

[Cite as *State v. Eicholtz*, 2015-Ohio-1937.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2014-CA-45
	:	
v.	:	T.C. NO. 11CR 494
	:	
JONATHAN EICHOLTZ	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 15th day of May, 2015.

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Defendant-Appellant

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FROELICH, P.J.

{¶ 1} Jonathan Eicholtz appeals from a post-judgment order of the Clark County Court of Common Pleas, which denied his motion for leave to file a delayed motion for new trial. An earlier order, from which Eicholtz had appealed, had denied as moot his “motion for leave to file a delayed appeal.” For the following reasons, we conclude that

any substantive issues related to the denial of Eicholtz's motion for leave to file a delayed motion for new trial could have been raised in his prior appeal and are barred by res judicata. Eicholtz had no right to appeal from the trial court's second (March 2014) entry, which was either in the nature of a nunc pro tunc entry or was a nullity, for the reasons described below.

{¶ 2} In January 2012, Eicholtz was convicted of aggravated burglary, abduction, and domestic violence; the trial court imposed an aggregate sentence of ten years of imprisonment. Eicholtz raised seven assignments of error in his direct appeal, and we affirmed his conviction. *State v. Eicholtz*, 2d Dist. Clark No. 2012-CA-7, 2013-Ohio-302 (*Eicholtz I*).

{¶ 3} In December 2012 and January 2013, Eicholtz filed three pro se motions or petitions in which he sought postconviction relief, a new trial, and/or to vacate his judgment of conviction, based on new evidence which allegedly supported his innocence and trial counsel's ineffectiveness in failing to uncover this evidence. In March 2013, the trial court overruled these motions. Eicholtz did not appeal from that judgment.

{¶ 4} On July 17, 2013, Eicholtz filed another pro se "postconviction motion" to vacate the judgment pursuant to R.C. 2953.21 and 2953.23 and a "motion for leave to file delayed motion for new trial." In support, he submitted affidavits from several individuals (including one whose affidavit had been submitted with his prior motion for new trial and petition for postconviction relief) which, in essence, attempted to present additional evidence of his innocence based on the defense theory presented at trial, namely that Eicholtz had not been the perpetrator of the offenses against the victim. The trial court overruled Eicholtz's petition in October 2013. In its order, the trial court also referred to a

“motion for leave to file a delayed appeal” and found the motion to be moot, stating that it “does not have authority to grant leave for a delayed appeal.”

{¶ 5} Eicholtz appealed from the October 2013 order, raising assignments of error related to the denial of his petition for postconviction relief. He did not raise any argument regarding the trial court’s denial of or its mischaracterization of his motion as a motion for leave to file a delayed appeal. In our Opinion rendered September 5, 2014, we recognized the trial court’s “mistaken” reference to the motion for leave to file a delayed appeal. *State v. Eicholtz*, 2d Dist. Clark No. 2013-CA-100, 2014-Ohio-3837, fn 1 (*Eicholtz II*). We also inferred that the trial court had denied the delayed motion for a new trial. We affirmed the trial court’s order. *Id.*

{¶ 6} In February 2014, Eicholtz filed a “motion for nunc pro tunc order correcting clerical mistakes in judgment, orders, or other parts of the record, and errors in the record arising from oversight or omission pursuant to Crim R. 36.” In this motion, Eicholtz asserted that the trial court had erred in stating, in its October 2013 post-judgment order, that it did not “have authority to grant leave for a delayed appeal” and that his motion to file a delayed appeal was “moot.” Eicholtz argued that 1) he actually sought leave to file a delayed motion for a new trial (not a delayed appeal), 2) the court ruled on a motion he did not file, 3) the court failed to rule on a motion he did file, and 4) he had therefore been unable to appeal because his motion for a new trial remained pending in the trial court. He asked that the court file a nunc pro tunc entry correcting the “clerical mistake” and overruling his motion for leave to file a delayed motion for new trial. In March 2013, the trial court filed a one-sentence entry which overruled Eicholtz’s motion for leave to file a delayed motion for new trial. Eicholtz appeals from that order.

{¶ 7} As noted above, in its October 2013 post-judgment order, the trial court referred to a motion for leave to file a delayed appeal, when no such motion was before it; rather, a motion for leave to file a delayed motion for new trial was pending. It does appear that the court misinterpreted the motion and overruled it for the wrong reasons. However, Eicholtz appealed from the October 2013 order. In doing so, he could have raised any alleged error in the trial court's order, including its failure to rule on the actual motion before it, its mischaracterization of the motion before it, and its incorrect rationale for denying it. In his February 2014 motion, Eicholtz alleges that the trial court erred in its October 2013 post-judgment order in that it failed to rule on the proper motion, but he did not allege this when he appealed the October 2013 order.

{¶ 8} Only one motion was pending before the trial court in October 2013: Eicholtz's motion for leave to file a delayed motion for new trial; a petition for postconviction relief was also pending. When the trial court overruled Eicholtz's "motion," there could have been no question as to which motion was at issue. (The court ruled on the petition in a separate sentence of the order.)

{¶ 9} Eicholtz appealed from the October 2013 order, and he could have raised at that time any infirmity in the trial court's order. Eicholtz did not attempt to raise any issues in that appeal related to the trial court's ruling on, or characterization of, his motion. Because he did not raise such arguments, when he could have done so, they are barred by res judicata. *State v. Haynes*, 2d Dist. Clark No. 2013-CA-90, 2014-Ohio-2675, ¶ 8, citing *State v. Griffin*, 138 Ohio St.3d 108, 2013-Ohio-5481, 4 N.E.3d 989.

{¶ 10} In February 2014, Eicholtz filed a motion for a nunc pro tunc entry correcting the court's prior order, in which he asserted that the court had misstated the

type of motion upon which it was ruling in October 2013 and had thereby deprived him of his right to appeal from the denial of his motion. In March 2014, the trial court filed a one-line entry overruling Eicholtz's motion for leave to file a delayed motion for new trial.

{¶ 11} The trial court's March 2014 order might properly be characterized as a nunc pro tunc entry, although the trial court did not label it as such, if the court intended, through that motion, to correct its mischaracterization of Eicholtz's motion in its prior order. "It is well settled that courts possess the authority to correct errors in judgment entries so that the record speaks the truth. Errors subject to correction by the court include a clerical error, mistake, or omission that is mechanical in nature and apparent on the record and does not involve a legal decision or judgment. Nunc pro tunc entries are used to make the record reflect what the court actually decided and not what the court might or should have decided or what the court intended to decide." (Internal citations omitted.) *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 18.

{¶ 12} A nunc pro tunc entry issued to correct a clerical error in a judgment of conviction is not a new final order from which a new appeal may be taken. *State v. Berryman*, 2d Dist. Montgomery No. 25081, 2012-Ohio-5208, ¶ 15. "Nunc pro tunc" means "now for then" and is commonly defined as "[h]aving retroactive legal effect through a court's inherent power." *Lester* at ¶ 19, citing Black's Law Dictionary (9th Ed.2009) 1174. Therefore, a nunc pro tunc entry by its very nature applies retrospectively to the judgment it corrects. *Id.* "A nunc pro tunc entry is the procedure used to correct clerical errors in a judgment entry, but the entry does not extend the time within which to file an appeal, as it relates back to the original judgment entry". *Id.*, quoting *State v. Yeaples*, 180 Ohio App.3d 720, 2009-Ohio-184, 907 N.E.2d 333, ¶ 15 (3d

Dist.). Thus, if the March 2014 order were properly characterized as a nunc pro tunc entry (as Eicholtz requested), Eicholtz had no right to appeal from it. We are reluctant, however, to characterize the order as a nunc pro tunc entry, where the trial court did not do so, and it is not at all clear that is what was intended or accomplished.

{¶ 13} If the March 2014 order were not a nunc pro tunc entry, it was a nullity for one of two reasons: 1) the trial court had already ruled on the motion, albeit inartfully, when it denied the motion before it in October 2013, or 2) the trial court lacked authority to rule on a motion for leave to file a delayed motion for new trial in March 2014, because an appeal of its prior order was then pending in this court.

{¶ 14} If the March 2014 order were a nunc pro tunc entry or a nullity, Eicholtz had no right to appeal from it. None of this denied Eicholtz's right to have any alleged errors considered by this court; we did exactly that in *Eicholtz II*, wherein we considered several alleged errors related to the trial court's denial of his petition for postconviction relief. Moreover, he could have appealed from the trial court's March 2013 judgment denying his first motion for new trial and petition for postconviction relief, in which he had also attempted to present new evidence.

{¶ 15} The appeal will be dismissed.

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FAIN, J. and WELBAUM, J., concur.

Copies mailed to:

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