

[Cite as *State ex rel. Albourque v. Terry*, 2010-Ohio-4362.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94825

**STATE OF OHIO, EX REL.
HOUSSAM ALBOURQUE**

RELATOR

vs.

STEPHEN J. TERRY, JUDGE

RESPONDENT

**JUDGMENT:
WRIT GRANTED**

Writ of Mandamus
Motion No. 432890
Order No. 436969

RELEASE DATE: September 13, 2010

FOR RELATOR

Houssam Albourque, pro se
Inmate No. 502-404
Richland Correctional Institution
P.O. Box 8107
Mansfield, Ohio 44901

ATTORNEYS FOR RESPONDENT

William D. Mason
Cuyahoga County Prosecutor

By: James E. Moss
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, J.:

{¶ 1} Relator, Houssam Albourque, is the defendant in *State v. Albourque*, Cuyahoga Cty. Court of Common Pleas Case No. CR-469393, which has been assigned to respondent judge. Albourque was indicted on five counts in CR-469393. Respondent's predecessor issued the following sequence of orders in 2006:

February 27 Accepting Albourque's guilty plea to amended count 2 (involuntary manslaughter with firearm specification) and count 3 (aggravated robbery with firearm specification), indicating

that counts 1 and 4 were nolleed, stating a sentence for each of counts 2 and 3 as well as the firearm specification, imposing five years mandatory postrelease control and holding sentencing in abeyance awaiting Albourque's testimony in a co-defendant's case.

March 13 Nunc pro tunc entry, as of February 27, stating that, unless Albourque's testimony is consistent with a prior statement, the state reserves the right to move the court to declare the plea agreement null and void.

March 21 Memorializing Albourque's plea and stating the charges for counts 2 and 3 (as amended), stating a sentence for each of counts 2 and 3 as well as the firearm specification, imposing five years mandatory postrelease control and ordering that Albourque be placed in solitary confinement on February 12 of each year.

{¶ 2} On March 18, 2009, Albourque filed a motion for sentencing in which he argued that he was entitled to a new sentence because the sentencing entry did not impose separate terms of postrelease control for each count. Respondent denied the motion. Albourque appealed and this court dismissed the appeal "for lack of a final appealable order. See R.C. 2505.02." *State v. Albourque* (May 21, 2009), Cuyahoga App. No. 93204, Entry No. 422260.

{¶ 3} Albourque commenced this action in mandamus. He contends that, because respondent issued the nunc pro tunc entry on March 13, 2006, the February 27, 2006 journal entry is not a final order. That is, Albourque observes that *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, requires that all of the components of a judgment stated in Crim.R. 32(C) must appear in a single document for a sentencing entry to be a final appealable order.

He argues that the March 13, 2006 nunc pro tunc entry modifies the sentence in the February 27, 2006 entry. He requests that this court compel respondent to issue a final appealable order.

{¶ 4} In *State ex rel. Carnail v. McCormick*, ___ Ohio St.3d ___, 2010-Ohio-2671, 931 N.E.2d 110, the Supreme Court reaffirmed the holding of *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, 895 N.E.2d 805, that relief in mandamus and procedendo lies “to compel the judge and the common pleas court to issue a sentencing entry that complied with Crim.R. 32(C) and constituted a final, appealable order.” *Carnail*, at ¶34. Albourque argues that he is entitled to relief in mandamus under *Culgan* because respondent has not issued a sentencing entry which constitutes a final appealable order and respondent denied Albourque’s motion for sentencing. Respondent argues, however, that the March 21, 2006 entry – which removed the temporary suspension of sentence stated in the February 27, 2006 entry – is a final appealable order.

{¶ 5} *Culgan* and *Carnail* require that we make a determination on the finality of the sentencing entry in the underlying case. Our review of the original papers in Case No. CR-469393 reflects that the court of common pleas did not issue a final appealable order complying with Crim.R. 32(C). Because respondent denied Albourque's motion for sentencing, we must conclude that Albourque is entitled to relief in mandamus.

{¶ 6} As mentioned above, the indictment in Case No. CR-469393 included *five* counts. This court is unable to identify a journal entry in the record in which the court of common pleas disposed of the fifth count, having a weapon while under disability. It is well established that Crim.R. 32(C) requires that a trial court dispose of each count before the determination of a criminal action is final and appealable. See, e.g., *State v. White*, Cuyahoga App. No. 92972, 2010-Ohio-2342, at ¶60. Because the absence of a disposition of count five requires the conclusion that the prior sentencing entry in Case No. CR-469393 is not a final appealable order, we need not reach Albourque's argument regarding the effect of the March 13, 2006 nunc pro tunc entry. Rather, because of the missing count five, we must conclude that the court of common pleas has not issued a final appealable order in Case No. CR-469393.

{¶ 7} "Although relator has not filed a dispositive motion, all of the relevant evidence is before the court and there is no genuine issue as to any material fact. We may, therefore, enter judgment for relator. See, e.g., *State ex rel.*

Cleveland v. Corrigan, Cuyahoga App. No. 93940, 2009-Ohio-6655.” *State ex rel. Fifth Third Mtge. Co. v. Russo*, 2010-Ohio-3734, at ¶3. As a consequence, we enter judgment for Albourque and issue a writ of mandamus compelling respondent to issue a sentencing entry in Case No. CR-469393 which complies with the requirements of Crim.R. 32(C) and *Baker*.

{¶ 8} Accordingly, respondent’s motion for summary judgment is denied and we enter judgment for relator. Respondent to pay costs. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

Writ granted.

LARRY A. JONES, JUDGE

JAMES J. SWEENEY, P.J., and
CHRISTINE T. MCMONAGLE, J., CONCUR