[Cite as *State v. Bonnell*, 2015-Ohio-4590.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102630

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MELVIN BONNELL

DEFENDANT-APPELLANT

JUDGMENT:
DISMISSED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-87-223820-A

BEFORE: Laster Mays, J., Jones, P.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: November 5, 2015

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant Melvin Bonnell ("Bonnell") appeals the trial court's entry of a "nunc pro tunc" judgment entered for the purpose of curing noncompliance with Crim.R. 32, subsequent to this court's remand to effect correction in *State v. Bonnell*, 8th Dist. Cuyahoga No. 96368, 2011-Ohio-5837 ("*Bonnell 2011*"). Bonnell asserts that, as a result, no final appealable order has ever been entered in this case. We disagree.

I. BACKGROUND AND HISTORY

{¶2} Bonnell was convicted in 1988 of two counts of aggravated murder (R.C. 2903.01) of Eugene Bunner with felony murder and firearms specifications and one count of aggravated burglary with firearm and aggravated felony specifications (R.C. 2911.11). The trial court imposed a death sentence pursuant to R.C. 2929.03(F) as well as a 10-to-25 year sentence for the aggravated burglary.

{¶3} A series of state and federal appellate filings followed. Extracting the procedural history pertinent to this appeal:

> [I]n *State v. Bonnell*, 8th Dist. Cuyahoga No. 55927, 1989 Ohio App. LEXIS 4982 (Oct. 5, 1989), this court merged the two separate murder counts and found that because the sentence for aggravated burglary was imposed outside of Bonnell's presence, he was to be resentenced on said count. Bonnell was resentenced to the same prison term on the aggravated burglary count on October 25, 1989. On May 21, 2010, 22 years after his conviction and sentence were initially imposed, Bonnell filed a "motion for resentencing and to issue a final appealable order."

Bonnell at ¶ 2.

{¶4} *Bonnell 2011* posed the following single assignment of error: "The trial court erred by not granting Bonnell's motion to vacate because the purported judgment of conviction [for aggravated burglary] does not comply with Crim.R. 32(C) and *State v. Baker* [119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163]." *Id.* at ¶ 3. This court held that the omission of the aggravated burglary conviction from the entry and opinion constituted a lack of "technical compliance" with Crim.R. 32(C). *Bonnell 2011* at ¶ 10-11.

{¶5} This court further determined that the issuance of a nunc pro tunc entry that included the fact and manner of conviction was the proper remedy and also held that the final corrected entry is not an appealable order:

> The Ohio Supreme Court has found that the technical failure to conform to Crim.R. 32(C) does not render the judgment a nullity. *State ex rel. DeWine v. Burge*, 128 Ohio St.3d 236, 2011-Ohio-235, 943 N.E.2d 535, ¶ 19. * * *
>
> "[T]he purpose of Crim.R. 32(C) is to ensure that a defendant is on notice concerning when a final judgment has been entered and the time for filing an appeal has begun to run." [*State v.*] *Lester*, [130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142], ¶ 20, citing *State v. Tripodo*, 50 Ohio St.2d 124, 127, 363 N.E.2d 719 (May 25, 1977); App.R. 4(A). Like the defendant in *Lester*, Bonnell had notice of his conviction, which was evident throughout the record, and was apparent to the defendant who had exhausted the appellate process. *See id*. at ¶13.

