

[Cite as *State v. Banks*, 2009-Ohio-3099.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92042

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CARLTON BANKS

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-420197 and CR-421541

BEFORE: Boyle, J., Cooney, A.J., and Celebrezze, J.

RELEASED: June 25, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Carlton Banks, appeals from an order denying his motion to vacate sentence because he was not notified of postrelease control. Finding merit to the appeal, we reverse and remand for resentencing.

{¶ 2} The following background information was gleaned from Banks's second appeal, *State v. Banks*, 8th Dist. Nos. 83782 and 83783, 2004-Ohio-4478 (*"Banks I"*).

{¶ 3} "On June 14, 2002, Banks entered pleas of guilty in two cases. In CR-421541, Banks pled guilty to count one, involuntary manslaughter, *** count two, failure to comply, *** and count six, aggravated assault ***. The remaining counts were dismissed by the state. In CR-420197, Banks pled guilty to count one, possession of drugs, and count three, drug trafficking ***. The remaining counts were dismissed by the state. *** On July 15, 2002, Banks was sentenced in CR-420197 to one year on each count, to run consecutively. In CR-421541, Banks was sentenced to the maximum amount of ten years on the involuntary manslaughter count, two years on the failure to comply count, and one year on the aggravated vehicular assault count, to run consecutively. Finally, the sentences in each case were ordered to run consecutive to each other, for a total of 15 years.

{¶ 4} "Banks appealed in *State v. Banks*, 8th Dist. Nos. 81679 and 81680, 2003-Ohio-1530 (*"Banks I"*), asserting five assignments of error. The trial court's judgment was affirmed in part, reversed in part, and the case was remanded for

resentencing. This court reversed in part because the trial court failed to make the proper findings pertaining to proportionality when ordering consecutive sentences. All other assignments of error were overruled.

{¶ 5} “Upon remand for resentencing, Banks moved to withdraw his guilty pleas in both cases. *** The trial court denied Banks’s motion to withdraw and again sentenced Banks to one year on each drug count, ten years on the involuntary manslaughter count, two years on the failure to comply count, and one year on the aggravated vehicular assault count. All sentences and both cases were again run consecutively for a total of 15 years in prison.” *Banks II* at _2-4.

{¶ 6} In *Banks II*, this court affirmed the trial court’s judgment resentencing Banks. *Id.* at _1.

{¶ 7} When the trial court resentenced Banks, however, it failed to give him postrelease control. The trial court stated in the resentencing entry: “Defendant to be notified of [the] possibility of post-release control sanctions.”

{¶ 8} On June 13, 2008, Banks moved to vacate his sentence, arguing that the trial court “failed to impose a specific period of post-release control.”

{¶ 9} The state responded to Banks’s motion to vacate his sentence and agreed that Banks’s sentence did “not include postrelease control.” The state requested, however, that the trial court stay the matter until the Ohio Supreme Court released its decision in *State v. Mosmeyer*, Supreme Court No. 2007-1415. In this case, the Supreme Court will decide whether a defendant can be advised of

postrelease control under R.C. 2929.191, rather than be resentenced. Oral arguments on the case were heard December 17, 2008.

{¶ 10} On August 11, 2008, the trial court denied Banks's motion to vacate his sentence.

{¶ 11} It is from this judgment that Banks appeals, raising a single assignment of error for our review:

{¶ 12} "Defendant was denied due process of law when the court overruled [his] motion to vacate sentence which did not include a period of postrelease control and was thus void."

{¶ 13} In *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, the Ohio Supreme Court held that "[w]hen a trial court fails to notify an offender that he may be subject to postrelease *** the sentence is void; the sentence must be vacated and the matter remanded to the trial court for resentencing." The Supreme Court explained that at such a resentencing hearing, "the trial court may not merely inform the offender of the imposition of postrelease control and automatically reimpose the original sentence. Rather, the effect of vacating the trial court's original sentence is to place the parties in the same place as if there had been no sentence." *Id.* at _13. Accordingly, "[t]he trial court must resentence the offender as if there had been no original sentence." *Id.* at _16. In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, syllabus, the Supreme Court upheld *Bezak*.

{¶ 14} Thus, based upon *Bezak* and *Simpkins*, we agree with Banks and find his sentence to be void since he was not notified that he would be subject to

postrelease control upon his release from prison. Accordingly, Banks is entitled to a de novo sentencing hearing.

{¶ 15} Banks's sole assignment of error is sustained.

{¶ 16} The trial court's judgment denying Banks's motion to vacate sentence is reversed. Banks's sentence is vacated, and this case is remanded for resentencing.

It is ordered that appellant recover of appellee 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. Case remanded to the trial court for resentencing.

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

MARY J. BOYLE, JUDGE

COLLEEN CONWAY COONEY, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR