

OPINION NO. 73-070

Syllabus:

1. Under R.C. 2947.061, the trial court must grant or deny a motion for "shock" probation within the 10-day period imposed, and may not continue such motion beyond such period.
2. After the expiration of the 10-day time period imposed by R.C. 2947.061, the trial court loses jurisdiction over the

subject matter and over the person of the defendant and may neither vacate nor set aside its ruling granting or denying a motion for "shock" probation under that Section.

3. The filing of a motion for "shock" probation subsequent to sentencing does not limit the jurisdiction of the Adult Parole Authority over the defendant.

To: J. Walter Dragelevich, Trumbull County Pros. Atty., Warren, Ohio
By: William J. Brown, Attorney General, July 13, 1973

I have your request for my opinion which reads as follows:

1. Does Ohio Revised Code Section 2947.061 make it mandatory on the sentencing Judge to enter a final ruling either granting or denying the defendant's motion within the time provided, or can "case continued" be construed to mean a "ruling" as required by said section.

2. After the Court "enters its ruling" pursuant to Ohio Revised Code Section 2947.061, can the Court at some subsequent time vacate or set aside said ruling and grant the original motion.

3. At what period of time, if at all, does the Court of Common Pleas lose total jurisdiction over a criminal defendant after the defendant has been sentenced.

4. Will the filing of a motion under Ohio Revised Code Section 2947.061 limit the jurisdiction of the Ohio Adult Parole Board, or will both the sentencing Common Pleas Court and the Ohio Adult Parole Board have concurrent jurisdiction regarding the status of a defendant.

R.C. 2947.061, the "shock probation" statute, reads as follows:

Subject to sections 2951.03 to 2951.09 inclusive, of the Revised Code, the trial court may, upon motion of the defendant made not earlier than thirty days nor later than sixty days after the defendant, having been sentenced, is delivered into the custody of the keeper of the institution in which he is to begin serving his sentence, or upon the court's own motion during the same thirty-day period, suspend the further execution of the sentence and place the defendant on probation upon such terms as the court determines, notwithstanding the expiration of the term of court during which such defendant was sentenced.

The court shall hear any such motion within sixty days after the filing date thereof and shall enter its ruling thereon within ten days thereafter.

The authority granted by this section shall be exercised by the judge who imposed such sentence, unless he is unable to act thereon and it appears that his inability may reasonably be expected to continue beyond the time limit for such action. In such case, a judge of such court or assigned thereto may dispose of a motion filed under this section, in accordance with an assignment of the presiding judge, or as prescribed by the rules or practices concerning responsibility for disposition of criminal matters.

In Opinion No. 70-089, Opinions of the Attorney General for 1970, my predecessor analyzed the purpose of R.C. 2947.061, as follows:

The purpose of Section 2947.061, supra, is to enable a common pleas court to place a first offender in prison to insure that he becomes aware of the penalty that may be paid by a convicted felon and then, after the felon has had an opportunity to understand fully what prison life is, to suspend the prison sentence and place him on probation.

Your first three questions may be answered on the basis of the recent decision of Dallman v. Court, 32 Ohio App. 2d 102 (1972). Because it is closely on point, I will quote at length from it. The syllabus holds as follows:

1. Statutory authority for suspension of execution of sentence must not only be specific in its terms but must also be strictly construed.
2. Under R.C. 2947.061 the Legislature has prescribed by mandatory words (1) that the period of time for filing a motion for "shock" probation begins not earlier than thirty days and expires not later than sixty days after the sentenced defendant is delivered into the custody of the keeper of the institution in which he is to begin serving his sentence, (2) that the period of time for hearing the motion begins on the date of filing and expires sixty days thereafter, and (3) that the period of time for a ruling thereon (when hearing has been had) begins on the date of hearing and expires ten days thereafter.
3. The time period for granting "shock" probation is mandatory and it may not be granted by a trial court beyond the ten day period following a hearing on a motion for same.
4. At the expiration of the ten day period for granting probation prescribed by R.C. 2947.061, the trial court loses its jurisdiction over the subject matter and

over the person of the defendant and any attempt by the trial court thereafter by virtue of that statute to suspend execution of sentence, grant probation, or order the defendant's release from his penal custodian is wholly void and no legal effect. In such circumstances prohibition will lie to prohibit such attempted judicial act.

