[Cite as *State v. Taste*, 2009-Ohio-5867.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22955
v.	:	T.C. NO. 1996 CR 3562
DAMRICK L. TASTE	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 6th day of November, 2009.

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FROELICH, J.

{¶ 1} In 1997, Damrick Taste pled guilty in the Montgomery County Court of Common Pleas to one count of carrying a concealed weapon, one count of failure to comply with an order or signal of a police officer, one count of grand theft, six counts of aggravated robbery, each with a firearm specification, and one count of involuntary manslaughter, with

a firearm specification. The trial court sentenced him to an aggregate term of 26 years in prison. On September 15, 2008, the trial court re-sentenced Taste due to the original trial judge's failure to advise him that he would be subject to mandatory post-release control after his prison sentence was completed. Taste again received an aggregate sentence of 26 years in prison, which included two three-year sentences for firearm specifications, and he was ordered to pay court costs and restitution, "if applicable."

{¶ 2} Taste appeals from his sentence. For the following reasons, the trial court's judgment will be vacated to the extent that it imposed a three-year term of actual incarceration for the firearm specification set forth in Counts 1 and 2 of the December 1996 indictment. In all other respects, the judgment will be affirmed.

I

{¶ 3} Taste's convictions were based on two indictments. The first indictment, dated November 19, 1996, alleged four counts of aggravated robbery (Counts 4, 5, 8, and 9), each with a firearm specification; involuntary manslaughter (Count 6), with a firearm specification; grand theft (Count 7); and carrying a concealed weapon (Count 15).[1] The second indictment (a "B" indictment with the same case number), dated December 19, 1996, charged two additional counts of aggravated robbery (Counts 1 and 2), each with a firearm specification, and failure to comply with an order or signal of a police officer (Count 3).

{¶ 4} Taste entered a negotiated plea of guilty to all of the pending charges and to

[1]The indictment also alleged aggravated burglary (Count 10), two counts of kidnapping (Counts 11 and 12), and two additional counts of aggravated robbery (Counts 13 and 14), each with firearm specifications. These charges were nollied prior to Taste's plea, and we will not discuss them.

the firearm specifications for Counts 4, 5, 6, 8, and 9. On January 21, 1997, Taste's written plea agreements for each of these charges and for the five firearm specifications, which were signed by Taste, his counsel, and the trial judge, were filed. The written pleas regarding Counts 1 and 2 reflected that the firearm specifications for those counts were dismissed in exchange for the pleas.

{¶ 5} At the June 27, 1997, sentencing hearing, the original trial judge imposed sentence as follows:

{¶ 6} "*** [W]ith respect to the aggravated robbery of the decedent and of the passenger, that Counts 1 and 2, that the sentences be ten years in Ohio Rehabilitation Corrections Receptions Center. On each count there was a gun specification. With respect to each count, however it merges and it shall be three years, so with respect to Counts 1 and 2, it will be 23 years. With respect to failure to comply with an order or signal of a police officer, Count 3, the sentence is eighteen months. Having considered all the factors and recidivism matters and the like under the Ohio Revised Code, the 18 months will be concurrent with Counts 1 and 2. With respect to Counts 4 and 5, again, aggravated robberies of different persons, it is the judgment and sentence with respect to Count 4 that this be ten years in the Ohio Rehabilitation Corrections Center. With respect to Count 5, the sentence shall be ten years in the Ohio Rehabilitation Corrections Center. This being a separate offense, the gun specification does apply but only with respect to one count, and the sentence there is three years additional, so that is 23 years. With respect to the involuntary manslaughter, which is Count 6, which relates to part of the aggravated robbery as previously mentioned, the sentence is ten years, gun specification merging. It will be

concurrent with the aggravated robbery sentences. Grand theft motor vehicle, Count 7 shall be eighteen months, felony of the fourth degree, that should be concurrent with all the above. Aggravated Robbery, Counts 8 and 9, which occurred at approximately the same time, shall be ten years each and shall be concurrent with each other, each count shall be concurrent with all of the above. Carrying concealed weapon, Counts 15, 6 to 18 months, shall be 18 months concurrent with all the above cases. Costs shall be assessed, making a total sentence in the Ohio Rehabilitation Corrections Center of 46 years. You have a right to appeal the judgment and sentence of the court, with to do so – I beg your pardon, 26 years rather, 26 years on this particular matter. Not 46, but 26."

{¶ 7} The court's June 27, 1997, judgment reflected an aggregate 26-year prison term, with Counts 4 through 9 from the November indictment running concurrently for a total of ten years, plus an additional three years for the merged firearm specifications, and Counts 1 through 3 from the December indictment running concurrently for a total of ten years, plus three years for the merged firearm specifications, to be served consecutively to the offenses set forth in the November indictment. The entry ordered payment of costs, and stated that "[i]f applicable in this, the defendant is hereby ORDERED to make complete restitution." The judgment entry further stated that, following Taste's release from prison, he "will/may serve a period of post-release control under the supervision of the parole board[.]"

{¶ 8} On September 11, 2008, the trial court held a new sentencing hearing due to the original trial judge's failure to inform Taste that he would be required to serve mandatory post-release control after the completion of his prison term. The court imposed

the same prison sentences as had been previously ordered in the June 1997 judgment entry and informed Taste of the requirement that he serve "a mandatory period of post-release control for a period of up to five years under the supervision of the Parole Board." The court told Taste that he would be given "all applicable jail time credit" and that it was imposing "any court costs or restitution previously imposed." At the hearing, Taste's counsel objected to the trial court's failure to merge all of the firearm specifications and to the imposition of non-minimum sentences.

{¶ 9} With the exception of the paragraph concerning post-release control, which was modified to reflect that Taste would be supervised by the Parole Board for five years after his release from prison, the trial court's September 15, 2008, judgment entry was identical to the June 27, 1997, entry.[2] It reflected the prison sentences as stated at the September 11, 2008, sentencing hearing and further ordered, in part:

{¶ 10} "The defendant is to pay the costs of this prosecution taxed at $_____, upon which execution is hereby awarded through the Montgomery County Clerk's Office.

{¶ 11} "***

{¶ 12} "If applicable in this, the defendant is hereby ORDERED to make complete restitution."

{¶ 13} Taste appeals from his sentence, raising one assignment of error.

II

{¶ 14} Taste's sole assignment of error states:

[2]The September 15, 2008, entry also included the additional remark that a copy of the judgment entry was provided to Taste on September 11, 2008.

{¶ 15} "THE TRIAL COURT ERRED WHEN IT RE-SENTENCED TASTE AND HIS SENTENCE IS THEREFORE VOID."

{¶ 16} Taste claims that the trial court erred when it failed to merge the seven firearm specifications into a single specification and failed to specify the amount of restitution.

{¶ 17} As an initial matter, the State argues that Taste cannot challenge either the court's failure to merge all of the firearm specifications or the restitution order, because those arguments could have, and should have, been raised in an appeal from his 1997 sentence and are barred by res judicata. The State contends that the original sentencing entry was not a void judgment, because the trial court did not exceed its authority when it sentenced Taste in 1997. We disagree.

{¶ 18} "If a trial court has decided to impose a prison term upon a felony offender, it is duty-bound to notify that offender at the sentencing hearing about postrelease control and to incorporate postrelease control into its sentencing entry." *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶22. For example, R.C. 2929.19(B)(3)(c) provides that, "[s]ubject to division (B)(4) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

{¶ 19} "***

{¶ 20} "(c) Notify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the first or second degree ***

{¶ 21} "(e) Notify the offender that, if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of this section, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of section 2967.131 of the Revised Code, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender. ***"

{¶ 22} The Supreme Court of Ohio has held that, "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence." *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, syllabus. See, also, *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250. The Court recently reiterated that a sentence that fails to include post-release control is void, and "[t]he effect of vacating the sentence places the parties in the same position they would have been in had there been no sentence." *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at ¶8.

{¶ 23} Following this supreme court authority, we have likewise held that, "[w]here a sentence fails to contain a statutorily mandated term, such as post-release control, it is unlawful and void, not merely voidable, *** [and] [r]es judicata does not bar resentencing because a trial court retains jurisdiction to correct a void sentence." *State v. Davis*, Montgomery App. No. 22403, 2008-Ohio-6722, at ¶14, citing *Simpkins* at ¶15, ¶30. See, also, *State v. Winston*, Montgomery App. No. 22506, 2009-Ohio-2171.

