

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

STEPHEN M. LESTER

Defendant-Appellant.

Case Nos. (2010-1007) 2010-1372

On appeal from the
Auglaize County Court of Appeals,
Third Appellate District,
Case No. 2-10-20

Reply Brief of Appellant Stephen M. Lester

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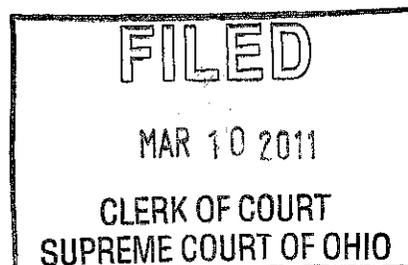
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I. INTRODUCTION: THIS CASE IS ABOUT JURISDICTION.

Either a court has jurisdiction or it does not. In this case it is undisputed that, when the Third District issued its 2006 and 2007 opinions, that appellate court did not have jurisdiction over Mr. Lester's case because no final appealable order had been issued by the trial court. As a result, the opinions issued by the Third District in the absence of jurisdiction have no binding effect.¹

The first time a final appealable order was issued in this case was in 2010 when the trial court issued a nunc pro tunc journal entry that contained all the necessary elements for a final appealable order. Mr. Lester timely appealed from this nunc pro tunc entry which was the first and only valid final appealable order ever entered in this case. However, even though this was the first time that the Third District obtained jurisdiction over Mr. Lester's case, the Third District erroneously dismissed his appeal.

II. APPELLEE AND ITS AMICI DO NOT CHALLENGE THE FOUNDATION OF DEFENDANT'S ARGUMENT.

A. This case presents a simple application of Crim. R. 32(C) and *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330.

The Appellee State of Ohio is represented by the Auglaize County Prosecutor and is supported by amici the Ohio Prosecuting Attorneys Association ("OPAA") and the Attorney General. Not one of the three briefs filed in support of Appellee dispute the fact that the 2006 and 2007 journal entries were not final appealable orders under *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. In *Baker*, this Court held that in order for a journal entry of conviction to

¹ *State v. Lester*, Third Dist. App. No. 2-06-31, 2007-Ohio-4239; *State v. Lester*, 3rd Dist. No. 2-07-34, 2008-Ohio-1148

be a final appealable order under R.C. 2505.02, it must contain the four items described by Crim.

R. 32(C).² This Court stated:

A judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court.

Baker at ¶ 1 of the syllabus. Mr. Lester's 2006 and 2007 journal entries contained the same deficiency as *Baker*, the failure to indicate the means of conviction. None of the three appellee briefs dispute this point or challenge the validity of *Baker*.

B. Prior to 2010, the Third District never had jurisdiction over Mr. Lester's appeals and, as a result, the prior appellate opinions have no legal effect.

In Ohio, the jurisdiction of an appellate court is wholly dependant on the issuance of a final appealable order. As stated by this Court: "It is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction." *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713 at ¶ 8 quoting *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20. The Appellee briefs do not challenge the principle that, "[i]f a court acts without jurisdiction, then any proclamation by that court is void." *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St. 3d 70, 75, 1998-Ohio-275. See also, *Hubbard v. Canton City School Board of Educ.*, 88 Ohio St.3d 14, 2000-Ohio-260 (this Court vacated an appellate decision because it was issued in the absence of jurisdiction as a result of a lack of a final appealable order.) As a result of the prior opinions being void, they cannot serve as valid, preclusive judgments under the doctrine of res judicata.

² Crim. R. 32(C) states in pertinent part: "A judgment of conviction shall set forth the plea, the verdict or findings and the sentence."

III. THE RESPECTIVE POSITIONS OF APPELLEE AND ITS AMICI

Appellee and its amici have filed separate briefs which, at times, offer different arguments and diverge from one another to a point of inconsistency. Accordingly, this Reply will address the portions of these positions that are not held in common, and also address the common arguments in each of the three briefs that oppose Mr. Lester's position.

A. Auglaize County's Position

The Auglaize County Prosecutor misunderstands Mr. Lester's position when, at page 7 of the State's brief, the Prosecutor contends that Mr. Lester "asserts that this error rendered his *sentence* void." This is incorrect.