In Dallman v. Court, a motion for "shock" probation was filed within the 60 day time limit imposed by R.C. 2947.061, and denied. 3 months later, a motion for reconsideration was filed, heard, and the trial court decided to suspend further execution of defendant's sentence. 32 Ohio App. 2d 103. In an original action for prohibition, the court of appeals held that the trial court was without jurisdiction to grant "shock" probation after the expiration of the 10 day time limitation, during which the trial court is required by R.C. 2947.061 to "enter its ruling".

The court stated its reasoning on 32 Ohio App. 2d 107-109, providing a good discussion of the proper construction of R.C. 2947.061, as follows:

Looking then to the provisions of R.C. 2947.061, we find that the General Assembly has prescribed by mandatory words (1) that the period of time for filing a motion for "shock" probation begins not earlier than thirty days and expires not later than sixty days after the sentenced defendant is delivered into the custody of the keeper of the institution in which he is to begin serving his sentence, (2) that the period of time for hearing the motion begins on the date of filing and expires sixty days thereafter, and (3) that the period of time for a ruling thereon (when hearing has been had) begins on the date of hearing and expires ten days thereafter.

In the instant case, it is of course evident that all of these periods of time were complied with as to the filing of the original motion for probation, the hearing thereof, and the ruling thereon denying the same, but the respondent claims that the authority existed to reconsider and reverse the ruling after the expiration of the ten-day period on motion for reconsideration filed within the same term of court in which the ruling was made.

Obviously courts have been held to have some general inherent powers to reconsider and reverse judgments and orders when the motion for reconsideration is made within the same term as that in which the judgment or order is rendered. Essentially, however, these general inherent powers are exercised to correct a judgment

or order resulting from a prejudicially erroneous conclusion of law or fact or error in procedure. Here, the judgment or order contemplated by statute following a hearing on a motion for "shock" probation involves the unfettered exercise of judicial discretion in determining whether probation shall be granted, such probation being a matter of grace and clemency and not a matter of right. The propriety of the court's conclusion arising from such exercise of discretion is not reviewable, although its right to exercise such discretion would be. State v. Poffenbaugh, 14 Ohio App. 2d 59, 43 O.O. 2d 191. In this case, where there was first a denial of probation, the motion for reconsideration could not have pertained to the authority of the court to exercise discretion or to prejudicial error in its exercise but could merely be an appeal to the court to exercise it in a different manner by granting probation. In practical, as well as legal, effect the defendant is making a second motion for "shock" probation at a time beyond which such motion may be made.

Moreover, the General Assembly, by the plain intendment of the words of the statute, as well as by the implication arising from its amendment following the decision in State v. Allison, supra (14 Ohio App. 2d 55), has effectively prescribed that any general power to entertain a motion for reconsideration is overcome by the specific limitations of R.C. 2947.061, limiting a ruling granting "shock" probation to the ten-day period following the hearing of a motion therefor. Such legislative enactment coupled with such legislative intent, and giving due effect to the separation of judicial and executive power, make us conclude that the provisions are mandatory and that "shock" probation may not be granted by a trial court after such ten-day period, either pursuant to motion for reconsideration or otherwise. When the ten-day period expires the trial court loses jurisdiction over the subject matter as well as the person, and any further attempt to grant such probation is void. Release from confinement following such period of time, except where a sentence has expired, is void ab initio, or is reversed and set aside through appeal, is left to the executive branch and the pardon and parole process.

(Emphasis added.)

The foregoing discussion provides specific answer to your second and third questions. After the expiration of the 10 day period, the trial court loses jurisdiction over the defendant and subject matter for purposes of "shock" probation. It cannot subsequently vacate or set aside its ruling.

Your first question is not directly answered by Dallman v. Court, supra, but the answer is indicated. The court states at 32 Ohio App. 2d 108 that "'shock' probation may not be granted by a trial court after such ten-day period, either pursuant to motion for reconsideration or otherwise." (Emphasis added.) To allow a trial court to delay its action beyond the 10-day period would circumvent that limitation. Such a construction of the statute would hardly be a strict one. (See the first branch of the syllabus of Dallman v. Court, supra.)

Moreover, the syllabus of State v. Orris, 26 Ohio App. 2d 87 (1971), holds as follows:

The holding of a hearing on a motion for probation after thirty days of sentence has been served pursuant to R.C. 2947.061 is discretionary with the trial court, and failure to conduct an oral hearing upon such a motion is not a denial of due process of law, the only mandatory requirement of R.C. 2947.061 being that the disposition of the motion be within certain specified time limits.

In restating the time limitation, the court revealed its view that the motion must be granted or denied, not continued. A motion is not "disposed of" by a continuance.

Finally, I note that R.C. 2947.061 provides, in its last paragraph, a procedure for assigning the motion to another judge if the trial judge is unable to act thereon and "it appears that his inability may reasonably be expected to continue beyond the time limit for such action." If the judge could postpone his decision beyond the 10-day period, such a procedure would probably be unnecessary.

In answer to your fourth question, I quote the following discussion of the relationship between "shock" probation and ordinary probation and parole procedures, found in State v. Orris, supra, at 26 Ohio App. 2d 88:

It must be noted that R.C. 2947.061 provides that the delayed probation arrangement is subject to R.C. 2951.03 through R.C. 2951.09, which sections provide for the procedure for probation, eligibility for probation, and the control and supervision of persons placed on probation. The relatively new sections, providing that a trial court "may" upon motion of the defendant, or upon its own motion, suspend execution of a sentence, are an adjunct to and a part of the ordinary probation procedures.

In the case of State v. Allison, 14 Ohio App. 2d 55 (1968), it was held that a court's power to grant "shock" probation did not impinge upon the authority of the Adult Parole Authority. At the time, R.C. 2947.061 did not contain the 10-day limitation on the trial court's ruling, which was added by amendment in 1969 (133 Ohio Laws, 2493). See the discussion in Dallman v. Court, supra. The court held, in the second branch of the syllabus, as follows:

Section 2947.061, Revised Code, does not limit or restrict the plenary discretion of the Common Pleas Court; and a ruling on a motion timely filed under the provisions of such section some six months after the filing thereof is not an abuse of discretion, nor is such ruling made in an unreasonable time, or impinge on or usurp the authority vested in the Ohio Adult Parole Authority.

The court briefly stated its reasoning at 14 Ohio App. 2d 58, as follows:

Coming to consider the third question posed by the prosecuting attorney's exceptions, in the opinion in the Mead case it is stated that one of the intended functions of the law was to relieve, in part, the burden of the state parole board. It may be concluded that there is no impingement on or usurpation of the authority vested in the Ohio Adult Parole Authority.

(The reference is to State v. Head, 6 Ohio Misc. 157 (1966).) On the basis of the foregoing, I conclude that R.C. 2947.061 does not limit the jurisdiction of the Adult Parole Authority, and that the trial court and the Authority have concurrent jurisdiction over the defendant. However, the overlap is much less extensive than it was at the time of State v. Allison, supra, because of the 10-day limitation imposed subsequently.

In specific answer to your questions, it is my opinion and you are so advised, that:

1. Under R.C. 2947.061, the trial court must grant or deny a motion for "shock" probation within the 10-day period imposed, and may not continue such motion beyond such period.
2. After the expiration of the 10-day time period imposed by R.C. 2947.061, the trial court loses jurisdiction over the subject matter and over the person of the defendant and may neither vacate nor set aside its ruling granting or denying a motion for "shock" probation under that Section.
3. The filing of a motion for "shock" probation subsequent to sentencing does not limit the jurisdiction of the Adult Parole Authority over the defendant.