

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : 09-1606
Appellee :
-vs- : On Appeal from the
ANDREW E. MILLER : Cuyahoga County Court
Appellant : of Appeals, Eighth
Appellate District Court
of Appeals
CA: 91543

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ANDREW E. MILLER

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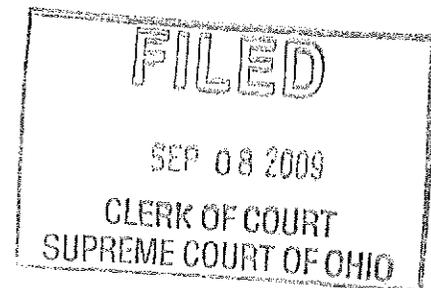


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**EXPLANATION OF WHY THIS FELONY CASE RAISES SUBSTANTIAL
CONSTITUTIONAL QUESTIONS AND IS A MATTER OF
GREAT PUBLIC AND GREAT GENERAL INTEREST**

What can a trial court do when it intends to impose a particular sentence and mistakenly imposes a different sentence than intended? Does a trial court have any power to correct its mistake? What can the aggrieved party do? Judges are human and can make mistakes. When does the concept of finality at sentencing become a game of “gotcha” that perverts justice? While this Court has resolved the issue of what can be done to correct a legally invalid sentence, it has yet to speak to the significant problem of how to address a sentence that, while unintended, is nonetheless legally constituted.

A divided panel of the Eighth District, in conflict with other district courts of appeals, has held in the instant case that a trial judge retains the ability to enter a nunc pro tunc order to impose a different sentence than that stated in open court several months earlier. Pursuant to Propositions of Law I and II, trial courts who employ such remedial measure offend jurisdictional limitations, violate the multiple punishment provision of the State and federal constitutions, destroy the constitutionally protected expectation of privacy in criminal sentences, and improperly employ the procedural mechanism of “nunc pro tunc.”

Resolving these issues is extremely important. The Eighth District has established a loophole in the doctrine of finality that opens a Pandora’s Box of litigation. From now on, a criminal defendant who does not like the sentence imposed can file a motion with the trial court to employ a nunc pro tunc entry to impose a new sentence on the basis that the trial court really meant to impose a different sentence. While such motions are not likely to succeed, they have the potential to clutter dockets in both the trial and appellate courts. No one – prosecutor, defendant or victim -- can leave a courtroom after a sentencing confident that the case is truly over if a

judge can take back a lawful sentence at a later time because it was not what was originally intended. And, by revising a sentence via a nunc pro tunc entry, the trial court can do so without giving the parties or crime victims the opportunity to again appear in open court (although the defendant was present in the instant case, there is no indication that the victims returned).

While in this case, the trial judge's motivation was to ensure that a crime victim receive restitution, there is no guarantee that the Eighth District's decision will not be used conversely in the future to justify a downward adjustment to the amount of a restitution order. And, if restitution can be adjusted, then so too can prison time. It is not hard to imagine a judge, with the benefit of hindsight, reducing a sentence because the judge did not realize that the prison sentence imposed was mandatory and could not be subject to judicial release, or re-visiting court costs upon realizing how high they would be.

To make matters worse, in the instant case, the trial judge who revised the sentence was not the judge who originally imposed the sentence – the second judge merely read the transcripts from the prior proceedings and determined that the first judge made a mistake. Thus, a successor judge now has the ability to reconsider old sentences in an effort to glean the sentencing judge's original intent.

At the same time, it is important to recognize what this case is *not* about. This is not a case where a trial judge made a mistake and corrected it immediately.¹ This is not even a case where the trial judge made a mistake and corrected it before journalization. This is a case where a party moved the trial court some seven weeks later to add restitution where restitution was never mentioned at sentencing, either verbally or via the journal entry. And this is a case where a trial court used a nunc pro tunc entry to effect such a change.

¹ Failing to recognize this distinction, the Opinion Below incorrectly relies upon the Twelfth District's decision in *State v. Middleton*, CA 2004-01-003, 2005-Ohio-681.

Not surprisingly, the Eighth District's decision is in conflict with decisions of other courts of appeals. With respect to Proposition of Law I, the Eight District is in conflict with the Hamilton County Court of Appeals (First Appellate District) in *State v. Purnell*, 171 Ohio App.3d 446, 450, 2006-Ohio-6160, and the Delaware County Court of Appeals (Fifth Appellate District) in *State v. Beam*, Delaware App. No. 06CAAA030018, 2007-Ohio-386. With respect to Proposition of Law II, the instant case conflicts with the judgment of the Summit County Court of Appeals (Ninth Appellate District) in *State v. Battle*, Summit App. No. 23404, 2007-Ohio-2475. The Eighth District denied Mr. Miller's motion to certify each of these conflicts.

As long as trial judges make mistakes there will be a need to correct those mistakes. But determining whether a legally constituted sentence is unintended or intended, and correcting those sentences that are truly unintended, is a question that raises significant constitutional and jurisdictional issues. With courts of appeals divided about how to proceed, this Court's intervention is needed.

STATEMENT OF THE CASE AND FACTS

The opinion of the Eighth District summarized the facts as follows:

{¶ 3} Miller allegedly injured the victim when he forcefully ejected him from a bar where Miller worked as a bouncer. Thereafter, the State charged Miller with two counts of felonious assault. He entered a plea to the lesser included offense of aggravated assault. In discussing the plea agreement, the trial court informed Miller that the victim was requesting restitution in the approximate amount of \$20,410. Miller's attorney stated that he had discussed the plea with Miller but Miller was "concerned" about the restitution; the court allowed Miller's attorney to have further discussions with Miller about the plea agreement.

{¶ 4} Afterwards, Miller pled guilty to the agreed-upon charge. The trial court informed him that the plea included a sentence that consisted of Miller serving community control and paying restitution. Miller indicated that he understood the consequences of his plea.

{¶ 5} Approximately two weeks later, Miller's sentencing hearing was

conducted. As promised, the trial court placed Miller on community control. However, the trial court failed to mention Miller's restitution obligation and did not include restitution in the sentencing entry.

{¶ 6} The State motioned (sic) for a hearing to be conducted to impose the restitution. At this hearing, the State argued that the restitution obligation was agreed to by Miller and was part of the plea agreement. Miller's attorney argued that Miller never agreed to pay restitution; moreover, the State failed to produce evidence of the amount of the restitution. The trial court recessed the matter to review the transcript of the hearing.

{¶ 7} Two weeks later, the hearing was reconvened; the trial court concluded the transcript indicated that Miller agreed to pay restitution in the amount of \$20,409.35 as part of the plea. The trial court determined that restitution was "inadvertently" omitted from the order and amended the sentence to include the restitution amount.

State v. Miller, Cuyahoga App. No. 91543, 2009-Ohio-3307 (Opinion Below).

It should be noted that the motion by the State to impose restitution was filed on January 22, 2008, approximately seven weeks after the sentencing hearing was conducted and the sentence journalized.

On appeal, the Eighth District affirmed the trial court's restitution order. Motions for reconsideration and to certify conflicts, respectively, were denied. This timely appeal follows.

ARGUMENT

The trial court lacked jurisdiction to impose restitution. The Fifth District Court of Appeals in *Beam* and the Second District Court of Appeals in *Purnell* each held that restitution must be addressed at the sentencing hearing in such a manner that the record reflects the trial court's determination at the hearing that restitution in a particular amount is part of the sentence.

Purnell articulated this requirement by stating:

Therefore, the plain language of R.C. 2929.18(A)(1) establishes that if the trial court orders restitution at sentencing, it must determine the amount of restitution at that time. There is no statutory authority for the trial court to exercise continuing jurisdiction to modify the amount of a financial sanction. It can,

however, modify the "payment terms of any restitution," *id.*, or enter a less restrictive sanction, see R.C. 2929.15(C), or suspend the financial sanction as provided in R.C. 2929.18(G). The trial court retains authority to impose a more restrictive financial sanction only if the defendant violates the conditions of his community control. See R.C. 2929.15(B).

State v. Purnell, 171 Ohio App. 3d 446, 450, 2006 Ohio 6160. at par. 9.

Beam used similar language in reaching the same conclusion:

A trial court is authorized to order restitution by an offender to a victim in an amount based upon the victim's economic loss. R.C. 2929.18(A)(1). The trial court is to determine the amount of restitution at the sentencing hearing. *Id.* The amount of the restitution must be supported by competent, credible evidence from which the court can discern the amount of the restitution to a reasonable degree of certainty. *State v. Gears* (1999), 135 Ohio App.3d 297, 733 N.E.2d 683. A trial court abuses its discretion in ordering restitution in an amount that was not determined to bear a reasonable relationship to the actual loss suffered. *State v. Williams* (1986), 34 Ohio App.3d 33, 516 N.E.2d 1270.

