ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

STEPHEN M. LESTER

Defendant-Appellant.

Case Nos. 2010-1007, 2010-1372

On appeal from the
Auglaize County Court of Appeals,
Third Appellate District,
Case No. 2-10-20

Reply Brief of Appellant Stephen M. Lester

Counsel for Plaintiff-Appellee
State of Ohio

Edwin A. Pierce (0023846)
Auglaize County Prosecutor
Amy Otley Beckett (0059852)
(Counsel of Record)
Assistant Auglaize County Prosecutor
The Auglaize County Court House
201 South Willipie Street
Wapakoneta, Ohio 45895

Counsel for Defendant-Appellant
Stephen M. Lester

Jon W. Oebker (0064255)
(Counsel of Record)
TUCKER ELLIS & WEST LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1414
(216) 592-5000
(216) 592-5009 – Fax

Counsel for Amicus Curiae – Ohio Attorney General Michael DeWine

Michael DeWine (0009181)
Attorney General of Ohio
Alexandra T. Schimmer (0075732)
Solicitor General
(Counsel of Record)
David M. Lieberman (0086005)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

Counsel for Amicus – Ohio Public Defender

E. Kelly Mihocik (0077745)
Assistant Ohio Public Defender
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215

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I. INTRODUCTION: THIS CASE IS ABOUT JURISDICTION.

Either a court has jurisdiction or it does not. In this case it is undisputed that, when the Third District issued its 2006 and 2007 opinions, that appellate court did not have jurisdiction over Mr. Lester's case because no final appealable order had been issued by the trial court. As a result, the opinions issued by the Third District in the absence of jurisdiction have no binding effect.[1]

The first time a final appealable order was issued in this case was in 2010 when the trial court issued a nunc pro tunc journal entry that contained all the necessary elements for a final appealable order. Mr. Lester timely appealed from this nunc pro tunc entry which was the first and only valid final appealable order ever entered in this case. However, even though this was the first time that the Third District obtained jurisdiction over Mr. Lester's case, the Third District erroneously dismissed his appeal.

II. APPELLEE AND ITS AMICI DO NOT CHALLENGE THE FOUNDATION OF DEFENDANT'S ARGUMENT.

A. This case presents a simple application of Crim. R. 32(C) and *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330.

The Appellee State of Ohio is represented by the Auglaize County Prosecutor and is supported by amici the Ohio Prosecuting Attorneys Association ("OPAA") and the Attorney General. Not one of the three briefs filed in support of Appellee dispute the fact that the 2006 and 2007 journal entries were not final appealable orders under *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. In *Baker*, this Court held that in order for a journal entry of conviction to

[1] *State v. Lester*, Third Dist. App. No. 2-06-31, 2007-Ohio-4239; *State v. Lester*, 3rd Dist. No. 2-07-34, 2008-Ohio-1148

III. THE RESPECTIVE POSITIONS OF APPELLEE AND ITS AMICI

Appellee and its amici have filed separate briefs which, at times, offer different arguments and diverge from one another to a point of inconsistency. Accordingly, this Reply will address the portions of these positions that are not held in common, and also address the common arguments in each of the three briefs that oppose Mr. Lester's position.

A. Auglaize County's Position

The Auglaize County Prosecutor misunderstands Mr. Lester's position when, at page 7 of the State's brief, the Prosecutor contends that Mr. Lester "asserts that this error rendered his *sentence* void." This is incorrect.

What the Prosecutor's analysis misses is the fundamental concept that an *effective judgment* is not necessarily a *final order.* This is not a case about void *sentences;* the sentence in this case was fully effective since it was imposed in 2006. The trial court's sentence included all the essential elements of a valid sentence – including a prison term accompanied by post-release control.[3] Accordingly, that sentence is fully in effect today – thus, for example, a habeas petition would not lie to release Mr. Lester from prison because the DRC has been fully justified in incarcerating Mr. Lester pursuant to the sentencing entry in 2006.

But the issue in this case is not about what the trial court did *at sentencing.* The issue is one of timing and jurisdiction: After the facially valid sentence was imposed, when did the trial court take the necessary step, to cause Mr. Lester's case to leave the jurisdiction of the trial court and enter the jurisdiction of the Third District Court of Appeals? The answer to his fundamental question remains unchanged – jurisdiction transfers only when the trial court enters a valid final order pursuant to Crim. R. 32.

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[3] Whether the sentence was appropriate or contrary to law is another question – one that Mr. Lester has not been allowed to appeal by virtue of the Third District's dismissal of his appeal.

In stark contrast to *Fischer*, because the 2006 and 2007 orders from the trial court were not final appealable orders (due to their Crim R. 32(C) deficiency), the previous appellate opinions from the Third District were rendered in the absence of jurisdiction. Thus, the prior appellate opinions from the Third District are void and cannot have a preclusive, res judicata effect that the previous appellate opinion in *Fischer* did.

The OPAA goes on to suggest that appellate courts reviewing a case which perceive an injustice will be powerless to act if they are required by Crim. R. 32 to remand the case to the trial court to enter a final order. OPAA Br. at 5-6. The OPAA's concern about defendants receiving the speedy vindication of appellate rights is unwarranted. As a practical matter, it takes a minimal amount of time for a trial court, on remand, to issue a final order. At that point, a new appeal can be taken with dispatch. Moreover, it is not necessary that briefing begin anew. Rather, a motion can be made to transfer the briefs previously filed to the new case number and the case can proceed expeditiously. The Ninth District has previously employed such economic measures. *State v. Miller,* Case No. 06CA0046-M, 2007-Ohio-1353, ¶ 20 (appeal dismissed for want of a final appealable order but court went on to note that, following a new notice of appeal, "[t]he parties may then move this Court to transfer the record from this appeal to the new appeal and to submit the matter on the same briefs as were filed in this case and we will consider the appeal in an expedited fashion"). Moreover, in cases where the meritorious nature of the appeal is apparent, a defendant can be released on bond pending appeal.

C. The Attorney General's Position

The Attorney General, as well as the Prosecutor, argue that "[t]he Third District had jurisdiction over Lester's 2007 appeal from his original sentencing judgment because the 2010 nunc pro tunc entry inserting the 'means of conviction' language retroactively rendered that judgment a final appealable order." Attorney General's Br. at p. 5; Auglaize County Br. at 6.

sufficient to vest the appellate court with jurisdiction. *State v. Culgan*, Ninth App. No. 08CA0080-M, 2009-Ohio-2783.

Further, the Attorney General, like the Prosecutor, relies on *State ex rel. DeWine v. Burge*, 2011-Ohio-235. The Attorney General goes so far to claim that "*Burge* settles the question here – nunc pro tunc entries correcting Rule 32(C) deficiencies have no effect on the validity of the court's original judgment." Attorney General Br. at p. 7. The Attorney General, like the Prosecutor, misunderstands the issue in this case. Mr. Lester has not challenged the validity of his original conviction. He has challenged whether that order was a final appealable order that was sufficient to transfer jurisdiction to the appellate court. *Burge* simply recognizes that the previous entered judgment was effective – and could not be changed by the trial court years after it had gone into effect. *Burge* is not about conferring jurisdiction on the court of appeals.

D. This Court Has Already Rejected Appellee's Argument that the Failure of a Trial Court to Include the Necessary Crim. R. 32(C) Information Amounts to a Mere Typo or Clerical Error.

Both the Attorney General and Auglaize County try to minimize the omitted "means of conviction" language from 2006 and 2007 journal entries. The Attorney General calls it "a mere clerical error" and Auglaize County refers to it as a typo. (AG's Brief at 1; Auglaize Br. at 9.) This argument was squarely rejected by this Court in *Baker* which held that the failure to include the means of conviction as required by Crim. R. 32 (C) was so significant, it prevented the order from being a final appealable order under R.C. 2505.02. Indeed the failure to include the means of conviction was not a typo or clerical error in *Baker,* and it should be treated any differently in this case.

IV. CONCLUSION

For all these reasons, Mr. Lester respectfully asks that this Court reverse the judgment of the Third District and reinstate his appeal.

Respectfully submitted,

Jon Oebker by E.Kelly Morrel per authority

By: Jon W. Oebker (0064255)
Tucker Ellis & West LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1414
Tel: (216) 592-5000
Fax: (216) 592-5009
E-mail: jon.oebker@tuckerellis.com

Counsel for Appellant Stephen M. Lester

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Appendix to

Reply Brief of Appellant Stephen M. Lester

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234 [2305.23.4], 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 [5111.01.8], and the enactment of *sections 2305.113 [2305.11.3], 2323.41, 2323.43,* and *2323.55 of the Revised Code* or or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of *sections 2125.02, 2305.10, 2305.131 [2305.13.1], 2315.18, 2315.19,* and *2315.21 of the Revised Code.*

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of *section 163.09 of the Revised Code.*

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

HISTORY:

GC § 12223-2; 116 v 104; 117 v 615; 122 v 754; Bureau of Code Revision, 10-1-53; 141 v H 412 (Eff 3-17-87); 147 v H 394. Eff 7-22-98; 150 v H 342, § 1, eff. 9-1-04; 150 v H 292, § 1, eff. 9-2-04; 150 v S 187, § 1, eff. 9-13-04; 150 v H 516, § 1, eff. 12-30-04; 150 v S 80, § 1, eff. 4-7-05; 152 v S 7, § 1, eff. 10-10-07.

Upon defendant's request, the court shall forthwith appoint counsel for appeal.

(C) Judgment.

A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence. Multiple judgments of conviction may be addressed in one judgment entry. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

HISTORY: Amended, eff 7-1-92; 7-1-98; 7-1-04; 7-1-09.