

[Cite as *State v. Hein*, 2018-Ohio-3584.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106223

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHRISTOPHER N. HEIN

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-598191-C

BEFORE: Laster Mays, J., McCormack, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: August 30, 2018

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant, Christopher N. Hein (“Hein”), appeals the trial court’s issuance of journal entries that are not consistent with the plea agreement of the parties. The state, pursuant to Loc.App.R. 16(B), concedes the error. We reverse and remand the case to the trial court for issuance of a nunc pro tunc entry correcting the journal entry error documenting the plea agreement, and to hold a hearing to clarify the plea agreement and sentence on the record with accurate journalization.

A. June 21, 2017 Hearing and Journal Entry

{¶2} On June 21, 2017, Hein entered a guilty plea with an agreed sentence to the charges of involuntary manslaughter (R.C. 2903.04(A)(1)), with a three-year firearm specification (R.C. 2941.145(A)), and to conspiracy (R.C. 2923.01(A)(1)). Hein was also required to cooperate with the state during the trial against Hein’s codefendants.

{¶3} As described by the state,

[T]he [s]tate amended Count 1 of [a]ppellant’s original indictment, [a]ggravated [m]urder, with a one- and three-year firearm specification, to [i]nvoluntary [m]anslaughter, with a three-year firearm specification. (Tr. 16-17.) The [s]tate also amended Count 2, [c]onspiracy, to delete the firearm specifications. (Tr. 17.) The [s]tate agreed to nolle the remaining Counts 3 through 5 and to recommend an aggregate prison sentence of 18 years — 11 years on Count 1, plus the three-year firearm specification, and four years on Count 2, to run consecutively. (Tr. 18.)

Notice of Conceded Error (Mar. 22, 2018), p. 1. The parties also agreed to a term of 18 years of imprisonment and postrelease control for five years.

{¶4} While the plea agreement is correctly recited in the hearing transcript, the June 21, 2017 judgment entry erroneously reflects that Hein pleaded guilty to aggravated murder pursuant to R.C. 2903.01(A), a first-degree felony, with one- and three-year firearm specifications pursuant to R.C. 2941.141 and 2941.145 respectively. The remainder of the journal entry accurately reflects the balance of the plea agreement.

B. August 8, 2017 Sentencing Hearing and Journal Entry

{¶5} The plea error is also reflected in the transcript for the sentencing hearing where Hein was sentenced to 18 years of imprisonment for:

Count 1, aggravated murder, [to] 3 years on the firearm specification to be served prior to and consecutive to 11 years in the aggravated murder of Lieutenant William Walker. Count 2, conspiracy, 4 years to run consecutive to the 14 years in Count 1.

(Tr. 59.)

{¶6} The original and correcting journal entries issued on August 8, 2017, are also in error. The original entry reflects that Hein pleaded guilty to aggravated murder with one- and three-year firearm specifications. The corrective entry contains the same error.

{¶7} Hein's appeal is based on the cited errors. We reverse and remand.

II. Assignments of Error

{¶8} Hein proffers three assigned errors. The gravamen of the first two assigned errors is that Hein's guilty plea was not knowingly, intelligently, and voluntarily made in light of the trial court's incorrect journalization of the plea agreement. The third assigned error asserts that counsel's failure to object to the improper entries constitutes ineffective assistance of counsel.

III. Discussion

{¶9} The parties agree that the first assigned error has merit. The mutual concession on these errors renders the second and third errors moot pursuant to Loc.App.R. 12(A).

{¶10} We find that the proper way to correct the June 21, 2017 journal entry is through a nunc pro tunc entry. In *State ex rel. Townsend v. Calabrese*, 8th Dist. Cuyahoga No. 97822, 2012-Ohio-1649, ¶ 6, this court stated that “[n]unc pro tunc orders may be used only to correct authentic clerical errors and not to effect what the judge intended to do or should have done * * *.” A nunc pro tunc entry does not replace the original judgment entry; it relates back to the original entry. *State v. Bonnell*, 8th Dist. Cuyahoga No. 102630, 2015-Ohio-4590, ¶ 14.

{¶11} This court has also stated:

In *Scaglione v. Saridakis*, 8th Dist. Cuyahoga No. 91490, 2009-Ohio-4702, this court reiterated the longstanding rule of the use of nunc pro tunc as follows: “A nunc pro tunc order may be issued by a trial court, as an

exercise of its inherent power, to make its record speak the truth. It is used to record that which the trial court did, but which has not been recorded. It is an order issued now, which has the same legal force and effect as if it had been issued at an earlier time, when it ought to have been issued. Thus, the effect of a nunc pro tunc order is limited to memorializing what the trial court actually did at an earlier point in time. It can be used to supply information which existed but was not recorded, to correct mathematical calculations, and to correct typographical or clerical errors. A nunc pro tunc order cannot be used to supply omitted action, or to indicate what the court might or should have decided, or what the trial court intended to decide. Its proper use is limited to what the trial court actually did decide.” *Id.* at ¶ 9, quoting *State v. Greulich*, 61 Ohio App.3d 22, 24-25, 572 N.E.2d 132 (9th Dist.1988).

Alden v. FirstEnergy Corp., 8th Dist. Cuyahoga No. 100575, 2014-Ohio-3235, ¶ 10.

{¶12} Rectification of the August 8, 2017 error on the record and the journal entry requires that we remand the matter to the trial court for a hearing to clarify the plea in the sentencing record and properly journalize the entry. *State v. Gay*, 8th Dist. Cuyahoga No. 101749, 2015-Ohio-1832, ¶ 27. “Pursuant to Crim.R. 43(A), the defendant must be present for the clarification and imposition of the corrected sentence.” *Id.*, citing *State v. R.W.*, 8th Dist. Cuyahoga No. 80631, 2003-Ohio-1142.

{¶13} This case is reversed and remanded to the trial court for the nunc pro tunc correction of the June 21, 2017 journal entry and for a hearing to clarify on the record the proper plea and sentence and to journalize the correction.

It is ordered that appellant recover from appellee 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.

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

ANITA LASTER MAYS, JUDGE

TIM McCORMACK, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR