

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

:

Case Number

14-1583

Appellant,

:

On Appeal from the Richland

County Court of Appeals,

v.

:

Fifth Appellate District

ANTONIO G. CROSKY,

:

Court of Appeals

Case No. 2013-CA-102

Appellee.

:

NOTICE OF APPEAL OF APPELLANT, STATE OF OHIO

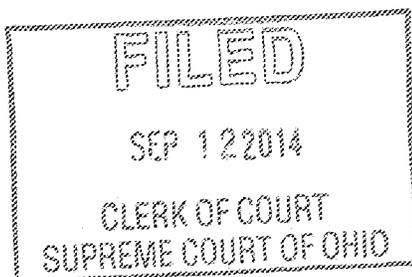
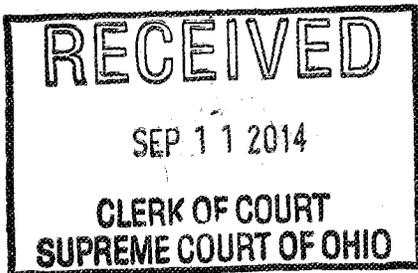
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**NOTICE OF APPEAL OF APPELLANT, STATE OF OHIO**

Appellant, State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Richland County Court of Appeals, Fifth Appellate District, entered in Court of Appeals Case No. 2013-CA-102 on June 16, 2014. The State of Ohio filed a timely motion for Reconsideration in the Fifth District Court of Appeals on June 19, 2014, thus tolling the time for filing the Notice of Appeal in this case. The Fifth District denied the same on August 1, 2014.

This case involves a felony and the constructions of the Rules of Criminal and Appellate Procedure as promulgated by this Honorable Court and is one of public or great general interest.

Respectfully Submitted,

  
\_\_\_\_\_  
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Assistant Prosecuting Attorney  
Richland County, Ohio

Counsel for Appellant, State of Ohio

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Notice of Appeal was sent to Attorney Edwin J. Vargas, 1956 West 25th Street, Suite 302, Cleveland, Ohio 44113 by regular U.S. Mail this 26 day of September, 2014.

  
\_\_\_\_\_  
Jill M. Cochran, # 0079088

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case Number \_\_\_\_\_  
Appellant, : On Appeal from the Richland  
County Court of Appeals,  
v. : Fifth Appellate District  
ANTONIO CROSKEY, : Court of Appeals  
Appellee. : Case No. 2013-CA-102

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APPELLANT, STATE OF OHIO'S  
MEMORANDUM IN SUPPORT OF JURISDICTION

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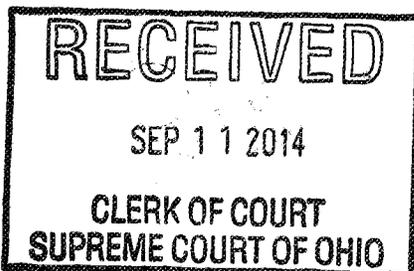


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**EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST AND  
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The Fifth District Court of Appeals has ruled that once a judgment entry is final under *State v. Baker*, then the trial court is divested of jurisdiction to clarify its judgment entry to reflect the trial court's intention in sentencing as clearly reflected by the record. This holding is in contravention of this Court's Criminal Rule 36 and this Court's ruling that a trial court is not divested of jurisdiction to make such orders until a notice of appeal has been filed. *Howard v. Catholic Social Services of Cuyahoga County, Inc.*, 70 Ohio St.3d 141, 146, 637 N.E.2d 890 (1994); *Yee v. Erie Cty. Sheriff's Dept.*, 51 Ohio St.3d 43, 44, 553 N.E.2d 1354 (1990); *In re Kurtzhalz*, 141 Ohio St. 432, 48 N.E.2d 657 (1943), paragraph two of the syllabus.

The Fifth District's ruling has also changed the long standing ruling by this Honorable Court that the burden of the production of transcripts for appeal is on the appellant and that, absent the transcripts, the appellate court is to presume regularity and affirm the trial court's ruling. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 400 N.E.2d 384 (1980). As the Appellee (Appellant below) failed to supply transcripts in this case, the presumption must stand that the Appellee was properly advised of the sentence that was held in abeyance upon his placement on community control during the sentencing hearing and that the trial court's amended sentencing entry was a properly issued nunc pro tunc entry to reflect what was on the record.

Under the standard proposed by the Fifth District Court of Appeals, once a sentencing entry has been issued and becomes a final appealable order, the trial court is divested of jurisdiction to fix clerical errors, even absent a filing of a notice of appeal,

and Criminal Rule 36(A) no longer applies. The requirement for proper placement on a form judgment entry becomes elevated above what is actually placed on the form and what is actually stated on the record by the sentencing court. In effect, the failure to cross a "t" or dot an "i" becomes the sine qua non of determining the adherence to Ohio Sentencing Guidelines, putting form over function.

