

[Cite as *State v. Miller*, 2009-Ohio-3307.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91543

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDREW E. MILLER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-493934

BEFORE: Blackmon, J., Gallagher, P.J., and McMonagle, J.

RELEASED: July 2, 2009

JOURNALIZED:
ATTORNEY FOR APPELLANT

Patrick S. Lavelle
Van Sweringen Arcade
123 West Prospect Avenue
Suite #250
Cleveland, Ohio 44115

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Debra A. Obed
Assistant County Prosecutor
9th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Andrew Miller appeals the trial court’s decision that ordered him to pay restitution in the amount of \$20,409.35. Miller argues that the restitution order was invalid and assigns the following errors for our review:

“I. The lower court abused its discretion by failing to determine on the record whether there was any evidentiary support for the requested restitution.”

“II. The lower court abused its discretion by entering a restitution order after the final sentencing order had been journalized.”

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court’s order of restitution.

Facts

{¶ 3} Miller allegedly injured the victim when he forcefully ejected him from a bar where Miller worked as a bouncer. Thereafter, the State charged Miller with two counts of felonious assault. He entered a plea to the lesser included offense of aggravated assault. In discussing the plea agreement, the trial court informed Miller that the victim was requesting restitution in the approximate amount of \$20,410. Miller’s attorney stated that he had discussed the plea with Miller but Miller was “concerned” about the restitution; the court allowed Miller’s attorney to have further discussions with Miller about the plea agreement.

{¶ 4} Afterwards, Miller pled guilty to the agreed-upon charge. The trial court informed him that the plea included a sentence that consisted of Miller serving community control and paying restitution. Miller indicated that he understood the consequences of his plea.

{¶ 5} Approximately two weeks later, Miller's sentencing hearing was conducted. As promised, the trial court placed Miller on community control. However, the trial court failed to mention Miller's restitution obligation and did not include restitution in the sentencing entry.

{¶ 6} The State motioned for a hearing to be conducted to impose the restitution. At this hearing, the State argued that the restitution obligation was agreed to by Miller and was part of the plea agreement. Miller's attorney argued that Miller never agreed to pay restitution; moreover, the State failed to produce evidence of the amount of the restitution. The trial court recessed the matter to review the transcript of the hearing.

{¶ 7} Two weeks later, the hearing was reconvened; the trial court concluded the transcript indicated that Miller agreed to pay restitution in the amount of \$20,409.35 as part of the plea. The trial court determined that restitution was "inadvertently" omitted from the order and amended the sentence to include the restitution amount.

Restitution

{¶ 8} We will address Miller's first and second assigned errors together because they both concern the trial court's ability to amend the sentencing entry to include Miller's obligation to pay restitution in the amount of \$20,409.35.

{¶ 9} We conclude the trial court had jurisdiction to include restitution as part of the sentence. During the plea phase of the case, the trial court informed Miller that restitution had been requested. Miller's lawyer stated on the record that restitution was part of the plea agreement, and he had discussed the restitution with his client who was concerned with the restitution. The court permitted Miller to consult with his attorney again before deciding whether to accept the plea. When Miller returned he decided to enter the plea and acknowledged in the affirmative to the court that indeed the plea agreement included restitution. During the plea colloquy, the following took place:

“Court: How do you plead to aggravated assault, a fourth degree felony, possible sentence of six to eighteen months, fine of up to five thousand dollars, post-release control up to three years, potential order of restitution in the amount of \$20,409.35? Guilty or not guilty?”

“Miller: Can I have a minute?”

“Court: Yeah. It's your case.”

“Miller: Guilty, your Honor.”

{¶ 10} Miller is correct that the trial court failed to advise him of the \$20,409.35 restitution amount at the sentencing hearing. The court also failed

to include restitution in the original sentencing entry; however, the court included it later in an amended journal entry. We conclude that the entry is valid because the trial court was correcting a mistake, not extending or modifying the sentence.

{¶ 11} This is no different than what the trial court did in *State v. Middleton*,¹ where the trial court imposed a 4-year sentence when it should have been a 7-year sentence. The court in *Middleton* mistakenly at sentencing referred to the burglary charge as a third-degree felony when it was a second-degree felony. The appellate court held the trial court could correct the mistake because Middleton was advised he was pleading to a second-degree felony, which carried a maximum sentence of eight years, at his plea hearing.

{¶ 12} Likewise, Miller entered into a plea agreement and agreed to pay \$20,409.35 in restitution. Principles of contract law are generally applicable to the interpretation and enforcement of plea agreements; if possible, courts should give effect to every provision therein contained.² The plea contract in this case should be honored and the trial court should be allowed to correct its inadvertence.

¹12th Dist. No. CA2004-01-003, 2005-Ohio-681.

²*State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853.

{¶ 13} In *State v. Williams*,³ although factually different, the appellate court defined a clerical mistake as a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment. *Williams* involved Crim.R. 36; however, it is helpful in defining when a trial court's error is legally correctable. *Williams* explains that the error is legally correctable when the mistake is apparent from the record.

{¶ 14} Here, the error was apparent from the record. Miller acknowledged that the plea agreement included \$20,409.35 in restitution; Miller was charged with two counts of felonious assault that was bargained to one count of aggravated assault, and he pled to the agreed-upon charge. Consequently, the error is apparent from the record. The trial court was not attempting to modify or enhance the sentence. This was not an afterthought. It was part of the plea agreement, which was the result of the plea bargain to which Miller agreed.

{¶ 15} In *State v. Turner*,⁴ another case that was not exactly on point, but nonetheless instructive, recognized the importance of sua sponte entries that allow for conformance to the transcript. We appreciate that *Turner* involved the sentencing hearing itself, where the original sentencing entry incorrectly

³6th Dist. No. L-02-1394, 2004-Ohio-466.

⁴Cuyahoga App. No. 81449, 2003-Ohio-4933.

sentenced the defendant to a concurrent sentence when it should have been a consecutive sentence. In *Turner*, we held that the trial court could, sua sponte by journal entry, make the correction because the transcript evidenced the error. This is the same concern in this case.

{¶ 16} Accordingly, we conclude that when the trial court's journal entry seeks to correct a clerical mistake, which is evidenced in the transcript or record, the trial court's action is valid under its continued jurisdiction to correct clerical mistakes so long as the transcript does not evidence an attempt by the trial court to modify or extend the sentence. Accordingly, Miller's assigned errors are overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., CONCURS
(WITH ATTACHED CONCURRING OPINION)
CHRISTINE T. McMONAGLE, J., DISSENTS
(WITH ATTACHED DISSENTING OPINION.)

SEAN C. GALLAGHER, P.J., CONCURRING:

{¶ 17} I concur with the majority opinion.

{¶ 18} At the plea hearing, it was represented that restitution in the amount of \$20,409.35 was a condition of the plea agreement. Consistent therewith, the trial court judge stated probation would be imposed, but that “there are going to be conditions” and that the court was going to “include restitution.” Although a “potential” order of restitution, as well as prison terms, were discussed in reviewing the possible penalties that could be imposed, Miller’s guilty plea was entered with the understanding that the conditions of the plea agreement would be imposed as part of Miller’s sentence. However, at sentencing, the trial court omitted restitution.

{¶ 19} Crim.R. 36 provides in relevant part that “errors in the record arising from oversight or omission, may be corrected by the court at any time.” I agree with the majority that the record reflects restitution was to be included in the sentence and that its oversight or omission in failing to reflect the actual agreed-to plea bargain was a legally correctable mistake. The trial court was not modifying its

sentence, but rather was correcting a mistake apparent from the record. Further, having agreed to the restitution, including the amount, as part of the plea agreement, appellant cannot complain on appeal that the trial court erred in ordering him to make restitution.

CHRISTINE T. McMONAGLE, J., DISSENTING:

{¶ 20} Respectfully, I dissent.

{¶ 21} At the time of the plea, Miller was asked in pertinent part: “[h]ow do you plead to aggravated assault *** possible sentence of six to 18 months *** potential order of restitution in the amount of \$20,409.35?” Nothing was said on the record about restitution at the time of sentencing, nor was restitution ordered in the sentencing entry. At a later date, without further hearing, and out of the presence of the defendant, an amended journal entry was made adding an order of restitution in the amount of \$20,409.35.

{¶ 22} In the first instance, the court informed Miller of a *potential* order of restitution. Potential means “possible, as opposed to actual.” Webster’s Revised Unabridged Dictionary (1996). In short, Miller was told that an order of restitution in the amount of \$20,409.35 could *possibly* be imposed. He was not told that an order of restitution in the amount of \$20,409.35 would actually be imposed. I do not agree with the majority that the admonitions given Miller at

the plea colloquy adequately notified him that restitution in the amount of \$20,409.35 would in fact be ordered. Nor do I believe his response of “guilty” represents his consent to this specific order of restitution.

{¶ 23} But more importantly, I do not believe that the court could utilize a nunc pro tunc entry to supply the missing order of restitution. In *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, the Ohio Supreme Court held that trial courts lack authority to reconsider their own valid final judgments in criminal cases, subject to two exceptions: (1) the court is authorized to correct a void sentence (not at issue here); and (2) it can correct clerical errors in judgments. (See Crim.R. 36.) “The term ‘clerical mistake’ refers to a mistake or omission, *mechanical in nature and apparent on the record, which does not involve a legal decision or judgment.*” *Cruzado* at ¶19. “Although courts possess inherent authority to correct clerical errors in judgment entries so that the record speaks the truth, *nunc pro tunc entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided.*” *Id.* (Emphasis added.) A nunc pro tunc entry relates back to the date of the journal entry it corrects. It is used to record that which the trial court did, but which has not been recorded. *Ohio v. Battle*, 9th Dist. No. 23404, 2007-Ohio-2475.

{¶ 24} It is uncontroverted that the trial court did not, at the time of sentencing, order restitution. A nunc pro tunc order cannot cure that failure. Further, because the judge never ordered restitution at sentencing and Miller never agreed to it at the plea hearing, the trial court's decision to impose restitution subsequent to sentencing involved a legal judgment as to whether restitution should be ordered; it was not a judgment correcting an error "apparent on the record."

{¶ 25} Accordingly, I would hold that the trial court was without jurisdiction to reconsider its own valid final judgment and that the order or restitution made by nunc pro tunc entry is hence void.