

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 22901
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-1520
v.	:	
	:	(Criminal Appeal from
DANNY HALL	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 13th day of November, 2009.

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BROGAN, J.

{¶ 1} Danny Hall appeals from his conviction and sentence following a no-contest plea to two counts of theft of drugs. Following the plea, the trial court sentenced him to five years of community control.

{¶ 2} In his sole assignment of error, Hall contends the trial court erred in not

considering him for intervention in lieu of conviction (ILC). During oral argument, we pointed out the absence of anything in the record showing that Hall ever sought ILC and that the trial court denied it. Shortly after oral argument, Hall presented us with a motion to file an App.R. 9 statement. Therein, he claimed to have raised the ILC issue during an unrecorded status conference. He further claimed that the trial court had indicated its unwillingness to consider ILC, relying on *State v. France*, Franklin App. No. 04AP-1124, 2006-Ohio-1204, which held that a nurse who stole drugs from the hospital where she worked was ineligible for ILC.

{¶ 3} While keeping Hall's appeal pending on our docket, we remanded the case on October 8, 2009, to allow the trial court to resolve the issue raised in his App.R. 9 motion. Thereafter, counsel for both parties met in open court and agreed that, during a prior status conference, defense counsel had expressed a desire to seek ILC. They further agreed that the State had indicated its opposition to ILC, citing *France*. They also agreed that the trial court had stated, based on *France*, that it believed Hall was ineligible for ILC. Therefore, defense counsel never formally moved for ILC. Instead, Hall entered a no-contest plea to the charges set forth above. During the on-the-record proceeding on October 8, 2009, the trial court agreed that the foregoing version of events was accurate. That proceeding was recorded on an audio-video disk and made part of the appellate record.

{¶ 4} Having reviewed the audio-video disk, we believe Hall sufficiently raised the issue of ILC to preserve it for appellate review. Although Hall did not file a written motion, his counsel essentially requested ILC during the status conference. As set forth above, the trial court responded by expressing its belief that Hall was ineligible

for ILC based on *France*. In light of that response, there would have been no purpose in Hall following up with a written motion.¹ Therefore, we conclude that the issue of Hall's eligibility for ILC properly is before us.

{¶ 5} On the merits of the ILC issue, we note the existence of conflicting views. In *France*, the Tenth District held that a nurse who stole drugs in the course of her employment was not eligible for ILC because she occupied a "position of trust" within the meaning of R.C. 2929.13(B)(1)(d) and the offense related to the position. *France*, supra, at ¶8-12. More recently, in *State v. Massien*, Summit App. No. 24369, 2009-Ohio-1521, the Ninth District held that a nurse who stole drugs from her employer was eligible for ILC. It reasoned that the phrase "position of trust" in R.C. 2929.13(B)(1)(d) is intended "to apply predominantly to the offender's public standing[.]" *Id.* at ¶17. While not foreclosing the possibility "that in limited circumstances, a private individual in a private setting may be found to have occupied a 'position of trust,'" the Ninth District held that a nurse did not hold such a position. *Id.* at ¶17-19.

{¶ 6} On July 1, 2009, the Ohio Supreme Court certified a conflict between *Massien* and *France*. The certified issue is "[w]hether a nurse employed by a hospital who in the course of her employment steals drugs from the hospital holds 'a position

¹Although the trial court's oral pronouncement on ILC bears some similarity to a ruling on a motion in limine, which is tentative and not appealable, we see at least one notable distinction. A trial court's decision on a motion in limine is anticipatory and unappealable because the preliminary ruling may change when the evidence is presented in its actual context at trial. In the present case, however, the trial court was confronted with a legal question, namely whether a nurse who steals drugs from his employer is eligible for ILC. The trial court resolved the issue by relying on *France*. No subsequent events were likely to change the trial court's legal opinion. Therefore, there

of trust' under R.C. 2929.13(B)(1)(d) thus making the nurse ineligible for intervention in lieu of conviction[.]” *State v. Massien*, 122 Ohio St.3d 1453, 2009-Ohio-3131.

{¶ 7} Although the Ohio Supreme Court has not yet resolved the certified conflict, we too have addressed the scope of R.C. 2929.13(B)(1)(d). In *State v. Jones* (Nov. 13, 1998), Greene App. No. 98CA009, we held:

{¶ 8} “We believe the trial court misconstrued R.C. 2929.13(B)(1)(d) to apply it to Defendant Jones. It applies to offenders who hold ‘a public office or position of trust and (when) the offense related to that office or position.’ Such persons are a ‘public official’ or a ‘public servant,’ as those terms are defined by R.C. 2921.01(A) and (B), who commits offenses such as theft in office, R.C. 2921.41, or bribery, R.C. 2921.02. *R.C. 2929.13(B)(1)(d) does not apply to a private person who abuses a position of trust into which he is put by another private person which is the case here.*” (Emphasis added).

{¶ 9} Based on *Jones*, we hold that Hall did not occupy a “position of trust” within the meaning of R.C. 2929.13(B)(1)(d). The statute applies to public officials and public servants, not to a private person such as Hall who abuses a position of trust granted to him by his private-hospital employer. As a result, the trial court erred in finding Hall ineligible for ILC on the basis of R.C. 2929.13(B)(1)(d). The question remains, however, whether Hall should receive ILC. “[E]ven when a defendant satisfies all of the statutory requirements, a trial court has discretion to determine whether the particular defendant is a good candidate for ILC.” *State v. Schmidt*, 149 Ohio App.3d 89, 91, 2002-Ohio-3923, ¶9. As a result, we must remand the cause for

is no reason to require Hall to have re-raised the issue in a written motion for ILC.

the trial court to determine, in its discretion, whether Hall is a suitable candidate for ILC. Id. at ¶12.

{¶ 10} Hall's sole assignment of error is sustained, the judgment of the Montgomery County Common Pleas court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

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FAIN and FROELICH, JJ., concur.

Copies mailed to:

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