

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 11AP-660
v.	:	(C.P.C. No. 08CR-04-3160)
	:	
Gregory L. Kilgore,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 27, 2012

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

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶ 1} Defendant-appellant, Gregory A. Kilgore, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to guilty plea, of two counts of robbery in violation of R.C. 2911.02, one a felony of the second degree and the other a felony of the third degree. Defendant assigns a single error:

THE TRIAL COURT ERRED WHEN IT MODIFIED A VALID JUDGMENT ENTRY AFTER THE DEFENDANT HAD STARTED SERVING HIS SENTENCE AND FURTHER ERRED BY INCREASING THE SENTENCE FROM THE ONE IMPOSED IN THE ORIGINAL JUDGMENT ENTRY.

Because the trial court properly corrected a clerical error in its original judgment entry, we affirm.

I. Facts and Procedural History

{¶ 2} By indictment filed April 28, 2008, defendant was charged with four counts of robbery in violation of R.C. 2911.02 arising out of two separate robberies in Columbus. The first occurred on October 2, 2007 at the Huntington National Bank at 180 E. Broad Street; the second took place on October 4, 2007 at the US Bank at 175 S. Third Street. Defendant entered a not guilty plea to all charges of the indictment. The case ultimately was consolidated with case No. 07CR-7406, also pending in the common pleas court against defendant.

{¶ 3} On February 5, 2009, partway through trial, defendant decided to change his plea to guilty to two of the four charges in the indictment. As a result of a Crim.R. 11 plea hearing, the trial court accepted defendant's guilty plea to robbery as a felony of the second degree arising out of the incident at the Huntington Bank, and robbery as a felony of the third degree arising out of the US Bank incident. With defendant's plea, the prosecution requested a nolle prosequi as to the remaining charges of the indictment and the charges in case No. 07CR-7406.

{¶ 4} After receiving a presentence investigation, the trial court conducted a sentencing hearing on March 3, 2009 and imposed a prison sentence of six years on one count of robbery, to be served consecutively with the three years the court imposed for the other count of robbery, for a total of nine years. In imposing the sentence, the trial court referred to two other cases for which defendant would be serving time, one in the state system and the other in the federal system, and asked defense counsel for "the case numbers * * * so I can enter which one is going to be concurrent and which one is consecutive." (Tr. 17-18.) Counsel for defendant advised he did not have the case numbers at the sentencing hearing, so the trial court noted it could "add those case numbers before filing this entry." (Tr. 18.) In an attempt to confirm the sequence of the court's sentence in relation to the other two cases, the trial court asked defense counsel, "[Y]ou want to run concurrent with the state charge and consecutive with the federal charge or other way around?" (Tr. 18.) Counsel for defendant advised that defendant "would like concurrent

with the federal case and second to the state." (Tr. 18.) The court so ordered and requested that counsel provide the appropriate case numbers.

{¶ 5} The court's judgment entry, filed March 10, 2009, incorporated the sentence imposed at the sentencing hearing and noted the six-year and three-year periods of imprisonment were to be served consecutively to each other. The judgment entry further specified the nine-year sentence would be served consecutively "to Case No. 01CR-2378, and concurrent with Federal Case No. 01CR-187." Defendant filed a notice of appeal from the trial court's entry.

{¶ 6} On May 1, 2009, the trial court filed a corrected judgment entry, the only change being in reference to the number of the state case to which defendant's nine-year sentence would be served consecutively. Although the first judgment entry stated that the nine years imposed would be served consecutively to case No. 01CR-2378, the corrected entry stated the sentence would be served consecutively "to Montgomery Case No. 96CR-163."

II. Assignment of Error

{¶ 7} Defendant's single assignment of error asserts the trial court erred in modifying the March 2009 judgment entry after defendant began serving his sentence. Defendant asserts the modification resulted in an increase in the sentence imposed pursuant to the original entry.

{¶ 8} "[A] trial court lacks the authority to reconsider its own valid, final judgment in a criminal case, with two exceptions: (1) when a void sentence has been imposed and (2) when the judgment contains a clerical error." *State v. Miller*, 127 Ohio St.3d 407, 2010-Ohio-5705, ¶ 14, citing *State ex rel. Cruzado v. Zeleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, ¶ 19, citing Crim.R. 36. "A clerical error or mistake refers to 'a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment.' " *Miller* at ¶ 15, quoting *Cruzado* at ¶ 19, quoting *State v. Brown*, 136 Ohio App.3d 816, 819-820 (3rd Dist.2000).

{¶ 9} "'Although courts possess inherent authority to correct clerical errors in judgment entries so that the record speaks the truth, 'nunc pro tunc entries 'are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided.' " " *Miller* at ¶ 15, quoting *Cruzado* at ¶ 19, quoting *State ex rel.*

Mayer v. Henson, 97 Ohio St.3d 276, 2002-Ohio-6323, ¶ 14, quoting *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 164 (1995). Even if a notice of appeal has been filed, "[a] trial court retains jurisdiction over issues not inconsistent with an appellate court's ability to review, affirm, modify, or reverse an appealed judgment." *State v. Wilson*, 2d Dist. No. 24352, 2011-Ohio-5990, ¶ 17, citing *State v. Dixon*, 2d Dist. No. 06-CA-0145, 2008-Ohio-415, ¶ 5 (concluding "[t]he trial court's correction of a clerical error to recognize that Wilson's crime was an aggravated first-degree felony did not interfere with our appellate jurisdiction"). See also Crim.R. 36 (providing that "[c]lerical mistakes in judgments * * * arising from oversight or omission, may be corrected by the court at any time").

{¶ 10} Here, the trial court changed only a case number to accurately reflect the state court case to which defendant's nine-year sentence would be served consecutively. Although defense counsel was to supply that information to the trial court for purposes of the court's sentencing entry, some error in transmission or transcription apparently occurred.

{¶ 11} As the Supreme Court of Ohio noted in *Miller*, determining whether a correction amounts to a clerical error, or something more, involves determining whether the change "entails a substantive legal decision or judgment and is not merely a mechanical part of the judgment." *Miller* at ¶ 16. In *Miller*, the court determined that restitution, omitted from the judge's sentence and original sentencing entry, is a financial sanction based on the victim's loss and is imposed as a part of a felony sentence. It concluded the omission of restitution from the sentence "is not an order that is so 'mechanical in nature' that its omission can be corrected as if it were a clerical mistake." *Id.*, quoting *Londrico v. Delores C. Knowlton, Inc.*, 88 Ohio App.3d 282, 285 (9th Dist.1993).

{¶ 12} By contrast, the trial court's amendment here left the sentence as originally imposed: nine years on the present case to be served consecutively to defendant's sentence in his state case and concurrently with the sentence imposed in his federal case. The only change inserted the proper case number for the state court case. Defendant does not suggest the case number, as amended, is inaccurate; nor does he suggest his serving the nine-year sentence consecutively to the state court sentence was not the sentence the trial court imposed. To the contrary, all counsel agreed at the sentencing hearing that the

pertinent case numbers later would be submitted to the trial court for insertion into the judgment entry. Correcting the clerical error in transcribing one of those case numbers is a clerical error that falls within the realm of Crim.R. 36.

{¶ 13} Accordingly, defendant's single assignment of error is overruled.

III. Disposition

{¶ 14} Having overruled defendant's single assignment of error, we affirm the judgment of the trial court.

Judgment affirmed.

CONNOR and DORRIAN, JJ., concur.
