

IN THE SUPREME COURT OF OHIO

State of Ohio

Case No.

11-0818

Appellant,

v.

On Appeal from the Coshocton
County Court of Appeals, Fifth
Appellate District.

Sandra Griffin

Appellee

Appellate Case No. 09 CA 0021

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT THE
STATE OF OHIO

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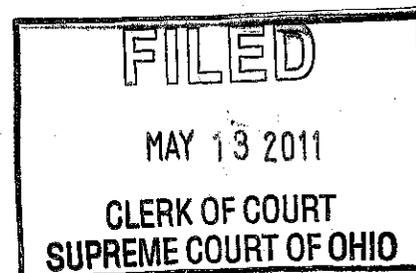


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND WHY LEAVE TO APPEAL SHOULD BE GRANTED

This court in *State v. Griffin*, 127 Ohio St.3d 266, 2010-Ohio-5948, remanded the instant case "for application of *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9." In a 2-1 opinion, the Coshocton County Court of Appeals concluded that *Ketterer* does not apply.

This case presents two issues important to the future of criminal law: whether this court's decision in *State v. Ketterer* applies to those who were not sentenced to death and whether appellants can use a motion for resentencing pursuant to *State v. Baker* 119 Ohio St.3d 197, 2008 Ohio 3330 to circumvent the doctrine of res judicata.

Before this court decided *State v. Parker* 95 Ohio St.3d 524, 2002-Ohio-2833, it was common practice for capital defendants to avoid the death penalty by waiving juries and appearing before a single judge.

Unlike the instant case, in which the defendant entered a not guilty plea and went to trial before a single judge, most capital defendants who chose single judges entered guilty pleas. Also unlike the instant case, in which Appellee fully litigated the single judge issue on direct appeal in 1992 and in a Murnahan motion in 1999, most of those defendants did not appeal the single judge procedure.

After *Parker*, a few defendants who received life sentences under the single judge procedure filed motions to withdraw guilty pleas, (*State v. Mitchell*, 5th Dist. App. No. 07-CA-17, 2008-Ohio-101, 2008 Ohio App. LEXIS 80) or state habeas corpus petitions (*Pratts v. Hurley*, 102 Ohio St. 3d 81, 2004-Ohio-1980). This court

held that the single judge issue failed to entitle a defendant to collateral relief. The court said that a sentence imposed by a single judge was not void but voidable. That decision no doubt stemmed the tide of state habeas petitions and requests for other collateral relief from this group of prisoners. After this court's decision in *State v. Baker*, however, another possible avenue of relief beckons.

Courts have differed on how *Baker* requests should be handled. The court in *State v. Melton*, (8th Dist. No. 93299), 2010 Ohio 3409, 2010 Ohio App. LEXIS 2917, considered a motion for a new sentencing entry to be a request for collateral relief and called it a postconviction petition. The Lucas County Court of Appeals in *State v. Mitchell*, 187 Ohio App.3d 315, 2010-Ohio-1766, held a defendant could relitigate everything he had litigated in the first appeal because, the court said, an entry that fails to comply with *Baker* is void.

In the first *Griffin* case, which this court vacated, the Coshocton County Court of Appeals simply assumed without discussion that the single document rule of *Baker* applied to the instant case. Twenty-nine days later, this court decided *Ketterer*. The State sought review of *Griffin* and this court summarily reversed.

The appellate court ordered the parties to brief the following. : "What part of *Ketterer* applies to the *Griffin* case: two judgment entries to be looked at as one or *State ex rel. Special Prosecutors v. Judges, Belmont County Court of Common Pleas* (1978), 55 Ohio St.2d 94?" The court also asked for an analysis of *State v. Fischer*, ____ Ohio St.3d ____, 2010 Ohio 6238, "as it relates to the *Griffin* case."

The first part of that instruction presumes that *Ketterer* requires that both a judgment of conviction and a sentencing entry each comply with Crim. R. 32(C).

The holding of *Ketterer*, to the contrary, was that the two documents combine to form a final appealable order.

The second part of the instruction was puzzling, as the case of *Judges*, cited in *Ketterer*, but not cited by either party in the instant case, seemed at best only marginally relevant. Not wanting to overlook something the appellate court considered important, the state argued that if the appellate court were citing *Judges* as a short-hand expression for the doctrine of res judicata, the state's position was that this court intended both res judicata and the "two document" rule of *Ketterer* to apply. The state had argued both issues to this court.

Nevertheless, the appellate court said that *Ketterer* does not apply to the instant case and reinstated its original reversal. The dissent in both *Griffin I* and *Griffin II* said the appeal should be barred by the doctrine of res judicata.

The majority in *Griffin I* remarked that this court has never decided whether an appeal acts as a bar to relitigating the same issues after a resentencing entry.

Although this court limited *Fischer* to cases in which trial courts had failed to impose post-release control, the case suggests that issues that have already been litigated are barred by the doctrine of res judicata.

The majority in the instant case, however, is apparently still dissatisfied with this court's guidance on the issue of res judicata. If this court does not offer further guidance soon, every defendant convicted before *Baker* who appealed, even those who have litigated the same issues they seek to raise, will appeal again. Those who failed to appeal at all, including the many defendants who sought a single judge as a certain way to avoid the death penalty, will get an appeal, no matter how much time

has passed, and regardless of whether there are grounds for a delayed appeal. Res Judicata will mean nothing.

STATEMENT OF THE CASE AND FACTS

During November and December of 1988, Sandra Griffin, Carl Steven Lewis, and James Steurer Jr. plotted to rob and kill James Steurer Sr. On January 4, 1989, while Appellee packed the victim's collection of firearms and searched his house for cash, Carl Steven Lewis shot James Steurer Sr. in the head, killing him.

The Coshocton County Grand Jury indicted Appellee for complicity (R.C. 2923.03) to commit aggravated murder, R.C. 2929.04(A), with an accompanying specification pursuant to R.C. 2929.04(A)(7), that the murder was committed during the course of an aggravated robbery; aggravated robbery, 2911.01; unlawful possession of dangerous ordnance, 2923, 17; and grand theft, 2913.02(A)(1). The indictment also contained firearm specifications (R.C. 2929.71), to the charges of aggravated murder and aggravated robbery.

To render imposition of the death penalty impossible, Appellee waived her right to a jury trial and the parties agreed that a single judge would conduct a bench trial.

After a complete bench trial, the judge found Appellee guilty of all charges, and specifications. On December 21, 1989, the court filed an entry of conviction recording "[t]he court finds the defendant guilty..." on all charges and the death penalty specification. On January 29, 1990, the court filed a sentencing entry, imposing a sentence of life with parole eligibility in thirty years on the aggravated murder charge; a consecutive three-year term on the firearm specification; a concurrent 10 to 25 year term for aggravated robbery; and a three year term on the firearm specification attached

to the aggravated robbery, to be served only if the sentence for the firearm specification attached to the aggravated murder charge subsequently be negated.

The Coshocton County Court of Appeals affirmed in *State v. Griffin* (1992), 73 Ohio App. 3d 1428. This court dismissed the appeal in *State v. Griffin* (1992), 64 Ohio St.3d 1428.

Appellee filed a federal petition for a writ of habeas corpus, which was denied on September 30, 1998. In May 1999, Appellee filed an application to reopen her appeal pursuant to *State v. Murnahan*, (1992), 63 Ohio St.3d 60. The trial court denied that application on May 24, 1999 and this court affirmed.

On August 4, 2009, Appellee filed a motion for a final appealable order, relying on *State v. Baker* 119 Ohio St.3d 197, 2008-Ohio-3330. The trial court journalized a "judgment on sentencing entry" on August 27, 2009. Appellee filed a notice of appeal.

On September 24, 2009, Appellant filed a motion to dismiss. The State observed that Appellee had raised the "single judge" issue in her appeal in 1992 and in her application to reopen in 1999. The State asserted the new appeal was barred by the doctrine of res judicata.

