[Cite as *State ex rel. Albourque v. Terry*, 2010-Ohio-5412.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94825

STATE OF OHIO, EX REL. HOUSSAM ALBOURQUE

RELATOR

vs.

STEVEN J. TERRY, JUDGE

RESPONDENT

JUDGMENT:
WRIT DENIED

Writ of Mandamus
Motion Nos. 438528 and 437799
Order No. 438530

RELEASE DATE: November 3, 2010

FOR RELATOR

Houssam Albourque, pro se
Inmate No.502-404
Richland Correctional Institution
P.O. Box 8107
Mansfield, Ohio 44901

ATTORNEYS FOR RESPONDENT

William D. Mason
Cuyahoga County Prosecutor

By: James E. Moss
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ON RECONSIDERATION [TREATED AS A MOTION FOR RELIEF FROM JUDGMENT UNDER CIV.R. 60(B)][1]

LARRY A. JONES, J.:

{¶ 1} Relator, Houssam Albourque, is the defendant in *State v. Albourque,* Cuyahoga Cty. Court of Common Pleas Case No. CR-469393, which has been assigned to respondent judge. Respondent's predecessor issued the following sequence of orders in 2006:

[1] The original announcement of decision, *State ex rel. Albourque v. Terry*, Cuyahoga App. No. 94825, 2010-Ohio-4362, released September 13, 2010, is vacated. This opinion is the court's journalized decision in this original action. See Civ.R. 58; see also S.Ct.Prac.R. 2.1(A)(1) and 2.2(A)(1).

February 27 — Accepting Albourque's guilty plea to amended count 2 (involuntary manslaughter with firearm specification) and count 3 (aggravated robbery with firearm specification), indicating that counts 1 and 4 were nolled, stating a sentence for each of counts 2 and 3 as well as the firearm specification, imposing five years mandatory postrelease control and holding sentencing in abeyance awaiting Albourque's testimony in a co-defendant's case.

March 13 — Nunc pro tunc entry, as of February 27, stating that, unless Albourque's testimony is consistent with a prior statement, the state reserves the right to move the court to declare the plea agreement null and void.

March 21 — Memorializing Albourque's plea and stating the charges for counts 2 and 3 (as amended), stating a sentence for each of counts 2 and 3 as well as the firearm specification, imposing five years mandatory postrelease control and ordering that Albourque be placed in solitary confinement on February 12 of each year.

{¶ 2} On March 18, 2009, Albourque filed a motion for sentencing in which he argued that he was entitled to a new sentence because the

sentencing entry did not impose separate terms of postrelease control for each count. Respondent denied the motion. Albourque appealed and this court dismissed the appeal "for lack of a final appealable order. See R.C. 2505.02." *State v. Albourque* (May 21, 2009), Cuyahoga App. No. 93204, Entry No. 422260.

{¶ 3} Albourque commenced this action in mandamus. He contends that, because respondent issued the nunc pro tunc entry on March 13, 2006, the February 27, 2006 journal entry is not a final order. That is, Albourque observes that *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, requires that all of the components of a judgment stated in Crim.R. 32(C) must appear in a single document for a sentencing entry to be a final appealable order. He argues that the March 13, 2006 nunc pro tunc entry modifies the sentence in the February 27, 2006 entry. He requests that this court compel respondent to issue a final appealable order.

{¶ 4} In *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110, the Supreme Court reaffirmed the holding of *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, 895 N.E.2d 805, that relief in mandamus and procedendo lies "to compel the judge and the common pleas court to issue a sentencing entry that complied with Crim.R. 32(C) and constituted a final,

appealable order." *Carnail*, at ¶34. Albourque argues that he is entitled to relief in mandamus under *Culgan* because respondent has not issued a sentencing entry which constitutes a final appealable order and respondent denied Albourque's motion for sentencing. Respondent argues, however, that the March 21, 2006 entry – which removed the temporary suspension of sentence stated in the February 27, 2006 entry – is a final appealable order.

{¶ 5} *Culgan* and *Carnail* require that we decide whether the sentencing entry in the underlying case is a final appealable order. Our review of the original papers in Case No. CR-469393 reflects that the court of common pleas did issue a final appealable order complying with Crim.R. 32(C). As required by *Baker*, the March 21, 2006 entry includes: the means of conviction (by guilty plea); the charges, as amended, on which Albourque was convicted; the specifications to which Albourque pled guilty; and the sentence on each count on which he pled guilty as well as the firearm specification.

{¶ 6} Although Albourque appealed the denial of his motion for sentencing, he never filed a direct appeal of his conviction. This court's determination in Case No. 93204 that the denial of his motion for sentencing is not a final appealable order does not require the conclusion that the court of common pleas did not issue a final and appealable sentencing entry.

Indeed, Albourque has yet to give this court the opportunity to exercise its *appellate* jurisdiction to determine whether the sentence imposed is a final appealable order. Cf. App.R. 5(A), "Motion by defendant for delayed appeal."

{¶ 7} Accordingly, respondent's motion for summary judgment is granted. Relator to pay costs. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

Writ denied.

LARRY A. JONES, JUDGE

CHRISTINE T. MCMONAGLE, .J., and
JAMES J. SWEENEY, J., CONCUR