ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel	:	
	:	
Michael DeWine, et al.,	:	Case No. 2010-1216
	:	
Relators-Appellants,	:	On Appeal from the Lorain County Court of Appeals, Ninth Appellate District, Case Nos. 09CA9723 and 09CA009724
	:	
v.	:	
	:	
Honorable James M. Burge,	:	
	:	
Respondent-Appellee.	:	

Office of the Ohio Public Defender's Brief Amicus Curiae
In Support of Respondent-Appellee's Motion for Reconsideration

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I. Introduction

This Court's January 27, 2011 decision holds that after a defendant is sentenced but before a final appealable order has issued, the only action a trial court may take is to issue a final appealable order. That ruling usurps the power, authority, and jurisdiction of the trial court; is not based on any existing precedent; and is inconsistent with existing notions of justice.

II. Argument

A. Judge Burge was not limited to issuing a final appealable order.

After sentencing but before a final appealable order has issued, a trial court's power and jurisdiction is not limited to issuing a final appealable order. See *Ortega-Rodriquez v. United States*, 507 U.S. 234, 238-39, 113 S.Ct. 1199, 1202-03, 122 L.Ed.2d 581, 590 (recognizing that the trial court entertained motions for acquittal and resentencing after the original sentence was imposed). Until 2009, final appealable orders had not been issued in this case. But this Court ruled that when a non-Criminal Rule 32(C)-compliant entry has been journalized, a court's remedy is limited to correcting that entry by issuing a nunc pro tunc entry. *State ex rel. DeWine v. Burge*, --- Ohio St.3d ---, 2011-Ohio-235, at ¶17-18. For support, that decision cites Criminal Rule 36, which contains a procedure for correcting clerical mistakes. That Rule states:

> Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, **<u>may</u>** be corrected by the court at any time.

(Emphasis added.) Crim.R. 36. However, by the use of the word "may," the Rule provides a permissive mechanism for correcting mistakes. Nothing in that Rule states that it is mandatory or that it is the only way that a court may correct an error. More importantly, that Rule in no way limits a court's ability to revisit its record and correct a manifest miscarriage of justice, such as when two innocent people have been convicted of a crime that they did not commit.

The trial court decided not to issue a nunc pro tunc entry. It decided to revisit its previous findings of fact and granted acquittals. It acted within its authority and jurisdiction when it did so, as a trial court is not divested of jurisdiction until it issues a final appealable order. See *Hubbard v. Canton City Sch. Bd. of Educ.*, 88 Ohio St.3d 14, 15, 2000-Ohio-260, 722 N.E.2d 1025, 1025. This Court's analysis does not support the conclusion that Judge Burge patently and unambiguously lacked jurisdiction when he granted Ms. Smith's Criminal Rule 29 motion for acquittal. Because a final appealable order was not entered, the trial court had continuing jurisdiction to resentence Ms. Smith and Joseph Allen. That power included the ability to enter judgments of acquittal. See *State v. Talley*, 8th Dist. No. 90274, 2008-Ohio-3461, at ¶15 (remanding for resentencing so the trial court may properly reconsider the defendant's Crim.R. 29 motion).

B. The cases relied upon by this Court do not limit the trial court's authority to issue a corrected judgment entry as the only remedy.

This Court cited three cases for the proposition that a trial court may only issue a corrected judgment entry to remedy a Rule 32(C) violation. But those cases did not address that question.

In *State ex rel Culgan v. Medina County Court of Common Pleas,* 119 Ohio St.3d 535, 2008-Ohio-4609, 895 N.E. 805, at ¶4, the trial court did not issue a Rule 32(C)-complaint entry. When the defendant requested a resentencing hearing, the trial court refused to issue a new order. Id. The defendant filed an extraordinary writ requesting the trial court issue a Rule 32(C)-compliant entry. This Court ruled that a non-compliant entry is not a final appealable order. Id. at ¶9. And that an extraordinary writ was an appropriate remedy to request the issuance of a final appealable order. Id. at ¶11. This Court did not hold that the only action the trial court could take was to issue a compliant entry.

In *State ex rel. Alicea v. Krichbaum,* 126 Ohio St.3d, 2010-Ohio-3234, 931 N.E.2d 1079, a petitioner sought an extraordinary writ to compel the trial court to conduct a resentencing hearing. Id. at ¶1. This Court's per curiam decision held that the petitioner's request lacked merit for two reasons. First, the trial court's entry was compliant with Rule 32(C). Id. at ¶2. Second, relying exclusively on *Culgan,* the Court concluded that the petitioner's relief was limited to resentencing only. But *Culgan* does

not stand for that proposition. Instead, *Alicea,* by mischaracterizing and misinterpreting the ruling in *Culgan,* created a new legal principle unsupported by any legal rationale.

Finally, in *Dunn v. Smith,* 19 Ohio St.3d 364, 2008-Ohio-4565, 894 N.E.2d 312, at ¶4, a petitioner sought a writ of habeas corpus ordering the petitioner's immediate release from prison because the trial court had not issued a Rule 32(C)-complaint entry. This Court held that a writ of habeas corpus was not the appropriate vehicle for requesting a compliant entry, and that a court's failure to provide a Rule 32(C)-compliant entry does not entitle "an inmate to immediate release from prison; instead, the appropriate remedy is correcting the journal entry." Id. at ¶10. It is an unreasonably liberal interpretation of this sentence's meaning to use it to create a rule that a trial court's power is limited to issuing a "corrected" entry when a defendant has been sentenced but before a final appealable order has issued. The cases cited by this Court did not limit the trial court's jurisdiction to issuing a corrected judgment entry.

C. The trial court's power to resentence a defendant encompasses more than the power to "correct" a judgment entry.

This Court ruled that the trial court was limited to issuing a corrected judgment entry because the Rule 32(C) violation in this case was less egregious than if the trial court had failed to journalize a final appealable order. *State ex rel. DeWine* at ¶19. But a judgment entry either complies with Rule 32(C) or it does not. And a trial court is not divested of subject-matter jurisdiction unless and until a final appealable order that complies with Rule 32(C) has been journalized. *Culgan* at ¶9. Indeed, all of the four

requirements of Rule 32(C) are necessary for there to be a final appealable order. *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, at ¶17. The 1994 entries did not include Ms. Smith or Mr. Allen's manner of conviction. Therefore, a final appealable order had not issued. The egregiousness of the Rule 32(C) violation is a distinction without significance.

Finally, when a trial court conducts a resentencing hearing because it has jurisdiction to do so, it is generally permitted to revisit all of the statutorily permissible sentencing considerations. See R.C. 2951.07 (allowing trial court to increase length of community control at a resentencing hearing). See *State v. Johnson*, 174 Ohio App.3d 130, 2007-Ohio-6512, 881 N.E.2d 289, at ¶11 (stating that trial court may increase or decrease the defendant's sentence upon resentencing); *State v. McMullen* (1983), 6 Ohio St.3d 244, 452 N.E.2d 1292 (discussing former R.C. 2951.09 and stating that a trial court may increase the defendant's sentence at resentencing for probation violations). This Court's decision usurps the trial court's power to conduct resentencing hearings when the trial court has continuing jurisdiction.

III. Conclusion

Based on the foregoing, this Court should reconsider its January 27, 2011 decision and deny the Relator's request for a writ of prohibition.

Respectfully submitted,

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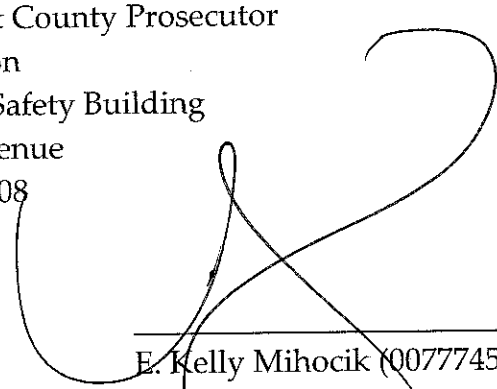

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