

ORIGINAL

IN THE SUPREME COURT
OF THE STATE OF OHIO

STATE OF OHIO	:	
	:	Case No. 11-0202
Plaintiff-Appellee,	:	
	:	On Appeal from the Meigs County
v.	:	Court of Appeals, Fourth Appellate District
	:	
ERIC A. QUALLS	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 10CA8

MERIT BRIEF OF APPELLEE

COLLEEN S. WILLIAMS #0065079
Meigs County Prosecutor
(COUNSEL OF RECORD)

KATHERINE A. SZUDY #0076729
Assistant State Public Defender
(COUNSEL OF RECORD)

AMANDA BIZUB-FRANZMANN #0085255
Assistant County Prosecutor

E. KELLY MIHOCIK #0077745
Assistant State Public Defender

Meigs County Prosecutor's Office
117 West Second Street
Pomeroy, Ohio 45769
(740) 992-6371
(740) 992-6567 – Fax
cwilliams@meigscountyprosecutor.com

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
Kelly.mihocik@opd.ohio.gov

Co-Counsel for the State of Ohio

Co-Counsel for Eric A. Qualls

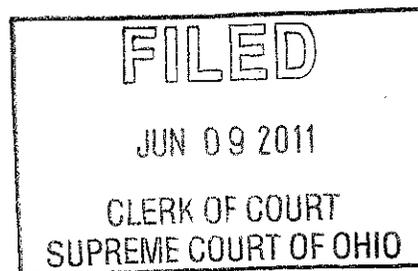
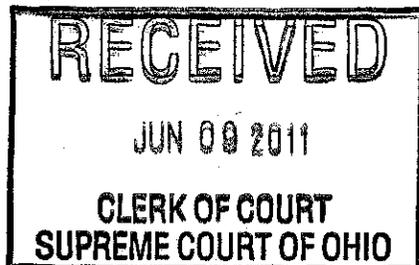


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Statement of the Case and Facts

Eric Qualls (“Qualls”), in an attempt to capitalize on the murkiness and ever changing nature of the Ohio Supreme Court’s rulings surrounding Post-Release Control (“PRC”) has filed his latest post-conviction action, an appeal of a ministerial act of the trial court. These post conviction actions included, but are not limited to, several motions to withdraw his pleas of guilty, attempted delayed appeals, improper public records actions, and an attempted writ of mandamus against the former elected-prosecutor who convicted Qualls.¹

Qualls is incarcerated in the Ross Correctional Institute for Aggravated Murder, an unclassified felony, and Kidnapping, a felony of the first degree. Qualls received his prison sentence because on March 7, 2002, he walked into “The Corner Restaurant”, a small family establishment in Middleport, Ohio, with a shotgun. Qualls forced Rebecca Ackerman, who was unarmed, the mother of his child and a waitress at the restaurant outside against her will.² Qualls then shot Ackerman at almost point blank range with the shotgun. Qualls reportedly called Ackerman a “bitch” as she lay dead. This was the final act in an abusive relationship. Qualls fled a short distance and after a several hour standoff with law enforcement, he surrendered. The Meigs County Grand Jury returned an indictment charging Qualls with a number of crimes including two counts of aggravated murder, one with a death specification, and kidnapping.

On August 15, 2002, Qualls, to save himself from possibly being put to death, pled guilty to amended aggravated murder with a firearms specification but no death specification and kidnapping, a felony of the first degree. The court sentenced Qualls accordingly and as the plea agreement called for in that same hearing. Most pointedly Qualls was informed, as even he

¹ See e.g. *State v. Qualls*, (4 Dist.), 2007 Ohio 3938; *State ex rel. Qualls v. Story*, (2004) 104 Ohio St.3d 343.

² Qualls prior domestic violence conviction in the Meigs County Court in case 2000CRB1228 in theory prevented him from possessing or using firearms.

admits in early filings³ of PRC, that PRC applied only to the kidnapping charge.⁴ The court went so far as to request Mr. Qualls' defense counsel to explain PRC to their client. After this discussion, the court directly asked Mr. Qualls if he understood PRC to which he replied, "Yes, Sir."⁵

Qualls did not appeal his conviction and served two years of his sentence, until 2006 when he filed with the Fourth District Court of Appeals requesting post conviction relief after being denied re-sentencing by the trial court. The District Court affirmed the trial court's decision and this Honorable Court denied jurisdiction over the matter. Previous to this, Qualls did file several motions with the trial court requesting permission to withdraw his guilty plea or for a reduction in sentence, but never a direct appeal.

