

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

State of Ohio

Court of Appeals No. WD-11-077

Appellee

Trial Court No. 2005CR0134

v.

Cory Foster

**DECISION AND JUDGMENT**

Appellant

Decided: December 21, 2012

\* \* \* \* \*

Paul A. Dobson, Wood County Prosecuting Attorney,  
Gwen Howe-Gebbers, Chief Assistant Prosecuting Attorney,  
and David E. Romaker, Jr., Assistant Prosecuting Attorney,  
for appellee.

Cory Foster, pro se.

\* \* \* \* \*

**OSOWIK, J.**

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas, which denied appellant's motion to withdraw guilty plea. The motion was filed six years after appellant was sentenced. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Cory Foster, sets forth the following two assignments of error:

I: THE TRIAL COURT IMPOSED A SENTENCE UPON MR. FOSTER TO-WIT A TWO-YEAR TERM OF INCARCERATION FOR A FELONY OF THE FIRST DEGREE. THE TRIAL COURT HAS IMPOSED A SENTENCE THAT THEY DID NOT HAVE LEGAL AUTHORITY TO IMPOSE. [SIC] VIOLATING HIS SIXTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION ARTICLE 4, SECTION 4, OF THE OHIO CONSTITUTION.

II: TRIAL COURT ERRORED [SIC] IN DENYING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA WHEN THE SENTENCE IS VOID AND THE JUDGMENT ENTRY HAS PREJUDICED THE APPELLANT FOR SUCH A DURATION THAT IT DENIES CREDIT FOR GOOD BEHAVIOR AND POSSIBLE EARLY RELEASE OPTIONS PURSUANT TO APPELLANT'S UNDERSTANDING OF THE PLEA AGREEMENT. [SIC] VIOLATING HIS SIXTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION ARTICLE 4, SECTION 4 OF THE OHIO CONSTITUTION.

{¶ 3} The following undisputed facts are relevant to this appeal. On March 16, 2005, appellant was indicted on three counts of drug trafficking, in violation of R.C. 2925.03, and one count of engaging, in violation of R.C. 2923.32. On May 6, 2005,

pursuant to a negotiated plea agreement, appellant pled guilty to one count of trafficking and the single count of engaging. In exchange, the remaining counts were dismissed.

{¶ 4} The record reflects that the plea agreement was set forth in detail in writing, explained to appellant, reviewed by appellant, and subsequently executed by appellant. In conformity with the express terms of the plea agreement, appellant was sentenced to the mandatory term of incarceration of seven years on Count 1, the mandatory term of incarceration of 10 years on Count 2, plus an additional two-year term necessitated by appellant's major drug offender specification ("MDO"). The sentences were ordered to be served on a concurrent basis, for an aggregate total term of incarceration of 12 years.

{¶ 5} In December 2007, appellant's motion for leave to file a delayed appeal was denied by this court. In 2008, appellant next filed an improper notice of appeal which was likewise denied by this court. On November 7, 2011, appellant filed a motion to vacate his sentence and to withdraw his guilty plea pursuant to Crim.R. 32. In support of the motion, appellant relied upon the trial court incorrectly attributing in the original written sentencing entry the ten-year term of incarceration to the MDO specification and the corollary two-year term of incarceration to the underlying felony, the reverse order of those sentencing components. Thus, while this error did not change the term of incarceration, it attributed two of the sentencing components in opposite order.

{¶ 6} On November 29, 2011, the trial court issued a nunc pro tunc entry correctly attributing the ten-year portion of the sentence to the felony and the corresponding two-year sentence to the MDO specification. In conjunction with this correction, the trial

court simultaneously held that reversing the order of the two sentencing components did not render the sentence void. The trial court denied appellant's motion to vacate and withdraw his guilty plea. This appeal ensued.

{¶ 7} Appellant's assignments of error are both rooted in the common premise that the underlying sentence was void. As such, they will be addressed simultaneously. It is well-established by the Ohio Supreme Court that nunc pro tunc judgment entries necessitated to correct clerical errors in a final judgment entry do not constitute judgments from which a new appeal may be taken. *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142.

{¶ 8} We have carefully reviewed the record of evidence. The record clearly reflects that the sole error in this matter was limited to a single clerical error in the written sentencing entry. The sentencing entry inverted two of the sentencing terms, attributing them in the opposite order. The substantive terms of the voluntary plea agreement and corresponding sentence were not altered or compromised. The sentence itself was not modified by the error. The trial court properly issued a nunc pro tunc entry restating appellant's sentence in the correct order. Upon due consideration, we find that the initial allocation of sentencing components in the reverse order in the sentencing entry was clerical in nature and did not serve to alter and arguably void the sentence. Wherefore, we find appellant's assignments of error not well-taken.

{¶ 9} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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, P.J.

\_\_\_\_\_  
JUDGE

Thomas J. Osowik, J.  
CONCUR.

\_\_\_\_\_  
JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
---