



TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTION[S] AND IS AN APPEAL OF A COURT OF APPEALS DETERMINATION UNDER APP. R.5(A).....	1
STATEMENT OF THE CASE AND FACTS.....	2
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	3
<u>Proposition of Law No.I:</u> An appellate court abuses its discretion by determining, on App. R.5(A), that appellant did not provide sufficient reasons for failure to perfect an appeal as of right.....	3
<u>Proposition of law No.II:</u> Equal protection of laws means that no person or class of people shall be denied same protection of laws which is enjoyed by other people or classes in same place under like circumstances.....	11
CONCLUSION.....	14
CERTIFICATE OF SERVICE.....	14
APPENDIX	<u>Appx.</u>
Judgment Entry of the Hamilton County Court of Appeals (March 23, 2011).....	1
Judgment Entry of the Hamilton County Court of Common Pleas Revoking Community Control and Imposing Sentence *** Nunc Pro Tunc 08/02/2010 *** Corrected (August 31, 2010).....	2
Judgment Entry of the Hamilton County Court of Common Pleas Revoking Community Control and Imposing Sentence (August 11, 2010).....	5
Judgment Entry of the Hamilton County Court of Common Pleas Sentence to Community Control (July 31, 2010).....	8

**EXPLANATION OF WHY THIS CASE INVOLVES  
SUBSTANTIAL CONSTITUTIONAL QUESTION[S] AND IS AN  
APPEAL OF A COURT OF APPEALS DETERMINATION UNDER APP. R.5(A)**

This cause presents two critical substantial Ohio and Federal Constitutional Questions: (1) Does Section 16, of Article 1 of the Ohio Constitution, and Amendment Fourteen of the United States Constitution guarantee an appellant's right to redress to *an injury done him in his person*, in his App. R.5(A) request, against a Court of Appeals Judgment that determines appellant failed to provide sufficient reasons for failure to perfect an appeal as of right?; and (2) Does Section 2 and 16, of Article 1 of the Ohio Constitution, and Amendment Fourteen of the United States Constitution protect an appellant against a Court of Appeals Judgment, in his App. R.5(A) request, that interprets a substantial state right unequally?

The decision of the court of appeals threatens the structure of App. R.5(A) created by the courts of Ohio. By its ruling, the court of appeals undermines the purpose of the rule and creates its own *modus operandi* of judgments under App. R.5(A). Moreover, the court of appeals' decision establishes the illogical and untenable rule that an appellate court can ignore its duty pursuant to App. R.1(A). Finally, the decision of the court of appeals alleviates an appellant's Ohio and Fourteenth Amendment United States Constitutional right to have due process implemented into the criminal proceedings in this case.

The decision of the court of appeals sets a precedent that would exclude a remedy to appellant's who have been deprived of due process in their case. Under this method, appellants would be denied of their fundamental ability to have redress in their case, in requesting leave to file an appeal as of right, with due process. The result of this abuse of discretion would be fundamentally unfair.

Not surprisingly, the conclusion of the court of appeals is contrary to the procedural mandate of App. R.5(A), the statutory scheme of R.C.2505.02(A)(1), and to all legal authority. The Supreme Court and Appellate Courts throughout this state have endorsed the remedy for appellants who have been deprived of due process when requesting leave to file an appeal as of right. Similarly Federal Courts

have recognized App. R.5(A) as part of Ohio's appellate process.

Finally, this cause is an appeal of a court of appeals determination under App. R.5(A). The determination offends Ohio's appellate scheme by circumventing the remedy when an appellant requests leave to file an appeal as of right pursuant to App. R.5(A), granted by the Ohio General Assembly as a substantial right under R.C.2505.02(A)(1). Such an implication of the appellate rule is contrary to the Federal Northern District of Ohio Court's holding in *Thompson v. Wilson* (N.D.2007), 523 F.Supp.2d 626.

Contrary to the holding in *Thompson v. Wilson*, the Court of Appeals circumvention of App. R.5(A) impairs the perception of the rule. The Federal court established the foundation for an App. R.5(A) request in *Jacobs v. Mohr* (6th Cir.2001), 265 F.3d 407, 419:

*"The Constitution is violated if a convicted defendant is not given the right to appeal "by reason of his lack of knowledge of his right" and the failure of his counsel or the trial court to advise him of his right to appeal with the aid of counsel."*

If allowed to stand, the determination of the court of appeals would impede the implication of App. R.5(A). Under the determination, the judgment would be a miscarriage of justice, prejudicial, and an abuse of discretion. Appellants would be subject to interference by Appellate Courts in receiving due process and rejection once establishing that there was sufficient reasons as to an appellant's failure to perfect an appeals as of right, whose actions would not only undermine the Fourteenth Amendment to the United States Constitution but also the general procedure of App. R.5(A) by Ohio Appellate Courts. The entire scheme of App. R.5(A), designed to provide a remedy to defendants who have failed to perfect an appeal as of right for sufficient reasons, would be ineffectual if the determination of the court of appeals is permitted to stand.

#### STATEMENT OF THE CASE AND FACTS

On November 30, 2009, appellant was indicted by the Hamilton County Grand Jury on one count of R.C.2903.13(A) and one count of R.C.2921.331(B). All other remaining counts issued in the

indictment were subsequently dismissed.

