[Cite as *State v. Allen*, 2010-Ohio-2990.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellant v. JOSEPH ALLEN Appellee	C.A. No. 09CA009636 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE Nos. 93CR044489 , 94CR045368, 93CR044488, 94CR045372

DECISION AND JOURNAL ENTRY

Dated: June 30, 2010

Per Curiam

{¶1} Appellant, the State of Ohio, appeals from the trial court's decision granting a judgment of acquittal to appellee, Joseph Allen. This Court cannot review the State's assignment of error because it is moot.

I

{¶2} Allen, along with Nancy Smith, was convicted of numerous sex offenses in a highly publicized trial in 1994. According to the testimony introduced at trial, numerous four to five year old children were driven by their bus driver, Smith, to Allen's house. Allen and Smith bound, molested, and raped the children in Allen's house. See, *State v. Allen* (Feb. 7, 1996), 9th Dist.No. 94CA005944, at *1. Following a jury trial, Allen was found guilty of four counts of rape, three counts of felonious sexual penetration, and one count of gross sexual imposition; a number of the offenses carried specifications that Allen used force or the threat of force. Id.

{¶3} This Court affirmed Allen's convictions on appeal. Id. at *6. The trial court denied postconviction relief, and this Court affirmed that decision. *State v. Allen* (Aug. 27, 1997), 9th Dist.No. 96CA006581. In 2009, Allen moved to be resentenced. In his motion, he argued that his judgment of conviction was not final, pursuant to Crim.R. 32(C) and *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. The State agreed that the order was not final because it failed to include the manner of conviction – that he was found guilty by a jury.

{¶4} Both parties presented written arguments to the trial court and the court held several hearings. At a status hearing in June 2009, the trial court concluded that both Allen's and Smith's convictions were not final. The trial court reviewed the evidence presented at the trial. The court concluded the hearing by granting Allen's and Smith's Crim.R. 29(C) motions for acquittal; it subsequently entered written judgments of acquittal.

{¶5} The State moved for leave to appeal. This Court granted the State's motion, but limited the appeal to only the substantive law rulings, not the trial court's grant of acquittal. While the State pursued its appeal, Dennis Will, the Lorain County Prosecutor, and Richard Cordray, the Ohio Attorney General, filed a petition for writ of prohibition in this Court. *State ex rel. Cordray v. Burge* (June 29, 2010), 9th Dist.Nos. 09CA009723 and 09CA009724. In that action, Will and Cordray argued that the trial court judge lacked jurisdiction to reconsider the trial court's prior denial of Allen's Crim.R. 29(C) motion. They asked this Court to conclude that the trial court judge, Judge Burge, acted without jurisdiction and, therefore, to order him to vacate his prior orders, including the grant of acquittal.

{¶6} On June 29, 2010, this Court concluded that the trial court judge lacked jurisdiction to enter a judgment of acquittal pursuant to Crim.R. 29(C) because Allen did not

make a timely motion pursuant to that Rule. Accordingly, as to Allen, this Court granted the petition for writ of prohibition and ordered Judge Burge to vacate the order granting an acquittal.

II

Assignment of Error

"The trial court acted without jurisdiction when it vacated Appellee's conviction."

{¶7} In its sole assignment of error, the State argues that the trial court lacked jurisdiction to vacate Allen's conviction. In its brief, the State makes the same arguments that this Court considered in *State ex rel. Cordray v. Burge*, 9th Dist.Nos. 09CA009723 and 09CA009724 (June 29, 2010). This Court has already concluded that the trial court lacked jurisdiction to vacate Allen's conviction pursuant to Crim.R. 29(C). This Court also ordered Judge Burge to vacate the order he entered granting the acquittal as the court was without jurisdiction. Because this Court has already ordered Judge Burge to vacate the order that is the subject of this appeal, this appeal must be dismissed as moot.

III

{¶8} This Court has already determined that the trial court lacked jurisdiction to act and ordered the trial court to vacate the order that is at issue in this appeal. Accordingly, this appeal is dismissed as moot.

