

[Cite as *State v. Culgan*, 2009-Ohio-2783.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF MEDINA    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

CLIFFORD J. CULGAN

Appellant

C. A. No.    08CA0080-M

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF MEDINA, OHIO  
CASE No.    01-CR-0372

DECISION AND JOURNAL ENTRY

Dated: June 15, 2009

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Per Curiam.

{¶1} Defendant-Appellant Clifford Culgan appeals from the October 7, 2008 *nunc pro tunc* sentencing entry of the Medina County Court of Common Pleas. We vacate Culgan’s sentence and remand this case for resentencing.

I.

{¶2} On September 13, 2001, Culgan was indicted for rape, unlawful sexual conduct with a minor, corrupting another with drugs, and pandering obscenity involving a minor. On May 15, 2002, the State amended the indictment, and Culgan pled guilty to two counts of unlawful sexual conduct with a minor, one count of corrupting another with drugs, and one count of attempted pandering obscenity involving a minor. Culgan was sentenced on August 2, 2002 to a total of ten years in prison.

{¶3} On September 3, 2002, Culgan appealed. This Court affirmed the decision of the trial court. *State v. Culgan*, 9th Dist. No. 02CA0073-M, 2003-Ohio-2713, at ¶1. Further review

was denied by the Supreme Court of Ohio. *State v. Culgan*, 100 Ohio St.3d 1470, 2003-Ohio-5772.

{¶4} On July 30, 2007, Culgan filed a motion for resentencing, arguing that the August 8, 2002 judgment entry journalizing Culgan's sentence failed to comply with Crim.R. 32(C). Culgan's motion was denied by the trial court on August 1, 2007. On October 26, 2007, Culgan filed a complaint for a writ of mandamus and/or procedendo with this Court to compel the State and the trial court judge to issue a sentencing entry that complied with Crim.R. 32(C). This Court dismissed Culgan's petition. Culgan appealed to the Supreme Court of Ohio on January 4, 2008. The Supreme Court of Ohio determined that Culgan's "sentencing entry did not constitute a final appealable order because it did not contain a guilty plea, a jury verdict, or the finding of the court upon which Culgan's convictions were based." *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, at ¶10. The Court "reverse[d] the judgment of the court of appeals and grant[ed] the writs of mandamus and procedendo to compel appellees to issue a sentencing entry that complie[d] with Crim.R. 32(C) and constitute[d] a final appealable order." *Id.* at ¶11.

{¶5} On October 7, 2008, the trial court issued a *nunc pro tunc* judgment entry in order to comply with the Supreme Court of Ohio's mandate. Culgan now appeals that *nunc pro tunc* entry. Culgan asserts five assignments of error related to the *nunc pro tunc* sentencing entry, his sentencing hearing, and his classification as a sexual predator.

## II.

### ASSIGNMENT OF ERROR I.

"The Trial Court Exceeded its Scope of Authority in issuing the Nunc Pro Tunc Sentencing Order, and the Order is Void; and the Trial Court Erred to the Prejudice of the Appellant's Substantial Rights by Sentencing the Appellant

Outside of His Presence, and by Depriving Him of His Lawful and/or Legal Remedy.”

#### ASSIGNMENT OF ERROR II.

“The Trial Court Erred to the Substantial Prejudice of the Appellant by Imposing Consecutive Terms Without Statutory Authority, and/or in violation of Constitutional and Statutory Law.”

#### ASSIGNMENT OF ERROR III.

“The Trial Court Erred to the Prejudice of the Appellant’s Substantial Rights by Engaging in Constitutionally Prohibited Judicial Fact-Finding.”

#### ASSIGNMENT OF ERROR IV.

“The Trial Court Erred to the Prejudice of the Appellant’s Substantial Rights by “Re-imposing” Unconstitutional Sentences; Application of the Foster “Remedy” to the Appellant who was Charged Prior to the Foster Decision Violates the Appellant’s Constitutional Rights.”

{¶6} The Supreme Court of Ohio in Culgan’s mandamus appeal concluded this Court erred in dismissing his complaint and granted Culgan’s writs to compel the trial court to issue a sentencing entry that complied with Crim.R. 32(C). *State ex rel. Culgan* at ¶11. The trial court attempted to comply with the Supreme Court of Ohio’s mandate by issuing a *nunc pro tunc* sentencing entry containing all the elements required under the rule. However, based on the reasoning of the Ohio Supreme Court’s decision, it was necessary for the trial court to resentence Culgan consistent with *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. We, therefore, vacate and remand accordingly.

### III.

#### ASSIGNMENT OF ERROR V.

“The Record Does Not Contain Sufficient Evidence to Establish by Clear and Convincing Evidence th[at] Culgan is a Sexual Predator; and the Trial Court Erred to the Prejudice of the Appellant’s Substantial Rights by First Determining the Evidence Insufficient, then contradictorily Declaring Culgan a Sexual Predator.”

{¶7} Culgan’s fifth assignment of error asserts that the trial court erred by classifying him as a sexual predator at his sentencing hearing.

{¶8} First, we note that pursuant to R.C. 2950.032(A)(1)(a) Culgan was subject to reclassification pursuant to changes in the Ohio Revised Code. Thus, Culgan’s current classification is not that of sexual predator. Culgan’s current classification is now based on the current statutory scheme and a challenge to his classification under that scheme is not before this Court.

{¶9} Secondly, both Culgan’s Notice of Appeal and his Amended Notice of Appeal indicate that he is appealing from the judgment of conviction entered on October 7, 2008. The October 7, 2008 entry is not the entry that journalized his classification as a sexual predator; the trial court journalized Culgan’s classification as a sexual predator on August 2, 2002, in a separate entry. This Court has held that a classification journal entry is separate and distinct from a sentencing entry, and that a proper classification entry is final and appealable even if the related sentencing entry is not. *State v. Williams*, 9th Dist. No. 08CA009350, 2008-Ohio-3586, at ¶10. However, “[t]his [C]ourt does not have jurisdiction to review the trial court’s decision absent the filing of a notice of appeal pursuant to App.R. 4, App.R. 5, and R.C. 2505.04.” *State v. Daniels* (Mar. 21, 2001), 9th Dist. No. 98CA007211, at \*4. As Culgan has not filed a notice of appeal concerning the classification entry, we lack jurisdiction to consider that issue. Further, we note that if Culgan were to file a notice of appeal from the August 2, 2002 entry classifying him as a sexual predator, such appeal would be untimely. See App.R. 4. Therefore, as we lack jurisdiction, we do not reach Culgan’s fifth assignment of error.

## CONCLUSION

{¶10} In light of the foregoing, we vacate Culgan's sentence and remand this case for resentencing.

Judgment vacated  
and cause remanded.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

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 equally to both parties.

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DONNA J. CARR  
FOR THE COURT

CARR, P. J.  
WHITMORE, J.  
CONCURS

BELFANCE, J.  
CONCURS IN JUDGMENT ONLY

APPEARANCES:

CLIFFORD J. CULGAN, pro se, Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MICHAEL P. MCNAMARA, Assistant Prosecuting Attorney, for Appellee.