

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO EX REL. MICHAEL
DEWINE, et al.,

Relators-Appellants,

v.

HON. JAMES M. BURGE,

Respondent-Appellee.

Case No. 2010-1216

On Appeal from the
Lorain County
Court of Appeals,
Ninth Appellate District

Court of Appeals Case Nos.
09CA009723
09CA009724

APPELLANTS' OPPOSITION TO THE HONORABLE JAMES M. BURGE'S
MOTION FOR RECONSIDERATION

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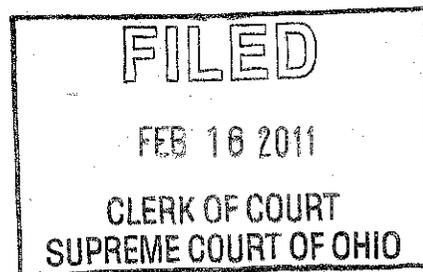


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**APPELLANTS' OPPOSITION TO THE HONORABLE JAMES M. BURGE'S
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On January 27, 2011, this Court concluded that Judge Burge lacked jurisdiction to acquit Nancy Smith of various child-sex offenses—offenses that a jury convicted Smith of in 1994. Judge Burge now asserts that this Court erred. The judge persists in his claim that he had jurisdiction—or at least, arguable jurisdiction—to issue the acquittals, and he asks this Court to reconsider its unanimous decision.

The judge is wrong, and the proof is in the pleadings. Neither the judge nor the Ohio Public Defender can cite any other instance where a trial court reopened a criminal case due to a clerical error in a judgment entry and then overturned a jury verdict that the court of appeals had affirmed many years earlier. That silence confirms what this Court concluded in its opinion—that the judge's assertion of jurisdiction in the underlying criminal case is unsupported by any precedent.

The trial court here issued a final judgment order in 1994, and the Ninth District affirmed that judgment in 1996. Those events divested the trial court of its general jurisdiction over Smith's criminal case. Its residual jurisdiction was "specific" and "limited"—the trial court could "issu[e] a corrected sentencing entry that complies with Crim. R. 32(C)." *State ex rel. DeWine v. Burge*, slip op., 2011-Ohio-235, ¶ 19, 21 (emphasis omitted). That is what the judge should have done in the first instance, and it is what this Court has now directed him to do. *Id.* at ¶ 23.

At bottom, neither the judge nor the Ohio Public Defender offers any reason for this Court to revisit its unanimous judgment. The Court should therefore deny the judge's motion.

I. Under well-established precedent, a clerical error in a final judgment entry does not vest a trial court with jurisdiction to reopen a criminal case.

In the motion for reconsideration, the judge again claims that he had broad jurisdiction to reconsider the merits of Smith's criminal conviction and issue a judgment of acquittal under Crim. R. 29(C). That position ignores the procedural posture of this case.

A jury convicted Nancy Smith of multiple sex offenses involving children in 1994. The Lorain County Common Pleas Court then issued a final judgment memorializing those convictions. The Ninth District affirmed Smith's conviction in 1996, and this Court declined discretionary review. See *State v. Smith* (9th Dist. 1996), No. 95CA6070, 1996 Ohio App. Lexis 241, *jur. denied*, 76 Ohio St. 3d 1419.

Those events divested the Lorain County Common Pleas Court of its subject matter jurisdiction over Smith's case. Once a common pleas court enters a final judgment entry, it has "no authority" to reconsider that judgment. *State ex rel. Hansen v. Reed* (1992), 63 Ohio St. 3d 597, 599. Once an appellate court issues a mandate affirming that judgment, the common pleas court loses its general jurisdiction over the case. See *State ex rel. Potain v. Mathews* (1979), 59 Ohio St. 2d 29, 32 ("The [Ohio] Constitution does not grant to a court of common pleas jurisdiction to review a prior mandate of a court of appeals."). The judge does not (and cannot) argue with either of these black-letter principles.

Those principles dictate the resolution of this case. After a trial court loses its general subject-matter jurisdiction over a criminal case, it retains "continuing jurisdiction" under Ohio law to address two narrow circumstances: (1) the court "is authorized to correct a void sentence"; and (2) the court "can correct clerical errors in judgments." *State ex rel. Cruzado v. Zaleski*, 111 Ohio St. 3d 353, 2006-Ohio-5795, ¶ 19.

