[Cite as *State v. Wyant,* 2010-Ohio-3260.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 10CA3337
vs.	:	
STEVEN D. WYANT,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Robert A. Cassity, 612 Sixth Street, Courthouse Annex, Ste. A., Portsmouth, Ohio, 45662

COUNSEL FOR APPELLEE: Mark E. Kuhn, Scioto County Prosecuting Attorney, and Danielle M. Parker, Scioto County Assistant Prosecuting Attorney, 602 Seventh Street, Portsmouth, Ohio 45662

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 6-30-10

ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment that revoked a community control sanction and imposed an eight year jail sentence. Steven D. Wyant, defendant below and appellant herein, previously pled guilty to (1) burglary in violation of R.C. 2911.12 (A)(2), and (2) three counts of breaking & entering in violation of R.C. 2911.13(A). Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY ISSUING A NUNC PRO TUNC ENTRY MODIFYING APPELLANT'S SENTENCE."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY SENTENCING THE APPELLANT TO A PRISON TERM IN EXCESS OF THE PRISON TERM RESERVED AT SENTENCING."

{¶ 2} On June 17, 1999, the Scioto County Grand Jury returned an indictment charging appellant with burglary, grand theft and three counts of breaking and entering. He initially pled not guilty, but later pled guilty to burglary and three counts of grand theft. The trial court accepted his pleas and issued a judgment of conviction.

{¶ 3} On November 10, 1999, the trial court sentenced appellant, inter alia, to serve ninety days in the Scioto County Jail and five years community control, with at least six months to be under the "Intensive Supervision Probation Program." The court also warned appellant that any violation of his sentence could lead to more restrictive sanctions, including "a prison term of up to 5 years." (Emphasis added.)

{¶ 4} Unfortunately, appellant made poor use of his opportunity to rehabilitate himself and in December 2001, tested positive for THC.[1] Appellant also violated curfew and, in late April 2002, neglected to continue to report to his probation officer. Appellant's whereabouts remained unknown until his November 2006 arrest for some other offense.

{¶ 5} On January 10, 2007, the trial court granted appellant's request to

[1] We presume that the term "THC," as used by the Scioto County Probation Department and the trial court, refers to the chemical compound tetrahydrocannabinol found in marijuana.

participate in a program at the "STAR Community Justice Center." Although the record is somewhat confusing, it appears that appellant successfully completed the STAR program and the court ordered him "released from custody" on May 1, 2008. Once again, however, appellant failed to take advantage of the opportunities afforded to him. Appellant stopped reporting to his probation officer in the spring and summer of 2008 and, in early October 2008, tested positive for marijuana.

{¶ 6} On October 16, 2008, the trial court revoked appellant's community control and sentenced him to serve five years in prison on the burglary conviction and twelve months on each of the breaking and entering convictions. The court ordered the sentences to be served consecutively to one another for an aggregate prison sentence of eight years.

{¶ 7} Appellant filed a timely pro se notice of appeal. Several months later, the trial court issued a "nunc pro tunc" entry, ostensibly to correct the 1999 sentencing entry. Specifically, the nunc pro tunc entry changed that part of the 1999 judgment that warned appellant that he could be sentenced to up to five years in prison for violating community control. The nunc pro tunc entry states that appellant could be sentenced to eight years for violating community control, thus matching the sentence imposed on him when his community control was revoked in 2008.

{¶ 8} An appeal was taken from the judgment that imposed the eight year prison sentence, but we dismissed it for the lack of a final appealable order. We note that count two of the indictment had not been resolved. See State v. Wyant, Scioto App. No. 08CA3264, 2009-Ohio-5200, at ¶10 (Wyant I). After Count two was dismissed, this appeal followed.

{¶ 9} Unfortunately, we must dismiss this appeal a second time for lack of jurisdiction. In Wyant I, at ¶10, fn. 2, we noted that a problem exists with both the 1999 sentencing entry and the 2009 nunc pro tunc entry. In particular, the problem is that the restitution that the trial court ordered appellant to pay to "Melissa Ehrhard" was never determined and that the court left it to the probation department to determine an amount of restitution. We cautioned that this could be a jurisdictional defect, but did not address it due to the fact that count two remained pending and that fact deprived us of jurisdiction.

{¶ 10} R.C. 2929.18(A)(1) mandates, in pertinent part, that "[i]f the court imposes restitution, at sentencing, the court shall determine the amount of [that] restitution." (Emphasis added.) Judgments that impose restitution, but do not determine the amount to be imposed, do not constitute final appealable orders. See In re Zakov (1995), 107 Ohio App.3d 716, 718, 669 N.E.2d 344; State v. Baker, Butler App. No. CA2007-06-152, 2008-Ohio-4426, at ¶43; State v. Kuhn, Defiance App. No. 4-05-23, 2006-Ohio-1145, at ¶8. Indeed, the Second Appellate District considered a nearly identical situation (a trial court deferred the amount of restitution to be determined by a probation department) and held that the entry is interlocutory. See State v. Plassenthal, Montgomery App. No. 22464, 2008-Ohio-5465, at ¶¶2&8.

{¶ 11} In the case sub judice, because the 1999 sentencing entry did not determine an amount of restitution for one of the victims, it, too, is interlocutory. Additionally, the 2009 nunc pro tunc sentencing entry, assuming arguendo that this is a correct use of a nunc pro tunc entry, also did not determine an amount of restitution. Thus, absent a final appealable order this court has no jurisdiction to consider this

appeal.

{¶ 12} In drawing this problem to the trial court's attention in Wyant I, at ¶10, fn. 2, we cited State v. Threatt, 108 Ohio St.3d 277, 843 N.E.2d 164, 2006-Ohio-905, wherein the Ohio Supreme Court held that a sentencing entry that assesses an undetermined amount of court costs to be paid by the defendant is a final order because the calculation of costs is merely a "ministerial" or mechanical task. Id. at ¶¶20-21. Besides, the Court noted, specific amounts of court costs are rarely included in a sentencing entry. Id. ¶19.

{¶ 13} Here, we do not believe that Threatt mandates a similar outcome. Calculating restitution is not ministerial and requires more than simply compiling a bill. The victim must be contacted and it must be determined the extent of damage that she sustained. A trial court also plays a much greater role in determining an appropriate amount of restitution rather than the calculation of court costs.

{¶ 14} Accordingly, based upon the foregoing reasons, we have no jurisdiction to consider this matter and the appeal is hereby dismissed.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the appeal be dismissed and the parties split the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an

application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, P.J. & Kline, J.: Concur in Judgment& Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.