ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No.: 10-1372
Plaintiff-Appellee,	:	On Appeal from the Auglaize County Court of Appeals, Third Appellate District.
vs.	:	
Stephen M. Lester,	:	C.A. Case No.: 02-10-20
Defendant-Appellant.	:	

NOTICE OF CERTIFIED CONFLICT

STEPHEN M. LESTER, pro-se
ToCI, Id.#A526919
2001 East Central Avenue
Post Office Box 80033
Toledo, Ohio 43608-0033

DEFENDANT-APPELLANT, PRO SE

EDWIN PIERCE (#0023846)
Auglaize County Prosecutor

AMY OTLEY-BECKETT (#0059852)
Assistant Prosecutor
Counsel of Record

Auglaize County Courthouse
201 South Willipie Street
Wapakoneta, Ohio 45895-1992
(419) 738-9688
(419) 738-3274 (FAX)

COUNSEL FOR APPELLEE, STATE OF OHIO

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No.: _____
Plaintiff-Appellee,	:	On Appeal from the Auglaize County Court of Appeals, Third Appellate District.
vs.	:	
Stephen M. Lester,	:	C.A. Case No.: 02-10-20
Defendant-Appellant.	:	

_____/

NOTICE OF CERTIFIED CONFLICT

Appellant Stephen M. Lester hereby gives notice of certified conflict to the Supreme Court of Ohio from the judgment of the Auglaize County Court of Appeals, Third Appellate District, entered in Court of Appeals Case No.: 02-10-20 on July 12, 2010.

This certified conflict raises a substantial constitutional questions, involves a felony, and is one of public or great interest.

Respectfully submitted,

Stephen M. Lester, in propria persona
ToCI, Id.#A526919
2001 East Central Avenue
Post Office Box 80033
Toledo, Ohio 43608-0033

DEFENDANT-APPELLANT, PRO SE

PROOF OF SERVICE

I attest I sent the Auglaize County Prosecutor a copy of this NOTICE OF CERTIFIED CONFLICT, by regular U.S. Mail, on this 3rd day of August, 2010, by sending it to 201 South Willipie Street, Post Office Box 1992, Wapakoneta, Ohio 45895-1992.

_____
Stephen M. Lester, pro-se
ToCI, Id.#A526919

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
AUGLAIZE COUNTY

STATE OF OHIO, **CASE NO. 2-10-20**

PLAINTIFF-APPELLEE,

v.

STEPHEN M. LESTER, **JUDGMENT ENTRY**

DEFENDANT-APPELLANT.

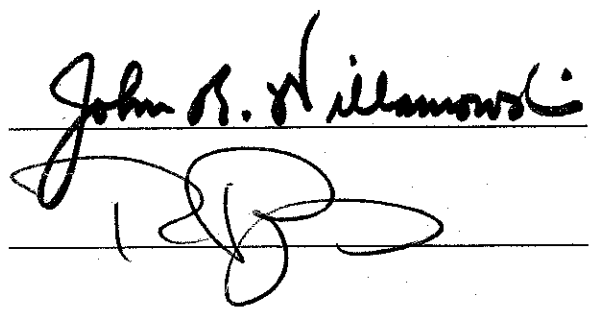
This cause comes on for determination of Appellant' motion to certify a conflict as provided in App.R. 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution.

Upon consideration the Court finds that the judgment in the instant case is in conflict with the judgments rendered in *State v. Lampkin*, 6th Dist. No. L-09-1270, 2010-Ohio-1971.

Accordingly, the motion to certify is well taken and the following issue should be certified pursuant to App.R. 25:

Is a *nunc pro tunc* judgment filed for the purpose of correcting a clerical omission in a prior sentencing judgment by adding "means of conviction" language, which was readily apparent throughout the record and to the parties but not originally included as required by Crim.R. 32(C), a final order subject to appeal?

It is therefore **ORDERED** that Appellant's motion to certify a conflict be, and hereby is, granted on the certified issue set forth hereinabove.



JUDGES

DATED: July 12, 2010
/jnc

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
AUGLAIZE COUNTY

STATE OF OHIO, **CASE NO. 2-10-20**

PLAINTIFF-APPELLEE,

v.

STEPHEN M. LESTER, **JUDGMENT ENTRY**

DEFENDANT-APPELLANT.

