

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : CASE NO. 2007-2425
Appellee, :
vs. :
DONALD J. KETTERER, :
Appellant. : *On Appeal from the Court of
Common Pleas of Butler County,
Case No. CR2003-03-0309*

**APPELLEE STATE OF OHIO'S MOTION TO DISMISS
FOR LACK OF JURISDICTION**

Attorneys for Appellee:

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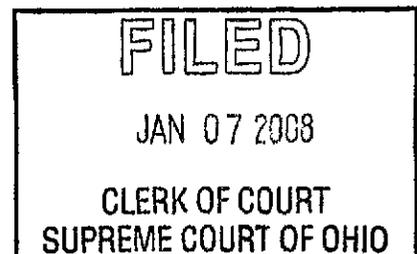
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OFFICE OF
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

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IN THE SUPREME COURT OF OHIO

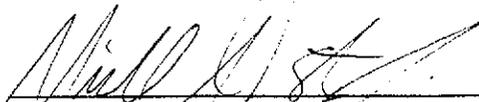
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APPELLEE STATE OF OHIO'S MOTION TO DISMISS

Now comes Appellee, State of Ohio, and respectfully moves this Court to dismiss the present appeal for lack of jurisdiction as the notice of appeal was untimely filed. A memorandum in support of this motion follows.

Respectfully submitted,

ROBIN N. PIPER (0023205)
Butler County Prosecuting Attorney


MICHAEL A. OSTER, JR. (0076491)
(Counsel of Record)

Assistant Prosecuting Attorney
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MEMORANDUM IN SUPPORT

Appellant Donald J. Ketterer's conviction and sentence of death were affirmed by this Court on October 25, 2006, in State v. Ketterer, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, *certiorari denied* (May 14, 2007), ___ U.S. ___, 127 S.Ct. 2266, ___ L.Ed.2d ___. Thereafter, on April 18, 2007, in State v. Ketterer, 113 Ohio St.3d 1463, 2007-Ohio-1722, 864 N.E.2d 650 (Table), this Court granted Appellant's application for reopening, vacated its prior judgment "as to the noncapital sentences only," and the cause was "remanded to the trial court for resentencing on the noncapital offenses in accordance with State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470."

Upon the required remand, the Butler County Court of Common Pleas (with the same three-judge panel reconstituted) imposed sentences on the noncapital offenses on May 24, 2007. Due to a clerical error, a *nunc pro tunc* order was issued by the Common Pleas Court on November 15, 2007.

The Appellant has an appeal pending before this Court, case number 2007-1261, in which he is appealing, among other things, his non-capital sentences. Now, the Appellant is attempting, in this second appeal, to appeal the exact same non-capital sentences. The fact that a clerical error was properly corrected should not, and does not, entitle the Appellant to a second appeal. Thus, the notice of appeal in the present case is untimely, and this case should be dismissed.

"The general rule is that a nunc pro tunc order does not operate to extend the period within which an appeal may be prosecuted." State v. Senz, Wayne App. No. 02CA0016,

2002-Ohio-6464, at ¶ 19, citing Perfection Stove Co. v. Scherer (1929), 120 Ohio St. 445, 448-449, 166 N.E. 376, See, also, Federal Trade Comm. v. Minneapolis-Honeywell Regulator Co. (1952), 344 U.S. 206, See, e.g., Wilner v. State Farm Mut. Auto. Ins. Co. (Feb. 13, 1997), Cuyahoga App. No. 70720; Moeller v. Moeller (Nov. 13, 2001), Clermont App. No. CA2001-05-049; Morris v. Conant (Oct. 21, 1988), Lake App. No. 12-270. Courts will not permit a *nunc pro tunc* entry or similar device to extend the time for filing an appeal unless additional rights were created or an existing right is denied by such *nunc pro tunc* entry or unless the proceeding grows out of the *nunc pro tunc* entry. Scherer, 120 Ohio St. 445.

In the case at bar, the Appellant is already before this Court on the issue of his resentencing. (Case No. 2007-1261) The final appealable order which was timely appealed from in the 2007-1621 case, was entered on May 29, 2007. (Appendix A) While a *nunc pro tunc* entry was filed on November 15, 2007, this entry did not create any new rights, or alterations to an existing right. (Appendix B) Rather, the *nunc pro tunc* order merely fixed a minor, and obvious clerical error. As such, the time to file an appeal began to run from the date of the May 29, 2007 order. Hence, the Notice of Appeal filed by the Appellant on December 28, 2007 is out of time.

