[Cite as *State v. Hundzsa,* 2008-Ohio-4985.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-P-0012**
- vs -	:	
MICHAEL HUNDZSA,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2004 CR 0318.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 466 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Michael Hundzsa, pro se, Belmont Correctional Institution, P.O. Box 540, St. Clairsville, OH 43950-0540 (Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, Mr. Michael Hundzsa, appeals from the January 2, 2008 judgment entry of the Portage County Court of Common Pleas, which denied his motion for a modification of sentence. For the following reasons, we affirm.

{¶2} **Substantive and Procedural History**

{¶3} On October 22, 2004, Mr. Hundzsa pled guilty to two counts of gross sexual imposition, felonies of the third degree in violation of R.C. 2907.05(A)(4), and one count of disseminating matter harmful to juveniles, a felony of the fourth degree in

violation of R.C. 2907.31(A)(1) and (F). The court accepted his plea and sentenced him to a three-year term of imprisonment for each count of gross sexual imposition, and a one-year term for disseminating matter harmful to juveniles. Although the trial court found that in this case Mr. Hundzsa had a criminal history, and that because the harm was so great or unusual a single term would not adequately reflect the seriousness of the conduct, the sentences were still ordered to run concurrently to one another in the sentencing entry. Thus, from the judgment entry of his sentencing that was filed on October 25, 2004, Mr. Hundzsa was purportedly sentenced to a three-year term.

{¶4} Also on October 22, 2004, the court held a sexual predator hearing where it determined that Mr. Hundzsa was a sexually oriented offender, and notified him of his duty to register as a sexual offender.

{¶5} On October 27, 2004, the court filed a nunc pro tunc order and judgment entry, which changed the sentencing entry of October 25, 2004, to reflect that the state entered a nolle prosequi to the remaining counts in exchange for Mr. Hundzsa's guilty plea. Mr. Hundzsa had been indicted on August 12, 2004, for two counts of kidnapping, felonies of the first degree in violation of R.C. 2905.01; eleven counts of gross sexual imposition, felonies of the third degree in violation of R.C. 2907.05(A)(4); one count of importuning, a fourth degree felony in violation of R.C. 2907.07(A); and one count of disseminating matter harmful to juveniles, a fourth degree felony in violation of R.C. 2907.31(A)(1) and (F).

{¶6} On November 12, 2004, a notice of commitment and calculation of sentence from the Ohio Department of Rehabilitation and Correction was filed. Per the

notice, Mr. Hundzsa was admitted to the correctional facility and began serving his sentence on November 4, 2004.

{¶7} Roughly two months later, on January 13, 2005, the trial court issued another nunc pro tunc order and judgment entry, which changed the terms of the sentences to run consecutively instead of concurrently.

{¶8} On December 15, 2005, Mr. Hundzsa, pro se, filed a motion for postconviction relief, alleging sentencing errors in light of the United States Supreme Court's decision in *Blakely v. Washington* (2004), 542 U.S. 296. The court overruled the motion on December 20, 2005 without a hearing. Two years later, on December 17, 2007, Mr. Hundzsa filed a motion for a modification of his sentence with a hearing requested. The trial court denied this motion without granting a hearing on January 28, 2008. It is from this judgment entry that Mr. Hundzsa now timely appeals, raising five assignments of error:

{¶9} "[1.] The trial court committed error by Nunc Pro Tunc of Sentencing Journal Entry, which allowed unconstitutional standing, violating Appellant's 5th, 6th and 14th Amendment [sic] to the United States Constitution.

{¶10} "[2.] The trial court committed error, when it denied the Appellant's Motion for Modification of sentence, in violation of the Fourteenth Amendment to the United States Constitution.

{¶11} "[3.] Appellant is entitled to be re-sentenced under the current interpretation of Ohio's Sentencing Laws, which the trial court erred by issuing consecutive sentences, beyond the original sentencing order/beyond the minimum, guaranteed under the Fourteenth Amendment of the United States Constitution.

{¶12} "[4.] The Trial Court erred in accepting a Plea Bargain that the Counts were allied offenses, without considering the circumstances, in turn Nunc Pro Tunc the order to consecutive sentences, in violation of the Appellant's Fifth and Fourteenth Amendment to the United States Constitution.

{¶13} "[5.] Appellant lacked effective assistance of counsel at his sentencing phase, and Trial counsel denied Appellant effective assistance of counsel beyond sentencing, in violation of Appellant's Sixth and Fourteenth Amendment [sic] to the United States Constitution."

{¶14} **Burden of Appellant to Provide Transcript**

{¶15} At the outset we note that "[a]n appellant is required to provide a transcript for appellate review." *Warren v. Clay*, 11th Dist. No. 2003-T-0134, 2004-Ohio-4386, ¶4, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. "Such is necessary because an appellant shoulders the burden of demonstrating error by reference to matters within the record." Id., see *State v. Skaggs* (1978), 53 Ohio St.2d 162, 163.

{¶16} "This principle is embodied in App.R. 9(B), which states in relevant part:

{¶17} 'At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk. *** If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of all evidence relevant to the finds or conclusion.'" Id. at ¶6, quoting App.R. 9(B); see, also,

Streetsboro v. Hughes (July 31, 1987), 11th Dist. No. 1741, 1987 Ohio App. LEXIS 8109, 2.

{¶18} Thus, "[w]here portions of the transcript necessary for the resolution of assigned errors are omitted from the record, an appellate court has nothing to pass upon. As appellant cannot demonstrate these errors, the court has no choice but to presume the validity of the lower court's proceedings." Id. at ¶7, citing *State v. Ridgway* (Feb. 1, 1999), 5th Dist. No. 1998CA00147, 1999 Ohio App. LEXIS 766, 3, citing *Knapp*.

{¶19} Thus, in order to review the assignments of error Mr. Hundzsa has raised, he was required to supplement the record with a transcript of the sentencing hearing, and we have no choice but to presume the regularity of the proceedings below and affirm.

{¶20} **Nunc Pro Tunc Sentencing Entry**

{¶21} With this in mind, we turn to Mr. Hundzsa's first assignment of error, which addresses the trial court's nunc pro tunc entry of January 13, 2005, that corrected the sentencing entry to reflect that the sentences were to run consecutively. Mr. Hundzsa argues that in doing so, the trial court effectively increased his sentence from a three-year term to a seven-year term after he began serving his sentence, thus violating his rights to due process under the Fifth, Sixth, and Fourteenth amendments of the United States Constitution. We find this contention to be without merit.

{¶22} Mr. Hundzsa was already serving his sentence when the trial court filed the nunc pro tunc order and judgment entry on January 13, 2005. The notice of commitment and calculation of sentence from the Lorain Correctional Institution reflects

that Mr. Hundzsa was admitted to the institution on November 4, 2004, and lists his total sentence as a "3.00 term." The calculated release date was listed as August 9, 2007.

{¶23} Without the sentencing transcript, however, we cannot determine whether the trial court merely corrected a clerical error to reflect its previously imposed sentence or effectively increased Mr. Hundzsa's sentence after he began serving a "valid sentence."

{¶24} "The Ohio Supreme Court, in *State ex rel Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, discussed two exceptions to the general rule that a trial court lacks authority to reconsider its own valid judgments in criminal cases. The *Cruzado* court explained that a trial court is authorized to correct a void sentence. Additionally, a trial court can correct clerical errors in the judgment." *State v. Foy*, 5th Dist. No. 2006-CA-00269, 2007-Ohio-6578, ¶49.

{¶25} Once a defendant begins serving his sentence there is a finality to the judgment, and the trial court may not modify its previously imposed sentence. "As a general rule, the execution of a criminal sentence commences when a defendant has been sentenced to a term of imprisonment and the defendant has been delivered to a penal institution of the executive branch." *State v. Evans*, 161 Ohio App. 3d 24, 2005-Ohio-2337, ¶12, see, also *State v. Addision* (1987), 40 Ohio App.3d 7. "Thus, once a defendant has been delivered into the custody of the penal institution in which he is to serve his sentence, a trial court's authority to suspend or to modify a sentence is limited to those instances specifically provided by the General Assembly." Id., citing *State v. Gilmore* (Apr. 6, 1995), 8th Dist. No. 67575, 1995 Ohio App. LEXIS 1418, citing *Addision*. In effect then, a court has no authority to amend a valid sentence which has

been put into execution. Id. at ¶13, citing *State v. Lambert*, 5th Dist. No. 03-CA-65, 2003-Ohio-6791.

