

IN THE SUPREME COURT OF OHIO

Case No. 2009-1606

ORIGINAL

STATE OF OHIO :  
Appellee :  
-vs- :  
ANDREW E. MILLER :  
Appellant :  
On Appeal from the  
Cuyahoga County Court  
of Appeals, Eighth  
Appellate District Court  
of Appeals  
CA: 91543

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**APPELLANT'S MOTION FOR RECONSIDERATION OF DISMISSAL OF APPEAL**

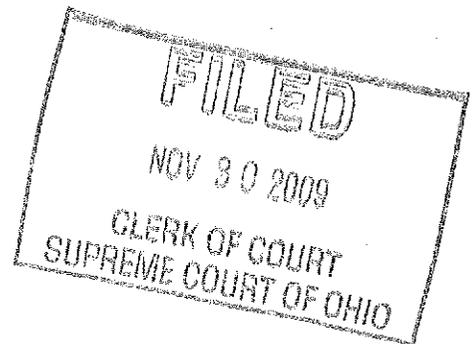
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Comes now Defendant-Appellant Andrew E. Miller, through undersigned counsel, and moves this Honorable Court to reconsider its decision of November 18, 2009, wherein it dismissed his appeal as not involving a substantial constitutional question.

In the instant case, a divided Eighth District Court of Appeals affirmed a trial judge's nunc pro tunc entry providing for restitution where, seven weeks previously at a sentencing conducted by a different judge, no restitution was ever ordered. In his memorandum in support of jurisdiction, Mr. Miller set forth two propositions of law that arose from the Eighth District's decision

**A trial court cannot enter a judgment that includes restitution as part of a criminal sentence when restitution was not imposed at the sentencing hearing. (Proposition I).**

**A trial court may not use a nunc pro tunc entry to impose a sentencing sanction that the trial court intended to impose but did not impose at the sentencing hearing. (Proposition II).**

In support of his argument that this Court should accept the instant case, Mr. Miller explained that the two propositions of law were the subject of inter-district appellate court conflicts. Specifically, as to Proposition of Law I, the Eighth District's opinion in the instant case conflicts with the Hamilton County Court of Appeals (First Appellate District) in *State v. Purnell*, 171 Ohio App.3d 446, 450, 2006-Ohio-6160, and the Delaware County Court of Appeals (Fifth Appellate District) in *State v. Beam*, Delaware App. No. 06CAAA030018, 2007-Ohio-386. With respect to Proposition of Law II, the Eighth District's opinion in the instant case conflicts with the judgment of the Summit County Court of Appeals (Ninth Appellate District) in *State v. Battle*, Summit App. No. 23404, 2007-Ohio-2475. Moreover, Mr. Miller discussed the dangerous consequences of the Eighth District's decision, which calls into question the finality of every criminal sentence. This Court declined jurisdiction over the dissent of three of its members. (Moyer, C.J., Pfeiffer and Lanzinger, JJ.).

In this motion, Mr. Miller posits two additional arguments as to why this Court should accept this case. First, the consequences of this decision are not limited to criminal cases. If a trial judge can re-visit a sentence seven weeks later via a nunc pro tunc entry, then there is no reason why a trial judge cannot re-visit a civil judgment as well. Once again, no litigant or other affected party can be assured of finality in light of the decision of the Eighth District.

Second, this Court is currently considering the disposition of *State of Ohio v. Jason Singleton*, Case No. 2008-1255, which was heard and submitted on June 3, 2009. There are issues in *Singleton* that are similar to those raised in the instant case and which should cause this Court, if it remains disinclined to accept the instant case for full briefing, to hold the instant case for *Singleton*. In *Singleton*, this Court is examining the validity of R.C. 2929.191, which authorizes a trial court to add a previously-omitted post-release control term to the previously-

imposed sentence via a nunc pro tunc entry. What R.C. 2929.191 authorizes in the context of post-release control is similar to what the trial court did in the instant case where it added restitution via a nunc pro tunc entry despite never having imposed it at sentencing.

Obviously, there are differences between *Singleton* and the instant case. *Singleton* must necessarily deal with the omission of a sentencing component, i.e. post-release control, whose absence has been held to nullify the entire sentence. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250. In the instant case, the omission of restitution does not nullify the entire sentence. Nonetheless, R.C. 2929.191's attempt to use the vehicle of "nunc pro tunc" to go beyond the mere correction of clerical errors and to modify an existing sentence is strikingly similar to what is presented to this Court in the instant case.

By accepting this case and holding it for *Singleton*, this Court will be able to evaluate whether the merits of the instant case can be disposed of summarily in light of *Singleton*. Moreover, this Court may find that important considerations regarding the use of nunc pro tunc entries could not be fully addressed in *Singleton* under the facts of that case (in *Singleton*, the nunc pro tunc entry adding post-release control followed a hearing where the trial court made some, but perhaps not adequate, reference to post-release control). If so, this Court may then desire to accept the instant case to discuss the use of nunc pro tunc entries to make additions to a journal entry that are not supported by what took place at the prior proceeding.

For these additional reasons, this Court should reconsider and accept jurisdiction over the instant case.

Respectfully submitted,

  
JOHN T. MARTIN, ESQ.  
Assistant Public Defender

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Reconsideration was sent via U.S. mail to William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 30<sup>th</sup> day of November, 2009.

  
JOHN T. MARTIN, ESQ.