The questions involved in this appeal are when does the trial court become divested of jurisdiction to fix a sentencing entry to reflect its true intent, as clear from the record, and whether the appellate court has to presume that an amended entry is a proper nunc pro tunc entry in the absence of the transcripts to validate what the trial court ordered on the record.

The State contends that a plain reading of Criminal Rule 36 and a multitude of cases from this Honorable Court allow the trial court to amend clerical errors in the sentencing entry **at any time** to reflect what the court actually decided on the record. As the Appellee failed to supply a sentencing transcript, under the prior rulings of this Honorable Court the appellate court must presume regularity in the proceedings below, specifically that the trial court informed the Appellee of a specific sentence should he violate the terms of his community control, and must presume that the trial court's amended sentencing entry was a proper nunc pro tunc entry to reflect what the trial court actually decided on the record, as otherwise clear from the judgment entry.

The State contends that a final determination of this issue is of great public or general interest. The Fifth District's decision basically terminates the jurisdiction of the trial court upon the filing of a final appealable order. This decision belies the fact that the trial court is human and errors occur. The ability of the trial court to fix these errors in

sentencing entries to reflect the true sentence as announced on the record is paramount. It not only affects the rights of the State but the rights of defendants as errors are not always to the benefit of one side over the other. There is a great need for the guidance of this Court on these issues.

### **STATEMENT OF THE CASE AND FACTS**

On January 23, 2008, the Appellee, Antonio Croskey, attempted to flee in his automobile from Officer Carroll when the officer tried to stop him for failing to use his turn signal. The Appellee fled into the parking lot of the Chelsea Square Apartments. As the vehicle came to a stop, it struck a light pole knocking it to the ground. A foot pursuit followed and the Appellee began throwing items as he ran. A baggie of suspected crack cocaine and a set of digital scales were found in the area where the Appellee was throwing items. Three baggies of marijuana were located in the glove box of the Appellee's car. Lab results indicated that the baggy contained cocaine base, a schedule II controlled substance, weighing 22.92 grams. The Appellee was out on bond at the time of this incident, having previously been indicted on March 8, 2007, for two counts of trafficking in cocaine, felonies of the third and fourth degree in case number 07-CR-234 and on November 7, 2007, for one count of possession of cocaine, a felony of the second degree in case number 07-CR-841.

As a result of the above incident, the Appellee was indicted on February 8, 2008, with one count of possession of cocaine, a felony of the second degree and one count of failure to comply, a felony of the third degree in case number 2008-CR-117. On May 14, 2008, the Appellee appeared before the court for sentencing on all three cases. In case

number 07-CR-234, the Appellee was sentenced to two years on Count 1 and one year on Count 2 to be served concurrently to each other. In case number 07-CR-841, the Appellee was sentenced to two years mandatory to be served consecutive to 08-CR-117. In case number 08-CR-117, the Appellee was sentenced to two years on Count 1, mandatory and three years of community control on Count 2 to begin after completion of his prison sentence. The prison sentence in this case was to be served consecutive to cases number 07-CR-234 and 07-CR-841 for a total sentence of six years, four years mandatory. The Appellee only served two years.<sup>1</sup>

The initial sentencing entry in case number 08-CR-117, filed on May 19, 2008, indicated that the Appellee was sentenced to two years on Count 2 and that this sentence was suspended in lieu of a sentence of three years of community control to begin upon release from prison. On the first page of the sentencing entry, under the section marked "SENTENCE," the Appellee was sentenced to two years in prison for Count 2. Written next to this two year sentence is the word "Suspended." At the bottom of page one, the box is checked that states "If there is more than one count, or if there are other cases, the sentences will be served..." A second box is marked indicating "Consecutively," with the hand written notation "with count 2 being suspended and consecutive to 07-CR-234 and 07-CR-841H." At the bottom of the second page is the notation regarding community control. It specifically indicates that this section is in regards to Count two (2). The Community Control Sanctions form also indicates specifically that it pertains to Count 2. The sentencing entry mistakenly omitted a prison term in the section discussing

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<sup>1</sup> Contact with the Bureau of Sentencing Computation indicated that the Appellee only served two years on 07-CR-234, which is the only sentencing entry ODRC received. His inmate paperwork indicates that he entered prison on May 20, 2008 and was released on January 28, 2010.

community control and the consequences of violating the same. However, it is clear from the face of the sentencing entry that this is a clerical error and that the trial court intended a sentence of two years be reserved pending a violation of community control. The Appellee did not appeal this sentencing entry.

On December 5, 2012, the trial court issued an “amended sentencing entry” in case 08-CR-117. This sentencing entry reflected that the Appellee was in court on November 30, 2012, with counsel and he was properly informed of his sentence regarding Count 2 in the 2008-CR-117 case.<sup>2</sup> This entry appropriately informs the Appellee that a violation of community control would lead to a specific prison sentence of two years and ordered him to report to the probation department upon his release from prison in case number 12-CR-374. The Appellee did not appeal this sentencing entry.

