

[Cite as *State v. Zeune*, 2012-Ohio-5476.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 12AP-198
v.	:	(C.P.C. No. 09CR-08-4919)
	:	
Rodney D. Zeune,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 27, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Timothy Young, Ohio Public Defender, and *Craig M. Jaquith*, for appellant; *Rodney D. Zeune*, pro se.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Defendant-appellant, Rodney D. Zeune ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which sentenced him to prison for trafficking in cocaine. He also filed a "MOTION TO VACATE VOID JUDGMENT AND SENTENCE." Because the trial court did not err in sentencing appellant, we affirm the trial court's judgment. We also deny appellant's motion.

I. BACKGROUND

{¶ 2} Appellant was indicted on one count of trafficking in cocaine as a third-degree felony. He pleaded not guilty to the charge, and a jury trial ensued. At trial, the evidence established that appellant sold 25.5 grams of cocaine in March 2009. The jury found appellant guilty of the drug offense, and the trial court sentenced him in October 2010. The court imposed four years imprisonment for the drug offense, and it ordered appellant to serve the sentence consecutively to a prison term imposed by a court in Knox County. We reversed appellant's sentence because the trial court failed to indicate that the drug offense carried a mandatory prison term under the sentencing law in effect at the time. *See State v. Zeune*, 10th Dist. No. 10AP-1102, 2011-Ohio-5170, ¶ 29.

{¶ 3} The trial court held another sentencing hearing on January 25, 2012. Appellant argued that the court was required to apply the sentencing law enacted under H.B. 86, which went into effect on September 30, 2011. But the court concluded that H.B. 86 did not apply and that, pursuant to our decision in *Zeune*, it was only obligated to clarify that appellant's drug offense carried a mandatory prison term. Therefore, the court ordered appellant to serve the sentence that it previously imposed, and it stated that the drug offense carried a mandatory prison term. As above, appellant now appeals his sentence, and he filed a "MOTION TO VACATE VOID JUDGMENT AND SENTENCE." We first discuss appellant's appeal.

II. APPELLANT'S APPEAL

A. Assignment of Error

{¶ 4} Appellant assigns the following as error in his appeal:

After reversal and remand by this Court, the trial court erred by determining that its only obligation at the resentencing hearing was to "clarify a prior sentence."

B. Discussion

{¶ 5} In his single assignment of error, appellant argues that the trial court erred by not applying H.B. 86 when it resentenced him. We disagree.

{¶ 6} Appellant contends that the trial court was required to apply H.B. 86 because it went into effect before he was resentenced on January 25, 2012. R.C. 1.58(B) governs whether appellant was entitled to be resentenced under H.B. 86. *See State v.*

Limoli, 10th Dist. No. 11AP-924, 2012-Ohio-4502, ¶ 57-58. According to R.C. 1.58(B), "[i]f the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed."

{¶ 7} Appellant was convicted of trafficking 25.5 grams of cocaine. When the trial court originally sentenced appellant, the offense was a third-degree felony punishable by a mandatory sentence of one to five years in prison, pursuant to former R.C. 2925.03(C)(4)(d) and 2929.14(A)(3). Under H.B. 86, however, trafficking 25.5 grams of cocaine is a second-degree felony punishable by a mandatory sentence of two to eight years in prison. *See* R.C. 2925.03(C)(4)(e) and 2929.14(A)(2). Therefore, H.B. 86 increased the penalty for appellant's offense, and the trial court was not authorized to impose that increased penalty under R.C. 1.58(B).

{¶ 8} Nevertheless, appellant contends that he was entitled to be sentenced under H.B. 86 because, for individuals like him with no prior drug abuse convictions, the penalty for a third-degree felony cocaine trafficking offense was reduced from a mandatory prison term of 1 to 5 years to a discretionary term of 9 to 36 months. *See* R.C. 2925.03(C)(4)(d) and 2929.14(A)(3)(b). This contention ignores the fact that, under H.B. 86, appellant's offense is a second-degree felony carrying an increased penalty. Consequently, the trial court lacked grounds to sentence appellant for a third-degree felony offense under H.B. 86.

{¶ 9} Our decision in *Limoli* does not require a different result. In that case, the defendant was convicted of possessing an amount of crack cocaine exceeding five grams, but less than ten grams. *Id.* at ¶ 54. Prior to H.B. 86, possessing that amount of crack cocaine constituted a third-degree felony offense and carried a mandatory prison term. *Id.* at ¶ 52. H.B. 86 eliminated the distinction between crack cocaine and powder cocaine, changed the level of the defendant's offense to a fourth-degree felony, and reduced the penalty from a mandatory prison term to a presumed community-control sanction. *Id.* at ¶ 51-52.

{¶ 10} The key question in *Limoli* was whether the nature of appellant's offense was changed when H.B. 86 eliminated the distinction between crack cocaine and

powder cocaine, and we held that it did not. *Id.* at ¶ 61-62. We did not, however, address the question before us here, i.e., whether H.B. 86 decreased or increased the penalty applicable to a conviction for trafficking 25.5 grams of cocaine. As to that question, we may only conclude that, under prior law, appellant's offense constituted a third-degree felony with a mandatory prison term of one to five years. Under H.B. 86, the offense now constitutes a second-degree felony with a mandatory prison term of two to eight years. Because H.B. 86 did not reduce the penalty for appellant's offense, the trial court did not err by failing to apply that new law when it resentenced appellant. *See* R.C. 1.58(B). Accordingly, we overrule appellant's single assignment of error.

III. MOTION TO VACATE VOID JUDGMENT AND SENTENCE

{¶ 11} Appellant contends in his motion that the trial court failed to state the manner of his conviction in the sentencing entry. He claims the entry is not a final, appealable order without that information. A defendant's manner of conviction pertains to whether it occurred from a guilty plea, a no contest plea or a verdict in a bench or jury trial. *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, ¶ 12. Here, although the trial court noted in the sentencing entry that a jury found appellant guilty of trafficking in cocaine, it also incorrectly stated that appellant pleaded guilty to the offense. Nevertheless, contrary to appellant's assertion, a court need not state a defendant's manner of conviction in a sentencing entry for it to be a final, appealable order. *Id.* Next, we decline to address the other issues in appellant's motion because we discern no basis in the rules of appellate procedure for the issues to be raised by a motion. Accordingly, we deny appellant's motion.

IV. CONCLUSION

{¶ 12} Having overruled appellant's single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas. We also deny appellant's "MOTION TO VACATE VOID JUDGMENT AND SENTENCE."

*Motion denied;
judgment affirmed.*

BRYANT and TYACK, JJ., concur.
