

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

STEPHEN M. LESTER

Defendant-Appellant.

Case Nos. 2010-1007, (2010-1372)

On appeal from the
Auglaize County Court of Appeals,
Third Appellate District,
Case No. 2-10-20

Merit Brief of Appellant Stephen M. Lester

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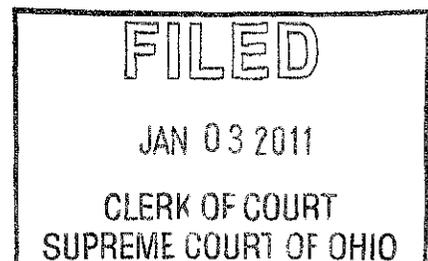


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I. INTRODUCTION

The most fundamental rules of appellate practice, both civil and criminal, are those rules regarding final appealable orders and appellate jurisdiction. In order to provide the necessary order and stability to this area of Ohio law, this Court has issued a body of case law defining what is and is not a final appealable order and when a court does or does not have jurisdiction. As a result of these black and white rules regarding whether or not a particular court has acquired jurisdiction, this Court has recognized that "[i]f a court acts without jurisdiction, then any proclamation by that court is void." *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St. 3d 70, 75, 1998-Ohio-275.

In the case at bar, the first time Appellant Stephen M. Lester (hereinafter "Mr. Lester") obtained a valid final appealable order was when the trial court issued a nunc pro tunc entry in 2010. Prior to that time, Mr. Lester's previous journal entries were not final appealable orders because they did not contain the information required by Crim. R. 32(C).¹ In dismissing Mr. Lester's appeal from his first and only final appealable order, the Third District (1) disregarded well-established final appealable order precedent from this Court, most notably *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, and (2) treated as valid the opinions it had previously rendered in Mr. Lester's case at a time when the court of appeals had no jurisdiction.

This case thus presents the issues of what is necessary to confer jurisdiction upon the appellate court in a criminal case and whether there is any legal significance to actions taken by a court without jurisdiction. In adopting Mr. Lester's propositions of

¹ Crim. R. 32(C) states in pertinent part: "A judgment of conviction shall set forth the plea, the verdict or findings and the sentence."

law, this Court should set forth the following rules of law that recognize the fundamental nature of jurisdiction:

Any action taken by a court prior to jurisdiction being conferred on that court is invalid and has no effect.

A valid final appealable order – which in a criminal case requires compliance with Crim. R. 32(c) – is a necessary prerequisite for the appellate court to acquire jurisdiction.

II. STATEMENT OF RELEVANT FACTS AND STATEMENT OF THE CASE

A. Mr. Lester's First Journal Entry of Conviction Fails to Indicate the Means of Conviction.

In May of 2006, Mr. Lester was convicted of Abduction, Theft, Attempted Felonious Assault, and Aggravated Menacing. (Auglaize County Case No. 2006-CR-6, Journal Entry dated July 10, 2006 attached as Appendix at p. A-20) This original sentencing entry did not indicate whether Mr. Lester was convicted pursuant to a jury trial, no contest plea, or guilty plea. (Id.) Even though his 2006 journal entry did not contain the necessary language describing the means of conviction, Mr. Lester appealed to the Third District which issued an opinion purporting to affirm in part and reverse in part. *State v. Lester*, Third Dist. App. No. 2-06-31, 2007-Ohio-4239. Specifically, the Third District opined that Appellant's sentence was in error because the trial court gave Appellant inconsistent information on postrelease control. The case was remanded back to the trial court.

B. Mr. Lester's Second Journal Entry of Conviction Fails to Indicate the Means of Conviction.

On August 30, 2007, the trial court re-sentenced Mr. Lester. In the second journal entry of conviction, the trial court again failed to indicate whether Mr. Lester was convicted pursuant to a jury trial, no contest plea, or guilty plea. (Auglaize County Case No. 2006-CR-6, Journal Entry dated September 10, 2007 attached as Appendix at

p. A-22.) Defendant appealed and the Third District issued an opinion purporting to affirm the judgment of the trial court. *State v. Lester*, Third Dist. No. 2-07-34, 2008-Ohio-1148.

C. In 2010, the Trial Court Corrected the Journal Entry of Conviction to Finally Add the Means of Conviction.

In 2010, Mr. Lester filed a motion asking the trial court to correct the journal entry of conviction. The trial court agreed and on April 5, 2010, filed a nunc pro tunc journal entry that, for the first time, indicated that Mr. Lester “had been convicted, pursuant to a verdict at Jury Trial returned May 16, 2007...” (Auglaize County Case No. 2006-CR-6, Journal Entry dated April 5, 2010 attached as Appendix at p. 25, emphasis in original.) On May 3, 2010, Mr. Lester appealed to the Third District.

D. The Third District Dismisses Mr. Lester’s Appeal and Certifies to this Court that a Conflict Exists.

On May 12, 2010, the Third District dismissed Mr. Lester’s appeal from the April 5, 2010 journal entry. The Third District stated that “the trial court’s April 5, 2010 Nunc Pro Tunc Judgment is not a ‘final order’ subject to appeal, and the instant appeal must be dismissed for lack of jurisdiction.” *State v. Lester*, Third Dist. No. 2-10-20 at page 3. (Attached as Appendix at pp. A-4, A-7.) In dismissing this appeal, the Third District recognized that their decision conflicted with a decision from the Sixth District, *State v. Lampkin*, Sixth District No. L-09-1270 (See, Appendix at p. A-10.)²

² In *Lampkin*, the Sixth District had previously issued an opinion, but because the journal entry of conviction that formed the basis of that appeal lacked the Crim. R. 32(C) means of conviction information, that first opinion from the Sixth District was issued in the absence of a final appealable order. After the trial court in *Lampkin* issued a sufficient final appealable order in the form of a nunc pro tunc entry, *Lampkin* again appealed to the Sixth District. The Sixth District denied the State’s motion to dismiss the appeal and held that the second appeal was the first justiciable appeal because the first appellate action occurred when the Sixth District lacked jurisdiction.

E. This Court Accepts Jurisdiction in Response to Mr. Lester's Pro Se Certified Conflict and Memorandum in Support of Jurisdiction.

After the Third District dismissed his appeal, Mr. Lester filed a motion for certified conflict in the Third District. The Third District agreed and certified a conflict to this Court. (See Appendix at p. A-10.)

Mr. Lester filed a pro se notice of appeal and notice of certified conflict with this Court. (Attached as Appendix pp. A-1, A-8.) This Court accepted jurisdiction over both cases and directed the parties to brief the following issue:

Is a nunc pro tunc judgment filed for the purpose of correcting a clerical omission in a prior sentencing judgment by adding "means of conviction" language, which was readily apparent throughout the record and to the parties but not originally included as required by Crim. R. 32(C), a final order subject to appeal?