Further, the issues raised in the pending appeal, 2007-1621, already encompass the very narrow clerical error that the *nunc pro tunc* entry properly amended. Thus, there are no new rights, or alterations to an existing right that necessitate the need, or would permit the filing of a second notice of appeal. What is more, as this issue is already before this Court, this is not a situation in which these proceedings grow out of the *nunc pro tunc* entry.

In fact, the *nunc pro tunc* entry was cited to in the Appellee's Merit Brief to this Court in the underlying case, and can be addressed in the Appellant's Reply Brief. For these reasons and for judicial economy, this Court should dismiss the present appeal and proceed with the already pending appeal in case number 2007-1621.

CONCLUSION

For the foregoing reasons, this Court should dismiss the untimely-filed appeal for want of jurisdiction.

Respectfully submitted,
ROBIN N. PIPER (0023205)
Butler County Prosecuting Attorney

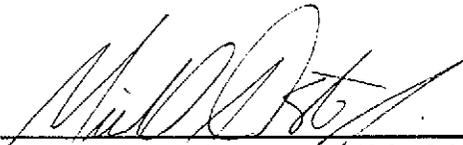


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PROOF OF SERVICE

This is to certify that a copy of the foregoing Motion was served upon Randall L. Porter, Assistant State Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43215, by ordinary U.S. mail this 7nd day of January, 2007.



MICHAEL A. OSTER, JR. (0076491)
(Counsel of Record)
Assistant Prosecuting Attorney

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :

CASE NO. 2007-2425

Appellee, :

vs. :

DONALD J. KETTERER, :

Appellant. :

*On Appeal from the Court of Common Pleas
of Butler County, Case No. CR2003-03-0309*

APPELLEE STATE OF OHIO'S APPENDIX

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

FILED in Common Pleas Court
BUTLER COUNTY, OHIO

STATE OF OHIO

Plaintiff

vs.

DONALD JOSEPH KETTERER

Defendant

CASE NO. CR2003-03-0309

ONEY, J., SAGE, J. and CREHAN, J.

RE-SENTENCING
JUDGMENT OF CONVICTION ENTRY

MAY 29 2007
GANDY J. CARPENTER
CLERK OF COURTS

On May 24, 2007 defendant's re-sentencing hearing was held on the noncapital offenses, Counts Two, Three, Four and Five, pursuant to Ohio Revised Code Section 2929.19 and the decision in State v. Ketterer, 113 Ohio St.3d 1463, 2007-Ohio-1722, the previous judgment of conviction and sentence as to Count One having been affirmed in State vs. Ketterer, 111 Ohio St.3d 70, 2006-Ohio-5283, certiorari denied (May 14, 2007), _____ U.S. _____, 2007 WL812004. Defense attorney Randall Porter, and the defendant were present and defendant was advised of and afforded all rights pursuant to Crim. R. 32. The Court has considered the record, the charges, the defendant's Guilty Finding by Judges, and findings as set forth on the record and herein, oral statements, any victim impact statement and pre-sentence report, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors of Ohio Revised Code Section 2929.12 and whether or not community control is appropriate pursuant to Ohio Revised Code Section 2929.13, and finds that the defendant is not amenable to an available community control sanction. Further, the Court has considered the defendant's present and future ability to pay the amount of any sanction, fine or attorney's fees.

The Court finds that the defendant has been found guilty of:

AGGRAVATED ROBBERY as to Count Two, a violation of Revised Code Section 2911.01(A)(3) a first degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 9 years.
This sentence will be served **consecutive** to Count One.
Fine in the amount of \$2,000

AGGRAVATED BURGLARY as to Count Three, a violation of Revised Code Section 2911.11(A)(1) a first degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 9 years.
This sentence will be served **consecutive** to Count Two.
Fine in the amount of \$2,000

GRAND THEFT as to Count Four, a violation of Revised Code Section 2913.02(A)(1) a fourth degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 17 months.
This sentence will be served **concurrent** with Count(s) Two and Three.

BURGLARY as to Count Five, a violation of Revised Code Section 2911.12(A)(3) a third degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 4 years.

This sentence will be served **consecutive** to Count(s) Two and Three.
Fine in the amount of \$1,000

Credit for 1556 served is granted as of this date.

As to Count(s) Two, Three, Four and Five:

The Court has notified the defendant that post release control is in this case up to a maximum of years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code Section 2967.28. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control. The defendant is therefore ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Correction.

