

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

THOMAS M. DUDLEY, et al.,	:	
Plaintiffs-Appellees,	:	CASE NO. CA2010-05-114
- vs -	:	<u>OPINION</u>
	:	1/23/2012
TERRY DUDLEY, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2006-12-4689

Thomas M. Dudley, Diane Dudley and Thomas M. Dudley, Trustee, 5876 Stillwell Road, Oxford, Ohio 45056, plaintiffs-appellees, pro se

Repper, Pagan, Cook, Ltd., Christopher J. Pagan, 1501 First Avenue, Middletown, Ohio 45044, for defendants-appellants

T.D., Ltd., TMD Builders, 5876 Stillwell Road, Oxford, Ohio 45056, defendants, pro se

Sams, Fischer, Packard & Schuessler, LLC, Jonathan D. Sams and Theresa N. Ruck, 8738 Union Centre Boulevard, West Chester, Ohio 45069, for amicus curiae, Kirsh CPA Group

HUTZEL, J.

{¶1} Defendant-appellant, Terry Dudley, appeals from a decision of the Butler County Common Pleas Court finding him in contempt of court and ordering him to pay \$151,367 to the receiver appointed to oversee the dissolution of two companies that Terry

co-owned with plaintiff-appellee, Thomas Dudley. We conclude that the decision from which Terry is appealing is not a final, appealable order, and thus we dismiss Terry's appeal for lack of jurisdiction.

{¶2} Terry and Thomas Dudley are brothers who were equal co-owners of two companies, TD, Ltd. & TMD Builders, Inc., which built, owned, and rented residential property to students at Miami University in Oxford, Ohio. The brothers had a falling out and sued each other in 2006, with each requesting a judicial dissolution of their companies. The trial court appointed a receiver, Kirsch CPA Group, to oversee the dissolution. On November 17, 2008, the trial court ordered Terry Dudley to pay the receiver the \$496,427.61 that Terry received from the sale of two houses he built through TMD. The order did not yet take into account the setoffs due Terry for labor and materials, which were to be determined by the receiver at a later date.

{¶3} On April 23, 2009, the trial court found Terry in contempt of court for failing to comply with the November 17, 2008 order, and ordered him to pay \$496,427.61 to the receiver by May 1, 2009. The trial court stated that if Terry failed to do so, the sanction would be \$100 per day for the first 30 days and \$200 per day for each day beginning on the 31st day of non-payment. The trial court permitted Terry to submit evidence to the receiver of any setoff or credit that he claimed he was due, and ordered the receiver to determine the amount of any setoff owed to Terry.

{¶4} On November 10, 2009, the trial court found that after taking into account the amount of setoffs he was owed, Terry was obligated to pay the receiver only \$151,367, rather than \$496,427.61, for the proceeds from the sale of the two houses. The trial court ordered Terry to pay this amount within two weeks, and stated that if he failed to do so, the sanction would be \$100 per day for the first 30 days and \$200 per day for each day beginning on the 31st day of nonpayment.

{¶15} On May 7, 2010, the trial court found Terry in contempt of court for his failure to comply with the November 10, 2009 order, and ordered him to pay the receiver \$151,367 by May 14, 2010. The trial court stated that "[i]f Terry Dudley fails to pay over \$151,367.00 * * * to the Receiver on or before May 14, 2010, Terry Dudley shall be sentenced to thirty (30) days in the Butler County jail."

{¶16} On May 14, 2010, Terry moved for a stay of the May 7, 2010 order, which he characterized as an order "imposing sanctions for contempt." Terry also requested that any supersedeas bond requirement that the trial court impose on him be limited to \$138,007, which represented what Terry characterized as "the revised amount owed to the Receiver" after taking into account an additional setoff that was owed to him.

{¶17} On May 25, 2010, the trial court held a hearing on Terry's motion for a stay. At the close of the hearing, the trial court agreed to stay the proceedings on the condition that Terry pay a \$201,000 supersedeas bond. At the close of the proceedings, the trial court remanded Terry to the sheriff's custody, but it appears he was soon released after he posted the \$201,000 supersedeas bond.

{¶18} Terry now appeals the trial court's May 7, 2010 order, and raises the following as his sole assignment of error:

{¶19} "THE TRIAL COURT ERRED IN FINDING TERRY IN CONTEMPT OF COURT AND IN IMPOSING SANCTIONS."

{¶10} Terry argues the trial court erred in finding him in contempt of court and in imposing sanctions on him, because he was unable to comply with the trial court's contempt orders, the orders were unclear and indefinite, and his compliance with the orders turned on the actions of third parties, namely, those of Thomas and the receiver. In response, the receiver argues the trial court did not abuse its discretion in finding Terry in contempt of court for failing to comply with the May 7, 2010 order. The receiver also argues that Terry should

be precluded from challenging the April 23, 2009 order, because that order was a final, appealable order, and since Terry did not appeal from it, he has waived any objections he has to it, or at the very least, his objections to that order are not relevant to this appeal and therefore should not be considered by this court. Terry counters by arguing that it is the imposition of a sanction that makes an order final and appealable, and therefore his "first opportunity to appeal was in May 2010, when the trial judge imposed a jail sentence."

{¶11} We conclude that none of the contempt orders at issue in this case are final and appealable orders, and therefore this court does not have jurisdiction over Terry's appeal.

{¶12} Generally, appellate courts have jurisdiction over judgments or "final orders." See Section 3(B)(2), Article IV, Ohio Constitution, and R.C. 2505.03(A). Final orders are generally those that dispose of the whole case or some separate and distinct branch of it, and leave nothing for future determination. *VIL Laser Sys., L.L.C. v. Shiloh Indus., Inc.*, 119 Ohio St.3d 354, 2008-Ohio-3920, ¶ 8. By contrast, appellate courts generally have no jurisdiction over "interlocutory" orders, which are defined "as 'any order other than a final order.'" *E.B.P., Inc. v. 623 W.St.Clair Ave., LLC*, Cuyahoga App. No. 93587, 2010-Ohio-4005, ¶ 44, quoting Black's Law Dictionary (9th Ed. 2009) 1207. But, see, R.C. 2505.02(B), which defines "final orders" to include several categories of orders that were commonly considered to be interlocutory, e.g., orders granting or denying "provisional remedies" or "class certification." R.C. 2505.02(B)(4)-(5).

{¶13} If an appeal is taken from an order that is not final and appealable, then an appellate court has no jurisdiction to rule on the appeal, and if the parties themselves fail to raise the issue of whether or not a judgment or order is final and appealable, then an appellate court must raise the issue sua sponte. *In re Adoption of S.R.A.*, 189 Ohio App. 3d 363, 368, 2010-Ohio-4435, at ¶ 11, citing *Whitaker–Merrell Co. v. Geupel Constr. Co.* (1972),

29 Ohio St.2d 184, 186.

{¶14} "Ohio courts have repeatedly held that contempt of court consists of two elements. The first is a finding of contempt, and the second is the imposition of a penalty or sanction. Until both have been made, there is no final order." *Armstrong v. Armstrong*, Lake App. No. 2004-L-010, 2004-Ohio-1521, ¶ 4.

{¶15} Here, the trial court's April 23, 2009 order is not final and appealable, as the receiver contends, because the trial court never issued a journal entry that contained the final amount that Terry owed in accumulated fines stemming from his refusal to comply with the trial court's orders of April 23, 2009, November 10, 2009, and May 7, 2010.

{¶16} The trial court's May 7, 2010 order is also not final and appealable, because the order did not actually impose a jail sentence on Terry, but, instead, merely stated that a 30-day jail sentence would be imposed on Terry *if* he failed to pay the receiver \$151,367 by May 14, 2010. While the May 7, 2010 order found Terry in contempt of court, the order gave him the opportunity to purge himself of the contempt by paying the receiver \$151,367 by May 14, 2010. Thus, the second element of contempt has not been fulfilled, i.e., that a penalty or sanction be imposed on the contemnor. See *Armstrong*, 2004-Ohio-1521 at ¶ 4. See, also, *Janecek v. Marshall*, Lake App. No. 2010-L-059, 2011-Ohio-2994, ¶ 59. To finalize the order, the trial court needed to find that Terry failed to purge himself and then actually impose the penalty or sanction. *Id.* Because the trial court failed to do so, the May 7, 2010 order is still conditional and not ripe for review. *Id.*

{¶17} Terry tacitly acknowledges that the May 7, 2010 order is not final and appealable. Nevertheless, he relies on the transcript of the May 25, 2010 hearing held on his motion for a stay as proof that the trial court issued a final order in this case. However, we find this contention unpersuasive.

