

[Cite as *State v. Pence*, 2016-Ohio-2880.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 14CA3473
 :
 vs. :
 :
 TODD A. PENCE, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

Todd A Pence, #A447-421, Marion Correctional Institution, Marion, Ohio, Appellant Pro Se.

Matthew S. Schmidt, Ross County Prosecuting Attorney, and Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED: 4-26-16

ABELE, J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court judgment. Todd A.

Pence, defendant below and appellant herein, assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ABUSED ITS DISCRETION BY IMPROPERLY USING THE CORRECTIVE ENTRY [NUNC PRO TUNC] AT THE HEARING HELD ON NOVEMBER 13, 2014, AT THE REQUEST OF THE STATE OF OHIO, TO IMPOSE A SANCTION OF EIGHT YEARS ON THE APPELLANT THAT WAS NOT PROPERLY IMPOSED AT THE ORIGINAL SENTENCING HEARING ON MARCH 18TH, 2003, AND JOURNALIZED ON APRIL 21ST, 2003, WHICH AFFECTED HIS SUBSTANTIAL RIGHTS [sic] OF DUE

PROCESS AND IS PLAIN ERROR[.]”

SECOND ASSIGNMENT OF ERROR:

“THE TRIAL COURT VIOLATED THE APPELLANT’S DUE PROCESS RIGHTS UNDER THE OHIO CONSTITUTION ARTICLE I, §16, WHEN IT IMPOSED A PRISON TERM OF EIGHT YEARS THAT THE TRIAL DID NOT IMPOSE AT THE ORIGINAL SENTENCING HEARING WHICH IS AN UNREASONABLE DELAY AFTER THE APPELLANT HAS COMPLETED HIS LAWFULLY IMPOSED SENTENCE[.]”

{¶ 2} On May 3, 2002, the Ross County Grand Jury returned an indictment that charged appellant with (1) two counts of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1); and (2) two counts of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2). Appellant initially pled not guilty, but later agreed to plead no contest to two of the charges.

{¶ 3} At the January 29, 2003 hearing, the State explained the terms of the plea agreement to the trial court. Those terms included (1) pleas to counts one and three of the indictment, (2) dismissal of counts two and four of the indictment, and (3) appellant would receive eight years in prison on each count, with the terms to be served consecutively. When asked if this represented the substance of their agreement, the defense answered affirmatively, although it stated that it wanted a pre-sentence investigation report that might contain something to prompt the court to “deviat[e] downward from that eight year figure.” The court accepted the pleas and found appellant guilty on counts one and three.¹ The trial court issued a judgment entry of conviction on February 11, 2003 that made note of appellant’s “no contest” pleas to

¹A February 2003 written petition to enter no contest plea shows that appellant’s pleas were directed at counts one and three.

counts one and three, as well as the dismissal of counts two and four.

{¶ 4} On March 18, 2003, the trial court sentenced appellant to serve consecutive eight year prison terms, as agreed in the plea agreement, but the court misspoke and imposed those sentences for counts one and two of the indictment rather than counts one and three. No one present at the hearing noticed the mistake.

{¶ 5} The trial court's April 21, 2003 sentencing entry states that counts two and four had been dismissed, and that appellant had been found guilty of counts one and three. However, on the following page the trial court stated that it imposed the prison sentences for counts one and two, not counts one and three. We affirmed appellant's conviction. *State v. Pence*, 4th Dist. Ross No. 03CA2719, 2003-Ohio-6943.

{¶ 6} Although this mistake slipped by a number of attorneys and judges, it did not go unnoticed by appellant. After he served the first eight year sentence, appellant filed for a writ of habeas corpus "in the third judicial district." His claim, presumably, was the same claim that he makes here in that he is being held in prison on count two of the indictment, which, in fact, had been dismissed. Apparently, the Ohio Attorney General's office contacted the Ross County Prosecutor's office and suggested that they "try and correct the prior entry in order to [forestall] a future or improper release of" appellant.²

{¶ 7} Consequently, on May 30, 2014 the State filed a "Request for Corrective Entry of Sentence" to reflect the fact that the trial court sentenced appellant on counts one and three, rather than counts one and two. Appellant filed a motion to dismiss and argued that the trial

² Although copies of the filings in the habeas corpus case are included in the original papers before us, we are not sure how they became a part of the record on appeal. Thus, we take this information from the transcript of the November 13, 2014 hearing.

court lacked jurisdiction to re-sentence him. The trial court held a hearing on November 13, 2014 and issued its judgment on December 4, 2014 that corrected the original sentencing entry, nunc pro tunc, and denied appellant's motion to dismiss. This appeal followed.

{¶ 8} For convenience, we jointly consider appellant's two assignments of error. Appellant asserts that the trial court improperly corrected his original sentencing entry with a nunc pro tunc judgment. Among other things, appellant asserts that the entry deprived him of an "expectation of finality" of a final judgment and somehow violated a "multi-part formula" concerning his "right of due process." Although we commend appellant for detecting this issue, we conclude that trial courts have the inherent authority to correct "clerical mistakes" in judgments. Crim.R. 36; also see *State v. Miller*, 127 Ohio St.3d 407, 2010-Ohio-5705, 940 N.E.2d 924, at ¶14. A "clerical error," the Ohio Supreme Court has explained, refers to a mistake or omission, mechanical in nature and apparent on the record, that does not involve a legal decision or judgment. *Id.* at ¶15 citing *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶19. This is what happened here. The record in the case sub judice shows that the parties reached a plea agreement to dismiss counts two and four in exchange for appellant's no contest pleas to counts one and three, and that he would be sentenced to serve consecutive eight year prison terms. This agreement is set out in the February 11, 2003 judgment of conviction. It is again set out in the second paragraph of the April 21, 2003 sentencing entry. However, in the ninth paragraph of that same entry the trial court mistakenly indicated that it sentenced appellant on count two.

{¶ 9} This is a "mechanical mistake," and the trial court did not make a legal decision, or enter judgment, different from the terms of the plea agreement, the judgment of conviction or

even the first part of the sentencing entry. Rather, this is a typographical error that the trial court properly corrected.

{¶ 10} Appellant cites *Miller*, supra at the syllabus, wherein the Supreme Court held that a “court may not use a nunc pro tunc entry to impose a sanction that the court did not impose as part of the sentence.” However, as the State points out in its brief, the *Miller* facts are much different from those at issue here. In *Miller*, several months after the court imposed a final sentence the trial court judge filed an amended entry to add an order of restitution to be made to the victim. Id. at ¶¶1-4. The Ohio Supreme Court, after it noted that the trial court did not inform appellant either by journal entry or orally state that a restitution order would be made id. at ¶2. Thus, the court held that the entry did “not reflect what the trial court did decide but recorded improperly.” Id. at ¶15. By adding restitution as an entirely new sanction, the trial court did not correct a mere clerical error, but instead rendered an entirely new judgment.

{¶ 11} That is not the case here. As stated before, the terms of the plea agreement were set out at the change of plea hearing, in the judgment entry of conviction and the first part of the final sentencing entry. Only in the latter part of the sentencing entry did the court mistakenly indicate “count two” rather than “count three.”

{¶ 12} The purpose of a nunc pro tunc entry is to correct an omission in a prior judgment so as to enter upon the record judicial action actually taken, but erroneously omitted, from the record. See *Roth v. Roth*, 65 Ohio App.3d 768, 771, 585 N.E.2d 482 (6th Dist.1989); *State v. Breedlove*, 46 Ohio App.3d 78, 81, 546 N.E.2d 420 (1st Dist.1988); *Mckay v. Mckay*, 24 Ohio App.3d 74, 75, 493 N.E.2d 317 (11th Dist.1985). Such entries should not be made to show what a court might or should have decided, or intended to decide, but what it did actually decide.

Leaseway Distribution Centers, Inc. v. Ohio Dept. of Adm. Serv., 49 Ohio App.3d 99, 108, 550 N.E.2d 955 (10th Dist.1988); *Renz v. Renz*, 4th Dist. Athens Nos. 1492&1519, 1992 WL 209500 (Aug. 26, 1992). In other words, a nunc pro tunc judgment should be used to correct clerical mistakes, not to change something that was deliberately done. *Dentsply Internatl., Inc. v. Kostas*, 26 Ohio App.3d 116, 118, 498 N.E.2d 1079 (8th Dist.1985); *State v. Johnson*, 4th Dist. Scioto Nos. 07CA3135, 07CA3136, 2007-Ohio-7173, at ¶11; *Metzger v. Thurman*, 4th Dist. Scioto No. 92CA2106, 1993 WL 278495 (Jul. 27, 1993).

{¶ 13} Therefore, after our review of the record in the case sub judice, we conclude that the trial court made proper use of a nunc pro tunc judgment. Accordingly, we hereby overrule appellant's two assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellee to recover of appellant the 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 Ross County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.