

ORIGINAL

In the Supreme Court of Ohio

The State of Ohio ex rel. )  
John E. Wells, Sr., )  
 )  
Relator, )  
 )  
Vs. )  
 )  
Jefferson County Court of Appeals, )  
et al., )  
 )  
Respondents. )

Number 11-0208

Memorandum In Support of  
Verified Complaint/Petition  
for a Writ of Mandamus

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Memorandum In Support of Verified  
Complaint/Petition for a Writ of Mandamus

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**For the Relator:**

John E. Wells, Sr.  
Relator  
P.O. Box 57 (344727)  
Marion, Ohio 43301

**For the Respondents:**

Thomas R. Straus (#0019073)  
Jefferson County Prosecutor  
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State Route 7  
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FILED  
FEB 04 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

In the State of Ohio, County of Marion, SS:

**Memorandum in Support**

**A. The void judgment is subject to repeated attack:** As an initial matter, the relator (Wells) points out that the claim here is that the Court of Appeals lacks subject matter jurisdiction over the appeal. Because of such lack of jurisdiction, the appeal was never actually opened, and thus, never actually closed. Therefore, there is no need for an application to reopen the appeal.

A judgment that is void for want of subject matter jurisdiction is subject to attack in any proceeding, at any time, and is not subject to any rule or statute governing proceedings, as the authority to vacate a void judgment is inherent in Ohio's Court and derives from Ohio's Constitution. See Patton v. Diemer (1988), 35 Ohio St.3d 68; Westmoreland v. Walley Homes Corp. (1975), 42 Ohio St.2d 291, 294, 71 O.O.2d 262, 264; Lincoln Tavern v. Snader (1956), 165 Ohio St. 61, 59 O.O. 74, ¶ 1 of the syllabus.

Void judgment are not subject to res judicata. LaBarbera v. Batsch (1967) 10 Ohio St.2d 106, 39 O.O.2d 103; Tari v. State (1927), 117 Ohio St. 481; Rite Rug Co. v. Wilson (1995), 106 Ohio App.3d 59; cf. State v. McCollough, 78 Ohio App3d. 587 (6th Dist. 1992).

It does not matter that several years have past since the void judgment was journalized, or that further review was sought in the Supreme Court, since when a court lacks jurisdiction, all further proceedings are void. Erie Ry. Co. v. Stringer (1877), 32 Ohio St. 468. See also, Walther v. Central Trust Co., 70 Ohio App.3d 26 (it is well settled that a party cannot appeal from dictum).

In State ex rel. Culgan v. Medina County Court of Common Pleas, et al., (2008), 119 Ohio St.3d 535, the Ohio Supreme Court noted that Culgan sought relief four years after his direct appeals had been affirmed. Id. ¶ 4. This is because, as shown below and in Culgan, a judgment that does not comply with

Crim.R. 32(C) is not final, nor appealable; any appeal taken therefrom is void; and because there is no final judgment, the case remains open in the trial court. The Entry here does not set forth the manner of conviction (Exhibit 3).

Therefore, Wells can challenge the void judgment repeatedly until a valid final judgment is rendered and journalized in the trial court.<sup>1</sup>

**B. Appeal is not available where the judgment appealed is void:** Wells's appeal taken from the void judgment is itself void, and cannot stand as a bar to relief in this court.

Article IV, section 3, of the Ohio Constitution empowers the Courts of Appeals to accept jurisdiction of Judgments and final orders as provided by law, whereas R.C. 2953.02 is the implementing statute. State v. Smith (1997), 80 Ohio St.3d 89. See also, R.C. 2505.02.

A court's jurisdiction relates to substantive rights created by the legislature, which a court cannot abridge, enlarge, or modify by fiat. See Reed v. MTD Products, Inc. 111 Ohio App.3d 451 (6th Dist. 1996); Grant v. Ohio Dept. of Liquor Control, 86 Ohio App.3d 76 (1st Dist. 1993).

The jurisdiction of the Court of Appeals depends upon the existence of a final appealable order. If such order does not, in fact and in law, exist it cannot be made to exist by agreement. Lima v. Elliot (1964), 35 O.Op.2d 427.

