[Cite as *State v. Moore*, 2015-Ohio-2090.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 13CA987
vs.	:	
PERRY MOORE,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Bryan Scott Hicks, P.O. Box 359, Lebanon, Ohio 45036

COUNSEL FOR APPELLEE: David Kelley, Adams County Prosecuting Attorney, and Jonathan Coughlan, Adams County Assistant Prosecuting Attorney, 110 West Main Street, Room 112, West Union, Ohio 45693

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:5-18-15
ABELE, J.

{¶ 1} This is an appeal from an Adams County Common Pleas Court judgment that re-imposed sentence. A jury found Perry Moore, defendant below and appellant herein, guilty of (1) two counts of trafficking in violation of R.C. 2925.03(A)(1); and (2) carrying a concealed weapon in violation of R.C. 2923.12(A). Appellant assigns the following "errors" for review:[1]:

[1] Appellant's brief does not contain a separate statement of the assignments of error. See App.R. 16(A)(3). Thus, we take these assignments of error from his table of contents. We also note that appellant does not posit a second assignment of error, but rather characterizes it as a "possible" assignment of error. However, App.R. 12(A)(1)(b) mandates that cases be decided on the basis of the "assignments of errors." There is no requirement that we consider "possible"

FIRST ASSIGNMENT OF ERROR:

"THE COURT ERRED IN NOT SENTENCING UNDER H.B. 86."

SECOND ASSIGNMENT OF ERROR:

"THE COURT HAD LOST JURISDICTION TO RESENTENCE."

{¶ 2} On October 27, 2008, the Adams County Grand Jury returned an indictment that charged appellant with the aforementioned offenses.[2] In July 2009, a jury found appellant guilty of the offenses. The trial court sentenced appellant to serve four years in prison on the first trafficking count, one year on the second trafficking count, and one year on the concealed weapon count, with those sentences to be served concurrently for a total of four years incarceration. We affirmed appellant's conviction. See *State v. Moore*, 190 Ohio App.3d 102, 2010-Ohio-4575, 940 N.E.2d 1003 (4th Dist.).

{¶ 3} On October 28, 2011, appellant filed a pro se motion "to impose a valid sentence." The gist of his argument was that the 2009 sentencing entry did not specify that the four year sentence on the first trafficking count was mandatory. The trial court apparently agreed, and on August 10, 2012 filed a "Nunc Pro Tunc" entry that makes no other apparent changes to the original entry, except to specify that the sentence on the first trafficking charge is "mandatory" rather than a "stated prison sentence" as characterized in the original.

{¶ 4} Approximately five months later, appellant filed another pro se pleading for

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assignments of error.

[2] Appellant was also charged with drug possession, but that charge was later dismissed.

"Judicial Notice" and argued that the Nunc Pro Tunc entry was "void" on its face. Specifically, appellant challenged the change of his "non-mandatory" prison sentence to a "mandatory" prison sentence without the trial court having held a re-sentencing hearing. The trial court agreed with his argument and, on June 12, 2013, concluded that the Nunc Pro Tunc entry is void because (1) it provided for re-sentencing without a de novo re-sentencing hearing, and (2) the court's entry amounted to an improper use of a nunc pro tunc judgment. The trial court ordered appellant to appear in court for a de novo sentencing hearing.

{¶ 5} On October 10, 2013, the trial court held the sentencing hearing. By that time, however, appellant had completed his prison sentence. Although some dispute arose over the statutory framework to apply in re-sentencing appellant, those arguments (as discussed infra) are not pertinent to our disposition of the case. The trial court re-imposed a cumulative four year prison sentence. The court further indicated that it "absolutely" did not intend to impose any additional prison time. The trial court issued its judgment on October 24, 2013 and noted that appellant's "sentence [was] served," and further, acknowledged, appellant had "completed his sentence effective July 16, 2013 . . ." In short, the re-sentencing entry imposed no additional prison time. This appeal followed.

