

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

State of Ohio

Court of Appeals No. L-14-1280

Appellant

Trial Court No. CR0201402402

v.

Chase Britton

DECISION AND JUDGMENT

Appellee

Decided: July 22, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, state of Ohio, appeals the judgment of the Lucas County Court of Common Pleas dismissing the charge against appellee, Chase Britton. Because the judgment from which appellant appeals is void and therefore not a final appealable order, we lack jurisdiction to address the merits of this case. Accordingly, we dismiss the appeal.

{¶ 2} On September 3, 2014, appellee was indicted on one count of discharging a firearm on or near prohibited premises, in violation of R.C. 2923.162(A)(2) and (C)(2), a felony of the third degree. Appellee pled not guilty to the charge. On November 17, 2014, a plea hearing was held wherein appellee withdrew his plea of not guilty and entered a plea of no contest to one count of attempt to commit discharge of a firearm on or near prohibited premises, in violation of R.C. 2923.02 and 2923.162(A)(2) and (C)(2), a felony of the fourth degree. The trial court advised appellee of his rights and complied with the requirements of Crim.R. 11(C)(2). The prosecutor then presented the facts the state would have proven had the matter proceeded to trial. The trial court accepted appellee's plea, found him guilty and pronounced a sentence of one year of community control. Thereafter, discussions were held. In an order journalized November 19, 2014, the trial court set forth that appellee entered a no contest plea, the court accepted the plea, and appellee was found guilty. The matter was set for sentencing on November 25, 2014.

{¶ 3} The sentencing hearing was held, at the conclusion of which the court stated, "Mr. Britton, I'm going to make a finding of not guilty on you." In an order journalized on December 3, 2014, the court set forth "[a]fter careful consideration of the facts presented at the sentencing hearing, the Court finds the Defendant not guilty * * *. Defendant is ordered discharged." The state appealed from this order.

{¶ 4} Before the merits of appellant's appeal can be considered, we must determine whether the order of December 3, 2014, is a final order subject to appeal.

{¶ 5} An appellate court does not have jurisdiction to review an order that is not final and appealable. *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 28. A judgment of conviction is a final order subject to appeal when the entry sets forth (1) the fact of conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp which indicates the entry on the journal by the clerk. *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 14. A court speaks only through its journal. *State ex rel. Indus. Comm. v. Day*, 136 Ohio St. 477, 26 N.E.2d 1014 (1940), paragraph one of the syllabus. Therefore, a sentence pronounced in open court does not become final until it has been entered on the journal of the court. *State v. Johnson*, 6th Dist. Lucas No. L-03-1206, 2005-Ohio-1222, ¶ 33; *State v. Baxter*, 6th Dist. Lucas No. L-82-343, 1983 WL 13843, *1 (Feb. 18, 1983).

{¶ 6} Here, the court's December 3, 2014 order finding appellee entered a plea of no contest, was not guilty and was discharged appears to satisfy all four of the requirements set forth in *Lester*. However, a closer review of the record reveals the trial court, in its November 19, 2014 order, had already accepted appellee's no contest plea and found him guilty. Seemingly then, the trial court, in its December 3, 2014 order, sua sponte vacated its previous acceptance of the plea and finding of guilt, as appellee did not move to vacate or withdraw his plea, nor did the state move to vacate the plea.

{¶ 7} Crim.R. 11 and relevant case law require that if a defendant enters a no contest plea to a felony offense, the procedures set forth in the rule must be followed. *State ex rel. Stern v. Mascio*, 75 Ohio St.3d 422, 425, 662 N.E.2d 370 (1996). There is

no procedure in Crim.R. 11 or elsewhere which allows a trial court to sua sponte vacate a defendant's plea. *State v. Heslop*, 7th Dist. Belmont No. 11-BE-19, 2012-Ohio-5118, ¶ 19. See also *State v. Richter*, 92 Ohio App.3d 395, 399, 635 N.E.2d 1295 (6th Dist.1993). Rather, Crim.R. 11(B)(3) provides that “[w]hen a plea of guilty or no contest is accepted pursuant to this rule, the court * * * shall proceed with sentencing under Crim. R. 32.” Crim.R. 32 does not authorize a court to sua sponte vacate a defendant's plea.

{¶ 8} A judgment rendered by a court that lacks the authority to act is a void judgment. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 12, *superseded on other grounds by statute as stated in State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958. No appeal can be taken from a void judgment because it is not a final appealable order. *State v. Gilmer*, 160 Ohio App.3d 75, 2005-Ohio-1387, 825 N.E.2d 1180, ¶ 6 (6th Dist.).

{¶ 9} Here, the trial court had the authority, pursuant to Crim.R. 11, to accept appellee's no contest plea and find him guilty, as reflected in the November 19, 2014 order. However, the court did not have the authority to attempt to vacate the November 2014 order by entering a new finding, one of not guilty, in its December 3, 2014 order. As a result, the December 3, 2014 order is void and is not a final appealable order. Therefore, this appeal is dismissed. Appellee is ordered to pay the court costs of this appeal.

Appeal dismissed.

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, 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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