The undersigned was appointed to represent Mr. Lester and presents the following argument.

III. LAW AND ARGUMENT IN SUPPORT OF MR. LESTER'S PROPOSITIONS OF LAW

The certified question should be answered in the affirmative and this Court should hold:

A nunc pro tunc judgment filed for the purpose of correcting a clerical omission in a prior sentencing judgment by adding "means of conviction" language, as required by Crim. R. 32(C), is a final order subject to appeal.

This holding follows from three propositions of law:

Proposition of Law I: Any action taken by a court prior to jurisdiction being conferred on that court is invalid and has no effect.

Proposition of Law II: A valid final appealable order – which in a criminal case requires compliance with Crim. R. 32(c) – is a necessary prerequisite for the appellate court to acquire jurisdiction.

Mr. Lester's argument can be summarized as follows:

- A judicial action taken without jurisdiction is a nullity and has no effect. See part A *infra*.
- An appellate court cannot acquire jurisdiction without a valid final appealable order. See part B *infra*.
- Pursuant to Crim. R. 32 (C) and *Baker*, the 2006 and 2007 journal entries were not final appeal orders because they failed to indicate the "means of conviction." See part C *infra*.
- The 2010 nunc pro tunc journal entry of conviction was the first and only time a final appealable order was issued in this case. See part D *infra*.

A. A judicial action taken without jurisdiction is a nullity and has no effect.

"If a court acts without jurisdiction, then any proclamation by that court is void." *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St. 3d 70, 75, 1998-Ohio-275. In other words, if jurisdiction is not properly conferred on a court, any action taken by that court is a nullity and has no effect. *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215.

This Court has consistently applied this principle of appellate practice. In *Hubbard v. Canton City School Board of Educ.*, 88 Ohio St.3d 14, 2000-Ohio-260, this Court vacated the judgment of the court of appeals because the statute that had provided the basis for the final appealable order to the Fifth District had been determined unconstitutional after the appellate court rendered its opinion. This Court vacated the appellate opinion because the subsequently-determined-to-be-deficient final appealable order meant that even though the appellate court had already issued a decision, the appellate court lacked jurisdiction when it issued that decision. This Court stated: "[t]he opinion of the court of appeals is vacated for the reason that the court of appeals lacked subject-matter jurisdiction for lack of a final appealable order." Notably, even though the Fifth District eventually came to the same result in the second appeal once a

valid final appealable order was obtained, the vacated appellate opinion was afforded no precedential effect.

Not only has this Court refused to give effect to an appellate judgment rendered in the absence of jurisdiction, this Court refused to give any validity to the actions of a trial court level court that acted without jurisdiction. In *In re S.J.*, the juvenile court, during a mandatory bindover hearing, dismissed a murder charge against the juvenile and amended a felony-murder charge to voluntary manslaughter. The State immediately appealed. Even though a notice of appeal had been filed, the juvenile court went ahead and accepted the juvenile's admission to the amended charge of voluntary manslaughter and declared the juvenile to be delinquent – a finding which would have precluded the juvenile from being prosecuted as an adult. *Id.* ¶ 4-5. This Court reversed and held that “[s]ince the juvenile court in this case acted without jurisdiction, the court's order adjudicating S.J. a delinquent child is void.” *Id.* at ¶ 15. Further, because the order adjudicating S.J. a delinquent child was determined to be “void,” Double Jeopardy did not attach. *Id.* Ultimately, the juvenile in question was bound over and prosecuted in adult felony court. In sum, because a valid notice of appeal transferred jurisdiction from the juvenile court to the appellate court, the delinquency finding made in the absence of jurisdiction had no effect.

By comparison, other states have found that an appellate decision that has been subsequently determined to have been rendered without jurisdiction has no binding effect on subsequent appeals. *See e.g., Johnson v. State* (Tex. 2005), 171 S.W.3d 643. In *Johnson*, the appellate court, on direct appeal, reversed the denial of defendant's motion to suppress. On discretionary review, the Texas Supreme Court held that the original notice of appeal to the intermediate appellate court was insufficient to invoke the

jurisdiction of the appellate court. When the case was eventually returned to the same intermediate appellate court pursuant to a now-proper notice of appeal, the prior opinion issued in the absence of jurisdiction had no precedential effect and, in fact, the second appellate court came to the opposite result and affirmed the denial of the motion to suppress.

Accordingly, if the Third District did not have jurisdiction when it issued the 2006 and 2008 opinions, those opinions have no force or effect. This Court's inquiry should now shift to determining whether the Third District did or did not have jurisdiction. As explained in parts B and C *infra*, the court did not have jurisdiction in 2006 and 2008. Rather, the first time the Third District acquired jurisdiction was in 2010.

B. An appellate court cannot acquire jurisdiction without a valid final appealable order.

The Third District could acquire jurisdiction over the 2006 and 2007 journal entries only if those journal entries were valid final appealable orders. "It is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction." *State Automobile Mutual Insurance Company v. Titanium Metals Corporation*, 108 Ohio St.3d 540, 2006-Ohio-1713 at ¶ 8 quoting *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20. As this Court explained:

[T]he entire concept of 'final orders' is based upon the rationale that the court making an order which is not final is thereby retaining jurisdiction for further proceedings. A final order, therefore, is one disposing of the whole case or some separate and distinct branch thereof.

Noble v. Colwell, (1989), 44 Ohio St.3d 92, 94, quoting *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306.

C. Pursuant to Crim. R. 32(C) and *Baker*, a journal entry of conviction is not a final appealable order if it fails to indicate the “means of conviction.”

This Court recently explained, in no uncertain terms, that in order for a journal entry of conviction to be a final appealable order, Crim. R. 32(C) requires that a number of specific items of information be included within journal entry of conviction. Crim. R. 32(C) states in pertinent part: “A judgment of conviction shall set forth the plea, the verdict or findings and the sentence.” Interpreting this rule, this Court, stated:

A judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court.

Baker at ¶ 1 of the syllabus; *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, at ¶11. In *Baker*, the journal entry that this Court determined to be deficient in that case failed to indicate the means by which the defendant was convicted, i.e., jury trial, no contest plea, or guilty plea. *Baker*, supra.

This Court’s recent opinion in *State v. Fischer*, Slip Opinion No. 2010-Ohio-6238 further reinforces the concept that a *Baker*-compliant journal entry is necessary for a final appealable order. In *Fischer*, this Court drew the line between appealable and non-appealable orders. In *Fischer*, the trial court’s sentence was “illegal” and “void” because it did not contain the statutorily mandated term of postrelease control. *Fischer* at ¶ 1 of the syllabus. **Importantly, however, even though the trial court’s sentence in *Fischer* was “illegal” and “void,” it did not deprive the appellate court of the jurisdiction to review the judgment because it “did set forth the sentence” as**

Baker requires. *Fischer* at ¶ 39. *Fischer* thus recognizes that, even when a trial court issues a void and illegal sentence, an appellate court will still acquire jurisdiction when the trial court issues a final judgment that is *Baker*-compliant.