Appeal dismissed.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

CARR, P. J.
DISSSENTS, SAYING:

{¶9} I dissented from this Court's decision in *State ex rel. Cordray v. Burge* (June 29, 2010), Ninth Dist.Nos. 09CA009723 and 09CA009724, and I respectfully dissent in this case because I disagree with the analysis used in *Burge* to conclude that the trial court lacked jurisdiction. Although I agree that this appeal is moot because of *Burge*, my analysis of the issue would make this appeal moot for a different reason. Because the approaches are inconsistent, I feel that I must dissent to explain why I would have reached a different result in *Burge*.

Background

{¶10} Joseph Allen was indicted in 1994. After months of pretrial proceedings, he received a nine-day jury trial. The jury found him guilty, the trial court sentenced him, and entered judgment. Unlike Smith, he did not move for a new trial or acquittal. Like Smith, Allen appealed his conviction and this Court affirmed in 1996. *State v. Allen* (Feb. 7, 1996), 9th Dist.No. 94CA005944. Later that year, he filed a petition for postconviction relief. The State responded. The trial court denied relief in 1996. This Court affirmed the trial court's decision the following year. *State v. Allen* (Aug. 27, 1997), 9th Dist.No. 96CA006581.

{¶11} After Smith moved to be resentenced, Allen did the same. He also argued that the trial court never entered a final, appealable order because the August 4, 1994, sentencing entry failed to reflect that he was found guilty by a jury. According to *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, Crim.R. 32(C) requires that the means of conviction be included in the judgment of conviction for the order to be a final, appealable order. This elevates form over substance to a new level. Allen sat through a nine-day jury trial. He was sentenced shortly after the jury returned its verdict. He appealed to this Court and sought postconviction relief. That a jury found him guilty was apparent to Allen, and to anybody who glanced at the record.

Final appealable orders in criminal cases

{¶12} *Baker* concludes that "[s]imply stated, a defendant is entitled to appeal an order that sets forth the manner of conviction and the sentence." *Baker* at ¶ 18. The "manner of conviction" language comes from Crim.R. 32(C), which defines "judgment." The Court held 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." *Baker* at ¶ 18. R.C. 2505.02(B), however, states that "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following: * * *." The statute does not refer to Crim.R. 32 or "judgments." The *Baker* Court used Crim.R. 32(C) as a means to define what constitutes a final appealable order, however, that was not the purpose of the rule. Crim.R. 32(C) describes what is required for a judgment, but that definition should not be used to limit the orders that are appealable as defined in R.C. 2505.02(B). To do so leads to absurd results.

{¶13} I encourage the Supreme Court to revisit this use of Crim.R. 32(C). The Court should focus on its statement from an earlier decision: "The important consideration is that the parties, particularly the defendant in a criminal case, be fully aware of the time from which appeal time commences running." *State v. Tripodo* (1977), 50 Ohio St.2d 124, 127. Allen knew when his appeal time commenced, and he was fully aware of the sentence imposed by the trial court. The absence of the "means of conviction" was meaningless. Put another way, if the trial court had included the words "by a jury" after "having been found," there would have been absolutely nothing different that would have happened in his legal proceedings from 1994 through 2008 – he would have had no greater appellate rights, no additional postconviction remedies, and no additional opportunities to challenge his conviction. The absence of this language did not affect the enforceability or duration of her sentence. The only thing that happened as a result of the trial court omitting these three words is that it provided the trial court with the opportunity to enter a judgment of acquittal 15 years after a jury found him guilty.

{¶14} One last thought – if the trial court had not crossed out the words on the form journal entry, so that it stated "having entered a plea of guilty," the order would have been final under *Baker* and Crim.R. 32(C), it would have just been wrong. It is certainly an odd result that an order can be final, but clearly wrong, rather than correct, but not final.

