

ORIGINAL

IN THE SUPREME COURT OF OHIO
AT COLUMBUS.

The State of Ohio, ex rel., :
JAMES E. WOMACK, :
Relator, :
vs. :
MELBA MARSH :
HAMILTON COUNTY :
COURT OF COMMON PLEAS, :
Respondent. :

APPEAL NO. C-100287

10-1157

~~IN RE: JAMES E. WOMACK~~

MEMORANDUM IN SUPPORT OF JURISDICTION OF RELATOR
JAMES E. WOMACK

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RELATOR

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SUPREME COURT OF OHIO

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Explanation of Why This Case Presents a Matter of Public or Great General Interest and raises a Substantial Constitutional Question.

Must the judgment of conviction contain the Relator's plea, verdict or findings, and the sentence in one document to constitute a final appealable order under Ohio Revised Code §2505.02?

In State v. Baker, 114 Ohio St.3d 1505, 2007-Ohio-4285, 872 N.E.2d 948, this case was accepted as a certified conflict between the Ninth and Twelfth District Court of Appeals to resolve what a judgment of conviction must include pursuant to Crim.32(C) to become a final appealable order. ((See R.C. §2505.02), delineating final appealable orders.

2(two) interrelated issues were included in this appeal, (1). whether "the plea, the finding, and the sentence," Crim. R.32(C), must be contained in one document; and (2), whether the judgment of conviction must include the plea entered at arraignment.

In State v. Baker, 119 Ohio St.3d 197, 893 N.E.2d 163, 2008-Ohio-3330, this court answered the certified question by holding that the judgment of conviction is a single document that need not necessarily include the plea entered at arraignment, but it must include the sentence and the means of conviction, whether the plea, or verdict, or finding by the court, to be a final appealable order under R.C. §2505.02.

STATEMENT OF THE CASE AND FACTS.

Relator, James E. Womack, was convicted after a jury trial of (4) four counts of robbery. R.C. §2911.02 (A)(3).

The judgment of conviction, entered on June 13, 2006, stated that the Defendant shall be supervised by the Adult Parole Authority after Defendant leave prison, which is preferred to as post-release control for (5) five years.

Relator appealed his convictions, and the Hamilton County, Court of Appeals, First Appellate District, State v. Womack, Hamilton App. No. C-060542, affirmed his convictions.

The Ohio Supreme Court, affirmed convictions, Case No. 07-1095, filed entry denying leave to appeal and dismissed as not having any constitutional question.

On June 8, 2009, Relator filed an Application for Resentencing Pursuant to Foster, in the Hamilton County, Court of Common Pleas, Case No. B-0501011, and on December 1, 2009, Relator filed an Application for Reopening for Resentencing Pursuant to Ohio Revised Code §2967.28 (B)(3), in the Hamilton County, Court of Common Pleas, Case No. B-0501011, asserting that certain portions of Ohio's sentencing laws are unconstitutional and violative of a defendant's Sixth Amendment right to a jury trial and that since the trial court made a mistake in it's sentencing entry regarding Post-Release Control, the journal entry is void, and there is no final appealable order. (Relator was sentenced to (5) five years Post-Release Control for a third-degree felony). (See Judgment Entry, 6-13-06, page 2).

On May 3, 2010, Relator filed a Writ of Mandamus and/or Procedendo in the Court of Appeals, First Appellate District, Case No. C-100287, to compel trial judge Melba D. Marsh, to rule on pending motions filed on June 8, 2009, and on December 1, 2009, pursuant to Superintendent Rule 40(A), to hold a de nova sentencing hearing pursuant to R.C. §2929.191, and issue new journal entry with correct term of Post-Release Control.

On May 11, 2010, trial court issued an Entry Overruling Application for Resentencing/Correcting Mandatory Term of Post-Control from (5) Five Years to (3) Three Years.

On May 20, 2010, Relator filed a Notice of Appeal, Appeal No. C-100343, and a Reply to Entry Overruling Application for Resentencing/Correcting Mandatory Term of Post-Release Control from (5) Five Years to (3) Three Years, Case No. C-100287, Trial Court Case No. B-0501011, to the Court of Appeals, First Appellate District, contending that the trial court erred in issuing a nunc pro tunc sentencing entry that failed to comply with Crim.R. 32(C), that it failed to contain the (4) four elements in constituting a final appealable order under R.C. §2505.02.

On June 9, 2010, the Court of Appeals, First Appellate District, Case No. C-100287, dismissed Writ of Mandamus and/or Procedendo.

This cause is now before this Honorable Court upon Relator's appeal.

ARGUMENT

PROPOSITION OF LAW No. 1:

The Court of Appeals erred to the prejudice of Relator by sua sponte dismissing Writ of Mandamus and/or Procedendo to compel trial court to issue an appropriate sentencing entry that complies with Crim.R.32(C), and R.C. §2505.02, that constitutes a final appealable order. State v. Baker, 893 N.E.2d 163, 119 Ohio St.3d 197, 2008-Ohio-3330, State v. Baker, 114 Ohio St.3d 1505, 872 N.E.2d 948, 2007-Ohio-4285, The STATE ex rel CULGAN v. MEDINA COUNTY COURT OF COMMON PLEAS et al., 119 Ohio St.3d 535, 895 N.E.2d 805, 2008-Ohio-4609.

Relator asserts that the Court of Appeals erred in sua sponte dismissing his complaint for Writ of Mandamus and/or Procedendo where revised sentencing entry correcting mandatory term of Post-Release Control did not set forth the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based and the sentence. Rules Crim.Proc., Rule 32(C).

