

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

:

Plaintiff - Appellee,

:

Case Nos. 2010-1007, 2010-1372

v.

STEPHEN M. LESTER

Defendant - Appellant.

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CLERK OF COURT
SUPREME COURT OF OHIO

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

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Memorandum in Support of Defendant-Appellant's Reply Brief

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RULE:

Criminal Rule 32 *passim*

I. Introduction

An appeal may be taken from an entry designated as nunc pro tunc, when it is the first entry that complies with Criminal Rule 32(C). And an entry designated as nunc pro tunc, even if it is the first final appealable order, cannot retroactively confer subject-matter jurisdiction onto a court of appeals.¹

When a trial court issues a final appealable order, it triggers a defendant's right to appeal. R.C. 2505.02. That right is more than a clerical nicety. It affects a defendant's

¹ Amicus the Ohio Attorney General mischaracterize the issue as whether "a mere clerical error in a sentencing order invalidates all subsequent proceedings" (Amicus Brief, at p. 1.) That proposition assumes too much. It assumes that the "subsequent" proceedings were valid at the time they were performed. Those actions could not have been valid because they were performed by a court acting without subject-matter jurisdiction.

Amici also misunderstand the arguments in this case. This case is about the ability of the court of appeals to act when a final appealable order has not been issued by the trial court. This case is not about the validity of the defendant's conviction in the trial court. (See Brief of the Ohio Attorney General at pages 6-7, relying on this Court's recent decision in *State ex rel. DeWine v. Burge*, --- Ohio St.3d ---, 2011-Ohio-235, and arguing that a trial court may only issue a corrected judgment entry when the trial court has not issued a final appealable order. See, also, Brief of the Ohio Prosecuting Attorneys Association at page 4, arguing that the *Burge* decision establishes that the trial court's failure to include the manner of conviction in a judgment entry does not render the trial court's judgment a nullity). Crucially, amici fail to address the power of the court of appeals to issue a binding decision.

The Ohio Attorney General also argues that a ruling in favor of Mr. Lester would preclude repeat violent offender classifications when a trial court has failed to issue a final appealable order for the prior offenses. (Amicus Brief, p. 13.) The Attorney General's argument misses the mark and is not relevant to this dispute. The issue is whether the court of appeals had jurisdiction when it decided Mr. Lester's appeal. This Court is not deciding whether a conviction is invalid if the trial court has unnecessarily delayed in issuing a Rule 32(C)-compliant final appealable order.

substantive rights. When a trial court issues the first Criminal Rule 32(C)-compliant entry, it is the first final appealable order issued. And until that final appealable order is issued, a defendant cannot file a valid notice of appeal. Nor can a court of appeals acquire subject-matter jurisdiction over the case.

II. Analysis

1. The Sky is Not Falling.

Appellee and the supporting amici argue that a favorable decision for Mr. Lester will result in the unraveling of the entire criminal appellate system. This is a gross exaggeration. Indeed, a favorable ruling for Mr. Lester will be of limited impact and will not cause the relitigation of all criminal appeals.

For this case to have an impact on an existing criminal case, the following facts must be present:

- The defendant must currently be serving a portion of his or her sentence;
- After a finding of guilt, the trial court must have issued a purported judgment entry that did not comply with Criminal Rule 32(C);
- Neither the prosecutor nor the defendant asked for and/or were granted the issuance of a final appealable order;
- The defendant or the prosecutor must have appealed from the non-compliant judgment entry;
- The court of appeals must have been unaware that a final appealable order did not exist;
- After a purported appeal was completed, the trial court must have issued a final appealable order and designated that order as a nunc pro tunc entry; and

- There must be a reversible error that was not raised in the improper appeal.

As stated, a non-frivolous, reversible error for appeal must exist. Defendants are unlikely to raise the same arguments in a proper appeal that were raised in an appeal without jurisdiction. Courts of appeals could merely adopt the reasoning contained in the prior void appeal. And while that appeal is void, it is intellectually dishonest to claim that the court of appeals did not examine the legal arguments previously raised. Moreover, attorneys are unlikely to repeat identical issues when the appellate court has already expressed an opinion that the defendant should lose, even if that opinion is not binding precedent.

