[Cite as *State v. Fought*, 2011-Ohio-4047.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-10-1348

Appellee — Trial Court No. CR0201002227

v.

Christopher Fought — **DECISION AND JUDGMENT**

Appellant — Decided: August 12, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Matthew O. Hutchinson, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Christopher Fought, appeals from a decision of the Lucas County Court of Common Pleas wherein he was sentenced to serve nine years in prison for the offense of aggravated burglary. For the reasons that follow, we affirm.

{¶ 2} On September 17, 2010, appellant entered a no contest plea to the charge of aggravated burglary, a violation of R.C. 2911.11(A)(2) and a felony of the first degree. The state alleged that appellant broke into a home, brandished a gun and demanded money from the resident. A sentencing hearing commenced on October 13, 2010. Appellant was found guilty and sentenced to six years in prison. The transcript shows that appellant responded to his sentencing by stating: "I should have killed that bitch."

{¶ 3} On October 20, 2010, appellant was once again called before the judge. The judge explained that he did not hear appellant state: "I should have killed that bitch" at his October 13, 2010 sentencing. After sentencing, court personnel made the judge aware of appellant's statement. The judge explained that the statement concerned him enough that he intended to resentence appellant. He then gave the parties one week to prepare memoranda on the issue and scheduled sentencing for October 27, 2010.

{¶ 4} On October 27, 2010, appellant was sentenced to serve nine years in prison. He now appeals setting forth the following assignments of error:

{¶ 5} "I. The trial court erred by increasing Mr. Fought's sentence after he had already been delivered to the County Sheriff and taken to the County Jail to await transport to prison.

{¶ 6} "II. Even if the trial court was permitted to re-sentence Mr. Fought, the trial court's increased sentence is not supported by clear and convincing evidence."

{¶ 7} In his first assignment of error, appellant contends that the judge erred in resentencing him.

{¶ 8} This very issue was discussed in *State v. Carlisle*, 8th Dist. No. 93266, 2010-Ohio-3407.

{¶ 9} "As a general proposition, a court has no authority to reconsider its own valid final judgments. *Brook Park v. Necak* (1986), 30 Ohio App.3d 118, 120. In criminal cases, a judgment is not considered final until the sentence has been ordered into execution. In *State v. Garretson* (2000), 140 Ohio App.3d 554, 558-559, the court of appeals stated:

{¶ 10} "'In *Columbus v. Messer* (1982), 7 Ohio App.3d 266, the Court of Appeals for Franklin County addressed the question of exactly when the execution of the sentence has begun: "Where the full sentence involves imprisonment, the execution of the sentence is commenced when the defendant is delivered from the temporary detention facility of the judicial branch to the penal institution of the executive branch." As a result, a trial court does not have jurisdiction to modify a valid sentence of imprisonment once imprisonment has begun. Should a trial court retain jurisdiction to modify an otherwise valid sentence "the defendant would have no assurance about the punishment's finality." *Brook Park v. Necak* * * *'

{¶ 11} "In other words, a criminal judgment is not final and the court retains the authority to modify the sentence until the defendant is delivered to a penal institution to start serving a sentence." *Carlisle*, supra, at ¶10-12.

{¶ 12} Appellant himself acknowledges that he was not delivered to the Department of Rehabilitation and Corrections until November 9, 2010. As such, the trial judge had jurisdiction to modify appellant's sentence on October 27, 2010.

{¶ 13} Moreover, oral pronouncements by a trial court judge are subject to revision before journalization. A court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum. *State ex. rel. Marshall v. Glavas*, 98 Ohio St.3d 297. Courts may increase sentences when the sentence does not constitute a final order. *Brook Park v. Necak*, supra.

{¶ 14} In this case, appellant's October 13 sentence was never journalized. Therefore, the trial court did not err in sentencing appellant on October 27. Appellant's first assignment of error is found not well-taken.

{¶ 15} In his second assignment of error, appellant contends that his nine-year sentence is not supported by the evidence.

{¶ 16} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio relevantly held that "[t]rial courts [now] have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences."

{¶ 17} R.C. 2929.14(A)(1) provides the statutory range of sentences for first degree felonies of a minimum of three years and maximum of ten years. As appellant's nine-year sentence is within the statutory range for first degree felonies, we find no abuse of discretion. Appellant's second assignment of error is found not well-taken.

{¶ 18} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the cost of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE