

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

State of Ohio

Court of Appeals No. L-09-1270

Appellee

Trial Court No. CR0200601214

v.

Terry Lee Lampkin, Jr.

DECISION AND JUDGMENT

Appellant

Decided: February 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:

{¶ 22} "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.

{¶ 23} 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.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.