Beam, 2007 Ohio 386, at par. 15.

Constitutional considerations also prohibited imposition of restitution. The Fifth Amendment's multiple punishment prohibition precluded the trial court from adding additional punishment to an already imposed sentence. Yet, this was precisely what happened. See generally *Crist v. Bretz* (1978), 437 U.S. 28, 33 (Double Jeopardy Clause advances societal interest in protecting the integrity of final judgments). See also, *North Carolina v. Pearce* (1969) 395 U.S. 711, 720.

Moreover, Fourteenth Amendment due process recognized that Mr. Miller enjoyed a protected expectation of finality in his already imposed sentence – which did not include restitution. *United States v. Daddino* (C.A. 7 1993), 5 F.3d 262, 265. See generally, *United States v. Difrancesco* (1980), 449 U.S. 117.

For all these reasons, the trial court erred when it imposed restitution and the restitution order should be vacated.

The trial court was not permitted to use a nunc pro tunc entry to add restitution. As the Ninth District noted in *Battle*, nunc pro tunc entries can only be used in those circumstances where the trial court took a particular action but then misreported that action in the ensuing journal entry. Here, the nunc pro tunc entry does not reflect what was previously said in open court.

The court of appeals in the instant case incorrectly characterized the original omission of restitution as a type of “clerical mistake.” It is not. Judges do not perform a simple ministerial act when they sentence a defendant. Rather, the judge passes judgment and makes a considered decision about punishment.

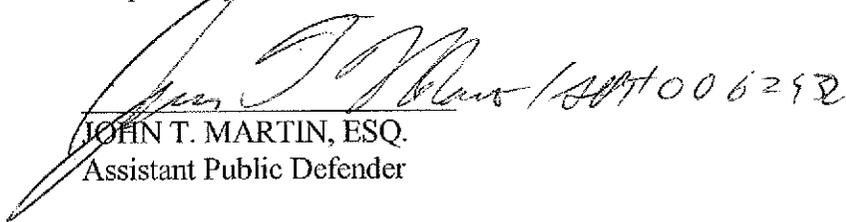
While use of a nunc pro tunc entry is never appropriate in these circumstances, it was particularly inappropriate where, as here, the judge who found that a mistake had been made was not the judge who imposed the sentence originally. Under such circumstances, the second judge’s actions are a substituted judgment – not a corrected one.

Accordingly, the restitution order should be vacated.

CONCLUSION

For these reasons, this Court should accept plenary jurisdiction over the instant case.

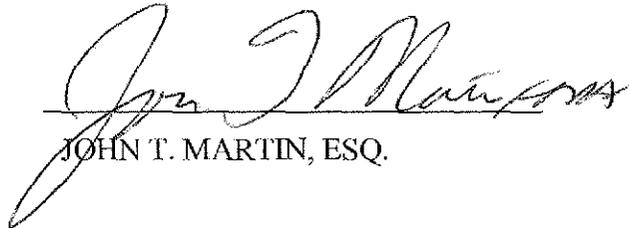
Respectfully submitted,



JOHN T. MARTIN, ESQ.
Assistant Public Defender

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was sent via U.S. mail to William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 8th day of September, 2009.



JOHN T. MARTIN, ESQ.

Judge Mason

JUL 22 2009

FILED

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GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91543

FEE
3
TAXED

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDREW E. MILLER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-493934

BEFORE: Blackmon, J., Gallagher, P.J., and McMonagle, J.

RELEASED: July 2, 2009

JOURNALIZED:
JUL 22 2009

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PATRICIA ANN BLACKMON, J.:

Appellant Andrew Miller appeals the trial court's decision that ordered him to pay restitution in the amount of \$20,409.35. Miller argues that the restitution order was invalid and assigns the following errors for our review:

"I. The lower court abused its discretion by failing to determine on the record whether there was any evidentiary support for the requested restitution."

"II. The lower court abused its discretion by entering a restitution order after the final sentencing order had been journalized."

Having reviewed the record and pertinent law, we affirm the trial court's order of restitution.

Facts

Miller allegedly injured the victim when he forcefully ejected him from a bar where Miller worked as a bouncer. Thereafter, the State charged Miller with two counts of felonious assault. He entered a plea to the lesser included offense of aggravated assault. In discussing the plea agreement, the trial court informed Miller that the victim was requesting restitution in the approximate amount of \$20,410. Miller's attorney stated that he had discussed the plea with Miller but Miller was "concerned" about the restitution; the court allowed Miller's attorney to have further discussions with Miller about the plea agreement.

