

[Cite as *State ex rel. Viceroy v. Strickland Saffold*, 2010-Ohio-5563.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95623

**STATE OF OHIO, EX REL.
PETER VICEROY**

RELATOR

vs.

**HONORABLE JUDGE SHIRLEY
STRICKLAND SAFFOLD**

RESPONDENT

**JUDGMENT:
WRIT GRANTED**

Writ of Procedendo
Motion Nos. 438091 and 437763
Order No. 438584

RELEASE DATE: November 8, 2010

FOR RELATOR

Peter Viceroy, pro se
Inmate No. 303-314
Richland Correctional Institution
P.O. Box 8107
Mansfield, Ohio 44901-8107

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

ANN DYKE, J.:

{¶ 1} On August 27, 2010, the petitioner, Peter Viceroy, commenced this procedendo action against the respondent, Judge Shirley Strickland Saffold, to compel the judge to issue a final order in the underlying case, *State v. Peter Viceroy*, Cuyahoga County Common Pleas Court Case No. CR-315048. On September 22, 2010, the respondent judge, through the Cuyahoga County Prosecutor, moved for summary judgment on the grounds of mootness and adequate remedy at law. On October 4, 2010, Viceroy filed his brief in opposition to the judge's motion for summary judgment and his own summary judgment motion. For the following reasons, this court grants Viceroy's motion for summary judgment, denies the judge's motion for summary judgment and

issues the writ of procedendo to compel the trial judge to issue a final, appealable order.

{¶ 2} In October 1994, the Grand Jury indicted Viceroy on one count of felonious assault with a three-year firearm specification and a violence specification, that during the commission of the offense Viceroy made an actual threat of physical harm to the victim with a deadly weapon. On March 22, 2010, a jury found Viceroy guilty of felonious assault and the firearm specification.¹ It is not clear on how or whether either the judge or jury rendered a verdict on the violence specification². The sentencing entry reads in pertinent part as follows: “Now comes the jury * * * and returned the following verdict in writing. To-wit: ‘We, the jury being duly impaneled and sworn, find the defendant, Peter Viceroy, guilty of felonious assault, R.C. 2903.11 with violent specifications as charged in the indictment.’ * * * (New Paragraph.) It is ordered by the court that defendant, Peter Viceroy, is sentenced to the Lorain Correctional Institution, for a term of (3) three years (mandatory) on the firearm specification after sentence of (3) three years to (15) fifteen years on the ‘felonious assault’ charge, to run consecutive.”

{¶ 3} Viceroy appealed and argued sufficiency of the evidence. This court affirmed in *State v. Viceroy* (May 20, 1996), Cuyahoga App. No. 68890. Subsequently, Viceroy pursued a postconviction relief petition, and in June 2009,

¹ The gravamen of the offense was that Viceroy pointed a loaded .32 caliber pistol at his wife and said, “If you don’t get out, you’ll be sorry. Get out now.”

² Transcript pages 230-232 of the verdict and sentencing are reproduced in the appendix and are made a part of the record.

he filed a motion to correct invalid, and null and void sentence. In that motion Viceroy argued that the sentence is void because it was in contravention of the statutory requirements that the three years for a firearm specification are to be served before the sentence for the base offense. His sentencing entry specified that the three-year firearm specification be served after the sentence for the base charge. The trial court denied the motion. On appeal this court dismissed for failure to file the record. *State v Viceroy* (Oct. 5, 2009), Cuyahoga App. No. 93797. Viceroy then commenced this writ action.

{¶ 4} Crim.R. 32(C) provides in pertinent part: “A judgment of conviction shall set forth the plea, the verdict or findings and the sentence.” The Supreme Court of Ohio in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, syllabus of the court ruled: “A judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court.” Moreover, it has long been established that in order to have a final, appealable order in a criminal case, there must be a resolution of each and every charge, and this includes the specifications. *State v. Ginocchio* (1987), 38 Ohio App.3d 105, 526 N.E.2d 1366 (“a clear pronouncement of the court’s judgment” paragraph three of the syllabus); *State v. Brown* (1989), 59 Ohio App.3d 1, 569 N.E.2d 1068; *State v. Phillips*, Cuyahoga App. No. 90124, 2008-Ohio-5101; *State v. Hayes* (May 24, 2000), Lorain App. No. 99CA007416; *City of Cleveland v.*

Duckworth, Cuyahoga App. No. 79658, 2002-Ohio-3448; and *City of Lakewood v. Dietz*, Cuyahoga App. No. 80621, 2002-Ohio-4424.

{¶ 5} In the present case, the sentencing entry has at least two fatal defects. The jury did not return a verdict on the violence specification, and the entry did not state that the jury found Viceroy guilty of the firearm specification. Without a proper resolution of these specifications, there is no final, appealable order.

{¶ 6} In *Baker* the Supreme Court of Ohio indicated that the writs of procedendo or mandamus would be proper remedies to obtain a final, appealable order. *Baker*, ¶14. In *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, 895 N.E.2d 805, the Supreme Court of Ohio affirmed that principle. In 2002, the sentencing journal entry stated that Culgan “had been convicted” of various offenses and sentenced to ten years; however, this journal entry did not comply with *Baker* by specifying how he had been convicted, whether by guilty plea, jury verdict or finding by the court. Nevertheless, he appealed his convictions, and when he lost, sought review by the Supreme Court of Ohio which declined to hear his case. Four years later he moved the trial court to issue a judgment that complied with Crim.R. 32(C). When the trial court denied this motion, he commenced a mandamus/procedendo action to compel the trial court to issue a proper judgment. The Supreme Court of Ohio ruled that despite the passage of time and appellate review, a defendant is still entitled to a sentencing entry that complies with Crim.R. 32(C). Thus, it

granted the writs of mandamus and procedendo and ordered the trial court “to issue a sentencing entry that complies with Crim.R. 32(C) and constitutes a final, appealable order.” 2008-Ohio-4609, ¶11. *State ex rel. Moore v. Krichbaum*, Mahoning App. No. 09 MA 201, 2010-Ohio-1541. This court concludes that Viceroy’s case is fully analogous to *Culgan*. Thus procedendo will lie to compel a final, appealable order pursuant to Crim.R. 32(C) and *Baker*.

{¶ 7} Accordingly, this court grants the writ of procedendo and orders the respondent to issue a final, appealable order in the underlying case which complies with Crim.R. 32(C) and which corrects the various defects and errors in the original sentencing journal entry, including a clear statement that the jury found Peter Viceroy guilty of the firearm specification and a resolution of the violence specification, which could be a dismissal or a nolle. Respondent to pay costs. This court further orders the clerk to serve upon all parties notice of this judgment and date of entry pursuant to Civ.R. 58(B).

Writ granted.

ANN DYKE, JUDGE

SEAN C. GALLAGHER, A.J., and
MELODY J. STEWART, J., CONCUR

APPENDIX

1 MARCH 22, 1995, WEDNESDAY MORNING SESSION

2 THE COURT: Ladies and gentlemen, I
3 understand you've reached a verdict. Hand the
4 verdict to the bailiff, please.

5 We the jury in this case being duly
6 impaneled and sworn do find the defendant guilty
7 of felonious assault in violation of Ohio Revised
8 Code Section 2903.11 signed by all 12 jurors. We
9 further find and specify the defendant, Peter
10 Viceroy, did have a firearm on or about his person
11 or under his control while committing the offense
12 charged in the indictment. Is this your verdict,
13 ladies and gentlemen? Is there anything further?
14 Miss Melton, anything further?

15 MS. MELTON: No, your Honor.

16 THE COURT: All right. Ladies and
17 gentlemen, I want to thank you for your service in
18 this case. If you would return to the jury room
19 now, you may be summoned on another case. On
20 behalf of all of the members of our court I want
21 to thank you for coming down here and performing
22 this most important civic function. These are
23 very difficult cases, I understand, and I know
24 that you conscientiously considered all the
25 evidence. I want to again thank you for your

1 service.

2 All right. Mr. Viceroy, is there anything
3 you have to say before the Court passes sentence?

4 THE DEFENDANT: Yes, your Honor, I would
5 like to say something. Cases like this are
6 difficult for you and a lot of people in my
7 position ask for a minimum sentence and I'm asking
8 for a maximum sentence.

9 THE COURT: You're asking for the maximum
10 sentence?

11 THE DEFENDANT: Yes, your Honor. My
12 opinion is anyone convicted of a firearm in a
13 crime should always get a maximum sentence. I'm
14 asking you to give me that sentence.

15 THE COURT: Well, on the firearm
16 specification the defendant is sentenced to three
17 years actual incarceration, LCI. On the felonious
18 assault, the defendant is sentenced after he has
19 served three years actual incarceration is
20 sentenced to a minimum of three years and a
21 maximum of 15 years at LCI.
22 Now, Mr. Viceroy you have the right to
23 appeal, you understand. Do you have funds to hire
24 a lawyer for your appeal?
25 THE DEFENDANT: No, sir, I do not.

1 THE COURT: Do you have funds to provide
2 yourself with a transcript of the proceedings that
3 took place here?

4 THE DEFENDANT: No. I'm indigent.

5 THE COURT: All right. This Court finds
6 the defendant is indigent. Therefore the State of
7 Ohio will provide a transcript of the proceedings
8 for the purpose of the appeal and, Miss Melton, you
9 wish to have the appeal?

10 MS. MELTON: Yes, your Honor.

11 THE COURT: The Court will assign Miss
12 Melton as the appeal counsel. All right. He is
13 remanded.

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15 (Proceedings concluded.)
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