On August 1, 2013, a bench warrant was issued for the Appellee’s arrest for violating the terms of his community control in 08-CR-117. The Appellee appeared in court on October 23, 2013, for a probation violation hearing. At that time he admitted to the violations and was found to be a community control violator and sentenced to serve two years in prison.

The Appellee appealed his probation violation arguing that the trial court improperly informed him of the amount of time that he could receive upon violation of the terms of his community control. The Appellee did not argue that he was not advised that he had a possible sentence of two years over his head. The Appellee conceded that he was aware that there was a two year sentence on Count 2. The Appellee’s specific

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<sup>2</sup> The Appellee appeared in court on this date for a change of plea in case number 12-CR-374. Although he was not violated from community control at this time, it appears that the 2008 case was discussed during this hearing. This entry fails to indicate a prison term for Count 1 on the assumption that the Appellee had already completed that prison sentence.

argument was that the trial court could not “suspend” a two year prison sentence but instead should have “reserved” a two year sentence and that the court did not properly reserve the two year sentence in this case. The Appellee failed to request transcripts for the appeal, arguing solely on the face of the two sentencing entries in this case. The State argued that the trial court’s “suspended” two year sentence on the first page of the sentencing entry was sufficient notification to the Appellee that he was facing two years in prison as a consequence of violating the terms of his probation and that the “amended” sentencing entry was an appropriate nunc pro tunc judgment entry.

On June 16, 2014, the Fifth District Court of Appeals ruled that the trial court lacked the authority to reconsider its own valid, final judgment on appeal. The Fifth District determined, without the benefit of the transcripts and in contradiction to the intent of the trial court clearly apparent on the face of the original sentencing entry, that the trial court never informed the Appellee that he was facing two years in prison if he violated the terms of his community control, that the amended entry added a sentence that was never previously given and, therefore, the Appellee’s two year sentence was vacated. *State v. Croskey*, 5th Dist. No. 13CA102, 2014 Ohio App. LEXIS 2551, ¶ 17. The court held that “[t]he sentencing entry was a final sentence in which the trial court failed to include a prison term for a violation of [sic] post release control.”<sup>3</sup> “The sentencing entry was not void due to the court’s failure to do so. Therefore, we find the trial court’s December 5, 2012 amended sentencing entry of no effect.” *Id.*

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<sup>3</sup> Clearly a typographical error on the part of the Appellate Court as this should read “community control.” If we hold the appellate court to the same standards they want to prescribe to the trial court, then their ruling has no effect as the Appellee in this case is not in prison for a violation of post release control but for a community control violation.

The State of Ohio filed a Motion to Reconsider on June 19, 2014 and a Motion to Certify Conflict on June 23, 2014. In the Motion to Certify Conflict, the State argued that this case was in direct conflict with the Ninth District's ruling in *State v. Lloyd*, 9th Dist. Summit No. 24833, 2010-Ohio-1037, which ruled that, in the absence of sentencing transcripts, the appellate court could not determine if the trial court was correcting a typographical error or reconsidering its previous decision and so affirmed the trial court's decision presuming regularity. The Fifth District denied both of these motions on August 1, 2014. The Fifth District found *Lloyd* distinguishable because the trial court in this case did not file a "nunc pro tunc" entry but an "amended sentencing entry" and so ruled that the lack of transcripts to determine what the trial court really sentenced the Appellee to on the record was of no consequence because clearly the trial court "amended" the Appellee's sentence and did not just fix typographical errors.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. I: The trial court retains the jurisdiction to correct oversights and omissions in a sentencing entry at any time so that the record reflects the truth, whether or not the sentencing entry was a final appealable order. Without transcripts to prove otherwise, it must be presumed that the trial court's amended sentencing entry was a proper nunc pro tunc entry.**

The Fifth District Court of Appeals made a factual finding that the trial court in this case failed to include a prison term that would be imposed if the Appellee failed to comply with the terms of his community control. The court further found that the "amended sentencing entry" added a term of prison that was not previously imposed, and, therefore, was not a nunc pro tunc entry, based on the title of the entry alone. The court made these findings without the benefit of a sentencing transcript which would have definitively indicated what the trial court actually sentenced the Appellee to. Further, the court made these findings despite the fact that the original sentencing entry, although inappropriately filled in, clearly reflected the intent of the trial court.

On January 15, 2014, the Appellee filed his brief in this appeal specifically arguing that the trial court's May 18, 2008 judgment entry incorrectly "suspended" a two year sentence in case of a community control violation rather than "reserving" a two year sentence in the event of a community control violation. Although the Appellee's Assignment of Error indicated that the Appellee was never notified what prison sanction would be imposed upon a violation of his community control, that was not what was argued, and in fact, could not have argued since he failed to provide the transcripts of the sentencing hearing which would have demonstrated whether or not he was informed of said prison sentence. It is the burden of the appellant below to provide the necessary transcripts.

The Appellee conceded that the sentencing entry suspended a two year prison term for Count 2, the count in question. Therefore, he was notified in the sentencing entry what the consequences were for violating community control. The Appellee simply argued that a “suspended” sentence was not the same as a notification of what prison sentence would be imposed upon violation of community control. The Fifth District did not answer the question about “suspended” sentence versus “reserved” sentence, but held instead that the Appellee was simply not notified at all, despite the fact that no transcripts were provided, and held that a nunc pro tunc entry would not be suitable to notify the Appellee of the reserved sentence after the fact. The court made a factual finding that the trial court did not provide a sentence in the event of a community control violation at sentencing but added it later in an “amended” sentencing entry.

First and foremost, **it is clear from the judgment entry itself** that the trial court intended that a violation of community control for Count 2 would lead to a prison term of two years in prison and notified the Appellee of the same. On the first page of the sentencing entry, under the section marked “SENTENCE,” the Appellee was sentenced to two years in prison for Count 2. Written next to this two year sentence is the word “Suspended.” At the bottom of page one the box is checked that states “If there is more than one count, or if there are other cases, the sentences will be served...” A second box is marked indicating “Consecutively,” with the hand written notation “with count 2 being suspended and consecutive to 07-CR-234 and 07-CR-841H.” At the bottom of the second page is the notation regarding community control. It specifically indicates that this section is in regards to Count two (2). The Community Control Sanctions form also

indicates specifically that it pertains to Count 2. All that is lacking is a second notation that the reserved sentence for a violation of community control was two years in prison.

It is disingenuous for the Appellee to argue that he was never notified what his sanction would be for a violation of community control when he admits that the court suspended a two year sentence. The Appellee's actual argument was that a "suspended" sentence was an incorrect form of notification and it should have been a "reserved" sentence, a question that the Appellate court did not answer.

The Appellate Court instead held that the sentencing entry was a final order and that the Appellee was never notified and, therefore, a nunc pro tunc entry was inappropriate. However, without the transcripts it is not possible to make that determination. If the trial court properly imposed a sentence at the sentencing hearing, ANY modification of the sentencing entry to reflect what was done on the record at that hearing would be appropriately accomplished through a nunc pro tunc entry. Simply because the entry was labeled as an "amended sentencing entry" does not mean it was not a nunc pro tunc entry.

"Although trial courts generally lack authority to reconsider their own valid final judgments in criminal cases, they retain continuing jurisdiction to correct clerical errors in judgments by nunc pro tunc entry to reflect what the court actually decided." *State ex rel. Womack v. Marsh*, 128 Ohio St.3d 303, 2011-Ohio-229, 943 N.E.2d 1010, ¶ 13, citing *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 18-19, and Crim.R. 36 ("Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time"). *See State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958

N.E.2d 142, ¶ 18-19 (courts possess the authority to correct an error in a judgment entry so that the record speaks the truth); *State v. Miller*, 127 Ohio St.3d 407, 2010 Ohio 5705, 940 N.E.2d 924, ¶ 15 (an error corrected by a nunc pro tunc entry does not involve a legal decision or judgment).

These nunc pro tunc entries "are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided." *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 164, 656 N.E.2d 1288 (1995). "We have held that where 'the court rendered its true judgment during the sentencing hearing and the Judgment Entry inadvertently failed to reflect the true judgment,' a nunc pro tunc entry is the appropriate remedy. *State v. McAdams*, 11th Dist. No. 2010-L-012, 2011 Ohio 157, ¶19." *State v. Ahladis*, 11th Dist. Trumbull No. 2010-T-0087, 2011-Ohio-4024, ¶ 27. Criminal Rule 36 does not specify that such corrections can only be made in a document entitled "nunc pro tunc" entry.

As long as the record demonstrates that the Appellee was properly informed in court of his sentence, the sentencing entry can later be corrected to fix any mistakes found within the judgment entry to reflect what was done on the record. The Appellee has the burden to demonstrate that he was not sentenced properly on the record. Since the Appellee failed to provide the appellate court with any transcripts of the hearings below, regularity in the proceedings is presumed. Therefore, the appellate court was required to presume that the trial court stated on the record that a violation of the Appellee's community control would result in a two year sentence.

The duty to provide a transcript demonstrating error falls upon the appellant below, and when portions of the transcript necessary for resolution of assigned errors are

omitted from the record, the appellate court has nothing to pass upon, and therefore must presume validity of the lower court's proceedings and affirm. *Knapp v. Edwards Laboratories*, 61 Ohio St. 2d 197, 400 N.E.2d 384 (1980).

