

[Cite as *State v. Boler*, 2021-Ohio-4081.]

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. 20CA09
 :
 v. :
 :
 PHILLIP DIONTE BOLER, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

Phillip Dionte Boler, Marion, Ohio, pro se.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Assistant Prosecuting Attorney, Athens, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED:11-8-21

ABELE, J.

{¶1} This is an appeal from an Athens County Common Pleas Court judgment. Phillip Dionte Boler, defendant below and appellant herein, assigns the following error for review:

"THE TRIAL COURT ERRED TO THE PREJUDICED [SIC] OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW WHERE ITS AUGUST 24, 2020 NUNC PRO TUNC ENTRY CORRECTED AN UNAUTHORIZED SENTENCE OUTSIDE HIS PRESENCE IN VIOLATION OF CRIM.R. 43(A)."

{¶2} On February 20, 2009, an Athens County Grand Jury returned an indictment that charged appellant with (1) one count of

aggravated robbery in violation of R.C. 2911.01(A)(3), a first-degree felony, along with a firearm specification in violation of R.C. 2941.145, and (2) one count of murder in violation of R.C. 2903.02(B), an unspecified felony, along with a firearm specification in violation of R.C. 2941.145. On June 18, 2009, a jury found appellant guilty of complicity to aggravated robbery and complicity to murder, each with a firearm specification.

{¶3} On July 12, 2010, this court affirmed the trial court's judgment of conviction and sentence and concluded that (1) no prosecutorial misconduct occurred during closing argument, (2) the trial court did not abuse its discretion by allowing certain challenged evidence, and (3) the cumulative error doctrine did not apply. See *State v. Boler (Boler I)*, 4th Dist. Athens No. 09CA24, 2010-Ohio-3344.

{¶4} After *Boler I*, appellant filed a postconviction relief request that the trial court denied. On appeal, we summarized relevant milestones and procedural history in *State v. Boler*, 4th Dist. Athens No. 18CA2, 2018-Ohio-3722 (*Boler II*):

The record reflects that on February 20, 2009, an Athens County grand jury returned an indictment that charged appellant with (1) one count of aggravated robbery in violation of R.C. 2911.01(A)(3), a first-degree felony, and (2) one count of murder in violation of R.C. 2903.02(B), an unspecified felony with the predicate offense being aggravated robbery. Both counts contained firearm specifications. The state issued a Bill of Particulars on April 1, 2009, and amended it on June 17,

2009, to add that the underlying theft offense to the aggravated robbery was attempted theft and/or burglary or an attempted burglary of 7467 New Marshfield Road.

On June 19, 2009, a jury found appellant guilty of complicity to aggravated robbery and complicity to murder, both with firearm specifications. On June 22, 2009, the trial court issued an entry to indicate that appellant was convicted of aggravated robbery [2911.01(A)(3)] and complicity to murder [2903.02(B)], but on July 1, 2009 the court issued a nunc pro tunc judgment to correct the June 22, 2009 judgment in which "the amount of money seized from Defendant during this investigation lists the wrong amount. Also, the previous entry stated that defendant was found guilty of Count One, Aggravated Robbery which should actually be Complicity to Aggravated Robbery. * * *" On September 22, 2009, the trial court issued another nunc pro tunc entry, this time to indicate once again that appellant was convicted of aggravated robbery and complicity to murder. On October 2, 2009, the trial court issued another nunc pro tunc entry to state that appellant was convicted of complicity to aggravated robbery and complicity to murder.

On May 5, 2010, and again on May 21, 2010, appellant filed motions for disclosure of grand jury transcripts. On May 21, 2010, appellant also filed his first petition for postconviction relief and asked the trial court to dismiss the defective indictment "do [sic] to lack of Sufficient Subject Matter, and Court have [sic] no Jurisdiction to hear such indictment, since the indictment does not have the necessary ingredience [sic] to create the required elements to display the initial charge." On May 25, 2010, the trial court dismissed appellant's motions for disclosure of grand jury transcripts and his petition for postconviction relief. Appellant did not appeal the decision.

As noted above, on July 12, 2010 this court affirmed the trial court's judgment of conviction. See *Boler*, 4th Dist. Athens App. No. 09CA24, 2010-Ohio-3344. On September 13, 2010, appellant filed a pro se App.R. 26(B) application to reopen the appeal. On November 1, 2010, appellant filed a motion for leave to file an amended

application to reopen. On November 22, 2010, this court denied appellant's application and concluded that "his motion does not show that a 'genuine issue' exists as to whether he was deprived the effective assistance of appellate counsel."

On August 26, 2011, appellant filed an App.R. 26(A) application for reconsideration and argued that the offenses should have merged, as did the convictions of a co-defendant. On December 22, 2011, this court denied appellant's delayed application for reconsideration, finding appellate counsel not ineffective and finding that aggravated robbery and felony murder are not allied offenses of similar import under the test in effect when appellant filed his direct appeal.

On January 11, 2012, appellant filed a second motion to reconsider, or in the alternative, to certify a conflict. On March 5, 2012, this court denied appellant's application for reconsideration and denied the untimely motion to certify a conflict. On March 16, 2012, appellant again filed a motion to reconsider this court's March 5, 2012 decision to deny appellant's January 11, 2012 application to reconsider or to certify a conflict. On May 1, 2012, this court denied appellant's application for reconsideration.

On April 9, 2013, appellant filed a request for a re-sentencing hearing. On April 16, 2013, the trial court denied appellant's request for resentencing, finding that the aggravated robbery related to Osbourne and that the individual murdered was Donnie Putnam, therefore as two victims were involved, the crimes were committed separately or with a separate animus as to each.

On May 2, 2013, appellant filed a second notice of appeal (13CA19) to appeal the trial court's April 16, 2013 decision that denied his motion for resentencing. On June 13, 2013, appellant filed a corrected notice of appeal, and on June 20, 2013, this court (13CA19) dismissed appellant's appeal because the trial court's April 16, 2013 entry is not a final appealable order. In this court's ruling, we also held: "Boler could have raised the issue concerning whether the trial court

sentenced him on allied offenses of similar import in his sentencing on his direct appeal, but failed to do so. The doctrine of res judicata bars not only the re-litigation of previous claims, but also bars a litigant from raising any issue, claim or defense that could have been previously raised but was not. (citation omitted). The allied offenses argument was available to Boler on direct appeal. Having failed to raise the issue then, Boler is bared by the doctrine of res judicata from raising it at this time."

On September 14, 2014, appellant filed a motion to vacate a void judgment (09CA24) and raised the same issue he raises here. On October 7, 2014, the magistrate's order denied appellant's motion to vacate a void judgment and stated "[t]his Court finds nothing in Boler's current motion that has not or could not have been raised in his direct appeal. The doctrine of res judicata bars the consideration of errors that could have been raised on direct appeal, but were not. (Citation omitted). Moreover, Boler has not demonstrated that any of these errors would have rendered the trial court's judgment void; therefore, they would also not render this Court's judgment void. Boler's motion to vacate a void judgment is hereby DENIED."

On October 15, 2014 (09CA24), appellant filed a motion for a judgment on the pleadings. On October 29, 2014, the magistrate's order denied appellant's motion for judgment on the pleadings as moot because no pleadings were currently before the court. On November 25, 2014 (09CA24), appellant filed a second motion for judgment on the pleadings, arguing that his four-year-old motion for leave to file amended application on reopening from November 1, 2010 was still pending before the court. On January 23, 2015, this court denied appellant's motion, concluding that appellant's November 1, 2010 motion was untimely filed and implicitly denied by the Court, and thus, the motion was no longer pending.

On July 17, 2017, appellant filed his second petition for postconviction relief, a motion to vacate a void judgment "due to fraud upon the court" in 09CR0091. On August 3, 2017, appellant filed a motion for judgment on the pleadings in the trial court, and on August 15,

2017, the court denied appellant's motion to vacate a void judgment due to fraud upon the court, construing it as "an untimely, as well as successive, R.C. 2953.21 petition for postconviction relief, and therefore denies the motion for want of jurisdiction." The trial court cited appellant's May 21, 2010 "motion to void judgment" as appellant's first motion for postconviction relief. Appellant did not appeal the trial court's decision the motions on May 25, 2010. The court dismissed appellant's July 17, 2017 motion for want of jurisdiction and concluded that the dismissal mooted appellant's August 3, 2017 motion for judgment on the pleadings. Appellant did not appeal that decision.

On December 22, 2017, appellant filed his third motion for postconviction relief and reasserted the claims that the trial court denied on August 15, 2017. On January 2, 2018, the trial court denied appellant's motion for postconviction relief and noted that appellant's motion is "an untimely, as well as successive, R.C. 2953.21 petition for post-conviction relief, and is therefore denied for want of jurisdiction." The trial court cited appellant's May 21, 2010 "motion to void judgment" as appellant's first motion for postconviction relief, denied on May 25, 2010, and cited appellant's July 17, 2017 "motion to vacate a void judgment due to fraud upon the court" as appellant's second petition, also denied August 15, 2017. The trial court correctly observed that appellant did not appeal either decision. The trial court held that (1) this is another untimely and successive postconviction petition, (2) the matter is barred by res judicata, (3) the mid-trial amendment to the bill of particulars is appropriate, (4) the amendment did not change the name of the offense or the identity of the crime, and (5) appellant's conviction for complicity, the offenses for which he was indicted, is proper. Thus, the trial court dismissed the December 22, 2017 motion for want of jurisdiction. Further, on January 18, 2018, the trial court denied appellant's January 16, 2018 "demand for a hearing on the merits" as moot."

State v. Boler, 4th Dist. Athens No. 18CA2, 2018-Ohio-3722, ¶ 3-14

(*Boler II*) (*appeal not allowed by State v. Boler*, 154 Ohio St.3d

1446, 2018-Ohio-4962, 113 N.E.3d 553).

{15} In *Boler II*, we concluded that the issues appellant raised in his “untimely, successive petition for postconviction relief could have been raised in his direct appeal, but were not.” *Boler II*, 2018-Ohio-3722, ¶ 20. Thus, we affirmed the trial court’s judgment to dismiss appellant’s untimely, successive petition for postconviction relief.

{16} On June 8, 2020, appellant filed a motion to correct a void sentence and asserted that the trial court’s October 2, 2009 nunc pro tunc entry effectively modified his sentence and converted his indefinite sentence to a definite sentence. In particular, appellant argued that, at his sentencing hearing, the trial court sentenced him to serve a mandatory prison term of 15 years to life for complicity to murder, 10 years for complicity to aggravated robbery, plus 3-year specifications for each, for a total of 28 years to life. However, appellant claims, the October 2, 2009 nunc pro tunc entry instead imposed a term of life in prison with parole eligibility after 28 years.

{17} On July 24, 2020, the trial court concluded that the court’s October 9, 2009 nunc pro tunc entry altered the phraseology of the court’s original order to “life in prison with parole eligibility after twenty-eight (28) years in the State Penal System.” Consequently, because this inaccuracy needed to be

corrected to its original "28 years to life" language, the court believed that this correction could be accomplished in another nunc pro tunc entry. The court additionally concluded that the October 9, 2009 nunc pro tunc entry incorrectly changed appellant's five-year mandatory post-release control term to a lifetime requirement. Thus, the court stated that "the original language should be reasserted in a new nunc pro tunc entry." The court further found that it initially properly sentenced appellant and, while the "nunc pro tunc entry may be invalid," "the court's originally [sic] sentencing is not." For these reasons, the trial court concluded that appellant need not be resentenced nor be entitled to appear at a hearing. On August 24, 2020, the trial court issued its nunc pro tunc entry "to reflect the correct prison term as twenty-eight (28) years to life and the term of postrelease control to five (5) years mandatory." This appeal followed.

{18} In his sole assignment of error, appellant asserts that the trial court's August 24, 2020 nunc pro tunc entry improperly corrected an unauthorized sentence and did so outside his presence in violation of Crim.R. 43(A).

{19} Nunc pro tunc is Latin for "now for then" and is commonly defined as "[h]aving retroactive legal effect through a court's inherent power." Black's Law Dictionary (9th Ed.2009) 1174. Crim.R. 36 authorizes a 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." This court has observed that "courts possess inherent common-law power to enter judgments or orders nunc pro tunc in proper cases." *Matter of H.S.*, 2017-Ohio-457, 84 N.E.3d 127, ¶ 46 (4th Dist.), quoting *Natl. Life Ins. Co. v. Kohn*, 133 Ohio St. 111, 113, 11 N.E.2d 1020 (1937). "The general purpose of such an entry is to record a prior but unrecorded act of the court." *Kohn* at 113. "The power to make nunc pro tunc entries is restricted ordinarily to the subsequent recording of judicial action previously and actually taken. It is a simple device by which a court may make its journal speak the truth." *Id.*; accord *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 163-164, 656 N.E.2d 1288 (1995). A nunc pro tunc entry "'speaks the truth' by correcting a judicial record that fails to show an order or a judgment of the court because the order or judgment was not recorded at all in the first instance." *State v. Breedlove*, 46 Ohio App.3d 78, 81, 546 N.E.2d 420 (1st Dist.1988). Thus, "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 or what the court intended to decide." *Fogle* at 164.

{¶10} "Errors subject to correction by the court include a clerical error, mistake, or omission that is mechanical in nature

and apparent on the record and does not involve a legal decision or judgment." *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 18; accord *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263. See also *State v. Greulich*, 61 Ohio App.3d 22, 24-25, 572 N.E.2d 132 (1988) (Nunc pro tunc order is a vehicle used to correct an order previously issued which fails to reflect the trial court's true action.) Further, a trial court may not use a nunc pro tunc entry to effect "[s]ubstantive changes in judgments, orders, or decrees." *Nichols v. Nichols*, 2013-Ohio-3927, 997 N.E.2d 1262 (10th Dist.), ¶ 12, citing *Thurston v. Thurston*, 10th Dist. Franklin No. 02AP-555, 2002-Ohio-6746. "A substantive mistake consists of instances where the court changes its mind, either because it made a legal or factual mistake in making its original thought, [or because on second thought] it has decided to exercise its discretion in a different manner." *Lakhi v. Healthcare Choices & Consultants, LLC*, 10th Dist. Franklin No. 06AP-806, 2007-Ohio-4127, ¶ 36 (internal quotations omitted).

{¶11} In the case sub judice, appellant asserts that the trial court's August 24, 2020 nunc pro tunc entry is improper because it (1) attempted to correct and impose an unauthorized sentence, and (2) occurred outside appellant's presence in violation of his due process rights embodied in Crim.R. 43(A). In support of his

argument, appellant relies on *State v. Mullens*, 9th Dist. Summit No. 23395, 2007-Ohio-2893.

{¶12} In *Mullens*, the defendant had been convicted of two counts of illegal manufacturing of drugs, three counts of illegal assembly or possession of chemicals for the manufacturing of drugs, and two counts of aggravated possession of drugs. After remand, based on *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the trial court held a resentencing hearing, but did not journalize the sentence. On August 4, 2006, the court held another hearing and imposed (1) a four-year mandatory prison term on the two illegal manufacturing counts, to be served consecutively with a three-year mandatory sentence in another case; and (2) a three-year non-mandatory prison term on the illegal assembly or possession counts, to be served consecutively with the other sentences imposed. The trial court also (1) stated that appellant's sentence was for a period of ten years in prison, only seven of which was mandatory, and (2) imposed a one-year concurrent sentence for the aggravated possession of drugs, that had previously been merged but apparently did not merge after resentencing. *Mullens* at ¶ 4.

{¶13} On August 10, 2006, the *Mullens* trial court journalized the sentence and ordered Mullens be committed to prison for a mandatory four-year term for two counts of illegal manufacturing of

drugs, a mandatory four-year term for the three counts of illegal assembly or possession, and a non-mandatory one-year term for the two counts of aggravated possession of drugs. The court further ordered that the prison terms be served concurrently with each other, but consecutively to a sentence in another case in which the trial court had imposed a mandatory three-year sentence. The court thus ordered Mullens to serve "a total of Ten (10) years in the Ohio Department of Rehabilitation and Correction, of which Seven (7) are mandatory." *Id.* at ¶ 5. However, on September 8, 2006, the trial court sua sponte entered another entry, "filed NUNC PRO TUNC to correct the Journal Entry dated August 4, 2006 and filed August 10, 2006 to read in part as follows: 'The Defendant is to serve a mandatory Ten (10) years in the Ohio Department of Rehabilitation and Correction[.]'" *Id.* at ¶ 6.

{¶14} After review, the Ninth District concluded that although the *Mullens* trial court issued its September 8, 2006 nunc pro tunc entry to "correct" its August 10, 2006 entry, it: "effectively vacated its previous sentence and imposed a new sentence." *Id.* at ¶ 20. Thus, because the trial court did not merely correct a typographical error or mathematical calculation, "a nunc pro tunc order was not the proper mechanism by which the trial court could modify appellant's sentence." *Id.* In addition, because Crim.R. 43(A) requires a criminal defendant's presence at sentencing,

"[w]hen 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." *Id.* at ¶ 21, quoting *State v. Hodges*, 1st Dist. Hamilton No. C-990516, 2001 WL 698135 (June 22, 2001), quoting *State v. Carpenter*, 1st Dist. Hamilton No. C-950889, 1996 WL 577854 (Oct. 9, 1996).

{¶15} Thus, in *Mullens* the court determined that the trial court modified the defendant's sentence outside the defendant's presence and, thus, improperly used a nunc pro tunc order to do so. *Id.* Consequently, the court vacated the September 8, 2006 nunc pro tunc order, reinstated the August 10, 2006 sentencing entry, and remanded the cause to the trial court to correct the August 10, 2006 sentencing entry to accurately reflect the true sentence imposed at the August 4, 2006 sentencing hearing. *Id.* at ¶ 22.

{¶16} In the case at bar, appellee argues that *Mullens* is inapplicable because in *Mullens* the court's nunc pro tunc entry did not accurately reflect the actual sentence imposed at the sentencing hearing. Instead, appellee cites *State v. Boyle*, 5th Dist. Richland No. 2019 CA 0114, 2020-Ohio-1224, in support.

{¶17} In *Boyle*, on July 2, 1990 a court sentenced a defendant to serve (1) an indeterminate term of 20 years to life in prison for murder, and (2) one and one-half years for abuse of a corpse. The court also ordered the sentences be served consecutively, with

no parole eligibility until after appellant served 20 years. The following day, however, the trial court issued a nunc pro tunc entry that sentenced appellant to serve (1) life imprisonment with no parole eligibility until 20 years have been served on the murder count, and (2) one and one-half years for abuse of a corpse, with both sentences to be served consecutively. Boyle argued that the trial court's use of the nunc pro tunc entry constituted reversible error. *Boyle* at ¶ 2-4.

{¶18} A review of Boyle's sentencing transcript revealed that, at the sentencing hearing, the trial court sentenced Boyle to serve "life imprisonment with an opportunity or possibility of probation or parole, I should say, after service of 20 years. * * * On the charge of abuse of a corpse * * * I'm going to sentence you to 18 months to run consecutive to the term on the Aggravated Murder charge." The trial court noted that the July 2, 1990 entry's wording "would appear to allow the Defendant parole eligibility after serving his one and one-half year sentence in Count Two and eighteen and one-half years of his twenty to life sentence."

{¶19} The Fifth District determined that, because this "is an incorrect statement of the sentence required by law and of the sentence that was actually imposed on the record in court," the trial court appropriately used the nunc pro tunc order to fix a ministerial wording issue. *Id.* at ¶ 14, citing Crim.R. 36(A);

State v. Bryan, 5th Dist. Muskingum No. CT2018-0058, 2019-Ohio-2980. Further, because a defendant has no right to be present when a nunc pro tunc entry does not change a defendant's sentence, but instead includes language to accurately reflect the original sentence, the court affirmed the trial court's judgment. *Id.* at ¶ 14, citing *State v. Spears*, 8th Dist. Cuyahoga No. 94089, 2010-Ohio-2229.

