

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No: 09CA7
	:	
v.	:	
	:	
CARL FRANKLIN,	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	File-stamped date: 12-8-09

APPEARANCES:

Lee D. Koogler, Hillsboro, Ohio, for the Appellant.

Fred J. Beery, Hillsboro City Law Director, Hillsboro, Ohio, for the Appellee.

Kline, P.J.:

{¶1} Carl Franklin appeals his resentencing for sexual imposition. On appeal, Franklin contends that the trial court erred when it ordered him to register as a Tier I sexually oriented offender as a condition of his community control. But after consideration, we find that the trial court was without jurisdiction to resentence Franklin. Accordingly, we vacate the resentencing judgment of the trial court and dismiss this appeal.

I.

{¶2} On November 3, 2005, Franklin was convicted of sexual imposition in violation of R.C. 2907.06(A)(1) and telephone harassment in violation of R.C. 2917.21(B). Franklin appealed his two misdemeanor convictions, but this court affirmed

the judgment of the trial court. *State v. Franklin*, Highland App. Nos. 05CA20 & 05CA21, 2006-Ohio-6369. The Ohio Supreme Court did not accept Franklin's appeal from this Court's decision. *State v. Franklin*, 113 Ohio St.3d 1489, 2007-Ohio-1986.

{¶3} On January 22, 2009, the Hillsboro Municipal Court resentenced Franklin pursuant to R.C. 2929.25. The trial court found that Franklin's prior conviction classified him as a Tier I sex offender under Ohio's most recent sex offender registration act, Senate Bill 10 ("S.B. 10"). After the hearing, the trial court docketed the following journal entry in its record: "Defendant is resentenced pursuant to § 2929.25. Conditions of community control[] shall include registration as a sex offender – Tier I pursuant to § 2950.04[.] Defendant was advised of the condition[s] in Court 1-22-09 and provided a copy of the registration obligations. Defendant was further advised that failure to register could be a violation of conditions of his suspended sentence."

{¶4} Franklin appeals and assigns the following error for our review: "The Trial Court erred in resentencing Defendant-Appellant Carl Franklin pursuant to O.R.C. Section 2929.25 through a Journal Entry and setting as a condition of his resentencing, that as a condition of his community control, that Defendant-Appellant register as a Tier I Sex Offender pursuant to O.R.C. Section 2950.04."

II.

{¶5} Before we consider Franklin's assignment of error, we first must establish whether the lower court had jurisdiction to resentence Franklin. At our request, both parties have filed briefs on this issue.

{¶6} The State argues that the original sentencing judgment was void because the judgment failed to conform to the mandatory sentencing requirements of R.C. 2929.23.

It claims that the judge at the initial sentencing was required to notify Franklin of his obligation to register because Franklin was convicted of a sexually oriented offense. The State relies on a Supreme Court of Ohio case, which held that a sentence is void where the law requires the imposition of post release control and the trial court fails to include that post release control in the sentence. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197.

{¶7} Applying *Simpkins* to this case, if Franklin's sentence was void, then the trial court would have had jurisdiction to resentence him. However, the result of a void Franklin sentence under *Simpkins* is to totally resentence him, starting with a new sentencing hearing. Stated differently, a court cannot limit the new hearing to only consider the issue found to be in error. Here, the trial court did limit the new sentencing hearing. The court characterized the issue as merely procedural and only explained the obligations of a Tier I offender under S.B. 10. Thus, even if we assume Franklin's sentence was void, the trial court did not comport with *Simpkins*. See *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at ¶16 ("The trial court must resentence the offender as if there had been no original sentence.").

{¶8} Regardless of the trial court's failure to comport with *Simpkins*, we do not agree with the State that Franklin's sentence was void pursuant to *Simpkins*.

{¶9} In *Simpkins*, the omitted term in the sentence was in regard to post release control; this is properly a part of a criminal judgment. In the present case, the omitted term is in regard to notice for registration. We have previously concluded that S.B. 10 remains civil rather than criminal in nature. *State v. Messer*, Ross App. No. 08CA3050, 2009-Ohio-312, at ¶12. The omission of a civil remedial matter does not necessarily

void a criminal judgment. See *Burbrink v. State*, Hamilton App. No. C-081075, 2009-Ohio-5346, at ¶10 (“Future sex-offender registration and notification statutes are remedial and not punitive. * * * They are not punishment and they are not part of any sentence imposed on the sex offender”) (internal citations omitted).

{¶10} We distinguish this case from *Simpkins* because it concerns a civil matter, rather than a punitive criminal matter. We find that the trial court lacked jurisdiction to reconsider its own final judgment in this case. Therefore, we are without jurisdiction to consider an appeal from a void judgment. *Napier v. Napier*, Meigs App. No. 08CA9, 2009-Ohio-3111, at ¶7-8.

{¶11} Accordingly, we vacate the resentencing judgment of the trial court and dismiss the present appeal.

**JUDGMENT VACATED AND
APPEAL DISMISSED.**

Harsha, J., concurring in judgment only:

{¶12} I agree that the trial court did not have the authority to re-sentence Mr. Franklin. As the principal opinion indicates, the original sentence was not void – it was merely voidable. Because the State failed to appeal the voidable judgment, it has now become law of the case and cannot be revisited. However, rather than dismissing the appeal, I would sustain the assignment of error and remand with instructions to vacate the revised sentence.

{¶13} Finally, because I agree that *Simpkins*, supra, is distinguishable and does not apply, I do not consider whether the trial court followed its mandate.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE VACATED and the APPEAL BE DISMISSED, and appellee pay the 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 Hillsboro Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J.: Concurs in Judgment Only with Opinion.

Abele, J.: Concurs in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.