[Cite as *State v. Waxler*, 2012-Ohio-3619.]

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

State of Ohio — Court of Appeals No. L-11-1101

Appellee — Trial Court No. CR0201002858

v.

David Waxler — **DECISION AND JUDGMENT**

Appellant — Decided: August 10, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Kathryn J. T. Sandretto, Assistant Prosecuting Attorney, for appellee.

John F. Potts, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals his sentence on multiple counts of drug possession, trafficking and receiving stolen property rendered following a guilty finding on a no contest plea in the Lucas County Court of Common Pleas. Because we find the imposition of consecutive sentences did not constitute an abuse of discretion, we affirm

that portion of the judgment of conviction. An erroneous finding that appellant "caused or threatened physical harm to a person" in the judgment of conviction, however, is substantive and not amenable to correction pursuant to Crim.R. 36. For that reason, the sentencing judgment must be vacated and the matter remanded for resentencing.

{¶ 2} On October 15, 2010, a Lucas County Grand Jury handed down a 12 count indictment charging appellant, David Waxler, with five counts of cocaine possession, five counts of trafficking in cocaine and two counts of receiving stolen property. The charges were the result of a series of controlled purchases of crack cocaine and stolen firearms by a confidential informant and an agent for the United States Bureau of Alcohol, Tobacco, Firearms and Explosives from appellant between April 2 and May 27, 2010.

{¶ 3} Appellant was arrested and entered an initial plea of not guilty to all counts. Following negotiations with prosecutors, however, appellant withdrew his not guilty plea and entered a no contest plea to two counts of cocaine possession, two counts of trafficking in cocaine and a single count of receiving stolen property. Following a hearing, the trial court accepted the plea, found appellant guilty and ordered a presentence report prior to sentencing.

{¶ 4} At sentencing, the court sentenced appellant to a three-year term of imprisonment for one count of third degree trafficking, three years for third degree possession and 15 months for fourth degree receiving stolen property. These terms were to be served concurrently, but consecutive to the sentences for the other two counts. On the remaining counts, the court imposed a five-year term for second degree cocaine

trafficking and five years for second degree cocaine possession, to be served consecutively, for an aggregate total of 13 years imprisonment. The court also imposed a mandatory $25,000 fine.

{¶ 5} In the court's judgment of conviction, there are two anomalies with respect to the proceedings. The court inaccurately characterized appellant's plea as "a plea of guilty pursuant to *North Carolina v. Alford*." The entry also states, "[t]he Court further finds that defendant caused or threatened physical harm to a person." No such assertion appears in the indictment, the pleadings or in the state's recitation of facts during the plea colloquy.

{¶ 6} From this judgment, appellant now brings this appeal. Appellant sets forth the following two assignments of error:

I. It Constituted an Abuse of Discretion to Impose Three Consecutive Sentences upon Defendant

II. It Constituted an Abuse of Discretion to Find That Appellant "Caused or Threatened Physical Harm to a Person"

I. Consecutive Sentences

{¶ 7} In his first assignment of error, appellant insists that the trial court abused its discretion when it sentenced him to consecutive sentences for the two second degree felonies and the concurrent lesser degree felonies. Appellant insists he is a 21 year old with an eighth grade education, has no prior felonies and what he maintains is "an extremely minimal misdemeanor record." According to appellant he has accepted

responsibility for his crimes and indicated that his motive was to provide support for his two children.

{¶ 8} Appellant objects to the trial court characterization of him as "a significant drug dealer" and "a very dangerous person" for his sale of stolen firearms. According to appellant, the court placed "considerable weight" on charges of cocaine and heroin possession and trafficking charges in another indictment that had not yet been adjudicated. Such reliance, appellant contends, is improper and constitutes an abuse of the court's discretion.

{¶ 9} Sentencing courts are statutorily mandated to consider the overriding principles of criminal sentencing: to protect the public from future crimes by the offender and to punish the offender. R.C. 2929.11(A). Additionally, the court is directed to take into account the seriousness of the defendant's conduct and the likelihood of his or her recidivism. R.C. 2929.12. In imposing a felony sentence, the court has full discretion to impose a prison sentence within the statutory range. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus. Absent an abuse of that discretion, the court's sentencing judgment must be sustained. An abuse of discretion is more than a mistake of law or a lapse of judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 10} A sentencing court may consider other charges, even if they did not result in conviction. *State v. Williams*, 2d Dist. No. 19026T, 2002-Ohio-2908, ¶ 8, *citing State*

v. Wiles, 59 Ohio St.3d 71, 78, 571 N.E.2d 97 (1991). Appellant relies on two cases from the Third District, *State v. Blake*, 3d Dist. No. 14-03-33, 2004-Ohio-1952, and *State v Montgomery*, 3d Dist. Nos. 3-08-10, 3-08-11, 2008-Ohio-6182, for the proposition that a sentencing judge should not consider allegations in a separate indictment as an aggravating factor to justify imposition of consecutive sentences.

{¶ 11} In *Blake*, at ¶ 6, a sentencing court expressly stated its belief that the defendant had committed offenses that had been voluntarily dismissed in a plea bargain. The court then based its decision to impose the maximum sentence on that belief. The appellate court reversed, stating that "[a]lthough all of these things can be considered to determine likelihood to recidivate, they cannot be the sole basis for imposing the maximum sentence." *Id.* In *Montgomery*, the sentencing court made similar statements, but the appellate court reached a different result, affirming the sentence because consideration of uncharged offenses was not the sole reason for the sentence imposed. *Montgomery*, at ¶ 13. "[T]he trial court also stated several grounds for the imposition of its sentence, including sentencing factors under R.C. 2929.11(A) and R.C. 2929.12(A) * * *." *Id.* at ¶ 15.

{¶ 12} These cases, of course, have only persuasive authority in this district. Perhaps more importantly, they do not support appellant's proposition of law. Although the trial court noted appellant's later indictment for more possession and trafficking charges, the court also stated clearly at both the sentencing hearing and in the sentencing judgment that it had considered the record, oral statements and the presentence report "as

well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12." Thus unadjudicated allegations were not the sole basis for the court imposing consecutive sentences. Accordingly, appellant's first assignment of error is not well-taken.

II. Erroneous Findings

{¶ 13} In his remaining assignment of error, appellant maintains that the trial court's statement in its sentencing judgment that found "the defendant caused or threatened physical harm to a person" has no basis in fact and requires that appellant's sentence be vacated and the matter remanded for resentencing. The state agrees that the finding is unsupported in the record, but contends that the mistake is a clerical error which may be remedied by a nunc pro tunc entry.

{¶ 14} We note, sua sponte, that the judgment of conviction also mischaracterized appellant's plea as being guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) (guilty plea to obtain benefit of plea bargain, while maintaining innocence), when both the written plea agreement and the plea colloquy indicate a no contest plea. This should be corrected in the final judgment entry.

{¶ 15} Crim.R. 36 provides that "[c]lerical mistakes in judgments, 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."

> A clerical error or mistake refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a

> legal decision or judgment. Although courts possess inherent authority to correct clerical errors in judgment entries so that the record speaks the truth, 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. (Citations omitted.) State v. Miller, 127 Ohio St.3d 407, 2010-Ohio-5705, 940 N.E.2d 924, ¶ 15.

{¶ 16} A finding in a judgment of conviction that a defendant perpetrated or threatened to perpetrate physical harm in the commission of a crime is a substantive legal decision and not merely a mechanical part of the judgment. As such, the finding is not amenable to correction through a nunc pro tunc entry. Since the finding is wholly unsupported in the record, its entry is erroneous and the sentencing entry must be vacated and the matter remanded for resentencing. Accordingly, appellant's second assignment of error is well-taken.

{¶ 17} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed. This matter is remanded to said court for resentencing. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

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

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE