

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 :  
 : Case No. 2012-1070  
 :  
 Plaintiff-Appellant, :  
 :  
 : On Appeal from the  
 :  
 v. : Lorain County Court of Appeals,  
 :  
 : Ninth Appellate District,  
 :  
 DAVID T. WASHINGTON, : Case No. 11CA010015  
 :  
 :  
 :  
 Defendant-Appellee. :

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APPELLEE DAVID T. WASHINGTON'S  
MOTION TO DISMISS AS MOOT AND IMPROVIDENTLY ALLOWED

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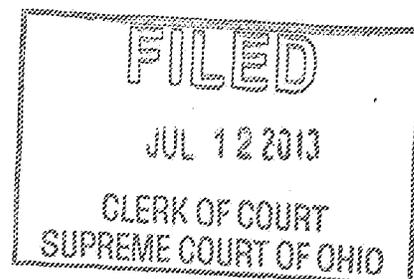
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## INTRODUCTION

This case is moot. Before this Court accepted this appeal (and with no objection from the State), the trial court resentenced Mr. Washington pursuant to the unstayed mandate of the court of appeals. The trial court's resentencing judgment has independent force that would be unaffected by any decision by this Court in this case, which concerns an appeal from an earlier judgment. As a result, this case is moot and this Court should dismiss it as improvidently allowed.

## PROCEDURAL HISTORY

### *Factual summary.*

A few minutes after David Washington and a companion took a car from a woman in the parking lot of Midway Mall in Elyria, local police located the stolen car and began a high-speed chase. T.p. 249-50.<sup>1</sup> Mr. Washington continued to flee even after stop sticks blew out his tires. T.p. 251-2. So ten minutes after he left the mall parking lot, he stopped and continued to briefly flee on foot. T.p. 233; 365. He went a little ways into some woods and hid in what the police described as a "drainage ditch," where he was quickly apprehended without further incident. T.p. 365. In his opening statement, the prosecutor explained that the *entire event*, from carjacking to arrest, lasted 11 minutes. T.p. 17.

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<sup>1</sup> Unless otherwise noted, all transcript citations refer to the three-volume transcript of the trial and original sentencing hearing.

The prosecutor told the grand and petit juries that Mr. Washington committed two offenses that began in Lorain County—fleeing and eluding and obstructing official business. Indictment. Consistent with that theory, the prosecutor at trial told the jury that the risk Mr. Washington created during the car chase demonstrated a “risk of physical harm” needed to elevate obstructing official business to a felony. R.C. 2921.31(B). T.p. 147-8. Notably, the State made *no* mention of any risk of physical harm that accrued during the on-foot portion of the chase. And the State barely mentioned the foot portion of the chase—which one of the officers had called “short[,]” T.p. 365—during its closing argument, and then only to establish the time of the chase to show that Mr. Washington was in the car during the auto chase. T.p. 533-4. And again, the State made no mention of any risk of physical harm that accrued during the on-foot portion of the chase.

*The jury verdict.*

The jury found Mr. Washington not guilty of all charges that involved violence: robbery, assault, and felonious assault. T.p. 612-3. The jury found him guilty of failure to comply, obstructing official business, and two counts of theft. T.p. 613. Relevant to this appeal, the trial court sentenced Mr. Washington to five years in prison for failure to comply, to run consecutively to one year for obstruction of official business.

(Judgment Entry of Conviction and Sentence, Aug. 26, 2009).

*The first appeal.*

The Ninth District reversed and ordered the trial court to apply *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. *State v. Washington*, 9th Dist. Nos. 10CA009767 & 10CA009768, 2011-Ohio-1149.

*The resentencing at issue in this case.*

On remand, the State changed its story and claimed for the first time that the car portion of the chase constituted failure to comply, and the "short" foot portion of the chase constituted obstructing official business. T.p. 14 (May 12, 2011). The trial court effectively conceded that on-foot part of the chase was part of the overall chase when it held that Mr. Washington and his companion were "still trying to escape" on foot. *Id.* at 20. But then the court speculated that there might have been a risk during the foot-portion of the chase. *Id.* at 20-21. No actual evidence was introduced to support the trial court's speculation. More importantly, the jury heard *no evidence* that Mr. Washington posed or created a risk of physical harm during the on-foot portion of the chase. Instead, the officers testified that Mr. Washington stopped his car, exited the car, and ran into the woods, where he was quickly found lying down in a drainage ditch. T.p. 365-6.

*The appeal from the resentencing at issue in this case.*

On appeal, the Ninth District held the State to the facts that persuaded the jury to convict Mr. Washington of failure to comply and obstruction:

Alternative theories that the State might have pursued, but did not, cannot form the basis for the State's argument at resentencing. Instead, the allied offense analysis must derive from the evidence introduced at trial, the record, and the legal arguments actually raised. *Johnson* at ¶ 56; ¶ 69-70 (O'Connor, J., concurring). At no point before resentencing for the application of *Johnson* did the State raise the argument that Washington's flight from the police on foot amounted to a separate act of conduct for which Washington possessed a separate animus.

*State v. Washington*, 9<sup>th</sup> Dist. No. 11CA010015, 2012-Ohio-2117, ¶ 16.

***The State asks this Court to hear this case, but does not ask for a stay or object to a resentencing hearing.***

The State then asked this Court to hear the case, but neither side asked that the Ninth District's mandate be stayed.<sup>2</sup> As a result, while the State's request for a discretionary appeal was pending, the trial court executed the mandate from the court of appeals and resentenced Mr. Washington. (Judgment Entry of Conviction and Sentence, Aug. 31, 2012). The entry is in the record before this Court.

This Court then accepted the State's appeal, and undersigned counsel was appointed to defend the Ninth District's decision.<sup>3</sup> Upon receiving the case, counsel noticed that no appeal had been taken from the most recent resentencing hearing, and the Ninth District granted a motion for delayed appeal without objection from the State.

*State v. Washington*, 9<sup>th</sup> Dist. No. 12CA010297 (Dec. 17, 2012), Exhibit 1.

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<sup>2</sup> Although the State had served the Ohio Public Defender's Office with a copy of its notice of appeal as required by S.Ct.Prac.R. 3.11(A)(3), undersigned counsel had no involvement with Mr. Washington's case at that point.

<sup>3</sup> This Court has received briefs and heard argument.

In the course of briefing in the court of appeals, the State filed a motion to dismiss arguing that the trial court lacked jurisdiction to resentence Mr. Washington. Mr. Washington opposed the request, and the court of appeals deferred judgment until after oral argument. *State v. Washington*, 9<sup>th</sup> Dist. No. 12CA010297 (May 30, 2013), Exhibit 2. The Ninth District specifically instructed counsel to be prepared to discuss the jurisdictional issues at argument. *Id.*

In preparing for the July 16, 2013 oral argument in the Ninth District, counsel prepared to discuss the jurisdictional issues as instructed by that court. And in the course of that research, counsel discovered that the most recent resentencing judgment—entered after the State asked this Court to hear this appeal but before this Court accepted the appeal—has independent force, so it would not be affected by the decision in this appeal. Therefore, this case is moot, and any decision by this Court would be merely advisory. Accordingly, this Court should find that this case is moot and dismiss it as improvidently allowed.

## ARGUMENT

### **I. The trial court had the power and duty to resentence Mr. Washington before this Court accepted the State's appeal.**

The trial court had not only the power, but the duty to resentence Mr. Washington absent a stay or a decision from this Court. As this Court has explained, a "lower court has no discretion, absent extraordinary circumstances, to disregard the mandate of a superior court in a prior appeal in the same case. An example of such a circumstance would be where a holding of the Court of Appeals is inconsistent with an intervening *decision* by this court." *State ex rel. Potain v. Mathews*, 59 Ohio St. 2d 29, 32 (1979). (Emphasis added.)

This Court did not issue an intervening decision in this case, and *no court* issued an intervening stay. So nothing changed the trial court's power and duty to execute the mandate from the court of appeals. Accordingly, the trial court not only had jurisdiction to resentence Mr. Washington, it had a *duty* to do so.

### **II. Lower courts do not lose jurisdiction until this Court *accepts* an appeal.**

This Court has made it clear that both this Court and the lower courts "have concurrent jurisdiction over an appealed judgment prior to attachment of [this Court's] exclusive jurisdiction." *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 249 (1992), summarizing *Cincinnati v. Alcorn*, 122 Ohio St. 294 (1930). In *Alcorn*, this Court explained that "the jurisdiction of this court to review is sought, but not fixed by the filing of" a request to certify the record. *Id.* at 298.

This Court has applied the same rule to felony discretionary appeals like this case. In *State v. Murphy*, 49 Ohio St.3d 293 (1990), this Court explained that:

an appeal in a felony case is not “perfected” before this court unless and until it is granted “on leave first obtained.” Once this court grants a motion for leave to appeal or to certify the record in such discretionary review cases, then and only then is the court of appeals prevented from exercising any jurisdiction over the matter.<sup>4</sup>

*Id.* at 295. At least one lower court has had no trouble following this decision. Applying *Murphy*, the Eighth District correctly held that a trial court retained jurisdiction to resentence a defendant after the State had filed a notice of appeal in this Court, but before this Court had decided whether to hear the appeal. See *State v. Bruce*, 8<sup>th</sup> Dist. No. 95064, 2011-Ohio-1240, ¶ 3; citing *State v. Thomas*, 111 Ohio App.3d 510, 515 (8<sup>th</sup> Dist.1996), discretionary appeal not allowed, 77 Ohio St. 3d 1469 (1996); citing *Murphy* at 295.

Accordingly, the lower courts did not lose jurisdiction to act in this case until this Court accepted the State’s appeal, and that did not happen until after the trial court resented Mr. Washington.

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<sup>4</sup> This holding is also reflected in paragraph one of the Court’s syllabus, “A court of appeals retains jurisdiction to render a determination in a felony case upon an application for reconsideration unless and until the Ohio Supreme Court exercises its discretionary and exclusive jurisdiction to hear such case pursuant to Section 2(B)(2)(b), Article IV of the Ohio Constitution.”

**III. The State does not receive a self-executing stay by asking this Court to hear a case.**

**A. The State misreads two statutes.**

The State has argued below that it gets a self-executing stay merely by filing a notice of discretionary appeal in this Court. That argument is based on a misunderstanding of R.C. 2505.09 and 2505.12, as well as on dicta, never cited or followed, from the text (not the syllabus) of the 43 year-old decision in *State v. Simmans*, 21 Ohio St.2d 258 (1970).<sup>5</sup> But *Simmans* has *never* been cited to support the suggestion that a State's appeal to this Court creates an automatic stay. The Fifth District did cite *Simmans* when it ordered that a stay come into effect if the State filed a notice of appeal, but even that stay was court-ordered, not automatic. *State v. Nelson*, 122 Ohio App. 3d 309, 315 (5<sup>th</sup> Dist.1996) ("the subject order of discharge *is ordered stayed* indefinitely until disposition of the State of Ohio's appeal by the Ohio Supreme Court"). (Emphasis added.)

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<sup>5</sup> The correct propositions which emerge from the foregoing review of the statutes are: (1) The appeal to this court is by the state, through the prosecuting attorney, to reverse a judgment adverse to it in a criminal proceeding, pursuant to R.C. 2953.14; and (2) that judgment is automatically stayed without bond given by, or a specific request of, the prosecuting attorney, who is a public officer of a political subdivision of the state properly prosecuting the appeal ("suing") in his representative capacity as such officer. Cf. R.C. 2953.09, governing appeals by the accused.

Moreover, the State misses the general point of *Simmons* – that R.C. 2505.09 does not apply to criminal cases because it requires a supersedeas bond to perfect an appeal, and no court has ever required a supersedeas bond for a criminal appeal. Even in civil cases, R.C. Sections 2505.09 and 2505.12 relieve the State only from the requirement to file a supersedeas bond *to obtain a stay*. No statute relieves the State of the requirement to *ask* for a stay.

More specifically, under R.C. 2505.09, “an appeal does not operate as a stay of execution until a stay of execution has been obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, and a supersedeas bond is executed. . . .”

So, normally, a stay does not come into effect until three things happen: 1) an appeal is perfected, 2) a party has obtained a stay, and 3) that party has filed a supersedeas bond.

But that section begins with the words, “[e]xcept as provided in section 2505.11 or 2505.12 or another section of the Revised Code or in applicable rules governing courts[.]” Section 2505.12 states:

An appellant is not required to give a supersedeas bond in connection with any of the following:

(A) An appeal by any of the following:

\* \* \*

(2) The state or any political subdivision of the state. . . .

Accordingly, while R.C. 2505.12(A)(2) permits the State to obtain a stay in a civil case without a supersedeas bond, it does not permit the State, in a criminal case, to obtain an automatic stay without even bothering to ask.

At any rate, the *Simmons* dicta is not controlling because, for opinions issued before May 1, 2002, only the syllabus of a decision from this Court created binding law. S. Ct. R.Rep.Op. 1(B) (2001) (“the syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication.”)

In short, the language the State cites is not binding law, it contradicts the clear language of the statute, and it has *never* been treated by *any* court as creating the rule the State proposes.

Further, subsequent decisions by this Court have been inconsistent with the State’s misinterpretation of *Simmons*. In at least one recent case, this Court has denied a motion from the State for a stay. *State v. Willan*, 131 Ohio St.3d 1483, 2012-Ohio-1143. If a stay automatically occurs merely by filing a notice of appeal, this Court would not have denied the stay requested in *Willan*. In another recent case, this Court ordered the defendant to respond to a motion for stay filed by the State. *State v. Brown*, Case Announcement #2, 2013-Ohio -1240. If the filing of a notice of appeal created a self-executing stay, there would be nothing relevant that the defendant could say in response.

**B. The State did not perfect an appeal until after the trial court resentenced Mr. Washington, so it cannot win even under its misreading of *Simmans*.**

Even if the State can receive an automatic stay, the State's appeal in this case was not perfected until this Court accepted the appeal. As explained in more detail above, "an appeal in a felony case is not 'perfected' before this court unless and until it is granted. . . ." *State v. Murphy*, 49 Ohio St.3d 293 (1990).

**IV. This case can only result in an advisory opinion.**

If this Court grants the State the relief it seeks in this case, the decision of the court of appeals would be reversed, and this case would be remanded to that court to apply the allied offense standard of review preferred by the State. And if the State won in the court of appeals, that court would affirm the trial court's second sentencing issue, so there would be nothing to remand. *All of this would have absolutely no effect on the trial court's third sentencing entry*, which was entered pursuant to a valid court of appeals mandate.

Because the trial court properly issued that third sentencing entry, any decision this Court makes related to the second sentencing entry would be merely advisory, and this Court does not issue merely advisory opinions. *See State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio- 3328, ¶ 42 (declining to decide a moot issue because any opinion would be advisory).

**V. This is a problem the State could have easily avoided.**

The State could have avoided the problem it created in this case by seeking a stay from the Ninth District or from this Court—or by asking the trial court to briefly continue the resentencing. It is all but certain that the trial court, the Ninth District, or this Court would have granted such a request. Instead, the State proceeded with the resentencing hearing without objection. As a result, the State rendered its own appeal to this Court moot.

**CONCLUSION**

This case is moot. This Court should dismiss this case was improvidently allowed.

Respectfully submitted,

Office of the Ohio Public Defender



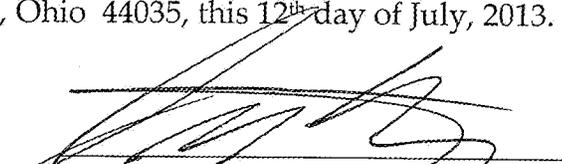
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Counsel for Appellee David T. Washington

## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **APPELLEE DAVID T. WASHINGTON'S MOTION TO DISMISS AS MOOT AND IMPROVIDENTLY ALLOWED** was sent by regular U.S. mail to Mary Slanczka, Assistant Prosecuting Attorney, Lorain County Prosecutor's Office, 225 Court Street, 3<sup>rd</sup> Floor, Elyria, Ohio 44035, this 12<sup>th</sup> day of July, 2013.



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#397620

COURT OF APPEALS

STATE OF OHIO )  
 )ss:  
COUNTY OF LORAIN )

FILED  
LORAIN COUNTY

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

2012 DEC 17 P 1:34

STATE OF OHIO

C.A. No. 12CA010297

Appellee

CLERK OF COMMON PLEAS  
LORAIN COUNTY

v.

9th APPELLATE DISTRICT

DAVID T. WASHINGTON

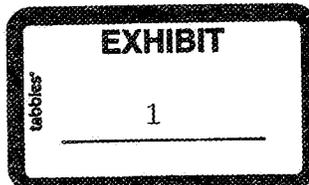
JOURNAL ENTRY

Appellant

On October 23, 2012, appellant moved this Court for leave to file a delayed appeal from the trial court's August 3, 2012, order. According to appellant, the untimely filing occurred because trial counsel did not file an appeal on appellant's behalf. Upon review, the motion for a delayed appeal is granted. The time for transmission of the record will begin to run from journalization of this order. See App.R. 10(G).

The clerk of courts is ordered to certify a copy of this order and mail or otherwise forward the copy to the clerk of the trial court, pursuant to App.R. 5(F).

Judge



COURT OF APPEALS  
FILED  
LORAIN COUNTY  
2013 APR 30 AM 11 18  
COURT OF COMMON PLEAS  
RON NABAKOWSKI

STATE OF OHIO

COUNTY OF LORAIN

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 12CA010297

Appellee

9th APPELLATE DISTRICT

v.

DAVID T. WASHINGTON

MAGISTRATE'S ORDER

Appellant

Appellee has moved this Court to dismiss this appeal for lack of jurisdiction. Appellee has also moved to stay the appeal pending determination of *State v. Washington*, Ohio Supreme Court Case No. 2010-1070. According to appellee, this Court lacks jurisdiction to hear the appeal because the trial court lacked jurisdiction to enter the order appealed while the Supreme Court case was pending. Appellee has also argued that this appeal cannot be resolved until after the Supreme Court appeal has been determined. Appellant has responded in opposition.

Upon review, this Court defers determination of appellee's motions until final disposition of the appeal. The parties should be prepared to discuss the issues during oral argument.

C. Michael Walsh  
C. Michael Walsh  
Magistrate

