[Cite as *State v. Steigerwald*, 2011-Ohio-1398.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Zachary Steigerwald

Appellant

Court of Appeals No. L-10-1104
L-10-1105

Trial Court No. CR0200902133
CR0200601108

DECISION AND JUDGMENT

Decided: March 25, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Frank H. Spryszak, Assistant Prosecuting Attorney, for appellee.

Diana L. Bittner, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Zachary Steigerwald, appeals from judgment entries of resentencing that were entered in two separate cases by the Lucas County Court of

Common Pleas. For the reasons that follow, we affirm in part, and reverse in part, the judgments of the trial court.

{¶ 2} In case No. CR 06-1108, appellant was found guilty of complicity to commit burglary, a felony of the second degree, on May 22, 2006. For this offense, appellant was sentenced to serve two years in the Ohio Department of Rehabilitation and Corrections.

{¶ 3} Appellant subsequently filed a request for judicial release. The trial court granted the request on December 18, 2006, and imposed upon appellant a term of three years of community control. Appellant was found in violation of the terms of his community control on four separate occasions between August 2007 and November 2009.

{¶ 4} On November 24, 2009, appellant entered a plea of guilty to a charge of forgery, a felony of the fifth degree, in case No. CR 09-2133. The forgery offense not only provided the basis for the conviction in CR 09-2133, it also served as the basis for appellant's fourth probation violation in CR 06-1108.

{¶ 5} At the plea hearing, the trial court indicated to appellant that if he were sentenced to the penitentiary in CR 09-2133, it was possible that, upon his release, he could be required to serve a period of discretionary postrelease control of up to three years. In addition, the trial court informed appellant of his right to have a hearing on the

community control violation in CR 06-1108 and of the potential penalties for being found in violation. Appellant gave up his right to a hearing and admitted to the violation.

{¶ 6} On December 8, 2009, appellant appeared with counsel for sentencing in CR 09-2133 and for mitigation on the probation violation in CR 06-1108. Appellant was sentenced in CR 06-1108 to serve two years in the Ohio Department of Rehabilitation and Corrections. In CR 09-2133, he was sentenced to a term of six months in prison, to be served consecutively to the sentence in CR 06-1108. The court advised appellant that, upon his release from the penitentiary, he would be subject to three years of discretionary postrelease control.

{¶ 7} On March 9, 2010, appellant appeared before the court, via video conference, for resentencing in both CR 06-1108 and CR 09-2133, in accordance with sentencing requirements that were set forth in *State v. Bloomer*, 122 Ohio St. 3d 200, 2009-Ohio-2462, and R.C. 2929.191. During that hearing, the trial court acknowledged that the postrelease control portions of appellant's sentences had not been properly journalized and were, therefore, void. After announcing its intention to sentence appellant de novo in both cases, the trial court proceeded to impose the same prison terms that were imposed at the December 8, 2009 hearing, with further orders subjecting appellant to three years of mandatory postrelease control in CR 06-1108 and three years of discretionary postrelease control in CR 09-2133.

{¶ 8} On March 12, 2010, the trial court's judgment entry in CR 06-1108 was filed, but it was neither signed by the judge nor journalized. An identical copy of the March 12, 2010 judgment entry, except this time signed by the judge, was filed on March 15, 2010, and journalized on March 18, 2010.

{¶ 9} The court's judgment entry in CR 09-2133 was filed on March 12, 2010, and journalized on March 15, 2010.

{¶ 10} Both of the journalized judgment entries contain the erroneous statement that the matters had come before the court on "this 9th day of March, 2009."

{¶ 11} Appellant timely appealed from both judgment entries, raising the following assignments of error:

{¶ 12} I. "Errors in the judgment entries of resentencing in both cases require reversal and remand."

{¶ 13} II. "Defendant-appellant's original sentence in CR-2006-01108 should stand, and defendant-appellant should not be subject to three years mandatory post release control."

{¶ 14} We begin with an examination of appellant's first assignment of error, wherein he asserts that errors in the judgment entries of resentencing in both cases require reversal and remand. Specifically, appellant argues that both cases must be remanded to the trial court in order for the trial court to: (1) file a new journal entry in CR 06-1108 that is in compliance with the law, because not one, but two, distinct judgment entries

were previously filed in the case in connection with appellant's resentencing hearing, and (2) correct the clerical error contained in the judgment entries in both CR 06-1108 and CR 09-2133 indicating that the cases came before the court for resentencing on "this 9th day of March, 2009."

{¶ 15} Ohio law is clear that "[c]ourts of appeals have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district * * *." Section 3(B)(2), Article IV, Ohio Constitution. Appellate courts have no jurisdiction over orders that are not final and appealable. *State v. Baker* (2008), 119 Ohio St.3d 197, 2008-Ohio-3330, ¶ 6; see, also, Section 3(B)(2), Article IV, Ohio Constitution.

{¶ 16} 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. *Baker*, supra, at ¶ 18.[1]

{¶ 17} Appellant, arguing that the matter in CR 06-1108 must be remanded for correction of the judgment entry, cites *Baker* for the proposition that multiple documents cannot be read together to form a final appealable order. We disagree with appellant's analysis.

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[1]To be an appealable order, "the judgment of conviction need not necessarily include the plea entered at arraignment, but [] it must include the sentence and the means of conviction, whether by plea, verdict, or finding by the court * * *." Baker, supra, at ¶ 19.

{¶ 18} The judgment entry filed on March 12, 2010, clearly did not constitute a final appealable order, but only because it did not contain the judge's signature and, further, was never journalized. This is not, as appellant suggests, a circumstance analogous to the one referenced in *Baker*, where two existing judgment entries had to be read together in order to form a final appealable order.

{¶ 19} The judgment entry filed by the trial court on March 15, 2010, merely corrects the errors contained in the March 12, 2010 judgment entry, and, as such, amounts to a revised entry that both constitutes a final appealable order and is in the nature of -- and has the effect of --a nunc pro tunc judgment entry.

{¶ 20} As stated by the First District Court of Appeals in *State v. Hodges* (June 22, 2001), 1st Dist. No. C-990516:

{¶ 21} "A nunc pro tunc order may be issued by a trial court, as an exercise of its inherent power, to make its record speak the truth. It is used to record that which the trial court did, but which has not been recorded. It is an order issued now, which has the same legal force and effect as if it had been issued at an earlier time, when it ought to have been issued. Thus the office of a nunc pro tunc order is limited to memorializing what the trial court actually did at an earlier point in time. * * * A nunc pro tunc order cannot be used to supply omitted action, or to indicate what the court might or should have decided, or what the trial court intended to decide. Its proper use is limited to what the trial court actually did decide. * * * That, of course, may include the addition of matters

omitted from the record by inadvertence or mistake of action taken. * * * Therefore, a nunc pro tunc order is a vehicle used to correct an order issued which fails to reflect the trial court's true action." Id. at 2.

{¶ 22} Because the revised judgment entry in CR 06-1108 merely corrects the deficiencies of the former, we find that the revised judgment entry, which is in the nature of a nunc pro tunc order, is in compliance with the law and does not require remand to the trial court due to the lack of a final and appealable order.

{¶ 23} Next, we turn to appellant's argument that remand is required in both cases due to the clerical error contained in the revised CR 06-1108 judgment entry and in the CR 09-2133 judgment entry. Appellant correctly points out that each judgment entry document indicates that the resentencing occurred "this 9th day of March, 2009," although the resentencing actually took place a year later, on March 9, 2010. Both parties agree that the subject cases should be remanded to the trial court for the purpose of correcting this clerical error. We agree with this conclusion, and find that such can be accomplished with a nunc pro tunc judgment entry.

{¶ 24} Accordingly, appellant's first assignment of error is found well-taken, but only with respect to the clerical error contained in the two judgment entries.

{¶ 25} Appellant argues in his second assignment of error that because his original sentence in CR 06-1108 did not include any period of postrelease control, he should not now be subject to three years of mandatory postrelease control.

{¶ 26} Per the Supreme Court of Ohio's recent decision in *State v. Fischer*, --- Ohio St.3d ---, 2010-Ohio-6238:

{¶ 27} "1. A sentence that does not include the statutorily mandated term of postrelease control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack.

{¶ 28} "2. The new sentencing hearing to which an offender is entitled under *State v. Bezak* is limited to proper imposition of postrelease control. (*State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, syllabus, modified.)" Id. at first and second paragraphs of the syllabus.

{¶ 29} The parties do not dispute that, under Ohio law, an offender convicted of a second degree felony that is not a felony sex offense is subject to a mandatory three-year period of postrelease control. R.C. 2967.28(B)(2). Applying the principles set forth in *Fischer* to the instant case, we find that the trial court acted appropriately when, in March 2010, following a resentencing hearing, it imposed upon appellant -- who was convicted of a second degree felony that is not a sex offense -- a three-year period of mandatory postrelease control. Accordingly, appellant's second assignment of error is found not well-taken.

{¶ 30} For all of the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed in part and reversed in part. This case is remanded to the trial

court for it to issue a nunc pro tunc entry consistent with our decision. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE