

[Cite as *State v. Allen*, 2009-Ohio-2896.]
STATE OF OHIO, MAHONING COUNTY

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IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)

PLAINTIFF-APPELLEE,)

VS.)

CASE NO. 08-MA-179

KEITH ALLEN,)

OPINION

DEFENDANT-APPELLANT.)

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common
Pleas of Mahoning County, Ohio
Case No. 08CR171

Criminal Appeal from Court of Common
Pleas of Mahoning County, Ohio
Case No. 08CR171

JUDGMENT: Reversed and Remanded

Reversed and Remanded

APPEARANCES:
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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

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Dated: June 11, 2009

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DONOFRIO, J.

{¶1} Defendant-appellant, Keith Allen, appeals from a Mahoning County Common Pleas Court judgment entry of sentence for his receiving stolen property conviction.

{¶2} On February 28, 2008, a Mahoning County grand jury indicted appellant on one count of receiving stolen property, a fifth-degree felony in violation of R.C. 2913.51(A)(C). Appellant entered a not guilty plea.

{¶3} Appellant later changed his plea to guilty pursuant to a plea deal with plaintiff-appellee, the State of Ohio. In exchange for his guilty plea, the state agreed to recommend that the trial court order appellant to serve any jail time in this case concurrent with any time he was currently serving. The trial court accepted his plea and entered a finding of guilt.

{¶4} The matter proceeded to a sentencing hearing. At the hearing, the trial court sentenced appellant to 12 months of incarceration. It made no mention whether appellant was to serve this sentence consecutive to or concurrent with the sentence he was already serving on unrelated misdemeanor convictions.

{¶5} But in its judgment entry of sentence, the court sentenced appellant to 12 months in prison “to run consecutive to the sentence imposed by [the Youngstown Municipal Court].”

{¶6} Appellant filed a timely notice of appeal on September 4, 2008.

{¶7} Appellant raises a single assignment of error, which states:

{¶8} “THE TRIAL COURT ERRED IN ORDERING APPELLANT’S FELONY SENTENCE TO RUN CONSECUTIVELY TO A MISDEMEANOR SENTENCE IMPOSED BY ANOTHER COURT WHERE THE WRITTEN JUDGMENT ENTRY IMPOSING THE CONSECUTIVE SENTENCE DOES NOT COMPORT WITH THE SENTENCE PRONOUNCED AT THE SENTENCING HEARING.”

{¶9} Appellant argues that the trial court erred in entering a sentence that was different than the sentence it announced at the sentencing hearing. Specifically, he points out that at the sentencing hearing, the trial court never stated that appellant was to serve his sentence consecutive to the sentence he was already serving on

unrelated misdemeanor charges. Because he was not present when the court ordered his current sentence to run consecutive to his other sentence, appellant asserts that we must reverse his sentence and remand the matter to the trial court for resentencing.

{¶10} Appellee concedes error in this case and agrees that we should remand this case for resentencing.

{¶11} Crim.R. 43(A) provides that the defendant shall be present at every stage of the trial, including at the imposition of sentence. Because appellant's presence is required when the court imposes sentence, the trial court errs when its judgment entry of sentence differs from the sentence that it announced at the sentencing hearing in the defendant's presence. *State v. Jordan*, 10th Dist. No. 05AP-1330, 2006-Ohio-5208, at ¶48.

{¶12} At the start of the sentencing hearing, the prosecutor made the court aware that appellant was already serving a sentence for misdemeanor convictions. (Sentencing Tr. 2). In fact, as part of the plea agreement, the state recommended that the trial court order that appellant serve his sentence in this case concurrent with the sentence he was already serving. However, the trial court never mentioned at the sentencing hearing whether appellant's sentence in this case was to run concurrent with or consecutive to his other sentence. Yet in its judgment entry of sentence, the court ordered that appellant's sentence was to be served consecutive to the sentence he was already serving. This was the first time the court made any mention of consecutive sentences.

{¶13} In similar cases, both the Eighth and Tenth Districts have found such a sentencing error to require reversal so that the trial court could resentence the defendant.

{¶14} In *Jordan*, 10th Dist. No. 05AP-1330, the trial court in its judgment entry of sentence, ordered the defendant to serve his sentences on some of the counts consecutive to his sentences for some of the other counts. The court made no

mention of this at the sentencing hearing. The Tenth District reversed and remanded the matter for resentencing. It reasoned:

{¶15} “Here, the trial court’s judgment entry pronounced consecutive sentences on certain counts even though the trial court made no such indications in appellant’s presence during the sentencing hearing. Thus, pursuant to [*State v. Jones*] (March 18, 1999), 10th Dist. No. 98AP-639] appellant is entitled to be present at a new sentencing hearing in regards to such sentencing matters.” *Id.* at ¶49.

{¶16} Likewise, in *State v. Quinones*, 8th Dist. No.89221, 2007-Ohio-6077, at the defendant’s sentencing hearing, the trial court did not state whether the defendant’s three sentences were to be served concurrently or consecutively. Yet in its judgment entry of sentence, the court stated that the sentences were to be served consecutively. The Eighth District reversed and remanded for resentencing. It noted that “if there exists a variance between the sentence pronounced in open court and the sentence imposed by a court’s judgment entry, a remand for resentencing is required.” *Id.* at ¶5, citing *State v. R. W.*, 8th Dist. No. 80631, 2003-Ohio-1142, *State v. Carpenter* (Oct. 9, 1996), 1st Dist. No. C-950889.

{¶17} The only difference in this case, as opposed to *Jordan* and *Quinones*, is that in this case the court’s judgment entry ordered appellant to serve his sentence consecutive to a sentence he was already serving in another case. In *Jordan* and *Quinones*, however, the court ordered the defendants to serve their sentences consecutive to their sentences for other counts for which the court was sentencing them at the same time. Despite this difference, the law as expressed in *Jordan* and *Quinones* applies here. In this case, the trial court ordered appellant to serve consecutive sentences while he was not present. It did so in its judgment entry but not at the sentencing hearing where appellant was present. This was in violation of Crim.R. 43(A), which requires the defendant to be present when the court imposes its sentence.

{¶18} Accordingly, appellant’s sole assignment of error has merit.

{¶19} For the reasons stated above, appellant's sentence is hereby reversed and the matter is remanded for resentencing.

Vukovich, P.J., concurs.

Waite, J., concurs.