[Cite as *State v. Waters*, 2005-Ohio-5137.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85691

STATE OF OHIO	:	
	:	
Plaintiff-appellee	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
MICHAEL WATERS	:	
	:	
Defendant-appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	SEPTEMBER 29, 2005
CHARACTER OF PROCEEDING	:	Criminal appeal from Cuyahoga County Court of Common Pleas Case No. CR-455093
JUDGMENT	:	DISMISSED.
DATE OF JOURNALIZATION	:	
APPEARANCES:		
For plaintiff-appellee	:	WILLIAM D. MASON Cuyahoga County Prosecutor SCOTT ZARZYCKI, Assistant Justice Center, Courts Tower 1200 Ontario Street Cleveland, Ohio 44113
For defendant-appellant	:	JEROME EMOFF Attorney at Law 55 Public Square #1300 Cleveland, OH 44113

KENNETH A. ROCCO, J.:

{¶1} After a trial to the bench, defendant-appellant Michael Waters appeals from his convictions on two counts of felonious assault and one count of possession of criminal tools.

{¶2} Waters argues that his convictions are unsupported by the weight of the evidence; he contends the evidence supports, at most, the crime of aggravated assault, which the trial court failed to consider. Waters additionally argues that testimony indicating he failed to provide a statement to the detective who investigated the incident compromised his right to a fair trial.

{¶3} Following a review of the record, this court cannot address the merits of Waters' arguments. The record reflects the trial court committed errors which deprive this court of jurisdiction to consider the appeal.

{¶4} The appeal must be dismissed because, although the journal entry is to the contrary, the record reflects the trial court found Waters guilty of only two counts of a three count indictment, and because the trial court failed to pronounce sentence on each count in accordance with Crim.R. 32(C).

{¶5} Waters' conviction results from an altercation that occurred at a Rocky River apartment complex in the early morning hours of July 10, 2004. Waters earlier had argued with the victim, James Sweeney; Sweeney testified that approximately forty-five minutes after the argument, he exited the front door of the building, and, immediately, Waters, who was standing just outside, struck him in the forehead with a glass beer mug. Sweeney sustained a skin laceration that required several sutures to close.

{¶6} Waters subsequently was indicted on three counts. Count one charged him with felonious assault upon Sweeney in violation of R.C. 2903.11(A)(1), count two charged him with felonious assault upon Sweeney in violation of R.C. 2903.11(A)(2), and count three charged him with possession of criminal tools, to wit: a glass beer mug, in violation of R.C. 2923.24.

{¶7} Waters eventually signed a waiver of his right to a jury trial. After listening to the testimony of the state's witnesses, the defense witnesses, and Waters himself, the trial court stated it had "considered all the evidence carefully and [was] going to find the defendant guilty of both counts of the indictment." (Emphasis added.) The trial court at that time referred Waters for a presentence report.

{¶8} When Waters' case was called for sentencing, the trial court pronounced sentence in the following terms:

{¶9} "***I made my decision based on the testimony which I heard in this court.

{¶10} "The minimum sentence is three years which I will impose but I will suspend imposition of that sentence. You will then have the three years of community-control sanctions***.

{¶11} "You must do 100 hours of community work service. You must continue with your outpatient alcohol treatment which will be monitored and controlled by the probation department.

{¶12} "You have to maintain full-time verifiable employment, attend anger management counseling, and have no contact with the victim in this case. ***

{¶13} "The problem you have here is if you violate, the minimum sentence is three

years. *** ”

{¶14} In pertinent part, the trial court’s journal entry of sentence states: “the court returned a verdict of guilty of felonious assault/ 2903.11-F2 as charged in count(s) 1,2,” and further, “returned a verdict of guilty of possessing criminal tools/2923.24-F5 as charged in count(s) 3. *** The court finds that a community control sanction will adequately protect the public and will not demean the seriousness of the offense. It is therefore ordered that the defendant is sentenced to 3 year(s) of community control***.” The entry additionally indicates Waters’ failure to comply with the conditions imposed “may result in more restrictive sanctions or a prison term of 3 year(s) as provided by law.”

{¶15} Waters has filed a timely appeal of his convictions, and presents two assignments of error, as set forth previously. This court, however, cannot consider them.

{¶16} Crim.R. 32(C) provides that a “judgment of conviction shall set forth***the verdict or findings, and the sentence.” Thus, absent either a specific finding of guilt or the imposition of sentence on each and every offense for which a defendant is convicted, no final appealable order exists. *State v. Garner*, Trumbull App. No. 2002-T-0025, 2003-Ohio-5222 at ¶7, citing *State v. Collins* (Oct. 18, 2003), Cuyahoga App. No. 79064. Without a final appealable order, this court lacks jurisdiction to hear this appeal.

{¶17} In *Garner* at ¶8, relying on this court’s opinion in *Collins*, the Eleventh District rejected the argument that “when a court sentences an offender to serve community control sanctions, the court cannot bifurcate the sentences if there is more than one count.”

{¶18} Instead, the opinion in *Garner* noted at ¶9 that “[n]owhere in R.C. 2929.15,

which governs community control sanctions, does it state that if a court chooses to sentence a person to something other than a prison term the court may impose only a single term, regardless of the number of charges." Such a procedure "not only leaves one of the offenses without a sentence, but it also prevents th[e appellate] court from determining to which offense the given sentence actually applies. As a result, there is no final appealable [order] for the appellate] court to review." Id., at ¶10.

{¶19} Needless to say, this court adheres to the same analysis. Thus, in *State v. Hicks*, Cuyahoga App. No. 84418, 2004-Ohio-6113, at ¶6, this court reminded the trial court that pursuant to Crim.R. 32(C), the duty to set forth the verdict or finding and the sentence for each and every criminal charge is "mandatory;" therefore, an order that "fails to impose sentence for an offense for which the offender was found guilty not only violates this rule, but renders the resultant order non-final and not immediately appealable."

{¶20} As a reminder, this court further notes that, at the conclusion of trial, by failing to pronounce on the record its findings as to all three counts of the indictment in the defendant's presence, the trial court violated Crim.R. 43(A). See, e.g., *State v. Henson*, Champaign App. No. 2002 CA 21, 2003-Ohio-4426, ¶7-9.

{¶21} The journal entry of Waters' sentence is defective, since it neither states which conviction is subject to community control sanctions, nor imposes a sentence for each conviction. It, therefore, does not constitute a final appealable order. *State v. Hicks*, supra.

{¶22} Consequently, this appeal is dismissed.

This cause is dismissed.

It is, therefore, considered that said appellee recover of said appellant costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO
JUDGE

ANN DYKE, P.J. CONCURS

CHRISTINE T. McMONAGLE, J. DISSENTS
(SEE ATTACHED DISSENTING OPINION)

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85691

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	D I S S E N T I N G
	:	
v.	:	O P I N I O N
	:	
MICHAEL WATERS,	:	
	:	
Defendant-Appellant	:	

DATE: SEPTEMBER 29, 2005

CHRISTINE T. McMONAGLE, J., DISSENTING:

{¶23} I dissent. The majority dismisses this appeal as not representing a final appealable order on essentially two grounds: first, because the trial court allegedly failed to make a finding of guilt or innocence on one of the counts, and second, because the court failed to create a separate entry of sentencing for each and every count for which appellant was placed on community control sanctions. The majority's decision in this matter raises issues not argued by either party, finds facts contrary to the consensus

of the parties, and, further, serves only to elevate form over substance.

THE VERDICT

{¶24} The majority's first finding is that the trial court, after a bench trial upon a three-count indictment, said at its conclusion, "I have considered all the evidence carefully and I'm going to find the defendant guilty of *both* counts of the indictment." (Emphasis added.) The contemporaneous journal entry reflects findings of guilt upon all three counts of the indictment. Despite well-established precedent that a court speaks through its journal entry, and depending solely upon the hearing and interpretation by a court reporter of one word, the majority concludes that no verdict was returned on one count--that count unknown--and hence, that there is no final appealable order.

{¶25} Curiously, however, neither the State nor appellant contend that appellant was not convicted of all three counts. In fact, appellant concedes in his Statement of Facts that he was found "guilty as charged in the indictment." Moreover, it is likely that the court's reference to "both" counts of the indictment meant that the trial court found appellant guilty of the two related counts of felonious assault *and* one count of possession of criminal tools. In light of this ambiguity, the parties' *agreement* that appellant was tried and convicted as indicted, and the journal entry which reflects findings of guilt on all three

counts, the majority's conclusion that appellant was not convicted of all three counts is disingenuous.

{¶26} At the conclusion of its opinion, the majority "reminds" the trial court that "at the conclusion of trial, by failing to pronounce on the record its findings as to all three counts of the indictment in the defendant's presence, the trial court violated Crim.R. 43(A)." (Emphasis sic.) The majority then cites *State v. Henson*, Champaign App. No. 2002 CA 21, 2003-Ohio-4426, at ¶s 7-9, as the basis for this "reminder." Neither Crim.R. 43(A) nor *Henson*, however, say that which the majority claims.

{¶27} Crim.R. 43(A) states:

{¶28} "The defendant shall be present at the arraignment and every stage of the trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes." Not a word is found in this rule about "pronouncing matters upon the record."

{¶29} Neither does *Henson* stand for the proposition stated by the majority. *Henson* simply states that a defendant has a right under Crim.R. 43 to be present when his sentence is imposed. That is not the issue involved in this case.

THE SENTENCE

{¶30} The majority cites three cases and one criminal rule for its conclusion that the trial court's failure to journalize separate entries for each count upon which it imposed community control sanctions means there is no final appealable order.

{¶31} The majority first cites *State v. Garner*, Trumbull App. No. 2002-T-0025, 2003-Ohio-5222, a Trumbull County case that has never been cited by another court since it was decided. While I concede that its holding supports the position of the majority, it is not binding upon this court and its reasoning is flawed and wholly unpersuasive.

{¶32} The majority then cites *State v. Collins* (Oct. 18, 2003), Cuyahoga App. No. 79064, which does not apply to the issue at hand. In *Collins*, the issue involved a *prison* sentence on two different counts and an entry that failed to note whether the counts were to be served concurrent with or consecutive to each other.

{¶33} Finally, the majority cites *State v. Hicks* (Jan. 21, 2005), Cuyahoga App. No. 84418. The majority quotes *Hicks* as stating, "Crim.R. 32(C) imposes a mandatory duty on the trial court to set forth the plea, the verdict or findings, and the sentence for each and every criminal charge prosecuted." Despite the wishes of the majority and the holding of *Hicks*, that is not what Crim.R. 32(C) says.

{¶34} Crim.R. 32(C) states:

{¶35} "A judgment of conviction shall set forth the plea, the verdict or findings, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk." Clearly, the creation of a "mandatory duty" to set forth the verdict or finding and the sentence for "each and every criminal charge" does not come from the wording of Crim.R. 32(C).

{¶36} I find that the court appropriately rendered and journalized a verdict as to all three counts of the indictment and I further find no legal authority requiring the court to journalize a separate, identical order of community control sanctions as to each and every count. This is a final appealable order and I would proceed to the merits of the appeal.