

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 14AP-611
v.	:	(C.P.C. No. 92CR-5290)
	:	
Kendrick Bonner,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 19, 2015

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*,
for appellee.

Andrea L. Reino, for appellant.

APPEAL from the Franklin County Court of Common Pleas

HORTON, J.

{¶ 1} Defendant-appellant, Kendrick Bonner, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion for a final appealable order. Defendant presents the following sole assignment of error for our review:

The trial court erred to the prejudice of Defendant-Appellant by denying him a final appealable order in compliance with Crim.R. 32(C).

{¶ 2} For the reasons which follow, we dismiss the appeal for lack of a final appealable order.

I. FACTS AND PROCEDURAL HISTORY

{¶ 3} The state indicted defendant on October 15, 1992 for one count of aggravated murder with a firearm specification, one count of felonious assault with a firearm specification, and one count of having a weapon while under disability. The charges arose out of an incident which occurred when defendant went to an illegal gambling business owned by the deceased. The individuals present at the gambling business got into an argument, and defendant "pulled out a gun and shot the deceased three times and also shot another witness who worked for the deceased." *State v. Bonner*, 10th Dist. No. 93APA07-951 (Apr. 12, 1994). Following a jury trial, defendant was convicted of all the charges and specifications charged in the indictment.

{¶ 4} On June 18, 1993, the trial court issued a judgment entry reflecting the jury's verdicts and imposing sentence. The court sentenced defendant to "not less than twenty (20) years to life on" the aggravated murder charge, "with an additional three (3) years actual incarceration for use of firearm; a sentence of not less than eight (8) years nor more than fifteen (15) years on" the felonious assault charge, "with an additional three (3) years actual incarceration for use of firearm; and a one and one-half (1-1/2) year Determinate sentence on" the having a weapon while under disability charge. (1993 Sentencing Entry, 2.) The court ordered that the sentences were "to run consecutive to each other." (1993 Sentencing Entry, 2.)

{¶ 5} Defendant appealed his convictions to this court, assigning three errors. On April 12, 1994, we issued a decision affirming in part, reversing in part, and remanding the case to the trial court. *See Bonner*. In *Bonner*, this court sustained defendant's first assignment of error upon finding that the trial court had wrongly rejected defendant's jury trial waiver on the having a weapon while under disability charge. We also sustained defendant's second assignment of error, concluding that defendant could "be sentenced to only a single three-year term of incarceration" on the two firearm specifications. *Id.* Finally, we sustained defendant's third assignment of error, as the record evidence was insufficient to establish that defendant acted with prior calculation and design when he murdered the decedent. Accordingly, we held that the trial court's judgment was "affirmed upon the felonious assault conviction, but is

reversed as to the conviction of aggravated murder and that conviction is reduced to murder." *Id.* We remanded the case to the trial "court for implementation and execution of the modified judgment in accordance with law and consistent with [our] opinion." *Id.*

{¶ 6} On April 13, 1995, the trial court ordered that a warrant be issued to the Sheriff of Franklin County, directing the sheriff to take defendant into custody "for RE-SENTENCING," and to hold him in the Franklin County Corrections Center "to await RE-SENTENCING." (Entry Granting Application for Warrant.) The record indicates that the warrant to convey defendant was returned as having been served on May 2, 1995. On May 3, 1995, the court issued a modified judgment entry of conviction, which was signed by the trial judge and entered on the journal by the clerk. The modified judgment entry indicates that, in accordance with *Bonner*, the 1993 judgment entry of conviction was modified as follows:

1. Due to insufficient evidence on the element of prior calculation and design, the conviction and sentence on count one of the indictment is hereby modified to reflect a conviction of the lesser offense of murder in violation of R.C. 2903.02, and a sentence of fifteen (15) years to life is imposed.
2. The conviction and sentence of eight (8) to fifteen (15) years imposed on count two of the indictment, are affirmed. However, the conviction and sentence on the firearm specification are vacated and held for naught pursuant to the judgment of the Court of Appeals.
3. The conviction and sentence on count three of the indictment for having a weapon while under disability in violation of R.C. 2923.13 are hereby vacated and the charge is dismissed at the request of the state.

(Modified Judgment Entry, 1-2.)

{¶ 7} On June 5, 2014, defendant filed a motion for final appealable order pursuant to Crim.R. 32(C). Defendant noted in the motion that, according to the Ohio Department of Rehabilitation and Correction ("ODRC"), "the counts are consecutive and Defendant Bonner's minimum sentence was 20 years." (Motion for Final Appealable

Order, 1.)¹ Defendant asserted that the modified judgment entry was not a final appealable order because it did "not state 'the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based,' and it fail[ed] to include the specific sentences for all counts, in violation of Rule 32(C) and [*State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330]." (Motion for Final Appealable Order, 2.)

{¶ 8} On June 17, 2014, the state filed a memorandum contra defendant's motion for a final appealable order. The state noted that pursuant to *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, the manner of conviction was not an essential element of the final judgment of conviction. The state concluded that the modified judgment entry was a final appealable order.

{¶ 9} On July 10, 2014, the trial court denied defendant's motion for a final appealable order. The court concluded that the modified judgment entry "was a final appealable order," and further held that defendant's "delay in raising any issue as to the modified order bar[red] the Defendant's Motion." (Entry Denying Motion for a Final Appealable Order.) Defendant filed a timely notice of appeal from the trial court's order.

II. MODIFIED JUDGMENT ENTRY, CRIM.R. 32(C), AND LACK OF A FINAL APPEALABLE ORDER

{¶ 10} Defendant asserts that the modified judgment entry is not a final appealable order, as it does not set forth the manner of conviction or his sentence. Defendant contends that he "has been denied the opportunity to see the Parole Board at the proper time, because he lacks a final appealable order setting forth the sentence on each count." (Appellant's brief, 6.) Defendant also notes that the modified judgment entry is silent on whether the "counts are to be served consecutively or concurrently." (Appellant's brief, 2.) See *Hamilton v. Adkins*, 10 Ohio App.3d 217 (12th Dist.1983), syllabus; *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶ 16. Although we agree that the modified judgment entry is not a final appealable order, because defendant has

¹ On appeal, defendant continues to assert that "[a]ccording to the ODRC, * * * Bonner's minimum sentence is 20 years." (Appellant's brief, 2.) However, the minimum sentence stated in the modified judgment entry, construed consecutively, would be 23 years (15 years on the murder charge plus 8 years on the felonious assault charge).

appealed the court's order denying his motion, we lack jurisdiction over the instant appeal.

{¶ 11} Ohio appellate courts have jurisdiction to review only final appealable orders of lower courts within their districts. Ohio Constitution, Article IV, Section 3(B)(2); R.C. 2501.02. If an order is not a final appealable order, the appellate court lacks jurisdiction and the appeal must be dismissed. *Prod. Credit Assn. v. Hedges*, 87 Ohio App.3d 207 (4th Dist.1993). A judgment of conviction in a criminal case is a final appealable order, as it " 'affects a substantial right' and 'determines the action and prevents a judgment' in favor of the defendant" under R.C. 2505.02(B). *Baker* at ¶ 9. "In entering a final appealable order in a criminal case, the trial court must comply with Crim.R. 32(C)." *Id.* at ¶ 10.

{¶ 12} Crim.R. 32(C) provides, in relevant part, as follows:

A judgment of conviction shall set forth the fact of conviction and the sentence. Multiple judgments of conviction may be addressed in one judgment entry. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

{¶ 13} In *Baker*, the Supreme Court of Ohio held that a judgment of conviction is a final appealable order when it sets forth: (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court. *Id.* at syllabus. At the time of *Baker*, and at the time the court issued the modified judgment entry, Crim.R. 32(C) stated, in relevant part, that "[a] judgment of conviction shall set forth the plea, the verdict or findings, and the sentence. * * * The judge shall sign the judgment and the clerk shall enter it on the journal." *Id.* at ¶ 10. The *Baker* court explained that the phrase "the plea, the verdict or findings, and the sentence," in former Crim.R. 32(C) meant that "a trial court [was] required to sign and journalize a document memorializing the sentence and the manner of the conviction: a guilty plea, a no contest

plea * * *, a finding of guilt based upon a bench trial, or a guilty verdict resulting from a jury trial." *Id.* at ¶ 14.

{¶ 14} In *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, the court modified *Baker*, holding that "[a] judgment of conviction is a final order subject to appeal under R.C. 2505.02 when it sets forth (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk." *Lester* at syllabus. "All of these requirements relate to the essence of the act of entering a judgment of conviction and are a matter of substance, and their inclusion in the judgment entry of the conviction is therefore required." *Id.* at ¶ 11. In *Lester*, the judgment entry stated the fact of conviction, but did not state the manner of conviction. The Supreme Court of Ohio determined that, when a judgment entry contains the substantive provisions of Crim.R. 32(C), "the trial court's omission of how the defendant's conviction was effected. i.e., the 'manner of conviction,' does not prevent the judgment of conviction from being an order that is final and subject to appeal." *Id.* at ¶ 12. In *Lester*, the trial court had sua sponte filed a nunc pro tunc entry adding the manner of conviction to the judgment entry, and the Supreme Court of Ohio held that "[a] nunc pro tunc judgment entry issued for the sole purpose of complying with Crim.R. 32(C) to correct a clerical omission in a final judgment entry is not a new final order from which a new appeal may be taken." *Id.* at paragraph two of the syllabus. Crim.R. 32(C) was amended in 2013 to reflect the *Lester* holding, and clarify that a judgment entry of conviction is not required to state the manner of conviction.

{¶ 15} The modified judgment entry states that "the judgment entry of conviction entered herein on June 21, [sic] 1993," was modified pursuant to *Bonner*. (Modified Judgment Entry, 1.) This statement is sufficient to satisfy the first Crim.R. 32(C) element, as it states the fact of conviction. However, the modified judgment entry does not satisfy the second *Baker/Lester* element, as the modified judgment entry does not reflect all of defendant's sentences.

{¶ 16} As noted above, defendant was indicted on one count of aggravated murder with a firearm specification, one count of felonious assault with a firearm specification, and one count of having a weapon while under disability. Defendant was

convicted of all the counts and specifications, and the trial court imposed a sentence for each charge and specification. Defendant's second assignment of error in *Bonner* asserted that "the trial court erroneously imposed multiple terms of incarceration for convictions of two firearm specifications committed as part of the same transaction." *Id.* Analyzing the applicable statute and the relevant facts, we found that the crimes did constitute "a single transaction," and therefore concluded that defendant could "be sentenced to only a single three-year term of incarceration." *Id.*

{¶ 17} Following *Bonner*, defendant was brought before the trial court for resentencing, and the lower court issued the modified judgment entry of conviction. The modified judgment entry reflects that the conviction on Count one of the indictment was reduced from aggravated murder to murder, and reflects that the sentence on that count was reduced from 20 years to life to 15 years to life. The entry then indicates that the sentence on the felonious assault conviction remained 8 to 15 years, but specified that the sentence on the firearm specification attached to the felonious assault charge was "vacated and held for naught." (Modified Judgment Entry, 1.) The court also vacated the conviction and sentence on the having a weapon while under disability charge. Thus, the modified judgment entry failed to include the three-year mandatory sentence for the firearm specification attached to the murder charge. As such, the modified judgment entry does not set forth all of defendant's sentences, and thus does not comply with Crim.R. 32(C).

{¶ 18} Defendant notes that, in order for ODRC to understand defendant's full sentence, it would have to "read the original sentence and then read the Modified Judgment Entry," which is "improper because a judgment of conviction must be a single document." (Appellant's brief, 6.) Indeed, in *Baker*, the court held "that the judgment of conviction is a single document." *Id.* at ¶ 1. Thus, multiple documents may not constitute a final appealable order, as "[o]nly one document can constitute a final appealable order." *Id.* at ¶ 17. *See also State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, ¶ 39, quoting *Baker* at ¶ 17 (noting that, "[a]s a general matter, '[o]nly one document can constitute a final appealable order,' meaning that a single entry must satisfy the requirements of Crim.R. 32(C)"); *State v. Ketterer*, 126 Ohio St.3d 448, 2010-

Ohio-3831, ¶ 15-17 (noting that for all noncapital criminal cases "multiple documents" may not be used to meet the requirements of Crim.R. 32(C)); *State v. Draget*, 4th Dist. No. 09CA3306, 2010-Ohio-3541, ¶ 6 (noting that "allowing multiple documents to create a final appealable order is improper; all required information must be present in a single document"); *State v. Daniels*, 1st Dist. No. C-140242, 2014-Ohio-5160, ¶ 7 (noting that "allowing multiple documents to constitute a final appealable order runs afoul of Crim.R. 32(C)"); *State v. Riggs*, 5th Dist. No. 2009 CA 00041, 2009-Ohio-6821, ¶ 31 (finding that the original sentencing entry and the subsequent agreed entry which determined the amount of restitution "could not be considered together because, under the Ohio Supreme Court *Baker* decision, only one document could constitute a final, appealable order").

{¶ 19} The state contends that, although an "*original* judgment of conviction must certainly comply with *Baker*, *Lester*, and Crim.R. 32(C)," a "modified judgment entry is not necessarily held to the same standard." (Emphasis sic.) (Appellee's brief, 3.) The state cites *State ex rel. Newell v. Gaul*, 135 Ohio St.3d 187, 2013-Ohio-68 in support of its contention. To understand the Supreme Court of Ohio's holding in *State ex rel. Newell*, we must briefly explain the history of the case.

{¶ 20} In two separate trials in 1978, Newell was found guilty of multiple counts of rape, kidnapping, aggravated robbery, and felonious assault. Newell appealed his convictions, and the court of appeals concluded that the kidnapping and rape convictions were allied offenses of similar import, as "there existed no separate animus to sustain the kidnapping convictions." *State v. Newell*, 8th Dist. No. 40334 (Feb. 14, 1980). As such, the court held that "all counts of kidnapping of which defendant was convicted and the sentences relating to these counts * * * are hereby reversed. The remaining convictions and the accompanying sentences shall remain undisturbed. Accordingly, the judgment is so modified." *Id.*

{¶ 21} Following the 1980 *Newell* decision, Newell filed a litany of actions in state and federal courts throughout the region. Newell commenced a mandamus action on April 10, 1995, seeking to compel the trial court judge to follow the appellate court's mandate and correct his sentence. *See State ex rel. Newell v. Gaul*, 8th Dist. No. 98326,

2012-Ohio-4068, ¶ 4. Prior to the court of appeals' ruling on the requested writ, the lower court issued a journal entry on June 26, 1996, wherein the trial court vacated Newell's convictions and sentences on the kidnapping charges, and "then listed the sentences for each of the remaining counts in each case and ordered them to be served consecutively." *Id.* at ¶ 6. The trial court, however, "did not reiterate the fact of conviction for each charge." *Id.* The court of appeals granted the trial judge's motion for summary judgment in the mandamus action.

