[Cite as *State v. Lucas*, 2004-Ohio-4929.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. Case No. 20052
vs.	:	T.C. Case No. 94-CR-01726
RANDALL E. LUCAS	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 17th day of September, 2004.

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BROGAN, J.

{¶ 1} Randall Lucas appeals from the trial court's denial of his motion for return of $3,040 that was ordered forfeited after he was arrested upon various weapons charges in 1994.

{¶ 2} Lucas was indicted by the Montgomery County Grand Jury on July 26, 1994 for two counts of carrying a concealed weapon, two counts of having weapons

while under disability and one count of possession of a dangerous ordnance. Lucas was acquitted of the charges in September 1997. On October 23, 2001, the Dayton Police Department applied to the Montgomery County Common Pleas Court for an order forfeiting $34,793.53 which had been seized by the police from various individuals. The police department specifically sought forfeiture of $3,040 which had been seized from Lucas. On October 24, 2001, the Montgomery County Common Pleas Court granted the application.

{¶ 3} On March 26, 2003, Lucas filed a motion for return of $10,706 which he contended Dayton police had seized from him. He filed the application with the common pleas judge who had presided over his criminal prosecution. Lucas then sought "summary judgment" seeking return of only $3,040. The State opposed Lucas' motion and attached the affidavit of Marcell Dezarn, an assistant county prosecutor. Dezarn stated that he mailed a letter by certified mail on August 28, 2001 to Lucas at his last known address informing him that the police had possession of his property and he should make a claim for it by September 28, 2001. Dezarn stated he also provided Lucas a similar notice by publication in the Daily Court Reporter on September 7, 2001. When the August 28, 2001 letter was returned as "unclaimed," Dezarn stated he sent another letter to Lucas' last known address by regular mail providing the identical notice.

{¶ 4} On June 30, 2003, the trial court denied Lucas' motion for return of the $3,040 he requested. On July 21, 2003, Lucas moved for reconsideration of the trial court's decision. Attached to his motion was Lucas' affidavit in which he stated he was incarcerated in a federal correctional facility in 2001 and did not receive

Dezarn's letters. He also stated his last address in Dayton was not the one listed in Dezarn's letters to him. On July 22, 2003, the trial court denied Lucas' motion to reconsider its decision. On August 7, 2003, Lucas appealed the trial court's denial of his reconsideration motion.

{¶ 5} Lucas has filed an appellate brief and has not assigned any specific error in the trial court's judgment of July 22, 2003. We glean, however, from his brief that he argues that the trial court denied him "due process of law" when it ordered his property forfeited without providing him notice of the police department's application.

{¶ 6} The State argues that Lucas' appeal should be dismissed because this court is without jurisdiction to entertain Lucas' appeal because the decision he appealed is a nullity. Secondly, the State argues that the civil forfeiture procedure may not be collaterally attacked via a motion to return property filed in a closed criminal prosecution.

{¶ 7} We disagree with the State's argument that we do not have jurisdiction to entertain Lucas' appeal. Lucas timely appealed the trial court's decision to overrule his motion to reconsider. We agree that a motion to reconsider does not toll the time to appeal a final order in a civil case and is considered a nullity. See, *Pitts v. Ohio Department of Transportation* (1981), 67 Ohio St.2d 378. Lucas did not timely appeal the trial court's original decision denying his motion and the trial court properly denied his reconsideration motion because such motions are procedural nullities in civil and criminal proceedings in the trial court.

{¶ 8} We also agree with the State that a civil forfeiture entry may not be

vacated by way of motion seeking return of seized property in a criminal proceeding. *State v. Stephens* (Sept. 10, 2001), Stark App. 2001 CA 00157. Lucas' appeal has no merit.

{¶ 9} The judgment of the trial court is Affirmed.

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FAIN, P.J., concurs.

GRADY, J., dissenting:

{¶ 10} In *Pitts v. Ohio Dep't of Transportation* (1981), 67 Ohio St.2d 378, the trial court had entered a final judgment dismissing the plaintiff's complaint on May 24, 1979. The plaintiff filed a motion for reconsideration from that judgment on June 4, 1979. While the motion was pending, on June 21, 1979 the plaintiff filed a notice of appeal from the May 24 judgment. The trial court denied the motion for reconsideration on June 26, 1979. No appeal was taken from that order. Subsequently, the court of appeals reversed the May 24 dismissal and remanded for a proceeding on the merits.

{¶ 11} On appeal to the Supreme Court, and on the arguments before it, that court noted that "[t]he eye of the controversy herein centers upon the status and application of the motion for reconsideration in the trial court." *Id.,* at p. 379. Finding that the Civil Rules make no provision for a motion for reconsideration, the Supreme Court wrote: "We hold that the motion for reconsideration of the May 24 ruling will not lie and all judgments or final orders from said motion are a nullity." *Id*.,

at p. 381. The Supreme Court further noted, however, that because the notice of appeal in *Pitts* that was filed on June 21, 1979 was timely in relation to the May 24 final order, the court of appeals' jurisdiction to review that order on its merits was properly invoked and preserved.

{¶ 12} *Pitts* holds that judgments rendered on motions for reconsideration filed after a final judgment or order are themselves "a nullity." Here, the majority characterizes the motion itself as the nullity. Perhaps it is, but our jurisdiction is determined from the nature and character of the judgment or order from which an appeal is taken, not the motion or other application that prompted it. When that judgment or order is a nullity, per *Pitts*, we lack jurisdiction to review it or any error assigned with respect to it.

{¶ 13} Applying *Pitts*, I would dismiss this appeal for lack of a final order. Had the trial court reached the opposite result and ordered the State to return the forfeited funds to Defendant-Appellant Lucas, the same result would obtain because that order, likewise, would be a nullity. In either alternative, appellate review is unavailable, at least on appeal from the trial court's order.

{¶ 14} The unavailability of appellate review results in no undue prejudice in this instance. As the majority notes, the prior civil forfeiture order was not subject to Defendant-Appellant's collateral attack in the criminal proceeding. Had the court instead granted his application for relief and ordered his money returned, the State might seek a writ of prohibition to prevent the court from enforcing its judgment, because the court would have lacked jurisdiction to reopen the criminal proceeding for that purpose. Any issuance of process to enforce the judgment would then

clearly be unauthorized by law. And, refusing the writ would, because no appeal is available, result in an injury for which there is not adequate remedy in the ordinary course of law. *State ex rel. La Boiteaux Co., Inc. v. Court of Common Pleas, Hamilton County* (1980), 61 Ohio St.2d 60.

{¶ 15} The viability of a motion for reconsideration was not the issue of law on which *Pitts* was decided. However, the holding can't be ignored, and neither can it be "refashioned" to make better sense. The Supreme Court would do well, when given the opportunity, to modify *Pitts* to hold that the motion for reconsideration, not the order entered on it, is the "nullity." Until then, we can only apply *Pitts* as it was decided.

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