[Cite as *Stave v. Cline*, 2012-Ohio-1130.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-P-0073**
- vs -	:	
DONALD CLINE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. 2009 CRB 2921 R.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, *Mordechai Osina* and *Pamela J. Holder*, Assistant Prosecutors, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Donald Gallick, 190 North Union Street, Suite 102, Akron, OH 44304 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Donald Cline, appeals from the August 23, 2010 judgment and the September 15, 2010 nunc pro tunc judgment of the Portage County Municipal Court, Ravenna Division, sentencing him for menacing.

{¶2} Two separate criminal complaints were filed against appellant on October 8, 2009. In Case No. 2009 CRB 2919, appellant was charged with possession of drug paraphernalia, a misdemeanor of the fourth degree, in violation of R.C. 2925.12. In

Case No. 2009 CRB 2921, appellant was charged with menacing, a misdemeanor of the fourth degree, in violation of R.C. 2903.22. Although filed as two separate cases, both counts involve the same incident from the same day. Appellant entered not guilty pleas and the cases were set for a combined bench trial to take place the following month.

{¶3} After several continuances, the trial court re-set both cases for a combined bench trial to be held at a later date. In the meantime, appellant filed a jury demand only on the charge of menacing in Case No. 2009 CRB 2921. The trial court subsequently rescheduled the menacing case for a jury trial, cancelled the bench trial for the menacing case, and set it for a pretrial. On the date of the pretrial for the menacing case and the bench trial for the possession of drug paraphernalia case, Case No. 2009 CRB 2919, the trial court issued a judgment, which included both case numbers, stating that because the officer failed to appear two times for trial, the state was unable to prosecute and dismissed the cases. Thereafter, the trial court issued a nunc pro tunc judgment dismissing only the possession of drug paraphernalia case, Case No. 2009 CRB 2919. The trial court subsequently explained that it inadvertently listed Case No. 2009 CRB 2921 on the entry of dismissal for Case No. 2009 CRB 2919.

{¶4} During the jury trial for the menacing case, appellant filed a motion in limine to exclude all reference to the possession of drug paraphernalia case that was dismissed. The trial court granted appellant's motion. The menacing case proceeded to a jury trial. The testimony at trial revealed that appellant followed the victim, Terry Jordan II, and sat outside his house. On one occasion, appellant followed Mr. Jordan to a bank. When Mr. Jordan began driving away in his car, appellant pointed at him as if

he had a gun and pulled the "trigger." Appellant was upset with Mr. Jordan because appellant believed Mr. Jordan was having an affair with his daughter-in-law.

{¶5} At the close of the state's case-in-chief, appellant's counsel moved for a judgment of acquittal, based on, inter alia, a defective complaint. In response, the prosecutor moved the trial court to amend the complaint to include language of "physical harm to the person." The trial court, however, found the complaint to be sufficient and ultimately overruled both motions. Following trial, the jury found appellant guilty of menacing.

{¶6} Appellant was sentenced to 30 days in jail and ordered to pay a $250 fine. The court suspended all 30 days in jail and $200 of the fine subject to the following four conditions: that appellant undergo a mental health evaluation and counseling; that he report to the Adult Probation Department; that he have no contact with the victim, including the victim's family and property; and that he commit no violation of law for two years. That judgment, however, incorrectly indicated that appellant pleaded guilty to the charge of menacing. Thus, the trial court filed a nunc pro tunc judgment correcting the previous judgment and properly stating that appellant was found guilty of menacing by a jury. Appellant's sentence was stayed pending appeal. It is from the foregoing judgments that appellant filed a timely notice of appeal, asserting the following assignments of error:

{¶7} "[1.] The trial court lacked authority to reinstate case 2009 CRB 2921 with a nunc pro tunc journal entry after filing a journal entry of dismissal.

{¶8} "[2.] The trial court erred in refusing to dismiss the complaint after it denied the prosecution's motion to amend because the language of the complaint failed to track the language of R.C. 2903.22, as required by the holding of *State v. Buehner.*"

{¶9} In his first assignment of error, appellant argues that the trial court lacked authority to reinstate the menacing case, Case No. 2009 CRB 2921, with a nunc pro tunc judgment after filing a judgment of dismissal.

{¶10} Crim.R. 36 states: "[c]lerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time."

{¶11} The Supreme Court of Ohio in *State v. Miller*, 127 Ohio St.3d 407, 2010-Ohio-5705, at ¶15, stated:

{¶12} "A clerical error or mistake refers to '"a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment."' [*State ex rel.*] *Cruzado* [*v. Zaleski*]*,* 111 Ohio St.3d 353, 2006-Ohio-5795, ¶19, ***, quoting *State v. Brown* (2000), 136 Ohio App.3d 816, 819-820, ***.' 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.'" *Cruzado,* [supra, at] ¶19, quoting *State ex rel. Mayer v. Henson,* 97 Ohio St.3d 276, 2002-Ohio-6323, *** ¶14, quoting *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 164, ***." (Parallel citations omitted.)

{¶13} In our case, again, appellant's menacing charge and his possession of drug paraphernalia charge involve the same incident from the same date. However,

each count was filed in two separate cases and each received a different case number. Initially, both cases were set for a combined bench trial. Appellant later filed a jury demand only to the charge of menacing in Case No. 2009 CRB 2921. The trial court subsequently rescheduled the menacing case for a jury trial, cancelled the bench trial, and replaced it with a pretrial.

{¶14} On April 7, 2010, the date of the pretrial for the menacing case and the bench trial for the possession of drug paraphernalia case, Case No. 2009 CRB 2919, the trial court issued a judgment of dismissal, which incorrectly included both case numbers. The trial court filed a dismissal because the officer failed to appear "for trial." Again, the menacing case was not set for trial on April 7, 2010, but rather for a pretrial. The trial court did not intend to dismiss the menacing case. The trial court mistakenly included Case No. 2009 CRB 2921 on the judgment of dismissal in Case No. 2009 CRB 2919.

{¶15} The trial court later corrected its clerical error by issuing a nunc pro tunc judgment dismissing only the possession of drug paraphernalia case. The trial court explained that it inadvertently listed both case numbers, Case No. 2009 CRB 2919 and 2009 CRB 2921 on the entry of dismissal for the possession of drug paraphernalia case, Case No. 2009 CRB 2919. Thus, the possession of drug paraphernalia case was dismissed and the menacing case proceeded to a jury trial in which appellant was found guilty.

{¶16} The record establishes that the trial court merely made a clerical error. The trial court determined and later explained that only the possession of drug paraphernalia case was to be dismissed. The trial court properly corrected its clerical

error by issuing a nunc pro tunc judgment dismissing only the possession of drug paraphernalia case and proceeding with the jury trial on the menacing case.

{¶17} Appellant's first assignment of error is without merit.

{¶18} In his second assignment of error, appellant contends that the trial court erred by refusing to dismiss the complaint because the language of the complaint failed to track the language of R.C. 2903.22, as required by the holding of *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707. Appellant stresses that when comparing the language of R.C. 2903.22(A) and the language of the complaint, it reveals that the complaint fails to track the language of the statute because the complaint does not include the language "the person or property of the other person, the other person's unborn, or a member of the other person's immediate family."

{¶19} Appellant cites to *Buehner*, *supra*, at ¶10, for the proposition that "where the indictment sufficiently tracks the wording of the statute of the charged offense, the omission of an underlying offense in the indictment can be remedied by identifying the underlying offense in the bill of particulars." We note, however, that the instant matter involves a complaint, not an indictment. "The purpose and function of a complaint is to inform the accused of the crime for which he is charged." *Lakewood v. Calanni*, 154 Ohio App.3d 703, 2003-Ohio-5246, at ¶25.

{¶20} Crim.R. 3 defines a criminal complaint as follows: "[t]he complaint is a written statement of the essential facts constituting the offense charged. It shall also state the numerical designation of the applicable statute or ordinance [and] shall be made upon oath before any person authorized by law to administer oaths."

{¶21} Appellant was charged with menacing in violation of R.C. 2903.22. R.C. 2903.22(A) states: "[n]o person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family."

{¶22} A plain reading of the complaint, signed by both Mr. Jordan and the deputy clerk, reveals it is not deficient in any respect:

{¶23} "Before me, personally came Terry Jordan II *** Who, being duly sworn according to law, deposes and says that on or about the 7th day of October, 2009, in the County of Portage, State of Ohio, one Donald G. Cline *** 'Did knowingly cause Terry Jordan II, to believe that said offender Donald G. Cline would cause physical harm.' TO WIT: Did follow Terry Jordan II around in his vehicle showing gestures imitating the use of a handgun. Did knowingly park across from Terry Jordan II's known residence to watch and observe Terry Jordan II's movements. Said act, occurred in the Village of Mantua, County of Portage, State of Ohio. Said act being Menacing, A Misdemeanor of the Fourth Degree (M4) Contrary to and in violation of Ohio Revised Code *** 2903.22 and against the peace and dignity of the State of Ohio."

{¶24} The written statement only mentioned Mr. Jordan as being in the vehicle when appellant made the gestures toward him, not Mr. Jordan's unborn, or a member of Mr. Jordan's immediate family. Because the complaint set forth a written statement of the essential facts constituting the offense; stated the numerical designation of the applicable statute, i.e., R.C. 2903.22; and was made upon oath, the trial court properly determined that the complaint was not deficient.

{¶25} Appellant's second assignment of error is without merit.

{¶26} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Portage County Municipal Court, Ravenna Division, is affirmed.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.