

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : Case No.: 2010-1007
 : 2010-1372 ✓
 :
 Plaintiff/Appellee :
 :
 vs. : On Appeal from the
 : Third Appellate District
 : Auglaize County
 : Case No.: 2-10-20
 :
 STEPHEN M. LESTER :
 :
 :
 Defendant/Appellant :

MERIT BRIEF OF PLAINTIFF/APPELLEE

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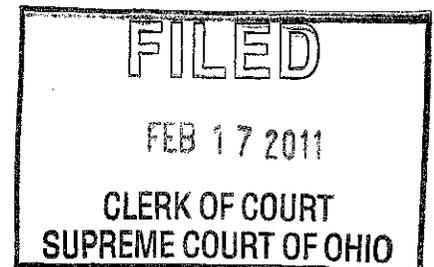


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Black’s Law Dictionary, 1097 (7th ed. 1999)

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STATEMENT OF PROPOSITIONS OF LAW

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

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

- 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.”**

- 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.**

STATEMENT OF FACTS AND CASE

On January 24, 2006, at the Koneta Rubber parking lot in Wapakoneta, Auglaize County, Ohio, Stephen Lester's stalking relationship of Angela Gierhart turned to harassment, threats, and violence. After trying to call her 12 times during her 12 minute commute to work, Stephen Lester approached her as she tried to get out of her car, seemingly out of nowhere he appeared threatening "You are coming with me. I have a knife." Angela Gierhart tried to call 911 but he threw her cell phone. He tried to grab her by the coat but she wiggled out of it. She tried to run but he tackled her, attempting to choke her. As Lester tried to drag the victim to the passenger side door of his car, she noticed the car was full of luggage. Angela Gierhart's defense mechanisms kicked in: Don't get in the car. She then fought for her life.

It is these actions that led to a January 26, 2006 Indictment by the Auglaize County Grand Jury to one count of Robbery, a second degree felony; one count Abduction, a third degree felony; one count Theft, a fifth degree felony; one count Attempted Felonious Assault, a third degree felony; and one count Aggravated Menacing, a misdemeanor of the first degree. The trial was eventually set for May 15, 2006 after the earlier trial date had been continued at the request of the Defendant who, on the eve of trial filed a NGRI plea which was eventually withdrawn at the commencement of trial on May 15, 2006 as the evaluating psychologist found the plea to be insufficient.

After a two day trial Stephen Lester was found guilty of all counts except for Robbery in which he was sentenced to eight years.

On appeal, this Honorable Court remanded for re-sentencing only. State v. Lester, 3d Dist. No.: 2-06-31, 2007-Ohio-4239.

Later, Lester filed a post conviction petition on March 20, 2007 which was dismissed by the trial court on March 22, 2007 and affirmed by this Honorable Court in State v. Lester, 3d Dist. No.: 2-07-23, 2007-Ohio-5627.

Again, Lester appealed and this Honorable Court affirmed the re-sentencing of the trial court in State v. Lester, 3d Dist. No.: 2-07-34; 2008-Ohio-1148.

On April 1, 2008, Lester filed a petition for post conviction relief. On April 2, 2008 the State filed its answer and a motion to dismiss the petition as untimely and also barred by *res judicata*. Lester's response to the motion to dismiss was filed on April 14, 2008. The trial court dismissed the motion to dismiss by Journal Entry filed April 16, 2008 and set the matter for summary judgment. Thereafter, counsel was appointed for the Defendant, withdrawal filed, and the trial court subsequently appointing Andrew Van Horn as counsel for Defendant. On October 27, 2008, Defendant, through Attorney Van Horn filed his response to the summary judgment. On November 4, 2008, the trial court granted summary judgment against the Defendant. Again, this Honorable Court denied Stephen Lester relief in his appeal.

State v. Lester, 3d Dist. No. 2-08-24; unreported, see attached. In sustaining the conviction of the trial court, this Court ruled that issues not raised on direct appeal would be barred by *res judicata*. Id.

Defendant/Appellant appealed the 2006 journal entry of conviction to the Third District Court of Appeals which issued an opinion purporting to affirm in part and reverse in part. State v. Lester, 3d Dist. App. No. 2-06-31, 2007-Ohio-4239. The Third District Court of Appeals ruled that the Defendant/Appellant's sentence was in error because the trial court had inconsistently provided information in the journal entry on post release control. The case was remanded to the trial court for re-sentencing. On August 30, 2007, the trial court re-sentenced Stephen Lester. Auglaize County Common Pleas Court Case No.: 2006-CR-6, Journal Entry filed 9-10-2007. Defendant/Appellant appealed to the Third District Court of Appeals and the appeal was denied. State v. Lester, 3d Dist. No. 2-07-34; 2008-Ohio-1148.

On April 5, 2010, the Auglaize County trial court filed a nunc pro tunc entry correcting the clerical error which failed to state the means of conviction in the second sentencing entry. On May 3, 2010, Stephen Lester appealed to the Third District Court of Appeals. On May 12, 2010, the Third District Court of Appeals dismissed the appeal indicating the Third District lacked jurisdiction since the nunc pro tunc entry did not constitute a final order subject to appeal. It is the certification of conflict in the Sixth District Court of Appeals, State v. Lampkin, 6th District No. L09-1270 where the conflict originates.

Stephen Lester then filed a Pro Se notice of appeal and notice of certified conflict in this Court wherein this Court combined cases and accepted jurisdiction.

ARGUMENT

- A. A judicial action taken without jurisdiction is a nullity and has no effect.
- B. An appellate court cannot acquire jurisdiction without a valid final appealable order.
- 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.”
- 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.

The issue certified is limited to the actual certified conflict. 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”, which was readily apparent throughout the record and to the parties but not originally included as required by Criminal Rule 32, a final order subject to appeal?

Nunc pro tunc: Latin “now for then”; having retroactive legal effect through the court’s inherent power. *Black’s Law Dictionary, 1097 (7th ed. 1999)* The definition furthers, “When an order is signed ‘*nunc pro tunc*’ as of a specified date, it means that a thing is now done which should have been done on the specified date.” Id. citing 35A C. J. S. Federal Civil Procedure 370 at 556 (1960)

Defendant/Appellant concedes in his response that the subject judgment entry filed herein is a *nunc pro tunc* entry. (Appellant's Brief Pg. 4, 5) The only issue from a *nunc pro tunc* entry correcting the "means of conviction" is an appeal of the actual correction, not any superfluous issues. All other issues that could have been raised by direct appeal are barred by *res judicata*. This *nunc pro tunc* entry relates back to the sentencing pursuant to State v. Baker, 19 Ohio St. 3d 197, 2008-Ohio-330. See also Harrison, 2010-Ohio-2709 citing Battle, 207-Ohio-2475 which holds that "Generally, a *nunc pro tunc* entry retreats back to the date of the journal entry it corrects." Further, the scope of an appeal from a sentencing entry corrected to comply with Criminal Rule 32 is limited to issues arising from the correction of the entry. State ex rel. DeWine v. Burge, 2011-Ohio-235, 2011 Ohio LEXIS 131, subject to revision. In sum, many courts did not contain the "means conviction" in their sentencing entries and have corrected that error in a *nunc pro tunc* entry filed pursuant to Baker. Id. The State Public Defender is arguing that not until the *nunc pro tunc* entries were filed was there a final appealable order. Yet, a *nunc pro tunc*, by its very definition is retroactive. The net result, if the State Public Defender is correct, would all the appeals on void entries are invalid and those affected pre-2008 cases would have the right of a direct again. Not only does it cause relitigation of issues wherein the outcome is likely similar, accordingly, it would also reverse those who won appeals thus having convictions reinstated.

Defendant/Appellant asserts that this error rendered his sentence void, thus requiring a new sentencing hearing and judgment entry with no authority for this position. He does, however, compare his situation to those cases involving a failure to notify an offender about post release control in a judgment entry, wherein the Ohio Supreme Court has determined that those sentences were void and remanded such for resentencing. See State v. Bezak, 114 Ohio St. 3d 94, 2007-Ohio-3250.

We agree, the Baker *nunc pro tunc* entry should be afforded the same protections as in post release control cases. State v. Fisher, Slip Opinion, No. 2012-Ohio-6238, Paragraphs 3, 4 of Syllabus. According to Fisher, the scope of an appeal from a sentencing entry corrected to comply with Criminal Rule 32 would be limited to issues arising from the correction of the entry and not other issues which could have been raised on direct appeal. Id. Generally, sentencing entries are not jurisdictional and do not necessary render a judgment void. See State ex rel. Massie v. Rogers, 77 Ohio St. 3d 449, 1997-Ohio-258; Johnson v. Sacks, (1967) 173 Ohio St. 452.

The Third District Court of Appeals carefully distinguished between cases wherein the trial court's actions were unlawful. "If a act is unlawful it is not erroneous or voidable, but it is wholly unauthorized and void." State ex rel. Cudrick v. Meredith, (1922) 24 Ohio N.P. (N.S.) 120, 124, 1922 WL 2015. The State Public Defender would have you believe that the entries filed in contradiction to Baker are premeditated, unauthorized actions, not clerical mistakes. There is no evidence to

support these judges acted outside the law when sentencing. Specifically, in the case *sub judice*, there is no assertion or evidence that the trial court acted with malfeasance by substituting a different sentence for that which is allowed by law. State v. Beasley, 14 Ohio St. 3d 74; 184 Ohio LEXIS 1246. Wherefore, the corrections are clerical and should be treated accordingly.

Likewise, at Stephen Lester's original sentence, upon his first direct appeal, during the sentence on remand from his first direct appeal, in his original position for post conviction relief for ineffective assistance of counsel, in his next petition for post conviction relief due to claimed withholding of evidence, throughout his pro se petition to vacate or set aside judgment of conviction or sentence, in the course of his request for new trial, even in the Statement of Facts for this brief, at all times Stephen Lester, sometimes pro se, sometimes with counsel, has referred to his jury trial and conviction by jury. Further, at jury trial Stephen Lester is referenced in *voir dire*, consulted with during preemptions, pointed at during open statement, identified in open court by witnesses, referenced in closing arguments, present for the polling of the jury, and questioned during both his sentencing hearings regarding the jury trial. There is no genuine issue that Stephen Lester did not, at all times, know his "means of conviction".

Stephen Lester has already lost appeals to these Courts' rulings on extraneous issues not raised on direct appeal on numerous occasions. Ruling in favor of the Sixth District will not only open these appeals, but also Stephen Lester's subsequent petitions for post conviction control which were barred by *res judicata* since they

were not raised on direct appeal. Further, it will re-open all other defendants similarly situated who may have had requests for delayed appeals and post conviction relief denied. Likewise, it could encourage pre-sentence motions to be filed which could result in the withdrawing of negotiated pleas in cases long stale. Stephen Lester who won one appeal, a matter of resentencing, was advised at the hearing by the trial court that he faced a potential sentence greater than his original sentence. If reopening his right to appeal leads to further resentencing it subjects Stephen Lester to a greater sentence. This individual and others similarly situated may find themselves sacrificed, maybe even incarcerated, for the cause of the State Public Defender; a cause which serves no real purpose.

Typos should not deprive victims of the closure and respect of the Ohio criminal justice system. Typos should not subject non-involved parties to reversal of overturned verdicts and certainly should not grant defendants additional constitutional rights to appeal in an untimely manner on issues already litigated.

Wherefore, a *nunc pro tunc* entry is just that - it is an entry that has retroactive legal effect through the court's inherent powers. This Court shall not divest those courts of their inherent powers. As such, the State respectfully requests this Court to resolve the certified conflict in favor of the Third District Court of Appeals.

CONCLUSION

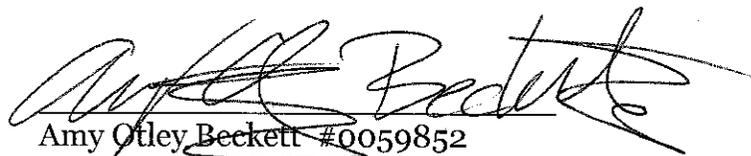
Since it is clear that the only issue from a *nunc pro tunc* entry correcting the means of conviction is an appeal of the actual correction, all other issues that could have been raised by direct appeal should be barred by *res judicata*. The State respectfully prays this court resolves this conflict by holding that the scope of an appeal from a sentencing entry corrected to comply with Criminal Rule 32 is limited to issues arising from the correction of the entry.



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PROOF OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular U. S. Mail this
17th day of February, 2011 to attorney
Defendant/Appellant, Jon Oebker, 1150 Huntington Building, 925 Euclid Ave.,
Cleveland, OH 44115.



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A P P E N D I X

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MAY 12 2009

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

PROSECUTING ATTORNEY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 2-08-24

v.

STEPHEN LESTER,

JUDGMENT
ENTRY

DEFENDANT-APPELLANT.

This appeal, having been placed on the accelerated calendar, is being considered pursuant to App.R. 11.1(E) and Loc.R. 12. This decision is therefore rendered by summary judgment entry, which is only controlling as between the parties to this action and not subject to publication or citation as legal authority under Rule 3 of the Ohio Supreme Court Rules for the Reporting of Decisions.

Defendant-Appellant Stephen M. Lester appeals the November 4, 2008 Order of the Court of Common Pleas, Auglaize County, Ohio, dismissing his Petition for Post-Conviction Relief.

During a jury trial held May 15-16, 2006 Lester was convicted of one count of abduction, in violation of R.C. 2905.02(A)(1), a third degree felony; one count of theft, in violation of R.C. 2913.02(A)(1), a fifth degree felony; one count of attempted felonious assault, in violation of R.C. 2923.02(A) and R.C. 2903.01(A)(1), a third degree felony; and one count of aggravated menacing, in

AUGLAIZE COUNTY
COURT OF APPEALS
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violation of R.C. 2903.21(A), a first degree misdemeanor. Lester was subsequently sentenced to a total of eight years in prison.

Lester appealed his conviction to this Court, which resulted in a remand for resentencing only. See *State v. Lester*, 3rd Dist. No. 2-06-31, 2007-Ohio-4239. Lester filed a post conviction petition on March 20, 2007, which was dismissed by the trial court on March 22, 2007. This Court affirmed the trial court's dismissal in *State v. Lester*, 3rd Dist. No. 2-07-23, 2007-Ohio-5627. Lester appealed, and this Court affirmed, his resentencing in *State v. Lester*, 3rd Dist. No. 2-07-34, 2008-Ohio-1148.

On April 1, 2008 Lester filed a petition for post conviction relief. On April 2, 2008 the State filed a motion to dismiss Lester's petition as untimely and also as barred by res judicata.¹ Lester filed a response on October 17, 2008. On November 4, 2008 the trial court dismissed Lester's petition.²

Lester now appeals, asserting two assignments of error.

ASSIGNMENT OF ERROR I

THE TRIAL COURT COMMITTED AN ERROR OF LAY [SIC] BY APPLYING THE DOCTRINE OF RES JUDICATA TO THE CLAIMS ASSERTED IN DEFENDANT-APPELLANT'S PETITION FOR POST CONVICTION RELIEF.

¹ It appears that the trial court construed the State's motion to dismiss as a motion for summary judgment.

² In dismissing Lester's petition, the trial court also granted summary judgment in favor of the State.

ASSIGNMENT OF ERROR II
**THE TRIAL COURT COMMITTED ERROR BY GRANTING
SUMMARY JUDGMENT WHEN GENUINE ISSUES OF
MATERIAL FACT WERE PRESENT**

For ease of discussion, we elect to address Lester's assignments of error together. Specifically, Lester appears to argue that the trial court erred in finding his petition barred by the doctrine of res judicata.

The Supreme Court of Ohio has held that the doctrine of res judicata will bar a defendant from raising any defenses or constitutional claims in a post conviction appeal under R.C. 2953.21 that were or could have been raised by the defendant at trial or on direct appeal. *State v. Perry* (1967), 10 Ohio St.2d 175, 180, 226 N.E.2d 104. Thus, the doctrine of res judicata will bar all claims except those that were not available at trial or on appeal because they are based on evidence outside the record. *State v. Medsker*, 3rd Dist. No. 1-04-24, 2004-Ohio-4291.

The Supreme Court of Ohio has recognized exceptions to this general rule and has held that the doctrine of res judicata does not apply to claims of ineffective assistance where the issue was not heard on direct appeal. See *State v. Hester* (1976), 45 Ohio St.2d 71, 75-76, 341 N.E.2d 304. However, the Supreme Court of Ohio has limited *Hester* to situations where defendant's counsel was the same at both trial and on direct appeal, because counsel "cannot realistically be

expected to argue his own incompetence.” *State v. Cole* (1982), 2 Ohio St.3d 112, 114 and fn. 1, 443 N.E.2d 169. Additionally, in *Cole*, the Supreme Court of Ohio held that where a defendant was represented by new counsel on direct appeal “who was in no way enjoined from asserting the ineffectiveness of appellant’s trial counsel,” claims of ineffective assistance of counsel *must be brought on direct review. Id.* (Emphasis added).

In the present case, Lester cited nine claims for relief in his petition for post conviction relief. Of those claims for relief, the first seven relate directly to his original conviction, where Lester had new counsel on appeal. Those arguments are barred by res judicata, as they could have been raised on direct appeal or in his prior petition for post conviction relief.

In Lester’s ninth claim for relief, Lester argues that the police failed to preserve exculpatory evidence. This claim was directly addressed in Lester’s prior petition for post conviction relief and is accordingly, barred by res judicata. See *State v. Lester*, 3rd Dist. No. 2-07-23, 2007-Ohio-5627.

Lester’s final remaining claim, claim number eight, argues that his due process rights were violated “when the trial court abused it [sic] discretion during Lester’s re-sentencing hearing.” In claim eight, Lester argues that the trial court

did not consider mitigating evidence at his sentencing.³ Lester's resentencing was thoroughly reviewed by this Court in *State v. Lester*, 3rd Dist. No. 2-07-34, 2008-Ohio-1148. Moreover, this court has previously held that

[r]egarding new sentences and re-sentences, the Supreme Court of Ohio stated, "we have concluded that trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster*, 2006-Ohio-856 at ¶ 100; see also *State v. Mathis* (2006), 109 Ohio St.3d 54, 846 N.E.2d 1, 2006-Ohio-855 at paragraph three of the syllabus, ¶ 37.

State v. James, 3rd Dist. No. 2-07-36, 2008-Ohio-3056.

Therefore, such a disagreement with the trial court's sentencing considerations could have been raised on the direct appeal of his sentence. It was not. Therefore, Lester's eighth claim is barred by res judicata. Accordingly, Lester's first and second assignments of error are overruled.

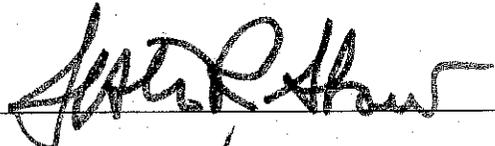
Accordingly, for the aforementioned reasons, it is the order of this Court that the Judgment Entry of the Auglaize County Court of Common Pleas be, and hereby is, affirmed. Costs are assessed to Appellant for which judgment is hereby rendered. This cause is remanded to the trial court for execution of the judgment

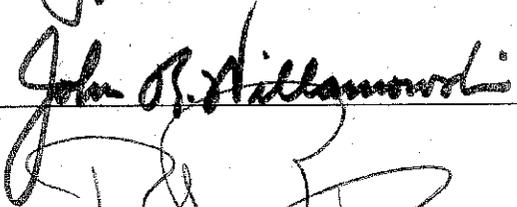
³ Lester also appears to argue that trial counsel erred in not objecting to his re-sentencing. Specifically, Lester argues that because he did not have separate counsel on appeal of his sentence, his petition is not barred by res judicata. We note that Lester's eighth claim does not actually argue ineffective assistance of counsel, and only notes that trial counsel did not object to Lester's perceived sentencing errors. Accordingly, we find that this does not bring this claim under the exception to res judicata where a defendant claims ineffective assistance of counsel and does not have new counsel on appeal.

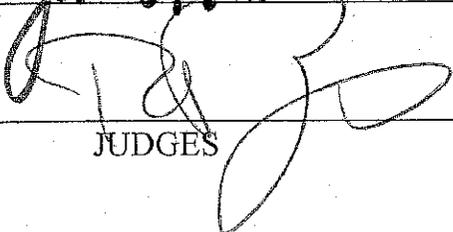
Case No. 2-08-24

for costs.

It is further ordered that the Clerk of this Court certify a copy of this judgment entry to the trial court as the mandate prescribed by App.R. 27, and serve a copy of this judgment entry on each party to the proceedings and note the date of service in the docket as prescribed by App.R. 30.







JUDGES

DATED: May 11, 2009

/jlr

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

AUGLAIZE COUNTY
COMMON PLEAS COURT
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CLERK OF COURTS

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PROSECUTING ATTORNEY

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.

cc: WPD
YA) 9-11-07
VICTIM

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.

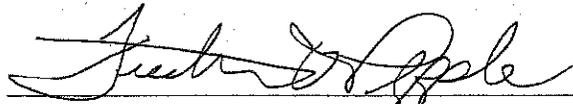
The Court advised the Defendant of his Criminal Rule 32 rights. The Court finds Defendant's Motion for appellate counsel to be appointed to be well taken and appoints the State Public Defender for the purposes of appeal.

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. PEPPL

nul waste (nəl wayst), *n.* [Law French "no waste"] *Hist.* The defendant's general denial in an action to recover damages for the destruction of lands and tenements. See NUL TORT.

number lottery. See *Genoese lottery* under LOTTERY.

numbers game. A type of lottery in which a person bets that on a given day a certain series of numbers will appear from some arbitrarily chosen source, such as stock-market indexes or the U.S. Treasury balance. • The game creates a fund from which the winner's share is drawn and is subject to regulation as a lottery.

numerata pecunia (n[y]oo-mə-ray-tə pi-kyoo-nee-ə), *n.* [Latin] *Hist.* Money counted or paid.

numerical lottery. See *Genoese lottery* under LOTTERY.

numerosity (n[y]oo-mər-ahs-ə-tee). The requirement in U.S. district courts that, for a case to be certified as a class action, the party applying for certification must show, among other things, that the class of potential plaintiffs is so large that the joinder of all of them into the suit is impracticable. See CLASS ACTION.

nummata (nə-may-tə), *n.* [Law Latin "money"] The monetary price of something.

nummata terrae (nə-may-tə ter-ee), *n.* [Law Latin] *Hist.* An acre of land.

nunciato (nən-shee-ay-toh). See NUNTIATIO.

nuncio (nən-shee-oh), *n.* [Italian, fr. Latin *nunciare* "to announce"] 1. A papal ambassador to a foreign court or government; a representative of the Vatican in a country that maintains diplomatic relations with it. — Also termed *nuncius*; *nuntio*. Cf. INTERNUNCIO; LEGATE. 2. *Archaic.* A messenger.

nunc pro tunc (nəŋg'ɪ proh təŋk or nuŋgk proh tuŋgk). [Latin "now for then"] Having retroactive legal effect through a court's inherent power <the court entered a *nunc pro tunc* order to correct a clerical error in the record>.

"When an order is signed 'nunc pro tunc' as of a specified date, it means that a thing is now done which should have been done on the specified date." 35A C.J.S. *Federal Civil Procedure* § 370, at 556 (1960).

nunc pro tunc amendment. See AMENDMENT.

nunc pro tunc judgment. See JUDGMENT.

nuncupare (nəŋg-kyoo-pair-ee), *vb.* [Latin "call by name"] *Hist.* To name or pronounce orally. • *Nuncupare heredem* means to name an heir before public witnesses.

nuncupate (nəŋg-kyə-payt), *vb.* [fr. Latin *nuncupare* "call by name"] 1. *Hist.* To designate or name. 2. To vow or declare publicly and solemnly. 3. To declare orally, as a will. 4. To dedicate or inscribe (a work).

nuncupative (nəŋg-kyə-pay-tiv or nəŋg-kyoo-pə-tiv), *adj.* [fr. Latin *nuncupare* "to name"] Stated by spoken word; declared orally.

nuncupative will. See WILL.

nundinae (nən-də-nee), *n.* [fr. Latin *novem* "nine" + *dies* "day"] 1. *Roman law.* A fair or market. 2. *Roman law.* The period between two consecutive markets (usu. eight days). • This period was often fixed for the payment of debts.

nundination (nən-di-nay-shən), *n.* [fr. Latin *nundinatio* "the holding of a market or fair"] *Hist.* The act of buying or selling at a fair.

nunquam indebitatus (nən[g]-kwam in-deb-i-tay-təs), *n.* [Latin "never indebted"] *Hist.* A defensive plea in a debt action, by which the defendant denies any indebtedness to the plaintiff. Cf. CONCESSIT SOLVERE.

nuntiatio (nən-shee-ay-shee-oh), *n.* [Latin "a declaration"] *Hist.* A formal declaration or protest. • A *nuntiatio novi operis* was an injunction placed on the construction of a new building by the person protesting the construction. — Also spelled *nunciato*.

nuntio. See NUNCIO.

nuntius (nən-shee-əs), *n.* [Latin "bearer of news"] 1. *Roman law.* A messenger. • Declarations through a messenger were usu. as valid as those by letter. 2. *Hist.* A messenger sent to make an excuse for a party's absence in court. 3. *Hist.* An officer of the court. — Also termed *summoner*; *beadle*. 4. *Eccles. law.* NUNCIO (1).

nuper obiit (n[y]oo-per oh-bee-it), *n.* [Latin "lately died"] *Hist.* A writ available to an heir to establish the equal division of land when, on