

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:
	: CASE NO. 2011-818
PLAINTIFF-APPELLANT,	:
	: On discretionary appeal from the
V.	: Coshocton County Court of Appeals,
	: Fifth Appellate District,
SANDRA GRIFFIN,	: Case No. 2009CA21
	:
DEFENDANT-APPELLEE.	:

MOTION FOR RECONSIDERATION OF APPELLEE SANDRA GRIFFIN

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TABLES

I. Introduction1

II. Standard.....2

III. Discussion2

 A. This Court’s opinion appears to hold that parties can waive subject
 matter jurisdiction.....2

Reconsideration is appropriate.....5

 B. If the lack of a final order is an error that the parties can waive, the
 State cannot argue that the jointly agreed 2009 sentencing entry was
 not a final order because it both waived and expressly invited any
 error.....6

Reconsideration is appropriate.....7

 C. The entry below was not final because the conviction and judgment
 are not contained in one document, and that rule pre-dates Miss
 Griffin’s trial by at least 12 years.7

Reconsideration is appropriate.....8

Conclusion.....9

Certificate of Service9

I. Introduction.

This Court should reconsider its four-to-three decision in this case because it appears to hold that parties can create subject matter jurisdiction through waiver. If that is what this Court meant, it should expressly overrule the decisions dating back to 1853.

Further, if subject matter jurisdiction can be created by waiver, then this Court should reconsider its decision and apply the invited error rule because, in the trial court, the State expressly agreed in writing that Miss Griffin was entitled to a final appeal order. State's Memorandum (Aug. 12, 2009), at p. 1. ("the Court should provide the defendant/petitioner with a final appealable order as requested in her motion"). The 2009 sentencing entry in this case was expressly and jointly agreed to by both Miss Griffin and the State. If the lack of subject matter jurisdiction can be waived, the State either waived the error or expressly invited it.

Finally, this Court addressed only one of two possible deficiencies in the original 1990 sentencing entry. This Court discussed the implications of the failure to file a sentencing opinion under R.C. 2929.03(F), but neither the majority nor the dissenting opinions discuss whether the entry was also non-final because it did not include the fact of conviction.

II. Standard.

A motion for reconsideration should be granted when it “calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been.” *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist. 1981).

Reconsideration is especially appropriate in this case because the four-member majority opinion stated “we have determined that the issues presented on this appeal should be decided on different grounds” than the Court accepted the case to decide. Opinion at ¶ 2.

III. Discussion.

A. This Court’s opinion appears to hold that parties can waive subject matter jurisdiction.

This Court’s opinion appears to set aside 160 years of cases holding that parties cannot waive subject matter jurisdiction. This Court ruled that in the 1990 appeal:

Griffin’s assignments of error included the claim that “[t]he trial court erred in the sentencing of the appellant by not following the mandates of R.C. 2929.03 and 2929.04 * * *.” Griffin never challenged the lack of a Crim.R. 32(B) entry or the lack of a three-judge panel, and therefore, *these claims are forever barred.*” (Citation omitted, emphasis added.)

Opinion at ¶ 49. Under the majority’s ruling, parties can ignore the final order rule and, with a cooperative or inattentive appeals court, obtain a binding ruling even in the absence of a final order.

It remains undisputed that “[a] court of appeals patently and unambiguously lacks jurisdiction to proceed in [an] appeal when the [lower court] order does not constitute a final, appealable order[.]” quoting, *State ex rel. Bates v. Court of Appeals for the Sixth Appellate Dist.*, 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162, ¶ 1.” It is also undisputed that, “[a]n order issued by a court without subject matter jurisdiction is void ab initio. See *State v. Upshaw*, 110 Ohio St.3d 189, 2006-Ohio-4253, 852 N.E.2d 711, ¶ 7. Accordingly, if the 1990 entry was not a final order, the court of appeals lacked subject matter jurisdiction, and its judgment was void.

But here, this Court appears to hold, for the first time, that the lack of jurisdiction created by a non-final order can be waived. For more than 160 years, this Court has held exactly the opposite.¹

- In *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, ¶ 10, 992 N.E.2d 1095, this Court quoted *State v. Lomax*, 96 Ohio St.3d 318, 2002-Ohio-4453, ¶ 17, 774 N.E.2d 249, to hold that, “[s]ubject-matter jurisdiction cannot be waived and is properly raised by this court sua sponte.
- In *Lomax* at ¶ 17, this Court cited *State ex rel. Bond v. Velotta Co.*, 91 Ohio St.3d 418, 419, 746 N.E.2d 1071 (2001), to hold that, “since subject-matter jurisdiction cannot be waived and may be raised by this court sua sponte, appellant’s failure to raise this argument on appeal does not foreclose this court’s authority to review the issue.”
- In *Volotto*, this Court cited, *Springfield Local School Dist. Bd. of Edn. v. Lucas Cty. Budget Comm.*, 71 Ohio St. 3d 120, 121, 642 N.E.2d 362, 364 (1994), to hold that “subject matter jurisdiction cannot be waived and may be raised by us sua sponte.”

¹ Some internal citations omitted.

- In *Board of Ed. v. Lucas*, this Court cited *Weathersfield Twp. v. Trumbull Cty. Budget Comm.*, 69 Ohio St.3d 394, 632 N.E.2d 1281 (1994), to hold that, “[s]ubject-matter jurisdiction cannot be waived.”
- In *Weathersfield Twp.*, this Court cited *Shawnee Twp. v. Allen Cty. Budget Comm.*, 58 Ohio St.3d 14, 567 N.E.2d 1007 (1991), to hold that, “parties cannot waive subject-matter jurisdiction.”
- In *Shawnee Twp.*, this Court cited *Painesville v. Lake Cty. Budget Comm.* (1978), 56 Ohio St. 2d 282, 284-285, 383 N.E. 2d 896, to hold that, “a party cannot waive subject-matter jurisdiction regardless of procedural sins, and we can entertain a subject-matter dismissal motion at this stage.”
- In *Painesville*, this Court quoted *Baltimore & Ohio Ry. Co. v. Hollenberger*, 76 Ohio St. 177, 182-3 (1907), to hold that, “[i]t has * * * long been a universal rule that an objection to the jurisdiction of the ‘subject matter’ cannot be waived; because, while parties may voluntarily submit their persons to the jurisdiction of a court which has jurisdiction over the cause, they cannot confer power on the court as to the subject matter, for the reason that the court can derive its general jurisdiction only from the power which created it, the sovereignty.”
- In *Baltimore & Ohio Ry. Co.*, this Court cited *Steamboat Gen. Buell v. Long*, 18 Ohio St. 521, 533 (1869); *Dayton & Western Railroad Co. v. Marshall*, 11 Ohio St., 497, 501(1860); *Gilliland v. Admrs. of Sellers*, 2 Ohio St., 223, 228 (1853); and *McCleary v. McLain*, 2 Ohio St., 369 (1853), for the holding that, “it has nevertheless long been a universal rule that an objection to the jurisdiction of the “subject-matter” can not be waived[.]”

If this Court intended such a broad ruling, it could so hold when ruling on this reconsideration motion. But it’s not clear that the Court did intend to overrule 150 years of case law. In the third paragraph of the opinion, this Court appears to create a more restrained holding that would not permit litigants to create subject matter jurisdiction through waiver or stipulation. Specifically, this Court held that the 2009 jointly agreed entry was void because the first entry was final. “*Because the sentencing*

entry issued in 1990 was a final, appealable order, the 2009 resentencing entry issued pursuant to [State v.] Baker, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, was a nullity."

A clarifying reconsideration entry would help avoid confusion in the lower courts regardless of whether this Court intended to retain or overturn the rule that parties may not create subject matter jurisdiction by waiver. If the reason that the *jointly agreed* 2009 sentencing entry was a nullity is that the original was a final order, then lower courts need to know that the ban on jurisdiction-by-waiver remains in place. If parties can waive the lack of a final order, litigants and lower courts should know that they now have a new path to more direct appellate resolution of issues. Either way, a decision on reconsideration can provide needed clarity.

Reconsideration is appropriate.

In the briefs, neither party argued that litigants can create subject matter jurisdiction through waiver. To the contrary, as the State explained, "Appellee has argued that the prosecution waived the right to argue that the new entry failed to grant new appellate rights because the prosecutor wrote the entry [and expressly agreed to the request]. However, a prosecutor cannot invest an appellate court with jurisdiction." State's brief at 8. The parties could not reasonably have been expected to brief an issue that was not in dispute. Accordingly, this motion both "calls to the attention of the court an obvious error in its decision [and] raises an issue for [the Court's] consideration that

was either not considered at all or was not fully considered by [the Court] when it should have been." *Matthews*, 5 Ohio App.3d at 143.

- B. If the lack of a final order is an error that the parties can waive, the State cannot argue that the jointly agreed 2009 sentencing entry was not a final order because it both waived and expressly invited any error.**

If this Court intended to hold that the lack of a final judgment can be waived, this Court should rule for Ms. Griffin because the State invited whatever error is contained in the 2009 *jointly agreed* final judgment. After Miss Griffin filed a motion for a final appealable order, the State agreed in writing that she did not have a final appealable order. The State's response reads, in its entirety, as follows:

Now comes the State of Ohio, by and through the Prosecuting Attorney, and hereby provides notice of the State's position that *the Court should provide the defendant/petitioner with a final appealable order as requested in her motion filed August 4, 2009. (See State v. Baker, 119 Ohio St.3d 535, 893 N.E.2d 163; State ex rel. Culligan v. Medina County Court of Common Pleas, 119 Ohio St.3d 535, 895 N.E.2d 805.*

Further, the State submits the proposed judgment entry to serve as the final appealable order. (Emphasis added.)

State's Memorandum (Aug. 12, 2009), at p. 1.

The State trial court did exactly what *the State* asked it to do—issue a new jointly agreed final order. So the State “invited any error and may not ‘take advantage of an error which [it, itself] invited or induced.’” *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶145, 954 N.E.2d 596, quoting *State v. Bey*, 85 Ohio St.3d 487, 493, 709 N.E.2d 484,

(1999), quoting *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.*, 28 Ohio St.3d 20, 502 N.E.2d 590 (1986), paragraph one of the syllabus.

Reconsideration is appropriate.

The issue was before the Court. In its merit brief, the State explained that “Appellee has argued that the prosecution waived the right to argue that the new entry failed to grant new appellate rights because the prosecutor wrote the entry [and expressly agreed to the request.” State’s Brief at 8. Accordingly, this argument “raises an issue for [the Court’s] consideration that was . . . not considered at all . . . when it should have been.” *Matthews*, 5 Ohio App.3d at 143.

C. The entry below was not final because the conviction and judgment are not contained in one document, and that rule pre-dates Miss Griffin’s trial by at least 12 years.

The lack of a sentencing opinion under R.C. 2929.03(F) is not the only reason no final order existed in this case until the jointly agreed 2009 sentencing entry was issued. The other reason is that no single document contains a record of both Ms. Griffin’s conviction and sentence.² And, unlike the R.C. 2929.03(F) sentencing opinion issue, the lack of a single document is not even arguably a new rule because, in *Baker*, this Court cited a case *from 1977* as authority for the one-document rule, so the rule was in place in

² *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, does not change this result because the error was more than the omission of the *means of conviction* from the judgment entry of sentence. The error was the omission of *any mention of a conviction* at all.

1993, when the Fifth District first issued a decision in this case. *Baker* at ¶ 17, citing *State v. Tripodo*, 50 Ohio St.2d 124, 363 N.E.2d 719 (1977).

The State has argued that, under *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, it could create a final order by combining the bench-trial verdict (which did not mention the sentence) with the original sentencing entry (which did not mention what Miss Griffin was convicted of). But *Ketterer* held only that a sentencing opinion issued pursuant to R.C. 2929.03(F) can combine with a judgment of conviction to create a final order. *Ketterer* at the syllabus. No court has held that the State can pick any two documents to create a final order. And nothing in *Ketterer* permits the State to transform a judgment entry of sentence into a sentencing opinion.

Reconsideration is appropriate.

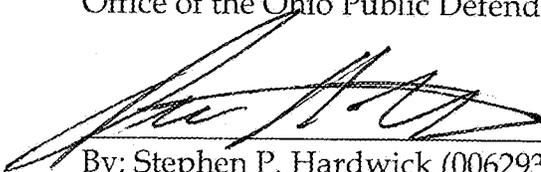
Miss Griffin addressed this issue in her merit brief. She wrote that under *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, “the failure to include any mention of the ‘fact of conviction’ is a ‘substantive’ error rendering the judgment non-final (and therefore not subject to correction by a nunc pro tunc entry)[.]” Brief at 7. Because this Court did not address the failure of the trial court to combine the fact of conviction and the sentence in a single document, this argument “raises an issue for [the Court’s] consideration that was . . . not considered at all . . . when it should have been.” *Matthews v. Matthews*, 5 Ohio App.3d 140, 450 N.E.2d 278 (10th Dist. 1981).

CONCLUSION

This Court should reconsider its decision in this case because the majority opinion omits discussion of a dispositive issue and because the opinion does not give clear guidance to the lower courts on the crucial issue of subject matter jurisdiction.

Respectfully submitted,

Office of the Ohio Public Defender



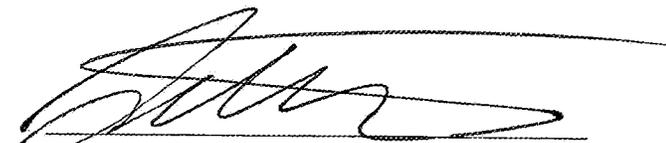
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Certificate of Service

I certify that a copy of the foregoing was sent by regular U.S. Mail to Jason
Given, Coshocton County Prosecutor, 318 Chestnut Street, Coshocton, Ohio 43812 this
23rd day of December, 2013 .



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