Qualls filed another motion on January 15, 2010, with the trial court and asserted that he should have a *de novo* sentencing hearing.⁶ Qualls argument, at first, was that because one of his convictions, aggravated murder, was an unclassified felony, he could not be placed on PRC for any reason, and thus he should be re-sentenced, omitting PRC. Qualls was not only informed of the PRC at his change of plea and sentencing, but the presiding judge clarified that PRC applied only to the kidnapping charge.

The State in responding found that Qualls original sentencing entry did not contain the required PRC language. The State brought this matter to the trial court's attention and noted that Qualls admitted in his January 15, 2010, filing that he had been advised of PRC and the transcript of the sentencing hearing showed Qualls had been advised of PRC, and that Qualls was advised that PRC applied only to the kidnapping charge. Because this was the not the first time

³ "He (Qualls) was also informed that he would be subject to 5 years Post Release Control upon his release." Defenses Jan 15, 2010 motion pg. 2, paragraph 2.

⁴ Tran of sent. hearing of Aug 15, 2002, pg. 9 lines 17-25. pg 10 lines 1-3

⁵ State v. Qualls, (4th Dist.) 2010 Ohio 5316.

⁶ Def. Mot. at page 2

such a matter had happened in Ohio, the State provided the Court with case law that showed in this particular fact pattern a *nunc pro tunc* is the appropriate remedy. The trial court overruled Qualls motion and upon the motion of the State issued a *nunc pro tunc* entry. Qualls also filed a motion claiming that the sentencing entry and sentencing hearing aside, he had never been properly advised of PRC and thus he could not be sentenced now which is his second assignment of error. The trial court, it appears, has never directly ruled on this motion. Qualls, no stranger to post conviction filings, then filed this appeal.

Jurisdictional Issue

This Court lacks jurisdiction to hear Qualls appeal, as a *nunc pro tunc* entry does not extend the time for filing an appeal and the Court has not granted Qualls an extension for this appeal.

The State of Ohio begins by noting that this court does not have jurisdiction to hear this matter, because Qualls has not filed for leave to appeal under App. R. 5. It is clear that when leave to appeal has not been granted, for a delayed appeal, then this court does not have jurisdiction to consider an appeal. Because this is a delayed appeal, with no request for a leave of appeal filed and no leave to appeal granted by this court, this matter should be dismissed due to a lack of jurisdiction.

In order for an appellate court to grant leave for a delayed appeal, the defendant must show that he “was unavoidably prevented from discovery of the facts upon which the petitioner must rely to the claim for relief.”⁷ Because this requirement is jurisdictional, a court cannot reach a decision on the merits unless the petitioner can show he meets the standard.⁸ Here, this appeal is clearly untimely. Qualls was advised of his sentence on August 15, 2002, and the judgment entry was signed within days of the sentencing hearing. At the end of the

⁷ See State v. Thomas, (8th Dist.) 2011 Ohio 2542, at ¶7.

⁸ State v. Muldrew, (8th Dist.) 2005 Ohio 5000, at ¶16.

order, Qualls was clearly informed that the sentencing order was a final, appealable order. There is no question that the judge orally advised Qualls of his right to a timely appeal. Qualls chose not to appeal his conviction in a timely fashion and had proof of the error in the sentencing order in 2002. Qualls cannot prove that he “unavoidably prevented from discovery” of the error in the judgment entry. He waited eight years to appeal the sentence based on the judgment entry.

In addition, since 1929 the rule in Ohio has been that the issuance of a *nunc pro tunc* entry does not extend the time for which an appeal can be undertaken.⁹ The only exceptions exist in situations where the *nunc pro tunc* entry creates additional rights, denies an existing right or the appeal stems from the *nunc pro tunc* entry, as distinguished from the original judgment entry.¹⁰ This rule has been extended to criminal cases and several appellate courts have noted that a defendant cannot simply use a *nunc pro tunc* entry to defeat the appellate rules.¹¹

This is not the first time that situations like this have occurred in Ohio, where the defendant was orally informed of PRC but the PRC language was omitted from the original sentencing entry. In these situations the sentencing court does not have the jurisdiction to re-sentence the defendant but rather can only issue a corrective entry *nunc pro tunc*.¹² A *nunc pro tunc* was appropriate in this case because the court, by a clerical entry, merely omitted from the journal entry what it did in fact advise at the sentencing hearing as shown in Qualls own brief to the Fourth District and in the transcript of the proceedings.¹³

⁹ Perfection Stove Co. v. Scherer, (1929) 120 Ohio St. 445, 449

¹⁰ Id.

