

[Cite as *State v. Spears*, 2010-Ohio-2229.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 94089**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**MYRON SPEARS**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-397098-D

**BEFORE:** Cooney, J., Gallagher, A.J., and Boyle, J.

**RELEASED:** May 20, 2010

**JOURNALIZED:  
FOR APPELLANT**

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**ATTORNEYS FOR APPELLEE**

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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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

COLLEEN CONWAY COONEY, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} Defendant-appellant, Myron Spears (“Spears”), pro se, appeals a nunc pro tunc entry that states that his total aggregate sentence is a term of eleven years instead of ten years. We find no merit to the appeal and affirm.

{¶ 3} In September 2000, Spears was charged in a ten-count indictment with three counts of felonious assault, three counts of aggravated robbery, three counts of kidnapping, and one count of aggravated burglary. All counts included one- and three-year firearm specifications. In May 2001, Spears entered a plea bargain and pled guilty to one count of felonious assault with a three-year firearm specification, one count of kidnapping, and one count of aggravated burglary. The remaining counts and specifications were nolle.

{¶ 4} The court sentenced Spears to seven years on the felonious assault charge with a mandatory three-year consecutive sentence for the accompanying firearm specification. The court sentenced Spears to eight years each on the kidnapping and aggravated burglary charges. The court ordered the sentences for kidnapping and aggravated burglary to run concurrently with each other and with the sentence imposed for felonious assault.

{¶ 5} In June 2008, the trial court entered the following nunc pro tunc entry upon the docket:

“Pursuant to Criminal Rule 36, due to clerical error, the court corrects its journal entry of sentencing dated 04/09/2001 to reflect that defendant received a net 11 year prison sentence (and not a 10 year sentence). \* \* \*”

{¶ 6} In September 2009, Spears filed a motion to correct the improper entry. The court denied the motion, and this appeal followed in which Spears raises two assignments of error.

{¶ 7} In the first assignment of error, Spears contends he was denied his constitutional right to be present at all essential parts of his trial when the trial court altered his sentence in an out-of-court proceeding and violated his right against double jeopardy. Spears also claims the trial court lacked authority to modify his sentence because it was an agreed sentence pursuant to a plea bargain.

{¶ 8} Spears was sentenced to seven years for felonious assault and three years on the accompanying firearm specification pursuant to R.C. 2929.14(E)(1)(a). The court further sentenced Spears to eight years each on the kidnapping and aggravated burglary charges. The court ordered the sentences for kidnapping and aggravated burglary to run concurrently with each other and with the sentence imposed for felonious assault. In its

sentencing entry, the court stated that this sentence amounted to a total net sentence of ten years.

{¶ 9} However, R.C. 2929.14(E)(1)(a) requires that the mandatory three-year prison sentence for the firearm specification be served “consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.” Thus, the three-year firearm specification must be served before both the seven-year sentence on the felonious assault count and the concurrent eight-year sentences on the kidnapping and aggravated burglary counts begin. When the three years is added to the eight years, the sentence adds up to a total of eleven years, not ten, even though the eight-year sentences were ordered to run concurrently with the felonious assault conviction. Thus the nunc pro tunc entry corrected a mathematical error in the sentencing entry.

{¶ 10} 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.* It can be used to correct mathematical calculations, and to correct typographical or clerical errors. *Id.*

Therefore, a nunc pro nunc entry may be used to correct a sentencing entry to reflect the sentence the trial court imposed upon a defendant at a sentencing hearing. *Dean v. Maxwell* (1963), 174 Ohio St. 193, 198, 187 N.E.2d 884; *State v. Ferrell*, Cuyahoga App. No. 85821, 2005-Ohio-5992, ¶21. We therefore find the court properly corrected the mathematical error in the sentencing journal entry with a nunc pro tunc entry.

{¶ 11} Spears argues the court could not correct the sentencing journal entry without his presence in open court and that the modification of the sentencing journal entry violated his rights against double jeopardy. Specifically, Spears claims that the nunc pro tunc entry effectively “increases” his sentence and, therefore, constitutes double jeopardy. We agree that, 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. However, we do not find that the court’s nunc pro tunc entry modified or increased Spears’s sentence.

{¶ 12} Crim.R. 43(A) requires that a criminal defendant be present for sentencing: “When a sentence pronounced in open court is subsequently

modified and the judgment entry reflects the modification, the modification must have been made in the defendant's presence.” However, because the nunc pro tunc entry was done to correct a mathematical error so that the journal entry would accurately reflect Spears’s original sentence, it did not modify the sentence. Therefore, Spears’s presence was not required and there was no violation of his rights. *State v. Burgan*, Cuyahoga App. No. 86176, 2006-Ohio-812; *Ferrell* at ¶21.

{¶ 13} Spears also argues the court did not have the authority to modify his sentence because the ten-year sentence was agreed to pursuant to a plea bargain. However, Spears failed to file a transcript of the plea hearing as required by App.R. 9. An appellant bears the burden of supplying those portions of the record that demonstrate the error on appeal. *DeCato v. Goughnour* (2000), 136 Ohio App.3d 795, 799, 737 N.E.2d 1042. “When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm.” *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384. Without the transcript of the plea hearing, this court cannot ascertain the actual terms of the plea agreement and thus cannot determine whether the agreement was in

fact breached.<sup>1</sup> Therefore, we must presume the validity of the trial court's proceedings on this matter.

{¶ 14} Accordingly, the first assignment of error is overruled.

{¶ 15} In the second assignment of error, Spears argues his sentence could not be modified because he had already served seven years of his sentence. As previously explained, Crim.R. 36 allows the court to correct a journal entry to correct a mathematical or clerical error. However, Crim.R. 1 provides as follows:

“(A) Applicability. These rules prescribe the procedure to be followed in all courts of this state in the exercise of criminal jurisdiction, with the exceptions stated in subdivision (C) of this rule.” (Emphasis added.)

{¶ 16} Thus, the criminal rules, including Crim.R. 36, are followed only when a court exercises criminal jurisdiction.

{¶ 17} In *State v. Nye* (June 4, 1996), Franklin App. No. 95APA11-1490, the court held that a nunc pro tunc entry is not available to correct an error after a defendant has been released from prison, probation, or parole because the court no longer retains criminal jurisdiction over the defendant. The *Nye* court explained:

“Criminal jurisdiction attaches when a charge is filed alleging some violation of the Ohio Criminal Statutes. \* \* \* Criminal jurisdiction ends upon the defendant's release from incarceration, probation or parole,

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<sup>1</sup>The original sentencing entry contained no mention of an agreed sentence.



whichever event occurs last. In the instant action, appellant was released, effective September 15, 1995. Appellant was not on parole, nor was he on probation. His release was full and final. He was not subject to further criminal prosecution and punishment for the instant offenses. *Id.* At that point in time, there were no pending criminal proceedings against appellant. The criminal rules simply do not apply, given that there is no 'criminal jurisdiction' to be exercised over appellant.

“Moreover, there must be some reasonable limit to the provisions of Crim.R. 36. Otherwise, the court could put on a nunc pro tunc entry many years after release from imprisonment. We hold that, at the latest, where a sentence not contrary to law is imposed upon a defendant's full and final release, the criminal rules no longer apply as there is no pending case, and a nunc pro tunc entry/judgment is not available to correct an error.” (Citations omitted.)

{¶ 18} Thus, so long as the court retains criminal jurisdiction over a defendant, the court may correct journal entries using a proper nunc pro tunc entry.

{¶ 19} Here, Spears is still serving his prison sentences for the convictions in this case. Therefore, the trial court retained criminal jurisdiction over him, which gave the trial court the authority to use a proper nunc pro tunc entry to correct a clerical or mathematical error in the original sentence.

{¶ 20} Accordingly, the second assignment of error is also overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant 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. 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.

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COLLEEN CONWAY COONEY, JUDGE

SEAN C. GALLAGHER, A.J., and  
MARY J. BOYLE, J., CONCUR