

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

:

SUPREME COURT CASE NO.

13-1439

Appellee,

ON APPEAL FROM THE  
MONTGOMERY COUNTY  
COURT OF APPEALS,  
SECOND APPELLATE  
DISTRICT

:

:

COURT OF APPEALS CASE NO.  
CA25502

vs.

:

ELZIE MCINTYRE

Appellant.

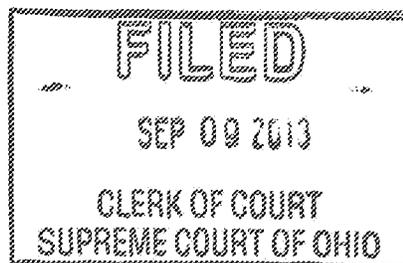
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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT  
ELZIE MCINTYRE FROM A DECISION OF THE SECOND DISTRICT COURT  
OF APPEALS

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**WHY THIS CASE IS OF GREAT PUBLIC INTEREST AND INVOLVES A  
SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case involves the proper parameters of the record on appeal. The question raised is whether under App. R. 9 a transcript is required when the record submitted by the Appellant is clear on its face and when any other actions taken by the trial court would have been contrary to statute and, thus, an abuse of the nunc pro tunc procedure. This case involves a 77 year old man, discharged from hospitalization in 1981 but forced to continue treatment by a nunc pro tunc order after being found not to be a mentally ill person in need of hospitalization under R. C. 2945.40(A), (E).

**Statement of the Case**

Appellant was indicted on one count of murder in 1980. After a bench trial in December, 1980, he was found not guilty by reason of insanity. He was committed to the Dayton Forensic Hospital and the Dayton VA medical center. On June 17, 1981 a Termination Entry dismissed the case and ordered the Appellant immediately discharged. On June 24, 1980, the Court issued a nunc pro tunc order referencing the June 17, 1980 hearing but placing conditions on the Appellant's release. On August 28, 2012, the Appellant filed a motion to dismiss. This motion was overruled and timely notice of appeal was filed. On July 26, 2013, the decision of the trial court was affirmed.

### Statement of the Facts

On June 17, 1981 a Termination Entry dismissed the case and ordered the Appellant immediately discharged. On June 24, 1980, the Court issued a nunc pro tunc order referencing the June 17, 1980 hearing but placing conditions on the Appellant's release. The June 17, 1980 hearing was held pursuant to R. C. 2945.40(A), The court considered submitted medical reports from the Forensic Hospital of Dayton Mental Health and Developmental Center and noted that prosecution offered no evidence to rebut the Forensic Hospital's reports. The Court then found by clear and convincing evidence that the Appellant was "...no longer a mentally ill person subject to hospitalization by Court Order..." and ordered that "...said defendant shall be immediately discharged and the Court further ORDERS that this case is hereby DISMISSED."

In its decision, the Second District stated that because there was no transcript of the June 17, 1980 hearing available, it could not determine if the trial court properly utilized the nunc pro tunc procedure or simply changed its mind. Since the Court of Appeals stated the burden of proof to be on the Appellant, it affirmed the decision of the Trial Court overruling the Appellant's Motion to Dismiss.

### ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

**Proposition of Law No. 1: A Reviewing Court May Not Additionally Require a Transcript Under App. R. 9 When the Record Submitted by an Appellant is Clear on Its Face**

The decision of the Second District centered on the use or misuse of a nunc pro tunc order and stated that the lack of a transcript made it impossible for it to determine

if the procedure had been misused. However, such an approach is to elevate one element of the record, the transcript, to the exclusion of other parts of the record that are clear statements of what occurred in a case and, in themselves leave no doubt as to the actions of the court.

App. R. 9 states:

(A) The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries, prepared by the clerk of the trial court shall constitute the record on appeal in all cases.

It also states:

(B) At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the parts of the proceeding not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk.

If the Appellee wishes for further portions of the transcript to be filed, it can so request.

Therefore, it is the decision of the Appellant as to whether to include the transcript in the record. The “if any” language of App. R. 9(A) makes this clear, as does its permitting the appellant to file only portions of a transcript, App. R. 9(B). An appellant obviously acts at his own peril, but a transcript is not a fetish. A record may adequately state the necessary facts without a transcript. Such is the case in this matter.

The June 17, 1980 Termination Entry was clear that no rebuttal evidence was offered by the State to the reports of the Dayton Forensic Center. The Court also clearly made its findings by clear and convincing evidence. The finding was that the Appellant “...no longer a mentally ill person subject to hospitalization by Court Order...” and

ordered that "...said defendant shall be immediately discharged and the Court further ORDERS that this case is hereby DISMISSED."

Under R. C. 2945.40, that is the only finding that the court could make under the circumstances.

R. C. 2945.40(E) states:

Upon completion of the hearing under division (A) of this section, if the court finds there is not clear and convincing evidence that the person is a mentally ill person subject to hospitalization by court order... the court shall discharge the person, unless a detainer has been placed upon the person by the department of rehabilitation and correction, in which case the person shall be returned to that department.

In this case there was no detainer and the action of the court in discharging the Appellant was the only action under R. C. 2945.40 that the court could take. The imposing of conditions is not included in R. C. 2945.40(E). Therefore, the trial court's order of June 17, 1980 was not only final on its face, but by statute, could include nothing else. The fact that the State presented no rebuttal evidence underscores this finality.

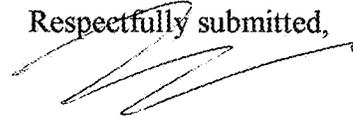
In its Amended Entry, seven days later, the Court plainly stated "The Court has further considered..." ,clearly indicating that it considered matters, medication, etc., after the fact. Therefore, the trial court simply tried to play doctor seven days after its final order, acting outside of the scope of the statute and, abusing the nunc pro tunc procedure that does not allow for a change of the court's original order. State v. Miller 127 Ohio St. 3d 407, 2010 Ohio 5705, 940 N. E. 2d 924. An improper nunc pro tunc entry is void. National Life Ins. Co. v. Kohn 133 Ohio St. 111, 11 N. E. 2d 1020 (1937).

Therefore a transcript was unnecessary to resolve the issue in the present matter and the Second District Court of Appeals erred in requiring one in circumstances where the record is clear and in contradiction of App. R. 9.

### CONCLUSION

Wherefore this Court should take jurisdiction of this matter.

Respectfully submitted,



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### CERTIFICATE OF SERVICE

I certify that on this 9th day of September, 2013, this Memorandum in Support of Jurisdiction was served upon the Appellee by Regular U. S. Mail at 301 West Third Street, Dayton, Ohio 45402.

Respectfully submitted,



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Case: CA 25502  
FILED  
DATE: 07/26/13

FILED  
IN THE COURT OF APPEALS  
2013 JUL 26 AM 8:47

CLERK OF COURTS  
MONTGOMERY CO. OHIO  
**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

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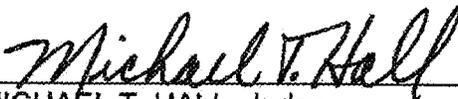
STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 25502
	:	
v.	:	Trial Court Case No. 1980-CR-871
	:	
ELZIE McINTYRE, JR.	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	<b>FINAL ENTRY</b>

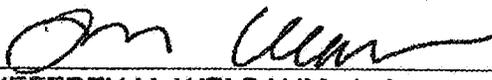
Pursuant to the opinion of this court rendered on the 26th day of July, 2013, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

*Mike Fain*  
\_\_\_\_\_  
MIKE FAIN, Presiding Judge

  
MICHAEL T. HALL, Judge

  
JEFFREY M. WELBAUM, Judge

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FILED

COURT OF APPEALS

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CLERK OF COURTS  
MONTGOMERY CO. OHIO

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

ELZIE McINTYRE, JR.

Defendant-Appellant

Appellate Case No. 25502

Trial Court Case No. 1980-CR-871

(Criminal Appeal from  
Common Pleas Court)

OPINION

Rendered on the 26th day of July, 2013.

MATHIAS H. HECK, JR., by ANDREW T. FRENCH, Atty. Reg. #0069384, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422  
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Attorney for Defendant-Appellant

HALL, J.,

{¶ 1} Elzie McIntyre appeals from the denial of his August 28, 2012 motion to dismiss the nunc pro tunc "Amended Entry and Order of Conditional Release" filed by the trial court on June 24, 1981.

{¶ 2} In his sole assignment of error, McIntyre contends the trial court lacked jurisdiction to issue the 1981 nunc pro tunc entry. He asserts that the trial court improperly used the nunc pro tunc device to modify a prior judgment entry that disposed of his case with finality.

{¶ 3} The facts underlying the present appeal are relatively simple. McIntyre was indicted for murder and other crimes in 1980. Following a December 1980 bench trial, he was found not guilty by reason of insanity. At various times, he was committed to the Dayton Forensic Hospital and the Dayton VA medical center. On June 17, 1981, the trial court filed a judgment entry that dismissed the case and ordered McIntyre "immediately discharged." Seven days later, the trial court filed a nunc pro tunc "Amended Entry and Order of Conditional Release."<sup>1</sup> Like the prior entry, the nunc pro tunc entry found that McIntyre no longer qualified as a mentally ill person subject to hospitalization. The nunc pro tunc entry also referenced an evidentiary hearing that had been held on June 17, 1981, the date of the termination entry. In the nunc pro tunc entry, the trial court found that based on the evidence that had been presented, McIntyre was entitled to conditional release subject to periodic mental-health monitoring, medication, and counseling. McIntyre apparently has abided by these conditions for more than thirty years with court-ordered reviews every two years.

{¶ 4} On August 28, 2012, McIntyre filed his motion to dismiss the 1981 nunc pro tunc entry ordering his conditional release. (Doc. #111). He argued that finality attached to the June 17, 1981 termination entry, which ordered him released. He further argued that

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<sup>1</sup>Copies of both entries are attached to the State's memorandum opposing McIntyre's motion to dismiss. (See Doc. #114).

the trial court's June 24, 1981 nunc pro tunc entry was invalid because it altered a final judgment. The State opposed the motion, arguing that it was impossible to tell—more than thirty years later and without a transcript of the June 17, 1981 hearing—whether the nunc pro tunc entry improperly modified the original judgment or whether it simply recorded what the trial court actually had decided during the hearing but inadvertently had omitted from the termination entry. (Doc. #114). In other words, absent a transcript reflecting what had been decided on June 17, 1981, the State claimed McIntyre could not demonstrate misuse of the nunc pro tunc process. The trial court apparently agreed with the State and overruled McIntyre's motion. (Doc. #120).

{¶ 5} On appeal, McIntyre repeats his refrain that the trial court misused the nunc pro tunc process to change the termination entry by adding conditions to his release. It is well settled that a nunc pro tunc entry can be used only to reflect what a court actually decided, not what it might have decided or should have decided. *State v. Miller*, 127 Ohio St.3d 407, 2010-Ohio-5705, 940 N.E.2d 924, ¶ 15. Stated differently, a nunc pro tunc entry may be used to “reflect what the trial court did decide but recorded improperly.” *Id.* An improper nunc pro tunc entry is void. *Plymouth Park Tax Services v. Papa*, 6th Dist. Lucas No. L-08-1277, 2009-Ohio-3224, ¶18, citing *Natl. Life Ins. Co. v Kohn*, 133 Ohio St. 111, 11 N.E.2d 1020 (1937), paragraph three of the syllabus.

{¶ 6} The problem here is that we have no way of knowing what the trial court actually decided on June 17, 1981. More than thirty years have elapsed since that hearing, and we do not have a transcript of the proceeding. It could be that the trial court decided to release McIntyre from confinement with conditions but inadvertently omitted those conditions from its June 17, 1981 entry. If so, the trial court's use of a nunc pro tunc entry

a week later to record those conditions and make the record "speak the truth" would be proper. Absent a transcript of the June 17, 1981 hearing that preceded the termination entry and the nunc pro tunc entry, McIntyre cannot demonstrate a misuse of the nunc pro tunc process. As the appealing party, he bears the burden of demonstrating error. Based on the record before us, he has failed to do so.

{¶ 7} McIntyre's assignment of error is overruled, and the judgment of the Montgomery County Common Pleas Court is affirmed.

.....

FAIN, P.J., and WELBAUM, J., concur.

Copies mailed to:

- Mathias H. Heck
- Andrew T. French
- Steven T. Pierson
- Hon. Gregory F. Singer