

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2017 IL App (4th) 150943-U

NO. 4-15-0943

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

December 14, 2017

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
FRANKLIN L. SMALL, JR.,)	No. 14CF713
Defendant-Appellant.)	
)	Honorable
)	Timothy J. Steadman,
)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court dismissed the appeal, finding it had no jurisdiction over the trial court’s denial of defendant’s motion for a *nunc pro tunc* order because it did not constitute a final judgment.

¶ 2 In May 2015, the trial court found defendant, Franklin L. Small, Jr., guilty of attempt (first degree murder) and aggravated domestic battery. In July 2015, the court sentenced him to prison. Defendant later filed a *pro se* motion for a *nunc pro tunc* order, which the court denied.

¶ 3 On appeal, defendant argues this court should vacate various fines improperly imposed by the circuit clerk. We dismiss the appeal.

¶ 4 I. BACKGROUND

¶ 5 In June 2014, the State charged defendant by information with single counts of attempt (first degree murder) (count I) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2014)) and

aggravated domestic battery (count II) (720 ILCS 5/12-3.3 (West 2014)). Following a May 2015 bench trial, the trial court found defendant guilty of both counts. Defendant later filed a posttrial motion, which the court denied.

¶ 6 On July 23, 2015, the trial court sentenced defendant to seven years in prison on count I and six years in prison on count II. The court ordered the sentences to be served consecutively to each other, as well as to the sentence imposed in Moultrie County case No. 14-CF-28. The court awarded defendant credit for time served in custody from June 17, 2014, to July 6, 2014. The court also ordered him to pay various court costs and fees.

¶ 7 On September 16, 2015, defendant filed a *pro se* motion for a *nunc pro tunc* order, claiming he was entitled to 408 days of credit for time served in his case. The following day, the trial court denied defendant's motion in a docket entry, stating the dates set forth in the sentencing judgment "appear to be correct" and there was "no credit in this cause for time served in custody simultaneously for the consecutive sentence in Moultrie County cause [No.] 14-CF-28."

¶ 8 On November 25, 2015, defendant filed an untimely notice of appeal from his convictions and sentences, stating he placed the notice of appeal in the institutional mail on October 16, 2015. This court allowed defendant's motion to file a late notice of appeal, which listed September 17, 2015, as the date of the judgment order from which the appeal was taken.

¶ 9 II. ANALYSIS

¶ 10 In the case *sub judice*, defendant argues various fines should be vacated because they were improperly imposed by the circuit clerk. The State argues this court is without jurisdiction to review defendant's appeal. We agree with the State.

¶ 11 In his late notice of appeal, defendant appeals the trial court’s denial of his motion for a *nunc pro tunc* order. In his brief, defendant cites Illinois Supreme Court Rule 606 (eff. Dec. 11, 2014), which pertains to an appeal from a final judgment. Thus, we must determine whether the denial of defendant’s motion for a *nunc pro tunc* order constitutes a final judgment such that his late notice of appeal vests jurisdiction in this court.

“Article VI, section 6, of the Illinois Constitution confers on the appellate court jurisdiction to hear appeals from all final judgments entered by the circuit court. Ill. Const. 1970, art. VI, § 6. It is well settled that a ‘final judgment’ is a determination by the circuit court on the issues presented by the pleadings ‘which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit.’ [Citation.] In other words, a judgment or order is considered final and appealable if it determines the litigation on the merits such that the only thing remaining is to proceed with the execution of judgment. [Citation.] Accordingly, only an order which leaves the cause still pending and undecided is not a final order for purposes of appeal.” *People v. Shinaul*, 2017 IL 120162,

¶ 10.

¶ 12 The State relies, in part, on the First District’s decision in *People v. Griffin*, 2017 IL App (1st) 143800, 82 N.E.3d 186. In that case, the defendant pleaded guilty in two cases in April 2014 but did not file a motion to withdraw his plea or reconsider his sentence or a direct appeal. *Griffin*, 2017 IL App (1st) 143800, ¶ 2, 82 N.E.3d 186. In September 2014, the defendant filed a *pro se* motion to correct the mittimus *nunc pro tunc* based on the trial court’s

allegedly incorrect presentence credit calculation. *Griffin*, 2017 IL App (1st) 143800, ¶ 2, 82 N.E.3d 186. The court denied the motion, and the defendant appealed. *Griffin*, 2017 IL App (1st) 143800, ¶ 3, 82 N.E.3d 186.

¶ 13 On appeal, the defendant did not challenge the trial court’s denial of his motion to correct the mittimus *nunc pro tunc*. *Griffin*, 2017 IL App (1st) 143800, ¶ 4, 82 N.E.3d 186. Instead, he raised new issues, including the propriety of certain fines and fees assessed against him. *Griffin*, 2017 IL App (1st) 143800, ¶ 4, 82 N.E.3d 186. Before it could even consider addressing the merits of the defendant’s claim, the First District first had to determine whether it had jurisdiction over the appeal. *Griffin*, 2017 IL App (1st) 143800, ¶ 10, 82 N.E.3d 186. While the defendant’s motion was properly before the trial court for its consideration, as the motion asserted a clerical error, the First District found it had no jurisdiction to consider the appeal because the motion was not a final and appealable order. *Griffin*, 2017 IL App (1st) 143800, ¶¶ 12-13, 82 N.E.3d 186. The court found the April judgments determined the litigation on the merits, and the September denial of the defendant’s motion “left the original judgments in place.” *Griffin*, 2017 IL App (1st) 143800, ¶ 13, 82 N.E.3d 186.

¶ 14 The First District found its case analogous to the facts in *People v. Salgado*, 353 Ill. App. 3d 101, 817 N.E.2d 1079 (2004). In that case, the defendant filed a *pro se* petition for free transcripts, the trial court denied his motion, and the appellate court dismissed the appeal for lack of a final and appealable order. *Salgado*, 353 Ill. App. 3d at 106-07, 817 N.E.2d at 1084. The court noted “[a]n order’s substance, and not its form, determines whether it is appealable.” *Salgado*, 353 Ill. App. 3d at 106, 817 N.E.2d at 1084. Noting the lack of any pending litigation or proceedings in the trial court at the time the petition was filed, the *Salgado* court found no basis for the defendant’s appeal. *Salgado*, 353 Ill. App. 3d at 106, 817 N.E.2d at 1084. While

the motion in *Salgado* was a petition for transcripts and common-law records, and not a motion for a *nunc pro tunc* order as in *Griffin*, the result was the same. *Griffin*, 2017 IL App (1st) 143800, ¶ 14, 82 N.E.3d 186.

¶ 15 Although defendant relies heavily on *People v. White*, 357 Ill. App. 3d 1070, 831 N.E.2d 657 (2005), we agree with the distinction noted by the *Griffin* court, which stated “it is axiomatic that not every denial of a motion gives rise to a right of appeal.” *Griffin*, 2017 IL App (1st) 143800, ¶ 15, 82 N.E.3d 186. Moreover, the First District stated where “a court does not enter or modify a judgment but merely affirms the correctness of an existing judgment, there is no new final order from which to appeal.” *Griffin*, 2017 IL App (1st) 143800, ¶ 15, 82 N.E.3d 186. As the denial of the defendant’s motion was not a final order for purposes of appeal, the appellate court dismissed the appeal. *Griffin*, 2017 IL App (1st) 143800, ¶ 26, 82 N.E.3d 186.

¶ 16 When defendant filed his motion in this case, nothing was pending for the trial court to resolve. The order that determined the litigation on the merits was the sentencing judgment entered against defendant on July 23, 2015. The court’s September 16, 2015, denial of defendant’s motion for an order *nunc pro tunc* did not create a new judgment or modify an existing judgment. Instead, it left standing its original judgment. As that prior judgment remained in place, no new final judgment resulted from which to appeal. We find defendant’s late notice of appeal, which was not taken from a final judgment, does not vest jurisdiction in this court. Accordingly, we must dismiss defendant’s appeal.

¶ 17 III. CONCLUSION

¶ 18 For the reasons stated, we dismiss the appeal. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 19 Appeal dismissed.