

[Cite as *State v. Drake*, 2018-Ohio-3592.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106551

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HOWARD L. DRAKE

DEFENDANT-APPELLANT

**JUDGMENT:
DISMISSED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-606259-A

BEFORE: Keough, J., E.A. Gallagher, A.J., and Jones, J.

RELEASED AND JOURNALIZED: August 30, 2018

APPELLANT

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ATTORNEYS FOR APPELLEE

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KATHLEEN ANN KEOUGH, J.:

{¶1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1. The purpose of an accelerated appeal is to allow this court to render a brief and conclusory opinion. *State v. Priest*, 8th Dist. Cuyahoga No. 100614, 2014-Ohio-1735, ¶ 1.

{¶2} Defendant-appellant, Howard Drake, appeals from the trial court's decision denying his Crim.R. 32.1 postsentence motion to withdraw his guilty plea. For the reasons that follow, we dismiss the appeal as being untimely.

{¶3} In 2017 and while his direct appeal was pending, the trial court denied Drake's Crim.R. 32.1 motion to withdraw his guilty plea. Drake appealed, and this court reversed the trial court's judgment, finding that it did not have jurisdiction to rule on the motion because the direct appeal was pending. *State v. Drake*, 8th Dist. Cuyahoga No. 105908, 2017-Ohio-7328. Accordingly, this court remanded the matter to the trial court to consider the merits of Drake's motion to withdraw his plea.

{¶4} The case was returned to the trial court's active docket on October 24, 2017, and days later, the state filed a brief in opposition to Drake's motion. On October 31, 2017, the trial court denied Drake's "motion to vacate and for post conviction relief," finding that "the state's brief in opposition to defendant's motion is well-taken." The following day on November 1, 2017, the trial court corrected its mistake and issued a nunc pro tunc entry stating: "motion to withdraw plea, pursuant to Crim.R. 32.1 is

denied. The state's brief in opposition to defendant's motion is well taken."¹ On December 1, 2017, Drake appealed the trial court's decision, attaching to his notice of appeal, the trial court's "nunc pro tunc entry as of and for 10/31/2017."

{¶5} It is well settled that a nunc pro tunc order does not affect substantive rights, and is not a new final order for purposes of appeal. Thus, it cannot be used to extend the time for filing an appeal. *Perfection Stove Co. v. Scherer*, 120 Ohio St. 445, 448-449, 166 N.E. 376 (1929) (nunc pro tunc entry that did not deprive the defendant of any rights the previous order had created, nor made that order any less final, was not effective to postpone the date when the period within which an appeal is authorized to be prosecuted begins to run); *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, syllabus ("A nunc pro tunc judgment entry issued for the sole purpose of complying with Crim.R. 32(C) to correct a clerical omission in a final judgment entry is not a new final order from which a new appeal may be taken"); *Gold Touch, Inc. v. TJS Lab, Inc.*, 130 Ohio App.3d 106, 109, 719 N.E.2d 629 (8th Dist.1998) ("the use of the nunc pro tunc

¹In response to Drake's subsequent request for findings of fact and conclusions of law, the trial court issued an order on December 12, 2017, explaining that

[T]he Eighth District Court of Appeals ordered that this matter be remanded to this court for its consideration and ruling on Drake's motion to withdraw plea, pursuant to Crim.R. 32.1. The Eighth District did not order that this court rule upon any previously-filed petition for post-conviction relief. The court corrected its entry of 10/31/17 on 11/1/17 (nunc pro tunc) and denied the motion to withdraw the plea. Because the October 31, 2017 order by this court is regarding a motion to withdraw guilty plea pursuant to Crim.R. 32.1, R.C. 2953.21 does not apply. No findings of fact or conclusions of law are required.

order in this case did not act to extend the normal thirty-day filing period for an appeal since no substantive changes were made to the final order”).

{¶6} In this case, the trial court entered the final appealable order on October 31, 2017, and its nunc pro tunc entry filed on November 1, 2017 did not restart the time period for perfecting an appeal. Therefore, Drake’s notice of appeal filed December 1, 2017, is untimely and therefore dismissed for lack of jurisdiction.

{¶7} Appeal dismissed.

It is ordered that appellee recover from appellant costs herein taxed.

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.

KATHLEEN ANN KEOUGH, JUDGE

EILEEN A. GALLAGHER, A.J., and
LARRY A. JONES, SR., J., CONCUR