

ORIGINAL

ORIGINAL

IN THE SUPREME COURT OF OHIO

12-0891

STATE OF OHIO,

:

Plaintiff - Appellee,

:

On Appeal from the  
Adams County Court  
of Appeals, Fourth  
Appellate District

:

:

Vs-

:

DONOVAN FITE,

Court of Appeals  
Case No. 2010 CA 888

:

Defendant - Appellant.

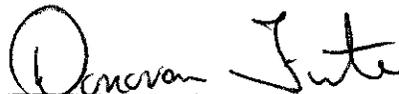
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MOTION TO FILE DELAYED APPEAL

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Donovan Fite, respectfully moves the Court pursuant to Ohio Supreme Court Rule 11, Section 2(A)(4)(a) for leave to file a delayed appeal and a notice of appeals. This case involves a felony and more than 45 days has passed since the Court of Appeals decision was filed in this case. A Memorandum in support is attached.



\_\_\_\_\_  
DONOVAN FITE  
ROSS CORRECTIONAL  
P.O. BOX 7010  
CHILLICOTHE, OHIO 45601

DEFENDANT - APPELLANT, PRO SE

FILED  
MAY 23 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

**MEMORANDUM AND AFFIDAVIT IN SUPPORT OF MOTION**

On February 1, 2011 the Court of Appeals filed its decision in my case. I have attached a copy of the Court of Appeals opinion to this motion. I was unable to file a notice of appeal, memorandum in support of jurisdiction within 45 days of the Court of Appeal decision in my case.

I was unable to file an appeal to this Court within 45 days of the the Court of appeal decision for the following reasons: Defendant - Appellant was sentenced on the 31st day of March, 2011 and had 30 days to timely file a notice of appeal. He remained incarcerated in Adams County Jail for days after sentencing and was transported to prison. Upon entering the ross correctional center, He was place in separated housing from general population from May 17, 2011 until September 27, 2011, and didn't have access to the prison law library during this time.

After being processed in orientation, he was moved to general population where he was permitted to use the pass system to request a pass to the law library. He did not receive a pass to the law library until the 8th day of October 2011. Upon entering the prison law library, he received information concerning his appeal, he was informed that it would be necessary to request notary services, copying and mailing to be completed by staff.

When filing an appeal, the Fourth District Court of Appeals requires that inmates complete a Certificate of Inmate Funds and an Affidavit of Indigence if he cannot pay the deposit. This certificate must be sent to cashier's office via kite and await its return before he can mail his appeal to the Court. Defendant - Appellant sent aforesaid kite on the 20th day of October, 2011, and did not receive it back until the 26th

day of October, 2011.

By the time he gets notary services, copies, certificate of inmate funds returned, and envelopes in which to mail notice of appeal, I was well beyond the 30 day requirement of Appellate Rule 4 (B). I was not made aware that I could file a delayed appeal until now.

**CONCLUSION**

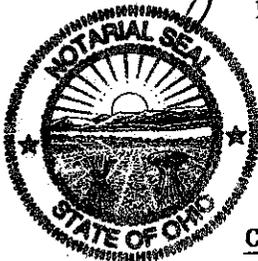
This Court should grant me leave to file a delayed appeal, based on the above mentioned foregoing facts.

Sworn to, or affirmed, and subscribed in my presence this 20 day of May 2012

Respectfully Submitted,

*Janet E. Spearry*  
Notary

*Donovan Fite*



Janet E. Spearry  
Notary Public - Ohio  
My Commission Expires 8-25-2013

DONOVAN FITE  
Ross Correctional  
P.O. Box 7010  
Chillicothe, Ohio 45601

Defendant Appellant, Pro Se

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion for delayed Appeal was forwarded by regular U.S. Mail to Aaron Haslam, 110 W. Main Street, Rm 112, West Union, Ohio 45693, this 20<sup>th</sup> day of May, 2012.