1. **In order for Mr. Lester’s 2006 and 2007 journal entries of conviction to be a valid final appealable orders, they needed to contain the information required by Crim. R. 32(C) and *Baker*.**

Mr. Lester’s 2006 and 2007 journal entries both contained the same deficiency as in *Baker*. Neither Mr. Lester’s original 2006 journal entry of conviction nor the 2007 post-remand journal entry of conviction constituted a final appealable order because neither entry indicated whether Mr. Lester was convicted pursuant to a jury trial, no contest plea, or guilty plea. In other words, neither entry contained the “means of conviction” as required by Crim. R. 32(C) and *Baker*.³

³ In certifying a conflict to this Court, the Third District was concerned, in part, with the issue of whether it mattered that the missing “means of conviction” information could be located in other parts of the record. *Baker* addressed and resolved this issue when it held that the Crim. R. 32(C) information, including the means of conviction, must be contained within the four corners of the judgment entry of conviction. “We noted [in *Baker*] that the Twelfth District erroneously interpreted Crim. R. 32(C) when it held that multiple documents were sufficient to meet the rules requirements and held that [o]nly one document can constitute a final appealable order.” *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831 at ¶ 15 quoting *Baker* at ¶ 17. Accordingly, even if the “means of conviction” language was readily apparent throughout the record, that fact that this necessary language was not contained within either the 2006 or 2007 journal entries results in orders that are not final appealable orders.

2. **Because the 2006 and 2007 journal entries were not final appealable orders, the trial court did exactly what this Court in *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609 instructed trial courts to do: issue a journal entry that complied with Crim. R. 32(C).**

Because trial court's 2006 and 2007 journal entries were not final appealable orders, the only way to properly transfer jurisdiction to the appellate court was by issuing an order that contained all the information required by Crim. R. 32(C). On April 5, 2010, the trial court did exactly that: it issued a journal entry of conviction that, for the first time, contained all the information required by Crim. R. 32(C) including the fact that Lester was convicted after a jury trial. In doing so, the trial court did precisely what this Court instructed the trial court to do in *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609. In *Culgan*, **even though court of appeals had issued an opinion five years earlier**, this court issued writs of mandamus and procedendo ordering the trial court to issue a sentencing entry that complied with Crim. R. 32(C) and thus constituted a final appealable order so that the court of appeals could properly acquire jurisdiction over the case. Thus, not only did the trial court not err in issuing the nunc pro tunc entry, it had a clear legal duty to do so.

- D. **In the case at bar, the 2010 nunc pro tunc journal entry of conviction was the first and only time a final appealable order was issued in this case.**

When the trial court issued its April 5, 2010 nunc pro tunc journal entry, it was the first and only time that valid final appealable order existed in this case.

1. **Because it merely reflected the undisputed fact that Lester was convicted after a jury trial, the trial court's April 5, 2010 order was a valid use of nunc pro tunc.**

The trial court's April 5, 2010 order was a valid nunc pro tunc order. As explained by this Court in *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, at ¶ 19, a nunc pro tunc entry can only be used to explain what *actually happened*, not what the trial court felt *should have happened* or *intended to happen*. "Although courts possess inherent authority to correct clerical errors in judgment entries so that the record speaks the truth, '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.'" (Citations omitted.) Here, the trial court's nunc pro tunc order added the necessary language indicating that Mr. Lester was convicted pursuant to a jury trial. This language reflected what actually happened at trial and, thus, was a valid use of a nunc pro tunc order.

2. **As long as it is a valid use of a nunc pro tunc, a nunc pro tunc order can be used transform an otherwise non-final order into a final appealable order.**

Moreover a nunc pro tunc order can be used provide the necessary information in order to transform an otherwise non-final order into a final appealable order. *See, e.g., Wisintainer v. Elcen Power Strut Co.* 67 Ohio St.3d 352, 1993-Ohio-120. In *Wisintainer*, this Court reversed the dismissal of an appeal in light of the trial court's nunc pro tunc order indicating that "[f]or good cause shown, and in accordance with Civ. R. 54(B), the Court expressly finds that there is no just reason for delay." *Id* at 353.

Trial courts routinely use *nunc pro tunc* entries in order to turn otherwise non-final appealable orders into final appealable orders. *See e.g., Kelley v. Ruf*, 181 Ohio App.3d 534, 2009-Ohio-1215 at ¶22-24 (the appellate court had jurisdiction because the

trial court's nunc pro tunc entry included the necessary "there is no just reason for delay" Civ. R. 54(B) language.) Indeed, other appellate district are routinely using *nunc pro tunc* orders to correct Crim. R. 32(C)-deficient journal entries and issue *Baker*-compliant entries. *State v. Havugiyaremye*, Sixth App. No. L-08-1201, 2010-Ohio-4204; *State ex rel. Moore v. Krichbaum*, Seventh App. No. 09 MA 201, 2010-Ohio-1541; *State v. Fowle*, Fifth App. No. 09 CAA 04 0035 2010-Ohio-586.

Moreover, the time for noting an appeal, and the subsequent conference of jurisdiction upon the court of appeals, cannot take place until after the nunc pro tunc entry is filed. A court cannot receive jurisdiction retroactively. See e.g., *Hubbard*, supra. (Appellate jurisdiction did not occur until a valid final appealable order issued.)

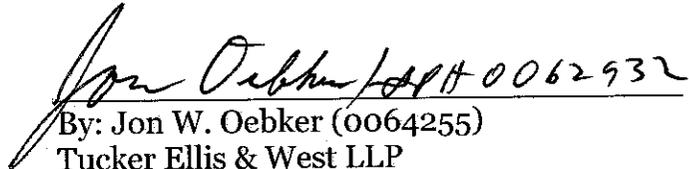
IV. CONCLUSION

The most fundamental question of appellate review is whether a court has jurisdiction. The answer to this question is not found in shades of gray but rather in black and white. Regarding the jurisdiction of the appellate court, a final appealable order is the necessary mechanism by which jurisdiction is conferred on the appellate court.

In this case, the 2006 and 2007 journal entries from the trial court were not final appealable orders as explained by this Court in *Baker*. As a result, those journal entries could not and did not confer jurisdiction to the Third District. Thereafter, in 2010, the trial court followed this Court's instruction in *Culgan* and issued an order that, for the first time, constituted a final appealable order. In contrast to the earlier, deficient orders, this *Baker*-compliant order was sufficient to confer jurisdiction to the Third District. When the Third District dismissed the appeal from this final appealable order,

it violated established precedent from this Court. Accordingly, the judgment of the Third District dismissing Mr. Lester's appeal should be reversed.

