[Cite as *State v. Melton*, 2010-Ohio-4476.]

[Please see original opinion at 2010-Ohio-3409.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93299

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDRE MELTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-327341

BEFORE: Dyke, J., Rocco, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: September 23, 2010

ATTORNEY FOR APPELLANT

Stephen P. Hardwick, Esq.
Asst. Public Defender
Ohio Public Defender's Office
250 East Broad Street, Suite 1400
Columbus, Ohio 43215

ATTORNEYS FOR APPELLEE

William D. Mason, Esq.
Cuyahoga County Prosecutor
By: Thorin Freeman, Esq.
Asst. County Prosecutor
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ON RECONSIDERATION[1]

ANN DYKE, J.:

{¶ 1} Affirmed in part, reversed in part and remanded. See Motion Number 437571, dated September 23, 2010. Order and Opinion of July 22, 2010 (Motion Number 435710) is hereby vacated.

{¶ 2} Defendant Andre Melton appeals from orders rendered in connection with his conviction for aggravated murder with mass murder and firearm specifications. For the reasons set forth below, we affirm in part, reverse in part, and remand for correction of a nunc pro tunc trial court order.

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[1]The original announcement of decision, *State v. Melton*, Cuyahoga App. No. 93299, 2010-Ohio-3409, released July 22, 2010, is hereby vacated. This opinion is the court's journalized decision in this appeal. See App.R. 22(C); see, also,

{¶ 3} On August 28, 1995, defendant was indicted pursuant to a three-count indictment. Count 1 charged defendant with aggravated murder, with mass murder, firearm and aggravated felony specifications, in connection with the death of Jeffrey Parker. Count 2 charged defendant with attempted murder with firearm and aggravated felony specifications, in connection with the shooting of Mylo Smith. Count 3 charged defendant with having a weapon while under disability, with violence and firearm specifications.

{¶ 4} Defendant pled not guilty to the indictment. Thereafter, on February 21, 1996, the state agreed to amend Count 1 to delete the aggravated felony specification, and defendant entered a guilty plea, before a three-judge panel, to this amended charge. He was subsequently sentenced to a term of twenty years to life imprisonment, plus three years of actual time for the firearm specification.

{¶ 5} On October 4, 1996, defendant moved to withdraw his guilty plea. The trial court denied the motion and defendant appealed to this court. The appeal was dismissed for failure to file the record. See *State v. Melton* (June 24, 1997), Cuyahoga App. No. 72485. On August 2, 1999, defendant filed a motion for a delayed appeal. The motion was denied. See *State v. Melton* (Sep. 2, 1999), Cuyahoga App. No. 76759. On March 15, 2005, defendant filed a motion for leave to appeal. This court denied the motion and stated:

{¶ 6} "Motion by appellant for leave to appeal is denied pursuant to *State*

S.Ct.Prac.R. 2.2 (A)(1).

v. Sherrills [(Aug. 13, 2001), Cuyahoga App. No. 77178]. There is no requirement for the written filing of a jury waiver when the defendant enters a guilty plea. *Martin v. Maxwell* (1963), 175 Ohio St. 47, 191 N.E.2d 838." See *State v. Melton* (Mar. 16, 2005), Cuyahoga App. No. 86123.[2]

{¶ 7} On April 10, 2007, defendant filed a "Memorandum Regarding Sentencing." Within this document, defendant asserted that he was not found guilty of capital specifications, so a "sentence of life with twenty full years is not available[.]" Rather, according to defendant, he is not subject to a term of "imprisonment for life with parole eligibility after serving twenty full years of imprisonment," as set forth in former R.C. 2967.13(D), but is instead subject to a term of "imprisonment for life with parole eligibility after serving twenty years of imprisonment * * *, diminished [by good time credit]," as set forth in former R.C. 2967.13(C). Defendant also asserted that the court was without authority to change the sentence because defendant did not waive his right to a jury, and because such change would render defendant's guilty plea involuntary.

{¶ 8} Several months later, defendant filed a motion for a final, appealable order and claimed that the court's sentencing entry failed to set forth a verdict under Crim.R. 32(C). In response to this motion, the trial court issued the

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[2]"This court's stated reason for denying Melton's motion for leave to appeal was incorrect in light of *State v. Carley*, 139 Ohio App.3d 841, 745 N.E.2d 1122. Nevertheless, since the supreme court declined to accept Melton's further appeal from that decision, the matter cannot be revisited; it is now barred by the doctrine of res judicata, as discussed infra."

following entry:

{¶ 9} "Nunc Pro Tunc Entry as of and for 2/21/96. The Court's 2-21-96 journal entry incorrectly indicated that defendant was sentenced to '20 years to life imprisonment consecutive to 3 years actual.' Defendant's actual sentence was '20 full years to life, which is consecutive to the 3 year actual.' (Tr. At 16). Not only was this the sentence that the court imposed at the sentencing hearing, but pursuant to R.C. 2929.01(C)(2) as it read in 1996, this was the minimum sentence allowed for aggravated murder involving capital specifications.

{¶ 10} "In *State v. Lynch*, 8th Dist. No. 90630, 2008-Ohio-5594, the court held: 'Journal entries must conform to the record at the sentencing hearing and must be corrected to reflect that which was stated hearing itself.' See also, *State v. Adams* (May 22, 1997), 8th Dist. No. 70045. Further, Crim.R. 36 provides that 'clerical mistakes in * * * orders * * * arising from oversight or omission * * * may be corrected at any time.' For example, in *State v. Turner*, 8th Dist. No. 81449, 2003-Ohio-4933, the appellate court held that it was not error for a trial court to, sua sponte, order the judgment entry of the sentence to conform to the transcript of the sentencing hearing. Based on the above, the court issues the following nunc pro tunc order correcting the 2-21-96 journal entry to accurately reflect defendant's sentence as imposed at the sentencing hearing."

{¶ 11} The trial court also noted that it considered defendant's remaining claims as a petition for postconviction relief, and as such, were untimely and barred by res judicata.

{¶ 12} Defendant now appeals and raises six errors for our review. For the sake of clarity, we shall begin with the second assignment of error.

{¶ 13} In his second assignment of error, defendant complains that "the trial court lacked jurisdiction to impose any sentence, let alone to 'correct' a sentence," in the absence of a signed jury waiver. As the trial court correctly noted, although defendant presented this argument in a motion entitled a "memorandum regarding resentencing," the motion is actually a petition for postconviction relief. "Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21." *State v. Reynolds* (1997), 79 Ohio St.3d 158, 1997-Ohio-304, 679 N.E.2d 1131, syllabus. Here, defendant filed his "memorandum regarding resentencing" on April 10, 2007. Since this court refused to entertain defendant's direct appeal two years earlier in *State v. Melton* (Mar. 16, 2005), Cuyahoga App. No. 86123, appeal denied by 107 Ohio St.3d 1423, 2005-Ohio-6124, 837 N.E.2d 1208, we find defendant's memorandum, although titled differently, actually constitutes a petition for postconviction relief.

{¶ 14} Because defendant presented his argument concerning the absence of a signed jury waiver as a petition for postconviction relief, we must decline review of the merits pursuant to the Supreme Court of Ohio's decision in *State v. Pless*, 74 Ohio St.3d 333, 1996-Ohio-102, 658 N.E.2d 766. In that case, the

court held "[t]he failure to comply with R.C. 2945.05 may be remedied only in a direct appeal from a criminal conviction." Id. at paragraph two of the syllabus. See, also, *State v. Carley* (2000), 139 Ohio App.3d 841, 846, 745 N.E.2d 1122. Accordingly, defendant's second assignment of error is overruled.

{¶ 15} For his first assignment of error, defendant claims that the trial court erred in accepting his guilty plea and imposing a sentence, "without taking evidence, without any recorded deliberation or determination by the three-judge panel as to the appropriateness of the charge, without any finding on the record that aggravated murder had been proven beyond a reasonable doubt, and without journalizing a finding of guilt."

{¶ 16} We note, however, that pursuant to the doctrine of res judicata, a final judgment of conviction bars a defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. This rule also includes appeals that were filed then dismissed for failure to file the record where the issue could fairly have been determined without resort to evidence dehors the record. *State v. Freed,* Cuyahoga App. No. 82854, 2003-Ohio-5938.