Without a valid judgment or final order, the Court of Appeals has no jurisdiction of the subject matter of the appeal, lacks authority to render judgment on the merits, and must dismiss; and the Court of Appeals is required to raise the issue of the non-final judgment, and the resulting want of jurisdiction, sua sponte. In re Murray (1990), 52 Ohio St.3d 155, 159-60; State v. Tripodo (1977), 50 Ohio St.2d 124, 127; Whitaker-Merrell v. Geupel Co. (1972), 29 Ohio St.2d 184, 186; Davison v. Reni (1996), 115 Ohio App.3d 688; Prod. Cred. Assn. v. Hedges (1993), 87 Ohio App.3d 207, 210.

When a Court of Appeals lacks subject matter jurisdiction for want of a final appealable order, it lacks jurisdiction to determine the merits, and any statement beyond the confines of the analysis of jurisdiction is dicta, and is to be disregarded. See Nat. Tube Co. v. Ayers (1949), 152 Ohio St. 255; Enyart v. Columbus Metro Area Comm. Action Org., 115 Ohio App.3d 118 (10th Dist. 1996); Rickard v. Ohio Dept. of Liquor Cont. 29 Ohio App.3d 133 (10th Dist. 1986); Gregg v. Kent (1938), 27 O.L.Abs. 628.

Since the existence of a final appealable order cannot be established by agreement of counsel, Lima Supra, then the filing and briefing of an appeal taken on a void judgment cannot constitute such agreement.

Further, since the want of subject matter jurisdiction causes all proceedings thereafter to be void, Erie, supra, the Court of Appeals cannot validate, in retrospect, the void judgment upon which the void appeal was taken, on the basis of the fact that the void appeal was taken.

Therefore, as there is no judgment or final order under the meaning of Crim.R. 32(C), or R.C. 2953.02, as hereinafter more fully appears, the judgment and opinion rendered in the above captioned appeal are void, and the Court of Appeals is required as a matter of law to vacate the judgment and remand the cause to the trial court for further proceedings.

**C. The Judgment is Void for failing to comply with Crim.R. 32(C):** As shown above in Section A, it does not matter when Wells seeks his relief, as the matter remains open in the trial court until a valid final judgment is journalized.

From the plain language of the Judgment Entry of Sentence, it is obvious that it does not set forth either the plea, or the verdict or findings of the court upon which the conviction is based. Until February 27, 2008, when State v. Baker (2008), 119 Ohio St.3d 197, was decided, that was the entire review of

the document, and failure to include every element of Crim.R. 32(C) demanded resentencing. However, after Baker, it is no longer necessary to include every element of Crim.R. 32(C) as long as the judgment specifies the manner of conviction, and includes a legal sentence; the Relator's does not (Exhibit 3).

The issue here is much simpler to determine than in most cases as it does not revolve around whether the Judgment Entry is or is not void, as **the Respondents have expressly admitted, not once, but twice, that the judgment does not comply with Criminal Rule 32(C) in State ex rel. John E. Wells, Sr. v. Jefferson County Court of Common Pleas, 7th Dist. No. 08-JE-28, 2008-Ohio-6972 (aff'd on technical grounds 122 Ohio St.3d 39; and State ex rel. Moore v. Krichbaum, 7th Dist. No. 09-MA-201, \_\_\_-Ohio-\_\_\_; and thus, the Respondents have also admitted that the "judgment" is not a "judgment or final order" under R.C. 2502.02 or 2953.02, and that such lack of finality deprives the Respondents of subject matter jurisdiction over the Relator's appeal thereof under Article IV, Section 3, of the Constitution of Ohio, as this is what all Ohio Supreme Court precedent states the law requires as the result of such want of a final appealable order.**

Because the Respondents have repeatedly admitted that the judgment entry does not comply with Crim.R. 32(C), and the law demonstrates the resulting want of subject matter jurisdiction, the only issue remaining is whether the Respondents have "further jurisdiction" to vacate the resulting void judgment rendered in the appeal, and to dismiss the appeal: the shows they do and must.