It is clear from the judgment entry on its face that the trial court intended to reserve a two year sentence in Count 2 in this case. It was written on the judgment entry twice that the sentence in Count 2 was suspended and a specific sentence for Count 2 was listed. This is the same sentence that was written in the amended entry of December 5, 2012 and the same sentence imposed by the trial court upon the Appellee's violation of community control. Since the Appellee failed to provide the sentencing hearing transcripts, the Fifth District was required to find that the judgment entry of December 5, 2012 simply corrected the original sentencing judgment entry of May 19, 2008, to reflect the sentence that was **actually imposed** at the sentencing hearing, especially in light of the information contained within the original sentencing entry itself.

The Fifth District cited to *State v. Miller*, 127 Ohio St.3d 407, 2010-Ohio-5705, 940 N.E.2d 924, for the proposition that the trial court cannot use a nunc pro tunc entry to order something that the trial court did not impose as a part of the sentence. This is true. In *Miller*, the trial court failed to impose the restitution on the record at the sentencing hearing, either orally or in the judgment entry. *Id.* at ¶ 2. Therefore, this Honorable Court was correct in determining that a nunc pro tunc entry was inappropriate. However, this case is distinguishable in that it **must be assumed** that the trial court imposed the appropriate sentence on the record absent the transcript to prove otherwise, especially when it is clear from the sentencing entry that the trial court intended to do the same. While the sentencing entry was a final appealable order, it could have been appropriately

amended by a nunc pro tunc order to reflect the sentence as given during the sentencing hearing.

The Fifth District's ruling directly conflicts the Fifth District's previous ruling on the same issue. *State v. Dotson*, 5th Dist. Stark No. 2013CA00024, 2013-Ohio-3716. In *Dotson*, there was confusion as to whether the defendant had been sentenced to a fourth or fifth degree felony drug possession charge and there was confusion as to whether the trial court reserved an 11 or 17 month sentence for a violation of community control. The defendant was indicted with a fourth degree felony, but the sentencing entry indicated that the offense was a fifth degree felony. The entry also reflected an 11 month sentence but the trial court's notes indicated that a 17 month sentence was reserved. *Id.* at ¶ 2-3. Since the defendant failed to provide transcripts of the sentencing hearing, the Fifth District determined that, in the absence of the sentencing transcripts, the appellate court could must find that the nunc pro tunc entry merely corrected the judgment entry to reflect the sentence imposed at the sentencing hearing. *Id.* at ¶ 27.

In the absence of a transcript, we cannot find that the nunc pro tunc entry fails to merely correct the judgment entry to correspond to the sentence imposed at the sentencing hearing. The duty to provide a transcript demonstrating error falls upon the appellant, and when portions of the transcript necessary for resolution of assigned errors are omitted from the record, this Court has nothing to pass upon, and therefore must presume validity of the lower court's proceedings and affirm. *Knapp v. Edwards Laboratories*, 61 Ohio St. 2d 197, 400 N.E.2d 384 (1980).

*Id.* at ¶ 27.

The Fifth District has attempted to factually distinguish this case and others similar cases by indicating that the trial court in this case filed an "amended sentencing entry" rather than a "nunc pro tunc" entry. There is no difference between an amended

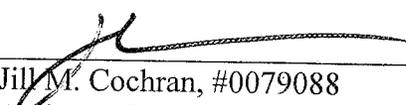
sentencing entry and a nunc pro tunc entry. A nunc pro tunc entry is “a procedural device by which the record of a judgment is **amended** to accord with what the judge actually said or did, so that the record will be accurate. BLACK’S LAW DICTIONARY, SECOND POCKET EDITION (emphasis added). This is especially true since a trial court cannot actually “amend” a sentence outside the presence of the defendant. Without the sentencing transcripts in this case to verify what the Appellee was actually sentenced to on the record, it is not possible to determine whether the trial court was merely fixing an error between what the sentencing entry contained and what was done on the record or if the trial court was actually attempting to change the Appellee’s sentence. The appellate court, therefore, must presume that the trial court was acting within its power.

In its ruling, the Fifth District places form over function and removes the power of the trial court under Criminal Rule 36 to fix what are clearly clerical errors. Many trial courts throughout the state use form sentencing entries and the failure to check a box or fill in a space should not be fatal to the imposition of a sentence that a trial court imposed on the record and that the defendant had notice of.

**CONCLUSION**

For the foregoing reasons, the State of Ohio respectfully requests that this Court accept jurisdiction of this case for the purpose of making a final determination on the issue set forth above.

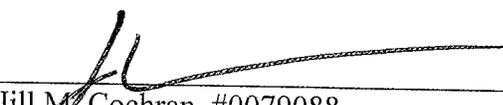
Respectfully Submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Memorandum in Support of Jurisdiction was sent to the office of Attorney Edwin J. Vargas, 1956 West 25<sup>th</sup> Street, Suite 302, Cleveland, Ohio 44113 by regular U.S. Mail this 3<sup>rd</sup> day of September, 2014.

