

[Cite as *State v. Wyant*, 2009-Ohio-5200.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 08CA3264
 :
 vs. :
 :
 STEVEN D. WYANT, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Robert A. Cassity, 612 Sixth Street, Courthouse Annex, Ste. A, Portsmouth, Ohio 45662

COUNSEL FOR APPELLEE: Mark E. Kuhn, Scioto County Prosecuting Attorney, and Danielle M Parker, Scioto County Assistant Prosecuting Attorney, 602 Seventh Street, Room 310, Portsmouth, Ohio 45662

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-21-09

ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment that revoked a community control sanction previously imposed on Steven D. Wyant, defendant below and appellant herein, as well as prison sentences for offenses he committed in 1999. Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED BY ISSUING A NUNC PRO TUNC ENTRY MODIFYING APPELLANT’S SENTENCE.”

SECOND ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED BY SENTENCING THE APPELLANT TO A PRISON TERM IN EXCESS OF THE PRISON TERM RESERVED AT SENTENCING.”

{¶ 2} On June 17, 1999, the Scioto County Grand Jury returned an indictment that charged appellant with burglary, grand theft and three counts of breaking and entering. He initially pled not guilty but, on September 23, 1999, he pled guilty to burglary and to three counts of grand theft. The trial court accepted his pleas and entered judgment of conviction that day.

{¶ 3} On November 10, 1999, the trial court sentenced appellant, inter alia, to serve ninety days in the Scioto County Jail and five years community control, with at least six months to be under the “Intensive Supervision Probation Program.” The court warned appellant that any violation of his sentence could lead to more restrictive sanctions, including “a prison term of up to 5 years.” (Emphasis added.)

{¶ 4} Unfortunately, appellant made poor use of the opportunity given to him. In December 2001, he tested positive for THC.¹ Appellant also violated curfew. In late April 2002, appellant stopped reporting to his probation officer altogether. Appellant’s whereabouts were unknown until November 2006 when he was arrested for some other offense.

{¶ 5} On January 10, 2007, the trial court issued an order that granted appellant’s request to participate in a program at “STAR Community Justice Center.”

¹ We presume that “THC” referred to the chemical compound tetrahydrocannabinol found in marijuana.

Although the record is somewhat confusing, it appears that appellant completed the STAR program and the court ordered him “released from custody” on May 1, 2008. Once again, however, appellant failed to take advantage of the opportunities afforded to him. He stopped reporting to his probation officer in the spring and summer of 2008 and, in early October 2008, again tested positive for marijuana.

{¶ 6} On October 16, 2008, the trial court revoked appellant's community control and sentenced him to serve five years in prison on the burglary conviction and twelve months on each of the breaking and entering convictions. The court ordered the sentences to be served consecutively to one another for an aggregate eight year prison sentence.

{¶ 7} Appellant filed a timely pro se notice of appeal and, several months later, the trial court filed a “nunc pro tunc” entry, ostensibly to correct the 1999 sentencing entry. Specifically, the nunc pro tunc entry amended that portion of the 1999 entry that warned appellant that he could be sentenced to up to five years in prison for a community control violation. The nunc pro tunc entry stated that he could be sentenced to eight years for violating community control – thus mirroring the sentence imposed when his community control was revoked in 2008.

{¶ 8} Appellant argues on appeal that the nunc pro tunc judgment improperly corrected the sentencing entry (from ten years earlier) to reflect the prison sentence imposed for violating community control. Although this is an interesting issue to consider, we cannot address it due to a jurisdictional problem with the 1999 entry. In Ohio, courts of appeals have appellate jurisdiction over “final appealable orders.” Section 3(B)(2), Article IV of the Ohio Constitution. If the judgment appealed is not a

final order, an appellate court has no jurisdiction to consider it and the appeal must be dismissed. See Davison v. Reni (1996), 115 Ohio App.3d 688, 692, 686 N.E.2d 278; Prod. Credit Assn. v. Hedges (1993), 87 Ohio Ap.3d 207, 210, 87 Ohio App.3d 207, 621 N.E.2d 1360. Furthermore, even if the parties do not raise jurisdictional issues on appeal, appellate courts are required to raise them sua sponte. See In re Murray (1990), 52 Ohio St.3d 155, 159-160, 556 N.E.2d 1169, at fn. 2; Whitaker-Merrell v. Geupel Co. (1972), 29 Ohio St.2d 184, 186, 280 N.E.2d 922.

{¶ 9} Here, the jurisdictional problem at issue is the second count of the 1999 indictment that charged appellant with grand theft of a motor vehicle, in violation of R.C. 2913.02(A)(1). Our review of the trial court record reveals that this count remains unresolved. Appellant pled guilty to the burglary charge and three of breaking and entering charges, but not this charge. Nowhere in the September 23, 1999 judgment or the November 17, 1999 sentencing entry is that charge dismissed. We also find no mention of a dismissal of that charge at the November 10, 1999 change of plea hearing. Finally, the 2009 nunc pro tunc entry that is the subject of this appeal does not dispose of that charge.

{¶ 10} Generally, when a count in an indictment remains unresolved and remains pending, there is no final, appealable order. State v. Rothe, Fairfield App. No. 2008CA44, 2009-Ohio-1852, at ¶10; State v. Goodwin, Summit App. No. 23337, 2007-Ohio-2343, at ¶13. Thus, because count two of the indictment in this case remains pending, we find no final order here and we lack jurisdiction to review the

matter. Accordingly, we hereby dismiss this appeal.²

APPEAL DISMISSED.
JUDGMENT ENTRY

It is ordered that the appeal be dismissed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Kline, P.J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

² Having determined that the 1999 sentencing entry does not constitute a final order because it did not dispose of count two of the indictment, we need not reach the issue of whether the trial court's failure to specify a precise amount of restitution due one of the victims (leaving the issue to the Probation Department instead) renders the judgment interlocutory. See State v. Threatt, 108 Ohio St.3d 277, 843 N.E.2d 164, 2006-Ohio-905. This may be an issue the trial court would want to revisit, however, when it disposes of the second count of the indictment.

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.