The effect of a void judgment is well established: it is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment. Romito v. Maxwell (1967), 10 Ohio St.2d 266, 267-68, 39 O.O.2d 414.

See also, Section "B. Appeal is not available where the judgment appealed

is void," supra, outlining the law as it relates to the subject matter jurisdiction of the Courts of Appeals, and, **especially, as it demonstrates the Respondents' duty to raise the issues presented herein sua sponte.**

Because the Respondents have a duty to raise the issue of their want of subject matter jurisdiction, they also have a duty to examine the issue when it is brought to their attention by any means: the authority to vacate a judgment that is void for want of subject matter jurisdiction is derived from inherent power not subject to any rule of procedure, statute, or time limit, as revealed by Lincoln Tavern and Patten, supra, making it is obvious that the Respondents have a clear legal duty to determine their own jurisdiction in this matter at this time; and since the above referenced appeal is obviously void for want of subject matter jurisdiction based upon the repeated admissions of the Respondents in Wells and Moore, supra, that the "judgment" appealed does not comply with Crim.R. 32(C), it is obvious that the above referenced appeal has never been opened so as to have been "closed" in a manner that would sever the Respondents' jurisdiction to determine their appellate jurisdiction and reach the merits of Wells' claims.

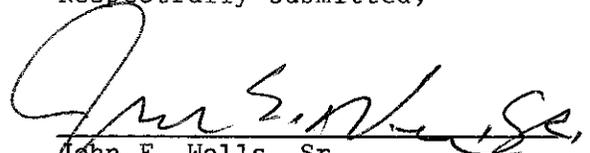
**D. Conclusion:** For the foregoing reasons, the Relator respectfully submits that the Respondents owe him a clear legal duty to determine their subject matter jurisdiction in the attempted appeal State v. Wells, 7th Dist. Court of Appeals No. 98-JE-3, as affected by the "Judgment Entry of Sentence" journalized in State v. Wells, Jefferson County Court of Common Pleas Case No. 97-CR-163, and vacate the judgment in such appeal if subject matter jurisdiction is wanting; that the Respondent is owed a clear legal duty by the Respondents to do the same; that the lack of valid final appealable order in the trial court deprives the Respondents of subject matter jurisdiction over any appeal, and the Respondents' refusal to enter a judgment on the motion to

vacate an dismiss prevents any possible appeal therefrom, and deprives the Relator of any adequate remedy in the ordinary course of law, and making this original action in Mandamus the only remedy available to the Relator.

The Relator, therefore, respectfully requests that the Supreme Court of Ohio issue a Writ of Mandamus compelling the Respondents to exercise their inherent power to determine whether subject matter jurisdiction exists or is wanting in the above referenced appeal, and to vacate the judgment and dismiss the appeal for want of subject matter jurisdiction if such jurisdiction is wanting.

Alternatively, the Relator respectfully requests that the Supreme Court of Ohio issue a Writ of Mandamus compelling the Respondents to vacate the judgment and dismiss the above referenced appeal for want of subject matter jurisdiction as the power to do is inherent power derived from the Ohio Constitution, and the want of subject matter jurisdiction is readily apparent based upon the Respondents' admission that the judgment journalized in the Relator's above cited criminal case does not comply with Crim.R. 32(C); such admissions of the Respondents having been made and journalized in the 7th Dist. Court of Appeals, and as public record, in State ex rel. Wells v. Jefferson County Court of Common Pleas, 7th Dist. No. 08-JE-28, 2008-Ohio-6972; and State ex rel. Moore v. Krichbaum, 7th Dist. No. 09-MA-201, 2009-Ohio-\_\_\_\_\_.

Respectfully submitted,

  
John E. Wells, Sr.  
Relator

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1. See State v. Fischer (2010), \_\_\_ Ohio St.3d \_\_\_, 2010-Ohio-6238, ¶ 40, where the Ohio Supreme Court held that "void sentences are not precluded from appellate review by principles of res judicata and may be reviewed at any time, on direct appeal or by collateral attack.