The first circumstance is not applicable here. Under this Court's case law, "a sentence is void" when "it does not contain a statutorily mandated term." *State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250, ¶ 10 (emphasis added and citation omitted). Smith has never claimed, nor has the judge ever found, an omission of a statutorily mandated term in her criminal sentence. Rather, the original trial court sentenced Smith on each count of the indictment as authorized by law. See Ex. C-1, attached to Merit Br. of Appellants, *State ex rel. DeWine v. Burge*, No. 2010-1216 (filed Sept. 3, 2010).

Therefore, the trial court's continuing jurisdiction over Smith's criminal case was limited to the second circumstance listed in *Cruzado*—the judge had authority to correct the "clerical error[] in [Smith's] judgment entr[y] so that the record speaks the truth." 2006-Ohio-5795, at ¶ 19. After all, the Crim R. 32(C) defect in the judgment entry was "mechanical in nature and apparent on the record." *Id.* Indeed, "[t]he trial court and the parties all proceeded under the presumption that the sentencing entry for Smith constituted a final, appealable order." *DeWine*, 2011-Ohio-235, at ¶ 19. In such circumstances, the judge had no authority to issue a different judgment entry "to reflect what . . . [he] might . . . have decided" had he presided over Smith's criminal trial. *Cruzado*, 2006-Ohio-5795, at ¶ 19 (citation omitted).

This legal framework was in place well before 2009, when the judge issued the disputed acquittal to Smith. (The Court issued *Cruzado* in 2006, and its analysis relied on decades-old precedents discussing the limited jurisdiction of the common pleas courts after issuance of a final judgment.) And the Court hewed to that framework in this case: The Court observed that a clerical omission in a judgment entry "does not render the judgment a nullity" under *Bezak* because it "is not a violation of a *statutorily* mandated term" in Smith's sentence. *DeWine*,

2011-Ohio-235, at ¶ 19. Thus, the judge’s “authority was limited to issuing a corrected sentencing entry.” *Id.* at ¶ 21.

II. The judge’s authorities do not address the jurisdictional dispute in this case.

The judge cites three other cases in an attempt to salvage the judgment of acquittal, but those authorities do not assist his claim of jurisdiction.

First, the judge references a passing comment by the Court in *McAllister v. Smith*, 119 Ohio St. 3d 163, 2008-Ohio-3881, remarking that “the appropriate remedy” for a Crim. R. 32(C) error “is resentencing.” *Id.* at ¶ 9; see also *Mitchell v. Smith*, 120 Ohio St. 3d 278, 2008-Ohio-6108, ¶ 1 (same). That reliance misreads the Court’s decision.

In *McAllister*, a prisoner alleged that his sentencing entry violated Crim. R. 32(C). 2008-Ohio-3881, at ¶ 5. He petitioned for a writ of habeas corpus, seeking release from prison. The Court denied the writ, observing that “habeas corpus is not available when there is an adequate remedy in the ordinary course of law.” *Id.* at ¶ 7 (citation omitted). It then instructed the prisoner to file “a motion in the trial court *requesting a revised sentencing entry.*” *Id.* (emphasis added). The Court repeated that directive in its headnote: “Petitioner has adequate remedy at law by way of motion to revise sentencing entry.”

The Court then summarized its holding in the decision’s penultimate paragraph: “[The prisoner] cites no case in which a court has held that the failure to comply with Crim. R. 32(C) entitles an inmate to immediate release from prison; instead, the appropriate remedy is resentencing instead of outright release.” *Id.* at ¶ 9. That comment was shorthand for what the Court had just stated in the two preceding paragraphs—that the prisoner’s “adequate remedy at law” for a Crim. R. 32(C) error was “a motion in the trial court requesting a revised sentencing entry.” *Id.* at ¶ 7; see also *DeWine*, 2010-Ohio-235, at ¶ 20 (“[W]e did not suggest that this term encompassed anything more than issuing a corrected sentencing entry that complies with Crim.

