

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

State of Ohio

Court of Appeals No. E-15-011

Appellee

Trial Court No. 2011-CR-491

v.

Timothy J. Zell

DECISION AND JUDGMENT

Appellant

Decided: June 30, 2015

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Chief Assistant Prosecuting Attorney,
for appellee.

Jeffrey J. Whitacre, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Timothy Zell, appeals from a judgment entry of resentencing issued by the Erie County Court of Common Pleas. We affirm.

{¶ 2} The relevant procedural facts are as follows. In 2012, appellant was convicted of burglary and attempted burglary. He appealed his convictions to this court. We affirmed his convictions but remanded the case for the sole purpose of correcting the variance in the judgment entry and transcript regarding whether the sentences are to be served concurrently or consecutively. *State v. Zell*, 6th Dist. Erie No. E-12-066, 2013-Ohio-5354.

{¶ 3} On remand, the trial court, on February 25, 2014, issued a “judgment entry nunc pro tunc” ordering appellant’s sentences to be served consecutively. No hearing was held. Appellant appealed to this court. Once again we affirmed appellant’s convictions, but remanded the case back to the trial court for the limited purpose of conducting a resentencing hearing, finding that our previous mandate anticipated a resentencing hearing given the fact that we had directed the trial court to appoint new counsel. *State v. Zell*, 6th Dist. Erie No. E-14-014, 2014-Ohio-4973.

{¶ 4} On January 20, 2015, the trial court held a resentencing hearing and ordered appellant to serve his sentences consecutively. Appellant now appeals setting forth the following assignments of error:

I. The trial court violated the requirements of Criminal Rule 32 and lacked jurisdiction when issuing its February 26, 2014 judgment entry.

II. The trial court violated appellant’s double jeopardy protections under the State and Federal constitutions when issuing its February 26, 2014 judgment entry.

{¶ 5} In his first assignment of error, appellant contends the trial court lacked jurisdiction to resentence him. Appellant relies on the case of *State v. Gilbert*, Slip Opinion No. 2014-Ohio-4562. In *Gilbert*, a defendant entered into a plea agreement in exchange for his testimony against another defendant in a murder prosecution. When the time came, Gilbert refused to testify. The state then asked the trial court to vacate Gilbert's plea. The trial court granted the request, withdrew the original plea agreement, and vacated the sentence. Based upon the trial court's action, Gilbert entered into a second plea agreement and was sentenced to imprisonment of 18 years to life.

{¶ 6} The Supreme Court of Ohio, citing Crim.R. 32, held that once a defendant has been sentenced by a trial court, that court does not have jurisdiction to entertain a motion by the state to vacate the defendant's guilty plea and sentence based upon the defendant's alleged violation of a plea agreement. *Id.* at ¶ 13. The court stated:

Crim.R. 32(C) lists the requirements for a valid final judgment in a criminal case. It provides that a judgment must set forth the fact of the conviction, the sentence, the judge's signature, and the time stamp indicating that the clerk entered the judgment in the journal. We have said that such a judgment "is a final order subject to appeal under R.C. 2505.02." * * * Once a final judgment has been issued pursuant to Crim.R. 32, the trial court's jurisdiction ends. *Id.* at ¶ 8-9.

Gilbert's initial sentence was ultimately reinstated.

{¶ 7} Appellant contends that because appellant's original 2012 sentencing order met the above listed Crim.R. 32 requirements, as did Gilbert's, the trial court lacked jurisdiction to resentence him two more times. We have two problems with this argument.

{¶ 8} First, it was never clear what appellant's original sentence was because of the variance between the judgment entry and the transcript. Second, R.C. 2953.08 gives appellate courts the power to increase, reduce, modify or vacate and remand for resentencing any sentence that is appealed. The *Gilbert* court, citing its decision in *State v. Carlisle*, 131 Ohio St.3d 127, 129, 2011-Ohio-6553, 961 N.E.2d 671, recognized an exception to its holding stating: “[a]bsent statutory authority, a trial court is generally not empowered to modify a criminal sentence by reconsidering its own final judgment.” *Gilbert* at ¶ 8. R.C. 2953.08 gives trial courts statutory authority, therefore jurisdiction, to resentence defendants whose cases are remanded from the appellate court.

Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 9} In his second assignment of error, appellant contends that his rights against double jeopardy were violated when the court initially resentenced him in February 2014. This argument is without merit. Appellant's original sentence was void. *State v. Zelinko*, 6th Dist. Lucas No. L-05-1345, 2006-Ohio-5106. Jeopardy does not attach to a void sentence. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E. 1254, ¶ 27. Accordingly, appellant's second assignment of error is found not well-taken.

{¶ 10} For the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs 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.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, P.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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