

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 17AP-397 (C.P.C. No. 09CR-3946)
Chase M. Banks,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 2, 2017

On brief: *Ron O'Brien*, Prosecuting Attorney, and
Barbara A. Farnbacher, for appellee.

On brief: *Chase M. Banks*, pro se.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, Chase M. Banks, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion for resentencing based on lack of subject-matter jurisdiction pursuant to R.C. 2929.13(F).

I. Facts and Procedural History

{¶ 2} Appellant was indicted on July 2, 2009 with one count of felonious assault and one count of having a weapon while under disability. The felonious assault charge contained two accompanying specifications, one for the use of a firearm and one for discharging a firearm from a motor vehicle. On December 16, 2010, appellant entered an *Alford*¹ plea of guilty to the stipulated lesser-included offense of felonious assault with the accompanying specifications, in violation of R.C. 2903.11, 2923.161, and 2921.141, a felony

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

of the second degree. The judgment entry, filed December 17, 2010, indicated that the parties jointly recommended an aggregate nine-year sentence; however, the trial court imposed an aggregate sentence of ten years, comprised of four years for the felonious assault, consecutive to five years for the discharging a firearm from a motor vehicle specification, consecutive to one year for the firearm specification. The judgment entry also stated "[t]he Court further finds that a prison term is mandatory pursuant to R.C. 2929.13(F)." (Dec. 17, 2010 Jgmt. Entry.) The entry did not specify whether the mandatory prison term applied to the felonious assault and the specifications, just to the felonious assault or just to the specifications. No appeal was taken.

{¶ 3} Over one year later, appellant filed, on December 20, 2011, a motion to correct sentence. In this motion, appellant argued the trial court failed to comply with Crim.R. 11 when it accepted his plea and, further, that he was entitled to have his sentence corrected in accordance with 2011 Am.Sub.H.B. No. 86 ("H.B. No. 86"), which amended Ohio's criminal sentencing laws. Stating that H.B. No. 86 does not apply to sentences imposed prior to its effective date, the trial court denied appellant's motion via entry filed January 26, 2012. We affirmed the trial court's decision in *State v. Banks*, 10th Dist. No. 12AP-96, 2012-Ohio-3770. On January 15, 2013, appellant filed a post-sentence motion to withdraw plea, which the trial court denied. Appellant appealed, and we dismissed the appeal as untimely. *State v. Banks*, 10th Dist. No. 13AP-822 (Oct. 15, 2013 Jgmt. Entry). On January 22, 2015, appellant filed a motion for resentencing based on void judgment. The trial court denied the motion. Again, appellant failed to file a timely appeal, but did file a motion for leave to file delayed appeal. We denied the motion as well as his request for reconsideration of same. *State v. Banks*, 10th Dist. No. 15AP-238 (May 5, 2015) (memorandum decision). On February 19, 2016, appellant filed another motion to vacate and/or set aside judgment of conviction and to withdraw guilty plea, pursuant to Crim.R. 32.1 and 11, based on void judgment and ineffective counsel, which the trial court denied. Once again, appellant failed to file a timely appeal and we denied his motion for delayed appeal. *State v. Banks*, 10th Dist. No. 16AP-641 (Oct. 4, 2016) (memorandum decision). We denied as well his request for reconsideration and en banc consideration.

{¶ 4} On March 23, 2017, appellant filed a motion for resentencing based on lack of subject-matter jurisdiction, pursuant to R.C. 2929.13(F) ("motion for resentencing").

In this motion, appellant argued the trial court erred in imposing a mandatory prison term for the felonious assault because only the specifications carried mandatory prison terms. In response, plaintiff-appellee, State of Ohio, opposed the motion, but also stated "[d]efendant is correct in stating that his 4 year sentence for Felonious Assault is not mandatory and that only his 6 years for the specifications are mandatory." (Apr. 5, 2017 Memo. Contra at 2.) The state noted, however, that "[f]rom [Ohio Department of Rehabilitation and Correction] online records, it seems that ODRC is reading the Entry in this case as saying that all 10 years of defendant's sentence is mandatory, when really only 6 years are mandatory." (Apr. 5, 2017 Memo. Contra at 2.) The state then suggested that "[t]o remedy this situation, the Court can simply issue a nunc pro tunc entry clarifying that defendant's 4 year sentence for Felonious Assault is not mandatory, only the specifications require mandatory prison time." (Apr. 5, 2017 Memo. Contra at 2-3.) The state finally urged the court that it was not necessary to hold a resentencing hearing because the sentence is not void.

{¶ 5} On May 5, 2017, the trial court denied defendant's motion for resentencing by simply stating it was "not well-taken" and in the same entry stated "but [it] will file contemporaneously herewith a Nunc Pro Tunc Entry clarifying that only six (6) years out of Defendant's total ten (10) year sentence are mandatory time. The four (4) years imposed on the underlying felony are not mandatory time." (May 5, 2017 Entry.) The same day, two minutes later, the trial court entered the nunc pro tunc judgment entry which stated:

For clarification, the FOUR (4) YEARS on the underlying felony is NOT mandatory time. However, the FIVE (5) YEARS on the Drive-By Specification and ONE (1) YEAR on the Firearm Specification ARE mandatory time, for a total of SIX (6) YEARS mandatory time.

(Emphasis sic.)

II. Assignment of Error

{¶ 6} Appellant appeals and assigns the following sole assignment of error for our review:

The Trial Court erred, as a matter of law, and violated Appellant's Fourteenth Amendment Due Process Protection,

when it journalized a Nunc Pro Tunc Entry that modified Appellant[']s sentence.

III. Discussion

{¶ 7} We begin by addressing the state's argument that appellant did not appeal the nunc pro tunc entry which is the subject of his sole assignment of error. Having carefully reviewed the notice of appeal, we agree with the state that appellant's notice of appeal states he is appealing "from the final judgment of Franklin County Common Pleas, from the order of Entry Denying Defendant's Motion for Re-Sentencing... lack of subject matter jurisdiction entered in this action on the 05 day of May, 2017." He did not also appeal from the nunc pro tunc entry or amend his notice of appeal to include the nunc pro tunc entry.

{¶ 8} App.R. 3 states in relevant part:

(A) Filing the notice of appeal. An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. *Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.* Appeals by leave of court shall be taken in the manner prescribed by Rule 5.

* * *

(D) Content of the notice of appeal. The notice of appeal shall specify the party or parties taking the appeal; *shall designate the judgment, order or part thereof appealed from*; and shall name the court to which the appeal is taken. The title of the case shall be the same as in the trial court with the designation of the appellant added, as appropriate. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(Emphasis added.)

{¶ 9} We are aware that some of our sister jurisdictions have applied the requirements of App.R. 3(D) as it relates to the requirement of designating the judgment to support dismissing an appeal of a judgment or order not designated in the notice of appeal. *See Wells Fargo Bank, N.A. v. Griffiths*, 6th Dist. No. H-12-027, 2013-Ohio-3472,

State v. Pope, 9th Dist. No. 13CA0031-M, 2014-Ohio-2864, *State v. Bray*, 2d Dist. No. 2016-CA-22, 2017-Ohio-118, *State v. Rolf*, 5th Dist. No. 12-CA-39 (Dec. 3, 2012) (Jgmt. Entry.). The state, however, has not pointed us to any case law from our own district requiring dismissal on the facts before us. Furthermore, considering that the non-designated nunc pro tunc entry in this case was filed the exact same day as the designated denial of motion for resentencing entry, as well as the fact that the nunc pro tunc entry is cross-referenced in the denial of the motion for resentencing entry, we find it appropriate in order to determine if consideration of the merits of the nunc pro tunc entry is proper here, to consider the criteria outlined in *Natl. Mut. Ins. Co. v. Papenhagen*, 30 Ohio St.3d 14 (1987), and *Transamerica Ins. Co. v. Nolan*, 72 Ohio St.3d 320, 332 (1995).

{¶ 10} In *Transamerica*, the court considered whether an improper specification of the parties on a notice of appeal warranted dismissal of the appeal. The court found App.R. 3(A) to be controlling and found that: "[p]ursuant to App.R. 3(A), the only jurisdictional requirement for the filing of a valid appeal is the timely filing of a notice of appeal. When presented with other defects in the notice of appeal, a court of appeals is vested with discretion to determine whether sanctions, including dismissal, are warranted, and its decision will not be overturned absent an abuse of discretion." *Id.* at 321.

{¶ 11} The court then considered the criteria outlined *Papenhagen* in deciding not to dismiss the appeal. In *Papenhagen*, the court considered whether a notice of appeal could survive an inadvertent violation of a local rule related to the filing of a notice of appeal. The court considered whether:

"(1) the mistake was made in good faith and not as part of a continuing course of conduct for the purpose of delay, (2) neither the opposing party nor the court is prejudiced by the error, (3) dismissal is a sanction that is disproportionate to the nature of the mistake, (4) the client will be unfairly punished for the fault of his counsel, and (5) dismissal frustrates the prevailing policy of deciding cases on the merits."

Id. at 15, quoting *DeHart v. Aetna Life Ins. Co.*, 69 Ohio St.2d 189 (1982), syllabus. The court reasoned that although the notice of appeal was technically incorrect, it "fulfilled its basic purpose of informing the parties and the court, in a timely manner, of [the

appellant's] intention of appealing a specified judgment." *Id.* at 16. We will apply the same criteria to the case at bar.

{¶ 12} First, here, there is no indication that appellant was acting in anything other than good faith when he filed his notice of appeal of the entry denying his motion for resentencing. However, as noted in our summary of appellant's appeal history related to the original judgment entry and in particular his untimely filings of notices of appeal and subsequent efforts to file motions for delayed appeal, we find there is a continuing course of conduct of untimely filings of notices of appeal. Nevertheless, it is not likely that appellant would want to delay this appeal as it seems his goal in filing the motion for resentencing was for the court to determine that he is eligible now for judicial release, earned days of credit, probation, or community control sanctions. Indeed, he stated in the motion for resentencing that:

Had the Trial Court correctly sentenced Appellant to non-mandatory prison term on the underlying offense, the outcome of the sentence and proceedings would have been different because, Appellant would be eligible for Judicial Release, earned days of credit, and being a first time offender, would have been eligible for probation or community control sanctions.

(Mar. 23, 2017 Mot. for Resentencing at 4.)

Further, in his brief before this court, appellant argues he is "*now* eligible for judicial release, community control sanctions, earned good days of credit." (Emphasis added.) (Appellant's Brief at 7.) All things considered, the first criteria weighs in favor of considering appellant's sole assignment of error regarding the merits of the nunc pro tunc entry.

{¶ 13} Second, neither the state, nor this court, will be prejudiced by our considering the nunc pro tunc entry on appeal. Thus, the second criteria weighs in favor of considering appellant's sole assignment of error regarding the merits of the nunc pro tunc entry.

{¶ 14} Third, because the nunc pro tunc entry states exactly what appellant sought in filing the motion for resentencing, on the facts of this case, we cannot say that dismissal of appellant's appeal of the nunc pro tunc entry is a sanction that is disproportionate to

the nature of the mistake of failing to designate the same in the notice of appeal. Therefore, the third criteria weighs in favor of not considering appellant's sole assignment of error regarding the merits of the nunc pro tunc entry.

{¶ 15} Fourth, again, because the nunc pro tunc entry states exactly what appellant sought in filing the motion for resentencing, on the facts of this case, we cannot say that appellant would be unfairly punished by dismissal of appellant's appeal of the nunc pro tunc entry for his own fault in failing to designate the same in the notice of appeal. Therefore, the fourth criteria weighs in favor of not considering appellant's sole assignment of error regarding the merits of the nunc pro tunc entry.

{¶ 16} Fifth, we note again, that because the nunc pro tunc entry states exactly what appellant sought in filing the motion for resentencing, we cannot say that dismissal of appellant's appeal of the nunc pro tunc entry frustrates the prevailing policy of deciding cases on the merits. Therefore, the fifth criteria weighs in favor of not considering appellant's sole assignment of error regarding the merits of the nunc pro tunc entry.

{¶ 17} Having considered and weighed all the factors outlined in *Transamerica* and *Papenhagen*, in our discretion, we decline to consider appellant's sole assignment of error regarding the merits of the nunc pro tunc entry.²

{¶ 18} Finally, to the extent appellant appeals the trial court's denial of his motion for resentencing, we note the following: (1) appellant brought no assignments of error related to the denial of his motion for resentencing, (2) in his brief, appellant did not address the merits of why the denial was allegedly in error, and (3) as pointed out by the

² Although we make no determination regarding the merits of whether the nunc pro tunc entry in this case was in error, we remind trial courts of the restriction on using a nunc pro tunc order to correct non-clerical errors. A nunc pro tunc order corrects a judicial entry that contains error in the recordation of a court's decision. *State v. Nye*, 10th Dist. No. 95APA11-1490 (June 4, 1996). Specifically, the order corrects errors that are merely clerical, and this type of error does not involve any legal determinations. *Warren v. Warren*, 10th Dist. No. 09AP-101, 2009-Ohio-6567, ¶ 7, 11; *State v. Brown*, 10th Dist. No. 08AP-747, 2009-Ohio-1805, ¶ 8. Stated another way, a nunc pro tunc order shall not modify a court's judgment or render a decision on a matter when none was previously made. *Nye*. Consequently, an entry corrected by a nunc pro tunc order must reflect what the court had actually decided, not what the court might or should have decided. *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, ¶ 14. See also *Norris v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 05AP-762, 2006-Ohio-1750, ¶ 12 (noting that a nunc pro tunc order is limited to memorializing what the court previously decided). An improper nunc pro tunc order is void. *Warren* at ¶ 7. Appellant argues that the state conceded error; however, a careful reading of the state's brief indicates the state conceded "clerical error." (State's Brief at 6.) Although appellant points to the entry of guilty plea form and the felony sentencing sheet to support his argument that the error was not clerical, he did not provide a transcript of the original plea and sentencing hearing. Therefore, there would still be a question regarding what the court had actually decided.

state, such question is now moot as the nunc pro tunc entry states exactly what appellant sought in filing the motion for resentencing. Therefore, we decline to consider the merits of the denial.

{¶ 19} Appellant did not appeal the nunc pro tunc entry he addresses in his sole assignment of error and brought no assignments of error related to the denial of the motion for resentencing which he did appeal. Accordingly, we dismiss the appeal of the judgment of the Franklin County Court of Common Pleas denying appellant's motion for resentencing.

Appeal dismissed.

BROWN, J., concurs.
HORTON, J., concurs in judgment only.
