[Cite as *State v. McIntyre*, 2010-Ohio-4658.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 25292
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 91 01 0135
LEROY L. MCINTYRE	
Appellant	

DECISION AND JOURNAL ENTRY

Dated: September 30, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Leroy L. McIntyre, appeals from the judgment of the Summit County Court of Common Pleas, denying his motion to vacate his sentence. This Court affirms.

I

{¶2} Following a jury trial in August 1991, McIntyre was convicted of felonious assault and aggravated burglary, both of which carried firearm specifications.[1] In September 1991, the trial court journalized McIntyre's sentence for the foregoing convictions. Two days after issuing its initial sentencing entry, the trial court issued a nunc pro tunc entry correcting the

[1] In this Court's decision on his direct appeal, when explaining the procedural history of the case, this Court's review of the offenses of conviction mistakenly refers to a finding of guilt on a specification for which the jury returned a not guilty verdict. This introductory comment is not relied upon or repeated in the remainder of the decision.

terms of McIntyre's felonious assault sentence to note that "the eight year minimum shall be a period of actual incarceration," as was indicated at McIntyre's sentencing hearing. McIntyre appealed, and this Court affirmed his convictions. *State v. McIntyre* (May 27, 1992), 9th Dist. No. 15348.

{¶3} McIntyre later appealed from the denial of his petition for post-conviction relief, and this Court again affirmed the trial court's decision. *State v. McIntyre* (Oct. 25, 1995), 9th Dist. No. 17095. In the intervening years since that time, McIntyre has filed numerous motions with the trial court challenging his convictions in one manner or another, all of which have been denied. Most recently, McIntyre filed a "Motion to Vacate the Void Ab Initio Sentencing Judgment Journal Entries, and to Revise/Correct Sentencing Entries to Comply with Criminal Rule 32(C)" in which he asserted that the sentencing entry from which he appealed was not a final, appealable order because it failed to comply with Crim.R. 32(C) and *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. The trial court denied McIntyre's motion as untimely and barred by res judicata. McIntyre appeals from the denial of his motion, asserting one assignment of error for our review.

II

Assignment of Error

> "THE TRIAL COURT ERRED TO THE PREJUDICE OF MCINTYRE AND VIOLATED BOTHOF HIS RIGHTS TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; ARTICLE I. SECTION 16 OF THE OHIO CONSTITUTION AND CRIMINAL RULE 32(C)." (Sic.)

{¶4} In his sole assignment of error, McIntyre argues that the sentencing entry from which he appealed his convictions in 1992 was not a final, appealable order. Specifically, McIntyre argues that his sentencing entry was not a final judgment because the trial court failed to: 1) incorporate any reference to him having been acquitted of a prior felony specification with

respect to his felonious assault conviction; 2) state that the jury was unable to reach a decision with respect to the felonious assault charge contained in the supplemental indictment; and 3) include all the terms of his sentence in one entry, as he argues is evidenced by the correction contained in the court's nunc pro tunc entry two days later. We disagree.

{¶5} In *State v. Baker*, the Supreme Court clarified that under Crim.R. 32(C), "a trial court is required to sign and journalize a document memorializing the sentence and the manner of the conviction: a guilty plea, a no contest plea upon which the court has made a finding of guilt, a finding of guilt based upon a bench trial, or a guilty verdict resulting from a jury trial." *Baker* at ¶14.

{¶6} Recently, this Court considered *Baker's* directive in the context of an acquittal and concluded that "a journal entry that does not contain [a] reference to counts that were *dismissed* or upon which the defendant was *acquitted*, does not render the journal entry invalid for lack of a final[,] appealable order." (Emphasis in original.) *State v. Smead*, 9th Dist. No. 24903, 2010-Ohio-4462, at ¶10. In this case, the record reveals that the jury found McIntyre not guilty of the prior aggravated felony specification to the felonious assault count contained in his original indictment. Additionally, the record reveals that the jury was hung with respect to the felonious assault charge contained in his supplemental indictment and its attendant specifications. Thus, McIntyre was not convicted of either of the foregoing offenses which serve as the basis for his assertion that his sentencing entry was not a final judgment. Consistent with our analysis in *Smead*, a defendant cannot be sentenced on a count for which he has not been convicted. Id. (quoting *Baker* and emphasizing that under Crim.R. 32(C), "a defendant is entitled to appeal an order that sets forth the manner of *conviction* and the sentence").

Consequently, the omission of these offenses from the terms of his sentencing entry does not affect its finality. Id.

{¶7} McIntyre also argues that his sentencing entry is not a final judgment because the trial court later issued a nunc pro tunc entry which failed to comply with Crim.R. 32(C). Initially, we note that McIntyre's sentencing entry, which was signed and journalized by the court on September 9, 1991, expressly states that he "was found GUILTY by a jury trial of FELONIOUS ASSAULT, *** with SPECIFICATION TO COUNT ONE, and AGGRAVATED BURGLARY, *** with SPECIFICATION ONE TO COUNT ONE[.]" The entry further states that McIntyre was sentenced to a period of incarceration for three years for each of the firearm specifications, eight to fifteen years for the felonious assault conviction, and eight to twenty-five years for the aggravated burglary conviction. Accordingly, McIntyre appealed from a final judgment, as his signed, journalized sentencing entry clearly stated his sentence and manner of conviction in satisfaction of Crim.R. 32(C), as clarified in *Baker*. *Baker* at ¶14. Though final, it appears McIntyre's sentence was written incorrectly in his journal entry based on the sentence announced at his sentencing hearing. Consequently, the trial court acted properly under Crim.R. 36 to correct a scrivener's error in the sentencing entry which omitted a portion of the sentence imposed upon McIntyre at his sentencing hearing. See Crim.R. 36 (providing that "[c]lerical mistakes in judgments, [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"). The trial court's nunc pro tunc entry noted, consistent with the transcript of McIntyre's sentencing hearing, that his "eight year minimum [sentence for the felonious assault conviction] shall be a period of actual incarceration." "[N]unc 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." *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 164. Moreover, "[a] nunc pro tunc entry records what the trial court did but failed to record in the journal entry." *State v. Plant*, 9th Dist. No. 24118, 2008-Ohio-4424, at ¶7. Here, the trial court properly used a nunc pro tunc entry to correct what was a final, but incorrect, sentencing entry.

{¶8} For the foregoing reasons, McIntyre's assertion that his sentencing entry failed to comply with Crim.R. 32(C) lacks merit. Accordingly, McIntyre's sole assignment of error is overruled.

III

{¶9} McIntyre's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

LEWIS LEROY MCINTYRE, JR., pro se, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.