This cause comes before the Court *sua sponte* for determination as to whether the appeal should be dismissed for want of jurisdiction.

The record reflects that a jury returned guilty verdicts in May 2006 to multiple felonies and one misdemeanor and, in July 2006, the trial court issued a judgment imposing sentence. Appellant filed an appeal and the judgment of the trial court was affirmed in part and reversed in part, based on an inconsistent notification of post release control. *State v. Lester*, 3rd Dist.No. 2-06-31, 2007-Ohio-4239; appeal not accepted for review *State v. Lester*, 117 Ohio St.3d 1500, 2008-Ohio-2028. Appellant filed a motion for post-conviction relief which was denied by the trial court, and that judgment was affirmed on appeal. *State v.*

Lester, 3rd Dist.No. 2-07-23, 2007-Ohio-5627; appeal not accepted for review *State v. Lester*, 117 Ohio St.3d 1439, 2008-Ohio-1279.

Appellant was then resentenced by the trial court, and that judgment was affirmed on appeal. *State v. Lester*, 3rd Dist.No. 2-07-34, 2008-Ohio-1148; appeal not accepted for review *State v. Lester*, 119 Ohio St.3d 1413, 2008-Ohio-3880. Appellant filed a second motion for post-conviction relief which was denied by the trial court, and that judgment was also affirmed on appeal. *State v. Lester* (May 11, 2009), 3rd Dist.No. 2-08-24, unreported, appeal not accepted for review *State v. Lester*, 122 Ohio St.3d 1524, 2009-Ohio-4776.

Thereafter, on April 5, 2010, the trial court filed a *Nunc Pro Tunc* Judgment on resentencing which corrected the prior judgment by adding a line of text to reflect the fact that the convictions were pursuant to a verdict at jury trial. Although not stated as such, the purpose was apparently to correct a clerical omission in the resentencing judgment to reflect that Appellant was convicted at jury trial. See *State v. Baker*, 119 Ohio St.3d 197, 2008 Ohio-3330, requiring that sentencing judgments include the "means of conviction." Appellant filed the instant appeal on May 3, 2010.

It is well settled that A *nunc pro tunc* judgment applies retrospectively to the judgment which it corrects. A *nunc pro tunc* judgment is not properly subject to appeal and does not act to extend the time in which a party can appeal the actual

judgment of sentence. *Gold Touch, Inc. v. TJS Lab, Inc.* (1998), 138 Ohio App.3d 106; *Roth v. Roth* (1989), 65 Ohio App.3d 768; *Kuehn v. Kuehn* (1988), 55 Ohio App.3d 245.

In the instant case, the court finds that the trial court issued a *Nunc Pro Tunc* Judgment for the sole purpose of retrospectively correcting a clerical omission in the prior sentencing judgment to comply with Crim.R. 32. No new or substantial right was affected under R.C. 2505.02(A)(1) by correction of the sentencing judgment to reflect what actually occurred and what clearly was evident throughout the record and, especially, to Appellant. Appellant exhausted the appellate process when the resentencing judgment was reviewed and affirmed on appeal, and the Ohio Supreme Court declined to accept it on further appeal. See, also, *State v. Hall* (Jan. 8, 2009), 3rd Dis.No. 12-08-09, unreported Judgment, dismissing appeal from *Nunc Pro Tunc* Judgment correcting omission in 2004 Sentencing Judgment; *State v. Lyles* (Aug. 13, 2009), 3rd Dist.No. 1-09-40, unreported Judgment, dismissing appeal from *Nunc Pro Tunc* Judgment correcting omission in 1999 Sentencing Judgment, discretionary appeal denied *State v. Lyles*, 123 Ohio St.3d 1523, 2009-Ohio-6487.

Accordingly, we find that the trial court's April 5, 2010 *Nunc Pro Tunc* Judgment is not a "final order" subject to appeal, and the instant appeal must be dismissed for lack of jurisdiction.

It is therefore **ORDERED, ADJUDGED** and **DECREED** that the appeal be, and the same hereby is, **DISMISSED** at the costs of the Appellant for which judgment is hereby rendered and that the cause be, and the same hereby is, remanded to the trial court for execution of the judgment for costs.

JUDGES

DATED: May 12, 2010
/jnc

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

State of Ohio

Appellee

v.

Terry Lee Lampkin, Jr.

Appellant

Court of Appeals No. L-09-1270

Trial Court No. CR0200601214

DECISION AND JUDGMENT

Decided: FEB 12 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Kevin A. Pituch, Assistant Prosecuting Attorney, for appellee.

Kenneth J. Rexford, for appellant.

* * * * *

PER CURIAM.

{¶ 1} Appellee, state of Ohio, has filed a motion to dismiss the appeal filed by defendant, Terry L. Lampkin. Lampkin has filed a memorandum in opposition to the motion. The case against Lampkin stems from a 2005 aggravated robbery and a

felonious assault at a Toledo car wash. Lampkin was tried and found guilty by a jury in November 2006.

{¶ 2} The record contains an order signed by the trial court judge on November 30, 2006, and journalized on December 1, 2006, which states that Lampkin was found guilty by a jury and sets the case for a sentencing hearing on December 1, 2006. Following the sentencing hearing, a judgment was signed by the judge, filed in the trial court on December 4, 2006, and entered on the court's journal on December 5, 2006. The judgment states, in pertinent part,

{¶ 3} "The Court finds that defendant has been convicted of Aggravated Robbery, counts 1 & 2 * * * Felonious Assault, counts 3 & 4 * * *.

{¶ 4} "It is ORDERED that defendant serve a term of 10 years as to Count 1 and 10 years as to Count 2 in prison. Counts 3 & 4 Felonious Assault, merge with counts 1 & 2 Aggravated Robbery as allied offenses. The sentences are ordered to be served consecutively * * *."

{¶ 5} Lampkin appealed from his conviction and this court affirmed. See *State v. Lampkin*, 6th Dist. No. L-07-1005, 2008-Ohio-2378. Lampkin filed an App.R. 26(B) application to reopen his appeal which was denied. He then attempted to appeal that decision to the Ohio Supreme Court, but that court declined to accept jurisdiction. Lampkin's subsequent motion for a delayed appeal to the Supreme Court of Ohio was

denied as was his motion for postconviction relief in the trial court. Thus, it would appear that Lampkin exhausted his state appeal rights in this case.

{¶ 6} However, on July 9, 2008, the Ohio Supreme Court issued its decision in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, syllabus, where the court states:

{¶ 7} "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. (Crim.R. 32(C), explained.)"

{¶ 8} The court in *Baker* further holds that "[o]nly one document can constitute a final appealable order." Id. at ¶ 17. Therefore, the finding of guilt or the guilty plea must be in the same document as the sentence.

{¶ 9} Just over two months later, on September 18, 2008, the Ohio Supreme Court clarified the *Baker* case and held that a judgment of conviction that "merely mentions that [the defendant] 'has been convicted' of the specified offense and declares his sentence for the convictions" violates Crim.R. 32(C). *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, ¶ 2. These cases taken together instruct us that in order to be final and appealable, a Crim.R. 32(C) judgment of conviction must be entered on the court's journal, state the sentence, be signed by the judge, and contain one of the following: the guilty plea, the jury verdict, or

the finding of the court upon which the conviction is based. Further, these elements must all be contained in one document.

{¶ 10} On August 18, 2009, Lampkin filed a motion in the trial court "to correct status of void sentencing entry" asking that court to issue a judgment of conviction that complies with Crim.R. 32(C) as interpreted by the *Baker* and *Culgan* cases. On September 22, 2009, the trial court entered a Nunc Pro Tunc order that mirrors Lampkin's December 5, 2006 entry of conviction with the exception of the following change: The original entry states, "The Court finds that defendant has been convicted of" aggravated robbery and felonious assault, while the nunc pro tunc entry states, "The Court finds that defendant has been found guilty by a Jury and has been convicted of" aggravated robbery and felonious assault. On October 20, 2009, Lampkin filed the present appeal which the state now seeks to have dismissed.

{¶ 11} Lampkin argues that despite the fact that he already appealed his conviction and it was affirmed by this court, he now is entitled to a second appeal because his original "conviction" was not valid. The state contends that it makes little sense to allow Lampkin a second appeal merely because in 2006 the trial court judge signed, filed and had journalized two judgments, one finding Lampkin guilty and the second sentencing him, instead of one judgment which does both as required by *Baker*.

