

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

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| STATE OF OHIO, | : | Case No. 17CA13 |
| Plaintiff-Appellee, | : | |
| v. | : | <u>DECISION AND</u> |
| LUCAS A. KLAYMAN, | : | <u>JUDGMENT ENTRY</u> |
| Defendant-Appellant. | : | RELEASED: 08/03/2018 |

APPEARANCES:

Ryan Shepler, Kernan & Shepler, L.L.C., Logan, Ohio, for appellant.

Benjamin E. Fickel, Hocking County Prosecuting Attorney, Logan, Ohio, for appellee.
Harsha, J.

{¶1} On appeal Lucas Klayman contends the trial court lacked jurisdiction to “resentence” him after an initial hearing on his violation of a previously imposed community-control sanction. The trial court convicted Klayman of violating his community control and sentenced him to continued community control, but failed to provide notice of possible sanctions in the event of another violation. Before journalizing that sentence the court held another sentencing hearing where it notified Klayman that he may face a prison term if he violated the terms of his continued community control. The trial court ultimately journalized its sentencing entry over three months after the initial sentencing hearing.

{¶2} Klayman asserts that the trial court lacked authority to resentence him after it conducted its first sentencing hearing. We reject Klayman’s assertion because the trial court did not enter a final judgment reflecting the sanction imposed at the initial

sentencing hearing. Therefore it retained the authority to conduct a new hearing and modify his sanction.

{¶3} Next Klayman contends that based on Crim.R. 32(A), Sup.R. 39(B)(4), and case law, the trial court lacked jurisdiction to resentence him after the over three-month delay in journalizing his sentence. However, we find the rules and cases he cites either are inapplicable or distinguishable. The trial court's short delay in holding a new hearing and journalizing his sentence was justified by the court's error in the sentence pronounced at the original hearing, the court's correction of the error upon the state's request to hold a new hearing, and Klayman's failure to appear for an August 2017 sentencing hearing.

{¶4} We overrule Klayman's assignment of error and affirm the judgment continuing his community control with the appropriate notice.

I. FACTS

{¶5} The Hocking County Grand Jury returned an indictment charging Lucas Klayman with one count of perjury and one count of identity fraud. After Klayman ultimately pleaded guilty to identity fraud in return for the dismissal of the perjury charge, the Hocking County Court of Common Pleas sentenced him to a five-year term of community control. The court included in its sentence a requirement that Klayman enter and successfully complete a program at SEPTA, the Southeastern Probation Treatment Alternative.

{¶6} In February 2017, the state filed a motion to revoke Klayman's community control because he violated two conditions of his supervised release. At a May 25, 2017 hearing Klayman admitted to violating the condition of his community control

ordering him to successfully complete the SEPTA program. The court convicted him upon his admission, and it orally sentenced him by continuing his community control pursuant to the parties' agreement. But the court failed to notify Klayman that he could receive a prison term if he were to violate the terms of his continued community control.

{¶7} On July 5, 2017, prior to the journalization of an entry reflecting the court's oral pronouncement, the state filed a motion to resentence Klayman to correct the error in the sentencing hearing. Klayman opposed the motion and requested that the trial court journalize an entry reflecting the sentence imposed in the May 25 hearing. The trial court scheduled a sentencing hearing for August 10, but the court had to reschedule that hearing after Klayman failed to appear. The court ultimately held the sentencing hearing on September 14, 2017, where it sentenced Klayman to a five-year term of continued community control for violating his original sentence of community control and notified him that he could receive a prison term of 12 months if he were to violate the conditions of his new community-control sanction. Klayman objected to the resentencing. Five days later, on September 19, the trial court entered its order reflecting Klayman's sentence.

II. ASSIGNMENT OF ERROR

{¶8} Klayman assigns the following error for our review:

THE TRIAL COURT ERRED BY RESENTENCING THE DEFENDANT WHEN IT DID NOT HAVE JURISDICTION TO DO SO.

- A. WHERE THERE IS A FINAL JUDGMENT OF CONVICTION, THE TRIAL COURT DOES NOT HAVE AUTHORITY TO MODIFY THE DEFENDANT'S SENTENCE.
- B. THE TRIAL COURT MAY LOSE JURISDICTION WHERE THERE IS AN UNREASONABLE DELAY BETWEEN A DEFENDANT'S

CONVICTION AND SENTENCING, EVEN WITHOUT THE
ISSUANCE OF A FINAL JUDGMENT OF SENTENCE.

- C. THE TRIAL COURT'S UNEXPLAINED DELAY IN ISSUING A
FINAL JUDGMENT OF SENTENCE, AND THE AMOUNT OF TIME
ELAPSED BETWEEN THE FIRST AND SECOND SENTENCING
HEARING, CAUSED THE TRIAL COURT TO LOSE
JURISDICTION IN THE PRESENT CASE.

III. STANDARD OF REVIEW

{¶9} In his assignment of error Klayman asserts that the trial court lacked jurisdiction to “resentence” him, which raises a question of law that we review de novo. See *State v. Doughman*, 4th Dist. Adams No. 16CA1023, 2017-Ohio-4253, 92 N.E.3d 30, ¶ 9 (applying this standard of review to a claim that a delay between a defendant’s bench trial and the trial court’s entry of a judgment finding him guilty resulted in the court losing jurisdiction to sentence him); *Yates v. G&J Pepsi-Cola Bottlers, Inc.*, 4th Dist. Scioto No. 15CA3711, 2016-Ohio-1436, ¶ 7 (“The existence of a court’s jurisdiction presents a question of law that we review de novo”).

IV. STANDARD OF REVIEW

A. Modification of Defendant’s Sentence

{¶10} Klayman contends because there already was a final judgment, the trial court did not have jurisdiction to modify his sentence at the second hearing. He argues the trial court initially sentenced him on May 25, 2017, so it lacked jurisdiction to “resentence” him thereafter. However, the court had not entered a judgment reflecting the sanction it orally announced on that date.

{¶11} A valid final judgment in a criminal case requires a journal entry that must set forth the fact of conviction, the sentence, the judge’s signature, and the time stamp indicating that the clerk entered the judgment in the journal. See Crim.R. 32(C) *State v.*

Lester, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 1. “Once a final judgment has been issued pursuant to Crim.R. 32, the trial court’s jurisdiction ends.” *State v. Gilbert*, 143 Ohio St.3d 150, 2014-Ohio-4562, 35 N.E.3d 493, ¶ 9. “ ‘[A]bsent statutory authority, a trial court is generally not empowered to modify a criminal sentence by reconsidering its own final judgment.’ ” *Id.* at ¶ 8, quoting *State v. Carlisle*, 130 Ohio St.3d 127, 2011-Ohio-5204, 958 N.E.2d 671, ¶ 1.

{¶12} Based on this precedent Klayman claims that the trial court lacked authority to “resentence” him after it conducted its first sentencing hearing on May 25, 2017. Klayman’s claim is meritless because the trial court did not enter a valid final judgment based on the original sentencing hearing. In fact, it did not enter a judgment meeting the requirements of Crim.R. 32(C) until September 2017, following the second sentencing hearing, when it journalized a judgment sentencing him for the community control violation. See *State v. Miller*, 127 Ohio St.3d 407, 2010-Ohio-5705, 940 N.E.2d 5705, ¶ 12 (“the axiomatic rule is that a court speaks through its journal entries”). In the absence of a valid final judgment reflecting the initial orally announced sanction, the trial court retained jurisdiction to modify an interlocutory order by conducting the second hearing and entering a final judgment reflecting the sanction imposed at that hearing. We reject Klayman’s first contention.

B. Unreasonable or Unexplained Delay in Sentencing

{¶13} In his second contention Klayman argues that the trial court lost jurisdiction because there was an unreasonable delay between his conviction and sentencing. In his third contention Klayman claims that the trial court lost jurisdiction because of its unexplained delay in issuing a final judgment of sentence, and the

amount of time between his first and second sentencing hearings. Because these contentions raise similar questions, we consider them jointly.

{¶14} Initially Klayman cites Crim.R. 32(A) (“Sentence shall be imposed without unnecessary delay”) and Sup.R. 39(B)(4) (“Provided the defendant in a criminal case is available, the court shall impose sentence or hold a sentencing hearing with all parties present within fifteen days of the verdict or finding of guilt or receipt of a completed pre-sentence investigation report”). Based on these rules he claims that the trial court lost its jurisdiction to sentence him in September 2017 after more than three months passed from his admission of violating community control at the May 2017 sentencing hearing.

{¶15} In *State v. Steward*, 10th Dist. Franklin No. 08AP-974, 2009-Ohio-2990, at ¶ 22, the Tenth District Court of Appeals concluded that the “unnecessary delay” provision of Crim.R. 32(A) did not apply to the delay in journalizing a criminal sentence:

* * * [E]ven assuming arguendo that Crim.R. 32(A) does apply to resentencing, appellant cites no authority for the proposition that the “without unnecessary delay” provision in Crim.R. 32(A) applies to the journalization of the sentence rather than [sic] merely to the oral imposition of the sentence. A plain reading of Crim.R. 32(A) suggests that the provision that “[s]entence shall be imposed without unnecessary delay” in that section relates to the sentencing hearing. By its title, Crim.R. 32(A) addresses “imposition of sentence” and provides that, “[a]t the time of imposing sentence,” the court must afford counsel and defendant an opportunity to speak, afford the prosecutor an opportunity to speak, afford the victim rights provided by law, and state statutory findings and give reasons for those findings, where necessary. Clearly, these four requirements relate to the oral sentencing hearing and not to the journalization of the judgment for such sentence. Because Crim.R. 32(A) applies to the oral pronouncement at the sentencing hearing, the provision that the “[s]entence shall be imposed without unnecessary delay” does not address whether the judgment journalizing the sentence must be completed without unnecessary delay. Therefore, even if Crim.R. 32(A) applies to resentencing, Crim.R. 32(A) does not apply to the present circumstances because an oral sentencing hearing was held within a timely manner.

{¶16} We agree with this rationale. Although Crim.R. 32(A) would apply to holding an oral sentencing hearing after a conviction, its plain language makes it inapplicable to any delay by the trial court in journalizing its sentence.

{¶17} Nor does Sup.R. 39(B)(4) provide the remedy that Klayman requests. “Courts have interpreted the Rules of Superintendence as general guidelines for the conduct of the courts that do not create substantive rights.” *McCoy v. Sullivan*, 4th Dist. Scioto No. 16CA3751, 2016-Ohio-8276, ¶ 30. They are purely internal housekeeping rules that create no rights in individual defendants. *Id.* citing *Nolan v. Nolan*, 4th Dist. Scioto No. 11CA3444, 2012-Ohio-3376; see also *State v. Bristow*, 4th Dist. Scioto Nos. 07CA3186 and 07CA3187, 2009-Ohio-523, ¶ 39; *State v. Johnson*, 12th Dist. Madison No. CA2002-07-016, 2003-Ohio-6261, ¶ 12 (Sup.R. 39(B)(4) “cannot be used by criminal defendants as a ground for discharge”).

{¶18} Nonetheless Klayman cites three cases in support of the argument that Crim.R. 32(A) precludes holding a new sentencing hearing more than three months after the court found he violated his community control. *Willoughby v. Lukehart*, 39 Ohio App.3d 74, 529 N.E.2d 206 (11th Dist.1987), *Warren v. Ross*, 116 Ohio App.3d 275, 688 N.E.2d 3 (11th Dist.1996), and *State v. Owens*, 181 Ohio App.3d 725, 2009-Ohio-1508, 910 N.E.2d 1059 (7th Dist.).

{¶19} In *Willoughby* the court held that an unjustified nearly 13-month delay between a finding of guilt and the imposition of a sentence deprived the trial court of jurisdiction under Crim.R. 32(A) and former M.C.Sup.R. 5. In *Warren* the same court relied on its holding in *Willoughby* to hold that an unjustified four-year delay after a finding of guilt, due to an attempt to resolve a part of a sentence, resulted in a loss of

jurisdiction. And in *Owens* the court held that a *13-month delay*, during which no action was taken by the state to extradite and sentence the defendant after his conviction, constituted an unreasonable delay that divested the court of jurisdiction to sentence him.

{¶20} Based on these cases Klayman claims that we should adopt a “clear rule that forbids a trial court from resentencing [him] more than three months after his original sentencing hearing, and without reacquiring jurisdiction through some other means.”

{¶21} We reject Klayman’s argument because none of the cases he cites have held that a three-month delay between a finding of guilt at an initial hearing and a subsequent sentencing hearing automatically results in the trial court losing jurisdiction. The cases he cites all involved substantially greater time periods between the finding of guilt and the ultimate sentencing hearing (from 13 months to over four years).

{¶22} More importantly, unlike any of the cases cited by Klayman, the record here establishes that there were multiple reasons justifying the over three-month delay between the initial and final sentencing hearings: (1) at the initial May 2017 sentencing hearing, the trial court violated R.C. 2929.19(B)(4) by failing to notify Klayman that if he did not comply with the conditions of the sanction the court could impose a prison term, and by failing to include notice of the specific prison term that it could impose, see *State v. White*, 4th Dist. Hocking Nos. 16CA23 and 17CA1, 2017-Ohio-8275, ¶ 17-22, citing *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, ¶ 19, 26-27; (2) a little more than a month later, in early July 2017, the state moved to resentence Klayman to correct the mistake; (3) the trial court scheduled the new sentencing hearing

for early August 2017; and (4) the trial court had to reschedule the August sentencing hearing for September 2017 when Klayman failed to appear for it.¹

{¶23} The state promptly alerted the trial court to an error in the original sentencing hearing, the trial court promptly scheduled a new hearing to rectify the error, and Klayman himself caused further delay when he did not appear on the original date for the new hearing. See *State v. Habo*, 11th Dist. Portage No. 2012-P-0056, 2013-Ohio-2142, ¶ 60 (holding that notwithstanding the court's holdings in *Warren*, 116 Ohio App.3d 275, 688 N.E.2d 3, and *Willoughby*, 39 Ohio App.3d 74, 529 N.E.2d 206, those cases were distinguishable because they included no reasons for the delays, whereas this case included reasons justifying the seven-month delay between conviction and sentencing).

{¶24} Finally, Klayman cites no persuasive or binding authority warranting the discharge he requests. Here the record reveals a relatively brief period passed before the trial court remedied the error in its original sentencing hearing. Klayman does not claim prejudice or any violation of his constitutional right to a speedy trial, nor raise any argument that would support a finding of a violation. See *State v. Doughman*, 2017-Ohio-4253, 92 N.E.3d 30 (4th Dist.) (defendant did not establish violation of constitutional right to a speedy trial warranting discharge for five-month delay between bench trial and his conviction).

¹ Klayman contends that he never received notice of the August 2017 resentencing hearing, but the record does not establish this. In fact, his trial attorney gave a different excuse at the hearing—claiming that he was incarcerated on another matter in Cincinnati at the time notice was sent. Regardless, even if we assume Klayman is correct, that would not change our disposition.

{¶25} We reject Klayman's remaining contentions, and overrule his assignment of error. The trial court committed no error by conducting a new sentencing hearing and journalizing his sentence three months after the initial hearing.

V. CONCLUSION

{¶26} Having overruled his assignment of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.