On July 27, 2010, in a 2-1 opinion, the Coshocton County Court of Appeals vacated Appellee's conviction, because of the single judge issue, and remanded the case for proceedings consistent with the opinion. On August 13, 2010, appellant filed a notice of appeal and a motion for stay in this court. On December 9, 2010, this court summarily vacated and remanded "for application of *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9." On April 1, 2011, the Coshocton County Court of appeals reinstated its reversal.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law I: Res Judicata precludes a litigant from using a resentencing entry issued pursuant to *State v. Baker* , 119 Ohio St.3d 197, 2008-Ohio-3330 to relitigate an issue when that defendant has already litigated the same issue on direct appeal.

The majority in the appellate court below explained its reasons for declining to apply res judicata primarily by quoting a large portion of Justice Lantzinger's opinion in *State ex rel DeWine v. Burge*, ___ Ohio St. 3d ___, 2011-Ohio-235. In *Burge*, the Ninth District Court of Appeals had ruled that the state was unentitled to a writ to order the trial court to reverse its having granted an acquittal after the defendant had requested a resentencing entry. This court reversed.

In her concurring opinion in *Burge*, Justice Lantzinger's cites two cases this court had held for decision in *Burge*: *State v. Allen*, Case No. 2010-1342, 126 Ohio St.3d 1615, 2010-Ohio-5101 and *State v. Smith*, Case No. 2010-1345, 126 Ohio St.3d 1615, 2010-Ohio-5101. On April 19, 2011, this court lifted the holding on those cases, summarily reversing *State v. Smith*. The county court of appeals in *Smith* had held that the trial court had jurisdiction to revisit the merits of the case by granting the defendant's Crim. R. 29 motion when the defendant had requested a resentencing entry pursuant to *State v. Baker*. One of the three judges in *Smith* would have found the defendant's guilt to be res judicata. This court reversed the appellate court's opinion. *State v. Smith*, 2011 Ohio-1839, 2011 Ohio LEXIS 954.

This Court in *Fischer* eschews the argument that a defendant who has fully litigated his conviction on appeal is entitled to another appeal if there was a *Baker* error in the first entry. On page 14 of that opinion, para.38, the court calls that argument "creative," before rejecting it. The court remarks that *Baker* has nothing to do with void or voidable sentences.

the question the court accepted in *Fischer* is "whether a direct appeal from a resentencing ordered pursuant to *State v. Bezak* is a first appeal as of right." Id. Para 5. The court holds it is not. An appeal from a resentencing necessitated by a court's omitting a sentence of post release control is limited to issues about the post release control; issues already litigated remain barred by the doctrine of res judicata.

Fischer "is limited to a discrete vein of cases: those in which a court does not properly impose a statutorily mandated period of post release control." Id at para 32, p. 12. The Coshocton County Court of Appeals relied on that limitation to ignore the other things in *Fischer* that this court said about res judicata.

Under *Fischer*, at a resentencing, and on appeal from a resentencing, a defendant is barred by the doctrine of res judicata from raising any issue except post release control. If a defendant in a capital case goes to trial before a single judge and fully litigates the single-judge issue on appeal and in collateral filings, res judicata ought to bar relitigating that issue.

This court in *State ex rel Rash v. Jackson* 102 Ohio St. 3d 145, 2004 Ohio 2053, held that a conviction based on a guilty plea before a single judge was not void but voidable. Defendant Rash had litigated the single judge issue on direct appeal after the appellate court had granted him leave to reopen his appeal. This court had

not decided *State v. Parker*, 95 Ohio St.3d 524, 2002 Ohio 2833, at that time. The appellate court overruled Rash's assignment of error raising the single judge *Parker* issue. After this court decided *Parker*, Rash filed for a writ of habeas corpus. This court said "Rash may not use habeas corpus to gain successive appellate reviews of the same issue." This court in *Rash* said that a *Parker* error rendered a judgment not void but voidable. Therefore, the rule of finality should apply.

In the instant case, Appellee actually litigated, in 1992, the exact issue that she won reversal on in 2010 and again in 2011. Finality matters. Even when a change in the law would have benefitted a defendant at trial or on appeal, if all appeals have been pursued and decided against the defendant, the defendant is unentitled to the benefit of the new law.

In the instant case, the old law benefitted Appellee. The single judge procedure precluded even the possibility of the death penalty. Under the facts of the instant case, the death penalty was a real possibility. This defendant was not a getaway driver with a bad boyfriend. She planned the murder for months, spent the night before the murder in the victim's bed, and gathered the victim's gun collection and cash while her accomplice shot the victim in the head.

The deluge has already begun. On April 22, 2010, the Lucas County Court of Appeals in *State v. Mitchell* 187 Ohio App.3d 315, 2010-Ohio-1766, said that there is no difference between an entry that fails to mention post release control and an entry that omits the words that the defendant was found guilty after a bench trial (saying instead that the defendant was convicted). The Lucas County Court said such a judgment was void. Res judicata, the court said, cannot apply when the order

appealed from is void. Therefore, the court held in *Mitchell*, a direct appeal was not a bar to a new sentencing entry and a new appeal from that new sentencing entry.

If every entry that suffers a *Baker* problem be void, the prison doors really will open. If every entry that suffers a *Baker* problem be void, nothing prevents prosecutors (except arguably in cases of convictions reversed on insufficient evidence) from requesting final judgments and relitigating reversed convictions.

The Coshocton County Court of Appeals in *Griffin I*, held that res judicata allowed Appellee to relitigate the *Parker* issue, although she had actually litigated it twice before. This court reversed. On remand, the appellate court reinstated its holding, complaining that this court had failed to give it adequate guidance.

If the lower appellate court in the instant case is correct, the defendants in *Rash State ex rel Jackson*, supra and in *Pratts v. Hurley* 102 Ohio St.3d 81, 2004 Ohio 1980, and all defendants in similar circumstances, will be entitled to request new sentencing entries and will win reversals on the *Parker* issue. If res judicata does not bar a second appeal, most defendants [as entries before *Baker* seldom included all information necessary under Crim. R. 32(C)] will relitigate every case, even if there has been no change in the law.

Proposition of Law No. II: In cases in which R.C. 2929.03(F) requires the court or panel to file a sentencing opinion, a final, appealable order consists of both the sentencing opinion filed pursuant to R.C. 2929.03(F) and the judgment of conviction filed

pursuant to Crim. R. 32 (C). *State v. Ketterer*, Slip Opinion

No.2010-Ohio-3831 applied.

In *Griffin I*, at paragraph 14 on page 4 of the lower court's opinion, the court said the following: "From our review of the trial court's judgment entries, we find a judgment entry of conviction filed on December 21, 1989 wherein the trial court announced its verdicts, and a separate sentencing entry filed on January 29, 1990 wherein the trial court imposed the sentence. *If we were permitted to read the two judgment entries in pari materia, there would be no Baker argument. Unfortunately, this is not the law.*" (Emphasis supplied) This court remanded *Griffin I* for application of *Ketterer*. On remand, however, the Coshocton County Court of Appeals refused to apply *Ketterer*. The court accepted the defendant's new argument that, because the trial court failed to comply with one part of RC 2929.03, it was relieved from complying with the rest of the statute. Because the trial court failed to compare aggravating circumstances to mitigating factors, the appellate court said, the sentencing opinion was invalid and not a final appealable order.

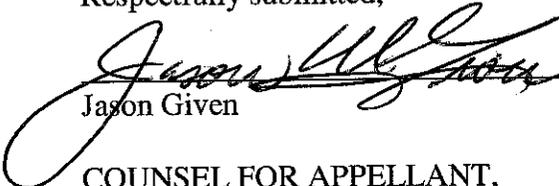
If every error in an entry rendered the entry non-appealable, there would be no appeals because there would be no final orders. There is a difference between a sentencing opinion that contains errors and a sentencing opinion that fails to impose part of a sentence. This Court has said that post release control is part of the sentence. A comparable issue with a sentencing entry under R.C. 2929.03 might be if the court sentenced a defendant to life, but left out the period after which the defendant would be eligible for parole. This Court in *Fischer* recognized at para 39,

the irony that would prevent a reviewing court from correcting sentencing errors. If every sentencing entry that was contrary to law failed to be a final order subject to review. If this court accepts the appellate court's conclusion, every defendant who convinced the trial court to use the single judge proceeding will be entitled to a second appeal.