On June 7, 2010, appellant's case proceeded before the trial court and he withdrew his plea of not guilty and entered a plea of guilty to one count of a violation under R.C.2903.13(A) and one count of a violation under R.C.2921.331(B). Appellant was initially sentenced by the trial court to a split sentence on August 2, 2010, to one year in the department of corrections (D.O.C.) for count one, R.C. 2903.13 (A) and to three years of community control for count four, R.C.2921.331(B). However on August 18, 2010, the trial court re-sentenced appellant *in absentia*, via a nunc pro tunc entry of judgment, and revoked the previously imposed sentence of community control pertaining to count four and in turn increased appellant's sentence by three years in the D.O.C. after he was already committed to a state penal institution to serve his one year sentence.

On March 3, 2011, appellant humbly requested leave to file a delayed appeal accompanied with the Notice of Appeal and on March 23, 2011, the First District Court of Appeals overruled appellant's request determining that the motion is not well taken as the appellant has failed to provide sufficient reasons for failure to perfect an appeal as of right.

The determination of Appellant's App. R.5(A) request is the cause supporting this appeal and such appellant presents the following arguments.

#### ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

**Proposition of Law No. I: An appellate court abuses its discretion by determining, on App. R.5(A), that appellant did not provide sufficient reasons for failure to perfect an appeal as of right.**

In the present cause in response to appellant's App. R.5(A) request the First District Court of Appeals determined that appellant had failed to provide [s]ufficient reasons for failure to perfect an appeal as of right. Appellant submits that the Court of Appeals determination was and is an abuse of judicial discretion. In the case at bar appellant contends that the aforementioned abuse of discretion occurred when said court implemented a criteria that applies unequally to him as it does to other persons or classes of people in like circumstances and that required appellant to put forth sufficient

reasons that would mendaciously place his failure to perfect an appeal as of right upon himself when truthfully such failure was orchestrated by the trial court. Appellant submits that the Court of Appeals determination that he failed to provide sufficient reasons for his failure to perfect an appeal as of right is erroneous.

Appellant contends that the following reason[s] were adequately explained to the Court of Appeals in his request, pursuant to App. R.5(A), regarding his failure to perfect an appeal as of right: 1) *Appellant was **not** reasonably notified of the trial court's August 31, 2010, entry of judgment **pursuant to Hamilton County Common Pleas Local Court Rule 17(A)***; and 2) *Appellant was **not** notified at all by the trial court or his attorney on August 18, 2010, when he was **unlawfully re-sentenced in absentia** of his appeal rights pursuant to Crim. R.32(B).*

**I. Appellant was not reasonably notified of the trial court's August 31, 2010, entry of judgment pursuant to Hamilton County Common Pleas Local Court Rule 17(A).**

The appellant in the case sub judice was not aware of the trial court's nunc pro tunc entry of judgment until he received the court document from his institutional case manager on **December 14, 2010**. Hamilton Court Common Pleas Local Court Rule states with no ambiguity;

*When the court signs a judgment defined in Ohio Civil Rule 54 from which an appeal lies, provided in R.C.2505.02, the court **shall** affix a uniform stamp identifying said judgment and **direct the clerk** to serve **[a]ll** parties pursuant to Ohio Civil Rule 58.*

The appellant asserts here that there is no discrepancy in Local Rule 17(A) as to what the trial court and the clerk of such court must do once a judgment is signed by the trial court. In this case once the trial court signed the relevant entry of judgment on August 18, 2010, and affixed a time-stamp upon it on August 31, 2010, the trial court was responsible for enforcing Hamilton County Common Pleas Local Court Rule 17(A) in its courtroom which included appellant. It was the trial court's unequivocal failure to implement Hamilton County Common Pleas Local Court Rule 17(A) that lead to appellant's failure to perfect an appeal as of right. It was an abuse of judicial discretion for the Court of Appeals to have determined that appellant failed to provide sufficient reasons why he failed to perfect an appeal as

of right when the record sufficiently reflects this reason why.

Furthermore appellant raises the fact within the record that he still has not been served true reasonable notice of the trial court's August 31, 2010, entry of judgment, in accordance with Hamilton County Common Pleas Local Court Rule 17(A). This subsequently means that his time to appeal the trial court's August 18, 2010, re-sentencing decision has not begin to run lawfully within the meaning of Ohio Law and he should be granted his App. R.5(A) request in order to prevent a miscarriage of justice in this case. In *Moldovan v. Cuyahoga* (1986), 25 Ohio St.3d 293, 496 N.E.2d 466 this Court held, "*the opportunity to file a timely appeal, pursuant to App. R.4(A), [i]s meaningless when reasonable notice of an appealable order is not given."* **The time to file an appeal does not begin to run unless the appellant has been [p]roperly served with notice of the final judgment of the trial court.** See *State v. Taylor* (July 1, 2003), Erie App.No.E-02-045, EL 21581710. In this case the trial court was the reason appellant failed to perfect an appeal as of right when it circumvented serving appellant with his notice of the final August 31, 2010, entry of judgment. Appellant provided this sufficient reason to the Court of Appeals in compliance with App. R.5(A).

**II. Appellant was not notified at all by the trial court or his attorney on August 18, 2010, when he was unlawfully re-sentenced in absentia, of his appeal rights pursuant to Crim. R.32(B).**

On August 31, 2010, the trial court journalized an entry indicating that the August 18, 2010, judgment was a nunc pro tunc entry for the August 2, 2010, entry which was journalized on August 11, 2010. "Crim. R.43(A) specifically requires that the defendant be present at every stage of the proceedings including the imposition of sentence, **and this applies where one sentence is vacated and a new sentence imposed.**" See *Columbus v. Rowland* (1981), 2 Ohio App.3d 144, 440 N.E.2d 1365.

