

Statement

For the purpose of this petition for jurisdiction, the relevant facts are limited to the events that have occurred since this court reversed the Sixth District on September 13, 2006. State v. Lather, 110 Ohio St.3d 270, 2006-Ohio-4477. This Court issued the mandate in Lather on September 28, 2006. The mandate was a standard mandate, with no special instructions. In other words, the matter was remanded back to the common pleas court to carry out the execution of the judgment, with instructions for the clerk of the court of appeals to enter a copy of the mandate in the record of that court.

On September 25, 2006, the last day to timely file a motion to reconsider in this Court, the common pleas court held a bond hearing on the underlying case. In a meeting in chambers, the common pleas court judge suggested that if Appellant believed that the mandate was unclear as to the role of the court of appeals after the reversal, that the appellant could file a motion for reconsideration. A phone call to the Ohio Supreme Court was also made by the common pleas court judge with both counsel present. The attorney at the Ohio Supreme Court suggested that the proper procedure to clear-up any issue with the mandate would be to file a motion to reconsider. For whatever reason, Appellant chose not to file a motion to reconsider.

On October 16, 2006, Appellant filed a motion requesting that the Sixth District issue a ruling on the "undecided issues." The State filed a response opposing the motion. On November 14, 2006, the Sixth District held that it would not review the other issues as it had no further jurisdiction. It held that its authority was limited to the mandate. Since the mandate did not instruct it to decide any issues it could not. On December 14, 2006, Appellant filed a motion in this court on Case No. 2005-0400 to consider this same issue.

Appellant has remained free on Bond since the Sixth District reversed his conviction. Appellant now has pending two matters in this court and one in the United States Supreme Court. State v. Lather, 2005-0400; Lather v. Ohio, U.S. Sup Ct Case No. 06-821.

Why this court should decline jurisdiction

Appellant had a proper forum to address this issue, but chose not to. Appellant failed to ask this court to reconsider the mandate at the proper time. Even before that, Appellant could have raised the issues at the time that this case was before this court on appeal. Appellant now seeks to collaterally attack this court's mandate. As a matter of judicial finality, this court should deny this petition for jurisdiction. In addition, the petition fails to support his position with any legal authority.

The cases cited by Appellant contain examples of mandates that, unlike this case, order the court of appeals to rule on other issues remaining in those cases. The cases cited, however, do not support Appellant's proposition - that the court of appeals must now rule on the other issues. It appears that what Appellant really wants is for this court to issue a new mandate; one that orders the Sixth District to take action on the issues that he failed to preserve on appeal to this court.

What Appellant does not seem to appreciate, even after the ruling by the Sixth District, is that Appellate Rule 12 permits a reviewing court to decline to rule on issues that are moot due to its resolution of other issues determinant of the appeal. App. R. 12(A)(1)(c).

It is not a novel concept that issues may escape appellate review under such a scenario. Kessler and Harper, At What Cost Judicial Economy: The Effects of Amended

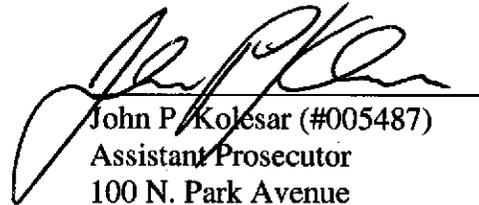
Appellate Rule 12(1995), 24 Cap. U.L.Rev. 549, 556-57, §(B)(3). Appellant had the opportunity to raise these issues as cross assignments of error at the time of this court's acceptance of jurisdiction, or could have filed a motion for remand requiring the court of appeals to decide the issues. Appellant did not avail himself of those options, nor did Appellant make this court aware of the issues before the mandate was issued. Appellant cites no authority for this proposed solution to his self-created dilemma.¹

Appellant cites no authority for his proposed proposition that the court of appeals must now undertake a full review of the other alleged errors in his direct appeal. In fact Appellant admits that the court of appeals refused to act on remand because the mandate did not instruct it to do so. In the absence of any error by the court of appeals this court should decline to exercise its authority to review the matter further.

Conclusion

Based on the foregoing, Appellee requests that this Court deny jurisdiction.

Respectfully submitted,



John P. Kolesar (#005487)
Assistant Prosecutor
100 N. Park Avenue
Fremont, OH 43420
(419) 334-6222

¹ Petitioner cites, without any explanation, R.C. §2953.02 and Ohio Constitution, Article IV, Section 3. Ohio R.C. §2953.02 is entitled "Review of Judgments" and sets forth the general provisions for appeals in criminal cases. Article IV, Section 3 of the Ohio Constitution establishes the courts of appeals and sets forth their jurisdiction. In short, Appellant does not develop an argument based on these two citations. It is not the role of Appellee to speculate or argue against an undeveloped argument of Appellant, especially considering that this case is before this court for a second time. Appellee respectfully suggests that this court likewise refrain from speculating upon Appellant's argument beyond his brief, and decline jurisdiction. App. R. 12 (A)(2) and 16(A)(7).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was sent by ordinary U.S. Mail this 12th day of January, 2007, to Michael W. Sandwisch, P.O. Box 129, Port Clinton, Ohio 43452, Attorney of Record for the Defendant-Appellant in this case.



John P. Kolesar (#0065487)
Sandusky County Assistant Prosecutor