

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 101603**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**L'DDARYL ELLIS**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-12-568532-A

**BEFORE:** Laster Mays, J., Boyle, P.J., and S. Gallagher, J.

**RELEASED AND JOURNALIZED:** April 30, 2015

**FOR APPELLANT**

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**ATTORNEYS FOR APPELLEE**

Timothy J. McGinty  
Cuyahoga County Prosecutor

BY: Katherine Mullin  
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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant L'Ddaryl Ellis ("Ellis"), proceeding pro se, appeals from the trial court's denial of his motion filed pursuant to Crim.R. 43. Ellis presents one assignment of error, claiming that the trial court's correction of its original judgment entry of sentence imposed in this case violated his right to be present at "every stage of the criminal proceeding."

{¶2} Because the trial court undertook the correction, only a ministerial action, under this court's mandate to vacate one of Ellis's convictions as ordered in *State v. Ellis*, 8th Dist. Cuyahoga No. 99830, 2014-Ohio-116 ("*Ellis I*"), which did not affect the total term of the prison sentence imposed on him, Ellis's assignment of error is overruled. The trial court's order is affirmed.

{¶3} In *Ellis I*, this court stated the pertinent facts underlying this case as follows:

On November 29, 2012, the Cuyahoga County Grand Jury returned a 14-count indictment against Ellis relating to two separate shooting incidents. Relative to the first incident, the grand jury indicted Ellis on one count of discharge of a firearm on or near prohibited premises and two counts of felonious assault. All three counts contained one and three-year firearm specifications.

Relative to the second incident, wherein a resident of East 95th Street who had been looking through her window, was struck and killed by a bullet[,] [t]he grand jury indicted Ellis on one count of discharge of a firearm on or near prohibited premises, one count of aggravated murder, one count of murder, and seven counts of felonious assault. The grand jury also indicted Ellis on one count of aggravated riot with purpose to commit or facilitate the commission of any offense of violence. All 11 counts contained one and three-year firearm specifications.

On \* \* \* March 6, 2013, a bench trial commenced.

\* \* \*

At the close of the state's case, the trial court granted Ellis's motion for acquittal on six counts. The trial court later found Ellis not guilty of aggravated murder, but considered the lesser included offense of murder, as well as involuntary manslaughter, and found him guilty of involuntary manslaughter with the attached firearm specifications. In addition, the trial court found Ellis guilty of murder, two counts of felonious assault, and the single count of aggravated riot, all with the attached firearm specifications.

On April 15, 2013, Ellis appeared for sentencing. The trial court *merged the involuntary manslaughter, felonious assault, and aggravated riot counts with the murder count for sentencing purposes. The trial court then imposed a prison term of 15 years to life to be served after Ellis served three years for the firearm specifications.*

\* \* \*

In the second assigned error, Ellis argues the state failed to produce sufficient evidence to support his convictions.

\* \* \*

\* \* \* [T]here exists sufficient evidence to sustain all of Ellis's convictions, except that for aggravated riot.

The trial court found Ellis guilty of aggravated riot in violation of R.C. 2917.02(A)(2), that provides that "[n]o person shall participate with four or more others in a course of disorderly conduct \* \* \* [w]ith purpose to commit or facilitate the commission of any offense of violence \* \* \*."

However, it is uncontested that when Ellis participated in the shooting incident on East 95th Street, he did so in the company of three fellow gang members. Because R.C. 2917.02(A)(2) requires the person charged with aggravated riot to have participated with four or more others in a course of disorderly conduct, the state did not meet the basic element of this charge. *See In re Jesse S.*, 129 Ohio App.3d 394, 717 N.E.2d 1143 (6th Dist.1998). As such, *the trial court should not have found Ellis guilty of aggravated riot.*

*Accordingly, we sustain the second assigned error as it relates to the aggravated riot conviction, but overrule the assigned error on the remaining convictions.*

\* \* \*

Judgment affirmed in part, reversed in part, and *remanded to the trial court to vacate Ellis's conviction for aggravated riot.*

\* \* \*

It is ordered that a special mandate be sent to said court to carry this judgment into execution. Case remanded to the trial court *for actions consistent with this opinion.*

(Emphasis added.)

{¶4} On remand, the trial court issued a corrected judgment entry that stated that “[t]he court finds Deft not guilty of Count 14,” aggravated riot. Therefore, the trial court imposed no sentence on that count. The total prison term imposed on Ellis remained unchanged.

{¶5} Subsequently, Ellis filed a motion pursuant to Crim.R. 43, requesting the trial court to “reverse” the correction and to order him returned to court for a resentencing hearing.

{¶6} After the state filed an opposition brief, the trial court denied Ellis’s motion. Ellis filed the instant appeal from that judgment entry.

{¶7} Ellis presents a single assignment of error, which is set forth verbatim as follows.

I. The trial court abused its discretion when it denied Mr. Ellis’s Criminal Rule 43 motion and prejudice of Appellant when it vacated Appellant’s conviction for Aggravated Riot without Appellant being

physically present violating Ohio Criminal Rule 43 and was denied effective assistance of Appellate Counsel Appellant was denied his right to appeal the re-sentencing violating Ohio Constitution Section 3 Article 4, R.C. 2953.02 and App.R. 4 and violating the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

{¶8} Ellis argues that the trial court's denial of his motion made pursuant to Crim.R. 43 was improper, because a correction of the journal entry of his sentence constituted a "resentencing" that required his presence. His argument lacks merit.

{¶9} In addressing a similar argument, the court in *State v. Marks*, 7th Dist. Monroe No. 868, 2002-Ohio-6267, ¶ 20-24, stated:

Appellant maintains that when this Court remanded his case \* \* \*, we were directing the trial court to modify his sentence, and not just to modify the entry. According to Appellant, therefore, due process considerations and Crim.R. 43(A) required his presence in court at the time of the modification. *State v. Coach* (May 5, 2000), 1st Dist. No. C-990349, 2000 Ohio App. LEXIS 1901; *State v. Carpenter* (Oct. 9, 1996), 1st Dist. No. C-950889, 1996 Ohio App. LEXIS 4434; *State v. Bayer* (1995), 102 Ohio App.3d 172, 656 N.E.2d 1314; and *State v. Jones* (Mar. 18, 1999), 10th Dist. No. 98AP-639, 1999 Ohio App. LEXIS 1248. Appellant further ventures that because he was not in court when the court made its modifications, he is now entitled to an entirely new sentencing hearing. Appellant's argument reveals that he has misconstrued the nature of our order \* \* \* .

{¶10} The *Marks* court explained that the trial court was obeying its mandate. Therefore, because "the trial court's modified order did not change the sentence originally imposed by the trial court," due process and Crim.R. 43 did not require the appellant's presence "for such a ministerial \* \* \* undertaking."

{¶11} This court provided a similar mandate as the one given to the trial court in this case in *State v. Watts*, 8th Dist. Cuyahoga No. 90435, 2008-Ohio-3792, ¶ 1. In that

case, although Watts's conviction on one count and its accompanying sentence were vacated, this court did not order the trial court to hold another sentencing hearing; rather, the trial court was ordered only to correct the sentencing entry. *See also State v. Bell*, 70 Ohio App.3d 765, 592 N.E.2d 848 (8th Dist.1990); *compare State v. Green*, 8th Dist. Cuyahoga No. 89326, 2008-Ohio-228, ¶ 21 (appellant's conviction on one count simply vacated); *State v. Fanning*, 8th Dist. Cuyahoga No. 88914, 2008-Ohio-2185, ¶ 20 (same).

{¶12} In this case, the trial court in its original sentencing entry "merged" all of Ellis's convictions for sentencing purposes and ordered them to be served after the three-year term imposed for the firearm specifications. Thus, despite the fact that this court vacated his conviction for aggravated riot in *Ellis I*, his total sentence remained unchanged. *Watts*. Moreover, in *State v. Lenard*, 8th Dist. Cuyahoga No. 99149, 2013-Ohio-1995, ¶ 19, this court additionally observed that, "Appellant benefits from this [acquittal] in that he has one fewer conviction," thus, the fact that the correction of the record "was not made in open court and outside appellant's presence, under these circumstances," did not constitute error.

{¶13} Because the trial court's correction of its judgment entry was issued pursuant to this court's mandate in *Ellis I*, was ministerial in nature, and did not require a resentencing hearing, Ellis's assignment of error is overruled.

{¶14} The trial court's order is affirmed.

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.

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

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ANITA LASTER MAYS, JUDGE

MARY J. BOYLE, P.J., CONCURS;  
SEAN C. GALLAGHER, J., CONCURS WITH SEPARATE OPINION

SEAN C. GALLAGHER, J., CONCURRING:

{¶15} Although I concur with the judgment and analysis of the majority, I write separately to address the merits of the appeal.

{¶16} In my view, this appeal was improvidently allowed. Had the state filed a motion to dismiss, this could have all been avoided.

**KEYWORDS**

#101603



Correction of sentence; Crim.R. 43; Mandate. The trial court's order denying appellant's Crim.R. 43 motion is affirmed, because the trial court's correction of the journal entry of appellant's sentence to vacate one of appellant's convictions, which did not affect the total prison term imposed, was a ministerial act performed under mandate from this court, rather than a "critical stage of the proceedings."