[Cite as *State v. McGlown*, 2012-Ohio-4493.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-10-1298

Appellee — Trial Court No. CR0200503412

v.

Ennie Ray McGlown, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: September 28, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Diana L. Bittner, for appellant.

Ennie Ray McGlown, Jr., pro se.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an *Anders* appeal. Appellant, Ennie Ray McGlown, Jr., appeals from the nunc pro tunc judgment entry of the Lucas County Court of Common Pleas that was entered, pursuant to Crim.R. 32(C) and *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-

3330, 893 N.E.2d 163, to specify that McGlown was found guilty by a jury verdict. We dismiss the appeal for lack of jurisdiction.

A. Facts and Procedural History

{¶ 2} McGlown was indicted by the Lucas County Grand Jury on one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree, and on six counts of rape in violation of R.C. 2907.02(A)(2), each a felony of the first degree. McGlown pleaded not guilty, and the matter proceeded to a jury trial. On March 9, 2007, the jury returned a verdict of guilty on all counts. Thereafter, the trial court sentenced McGlown to a total prison term of 36 years. We affirmed McGlown's conviction on direct appeal in *State v. McGlown*, 6th Dist. No. L-07-1163, 2009-Ohio-2160.

{¶ 3} Subsequently, in March 2010, McGlown filed a pro se "motion for final judgment" pursuant to *State v. Baker*. On September 16, 2010, the trial court issued its nunc pro tunc entry, which corrected the previous entry solely by including that McGlown was found guilty by a jury verdict. McGlown now appeals the September 16, 2010 nunc pro tunc judgment.

B. *Anders* Requirements

{¶ 4} Appointed counsel has filed a brief and requested leave to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Under *Anders*, if, after a conscientious examination of the case, counsel concludes the appeal to be wholly frivolous, he or she should so advise the court and

request permission to withdraw. *Id.* at 744. This request must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* In addition, counsel must provide the appellant with a copy of the brief and request to withdraw, and allow the appellant sufficient time to raise any additional matters. *Id.* Once these requirements are satisfied, the appellate court is required to conduct an independent examination of the proceedings below to determine if the appeal is indeed frivolous. *Id.* If it so finds, the appellate court may grant counsel's request to withdraw, and decide the appeal without violating any constitutional requirements. *Id.*

{¶ 5} In her brief, counsel asserts two proposed assignments of error:

1. THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S RULE 29 MOTION AS TO THE GROSS SEXUAL IMPOSITION CHARGE IN COUNT ONE OF THE INDICTMENT.

2. THE JURY'S FINDING OF GUILTY ON ALL SEVEN COUNTS OF THE INDICTMENT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 6} In addition, McGlown has filed a pro se brief in which he asserts two additional assignments of error:

1. Appellant's sentence to post-release control is contrary to law and void.

2. Appellant's sentence(s) of Gross Sexual Imposition and the Six Counts of Rape are unauthorized by law and void – when said offenses are allied offenses of similar import under R.C. 2941.25.

II. Analysis

{¶ 7} In her discussion of the proposed assignments of error, counsel notes that McGlown is not entitled to a new appeal under the rule announced in *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142. We agree.

{¶ 8} In *State v. Lester*, the Ohio Supreme Court held, "a nunc pro tunc judgment entry issued for the sole purpose of complying with Crim.R. 32(C) to correct a clerical omission in a final judgment entry is not a new final order from which a new appeal may be taken." *Id.* at ¶ 20. In that case, as here, the defendant was appealing a nunc pro tunc entry filed for the sole purpose of including the manner of the defendant's conviction, i.e., being found guilty by a jury verdict. *Id.* at ¶ 5. The appellate court concluded that the nunc pro tunc entry was not a final appealable order, and consequently dismissed the appeal for lack of jurisdiction. *Id.* The Ohio Supreme Court affirmed. *Id.* at ¶ 20.

{¶ 9} Accordingly, we likewise conclude that the trial court's September 16, 2010 nunc pro tunc judgment is not a final order subject to appeal, and we dismiss this appeal for lack of jurisdiction.

{¶ 10} As a final matter, although we dismiss this appeal, in the interests of justice we will briefly address McGlown's pro se assignments of error.

{¶ 11} In his first assignment of error, McGlown argues that the imposition of postrelease control is contrary to law and is void. Specifically, he challenges both the notification in the judgment entry and at the sentencing hearing. Notably, however, McGlown has not provided this court with a transcript of the April 19, 2007 sentencing hearing.[1] Thus, we will presume the validity of that proceeding, *see Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980), and will limit our discussion to the sentencing entry itself. In this case, the judgment entry provided, "Defendant given notice of appellate rights under R.C. 2953.08 and post release control notice under R.C. 2929.19(B)(3) and R.C. 2967.28." We have previously held that this identical language is sufficient to impose postrelease control. *State v. Tribue*, 6th Dist. Nos. L-10-1250, L-10-1251, 2011-Ohio-4282, ¶ 2, 11. Accordingly, McGlown's first pro se assignment of error is not well-taken.

{¶ 12} In his second assignment of error, McGlown argues that his sentence is unauthorized by law because it contains sentences for allied offenses of similar import under the standard announced in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. Without looking to the merits of whether the offenses should have merged, we find McGlown's argument unpersuasive for two reasons. First, Ohio courts

[1] The praecipe requested that all pre-trial, trial, sentencing, and any other hearings held before the trial court be transcribed. However, in the App.R. 11(B) notice of the filing of the record, the clerk informed the parties that the record contained seven transcripts of proceedings, which included three pretrial and four trial transcripts. The transcript of the sentencing hearing was not included. No further action was taken with regard to obtaining transcripts.

have consistently held that res judicata bars an appellant from making an allied offenses claim when it was not raised on direct appeal. *See, e.g.*, *State v. Young*, 6th Dist. No. E-11-029, 2012-Ohio-1102, ¶ 18 ("[We] find that the proper avenue for appellant's merger challenge would have been in his direct appeal from his original, June 2003, sentencing. As such, appellant's assignment of error is found to be outside the scope of his present appeal from resentencing and is barred under the doctrine of res judicata.") Second, *State v. Johnson* does not apply to McGlown's case. "A new judicial ruling generally applies only to cases that are pending on the announcement date, not to a conviction where the accused has exhausted all of his appellate remedies." *State v. Boone*, 2012-Ohio-3653, --- N.E.2d ---, ¶ 38 (10th Dist.), citing *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, 819 N.E.2d 687. Here, McGlown exhausted his appellate remedies with respect to his convictions in his prior direct appeal in 2009, one and a half years before *Johnson* was announced. Therefore, he is not entitled to a merger analysis under *Johnson*. Accordingly, McGlown's second pro se assignment of error is not well-taken.

III. Conclusion

{¶ 13} This court, as required under *Anders*, has undertaken our own examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we grant the motion of counsel to withdraw.

{¶ 14} This appeal is dismissed for lack of jurisdiction. Costs are assessed to McGlown pursuant to App.R. 24. The clerk is ordered to serve all parties, including McGlown, with notice of this decision.

Appeal dismissed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE