

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-35 (C.P.C. No. 96CR08-4822)
Tyrone V. Berry,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on August 9, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

*Tyrone V. Berry*, pro se.

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Tyrone V. Berry, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion to impose a valid sentence and his request for dismissal. Defendant assigns a single error:

THE TRIAL COURT ERROR [sic] AND DEPRIVED THE APPELLANT OF DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION IN THAT THE TRIAL COURT IS DIVESTED OF ITS JURIS-

DICTION TO IMPOSE ANY SENTENCE IN LIGHT OF THE PROTRACTED AND UNREASONABLE DELAY IN IMPOSING A SENTENCE AFTER THE CASE WAS REMANDED FOR RESENTENCING.

Because defendant's appeal is untimely, we dismiss the appeal.

### **I. Facts and Procedural History**

{¶2} On August 26, 1996, defendant was indicted on three counts of aggravated murder, as well as charges of aggravated robbery, aggravated burglary, kidnapping, and having a weapon while under disability, all with specifications. *State v. Berry*, 10th Dist. No. 08AP-762, 2009-Ohio-1557. Defendant waived his right to a jury on the weapons under disability charge, and the trial court found him guilty. The jury, however, was unable to decide the other counts, and defendant subsequently was retried to a three-judge panel that found him guilty of all counts and specifications. *Id.*

{¶3} Prior to retrial, the court imposed a sentence of three years on the weapons under disability count, with an additional three-year term of actual incarceration for the firearm specification. *Id.* Following retrial, the court found defendant guilty of all remaining charges and sentenced defendant to 30 years to life of "actual" incarceration on each of the aggravated murder counts, 10 to 25 years of incarceration on each of the remaining counts, and one additional three-year term of actual incarceration for the remaining firearm specifications. *Id.*

{¶4} On appeal, this court affirmed defendant's convictions but remanded for resentencing, concluding the trial court erred in imposing two separate three-year terms of incarceration on the firearm specifications. *Id.* Further concluding the appealed sentence was ambiguous due to discrepancies between defendant's sentence

announced in court and that stated in the trial court's judgment entry, this court remanded the matter to the trial court for clarification. *Id.*

{¶5} Pursuant to remand, the trial court issued an amended judgment entry on November 17, 1999 that reduced to one the number of three-year terms of actual incarceration for the firearm specifications. *Id.* In an attempt to clarify the sentence, the trial court stated that defendant's sentences of 10 to 25 years each on the aggravated burglary, aggravated robbery, and kidnapping offenses were to be served consecutively to each other but concurrently to the sentences imposed for aggravated murder. *Id.* In doing so, the court stated the sentence on each of the aggravated murder counts was 30 years to life of "actual" incarceration. *Id.*

{¶6} On October 15, 2004, the state moved to correct defendant's illegal sentence concerning the aggravated murder convictions, requesting the court to specify defendant's sentences on those convictions were 30 "full" years to life. *Id.* The court so amended its entry on February 21, 2006. *Id.* In response, defendant filed on April 9, 2008 a "Motion to Vacate or Set Aside Sentence Pursuant to Rule 60(B) (4) (5) and (6)" and on July 7, 2008 a "Motion to Void Judgment Pursuant to Civil R. 60(B)(4)(5) and (6)." *Id.* The trial court, recasting defendant's motions as untimely petitions for post-conviction relief, denied them. Defendant appealed and this court affirmed. *Id.*

{¶7} Underlying the current appeal, defendant's motion of March 18, 2010 moved the trial court to impose a valid sentence through a resentencing hearing. Defendant contended the February 21, 2006 amended sentencing entry did not comply with the requirements of Crim.R. 32(C) and was void because the trial court failed to conduct a sentencing hearing before amending its sentencing entry. Further arguing a

substantial period of time thus had elapsed in which no valid sentence was imposed, defendant asserted the trial court was required to vacate his sentence and dismiss the case in its entirety. The trial court denied both the motion to impose a valid sentence and the motion to dismiss in a December 10, 2010 judgment entry. Plaintiff filed a notice of appeal on January 11, 2011.

## II. Jurisdiction

{¶8} To vest this court with jurisdiction over his appeal, defendant was required under App.R. 4(A) to file a notice of appeal within 30 days of the trial court's judgment. The trial court issued its decision on December 10, 2010. Thirty days following the trial court's decision was Sunday, January 9, 2011. Because the notice of appeal could not be filed that day, defendant's appeal would have been timely had he filed it on the next day that was not a Saturday, Sunday or legal holiday: Monday January 10, 2011. App.R. 14(A); *Mallory v. Berkey* (June 24, 1981), 9th Dist. No. 1721 (citing App.R. 14(A) and concluding the 30-day period for filing a notice of appeal is extended "until the end of the next day which is not a Saturday, Sunday, or a legal holiday"); *Hicks v. Hicks* (July 13, 1978), 10th Dist. No. 78AP-228. Defendant failed to do so, instead filing his notice of appeal on January 11, 2011.

{¶9} Because defendant did not file his notice of appeal within 30 days following the judgment appealed, we lack jurisdiction to consider his assignment of error. *State v. Myers*, 9th Dist. No. 08CA0041, 2009-Ohio-2082 (dismissing for lack of jurisdiction because the appeal was untimely); *Americare Corp. v. Misenko* (1984), 10 Ohio St.3d 132 (concluding the court of appeals properly dismissed an appeal where the notice of appeal was not filed within 30 days of the entry of judgment); *Kemper Securities, Inc. v.*

*Schultz* (1996), 111 Ohio App.3d 621 (noting court of appeals lacked jurisdiction over an untimely filed appeal). In view of defendant's untimely-filed notice of appeal, this court lacks jurisdiction to consider his appeal.

**III. Disposition**

{¶10} Accordingly, we dismiss defendant's appeal for lack of jurisdiction.

*Case dismissed.*

TYACK and CONNOR, JJ., concur.

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