

[Cite as *State v. Lee*, 2010-Ohio-3914.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
 Plaintiff-Appellee : C.A. CASE NO. 23516
 vs. : T.C. CASE NO. 07CRB16041
 MADONNA M. LEE : (Criminal Appeal from
 Defendant-Appellant : Municipal Court)

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O P I N I O N

Rendered on the 20th day of August, 2010.

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GRADY, J.:

{¶ 1} Defendant, Madonna Lee, was found guilty of assault,
 R.C. 2903.13(A), following a trial to the bench, by Judge Dennis
 J. Greaney of the Dayton Municipal Court. Sentencing was continued
 for a presentence investigation. (Dkt. 34).

{¶ 2} A sentencing hearing was ordered for July 1, 2008. (Dkt. 36). On that date the hearing was held before Colette Moorman, an acting judge, who explained that "Judge Greaney is unavailable today and I'm sitting by assignment on his behalf" (T. 1).

{¶ 3} Acting Judge Moorman imposed a jail sentence of one hundred eighty days, with one day's credit against that time and eighty nine days suspended. The sentence of ninety days remaining was ordered to commence on July 15, 2008. A one-year term of intensive probation was also imposed. (Dkt. 40).

{¶ 4} On September 2, 2008, Judge Greaney ordered Defendant Lee released from jail forthwith and continued on probation, subject to specified conditions. (Dkt. 44, attachment).

{¶ 5} On October 6, 2008, the State filed a motion asking the court to impose the remainder of the jail sentence that was imposed on July 1, 2008. (Dkt. 44). Defendant Lee opposed the motion. (Dkt. 47).

{¶ 6} On June 16, 2009, Judge Greaney imposed a jail sentence of forty-three days. (Dkt. 51). The order of commitment was ordered stayed pending appeal. (Dkt. 54). On June 24, 2009, Defendant Lee filed a notice of appeal from the final order of June 16, 2009. (Dkt. 55).

ASSIGNMENT OF ERROR

{¶ 7} "THE TRIAL COURT PROPERLY RETAINED JURISDICTION TO

RELEASE APPELLANT FROM JAIL, BECAUSE AT THE TIME OF SENTENCING, THE COURT SENTENCED APPELLANT TO COMMUNITY CONTROL SANCTIONS IN ADDITION TO A JAIL SENTENCE."

{¶ 8} "[A]bsent statutory authority, the trial court may not amend a defendant's sentence after the sentence has been carried into execution." *State v. Sharp*, Montgomery App. No. 21958, 2008-Ohio-1618, ¶5. Lee's ninety day jail sentence had been carried into execution beginning on July 16, 2008, when, on September 2, 2008, the court amended her sentence and ordered Lee released.

{¶ 9} Lee argues that R.C. 2929.25(B)(1) authorized the court to order her release. That section provides that "[t]he sentencing court retains jurisdiction over any offender whom it sentences for the duration of the sanction or sanctions imposed." The sanctions to which that section refers are community control sanctions which R.C. 2929.25(A)(1)(a) authorizes the court to impose in addition to a jail term. Any jail term the court imposes must be a "definite" term. R.C. 2929.24(A). R.C. 2929.25(B)(1) does not authorize the court to modify a definite jail term the court also imposed.

{¶ 10} The trial court erred when, on September 2, 2008, the court modified the ninety-day jail term that was imposed on July 1, 2008. The court's order of September 2, 2008, was a final order,

for which a right of appeal would lie. Instead, the State on October 6, 2008, asked the court to impose the unserved remainder of Lee's jail sentence.

{¶ 11} The State's motion of October 6, 2008, was in the nature of an application for reconsideration of a final order. The Rules of Criminal Procedure make no provision for such a motion. Because the motion could not lie, the court's order of June 16, 2009 from that motion, imposing a forty-three day jail sentence, is a nullity. *Pitts v. Ohio Department of Transportation* (1981), 67 Ohio St.3d 378.

{¶ 12} Because the trial court's order of June 16, 2009, is a nullity, the relief the court granted in that order constitutes plain error, which we may notice pursuant to Crim.R. 52(B) because Defendant's substantial rights were as a result affected. On that finding of plain error, we will reverse and vacate the order of June 16, 2009, imposing a forty-three day jail sentence, the order from which this appeal was taken.

BROGAN, J., concurs

FROELICH, J., concurring in judgment:

{¶ 13} The majority concludes that the June 16, 2009, order was a nullity since it was a reconsideration of the September 2, 2008, order, which although it was in error, was itself never

appealed. I concur that the June 16, order was a nullity, but disagree that the September 2, 2008, order was in error.

{¶ 14} On May 2, 2008, Judge Dennis Greaney of the Dayton Municipal Court found the Appellant guilty of assault and referred the matter for a presentence investigation.

{¶ 15} On July 2, 2008, a "sentencing entry" was signed by "Judge Moorman" which stated that the Appellant was sentenced to 180 days in jail (one day credit), but with 89 days suspended and the remaining 90 days to commence on July 15. Further, the Appellant was placed on supervised probation for one year, and ordered to pay a fine and costs. A "commitment order" for the 90 days was also signed by "Judge Moorman" and filed on July 2. Before the hearing, "Judge Moorman" stated that she was "sitting by assignment on [Judge Greaney's] behalf"; however, Appellee's counsel conceded at oral argument that there is no order or entry appointing or assigning anyone to sit on behalf of Judge Greaney for that day. Therefore, the orders and entries were not final since there is no record they were ever adopted by a judge.

{¶ 16} On September 2, Judge Greaney ordered Appellant "released from jail . . . and continued on probation" under specific terms and conditions.

{¶ 17} On October 6, 2008, the Appellee filed a motion to impose sentence, arguing that once jail was imposed (on July 2) that a

municipal court has no jurisdiction to modify the sentence and release a defendant prior to completion of the imposed jail sentence, citing *State v. Sharpe*, Montgomery App. No. 21958, 2008-Ohio-1618.

{¶ 18} The only final order was Judge Greaney's of September 2, when he "continued" (actually, "placed") the Appellant on probation. The June 16, 2009, order was, if anything, a reconsideration of the judge's September 2, order and, as such, was a nullity.

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