The August 31, 2010, judgment entry reflecting the nunc pro tunc re-sentencing hearing that occurred on August 18, 2010, is a nullity because appellant was [n]ot present. In *State v. Welch* (1978), 53 Ohio St.2d 47, 372 N.E.2d 346, this Court stated, "the fact that a defendant is [n]ot present at sentencing nullifies the judgment entry." In addition the trial court in this case erred in increasing

appellant's sentence by three additional years during said re-sentencing hearing in his absence. See State v. Gabriel (Dec. 31, 1987), Cuyahoga App.No.53141, WL 32122.

The case sub judice is similar to State v. Cavillo (1991), 76 Ohio App. 3d 714, 603 N.E.2d 325, in which the trial court corrected a sentence via a nunc pro tunc entry. The court noted that "[a] trial court can correct an illegal sentence so long as it is in open court with the defendant present and with a full explanation for re-sentencing." Id. at 717; See also Crim. R. 43(A). Appellant contends initially that his split sentence was not illegal and secondly that he has no retained knowledge if he was re-sentenced in open court on August 18, 2010, because he was not there. Crim. R.43(A)'s requirement that the defendant be present during sentencing applies where one sentence is vacated and a new sentence imposed, as it occurred in this case. See State v. Bell (1990), 70 Ohio App.3d 765, 592 N.E.2d 848.

Thus the office of a nunc pro tunc order is limited to memorializing what the trial court [a]ctually did at an earlier point in time. What the trial court [a]ctually did on August 2, 2010, was sentence appellant, via a split sentence, to a one year aggregate sentence in the D.O.C. on count one of the indictment and to three years of community control on count four of the same indictment. \*\*\* A nunc pro tunc order cannot be used to supply omitted action, or to indicate what the court might or should have decided, or what the trial court intended to decide. See State v. Hodges (June 22, 2001), Hamilton App.No.C-990516, WL 698135.

Further the use of a nunc pro tunc order in this case is repugnant to the requirements of Crim. R.43(A). The trial court did not merely "amend" appellant's sentence. The effect of its new sentence was to extend appellant's sentence for an additional three years. A defendant is entitled to be present at their re-sentencing if the trial court changes their sentence. See State v. Coach (May 5, 2000), Hamilton App.No.C-990349, WL 543801. A violation of Crim. R.43(A) is a violation of the defendant's due process rights. See State v. Griffin (1998), 131 Ohio App.3d 696, 699, 723 N.E.2d 606, 609.

In support of this proposition of law, appellant cites State v. Hunter (Feb.25, 2010), Cuyahoga App.No.92626, WL wherein the Eighth District Court of Appeals reversed Hunter's re-sentencing because the trial court failed to inform him of his Crim. R.32(B) appeal rights. The facts in Hunter are similar to the instant case. Here the trial court did not recite any components of Crim. R.32(B) to appellant on August 18, 2010, because appellant was re-sentenced in absentia. In Hunter the trial judge made no mention of appellant's appeal rights. "\*\*\*\* the record, as in the case at bar, is devoid of any mention of [a]ppellant's appeal right." Id.

Courts may make judgments nunc pro tunc so that " 'the records of a court or another tribunal may be made to speak the truth.' " See Ruby v. Wolfe (1931), 39 Ohio App. 144, 146, 177 N.E.240. However a court's power to enter a nunc pro tunc judgment is *[n]ot* unlimited. "The [p]ower 'is *restricted* to placing upon the record evidence of judicial action, which has been [a]ctually,' and 'it can be exercised *only* to supply omissions in the exercise of functions that *[a]re clerical merely.*' " Id., quoting Jacks v. Adamson (1897), 56 Ohio St.397, 402, 47 N.E. 48. *Most importantly, "a mere erroneous judgment [c]annot be corrected by a nunc pro tunc entry."* See Smith v. Smith (March 12, 2007), Marion App.No.9-06-41, WL 730234. The province of an "entry nunc pro tunc" is not to change, modify or correct erroneous judgments, but is to make the record speak the [t]ruth." See Hermon v. Ohio (1940), 66 Ohio App. 164, 32 N.E.2d 28. The nunc pro tunc entry of judgment in this case erroneously changed and modified a sentence that was correct within the confines of Ohio Law.

Appellant submits that had he been granted his App. R.5(A) request then he would have been able to raise two assignments of error such as: 1) The trial court sentenced him to community control in *absentia* on July 7, 2010, ; and 2) after a mere twenty-five days the trial court revoked his community control in *absentia* on August 2, 2010. In this case the trial court was the reason appellant failed to perfect an appeal as of right when it re-sentenced him in absentia on August 18, 2010, and did not notify him pursuant to Crim. R.32(B). Appellant provided this sufficient reason to the Court of Appeals in compliance with App. R.5(A). A nunc pro tunc entry is an improper vehicle for increasing a

defendant's sentence. See State v. Santiago (Sept.27, 1995), Lorain App.No.95CA006068, WL 569140.

### **III. The Court of Appeals determination was an abuse of judicial discretion.**

Pursuant to App. R.5(A)(2) "[a] motion for leave to appeal shall be filed with the court of appeals and shall set forth the reasons for the failure of appellant to perfect an appeal as of right." See State v. Ponzi (Sept.30, 2010), Trumbull App.No.2010-T-0082, WL 3793974. Whether to grant or refuse leave to file a delayed appeal is within the sound discretion of the appeals court. See State v. McGahan (1949), 86 Ohio App. 283, 88 N.E.2d. 613.

"[S]ound discretion has long meant a discretion that is not exercised arbitrarily or willfully, but with regard to *what is right and equitable under the circumstances and law*, and directed by the reason and conscience of the judge to a *just result*. See State v. Mitchell (Sept.29, 2006), Williams App.No.WM-05-004, WL 2790333. The Court of Appeals determination in this case was not right and equitable under the circumstances and law by the reason and conscience of a judge seeking a just result. "Discretion" as applied to Court, means *sound discretion guided by law and governed by legal principles as applied to facts of case* and *it must not be arbitrary*." See Broceus v. McQuigg (March 9, 1977), Knox App.No.76-CA-17, WL 200760.

In State v. Adams (1980), 62 Ohio St.2d 151, 404 N.E.2d 144, this Court composed the following definition: "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." Id at 157-58, 404 N.E.2d at 149. Moreover, a decision is "unreasonable" where there is "*no sound reasoning process*" supporting it. See Hollis v. Hollis (1997), 124 Ohio App.3d 481, 706 N.E.2d798.

Appellant submits that there was "no sound reasoning process" used in the Court of Appeals determination to support it when the record unequivocally supports appellant's claim that he was never served reasonable notification of the trial court's August 31, 2010, nunc pro tunc entry of judgment and he was never notified of his Crim. R. 32(B) appeal rights because he was re-sentenced in absentia in violation of Crim. R.43(A). The supposed "sound reasoning process" implemented by the Court of

Appeals in making its discretionary determination was based upon the act of appellant mendaciously accusing himself for his failure to perfect an appeal as of right or truthfully acknowledging that the trial court caused the delay.

An abuse of discretion \*\*\* implies a decision which is without a reasonable basis or one which is clearly wrong. See State v. Steel (May 26, 2005), Cuyahoga App.No.85076, WL 1245628. Regarding this standard, the term "abuse of discretion" is one of art, essentially connoting judgment exercised by a court which neither [comports with reason], nor [the record]. See State v. Ferranto (1925), 112 Ohio St. 667, 676, 148 N.E.2d 362.

In the case sub judice appellant contends that the discretionary decision of the Court of Appeals was without a reasonable basis and one which was clearly wrong because the record in this case blatantly reflects that on August 18, 2010, appellant, via a nunc pro tunc entry of judgment was: 1) re-sentenced in absentia resulting in an unlawful increase of his original sentence in violation of Crim.R. 43(A) and due process; and 2) was not notified of his appeal rights in violation of Crim. R.32(B) and due process because he was re-sentenced in absentia. The Court of Appeals discretion in this case was to determine whether potential appellant *Hyde* in this matter stated arguably valid reasons for the delay. See State v. Reed (Sept.30, 2003), Mahoning App.No.03-MA-92, WL 22331988.

In State v. Gentry, (1983) 10 Ohio App.3d 227, 461 N.E.2d 1320, this Court Held, "as his [r]eason for failure to perfect an appeal as of right, defendant asserts that he was unable to perfect an appeal due to his being indigent, and the failure of the trial court to assign counsel. Appellant in the case at hand has asserted that he was and is still indigent when the trial court re-sentenced him in absentia on August 18, 2010, and was not present on this day in order to be informed of his appeal rights nor that he had a right to counsel or if the trial court would appoint counsel pursuant to Crim. R.32(B). Furthermore appellant contends that he, as did the defendant in *Gentry*, never waived his right to have counsel appointed. See Crim. R.44(A). This Court went on to state in *Gentry* that, " \*\*\* , we are required, under the circumstances, to grant defendant's motion in order to determine whether or not

there is merit in the assertions raised by his motion for leave to appeal," citing State v. Sims (1971), 27 Ohio St.2d 79, 272 N.E.2d 87.

In Deitz v. Money, (6th Cir.2004) 391 F.3d 804, 810-11, the United States Court of Appeals for the Sixth Circuit held:

[W]e conclude \*\*\* that Rule 5(A) does not specify criteria the courts should use in determining whether to grant a delayed appeal. Instead it simply requires the defendant set forth the reasons for failure to perfect an appeal of right.

The decision to grant or delay a motion for leave to appeal pursuant to App. R.5(A) is therefore solely within the discretion of the appellate court. See State v. Fisher, 35 Ohio St.3d 22, 517 N.E.2d 911, 914 (1988). *A rule that grants such discretion to the courts is not "firmly established and regularly followed" so as to be adequate within the meaning of Maupin.* See Hutchinson v. Bell, 303 F.3d 720, 738 (6th Cir.2002).

The holding in Deitz appears to be based on the fact that Ohio's Rule 5(A) is not only discretionary, but offers no criteria for the exercise of that discretion and is, further, *inconsistently enforced*. See Bobb v. Voorhies (S.D. Ohio Jan.21, 2010), No.2:08-cv-0645, WL 273425. Where a court does not exercise a "discretion" in the sense of being discreet, circumspect, prudent, and exercising cautious judgment, there is an "abuse of discretion." See State ex rel. Williams v. Blake (1945), 144 Ohio St. 619, 60 N.E.2d 308. *It means 'a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.'* See Sinclair v. Sinclair (1954), 98 Ohio App. 308, 129 N.E.2d 311. *The term has been defined as 'a view or action that no conscientious judge, acting intelligently, could have honestly taken.'* See Solon v. Smiley (1967), 12 Ohio Misc. 269, 229 N.E.2d 131.

In the case at bar appellant purports that the discretionary determination by the Court of Appeals that he failed to provide sufficient reasons for failure to perfect an appeal as of right *is not* justified by, and *is* clearly against reason and evidence. In addition such discretionary determination *is* a view and/or action that no conscientious judge, *acting intelligently*, could have *honestly* taken. Appellant in this case humbly prays that this Honorable Court will conclude that it be required, under the circumstances, to grant appellant's motion for leave to appeal.