What the Prosecutor's analysis misses is the fundamental concept that an *effective judgment* is not necessarily a *final order*. This is not a case about void *sentences*; the sentence in this case was fully effective since it was imposed in 2006. The trial court's sentence included all the essential elements of a valid sentence – including a prison term accompanied by post-release control.³ Accordingly, that sentence is fully in effect today – thus, for example, a habeas petition would not lie to release Mr. Lester from prison because the DRC has been fully justified in incarcerating Mr. Lester pursuant to the sentencing entry in 2006.

But the issue in this case is not about what the trial court did *at sentencing*. The issue is one of timing and jurisdiction: After the facially valid sentence was imposed, when did the trial court take the necessary step, to cause Mr. Lester's case to leave the jurisdiction of the trial court and enter the jurisdiction of the Third District Court of Appeals? The answer to his fundamental question remains unchanged – jurisdiction transfers only when the trial court enters a valid final order pursuant to Crim. R. 32.

³ Whether the sentence was appropriate or contrary to law is another question – one that Mr. Lester has not been allowed to appeal by virtue of the Third District's dismissal of his appeal.

B. The OPAA's Position

The Amicus Brief from the OPAA argues that this Court should extend the so-called “*Fisher* [sic] remedy” to this case. OPAA Br. at p. 4-6. This Court should decline to do so. In *State v. Fischer*, --- Ohio St.3d ---, 2010-Ohio-6238, the defendant had taken a previous appeal from a journal entry that failed to properly impose post-release control on the offender. After the trial court in *Fischer* corrected the post-release control error, the defendant appealed again and argued that the previous appellate decision was not “valid” because it was an appeal from a journal entry that contained a post-release control error. This Court rejected that argument and held that the previous appellate opinion was valid and sufficient for purposes of res judicata. Thus, this Court in *Fischer* recognized the validity of prior appellate judgments from post-release-control-deficient orders.

The argument to extend the “*Fischer*-remedy” to Crim. R. 32 errors fails because, not only did this Court go out of its way to limit *Fischer* to post-release control errors, but more importantly, the OPAA’s argument ignores one crucial and fundamental distinction between *Fischer* and the case at bar: **jurisdiction**. In *Fischer*, the prior appellate judgment was sufficient for purposes of res judicata because that opinion was issued by an appellate court that had jurisdiction over the appeal. Central to this Court’s holding was its rejection of the argument that the trial court’s post-release-control-deficient order was not a final appealable order. (“In so holding, we reject Fischer's claim that there was no final, appealable order in this case.” *Fischer* at ¶ 37). Thus, because there was a final appealable order in *Fischer*, the prior appellate judgment was issued when the appellate court had jurisdiction, and the prior appeal was neither “void” or a “nullity.” Thus, unlike the case at bar, the prior appellate opinion in *Fischer* could serve as a valid judgment for purposes of the applying the doctrine of res judicata. *Fischer* at ¶ 32, 36.

In stark contrast to *Fischer*, because the 2006 and 2007 orders from the trial court were not final appealable orders (due to their Crim. R. 32(C) deficiency), the previous appellate opinions from the Third District were rendered in the absence of jurisdiction. Thus, the prior appellate opinions from the Third District are void and cannot have a preclusive, *res judicata* effect that the previous appellate opinion in *Fischer* did.

The OPAA goes on to suggest that appellate courts reviewing a case which perceive an injustice will be powerless to act if they are required by Crim. R. 32 to remand the case to the trial court to enter a final order. OPAA Br. at 5-6. The OPAA's concern about defendants receiving the speedy vindication of appellate rights is unwarranted. As a practical matter, it takes a minimal amount of time for a trial court, on remand, to issue a final order. At that point, a new appeal can be taken with dispatch. Moreover, it is not necessary that briefing begin anew. Rather, a motion can be made to transfer the briefs previously filed to the new case number and the case can proceed expeditiously. The Ninth District has previously employed such economic measures. *State v. Miller*, Case No. 06CA0046-M, 2007-Ohio-1353, ¶ 20 (appeal dismissed for want of a final appealable order but court went on to note that, following a new notice of appeal, "[t]he parties may then move this Court to transfer the record from this appeal to the new appeal and to submit the matter on the same briefs as were filed in this case and we will consider the appeal in an expedited fashion"). Moreover, in cases where the meritorious nature of the appeal is apparent, a defendant can be released on bond pending appeal.