{¶ 24} The State would have us rule that the Supreme Court's authority ignores the plain language of R.C. 2953.08(A)(4), which allows a defendant to appeal a sentence that is "contrary to law," and R.C. 2953.08(D)(1), which states that "[a] sentence imposed upon a defendant is not subject to review *** if the sentence is authorized by law, had been recommended jointly by the defendant and the prosecution in the case, and is impoed by a sentencing judge." The State argues: "[T]he plain language of the statute demands that a sentence which is contrary to law is not void, but voidable, reviewable, can be waived for appellate review, and the doctrine of res judicata applies."

{¶ 25} As a court inferior to the Supreme Court of Ohio, we lack jurisdiction to review whether the Supreme Court has properly determined that a sentence which fails to include post-release control is void, rather than voidable. See *State v. Aitken*, Clark App. No. 2008 CA 75, 2009-Ohio-3757, at ¶8. Rather, we are obliged to follow and apply the rules of law that the Supreme Court announces in its decisions. *In re Estate of Werts*, Montgomery App. No. 22824, 2009-Ohio-3120, at ¶23. "We may not vary from them, much less overrule them ***." Id.

{¶ 26} Based on the Supreme Court's authority, Taste's original sentence was void for failure to include mandatory post-release control, and Taste's arguments concerning his sentence are not barred by res judiciata.

{¶ 27} First, Taste asserts that his firearm specifications should have been merged into a single three-year mandatory sentence.

{¶ 28} If a defendant is convicted of a firearm specification pursuant to R.C. 2941.145, the sentencing court is required to impose a three-year mandatory prison term.

R.C. 2929.14(D)(1)(a)(ii). If multiple firearm specifications are involved, the court is not permitted to impose more than one three-year term if the underlying felonies were "committed as part of the same act or transaction." R.C. 2929.14(D)(1)(b). For purposes of the firearm specification statute, "transaction" means "a series of continuous acts bound together by time, space and purpose, and directed toward a single objective." (Citation omitted.) *State v. Wills*, 69 Ohio St.3d 690, 691, 1994-Ohio-417. "The test is not whether there was a separate animus for each offense; the appropriate consideration is whether the defendant 'had a common purpose in committing multiple crimes' and engaged in a 'single criminal adventure.'" *State v. Like*, Montgomery App. No. 21991, 2008-Ohio-1873, at ¶40, quoting *State v. Adams*, Mahoning App. No. 00CA211, 2006-Ohio-1761, at ¶54, ¶57. The focus of the inquiry is "on the defendant's overall criminal objectives." *State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311, at ¶45.

{¶ 29} According to the December 19, 1996, indictment, Taste committed an aggravated robbery on October 1, 1996 (Count 2), and, again, on October 24, 1996 (Count 1). Both of the aggravated robbery offenses in the December 1996 indictment included a firearm specification. The November 1996 indictment alleged that Taste committed two additional aggravated robberies on October 24, 1996 (Counts 4 and 5). On October 30, 1996, he also committed two aggravated robberies (Counts 8 and 9), shot and killed Forrest McKinney during the commission of a felony (Count 6), and stole an Oldsmobile automobile belonging to Fred Favor (Count 7). Taste allegedly had a firearm when he committed each of the aggravated robberies and the involuntary manslaughter.

{¶ 30} In its appellate brief, the State provides further details regarding these

offenses, stating that Taste robbed a Church's Fried Chicken restaurant on October 1, robbed Tawana Thomas on October 24, and robbed Jeff Pounds and Torii Sayles on October 24, but in a different location than Thomas. The State further indicates that, on October 30, Taste robbed a passenger in the vehicle that McKinney was driving. These additional details are not alleged in the indictments, nor are they found in the record.

{¶ 31} As stated above, the trial court chose to merge the firearm specifications in the two indictments, respectively, resulting in two three-year mandatory prison terms. We agree with Taste that this was error, although not for the reason he assigns. The record reflects that the firearm specifications for Counts 1 and 2 in the December 1996 indictment were dismissed as part of Taste's negotiated plea in January 1997. Accordingly, at the time of Taste's sentencing, the trial court could not merge those specifications and impose a three-year term of actual incarceration. Rather, the court was left with only the five specifications from the November 1996 indictment, which the court merged into a single specification. The court's imposition of a second three-year term for the specifications set forth in December 1996 indictment must be vacated.

{¶ 32} Second, Taste claims that the trial court erred in failing to specify the amount of restitution that he was required to pay.

{¶ 33} Under R.C. 2929.18(A)(1), a court may order a felony offender to pay, as part of the sentence, a financial sanction in the form of restitution by the offender to the victim of the crime "in an amount based on the victim's economic loss." R.C. 2929.18(A)(1) provides, in part:

{¶ 34} "If the court imposes restitution, at sentencing, the court shall determine the

amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount."

{¶ 35} "There must be sufficient clarity in the court's restitution order. *State of Ohio v. Brown*, 54 Ohio App.3d 160, 561 N.E.2d 995. Although it may not be necessary to identify each victim by name, particularly in cases with 'multiple victims,' at a minimum, the total amount must be journalized and a cogent record must exist as to whom said amount shall be distributed. Failure to do so constitutes plain error." *State v. DeLong*, Montgomery App. No. 20656, 2005-Ohio-1905, at ¶19.

{¶ 36} At the September 2008 sentencing hearing, the court informed Taste that he was required to pay any restitution "previously imposed." The original trial judge made no mention of restitution at the June 24, 1997, sentencing hearing and, like the September 15, 2008, judgment entry, the original June 27, 1997, judgment entry merely stated that Taste was ordered to make complete restitution "if applicable." There is nothing in the record to suggest that Taste, in fact, was ever ordered to pay restitution. In our view, the language in the judgment entries that Taste was ordered to make restitution "if applicable" is insufficient to constitute an order of restitution. At best, this language vaguely suggests that Taste

would be required to pay restitution if it had been ordered at the sentencing hearing, which it had not.

{¶ 37} Because the trial court's judgment did not, in fact, order Taste to pay restitution, the trial court did not err in failing to specify an amount of restitution in its entry, which it would have been required to do had restitution been ordered.

{¶ 38} The assignment of error is overruled.

{¶ 39} Parenthetically, we note that, had the language in the judgment entries constituted an order of restitution, it is questionable whether the trial court's judgment would have constituted a final, appealable order. Historically, if the trial court did not determine the amount of restitution at the sentencing hearing and failed to specify an amount in the judgment entry, we would have reversed the judgment and remanded for a determination of the amount of damages to be paid by the defendant. See, e.g., *State v. Howard*, Montgomery App. No. 20326, 2004-Ohio-6227, at ¶5 ("[W]e agree with Howard that the trial court committed plain error by failing to order restitution in a specific amount. *** We also agree with the State that the proper remedy is to remand the matter to the trial court for a hearing to determine the amount of restitution."); *DeLong*, supra; *State v. Collins*, Montgomery App. No. 21182, 2006-Ohio-3036, at ¶4. See, also, *State v. Davis*, Butler App. No. CA2005-01-008, 2005-Ohio-5292, at ¶3 ("In the absence of an order specifying the particular amount that is to be paid as restitution, the case should be remanded for further proceedings on the issue of restitution."). This approach continues to be used in several other districts. See *In re Boss B.*, Lucas App. No. L-07-1343, 2008-Ohio-2995; *State v. Downie*, Mahoning App. No. 07 MA 214, 2009-Ohio-4643, at ¶41-42.

{¶ 40} However, we recently held that a misdemeanor sentencing entry that referred the determination of the amount of restitution to the probation department was not a final, appealable order, because "[a] restitution order that fails to determine the amount of restitution owed does not affect a substantial right." *State v. Plassenthal*, Montgomery App. No. 22464, 2008-Ohio-5465, at ¶8. Rather, "[t]he order remains interlocutory until a specific amount of restitution owed is determined." Id.

{¶ 41} Other districts have likewise held that a judgment entry remains interlocutory when it fails to specify the amount of restitution or the method of payment. See, e.g., *State v. Baker*, Butler App. No. CA2007-06-152, 2008-Ohio-4426, at ¶43 (sentencing entry not final where restitution was ordered in an amount "to be determined on June 19, 2007"). For example, the Third District held that a sentencing entry that included an award of restitution to the victim's family for funeral and burial expenses of the decedent was not a final, appealable order when the judgment failed to specify the amount of restitution. *State v. Kuhn*, Defiance App. No. 4-05-23, 2006-Ohio-1145, at ¶8.

{¶ 42} Because Taste was not ordered to pay restitution, *Plassenthal* is not applicable to the situation before us, and we need not determine whether a sentencing entry that is silent as to the amount of ordered restitution is a final, appealable order.

III

{¶ 43} The judgment of the trial court will be vacated to the extent that it imposed a three-year term of actual incarceration for the firearm specification set forth in Counts 1 and 2 of the December 1996 indictment. In all other respects, the judgment will be affirmed.

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DONOVAN, P.J. and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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