The Supreme Court of Ohio held in The STATE ex rel CULGAN v. MEDINA COUNTY COURT OF COMMON PLEAS et al., 119 Ohio St.3d 535, 895 N.E.2d 805, 2008-Ohio-4609, that Writs of Mandamus and/or

Procedendo would issue to compel trial court to issue appropriate sentencing judgment.

Pursuant to State v. Baker, 119 Ohio St.3d 197, 893 N.E.2d 163, 2008-Ohio-3330, a judgment of conviction is a final appealable order when it sets forth: (1), the guilty plea, the jury verdict or the findings of the court upon which the conviction is based; (2), the sentence; (3), the signature of the judge; (4), the time-stamp showing journalization by the clerk of court. R.C. §2505.02, Crim. Proc. Rule 32(C).

In the instant case, the Relator was convicted of robbery, R.C. §2911.02 (A)(3), which are third-degree felonies.

The Judgment Entry states that the Relator shall be supervised by the Adult Parole Authority after Relator leaves prison which is referred to as Post-Release Control for (5) five years. (Please read sentencing entry, (6-13-06), Page 2).

R.C. §2967.28 (B)(3), provides in part * * * period of Post-Release required by this division for an offender shall be one of the following periods; * * * (3), for a felony of the third-degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, (3) three years.

The original journal entry sets forth; (1), the jury verdict; (2), the sentence; (3), the signature of the judge; (4), the entry on the journal by the clerk of court. (June 13, 2006).

The amended or revised journal entry is correct in the mandatory (3) three year term of Post-Release Control, the signature of the judge, and the entry on the journal by the clerk of court, but it fails to set forth the jury verdict, and the sentence.

Allowing multiple documents to constitute a final appealable order is an erroneous interpretation of Crim.R. 32(C), only one document can constitute a final appealable order.

The judgment of conviction is a single document.

A court of appeals has no jurisdiction over orders that are not final and appealable. Section 3(B)(2), Article IV, Ohio Constitution. Baker, 893 N.E.2d 163 at ¶6.

"In order to decide whether an order issued by a trial court in a criminal proceeding is a reviewable final order, appellate courts should apply the definitions of 'final order' contained in R.C. §2505.02." State v. Muncie (2001), 91 Ohio St.3d 440,444, 746 N.E.2d 1092.

R.C. §2505.02(B) provides:

"An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following;

"(1) An order that affects a substantial right in an action that ~~in effect~~ determines the action and prevents a judgment."

Undoubtedly, a judgment of conviction qualifies as an order that "affects a substantial right" and "determines the action and prevents a judgment" in favor of the defendant. Baker, 893 N.E.2d 163 at ¶9.

Finally, a judgment of conviction is final and appealable as one including sentence and means of conviction.

CONCLUSION

The judgment of conviction is a single document that includes the sentence, and the mean of conviction, whether by plea, verdict, or finding by the court, to be a final appealable order under R.C.

§2505.02.

The Relator is correct that the trial court's amended sentencing entry violates Crim.R.32(C) which would render the entry non-appealable.

His claim of Writ of Mandamus and/or Procedendo has merit and the Court of Appeals erred in sua sponte dismissing his complaint.

The Writ of Mandamus and/or Procedendo should be granted to compel the trial court to issue a sentencing entry that complies with Crim.R.32(C) and R.C. §2505.02, and constitutes a final appealable order.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal of Relator James E. Womack, and Memorandum in Support of Jurisdiction of Relator James E. Womack, has been served by U.S. Mail postage pre-paid to Joseph T. Deters, Prosecuting Attorney, c/o Paula E. Adams, Assistant Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio, 45202, on the 28th, day of June, 2010.

James E. Womack
Relator.

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE EX REL.
JAMES E. WOMACK,

APPEAL NO. C-100287

Relator,

vs

ENTRY DISMISSING PETITION
FOR WRIT OF MANDAMUS

MELBA MARSH, JUDGE,
HAMILTON COUNTY
COURT OF COMMON PLEAS,

Respondent.

This cause came on to be considered upon the petition for a writ of mandamus, upon the motion of the respondent to dismiss the petition, and upon the relator's reply.

The Court finds that the motion to dismiss is well taken and is granted.
The petition for writ of mandamus is dismissed.

To The Clerk:

Enter upon the Journal of the Court on JUN - 9 2010 per order of the Court.

By:


Presiding Judge

(Copies sent to all counsel)



THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS
CRIMINAL DIVISION

STATE OF OHIO
Plaintiff
vs.
JAMES WOMACK
Defendant

: Case No. B-0501011
: Judge Melba D. Marsh
: ENTRY OVERRULING
: APPLICATION FOR RE-
: SENTENCING / CORRECTING
: MANDATORY TERM OF POST-
: RELEASE CONTROL FROM
: FIVE YEARS TO THREE YEARS

This matter is before the court on the defendant's "Application for Re-sentencing Pursuant to Foster" filed on June 24, 2009 and his "Motion Requesting Re-Sentencing" filed on December 1, 2009. The court finds that the defendant is not entitled to a re-sentencing hearing. The court further finds that the defendant is correct that the mandatory term of post-release control is three years as opposed to the five years originally ordered by this Court. Therefore, it is the order of this Court that, as the defendant is well aware, he shall be subject to three years of post-release control.

Judge Melba D. Marsh

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Paula E. Adams (0069036P)
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A TRUE COPY OF THE ORIGINAL
ENTERED 5/10/10
ATTEST PATRICIA M. CLANCY
CLERK. [Signature]
BY _____
DEPUTY
DATE 5/10/10