Defendant is ORDERED to pay:

Costs of prosecution, supervision and any supervision fees permitted pursuant to Revised Code Section 2929.18(A)(4).

The Court further advised the defendant of all of his/her rights pursuant to Criminal Rule 32, including his/her right to appeal the judgment, his/her right to appointed counsel at no cost, his/her right to have court documents provided to him/her at no costs, and his / her right to have notice of appeal filed on his behalf.

Directive to Ohio Department of Rehabilitation and Correction: Please notify the Butler County Court of Common Pleas of any major changes of incarceration status including but not limited to release, transfer, execution or death of the defendant.

APPROVED AS TO FORM:

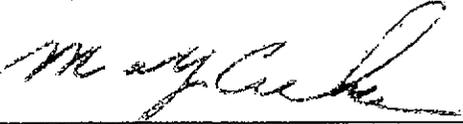
ROBIN N. PIPER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

ENTER



ONEY, J.

SAGE, J.



CREHAN, J.

MAO/beg
May 25, 2007

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

FILED & RECORDED
COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

NOV 15 2007

CINDY DANFORTH
CLERK OF COURTS

STATE OF OHIO

Plaintiff

vs.

DONALD JOSEPH KETTERER

Defendant

CASE NO. CR2003-03-0309

ONEY, J., SAGE, J. and CREHAN, J.

AMENDED RE-SENTENCING
JUDGMENT OF CONVICTION ENTRY
{NUNC PRO TUNC: May 29, 2007}

On May 24, 2007 defendant's re-sentencing hearing was held on the noncapital offenses, Counts Two, Three, Four and Five, pursuant to Ohio Revised Code Section 2929.19 and the decision in State v. Ketterer, 113 Ohio St.3d 1463, 2007-Ohio-1722, the previous judgment of conviction and sentence as to Count One having been affirmed in State vs. Ketterer, 111 Ohio St.3d 70, 2006-Ohio-5283, certiorari denied (May 14, 2007), _____ U.S. _____, 2007 WL812004. Defense attorney Randall Porter, and the defendant were present and defendant was advised of and afforded all rights pursuant to Crim. R. 32. The Court has considered the record, the charges, the defendant's Guilty Finding by Judges, and findings as set forth on the record and herein, oral statements, any victim impact statement and pre-sentence report, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors of Ohio Revised Code Section 2929.12 and whether or not community control is appropriate pursuant to Ohio Revised Code Section 2929.13, and finds that the defendant is not amenable to an available community control sanction. Further, the Court has considered the defendant's present and future ability to pay the amount of any sanction, fine or attorney's fees.

The Court finds that the defendant has been found guilty of:

AGGRAVATED ROBBERY as to Count Two, a violation of Revised Code Section 2911.01(A)(3) a first degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 9 years.
This sentence will be served **consecutive** to Count One.
Fine in the amount of \$2,000

AGGRAVATED BURGLARY as to Count Three, a violation of Revised Code Section 2911.11(A)(1) a first degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 9 years.
This sentence will be served **consecutive** to Count Two.
Fine in the amount of \$2,000

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This sentence will be served **concurrent** with Count(s) Two and Three.

BURGLARY as to Count Five, a violation of Revised Code Section 2911.12(A)(3) a third degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 4 years.

This sentence will be served **consecutive** to Count(s) Two and Three.
Fine in the amount of \$1,000

Credit for 1556 served is granted as of this date.

As to Count(s) Two, Three, Four and Five:

The Court has notified the defendant that post release control is Mandatory in this case up to a maximum of 5 years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code Section 2967.28. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control. The defendant is therefore ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Correction.

Defendant is ORDERED to pay:

Costs of prosecution, supervision and any supervision fees permitted pursuant to Revised Code Section 2929.18(A)(4).

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Directive to Ohio Department of Rehabilitation and Correction: Please notify the Butler County Court of Common Pleas of any major changes of incarceration status including but not limited to release, transfer, execution or death of the defendant.

{This *nunc pro tunc* entry is necessary to properly and legally reflect the Court of Common Pleas Judgement of Conviction that was originally entered on May 24, 2007, and journalized on May 29, 2007}.

APPROVED AS TO FORM:

ENTER

ROBIN N. PIPER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

ONEY, J.

SAGE, J.

CREHAN, J.

MAO/beg
May 25, 2007
November 7, 2007 amended