

[Cite as *State v. Ferrell*, 2005-Ohio-5992.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85821

STATE OF OHIO, :
 :
 Plaintiff-Appellee : JOURNAL ENTRY
 : and
 vs. : OPINION
 :
 TERRY FERRELL, :
 :
 Defendant-Appellant :

DATE OF ANNOUNCEMENT :
 OF DECISION : NOVEMBER 10, 2005

CHARACTER OF PROCEEDING: : Criminal appeal from
 : Common Pleas Court
 : Case No. CR-414835

JUDGMENT : AFFIRMED.

DATE OF JOURNALIZATION :

APPEARANCES:

For plaintiff-appellee: William D. Mason, Esq.
 Cuyahoga County Prosecutor
 BY: John R. Kosko, Esq.
 Assistant County Prosecutor
 The Justice Center - 8th Floor
 1200 Ontario Street
 Garfield Heights, Ohio 44113

For defendant-appellant: Robert L. Tobik, Esq.
 Cuyahoga County Public Defender
 BY: Robert M. Ingersoll, Esq.
 Assistant Public Defender
 100 Lakeside Place
 1200 West Third Street
 Cleveland, Ohio 44113

MICHAEL J. CORRIGAN, J.:

{¶ 1} A jury convicted appellant, Terry Ferrell (“Ferrell”), of aggravated murder, aggravated burglary, aggravated robbery, and kidnapping for the brutal deaths of two victims in 1992. Although Ferrell could have received the death penalty for his convictions, the jury found that the aggravating circumstances did not outweigh the mitigating factors and instead recommended that Ferrell be sentenced to life imprisonment without the possibility of parole. The trial court accepted the jury’s recommendation and sentenced Ferrell to life in prison without parole.

{¶ 2} Ferrell appealed his convictions and sentence. This court, while affirming his convictions, reversed Ferrell’s sentence and remanded to the trial court for resentencing because Ferrell should have been sentenced in accordance with the statutory scheme in effect in 1992 - the law in effect when the crimes occurred - and not in accordance with Senate Bill 2, which was enacted in 1996.

{¶ 3} On remand, the trial court conducted a resentencing hearing and sentenced Ferrell to life in prison with the possibility of parole after serving a full 30 years in prison for each of the two murders he committed. The trial court also sentenced Ferrell to ten to 25 years in prison for the aggravated robbery, aggravated burglary, and kidnapping convictions. Ferrell now appeals, citing two assignments of error.

I.

{¶ 4} Ferrell argues in his first assignment of error that he was denied his constitutional right to a trial by jury when the trial court, and not a jury, resentenced him on the aggravated murder convictions. In particular, Ferrell complains that because he

originally faced the death penalty, he is entitled to another jury recommendation at resentencing. However, Ferrell's argument is without merit.

{¶ 5} The Supreme Court of Ohio in *State v. Penix* (1987), 32 Ohio St.3d 369, 373, 513 N.E.2d 744, held as follows:

{¶ 6} “[W]hen an accused is tried by jury and convicted of aggravated murder with specification, a death sentence may be imposed by the trial judge only upon recommendation of the same jury that tried the guilt phase of the proceedings, pursuant to the criteria set forth in R.C. 2929.03. Thus, when a case is remanded to the trial court following vacation of the death sentence due to error occurring at the penalty phase of the proceeding, the trial court, in resentencing the offender, is limited to the sentences of life imprisonment with parole eligibility after serving twenty full years of imprisonment or life imprisonment with parole eligibility after serving thirty full years of imprisonment.”

{¶ 7} Although the jury in *Penix* recommended a death sentence and the jury here recommended life imprisonment without the possibility of parole for Ferrell, the *Penix* holding is still applicable. This court, like the *Penix* court, vacated Ferrell's sentence and remanded to the trial court for resentencing because of applying the wrong statutory sentencing scheme to Ferrell's sentence. On remand at the resentencing, the trial court was limited to the sentences available pursuant to the 1992 version of R.C. 2903.01, which included life imprisonment with the possibility of parole after serving a full 30 years in prison or life imprisonment with the possibility of parole after serving a full 20 years in prison¹. Reasoning that the original jury found Ferrell's crimes deserving of the next

¹ R.C. 2903.01, in 1992, also included death as a possible sentence; however,

highest sentence after death (life imprisonment without the possibility of parole), the trial court resentenced Ferrell to an analogous sentence under the 1992 version of R.C. 2903.01 - life imprisonment with the possibility of parole after serving a full 30 years in prison.

