

In the
Supreme Court of Ohio

STATE OF OHIO EX REL. RICHARD
CORDRAY, et al.,

Relators-Appellants,

v.

HON. JAMES M. BURGE,

Respondent-Appellee.

: Case No. 2010-1216
:
:
: On Appeal from the
: Lorain County
: Court of Appeals,
: Ninth Appellate District
:
:
: Court of Appeals Case Nos.
: 09CA009723
: 09CA009724
:

**REPLY BRIEF OF RELATORS OHIO ATTORNEY GENERAL RICHARD CORDRAY
AND LORAIN COUNTY PROSECUTING ATTORNEY DENNIS P. WILL**

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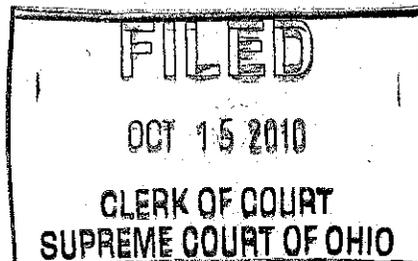


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INTRODUCTION

Nancy Smith and Joseph Allen's convictions became final in 1996 when the Ninth District affirmed their criminal judgments, and this Court declined discretionary review. Judge Burge nevertheless asserted jurisdiction over the cases anew, disagreed with the Ninth District's earlier findings, and entered judgments of acquittal for both Smith and Allen.¹

Judge Burge defends his jurisdiction to revisit the merits and enter the acquittals by pointing to the original trial court's judgment entries for Smith and Allen. Because the entries did not list the verdicts as having been found "by a jury," he concluded that they were not final appealable orders under Crim. R. 32(C). Br. at 2-3. Therefore, Judge Burge argues, he "retained subject matter jurisdiction over the cases and over the parties." *Id.* at 7.

Judge Burge lacked jurisdiction to issue these acquittals for two reasons. First, he misread the requirements of Rule 32(C). Under that rule, a judgment entry must set forth "the plea, the verdict, or findings, upon which each conviction is based." Smith and Allen's entries do just that; they accurately set forth the "verdict . . . upon which each conviction is based." Nothing in Rule 32(C) requires the entry to state further that the verdict was "found by a jury." Because the judgment entries were final and appealable, the trial court (and, by extension, Judge Burge) lost jurisdiction over the case in 1994, when Smith and Allen appealed those judgments to the Ninth District.

Second, even if Smith and Allen's judgment entries deviate from the requirements of Rule 32(C), Judge Burge misinterpreted the scope of his jurisdiction to remedy the error. "[T]he remedy for a failure to comply with Crim. R. 32(C) is a revised sentencing entry." *Alicea v. Krichbaum*, 126 Ohio St. 3d 194, 2010-Ohio-3234, ¶ 2. That is, the trial court may issue a "nunc

¹ For the sake of clarity, Relators will again use the term "trial court" to refer to the common pleas court that oversaw Smith and Allen's 1994 criminal proceedings; to identify the 2009 proceedings now under review, Relators refer to Judge Burge by name.

pro tunc entr[y]” to “correct [the] clerical error[] in [the] judgment entr[y] so that the record speaks the truth.” *State ex rel. Cruzado v. Zaleski*, 111 Ohio St. 3d 353, 2006-Ohio-5795, ¶ 19. But the trial court may not revisit and review the *merits* of the underlying judgment. Once an appellate court issues a mandate affirming a judgment (as the Ninth District did here), any effort to “modify[] or reverse” it is a “power . . . strictly limited to appellate courts.” *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, ¶ 58; accord *State ex rel. Cordray v. Marshall*, 123 Ohio St. 3d 229, 2009-Ohio-4986, ¶ 32 (“[T]he Ohio Constitution does not grant to a court of common pleas jurisdiction to review a prior mandate of a court of appeals.”) (internal quotations and citation omitted).

Judge Burge’s brief also includes a lengthy discussion on whether trial judges have authority to enter sua sponte judgments of acquittal under Crim. R. 29(C). Br. at 7-13. That issue is (1) irrelevant because Judge Burge had no jurisdiction over Smith and Allen’s criminal case in the first place; (2) unpreserved because Judge Burge failed to file a cross appeal; and (3) without merit because the plain text of Rule 29(C) contradicts Judge Burge’s position.

At most, Judge Burge had jurisdiction to issue a nunc pro tunc order correcting the purported omission in Smith and Allen’s judgment entries. The Ninth District’s 1996 mandate affirming Smith and Allen’s criminal convictions, however, deprived him of authority to take any other action. Because Judge Burge unambiguously lacked jurisdiction to enter the judgments of acquittal for these two defendants, this Court should issue the writ of prohibition.

