IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2005-0400
	:	
Plaintiff-Appellant,	:	On Appeal from the Sandusky County Court of Appeals, Sixth Appellate District
vs.	:	
MICHAEL A. LATHER,	:	
	:	Court of Appeals Case No. S-03-008
Defendant-Appellee.	:	

Memorandum in Opposition

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FILED
DEC 20 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

MEMORANDUM IN OPPOSITION

Now comes the State of Ohio and hereby moves this court to deny the "Motion" filed by Appellee in this matter on December 14, 2006. The filing by Appellee does not fall under any of the rules of this Court and should therefore be denied by the court. Appellee should have filed a Motion to Reconsider to address any issue regarding the Mandate of this court. It is now well beyond the ten days allowed for such a motion. S.Ct. Prac.R. XI, §2(A).

Statement

On September 13, 2006, this court issued a decision reversing the Sixth District Court of Appeals. State v. Lather, 110 Ohio St.3d 270, 2006-Ohio-4477. Pursuant to its rules, in the absence of a Motion to Reconsider, this Court issued its mandate on September 28, 2006. S.Ct.Prac. R. XI, §4. The Sixth District Court of Appeals decided that the Mandate gave it no further authority to act on November 13, 2006.

Argument

The issues that Appellee wishes to reargue, referenced in his motion, were ruled upon by the Sixth District Court of Appeals on direct appeal. "Accordingly, based on our disposition of appellant's first assignment of error, we find Assignments of Error Nos. II through VI are moot and not well-taken." State v. Lather (Feb. 18, 2005), Sandusky App. No. S-03-008, unreported, at 11. An assignment of error may escape review under just such circumstances. See Kessler and Harper, At What Cost Judicial Economy: The Effects of Amended Appellate Rule 12, Cap. U.L.Rev. 549, 556-57, §(B)(3). It is the responsibility of the attorney defending the appeal in the Supreme Court to take appropriate steps to preserve the unresolved issues for further review. Id. at 561-563,

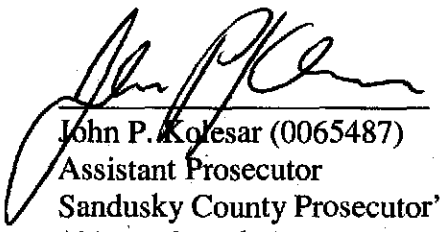
§(E)(1)-(3); R.C. 2505.22. "A court that reverses or affirms a final order, judgment, or decree of a lower court upon appeal on questions of law, shall not issue execution, but shall send a special mandate to the lower court for execution or further proceedings." R.C. §2505.39. The appellate court properly found that it was without jurisdiction where the Supreme Court remands with a mandate to the common pleas court to carry the judgment into execution, with a copy of the Supreme Court's judgment entry sent to the court of appeals for entry. Tancer v. Bd. of Liquor Control (1953), 98 Ohio App. 460. The Judgment Entry at issue here from this Court states, almost identically to the language in Tancer, ". . . that a mandate be sent to the Court of Common Pleas for Sandusky County to carry this judgment into execution and that a copy of this entry be certified to the Clerk of the Court of Appeals for Sandusky County for entry." Id. at 462-63. Appellee failed to timely object to any of the language of the Mandate, even though it was suggested through his attorney that he might do so by the Common Pleas Court judge on September 25, 2006 in an off-the-record, in-chambers conference with the Assistant Prosecutor present.

The "Motion" filed by Appellee seems to be filed in an attempt to obtain review of the Sixth District judgment entry of November 13, 2006. Proper review of a court of appeals decision can be obtained by filing a jurisdictional memorandum with the Supreme Court at the appropriate time. Enforcing the Mandate might be accomplished by filing a writ. Neither option seems to be available.

Conclusion

Since Appellee's "Motion" does not properly invoke the further jurisdiction of this court, and is otherwise an out of time Motion to Reconsider, it should be dismissed.

Respectfully submitted,



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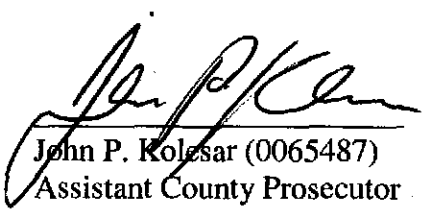
Certificate of Service

This is to certify that a copy of the foregoing was delivered by U.S. Mail, postage prepaid, this 18th day of December, 2006 to Michael W. Sandwisch, Attorney for Appellee, P.O. Box 129, Port Clinton, Ohio 43452.



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