{¶ 8} Following *Penix*, the trial court, and not a jury, resentenced Ferrell. Despite Ferrell's argument to the contrary, he is not entitled to another jury recommendation at resentencing, as death is no longer a possible sentence and the Supreme Court of Ohio specifically provided that it is the trial court that resentences the offender. The trial court properly resentenced Ferrell to life imprisonment with the possibility of parole after serving a full 30 years in prison for both aggravated murder convictions. Thus, Ferrell's first assignment of error is overruled.

II.

{¶ 9} For his second assignment of error, Ferrell contends that he was denied his constitutional right to be present at all essential parts of his trial when the trial court altered his sentence in an out of court proceeding. In particular, Ferrell argues that the trial court, at the resentencing, imposed a sentence of ten years for the aggravated burglary, aggravated robbery, and kidnapping convictions, but later issued a nunc pro tunc entry clarifying the sentence to be ten to 25 years in prison. For this, Ferrell argues that the trial court imposed a sentence outside of his presence, which must be reversed by this court. However, Ferrell's argument lacks merit.

following *Penix*, a death sentence, at resentencing, is no longer an available sentence.

{¶ 10} It is patently clear from the transcript at the resentencing hearing, at which Ferrell was present, that the trial court informed Ferrell of the possible sentence that could be imposed for his aggravated burglary, aggravated robbery, and kidnapping convictions pursuant to the 1992 version of R.C. 2911.01. The possible sentences ranged from five, six, seven, eight, nine or ten to 25 years in prison. At resentencing, the trial court afforded Ferrell his right of allocution. Imposing a ten-year prison sentence was simply a clerical error that was later corrected by the nunc pro tunc entry. Ferrell's presence was not crucial at the time the trial court corrected its journal entry. Ferrell cannot claim he was unaware of the possible sentences for his convictions; thus, the trial court properly clarified the sentence to ten to 25 years in prison. Ferrell's second assignment of error is overruled.

Judgment affirmed.

[Cite as *State v. Ferrell*, 2005-Ohio-5992.]

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 issue out of this court directing the Common Pleas 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.

MICHAEL J. CORRIGAN
JUDGE

ANN DYKE, P.J., CONCURS IN
JUDGMENT ONLY.

MARY EILEEN KILBANE, J., CONCURS
IN PART AND DISSENTS IN PART
WITH SEPARATE OPINION.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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COUNTY OF CUYAHOGA
NO. 85821

STATE OF OHIO,	:	
	:	C O N C U R R I N G
Plaintiff-Appellee	:	
	:	A N D
	:	
-vs-	:	D I S S E N T I N G
	:	
	:	O P I N I O N
TERRY FERRELL,	:	
	:	
	:	
Defendant-Appellant	:	

DATE: NOVEMBER 10, 2005

MARY EILEEN KILBANE, J., CONCURS IN PART AND DISSENTS IN PART:

{¶ 11} I concur with the majority's opinion disposing of the first assignment of error, but respectfully dissent with the majority's conclusion that the trial court's nunc pro tunc order was merely a correction of a clerical error.

{¶ 12} Crim.R. 36 provides that "[c]lerical 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. 43, however, provides that:

"(A) Defendant's presence

The defendant shall be present at the arraignment and every stage of the trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the

verdict. A corporation may appear by counsel for all purposes."

{¶ 13} Upon this Court's original remand for resentencing, the trial court noted that since Ferrell's offenses occurred on or about December 19, 1992, a time before the sentencing changes under Senate Bill 2, Ferrell would be sentenced under those guidelines. Before imposing sentence, the court advised Ferrell of the possible sentences and advised him that:

"Under Section 2911.01 of the Revised Code aggravated robbery is an aggravated felony of the first degree punishable in the same manner, five, six, seven, eight, nine or ten to 25 years in prison, and the same penalty also applies to the charge of kidnapping, under Section 2905.01 of the Ohio Revised Code." Transcript at 5.

{¶ 14} After allowing argument from defense counsel and from the State, and advising Ferrell of the possible range of sentences, the trial court sentenced Ferrell and found:

"Now, with respect to counts five through ten, the Court imposes the sentence of 10 years in prison on each of these counts. These 10 year sentence [sic] on counts five through ten will run concurrent to each other."

(Transcript at 18.)

{¶ 15} Although the majority contends that any correction of Ferrell's sentence from ten years to ten to twenty-five years was merely a clerical error, I believe this correction imposes a substantive change that necessitates a remand for resentencing.

{¶ 16} In *State v. Brown*, 136 Ohio App.3d 816, 2000-Ohio-1660, Brown was sentenced to nine months in prison after violating a previous community control sanction. Four days after entering its journal entry, the trial court journalized a nunc pro tunc order which changed the previously pronounced sentence. On appeal, the court distinguished this correction from a Crim.R. 36 clerical error, and found that the trial court's nunc pro tunc entry made substantive changes to Brown's sentence. The court then disregarded the nunc pro tunc entry in its entirety.

{¶ 17} Likewise, in *State v. Gabriel*, (Dec. 31, 1987), Cuyahoga App. No. 53141, the defendant appealed claiming that the trial court, outside of his presence, increased his original sentence through the use of a nunc pro tunc entry. Although Gabriel was originally sentenced to a period of nine to twenty-five years and five to fifteen years on various charges, seven days later, the trial court vacated its original sentence and imposed a sentence of ten to twenty-five years on each count, sentences to run concurrent. The trial court then journalized an entry indicating that the later entry was a nunc pro tunc, which therefore replaced the first entry.

{¶ 18} On appeal, this Court noted that Crim.R. 43(A) specifically requires a defendant's presence at every stage of the proceedings, including the imposition of sentence, and further found that this reasoning applied where one sentence is vacated and

a new sentence imposed. See *City of Columbus v. Rawland* (1981), 2 Ohio App.3d 144. The nunc pro tunc judgment entry was then nullified with the specific finding that the trial court erred in increasing the sentence outside of the defendant's presence.

{¶ 19} Similarly, in *State v. Calvillo* (Nov. 25, 1991), Cuyahoga App. No. 59282, the defendant appealed his felonious assault conviction claiming that the trial court's nunc pro tunc entry increasing his sentence violated Crim.R. 43 since he was not present for resentencing. The facts reveal that the initial sentence, i.e., a two- to fifteen-year sentence for an aggravated felony of the second degree, was not statutorily authorized. To correct this error, the trial court used a nunc pro tunc order to state the proper statutory period, i.e., three to fifteen years. This Court found that a trial court can correct an illegal sentence so long as it is in open court with the defendant present and with a full explanation for resentencing—a fact not present in the instant case.

{¶ 20} In this case, I believe the trial court likewise used a nunc pro tunc entry to make a substantive correction to a prior entry. As held by the Ohio Supreme Court, "[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*, 74 Ohio St.3d 158, 164, 1995-Ohio-278. (Emphasis added.)

{¶ 21} The transcript reflects that on January 17, 2005, Ferrell was sentenced to ten years on counts five through ten. Fifteen days later, on February 1, 2005, the trial court entered a nunc pro tunc order altering the sentence from ten years to ten to twenty-five years. While the court might have imposed or intended to impose a ten- to twenty-five-year sentence originally, it clearly did not do so at the time of sentencing. Nunc pro tunc orders are allowed only to make the record reflect what *actually* occurred at the hearing. See *State v. McCornell*, Cuyahoga App. No. 81581, 2003-Ohio-2474; See, also, *State v. Francis* (Jan. 25, 2000), Guernsey App. No. 98CA13; *State v. Brown*, 136 Ohio App.3d 816, 819-820, 2000-Ohio-1660.

{¶ 22} For these reasons, I would find Ferrell's second assignment of error to have merit and remand for a complete resentencing.