**Proposition of Law No. II: Equal protection of laws means that no person or class of people shall be denied same protection of laws which is enjoyed by other people or classes in same place or like circumstances.**

The limits placed upon government action by the Equal Protection Clauses of the United States Constitution and Ohio Constitution are "essentially identical." See *Beatty v. Akron* (1981), 67 Ohio St.2d 483, 424 N.E.2d 586. **The prohibition against the denial of equal protection of the laws requires that the law *shall have equality of operation on all persons* according to their relation.** See *State v. Peoples* (2004), 102 Ohio St.3d 460, 812 N.E.2d 963. So long as the laws are applicable to all persons under like circumstances and do not subject individuals to an arbitrary exercise of power and operate alike upon all persons similarly situated, it suffices the constitutional prohibition against the denial of equal protection of the laws. See *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 595 N.E.2d 862.

Appellant in support of this proposition of law contends that the Court of Appeals discretionary determination concluding that he failed to provide sufficient reasons for failing to perfect an appeal as of right was a denial of the equality of operation applicable to App. R.5(A). The Court of Appeals discretionary determination was arbitrary and did not act alike upon appellant as it has upon persons previously similarly situated.

[O]nce the state grants the right to appeal it must follow procedures comports with the Fourteenth Amendment. See *Evitts v. Lucey* (1985), 469 U.S.387, 403, 105 C.Ct. 830. After deciding that a right to appeal is essential, the state ***cannot then deny a defendant due process.*** Due process claims are implicated when a defendant ***is denied an adequate opportunity to present*** his claim and receive an adjudication on the merits, on when defendants are ***treated differently*** in such a way that affects their ability to ***pursue*** a meaningful appeal. *Id.* at 402, 405, 469 U.S.387, 105 S.Ct. 830. Ohio has granted all defendants the right to appeal following a criminal conviction, and as a result must conform its procedures to the standards of due process. Ohio R. Crim. P.32.

In the case at hand appellant submits that he has been denied an adequate opportunity to present

his claims, via being re-sentenced in absentia on August 18, 2010, and receive an adjudication on the merits. Appellant is also being treated differently in such a way that affects his ability to pursue a meaningful appeal when he was re-sentenced in absentia which subsequently lead to him never being reasonably notified of his appeal rights under Crim. R.32(B).

[D]ue process is offended when a defendant who pleads guilty, as in this case, is kept completely ignorant of his appellate rights. See *Peguero v. U.S.* (1999), 526 U.S. 23, 119 S.Ct. 961; *White v. Johnson* (5th Cir.1999), 180 F.3d 648, 652. The right of notice is more fundamental than the rights previously guaranteed by the Supreme Court. **Precedent therefore dictates that failure to inform an indigent defendant of their appellate rights violates due process.** See *Korbel v. Jefferies* (S.D.Ohio Oct.24, 2007), No.2:06-cv-625, WL 3146248. [A] defendant is not necessarily denied a constitutional right when a state court denies a request for a delayed appeal. **However**, due process rights **are** offended when a delayed appeal [**is**] the result of a lower courts failure to ensure that an indigent defendant's appellate rights **are** protected. See *Monroe v. Jefferies* (S.D.Ohio June 2, 2006), No.2:05-cv-857, WL 1580222.

It cannot be contested in this case that appellant's due process rights were offended on August 18, 2010, when the trial court failed considerably to protect his due process rights while in the commission of re-sentencing him in absentia. Subsequently appellant was never informed by the trial court or his trial counsel of his appeal rights.

**The constitution is violated if a convicted defendant is not given the right to appeal "by reason of his lack of knowledge of his right and the failure of his counsel or the court to advise him of his right to appeal with the aid of counsel."** See *Wolfe v.Randle* (2003), 267 F.Supp.2d 742.

Not only was appellant's Fourteenth Amendment Constitutional right to due process violated when the trial court and his counsel failed to advise him of his right to appeal with the aid of counsel on August 18, 2010 , but also when he was re-sentenced in absentia, via a nunc pro tunc entry of judgment, on the same date. Furthermore appellant was also deprived of **his** choice to make the

fundamental decision to appeal. The defendant has ultimate authority in making certain fundamental determinations pertaining to his case, including the right to appeal. See Jones v. Barnes (19983), 463 U.S. 745, 751, 103 S.Ct. 3308. **The authority to pursue an appeal**, even one following a guilty plea is, **the defendant's alone**. See Marrow v. United States (9th Cir.1985), 772 F.2d 525, 530 **The decision to appeal in not the determination of defendant's lawyer**. Id. In order to make such a decision, the defendant must have knowledge about the appeals options available to **him**. See United States ex rel. Smith v. McMann (2d Cir.1969), 417 F.2d 648, *cert. denied*, 397 U.S. 925, 90 S.Ct. 929 (1970)(construing Douglas v. California as imposing on a state "[a] duty to warn [e]very person convicted of a crime of his right to appeal ... **the right to appeal at the expense of the state is a mere illusion if the convicted indigent defendant does not know such right exists.**"); State v. Sims, 27 Ohio St.2d 79, 272 N.E.2d 87, 91 (1971) (finding that "in the absence of evidence in the record upon which it could be determined that an indigent convicted defendant knowingly and intelligently waived his right of direct appeal ... it was error for the Court of Appeals to dismiss the motion for leave to appeal without making such factual determination.")