{¶26} If, however, the trial court was merely correcting the judgment entry to reflect Mr. Hundzsa's true sentence as imposed at the sentencing hearing, then there is no error. See *State v. Turner*, 8th Dist. No. 81449, 2003-Ohio-4493 (nunc pro tunc entry changing the individual sentences to run consecutively was merely correcting a clerical error since the transcript of the sentencing proceeding reflected that was the sentence originally imposed); *State v. Steinke*, 8th Dist. No. 81785, 2003-Ohio-3527, ¶45 (recognizing that ordinarily a court of record speaks only through its journal entries, but that in this case, the court made an apparent clerical or scrivener's error in journalizing the sentence it imposed in open court); *State v. House*, 8th Dist. No. 80939, 2002-Ohio-7227; *State v. Burnett* (Sept. 18, 1997), 8th Dist. No. 72373, 1997 Ohio App. LEXIS 4249.

{¶27} "'The purpose of a nunc pro tunc order is to have the judgment of the court reflect its true action. The power to enter a judgment nunc pro tunc is restricted to placing upon the record evidence of judicial action which has actually been taken. It does not extend beyond the power to make the journal entry speak the truth, and can be exercised only to supply omissions in the exercise of functions which are merely clerical. It is not made to show what the court might or should have decided, or intended to decide, but what it actually did decide.'" *Swift v. Gray*, 11th Dist. No. 2007-T-0096, 2008-Ohio-2321, ¶64, citing *McKay v. McKay* (1985), 24 Ohio App.3d 74, 75 (citations omitted) (Trapp, Mary J., concurring).

{¶28} "Further, '[w]hen a court exceeds its power in entering a purported nunc pro tunc order, that order is invalid.'" Id. at ¶65, citing *State v. Breedlove* (1988), 46 Ohio App.3d 78, 81, citing *National Life Ins. Co. v. Kohn* (1937), 133 Ohio St. 111, paragraph three of the syllabus. Thus, a nunc pro tunc entry could not be used if the court was attempting to impose a sentence that it merely intended to, yet did not, truly impose. See *State v. Delmar*, 3d Dist. Nos. 1-07-69 and 1-07-81, 2008-Ohio-1345 (that found the nunc pro tunc entry, which changed the sentences to run consecutively rather than concurrently was error as the modification was not an attempt to fix an a clerical omission, but was an actual change in the terms of the sentence); *State v. Mullens*, 9th Dist. No. 23395, 2007-Ohio-2893 (holding that the trial court improperly used a nunc pro tunc entry to modify the appellant's sentence, and that the original sentencing entry reflected the appellant's true sentence that was actually imposed at his sentencing hearing.)

{¶29} In this case, this is merely an exercise in speculation as we are bound to presume that the trial court was merely correcting a clerical error. Without a transcript of the sentencing hearing, we must presume regularity of the proceedings below and affirm. "When portions of the transcript necessary for the resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus as to the assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *State v. Mike*, 11th Dist. No. 2007-T-0116, 2008-Ohio-2754, ¶8, citing *Knapp* at 199; see, also, App.R. 9(B).

{¶30} Fundamentally, the record reflects that Mr. Hundzsa requested the entries from his guilty plea and sentencing on March 3, 2005, and that on November 2, 2005,

he was given copies of the original sentencing judgment entry of October 25, 2004, the judgment entry of the sexual predator hearing, and most importantly, both nunc pro tunc sentencing entries. Those documents included the October 27, 2004 entry, that nolled the remaining counts of the indictment, and the January 13, 2005 entry that corrected the sentences to run consecutively instead of concurrently.

{¶31} Mr. Hundzsa should and could have raised these issues in his petition for postconviction relief that was filed on December 15, 2005. A review of his petition reveals that Mr. Hundzsa argued that his sentence did not justify the imposition of a three year sentence in light of the United States Supreme Court's decision in *Blakely v. Washington*, supra. Although he had copies of all three sentencing entries, he seemed to be arguing under the premise that his sentence was only three years. It was not until his motion for modification of sentence that was filed two years later and is the basis of the present appeal that Mr. Hundzsa mentions the nunc pro tunc entry and argues that the trial court modified his sentence instead of merely correcting a clerical error.

{¶32} Thus, notwithstanding the failure to file a transcript of the sentencing hearing, Mr. Hundzsa's argument is also barred by the principles of res judicata. "[P]rinciples of res judicata prevent relief on successive, similar motions raising issues which were or could have been raised originally." *State v. Hall*, 11th Dist. No. 2007-T-0022, 2008-Ohio-2128, ¶21, citing *Brick Processors, Inc. v. Culbertson* (1981), 2 Ohio App.3d 478, paragraph one of the syllabus.

{¶33} Mr. Hundzsa's first assignment is without merit.

{¶34} **Motion for Modification of Sentence**

{¶35} In his second assignment of error, Mr. Hundzsa contends that the trial court erred in denying his motion for modification of sentence, in violation of his Fourteenth Amendment rights to the United States Constitution. Specifically, Mr. Hundzsa argues that the trial court effectively increased his sentence by issuing the January 13, 2004 nunc pro tunc entry that reflected the sentences were to run consecutively instead of concurrently. We find this argument to be without merit.

{¶36} As we noted above, without the transcript of the sentencing hearing, we must presume the regularity of the proceedings below, and affirm. *Mike* at ¶8, citing *Knapp* at 199; see, also, App.R. 9(B). Similarly, this argument should have been raised in his petition for postconviction relief and is barred by principles of res judicata. *Hall* at ¶21, citing *Brick Processors, Inc.* at paragraph one of the syllabus.

{¶37} As an aside, we also note that the trial court did find "that is a negotiated sentence and Defendant has served a prior prison term. The court further finds because of Defendant's criminal history and because the harm was so great or unusual that a *single term* does not adequately reflect the seriousness of the conduct." (Emphasis added.) Thus, the original sentencing entry does support a consecutively imposed term of incarceration, and not the concurrent term as the entry originally read and Mr. Hundzsa argues.

{¶38} Mr. Hundzsa's second assignment of error is without merit.

{¶39} **More than the Minimum**

{¶40} In his third assignment of error, Mr. Hundzsa contends that he is entitled to be resentenced because he was sentenced to a more than the minimum term, beyond the original sentencing order, and without the requisite statutory findings on the

record to explain why an enhanced sentence was necessarily imposed in this case. For similar reasons, we find this contention to be without merit.

{¶41} We cannot determine whether the trial court adequately reviewed the factors in sentencing Mr. Hundzsa to a more than the minimum sentence because Mr. Hundzsa failed to provide a transcript of the sentencing hearing. Thus, we must presume regularity of the proceedings and affirm. See *Mike* at ¶8, citing *Knapp* at 199; see, also, App.R. 9(B).

{¶42} Moreover, we note that the sentencing entry supports an enhanced sentence in that the trial court found Mr. Hundzsa to have a previous conviction, and that the harm in this case was so great or unusual that a single term did not adequately reflect the seriousness of the conduct, thus warranting an increased sentence.

{¶43} Mr. Hundzsa's third assignment of error is without merit.

{¶44} **Allied Offenses and Plea Bargain**

{¶45} In his fourth assignment of error, Mr. Hundzsa contends that the trial court erred in accepting his plea bargain, and by ordering consecutive sentences because the offenses were "allied offenses" as they occurred at the same time, and thus should have been merged for sentencing purposes. We find this argument to be without merit.

{¶46} Mr. Hundzsa was indicted on August 12, 2004, of two counts of kidnapping, felonies of the first degree in violation of R.C. 2905.01, eleven counts of gross sexual imposition, felonies of the third degree in violation of R.C. 2907.05, one count of importuning, a fourth degree felony in violation of R.C. 2907.07, and one count of disseminating matter harmful to juveniles, a fourth degree felony in violation of R.C.

2907.31. The indictment reflects that these acts occurred over a two year time period, from November 21, 2002 until August 9, 2004.

{¶47} Ohio's multiple-count statute, R.C. 2941.25, provides:

{¶48} "(A) where the same conduct by defendant can be construed to constitute two or more allied of offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶49} "(B) where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind *committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all them*." (Emphasis added.)

{¶50} Thus, the "allied-offense analysis will only be applied when the same conduct, or single act, results in multiple convictions." *State v. Ramos*, 11th Dist. No. 2007-G-2773, 2007-Ohio-6934, ¶48, citing *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, ¶17. A review of the incomplete record that was provided reflects that Mr. Hundzsa was charged with multiple, similar offenses that were committed over a two year period.

{¶51} Mr. Hundzsa's fourth assignment of error is without merit.

{¶52} **Ineffective Assistance of Counsel**

{¶53} In his last assignment of error, Mr. Hundzsa raises claims of ineffective assistance of counsel. Mr. Hundzsa contends that his counsel was deficient in "accepting" his plea bargain, in not advising the court that the offenses were "allied

offenses," and further, that she allowed the January 13, 2005 nunc pro tunc entry to be filed without argument. We find this argument to be without merit.

{¶54} Mr. Hundzsa's claims that he was deprived the effective assistance of counsel are barred by the principles of res judicata as he should have raised these claims on direct appeal or in his petition for postconviction relief. "[R]es judicata bars a claim of ineffective assistance of trial counsel raised for the first time in a postconviction motion where the issue could have been asserted on direct appeal without recourse to evidence dehors the record." *Mike* at ¶11.

{¶55} Furthermore, Mr. Hundzsa failed to include a transcript of the plea hearing and sentencing. "Where 'a transcript of the guilty plea hearing is not available, we cannot adequately determine whether appellant fully understood the sentencing consequences of his guilty plea, or what effect the alleged misinformation would have had on his guilty plea. ***'" *State v. Lloyd*, 11th Dist. No. 2006-L-185, 2007-Ohio-3013, ¶71, quoting *State v. Mack*, 11th Dist. No. 2005-P-0033, 2006-Ohio-1694, ¶19. "When portions of the transcript necessary to resolve issues are not part of the record on appeal, we must presume regularity in the trial court proceedings and affirm." Id. at ¶17; see, also, *Knapp* at 199.

{¶56} Mr. Hundzsa's fifth assignment of error is without merit.

{¶57} The judgment of the Portage County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., Dissents with Dissenting Opinion.

{¶58} I respectfully dissent.

{¶59} The majority cites to a portion of App.R. 9(B) and contends that in order to review Mr. Hundzsa's assignments of error, he was required to supplement the record with a transcript of the sentencing hearing. Thus, the majority holds that this court has no choice but to presume the regularity of the proceedings below and affirm. I disagree.

{¶60} App.R. 9(B) states in its entirety:

{¶61} "**(B) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.**

{¶62} "At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk. The reporter is the person appointed by the court to transcribe the proceedings for the trial court whether by stenographic, phonogramic, or photographic means, by the use of audio electronic recording devices, or by the use of video recording systems. If there is no officially appointed reporter, App.R. 9(C) or 9(D) may be utilized. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of all evidence relevant to the findings or conclusion.

{¶63} "Unless the entire transcript is to be included, the appellant, with the notice of appeal, shall file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript that the appellant intends to include in the

record, a statement that no transcript is necessary, or a statement that a statement pursuant to either App.R. 9(C) or 9(D) will be submitted, and a statement of the assignments of error the appellant intends to present on the appeal. If the appellee considers a transcript of other parts of the proceedings necessary, the appellee, within ten days after the service of the statement of the appellant, shall file and serve on the appellant a designation of additional parts to be included. The clerk of the trial court shall forward a copy of this designation to the clerk of the court of appeals.

{¶64} "If the appellant refuses or fails, within ten days after service on the appellant of appellee's designation, to order the additional parts, the appellee, within five days thereafter, shall either order the parts in writing from the reporter or apply to the court of appeals for an order requiring the appellant to do so. At the time of ordering, the party ordering the transcript shall arrange for the payment to the reporter of the cost of the transcript.

{¶65} "A transcript prepared by a reporter under this rule shall be in the following form:

{¶66} "**(1)** The transcript shall include a front and back cover; the front cover shall bear the title and number of the case and the name of the court in which the proceedings occurred;

{¶67} "**(2)** The transcript shall be firmly bound on the left side;

{¶68} "**(3)** The first page inside the front cover shall set forth the nature of the proceedings, the date or dates of the proceedings, and the judge or judges who presided;

{¶69} "**(4)** The transcript shall be prepared on white paper eight and one-half inches by eleven inches in size with the lines of each page numbered and the pages sequentially numbered;

{¶70} "**(5)** An index of witnesses shall be included in the front of the transcript and shall contain page and line references to direct, cross, re-direct, and re-cross examination;

{¶71} "**(6)** An index to exhibits, whether admitted or rejected, briefly identifying each exhibit, shall be included following the index to witnesses reflecting the page and line references where the exhibit was identified and offered into evidence, was admitted or rejected, and if any objection was interposed;

{¶72} "**(7)** Exhibits such as papers, maps, photographs, and similar items that were admitted shall be firmly attached, either directly or in an envelope to the inside rear cover, except as to exhibits whose size or bulk makes attachment impractical; documentary exhibits offered at trial whose admission was denied shall be included in a separate envelope with a notation that they were not admitted and also attached to the inside rear cover unless attachment is impractical;

{¶73} "**(8)** No volume of a transcript shall exceed two hundred and fifty pages in length, except it may be enlarged to three hundred pages, if necessary, to complete a part of the voir dire, opening statements, closing arguments, or jury instructions; when it is necessary to prepare more than one volume, each volume shall contain the number and name of the case and be sequentially numbered, and the separate volumes shall be approximately equal in length.

{¶74} "The reporter shall certify the transcript as correct, whether in written or videotape form, and state whether it is a complete or partial transcript, and, if partial, indicate the parts included and the parts excluded.

{¶75} "If the proceedings were recorded in part by videotape and in part by other media, the appellant shall order the respective parts from the proper reporter. The record is complete for the purposes of appeal when the last part of the record is filed with the clerk of the trial court."

{¶76} This writer stresses that according to App.R. 9(B), an appellant need not provide an entire transcript, but may "*** with the notice of appeal, *** file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript that the appellant intends to include in the record ***. *** If the appellee considers a transcript of other parts of the proceedings necessary, the appellee, within ten days after the service of the statement of the appellant, shall file and serve on the appellant a designation of additional parts to be included.

{¶77} "*** If the appellant refuses or fails, within ten days after service on the appellant of appellee's designation, to order the additional parts, the appellee, within five days thereafter, shall either order the parts in writing from the reporter or apply to the court of appeals for an order requiring the appellant to do so."

{¶78} Thus, based on App.R. 9(B), the prosecutor could have filed and served on Mr. Hundzsa a designation of additional parts to be included. If Mr. Hundzsa refused or failed to order the additional parts, the prosecutor should have either ordered the parts in writing from the reporter or applied to this court for an order requiring Mr. Hundzsa to do so.

{¶79} In addition, the majority finds Mr. Hundzsa's contention that the trial court erred by increasing his sentence in its nunc pro tunc judgment entry to be without merit. I disagree.

{¶80} The trial court's nunc pro tunc entry changed Mr. Hundzsa's sentence from concurrent to consecutive, thereby adding an additional four years. I believe that the trial court erred in entering the nunc pro tunc entry since the modification was not an attempt to fix an omission which was merely clerical, but rather changed the terms of the sentence. See *State v. Cunningham*, 3d Dist. Nos. 1-07-69 and 1-07-81, 2008-Ohio-1345, at ¶10. The majority cannot hide behind an incomplete reading and application of App.R. 9 to justify an affirmation, wherein the state of the record before us illustrates an impermissible modification of a sentence.

{¶81} For the foregoing reasons, I would reverse the judgment of the trial court.