¹¹ See State v. Shinkle, (12th Dist.) 27 Ohio App.3d 54, 56; State v. Senz, (9th Dist.), 2002 Ohio 6464, at ¶18-20; State v. Taylor (3rd Dist.) 1986 WL 12553

¹² State v. Gause, (1st Dist) 182 Ohio App.3d 143.

¹³ see McKay v. McKay (1985), 24 Ohio App.3d 74. Jacks v. Adamson (1897), 56 Ohio St. 397, Webb v. Western Reserve Bond & Share Co. (1926), 115 Ohio St. 247, Brown v. Brown (4th Dist.), 2003 Ohio 304.

In this case, no leave of appeal was requested and no additional rights have been created or denied. This Court should dismiss this appeal, as it does not have jurisdiction to hear it since it has not allowed a delayed appeal to be undertaken.

Response to the Assignments of Error

First Assignment of Error

The trial court that properly advises a defendant of PRC but fails to put PRC language into the written judgment entry may correct that error by the issuance of a *nunc pro tunc* entry.

PRC in Ohio is a creature of both statutory and case law. PRC also seems an ever-changing beast. The generally understood current rule is that if a defendant, sentenced prior to July 11, 2006, was not advised of PRC the defendant should be brought back for a *de novo* sentencing hearing in accordance with the case law and procedures outlined by the Ohio Supreme Court.¹⁴

In this case Qualls initially admitted he was informed at the change of plea/sentencing hearing that he would be subject to 5 years PRC.¹⁵ Qualls was not only informed of the PRC, but the presiding judge clarified that PRC applied to the kidnapping charge only and had counsel explain this to their client.¹⁶

Qualls original sentencing entry did not contain the required PRC language. The State brought this error to the trial court's attention. PRC language is required because without it the parole board would be unable to supervise Qualls under the post-release control provision if he ever was released. Since Qualls' release is at the discretion of the parole board, due to his indeterminate sentence for aggravated murder, PRC may be an academic point. The bulk of

¹⁴ R.C. 2929.191(A)(2); *State v. Singleton*, (2009), 124 Ohio St. 3d 173, 180.

¹⁵ Def, Jan 15, 2010 motion pg. 2, paragraph 2, "He (Qualls) was also informed that he would be subject to 5 years Post Release Control upon his release."

¹⁶ Tran. of Sent. Hearing of Aug 15, 2002. Pg 9, lines 17-25, pg 10, lines 1-3

Ohio PRC cases, and all of the cases Qualls cites, deal with situations in which the PRC advisement was not given at change of plea and/or sentencing and the rulings are factually limited to those instances.¹⁷ In *State v. Jordan*, the court failed to notify the defendant about PRC during the sentencing hearing and then sent out an erroneous notification in the sentencing entry.¹⁸ In *Singleton* the court also forgot to advise about PRC and attempted to correct this in the sentencing entry.¹⁹ The same is true in *Hernandez v. Kelly*, *State v. Bezak* and *State v. Simpkins*. In none of those cases, was the defendant notified orally and on the record about PRC.

Qualls' case is clearly distinguishable. There is no question that Qualls was informed of PRC on the record, during the sentencing hearing. Even Qualls admits himself that he was advised of PRC by the judge and his attorneys during the sentencing hearing, but the advisement was not placed in the original journal entry. A *nunc pro tunc* is appropriate in this case because the court, by a clerical entry, merely omitted from the journal entry what it did in fact advise at the sentencing hearing.²⁰ Where a court uses a *nunc pro tunc* to modify a judgment entry to correctly reflect the record, the use of the *nunc prop tunc* is proper.²¹ The First District Court of Appeals has found that in these situations where the defendant was orally informed of PRC but the PRC language was omitted from the entry, the trial court does not have the jurisdiction to re-sentence the defendant but rather can only issue a corrective entry *nunc pro tunc*.²² Qualls attempts to point to an unreported case from the 10th District to say that a *nunc pro tunc* entry is improper²³. However in that unreported case the 10th district was informing its lower courts of

¹⁷ e.g. *State v. Bezak*, (2007) 114 Ohio St.3d 94.

