[Cite as *State v. Griffin*, 2010-Ohio-3517.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
SANDRA GRIFFIN	:	Case No. 09CA21
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 89CR13
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	July 27, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ROBERT J. BATCHELOR 318 Chestnut Street Coshocton, OH 43812	STEPHEN P. HARDWICK 250 East Broad Street Suite 1400 Columbus, OH 43215

Farmer, J.

{¶1} On February 27, 1989, the Coshocton County Grand Jury indicted appellant, Sandra Griffin, on one count of aggravated murder with specifications in violation of R.C. 2903.01(A), R.C. 2929.04(A)(7), and R.C. 2941.141, one count of aiding and abetting marijuana trafficking in violation of R.C. 2925.03(A)(6) and R.C. 2923.03(A)(2) or (3), one count of aiding and abetting a dangerous ordnance in violation of R.C. 2923.17 and R.C. 2923.03(A)(2) or (3), one count of aiding and abetting grand theft in violation of R.C. 2913.02(A)(1) and R.C. 2923.03(A)(2) or (3), one count of aiding and abetting aggravated robbery with a specification in violation of R.C. 2913.02(A)(1), R.C. 2923.03(A)(2) or (3), and R.C. 2941.141, and one count of abuse of a corpse in violation of R.C. 2927.01(B). Said charges arose from the death of James Steurer, Sr.

{¶2} On November 1, 1989, appellant waived her right to a speedy trial and her right to be tried by a three-judge panel or a jury. The state agreed not to pursue the death penalty, but would not dismiss the death specification.

{¶3} A trial before a single judge commenced on December 7, 1989. The trial court found appellant guilty of all counts except the trafficking in marijuana charge and the abuse of a corpse charge which were dismissed. By judgment entry on sentencing filed January 29, 1990, the trial court sentenced appellant to an aggregate term of life imprisonment with parole eligibility after thirty years, and ordered her to serve three years actual incarceration on the firearm specification, to be served consecutively.

{¶4} This court affirmed appellant's conviction. See, *State v. Griffin* (1992), 73 Ohio App.3d 546, further appeal dismissed (1992), 64 Ohio St.3d 1428.

{¶5} On August 4, 2009, appellant filed a motion for a final appealable order pursuant to *State v. Baker,* 119 Ohio St.3d 197, 2008-Ohio-3330. On August 27, 2009, the trial court filed a new judgment entry on sentencing, once again sentencing appellant to life imprisonment with parole eligibility after thirty years plus the three years for the firearm specification.

{¶6} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶7} "THE TRIAL COURT ERRED BY PERMITTING A SINGLE JUDGE TO HEAR HER CAPITAL TRIAL AND SENTENCING HEARING."

I

{¶8} Appellant brings forth this appeal based upon a resentencing under *State v. Baker,* 119 Ohio St.3d 197, 2008-Ohio-3330. Appellant argues she is entitled to a de novo direct appeal after resentencing.

{¶9} *Baker* involved Crim.R. 32(C) which states, "[a] judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence." The *Baker* court held the following at syllabus:

{¶10} "A judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court."

{¶11} Preliminarily, it is necessary to review whether a *Baker* resentencing was appropriate. Pursuant to R.C. 2929.03(F), applicable during appellant's original trial, a trial court is required to file a separate opinion when it imposes life imprisonment:

{¶12} "The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors."

{¶13} Despite the *Baker* error in the trial court's original judgment entry, a proper entry pursuant to R.C. 2929.03(F) could rectify the *Baker* error and render the resentencing moot. Therefore, this court searched the dockets of the Court of Appeals and the Supreme Court of Ohio as to the filing of separate findings of fact pursuant to R.C. 2929.03(F). However, the dockets did not reveal any separate findings.

{¶14} From our review of the trial court's judgment entries, we find a judgment entry of conviction filed on December 21, 1989 wherein the trial court announced its verdicts, and a separate sentencing entry filed on January 29, 1990 wherein the trial court imposed the sentence. If we were permitted to read the two judgment entries in pari materia, there would be no *Baker* argument. Unfortunately, this is not the law.

{¶15} On February 14, 1991, the trial court denied appellant's motion for a new trial. The judgment entry included some Crim.R. 32(C) mandates, but did not include the sentence.[1] We conclude a *Baker* resentencing was appropriate.

