

[Cite as *State v. Oliver*, 2015-Ohio-5596.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO

PLAINTIFF-APPELLEE

V.

DWAYNE A. OLIVER

DEFENDANT-APPELLANT

CASE NO. 15 MA 97

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from Court of Common
Pleas of Mahoning County, Ohio
Case No. 95 CR 122 A

JUDGMENT:

Affirmed

APPEARANCES:

For Plaintiff-Appellee

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21 West Boardman Street, 6th Floor
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For Defendant-Appellant

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JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 30, 2015

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DeGENARO, J.

{¶1} Defendant-Appellant, Dwayne Oliver, appeals the June 4, 2015 judgment of the Mahoning County Court of Common Pleas issuing a nunc pro tunc order to correct a clerical omission of the trial court's original entry dated January 6, 1997. As Oliver's arguments are meritless, the judgment of the trial court is affirmed.

{¶2} On December 27, 1996, pursuant to a rule 11 agreement, Oliver pled guilty to Involuntary Manslaughter and two counts of Felonious Assault. On January 6, 1997, he was sentenced to ten to twenty-five years for "Voluntary Manslaughter", and eight to fifteen years for each count of Felonious Assault. The trial court imposed concurrent sentences that were also concurrent to a federal sentence Oliver was then serving. Oliver did not appeal.

{¶3} Upon completion of his federal sentence, the trial court issued an amended judgment entry on June 24, 2003, which transferred Oliver to a state facility to serve the remainder of his sentence. Again, no appeal was taken.

{¶4} On January 14, 2015, Oliver filed a "motion to find judgment entry and guilty plea void." The basis of his argument being that he pled guilty to "Involuntary Manslaughter" but the January 1997 judgment entry listed "Voluntary Manslaughter."

{¶5} The State filed its response and acknowledged that Oliver did indeed plead to "Involuntary Manslaughter" and that the correct statutory section, R.C. 2903.04, was listed on the judgment entry and in the rule 11 agreement. However, due to clerical error it was mistakenly described as "Voluntary Manslaughter." The State requested the trial court to correct this error through a nunc pro tunc judgment entry. Further, noticing the 1997 entry was silent as to court costs, the State requested that the court impose and suspend court costs in the interest of justice.

{¶6} On June 4, 2015, the trial court issued a nunc pro tunc order to indicate that Oliver pled guilty to "Involuntary Manslaughter" and that based on his properly filed affidavit of indigency, the trial court imposed, but suspended, court costs.

{¶7} Oliver's first of three assignments of error asserts:

The Trial court violated R.C. 2947.23(A)(1), when the court failed to impose the mandatory court cost in the Judgment entry and

improperly issued a nunc pro tunc order on June 4, 2015 waiving court cost, when no affidavit of indigency was ever filed pursuant to R.C. 2929.18(B)(1), rendering both judgment entries void and a non-appealable order.

{¶8} The Ohio Supreme Court held that the trial court's failure to inform an offender in open court of mandatory court costs does not render the offender's entire sentence void. *State v. Joseph*, 125 Ohio St.3d 76, 80, 2010-Ohio-954, 926 N.E.2d 278. "The Court reasoned that the defendant was denied the opportunity to claim indigency and to seek a waiver of the payment of court costs before the trial court because the trial court did not mention costs at the sentencing hearing." *State v. Walker*, 8th Dist. No. 96305, 2011-Ohio-5270, ¶9, citing *Joseph*, supra.

{¶9} Addressing this alleged error is problematic for two reasons. First, no transcript was provided with the record on appeal so it is impossible to ascertain exactly what the court decided or intended to decide in December, 1996 with respect to costs.

{¶10} Second, and more fundamentally, a nunc pro tunc entry reflects what a court "actually decided, not what the court might or should have decided or what the court intended to decide." *State v. Ware*, 141 Ohio St.3d 160, 2014-Ohio-5201, 22 N.E.3d 1082, ¶ 16, quoting *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 164, 656 N.E.2d 1288 (1995). Nunc pro tunc entries are reserved to correct clerical, not substantive errors or omissions. For example, the trial court's June, 2015 nunc pro tunc order was the proper procedural device to reflect the correct descriptive offense for R.C. 2903.04 as Involuntary Manslaughter. "Clerical 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" Crim.R. 36.

{¶11} Although a nunc pro tunc order was an improper procedural mechanism to address costs, the error is harmless. The trial court originally did not impose costs, and that remains the case as the amended entry suspends costs. Accordingly, this assignment of error is meritless.

{¶12} Oliver's second of three assignments of error asserts:

The Trial court erred in not finding the guilty plea void, where the Appellant went to prison for an offense contrary to the plea agreement rendering the plea agreement void.

{¶13} Pursuant to the doctrine of res judicata, "a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶14} Any issues related to the guilty plea and prison sentence should have been raised on direct appeal and as such are barred by res judicata. Oliver pled guilty to Involuntary Manslaughter and two counts of Felonious Assault. The 2007 judgment entry listed the correct statutory section for Involuntary Manslaughter, R.C. 2903.04, but incorrectly listed Voluntary Manslaughter as the descriptive offense. Any arguments relating to the validity of the plea and sentence were required to be raised in a direct appeal. Thus, the issue is barred by res judicata.

{¶15} Oliver's third of three assignments of error asserts:

The Trial court violated due process and Crim. R. 43(A), when the court modified the judgment entry filed on January 6, 1997 and modified the judgment again on June 4, 2015 nunc pro tunc.

{¶16} Crim.R. 43(A) states that "the defendant must be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence."

{¶17} As discussed above, the January 1997 judgment entry contained a clerical mistake—the descriptive offense for R.C. 2903.04, which the trial court is

permitted to correct pursuant to Crim.R. 36. It was not a modification of the offense that he pled to or a change in the sentence he received in open court on December 27, 1996. Oliver's sentence was not modified in any way. Accordingly, Oliver's third assignment of error is meritless.

{¶18} For the foregoing reasons, the judgment of the Mahoning County Court of Common Pleas is affirmed.

Donofrio, P. J., concurs

Waite, J., concurs