> Similarly, in *State v. Fischer,* [128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332], the Ohio Supreme Court rejected the notion that a defendant could raise any and all errors relating to his conviction when his original sentence was deemed void for the failure to include postrelease control and he had already appealed his conviction. Instead, the court limited the scope of relief to correcting only the illegal sentence and found res judicata still applied to other aspects of the merits of the conviction. *Id. See, also, State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381 (applying law of the case and res judicata to convictions and unaffected sentences upon remand for an allied offenses sentencing error).
>
> Additionally, Ohio appellate courts have found that where a trial court issues a corrected judgment entry to comply with Crim.R. 32(C), a defendant who has already had the benefit of a direct appeal cannot raise any and all claims of error in successive appeals. *State v. Triplett,* 6th Dist. Lucas No. L-10-1158, 2011-Ohio-1713; *State v. Avery*, 3d Dist. Union No. 14-10-35, 2011-Ohio-4182, ¶ 14; *State v. Harris*, 5th Dist. Richland No. 10-CA-49, 2011-Ohio- 1626, ¶ 30. In such circumstances, res judicata remains applicable and the defendant is not entitled to a "second bite at the apple." *Avery* at ¶ 14. Aptly stated, "[n]either the Constitution nor common sense commands anything more." *Fischer* at ¶ 26. As argued by the state herein, to hold otherwise would open the floodgates and "enable validly convicted and sentenced prisoners throughout the state to circumvent res judicata by arguing, after all direct and collateral appeals are exhausted, that their sentencing documents are improperly worded[.]"

Bonnell 2011 at ¶ 13-17.

II. ASSIGNMENT OF ERROR

{¶6} In this appeal, Bonnell challenges the propriety of the nunc pro tunc entry, offering a single assignment of error:

> I. The trial court erred when it filed an illegal nunc pro tunc judgment entry, when a Crim.R. 32 final appealable order has never been filed in this case.

{¶7} Bonnell argues that the trial court's revised entry as a result of the nunc pro tunc is legally inadequate and does not constitute a final appealable order. Bonnell

states that this court's reliance on *Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, and *Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, is incorrect. Those cases are distinguishable, Bonnell argues, because a final appealable order in a death penalty case consists of the judgment entry as well as the sentencing opinion. *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, syllabus and ¶ 17-18 (in capital cases, a "final, appealable order consists of both the sentencing opinion filed pursuant to R.C. 2929.03(F) and the judgment of conviction filed pursuant to Crim.R. 32(C)").

{¶8} The Ohio Supreme Court considered the capital case dichotomy in *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096. Thompson was sentenced to death for the aggravated murder of Twinsburg Police Officer Joshua Miktarian. A jury convicted Thompson of two counts of aggravated murder with each count carrying three death specifications: (1) purposely killing a law enforcement officer, R.C. 2929.04(A)(6); (2) killing to escape detection, R.C. 2929.04(A)(3); and (3) killing while under detention, R.C. 2929.04(A)(4). *Id*. at ¶ 2.

{¶9} The jury also convicted Thompson of escape, resisting arrest, tampering with evidence, and carrying a concealed weapon. Pursuant to Crim.R. 29, the court dismissed one escape count and merged the two aggravated murder convictions and two of the three death specifications for the mitigation hearing and sentencing. *Id.* at ¶ 32-34.

{¶10} After the mitigation hearing and the jury's unanimous recommendation of the death penalty, the court sentenced Thompson to death for one count of aggravated

murder, R.C. 2903.01(E), with two death specifications — purposely killing a police officer, R.C. 2929.04(A)(6), and killing to escape detection, R.C. 2929.04(A)(3). The three counts of tampering with evidence were also merged and the court imposed various sentences for the remaining charges. *Id.*

{¶11} Thompson raised 18 propositions of law in his appeal of the aggravated murder conviction and death sentence. Of import here is his first proposition of law: "Thompson challenges this court's jurisdiction to hear his appeal because, he claims, the trial court failed to issue a final, appealable order in compliance with Crim.R. 32(C)." *Id.* at ¶ 36.

{¶12} The *Thompson* court explained that, in capital cases:

> R.C. 2929.03(F) requires the court or panel to file a sentencing opinion. *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, syllabus and ¶ 17-18. In those cases, "a final, appealable order consists of *both* the sentencing opinion filed pursuant to R.C. 2929.03(F) and the judgment of conviction filed pursuant to Crim.R. 32(C)." *Id*. at syllabus.

(Emphasis added.) *Thompson* at ¶ 39.

