

[Cite as *State v. Rivera*, 2023-Ohio-3053.]

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 112029
 v. :
 :
 JAVIER RIVERA, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: DISMISSED

RELEASED AND JOURNALIZED: August 31, 2023

Criminal Appeal from the Cuyahoga County Common Pleas Court
Case No. CR-21-661526-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting
Attorney, and Glen Ramdhan, Assistant Prosecuting
Attorney, *for appellee*.

Robert A. Dixon, *for appellant*.

ANITA LASTER MAYS, A.J.:

{¶ 1} Defendant-appellant Javier Rivera (“Rivera”) appeals his convictions
and asks this court to vacate and remand for a new trial. We find that this appeal

was not timely perfected, and Rivera has not complied with the express requirements of App.R. 5(A) in order to perfect a delayed appeal.

{¶ 2} On September 6, 2022, after a bench trial and presentence investigation, the trial court published Rivera’s sentence in the court’s journal entry. On September 8, 2022, through a nunc pro tunc, the trial court corrected its September 6, 2022 journal entry to reflect what actually occurred in court. On October 11, 2022, Rivera filed his notice of appeal. Rivera had 30 days to file his notice of appeal under App.R. 4(A). Due to the Columbus Day holiday on October 10, 2022, the notice of appeal was timely filed from the date of the nunc pro tunc entry but not the original September 6, 2022 journal entry. “A nunc pro tunc entry is the procedure used to correct clerical errors in a judgment entry, but the entry does not extend the time within which to file an appeal, as it relates back to the original judgment entry.” *State v. Yeaples*, 180 Ohio App.3d 720, 2009-Ohio-184, 907 N.E.2d 333, ¶ 15 (3d Dist.).

{¶ 3} “Compliance with App.R. 4(A) is a jurisdictional requirement, and where a notice of appeal is not timely filed, the court of appeals has no jurisdiction to entertain the appeal.” *Agee v. Cty. of Cuyahoga*, 8th Dist. Cuyahoga No. 103464, 2016-Ohio-2728, ¶ 3. Because Rivera failed to file a timely appeal under App.R. 4(A) and did not file a motion for delayed appeal under App.R. 5(A), we lack jurisdiction to consider this appeal and must dismiss it.

{¶ 4} Appeal dismissed.

It is ordered that appellee recover from appellant costs herein taxed.

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

ANITA LASTER MAYS, ADMINISTRATIVE JUDGE

FRANK DANIEL CELEBREZZE, III, J., CONCURS WITH MAJORITY OPINION
AND SEPARATE CONCURRING OPINION;
SEAN C. GALLAGHER, J., CONCURS (WITH SEPARATE OPINION)

SEAN C. GALLAGHER, J., CONCURRING:

{¶ 5} I concur with the dismissal of this appeal. I write to further address the basis for the dismissal.

{¶ 6} Generally, a nunc pro tunc entry does not extend the time within which to file a notice of appeal. *State v. Trone*, 8th Dist. Cuyahoga Nos. 108952 and 108966, 2020-Ohio-384, ¶ 22; *In re J.R.*, 8th Dist. Cuyahoga No. 92957, 2009-Ohio-4883, ¶ 11. “When an initial entry is a final determination of the rights of the parties, a subsequent nunc pro tunc entry clarifying the initial entry relates back to the time of the filing of the initial entry, and does not extend the time for appeal.” *State v. Davis*, 10th Dist. Franklin No. 06AP-505, 2007-Ohio-944, ¶ 8, quoting *ABN AMRO Mtge. Group, Inc. v. Roush*, 10th Dist. Franklin No. 04AP-457, 2005-Ohio-1763, ¶ 43.

{¶ 7} The nunc pro tunc entry in this case stated that it included an advisement of the prison terms if probation was violated and added an explanation of postrelease control. However, those additions reflect that which actually occurred at the sentencing hearing rather than substantive modifications of the earlier entry. A nunc pro tunc entry that merely corrects the prior entry to memorialize what actually occurred retroactively replaces the former entry. *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 19. Therefore, Rivera had 30 days from September 6, 2022, to timely file his notice of appeal under App.R. 4(A), which he failed to do.

{¶ 8} Because the time to perfect a timely appeal expired before the October 11, 2022 filing of the notice of appeal, Rivera was required to adhere to the requirements of App.R. 5(A). He did not do so, and therefore, we lack jurisdiction to do anything but dismiss this appeal.

{¶ 9} App.R. 5(A) is simple on its face. After the expiration of the 30-day period to timely perfect an appeal, a defendant may seek leave to file a delayed appeal. In order to do so under App.R. 5(A)(2), “[a] motion for leave to appeal *shall* be filed with the court of appeals and *shall* set forth the reasons for the failure of the appellant to perfect an appeal as of right. *Concurrently with the filing of the motion*, the movant *shall* file with the clerk of the trial court a notice of appeal in the form prescribed by App.R. 3.” (Emphasis added.) *Id.* The rule thus mandates that a notice of appeal be filed concurrently with the required motion for leave; there is no

discretion left to invoking the appellate court's jurisdiction. Either the defendant complied with the express and unambiguous mandates of App.R. 5(A), or he did not. The only discretion lies in whether the motion for leave, if timely filed concurrently with the notice of appeal, should be granted. *See, e.g., State v. Adams*, 9th Dist. Lorain No. 14CA010709, 2016-Ohio-336, ¶ 4; *State v. Williams*, 8th Dist. Cuyahoga No. 105025, 2017-Ohio-2662. That discretion cannot extend to creating our own appellate jurisdiction. Ohio Constitution, Article IV, Section 3(B)(2).

{¶ 10} Despite this unambiguous rule, courts from around Ohio maintain, some in the amorphous citation to the interests of justice, that an appellate panel possesses discretion to permit a belated appeal without adherence to App.R. 5(A). *See, e.g., State v. Newman*, 2017-Ohio-4047, 90 N.E.3d 1278, ¶ 8 (5th Dist.), fn. 1; *State v. Ronny*, 8th Dist. Cuyahoga No. 102968, 2016-Ohio-3448, ¶ 19 (sua sponte deeming the belated appeal to be a delayed appeal despite the defendant's failure to adhere to the requirements of App.R. 5(A)). Yet this notion that an appellate court has discretion to circumvent the appellate rules in favor of addressing the merits of the appeal does not seem to extend to certain parties. *See In re D.S.*, 8th Dist. Cuyahoga Nos. 109943, 110058, and 110064, 2021-Ohio-2516, ¶ 26 (dismissing the state's appeal based on the state's failure to strictly adhere to the requirements of App.R. 5(C), which like App.R. 5(A)(2) requires that a motion for leave be filed concurrently with the notice of appeal).

{¶ 11} This court’s authority to issue any order in the furtherance of an appeal is entirely dependent on the proper invocation of the court’s jurisdiction. *State ex rel. McGinty v. Eighth Dist. Court of Appeals*, 142 Ohio St.3d 100, 2015-Ohio-937, 28 N.E.3d 88, ¶ 13. The failure to timely perfect a criminal appeal or file a motion for a delayed appeal is a jurisdictional limitation that requires immediate dismissal of the appeal. *See, e.g., State ex rel. Steffen v. Judges of the Court of Appeals for the First Appellate Dist.*, 126 Ohio St.3d 405, 2010-Ohio-2430, 934 N.E.2d 906, ¶ 27 (the failure to timely file a motion for leave to appeal is jurisdictional and cannot be corrected after the filing deadline expired); *State v. Edwards*, 157 Ohio St. 175, 181, 105 N.E.2d 259 (1952) (motion for delayed appeal was only remedy to perfect an untimely appeal); *see also State v. Crytzer*, 11th Dist. Ashtabula No. 2020-A-0020, 2020-Ohio-3244, ¶ 12 (“App.R. 5(A) requires that a notice of appeal be filed with the trial court concurrently with the filing of a motion for delayed appeal with this court. No notice of appeal was filed.”).

{¶ 12} And more to the point, there is no justice lost through requiring defendants to adhere to the jurisdictional requirements of the appellate process. Under App.R. 5(A)(2), the only requirement to obtaining a delayed appeal is an explanation as to the failure to timely “perfect an appeal as of right.” Dismissing this case for the want of jurisdiction would not impede Rivera’s opportunity to properly invoke appellate jurisdiction to consider the merits of his argument; dismissal

means he never perfected a timely appeal as of right. That delayed-appeal opportunity is still available to address the merits of his claims.

{¶ 13} Accordingly, although this appeal must be dismissed for lack of jurisdiction, nothing within that conclusion would preclude Rivera from following the express requirements of App.R. 5(A) in the future.