The appellant in the case sub judice humbly contests before this Honorable Court that when the trial court re-sentenced him, via a nunc pro tunc entry of judgment on August 18, 2010, it did not reasonably inform appellant of his right to appeal in accordance with Crim. R.32(B). In order to be reasonably informed, a defendant must be told of his right to appeal, the procedures and time limits involved in proceeding with that appeal, and the right to have the assistance of appointed counsel for that appeal. See White, 180 F.3d at 652 (5th Cir.1999).

In this case the Court of Appeals discretionary determination denies appellant the same equal protection of laws which is enjoyed by other people or classes in same place or like circumstances. A delayed appeal should be granted where it appears on the face of the record the overruling of such motion would result in a miscarriage of justice. See State v. Bednarik (1954), 101 Ohio App. 339, 123 N.E.2d 31.

**CONCLUSION**

For the reasons discussed above, this case involves substantial constitutional question[s] and is an appeal of a Court of Appeals determination under App. R.5(A). The appellant humbly requests that this Court accept jurisdiction in this case so that the important "sufficient reasons" presented will be reviewed on the merits.

Respectfully Submitted,

\_\_\_\_\_  
Brandon A. Hyde-Pro Se

**Certificate of Service**

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee, Scott M. Heenan, Hamilton County Assistant Prosecuting Attorney, at 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 on April 27, 2011.

\_\_\_\_\_  
Brandon A. Hyde

Appellant Pro Se

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,

APPEAL NO. C-110127  
TRIAL NO. B-0907363

Appellee,

vs.

ENTRY OVERRULING MOTION  
FOR LEAVE TO APPEAL

BRANDON A. HYDE,

\* Appellant.

This cause came on to be considered upon the *pro se* motion of the appellant for leave to file a delayed appeal and upon the memorandum in opposition.

The Court finds that the motion is not well taken and is overruled as the appellant has failed to provide sufficient reasons for failure to perfect an appeal as of right.

Further, all other pending motions are overruled as being moot.

To The Clerk:

Enter upon the Journal of the Court on MAR 23 2011 per order of the Court.

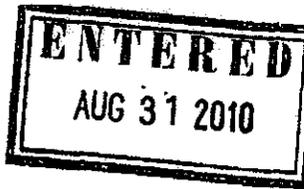
By:

  
Presiding Judge

(Copies sent to all counsel)

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

date: 08/18/2010  
code: GJRC  
judge: 255



*Judy M Luebberts 8/27/10*  
Judge: JODY M LUEBBERS

NO: B 0907363

STATE OF OHIO  
VS.  
BRANDON A HYDE

JUDGMENT ENTRY REVOKING  
COMMUNITY CONTROL AND  
IMPOSING SENTENCE  
\*\*\*NUNC PRO TUNC 08/02/2010\*\*\*  
\*\*\*CORRECTED\*\*\*

Defendant was present in open Court with Counsel GLORIA L SMITH on the 2nd day of August 2010 for a hearing on a charge of violation of the conditions of defendant's community control. Defendant was informed of the grounds upon which revocation of community control was proposed.

The Court afforded the defendant and counsel an opportunity to be heard and to submit evidence on defendant's behalf, together with such facts and circumstances as tend to contradict or to explain the violation of the conditions of defendant's community control.

Upon consideration of the evidence produced at the hearing, the Court finds that the defendant violated the conditions of community control.

THEREFORE, the Court revokes the community control heretofore granted to Defendant, and orders that sentence be executed forthwith; to-wit, Defendant is sentenced to be imprisoned for a period of:

CHARGE:

count 1: ASSAULT, 2903-13A/ORCN,F4

CONFINEMENT:1 Yrs DEPARTMENT OF CORRECTIONS

count 2: RECEIVING STOLEN PROPERTY, 2913-51A/ORCN, DISMISSAL

count 3: TAMPERING WITH EVIDENCE, 2921-12A1/ORCN, DISMISSAL

count 4: FAILURE TO COMPLY WITH AN ORDER OR SIGNAL OF PO, 2921-331B/ORCN,F3

CONFINEMENT:3 Yrs DEPARTMENT OF CORRECTIONS

COMMUNITY CONTROL TERMINATED.

THE SENTENCES IN COUNTS #1 AND #4 ARE TO BE SERVED  
CONSECUTIVELY TO EACH OTHER.

THE TOTAL AGGREGATE SENTENCE IS FOUR (4) YEARS IN THE  
DEPARTMENT OF CORRECTIONS.



D89764806

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

date: 08/18/2010  
code: GJRC  
judge: 255

Judge: JODY M LUEBBERS

NO: B 0907363

STATE OF OHIO  
VS.  
BRANDON A HYDE

JUDGMENT ENTRY REVOKING  
COMMUNITY CONTROL AND  
IMPOSING SENTENCE

\*\*\*NUNC PRO TUNC 08/02/2010\*\*\*

\*\*\*CORRECTED\*\*\*

THE DEFENDANT IS TO RECEIVE CREDIT FOR TWO HUNDRED EIGHTY TWO (282) DAYS TIME SERVED.

THE DEFENDANT IS TO PAY THE COURT COSTS.

THE DEFENDANT IS TO PAY PUBLIC DEFENDER ATTORNEY FEES.

THE DEFENDANT IS TO PAY A FINE OF \$100.00.

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

AS PART OF THE SENTENCE IN THIS CASE, THE DEFENDANT MAY BE SUPERVISED BY THE ADULT PAROLE AUTHORITY AFTER DEFENDANT LEAVES PRISON, WHICH IS REFERRED TO AS POST-RELEASE CONTROL, FOR UP TO THREE (3) YEARS AS DETERMINED BY THE ADULT PAROLE AUTHORITY.

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

date: 08/18/2010  
code: GJRC  
judge: 255

Judge: JODY M LUEBBERS

NO: B 0907363

STATE OF OHIO  
VS.  
BRANDON A HYDE

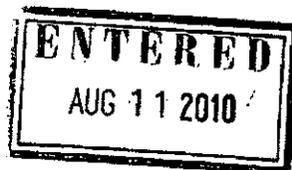
JUDGMENT ENTRY REVOKING  
COMMUNITY CONTROL AND  
IMPOSING SENTENCE  
\*\*\*NUNC PRO TUNC 08/02/2010\*\*\*  
\*\*\*CORRECTED\*\*\*

IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL SUPERVISION OR ANY CONDITION THEREOF, THE ADULT PAROLE AUTHORITY MAY IMPOSE A PRISON TERM, AS PART OF THE SENTENCE, OF UP TO NINE ( 9 ) MONTHS, WITH A MAXIMUM FOR REPEATED VIOLATIONS OF FIFTY PERCENT ( 50% ) OF THE STATED PRISON TERM. IF THE DEFENDANT COMMITS A NEW FELONY WHILE SUBJECT TO POST-RELEASE CONTROL, THE DEFENDANT MAY BE SENT TO PRISON FOR THE REMAINING POST-RELEASE CONTROL PERIOD OR TWELVE ( 12 ) MONTHS, WHICHEVER IS GREATER. THIS PRISON TERM SHALL BE SERVED CONSECUTIVELY TO ANY PRISON TERM IMPOSED FOR THE NEW FELONY OF WHICH THE DEFENDANT IS CONVICTED.

\*\*\*CORRECTED, NUNC PRO TUNC 08/02/2010\*\*\*

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

date: 08/02/2010  
code: GJRC  
judge: 255



*Jody M Luebbers*  
Judge: JODY M LUEBBERS

NO: B 0907363

STATE OF OHIO  
VS.  
BRANDON A HYDE

JUDGMENT ENTRY REVOKING  
COMMUNITY CONTROL AND  
IMPOSING SENTENCE

Defendant was present in open Court with Counsel **GLORIA L SMITH** on the **2nd** day of **August 2010** for a hearing on a charge of violation of the conditions of defendant's community control. Defendant was informed of the grounds upon which revocation of community control was proposed.

The Court afforded the defendant and counsel an opportunity to be heard and to submit evidence on defendant's behalf, together with such facts and circumstances as tend to contradict or to explain the violation of the conditions of defendant's community control.

Upon consideration of the evidence produced at the hearing, the Court finds that the defendant violated the conditions of community control.

THEREFORE, the Court revokes the community control heretofore granted to Defendant, and orders that sentence be executed forthwith; to-wit, Defendant is sentenced to be imprisoned for a period of:

**CHARGE:**

**count 1: ASSAULT, 2903-13A/ORCN,F4**

**CONFINEMENT:1 Yrs DEPARTMENT OF CORRECTIONS**

**count 2: RECEIVING STOLEN PROPERTY, 2913-51A/ORCN, DISMISSAL**

**count 3: TAMPERING WITH EVIDENCE, 2921-12A1/ORCN, DISMISSAL**

**count 4: FAILURE TO COMPLY WITH AN ORDER OR SIGNAL OF PO, 2921-331B/ORCN,F3, COMMUNITY CONTROL: 3 Yrs**

**COMMUNITY CONTROL TERMINATED.**

**THE SENTENCES IN COUNTS #1 AND #4 ARE TO BE SERVED  
CONSECUTIVELY TO EACH OTHER.**

**THE TOTAL AGGREGATE SENTENCE IS FOUR (4) YEARS IN THE  
DEPARTMENT OF CORRECTIONS.**



D89496328

Page 1  
3325N

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

date: 08/02/2010  
code: GJRC  
judge: 255

Judge: JODY M LUEBBERS

NO: B 0907363

STATE OF OHIO  
VS.  
BRANDON A HYDE

JUDGMENT ENTRY REVOKING  
COMMUNITY CONTROL AND  
IMPOSING SENTENCE

THE DEFENDANT IS TO RECEIVE CREDIT FOR TWO HUNDRED EIGHTY TWO (282) DAYS TIME SERVED.

THE DEFENDANT IS TO PAY THE COURT COSTS.

THE DEFENDANT IS TO PAY PUBLIC DEFENDER ATTORNEY FEES.

THE DEFENDANT IS TO PAY A FINE OF \$100.00.

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

AS PART OF THE SENTENCE IN THIS CASE, THE DEFENDANT MAY BE SUPERVISED BY THE ADULT PAROLE AUTHORITY AFTER DEFENDANT LEAVES PRISON, WHICH IS REFERRED TO AS POST-RELEASE CONTROL, FOR UP TO THREE ( 3 ) YEARS AS DETERMINED BY THE ADULT PAROLE AUTHORITY.