{¶15} In *State ex rel. Culgan v. Medina Cty. Court of Common Pleas* (2008), 119 Ohio St.3d 535, the Ohio Supreme Court had an opportunity to limit the impact of *Baker* in cases like this. Culgan had pleaded guilty and had already appealed his conviction by the time *Baker* was decided. His sentencing entry failed to reflect that he entered a guilty plea. In resolving his original action, this Court concluded that, because Culgan had exhausted his appellate remedies from his conviction and sentence in 2003, his conviction was final. This Court's conclusion

relied on *State v. Greene*, 6th Dist. No. S-03-045, 2004-Ohio-3456, ¶ 10, where the Sixth District held that "once a conviction has become 'final' because the defendant can no longer pursue any appellate remedy, any new case law cannot be applied retroactively even if it would be relevant to the facts of his case." The *Culgan* Court adopted a different approach, but it is not too late to recognize a "practical finality" approach to avoid reopening cases long thought final.

State ex rel. Cordray v. Marshall

{¶16} Turning away from what I would hope the Supreme Court might do in the future, *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, requires the conclusion that the trial court lacked jurisdiction to enter acquittals in Allen's case.

{¶17} I disagree with the application of *Marshall* in *State ex rel Cordray v. Burge*. I would apply the precise language used by the Supreme Court in its decision – that "the Ohio Constitution does not grant to a court of common pleas jurisdiction to review a prior mandate of a court of appeals. Therefore, a writ of prohibition is an appropriate remedy to prevent a lower court from proceeding contrary to the mandate of a superior court." (quotations and citations omitted) *Marshall*, 2009-Ohio-4986, ¶ 32. This Court decided Allen's appeal in 1996. *State v. Allen* (Feb. 7, 1996) 9th Dist.No. 94CA005944. Following a lengthy review, including a review of the sufficiency of the evidence, this Court affirmed the trial court's judgment. Id. at 6. This Court also "order[ed] that a special mandate issue out of this court, directing the County of Lorain Common Pleas Court to carry this judgment into execution." Id.

{¶18} This Court issued its mandate in 1996. There is nothing in the record to show that this Court's mandate has been vacated or modified. Neither *Baker* nor *Culgan* held that a court of appeals' mandate is void or a nullity if the trial court's judgment does not comply with Crim.R. 32(C). Because this Court entered its mandate in 1996, and it remained in effect when

the trial court acted contrary to it, I would conclude, pursuant to *Marshall*, that the trial court lacked jurisdiction to enter any order that constituted a review this Court's prior mandate.

{¶19} To be clear, that is precisely what the trial court did. On his direct appeal, this Court reviewed Allen's assignments of error, including an argument that his convictions were not supported by sufficient evidence. This Court, after a review of the trial court record, concluded that the jury's verdict was supported by sufficient evidence. *Allen*, supra. By granting Allen an acquittal, the trial court determined that the convictions were not supported by sufficient evidence. This conclusion was contrary to this Court's mandate and, pursuant to *Marshall*, the trial court lacked jurisdiction to enter this order.

Finality in criminal cases

{¶20} The acts that formed the basis for Allen's convictions took place as late as 1993. A jury convicted him in 1994. Almost two decades later, the litigation continues. The Ohio Supreme Court eloquently addressed the effect of continued litigation, albeit in the capital punishment context:

> "The constitutions and courts of our country have established procedural safeguards reflecting our society's concern for the rights of citizens accused of committing crimes. When those safeguards are used to thwart judgments rendered pursuant to the procedures, it is predictable that citizens will lose confidence in the ability of the criminal justice system to enforce its judgments."

State v. Steffen (1994), 70 Ohio St.3d 399, 406. I would add to this passage that citizens will also lose confidence in the criminal justice system when they see defendants who have been convicted, received appellate review, and pursued postconviction relief, released with a judgment of acquittal because the original judgment of conviction failed to include the word "jury."

{¶21} As this Court has recognized, the application of new rules to cases long thought final can lead to the reopening of cases with absurd results. As other courts have done, I ask the

Supreme Court to reconsider these issues of finality and void sentences. See, e.g., *State v. Mitchell*, Sixth Dist.No. L-10-1047, 2010-Ohio-1766, ¶¶ 30-31.

APPEARANCES:

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DENNIS WILL, Prosecuting Attorney, ANTHONY D. CILLO, and BILLIE JO BELCHER, Assistant Prosecuting Attorneys, for Appellant.