[Cite as *State v. Barnes*, 2024-Ohio-2184.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 112712
v.	:	
FREDERICK E. BARNES,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: VACATED
RELEASED AND JOURNALIZED: June 6, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-623256-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Alan Dowling, Assistant Prosecuting Attorney, *for appellee*.

Ohio Crime Victim Justice Center and Latina Bailey, *for appellee* victim Mary Seawright.

Cullen Sweeney, Cuyahoga County Public Defender, Erika B. Cunliffe and John T. Martin, Assistant Public Defenders, *for appellant*.

MARY J. BOYLE, J.:

{¶ 1} In this appeal, we are asked to determine if the trial court is without jurisdiction to order restitution after defendant-appellant, Frederick E. Barnes ("Barnes"), was sentenced to time served in November 2018; the trial court did not impose restitution at that time and the victim-appellee, Mary Seawright ("Seawright"), voluntarily dismissed her direct appeal challenging the lack of restitution. While there is no dispute that Seawright was entitled to receive restitution for any actual financial losses she suffered stemming from Barnes's actions, the fact remains that Barnes completed his sentence five and a half years ago. For the reasons set forth below, we vacate the trial court's judgment, finding that Barnes possesses a legitimate expectation in the finality of his sentence; according to the Ohio Supreme Court in *State v. Brasher*, 171 Ohio St.3d 534, 2022-Ohio-4703, 218 N.E.3d 899, the sentencing journal entry, which did not order Barnes to pay restitution is a final order and res judicata attached. Thus, when Barnes completed his sentence five and a half years ago, the trial court lost jurisdiction to modify the sentence. *Id.* at ¶ 24, citing *State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776; *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248; *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, *overruled on other grounds*, *Harper*.

I. Facts and Procedural History

A. Barnes's Underlying Criminal Case

{¶ 2} In December 2017, Barnes was charged in a three-count indictment for breaking and entering (Count 1); grand theft (Count 2); and petty theft (Count 3). The indictment alleged that Barnes broke into Seawright's office and stole a 9 mm Smith & Wesson handgun and a nail gun valued at less than $1,000. Barnes entered a guilty plea in October 2018 to attempted breaking and entering, as amended in Count 1, and petty theft, as charged in Count 3 (both offenses are first-degree misdemeanors). Count 2 was dismissed.

{¶ 3} The matter proceeded to a sentencing hearing in November 2018, during which the issue of restitution was addressed:

> [STATE]: Your Honor, regardless of [Barnes's] volunteer work or his charitable contributions, the focus is on the restitution.
>
> Under Criminal Rule 11, there was a full factual admission to theft. He pled guilty to that.
>
> Under [R.C.] 2929.18 [Seawright] is entitled to restitution in an amount based on her economic loss. She's here today. She can talk to the Court about her economic loss. But, again, the focus is on the restitution. The theft has been admitted to.
>
> So we ask the Court to hear from the victim, and she can explain to you how much loss she has suffered.
>
> [COURT]: Sure. * * * I ask the victim to come forward to the podium * * * and state whatever you would like to for the Court's consideration.
>
> * * *
>
> [Seawright]: * * * I gave [Barnes] the key to my office. Only he and I had it.
>
> On the 25th, when I came into my office, everything was turned upside down everywhere. I had witnesses that came in and saw this. I called [Barnes] because only he and I had keys. He denied it.

I'm telling you, as sure as I'm standing here and God is a witness, this man and everybody that is speaking for him, he's not what he is pretending to be. He is involved in my things being stolen.

I went online. I had all these tools. I went online and got the prices for these tools that was missing. All of the keys to all of the properties was taken. All of the keys. I couldn't believe that. Every key.

I had to go out and buy those locks and call those people. I was scared to death. And I could not believe that this man did something like that.

* * *

It is * * * a disgrace. * * * And I am not lying, but he is. He is lying. He did that. He violated me. He stole my stuff.

[COURT]: Thank you ma'am.

[Seawright]: Thank you.

[COURT]: Anything further on behalf of State?

[STATE]: No. The State previously provided the Court with the paperwork for the restitution and a letter from the victim, so I wanted to place that on the record. Defense counsel saw that, and the Court is in possession of that.

[COURT]: Correct.

DEFENSE COUNSEL: Thanks, your Honor. We're not here to try the restitution case, your Honor, but she is talking about the keys and she had to change the locks.

Well, the receipts she gave were for like four months prior to her even meeting [Barnes]. All of this stuff, nothing was ever mentioned in the police report.

There is an alleged gun. We don't have a receipt for the value of the gun. I think this is a civil matter as far as restitution, and I would respectfully request this Court to leave that as a civil matter and let them handle that as they may.

[COURT]: Thank you. The Court will sentence you to time served, costs waived. Defendant ordered released.

DEFENSE COUNSEL: Thank you, your Honor.

[BARNES]: Thank you, your Honor.

(Tr. 9-12.)

{¶ 4} The accompanying journal entry reflects what transpired at the sentencing hearing, and it provides in relevant part: "[Barnes] sentenced to time served. [Barnes] declared indigent. Costs waived all motions not specifically ruled on prior to the filing of this judgment entry are denied as moot." (Journal entry, Nov. 19, 2018.)

B. Seawright's Subsequent Appeal and Writ

{¶ 5} In December 2018, Seawright appealed to this court in *State v. Barnes*, 8th Dist. Cuyahoga No. 107961, on the grounds that the trial court violated her rights under the Ohio Constitution. Seawright voluntarily dismissed this appeal in April 2019 because of *State v. Hughes*, 2019-Ohio-1000, 134 N.E.3d 710 (8th Dist.). In this decision, which was issued in March 2019, we held that, while victims cannot appeal violations of Ohio Constitution, Article I, Section 10a(A) ("Marsy's Law"), "[a] victim may 'petition' the appropriate appellate court for relief. Appellate courts have original jurisdiction to hear actions in quo warranto, mandamus, habeas corpus, prohibition, procedendo, or '[i]n any cause on review as may be necessary to its complete determination.'" *Id.* at ¶ 28.

{¶ 6} As a result, on April 24, 2019, Seawright filed a complaint for a writ of mandamus in *State ex rel. Seawright v. Russo*, 8th Dist. Cuyahoga No. 108484, 2019-Ohio-4983. Approximately two weeks later, the trial court, sua sponte, set a

restitution hearing for May 23, 2019. On May 20, 2019, Barnes filed a motion to continue the restitution hearing until this court decided the merits of Seawright's writ. Barnes also appealed the trial court's order scheduling the restitution hearing in *State v. Barnes*, 8th Dist. Cuyahoga No. 108601 ("*Barnes I*"). This appeal was dismissed by our court for lack of final appealable order on May 29, 2019. We stated, "Sua sponte, appeal is dismissed for lack of final appealable order. An order scheduling a restitution hearing is not a final appealable order because further action is contemplated. Therefore it does not prevent or determine a judgment. R.C. 2505.02." (Journal entry, May 29, 2019.)

{¶ 7} In the interim, on May 23, 2019, Judge Russo issued a nunc pro tunc journal entry that provided:

> The following entry is issued nunc pro tunc as if and for the sentencing entry issued on November 19, 2018[:]
>
> * * *
>
> Defendant sentenced to time served. Defendant declared indigent. Costs waived all motions not specifically ruled on prior to the filing of this judgment entry are denied as moot.
>
> Restitution hearing held. * * * [C]ounsel for the defendant, and victim addressed the court about restitution. [The] Assistant prosecuting attorney * * * provided the court with paper and a letter from the victim in support of restitution.
>
> It is so ordered.

(Journal entry, May 23, 2019.)

{¶ 8} Following our dismissal of *Barnes I*, the trial court issued a journal entry stating that "no substantive action is to be taken in this matter until the time

for filing any reviewing motion to the 8th District has expired." (Journal entry, May 31, 2019.)

{¶ 9} In *State ex rel. Seawright*, Seawright sought to compel the trial judge to order restitution in the underlying action. Seawright argues that, as the victim of a crime, she is entitled to a writ of mandamus that orders the trial judge "'reopen sentencing in [the underlying action] to amend its unlawful sentence, which denied Seawright her constitutionally guaranteed order of restitution.'" *Id.* at ¶ 1. Specifically, Seawright sought restitution in the amount of $3,581.42. In response, the trial judge filed a motion for summary judgment. We denied the trial judge's motion for summary judgment and granted Seawright's request for a writ of mandamus in part. *Id.*

{¶ 10} We found that based solely upon the facts pertinent to this original action, Seawright established that (1) she may be entitled to restitution; (2) the trial judge is required to determine whether Seawright is entitled to restitution; and (3) Seawright possessed no other adequate remedy in the ordinary course of the law. *Id.* at ¶ 9. As a result, the matter was remanded for the trial judge "to determine, based upon the testimony and evidence adduced at Barnes' sentencing hearing and/or the taking of supplemental testimony and evidence, whether Seawright is entitled to restitution and the amount of restitution." *Id.* at ¶ 13. Additionally, we denied Seawright's request to compel the trial judge to order restitution in the amount of $3,581.42, noting that this amount was puzzling to the court "when Barnes [pled] guilty to Count 3 (petty theft), which specified the theft of a single

item; a nail gun. Count 2 (grand theft), which specified the theft of a 9 mm Smith & Wesson handgun, was nolled." *Id.* at ¶ 10, fn. 1.

C. Barnes's Underlying Case Post-Writ

{¶ 11} Following our writ, the trial court set another restitution hearing for November 19, 2020. Two weeks after the hearing was set, Barnes moved to withdraw his guilty plea in October 2020, which the State opposed. Barnes argued that his plea should be withdrawn because restitution was not contemplated by the agreement that led him to plead guilty and he was not advised when he entered his guilty plea that any sentence imposed would require him to pay restitution. Then, in May 2021, Seawright moved for restitution. During June and July 2021, Seawright briefed the restitution issue and Barnes renewed his motion to withdraw his guilty plea and opposed the restitution hearing. After several continuances, the trial court set the restitution hearing for December 16, 2021. On December 11, 2021, Barnes moved to stay restitution proceedings pending a decision by the Ohio Supreme Court in *State v. Brasher*, 171 Ohio St.3d 534, 2022-Ohio-4703, 218 N.E.3d 899, to resolve a conflict regarding a victim's standing under Marsy's Law. The Ohio Supreme Court decided *Brasher* at the end of December 2022 and held that victims should assert Marsy's Law rights by direct appeal, not extraordinary writ. *Id.* at ¶ 27.

{¶ 12} In April 2023, Seawright once again moved for restitution and the trial court set a hearing for May 12, 2023. On May 11, Barnes appealed this order, which is now before this court for review ("*Barnes II*"). Seawright filed a motion

to dismiss for lack of final appealable order, which Barnes opposed. We granted Seawright's motion, noting that while a restitution hearing has been ordered, an order as to the amount of restitution has not been entered. We concluded that this appeal is distinguishable from *Brasher* "because in that case, the trial court had conducted a hearing and ordered a restitution amount. Here, the hearing has not yet been conducted and no restitution has been ordered. [Barnes] has a remedy via direct appeal once the restitution order is entered to argue the trial court's jurisdiction to proceed to determine restitution after the sentence has been entered and served." (Journal entry, June 14, 2023.) Barnes filed a motion for reconsideration, which we granted, "due to issues involving double jeopardy and the relatively new case from the Ohio Supreme Court, [*Brasher*]."

{¶ 13} Barnes now asks us to review the following two assignments of error:

> **Assignment of Error I:**
>
> By ordering a new restitution hearing in this case after [Barnes's] conviction became final the trial court contravenes the Ohio Supreme Court's decision in [*Brasher*], which held that the restitution order needed to be challenged by way of a timely direct appeal.
>
> **Assignment of Error II:**
>
> The trial court violated the prohibition against double jeopardy and the terms of [Barnes's] plea agreement when it ordered the parties to proceed to a new restitution hearing.

II. Law and Analysis

A. Final Appealable Order

{¶ 14} Before considering the merits of Barnes's appeal, we must first decide whether the trial court's April 27, 2023 journal entry setting a restitution hearing for

May 12, 2023 is a final appealable order. Seawright and plaintiff-appellee, the state of Ohio, contend that it is not because the setting of a restitution hearing alone does not in effect determine the action and prevent a judgment in Barnes's favor. They argue that an order setting a restitution hearing does not (1) determine an action; (2) affect a substantial right made in a special proceeding; and (3) vacate or set aside a judgment or grant a new trial. Whereas, Barnes argues that double jeopardy precludes a second sentencing hearing and an interlocutory appeal can be taken when double jeopardy is at stake. We find Barnes's argument more persuasive.

{¶ 15} In *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, the Ohio Supreme Court reiterated:

> "An appellate court can review only final orders, and without a final order, an appellate court has no jurisdiction." *Supportive Solutions, L.L.C. v. Electronic Classroom of Tomorrow*, 137 Ohio St.3d 23, 2013-Ohio-2410, 997 N.E.2d 490, ¶ 10.
>
> R.C. 2953.02 authorizes appellate courts to review the judgment or final order of a trial court in a criminal case. *State v. Muncie*, 91 Ohio St.3d 440, 444, 2001 Ohio 93, 746 N.E.2d 1092 (2001). To determine whether the order issued by the trial court in a criminal proceeding is a final, appealable order, appellate courts must apply the definitions of "final order" contained in R.C. 2505.02. *Id.*, citing *State ex rel. Leis v. Kraft*, 10 Ohio St.3d 34, 36, 460 N.E.2d 1372 (1984).

Id. at ¶ 28-29.

{¶ 16} In order to qualify as a final appealable order under R.C. 2505.02(B)(4), three requirements must be satisfied: (1) the order must grant or deny a provisional remedy as defined in the statute; (2) the order must in effect determine the action with respect to the provisional remedy; and (3) the appealing party would not be afforded a meaningful review of the decision if that party had to

wait for final judgment as to all proceedings in the action. *State v. Upshaw*, 110 Ohio St.3d 189, 2006-Ohio-4253, 852 N.E.2d 711, ¶ 15, citing *Muncie* at 446.

{¶ 17} In *Anderson*, the Ohio Supreme Court concluded that the denial of a motion to dismiss on double-jeopardy grounds is a final appealable order. *Id.* at ¶ 43. First, the *Anderson* Court found that a motion to dismiss on double-jeopardy grounds is a provisional remedy because the motion is an ancillary proceeding — it "'grows out of' the primary suit, i.e., the prosecution. The act of prosecution triggers a defendant's constitutional protection against double jeopardy." *Id.* at ¶ 49. Next, the court found that "a decision on a motion to dismiss on double-jeopardy grounds determines the action because it permits or bars the subsequent prosecution." *Id.* at ¶ 52. Last, the *Anderson* Court found that "the appealing party would not be afforded a meaningful review of the decision if that party had to wait for final judgment as to all proceedings in the action." *Id.* at ¶ 53. In finding so, the court noted:

> The "basic theory" underlying the doctrine of double jeopardy "is that it is wrong for one to be subjected more than once *to the danger of being punished* for an offense." (Emphasis added.) *State v. Best*, 42 Ohio St.2d 530, 532, 330 N.E.2d 421 (1975).
>
> The denial of an interlocutory appeal to an accused arguing that a prosecution is barred by double jeopardy vitiates one of the very protections the Constitution provides: the right not to be improperly forced to stand trial repeatedly for the same offense.
>
> As the [United States] Supreme Court has explained:
>
> > [The] protections [of the Double Jeopardy Clause] would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double

> jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, *if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs*.
>
> (Emphasis added in part, and footnote omitted.) *Abney* [*v. United States*], 431 U.S. [651,] 662, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

Id. at ¶ 56.

{¶ 18} Similarly, it is this facet of the Double Jeopardy Clause that is at stake in the matter before us. Barnes already had a sentencing hearing in 2018 where the court heard all the evidence regarding restitution, including a statement from Seawright, and the state provided the court with paperwork and a letter from Seawright The court then sentenced Barnes to time served and did not order him to pay restitution. In May 2019, the trial court issued a nunc pro tunc entry indicating that a restitution hearing was held. And now, more than five years later, Barnes was ordered to go through another hearing. The denial of Barnes's interlocutory appeal in this case would force him to "run the gauntlet" a second time before an appeal could be taken. If Barnes waits to file an appeal following the second restitution hearing, he will be precluded from meaningful review and will not be afforded appropriate relief in the future. Thus, based on these facts and circumstances, we find that the trial court's April 27, 2023 journal entry setting the restitution hearing is a final and appealable order.

{¶ 19} Having found a final appealable order, we now turn to Barnes's assigned errors.

B. Under Brasher, Seawright forfeited her right to challenge Barnes's sentence, which did not order restitution, when she withdrew her direct appeal in April 2019

{¶ 20} In the first assignment of error, Barnes argues that under *Brasher*, Seawright forfeited her right to challenge the sentencing order when she dismissed her direct appeal. In *Brasher*, the defendant-appellee, Kyle Brasher, stole the victims' car and totaled it. The victims and the state did not argue for restitution before the trial court and the trial court's sentencing entry made no mention of restitution. The victims did not seek to intervene, and neither the State nor Brasher appealed. Five months after Brasher was sentenced, the victims filed a complaint for a writ of mandamus seeking an order to compel the trial court to hold a restitution hearing in *State ex rel. Howery v. Powers*, 2020-Ohio-2767, 154 N.E.3d 146 (12th Dist.). The Twelfth District Court of Appeals granted summary judgment in the mandamus action in favor of the victims and ordered the trial court to hold a restitution hearing. Subsequently, the trial court held a restitution hearing and entered a restitution order for $1,976.55. *Brasher*, 171 Ohio St.3d 534, 2022-Ohio-4703, 218 N.E.3d 899 at ¶ 1, 4-7, 11 ("*Brasher II*").

{¶ 21} Brasher appealed this restitution order to the Twelfth District, where the court of appeals concluded that "when Brasher was released from prison on February 17, 2020, having served his entire term of imprisonment, the trial court lost jurisdiction to modify his sentence and could not, thereafter, impose restitution." *Brasher II* at ¶ 12, citing *State v. Brasher*, 2021-Ohio-1688, 170 N.E.3d 920, ¶ 19-21 (12th Dist.) ("*Brasher I*"). The Twelfth District concluded that the trial

court's supplemental sentencing entry ordering restitution was void. *Brasher II* at ¶ 12, citing *Brasher I* at ¶ 22. The State and one of the victims then appealed to the Ohio Supreme Court each presenting one proposition of law. The question raised before the Ohio Supreme Court was "whether the victims should have appealed the portion of Brasher's sentence denying restitution or whether they had the right to collaterally attack the trial court's judgment sentencing Brasher by seeking an extraordinary writ for a restitution order — in this case, after the sentencing court's judgment was final and Brasher's sentence had been completed." *Brasher II* at ¶ 1. The Ohio Supreme Court concluded that

> the victims should have appealed the trial court's failure to award restitution, because they developed standing to appeal when the trial court denied their request to impose restitution. While it is clear that these victims should be compensated for the loss of their stolen vehicle, they did not act to protect their right to restitution when they did not appeal the portion of Brasher's sentence denying restitution.

Id. at ¶ 2.

{¶ 22} In reaching its decision, the *Brasher II* Court noted that under Article I, Section 10a(A)(7) of the Ohio Constitution, the victims had a right to restitution.[1] "When that right is not invoked at the defendant's trial or raised on direct appeal,

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[1] The *Brasher II* Court noted that the caselaw is not clear as to the proper mechanism — direct appeal or an original action — for victims seeking to enforce their rights under Marsy's Law. To bring the caselaw back in line with the text of Marsy's Law, the *Brasher II* Court found that "whether a direct appeal or an original action is the appropriate 'petition' for a crime victim to file relies on the circumstances of the case, particularly whether an appeal is available as an adequate remedy." *Id.* at ¶ 22, citing *State v. Beach*, 10th Dist. Franklin No. 20AP-589, 2021-Ohio-4497, ¶ 16. In situations where "a victim of a crime seeks enforcement of his or her constitutional rights by submitting a request to the trial court, the victim has standing to file a direct appeal." *Id.*

thereby eliminating the availability of that remedy, victims must then turn to the civil-justice system to seek compensation from the offender in order to be made whole." *Id.* at ¶ 27. This is because

> "[a]n order of restitution imposed by the sentencing court on an offender for a felony is part of the sentence." *State v. Danison*, 105 Ohio St.3d 127, 2005-Ohio-781, 823 N.E.2d 444, syllabus. If no one appeals a criminal judgment, it becomes final and res judicata attaches. *State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, ¶ 16-40; *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, ¶ 20-41. Once an offender has completed his or her sentence, the trial court loses jurisdiction to modify it. *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 14-18, overruled on other grounds by *Harper* at ¶ 5, 40.

Id. at ¶ 15. Without a timely appeal by the victims or the prosecutor, the trial court's initial judgment on Brasher's sentence, which was devoid of any order of restitution to the victims, became final, and res judicata attached. *Id.* at ¶ 24, citing *Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, at ¶ 26-27, 34-38; *Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, at ¶ 41. Further, the court stated that when Brasher completed his sentence, the trial court lost any jurisdiction to modify the sentence. *Id.*, citing *Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, at ¶ 14-18. When the trial court subsequently ordered restitution, it acted without jurisdiction, and an order issued without jurisdiction is void. *Id.*, citing *Henderson* at ¶ 43; *Harper* at ¶ 42.

{¶ 23} Likewise, in the instant case, Barnes pled guilty and completed serving his sentence more than five and a half years ago. The trial court, despite being aware of the request for restitution, did not order it. While Seawright did

initially file a direct appeal, she subsequently dismissed the appeal, opting instead, like the victims in *Brasher*, to pursue a writ action. Following the mandate in the writ, the trial court in this case, like the trial court in *Brasher*, ordered a restitution hearing.[2] The key question in this case is what should have happened next. *Brasher II* now provides us with the answer to that question — a direct appeal by the victim. Once the trial court issued its sentencing order, the obligation was on Seawright to challenge it properly. When Seawright withdrew her direct appeal, *Brasher II* tells us that she forfeited her right to challenge the sentencing order. That is because the trial court's initial judgment on Barnes's sentence — devoid of any order of restitution to the victims — became final, and res judicata attached. *Brasher II* at ¶ 24, citing *Henderson* at ¶ 26-27; *Harper* at ¶ 41. Moreover, when the trial court sentenced Barnes to time served, the court lost any jurisdiction to modify the sentence. *Id.*, citing *Holdcroft* at ¶ 14-18. Thus, when the trial court ordered the restitution hearing for May 2023, it acted without jurisdiction and that order is void. *Id.*, citing *Henderson* at ¶ 43; *Harper* at ¶ 42.

{¶ 24} As the *Brasher II* Court stated, "While this result is difficult for the victims here, it is necessary in the end to provide clarity to victim-litigants on the proper procedures for appealing restitution orders under Marsy's Law." *Brasher II*, 171 Ohio St.3d 534, 2022-Ohio-4703, 218 N.E.3d 899 at ¶ 25. We stress, just as the

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[2] We note that our court in *State ex rel. Seawright*, 8th Dist. Cuyahoga No. 108484, 2019-Ohio-4983, just as the court in *State ex rel. Howery*, 2020-Ohio-2767, 154 N.E.3d 146 (12th Dist.), issued their respective decisions mandating a restitution hearing prior to the issuance of the Ohio Supreme Court's decision in *Brasher II*.

Brasher II Court stressed, that there is no question that Seawright had the right to seek and be awarded restitution under Marsy's Law while the trial court had jurisdiction over Barnes's case. "But like most constitutional rights, this right can be forfeited if it is not invoked as necessary or required." *Id.*, citing *United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), citing *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944).

{¶ 25} Therefore, the first assignment of error is sustained.

C. Restitution, the Double Jeopardy Clause, and the Plea Agreement

{¶ 26} In the second assignment of error, Barnes argues that the Fifth Amendment's multiple punishment prohibition precludes the court from adding additional punishment to an already imposed sentence. Barnes further argues that restitution was never a condition of his plea agreement and its inclusion in his sentence violates that agreement. However, in light of our disposition of the first assignment of error, we find the remaining assignment of error moot.

III. Conclusion

{¶ 27} According to *Brasher II*, we find the trial court was without jurisdiction to order a restitution hearing in May 2023 after Barnes was sentenced to time served in November 2018 and by a nunc pro tunc entry in May 2019. Therefore, the trial court's April 27, 2023 journal entry is void and is hereby vacated.

{¶ 28} Accordingly, judgment is vacated.

Costs waived.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY J. BOYLE, JUDGE

EILEEN A. GALLAGHER, P.J., and
MARY EILEEN KILBANE, J., CONCUR