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

date: 08/02/2010  
code: GJRC  
judge: 255

---

Judge: JODY M LUEBBERS

NO: B 0907363

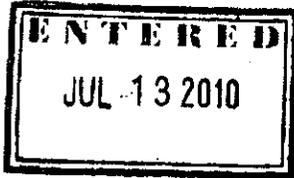
STATE OF OHIO  
VS.  
BRANDON A HYDE

JUDGMENT ENTRY REVOKING  
COMMUNITY CONTROL AND  
IMPOSING SENTENCE

IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL SUPERVISION OR ANY CONDITION THEREOF, THE ADULT PAROLE AUTHORITY MAY IMPOSE A PRISON TERM, AS PART OF THE SENTENCE, OF UP TO NINE ( 9 ) MONTHS, WITH A MAXIMUM FOR REPEATED VIOLATIONS OF FIFTY PERCENT ( 50% ) OF THE STATED PRISON TERM. IF THE DEFENDANT COMMITS A NEW FELONY WHILE SUBJECT TO POST-RELEASE CONTROL, THE DEFENDANT MAY BE SENT TO PRISON FOR THE REMAINING POST-RELEASE CONTROL PERIOD OR TWELVE ( 12 ) MONTHS, WHICHEVER IS GREATER. THIS PRISON TERM SHALL BE SERVED CONSECUTIVELY TO ANY PRISON TERM IMPOSED FOR THE NEW FELONY OF WHICH THE DEFENDANT IS CONVICTED.

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

date: 07/07/2010  
code: GJCC  
judge: 255



*Judy M Luebbbers* 7/9/10  
Judge: JODY M LUEBBERS

NO: B 0907363

STATE OF OHIO  
VS.  
BRANDON A HYDE

JUDGMENT ENTRY: SENTENCE  
TO COMMUNITY CONTROL

Defendant was present in open Court with Counsel JOHN P WEBER on the 7th day of July 2010 for sentence.

The court informed the defendant that, as the defendant well knew, the defendant had pleaded guilty, and had been found guilty of the offense(s) of:

count 1: ASSAULT 2903-13A/ORCN,F4

count 4: FAILURE TO COMPLY WITH AN ORDER OR SIGNAL OF PO 2921-331B/ORCN,F3

count 2: RECEIVING STOLEN PROPERTY 2913-51A/ORCN, DISMISSAL

count 3: TAMPERING WITH EVIDENCE 2921-12A1/ORCN, DISMISSAL

The Court held a sentencing hearing during which the Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of sentence. The State's representative also had the opportunity to address the Court. Sentence is under the provisions of Senate Bill 2, effective 7/1/96.

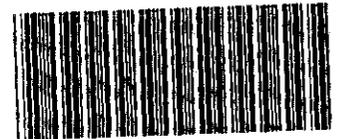
After considering the risk that defendant will commit another offense, the need for protecting the public therefrom, the nature of circumstances of the offense(s), and the defendant's history, character and condition, the Court hereby orders the defendant placed on Community Control on condition that defendant comply with the general conditions of Community Control established by this Court, and further:

count 1: COMMUNITY CONTROL:3 Yrs

count 4: COMMUNITY CONTROL: 3 Yrs

count 1: DRIVER'S LICENSE SUSPENSION:1 Yrs

count 4: DRIVER'S LICENSE SUSPENSION:1 Yrs



D89090194

21 WEAPON ORDERED FORFEITED, AND <sup>5 ARE</sup> SIGNED AND RELEASED TO TRACY HANSON.

THE DEFENDANT IS TO PERFORM ONE HUNDRED ( 100 ) HOURS OF COMMUNITY SERVICE.

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

date: 07/07/2010  
code: GJCC  
judge: 255

Judge: JODY M LUEBBERS

NO: B 0907363

STATE OF OHIO  
VS.  
BRANDON A HYDE

JUDGMENT ENTRY: SENTENCE  
TO COMMUNITY CONTROL

THE DEFENDANT IS TO MAKE RESTITUTION IN THE AMOUNT OF \$84.00 FOR LAB FEES.

THE DEFENDANT IS TO PAY COURT COSTS.

THE DEFENDANT IS TO PAY PUBLIC DEFENDER ATTORNEY FEES.

THE DEFENDANT IS TO PAY A FINE OF \$100.00.

THE COURT ALSO ADVISED THE DEFENDANT THAT IF HE / SHE VIOLATES THE TERMS AND CONDITIONS OF COMMUNITY CONTROL, THE COURT WOULD IMPOSE A PRISON TERM OF TWELVE (12) MONTHS IN THE DEPARTMENT OF CORRECTIONS.

IF THE DEFENDANT IS SENTENCED TO THE DEPARTMENT OF CORRECTIONS IN THIS CASE, THE DEFENDANT MAY BE SUPERVISED BY THE ADULT PAROLE AUTHORITY AFTER DEFENDANT LEAVES PRISON, WHICH IS REFERRED TO AS POST-RELEASE CONTROL, FOR UP TO THREE (3) YEARS AS DETERMINED BY THE ADULT PAROLE AUTHORITY.

IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL SUPERVISION OR ANY CONDITION THEREOF, THE ADULT PAROLE AUTHORITY MAY IMPOSE A PRISON TERM, AS PART OF THE SENTENCE, OF UP TO NINE (9) MONTHS, WITH A MAXIMUM FOR REPEATED VIOLATIONS OF FIFTY PERCENT (50%) OF THE STATED PRISON TERM. IF THE DEFENDANT COMMITS A NEW FELONY WHILE SUBJECT TO POST-RELEASE CONTROL, THE DEFENDANT MAY BE SENT TO PRISON FOR THE REMAINING POST-RELEASE CONTROL PERIOD OR TWELVE (12) MONTHS, WHICHEVER IS GREATER. THIS PRISON TERM SHALL BE SERVED CONSECUTIVELY TO ANY PRISON TERM IMPOSED FOR THE NEW FELONY OF WHICH THE DEFENDANT IS CONVICTED.

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

date: 07/07/2010  
code: GJCC  
judge: 255

Judge: JODY M LUEBBERS

NO: B 0907363

STATE OF OHIO  
VS.  
BRANDON A HYDE

JUDGMENT ENTRY: SENTENCE  
TO COMMUNITY CONTROL

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.