

[Cite as *State v. Newell*, 2009-Ohio-3066.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92361

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

TIMOTHY NEWELL

DEFENDANT-APPELLANT

**JUDGMENT:
DISMISSED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-040174

BEFORE: Kilbane, P.J., McMonagle, J., and Stewart, J.

RELEASED: June 25, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Timothy Newell (Newell), pro se, filed the instant appeal requesting that this court reverse the trial court's denial of his motion to vacate the trial court's sentencing entry of January 10, 1979. After reviewing the record and the applicable law, we dismiss Newell's appeal as moot.

{¶ 2} Because they are interrelated, we address Newell's assignments of error together.

{¶ 3} Assignment of Error One

"The trial court lacked subject matter jurisdiction to modify Mr. Newell's sentence after his appeal was pending and prior to remand, that sentence is void judgment, and failure to vacate said modification of sentence deprived Mr. Newell of due process and equal protection of law."

{¶ 4} Assignment of Error Two

"The trial court abused its discretion when it denied Mr. Newell's motion to vacate sentencing entry of January 10, 1979 pursuant to the inherent power of the court and pursuant to the Crim.R. 43(A) of the Ohio Rules of Criminal Procedure [sic]."

{¶ 5} We review the denial of a postsentence motion to vacate a sentence under an abuse of discretion standard. *State v. Jewell* (Mar. 30, 2001), Darke App. No. 1532, at 4. "In order for a trial court to have abused its discretion, the court must demonstrate an unreasonable, arbitrary, or unconscionable attitude." *Id.*, citing *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶ 6} Newell argues that the trial court lacked subject matter jurisdiction to modify his sentence after his appeal was pending. Principally, he argues that the trial court denied his motion to modify sentence on January 10, 1979, and because his appeal was taken in this matter on January 9, 1979, the trial court's order is void for lack of jurisdiction.

{¶ 7} However, a review of the docket in the underlying case reveals that the sentence being appealed was actually modified by the trial court on June 6, 1996, pursuant to an order of resentencing after the conviction in this case was affirmed in 1980.¹ Therefore, the sentence Newell is attempting to appeal is moot.

{¶ 8} Newell's appeal is dismissed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

¹The reason for the delay is that initially, the common pleas court failed to execute the judgment of the court of appeals. In 1995, Newell filed a complaint in the court of appeals for a writ of mandamus to compel the common pleas court to correct his sentence. In June 1996, the common pleas court corrected Newell's sentences by vacating his kidnapping convictions and sentences. The court of appeals subsequently granted the common pleas court's motion for summary judgment and dismissed Newell's mandamus action. See *State ex rel. Newell v. Cuyahoga County Court of Common Pleas*, 77 Ohio St.3d 269, 1997-Ohio-76.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and
MELODY J. STEWART, J., CONCUR