*Donovan Fite*  
DONOVAN FITE

DEFENDANT - APPELLANT, PRO SE

COURT OF COMMON PLEAS  
ADAMS COUNTY, OHIO

FILED  
ADAMS COUNTY  
CLERK OF COURTS

2011 MAR 31 AM 8:15

STATE OF OHIO  
PLAINTIFF  
VS

CASE NO. 20090010  
SECOND AMENDED

  
CLERK

JUDGMENT ENTRY ON SENTENCE

DONOVAN FITE

DEFENDANT

\*\*\*\*\*

On January 8, 2010, defendant's sentencing hearing was held, pursuant to Ohio Revised Code Section 2929.19. Present in Court were, Defense Attorney, Michael P. Kelly; and Prosecuting Attorney, Aaron Haslam, as was the defendant, who was afforded all rights, pursuant to Criminal Rule 32. The Court has considered the record, oral statements, any victim impact statements and presentence report prepared, as well as the principle and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors of ORC 2929.12.

The Court finds that the defendant has been convicted, pursuant to voluntary plea of guilty in COUNT I of MURDER, w/specification, in violation of ORC 2903.02A, being a Special Felony; and in COUNT II of INVOLUNTARY MANSLAUGHTER w/specification, in violation of ORC 2903.04A, being a First Degree Felony; both convictions in Count I and Count II by way of Pleas of Guilty entered knowingly, intelligently and voluntarily by the defendant, and each subject to division (A) of 2929.14 of the Ohio Revised Code.

Therefore, after due consideration, the Court finds that the defendant is not amenable to available Community control Sanctions.

IT IS THEREFORE ORDERED, that the defendant serve a stated prison term of in COUNT I of FIFTEEN (15) YEARS TO LIFE IMPRISONMENT; and a stated prison term in COUNT II of TEN (10) YEARS to be served in the Ohio Department of Rehabilitation and Corrections.

Further, the gun specifications contained in the Indictments shall merge into a single specification for sentencing, pursuant to RC 2929.14D1b, as the specifications refer to the same

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MAR 31 2011

criminal act or transaction.

Specification - A THREE (3) YEAR mandatory term of incarceration must run consecutively and prior to any prison term imposed for the underlying felony; and consecutive to any other prison term or mandatory prison term previously or subsequently imposed, pursuant to RC 2929.14E1a.

The term of incarceration in COUNT I shall run CONSECUTIVE to the term of incarceration in COUNT II.

~~SM~~: The defendant's placement/transfer in to a Transitional Control Program (ORC 2967.26) is specifically hereby DENIED.

~~SM~~: The defendant's placement/transfer in to a Intensive Program Prison (O.R.C. 5120.032) is specifically hereby DENIED.

The Court has further notified the defendant that post release control is MANDATORY in this case for a maximum of FIVE years. If the defendant violates a Post Release Control Sanction or any condition imposed by the Parole Board under Revised Code Section 2967.28, the Parole Board may impose a more restrictive sanction, a prison term not to exceed nine (9) months or a maximum cumulative prison term for all violations not to exceed one-half of the stated prison term originally imposed. If the violation is a new felony, defendant may receive a prison term of the greater of one year, OR the time remaining on post release control, in addition to any other prison term imposed for the new offense. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control.

The defendant is therefore ordered conveyed to the custody of the OHIO DEPARTMENT OF REHABILITATION AND CORRECTION by the Adams County Sheriff's Department.

Credit for 362 days is granted as of this date along with future custody days while the defendant awaits transportation to the appropriate state institution.

The defendant is further ordered THAT DEFENDANT PAY RESTITUTION IN THE SUM OF \$9,229.66 AS AND FOR REIMBURSEMENT FOR THE FUNERAL EXPENSES OF THE VICTIM, FREELAND. SAID SUMS ARE PAYABLE TO CHRISTINE CRONE. FURTHER, THE DEFENDANT IS TO PAY RESTITUTION IN THE SUM OF \$150.00 AS AND FOR REIMBURSEMENT FOR THE FUNERAL EXPENSES OF THE VICTIM, FREELAND. SAID

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SUMS ARE PAYABLE TO SAM FREELAND, SR.. FINALLY, THE DEFENDANT IS TO PAY RESTITUTION IN THE SUM OF \$3,400.00 AS AND FOR REIMBURSEMENT FOR THE FUNERAL EXPENSES OF THE VICTIM, KING. SAID SUMS ARE PAYABLE TO ALICE TEEGARDNER. TOTAL RESTITUTION IS IN THE AMOUNT OF \$12,779.66, FOR WHICH EXECUTION IS AWARDED.

