

[Cite as *State v. Evans*, 2016-Ohio-1434.]

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

STATE OF OHIO, :
 :
Plaintiff-Appellee, : Case No. 15CA15
 :
vs. :
 :
DION M. EVANS, : DECISION AND JUDGMENT ENTRY
 :
Defendant-Appellant. :

APPEARANCES:

Dion M. Evans, #537-957, Marion, Ohio, Pro Se

Judy C. Wolford, Pickaway County Prosecuting Attorney, and Jayme Hartley Fountain,
Pickaway County Assistant Prosecuting Attorney, Circleville, Ohio, for appellee

CRIMINAL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED: 3-18-16

ABELE, J.

{¶ 1} This is an appeal from a Pickaway County Common Pleas Court judgment that denied a motion to vacate the trial court’s nunc pro tunc entry. Dion M. Evans, defendant below and appellant herein, assigns the following error for review:

“[THE] TRIAL COURT LACKED JURISDICTION TO ISSUE A
NUNC PRO TUNC ENTRY[.]”

{¶ 2} In 2006, appellant was convicted of (1) two counts of burglary in violation of R.C. 2911.12(A)(2); (2) two counts of theft in violation of R.C. 2913.02; (3) failure to comply with the order of police in violation of R.C. 2921.331(B); (4) safe cracking in violation of R.C.

2911.13(A); and (5) receiving stolen property in violation of R.C. 2913.51. We affirmed his conviction and sentence. See *State v. Evans*, 4th Dist. No. 06CA34, 2007-Ohio-6575 (*Evans I*). The Ohio Supreme Court declined to hear any further appeal. See *State v. Evans*, 119 Ohio St.3d 1449, 2008-Ohio-4487, 893 N.E.2d 518 (*Evans IA*). In 2009, the trial court denied appellant's motion for new trial. We affirmed that judgment as well. See *State v. Evans*, 4th Dist. No. 09CA20, 2010-Ohio-5838 (*Evans II*).

{¶ 3} On August 24, 2010, appellant filed a motion with the trial court for “de novo sentencing” because the trial court failed to include language in its sentencing entry about the consequences of violating post-release control. The trial court overruled his motion. We, however, reversed, and remanded for the correction of the sentencing entry through a nunc pro tunc entry pursuant to R.C. 2929.191. See *State v. Evans*, 4th Dist. No. 10CA33, 2011-Ohio-4630 (*Evans III*). On September 12, 2011, the trial court filed its nunc pro tunc entry and corrected the omission from its original sentencing entry.¹ No direct appeal was taken from that entry.

{¶ 4} More than three years later, on April 3, 2015, appellant commenced the instant proceedings with a motion that asked the trial court to vacate the 2011 nunc pro tunc entry. The gist of his argument was that a nunc pro tunc entry could not be used to enhance or modify a previous sentence. The State's brief pointed out that the trial court issued the nunc pro tunc entry pursuant to this Court's order and did not modify an existing sentence. The trial court

¹ On November 10, 2011, two months after our ruling in *Evans III*, appellant filed another motion “to vacate and correct sentence,” and challenged that part of the 2006 judgment that imposed twenty additional months of imprisonment for violating post-release control that was, apparently, imposed after a conviction in Franklin County. The December 7, 2011 judgment denied that motion. We affirmed the trial court's decision. See *State v. Evans*, 4th Dist. Pickaway No. 11CA24, 2012-Ohio-4143.

agreed and, on April 14, 2015, denied the motion to vacate. This appeal followed.²

{¶ 5} The text of appellant's assignment of error asserts that the trial court "lacked jurisdiction" to issue the 2011 nunc pro tunc entry. We disagree with appellant. The term "jurisdiction" refers to a court's constitutional and statutory power to adjudicate a case. See e.g. *State v. Gaston*, 197 Ohio App.3d 501, 2011-Ohio-6317, 968 N.E.2d 24, at ¶16 (2nd Dist.); *State v. Oglesby*, 5th Dist. Richland, No. 15CA42, 2015-Ohio-4931, at ¶10. Despite reading and re-reading the appellant's arguments, we discern no statutory, constitutional or case law citation that stands for the proposition that the trial court lacked the ability to issue the nunc pro tunc entry. Further, we have found no authority in our own research. We thus conclude that the trial court possessed jurisdiction to issue the nunc pro tunc entry.

{¶ 6} To whatever extent appellant's argument could be construed as alleging a non-jurisdictional error on the trial court's part, we also find no merit to his position. Because appellant filed no direct appeal from *Evans III*, he waived any alleged error. The matter is now res judicata. Inasmuch as that decision was not reversed by either the Ohio or the United States Supreme Court, it is now the "law of the case."³

² After some initial misgivings whether we had jurisdiction to consider the case sub judice, we held that the trial court's April 14, 2015 judgment is a final appealable order. See *State v. Evans*, 4th Dist. Pickaway No. 15CA15, 2015-Ohio-3649, at ¶5.

³ We apply the "law of the case doctrine" solely to any trial court error that appellant may be interpreted as arguing in his brief. Jurisdictional issues are not shielded by that doctrine. See *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 819, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988). As we noted previously, appellant did not demonstrate that the trial court lacked jurisdiction to issue the 2011 nunc pro tunc entry.

{¶ 7} The “law of the case” doctrine holds that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *State v. Hardie*, 171 Ohio App.3d 429, 870 N.E.2d 1231, 2007-Ohio-2755, at ¶14 (4th Dist.); *State v. Clagg*, 4th Dist. Washington No. 06CA44, 2007- Ohio-1661, at ¶16. As with his prior jurisdictional argument, appellant’s brief neglects to set out how, or why, the trial court’s nunc pro tunc entry is erroneous.

{¶ 8} The argument portion of appellant's brief appears to consist of string citations that span two pages. Many of those cases address the proper use of a nunc pro tunc entry. Thus, we believe that the underlying premise of appellant’s argument is that a nunc pro tunc entry is improper. We disagree.

{¶ 9} First, as noted above, the *Evans III* decision is the “law of the case.” Second, even if our decision was in error, appellant could have filed an appeal from *Evans III*, but he did not. The matter is now res judicata.

{¶ 10} In his “statement of the facts and the case,” appellant also appears to argue that the trial court did not allow him to be “physically present” when the trial court issued the nunc pro tunc entry. In his conclusion, appellant argues that he “had a due process interest in the hearing that issued the nunc pro tunc entry and the [t]rial [c]ourt did so outside” his presence. Normally, we would not consider this particular issue because appellant did not assign it as a separate assignment of error, but instead only as an underlying argument. Reviewing courts address assignments of error, not various arguments that may underlie those assignments of error. See e.g. App.R. 12(A)(1)(b); also see *State v. Munoz*, 10th Dist. Franklin No. 11AP–475, 2011-Ohio-6672, at ¶7, fn. 1; *State v. Norman*, 10th Dist. Franklin No. 10AP–680,

2011-Ohio-2870, at ¶13, fn. 1. However, we depart from that general rule here as the State of Ohio appears to concede in its brief that, although the trial court had jurisdiction to enter its 2011 judgment, appellant should have been present at that time. The State concedes that appellant's assignment of error should be sustained as it relates to this issue. We, however, disagree with both appellant and the State on this particular point.⁴

{¶ 11} Appellant's argument is rooted in R.C. 2929.191(C) which states, in pertinent part, "after July 11, 2006, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division." (Emphasis added.) We interpret appellant's argument to be that the trial court neglected to hold a hearing on this issue while he was present. Indeed, the State agrees that the trial court erred by not having appellant appear for some sort of recitation of our previously ordered nunc pro tunc judgment. However, our decision in *Evans III* was grounded in R.C. 2929.19, rather than R.C. 2929.191. We noted in *Evans III* that appellant received notice at the sentencing hearing of the consequences for violating post-release control, but those consequences were erroneously omitted from the sentencing entry. 2011-Ohio-4630, at ¶6. Consequently, we instructed the trial court to issue a nunc pro tunc entry to carry over the court's verbal instructions into its final

⁴ The State's concession leads to a conclusion that the nunc pro tunc entry should be affirmed, but that the trial court must go through the empty gesture of having appellant returned to open court solely to observe the entry's execution. We believe that in light of the facts present in this case, such action is unnecessary. See, generally, *State v. Cabrales*, 118 Ohio St.3d 548, 2008-Ohio-1625, 886 N.E.2d 181, at ¶20; also see e.g. *State v. Blagajevic*, 21 Ohio App.3d 297, 299, 488 N.E.2d 495 (8th Dist.1985).

order. Id. at ¶9. R.C. 2929.191 was enacted as a remedial provision to correct those situations where the State did not comply with the provisions of R.C. 2929.19. See *State v. McKinney*, 11th Dist. Trumbull No. 2010-T-001, 2010-Ohio-6445, at ¶¶19-21; *State v. Conway*, 2nd Dist. Clark No. 2010-CA-50, ¶¶21-23. *Evans III* was not a situation in which a case was remanded to comply with those provisions. This case was remanded to include a provision in the final entry that was inadvertently omitted after the trial court orally stated the information at the sentencing hearing.

{¶ 12} Accordingly, for these reasons, we hereby overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that 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 Pickaway 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, J. & Hoover, 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.