CONCLUSION

Appellant, the State of Ohio, respectfully requests that this court accept jurisdiction and do one of three things: vacate and reinstate the defendant's conviction; reverse and remand to the Coshocton County Court of Appeals, explaining that, if this court believed *Ketterer* to be inapplicable, it would not have told the lower court to apply it; or accept jurisdiction to allow the parties to brief the issues of 1) whether *Ketterer* applies to capital cases brought to trial before a single judge who issued a judgment of conviction and a sentencing entry and 2) whether a defendant who received a new sentencing entry under *State v. Baker*, may relitigate an issue that has already been decided against that defendant on direct appeal.

Respectfully submitted,

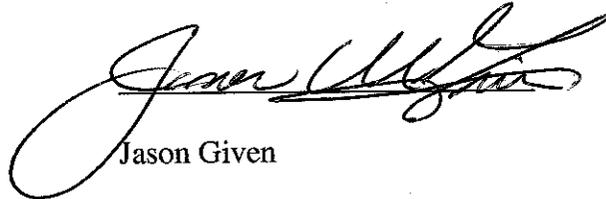


Jason Given

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Proof 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, Stephen Hardwick, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215 on this day May 17, 2011.

A handwritten signature in black ink, appearing to read "Jason Given", written over a horizontal line.

Jason Given

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STATE OF OHIO

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff

-vs-

SANDRA GRIFFIN

Defendant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Julie A. Edwards, J.

Case No. 09-CA-21

OPINION

CHARACTER OF PROCEEDING:

On Remand from the Supreme Court of
Ohio, Case No. 2010-1434

JUDGMENT:

Original Reversal & Remand Reimposed

DATE OF JUDGMENT ENTRY:

FILED
DATE APR 1 2011
TIME _____

Fifth District Court of Appeals
State of Ohio
County of Coshocton

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{¶1} On February 27, 1989, the Coshocton County Grand Jury indicted Sandra Griffin on several counts, including one count of aggravated murder with death and firearm specifications in violation of R.C. 2903.01(A), R.C. 2929.04(A)(7), and R.C. 2941.141.

{¶2} On November 1, 1989, Ms. Griffin waived her right to a speedy trial and her right to be tried by a three-judge panel or a jury. The state agreed not to pursue the death penalty, but did not dismiss the death specification.

{¶3} A trial before a single judge commenced on December 7, 1989. The trial court found Ms. Griffin guilty of all counts except two. By judgment entry on sentencing filed January 29, 1990, the trial court sentenced Ms. Griffin to an aggregate term of life imprisonment with parole eligibility after thirty years, and ordered her to serve three years actual incarceration on the firearm specification, to be served consecutively.

{¶4} This court affirmed the conviction. See, *State v. Griffin* (1992), 73 Ohio App.3d 546, further appeal dismissed (1992), 64 Ohio St.3d 1428.

{¶5} On August 4, 2009, Ms. Griffin filed a motion for a final appealable order pursuant to *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. On August 27, 2009, the trial court filed a new judgment entry on sentencing, once again sentencing Ms. Griffin to life imprisonment with parole eligibility after thirty years plus the three years for the firearm specification.

{¶6} Ms. Griffin filed an appeal, challenging the fact that a single judge heard her capital trial and sentencing hearing. This court, after lengthy analysis on several issues, including the application of *Baker*, R.C. 2929.03(F), prior direct appeal, non-final

orders, and finality of judgments, reversed and remanded the case for new trial. *State v. Griffin*, Coshocton App. No. 09CA21, 2010-Ohio-3517.

{¶7} The state of Ohio filed an appeal with the Supreme Court of Ohio. On December 9, 2010, the Supreme Court of Ohio entered the following decision:

{¶8} "The judgment of the court of appeals is vacated, and the cause is remanded to the court of appeals for application of *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9." *State v. Griffin*, 127 Ohio St.3d 266, 2010-Ohio-5948, ¶2.

{¶9} This matter is now before this court for determination in light of the Supreme Court of Ohio's remand.

{¶10} In *Ketterer* at ¶17, the Supreme Court of Ohio specifically found, in aggravated murder cases, R.C. 2929.03(F) determines the nature of "a final appealable order":

{¶11} "We distinguish the present case from *Baker* and agree with the state that in aggravated-murder cases subject to R.C. 2929.03(F), the final, appealable order consists of the combination of the judgment entry and the sentencing opinion. Because R.C. 2929.03(F) requires the court to file a sentencing opinion, *Baker* does not control this case, because *Baker* addressed only noncapital criminal cases, in which a judgment of conviction alone constitutes a final, appealable order. R.C. 2929.03(F) requires that a separate sentencing opinion be filed in addition to the judgment of conviction, and the statute specifies that the court's judgment is not final until the sentencing opinion has been filed. Capital cases, in which an R.C. 2929.03(F) sentencing opinion is necessary, are clear exceptions to *Baker*'s 'one document' rule."

{¶12} In *Ketterer*, the defendant pled guilty to aggravated murder and was sentenced to death by a three-judge panel. A sentencing opinion pursuant to R.C. 2929.03(F) was filed. In the case sub judice, Ms. Griffin was tried and found guilty of aggravated murder by a single judge. Ms. Griffin had waived her right to a three-judge panel because the state had agreed not to pursue the death penalty, although the state did not dismiss the death specification. She was sentenced to life imprisonment with parole eligibility after thirty years.

{¶13} During the time of appellant's case, R.C. 2929.03(F) read as follows:

{¶14} "**** The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed."

{¶15} R.C.2929.03(D)(3), applicable during appellant's case, stated the following:

{¶16} "Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after

receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

{¶17} "(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

{¶18} "(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment."

{¶19} The threshold question is whether R.C. 2929.03(F) applies to a defendant who never had a mitigation hearing under R.C. 2929.04. Clearly, the record sub judice establishes the imposition of the death penalty was never to be considered. Ms. Griffin was sentenced to life imprisonment with parole eligibility after thirty years pursuant to R.C. 2929.03(D)(3)(b). There was never a finding on the question of aggravating circumstances outweighing mitigating factors in Ms. Griffin's case. By not having a mitigation hearing, it is as if the procedures set forth in R.C. 2929.03(D) are bypassed.

{¶20} R.C. 2929.03(F) references subsection (D) as the predicate to the filing of a separate opinion on weighing the mitigation factors vis-à-vis the aggravating circumstances. In this case, there was no need for a separate opinion pursuant to R.C. 2929.03(F) because the procedures of R.C. 2929.03(D) were not utilized.

{¶21} We therefore conclude that the holding in *Ketterer* as it applies to the issue of a final appealable order does not apply in this case. There was no final

appealable order until the August 27, 2009 judgment entry on sentencing. The holding of our previous decision in this case applies. There was no need for a mitigation entry under R.C. 2929.03(F).

{¶22} In *State ex rel. DeWine v. Burge*, ___ Ohio St.3d ___, 2011-Ohio-235, Justice Lanzinger, in a concurring opinion at ¶24, discussed whether new appellate rights emerge from a *Baker* violation:

{¶23} "I concur in the court's opinion, but write separately to note that our decision today leaves open the question whether new appellate rights arise from a new sentencing entry issued in order to comply with Crim.R. 32(C).^{FN2} We have held that a sentencing entry that violates Crim.R. 32(C) renders that entry nonappealable. *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, 895 N.E.2d 805, ¶9. In light of the facts of the present case, we eventually will need to determine what effect an appellate decision has when the appellate court's jurisdiction was premised upon a sentencing entry that violated Crim.R. 32(C) and was thus nonappealable.

{¶24} "FN2. The state has raised this issue in its second proposition of law in *State v. Allen*, case No. 2010-1342, 126 Ohio St.3d 1615, 2010-Ohio-5101, 935 N.E.2d 854, and *State v. Smith*, case No. 2010-1345, 126 Ohio St.3d 1615, 2010-Ohio-5101, 935 N.E.2d 854, both of which we accepted for review and held for our decision in the case. The issue is also pending in *State v. Lester*, which we agreed to review on order of a certified conflict and on a discretionary appeal, case Nos. 2010-1007, 126 Ohio

St.3d 1581, 2010-Ohio-4542, 934 N.E.2d 354 and 2010-1372, 126 Ohio St.3d 1579, 2010-Ohio-4542, 934 N.E.2d 353."¹

{¶25} In *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, paragraphs three and four of the syllabus, a case involving the failure to properly sentence on postrelease control, the Supreme Court of Ohio held the scope of an appeal from a resentencing hearing is limited to issues arising during the resentencing hearing:

{¶26} "Although the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.

{¶27} "The scope of an appeal from a resentencing hearing in which a mandatory term of postrelease control is imposed is limited to issues arising at the resentencing hearing."

{¶28} On the issue of res judicata and postrelease control resentences, the *Fischer* court explained the following at ¶30-31:

{¶29} "Correcting the defect without remanding for resentencing can provide an equitable, economical, and efficient remedy for a void sentence. Here, we adopt that remedy in one narrow area: in cases in which a trial judge does not impose postrelease control in accordance with statutorily mandated terms. In such a case, the sentence is void. Principles of res judicata, including the doctrine of the law of the case, do not preclude appellate review. The sentence may be reviewed at any time, on direct appeal or by collateral attack.

¹We note as of March 23, 2011, the *Allen* and *Smith* cases are still stayed, and *Lester* is currently set for oral argument on April 6, 2011.

{¶30} "Our decision today is limited to a discrete vein of cases: those in which a court does not properly impose a statutorily mandated period of postrelease control. In cases involving postrelease control, we will continue to adhere to our narrow, discrete line of cases addressing the unique problems that have arisen in the application of that law and the underlying statute. In light of the General Assembly's enactment of R.C. 2929.191, it is likely that our work in this regard is drawing to a close, at least for purposes of void sentences. Even if that is not the case, however, we would be ill-served by the approach advocated by the dissent, which is premised on an unpalatable and unpersuasive foundation."

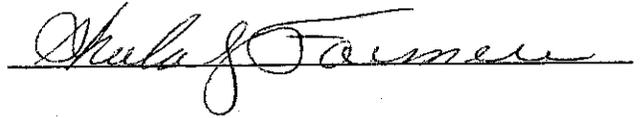
{¶31} We therefore conclude there has been no guidance provided to the appellate courts on the applicability of res judicata to a non-final order pursuant to *Baker*.

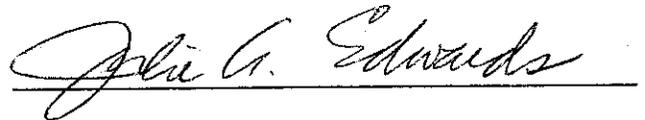
{¶32} Faced with this open issue, we are forced to conclude that under *Baker*, Ms. Griffin's assignment of error in raising *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833, is valid. Our original reversal and remand are unaffected by *Ketterer*, and are hereby reimposed. See, *State v. Griffin*, Coshocton App. No. 09CA21, 2010-Ohio-3517.

By Farmer, J.

Edwards, J. concur and

Hoffman, P.J. dissents.



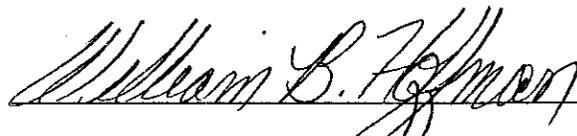


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Hoffman, P.J., dissenting

{¶33} I respectfully dissent for the reasons set forth in my dissent in *State v. Griffin*, Coshocton App. No. 09CA21, 2010-Ohio-3517.


HON. WILLIAM B. HOFFMAN

FILED
DATE APR 1 2011
TIME _____
Fifth District Court of Appeals
State of Ohio
County of Coshocton

