SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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By facsimile and U.S. Mail

Re: Steven D. Humes v. State of Delaware
Cr. ID No. 0402006855

Submitted: February 9, 2006
Decided: March 1, 2006

On the State's Motion to Correct Clerical Mistake.
GRANTED.

Dear Counsel:

This case is an appeal from a criminal conviction in the Court of Common Pleas. Before this Court is the State's "Motion to Correct Clerical Mistake" brought pursuant to Superior Court Criminal Rule 36 and filed on November 17, 2005. This motion was brought after a "nolle prosequi" in this case was "filed in error" by the State in this Court on November 9, 2005, before briefing on the appeal began. For the reasons below, the State's motion is **GRANTED.**

I. FACTS AND PROCEDURAL HISTORY

On October 27, 2004, Steven D. Humes ("Appellant") was convicted of Misuse of Computer Information[1] in the Court of Common Pleas. Defendant then filed an appeal to the Superior Court on November 11, 2004. Appellant requested appointment of counsel and this Court appointed Andrew J. Witherell, Esquire to represent Appellant.

The pertinent history begins on November 9, 2005, when the Attorney General filed what it termed a "nolle prosequi" of Appellant's case. Appellant's appeal had been inadvertently included on a list of "Unindicted Cases" from 2004 sent to the State by the Superior Court Prothonotary.[2] The State then incorrectly attempted to nolle pross the instant appeal (not realizing that this case was an appeal).[3] The Prothonotary accepted and docketed the nolle prosequi on November 9.[4] After learning of its error, the State quickly responded with the instant motion asking that the nolle prosequi be set aside because of a clerical mistake made by the State. The Deputy Attorney General who "nolle prossed" the appeal (Mark W. Butnitsky) was not the Deputy Attorney General assigned to the appeal and who had prosecuted the case in the Court of Common Pleas (Shawn E. Martyniak). Mr. Martyniak had no knowledge of Mr. Bunitsky's action until after it happened.

II. CONTENTIONS OF THE PARTIES

The State contends that the November 9 nolle prosequi was "filed in error" and should therefore be withdrawn.[5] The State claims that it neither had the intent nor the authority to file the nolle prosequi: "It was clearly not the State's intent to 'dispose' of the underlying charges against the [Appellant] (since the State had no need to do so) nor does the State have the right or authority to dismiss the [Appellant's] appeal."[6] Moreover, the State argues that because "the nolle prosequi was filed 'without prejudice' to

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[1] 11 *Del. C.* § 935.
[2] Mark W. Bunitsky, Esq. Aff. ¶ 4, Jan. 6, 2006.
[3] *Id.* at ¶ 5.
[4] Nolle Prosequi filed by Attorney General, D.I. 27 (Nov. 9, 2005).
[5] Letter to the Court from Mark W. Bunitsky, Esq., at 1 (Jan. 6, 2006).
[6] Letter to the Court from Mark W. Bunitsky, Esq., at 1 (Feb. 9, 2006).

reinstate the case in Superior Court, … the State could, if all other arguments fail, choose to reinstate the charges."[7]

Appellant responds that "the 'without prejudice' [classification] was simply the State's precautionary position allowing it to argue, as it does now, mistake, and to reinstate the charge."[8] As to the State's claim that it does not have authority to file a nolle prosequi on the Appellant's appeal without permission of the Court, Appellant claims that in "a criminal appeal, the State is in the position at any time to dismiss a criminal action."[9] Appellant further argues that "[t]he State has had ample time to review and prosecute this action accordingly and has failed to do so."[10] Thus, Appellant urges that the "interest of justice mitigates" in his favor and, thus, the nolle prosequi must not be corrected.[11]

The State argues in reply that "[t]he nolle prosequi filed in this case has not caused the [Appellant] prejudice, was not filed in an effort for the State to get some advantage, nor to manipulate the case/charges to the [Appellant's] disadvantage."[12]

III. DISCUSSION

The issue here is whether a clerical error was made by the Prothonotary in accepting and docketing a nolle prosequi incorrectly filed in this Court by the State in this pending criminal appeal from a conviction in the Court of Common Pleas.

Superior Court Criminal Rule 36 provides that "[c]lerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders."[13] In Delaware, "Criminal Rule

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[7] Letter to the Court from Mark W. Bunitsky, Esq., at 1-2 (Jan. 6, 2006).

[8] Letter to the Court from Andrew J. Witherell, Esq., at 1 (Feb. 3, 2006).

[9] *Id.* at 2.

[10] *Id.*

[11] *Id.*

[12] Letter to the Court from Mark W. Bunitsky, Esq., at 2 (Feb. 9, 2006) ("As soon as the State discovered the error, the State immediately (within about a week) moved to void the error.").

[13] Super. Ct. Crim. R. 36. *See also* 26 James Wm. Moore et al., Moore's Federal Practice § 636.02(2) (1997) ("A clerical error involves a failure to accurately record a statement or action by the court or one of the parties.").

36 empowers the Superior Court to correct clerical mistakes or errors in the record resulting from 'oversight or omission.'"[14] One commentator elaborates: "Errors arising from oversight or omission are generally corrected to conform to the *intention* of the court or parties at the time the error was made, which may not be reflected in their recorded statements."[15] Rule 36 does not allow the Superior Court to correct errors of parties before it, but only its own clerical errors.

To determine whether the Prothonotary erred in accepting and docketing the purported nolle prosequi, the Court must look to Superior Court Criminal Rule 48(a). Rule 48(a) provides: "The attorney general may without leave of the court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant or after conviction without leave of the court."[16]

Under the plain language of Rule 48(a), the State may not enter a nolle prosequi "without leave of the court" after there has been a conviction. Here, Appellant was convicted in the Court of Common Pleas and then appealed to this Court. Criminal Rule 48(a) is similar in both the Court of Common Pleas and the Superior Court.[17] The term "the court" in Rule 48(a), as applied to the appeal at hand, refers to the Court where the conviction occurred.[18] Because the State attempted to enter the November 9, 2005, nolle prosequi in this Court instead of the court where the conviction occurred (the Court of Common Pleas), the nolle prosequi was void *ab initio*.

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[14] *Guyer v. State*, 453 A.2d 462, 464 (Del. 1982) (upholding Superior Court's "reassignment" of defendant's sentences under Rule 36 after a clerical error resulted in an ambiguous sentence that did not reflect the intent of the trial judge).

[15] Moore's Federal Practice, § 636.02(3).

[16] Super. Ct. Crim. R. 48(a).

[17] CCP Crim. R. 48(a):

> The Attorney General may file in open court, either orally or in writing, a nolle prosequi of an information and the prosecution thereof shall terminate, provided, however, that in any case in which a plea of guilty shall have been entered or *a verdict of guilty returned, a nolle prosequi shall be filed and entered only by and with the consent of the Court*.
> (emphasis added).

[18] If the State had wished to terminate the criminal prosecution of Appellant, the correct course of action would have been for the State to move to remand the case back to the Court of Common Pleas, and then seek the permission of that Court pursuant to Court of Common Pleas Criminal Rule 48(a) to enter the nolle prosequi.

Finally, there is no evidence that the State is attempting to strategically place the Appellant at a disadvantage or that Appellant is prejudiced by the delay (which Appellant attributes to the State and which the State, in turn, attributes to Appellant). Actually, the chief delay in this case was the great delay in the preparation of the entire transcript by the Court of Common Pleas Court Reporter, despite efforts by this Court to get that transcript completed. Any grounds for prejudice based on delay set forth by Appellant are without merit.

Therefore, because the nolle prosequi was void on its face, the Prothonotary technically erred in accepting it and docketing it. It was not the intent of the State to enter a void nolle prosequi, let alone to vacate Appellant's conviction in the Court of Common Pleas. Nor was it the intent of the Prothonotary to accept and docket such a void nolle prosequi. Such an error, therefore, is clerical and is within the ambit of Rule 36. It should be corrected so that the appeal may continue.

IV. CONCLUSION

For the foregoing reasons, the State's "Motion to Correct Clerical Mistake" is **GRANTED.** Docket entry # 27 accepting the filing of the nolle prosequi is **VACATED.** Accordingly:

- Appellant's Opening Brief and Appendix on the substantive appeal shall be due **March 30, 2006**.
- The State's Answering Brief and Appendix on the substantive appeal shall be due **April 28, 2006**.
- The Appellant's Reply Brief shall be due **May 16, 2006**.

Given the age of this case, the Court asks that no extensions of these deadlines be requested.

Very truly yours,

oc: Prothonotary