[1]At the time of sentencing, Crim.R. 32(B) was applicable which is now Crim.R. 32(C).

{¶16} Before addressing this assignment, it is necessary to determine if a de novo review is mandated or if our review is limited to the resentencing only. In order to determine this, it is important to review the holding in *Baker* at ¶18:

{¶17} "We now hold that a judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court. Simply stated, a defendant is entitled to appeal an order that sets forth the manner of conviction and the sentence."

{¶18} Adopting this argument, the Supreme Court of Ohio determined that a final appealable order in a criminal conviction must have all four mandates. We therefore conclude appellant's original sentence on January 29, 1990 was not a firm or final appealable order.

{¶19} The next issue concerns the affect of this court's affirmance of appellant's conviction in 1992 and the Supreme Court of Ohio's decision dismissing appellant's appeal. See, *State v. Griffin* (1992), 73 Ohio App.3d 546; *State v. Griffin* (1992), 64 Ohio St.3d 1428.

{¶20} The issue raised in this appeal was also raised in the original appeal under Assignment of Error V:

{¶21} "The trial court erred in the sentencing of the appellant by not following the mandates of R.C. 2929.03 and 2929.04, as well as allowing victim impact evidence in violation of Evid.R. 404, the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ Nine, Ten, and Sixteen of the Ohio Constitution."

{¶22} The original direct appeal did not contain a claim of the lack of a final appealable order regarding the judgment entry appealed from. Appellant now argues the original appeal was a nullity under *Baker*:

{¶23} "A court of appeals has no jurisdiction over orders that are not final and appealable. Section 3(B)(2), Article IV, Ohio Constitution ('Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district***'). See also R.C. 2953.02. We have previously determined that 'in order to decide whether an order issued by a trial court in a criminal proceeding is a reviewable final order, appellate courts should apply the definitions of "final order" contained in R.C. 2505.02.' *State v. Muncie* (2001), 91 Ohio St.3d 440, 444, 746 N.E.2d 1092, citing *State ex rel. Leis v. Kraft* (1984), 10 Ohio St.3d 34, 36, 10 OBR 237, 460 N.E.2d 1372.

{¶24} "In entering a final appealable order in a criminal case, the trial court must comply with Crim.R. 32(C), which states: 'A judgment of conviction shall set forth the plea, the verdict or findings, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.' Journalization of the judgment of conviction pursuant to Crim.R. 32(C) starts the 30-day appellate clock ticking. App.R. 4(A); see also *State v. Tripodo* (1977), 50 Ohio St.2d 124, 4 O.O.3d 280, 363 N.E.2d 719." *Baker* at ¶6 and 10.

{¶25} Therefore, this court was without jurisdiction to hear the original appeal. The next issue is what is the affect of our decision on an unchallenged non-final appealable order?

{¶26} For this analysis, we find a series of cases, one of which is now pending before the Supreme Court of Ohio, on the issue of resentencing.

{¶27} In *State v. Fischer,* 118 Ohio App.3d 758, 2009-Ohio-1491, our brethren from the Ninth District found despite a sentence being deemed void, their jurisdiction on appeal after resentencing was limited to issues raised on the resentencing and barred the appellant from raising any and all issues related to the conviction. We note this matter is currently pending in the Supreme Court of Ohio, Case No. 2009-0897, heard March 30, 2010.

{¶28} Prior to the *Fischer* decision, the Supreme Court of Ohio ruled in a writ of mandamus and/or procedendo action that a judgment entry that failed to comply with Crim.R. 32(C) was not a final appealable order and mandamus and procedendo would lie relative to an order of resentencing. *State ex rel, Culgan v. Medina County Court of* Common *Pleas,* 119 Ohio St.3d 535, 2008-Ohio-4609.

{¶29} Seizing on the language of *Culgan,* the Ninth District revisited its decision in *Fischer* and found in a postrelease control resentencing, they may entertain all issues relative to the underlying conviction and/or trial:

{¶30} "The implication of the Supreme Court's opinion in *Culgan* is that regardless of whether a defendant has already appealed his conviction, if the order from which the first appeal was taken is not final and appealable, he is entitled to a new sentencing entry which can itself be appealed. Although the connection between

Culgan and cases involving postrelease control has not yet been explicitly stated, the logic inherent in recent Supreme Court cases regarding postrelease control leads to a similar result. See *Fischer,* 2009-Ohio-1491, at ¶15, 181 Ohio App.3d 758, 910 N.E.2d 1083 (Dickinson, J., concurring) (observing that two of the appellant's assignments of error, which challenged his underlying conviction and the continuing viability of this Court's earlier opinion in his direct appeal, were 'the logical extension of the Ohio Supreme Court's decisions in *State v. Simpkins,* 117 Ohio St.3d 420, 884 N.E.2d 568, 2008-Ohio-1197, and *State v. Bezak,* 114 Ohio St.3d 94, 868 N.E.2d 961, 2007-Ohio-3250.')." *State v. Harmon* (September 2, 2009), Summit App. No. 24495, 2009-Ohio-4512, ¶6.

{¶31} What the Ninth District did in *Harmon* was to find that a non-final appealable order was a void judgment. The Supreme Court of Ohio in *Baker* and *Culgan* never termed a non-final appealable order as a void judgment. The issue still remains open. Can a subsequent affirmance of a conviction and sentence by an appellate court rectify a non-final appealable order?

{¶32} In *State ex rel. Moore v. Krichbaum,* Mahoning App. No. 09 MA 201, 2010-Ohio-1541, our brethren from the Seventh District addressed this issue at ¶13:

{¶33} "In *Culgan,* the Supreme Court of Ohio considered whether a defendant was entitled to writs of mandamus and procedendo compelling the trial court to enter a judgment on his convictions that complied with Crim.R. 32(C), even though his convictions in 2002 had been previously reviewed and affirmed on a direct appeal. *Culgan* at ¶3. The Ohio Supreme Court concluded that the defendant was entitled to a new sentencing entry irrespective of prior appellate review, because the original

sentencing entry did not constitute a final appealable order. *Id.* at ¶10-11, 895 N.E.2d 805. Because the Ohio Supreme Court applied *Baker* to Culgan's petitions even though Culgan's convictions and direct appeal had been finalized prior to the decision in *Baker,* this Court can no longer hold that *Baker* may only be applied prospectively. We therefore conclude that we are obligated to apply *Baker* retrospectively."

{¶34} Reluctantly, we reach the same conclusion as our brethren from the Seventh District. We acknowledge there are valid arguments contra as the Ohio Prosecuting Attorneys Association's amicus brief to the Supreme Court of Ohio in the *Fischer* case reminds us at 6-7:

{¶35} "There is a distinction to be made between the finality of judgments for the purpose of appeal and the type of finality that is required to preclude further litigation on the issue between the parties. *Michaels Bldg. Co. v. City of Akron* (Nov. 25, 1987), Summit App. No. 13061; 18 Wright, Miller & Cooper, Federal Practice and Procedure, (1981), § 4434; Restatement of the Law 2d, Judgments (1982), Section 13. Making that distinction honors the principle of repose, maintains confidence in the rule of law, and makes certain that the courts are not burdened by rehearing appeals long before decided. At the same time, it imposes no cost on those, like Fischer, who has had the opportunity for a full direct appeal of his conviction.

{¶36} "An interlocutory decision that is non-appealable may yet be final in the preclusive sense: 'Whether a judgment, not final [for purposes of appeal under 28 U.S.C. §1291] ought nevertheless be considered 'final' in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for

review. "Finality" in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.' *Michaels Bldg. Co. vs. City of Akron* (Nov. 25, 1987), Summit App. No. 13061, quoting *Lummus Co. v. Commonwealth Oil Ref. Co.* (C.A.2, 1961), 297 F. 2d 80, 89, cert. denied sub nom. *Dawson v. Lummus Co.* (1962), 368 U.S. 986, certiorari denied (1962), 368 U.S. 986. With respect to collateral estoppel, it has been said that the concept of finality 'includes many dispositions which, though not final in [the sense of a final order for purposes of appeal] have nevertheless been fully litigated.' *Metromedia Corp. v. Fugazi* (1980, C.A.2), 983 F.2d 350. This principle of 'practical finality' is often applied where an appellate court has decided an appeal from a summary judgment in the absence of a Rule 54 certification. See, e.g., *O'Reilly v. Malon* (1984, C.A. 1), 747 F.2d 820."

{¶37} We are also aware of the dicta of *State ex rel., Special Prosecutors v. Judges, Court of Common Pleas,* 55 Ohio St.2d 94, 97, wherein the Supreme Court of Ohio adopted a similar rule of finality regarding the affirmance of a conviction by a court of appeals:

{¶38} "However, in the instant cause, the trial court's granting of the motion to withdraw the guilty plea and the order to proceed with a new trial were inconsistent with the judgment of the Court of Appeals affirming the trial court's conviction premised upon the guilty plea. The judgment of the reviewing court is controlling upon the lower court as to all matters within the compass of the judgment. Accordingly, we find that the trial court lost its jurisdiction when the appeal was taken, and, absent a remand, it did not regain jurisdiction subsequent to the Court of Appeals' decision."

{¶39} As we emerge from the "fray" created from *Baker* and its progeny, it is important to note that the cry for finality of judgments is a valid public policy consideration. The tried and true axiom that old cases should not get the benefit of new law is still of public concern.

{¶40} Based upon our analysis, we will address appellant's sole assignment of error.

{¶41} In *State v. Parker,* 95 Ohio St.3d 524, 2002-Ohio-2833, syllabus, the Supreme Court of Ohio held the following:

{¶42} "A defendant charged with a crime punishable by death who has waived his right to trial by jury must, pursuant to R.C. 2945.06 and Crim.R. 11(C)(3), have his case heard and decided by a three-judge panel even if the state agrees that it will not seek the death penalty."[2]

{¶43} Appellant argues she is entitled to a reversal of her conviction because the trial court erred in not convening a three-judge panel to hear her non-jury trial when the capital specification was not dismissed.

{¶44} Based upon the *Parker* decision, we agree.

{¶45} The sole assignment of error is granted.

[2]*Parker* specifically abrogated *Griffin,* supra.

{¶46} The judgment of the Court of Common Plea of Coshocton County, Ohio is hereby reversed and remanded.

By Farmer, J.

Edwards, P.J. concur and

Hoffman, J. dissents.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_____

JUDGES

SGF/sg 617

Hoffman, J., dissenting

{¶47} I respectfully dissent from the majority decision. While doing so, I appreciate my colleagues' effort to faithfully adhere to and apply the precedent set by various Ohio Supreme Court decisions despite the significant ramification of their doing so, not only in this case, but also potentially many others. I enter the "fray" only to suggest an alternative view.

{¶48} Unlike the majority and the Seventh and Ninth districts, I do not read *Culgan* as broadly as they do. As pointed out by the majority herein, the Ohio Supreme Court did not find the non-final appealable order in either *Baker* or *Culgan* resulted in a void judgment. The specific issue as to the effect of the grant of the writ of mandamus and procedendo on the prior appeal was not discussed in the Per Curiam opinion in *Culgan*[3].

{¶49} As noted by the majority, in quoting from an amicus brief to the Ohio Supreme Court in *Fischer*, "There is a distinction to be made between the finality of judgments for the purpose of appeal and the type of finality that is required to preclude further litigation on the issue between the parties". *Michaels Bldg. Co. v. City of Akron* (Nov. 25, 1987), Summit App. No. 13061.

{¶50} Because Appellant herein previously invoked appellate review and nothing in the order as it then existed prohibited or affected her ability to address all issues relating to her previous conviction, Appellant should be judicially estopped from now asserting our previous appellate court ruling is not entitled to law of the case status. To

[3] In his dissent, Justice O'Donnell, joined by Justice Lundberg Stratton, does note *Culgan* was not deprived of his opportunity to appeal his conviction.

hold otherwise violates the invited error doctrine and allows Appellant the proverbial "second bite at the apple."

{¶51} As does the majority and many of my brethren on appellate courts throughout the State, I anxiously await the Ohio Supreme Court's guidance in the *Fischer* case.

s / William B. Hoffman
HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
SANDRA GRIFFIN	:	
Defendant-Appellant	:	CASE NO. 09CA21

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Plea of Coshocton County, Ohio is reversed and the matter is remanded to said court for further proceedings consistent with this opinion. Costs to appellee.

s/ Sheila G. Farmer

s/ Julie A. Edwards

JUDGES