

STATE OF OHIO                     )  
  )ss:  
COUNTY OF LORAIN            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellant

v.

NANCY SMITH

Appellee

C.A. Nos.     09CA009634  
                  09CA009635

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

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Per Curiam

{¶1} Nancy Smith was convicted almost 20 years ago of numerous sex offenses. The trial court failed to include the means of conviction in its sentencing entry. Fourteen years after being found guilty following a jury trial, Ms. Smith moved to be resentenced, arguing that her conviction was not final. By the time of her motion for resentencing, the judge who had presided over her trial had retired. After extensive briefing and several hearings, the judge to whom the case was now assigned, rather than resentencing her, reconsidered and granted her previously overruled motion for acquittal. The State has appealed and argued that the trial court lacked jurisdiction to vacate Ms. Smith's conviction. Because this Court has already determined in *State ex rel. Cordray v. Burge*, 9th Dist.Nos. 09CA009723 and 09CA009724 (June 29, 2010), that the trial court had jurisdiction to act, we affirm.

## FACTS

{¶2} Nancy Smith and Joseph Allen were convicted of numerous sex offenses in a highly publicized trial in 1994. The trial court failed to include how Ms. Smith was found guilty – by guilty plea, jury trial, or by the court. Over the following years, her convictions were affirmed on appeal and she was denied postconviction relief.

{¶3} In 2008, Ms. Smith moved for resentencing. She argued that her judgment of conviction failed to comply with Crim.R. 32(C) and *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, and, therefore, the trial court had never entered a final order. After the parties briefed the question and the State conceded that the 1994 judgment of conviction was not final, the judge to whom the case was now assigned held several hearings culminating in a status conference. At that conference, the judge recounted the history of the cases – both Ms. Smith’s and Mr. Allen’s – and concluded that Ms. Smith’s sentencing entry was not a final judgment.

{¶4} The court then reviewed the evidence presented at trial. At the end of his recitation, the judge concluded that the evidence was insufficient to support Ms. Smith’s convictions. Because he had already decided that the judgment of conviction was not final, he reconsidered and granted Ms. Smith’s Crim.R. 29(C) motion for acquittal, which the original judge had denied.

{¶5} The State moved for leave to appeal. 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. In that action, Mr. Will and Mr. Cordray argued that the trial court lacked jurisdiction to reconsider the prior denial of Ms. Smith’s Rule 29(C) motion. They asked this Court to hold that the trial court judge 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 had jurisdiction to reconsider the trial court's prior denial of the Rule 29(C) motion. Accordingly, as to Ms. Smith, this Court denied the petition for writ of prohibition. With that background, we now consider the State's assignment of error.

#### THE TRIAL COURT HAD JURISDICTION TO ACT

{¶7} The State's only assignment of error is that the trial court acted without jurisdiction when it vacated Ms. Smith's conviction. In its brief, the State makes the same arguments that this Court considered and rejected 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 had jurisdiction to vacate Ms. Smith's conviction under Rule 29(C) of the Ohio Rules of Criminal Procedure. Accordingly, the assignment of error is overruled.

#### CONCLUSION

{¶8} Because this Court has already determined that the trial court had jurisdiction to act, the judgment of the Lorain County Common Pleas Court is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

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.

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CLAIR E. DICKINSON  
FOR THE COURT

DICKINSON, P. J.  
BELFANCE, J.  
CONCUR

CARR, J.  
DISSENTS, SAYING:

{¶9} I dissented from this Court’s decision in *State ex rel. Cordray v. Burge* (June 29, 2010), 9th Dist.Nos. 09CA009723 and 09CA009724, and, for the same reasons, I dissent from this Court’s decision in this appeal.

### **Background**

{¶10} Nancy Smith was indicted in 1994. After months of pretrial proceedings, she received a nine-day jury trial. The jury found her guilty, the trial court sentenced her, and entered judgment. She moved for a new trial and acquittal; the trial court denied both motions. Smith appealed her conviction and this Court affirmed in 1996. Later that year, she filed a petition for postconviction relief. The State responded. The trial court denied relief in 1997. This Court affirmed the trial court’s decision the following year. In 2003, Smith moved to reopen her direct appeal; this Court denied the motion.

{¶11} Five years later, Smith moved to be resentenced. Her motion argued that the trial court never entered a final, appealable order because the August 4, 1994, sentencing entry failed

to reflect that she 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. Smith sat through a nine-day jury trial. She was sentenced shortly after the jury returned its verdict. She moved for a new jury trial after being sentenced. She appealed to this Court within 30 days of August 4, 1994. In her petition for postconviction relief, she raised an issue related to the fairness of her jury trial. That a jury found her guilty was apparent to Smith, 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. Smith knew when her appeal time commenced, and she 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 her legal proceedings from 1994 through 2008 – she would have had no greater appellate rights, no additional postconviction remedies, and no additional opportunities to challenge her 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 her 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*, 119 Ohio St.3d 535, 2008-Ohio-4609, 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 Smith’s case.

{¶17} I disagree with the application of *Marshall* in *State ex rel Cordray v. Burge*, 9th Dist.Nos. 09CA009723 and 09CA009724. 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 Smith’s appeal on January 25, 1996. *State v. Smith* (Jan. 25, 1996) 9th Dist.No. 95CA006070. Following a lengthy review, including a review of the sufficiency of the evidence, this Court affirmed the trial court’s judgment. *Id.* 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 her direct appeal, this Court reviewed Smith's assignments of error, including an argument that her 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. *Smith*, supra. By granting Smith's Crim.R. 29(C) motion, 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 Smith's convictions took place as late as 1993. A jury convicted her 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.”

{¶21} *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.”

{¶22} 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.

### **Conclusion**

{¶23} I believe the trial court acted without jurisdiction when it entered acquittals for Smith. Accordingly, I would reverse the trial court’s decision.

### **APPEARANCES:**

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

JACK W. BRADLEY, Attorney at Law, for Appellee.