

[Cite as *State v. Leone*, 2010-Ohio-5358.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94275

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN LEONE

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-325657

BEFORE: Stewart, J., Gallagher, A.J., and Blackmon, J.

RELEASED AND JOURNALIZED: November 4, 2010

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MELODY J. STEWART, J.:

{¶ 1} Appellant, John Leone, appeals the October 23, 2009 nunc pro tunc journal entry of the Cuyahoga County Court of Common Pleas. For the reasons stated below, we reverse.

{¶ 2} In 1998, appellant entered a plea of guilty to 24 criminal counts in three cases. In accordance with his plea agreement, appellant was sentenced to an agreed sentence of 18 to 25 years, with a minimum of 18

years of actual incarceration. Prior to sentencing, appellant had moved to withdraw his pleas claiming they were not knowingly and voluntarily made. On appeal, this court affirmed the convictions finding that appellant was given a full Crim.R. 11 hearing prior to entering his pleas, was informed and aware of the consequences of his guilty pleas, and was given a full and impartial hearing on his motion to withdraw his pleas. *State v. Leone* (Feb. 24, 2000), 8th Dist. Nos. 75871, 75872, 75873, 75874, appeal not allowed, 89 Ohio St.3d 1426, 729 N.E.2d 1197 (June 14, 2000) (Table No. 00-593) (“Leone I”). Appellant’s subsequent application to reopen his appeal was denied. *State v. Leone* (Oct. 12, 2001), 8th Dist. Nos. 75871, 75872, 75873, 75874 (“Leone II”). In denying the request for reopening, this court found no merit to appellant’s claim that he received ineffective assistance of counsel on appeal for failing to argue that the trial court misinformed him both about the maximum sentence his guilty plea exposed him to and about the maximum sentence under the plea agreement. Additionally, this court determined that the doctrine of res judicata prevented further review of the issue of whether appellant entered a voluntary and knowing plea of guilty since the issue was previously raised before us as well as the Supreme Court of Ohio. *Id.*

{¶ 3} In 2007, appellant filed a motion to correct his sentence. He claimed that the Ohio Department of Rehabilitation and Corrections (“DRC”)

unlawfully increased his sentence to 18 to 40 years after he was incarcerated.

He also argued that the 18 to 25 year sentence as imposed by the court was contrary to law. Appellant requested a hearing to determine how to make his sentence comport with the plea agreement and with statutory law. On October 23, 2009, in response to appellant's motion, the trial court issued a nunc pro tunc entry relating back to January 1999 and purporting to correct the term of incarceration "to accurately reflect the intentions of the parties."

{¶ 4} In this appeal of the October 23, 2009 entry, appellant argues that the sentencing entry is void because the trial court lacked jurisdiction to modify his sentence and because the trial court improperly resentenced him without his presence. He further contends that the sentence imposed by the court in 1999 is void due to an error in calculating the maximum indefinite sentence and that the court's error necessitates his guilty plea being vacated.

{¶ 5} Courts possess inherent authority to correct errors in judgment entries in order for the record to speak the truth. *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 163-164, 1995-Ohio-278, 656 N.E.2d 1288. Thus, the purpose of a nunc pro tunc entry is to make the record reflect the truth. *Reinbolt v. Reinbolt* (1925), 112 Ohio St. 526, 532, 147 N.E. 808. The function of a nunc pro tunc entry is not to correct or modify an existing judgment, but rather to make the record conform to that which has already occurred. *State ex rel. Phillips v. Indus. Comm.* (1927), 116 Ohio St. 261, 264, 155 N.E. 798. Therefore, "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 or what the court intended to decide.” *Fogle*, 74 Ohio St.3d at 163-164. When a court exceeds its power in entering a nunc pro tunc order, the resulting nunc pro tunc order is invalid. *Natl. Life Ins. Co. v. Kohn* (1937), 133 Ohio St. 111, 113-114, 11 N.E.2d 1020.

{¶ 6} In the instant case, appellant was convicted of one count of felonious assault after pleading guilty. By entry dated January 11, 1999, appellant was sentenced to an indefinite prison term of 6 to 15 years, “consecutive to 12 to 25 years actual incarceration (mandatory) sentence in CR 335682, count one.” Due to his prior convictions, this was a valid sentence for appellant’s felonious assault conviction under the sentencing statutes in effect at that time. Thus, the court was without authority to enter a subsequent judgment entry.

{¶ 7} Furthermore, the October 23, 2009 entry does not correct any clerical error or make the record speak the truth. The entry states that appellant “is sentenced to 6 years to 15 years at Lorain Correctional Institution actual incarceration and to 12 years to 25 years actual incarceration (mandatory) sentence in CR 335682, count one. Minimum terms to be served consecutive with maximum terms to be served concurrently, total 18-25 mandatory prison term as agreed by the parties.” This entry misstates the law.

{¶ 8} R.C. 2929.41(C)(1), in effect at that time, stated: “When consecutive sentences of imprisonment are imposed for felony under division

(B)(1) of this section, the minimum term to be served is the aggregate of the consecutive minimum terms imposed, and the maximum term to be served is the aggregate of the consecutive maximum terms imposed.” Thus, while the trial court had discretion in determining the minimum term of an indefinite sentence, the maximum term was determined by statute and the court was without authority to change it. Accordingly, the October 23, 2009 entry is invalid and must be vacated.

{¶ 9} We find no merit to appellant’s contention that his guilty pleas must also be vacated. As noted at the beginning of this opinion, appellant previously appealed the validity of his guilty pleas. Therefore, the doctrine of res judicata prevents further review of the issue of whether appellant’s pleas were knowing and voluntary.

{¶ 10} We are without jurisdiction to address appellant’s remaining legal arguments. This court’s jurisdiction is limited to reviewing and affirming, modifying, or reversing the judgment or final order appealed. App.R. 12(A)(1)(a). Only the October 23, 2009 judgment entry in CR-325657 is on appeal before this court. Therefore, while appellant raises challenges to the judgments in all three cases, our jurisdiction is limited to the one on appeal.

{¶ 11} Therefore, we sustain appellant’s assignment of error in part, reverse the trial court’s judgment, and remand the matter to the trial court to

vacate the October 23, 2009 nunc pro tunc entry and reinstate the January 11, 1999 judgment.

{¶ 12} This cause is reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, A.J., and
PATRICIA ANN BLACKMON, J., CONCUR