[Cite as *Kirtland v. Clark*, 2012-Ohio-3887.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

CITY OF KIRTLAND,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-089**
- vs -	:	
ANGIE L. CLARK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Willoughby Municipal Court, Case No. 11CRB00311.

Judgment: Appeal dismissed.

Michael P. Germano, City of Kirtland Prosecutor, 37265 Euclid Avenue, Willoughby, OH 44094 (For Plaintiff-Appellee).

Harvey B. Bruner, 700 W. St. Clair Avenue, #110, Cleveland, OH 44113 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Angie L. Clark, appeals her conviction in the Willoughby Municipal Court following her guilty plea to theft and misuse of 911. At issue is whether the appeal is time-barred. For the reasons that follow, we dismiss the appeal.

{¶2} On January 26, 2011, a complaint was filed against appellant charging her with theft, in violation of R.C. 2913.02, a misdemeanor of the first degree; misuse of credit cards, in violation of R.C. 2913.21, a misdemeanor of the first degree; and misuse of 911, in violation of R.C. 4931.49(D), a misdemeanor of the fourth degree.

{¶3} On January 28, 2011, appellant pled not guilty and the public defender was appointed to represent her.

{¶4} On February 2, 2011, appellant pled guilty to theft and misuse of 911. The trial court found her guilty. At the state's request, the misuse-of-credit-card charge was nolled. On the same date, the trial court sentenced her. The court sentenced her on the theft charge to 90 days in jail, suspending 60 days, for a total of 30 days in jail, to be deferred for review in 60 days. She was also fined $500, with $400 suspended, for a total of $100. She was placed on probation for one year. In addition, the court sentenced appellant on the 911-misuse charge to 30 days in jail. The court suspended the jail sentence. She was also fined $100 and placed on probation for one year. Appellant's guilty plea and sentence were journalized on February 16, 2011.

{¶5} On June 8, 2011, the trial court held a probation-violation hearing. Following the hearing, the court ordered appellant to serve the 30-day sentence that had previously been imposed but deferred in the court's February 16, 2011 judgment of conviction.

{¶6} The trial court granted appellant's motion to stay the execution of sentence pending appeal.

{¶7} On July 5, 2011, appellant appealed her conviction. For her sole assignment of error, she alleges:

{¶8} "The court failed to satisfy the requirements of Rule 11 when it failed to advise Appellant of the potential penalties of the charges and the Constitutional rights she would be waiving."

{¶9} Before we may consider the merits of this assignment of error, we must first address the city's argument that appellant failed to timely appeal her conviction.

{¶10} App.R. 4(A) provides that a party shall file a notice of appeal within 30 days of entry of the judgment appealed. "The time for filing a notice of appeal is governed by App.R. 4 and, pursuant to App.R. 14(B), a court may not enlarge the time for filing a notice of appeal." *State v. Thacker*, 4th Dist. No. 02CA35, 2002-Ohio-7443, ¶3, citing *Ross v. Harden*, 8 Ohio App.3d 34 (10th Dist.1982). If a party fails to file a notice of appeal within thirty days as required by App.R. 4(A), the appellate court does not have jurisdiction to entertain the appeal. *State v. Smartt*, 11th Dist. No. 2011-L-140, 2011-Ohio-6212, ¶11. The timely filing of a notice of appeal under this rule is a jurisdictional prerequisite to appellate review. *Thacker, supra*; *State v. Sides*, 11th Dist. No. 2008-L-145, 2008-Ohio-6058, ¶6.

{¶11} Journalization of the judgment of conviction pursuant to Crim.R. 32(C) starts the 30-day appellate clock ticking. *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, ¶10, *modified by State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, paragraph one of the syllabus. A judgment of conviction based on a guilty plea is final and appealable when it sets forth: (1) the guilty plea; (2) the sentence; (3) the judge's signature; and (4) the time stamp showing journalization by the clerk of court. *Baker*, *supra*, at syllabus.

{¶12} Further, an order suspending the imposition of sentence for a misdemeanor and placing the defendant on probation is a final order from which an appeal may be prosecuted. *State v. Kaiser*, 4th Dist. No. 10CA1, 2010-Ohio-4616, ¶15; *State v. Fair*, 9th Dist. No. 14343, 1990 Ohio App. LEXIS 2366, *5 (June 13, 1990); R.C. 2951.10.

{¶13} Applying the foregoing authority to the instant case, the trial court's February 16, 2011 judgment of conviction in the theft case was a final, appealable order

because it satisfied each of the requirements for a judgment of conviction to be a final, appealable order under *Baker, supra*. The judgment of conviction set forth appellant's guilty plea, her sentence, the judge's signature, and the clerk's time stamp. Further, the court's February 16, 2011 judgment was an order suspending the imposition of appellant's sentence for a misdemeanor and placing her on probation. For this additional reason, it was a final, appealable order. Therefore, pursuant to App.R. 4(A), appellant was required to appeal her conviction within 30 days of the entry of that judgment, i.e., by March 18, 2011. However, as noted above, appellant did not appeal her conviction in the theft case until July 5, 2011. Her appeal is therefore untimely by nearly four months.

{¶14} In an apparent attempt to avoid the consequences of her late filing, appellant stated in her notice of appeal that she was appealing the February 16, 2011 judgment of conviction as well as the June 8, 2011 judgment ordering her previously-imposed sentence into execution. However, the only argument appellant asserts on appeal in the theft case is that her guilty plea is invalid because the trial court failed to comply with Crim.R. 11. She does *not* challenge or even refer to the trial court's June 8, 2011 judgment ordering her original sentence into execution. She presents no assignment of error or argument challenging the later order. Her argument is therefore limited to a challenge to her guilty plea. Thus, on appeal, appellant is actually challenging only the February 16, 2011 judgment of conviction. Because she failed to timely appeal that judgment and also failed to file a motion for a delayed appeal pursuant to App.R. 5(A), this court lacks jurisdiction to consider whether the trial court erred in accepting appellant's guilty plea.

{¶15} We note that even if appellant had also appealed the later judgment, that would not have affected the finality of the judgment of conviction or the untimely nature of her appeal from that judgment. *See Kaiser*, *supra*, at ¶13-16. "The failure to file a timely notice of appeal is a jurisdictional requirement that cannot be ignored." *State v. Ward*, 5th Dist. No. 2005-CA-0092, 2007-Ohio-302, ¶16.

{¶16} It is also worth noting that, while the city argues this appeal is untimely, appellant has not filed a reply brief. Thus, she has failed to offer any rebuttal to the argument that the appeal is time-barred.

{¶17} The dissent maintains that the trial court's February 16, 2011 sentencing entry was not a final, appealable order because the conditions that would trigger execution of the jail term were not spelled out. The dissent thus maintains that the sentencing entry did not provide notice to appellant that the court had entered a final, appealable order. However, the dissent is incorrect because the sentencing entry satisfied the four requirements under *Baker*, *supra*, for the court's judgment of conviction to be a final, appealable order. The court actually imposed the 30-day jail term without any conditions, but simply deferred or delayed execution of the jail time until a review hearing after 60 days. Except for the lack of conditions, the trial court's judgment here was the same as a suspended sentence. In both cases, the jail sentence is actually imposed, but suspended or deferred pending further hearing. In both scenarios, the defendant does not know at the time of sentencing if the court will eventually put him or her in jail. If anything, the instant entry is more definite than the typical suspended sentence because, here, there were no conditions placed on the jail time. Contrary to the dissent, it is of no consequence that the prosecutor acknowledged at oral argument that an additional entry would be necessary if the court ordered the

previously-imposed jail term into execution. This would be necessary whenever a sentence is suspended. And this is exactly what occurred after the June 8, 2011 hearing.

{¶18} In any event, the dissent merely raises a potential *error* in the court's sentence, i.e., whether the court was entitled to defer sentence; the issue raised by the dissent does not constitute a cognizable challenge to the *finality of the court's judgment*. Because appellant does not allege any error in her sentence on appeal, this issue is not before us.

{¶19} Finally, the dissent's suggestion that the jail term was dependent on the results of the drug and alcohol assessment is simply not supported by the record. While a drug and alcohol assessment was ordered as a condition of appellant's one-year probation, the entry did not provide that execution of the jail time was conditioned on the results of the assessment.

{¶20} Accordingly, we hold that appellant's appeal is untimely and we lack jurisdiction to address it. The instant appeal is therefore dismissed.

{¶21} Appeal dismissed.

DIANE V. GRENDELL, J., concurs,

TIMOTHY P. CANNON, P.J., dissents with Dissenting Opinion.

TIMOTHY P. CANNON, P.J., dissenting.

{¶22} I do not believe the trial court's entry of February 16, 2011, is a final order. The judgment of conviction based on Clark's guilty plea was not a final, appealable order, as it did not set forth the sentence as required by *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330 and *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204. The trial court is required by Crim.R. 32 to sign and journalize a document memorializing the sentence—in this case, however, there was no definite sentence to memorialize. There is a 30-day time period (not "suspended" but, instead, "deferred") which had to be imposed or otherwise disposed of by the court at a later date.

{¶23} As the Ohio Supreme Court stated in *Lester*, "the purpose of Crim.R. 32(C) is to ensure that a defendant is on notice concerning when a final judgment has been entered and the time for filing an appeal has begun to run." *Id*. at ¶10, citing *State v. Tripodo*, 50 Ohio St.2d 124, 127 (1977) and App.R. 4(A). Clark, however, was deprived of the notice that Crim.R. 32(C) attempts to ensure. As she left the courtroom that day, the trial court made it clear that Clark would need to return to find out the full breadth of her sentence. This is distinguishable from the situation where a defendant knows he will serve additional time if he violates certain terms, such as terms in a Crim.R. 11 agreement. In that situation, the defendant understands the contingent event that would trigger additional time. Here, there was no defined contingent event to dictate what would happen with those 30 days; the time was merely "deferred for review" with *reference* to a drug and alcohol assessment to be done.

{¶24} The majority's acknowledgement of the lack of any conditions is significant. It is precisely this lack of any conditions that makes the deferral different in kind and substance from a suspended sentence. The majority asserts that in both the

deferred and the suspended sentence, the jail time is actually imposed but suspended or imposed pending further hearing. That is simply not the case. When a jail sentence is suspended, it is suspended based on certain conditions. A further hearing occurs only if there is a violation of those conditions or if there is a motion to revise the sentence.

{¶25} In addition, the majority asserts that this dissent raises some potential "error" in the trial court's entry. To be clear, I am claiming no error in the entry by the trial court. At the hearing on February 16, 2011, there simply was no final decision whether to (1) impose jail or (2) suspend jail based on certain conditions. It is clear from the trial court's entry that this decision was to be made at a later date.

{¶26} As the prosecutor acknowledged at oral argument, the parties knew there would have to be another entry—one that either imposed the jail sentence or suspended it based on the results of the drug and alcohol assessment. The 30-day jail sentence was *neither* imposed *nor* suspended on February 16, 2011. The jail sentence was not imposed until June 8, 2011. Therefore, I would hold the July 5, 2011 notice of appeal was effective and address the merits of the case.