{¶18} The May 25, 2010 transcript does, in fact, indicate that the trial court found that

Terry failed to comply with the May 7, 2010 order, since Terry's counsel acknowledged Terry's noncompliance with the order, and at the close of the proceedings, the trial court remanded Terry to the sheriff's custody to serve his 30-day jail sentence. The transcript also shows that the receiver estimated that as a result of Terry's noncompliance with the trial court's orders of April 23, 2009, November 10, 2009, and May 7, 2010, Terry owes \$63,000 in accumulated fines, stemming from the trial court's orders of April 23, 2009 and November 10, 2009. However, the receiver also stated that they had "a few different calculations. It's just depending on what the [trial court] would like to have provided." The trial court agreed to Terry's request for a stay of the contempt proceedings on the condition that he post a supersedeas bond of \$201,000. The trial court apparently arrived at that amount by adding the receiver's estimate of what Terry owed in accumulated fines, i.e., \$63,000, to the "revised amount" that Terry claimed was owed to the receiver, i.e., \$138,007. That same day, the trial court issued an entry requiring Terry to post a bail bond of \$201,000.

{¶19} The transcript of the March 25, 2010 hearing indicates that Terry did not comply with the May 7, 2010 order. Moreover, it can be inferred from that transcript that the trial court found that Terry owed \$63,000 in fines as a result of his noncompliance with the trial court's orders of April 23, 2009 and November 10, 2009. However, this inference is by no means a certainty, as it is possible that the trial court did not intend to arrive at a final decision on the amount of accumulated fines owed by Terry at that hearing. In any event, it is well-established that a trial court speaks only through its journal entries and not by its oral pronouncements from the bench, see *In re R.D.G.*, Butler CA2010-12-323, 2011-Ohio-6018, ¶ 15, and therefore the transcript of the May 25, 2010 hearing cannot serve as a substitute for the trial court's failure to issue a final, appealable order on the contempt issues in this case.

{¶20} The trial court and the parties overlooked the need to issue a journal entry that

expressly and explicitly found that Terry failed to purge himself of his contempt, imposed a 30-day jail sentence on Terry as a result of his noncompliance, and set forth the amount of accumulated fines that Terry owes as a result of his noncompliance with the trial court's orders of April 23, 2009, November 10, 2009, and May 7, 2010. Until the trial court issues such a journal entry, there is no final order in this case and the contempt issues raised by Terry are not ripe for review. See *Id.* and *Armstrong*, 2004-Ohio-1521 at ¶ 5.

{¶21} In light of the foregoing, we dismiss Terry Dudley's appeal for lack of a final, appealable order.

HENDRICKSON, P.J., concurs.

PIPER, J., dissents.

PIPER, J., dissenting.

{¶22} The trial court's finding of contempt was not a conditional punishment because Terry was given a definite sentence and was found to be in continuing contempt. The trial court's wording in its finding of contempt indicated no further proceedings were necessary or contemplated, which explains why the parties, the attorneys, and the trial court all proceeded on the trial court's final decision that Terry would be incarcerated. So certain was his jail sentence that Terry successfully sought a stay and posted bond pending appeal.

{¶23} While case law exists indicating that there is no final appealable order when the opportunity to purge is pending, there is also case law finding "finality" has been achieved when there is no need for further proceedings. *Davis-Wright v. Wright*, Highland App. No. 09CA1, 2010-Ohio-3984.

{¶24} In *Davis-Wright*, a father was found to be in contempt for failing to pay child support. Even though the father was given an opportunity to purge himself of contempt, he

was, pursuant to the court's order, to appear at the county jail for incarceration. The order was final because the court expected its contempt finding to be self-executing when the father did not purge himself of contempt. Thus, no further proceedings were necessary or contemplated before the sentence was to be imposed.

{¶25} The parties herein have not raised the issue of a final order because they understood the trial court's ruling to be self-executing. Dismissing the appeal will only delay resolution of the issues involved and require the parties to expend additional resources, time and money.

{¶26} Instead, the parties could have obtained a nunc pro tunc entry to more accurately convey the trial court's order. A nunc pro tunc order is used to record that which the trial court did, but which may not be recorded. *State v. Hodges*, Hamilton App. No. C-990516, 2001 WL 698135. As the court state in *Ferraro v. BF Goodrich Co.*, 149 Ohio App.3d 301, 2002-Ohio-4398, ¶ 10:

While a case is pending on appeal, a trial court retains all jurisdiction over the case that is not inconsistent with the court of appeals' jurisdiction to reverse, modify, or affirm the judgment.

Thus a nunc pro tunc order herein would not be inconsistent with our appellate court jurisdiction.

{¶27} Thus, I respectfully dissent from the path chosen by the majority in dismissing the appeal, because a nunc pro tunc entry would more efficiently satisfy the concerns expressed by the majority and ultimately place less burden upon the parties.