The defendant is further ordered to pay all costs of the prosecution of this action for which execution is awarded, and any fees permitted pursuant to Revised Code Section 2929.18 (A)(4). The Department of Rehabilitation and Corrections is ordered to withhold funds in the appropriate amount from the defendant's account to pay the costs.

Pursuant to ORC 2947.23(A)(1)(a) - If the defendant fails to pay that judgment or fails to timely make payments toward that judgment under a payment schedule approved by the Court, the Court may order the defendant to perform community service in an amount of not more than forty (40) hours per month until the judgment is paid, or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

(b) - If the Court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.

 10: The Court specifically finds in the imposition of financial sanctions that the defendant has the past, present and future income ability and/or potential to satisfy all financial sanctions as imposed.

THE DEFENDANT SHALL SUBMIT TO DNA TESTING, PURSUANT TO O.R.C. SECTION 2901.07.

**THIS IS A FINAL APPEALABLE ORDER.**

The Clerk is instructed to deliver a copy of this Entry to all counsel of record and to any authorities as are necessary.

Approved: *MARCH 30, 2011*

  
BRETT M. SPENCER, JUDGE.

*7 292 P440*

## STATE OF OHIO, Plaintiff-Appellee, v. DONOVAN FITE, Defendant-Appellant.

Case No: 10CA888

## COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT, ADAMS COUNTY

2011 Ohio 507; 2011 Ohio App. LEXIS 435

February 1, 2011, File-stamped

**DISPOSITION:** [\*\*1] APPEAL DISMISSED.**COUNSEL:** Timothy Young, Ohio State Public Defender, and Craig M. Jaquith, Ohio State Assistant Public Defender, Office of the Ohio Public Defender, Columbus, Ohio, for Appellant.

Aaron E. Haslam, Adams County Prosecutor, and Mark R. Weaver, Adams County Assistant Prosecutor, West Union, Ohio, for Appellee.

**JUDGES:** Kline, J. Abele, J.: Concur in Judgment and Opinion. McFarland, J.: Dissents.**OPINION BY:** Roger L. Kline**OPINION****DECISION AND JUDGMENT ENTRY**

Kline, J.:

[\*P1] Donovan Fite (hereinafter "Fite") pled guilty to murder and involuntary manslaughter. On appeal, Fite raises arguments related to the propriety of his guilty pleas, the length of his sentence, and the trial court's order of restitution. Because the Adams County Common Pleas Court's Judgment Entry on Sentence fails to provide a method for the payment of restitution, the entry is not a final appealable order. Accordingly, we do not address Fite's arguments and dismiss this appeal for lack of jurisdiction.

I.

[\*P2] Fite shot and killed Samuel Freeland (hereinafter "Freeland") and Regina King (hereinafter "King"). After reaching a plea agreement, Fite pled guilty to one count of murder with a firearm specification and one count of involuntary manslaughter with [\*\*2] a firearm specification. After the firearms specifications were merged, the trial court sentenced Fite to a combined term of twenty-eight years to life in prison. The trial court also ordered Fite "to pay restitution in the amount of \$12,779.66[.]" Judgment Entry on Sentence at 3.

[\*P3] Fite appeals and asserts the following three assignments of error: I. "Donovan Fite's guilty plea was not knowing, voluntary, and intelligent because the trial court misinformed him that he would be subject to a limited period of post-release control upon his release from prison." II. "The trial court unlawfully imposed consecutive terms of imprisonment, when it did not make the findings required by statute." And, III. "The trial court erred in imposing a sentence that contains an order of restitution without identification of the individual or entity entitled to receive such restitution."

II.

[\*P4] Before we may consider the merits of Fite's appeal, we must determine whether the trial court's Judgment Entry on Sentence is a final appealable order. "A court of appeals has no jurisdiction over orders that are not final and appealable." *State v. Baker*, 119 Ohio St.3d 197, 2008 Ohio 3330, at ¶6, 893 N.E.2d 163, citing Section 3(B)(2), Article IV, Ohio Constitution; [\*\*3] see, also, *R.C. 2505.02*. "If a court's order is not final and appealable, we have no jurisdiction to review the matter and must dismiss the appeal." *State v. Darget, Scioto App. No. 09CA3306*, 2010 Ohio 3541, at ¶4, citing *Eddie v. Saunders, Gallia App. No. 07CA7*, 2008 Ohio 4755, at ¶11. "If the parties do not raise the jurisdictional issue, we must raise it sua sponte." *Darget* at ¶4, citing *Sexton v. Conley* (Aug. 7, 2000), *Scioto App. No. 99CA2655*, 2000 Ohio App. LEXIS 3647; see, also, *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 541 N.E.2d 64, syllabus; *Whitaker-Merrell v. Geupel Co.* (1972), 29 Ohio St.2d 184, 186, 280 N.E.2d 922.

[\*P5] "A judgment entry ordering restitution is not final and appealable if the entry fails to provide either the amount of restitution or the method of payment." *City of Toledo v. Kakissis, Lucas App. No. L-07-1215*, 2008 Ohio 1299, at ¶3, citing *In re Holmes* (1980), 70 Ohio App.2d 75, 77, 434 N.E.2d 747 ("The order appealed from was not a final appealable order, because it settled neither the amount of restitution nor the method of payment."); *State v. Kuhn, Defiance App. No. 4-05-23*, 2006 Ohio 1145, at ¶8; *State v. Lange, Mercer App. No.*

10-06-28, 2007 Ohio 2280, at ¶8, fn. 1. See, also, *State v. Baker*, Butler App. No. CA2007-06-152, 2008 Ohio 4426, at ¶43 [\*\*4]. Here, the trial court's judgment entry provides an amount of restitution -- \$12,779.66. But the judgment entry does not provide a method of payment. That is, the judgment entry does not specify the intended recipients of the restitution.

[\*P6] From the record, we can discern the trial court's intentions as to the restitution amount. Freeland's funeral apparently cost \$9,379.66, and King's funeral apparently cost \$3,400. These two figures total \$12,779.66, the amount of restitution in the judgment entry. However, the judgment entry does not provide how the \$12,779.66 should be divided among the victims' survivors. The state argues that we should "simply modify the restitution order to reflect the trial court's obvious intentions with regard to whom restitution is due." Brief of Appellee at 13. But after a thorough review of the record, we cannot determine the intended recipients of the restitution order. We recognize that the trial court mentioned the victims' families during Fite's sentencing hearing. As the trial court explained, "the Court \* \* \* feels compelled that \* \* \* whatever restitution for the imposition of the funeral expenses \* \* \* [\*\*5] \* that ha[ve] been placed upon the families that \* \* \* Mr. Fite should be required to pay as much as he possibly can[.]" January 8, 2010 Transcript at 40. Here, despite mentioning the victims' families in general, the trial court never mentioned who, specifically, should be repaid the victims' funeral expenses. We cannot discern whether the victims' parents, siblings, children, other family members, or some combination thereof are entitled to restitution. No payment can be completed without an intended

recipient. Therefore, because the trial court did not provide a method for the payment of restitution, the Judgment Entry on Sentence is not a final appealable order.

[\*P7] Accordingly, we must dismiss Fite's appeal for lack of jurisdiction.

#### **APPEAL DISMISSED.**

#### **JUDGMENT ENTRY**

It is ordered that the **APPEAL BE DISMISSED**. Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*. Exceptions.

Abele, [\*\*6] J.: Concur in Judgment and Opinion.

McFarland, J.: Dissents.

For the Court

Roger L. Kline, Judge

#### **NOTICE TO COUNSEL**

Pursuant to Local Rule No. 14, this document constitutes a final judgment