Respectfully submitted,

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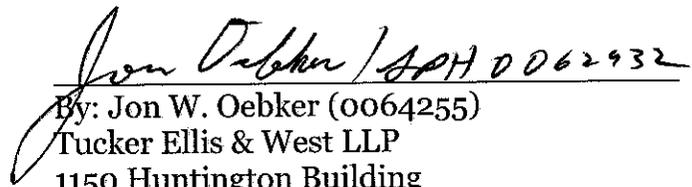
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APPENDIX

Notice of Appeal..... A-1

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Notice of Certified Conflict A-8

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 : C.A. Case No.: 2-10-20
 Defendant-Appellant. :

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DEFENDANT-APPELLANT, PRO SE

EDWIN PIERCE (#0023846)
 Auglaize County Prosecutor

AMY OTLEY-BECKETT (#0059852)
 Assistant Prosecutor
 Counsel of Record

Auglaize County Courthouse
 201 South Willipie Street
 Wapakoneta, Ohio 45895-1992
 (419) 738-9688
 (419) 738-3274 (FAX)

COUNSEL FOR APPELLEE, STATE OF OHIO

RECEIVED
 JUN 09 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

FILED
 JUN 09 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

State of Ohio, : Case No.: _____
Plaintiff-Appellee, : On Appeal from the Auglaize
vs. : County Court of Appeals,
 : Third Appellate District.
Stephen M. Lester, : C.A. Case No.: 2-10-20
Defendant-Appellant. :
_____ /

NOTICE OF APPEAL OF APPELLANT STEPHEN M. LESTER

Appellant Stephen M. Lester hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Auglaize County Court of Appeals, Third Appellate District, entered in Court of Appeals Case No.: 2-10-20 on May 12, 2010.

This case raises a substantial constitutional question, involves a felony, and is public or great interest.

Respectfully submitted,


Stephen M. Lester, in propria persona
ToCI, Id.#A526919
2001 East Central Avenue
P.O. Box 80033
Toledo, Ohio 43608-0033

DEFENDANT-APPELLANT, PRO SE

PROOF OF SERVICE

I attest I sent the Augliaze County Prosecutor a copy of this NOTICE OF APPEAL OF APPELLANT STEPHEN M. LESTER, by regular U.S. Mail, on this 2nd day of June, 2010, by sending it to 201 S. Willipie Street, P.O. Box 1992, Wapakoneta, Ohio 45895-1992.

Respectfully submitted,



Stephen M. Lester, pro-se
ToCI, Id. #A526919
2001 East Central Avenue
P.O. Box 80033
Toledo, Ohio 43608-0033

DEFENDANT-APPELLANT, PRO SE

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
AUGLAIZE COUNTY

STATE OF OHIO,

CASE NO. 2-10-20

PLAINTIFF-APPELLEE,

v.

STEPHEN M. LESTER,

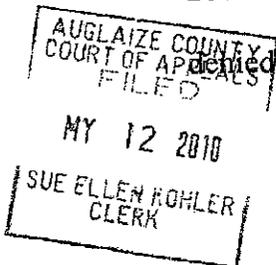
JUDGMENT
ENTRY

DEFENDANT-APPELLANT.

This cause comes before the Court *sua sponte* for determination as to whether the appeal should be dismissed for want of jurisdiction.

The record reflects that a jury returned guilty verdicts in May 2006 to multiple felonies and one misdemeanor and, in July 2006, the trial court issued a judgment imposing sentence. Appellant filed an appeal and the judgment of the trial court was affirmed in part and reversed in part, based on an inconsistent notification of post release control. *State v. Lester*, 3rd Dist.No. 2-06-31, 2007-Ohio-4239; appeal not accepted for review *State v. Lester*, 117 Ohio St.3d 1500, 2008-Ohio-2028. Appellant filed a motion for post-conviction relief which was

denied by the trial court, and that judgment was affirmed on appeal. *State v.*



VOL 1 PAGE 924

Case No. 2-10-20

Lester, 3rd Dist.No. 2-07-23, 2007-Ohio-5627; appeal not accepted for review
State v. Lester, 117 Ohio St.3d 1439, 2008-Ohio-1279.

Appellant was then resentenced by the trial court, and that judgment was affirmed on appeal. *State v. Lester*, 3rd Dist.No. 2-07-34, 2008-Ohio-1148; appeal not accepted for review *State v. Lester*, 119 Ohio St.3d 1413, 2008-Ohio-3880. Appellant filed a second motion for post-conviction relief which was denied by the trial court, and that judgment was also affirmed on appeal. *State v. Lester* (May 11, 2009), 3rd Dist.No. 2-08-24, unreported, appeal not accepted for review *State v. Lester*, 122 Ohio St.3d 1524, 2009-Ohio-4776.

Thereafter, on April 5, 2010, the trial court filed a *Nunc Pro Tunc* Judgment on resentencing which corrected the prior judgment by adding a line of text to reflect the fact that the convictions were pursuant to a verdict at jury trial. Although not stated as such, the purpose was apparently to correct a clerical omission in the resentencing judgment to reflect that Appellant was convicted at jury trial. See *State v. Baker*, 119 Ohio St.3d 197, 2008 Ohio-3330, requiring that sentencing judgments include the "means of conviction." Appellant filed the instant appeal on May 3, 2010.

It is well settled that A *nunc pro tunc* judgment applies retrospectively to the judgment which it corrects. A *nunc pro tunc* judgment is not properly subject to appeal and does not act to extend the time in which a party can appeal the actual

Case No. 2-10-20

judgment of sentence. *Gold Touch, Inc. v. TJS Lab, Inc.* (1998), 138 Ohio App.3d 106; *Roth v. Roth* (1989), 65 Ohio App.3d 768; *Kuehn v. Kuehn* (1988), 55 Ohio App.3d 245.

In the instant case, the court finds that the trial court issued a *Nunc Pro Tunc* Judgment for the sole purpose of retrospectively correcting a clerical omission in the prior sentencing judgment to comply with Crim.R. 32. No new or substantial right was affected under R.C. 2505.02(A)(1) by correction of the sentencing judgment to reflect what actually occurred and what clearly was evident throughout the record and, especially, to Appellant. Appellant exhausted the appellate process when the resentencing judgment was reviewed and affirmed on appeal, and the Ohio Supreme Court declined to accept it on further appeal. See, also, *State v. Hall* (Jan. 8, 2009), 3rd Dis.No. 12-08-09, unreported Judgment, dismissing appeal from *Nunc Pro Tunc* Judgment correcting omission in 2004 Sentencing Judgment; *State v. Lyles* (Aug. 13, 2009), 3rd Dist.No. 1-09-40, unreported Judgment, dismissing appeal from *Nunc Pro Tunc* Judgment correcting omission in 1999 Sentencing Judgment, discretionary appeal denied *State v. Lyles*, 123 Ohio St.3d 1523, 2009-Ohio-6487.

Accordingly, we find that the trial court's April 5, 2010 *Nunc Pro Tunc* Judgment is not a "final order" subject to appeal, and the instant appeal must be dismissed for lack of jurisdiction.

Case No. 2-10-20

It is therefore **ORDERED, ADJUDGED** and **DECREED** that the appeal be, and the same hereby is, **DISMISSED** at the costs of the Appellant for which judgment is hereby rendered and that the cause be, and the same hereby is, remanded to the trial court for execution of the judgment for costs.

John B. Villanoweli
JRB
John R. Shaw
JUDGES

DATED: May 12, 2010
/jnc

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No.:	<u>10-1372</u>
Plaintiff-Appellee,	:	On Appeal from the Auglaize	
vs.	:	County Court of Appeals,	
	:	Third Appellate District.	
Stephen M. Lester,	:	C.A. Case No.:	02-10-20
Defendant-Appellant.	:		

NOTICE OF CERTIFIED CONFLICT

STEPHEN M. LESTER, pro-se
 ToCI, Id. #A526919
 2001 East Central Avenue
 Post Office Box 80033
 Toledo, Ohio 43608-0033

DEFENDANT-APPELLANT, PRO SE

RECEIVED
 AUG 05 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

EDWIN PIERCE (#0023846)
 Auglaize County Prosecutor

AMY OILEY-BECKETT (#0059852)
 Assistant Prosecutor
 Counsel of Record

Auglaize County Courthouse
 201 South Willipie Street
 Wapakoneta, Ohio 45895-1992
 (419) 738-9688
 (419) 738-3274 (FAX)

COUNSEL FOR APPELLEE, STATE OF OHIO

FILED
 AUG 05 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

State of Ohio, :
Plaintiff-Appellee, :
vs. :
Stephen M. Lester, :
Defendant-Appellant. :

Case No.: _____
On Appeal from the Auglaize
County Court of Appeals,
Third Appellate District.
C.A. Case No.: 02-10-20

NOTICE OF CERTIFIED CONFLICT

Appellant Stephen M. Lester hereby gives notice of certified conflict to the Supreme Court of Ohio from the judgment of the Auglaize County Court of Appeals, Third Appellate District, entered in Court of Appeals Case No.: 02-10-20 on July 12, 2010.

This certified conflict raises a substantial constitutional questions, involves a felony, and is one of public or great interest.

Respectfully submitted,


Stephen M. Lester, in propria persona
ToCI, Id.#A526919
2001 East Central Avenue
Post Office Box 80033
Toledo, Ohio 43608-0033

DEFENDANT-APPELLANT, PRO SE

PROOF OF SERVICE

I attest I sent the Auglaize County Prosecutor a copy of this NOTICE OF CERTIFIED CONFLICT, by regular U.S. Mail, on this 3rd day of August, 2010, by sending it to 201 South Willipie Street, Post Office Box 1992, Wapakoneta, Ohio 45895-1992.


Stephen M. Lester, pro-se
ToCI, Id.#A526919

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
AUGLAIZE COUNTY

STATE OF OHIO,

CASE NO. 2-10-20

PLAINTIFF-APPELLEE,

v.

STEPHEN M. LESTER,

JUDGMENT
ENTRY

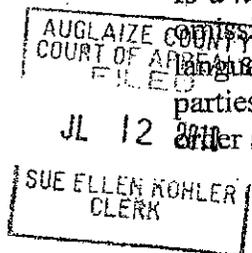
DEFENDANT-APPELLANT.

This cause comes on for determination of Appellant' motion to certify a conflict as provided in App.R. 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution.

Upon consideration the Court finds that the judgment in the instant case is in conflict with the judgments rendered in *State v. Lampkin*, 6th Dist. No. L-09-1270, 2010-Ohio-1971.

Accordingly, the motion to certify is well taken and the following issue should be certified pursuant to App.R. 25:

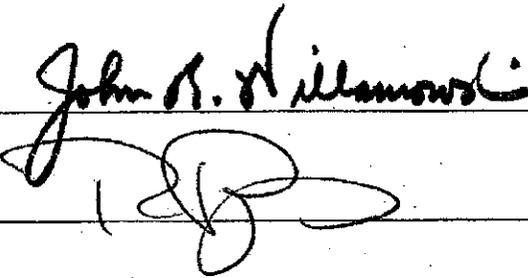
Is a *nunc pro tunc* judgment filed for the purpose of correcting a clerical omission in a prior sentencing judgment by adding "means of conviction" language, which was readily apparent throughout the record and to the parties but not originally included as required by Crim.R. 32(C), a final order subject to appeal?



VOL 1 PAGE 944

Case No. 2-10-20

It is therefore **ORDERED** that Appellant's motion to certify a conflict be,
and hereby is, granted on the certified issue set forth hereinabove.

A handwritten signature in black ink, appearing to read "John R. Wilamowski", is written over two horizontal lines. Below these lines is a large, stylized flourish or scribble.

JUDGES

DATED: July 12, 2010
/jnc

FILED
COURT OF APPEALS

2010 FEB 12 A 9:48

COMMON PLEAS COURT
BERNEE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-09-1270

Appellee

Trial Court No. CR0200601214

v.

Terry Lee Lampkin, Jr.

DECISION AND JUDGMENT

Appellant

Decided: FEB 12 2010

Julia R. Bates, Lucas County Prosecuting Attorney, and
Kevin A. Pituch, Assistant Prosecuting Attorney, for appellee.

Kenneth J. Rexford, for appellant.

PER CURIAM.

{¶ 1} Appellee, state of Ohio, has filed a motion to dismiss the appeal filed by defendant, Terry L. Lampkin. Lampkin has filed a memorandum in opposition to the motion. The case against Lampkin stems from a 2005 aggravated robbery and a

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FEB 12 2010

1.

felonious assault at a Toledo car wash. Lampkin was tried and found guilty by a jury in November 2006.

{¶ 2} The record contains an order signed by the trial court judge on November 30, 2006, and journalized on December 1, 2006, which states that Lampkin was found guilty by a jury and sets the case for a sentencing hearing on December 1, 2006. Following the sentencing hearing, a judgment was signed by the judge, filed in the trial court on December 4, 2006, and entered on the court's journal on December 5, 2006. The judgment states, in pertinent part,

{¶ 3} "The Court finds that defendant has been convicted of Aggravated Robbery, counts 1 & 2 * * * Felonious Assault, counts 3 & 4 * * *.

{¶ 4} "It is ORDERED that defendant serve a term of 10 years as to Count 1 and 10 years as to Count 2 in prison. Counts 3 & 4 Felonious Assault, merge with counts 1 & 2 Aggravated Robbery as allied offenses. The sentences are ordered to be served consecutively * * *."

{¶ 5} Lampkin appealed from his conviction and this court affirmed. See *State v. Lampkin*, 6th Dist. No. L-07-1005, 2008-Ohio-2378. Lampkin filed an App.R. 26(B) application to reopen his appeal which was denied. He then attempted to appeal that decision to the Ohio Supreme Court, but that court declined to accept jurisdiction. Lampkin's subsequent motion for a delayed appeal to the Supreme Court of Ohio was

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denied as was his motion for postconviction relief in the trial court. Thus, it would appear that Lampkin exhausted his state appeal rights in this case.

{¶ 6} However, on July 9, 2008, the Ohio Supreme Court issued its decision in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, syllabus, where the court states:

{¶ 7} "A judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court. (Crim.R. 32(C), explained.)"

{¶ 8} The court in *Baker* further holds that "[o]nly one document can constitute a final appealable order." *Id.* at ¶ 17. Therefore, the finding of guilt or the guilty plea must be in the same document as the sentence.

{¶ 9} Just over two months later, on September 18, 2008, the Ohio Supreme Court clarified the *Baker* case and held that a judgment of conviction that "merely mentions that [the defendant] 'has been convicted' of the specified offense and declares his sentence for the convictions" violates Crim.R. 32(C). *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, ¶ 2. These cases taken together instruct us that in order to be final and appealable, a Crim.R. 32(C) judgment of conviction must be entered on the court's journal, state the sentence, be signed by the judge, and contain one of the following: the guilty plea, the jury verdict, or

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the finding of the court upon which the conviction is based. Further, these elements must all be contained in one document.

{¶ 10} On August 18, 2009, Lampkin filed a motion in the trial court "to correct status of void sentencing entry" asking that court to issue a judgment of conviction that complies with Crim.R. 32(C) as interpreted by the *Baker* and *Culgan* cases. On September 22, 2009, the trial court entered a Nunc Pro Tunc order that mirrors Lampkin's December 5, 2006 entry of conviction with the exception of the following change: The original entry states, "The Court finds that defendant has been convicted of" aggravated robbery and felonious assault, while the nunc pro tunc entry states, "The Court finds that defendant has been found guilty by a Jury and has been convicted of" aggravated robbery and felonious assault. On October 20, 2009, Lampkin filed the present appeal which the state now seeks to have dismissed.

{¶ 11} Lampkin argues that despite the fact that he already appealed his conviction and it was affirmed by this court, he now is entitled to a second appeal because his original "conviction" was not valid. The state contends that it makes little sense to allow Lampkin a second appeal merely because in 2006 the trial court judge signed, filed and had journalized two judgments, one finding Lampkin guilty and the second sentencing him, instead of one judgment which does both as required by *Baker*.

{¶ 12} It is clear that the December 6, 2006 judgment sentencing Lampkin was not a final appealable order. "[T]he purported judgment did not comply with Crim.R. 32(C)

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and * * * did not constitute a final appealable order." *Culgan* at ¶ 1. Without a final appealable order, this court is without jurisdiction to hear an appeal. *State Auto Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, ¶ 8. It follows that we were without jurisdiction to hear Lampkin's appeal in case No. L-07-1005.

{¶ 13} Lampkin now has a sentencing entry that complies with Crim.R. 32(C) and he has filed an appeal from that entry. The state contends that this second appeal should be governed by App.R. 4(C) which states:

{¶ 14} "(C) Premature notice of appeal

{¶ 15} "A notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the appeal time period is treated as filed immediately after the entry."

{¶ 16} Under this rule, the state argues:

{¶ 17} "[Now] that Lampkin's sentencing judgment entry satisfies the requirements of *Baker, supra*, this case does not require a new notice of appeal, new or additional appellate briefs, or much further consideration by the Court. Lampkin filed an appellate brief and had oral argument in case No. L-07-1005. The Court affirmed Lampkin's convictions and sentence. While all of this occurred prior to the new sentencing judgment entry, given *Appellate Rule 4(C)*, the Court should now consider all filings, from Lampkin's notice of appeal to this Court's May 16, 2008, *Decision and Judgment Entry* (that affirmed his convictions and sentence), as properly before the

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Court. There is nothing unconstitutional or unfair with this result. Lampkin will sustain no prejudice with this procedure because in case No. L-07-1005, Lampkin was provided with what he now seeks - an appeal of his aggravated robbery convictions and twenty-year sentence. Thus, the Court should find its decision in Case No. L-07-1005 now governs Lampkin's appeal in case No. L-09-1270." (Footnote omitted.)

{¶ 18} In response to this argument, Lampkin states that App.R. 4(C) cannot act to retroactively validate our earlier decision in his case because at the time we issued our decision, we had no jurisdiction over the case since there was no final appealable order. Lampkin states that the effect of App.R. 4(C) on his case "simply means * * * that the case on appeal is now initiated."

{¶ 19} In *State v. Baker*, No. CA2007-06-152, 2008-Ohio-4426, the Twelfth District Court of Appeals discussed the interplay between App.R. 4(C) and an appeal filed from a trial court judgment that did not comply with *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330 and Crim.R. 32(C). In the Twelfth District case, an appeal was filed from an order that did not comply with *Baker*. Prior to any further action being taken in the court of appeals, the trial court issued an amended judgment that did comply with *Baker*, and the court of appeals held that it had jurisdiction to hear the appeal since the original notice of appeal was premature under App.R. 4(C).

{¶ 20} We have found no cases in Ohio where App.R.4(C) was used to validate a completed appeal taken from a non-final order; the rule is used exclusively in

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un-disposed of appeals where the notice of appeal is filed from a non-final judgment, a final judgment is entered in the trial court, and the original notice of appeal is deemed to have been filed as of the date of the final entry. See, e.g., *State v. Baker*, 12th Dist.No. CA2007-06-152, 2008-Ohio-4426. In the instant case, appellee wants us to resurrect a decided and disposed of appeal via the App.R. 4(C) premature notice of appeal rule. We decline to extend the reach of App.R. 4(C) to cases that have already been decided, even if this court did not have jurisdiction to decide them.

{¶ 21} Appellee alternatively argues, citing *In re Palmer* (1984), 12 Ohio St.3d 194, that Lampkin's appeal should be dismissed because he stipulated to this court's jurisdiction when he prosecuted his original appeal. In *Palmer*, the court stated: "Stipulation to the truth of facts necessary to insure jurisdiction, however, may suffice to confer jurisdiction through estoppel." *Id.* at 196. There is no such stipulation in this case; Lampkin did not stipulate to the "fact" of a final, appealable order of conviction merely by filing a notice of appeal. Further, the *Palmer* case did not involve the issue of stipulating to a final appealable order and is not applicable.

{¶ 22} Accordingly, the state's motion to dismiss is denied. Appellee shall file its brief within 20 days of the date this decision is entered on the journal.

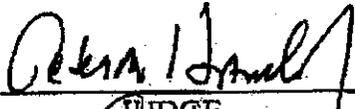
MOTION DENIED.

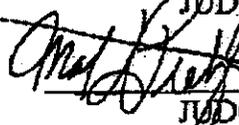
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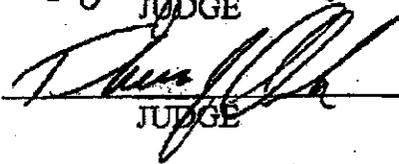
Peter M. Handwork, J.

Mark L. Pietrykowski, J.

Thomas J. Osowik, P.J.
CONCUR.



JUDGE


JUDGE


JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

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AUGLAIZE COUNTY
COMMON PLEAS COURT
FILED

IN THE COURT OF COMMON PLEAS
AUGLAIZE COUNTY, OHIO
CRIMINAL DIVISION

2006 JUL 10 PM 12:37

SUE ELLEN KOHLER
CLERK OF COURTS

STATE OF OHIO
Plaintiff

vs.

STEPHEN M. LESTER
Defendant

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Case No. 2006-CR-6

JOURNAL ENTRY --
ORDERS ON SENTENCE

On July 6, 2006, Defendant's Sentencing Hearing was held pursuant to Ohio Revised Code §2929.19. Defense Attorney Gerald F. Siesel and Attorney Amy Otley Fox of the Prosecuting Attorney's Office were present. Defendant was afforded all rights pursuant to Criminal Rule 32. The Court has considered the record, oral statements, any Victim Impact Statement and Pre-Sentence Report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code §2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code §2929.12.

The Court finds the Defendant has been convicted of ABDUCTION, a violation of Ohio Revised Code §2905.02(A)(1), a FELONY of the 3RD degree WITHOUT specification; THEFT, a violation of Ohio Revised Code §2913.02(A)(1), a FELONY of the 5TH degree WITHOUT specification; ATTEMPTED FELONIOUS ASSAULT, a violation of Ohio Revised Code §2923.02(A)/2903.11(A)(1), a FELONY of the 3RD degree and AGGRAVATED MENACING, a violation of Ohio Revised Code §2903.21(A), a MISDEMEANOR of the 1ST degree WITHOUT specification.

It is the sentence of the Court that the Defendant be incarcerated with the Ohio Department of Rehabilitation and Corrections, Orient, Ohio,

COUNT II - for a term of FIVE (5) YEARS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

COUNT III - for a term of SIX (6) MONTHS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

COUNT IV - for a term of THREE (3) YEARS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

COUNT V – for a term of SIX (6) MONTHS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

COUNTS II & IV shall run CONSECUTIVE to each other and COUNTS III & V shall run CONCURRENT to each other and CONCURRENT to COUNT II for a total prison sentence of EIGHT (8) YEARS.

The Court has further notified the Defendant that Post Release Control in this case is MANDATORY for FIVE (5) YEARS, as well as the consequences for violating conditions of Post Release Control imposed by the Parole Board under Ohio Revised Code §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. Credit for -163- days local jail time is granted as of this date along with future custody days while the Defendant awaits transportation to the appropriate State institution. The Defendant is ORDERED to pay restitution in the amount of \$1,328.98 to Angela Gierhart, 305 W. High Street, Cridersville, Ohio 45806, all court costs, costs of prosecution and any fees permitted pursuant to R.C. §2929.18(A)(4) through the Office of the Clerk of Courts.

The Defendant shall not have any contact or association directly or indirectly with Angela Gierhart.

Pursuant to House Bill 525, the Court ORDERS the Defendant to provide a DNA sample, to be collected by the Ohio Department of Rehabilitation & Corrections upon his being conveyed to the institution.

Costs assessed to the Defendant. Judgment for restitution and Court costs.

The Clerk of Courts shall cause a copy of this Journal Entry to be served on Attorney S. Mark Weller, and a copy on the Auglaize County Sheriff, the Ohio Adult Parole Authority and the Prosecuting Attorney by hand delivering the same, and a copy upon the Warden of the Corrections Reception Center, Orient, Ohio and to the Defendant by Personal Service by the Auglaize County Sheriff. The Court further ORDERS that a copy of the Pre-Sentence Investigation Report and Victim Impact Statement, sealed by the Court, be served upon the Warden together with said copy of this Entry, in accordance with law.

IT IS SO ORDERED.



JUDGE FREDERICK D. PEPPLE

IN THE COURT OF COMMON PLEAS
AUGLAIZE COUNTY, OHIO
CRIMINAL DIVISION

AUGLAIZE COUNTY
COMMON PLEAS COURT
FILED

2007 SEP 10 AM 11:18

SUE ELLEN KOHLER
CLERK OF COURTS

STATE OF OHIO
Plaintiff

vs.

STEPHEN M. LESTER
Defendant

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Case No. 2006-CR-6

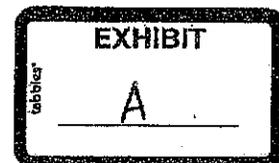
JOURNAL ENTRY --
ORDERS ON RE-SENTENCING

On August 30, 2007, Defendant's Re-Sentencing Hearing was held pursuant to Ohio Revised Code §2929.19. The Third Appellate District Court of Appeals found on August 20, 2007 that Judgment was affirmed in part, sentence vacated in part, and cause remanded. Defense Attorney Kenneth R. Spiert and Attorney Amy Otley Fox of the Prosecuting Attorney's Office were present. Defendant was afforded all rights pursuant to Criminal Rule 32. The Court has considered the record, oral statements, any Victim Impact Statement and Pre-Sentence Report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code §2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code §2929.12.

The Court finds the Defendant has been convicted of ABDUCTION, a violation of Ohio Revised Code §2905.02(A)(1), a FELONY of the 3RD degree WITHOUT specification; THEFT, a violation of Ohio Revised Code §2913.02(A)(1), a FELONY of the 5TH degree WITHOUT specification; ATTEMPTED FELONIOUS ASSAULT, a violation of Ohio Revised Code §2923.02(A)/2903.11(A)(1), a FELONY of the 3RD degree and AGGRAVATED MENACING, a violation of Ohio Revised Code §2903.21(A), a MISDEMEANOR of the 1ST degree WITHOUT specification.

It is the sentence of the Court that the Defendant be incarcerated with the Ohio Department of Rehabilitation and Corrections, Orient, Ohio,

COUNT II – for a term of FIVE (5) YEARS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.



COUNT III – for a term of SIX (6) MONTHS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

COUNT IV – for a term of THREE (3) YEARS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

COUNT V – said sentence was not reversed, therefore, Defendant not re-sentenced on this Count.

COUNTS II & IV shall run CONSECUTIVE to each other and COUNT III shall run CONCURRENT to COUNT II for a total prison sentence of EIGHT (8) YEARS.

The Court has further notified the Defendant that Post Release Control in this case is MANDATORY for THREE (3) YEARS, as well as the consequences for violating conditions of Post Release Control imposed by the Parole Board under Ohio Revised Code §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. Credit for -169- days local jail time is granted as of this date along with future custody days while the Defendant awaits transportation to the appropriate State institution. The Defendant is ORDERED to pay restitution in the amount of \$1,328.98 to Angela Gierhart, 305 W. High Street, Cridersville, Ohio 45806, all court costs, costs of prosecution and any fees permitted pursuant to R.C. §2929.18(A)(4) through the Office of the Clerk of Courts.

The Defendant shall not have any contact or association directly or indirectly with Angela Gierhart.

Pursuant to House Bill 525, the Court ORDERS the Defendant to provide a DNA sample, to be collected by the Ohio Department of Rehabilitation & Corrections upon his being conveyed to the institution.

The Court advised the Defendant of his Criminal Rule 32 rights. The Court finds Defendant's Motion for appellate counsel to be appointed to be well taken and appoints the State Public Defender for the purposes of appeal.

Costs assessed to the Defendant. Judgment for restitution and Court costs.

The Clerk of Courts shall cause a copy of this Journal Entry to be served on Attorney Kenneth R. Spiert, Ohio Public Defender's Office, 8 East Long Street, 11th Floor, Columbus, Ohio 43215 by Regular U.S. Mail, and a copy on the Auglaize County

Sheriff, the Ohio Adult Parole Authority and the Prosecuting Attorney by hand delivering the same, and a copy upon the Warden of Toledo Correctional Institution, 2001 East Central Avenue, Toledo, Ohio 43608 and to the Defendant Stephen M. Lester #526919, Toledo Correctional Institution, 2001 East Central Avenue, Toledo, Ohio 43608 by Regular U.S. Mail.

IT IS SO ORDERED.

A handwritten signature in cursive script, appearing to read "Frederick D. Pepple", written over a horizontal line.

JUDGE FREDERICK D. PEPPE

IN THE COURT OF COMMON PLEAS
AUGLAIZE COUNTY, OHIO
CRIMINAL DIVISION

AUGLAIZE COUNTY
COMMON PLEAS COURT
FILED

2010 APR -5 AM 10:42

SUE ELLEN KOHLER
CLERK OF COURTS

STATE OF OHIO
Plaintiff

vs.

STEPHEN M. LESTER
Defendant

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Case No. 2006-CR-6

NUNC PRO TUNC--
JOURNAL ENTRY --
ORDERS ON RE-SENTENCING

Exhibit B

On August 30, 2007, Defendant's Re-Sentencing Hearing was held pursuant to Ohio Revised Code §2929.19. The Third Appellate District Court of Appeals found on August 20, 2007 that Judgment was affirmed in part, sentence vacated in part, and cause remanded. Defense Attorney Kenneth R. Spiert and Attorney Amy Otley Fox of the Prosecuting Attorney's Office were present. Defendant was afforded all rights pursuant to Criminal Rule 32. The Court has considered the record, oral statements, any Victim Impact Statement and Pre-Sentence Report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code §2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code §2929.12.

The Court finds the Defendant has been convicted, pursuant to a verdict at Jury Trial returned May 16, 2006, of ABDUCTION, a violation of Ohio Revised Code §2905.02(A)(1), a FELONY of the 3RD degree WITHOUT specification; THEFT, a violation of Ohio Revised Code §2913.02(A)(1), a FELONY of the 5TH degree WITHOUT specification; ATTEMPTED FELONIOUS ASSAULT, a violation of Ohio Revised Code §2923.02(A)/2903.11(A)(1), a FELONY of the 3RD degree and AGGRAVATED MENACING, a violation of Ohio Revised Code §2903.21(A), a MISDEMEANOR of the 1ST degree WITHOUT specification.

It is the sentence of the Court that the Defendant be incarcerated with the Ohio Department of Rehabilitation and Corrections, Orient, Ohio,

COUNT II – for a term of FIVE (5) YEARS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

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COUNT III – for a term of SIX (6) MONTHS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

COUNT IV – for a term of THREE (3) YEARS, in addition to POST RELEASE CONTROL TIME AND POST RELEASE CONTROL VIOLATION TIME as may be imposed according to law.

COUNT V – said sentence was not reversed, therefore, Defendant not re-sentenced on this Count.

COUNTS II & IV shall run CONSECUTIVE to each other and COUNT III shall run CONCURRENT to COUNT II for a total prison sentence of EIGHT (8) YEARS.

The Court has further notified the Defendant that Post Release Control in this case is MANDATORY for THREE (3) YEARS, as well as the consequences for violating conditions of Post Release Control imposed by the Parole Board under Ohio Revised Code §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. Credit for -169- days local jail time is granted as of this date along with future custody days while the Defendant awaits transportation to the appropriate State institution. The Defendant is ORDERED to pay restitution in the amount of \$1,328.98 to Angela Gierhart, 305 W. High Street, Cridersville, Ohio 45806, all court costs, costs of prosecution and any fees permitted pursuant to R.C. §2929.18(A)(4) through the Office of the Clerk of Courts.

The Defendant shall not have any contact or association directly or indirectly with Angela Gierhart.

Pursuant to House Bill 525, the Court ORDERS the Defendant to provide a DNA sample, to be collected by the Ohio Department of Rehabilitation & Corrections upon his being conveyed to the institution.

The Court advised the Defendant of his Criminal Rule 32 rights. The Court finds Defendant's Motion for appellate counsel to be appointed to be well taken and appoints the State Public Defender for the purposes of appeal.

Costs assessed to the Defendant. Judgment for restitution and Court costs.

The Clerk of Courts shall cause a copy of this Journal Entry to be served on the Warden and the Defendant Stephen M. Lester #526919, Toledo Correctional Institution, 2001 East Central Avenue, P.O. Box 80033, Toledo, Ohio 43608 by Regular

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U.S. Mail; to Attorney Kenneth R. Spiert, Ohio Public Defender's Office, 8 East Long Street, 11th Floor, Columbus, Ohio 43215 by Regular U.S. Mail, and a copy on the Prosecuting Attorney by hand delivering the same.

IT IS SO ORDERED.



JUDGE FREDERICK D. PEPPL

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