[Cite as *State v. Rainwater*, 2011-Ohio-872.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff-Appellee	**:**	**C.A. CASE NO. 24136**
vs.	**:**	**T.C. CASE NO. 08CRB17978**
ZACHARY R. RAINWATER	**:**	**(Criminal Appeal from Municipal Court)**
Defendant-Appellant	**:**	

. . . . . .

O P I N I O N

Rendered on the 25th day of February, 2011.

. . . . . .

John Danish, City Attorney; Stephanie L. Cook, Chief Prosecutor; Ebony N. Wreh, Atty. Reg. No.0080629, Asst. City Prosecutor, 335 W. Third Street, Rm. 372, Dayton, OH 45402
Attorneys for Plaintiff-Appellee

Thaddeus A. Hoffmeister, Atty. Reg. No.0081977, University of Dayton Law Clinic, 300 College Park, Dayton, OH 45469
Attorney for Defendant-Appellant

. . . . . .

GRADY, P.J.:

{¶ 1} Defendant Zachary R. Rainwater, was convicted following a bench trial of four misdemeanor offenses. One of those offenses was domestic violence, R.C. 2915.25(A)(1), a first degree misdemeanor.

{¶ 2} Defendant was sentenced on June 2, 2010. When it pronounced Defendant's sentence from the bench for the first degree domestic violence offense, the court stated:

{¶ 3} "OK. ON THE DOMESTIC VIOLENCE MISDEMEANOR ONE DOMESTIC VIOLENCE SIR THE COURTS GOING TO SENTENCE YOU TO A HUNDRED EIGHTY DAYS. THE COURT WILL SUSPEND A HUNDRED AND FIFTY OF THAT, TWO HUNDRED DOLLAR FINE, FINE SUSPENDED." (T. 87-88).

{¶ 4} The court also imposed but suspended a 180-day jail sentence for an aggravated menacing offense, and imposed 180 days for an assault offense, of which the court suspended 150 days, leaving thirty days to be served. The court imposed a thirty day jail sentence for a fourth degree domestic violence offense. The two thirty-day jail terms were to be served concurrent with the term remaining for the first-degree domestic violence offense.

{¶ 5} The court journalized its judgment of conviction for the first degree domestic violence offense on the same date, June 2, 2010, at 4:13 p.m. (Dkt. 35). With respect to jail time that as imposed, the figure "180" is scribbled-over and the figure "150" appears. The figure "150" that appeared in the box for suspended jail time is likewise scribbled-over, with no other figure replacing it.

{¶ 6} A commitment order was also journalized by the court on June 2, 2010, at 4:13 p.m. (Dkt. 39). It indicates that the

term of commitment is "150 days," with no time suspended, and that the term is to be commenced forthwith.

{¶ 7} Defendant sent a letter to the trial court on June 17, 2010. (Dkt. 48). Defendant pointed out the discrepancy between the sentence the court had orally pronounced for the first degree domestic violence offense, 180-days, of which 150 were suspended, and the 150-day sentence the court imposed in its journalized judgment of conviction.

{¶ 8} On June 29, 2010, the court entered a written decision with respect to Defendant's letter. (Dkt. 41). The court stated that the journalized "Entries reflect the Court's intention and recollection that Defendant was to serve 150 days on this Case."

{¶ 9} Defendant filed a notice of appeal on July 1, 2010. (Dkt. 42). On October 28, 2010, on Defendant's motion, we stayed further execution of Defendant's jail sentence and ordered him released from jail, forthwith, pending our determination of his appeal. Defendant had by then served 149 days in jail.

ASSIGNMENT OF ERROR

{¶ 10} "THE TRIAL COURT ERRED BY NOT GIVING APPELLANT THE OPPORTUNITY TO DEMONSTRATE A CLERICAL ERROR IN THE COURT'S SENTENCING ENTRY, OR ALTERNATIVELY BY NOT CORRECTING THE CLERICAL ERROR NUNC PRO TUNC, SINCE THE SENTENCING HEARING TRANSCRIPT CONFLICTED WITH THE SENTENCING ENTRY AND APPELLANT NOTIFIED THE

TRIAL COURT OF THE ERROR AND REQUESTED CORRECTIVE RELIEF."

{¶ 11} The court treated Defendant's letter as a form of motion and ruled on it accordingly. Defendant argues that the court abused its discretion when it denied his motion without a hearing. Defendant argues that he is entitled to a hearing in order to demonstrate that the judgment of conviction contains a clerical error and that the judgment should be corrected by the court pursuant to Crim.R. 36, to conform to the court's oral pronouncement. Crim.R. 36 states:

{¶ 12} "Clerical mistakes in judgment, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time."

{¶ 13} Crim.R. 36, like its civil analogue, Civ.R. 60(A), permits the court to exercise its inherent power to enter an order nunc pro tunc, "now for then," to correct a clerical error in the execution of a ministerial act. *Helle v. Public Utilities Commission* (1928), 118 Ohio St.435. 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." *State v. Miller*, __ Ohio St.3d ___, 2010-Ohio-5705, ¶14, quoting *Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795.

{¶ 14} The trial court found that its judgment of conviction reflects the court's intention to impose a sentence of 150 days

for the first degree domestic violence offense. The court thus considered the grounds for correction of its judgment offered by Crim.R. 36, and rejected them. On its face, the court's order fails to demonstrate any error of law in the court's application of Crim.R. 36.

{¶ 15} Defendant relies on *State v. Haley*, Greene App. No. 2001-CA-110, 2002-Ohio-389. In that case a similar discrepancy occurred in a sentence imposed by a judge who subsequently died. We held that, on the showing of a discrepancy, a hearing was required to determine the deceased judge's intention when he imposed the sentence. The same consideration does not apply in the present case. The judge who imposed the sentence is alive and capable of determining his own intentions.

{¶ 16} Defendant argues that he was entitled to a hearing to demonstrate to the court what its intentions were when it orally pronounced his sentence from the bench. Defendant contends that the court did not consider its oral pronouncement because the court made no mention of it in the court's written decision. We do not believe the written decision supports that interpretation. Implicit in the court's stated view is that a discrepancy between its oral pronouncement and its journalized judgment of conviction exists. The court merely found that, notwithstanding that, the judgment correctly reflects what the court's intentions were.

{¶ 17} A court of record speaks only through its journal entries. *Hairston v. Seidner,* 88 Ohio St.3d 57, 2000-Ohio-271. A journal entry in a criminal case is subject to correction pursuant to Crim.R. 36 when it is inconsistent with the court's intention in the matter concerned. A journal entry is not subject to correction because it is inconsistent with the court's prior oral pronouncement, so long as the journal entry is consistent with the court's intention when it made the oral pronouncement. The court so found in the present case. We find no abuse of discretion.

{¶ 18} The assignment of error is overruled. The judgment of the trial court will be affirmed.

FAIN, J. And DONOVAN, J., concur.

Copies mailed to:

Ebony N. Wreh, Esq.
Thaddeus A. Hoffmeister, Esq.
Hon. Carl Sims Henderson