Afterwards, Miller pled guilty to the agreed-upon charge. The trial court informed him that the plea included a sentence that consisted of Miller serving community control and paying restitution. Miller indicated that he understood the consequences of his plea.

Approximately two weeks later, Miller's sentencing hearing was conducted. As promised, the trial court placed Miller on community control. However, the trial court failed to mention Miller's restitution obligation and did not include restitution in the sentencing entry.

The State motioned for a hearing to be conducted to impose the restitution. At this hearing, the State argued that the restitution obligation was agreed to by Miller and was part of the plea agreement. Miller's attorney argued that Miller never agreed to pay restitution; moreover, the State failed to produce evidence of the amount of the restitution. The trial court recessed the matter to review the transcript of the hearing.

Two weeks later, the hearing was reconvened; the trial court concluded the transcript indicated that Miller agreed to pay restitution in the amount of \$20,409.35 as part of the plea. The trial court determined that restitution was "inadvertently" omitted from the order and amended the sentence to include the restitution amount.

Restitution

We will address Miller's first and second assigned errors together because they both concern the trial court's ability to amend the sentencing entry to include Miller's obligation to pay restitution in the amount of \$20,409.35.

We conclude the trial court had jurisdiction to include restitution as part of the sentence. During the plea phase of the case, the trial court informed Miller that restitution had been requested. Miller's lawyer stated on the record that restitution was part of the plea agreement, and he had discussed the restitution with his client who was concerned with the restitution. The court permitted Miller to consult with his attorney again before deciding whether to accept the plea. When Miller returned he decided to enter the plea and acknowledged in the affirmative to the court that indeed the plea agreement included restitution. During the plea colloquy, the following took place:

"Court: How do you plead to aggravated assault, a fourth degree felony, possible sentence of six to eighteen months, fine of up to five thousand dollars, post-release control up to three years, potential order of restitution in the amount of \$20,409.35? Guilty or not guilty?

"Miller: Can I have a minute?

"Court: Yeah. It's your case.

"Miller: Guilty, your Honor."

Miller is correct that the trial court failed to advise him of the \$20,409.35 restitution amount at the sentencing hearing. The court also failed to include restitution in the original sentencing entry; however, the court included it later in an amended journal entry. We conclude that the entry is valid because the trial court was correcting a mistake, not extending or modifying the sentence.

This is no different than what the trial court did in *State v. Middleton*,¹ where the trial court imposed a 4-year sentence when it should have been a 7-year sentence. The court in *Middleton* mistakenly at sentencing referred to the burglary charge as a third-degree felony when it was a second-degree felony. The appellate court held the trial court could correct the mistake because Middleton was advised he was pleading to a second-degree felony, which carried a maximum sentence of eight years, at his plea hearing.

Likewise, Miller entered into a plea agreement and agreed to pay \$20,409.35 in restitution. Principles of contract law are generally applicable to the interpretation and enforcement of plea agreements; if possible, courts should give effect to every provision therein contained.² The plea contract in

¹12th Dist. No. CA2004-01-003, 2005-Ohio-681.

²*State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853.

this case should be honored and the trial court should be allowed to correct its inadvertence.

In *State v. Williams*,³ although factually different, the appellate court defined a clerical mistake as a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment. *Williams* involved Crim.R. 36; however, it is helpful in defining when a trial court's error is legally correctable. *Williams* explains that the error is legally correctable when the mistake is apparent from the record.

Here, the error was apparent from the record. Miller acknowledged that the plea agreement included \$20,409.35 in restitution; Miller was charged with two counts of felonious assault that was bargained to one count of aggravated assault, and he pled to the agreed-upon charge. Consequently, the error is apparent from the record. The trial court was not attempting to modify or enhance the sentence. This was not an afterthought. It was part of the plea agreement, which was the result of the plea bargain to which Miller agreed.

In *State v. Turner*,⁴ another case that was not exactly on point, but nonetheless instructive, recognized the importance of sua sponte entries that

³6th Dist. No. L-02-1394, 2004-Ohio-466.

