[Cite as *State v. Brewer,* 2010-Ohio-5242.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94144

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

REGINALD BREWER

DEFENDANT-APPELLANT

JUDGMENT:
DISMISSED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-524780

BEFORE: Rocco, P.J., Celebrezze, J., and Boyle, J.

RELEASED AND JOURNALIZED: October 28, 2010

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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Reginald Brewer appeals from his conviction after a bench trial for aggravated assault.

{¶ 2} Brewer presents two assignments of error. He claims his conviction is not supported by the manifest weight of the evidence and his trial counsel rendered ineffective assistance.

{¶ 3} This court, however, cannot address Brewer's claims. Since a review of the trial court's order of sentence demonstrates it is not a final appealable order, this court lacks jurisdiction and is constrained to dismiss this appeal.

{¶ 4} The facts of this case, briefly stated, follow.

{¶ 5} Brewer was charged on two counts, viz., felonious assault and assault, as the result of an altercation that occurred outside a bar in Cleveland. He waived his right to a jury trial and his case proceeded to a trial to the bench.

{¶ 6} At the conclusion of the case, the trial court found Brewer not guilty of felonious assault but guilty of the "lesser included offense" of aggravated assault[1] in count one; the court acquitted Brewer on count two. The trial court then ordered the probation department to prepare a presentence investigation report.

{¶ 7} When the case was called for sentencing, defense counsel acknowledged that his client already was "on probation for a case," but pointed out Brewer "had no felony record" until then. The trial court decided to impose a community control sanction of two years, "subject to 12 [sic] days of local incarceration, which is time served * * *." The court stated that Brewer was subject to the "[s]ame terms and conditions [as] in the other case * * *, plus restitution, should any be forthcoming." The court further warned Brewer that, "if [he] violate[d], [he was] looking at 12 months."

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[1]The trial court was incorrect in so stating, since aggravated assault is an offense of inferior degree rather than a lesser included offense of felonious assault. *State v. Ruppart*, 187 Ohio App.3d 192, 2010-Ohio-1574, 931 N.E.2d 627.

{¶ 8} The journal entry resulting from Brewer's sentencing hearing was more detailed in some respects, but, in pertinent part, stated only as follows:

{¶ 9} "Defendant *is sentenced to* 2 years of community control, under supervision of the Adult Probation Department. * * * *Restitution, if any*, 120 days C[uyahoga] C[ounty] jail, Deft. has already served this time. Violation of the terms and conditions may result in more restrictive sanctions, or a prison term of 12 month(s) as approved by law. * * *." (Emphasis added.)

{¶ 10} Although Brewer filed a timely notice of appeal of his conviction, this court lacks jurisdiction to consider his case, since the foregoing order is not final and appealable. His case has not yet been fully "determined."

{¶ 11} "R.C. 2953.02 describes the scope of review in a criminal case and provides that a court of appeals may review a 'judgment' or 'final order.' *State v. Crago* (1990), 53 Ohio St.3d 243, 244, 559 N.E.2d 1353; *State v. Hunt* (1976), 47 Ohio St.2d 170, 174, 1 O.O.3d 99, 351 N.E.2d 106. A final order is an order that in effect *determines* the case. R.C. 2505.02(B)(1); *State v. Bassham* (2002), 94 Ohio St.3d 269, 271, 762 N.E.2d 963.

{¶ 12} "Generally, in a criminal case, the final judgment is the sentence. *Columbus v. Taylor* (1988), 39 Ohio St.3d 162, 165, 529 N.E.2d 1382, quoting *State v. Chamberlain* (1964), 177 Ohio St. 104, 106, 29 O.O.2d 268, 202 N.E.2d 695; *State v. Hunt*, 47 Ohio St.2d at 174, 1 O.O.3d 99, 351 N.E.2d 106. The sentence is *the sanction* or combination of sanctions *imposed* by the sentencing

court on an offender who pleads guilty to or is convicted of an offense. R.C. 2929.01(FF). The *sentence imposed* on an offender for a felony may *include financial sanctions,* including restitution *in an amount based on the victim's economic loss*. R.C. 2929.18(A)(1)." (Emphasis added.) *State v. Danison*, 105 Ohio St.3d 127, 2005-Ohio-781, 823 N.E.2d 444, ¶5-6.

{¶ 13} Recently, the First Ohio Appellate District made the following observations:

{¶ 14} "Restitution is a financial community-control sanction authorized by R.C. 2929.18(A)(1), which provides for '[r]estitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss.' The statute identifies the manner in which the trial court may award restitution. * * * But '[i]f the court imposes restitution, *at sentencing*, the court shall determine the amount of restitution to be made by the offender.' (Emphasis sic.) Id.

{¶ 15} "Therefore, the plain language of R.C. 2929.18(A)(1) establishes that *if the trial court orders restitution at sentencing*, it must *determine the amount of restitution at that time*. There is no statutory authority for the trial court to exercise continuing jurisdiction to modify the amount of a financial sanction. * * *." (Emphasis added.) *State v. Purnell*, 171 Ohio App.3d 446, 2006-Ohio-6160, 871 N.E.2d 613, at ¶8-9.

{¶ 16} From the foregoing, it is reasonable to determine that when a sentencing entry in a criminal case includes an order of restitution, it also must contain an "amount certain"; otherwise, it does not constitute a final order for appellate purposes. *State v. Sanner*, Greene App. No. 2007 CA 13, 2008-Ohio-1168, ¶9; *State v. Heft*, Knox App. No. 04 CA 28, 2005-Ohio-3253. This court recognizes the existence of contrary authority, as set forth in *State v. Silbaugh*, Portage App. No. 2008-P-0059 and *State v. Carr*, Tuscarawas App. No. 2007 AP120076, 2008-Ohio-3423, but finds, in this context, that the dissenting opinions in those cases contain the better analyses of *Danison*'s application.

{¶ 17} Since the journal entry of sentence in this case is thus incomplete, it is not a final order, and this appeal must be dismissed.

Dismissed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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KENNETH A. ROCCO, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
MARY J. BOYLE, J., CONCUR