

11-1780

Roland Nickleson, Pro se
-Appellant-

On Appeal from the Wood
County Court of Appeals
Sixth Appellate District

v.

State of Ohio
-Appellee-

Court of Appeals
CASE NO. WD-11-089

Memorandum in Support of Jurisdiction of
Appellant Roland Nickleson #516813

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-Appellant-
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County Court of Common Pleas

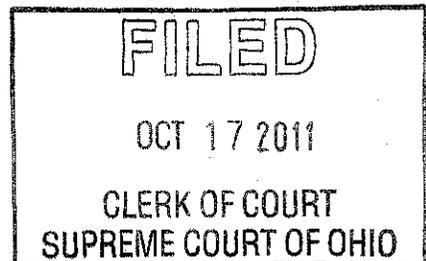


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Explanation of Why This Case is a Case of Public or Great General Interest, Involves a Substantial Constitutional Question, and as a Felony Case, Should be Granted Opportunity to Appeal

This Court, as recent as 2010, reviewed and decided upon the issues raised in this appeal on at least two separate fronts, and announced "Decisions" that the Wood County Common Pleas Court and Sixth Appellate District Court of Appeals are in direct conflict with, according to the "Decisions" rendered by both of these Courts in case no. 2005 CR 0361(May 26, 2011) and Court of Appeals case no. WD-11-039(Aug. 31, 2011).

Central to this appeal is the question of whether a Writ of Mandamus is the appropriate vehicle when a trial court refuses or delays performing it's duty or rendering a judgment? Appellant relies upon this Court's "Decisions" in Kennedy v. Cleveland (1948) 16 Ohio App. 3rd 399; Cleveland v. Trzebuckowski (1999), 709 NE. 2d 1148; State Ex Rel. Carnail v. McCormic, 126 Ohio St. 3rd 124, and State v. Notestine 2010, 2010 WL 3450061, to answer this question affirmatively. In State Ex Rel. Carnail v. McCormic, supra, it states as follows: "We have consistantly held that if the trial court refuses upon request or motion to journalize it's decision, either party may compel the court to act by filing a Writ of Mandamus or Writ of Procedendo "because" [A]bsent journalization of the judgment a party cannot appeal it.

The Sixth District Court of Appeals appears to ignore the directive in Notestine supra as well: "Appellant has chosen the wrong legal avenue of relief; Mandamus, not direct appeal is the appropriate action by which to obtain the type of relief Appellate seeks."

Noting that Notestine was announced in 2010, Appellant relied upon the authority of Notestine opposed to the guidance of State Ex Rel. Freed v. McMonagle, No. 82678 2003-Ohio-3382; WHICH the Sixth District Appellate Court of Appeals relied upon in it's decision denying Appellants Writ of Mandamus, as the vehicle to seek relief from the Trial Courts Order in case no. 2005 CR 0361(May 26, 2011).

The Conflict is also apparent where the Sixth District Court of Appeals disregarded this courts decision in State v. Ex Rel. Culgan v. Medina City, Court of Common Pleas 119 Ohio St. 3d 535 2008-Ohio-4609: "granting Writs of Mandamus and Pro-cedendo to compel judges and common pleas courts to issue senten-cing entries that complied with Crm. R. 32(C) and constitute final appealable orders."

Also, central to this appeal is the question of whether a defendant can appeal his case to the appellate court when the trial court has failed to issue a final appealable order that is in compliance with Crm. R. 32(C) or not?

This question was answered in the negative by the Eight District Court of Appeals in State of Ohio v. Benton White, Cuyahoga County case no. 92972(May 2010). In White, State v. Baker, 2008-Ohio-3330, 893- NE 2d 163 was cited in relevant part as follows: "the Supreme Court held that the requirements of Crm. R. 32(C) are jurisdictional and that absent compliance to Crm. R. 32(C) there can be no final appealable order under R.C. 2505.02 Id at syllabus. Baker did not affect long-standing precedent that says a criminal action is not final for purposes of appeal until the court has separately disposed of each count in the indictment." State v. Waters, 9th Dist. no. 85691, 2005-Ohio-5137; State v. Cooper, 8th Dist. no. 84716, 2005-Ohio-754; see also State v. Goldberry, 3rd Dist. no. 14-07-06, 2009-Ohio-6029.

The announcement of Baker appears to make clear a trial courts duty in regards to issuing final appealable orders for the purpose of appeal; which then raises the question of a trial courts duty in complying with Crm. R. 32(C). In this regard, Crm. R. 32(C) reads as follows: "Crm. R. 32(C) imposes on a trial court a mandatory duty to set forth the verdict of it's findings as to each and every charge prosecuted against an accus-ed, and failure to so renders the judgment substantially defici-ent under the rule. In absence of a signed journal entry reflect-ing the courts rulings as to each charge, the order of the court is interlocutory." Cleveland v. Duckworth, 2002 App. no. 79658; State v. Brown, 569 NE. 2d 1068; and State v. Lupardus, 2008-Ohio-2660

On Feb. 9th 2006, the Trial Court failed to issue a final appealable order which complied with Crm. R. 32(C) when it failed to set forth the verdict of it's findings for the charge of robbery in violation of R.C. 2911.02 (A)(2) of the indictment. On May 17, 2011, pursuant to the 8th Dist. announcement in White, Appellant requested the Trial Court to issue a final appealable order; which the Trial Court denied. See case no. 2005 CR 0361, order (May 26, 2011).

Pursuant to this court decision in Notestine, appellant filed a Writ of Mandamus to the Sixth Dist. Appellate Court, but citing Freed, the Writ was denied. See Court of Appeals case no. WD-11-039 (Aug. 31, 2011). Appellant now ask this Court to settle this conflict and render it's decision.

Statement of Case and Facts

Appellant, Roland Nickleson was indicted on July 21, 2005 of Robbery in violation of R.C. Title 29, section 2911.02 (A)(1) and (2), Count Four(4) of an indictment which listed seven(7) counts; one of the seven counts being Count Five(5) Aggravated Robbery charge. (See indictment)

On February 9th 2006, the State filed a motion to amend Count Four(4) of the indictment in order to strike the offending language of (A)(1) as not to confuse the jury. The Trial Court acknowledged and agreed with the State's reasoning for the motion however, the Trial Court figured that the jury would "sort it out" and went on to ultimately deny the State's motion to amend Count Four(4). (See Transcript Pgs. 126-128)

On Feb. 9th 2006, after the jury first, sent the Trial Court a letter requesting clarification as to how they should go about weighing the evidence and applying it to the correct subsection of Count Four(4) ^{two(2)} offenses combined in one count, the jury ultimately returned a guilty verdict for the robbery in Count Four(4) as charged in the indictment. (See Trans. pg. 197)

On May 17, 2011, for the first time, Appellant filed a motion with the Wood County Common Pleas Court requesting the Trial Court to issue a final appealable order by resentencing him in compliance with the mandatory requirements set forth in Crm. R. 32(C). (See request filed 5-17-11)

On May 26, 2011, the Trial Court, without citing any authorities, denied Appellants request by first, incorrectly claiming to have met the Crm. R. 32(C) requirements, thus having properly issued a final appealable order; second, the Trial Court claimed not to recognize the duplicitous error in Count Four(4)^s charges; and third, the trial court incorrectly claimed that the issues raised in the May 17th "Request to be Re~~g~~resented" were issues that Appellant had previously placed before the Sixth Dist. Appellate Court for review in case no. 2006-WD-0023, and again in case no. 2009-WD-0002.

On June 24, 2011, Appellant filed a Writ of Mandamus with the Sixth Dist. Appellate Court requesting that court to compel the Trial Court to resentence him in compliance with Crm. R. 32(C).

On Aug. 31, 2011, the Sixth Dist. Appellate Court rendered it's Decision and Judgment in this matter denying Appellant's Writ as not being the vehicle in which to find remedy. Appellant now pursues remedy herein this Appeal to this Supreme Court of Ohio.

Here, it should be noted that the issues raised in the Trial Court on May 17, 2011, case no. 2005 CR 0361; the issues raised in Writ of Mandamus, case no. WD-11-039; and the issues contained herein this Ohio Supreme Court Appeal, have never ben raised by Appellant in any other action, collateral or otherwise, prior to May 17, 2011.

Argument In Support of Propositions of Law

Proposition of Law No. I: The Trial Court Failed to Issue a Final Appealable Order When it Failed to Comply With Crm. R. 32(C) by Journalizing it's Finding for the Count of Robbery in Violation of R.C. 2911.02(A)(2) of the Indictment

There can be absolutely no argument about whether or not Appellant was accused of, and held to answer the charge of robbery in violation of R.C. 2911.02(A)(2). Both the indictment and Bill of Particulars firmly charged it. (See charging instruments)

However, where the record reflects the existence of R.C. 2911.02(A)(2) throughout the entire trial process, the record is completely silent in regards to the jury's verdict or the Trial Court's findings concerning the 2911.02(A)(2) charge or how it was disposed of.

Ohio Constitution provides for a defendant the right to an appeal under the due process protection of the 14th Amendment. But there can be no appeal where no final appealable order, or final judgment have been issued. See State v. Baker 119 Ohio St. 3rd 197; State v. Goldsberry 3rd Dist. 14-07-06; and U.S. v. Leichter (1998) 160 F. 3rd 33.

The Trial Court committed plain error when it failed to issue a final appealable order which was in compliance with the mandate of well established and long-standing law-Crm. R. 32(C). City of Cleveland v. Scully, 1994 WL 245888.

Plain error exist where there is deviatio from a legal rule, error is obvious on the face of the record, and the error affects a substantial right. State v. Payne 2007-Ohio-4642, The Trial Court deviated from the legal rule of Crm.R. 32(C). The fact that first, the indictment charged R.C. 2911.02(A)(2); second,, the State motioned the Court in regards to 2911.02(A)(2); and ultimately, the jury addressed the Court during deliberations with concerns about 2911.02(A)(2) constitutes the error as an error which was obvious on the face of the record. Further, the error affected the Appellant's right to appeal a final appealable order.

Proposition of Law No. II: The Trial Court Abused it's Discretion When it Failed to Grant the States Motion to Amend, Count Four(4) of the Indictment Due to Count Four's(4) Duplicitous Nature and Offending Language; Which Charge Multiple Offenses in a Single Count of the Indictment

The charging instruments in this case were clearly duplicitous. (See charging instruments) The Georgetown Law Journal speaks in depth of the many hazards that may occur and violate a defendant's rights as a result of a duplicitous indictment. (See Georgetown Law Journal)

Obviously the State recognized the dangers of Count Four's(4) duplicitous charges and filed a motion to amend Count Four(4) of the indictment. (See Trans. Pg. 126-128)

The Government may correct a duplicitous indictment by electing the basis upon which it will continue. Georgetown Law Journal, also see U.S. v. Savoires, 430 Fd. 3rd 367, 377(6th Cir. 2005)

In response to, and in acknowledgment of the State's motion to amend Count Four(4) of the Indictment, Judge Mayberry states in relevant part, as follows:

Court: "Remove what might be otherwise confusing for the jury." (See Trans. Pg. 128 LN.12-16)

Court: "I guess the Court has confidence in the jury's ability to sort it out, and for us to properly define in our instruction to the jury the alternative to them in the elements." (See Trans. Pg. 128 LN. 6-9)

Consequently, as a result of the Trial Court denying the States reasonable motion to amend Count Four(4) of the indictment, and the Trial Court's error in failing to charge the jury with an instruction that would cure the duplicitous error in the indictment, the jury ultimately returned a general verdict of guilty as to Count Four's(4) duplicitous charges in the indictment; which constitutes a violation of Appellant's rights in regards to each of the hazards the Georgetown Law Journal speaks of.

Due to the unreasonable, arbitrary and unconscionable attitude of the Trial Court, where protecting the Appellant's rights are concerned, Appellant now stands convicted and sentenced of ~~the~~ charges in Count Four(4) of the indictment that it's unclear whether or not the jury ever reached a guilty verdict for. Appellant insists that the error complained of in this argument would not only change the degree of his conviction but would also affect the time of his sentence and relief eligibility.

Proposition of Law No. III: The Trial Court Committed Plain Error When it Failed to Charge the Jury With an Instruction Which Would Cure the Error That Count Four(4) Duplicious Language and Multiple Statues Caused

The Sixth Amendment to the United State Constitution require unanimity and a jury must be properly instructed in order to achieve it. U.S. v. Petersen 768 F. 2d 64(2d Cir.). When it appears... that there is genuine possibility of jury confusion or that a conviction may occur as a result of different juror's concluding that the Defendant committed different acts, the general unanimity instruction does not suffice. To correct any potential confusion, the Trial Court must augment the general instruction to ensure the jury understands it's duty to agree on a particular set of facts. State v. Johnson 545 NE. 2d 636 citing Gibson 553 F. 2d 453.

A review of the record will reveal that the Trial Court, prior to denying the State's motion to amend Count Four(4) of the indictment, stated:

Court: "Your asking to delete there from, have a deadly weapon on or about his person or under his control?"(Trans. Pg. 127 LN. 6)

Court: "If the Court would not grant that amendment it's charged in the alternative so the jury, it would-- all it would do is clean up the language and remove what might be otherwise confusing to the jury?"(Trans Pg. 126 LN. 12-16)

After acknowledgment of the potential confusion that Count Four(4) would cause the jury, without the requested Amendment, the Trial Court goes on to conclude the following:

Court: "I guess the Court has confidence in the jury's ability to be able to sort it out, and for us to properly define in our instructions to the jury the alternative to them in the elements."(Trans Pg. 128 LN. 6-9)

This Court may review the record to determine the sufficiency of the eventual instruction given to jury, but it's apparent from the question the jury submitted to the Trial Court during deliberations, and the jury's verdict of "guilty in Count Four(4) charged in the indictment", the instruction failed to ensure that the jury understood it's duty of reaching an agreement upon a particular set of facts. The jury's question to the Trial Court was as follows:

Court: "We have a question from the jury which states" "Does quote, attempted to inflict or threaten to inflict physical harm on another" and quote "without a weapon or ordinance fulfill part 5 in Count Four(4)?"(Trans Pg. 197 LN. 5-9)

Also see verdict form to determine whether or not Count Four(4) "as charged in the indictment" sufficiently sets forth a particular set of facts

for the jury to decide upon without either the indictment being amended, the instruction being augmented, or the verdict form being altered to specify a particular degree of the offense charged.(Robbery)

Proposition of Law No. IV: The Evidence Offered at Trial was Insufficient and Against the Manifest Weight to Support a Conviction for Robbery in Violation of R.C. 2911.02(A)(1)(With a Deadly Weapon)

Pursuant to the determinations and guidance of well established long-standing case law precedent, found in Stae v. Jenks(1981) 574 NE. 2d 492 and State v. Thompkins(1997) 678 NE. 2d 541, Appellant urges this Court to consider the circumstances of this case, evidence offered at Trial, the elements that must be proven beyond a reasonable doubt, witness credibility, and reasonable inferences to determine whether, in resolving conflicts in the evidence, the jury clearly lost it's way.

In Count Four(4) of the indictment, Appellant was charged with both R.C. 2911.02(A)(1) and R.C. 2911.02(A)(2). IN Count Five(5) of the indictment, Appellant was charged with R.C. 2911.01(A)(1). Both R.C. 2911.02(A)(1) and R.C. 2911.01(A)(1) require the employment of a deadly weapon during the commission of the crime. However Count Five's(5) 2911.01(A)(1) charge specified the use of a handgun. Count Five(5) charged and specified the use of a handgun based sole on the state key witnesses testimony of actually seeing and being threatened with a "black or dark bluish colored handgun during the robbery."

Because the record clearly reflects that there was absolutely no evidence offered that supports the theory of the crime having been committed with some other form of deadly weapon, the "not guilty" verdict reached by the jury in regards to Count Five(5)'s Agg. Robbery charge in violation of R.C. 2911.02(A)(1); which specified the handgun, was a clear indication that the factfinders determined that the Appellant committed the crime by threat to inflict, attempt to inflict or infliction of physical harm on the victim as found in the 2911.02(A)(2) statue of the robbery charge, and therefore, the conviction for robbery in violation of R.C. 2911.02(A)(1) lacks sufficient evidence and is against the manifest weight of the evidence to sustain the conviction.

Proposition of Law No. V The Verdict Form That was Submitted to the Jury was Insufficient to Convict Appellant of a Felony of the Second Degree

Crm. R. 31(A) requires that a verdict form be unanimous. It shall be in writing, signed by all jurors concurring therein, and returned by the jury to the judge in open court. Further, R.C. 2945.75(A)(2) requires that a guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. State v. Hobbs, 2008 WL 4193634. Otherwise a guilty verdict constitutes a finding of the least degree of the offense charged. Also see State v. Pelfrey 860 NE. 2d 735(2007).

"Because the jury instructions did not provide a basis in law for the jury to reach it's decision, the courts failure to clarify them constituted plain error." Wheeler v. McKinley Enterprises 973 F. 2d 1158(6th Cir. 1999)

In the instant case, Appellant failed to object to the erroneous verdict form; however, the Indictment and Bill of Particulars both were duplicitous for Count Four(4) of the Indictment, and the jury eventually expressed the obvious confusion that Count Four's(4) duplicitous charges caused, it constituted plain error when the Trial Court still unreasonably failed to charge a proper instruction which would cure the error, or ultimately, correct the verdict form to specify a degree of the offense charged.

Conclusion

Appellant has clearly pointed out the Trial Court's error in failing to issue a final appealable order which complied with Crm. R. 32(C). In pointing out the Trial Court's error, Appellant demonstrated how the Trial Court clearly abused it's discretion when it unreasonably, arbitrarily and unconscionably first, denied a most reasonable and most necessary motion to amend Count Four(4) , filed by the state in order to protect the integrity of the Appellant's trial process and due process right; and second failed to charge the jury with an instruction that was absolutely necessary and mandatory in order to cure the initial error in which the Trial Court committed by denying the State's motion to amend Count Four(4) of the Indictment.

Further, Appellant shows how this error committed by the Trial Court ultimately affected his conviction and sentence where the jury lost it's way due to an indictment that was duplicitous, an instruction that was ambiguous and general, and a verdict form that was clearly misleading and reached a verdict of guilty in Count Four(4) of the Indictment that was against the manifest weight of the evidence and unsupported by sufficient enough evidence to sustain the conviction.

Certificate of Service

I certify that a copy of this Memorandum in Support of Roland Nickleson's Notice of Appeal was sent to Counsel for the State of Ohio, Gwen Howe-Gerbers at One Courthouse Square, Bowling Green, Ohio 43402 by regular U.S. mail on this 10 day of October 2011 via Supreme Court of Ohio Office of the Clerk, 65 South Front Street Columbus Ohio 43215-3431.



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FILED
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AUG 31 10:07

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State ex rel. Roland Nickelson

Court of Appeals No. WD-11-039

Relator

v.

Alan Mayberry

DECISION AND JUDGMENT

Respondent

Decided:

AUG 31 2011

Roland Nickelson, pro se.

HANDWORK, J.

{¶ 1} On June 24, 2011, relator, Roland Nickelson, commenced this mandamus action against respondent, Judge Alan Mayberry, to compel the judge to reverse his decision denying Nickelson's May 17, 2011 petition for postconviction relief.

{¶ 2} The relevant history of this action is as follows. In February 2006, a jury found Nickelson guilty on three counts of kidnapping, one count of robbery, one count of

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I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL DOCUMENT FILED AT WOOD CO. COMMON PLEAS COURT, BOWLING GREEN, OHIO
BY Cindy A. Horner DEPUTY CLERK
THIS 31st DAY OF Aug. 2011

1.

theft of drugs, and one count of aggravated robbery. For these offenses, relator received an aggregate sentence of 28 years and 11 months in prison.

{¶ 3} In September 2008, relator filed a postconviction petition requesting the trial court to vacate or set aside relator's conviction or sentence. On December 12, 2008, the trial court denied the petition on the grounds that it was untimely filed.

{¶ 4} In December 2010, relator filed a second postconviction petition, this time requesting resentencing. On January 13, 2011, the trial court, finding that relator had been properly sentenced, denied this motion.

{¶ 5} In his May 17, 2011 petition, relator again requested a resentencing hearing. As grounds for this petition, relator alleged deficiencies in Count 4 of the indictment against him, for robbery. The judge, in his May 26, 2011 order, addressed these alleged deficiencies and, upon finding no error—and further finding that the matter had been previously reviewed by this court—denied relator's motion.

{¶ 6} The principles that govern mandamus are well established and are as follows: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief, and (3) there must be no adequate remedy at law. *State ex rel. Freed v. McMonagle*, 8th Dist. No. 82678, 2003-Ohio-3382, ¶ 7. "[A]lthough mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused." *Id.* In addition, mandamus is not a substitute for appeal. *Id.* Thus, mandamus is not a vehicle by which to correct errors or procedural

irregularities in the course of a case. *State ex rel. Nelson v. Russo*, 8th Dist. No. 96706, 2011-Ohio-3698, ¶ 6. Relief in mandamus is also precluded where a relator had an adequate remedy, regardless of whether it was used. *Id.*

{¶ 7} In the instant case, relator had an adequate remedy at law, through direct appeal, to contest the respondent judge's denial of his motion. As stated by the court in *Freed*, supra, "[A]ppeal, not mandamus, is the proper remedy for correcting irregularities or errors in postconviction proceedings." *Id.* at ¶ 9. Thus, mandamus is precluded in the instant case.

{¶ 8} In addition, relator had multiple opportunities in the past to raise the argument concerning the language of the indictment. When relator did raise the argument, both the trial court and this court specifically rejected it. That this court has specifically rejected relator's argument also means that it is barred by res judicata. See *State ex rel. Nelson v. Russo*, supra, at ¶ 7.

{¶ 9} For all of the foregoing reasons, this court denies relator's application for a writ of mandamus. Costs are assessed against relator. The clerk is directed to serve upon all parties, within three days, a copy of this decision in a manner prescribed by Civ.R. 5(B).

WRIT DENIED.

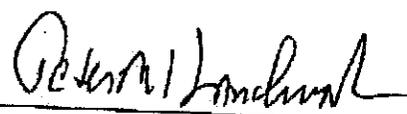
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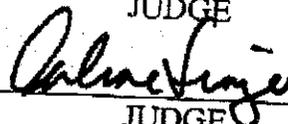
State ex rel. Nickelson
v. Mayberry
C.A. No. WD-11-039

Peter M. Handwork, J.



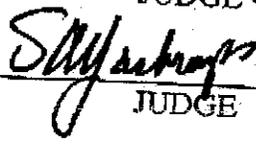
JUDGE

Arlene Singer, J.



JUDGE

Stephen A. Yarbrough, J.
CONCUR.



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

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AUG 31 2011

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CINDY A. HOFNER

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

State of Ohio,

2005CR0361

Plaintiff,

Judge Mayberry

Vs.

Roland Nickelson,

ORDER

Defendant.

May 26, 2011

This matter comes before the court on the defendant's request for a sentencing hearing, filed May 17, 2011 and the memorandum in support thereof. The defendant argues that the court has not issued a final appealable order in this matter with regard to Count 4.

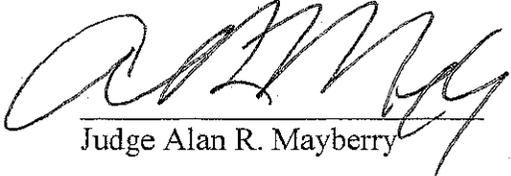
The defendant, who was indicted under the spelling Nickelson, but who signs his name as Nickleson, argues that Count 4 of the indictment contained two separate robbery offenses: one offense being a violation of division (A)(1) of section 2911.02 of the Ohio Revised Code and the other offense being a violation of division of (A)(2) of the same section. The defendant argues that because Count 4 contained language that encompassed both division (A)(1) and division (A)(2) of the robbery statute and because he was sentenced for a violation of division (A)(1) but not for a violation of division (A)(2), there remains an unsettled issue as to Count 4 and that until it is resolved this court's judgment regarding Count 4 is not final and appealable.

The defendant argues that because he was found not guilty of the aggravated robbery charge in Count 5, which alleged that he had a deadly weapon on or about his person or under his control and that he displayed or brandished or indicated that he possessed a deadly weapon or that he used a

deadly weapon during the commission of the offense constituting Count 5, the conviction on Count 4, which required either that the defendant had a deadly weapon on or about his person or under his control or that he inflicted or attempted to inflict or threatened to inflict physical harm on another, represents a verdict that is inconsistent with the evidence. The defendant argues that because the Verdict Form for Count 4, which he calls misleading, did not specify whether he was found guilty of a violation of division (A)(1) or a violation of division (A)(2) of the robbery statute, that a hearing must be conducted in order to resolve this issue. The defendant further argues that the jury instructions were improper and that as a result the sentence imposed for Count 4 is improper as a matter of law. The defendant further alleges that the sentencing entry does not comply with Crim.R. 32(C). The defendant suggests that until this court issues a final appealable order, the court of appeals may not review this matter. This court, however, notes that the court of appeals reviewed this matter in 2006WD0023 and declined the opportunity to review it again in 2009WD0002. This court determines that the alternative language employed in Count 4 did not cause the verdict rendered thereon to be incomplete. The court finds that it has issued a final appealable order as to Count 4.

Accordingly, the defendant's request to be returned to the trial court for further proceedings is not well-taken and his motion for a sentencing hearing is denied.

So Ordered.



Judge Alan R. Mayberry