (9th Dist.1998) (recognizing the application of the three-prong test in *Jones, supra*); *State v. Livingston*, 53 Ohio App.2d 195, 197 (6th Dist.1976). Notably, the Ohio Supreme Court in *Jones* did not engage in a strict scrutiny analysis of the validity of a condition of probation that affected Jones' fundamental right to free association. Instead, the high court analyzed the issue under an abuse of discretion standard of review in consideration of three factors from *Jones*, enumerated above. Given that Ohio courts have consistently reviewed the propriety of community control conditions for an abuse of discretion, and have not applied a strict scrutiny analysis, I would analyze the instant condition likewise. Moreover, as the dissent in *Talty*, 2004-Ohio-4888, at ¶ 35 (Pfeifer, J., dissenting), recognized, persons who have been convicted and placed on community control enjoy only conditional liberty, further supporting the conclusion that a strict scrutiny analysis is not implicated in these types of cases. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987); *State v. Benton*, 82 Ohio St.3d 316, 318 (1998); *United States v. Hughes*, 964 F.2d 536 (6th Cir.1992). Furthermore, the analysis should not change depending on the fundamental right implicated. There is, after all, no super fundamental right relating to procreational interests.

{¶23} In this case, the trial court heeded the lesson in *Talty* and crafted a condition of community control that expressly created a mechanism via two avenues under which the proscription against procreation could be lifted. *See Talty* at ¶ 20. First, the condition would

terminate as soon as Taylor began supporting his existing four children and could prove to the sentencing court that he was able to continue providing support. In other words, if he could effectively demonstrate that he had come to appreciate his responsibility to support his children, i.e., that he was rehabilitated, the limitation on his right to procreate would be lifted. Second, the antiprocreation condition would terminate upon "a change in conditions warrant[ing] the lifting of this condition." This encompasses a broad spectrum of circumstances such as Taylor's incapacity to work, a good faith effort to pay support, marriage, or the termination of his parental rights as to some or all of his existing children. These circumstances for lifting the condition, coupled with the requirement that Taylor merely "make all reasonable efforts to avoid impregnating a woman" and not that he ensure that he does not impregnate a woman, narrowly limit, rather than terminate, his procreation rights. I believe that these mechanisms for lifting the condition provide "easy alternative[s] that [] have better accommodated [Taylor's] procreation rights at de minimis costs to the legitimate probationary interests of rehabilitation and avoiding future criminality." *See Talty* at ¶ 21. Accordingly, I would substantively overrule Taylor's assignment of error and affirm the trial court's judgment.

APPEARANCES:

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