R. 32(C).”). Given the entirety of the Court’s opinion, it was not reasonable for the judge here to interpret the reference to “resentencing” as a broad authorization of jurisdiction.¹

Second, the judge claims that his acquittal of Smith “must stand” under R.C. 2945.67(A) and *State v. Bistricky* (1990), 51 Ohio St. 3d 157 (1990). That statute and case have nothing to do with the present dispute. In *Bistricky*, the Court reaffirmed the rule that “a directed verdict of acquittal by the trial judge in a criminal case . . . is not appealable by the state as a matter of right or by leave to appeal” under R.C. 2945.67(A). *Id.* at 159 (alteration and citation omitted). But in this case, the State did not take an appeal under R.C. 2945.67(A).

Rather, the Attorney General and the county prosecutor filed an original action against the judge, alleging that he had no jurisdiction to vacate Smith’s convictions and enter a judgment of acquittal. This Court has long entertained complaints in prohibition where a trial court has “no jurisdiction of the cause which it is attempting to adjudicate, or is about to exceed its jurisdiction.” *State ex rel. Carmody v. Justice* (1926), 114 Ohio St. 94, 97. Indeed, in *State ex rel. Cordray v. Marshall*, 123 Ohio St. 3d 229, 2009-Ohio-4986, ¶ 36, this Court issued a writ of prohibition to address an identical violation—a common pleas court judge exceeding his jurisdiction in vacating a defendant’s criminal convictions. In short, nothing in *Bistricky* restricts (or even addresses) the right of the Attorney General or the prosecutor to file a complaint in prohibition.

Third, the judge contends that the Court’s decision contradicts its recent opinion in *State v. Ross*, slip op., 2010-Ohio-6282. This is wrong. In *Ross*, the trial court granted a mistrial due to

¹ Judge Burge’s reliance on *McAllister* and *Mitchell* is suspect in a second respect. As this Court noted in its opinion, “Judge Burge did far more than simply ‘resentence’ Smith and Allen”—he “grant[ed] judgments of acquittal that the previous trial court judge had not.” *DeWine*, 2011-Ohio-235, at ¶ 20.

juror misconduct. *Id.* at ¶ 4. Within fourteen days of the jury's discharge, the defendant moved for an acquittal under Crim. R. 29(C), but the court denied the motion. *Id.* at ¶¶ 5-6. Three years later, the defendant filed a renewed motion for acquittal, and the court granted it. *Id.* at ¶¶ 9-10.

This Court found error in that decision: “[T]he renewed motion was not properly before the trial court and should have been denied” because it was “filed outside the 14-day time period in Crim. R. 29(C).” *Id.* at ¶ 47. The Court nevertheless refused to disturb the acquittal because the fourteen-day deadline was “a rigid claim-processing rule,” not “a jurisdictional bar.” *Id.* at ¶ 29. Therefore, the trial court had “subject-matter jurisdiction to enter [the acquittal],” and the acquittal was not subject to appeal. *Id.* at ¶ 30.

Ross is inapposite for one simple reason: That case was on retrial; it had not yet proceeded to final judgment. The trial court thus enjoyed “general subject-matter jurisdiction” over the case, including jurisdiction to rule on all motions by the parties. *Jimison v. Wilson*, 106 Ohio St. 3d 342, 2005-Ohio-5143, ¶ 11; accord *State ex rel. Shimko v. McMongale* (2001), 92 Ohio St. 3d 426, 428 (“[A] court having general subject-matter jurisdiction can determine its own jurisdiction.”). When the court misconstrued its authority under Crim. R. 29(C) and granted the defendant's motion for an acquittal, it committed a non-jurisdictional error.

In this case, Judge Burge did not possess general subject-matter jurisdiction over Smith's criminal case. Because the Ninth District previously affirmed Smith's convictions, the judge had only limited jurisdiction to “correct a void sentence” and “correct clerical errors in judgments.” *Cruzado*, 2006-Ohio-5795, at ¶ 19. As explained above, Smith's criminal sentence was not void. Judge Burge therefore had jurisdiction to do only one thing—he could “issu[e] a corrected sentencing entry that complies with Crim. R. 32(C).” *DeWine*, 2011-Ohio-235, at ¶ 21.

