Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No.   104226

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LONNIE B. THOMPSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-11-553640-A

BEFORE: Blackmon, J., Jones, A.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: October 20, 2016

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Lonnie B. Thompson ("Thompson") appeals his sentence and assigns the following three errors for our review:

> I. Defendant was denied due process of law when the court entered a nunc pro tunc sentencing entry without the appearance of defendant nor a waiver of his appearance.

> II. Defendant was denied due process of law when the court entered a nunc pro tunc entry which did not reflect what had actually occurred previously in the case.

> III. Defendant was denied due process of law when the trial court failed to follow the mandate from the court of appeals concerning jail time credit.

{¶2} Having reviewed the record and pertinent law, we affirm Thompson's sentence. The apposite facts follow.

{¶3} This is Thompson's third appeal. In his first appeal, Thompson argued that the trial court "abused its discretion by imposing a total sentence of 32½ years." *State v. Thompson,* 8th Dist. Cuyahoga No. 99628, 2014-Ohio-202, ¶ 21 (*"Thompson I"*). We concluded that the trial court erred by failing to merge two counts and remanded the matter for resentencing as to those two counts. Thompson did not raise any issue in his first appeal regarding the trial court's imposition of a fine, costs, or restitution or the trial court's failure to give him jail-time credit.

{¶4} In his second appeal, Thompson argued that the trial court's nunc pro tunc entry correcting his sentence was invalid because the sentence was greater than the 28½

years imposed at the sentencing hearing. *State v. Thompson*, 8th Dist. Cuyahoga No. 102326, 2015-Ohio-3882, ¶ 5 (*"Thompson II"*). This court held that in his prior appeal, Thompson only argued that the trial court erred by imposing 32½ years and that res judicata prevented him from raising an argument he could have raised on direct appeal. We also concluded that issuing the nunc pro tunc was an appropriate manner to correct the mathematical error with respect to the sentencing error, because it was undisputed that the aggregate prison sentence imposed totaled 31½ years. We held that "[a]lthough Thompson's sentences on each of the individual counts were clearly stated at the sentencing hearing, the record reflects that the trial court, the state, and defense counsel each made a math error in calculating Thompson's aggregate sentence." *Thompson II* at ¶ 17.

{¶5} We agreed with Thompson, however, that the trial court erred by not correcting the improper imposition of a fine, costs, and restitution, "which were either ordered suspended or not imposed at the sentencing hearing." *Id.* at ¶ 18. We concluded that "the November 14, 2014 nunc pro tunc entry is incomplete and a new nunc pro tunc entry must be issued correcting all of the mathematical and clerical errors in the March 13, 2013 sentencing journal entry." *Id.* Although Thompson also argued in *Thompson II* that the trial court erred by not giving him jail-time credit, we held that Thompson's remedy was to file a motion with the trial court pursuant to R.C. 2929.19(B)(2)(g)(iii).

{¶6} On remand, the trial court issued a nunc pro tunc entry on February 10, 2016. The entry imposed the correct sentence and removed the imposition of restitution, fines, and costs from the order.

Nunc Pro Tunc Entry

{¶7} We will address Thompson's first and second assigned errors together because they both allege the trial court erred by issuing the nunc pro tunc entry.

{¶8} Thompson argues that the trial court erred by correcting his sentence by issuing a nunc pro tunc entry instead of conducting a resentencing hearing as required by Crim.R. 43. However, in *Thompson II*, we directed the trial court to issue a nunc pro tunc entry to correct the mathematical and clerical errors. As we explained in *Thompson II:*

> Although trial courts generally lack authority to reconsider their own valid final judgments in criminal cases, they retain continuing jurisdiction to correct certain types of errors in judgments by nunc pro tunc entry to reflect what the court actually decided. *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 13, citing *State ex rel. Womack v. Marsh*, 128 Ohio St.3d 303, 2011-Ohio-229, 943 N.E.2d 1010, ¶ 13. Pursuant to Crim.R. 36, "[c]lerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time." *See also State ex rel. DeWine v. Burge*, 128 Ohio St.3d 236, 239, 2011-Ohio-235, 943 N.E.2d 535, ¶ 17 ("'[C]ourts possess inherent authority to correct clerical errors in judgment entries so that the record speaks the truth.'"), quoting *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19. A nunc pro tunc entry can be used to correct mathematical calculations and typographical or clerical errors, i.e., "'a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment.'" *State v. Spears,* 8th Dist. Cuyahoga No. 94089, 2010-Ohio-2229, ¶ 10; *State v. Miller*, 127 Ohio St.3d 407, 2010-Ohio-5705, 940 N.E.2d 924, ¶ 15, quoting *Zaleski* at ¶ 19. However, proper use of a nunc pro tunc order "is limited to memorializing what the trial court actually did at an earlier point in time, such as correcting a previously issued order that fails to reflect the trial court's true action," *Spears* at ¶ 10, "not what the court might or should have decided or what the court intended to decide." *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 18. A nunc pro tunc entry relates back to the date of the original entry. *Marsh* at ¶ 15.

Thompson II at ¶ 15. In the instant case, because the mistakes were mathematical and clerical in nature, the trial court did not err by issuing a nunc pro tunc entry. Moreover, the trial court was following this court's mandate on remand. Because the Ohio Supreme Court denied Thompson's appeal in *Thompson II*, he is prevented from raising issues regarding our remand for the trial court to issue a nunc pro tunc entry. *State v. Thompson*, 144 Ohio St.3d 1507, 2016-Ohio-652, 45 N.E.3d 1051.

{¶9} Thompson also argues that the trial court used the nunc pro tunc entry to "recreate something" that had not previously occurred. However, he does not set forth how the trial court erred in this respect. Our review of the record shows that the nunc pro tunc entry reflected what occurred at the sentencing hearing. Accordingly, Thompson's first and second assigned errors are overruled.

Jail-Time Credit

{¶10} In his third assigned error, Thompson argues that the trial court failed to follow this court's mandate to include jail-time credit when resentencing Thompson.

{¶11} However, in *Thompson II* we did not order the trial court to include jail-time credit. Instead we stated: "Because Thompson did not raise the issue at sentencing or in his prior appeal, Thompson's remedy, under R.C. 2929.19(B)(2)(g)(iii), is to file a motion with the trial court seeking to correct the error." *Id.* at ¶ 23. Accordingly, Thompson's third assigned error is overruled.

{¶12} Judgment affirmed.

It is ordered that appellee recover of appellant 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

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PATRICIA ANN BLACKMON, JUDGE

LARRY A. JONES, SR., A.J., and
ANITA LASTER MAYS, J., CONCUR