⁴Cuyahoga App. No. 81449, 2003-Ohio-4933.

allow for conformance to the transcript. We appreciate that *Turner* involved the sentencing hearing itself, where the original sentencing entry incorrectly sentenced the defendant to a concurrent sentence when it should have been a consecutive sentence. In *Turner*, we held that the trial court could, sua sponte by journal entry, make the correction because the transcript evidenced the error. This is the same concern in this case.

Accordingly, we conclude that when the trial court's journal entry seeks to correct a clerical mistake, which is evidenced in the transcript or record, the trial court's action is valid under its continued jurisdiction to correct clerical mistakes so long as the transcript does not evidence an attempt by the trial court to modify or extend the sentence. Accordingly, Miller's assigned errors are overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.



PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., CONCURS
(WITH ATTACHED CONCURRING OPINION)
CHRISTINE T. McMONAGLE, J., DISSENTS
(WITH ATTACHED DISSENTING OPINION.)

SEAN C. GALLAGHER, P.J., CONCURRING:

I concur with the majority opinion.

At the plea hearing, it was represented that restitution in the amount of \$20,409.35 was a condition of the plea agreement. Consistent therewith, the trial court judge stated probation would be imposed, but that "there are going to be conditions" and that the court was going to "include restitution." Although a "potential" order of restitution, as well as prison terms, were discussed in reviewing the possible penalties that could be imposed, Miller's guilty plea was entered with the understanding that the conditions of the plea agreement would be imposed as part of Miller's sentence. However, at sentencing, the trial court omitted restitution.

Crim.R. 36 provides in relevant part that "errors in the record arising from oversight or omission, may be corrected by the court at any time." I agree with the majority that the record reflects restitution was to be included in the sentence and that its oversight or omission in failing to reflect the actual agreed-to plea bargain was a legally correctable mistake. The trial court was not modifying its sentence, but rather was correcting a mistake apparent from the record. Further, having agreed to the restitution, including the amount, as part of the plea agreement, appellant cannot complain on appeal that the trial court erred in ordering him to make restitution.

CHRISTINE T. McMONAGLE, J., DISSENTING:

Respectfully, I dissent.

At the time of the plea, Miller was asked in pertinent part: "[h]ow do you plead to aggravated assault *** possible sentence of six to 18 months *** potential order of restitution in the amount of \$20,409.35?" Nothing was said on the record about restitution at the time of sentencing, nor was restitution ordered in the sentencing entry. At a later date, without further hearing, and out of the presence of the defendant, an amended journal entry was made adding an order of restitution in the amount of \$20,409.35.

In the first instance, the court informed Miller of a *potential* order of restitution. Potential means "possible, as opposed to actual." Webster's Revised Unabridged Dictionary (1996). In short, Miller was told that an order of restitution in the amount of \$20,409.35 could *possibly* be imposed. He was not told that an order of restitution in the amount of \$20,409.35 would actually be imposed. I do not agree with the majority that the admonitions given Miller at the plea colloquy adequately notified him that restitution in the amount of \$20,409.35 would in fact be ordered. Nor do I believe his response of "guilty" represents his consent to this specific order of restitution.

But more importantly, I do not believe that the court could utilize a nunc pro tunc entry to supply the missing order of restitution. In *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, the Ohio Supreme Court held that trial courts lack authority to reconsider their own valid final judgments in criminal cases, subject to two exceptions: (1) the court is authorized to correct a void sentence (not at issue here); and (2) it can correct clerical errors in judgments. (See Crim.R. 36.) "The term 'clerical mistake' refers to a mistake or omission, *mechanical in nature and apparent on the record, which does not involve a legal decision or judgment.*" *Cruzado* at ¶19. "Although courts possess inherent authority to correct clerical errors in judgment entries so that the

record speaks the truth, *nunc pro tunc* entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided." Id. (Emphasis added.) A *nunc pro tunc* entry relates back to the date of the journal entry it corrects. It is used to record that which the trial court did, but which has not been recorded. *Ohio v. Battle*, 9th Dist. No. 23404, 2007-Ohio-2475.

It is uncontroverted that the trial court did not, at the time of sentencing, order restitution. A *nunc pro tunc* order cannot cure that failure. Further, because the judge never ordered restitution at sentencing and Miller never agreed to it at the plea hearing, the trial court's decision to impose restitution subsequent to sentencing involved a legal judgment as to whether restitution should be ordered; it was not a judgment correcting an error "apparent on the record."

Accordingly, I would hold that the trial court was without jurisdiction to reconsider its own valid final judgment and that the order or restitution made by *nunc pro tunc* entry is hence void.