{¶ 17} Because this challenge could have been raised on direct appeal, it is waived. *Pratts v. Hurley,* 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992,

syllabus ("The failure of a court to convene a three-judge panel, as required by R.C. 2945.06, does not constitute a lack of subject-matter jurisdiction that renders the trial court's judgment void ab initio and subject to collateral attack in habeas corpus. It constitutes an error in the court's exercise of jurisdiction that must be raised on direct appeal.") See, also, *State v. Stewart,* Franklin App. No. 09AP-817, 2009-Ohio-6423 (claimed violation R.C. 2945.06 was known to and discoverable by appellant at the time of the trial court's original judgment and sentence, and could have been raised on direct appeal, so is barred under the doctrine of res judicata and is untimely under R.C. 2953.21). Accord *State v. Nieves,* Lorain App. No. 08CA009500, 2009-Ohio-6374; *State v. Mitchell*, Guernsey App. No. 07 CA 17, 2008-Ohio-101.

{¶ 18} In accordance with the foregoing, this assignment of error is without merit.

{¶ 19} For his third assignment of error, defendant asserts that the trial court erred in issuing a nunc pro tunc entry signed by one judge rather than the three-judge panel, and improperly increased the sentence.

{¶ 20} In *State v. Spears,* Cuyahoga App. No. 94089, 2010-Ohio-2229, this court stated:

{¶ 21} "Crim.R. 36 specifically authorizes the trial court to correct '[c]lerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission * * * at any time.' A trial court may use a nunc pro tunc entry to correct mistakes in judgments, orders, and other parts of

the record so the record speaks the truth. *State v. Gruelich* (1988), 61 Ohio App.3d 22, 24, 572 N.E.2d 132. A nunc pro tunc order is limited to memorializing what the trial court actually did at an earlier point in time, such as correcting a previously issued order that fails to reflect the trial court's true action. Id.

{¶ 22} "[However,] * * * once a defendant has started to serve a sentence, a court may not modify or increase it, as that constitutes double jeopardy. See *State v. Bell* (1990), 70 Ohio App.3d 765, 773, 592 N.E.2d 848."

{¶ 23} In this matter, the court stated on the record that defendant was receiving "twenty full years to life which is consecutive to the three year actual" for the firearm. (Tr. 16, see, also, tr. 4). Accordingly, we find that the trial court simply issued a nunc pro tunc correction to the sentence and did not modify or increase the original sentence.

{¶ 24} As to whether a single judge may sign a nunc pro tunc order correcting a previous order from a three-judge panel, we note that the state concedes that error occurred in this regard.

{¶ 25} The third assignment of error is well taken in part. The nunc pro tunc entry is reversed and remanded for consideration by the three-judge panel.

{¶ 26} For his fourth assignment of error, defendant asserts that the trial court erred in "converting his motion for a final appealable order into a postconviction petition and denying it as untimely."

{¶ 27} In that the "motion for a final appealable order" set forth a collateral

attack on the judgment of conviction, the trial court properly deemed it a petition for postconviction relief. *State v. Steffen,* 70 Ohio St.3d 399, 1994-Ohio-111, 639 N.E.2d 67. As such, it was untimely since it was filed "later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction[.]" R.C. 2953.21(A)(2). Accord *State v. Stewart,* supra. The fourth assignment of error is therefore without merit.

{¶ 28} For his fifth assignment of error, defendant asserts that the trial court erred in failing to issue a final appealable order. We conclude that the trial court issued a judgment entry of conviction. The Ohio Supreme Court has determined that any defects in the entry pursuant to R.C. 2945.06 could have been raised on direct appeal. *Pratts v. Hurley*. We therefore do not find the judgment deficient as a final appealable order. The fifth assignment of error is therefore without merit.

{¶ 29} For his sixth assignment of error, defendant asserts that his trial counsel was ineffective in connection with the sentencing of this matter. In that this issue could have been raised on direct appeal without evidence dehors the record, it is barred by res judicata. Accord *State v. Stewart*.

Judgment affirmed in part, reversed in part, and remanded for correction of the nunc pro tunc trial court order.

It is ordered that appellee and appellant split the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR