[Cite as *State v. Nevedale*, 2007-Ohio-2042.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. KEITH B. NEVEDALE Appellant	C. A. No. 06CA008999 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 01CR058443

DECISION AND JOURNAL ENTRY

Dated: April 30, 2007

This cause was heard upon the record in the trial court and the following disposition is made:

SLABY, Presiding Judge.

{¶1} Defendant, Keith Nevedale, appeals the decision of the Lorain County Court of Common Pleas imposing a definite time period of post-release control after Defendant was previously found guilty and sentenced after being convicted for robbery with a firearm specification. We dismiss the appeal.

{¶2} On August 30, 2002, Defendant pled guilty to one count of aggravated robbery, a violation of R.C. 2911.01, a felony of the first degree with a firearm specification. On September 4, 2002, the trial court sentenced Defendant to a term of six years incarceration, but failed to advise Defendant as to the specific time period of his post-release control.

{¶3} Pursuant to R.C. 2929.191, the trial court, sua sponte, resentenced Defendant on July 28, 2006, solely to advise him of the five year term of his mandatory post-release control. The July 28, 2006 entry is entitled "Post-Release Control Entry." ("Judgment Entry"). The Defendant was still incarcerated at the time of the resentencing.

{¶4} Defendant timely appeals the Judgment Entry and raises three assignments of error.

Assignment of Error No. 1

> "The trial court erred and committed plain error by imposing post-release control in an after-the-fact sentencing hearing. R.C. 2929.14, 2929.19, 2929.191, 2967.28; Crim.R. 52; Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Section 15(D), Article II of the Ohio Constitution; Sentencing Entry, Apx. A-1; T.p.4."

Assignment of Error No. 2

> "The trial court erred by failing to comply with Criminal Rule 32(C) because the judgment entry of sentence does not 'set forth the plea, the verdict or findings, and the sentence[.]' Apx. at A-1."

Assignment of Error No. 3

> "[Defendant] was deprived of the effective assistance of counsel in violation of the Sixth, and Fourteenth Amendments to the United States Constitution; Sentencing Entry, Apx. A-1; T.p. 4."

{¶5} Defendant challenges his sentence as being an unconstitutional violation of the prohibition of ex post facto enforcement of judicial decision. However, we do not reach Defendant's argument because the trial court has not

complied with Crim.R. 32(C). *State v. Earley*, 9th Dist. No. 23055, 2006-Ohio-4466. Specifically, the trial court's judgment entry, from which Defendant appeals, does not set forth a plea, findings, or Defendant's complete sentence and is not a final appealable order.

{¶6} We are obligated to raise sua sponte questions related to our jurisdiction. *Whittaker-Merrell Co. v. Geupel Constr. Co.* (1972), 29 Ohio St.2d 184, 186. CrimR. 32(C) sets forth the following requirements for a judgment entry of conviction: "A judgment of conviction shall set forth the plea, the verdict or findings, and the sentence." This Court explained in *Earley* that the trial court must include a finding in a sentencing entry in order for that entry to be a final appealable order. See *Earley* at ¶4. An order lacking a finding is not a final and appealable order, and this Court lacks jurisdiction to consider an appeal from such an order. Id. See, also Section 3(B)(2), Article IV, Ohio Constitution; *State v. Tripodo* (1977), 50 Ohio St.2d 124, 127.

{¶7} The *Earley* decision went largely unrecognized and trial courts have continued to issue orders that lack findings or other elements of Crim.R. 32(C). As a result, this court recently decided *State v. Miller*, 9th Dist. No. 06CA0046-M, 2007-Ohio-1353, in which it clearly enumerated and explained the elements of Crim.R. 32(C) that must be present in a judgment entry of conviction in order for that entry to constitute a final appealable order. See, also, *State v. Williams*, 9th Dist. No. 06CA008927, 2007-Ohio-1897.

{¶8} Crim.R. 32(C) states, in pertinent part:

> "A judgment of conviction shall set forth the plea, the verdict or findings, and the sentence. *** The judge shall sign the judgment entry and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk."

{¶9} This Court observed in *Miller* that Crim.R. 32(C) sets forth five elements that must be present in any judgment of conviction in order for that judgment entry to be final and appealable:

1. the plea;
2. the verdict or findings;
3. the sentence;
4. the signature of the judge; and
5. the time stamp of the clerk to indicate journalization. See *Miller* at ¶5.

{¶10} We note that this rule also applies to resentencing entries, entered pursuant to R.C. 2929.191, as is the Judgment Entry here, as there is nothing in R.C. 2929.191, or elsewhere, to indicate that resentencing entries do not need to comply with Crim.R. 32(C).

{¶11} The first element required under Crim.R. 32(C) is the plea. *Miller* stated as follows:

> "For judgment entries entered after this decision is journalized, this Court will not search the record to determine what plea the defendant entered. The trial court's judgment entry must comply fully with Crim.R. 32(C) by setting forth the defendant's plea of not guilty, guilty, no contest, or not guilty by reason of insanity." *Miller* at ¶10." See, also, *Williams*, 2007-Ohio-1897 (clarifying the *Miller*

> decision as it relates to Crim.R. 32(C) requirement that a plea be included in the trial court judgment entry).

{¶12} This was the only aspect of the *Miller* decision to be applied prospectively, as it overruled this Court's prior decision in *State v. Morrison* (Apr. 1, 1992), 9th Dist. No. 2047, which had allowed an exception to the plea requirement in circumstances in which a defendant had pled not guilty and proceeded to trial. *Miller* held that the *Morrison* plea exception was overruled, and that there was no longer any exception to the plea requirement. After the journalization of *Miller*, any trial court judgment entries must clearly set forth a defendant's plea, without exception.