ARGUMENT

A. A judgment entry complies with Crim. R. 32(C) if it accurately recites “the verdict.”

Under Crim. R. 32(C), “[a] judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence.” Smith and Allen’s judgment entries comply with the letter of that rule. They accurately recite “the verdict . . . upon which

each [defendant's] conviction is based.” See Relators’ Ex. C-1 (Smith Entry), Ex. D-1 (Allen Entry). Thus, the entries were final and appealable under Rule 32(C).

Judge Burge nevertheless reasons that Smith and Allen’s judgment entries were deficient under Crim. R. 32(C) because they “failed to note that Smith and Allen were found guilty by a jury.” Br. at 1. Or, stated differently, he views the entries as deficient because “the manner of conviction is not included.” *Id.* at 5. Therefore, Judge Burge argues, “the original trial court failed to file a final appealable order after the jury returned its verdict,” which allowed him to “retain[] jurisdiction” over Smith and Allen’s case. *Id.* at 3.

Judge Burge’s analysis of Rule 32(C) is wrong for two reasons. First, it ignores the plain language of the rule, which requires the judgment entry to recite only “the verdict . . . upon which each conviction is based.” Nothing in that provision requires the entry to further indicate that the verdict was found “by a jury.” By holding otherwise, Judge Burge inserted a requirement into Rule 32(C) that the legislature never intended. See *Perrysburg Twp. v. City of Rossford*, 103 Ohio St. 3d 79, 2004-Ohio-4362, ¶ 7 (“In interpreting statutes, ‘it is the duty of this court to give effect to the words used, not . . . to insert words not used.’”) (citation omitted).

Second, Judge Burge’s position ignores this Court’s recent opinion in *State ex rel. Barr v. Sutula*, 126 Ohio St. 3d 193, 2010-Ohio-3213. In *Barr*, the defendant was convicted of robbery after a bench trial, but the trial court’s judgment entry indicated only that “the court found the defendant guilty of robbery.” *Id.* at ¶ 2. That cursory notation did not state the precise manner of conviction; it did not specify whether the defendant was (1) “convicted upon a finding of guilt by the court” after “enter[ing] a plea of no contest”; or, alternatively, (2) “found guilty by the court after a bench trial.” *State v. Baker*, 119 Ohio St. 3d 197, 2008-Ohio-3330, ¶ 12.

Despite that ambiguity, the *Barr* Court found that the trial court's judgment entry "sufficiently set forth the findings upon which [the defendant's] bench conviction is based." *Barr*, 2010-Ohio-3213, ¶ 2. The Court further stated that additional language reciting that the defendant had been "found . . . guilty of the offenses *after a bench trial* would have been superfluous" for purposes of Rule 32(C). *Id.* (emphasis added).

The plain language of Rule 32(C) establishes, and *Barr* confirms, that the manner by which the verdict was reached—jury trial or bench trial—need not be specified in the judgment entry. To be a final appealable order, the entry need only recite "the verdict . . . upon which each conviction is based," nothing more. Because Smith and Allen's judgment entries properly recited their verdicts, they were final appealable orders under Rule 32(C). The Lorain County Common Pleas Court therefore lost jurisdiction over the case in 1994, when Smith and Allen appealed those judgments to the Ninth District.

B. Trial courts have limited jurisdiction to correct a defective judgment entry under Crim. R. 32(C) through a nunc pro tunc order.

Even if Smith and Allen's judgment entries were deficient under Rule 32(C) (and they are not), Judge Burge still lacked authority to reopen the merits of the underlying criminal case and acquit Smith and Allen of the criminal charges. Because the Ninth District had already issued its mandate affirming the defendants' convictions, Judge Burge retained jurisdiction to do only one thing—issue a nunc pro tunc order correcting the judgment entries.

1. A trial court may not grant a judgment of acquittal if an appellate court has previously found the evidence sufficient to sustain the defendant's convictions.

A jury convicted Smith and Allen of multiple child-sex crimes in 1994, and the original trial court sentenced them accordingly. Smith and Allen appealed. The Ninth District affirmed the convictions in 1996, expressly finding that the State's evidence was admissible and adequate to sustain the convictions. See *State v. Smith* (9th Dist. 1996), No. 95CA6070, 1996 Ohio App.