¹⁸ *State v. Jordan*, (10th Dist.) 2004 Ohio 6985, at ¶4.

¹⁹ *Singleton*, 124 Ohio St. 3d 173, 174-175.

²⁰ see *McKay v. McKay* (1985), 24 Ohio App.3d 74. *Jacks v. Adamson* (1897), 56 Ohio St. 397, *Webb v. Western Reserve Bond & Share Co.* (1926), 115 Ohio St. 247, *Brown v. Brown* (4th Dist.), 2003-Ohio-304.

²¹ *State v. Leone*, (8th Dist.) 2010 Ohio 5358, at ¶5; See *Reinbolt v. Reinbolt*, (2010) 112 Ohio St. 526, 532).

²² *State v. Gause*, (2009) 182 Ohio App.3d 143.

²³ *State v. Broadnax*, (10th Dist.), 2008 Ohio 1799

how to comply with the Ohio Supreme Courts mandate when PRC was not imposed at the original sentencing hearing.

Since by Qualls own admission, and from a review of the transcript, this is not a situation where Qualls was not advised of PRC, but one in which by a clerical error the entry neglects to include what even Qualls admits was actually done, the trial court was proper to issue a corrective entry *nunc pro tunc* and not order a de novo sentencing hearing.

Second Assignment of Error

The Trial Court retains the right to correct a sentencing entry so that it complies with legal requirements.

Qualls attempts to assert that because around 8 years have passed and the trial court has lost jurisdiction under Crim. R. 32 it cannot correct its sentencing entry.

This is simply incorrect. While a trial court's jurisdiction over a criminal case is limited after it renders judgment, the trial court will retain jurisdiction to correct a sentence and is authorized to do so.²⁴ What Qualls would seek to have this court do is to turn sentencing into a game in which a wrong move by the judge or prosecutor means immunity for a defendant.²⁵ For PRC issues this type of gamesmanship has expressly been disallowed by State v. Simpkins.²⁶

While Qualls cites to several appellate cases involving Crim. R. 32 none those cases apply to the complexities of PRC. The Ohio Supreme Court has held very clearly that PRC may be imposed at anytime prior to release from prison.²⁷

Qualls argues that if he prevails on this appeal, he should receive a de novo sentencing hearing for the entire matter, including the two aggravated murder charges and one kidnapping

²⁴ State v. Simpkins, (2008) 117 Ohio St.3d 420 at 425

²⁵ Bozza v. United States (1947), 330 U.S. 160, 166-167.

²⁶ Simpkins, 117 Ohio St.3d 426.

²⁷ State v. Singleton, 124 Ohio St. 3d 173, 177.

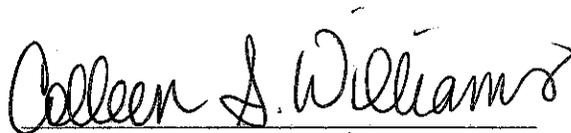
charge. In *State v. Fischer*, the Ohio Supreme Court clarified that if there is an error in sentencing for PRC and there are other offenses, then only the error in regards to the offense affiliated with PRC will be voided and remanded for a de novo sentencing hearing; the remaining part of the sentence is valid and not re-sentenced.²⁸ The prevailing appellant is not entitled to a de novo hearing regarding the offenses to which PRC does not apply.²⁹

If Qualls is correct and the *nunc pro tunc* entry correcting the record was not the proper course of action this matter should be remanded on the issue of PRC in regards to the kidnapping charge only. The sentence for Aggravated Murder was properly advised in court and properly journalized in the judgment entry from August, 2002.

Conclusion

For the foregoing reasons, the judgment of the Appellate Court should be affirmed.

Respectfully Submitted,



Colleen S. Williams (0065079)
Meigs Prosecuting Attorney



Amanda Bizub-Franzmann (0085255)
Assistant County Prosecuting Attorney
117 West Second Street
Pomeroy, Ohio 45769
Phone (740) 992-6371
Fax (740) 992-6567
cwilliams@meigscountyprosecutor.com

²⁸ *State v. Fischer*, (2010) 129 Ohio St.3d 92, 97.

²⁹ *Id.*

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed via US Mail to Katherine A. Szudy, Assistant State Public Defender, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, OH 43215, on the 8th day of June 2011.



Amanda Bizub-Franzmann, Esq.
Meigs County Assistant Prosecuting Attorney