{¶20} In the case sub judice, the trial court stated at appellant's June 19, 2009 sentencing hearing: "Yesterday the * * * jury returned [a] verdict of guilty on complicity to aggravated robbery with a gun specification and complicity to murder * * * with a gun specification." The court further stated:

With regard to your murder conviction Mr. Boler the Court is going to * * * impose a mandatory required, or a mandatory sentence that's statutory. That the sentence being fifteen years to life. And * * * there is a mandatory three year firearm specification that shall be served consecutively to that sentence. With regard to the aggravated robbery sentence first degree felony, the Court has already stated * * * reasons for * * * imposing the ten year sentence to be served consecutively to the * * * murders [sic.] sentence as well as the firearm specification and * * * *for a twenty eight to life sentence*. The second firearm specification will merge with the first firearm specification." The court further ordered restitution, costs, a drivers' license suspension, and "five year mandatory post release control term." (Emphasis added.)

{¶21} However, the trial court's June 22, 2009 sentencing entry incorrectly stated that appellant had been convicted of aggravated

robbery and complicity to murder, rather than complicity to aggravated robbery and complicity to murder. The court thus sentenced appellant to serve:

a mandatory prison term of fifteen (15) years to life * * * for the crime of Complicity to Murder with Specification, * * * to ten (10) years * * * for the crime of Complicity to Aggravated Robbery with Specification, * * * and a mandatory three (3) years * * * for each Specification. All counts shall run consecutive to each other with both Specifications to be merged to each other but consecutive to Count One and Count Two, *for a total of twenty-eight (28) years to life in the States Penal System. (Emphasis added.)*

The court further ordered appellant to (1) pay \$6,618.73 in restitution, (2) pay costs, (3) serve a lifetime license suspension, (4) forfeit \$485 that officers seized at the time of arrest, and (5) serve a mandatory five-year postrelease control term.

{¶22} On July 1, 2009, the trial court issued a nunc pro tunc entry to correct its June 22, 2009 entry to (1) clarify the amount of money seized during the investigation, and (2) correct appellant's convictions for complicity to aggravated robbery and complicity to murder, rather than convictions for aggravated robbery and complicity to murder. The entry provides:

a mandatory prison term of fifteen (15) years to life * * * for the crime of Complicity to Murder with Specification, * * * to ten (10) years * * * for the crime of Complicity to Aggravated Robbery with Specification, * * * and a mandatory three (3) years * * * for each Specification. All counts shall run

consecutive to each other with both Specifications to be merged to each other but consecutive to Count One and Count Two, *for a total of twenty-eight (28) years to life* in the State Penal System. (Emphasis added.)

The court further ordered appellant to (1) pay \$6,618.73 in restitution, (2) pay costs, (3) serve a lifetime license suspension, (4) forfeit \$437.80 that officers seized at the time of arrest, and (5) serve a mandatory five-year postrelease control term.

{¶23} On September 22, 2009, the trial court issued yet another nunc pro tunc entry. This entry incorrectly stated that appellant had been found guilty of aggravated robbery (rather than complicity to aggravated robbery) and complicity to murder. The court sentenced appellant to serve:

a mandatory prison term of fifteen (15) years to life * * * for the crime of Complicity to Murder with Specification, * * * ten (10) years * * * for the crime of Complicity to Aggravated Robbery with Specification, * * * and a mandatory three (3) years * * * for each Specification. All counts shall run consecutive to each other with both Specifications to be merged to each other but consecutive to Count One and Count Two, *for a total of life in prison with parole eligibility after twenty-eight (28) years* in the State Penal System. (Emphasis added.)

The court also ordered the same restitution, costs, license suspension, money seized from appellant, and indicated that the court notified appellant that "parole/post-release control [is] mandatory in this case for life."

{¶24} On October 2, 2009, the trial court issued yet another nunc pro tunc entry to correctly state that appellant had been convicted of complicity to aggravated robbery and complicity to murder. The court sentenced appellant to serve:

a mandatory prison term of fifteen (15) years to life * * * for the crime of Complicity to Murder with Specification, * * * to ten (10) years * * * for the crime of Complicity to Aggravated Robbery with Specification, * * * and a mandatory three (3) years * * * for each Specification. All counts shall run consecutive to each other with both Specifications to be merged to each other but consecutive to Count One and Count Two, *for a total of life in prison with parole eligibility after twenty-eight (28) years in the State Penal System. (Emphasis added.)*

The court also ordered the same restitution, costs, license suspension, money seized from appellant, and this time indicated that the court notified appellant that "parole/post-release control [is] mandatory in this case for life."

{¶25} After other non-related motions and appeals, on June 8, 2020 appellant filed a motion to correct a void sentence. In particular, appellant asserted that the trial court's October 2, 2009 nunc pro tunc entry modified his sentence and converted his indefinite sentence to a definite sentence. Appellant argued that, at the sentencing hearing, the court sentenced him to serve a mandatory term of 15 years to life for complicity to murder, 10 years for complicity to aggravated robbery, plus 3-year specification for each, for a total of 28 years to life. However,

the October 2, 2009 nunc pro tunc entry imposed a term of life in prison with parole eligibility after 28 years.

{¶26} As noted above, on July 24, 2020 the trial court's entry concluded that the court's October 9, 2009 nunc pro tunc entry altered the phraseology of the court's original order to "life in prison with parole eligibility after twenty-eight (28) years in the State Penal System." The court also concluded that this inaccuracy should be corrected to its original "28 years to life" language and could be accomplished in another nunc pro tunc entry. The court further determined that the October 9, 2009 nunc pro tunc entry incorrectly changed appellant's five-year mandatory post-release control term to a lifetime parole requirement. Thus, the court stated (1) that "the original language should be reasserted in a new nunc pro tunc entry," and (2) that appellant was properly sentenced and, while the "nunc pro tunc entry may be invalid," "the court's originally [sic] sentencing is not." Therefore, the court concluded that appellant is not entitled to be resentenced nor entitled to a sentencing hearing.

{¶27} On August 24, 2020, the trial court issued its final nunc pro tunc entry "to reflect the correct prison term as *twenty-eight (28) years to life* and the term of postrelease control to five (5) years mandatory. (Emphasis added.)" We observe that this entry does correctly reflect the sentence provided in R.C. 2929.02(B)(A) that

sets forth the penalty for murder. The relevant question, however, is whether the August 24, 2020 nunc pro tunc entry correctly reflects the sentence that the trial court imposed during the June 19, 2009 sentencing hearing.

{¶28} Our review of the June 19, 2009 sentencing transcript reveals that the trial court sentenced appellant to serve: (1) 15 years to life in prison for complicity to murder, with a consecutive 3 year firearm specification, and (2) 10 sentence for aggravated robbery, with the sentences to be served consecutively. Thus, because the court sentenced appellant to serve "twenty eight [years] to life," the August 24, 2020 nunc pro tunc entry accurately reflects appellant's sentence, the sentence the court actually imposed at the June 19, 2009 sentencing hearing. Consequently, we believe that the trial court in the case at bar properly corrected the previous language contained in a sentencing entry with a nunc pro tunc entry.

{¶29} Appellant further asserts that, because the trial court modified his sentence, Crim.R. 43(A) mandated his presence in the courtroom. 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."

{¶30} In the case sub judice, because the trial court issued a nunc pro tunc entry to merely correct a mistake and to accurately reflect appellant's original sentence, the trial court's entry did not modify appellant's sentence. Thus, under these circumstances, the rules of criminal procedure did not require appellant's presence. See *Spears* at ¶ 12.

{¶31} Accordingly, based upon the foregoing reasons, we overrule appellant's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed. Appellee shall 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 Athens County Common Pleas Court to carry this judgment into execution.

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

Smith, P.J. & Wilkin, 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.