{¶ 6} Before we address the assignments of error on their merits, we first address a threshold jurisdictional issue. The principle of "judicial restraint" mandates that Ohio courts should not exercise jurisdiction over questions of law that have been rendered moot. *Miner v. Witt*, 82 Ohio St. 237, 92 N.E. 21, at the syllabus (1910); also see *Gold Key Realty v. Collins*, 2nd Dist. Greene No. 2013 CA 57, 2014-Ohio-4705, at ¶23. A case is "moot" when a determination is sought on a matter that, when rendered, has no practical effect on the existing controversy.

Black's Law Dictionary 909 (5th Ed. 1979). Courts should not answer moot questions. If a question is moot, the appeal should be dismissed. See *Miner*, supra, at the syllabus. Our Second District colleagues observed:

> "The concept of mootness is firmly rooted in Article III, Section 2, of the United States Constitution, conferring power upon courts to hear cases or controversies. Mootness presents a question of jurisdiction because a lack of an actual case or controversy between the parties renders it necessarily impossible for a court to grant any meaningful relief. Obviously, a judgment cannot be carried into effect when the underlying issue at hand is abstract, hypothetical, or otherwise potential. Although Ohio does not have a constitutional counterpart to Article III, Section 2, courts throughout Ohio continue to follow the long-standing concept of judicial restraint, mandating that courts entertain jurisdiction only over questions that are not moot." (Case Citations omitted.)

See *Gold Key Realty v. Collins*, 2nd Dist. Greene No. 2013CA57, 2014-Ohio-4705, at ¶23; *Brown v. Dayton*, 2nd Dist. Montgomery App. No. 24900, 2012- Ohio-3493, at ¶10.

{¶ 7} As we note above, an issue is moot when it has no practical significance and, instead, presents a hypothetical or academic question. See *State v. Jeffrey*, 2nd Dist. Montgomery No. 24850, 2012-Ohio-3104, at ¶17; *In re Guardianship of Weller*, 2nd Dist. Montgomery No. 24337, 2011- Ohio-5816, at ¶7. In the case sub judice, because the trial court indicated that appellant will not serve any additional prison time, any ruling we make will have no practical effect. No ruling we make could benefit appellant (i.e. he has already served his sentences and that time cannot be restored), and no ruling we make could work to appellant's detriment (i.e. requiring him to serve more time in prison). In short, any ruling we issue in this case would amount to an advisory opinion. Once again, appellate courts have been admonished to refrain from rendering advisory opinions. See, generally, *Tewksbury v. Tewksbury*, 194 Ohio App.3d 603, 2011-Ohio- 3358, 957 N.E.2d 362, at ¶13 (4th Dist.); *In re Arnott*, 190 Ohio App.3d 493,

2010-Ohio-5392, 942 N.E.2d 1124, at ¶28 (4th Dist.).

> With regard to the issue of mootness, on many occasions we have noted as follows:
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> An appeal challenging a felony conviction is justiciable, i.e., not moot, even if the defendant has served sentence because the defendant "has a substantial stake in the judgment of conviction which survives the satisfaction of the judgment imposed upon him or her. This is because when the defendant has served his punishment, "there is no collateral disability or loss of civil rights that can be remedied by a modification of the rights of the sentence in the absence of a reversal of the underlying conviction. * * * [A]nd no relief can be granted* * * subsequent to the completion of the sentence if the conviction itself is not at issue.'" (Emphasis added.) (Citations omitted.)

State v. Ogle, 4th Dist. Hocking Nos. 11CA29, 11CA32, 12CA2, 12CA11, 12CA12 & 12CA19, 2013-Ohio-3420, at ¶57; also see e.g. *State v. McKinnon*, 4th Dist. Ross No. 12CA3337, 2013-Ohio-2324, at ¶11; *State v. Popov*, 4th Dist. Lawrence No. 10CA26, 2011-Ohio-372, at ¶¶5-6.

{¶ 8} Once again we emphasize that appellant in the case sub judice does not challenge his underlying conviction, but, rather, the prison sentence that the trial court imposed. We further point out that his sentences have been completed and the trial court imposed no additional prison time. Thus, any arguable error in re-sentencing has been rendered moot, and we reject appellant's assignments of error.

{¶ 9} Accordingly, based upon the foregoing reasons, we hereby dismiss this appeal.

APPEAL DISMISSED.

Harsha, J., concurs.

{¶ 10} I agree that this appeal is moot and I am persuaded that dismissal of the appeal, rather than affirmance of the trial court's reimposition of sentence, is required under the

mootness doctrine.

{¶ 11} Moore has completed his sentence, so there is no remedy we can provide him. "It is not the duty of the court to answer moot questions, and when, pending proceedings in error in this court, an event occurs, without the fault of either party, which renders it impossible for the court to grant any relief, it will dismiss the petition in error." *Miner v. Witt*, 82 Ohio St. 237, 92 N.E. 21 (1910), syllabus. " 'Where a defendant, convicted of a criminal offense, has voluntarily paid the fine or completed the sentence for that offense, an appeal is moot when no evidence is offered from which an inference can be drawn that the defendant will suffer some collateral disability or loss of civil rights from such judgment of conviction.' " *State v. Wilson*, 41 Ohio St.2d 236, 325 N.E.2d 236 (1975), syllabus; *In re Helfrich*, 5th Dist. Licking No. 13CA20, 2014-Ohio-1933, ¶ 26. An appeal is moot if the sentence challenged has expired and the person has been released from prison. *State ex rel. Gordon v. Murphy*, 112 Ohio St.3d 329, 2006-Ohio-6572, 859 N.E.2d 928, ¶ 6. In general, an appeal from a criminal sentence is moot if the defendant completes the sentence because the appellate court cannot restore to [the appellant] any of the time he spent in jail. *See* Painter and Pollis, Baldwin's Ohio Appellate Practice, Section 7:2 (2014), citing *State v. MacConnell*, 2d Dist. Montgomery No. 25437, 2013-Ohio-4947.

{¶ 12} Unless the appellate court is affirming the dismissal of a claim based on mootness, dismissal is normally appropriate because the reviewing court lacks jurisdiction to address the merits of the judgment being contested. In other words, there is no justiciable case or controversy to decide. Painter and Pollis, at Section 7:2 ("A court of appeals will thus dismiss a case for mootness if there is no longer a live controversy between the parties"); *Miner*; *Gordon*;

MacConnell. To be sure, this court has at times affirmed the judgment of trial courts in similar circumstances. *See State v. Popov*, 4th Dist. Lawrence No. 10CA26, 2011-Ohio-372 (rejecting appellant's assignments of error based on mootness because he challenged only the length of his sentence that had expired, but affirming the trial court's judgment sentencing him to prison for a violation of community control sanctions); *State v. McKinnon*, 4th Dist. Ross No. 12CA3337, 2013-Ohio-2324 (applying Popov to affirm a sentence based on mootness). But in those cases we did not consider whether dismissal was the more appropriate resolution of the appeal.

{¶ 13} Notably, on other occasions we have dismissed appeals based on mootness, including ones where the appellant was challenging a sentence that had expired. *See State v. Stacey*, 4th Dist. Lawrence No. 05CA12, 2005-Ohio-5014; *Millenia Housing Management, Ltd. v. Withrow*, 4th Dist. Athens No. 12CA2, 2013-Ohio-278.

{¶ 14} Because I am persuaded that the proper resolution of these cases is dismissal—where the trial court itself failed to dismiss the claim or motion as moot—we should do so to be consistent with controlling precedent. Although the trial court mentioned that Moore had served his sentence, it did not appear to dismiss his motion based on mootness. Instead, it held a resentencing hearing and reimposed his sentence. Thus, I agree that we must dismiss this case based on mootness.

JUDGMENT ENTRY

It is ordered the judgment be affirmed and appellee recover of appellant 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 Adams 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.

Hoover, P.J.: Concurs in Judgment & Opinion
Harsha, J.: Concurs with Concurring 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.