

[Cite as *State ex rel. Albourque v. Terry*, 2010-Ohio-5412.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 94825**

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

RELATOR

vs.

**STEVEN J. TERRY, JUDGE**

RESPONDENT

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**JUDGMENT:  
WRIT DENIED**

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Writ of Mandamus  
Motion Nos. 438528 and 437799  
Order No. 438530

**RELEASE DATE:** November 3, 2010

**FOR RELATOR**

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

**ATTORNEYS FOR RESPONDENT**

William D. Mason  
Cuyahoga County Prosecutor

By: James E. Moss  
Assistant County Prosecutor  
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ON RECONSIDERATION [TREATED AS A MOTION FOR RELIEF FROM JUDGMENT  
UNDER CIV.R. 60(B)]<sup>1</sup>

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. Respondent's predecessor issued the following sequence of orders in 2006:

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<sup>1</sup> The original announcement of decision, *State ex rel. Albourque v. Terry*, Cuyahoga App. No. 94825, 2010-Ohio-4362, released September 13, 2010, is vacated. This opinion is the court's journalized decision in this original action. See Civ.R. 58; see also S.Ct.Prac.R. 2.1(A)(1) and 2.2(A)(1).

- February 27      Accepting Alburque'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 nolle, 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 Alburque's testimony in a co-defendant's case.
- March 13        Nunc pro tunc entry, as of February 27, stating that, unless Alburque'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 Alburque'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 Alburque be placed in solitary confinement on February 12 of each year.

{¶ 2} On March 18, 2009, Alburque 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*, 126 Ohio St.3d 124, 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 decide whether the sentencing entry in the underlying case is a final appealable order. Our review of the original papers in Case No. CR-469393 reflects that the court of common pleas did issue a final appealable order complying with Crim.R. 32(C). As required by *Baker*, the March 21, 2006 entry includes: the means of conviction (by guilty plea); the charges, as amended, on which Albourque was convicted; the specifications to which Albourque pled guilty; and the sentence on each count on which he pled guilty as well as the firearm specification.

{¶ 6} Although Albourque appealed the denial of his motion for sentencing, he never filed a direct appeal of his conviction. This court’s determination in Case No. 93204 that the denial of his motion for sentencing is not a final appealable order does not require the conclusion that the court of common pleas did not issue a final and appealable sentencing entry.

Indeed, Albourque has yet to give this court the opportunity to exercise its *appellate* jurisdiction to determine whether the sentence imposed is a final appealable order. Cf. App.R. 5(A), “Motion by defendant for delayed appeal.”

{¶ 7} Accordingly, respondent’s motion for summary judgment is granted. Relator 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 denied.

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LARRY A. JONES, JUDGE

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