{¶ 22} Thereafter, on March 19, 2012, Newell filed a motion requesting the trial court to issue a final appealable order pursuant to Crim.R. 32(C). The trial court denied the motion. Newell then commenced another mandamus action on May 7, 2012, to compel the trial judge to issue a final appealable order pursuant to Crim.R. 32(C). The court of appeals observed that the "June 26, 1996 order was the result of a peculiar procedural posture," and stated that "[b]ecause of the special nature and purpose of the order," the court of appeals "question[ed] whether the subject June 26, 1996 order [was] a judgment of conviction under Crim.R. 32(C), subject to a new appeal." *Id.* at ¶ 12. Because mandamus should not issue in doubtful cases, the court of appeals declined to grant the writ of mandamus to compel the respondent judge to modify the 1996 order. *Id.* The court also observed that Newell had an adequate remedy at law because, "[i]n all reality, if either Newell or the state of Ohio had wanted to appeal the subject order in 1996, they could have." *Id.* at ¶ 13.

{¶ 23} In *State ex rel. Newell*, the Supreme Court of Ohio affirmed the court of appeals' judgment denying Newell's May 7, 2012 request for a writ of mandamus. The court noted that, "in *State v. Newell*, 8th Dist. Nos. 40334 and 40335, * * * the court of appeals reversed several of Newell's convictions and sentences but left Newell's remaining convictions and sentences undisturbed." *Id.* at ¶ 1. The court observed that, "[a]lthough the court of appeals directed the common pleas court to execute its judgment, * * * it did not remand the cause to the common pleas court for resentencing." *Id.*, citing App.R. 12(B). The court concluded that "[u]nder such circumstances, Crim.R. 32(C) [was] inapplicable." *Id.* The Supreme Court further found that res judicata barred Newell's request for a writ of mandamus, and noted that " 'any

order to comply with Crim.R. 32(C) to correct a clerical error in his original sentencing entry would not constitute a final, appealable order from which a new appeal may be taken.' " *Id.* at ¶ 3, quoting *State ex rel. Compton v. Sutula*, 132 Ohio St.3d 35, 2012-Ohio-1653, ¶ 3.

{¶ 24} The case before us does not present the peculiar procedural posture present in *Newell*. Here, the trial court issued the modified judgment entry shortly after, and in response to, this court's decision in *Bonner*. In *State ex rel. Newell*, the trial court issued the modified sentencing entry 15 years after the court of appeals issued its decision, and issued the modified entry in response to Newell's request for a writ of mandamus. Unlike the instant action, the 1996 judgment entry in *State ex rel. Newell* also properly contained all of Newell's sentences; it omitted only the fact and means of conviction. Furthermore, the Supreme Court's conclusion that Crim.R. 32(C) was inapplicable in *State ex rel. Newell* appears to have been based on the fact that, in the 1980 *Newell* decision, the court of appeals did not remand the case for resentencing. In *Bonner*, this court vacated a portion of defendant's sentence, reduced the aggravated murder conviction to murder, and remanded the case to the trial court for implementation and execution of the modified judgment consistent with our opinion. In order to implement our opinion, defendant had to be resentenced. To that end, the trial court granted the state's application to issue a warrant to the Sheriff of Franklin County, commanding the sheriff to remove defendant from the Southern Ohio Correctional Facility to the Franklin County Corrections Center "to await RE-SENTENCING." (Entry Granting Application for Warrant.) The trial court record demonstrates that defendant was brought before the court for resentencing on May 2, 1995. (R. 187.)

{¶ 25} We find that *State ex rel. Newell* stands on its own facts, and is not applicable in the instant action. As defendant was resentenced herein, the modified judgment entry must comply with Crim.R. 32(C). Compare *State v. Lawson*, 8th Dist. No. 97894, 2012-Ohio-3157, ¶ 4, 6 (where the Eighth District Court of Appeals affirmed the defendant's convictions but remanded for resentencing on the gross sexual imposition charge, and the trial court then "issued a new sentencing entry only for the gross sexual imposition count" but "failed to issue a judgment entry that also included

the convictions for the other counts," the court of appeals concluded that the new sentencing entry violated *Baker* because "multiple documents had to be considered to determine the aggregate sentence").

{¶ 26} Thus, pursuant to *Baker* and *Lester*, the modified judgment entry was not a final appealable order under Crim.R. 32(C), as it did not include all of defendant's sentences. However, in order to force the trial court to issue a final appealable order which complies with Crim.R. 32(C), defendant must request a writ of mandamus and/or procedendo. *State v. Clutter*, 3d Dist. No. 3-08-27, 2008-Ohio-6576, ¶ 13.

{¶ 27} In *Clutter*, the lower court denied the defendant's Crim.R. 32(C) motion for resentencing. The defendant appealed from that order and, on appeal, the court concluded in applying *Baker*, that the sentencing entry was not a final appealable order as it did not contain the manner of conviction. The *Clutter* court observed, however, that the "Ohio Supreme Court has also stated that 'if the trial court refuses upon request to issue a revised sentencing entry, [the defendant] can then seek to compel the court to act by filing an action for a writ of mandamus or a writ of procedendo.' " *Id.* at ¶ 13, quoting *McAllister v. Smith, Warden*, 119 Ohio St.3d 163, 2008-Ohio-3881. The court stated that, "[h]ad the case before us been in mandamus or procedendo, this court could have granted the writ and ordered the foregoing resentencing." *Id.* at ¶ 14. However, as *Clutter* "did not pursue the trial court's denial of the motion for resentencing in mandamus or procedendo, but instead chose to file a direct appeal of the trial court's denial of the motion," the court's conclusion that the sentencing entry did not constitute a final appealable order, left the court of appeals without jurisdiction to review any order of the trial court, "including the trial court's denial of the motion to resentence." *Id.* at ¶ 14. Thus, the *Clutter* court concluded that it had "no choice but to dismiss the appeal for lack of a final, appealable order." *Id.* at ¶ 15.

{¶ 28} Notably, the Supreme Court of Ohio favorably applied *Clutter's* holding in *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671. There, Carnail requested a writ of mandamus to compel the trial court judge to issue a final appealable order, which properly included post-release control in Carnail's sentence. The court concluded that Carnail was entitled to the requested writ. The court observed that,

pursuant to *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, once the trial court judge "denied Carnail's motion to correct the 1999 sentence, Carnail was entitled to the requested extraordinary relief in mandamus to compel the judge to issue a new sentencing entry," and further noted that Carnail was not "relegated to appealing the judge's order denying his motion to correct sentence." *Id.* at ¶ 37. The court then noted that, "in *State v. Clutter* * * * the Third District Court of Appeals dismissed an appeal from a trial court's denial of a defendant's motion for resentencing and held that under *Culgan*, the appropriate remedy was an action in mandamus or procedendo." *Carnail* at ¶ 37.

{¶ 29} Thus, pursuant to *Clutter* and *State ex rel. Carnail*, we conclude that the appropriate remedy in the instant case is an action in mandamus or procedendo to compel the trial court to issue a sentencing entry which complies with Crim.R. 32(C). *See Culgan* at ¶ 8 (noting that "[i]f the trial court refuses upon request or motion to journalize its decision, either party may compel the court to act by filing a writ of mandamus or a writ of procedendo"); *State ex rel. Moore v. Krichbaum*, 7th Dist. No. 09 MA 201, 2010-Ohio-1541, ¶ 8, 15 (noting that "[t]he appropriate remedy for a trial court's failure to comply with Crim.R. 32(C) and *Baker* is a correction of the sentencing entry," and concluding that the court was bound to "grant Moore's writs to the extent that they demand a sentencing entry that complies with Crim.R. 32(C)"). Because the modified judgment entry is not a final appealable order, and because defendant filed an appeal from the trial court's order denying his motion for a final appealable order instead of filing a complaint for a writ of mandamus and/or procedendo, we lack jurisdiction to resolve this appeal. Therefore, the appeal is dismissed for lack of a final appealable order.

Appeal dismissed.

TYACK and LUPER SCHUSTER, JJ., concur.