Lexis 241; *State v. Allen* (9th Dist. 1996), No. 94CA5944, 1996 Ohio App. Lexis 385. The Ninth District then entered a “special mandate” in both cases, “directing the County of Lorain Common Pleas Court to carry [its] judgment into execution.” *Smith*, 1996 Ohio App. Lexis 241, at *38; *Allen*, 1996 Ohio App. Lexis 385, at *18. That mandate governs “all subsequent proceedings in the case” regardless of “whether [it is] correct or incorrect.” *State ex rel. Sharif v. McDonnell* (2001), 91 Ohio St. 3d 46, 47-48 (internal quotation, citation, and emphasis omitted).

When he granted judgments of acquittal to Smith and Allen, however, Judge Burge openly disagreed with the Ninth District’s decision and mandate. He found much of the State’s trial evidence inadmissible, and he further announced that he “ha[d] absolutely no confidence that these verdicts are correct.” See Relators’ Ex. E, Hr’g Tr. at 5-8 (June 24, 2009).

Judge Burge argues that he was not bound by the Ninth District’s prior mandate because the appellate court “had no jurisdiction to issue a mandate to the trial court.” Br. at 13. But the force of an appellate court’s mandate cannot be questioned by a trial court. See *Marshall*, 2009-Ohio-4986, at ¶ 32 (“[T]he Ohio Constitution does not grant to a court of common pleas jurisdiction to review a prior mandate of a court of appeals.”) (internal quotations and citation omitted); accord *Bodyke*, 2010-Ohio-2424, at ¶ 58 (“The power to review and affirm, modify, or reverse other courts’ judgments is strictly limited to appellate courts.”). Rather, the mandate must be respected. See *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St. 3d 320, 323 (“[A]n inferior court has no discretion to disregard the mandate of a superior court.”).

In this case, the Ninth District affirmed Smith and Allen’s convictions over objections to the admissibility and sufficiency of the State’s evidence. It then issued a mandate to the Lorain County Common Pleas Court, directing it to enforce the judgments of *conviction*. By reaching the opposite conclusion and issuing judgments of *acquittal*, Judge Burge “var[ied] the mandate

of an appellate court.” *Id.* In such circumstances, “[a] writ prohibition is appropriate to require [the] lower court to comply with and not proceed contrary to the mandate of [the] higher court.”

State ex rel. Dazinger v. Yarbrough, 114 Ohio St. 3d 261, 2007-Ohio-4009, ¶ 8.

2. After a defendant’s conviction becomes final, a trial court’s limited jurisdiction allows it only to correct a Crim R. 32(C) error through a nunc pro tunc order.

If Smith and Allen’s judgment entries were deficient under Rule 32(C), Judge Burge had limited jurisdiction only to issue a nunc pro tunc order correcting those entries.

Once an appellate court affirms a criminal judgment (as the Ninth District did here), a trial court generally loses all jurisdiction over the case. Only “two exceptions [exist] under which the trial court retains continuing jurisdiction.” *Cruzado*, 2006-Ohio-5795, at ¶ 19.

“First, a trial court is authorized to correct a void sentence.” *Id.* “[A] sentence is void” when “it does not contain a statutorily mandated term,” such as a period of post-release control following imprisonment. *Id.* at ¶ 20 (quoting *State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085, ¶ 23). In such instances, the “sentence must be vacated” and the case returned “to the trial court for resentencing,” notwithstanding any appellate proceedings that might have occurred. *Id.* at ¶ 21 (quoting *Jordan*, 2004-Ohio-6085, at ¶ 27).

“Second, a trial court can correct clerical errors in judgment.” *Id.* at ¶ 19. A clerical error “refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment.” *Id.* (citation omitted). In such instances, the trial court retains limited jurisdiction “to correct clerical errors in judgment entries so that the record speaks the truth.” *Id.* Such “nunc pro tunc entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided.” *Id.* (citation omitted).

The first exception is not applicable here. The trial court had jurisdiction over the case and the parties in 1994, and it imposed prison sentences on Smith and Allen that contained all the

statutorily required elements. Therefore, Smith and Allen’s criminal sentences are not “void,” and Judge Burge had no authority to vacate them.

The second exception, however, is directly applicable. Although no one disputes that a jury trial occurred in this case, Judge Burge determined that Smith and Allen’s judgment entries were deficient because they failed to note that specific fact. That oversight, if error, was “mechanical in nature and apparent on the record.” *Cruzado*, 2006-Ohio-5795, at ¶ 19 (citation omitted). It does not touch on the validity of Smith and Allen’s convictions, but merely on the accuracy of the trial court’s effort at journalization. When such typographical errors are discovered in a final judgment, trial courts have limited jurisdiction to perform only one task—issue a “nunc pro tunc entr[y]” that “correct[s] [the] clerical error[] in [the] judgment entr[y] so that the record speaks the truth.” *Id.*

This Court has confirmed the exclusive nature of that remedy on at least three occasions. In *Alicea*, 2010-Ohio-3234, at ¶ 1, the defendant argued that he was entitled to a new sentencing hearing because his original judgment entry did not comply with Rule 32(C). This Court disagreed, stating that “the remedy for failure to comply with Crim. R. 32(C) is a revised sentencing entry rather than a new hearing.” *Id.* at ¶ 2; accord *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St. 3d 535, 2008-Ohio-4609, ¶ 10 (“Culgan is entitled to a sentencing entry that complies with Crim. R. 32(C).”); *Dunn v. Smith*, 119 Ohio St. 3d 364, 2008-Ohio-4565, ¶ 10 (holding that the “appropriate remedy” for “a trial court’s failure to comply with Crim. R. 32(C) . . . is correcting the journal entry”).

The holdings of *Alicea*, *Culgan*, and *Dunn* are consistent with this Court’s long-standing jurisprudence. A Rule 32(C) deficiency does not implicate the substance of “the judgment itself,” but simply a “judicial record[] . . . th[at] fail[ed] to record, or improperly record[ed], [that]

judgment.” *Caprita v. Caprita* (1945), 145 Ohio St. 5, 7. In such instances, the trial court may issue a corrected entry to ensure “that the record speaks the truth.” *Cruzado*, 2006-Ohio-5795, at ¶ 19. But the trial court may not alter the substance of the original judgment. See *State ex rel. Mayer v. Henson*, 94 Ohio St. 3d 276, 2002-Ohio-6323, ¶ 14 (“[A] trial court exceeded its authority by issuing a nunc pro tunc entry reducing a criminal sentence because the entry did not simply correct a clerical mistake.”).

By contrast, Judge Burge has cited *no* authority to support his claim that Rule 32(C) error authorizes a trial court to reopen a criminal case and acquit a defendant years after the conclusion of his direct appeal proceedings. Nor has he offered any explanation as to why such a drastic remedy is necessary to cure a minor clerical omission in the judgment entry. Finally, the practical consequences of Judge Burge’s position are considerable. If Judge Burge is right, and Rule 32(C) error operates to invalidate a final criminal conviction, then an untold number of convictions and sentences in this State are at risk of invalidation.

Simply put, Judge Burge’s authority was at its nadir in this case: either (1) he had no jurisdiction to review Smith and Allen’s criminal convictions because their judgment entries complied with Rule 32(C); or (2) he had limited jurisdiction to issue a nunc pro tunc order that corrected a clerical error in those entries. But the Ninth District’s prior judgment and mandate affirming Smith and Allen’s criminal convictions deprived him of authority to take any other action. Because he plainly lacked jurisdiction to issue the judgments of acquittal to these defendants, Relators are entitled to a writ of prohibition.

C. Judge Burge’s challenge to the Ninth District’s partial judgment against him is not before the Court and, in any event, is without merit.

The Ninth District below issued two distinct holdings. First, the court held that Judge Burge had jurisdiction over Smith and Allen’s cases because their “judgments of conviction did

not comply with Crim. R. 32(C).” App. Op. ¶ 20. He could thus “reconsider [the original trial court’s] non-final orders.” *Id.* Second, the court held that “Judge Burge did not have jurisdiction to grant motions that were not before the court.” *Id.* at ¶ 31. Judge Burge therefore lacked jurisdiction to grant an acquittal to Allen because, unlike Smith, Allen never sought such relief under Crim. R. 29(C). *Id.* at ¶ 32. Accordingly, the Ninth District entered a partial judgment for Relators and ordered Judge Burge to vacate his acquittal for Allen. *Id.* at ¶ 34. The court left Smith’s acquittal in place.

Relators now seek reversal of the Ninth District’s judgment with respect to Smith. See Rel. Merit Br. at 13. But Judge Burge, in his second proposition of law, attacks the Ninth District’s judgment with respect to Allen. Br. at 7-13. That argument fails, both on procedure and on substance.

1. Judge Burge did not preserve this issue for review because he did not cross-appeal the Ninth District’s judgment.

In his second proposition of law, Judge Burge asks this Court to review the Ninth District’s partial grant of judgment against him. He argues that he had jurisdiction “to review the sufficiency of the evidence on behalf of [Allen], *sua sponte*.” Br. at 7. He therefore urges the Court “to reverse the decision of the court of appeals” holding otherwise. *Id.* at 14.

Relators prevailed on this issue below. See App. Op. at ¶ 34 (“We grant the Relators’ petition as it relates to Allen and order Judge Burge to vacate the June 24, 2009, order that granted Allen an acquittal.”). As the non-prevailing party, Judge Burge had a right to appeal that judgment if he disagreed with it. See S.Ct. Prac. R. 2.2(A). He did not do so.

Judge Burge’s failure to file a cross-appeal precludes this Court’s consideration of his second proposition of law. “To preserve [a] question properly, [the] party aggrieved . . . should . . . file[] its own appeal and specif[y] the error.” *Dayton-Montgomery Cty. Port Auth. v.*

Montgomery Cty. Bd. of Revision, 113 Ohio St. 2d 281, 2007-Ohio-1948, ¶ 33. An “appellee’s failure to file [a] cross-appeal preclude[s] consideration of [an] error it assert[s]” in its merit brief. *Id.* (citation omitted).

In this case, Judge Burge was the “party aggrieved” by the Ninth District’s partial grant of relief to Relators. Because Judge Burge failed to file a cross-appeal, this Court “ha[s] no jurisdiction” to review his second proposition of law. *Id.* at ¶ 33. Thus, this Court has no occasion to consider the Ninth District’s judgment with respect to Allen’s conviction.

2. Even if the issue had been preserved, Judge Burge did not have authority to grant an untimely judgment of acquittal to Allen under Crim. R. 29(C).

Even if Judge Burge had filed a cross appeal and preserved this issue for review, the outcome would not change. Judge Burge did not have authority under Crim. R. 29(C) to issue a sua sponte judgment of acquittal to Allen fifteen years after the jury verdict.

Rule 29(C) defines a defendant’s right to request, and a trial court’s authority to issue, a judgment of acquittal following a jury verdict: “If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period.” The plain language of this provision is fatal to Judge Burge’s position.

First, Rule 29(C) does not expressly permit a trial court to enter a judgment of acquittal on its own accord after the jury returns its verdict. This is in stark contrast to Rule 29(A), which specifically authorizes the trial court to act “on its own motion” and “order the entry of a judgment of acquittal” before the case is submitted to the jury. That the General Assembly would include such explicit language in Rule 29(A), and then omit that language from Rule 29(C), demonstrates its clear intent: A trial court may enter a judgment of acquittal “on its own

motion” before, but not after, the submission of the case to the jury. See *NACCO Indus. v. Tracy* (1997), 79 Ohio St. 3d 314, 316 (“[A legislative body] is generally presumed to act intentionally and purposely when it includes particular language in one section of a statute but omits it in another.”).

Second, Rule 29(C) sets forth a strict time window. “This Rule clearly limits the time for filing a Crim. R. 29(C) motion to 14 days after the jury is discharged,” and “[t]he trial court can extend that time only before the expiration of the 14 day period.”² App. Op. ¶ 22. Therefore, Judge Burge’s attempt to act “on [his] own motion” under Rule 29(C) and grant a judgment of acquittal to Allen was, at the very least, untimely. It occurred some fifteen years after the jury returned its guilty verdict—well beyond the fourteen-day period specified in the rule.

Judge Burge briefly invokes other doctrines—due process, unconscionability, and the “interests of justice”—to explain his non-compliance with Rule 29(C). But he does not cite, nor are Relators aware of, any authority authorizing trial courts to invoke such doctrines on their own accord as justification for disregarding the Ohio Rules of Criminal Procedure.

Judge Burge’s second proposition of law should be rejected. The claim was not preserved for appellate review and, in any event, it is undercut by the plain language of Rule 29(C).

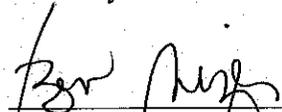
² By way of comparison, other criminal procedure rules do not impose time frames on motions. See, e.g., Crim. R. 12(D) (“The court in the interest of justice may extend the time for making pretrial motions.”).

CONCLUSION

For these reasons, Relators respectfully ask this Court to reverse the Ninth District's decision below and issue a writ of prohibition ordering Judge Burge to vacate Smith's judgment of acquittal and deny the motions for resentencing.

Respectfully submitted,

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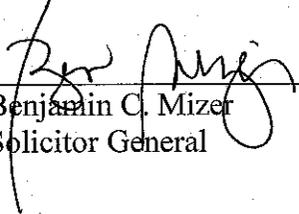
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Relators Ohio Attorney General Richard Cordray and Lorain County Prosecuting Attorney Dennis P. Will was served by U.S. mail this 15th day of October, 2010, upon the following:

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