{¶13} The judgment entry in the instant case does not contain any reference to a plea to the charges for which Defendant was ultimately sentenced. However, because this judgment entry was journalized before this Court's decision in *Miller*, we do not dispose of this appeal on that basis, and we proceed to the verdict or findings as required by Crim.R. 32(C), and as discussed in *Miller*.

{¶14} The second element of a judgment entry under Crim.R. 32(C) is the verdict or findings.

> "Following either a jury trial or a bench trial, the trial court must set forth the verdict in the judgment entry. The verdict is the 'jury's finding or decision on the factual issues of a case.' *State v. Lomax*, 96 Ohio St.3d 318, 2002-Ohio-4453, ¶23. In the case of a plea of guilty or no contest, the trial court must enter its finding on the plea." *Miller* at ¶11.

{¶15} In this case, the trial court failed to set forth a finding of guilt. Instead, the Judgment Entry stated that the Defendant "has been sentenced" for the offenses of aggravated robbery with firearm specification. This is not sufficient to satisfy Crim.R. 32(C), as we explained in *Miller*. See *Miller* at ¶12-16. The court must instead make a present finding of guilt in order to comply with Crim.R. 32(C). See *Miller* at ¶13-15. See, also, *State v. Meese*, 5th Dist. No. 2005AP11075, 2007-Ohio-742.

{¶16} Moreover, this Court explained in *Miller* that "in the context of a guilty or no contest plea, it is also not sufficient for the trial court to note only that it *accepted* the defendant's plea. The trial court must enter a finding of guilt to comply with Crim.R. 32(C)." *Miller* at ¶14. See, also, *State v. Sandlin*, 4th Dist. No. 05CA23, 2006-Ohio-5021, at *3 (deciding that the imposition of a sentence does not satisfy this element of Crim.R. 32(C), which "requires that the verdict [or finding] itself be recorded in the court's journal," and that "[w]ithout the journalization of this information, there is no judgment of conviction pursuant to Crim.R. 32(C), and therefore, no final appealable order.")

{¶17} We also note that the *Miller* decision included a footnote that read as follows:

> "Trial courts that utilize a form judgment entry must be certain that the form complies with this decision. The form must reflect the plea, the verdict or findings, the sentence, and the judge's signature.

> When that form is journalized by the clerk, it will comply with Crim.R. 32(C)" *Miller*, FN 1.

{¶18} "The form used by the trial court in this case does not comply with Crim.R. 32(C) in that it lacks the court's finding. The lack of a finding means that the trial court's judgment entry is not a final appealable order, and we lack jurisdiction to consider the merits of Defendant's appeal." *Miller* at ¶16. See, also, *Sandlin*, at *3. Here, the trial court used a form entry that has failed to comply with the requirements of Crim.R. 32(C), as set forth above.

{¶19} In addition to the plea and the verdict or findings, Crim.R. 32(C) also requires that the sentence imposed by the trial court be included in the judgment entry. See *Miller* at ¶17. Our review of the sentence establishes that the Judgment Entry also fails to set forth Defendant's complete sentence. The Judgment Entry merely indicates that Defendant was already sentenced and then imposes a mandatory 5-year term of post-release control. For this additional reason, we find that the Judgment Entry does not constitute a final appealable order and we are without jurisdiction to consider the merits of Defendant's appeal.

{¶20} Finally, the Judgment Entry bears the signature of the trial court judge and bears the time stamp of the clerk of the trial court. Therefore, it complies with Crim.R. 32(C) in these respects. See *Miller* at ¶18-19.

{¶21} The trial court's judgment entry fails to comply with Crim.R. 32(C). We therefore, dismiss this appeal for lack of subject matter jurisdiction on the

grounds that the trial court has not rendered a final appealable order. As we indicated in *Miller*,

> "We encourage the trial court to enter a judgment entry as soon as possible that complies with Crim.R. 32(C). After the trial court files that entry, if Defendant desires to appeal, he must file a new notice of appeal. The parties may then move this Court to transfer the record from this appeal to the new appeal and to submit the matter on the same briefs as were filed in this case and we will consider the appeal in an expedited fashion. See, e.g., *Sandlin*, n.4." *Miller* at ¶20.

Appeal dismissed.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

LYNN C. SLABY
FOR THE COURT

WHITMORE, J.
CONCURS

DICKINSON, J.
CONCURS, SAYING:

{¶22} I concur with the majority's dismissal of this appeal. As I wrote in my concurring opinion in *State v. Williams*, Lorain App. No. 06CA008927, 2007-Ohio-1897, when a defendant pleads guilty, the trial court must include that fact in its judgment of conviction in order to render that judgment a final appealable order within the meaning of Section 2505.02(B)(1) of the Ohio Revised Code. Because the trial court failed to include in its judgment in this case that defendant had pleaded guilty, that judgment was not a final appealable order. I would dismiss this appeal based on this failure by the trial court.

{¶23} As discussed in my concurring opinion in *Williams*, I do not believe that either Rule 32(C) or, more importantly, Section 2505.02(B)(1) of the Ohio Revised Code requires a trial court to make a finding of guilt if a defendant has pleaded guilty. I acknowledge, however, that this Court has determined in *State v. Miller*, Medina App. No. 06CA0046-M, 2007-Ohio-1353, that such a finding of guilt is necessary. Accordingly, based on stare decisis, I concur in the majority's dismissal of this appeal for failure to include a finding of guilt in its judgment of conviction.

APPEARANCES:

DAVID H. BODIKER, State Public Defender, and STEPHEN P. HARDWICK, Assistant Public Defender, for Appellant.

DENNIS WILL, Prosecuting Attorney, and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellee.