

[Cite as *State v. Hill* , 2020-Ohio-5190.]

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 109656
v.	:	
	:	
DORIAN L. HILL,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: November 5, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-88-226126-ZA

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Frank Romeo Zeleznikar, Assistant Prosecuting Attorney, *for Appellee*.

Dorian L. Hill, *pro se*.

EILEEN A. GALLAGHER, J.:

{¶ 1} Pro se appellant Dorian Hill appeals following the denial of his postconviction motion “to correct a fundamental miscarriage of justice.” We affirm.

Relevant Factual and Procedural Background

{¶ 2} The relevant background in this case is derived from the trial court’s journal. A 1988 sentencing entry reflects that a jury found Hill guilty of aggravated murder, kidnapping and aggravated robbery in addition to multiple specifications including firearm specifications attached to each count.¹ The entry further reflects that the court imposed a death sentence for aggravated murder, consecutive prison terms of 10 to 25 years for both kidnapping and aggravated robbery and a consecutive three-year prison term for a firearm specification. Hill directly appealed and this court affirmed his convictions but reversed his death sentence, remanding for resentencing as to that count. *State v. Hill*, 8th Dist. Cuyahoga No. 57334, 1991 Ohio App. LEXIS 1830 (Apr. 25, 1991).

{¶ 3} In 1991, following remand, the trial court “modified” Hill’s original sentence, resentencing him on the aggravated murder count to “life’ imprisonment with parole eligibility after serving thirty (30) years.” The journal entry further reflects that “[a]ll other aspects of the sentence to remain without changes.” Hill did not directly appeal.

{¶ 4} Hill was resentenced again in 1994. The court’s journal reflects that at that time Hill was present with counsel that the court imposed the following sentence:

[O]n Count 1 [aggravated murder], for 30 years to to [sic] life in prison with no chance of parole within 30 years; Count 2 [kidnapping], 10 years to 25 years to run consecutive to Count 1; Count 3 [aggravated

¹ Hill admits a jury found him guilty.

robbery], 10 years to 25 years to run consecutive to Count 1 and 2, 3 years on gun specification, actual incarceration on Count 1,2, [sic] and 3 but only 1, 3 year [sic] actual incarceration concerning gun specification.

The journal entry from the 1994 resentencing failed to include a notation that Hill was found guilty by a jury. Hill did not directly appeal.

{¶ 5} In 2019, Hill filed a “[m]otion to comport with Crim.R. 32(C),” arguing that the journal entry pertaining to the 1994 resentencing “did not contain a guilty plea, a jury verdict, or the finding of the Court upon which [his] convictions were based,” and thus, “did not constitute a final appealable order.”

{¶ 6} In October 2019, the trial court granted this motion, issuing a nunc pro tunc journal entry, “incorporating” both the original 1988 sentencing entry and the 1994 resentencing entry. The 2019 entry reflects that Hill was “found guilty by a jury” of aggravated murder, kidnapping and aggravated robbery, as well as firearm specifications attached to each count. The entry notes that this court affirmed Hill’s convictions, but vacated the death sentence for aggravated murder and remanded it for resentencing as to that count. The entry further reflects Hill’s sentence as articulated in the 1994 resentencing entry:

Count 1 [aggravated murder]: 30 years to life in prison with no chance of parole within 30 years; Count 2 [kidnapping]: 10 years to 25 years to run consecutive to Count 1; Count 3 [aggravated robbery]: 10 years to 25 years to run consecutive to Counts 1 and 2. Gun specifications merge. Actual incarceration on Count 1, 2 and 3 but only one 3 year [sic] actual incarceration concerning gun specification.

Hill did not directly appeal.

{¶ 7} In February 2020, Hill filed the subject motion “to correct a fundamental miscarriage of justice,” claiming that the trial court erred when it issued the nunc pro tunc journal entry when he was not physically present. The court denied the motion. From that denial, Hill now appeals.

Assignment of Error

{¶ 8} Hill asserts one assignment of error for consideration:

Where the court’s journal entry presents a prima facie case for invalidity, and defendant particularizes his challenge thereto in a state statutory context, *State v. Pippin*, 2014-Ohio-4454 (4th Dist.), at: [*P11], the trial court abuses its discretion thereby violating due process, U.S.C.A. Const. Amend. 14, when it denies defendant’s motion for resentencing ‘without a hearing and after violating the mandatory provisions of: Crim. R. 25(B). see also: *State v. Simpkins*, 117 Ohio St. 3d 420, at: §23; and, §30.

Law and Analysis

{¶ 9} As noted, although Hill appeals from the trial court’s denial of his motion “to correct a fundamental miscarriage of justice,” his argument is predicated on claimed errors in the court’s 2019 nunc pro tunc journal entry. However, as noted, Hill did not directly appeal from that entry.

“[A] convicted defendant is precluded under the doctrine of res judicata from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on appeal from that judgment.”

State ex rel. Rodriguez v. Barker, 8th Dist. Cuyahoga No. 107831, 2019-Ohio-256, ¶ 20, quoting *State v. Szefcyk*, 77 Ohio St.3d 93, 671 N.E.2d 233 (1996). Because

Hill failed to directly challenge the journal entry, his attempt to do so now is barred by res judicata.

{¶ 10} Even if res judicata did not bar Hill's claims, they are meritless nonetheless.

{¶ 11} Hill asserts that the 2019 nunc pro tunc journal entry issued following his Crim.R. 32(C) motion was, itself, a resentencing. As such, he argues, Crim.R. 43(A) required that he be physically present. We disagree.

{¶ 12} This court has observed that Crim.R. 43(A) generally requires a defendant to be physically present at sentencing and resentencing. *See, e.g., State v. Kemp*, 8th Dist. Cuyahoga No. 100426, 2014-Ohio-3414, ¶ 6. In this case, as noted, Hill was present at both his 1988 sentencing as well as his 1994 resentencing.

{¶ 13} There is no dispute that Hill was found guilty by a jury. Both the 1988 sentencing entry and Hill himself confirm this. Nevertheless, the 1994 resentencing entry does omit the fact of conviction. *But see* Crim.R. 32(C) ("A judgment of conviction shall set forth the fact of conviction and the sentence.").

{¶ 14} "[W]hen a trial court fails to comply with Crim.R. 32(C), 'the appropriate remedy is correcting the journal entry.'" *State ex rel. DeWine v. Burge*, 128 Ohio St.3d 236, 2011-Ohio-235, 943 N.E.2d 535, ¶ 18, quoting *Dunn v. Smith*, 119 Ohio St.3d 364, 2008-Ohio-4565, 894 N.E.2d 312, ¶ 10. The Supreme Court has found that the "failure to comply with Crim.R. 32(C) * * * vest[ed] the trial court

with specific, limited jurisdiction to issue a new sentencing entry to reflect what the court had previously ruled and not to issue a new sentencing order * * *.” *Id.* at ¶ 19.²

{¶ 15} Although the 1994 resentencing did omit the fact that Hill was found guilty by a jury, there is no dispute that the record, i.e. the original 1988 sentencing entry, affirmatively and undisputedly establishes that is precisely what happened.

{¶ 16} The 2019 nunc pro tunc entry was not a resentencing. It did not modify the sentence that was imposed at the 1994 resentencing. The entry merely included the fact of conviction which was present in the 1988 sentencing entry but was omitted from the 1994 resentencing. “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. Spears*, 8th Dist. Cuyahoga No. 94089, 2010-Ohio-2229, ¶ 10, citing *State v. Greulich*, 61 Ohio App.3d 22, 24, 572 N.E.2d 132 (9th Dist.1988).

{¶ 17} Accordingly, where the record undisputedly reflects that Hill was found guilty by a jury, and where the 1994 resentencing fails to reflect that fact, the trial court appropriately used a nunc pro tunc entry to correct that omission. *See State v. Rosa*, 8th Dist. Cuyahoga No. 108051, 2019-Ohio-4888, ¶ 44. Moreover, Hill’s presence was not required for the nunc pro tunc entry because that entry did not modify his sentence. *See State v. Sandidge*, 8th Dist. Cuyahoga No. 109277,

² Moreover, in that case the Supreme Court observed that this “technical failure” to include the manner of conviction was “not a violation of a statutorily mandated term,” and thus did “not render the judgment a nullity.” *Id.*, citing *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 10-12.

2020-Ohio-1629, ¶ 8. The entry merely corrected the record to reflect what actually occurred.

{¶ 18} Finally, we also reject Hill’s claim that the trial court’s nunc pro tunc entry violated Crim.R. 25(B). Even if we assumed, despite any indication in the record, that the judge issuing the nunc pro tunc entry was improperly presiding over the case, we would find no reversible error. *See State ex rel. Harris v. Hamilton Cty. Court of Common Pleas*, 139 Ohio St.3d 149, 2014-Ohio-1612, 9 N.E.3d 1057, ¶ 8 (“Crim.R. 25(B) does not preclude one judge from signing for another without a reassignment when the matter is purely ministerial.”). Hill cannot claim that any prejudice resulted because the nunc pro tunc entry was nothing more than a restatement of what previously occurred.

{¶ 19} Judgment affirmed.

It is ordered that appellee recover from appellant 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.

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

EILEEN A. GALLAGHER, JUDGE

EILEEN T. GALLAGHER, A.J., and
RAYMOND C. HEADEN, J., CONCUR