

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

State of Ohio

Court of Appeals No. L-10-1282

Appellee

Trial Court No. CR0201002017

v.

Demarkus Hardison

DECISION AND JUDGMENT

Appellant

Decided: September 23, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Ian B. English, Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a sentencing judgment of the Lucas County Court of Common Pleas. For the reasons set forth below, this court affirms the judgment of the trial court. In this case, the substantive terms of sentence did not vary between the

sentencing hearing transcript and the sentencing judgment entry. As such, the nunc pro tunc judgment entry was proper and no resentencing is required.

{¶ 2} Appellant, Demarkus Hardison, sets forth the following sole assignment of error:

{¶ 3} "THE TRIAL COURT'S NUNC PRO TUNC ORDER VIOLATED CRIM. R. 36 AND 43."

{¶ 4} The following undisputed facts are relevant to the issue raised upon appeal. On August 23, 2010, in conjunction with a negotiated plea, appellant was found guilty of one count of burglary, in violation of R.C. 2911.12 (A)(2) and (C), a felony of the second degree.

{¶ 5} On September 16, 2010, the trial court imposed a sentence of three years to be served consecutively to a sentence of two years for a community control violation for a total term of incarceration of five years. The sentencing judgment entry filed on September 23, 2010, stated:

{¶ 6} "It is ORDERED that defendant serve a term of three (3) years in prison. This sentence is to be served consecutive to sentence in CR2009-2970 of two years, for an aggregate total of five years in prison. The Court further finds the defendant caused or threatened physical harm to a person. It is further ORDERED the defendant is subject to 3 years mandatory post-release control as to count 2 after the defendant's release from imprisonment pursuant to R.C. 2967.28 and 2929.14."

{¶ 7} On October 8, 2010, the court filed a nunc pro tunc judgment entry omitting the extraneous sentence: "The Court further finds the defendant caused or threatened physical harm to a person."

{¶ 8} In his sole assignment of error, appellant contends that the trial court violated his due process rights as well as Crim.R. 36 and 43(A) by issuing a nunc pro tunc entry rather than conduct a second sentencing hearing in order to omit the extraneous sentence in the original entry.

{¶ 9} The record reflects that the original sentencing judgment entry, the sentence hearing transcript and the nunc pro tunc entry each contained substantively equivalent terms of sentence. According to Ohio law, "If there exists a variance between the sentence pronounced in open court and the sentence imposed by a court's judgment entry, a remand for resentencing is required." *State v. Pfeifer*, 6th Dist. No. OT-10-013, 2011-Ohio-289, ¶ 8, quoting *State v. Quinonos*, 8th Dist. No. 89221, 2007-Ohio-6077.

{¶ 10} Appellant relies on *Pfeifer* as a controlling case, where we remanded for resentencing because the sentencing hearing transcript imposed sentences to be served consecutively, while the judgment entry imposed them to run concurrently. Appellant's reliance upon *Pfeifer* is misplaced. In the instant case, unlike in *Pfeifer*, there is no conflict or discrepancy between the substantive terms of sentence imposed at the sentencing hearing and the disputed sentencing judgment entry.

{¶ 11} Lastly, this court must address whether the nunc pro tunc entry in any way altered the postrelease control provisions of the original sentencing entry so as to require

resentencing. The record shows that the nunc pro tunc entry omitted the following sentence from the original entry: "The Court further finds the defendant caused or threatened physical harm to a person." Our law states that, "A nunc pro tunc entry is often used to correct a sentencing entry that, because of a mere oversight or omission, does not comply with Crim.R. 32(C)." *State ex rel. Dewine v. Burge*, 128 Ohio St.3d 236, 2011-Ohio-235, ¶ 17.

{¶ 12} "Pursuant to Crim.R. 36, clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission may be corrected by the court at any time." *Id.*

{¶ 13} This court finds that the postrelease control provisions portion of the sentence were not altered or affected by this revision. As such, the nunc pro tunc judgment properly addressed a clerical oversight. This is permissible under *Burge*. The record demonstrates that the nunc pro tunc judgment did not affect any terms of the sentencing. No resentencing is required. Appellant's sole assignment of error is not well-taken.

{¶ 14} The judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, costs of this appeal are assessed to appellant.

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

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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