  
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JUN 16 2014

COURT OF APPEALS  
RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ANTONIO G. CROSKY

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Craig R. Baldwin, J.

Case No. 13CA102

2014 JUN 16 AM 10:37  
CLEVELAND COUNTY  
FILED  
CLERK OF COURT

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Richland County Court of  
Common Pleas, Case No. 2008 CR 0117H

JUDGMENT:

Vacated

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Journalized on the court's  
docket on 6-16-14  
Wiggins  
Deputy Clerk



*Hoffman, P.J.*

{¶1} Defendant-appellant Antonio Croskey appeals his sentence entered by the Richland County Court of Common Pleas. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE CASE<sup>1</sup>

{¶2} On April 30, 2008, Appellant entered a plea of guilty to the charges of drug possession, in violation of R.C. 2925.11, a felony of the second degree; and failure to comply with the order or signal of a police officer, in violation of R.C. 2921.331, a felony of the third degree.

{¶3} On May 19, 2008, the trial court sentenced Appellant to two years in prison on the drug possession charge, and three years of community control sanctions on the failure to comply charge, to be served after release from the prison term. The May 19, 2008 sentencing entry did not state a prison term for violation of the community control sanctions. Rather, the sentencing entry left blank the line indicated for a term of imprisonment for a community control sanction violation.<sup>2</sup>

{¶4} On December 5, 2012, the trial court filed an amended sentencing entry amending Appellant's sentence to add a stated prison term of two years for violation of the community control sanctions.

{¶5} On October 23, 2013, the trial court conducted a probation violation hearing finding Appellant a probation violator. The trial court then imposed a prison sentence of two years as stated in the amended sentencing entry.

{¶6} Appellant appeals, assigning as error:

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<sup>1</sup> A rendition of the underlying facts is unnecessary for the resolution of this appeal.

<sup>2</sup> A transcript of the sentencing hearing has not been included in the record for this appeal.

{¶7} "I. THE TRIAL COURT WAS WITHOUT JURISDICTION AND ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHT WHEN IT SENTENCED APPELLANT TO PRISON ALTHOUGH IT NEVER NOTIFIED APPELLANT IN ITS JOURNAL ENTRY WHAT THAT PRISON [SIC] WOULD BE A SANCTION FOR VIOLATING COMMUNITY CONTROL."

{¶8} The trial court's May 19, 2008 Sentencing Entry states,

{¶9} "As to Count Two (2): The court has considered the factors in R.C. 2929.13 and sentences the defendant to  3  years of Community Control\* (to begin upon release from prison on count one) to include the conditions and sanctions listed on the attached sheet. Violation of community control will lead to a prison term of \_\_\_\_\_ months/years and 5 years of post release control. \*\*\*\*"

{¶10} In *State v. Miller*, 127 Ohio St.3d 407, 2010-Ohio-5705, the Ohio Supreme Court held,

{¶11} "Moreover, a trial court lacks the authority to reconsider its own valid, final judgment in a criminal case, with two exceptions: (1) when a void sentence has been imposed and (2) when the judgment contains a clerical error. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19, citing *Crim.R.* 36. The court of appeals in this case suggested that the latter exception applied and that nothing more than a nunc pro tunc entry was invoked. Not so.

{¶12} "A clerical error or mistake refers to 'a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment.' ' *Cruzado*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19, quoting *State v. Brown* (2000), 136 Ohio App.3d 816, 819-820, 737 N.E.2d

1057. Although courts possess inherent authority to correct clerical errors in judgment entries so that the record speaks the truth, 'nunc pro tunc entries 'are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided.' ' *Cruzado*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19, quoting *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, 779 N.E.2d 223, ¶ 14, quoting *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 164, 656 N.E.2d 1288. The amended journal entry in this case may reflect what the trial court *should have decided* at sentencing. It does not reflect what the trial court did decide but recorded improperly. Thus, the use of the nunc pro tunc entry to impose restitution upon Miller was improper because it does not reflect the events that actually occurred at the sentencing hearing.

{¶13} "Notably, the determination of restitution entails a substantive legal decision or judgment and is not merely a mechanical part of a judgment. Restitution is a financial sanction, based on a victim's economic loss, that is imposed by a judge as part of a felony sentence. See R.C. 2929.18(A)(1). See also *State v. Danison*, 105 Ohio St.3d 127, 2005-Ohio-781, 823 N.E.2d 444, syllabus. It is not an order that is so 'mechanical in nature' that its omission can be corrected as if it were a clerical mistake. *Londrico v. Delores C. Knowlton, Inc.* (1993), 88 Ohio App.3d 282, 285, 623 N.E.2d 723. As the dissenting judge stated, a nunc pro tunc order cannot cure the failure of a judge to impose restitution in the first instance at sentencing. *Miller*, 2009-Ohio-3307, 2009 WL 1914620, ¶ 24. Accord *Caprita v. Caprita* (1945), 145 Ohio St. 5, 30 O.O. 238, 60 N.E.2d 483, paragraph two of the syllabus (a nunc pro tunc entry corrects a judicial record that fails to show a correct order or judgment of the court because the order or

judgment was not recorded properly in the first place). We agree and therefore hold that a court may not use a nunc pro tunc entry to impose a sanction that the court did not impose as part of the sentence."

{¶14} The Ninth District addressed the issue in *State v. Clouser*, 9th Dist. No. 26060, 2012-Ohio-1711, holding:

{¶15} "The Ohio Supreme Court recently addressed this issue. In *State v. Carlisle*, 131 Ohio St.3d 127, 2011-Ohio-6553, the Court held that a trial court lacks authority to modify a final criminal sentence even if the sentence has yet to be executed. *Carlisle* at ¶ 16. The Court explained that, the stay of an execution of a sentence does not detract from the sentence's finality as, '[a] criminal sentence is final upon issuance of a final order' in compliance with Crim.R. 32(C). *Id.* at ¶ 11. The Court noted that, to the extent there once existed authority for the proposition that a sentence could be modified up until the point of execution, those authorities are 'now defunct' as they 'were premised on a statute that has since been repealed.' *Id.* at ¶ 13, 15. Consequently, the Court agreed that the trial court lacked authority to modify Carlisle's sentence after journalization and remanded the matter to the trial court for execution of the original sentence. *Id.* at ¶ 17.

{¶16} "Much like the trial court in *Carlisle*, the trial court here attempted to vacate and modify Clouser's final judgment under the auspices of it not yet having been executed. The trial court lacked authority to do so. *Id.* at ¶ 16-17. The court issued Clouser's final criminal sentence on March 15, 2011, as that sentencing entry complies with Crim.R. 32(C) and the requirements set forth in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, syllabus. Clouser's argument that the trial court lacked authority to

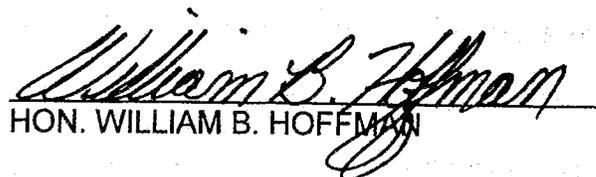
modify that sentencing entry has merit and his assignment of error is sustained on that basis."

{¶17} Based on the above authority, we find the trial court erred in amending the May 19, 2008 sentencing entry. The sentencing entry was a final sentence in which the trial court failed to include a prison term for a violation of post release control. The sentencing entry was not void due to the trial court's failure to do so. Therefore, we find the trial court's December 5, 2012 amended sentencing entry of no effect. Because the original May 19, 2008 sentencing entry does not indicate a term of prison for violation of community control sanctions, we sustain the assignment of error. The trial court's imposition of the two year prison sentence in its October 24, 2013 Community Control Violation Journal Entry is vacated.

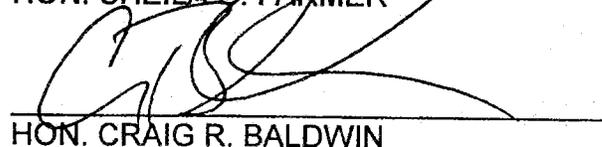
By: Hoffman, P.J.

Farmer, J. and

Baldwin, J. concur

  
HON. WILLIAM B. HOFFMAN

  
HON. SHEILA G. FARMER

  
HON. CRAIG R. BALDWIN

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

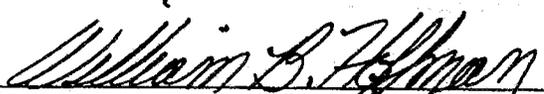
ANTONIO G. CROSKEY

Defendant-Appellant

JUDGMENT ENTRY

Case No. 13CA102

For the reason stated in our accompanying Opinion, the sentence entered in the October 24, 2013 Community Control Violation Journal Entry entered by the Richland County Court of Common Pleas is vacated. Costs to Appellee.

  
HON. WILLIAM B. HOFEMAN

  
HON. SHEILA G. FARMER

  
HON. CRAIG R. BALDWIN

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

COURT OF APPEALS  
RICHLAND COUNTY OHIO  
FILED  
2014 AUG -1 AM 9:44  
LINDA N. FRARY  
CLERK OF COURTS

STATE OF OHIO

Plaintiff-Appellee

-vs-

ANTONIO CROSKEY

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 13CA102

This matter came on for consideration upon Appellee State of Ohio's motion for reconsideration of appeal, which motion was filed on June 19, 2014. Appellant Antonio Croskey did not file a memorandum in opposition. Specifically, Appellant requests this Court to reconsider its June 16, 2014 Opinion and Judgment Entry vacating Appellant's October 13, 2013 sentence.

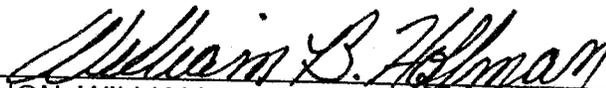
The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Columbus v. Hodge*, 37 Ohio App.3d 68, 523 N.E.2d 515, (1987) paragraph one of the syllabus. "An application for reconsideration may not be filed simply on the basis that a party disagrees with the prior appellate court decision." *Hampton v. Ahmed*, 7th Dist. No. 02 BE 66, 2005-Ohio-1766, ¶ 16, citing *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (1996).

Upon review, Appellee State of Ohio's motion does not call our attention to an obvious error in the decision or raise an issue for our consideration not previously considered.<sup>1</sup>

<sup>1</sup> We note from our cursory comparison, none of the 14 cases cited in Appellee's Motion for Reconsideration were cited in Appellee's original brief to this Court.



Appellee State of Ohio's motion for reconsideration is denied.  
IT IS SO ORDERED.

  
\_\_\_\_\_  
HON. WILLIAM B. HOFFMAN

  
\_\_\_\_\_  
HON. SHEILA G. FARMER

  
\_\_\_\_\_  
HON. CRAIG R. BALDWIN

WBH/ag 7/21/14

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

COURT OF APPEALS  
RICHLAND COUNTY OHIO  
FILED

2014 AUG -1 AM 9:44

LINDA H. FRARY  
CLERK OF COURTS

STATE OF OHIO

Plaintiff-Appellee

-vs-

ANTONIO CROSKEY

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 13CA102

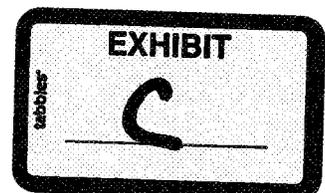
This matter came on for consideration upon Appellee State of Ohio's motion to certify a conflict. Specifically, Appellant moves this Court to certify a conflict between this Court's June 16, 2014 Judgment Entry, the decision of the Ninth District Court of Appeals in *State v. Lloyd*, 9th Dist. Summit No. 24833, 2010-Ohio-1037, and this Court's previous opinion in *State v. Dotson*, 5th Dist. Stark No. 2013CA00024, 2013-Ohio-3716.<sup>1</sup>

Section 3(B)(4), Article IV, of the Ohio Constitution governs motions seeking an order to certify a conflict. It provides:

"Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." (Emphasis added.)

In *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 1993-Ohio-223, syllabus, rehearing denied by *Whitelock v. Cleveland Clinic Found.* (1993), 67 Ohio St.3d 1420, the Supreme Court of Ohio held, pursuant to Section 3(B)(4), Article IV, Ohio Constitution and S.Ct.Prac.R. III, "there must be an actual conflict between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for

<sup>1</sup> Neither case Appellee now asserts are in conflict with our opinion were cited in Appellee's original brief in this appeal.



review and final determination is proper." *Id.* at paragraph one of the syllabus. The court further stated:

"[A]t least three conditions must be met before and during the certification of a case to this court pursuant to Section 3(B)(4), Article IV of the Ohio Constitution. First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of *another district* and the asserted conflict must be 'upon the same question.' Second, the alleged conflict must be on a rule of law-not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. (Emphasis sic.) *Id.* at 596.

"Additionally, factual distinctions between cases are not a basis upon which to certify a conflict. *Id.* at 599. 'For a court of appeals to certify a case as being in conflict with another case, it is not enough that the reasoning expressed in the opinions of the two courts of appeals be inconsistent; the judgments of the two courts must be in conflict.' *State v. Hankerson* (1989), 52 Ohio App.3d 73, paragraph two of the syllabus."

Upon review of Appellee State of Ohio's motion to certify a conflict, we find our decision is not in actual conflict with another district of the state on the same question of law.

We find our opinion is not in conflict with this Court's prior opinion in *Dotson*, *supra*, as the opinion in *Dotson* is not "a judgment of a court of appeals' of another district."

Further, we find the Ninth District Court of Appeals' decision in *State v. Lloyd*, 9th Dist. No. 24833, 2010-Ohio-1037, is not in conflict with our prior opinion on the same question or rule of law.

In *Lloyd*, the Ninth District held the Court was unable to determine whether the trial court was merely correcting a typographical error or if the court was reconsidering its previous decision because of the absence of sentencing hearing transcripts. Here, the trial court did not file a Nunc Pro Tunc Sentencing Entry, but rather an Amended Sentencing Entry which not only added the term of 2 years for a violation of community control but also reduced the length of community control from 3 to 2 years. We find this case factually distinguishable from *Lloyd*.

Accordingly, the motion to certify a conflict is denied.

IT IS SO ORDERED.

  
HON. WILLIAM B. HOFFMAN

  
HON. SHEILA G. FARMER

  
HON. CRAIG R. BALDWIN

WBH/ag 7/21/14