The remaining portions of the judge's motion restate arguments already pressed in his merit brief, and they provide no grounds for reconsideration.

III. The Ohio Public Defender disregards the procedural posture of this case.

The Ohio Public Defender's Office advances a similar argument: It contends that, due to the clerical error in the judgment entry, Judge Burge retained broad subject-matter jurisdiction over Smith and Allen's criminal cases. He was therefore free to revisit every aspect of the case, including the propriety of the jury verdicts.

The Public Defender is looking at this case through the wrong end of the telescope. This is not a situation where the trial court is presiding over an ongoing criminal proceeding, and where the court has not yet issued a final judgment. (Were that so, the trial court would have jurisdiction to rule on any issues or motions brought to its attention.)

Rather, this criminal case proceeded to final judgment in 1994, and the Ninth District affirmed that judgment in 1996. Those actions deprived Judge Burge of general subject-matter jurisdiction over the case. See *Hansen*, 63 Ohio St. 3d at 599; *Potain*, 59 Ohio St. 2d at 32.

The Public Defender offers no authority for its contrary position that an inadvertent clerical error authorizes a trial court to reopen a final criminal judgment. And for good reason: No such authority exists.

The consequences of the Public Defender's position are breathtaking. It would mean that, upon discovery of a clerical error, a trial court could review claims and reverse judgments previously affirmed by an appellate court—including this Court. That is precisely what the judge did here. In 1996, the Ninth District found no error in the trial court's decision to admit certain hearsay statements, it deemed the State's evidence sufficient to sustain Smith and Allen's convictions, and it issued a mandate affirming the judgments. But in 2009, the judge here sought to revisit the appellate court's decision, announcing that the disputed statements "should not have

been admissible,” and that he had “absolutely no confidence” in the verdicts. See Hr’g Tr. at 6, 8, attached to Merit Br. of Appellants, *State ex rel. DeWine v. Burge*, No. 2010-1216 (filed Sept. 3, 2010).

This judicial action, if sanctioned, would uproot a century’s worth of precedent. It has long been the rule in Ohio that “an inferior court has no discretion to disregard the mandate of a superior court.” *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St. 3d 320, 323 (citation omitted); accord *In re Stayner* (1878), 33 Ohio St. 481, 489-90. That rule applies even if the trial court believes the appellate mandate to be incorrect, invalid, or issued without authority. See *In re S.J.*, 106 Ohio St. 3d 11, 2005-Ohio-3215, ¶ 10 (“[T]he trial court does not have any jurisdiction to consider whether the person has validly invoked the jurisdiction of the appellate court.”) (citation omitted). As this Court has stated, “[t]he power to review and affirm, modify, or reverse other courts’ judgments is strictly limited to appellate courts.” *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, ¶ 58.

The Public Defender’s remaining arguments—that this Court misinterpreted its decisions in *State ex rel. Alicea v. Krichbaum*, 126 Ohio St. 3d 194, 2010-Ohio-3234, *State ex rel. Culgan v. Medina County Court of Common Pleas*, 119 Ohio St. 3d 535, 2008-Ohio-4609, and *Dunn v. Smith*, 119 Ohio St. 3d 364, 2008-Ohio-4565—do not merit further attention. The parties discussed these authorities at length in their merit briefs, and this Court correctly applied them.

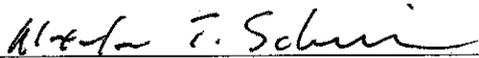
The Court correctly resolved this case on its first pass: The proper remedy for a clerical error is a nunc pro tunc entry that corrects the error.

CONCLUSION

The Court should deny the motion for reconsideration.

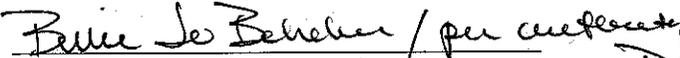
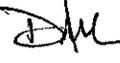
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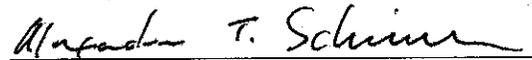
I certify that a copy of the foregoing Appellants' Opposition to the Honorable James M. Burge's Motion for Reconsideration was served by U.S. mail this 16th day of February, 2011, upon the following counsel:

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