[Cite as *State v. McClanahan*, 2010-Ohio-5825.]

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

STATE OF OHIO	C. A. No. 25284
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MICHAEL W. MCCLANAHAN	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 04 03 0799(A)

DECISION AND JOURNAL ENTRY

Dated: December 1, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Michael McClanahan, appeals from a nunc pro tunc entry, correcting his judgment of conviction in the Summit County Court of Common Pleas. This Court dismisses for lack of jurisdiction because the appeal is untimely.

I

{¶2} Following a jury trial, McClanahan was sentenced on two counts of felonious assault with attendant firearm specifications, tampering with the evidence, vandalism, falsification, child endangering, and possession of marijuana on July 28, 2004. This Court affirmed McClanahan's convictions and sentence on appeal. *State v. McClanahan*, 9th Dist. No. 22277, 2005-Ohio-2975. McClanahan then appealed to the Ohio Supreme Court and, after issuing *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court reversed this Court's decision with respect to McClanahan's sentence and remanded his case for resentencing consistent with *Foster*.

{¶3} The trial court held another sentencing hearing on June 1, 2006 and issued McClanahan's new sentencing entry on June 13, 2006. Thereafter, McClanahan filed a petition for post-conviction relief and appealed from the trial court's denial of his petition. This Court affirmed the trial court's decision. *State v. McClanahan*, 9th Dist. No. 23380, 2007-Ohio-1821.

{¶4} In September 2009, McClanahan filed a motion for sentencing because his sentence did not include a valid post-release control notification. The State conceded that McClanahan's sentence was void, and the trial court conducted a resentencing hearing on October 29, 2009. The court issued McClanahan's new sentencing entry on November 5, 2009. On December 28, 2009, McClanahan filed a "motion for final appealable order" because the court's sentencing entry did not dispose of one of the counts in his indictment. On February 4, 2010, the court issued a nunc pro tunc entry, which indicated that the missing count was dismissed during trial pursuant to Crim.R. 29.

{¶5} McClanahan now appeals from the court's February 4, 2010 nunc pro tunc entry and raises one assignment of error for our review.

II

Assignment of Error

"THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO MORE THAN THE MINIMUM SENTENCE AND TO CONSECUTIVE TERMS OF IMPRISONMENT."

{¶6} In his sole assignment of error, McClanahan argues that the trial court erred by sentencing him to more than the minimum term on his charges and by ordering those terms to run consecutively. McClanahan argues that the Ohio Supreme Court's decision in *State v. Foster* is unconstitutional and that, by applying *Foster* to him, the trial court violated his due process

rights. We do not reach the merits of McClanahan's assignment of error because his appeal is untimely.

{¶7} "An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4." App.R. 3(A). App.R. 4(A) provides, in relevant part, 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[.]" "This Court has recognized that '[t]his time requirement is jurisdictional and may not be extended. Where an untimely appeal has been filed, an appellate court lacks jurisdiction to consider the merits, and the appeal must be dismissed.'" (Citations omitted.) *State v. Myers*, 9th Dist. No. 08CA0041, 2009-Ohio-2082, at ¶7, quoting *Metropolitan Bank & Trust Co. v. Roth*, 9th Dist. No. 21174, 2003-Ohio-1138, at ¶15.

> "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." *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, paragraph one of the syllabus.

So long as the record reveals that all of a defendant's counts have been resolved, *Baker* does not require a sentencing entry to refer to counts that have been dismissed. *State v. Smead*, 9th Dist. No. 24903, 2010-Ohio-4462, at ¶10 ("[W]e interpret *Baker* to mean that a journal entry that does not contain reference to counts that were *dismissed* or upon which the defendant was *acquitted*, does not render the journal entry invalid for lack of a final appealable order.").

{¶8} McClanahan's November 5, 2009 sentencing entry met all of Crim.R. 32(C) and *Baker's* finality requirements. *Baker* at paragraph one of the syllabus (interpreting Crim.R. 32(C)). The only item missing from the court's sentencing entry was a count that the court had dismissed; an omission that did not affect the entry's finality. *Smead* at ¶10. The trial court later

added a reference to the dismissed count by way of a nunc pro tunc entry. McClanahan has appealed from the court's nunc pro tunc entry. Generally, however, "[a] nunc pro tunc entry relates back to the date of the journal entry it corrects." *State v. Battle*, 9th Dist. No. 23404, 2007-Ohio-2475, at ¶6. This Court sees no reason why the general rule should not apply in this instance. The Supreme Court issued *Baker* more than a year before the trial court issued McClanahan's November 5, 2009 entry. Thus, McClanahan had notice of *Baker's* holding and cannot be said to have been deprived of his right to appeal. Compare *Petition for Inquiry into Certain Practices* (1948), 150 Ohio St. 393, 398-99 (noting that nunc pro tunc entries cannot be given retrospective application if doing so would deprive a party of a substantial right). Even though the trial court here issued its nunc pro tunc entry on February 4, 2010, the entry must be treated as if the court had issued it on November 5, 2009. See *State v. O'Neal*, 9th Dist. No. 09CA0045-M, 2010-Ohio-1252, at ¶13. McClanahan did not file his notice of appeal until March 5, 2010. As such, he filed his appeal well beyond the thirty-day time limit contained in App.R. 4(A), and this Court lacks jurisdiction to consider it. See *Myers* at ¶17.

III

{¶9} Because McClanahan's appeal is untimely, this Court lacks jurisdiction to address his sole assignment of error.

Appeal dismissed.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

THOMAS C. LOEPP, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.