{¶13} The *Thompson* trial court issued a sentencing opinion on June 23, 2010, that was signed by the judge and journalized, listing the capital death sentence and the sentences for the noncapital counts. *Id*. at ¶ 40. On June 24, 2010, the court filed a separate entry recording the jury verdict of guilt on all 26 counts and specifications that was also signed by the judge and journalized. *Id*. "Together, those two documents comply with the requirements of Crim.R. 32(C) and thus constitute a final, appealable order. *See Ketterer* at ¶ 17." *Id.*

{¶14} Thompson argued that the two documents in his case did not satisfy Crim.R. 32(C) because, (1) the June 24 entry was subsequently replaced by a nunc pro tunc entry and (2) the sentencing opinion contained an error. The Supreme Court first addressed the nunc pro tunc issue:

> First, Thompson argues that when a nunc pro tunc entry corrects an earlier entry, it entirely replaces the original entry. In this case, the trial court's June 24 entry mistakenly stated that Thompson's "sentencing hearing commenced on June 10, 2006." The sentencing hearing actually began on June 10, 2010. On July 1, 2010, the trial court entered a nunc pro tunc entry to change the erroneous date in the June 24 entry. Thompson says we can look only to the nunc pro tunc entry, and not to the June 24 entry, to evaluate compliance with Crim.R. 32(C).
>
> Thompson's argument misconstrues the nature of a nunc pro tunc entry. As we recently explained in *Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, the phrase "'[n]unc pro tunc' * * * is commonly defined as '[h]aving retroactive legal effect through a court's inherent power.'" *Id*. at ¶ 19, quoting *Black's Law Dictionary* 1174 (9th Ed.2009). Therefore, "a nunc pro tunc entry by its very nature applies retrospectively to the judgment it corrects." *Id*. But a nunc pro tunc entry does not replace the original judgment entry; it relates back to the original entry. Thus, we need not disregard the trial court's June 24 entry.

Id. at ¶ 43.

{¶15} The court next responded to the challenge of the sentencing opinion error:

> Second, Thompson claims that there is no final, appealable order here because the trial court's June 23 sentencing opinion contains an error. The opinion sentenced Thompson on Count 3 (third degree felony escape), despite the fact that the court had previously dismissed that count. In the opinion, the court purported to merge Count 3 with Count 4 (fifth degree felony escape) and then sentenced Thompson to five years on the two merged counts. This five-year sentence would have been appropriate for Count 3, but it exceeded the maximum 12-month punishment permitted for Count 4 alone. *See* R.C. 2929.14(A)(5) (authorizing a maximum sentence

> of 12 months' imprisonment for a fifth degree felony); R.C. 2929.14(A)(3) (authorizing a maximum sentence of five years' imprisonment for a third degree felony). Because Thompson should have been sentenced only on Count 4, not on Count 3, he could not have been sentenced to the five-year sentence the court imposed.
>
> Contrary to Thompson's claims, the trial court's mistaken reference to a five-year sentence in the June 23 sentencing opinion does not deprive this court of jurisdiction over this appeal. "[S]entencing errors are not jurisdictional." *Manns v. Gansheimer*, 117 Ohio St.3d 251, 2008-Ohio-851, 883 N.E.2d 431, ¶ 6 (holding that extraordinary writs are not available to remedy sentencing errors). Instead, sentencing errors can be remedied on appeal in the ordinary course of law. *State ex. rel Davis v. Cuyahoga Cty. Court of Common Pleas*, 127 Ohio St.3d 29, 2010-Ohio-4728, 936 N.E.2d 41, ¶ 2 (the erroneous inclusion of post release control in a sentencing entry can be remedied on appeal).
>
> To determine the appropriate remedy here, we need only look to the trial court's entries. Although the June 23 sentencing opinion mistakenly referred to Count 3 and a five-year sentence for escape, the trial court's June 24 journal entry eliminated these erroneous references. The June 24 entry states that for the crime of escape, Thompson is sentenced to only 12 months, and only on Count 4. The entry removes any reference to a five-year sentence for escape and contains no sentence whatsoever for Count 3. The record therefore, clearly indicates that for the crime of escape, the trial court intended to impose a 12-month sentence on a single fifth degree felony count. Accordingly, this is the only escape sentence that applies to Thompson.
>
> In sum, we may properly consider both the trial court's June 24 entry and its sentencing opinion to evaluate compliance with Crim.R. 32(C). *These two documents satisfy the requirements for a final, appealable order, and thus we do have jurisdiction over Thompson's appeal.*

(Emphasis added.) *Id.* at ¶ 44-47.

{¶16} Further, as to the propriety of employing the nunc pro tunc entry to correct the technical error in this case, a nunc pro tunc entry is properly used to show what actually happened in the court as supported by the record. "Such an entry is to be used to

reflect what a trial court actually did, not what the court might or should have done. *State ex rel. DeWine v. Burge*, 128 Ohio St.3d 236, 2011-Ohio-235, 943 N.E.2d 535, ¶ 17, citing *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, 779 N.E.2d 223, ¶ 14." *Bay Village v. Barringer*, 8th Dist. Cuyahoga No. 100959, 2014-Ohio-4816, ¶ 24.

{¶17} From the March 3, 1988 entry of the trial court memorializing the verdict of the jury finding, throughout the direct appeals as well as postconviction proceedings to date, the record reflects the convictions for aggravated murder and aggravated burglary. Thus, the nunc pro tunc entry is appropriate. "Nunc pro tunc entries are used to make the record reflect what the court actually decided * * *." *Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 18.

{¶18} We hold that, in light of the guidance provided in *Thompson* as to capital cases, coupled with the Ohio Supreme Court's further elaboration in *Lester*, *Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, and *Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, syllabus and ¶ 17-18, the nunc pro tunc entry and sentencing opinion in this case properly and adequately meet the elements of Crim.R. 32(C). We further hold that nunc pro tunc was the appropriate vehicle to cure the technical error in this case.

{¶19} It is clear that the policy and purpose of Crim.R. 32, R.C. 2929.03(F) and a defendant's right to due process have been fulfilled. We reiterate:

> Ohio appellate courts have found that where a trial court issues a corrected judgment entry to comply with Crim.R. 32(C), a defendant who has already

> had the benefit of a direct appeal cannot raise any and all claims of error in successive appeals. *Triplett*, 6th Dist. Lucas No. L-10-1158, 2011-Ohio-1713; *Avery*, 3d Dist. Union No. 14-10-35, 2011-Ohio-4182, ¶ 14; *Harris*, 5th Dist. Richland No. 10-CA-49, 2011-Ohio-1626, ¶ 30. In such circumstances, res judicata remains applicable and the defendant is not entitled to a "second bite at the apple." *Avery*, at ¶ 14. Aptly stated, "[n]either the Constitution nor common sense commands anything more." *[State v.] Fischer*, 128 Ohio St.3d 92, [2010-Ohio-6238, 942 N.E.2d 332], ¶ 26. As argued by the state herein, to hold otherwise would open the floodgates and "enable validly convicted and sentenced prisoners throughout the state to circumvent res judicata by arguing, after all direct and collateral appeals are exhausted, that their sentencing documents are improperly worded[.]"
>
> In this case, all parties were aware that Bonnell _was convicted by a jury on the aggravated burglary charge for which he was sentenced, as evidenced by his appeal of that charge. Further, the reviewing courts exercised jurisdiction over his appeals, and heard and decided his case. Thus, unlike the defendant in *Baker*, Bonnell was not deprived the opportunity to appeal his conviction. Rather, Bonnell was given full opportunity to litigate all of the issues relating to his conviction and sentence, and his substantive rights were not prejudiced in any way.

Bonnell 2011 at ¶ 17.

{¶20} This appeal, therefore, 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.

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

ANITA LASTER MAYS, JUDGE

LARRY A. JONES, SR., P.J., and
EILEEN A. GALLAGHER, J., CONCUR