[Cite as *State v. Thomas*, 2004-Ohio-964.]

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

STATE OF OHIO

Appellee

v.

LAVAILE B. THOMAS

Appellant

C.A. No. 21472

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE Nos. CR 2000 09 2152
CR 2001 05 1249
CR 2002 07 1747

DECISION AND JOURNAL ENTRY

Dated: March 3, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Presiding Judge.

{¶1} Appellant, Lavaile Thomas, appeals the decision of the Summit County Court of Common Pleas, which sentenced him to a term of imprisonment of one year. This Court affirms.

I.

{¶2} In Case No. CR 01 05 1249, appellant was indicted for one count of escape in violation of R.C. 2921.34(A). After initially pleading not guilty, appellant withdrew his not guilty plea and pled guilty. The trial court accepted appellant's guilty plea, found him guilty, and sentenced him to six months incarceration, which was to be served consecutively to Case Number CR 00 09 2152, in which appellant was found guilty of violating a protection order and sentenced to a term of imprisonment of one year. Appellant's sentence was suspended upon the condition that appellant complete nine months of community control with sanctions.

{¶3} On July 12, 2002, appellant pled guilty to a community control violation that occurred on or about March 3, 2001. The trial court held a hearing on the community control violation and found appellant guilty of the violation. In an order journalized on October 18, 2002, the trial court re-imposed the sentence of six months incarceration for the escape conviction. The trial court's order indicated that the six-month sentence was to be served consecutively with the sentence imposed in Case Number CR 00 09 2152 and concurrently to the sentence imposed in Case Number CR 02 07 1747, in which appellant was found guilty of violating a protection order and sentenced to home incarceration.

{¶4} On February 7, 2003, the trial court issued a nunc pro tunc order stating that the aggregate credit for time served in the community-based control facility ("CBCF") was to also be calculated by the Summit County Adult Probation Department. The trial court's October 18, 2002 entry stated that the Summit County Adult Probation Department was to calculate the aggregate credit for time served in the Summit County Jail.

{¶5} Appellant appealed to this Court, setting forth two assignments of error for review.

II.

FIRST ASSIGNMENT OF ERROR

> "THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE TRIAL COUNSEL FAILED TO NOTIFY THE TRIAL COURT THAT THE APPELLANT WAS NO LONGER UNDER ITS JURISDICTION IN A CASE IN WHICH COMMUNITY CONTROL HAD EXPIRED."

{¶6} In his first assignment of error, appellant argues that he was denied effective assistance of counsel because his trial counsel did not argue that the trial court did not have jurisdiction to sentence him to a term of six months imprisonment. Specifically, appellant argues that the nine months of community control that he was sentenced to on July 11, 2001, had expired when he committed what would have been a community control violation on or about March 3, 2001. Therefore, appellant argues that the trial court had no authority to sentence him on

October 15, 2002, for said violation. This Court finds that it does not have jurisdiction to hear this issue on appeal.

{¶7} App.R. 4(A) states that "[a] party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed[.]" The time requirement of App.R. 4(A) is jurisdictional and may not be extended. *Ditmars v. Ditmars* (1984), 16 Ohio App. 3d 174, 175; *State v. Blunt* (Mar. 6, 1997), 10th Dist. No. 96APA09-1231.

{¶8} Appellant's notice of appeal, which was filed on March 10, 2003, states that Appellant is appealing the trial court's entry dated February 5, 2003.[1] The trial court's order, which was journalized on February 7, 2003, is a nunc pro tunc order. "The general rule is that a nunc pro tunc entry cannot operate to extend the period within which an appeal may be prosecuted especially where the appeal grows out of the original order rather than the nunc pro tunc entry." *Lindle v. Inland Lakes Mgt., Inc.* (June 4, 1998), 8th Dist. No. 72947, quoting *Prudential Ins. Co. of America v. Corporate Circle Ltd.* (June 5, 1997), 8th Dist. No. 71772. Appellant has conceded that this assignment of error stems from the trial court's October 15, 2002 entry, and not the nunc pro tunc entry. Appellant filed his notice of appeal well after the expiration of the thirty day period allowed in App.R. 4. Therefore, this Court does not have jurisdiction to hear this portion of appellant's appeal. Appellant's first assignment of error is dismissed.

SECOND ASSIGNMENT OF ERROR

> "THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED THE APPELLANT'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY AS GUARANTEED BY THE UNITED STATES CONSTITUTION BECAUSE IT MODIFIED AND INCREASED THE APPELLANT'S SENTENCE AFTER HE BEGAN SERVING HIS SAID SENTENCE IN THE OHIO STATE DEPARTMENT [OF] REHABILITATION AND CORRECTIONS."

{¶9} In his second assignment of error, appellant contends that the trial court modified and increased his sentence after he began serving his said sentence in the Ohio State Department of Rehabilitation and Corrections. This Court disagrees.

{¶10} This Court has explained that the proper function of a nunc pro tunc order is to make the record reflect a trial court's true action:

> "A *nunc pro tunc* order may be issued by a trial court, as an exercise of its inherent power, to make its record speak the truth. It is used to record that which the trial court did, but which has not been recorded. It is an order issued now, which has the same legal force and effect as if it had been issued at an earlier time, when it ought to have been issued. Thus, the office of a *nunc pro tunc* order is limited to memorializing what the trial court actually did at an earlier point in time. It can be used to supply information which existed but was not recorded, to correct mathematical calculations, and to correct typographical or clerical errors.
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> "A *nunc pro tunc* order cannot be used to supply omitted action, or to indicate what the court might or should have decided, or what the trial court intended to decide. Its proper use is limited to what the trial court actually did decide. That, of course, may include the addition of matters omitted from the record by inadvertence or

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[1] This Court notes that the trial court's entry was actually filed on February 7, 2003.

> mistake of action taken. Therefore, a *nunc pro tunc* order is a vehicle used to correct an order previously issued which fails to reflect the trial court's true action." *State v. Greulich* (1988), 61 Ohio App.3d 22, 24-25. (Citations omitted.)

{¶11} In the present case, the trial court's nunc pro tunc entry merely gave appellant credit for time served in CBCF in addition to time served in the Summit County Jail. The nunc pro tunc order in no way increased appellant's sentence. The trial court's entry which was journalized on October 18, 2002, sentenced appellant to six months imprisonment which was to be served consecutively with the one year sentence he received in Case Number CR 00 09 2152. In its nunc pro tunc order, the trial court merely reiterated what it stated in its October 18, 2002 entry before it corrected the entry by giving appellant credit for time served in CBCF.

{¶12} Furthermore, this Court notes that the trial court stated the following at the sentencing hearing: "Court will credit you with all time served. I have 83 days on this offense. We will credit you with all time served in regard to prior offenses as well and any time you will be credited against this will apply." It is clear that the trial court intended to credit appellant with time served in CBCF. Therefore, the nunc pro tunc order merely memorialized what was said at the sentencing hearing. Appellant's second assignment of error is overruled.

III.

{¶13} The February 7, 2003 decision of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
BATCHELDER, J.
CONCUR

APPEARANCES:

JANA DELOACH, Attorney at Law, P. O. Box 2385 Akron, Ohio 44309-2385, for appellant.

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