{¶ 12} It is clear that the December 6, 2006 judgment sentencing Lampkin was not a final appealable order. "[T]he purported judgment did not comply with Crim.R. 32(C)

and * * * did not constitute a final appealable order." *Culgan* at ¶ 1. Without a final appealable order, this court is without jurisdiction to hear an appeal. *State Auto Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, ¶ 8. It follows that we were without jurisdiction to hear Lampkin's appeal in case No. L-07-1005.

{¶ 13} Lampkin now has a sentencing entry that complies with Crim.R. 32(C) and he has filed an appeal from that entry. The state contends that this second appeal should be governed by App.R. 4(C) which states:

{¶ 14} "(C) Premature notice of appeal

{¶ 15} "A notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the appeal time period is treated as filed immediately after the entry."

{¶ 16} Under this rule, the state argues:

{¶ 17} "[Now] that Lampkin's sentencing judgment entry satisfies the requirements of *Baker, supra*, this case does not require a new notice of appeal, new or additional appellate briefs, or much further consideration by the Court. Lampkin filed an appellate brief and had oral argument in case No. L-07-1005. The Court affirmed Lampkin's convictions and sentence. While all of this occurred prior to the new sentencing judgment entry, given *Appellate Rule* 4(C), the Court should now consider all filings, from Lampkin's notice of appeal to this Court's May 16, 2008, *Decision and Judgment Entry* (that affirmed his convictions and sentence), as properly before the

Court. There is nothing unconstitutional or unfair with this result. Lampkin will sustain no prejudice with this procedure because in case No. L-07-1005, Lampkin was provided with what he now seeks - an appeal of his aggravated robbery convictions and twenty-year sentence. Thus, the Court should find its decision in Case No. L-07-1005 now governs Lampkin's appeal in case No. L-09-1270." (Footnote omitted.)

{¶ 18} In response to this argument, Lampkin states that App.R. 4(C) cannot act to retroactively validate our earlier decision in his case because at the time we issued our decision, we had no jurisdiction over the case since there was no final appealable order. Lampkin states that the effect of App.R. 4(C) on his case "simply means * * * that the case on appeal is now initiated."

{¶ 19} In *State v. Baker*, No. CA2007-06-152, 2008-Ohio-4426, the Twelfth District Court of Appeals discussed the interplay between App.R. 4(C) and an appeal filed from a trial court judgment that did not comply with *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330 and Crim.R. 32(C). In the Twelfth District case, an appeal was filed from an order that did not comply with *Baker*. Prior to any further action being taken in the court of appeals, the trial court issued an amended judgment that did comply with *Baker*, and the court of appeals held that it had jurisdiction to hear the appeal since the original notice of appeal was premature under App.R. 4(C).

{¶ 20} We have found no cases in Ohio where App.R.4(C) was used to validate a completed appeal taken from a non-final order; the rule is used exclusively in

un-disposed of appeals where the notice of appeal is filed from a non-final judgment, a final judgment is entered in the trial court, and the original notice of appeal is deemed to have been filed as of the date of the final entry. See, e.g., *State v. Baker*, 12th Dist.No. CA2007-06-152, 2008-Ohio-4426. In the instant case, appellee wants us to resurrect a decided and disposed of appeal via the App.R. 4(C) premature notice of appeal rule. We decline to extend the reach of App.R. 4(C) to cases that have already been decided, even if this court did not have jurisdiction to decide them.

{¶ 21} Appellee alternatively argues, citing *In re Palmer* (1984), 12 Ohio St.3d 194, that Lampkin's appeal should be dismissed because he stipulated to this court's jurisdiction when he prosecuted his original appeal. In *Palmer*, the court stated: "Stipulation to the truth of facts necessary to insure jurisdiction, however, may suffice to confer jurisdiction through estoppel." Id. at 196. There is no such stipulation in this case; Lampkin did not stipulate to the "fact" of a final, appealable order of conviction merely by filing a notice of appeal. Further, the *Palmer* case did not involve the issue of stipulating to a final appealable order and is not applicable.

{¶ 22} Accordingly, the state's motion to dismiss is denied. Appellee shall file its brief within 20 days of the date this decision is entered on the journal.

MOTION DENIED.

Peter M. Handwork, J.

Mark L. Pietrykowski, J.

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

JUDGE

JUDGE