ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Plaintiff - Appellee,	:	Case Nos. 2010-1007, 2010-1372
	:	
v.	:	On Appeal from the Auglaize County Court of Appeals,
	:	
STEPHEN M. LESTER	:	Third Appellate District,
	:	Case No. 2-10-20
Defendant - Appellant.	:	

Amicus Curiae The Office of the Ohio Public Defender's Memorandum in Support of Defendant-Appellant's Merit Brief

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I. Statement of Amicus Curiae's Interests

The Office of the Ohio Public Defender, as amicus curiae, files this Brief in support of the Merit Brief of Defendant-Appellant Stephen M. Lester. The Ohio Public Defender is a state agency responsible for providing legal representation and other services to indigent criminal defendants in state court. The Office provides legal representation in the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. As such, the Ohio Public Defender has an interest in the interpretation and application of Ohio Criminal Rule 32(C) and the effect of a nunc pro tunc judgment entry on a defendant's right to appeal.

II. Introduction

Direct criminal appeals are made from final appealable orders. Whether an entry is a final appealable order is determined by looking at the four corners of the document. *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, at ¶17. A direct criminal appeal may not be made from a non-final, unappealable order. Thus, even if the first final appealable order is designated as a nunc pro tunc entry, an appeal may be taken from that order.

In July 2006, an entry was journalized in Mr. Lester's case. In September 2007, the trial court issued Orders on Resentencing. Neither document complied with Criminal Rule 32(C), as both documents lacked Mr. Lester's manner of conviction.

In April 2010, the trial court acknowledged that it had not yet issued a final appealable order. It then issued the first final appealable order that complied with Criminal Rule 32(C) and called it a nunc pro tunc judgment entry. That entry contained each of the three essential and necessary statements needed to create a final appealable order. Mr. Lester appealed from that entry. The court of appeals dismissed Mr. Lester's appeal, reasoning that an appeal may not be taken from a nunc pro tunc entry. That decision should be reversed.

A court of appeals may only obtain jurisdiction over a criminal appeal when there has been a final appealable order. When an appeal is taken from a non-final order, the court of appeals lacks jurisdiction and has no choice but to dismiss the appeal. Because any rulings made by a court without jurisdiction to act are void, it follows that the appeal is void. And a trial court cannot retroactively confer subject-matter jurisdiction onto a court of appeals by issuing a new order after a void appeal, because subject-matter jurisdiction is determined as of the date of the judicial act. See, *Grupo Dataflux v. Atlas Global Group* (2004), 541 U.S. 567, 575, 124 S.Ct. 1920, 1926, 158 L.Ed.2d 866, 875 (stating that subject-matter jurisdiction is determined as of the time of filing and that a subsequent effort to cure the jurisdictional defect does not create jurisdiction).

Unless and until there is a final appealable order, a defendant should not be expected to file a notice of appeal, regardless of whether the trial court calls it a nunc

pro tunc judgment entry, an amended judgment entry, or a judgment entry. Courts of appeals will not presume the intent of a trial court, and the parties should not be held to a different standard. A rule that requires parties to appeal from orders that they think the trial court may have intended to be a final appealable order is confusing and unconstitutional. Such a rule encourages needless, untimely, and preemptive filings. It also risks foreclosing a defendant's constitutional right to appeal.[1]

Requiring that final appealable orders satisfy the minimal requirements found in Criminal Rule 32(C) is not burdensome. The entry either satisfies Criminal Rule 32(C), or it does not. The parties need only review the entry for the presence of three statements. The Rule encourages the defense and the prosecution to act as officers of the court. The prevailing party, whether it be the defense or the prosecution, has an interest in protecting the integrity of the entry and bringing any deficiencies to the court's attention. The Rule also promotes finality because the parties can easily determine whether an order is final, when it has been journalized, and when the time for taking an appeal begins to run.

Finally, an entry that does not comply with Criminal Rule 32(C) and *Baker* must be distinguished from a "*Fischer* entry." Recently, this Court decided *State v. Fischer*, --- Ohio St.3d ---, 2010-Ohio-6238, a case that addressed what effect improperly imposed

[1] If a trial court issues a judgment entry that does not comply with Criminal Rule 32(C), a defendant need not file a notice of appeal from that entry. The trial court may, however, issue a nunc pro tunc judgment entry 31 days after the first entry. Under such circumstances, the trial court would have foreclosed the defendant's constitutional right to a appeal.

postrelease control has on a judgment entry. This Court ruled that a judgment entry that includes a sentence, albeit improper, does not affect the jurisdiction of the court of appeals. Id. at ¶38-39. Indeed, a *Fischer* entry contains each essential statement necessary to render the judgment entry a final appealable order: (1) the manner of conviction; (2) the sentence; and (3) the signature of the judge. Crim.R. 32(C). But an entry that fails to comply with *Baker* lacks one of those necessary statements. Id. A non-*Baker* compliant judgment entry is not a final appealable order, and is insufficient to confer subject-matter jurisdiction onto the court of appeals.