C. The Attorney General's Position

The Attorney General, as well as the Prosecutor, argue that "[t]he Third District had jurisdiction over Lester's 2007 appeal from his original sentencing judgment because the 2010 nunc pro tunc entry inserting the 'means of conviction' language retroactively rendered that judgment a final appealable order." Attorney General's Br. at p. 5; Auglaize County Br. at 6.

This argument is wrong. The nunc pro tunc entry issued by the trial court in 2010 could only indicate what *actually happened* – the fact that Defendant was convicted pursuant to a jury trial – it could not rewrite history to confer jurisdiction on the appellate court in 2007 when it is clear that Third District did not have jurisdiction at that time.

Indeed, the argument that a nunc pro tunc entry could retroactively render a judgment a final appealable order would produce absurd results. For example, if a trial court issued a journal entry that failed to contain the means of conviction, the defendant would have no basis to appeal because the order would not be a final appealable order. If the trial court then ultimately issued, nunc pro tunc, a final appealable order after 30 days had passed, the defendant would be unable to timely file a notice appeal.

The error of the Attorney General's argument is demonstrated by *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609. In *Culgan*, the defendant was convicted and sentenced in 2002. He appealed, and the Ninth District affirmed. *State v. Culgan*, Medina App. No. 02CA0073-M, 2003-Ohio-2713, 2003 WL 21221966. Four years later, Culgan filed a motion for new sentencing entry because he discovered that his original entry did not contain the means of conviction. After the trial court denied his motion for a new entry, this Court granted Culgan's petition for a writ of mandamus and/or procedendo and specifically held that "Appellees' sentencing entry did not constitute a final appealable order because it did not contain a guilty plea, a jury verdict, or the finding of the court upon which Culgan's *** convictions were based." *Culgan* at ¶ 10. In response to the order of this Court, the trial court in *Culgan* issued a nunc pro tunc order that complied with Crim. R. 32(C) and thus constituted a final appealable order. Then, even though he had previously appealed and lost in 2003, Culgan filed a second appeal in the Ninth District from that nunc pro tunc order which was

sufficient to vest the appellate court with jurisdiction. *State v. Culgan*, Ninth App. No. 08CA0080-M, 2009-Ohio-2783.

Further, the Attorney General, like the Prosecutor, relies on *State ex rel. DeWine v. Burge*, 2011-Ohio-235. The Attorney General goes so far to claim that “*Burge* settles the question here – nunc pro tunc entries correcting Rule 32(C) deficiencies have no effect on the validity of the court’s original judgment.” Attorney General Br. at p. 7. The Attorney General, like the Prosecutor, misunderstands the issue in this case. Mr. Lester has not challenged the validity of his original conviction. He has challenged whether that order was a final appealable order that was sufficient to transfer jurisdiction to the appellate court. *Burge* simply recognizes that the previous entered judgment was effective – and could not be changed by the trial court years after it had gone into effect. *Burge* is not about conferring jurisdiction on the court of appeals.

D. This Court Has Already Rejected Appellee’s Argument that the Failure of a Trial Court to Include the Necessary Crim. R. 32(C) Information Amounts to a Mere Typo or Clerical Error.

Both the Attorney General and Auglaize County try to minimize the omitted “means of conviction” language from 2006 and 2007 journal entries. The Attorney General calls it “a mere clerical error” and Auglaize County refers to it as a typo. (AG’s Brief at 1; Auglaize Br. at 9.) This argument was squarely rejected by this Court in *Baker* which held that the failure to include the means of conviction as required by Crim. R. 32 (C) was so significant, it prevented the order from being a final appealable order under R.C. 2505.02. Indeed the failure to include the means of conviction was not a typo or clerical error in *Baker*, and it should be treated any differently in this case.

E. Contrary to the Claims of Appellee and its Amici, Reversal of the Third District Will Do No Harm to the Practice of Criminal Law in Ohio.

Finally, all three Appellee briefs suggest that a reversal of the Third District would result in dire consequence for the practice of criminal appellate law in the state of Ohio. The Attorney General's brief warns of a "flood" of potential cases. Attorney General Br. at p. 13. Nothing could be further from the truth. In fact, since the release of *Baker* in 2008, courts have seen only a mere trickle of cases raising Crim. R. 32(C) deficiencies statewide. A Westlaw search of *Baker* does not reveal that any county is swamped with Crim. R. 32(C) appeals. Moreover, if a criminal litigant does raise the exact same issues that were raised in a prior appeal, the State will have the benefit of having already briefed those issues and the appellate court will have benefit of reviewing a written decision on the issues. Indeed, there is no denying that a prior appellate decision – while not legally binding for purposes of res judicata because it was written in the absence of jurisdiction – will have the practical effect of being persuasive if the criminal defendant raises the exact same issues. To be sure, the practice of appellate criminal law will survive.

However, while a reversal of the Third District will not wreak havoc on Ohio law, an affirmance of the Third District will inject confusion and uncertainty into the practice of appellate law in Ohio. When it comes to final appealable orders and the jurisdiction of the appellate courts of this state, Ohio law does not distinguish between civil and criminal cases. Orders entered in both types of cases have to satisfy R.C. 2505.02 in order to be final appealable orders and thus vest the appellate court with jurisdiction. An affirmance of the Third District will effectively (a) sanction interlocutory appeals – appeals from non-final orders – and (b) recognize the validity of judicial pronouncements made in the absence of jurisdiction. This is truly a path down which this Court should not travel.

IV. CONCLUSION

For all these reasons, Mr. Lester respectfully asks that this Court reverse the judgment of the Third District and reinstate his appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a copy of the foregoing **Reply Brief of Appellant Stephen M. Lester** has been sent by regular U.S. mail, postage-prepaid, this 10th day of March, 2011 to:

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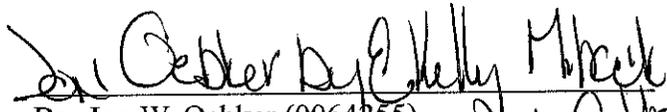
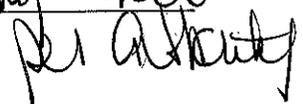
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Appendix to

Reply Brief of Appellant Stephen M. Lester

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH FILE 58 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH OCTOBER 1, 2010 ***

TITLE 25. COURTS -- APPELLATE
CHAPTER 2505. PROCEDURE ON APPEAL

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ORC Ann. 2505.02 (2011)

§ 2505.02. Final order

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to *section 2307.85* or *2307.86 of the Revised Code*, a prima-facie showing pursuant to *section 2307.92 of the Revised Code*, or a finding made pursuant to division (A)(3) of *section 2307.93 of the Revised Code*.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234 [2305.23.4], 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 [5111.01.8], and the enactment of sections 2305.113 [2305.11.3], 2323.41, 2323.43, and 2323.55 of the Revised Code or or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131 [2305.13.1], 2315.18, 2315.19, and 2315.21 of the Revised Code.

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

HISTORY:

GC § 12223-2; 116 v 104; 117 v 615; 122 v 754; Bureau of Code Revision, 10-1-53; 141 v H 412 (Eff 3-17-87); 147 v H 394. Eff 7-22-98; 150 v H 342, § 1, eff. 9-1-04; 150 v H 292, § 1, eff. 9-2-04; 150 v S 187, § 1, eff. 9-13-04; 150 v H 516, § 1, eff. 12-30-04; 150 v S 80, § 1, eff. 4-7-05; 152 v S 7, § 1, eff. 10-10-07.

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*** RULES CURRENT THROUGH MARCH 1, 2011 ***
*** ANNOTATIONS CURRENT THROUGH JULY 1, 2010 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 32 (2011)

Review Court Orders which may amend this Rule.

Rule 32. Sentence

(A) Imposition of sentence.

Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

(1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

(2) Afford the prosecuting attorney an opportunity to speak;

(3) Afford the victim the rights provided by law;

(4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.

(B) Notification of right to appeal.

(1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.

(2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.

(3) If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court shall also advise the defendant of all of the following:

(a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

(b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

(c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

(d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

Upon defendant's request, the court shall forthwith appoint counsel for appeal.

(C) Judgment.

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.

HISTORY: Amended, eff 7-1-92; 7-1-98; 7-1-04; 7-1-09.