A. *A Favorable Ruling for Mr. Lester Will Have Minimal Impact on Cases in Which Guilty Pleas Were Entered.*

This case will have minimal impact on cases in which a defendant has entered a guilty plea. In most cases, an appeal was not taken. At any time, the prosecutor or the trial court can review the entries to ensure compliance with Criminal Rule 32(C). If a final appealable order does not exist, the trial court may issue a Rule 32(C)-compliant entry. Because no appeal was taken, the trial court is not trying to retroactively confer subject-matter jurisdiction onto a court of appeals. While the Rule 32(C)-compliant entry is the first final appealable order in the case, it is unlikely that the defendant will appeal. Indeed, in most cases, if non-frivolous issues for appeal existed, the defendant would have sought a final appealable order at an earlier time.

B. Trial Courts Have Already Issued Rule 32(C)-Compliant Entries.

In many cases in which an appeal was taken from a non-final, unappealable order, the court of appeals or the parties have already requested a proper judgment entry. Because a court of appeals lacks jurisdiction unless and until a notice of appeal is filed from a final appealable order, courts of appeals have remanded actions back to the trial courts so that Rule 32(C)-compliant entries could be issued. See, e.g., *State v. Preston* (June 6, 2010), 4th Dist. No. 10CA04 (entry remanding action back to the trial court so that it may issue a final appealable order); *State v. Kulchar* (Apr. 28, 2010), 4th Dist. No. 10CA06 (entry remanding action for issuance of a final appealable order).

C. Criminal Rule 32(C) is Easy to Follow and Most Courts Likely Issued Rule 32(C)-Compliant Entries.

Criminal Rule 32(C) is straightforward and easy to follow.

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 should 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.

Crim.R.32(C). Because of its simplicity, it is likely that most courts, most of the time, have complied with Criminal Rule 32(C). Yet, the State argues that a ruling adverse to its position will cause the sky to fall.

A prevailing party has an interest in protecting the integrity of a judgment, while the losing party chooses whether to appeal. (But see Amicus Brief of the Ohio Attorney General, pp. 11-12, suggesting that only the defendant has the burden of reviewing an entry and requesting a correction from the trial court). A prevailing prosecutor need only review the purported final entry for the presence of three requirements and ensure that that entry is journalized.² See *State ex rel. Rose v. McGinty*, --- Ohio St.3d ---, 2011-Ohio-761, ¶2. It is easy to create a checklist, and it takes only a moment to ensure that the entry is Rule 32(C)-compliant. And yet, the State's entire position is based on the premise that reviewing an entry for the presence of those requirements is onerous.

2. The Right to Appeal is a Substantive Right. An Entry that Lacks the Manner of Conviction is Not Merely a Clerical Mistake.

Words have meaning. There is a difference between a layperson's definition of a clerical error and its legal definition. See R.C. 1.42. In its colloquial sense, a clerical error is a typographical error that does not trigger or affect a person's legal standing or rights. On the other hand, an error that is created, negated, or otherwise specifically tied to a legal right cannot be termed a clerical error. In this case, it is the words

² If need be, each prosecutor's office could create a checklist that is stamped onto each purported final appealable order to ensure compliance with Rule 32(C). Below is an example of one possible stamp.

_____ Finding of guilt: Bench trial, Jury trial, or Plea
_____ Sentence
_____ Judge's Signature
_____ Journalized
_____ Reviewer's Signature

themselves that trigger a party's right to appeal. The right to appeal cannot be termed as a clerical right.

A purported final entry that is not Rule 32(C)-compliant affects a defendant's substantive rights. See *State v. Yeaples*, 180 Ohio App.3d 720, 2009-Ohio-184, 907 N.E.2d 333 (recognizing that an entry must be Rule 32(C)-compliant to trigger a party's right to appeal); *State v. Hopkins*, 3rd Dist. No. 17-008-01, 2008-Ohio-2611 (recognizing that a failure to comply with Criminal Rule 32(C) is an error affecting substantive rights, while a typographical error is a technical error that is properly corrected through a nunc pro tunc entry). Cf. *White v. Westrick* (8th Cir. 1990), 921 F.2d 784 (recognizing that a misspelling of a party's name is a technical error that may be corrected through a nunc pro tunc entry because it does not implicate or affect the party's substantive rights).

A defendant may not appeal from an entry that does not comply with Criminal Rule 32(C). *Yeaples* at ¶18; *State v. Vargas*, 9th Dist. No. 06CA008994, 2007-Ohio-2264, ¶9. Critically, an entry that lacks one of the *Baker*³ requirements is not merely a clerical mistake because the omission makes the entry unappealable. *McGinty* at ¶2; *Yeaples* at ¶18. It renders the document a non-final, unappealable order. *Vargas* at ¶9.

This Court has spoken numerous times on the requirements of a final appealable order. *McGinty* at ¶2. Those requirements include an affirmative statement of the defendant's manner of conviction. *Baker* at ¶18. If that statement is not present, a final

³ *Baker* refers to this Court's decision in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163.

appealable order does not exist, and a court of appeals cannot acquire subject-matter jurisdiction over the action. *McGinty* at ¶2. Subject-matter jurisdiction is an absolute prerequisite for a court to take any binding action. *Gen. Accident Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266, 269; *State v. Koreisl*, 8th Dist. No. 92068, 2009-Ohio-4195, ¶9-10. And any action taken without subject-matter jurisdiction is a nullity. *Gordon v. Gordon*, 5th Dist. Nos. CT2007-0072 and CT2007-0081, 2009-Ohio-177, at ¶30. *State v. Fischer*, --- Ohio St.3d ---, 2010-Ohio-6238, ¶19 (stating that a void judgment is one issued by a court without jurisdiction to act).

The failure to include the manner of conviction is of greater significance than had the trial court misspelled Mr. Lester's name. The first two entries issued by the trial court did not comply with Criminal Rule 32(C). That compliance matters. It makes the difference between a document that is a final appealable order, that can confer subject-matter jurisdiction onto a court of appeals, and a document that cannot. *Baker* at ¶18; *McGinty* at ¶2; *O'Neal v. Bradshaw* (N.D. Ohio), Case No. 1:09-CV1751, 2009 U.S. Dist. LEXIS 124471, at , at *3-4 (discussing the case history, including the fact that the Ohio appellate court dismissed the appeal because it lacked jurisdiction because the trial court's entry did not comply with Rule 32(C)).

Amicus, the Ohio Attorney General, argues that the trial court's failing to issue a final appealable order does not affect a defendant's substantive rights. (See Amicus Brief, at p.2, stating that failing to issue a Rule 32(C)-compliant entry is merely a

“clerical” matter). The Ohio Attorney General could not be more wrong. A defendant has a statutory right to appeal his or her conviction. R.C. 2505.02. The right to appeal is not triggered unless and until the trial court issues a final appealable order. *Id.*; *Hubbard v. Canton City Sch. Bd. of Educ.*, 88 Ohio St.3d 14, 15, 2000-Ohio-260, 260, 722 N.E.2d 1025, 1025 (vacating opinion of the court of appeals as it lacked subject-matter jurisdiction because there was no final appealable order); *Gen. Accident Ins. Co. at 269*; *Koreisl* at ¶9-10 (judgment did not have the requisite findings to make it a final appealable order); *Wade v. Stewart*, 8th Dist. No. 93405, 2010-Ohio-164, ¶15. In Ohio, that right is not triggered until R.C. 2505.02 has been satisfied. See R.C. 2505.03 (stating that an appeal may be made from a final order). To meet the requirements of R.C. 2505.02, the trial court must issue a Rule 32(C)-compliant final appealable order. *Baker* at ¶18. See *McGinty* at ¶2.

3. A Nunc Pro Tunc Entry Cannot Validate a Court’s Action Performed Without Subject-Matter Jurisdiction.

The State and supporting amici argue that a nunc pro tunc entry may replace a non-Rule 32(C)-compliant entry. They also argue that courts may give that entry a retroactive application. But a nunc pro tunc entry cannot be used to validate action taken by a court of appeals that lacked the power and jurisdiction to act when it did. *Yeaples* at ¶15 (stating that “[j]ust because the trial court refers to an entry as nunc pro tunc does not make it so established.”). Nunc pro tunc entries may only be used to correct action that actually occurred. *Hopkins* at ¶13; *In re RMAA Real Estate Holdings*,

L.L.C. (Nov. 15, 2010 E.D. Va.), Case No. 10-16505-RGM, 2010 Bankr. LEXIS 4102, at *5 (stating that a nunc pro tunc order cannot create any new or additional rights or change the legal effect of the original judgment or decree). (Citation omitted) (punctuation altered.) The court of appeals did not subject-matter jurisdiction at the time it issued its decision in the void appeal. It cannot retroactively acquire subject-matter jurisdiction by a nunc pro tunc entry issued by an inferior court. Jurisdiction is not a clerical matter, and there is no authority that permits jurisdiction to be imbued upon a court retroactively.

The State and amici's arguments rest solely on the principle that the easiest resolution is to find some way to retroactively confer subject-matter jurisdiction onto the court of appeals. But the law is not about taking the easiest road. The court of appeals acted before a final appealable order was issued. Consequently, it did not have the power or authority to act when it did, which renders its judgment void. The court of appeals' decision is of no precedential value and is not binding on the lower court.

4. An Appeal From the First Rule 32(C)-Compliant Entry is Not Limited to Issues Arising From the "Correction."

The State and supporting amici argue that an appeal from a nunc pro tunc order should be limited to issues arising from the correction. That argument is illogical. Without including the manner of conviction, a final appealable order does not exist. Any purported appeal from the non-final, unappealable order is void. Consequently, so too is any decision by the court of appeals. The only valid appeal is the appeal from

the first valid, final appealable order. See *Yeaples* at ¶16. In the first valid direct appeal, a party may raise any issues that appear in the trial court's record. While pragmatic concerns about intellectual honesty may limit the depth of review that a court of appeals affords previously reviewed issues, res judicata does not preclude a defendant from raising new or different issues in the first valid appeal. *State v. Mitchell*, 187 Ohio App.3d 315, 2010-Ohio-1766, 931 N.E.2d 1157, ¶17 ("there was no final order for purposes of Crim.R. 32 and therefore res judicata is inapplicable due to the 'lack of a final order.'"). See, also, *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶30 (stating that res judicata does not apply to void sentences); *State v. Perry*, 10 Ohio St.2d 175, 180, 226 N.E.2d 104, 108 (stating that the doctrine of res judicata applies when there has been a **final** judgment); *Lash v. Lash*, 8th Dist. Nos. 56155, 56837, 57816, 1990 Ohio App. LEXIS 642, *9-10 ("[w]here a decision was void because of some defect relating to the jurisdiction of the trial court, said decision could not operate as res judicata to a subsequent cause of action.").

III. Conclusion

This Court should hold that even if an entry is designated as nunc pro tunc, if it was the first final appealable order journalized, an appeal may be taken from that entry.

Respectfully submitted,

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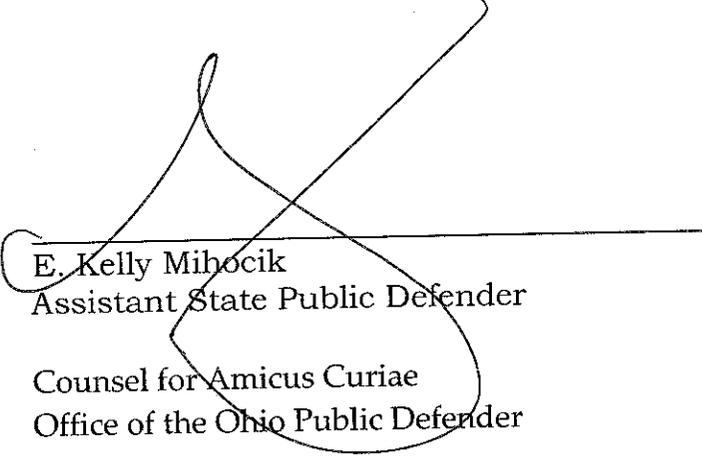
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