III. Analysis

A. An entry that is not *Baker*-compliant because it lacks the manner of conviction is not a final appealable order, and a court of appeals does not have jurisdiction to hear an appeal from the non-compliant entry.

The Ohio Constitution delineates the jurisdictional limits of the Ohio courts of appeals.

> Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or review final orders or actions of administrative officers or agencies.

Section 3, Article IV, Ohio Constitution. As a prerequisite for the courts of appeals to have jurisdiction over a criminal appeal, there must be a judgment entry that is a final

appealable order. Id. While the types of entries that are considered "final" may be modified, neither the courts nor the General Assembly may circumvent the constitutional mandate. *Village of Commercial Point v. Branson* (1969), 20 Ohio Misc. 66, 69, 251 N.E.2d 705, 707, 48 Ohio Op.2d 349.

This Court has repeatedly held, "Criminal Rule 32(C) sets forth the requirements for a final appealable order in all criminal cases." *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, at ¶11.

> A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence. Multiple judgments of conviction may be addressed in one judgment entry. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

Thus, a final appealable order exists only when the entry contains the following: (1) the manner of conviction; (2) the sentence; and (3) the signature of the judge. And each of these items must be contained in single document. *Ketterer* at ¶15; *Baker* at ¶17. If any of the required information is missing, the document is not a final appealable order. *Baker* at ¶19; *State v. Taylor*, 9th Dist. No. 06CA008964, 2007-Ohio-2038, at ¶17. See, *In re Appeal of James C. Davis* (1982), 5th Dist. No. CA82-8 ("Where a statute confers a right to appeal, if such conditions are not strictly adhered to, the enjoyment of that right is lost"). Even if the missing information can be found in the trial court's record, it will not cure the document's deficiency, and the document remains a non-final,

unappealable order. *Baker* at ¶16, 17, 19. And a non-*Baker* compliant entry is insufficient as matter of law to confer subject-matter jurisdiction upon a court of appeals. Id. at ¶17.

Courts of appeals do not have jurisdiction to hear an appeal until the trial court issues a final appealable order, and the appellant files a timely notice of appeal. *Hubbard v. Canton City Sch. Bd. of Educ.*, 88 Ohio St.3d 14, 15, 2000-Ohio-260, 260, 722 N.E.2d 1025, 1025 (vacating opinion of the court of appeals as it lacked subject-matter jurisdiction because there was no final appealable order); *Gen. Accident Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266, 269; *State v. Koreisl*, 8th Dist. No. 92068, 2009-Ohio-4195, at ¶9-10 (dismissing appeal because trial court's judgment did not have the requisite findings to make it a final appealable order); *Wade v. Stewart*, 8th Dist. No. 93405, 2010-Ohio-164, at ¶15 (ruling that there was no final appealable order, and it lacked jurisdiction to hear the merits of the appeal).

A notice of appeal from a non-final, unappealable order will not confer subject-matter jurisdiction on the courts of appeals. *State v. Frazier*, 9th Dist. No. 05CA0064-M, 2006-Ohio-3334, at ¶15. Jurisdiction cannot be "created" simply because the trial court may have intended to issue a final appealable order. Id. at ¶13 (stating that courts will not rewrite the strict dictates of a rule for convenience).

When a court does not have subject-matter jurisdiction to hear an appeal, it has no choice but to dismiss the appeal. *State v. Williams* (1993), 85 Ohio App.3d 542, 546,

620 N.E.2d 171, 174 (dismissing appeal because the State failed to request leave as required by rule); *City of Columbus, Parking Violations Bureau v. Heath* (1985), 24 Ohio App.3d 141, 142, 493 N.E.2d 1005, 1005, 24 Ohio B. Rep. 213.

B. When an appeal from a non-*Baker* compliant entry is made, that appeal is void because the court of appeals lacked jurisdiction.

The time for filing a notice of appeal does not begin to run unless and until the trial court issues a final appealable order. And a court of appeals lacks subject-matter jurisdiction to hear an appeal from a non-final order. See, *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, 861 N.E.2d 519, at ¶13-14. If the court of appeals nevertheless proceeds to judgment, it does so without jurisdiction, and its decision is null and void. *Gordon v. Gordon*, 5th Dist. Nos. CT2007-0072 and CT2007-0081, 2009-Ohio-177, at ¶30. *Fischer* at ¶19 (stating that a void judgment is one issued by a court without jurisdiction to act). A void judgment is the same as if there had been no judgment. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, at ¶12. *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267, 227 N.E.2d 223, 268; *State v. Benford*, 9th Dist. No. 24828, 2010-Ohio-54, at ¶4-5 (because there was no final appealable order the appeal was void). Thus, a decision rendered by the court of appeals without jurisdiction is a legally nullity.

C. When a nunc pro tunc judgment entry is journalized because the final entry was not *Baker*-compliant, an appeal may be taken from the nunc pro tunc judgment entry.

"Nunc pro tunc" means "now for then." Black's Law Dictionary (6 Ed. 1991) 737. Courts may use nunc pro tunc entries to correct clerical mistakes in their judgment entries. *State v. Yeaples*, 180 Ohio App.3d 720, 2009-Ohio-184, 907 N.E.2d 333, at ¶15. Generally, a nunc pro tunc entry has the same effective date as the entry it corrects. Black's Law Dictionary (6 Ed. 1991) 737. But simply because a court calls an entry "nunc pro tunc" does not make it so. *Yeaples* at ¶15. In fact, the nunc pro tunc entry may be the original judgment entry upon which the appeal may be made. Id. at ¶16; *Ketterer* at ¶5 (allowing appeal from a nunc pro tunc entry); *Garrett v. Wilson*, 5th Dist. No. 07-CA-60, 2007-Ohio-4853, at ¶10 (stating that the proper remedy at law was for defendant to take an appeal from the nunc pro tunc judgment entry).[2]

It is axiomatic that a criminal defendant has a constitutional right to a direct appeal. Section 3, Article IV of the Ohio Constitution; R.C. 2953.02. And that right is not triggered until the trial court issues a final appealable order. Id.; Crim.R. 32(C);

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[2] Other states have ruled that a nunc pro tunc entry is the original entry from which the appeal may be taken. *Statis v. Pacific Ins. Co.* (1990), 8 Haw. App. 79; 83, 794 P.2d 1122 (ruling that 30 day appellate period begins to run from the entry of the nunc pro tunc judgment); *Valley Nat'l Bank of Ariz. v. Meneghin* (1981), 130 Ariz. 119, 123, 634 P.2d 570, 574 (time for appeal from an entry nunc pro tunc runs from the time of the entry); *Utah State Bldg. Bd. v. Walsh Plumbing Co.* (1964), 16 Utah 2d 249, 254, 399 P.2d 141, 144 (party must be permitted to appeal from a nunc pro tunc entry as it cannot be used to reduce or defeat the time for taking an appeal); *Phillips v. Phillips* (1953), 41 Cal.2d 869, 264 P.2d 926, 929-30 (ruling that the "nunc pro tunc" entry would not relate back because it would cause injustice and recognizing that a defect in jurisdiction cannot be waived).

App.R. 3(A); and App.R. 4(A). Thus, a defendant is constitutionally entitled to an appeal from a final appealable order, even if the order is captioned as a "nunc pro tunc" entry. While a true "nunc pro tunc" entry merely substitutes for the original clerical mistake, if the "nunc pro tunc" entry is the first *Baker*-compliant entry issued by the trial court, it is the first entry that triggers the defendant's constitutional right of appeal.

Moreover, a defendant must be permitted to appeal from a nunc pro tunc entry because courts may not shorten the time in which a defendant may exercise his or her constitutional right to appeal. *State v. Crandall* (1983), 9 Ohio App.3d 291, 294, 460 N.E.2d 296, 300. *Phillips* at 929-30 ("Even if the judgment were entered nunc pro tunc, a party's right to an appeal cannot be cut off by antedating the entry of the judgment which he desires to appeal."). A defendant has 30 days to appeal from a final appealable order. App.R. 4(A). A court may not issue a nunc pro tunc final appealable order that has an effective date that is earlier than the date upon which the nunc pro tunc entry is journalized. Otherwise, the practice would interfere with, and may foreclose, a defendant's constitutional right to a direct appeal. Accordingly, this Court should hold that when a trial court has not issued a prior, final appealable order, an appeal may be taken from the nunc pro tunc judgment entry.

D. Res judicata does not preclude the parties from raising claims different from those raised in the void appeal.

Mr. Lester's appeal from the July 2006 order was void. When the trial court issued the April 2010 final appealable order, Mr. Lester could raise identical arguments as those made in the void appeal. Mr. Lester could also raise new arguments.

The doctrine of res judicata is inapplicable to a purported direct appeal made from a non-final, unappealable order. *State v. Mitchell,* 187 Ohio App.3d 315, 2010-Ohio-1766, 931 N.E.2d 1157, at ¶17 ("there was no final order for purposes of Crim.R. 32 and therefore res judicata is inapplicable due to the 'lack of a final order.'"). See, also, *State v. Simpkins,* 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, at ¶30 (stating that res judicata does not apply to void sentences); *State v. Perry,* 10 Ohio St.2d 175, 180, 226 N.E.2d 104, 108 (stating that the doctrine of res judicata applies when there has been a **final** judgment); *Lash v. Lash,* 8th Dist. Nos. 56155, 56837, 57816, 1990 Ohio App. LEXIS 642, at *9-10 ("Where a decision was void because of some defect relating to the jurisdiction of the trial court, said decision could not operate as res judicata to a subsequent cause of action."). Because the appeal from the July 2006 entry was void, res judicata does not apply.

IV. Conclusion

This Court should hold that if a nunc pro tunc judgment entry is the first final appealable order journalized, an appeal may be taken from that nunc pro tunc judgment entry.

Respectfully submitted,

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