[Cite as *State v. Siwik*, 2009-Ohio-3896.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92341

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TODD L. SIWIK

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED, VACATED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-453816-A

BEFORE: Rocco, P.J., Dyke, J., and Celebrezze, J.

RELEASED: August 6, 2009

JOURNALIZED:

APPELLANT

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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Todd Siwik, proceeding pro se, appeals from the trial court's decision to deny his motion "to vacate and correct void sentence."

{¶ 2} Siwik argues in his sole assignment of error that the trial court lacked authority to deny his motion when its original journal entry of sentence demonstrates a failure to properly impose postrelease control. Since the Ohio Supreme Court has indicated that the trial court was required under these circumstances to conduct a new sentencing hearing, Siwik's argument has merit; consequently, the trial court's order is reversed, and this matter is remanded for further proceedings.

{¶ 3} The record reflects Siwik originally was indicted in this case in 2004 on one hundred and fifty counts, charged with forcible rape, gross sexual imposition ("GSI"), kidnapping, and endangering children, with sexually violent predator specifications and sexual motivation specifications. The crimes were alleged to have occurred between 1998 and 2004. Two "Jane Doe" victims were named, with birth dates in 1987 and 1993.

{¶ 4} Siwik eventually entered into a plea agreement, whereby in exchange for his guilty plea to six counts of rape, forty-nine counts of GSI, and twenty-one counts of kidnapping, all amended to delete the specifications, the

state would dismiss the remaining counts. The trial court accepted Siwik's pleas.

{¶ 5} On the date of the sentencing hearing in April 2005, Siwik stipulated to his classification as a sexual predator and a child victim predator. The trial court proceeded to sentence him to a total term of fourteen years in prison. No transcript of this hearing is present in the record.

{¶ 6} The journal entry of the original sentence indicated that "post release [sic] control [wa]s a part of this sentence for the maximum time allowed * * * under R.C. 2967.28." Furthermore, Siwik "waive[d] all appellate rights."

{¶ 7} In July 2005, Siwik filed a motion to withdraw his plea. The trial court denied his motion.

{¶ 8} In 2006, Siwik attempted to appeal from his conviction and sentence, but the appeal was dismissed.[1] The supreme court declined to accept the case for further review. *State v. Siwik*, 112 Ohio St.3d 1405, 2006-Ohio-1447.

{¶ 9} In June 2008, Siwik filed a motion to correct his sentence pursuant to Crim.R. 47 and R.C. 2929.191. The trial court denied his motion the following

[1]App. No. 88093. Siwik did not appeal from the trial court's denial of his motion to withdraw his plea.

month. Although he filed a notice of appeal, in September 2008 this court dismissed the case.[2]

{¶ 10} In October 2008, Siwik filed another motion to vacate and correct the sentence pursuant to R.C. 2929.191, *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, and *State v. Besak*, 114 Ohio St.3d 94, 2007-Ohio-3250. The trial court denied his motion two weeks later.

{¶ 11} It is from the foregoing order that Siwik filed the instant appeal. He presents one assignment of error for review, as follows:

{¶ 12} "The trial court erred [in failing to] vacate the void sentencing order when the language in the order does not articulate the statutory requirement of post release control and the trial court failed to comply with O.R.C. [Section] 2929.191."

{¶ 13} Siwik argues that since the journal entry of his original sentence was inadequate to impose lawful postrelease control, R.C. 2929.191 required the trial court to conduct a new sentencing hearing. His argument has merit.

{¶ 14} R.C. 2929.191 became effective on July 11, 2006. According to its terms, if a trial court imposed a sentence prior to that date and failed to include the appropriate period of postrelease control in the journal entry, then, at any

[2]App. No. 91925.

time before the offender is released from prison, the statute permits the court to order a hearing and issue a corrected entry providing for postrelease control.

{¶ 15} The statute does not provide an option. Instead, it requires the trial court to provide notice of postrelease control at sentencing and in the resulting journal entry, because it states that if the trial court fails to do so, then further action is required before postrelease control is valid.

{¶ 16} The statute is in keeping with decisions of the Ohio Supreme Court, which has held that when postrelease control is not mentioned at the sentencing hearing, or where the appropriate period of postrelease control is not incorporated into the sentencing entry, the sentence is void, not merely voidable. *State v. Simpkins*, supra.

{¶ 17} The supreme court recently has reiterated its position in *State v. Boswell*, 121 Ohio St.3d 125, 2009-Ohio-1577, in the following terms:

{¶ 18} "Our recent line of cases dealing with postrelease control has consistently held that sentences that fail to impose a mandatory term of postrelease control are void. See *Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at syllabus; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, syllabus; *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, ¶20. This stems from 'the fundamental understanding that no court has the authority to substitute a different sentence for that which is required by law.' *Simpkins* at

¶20, citing *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438. A sentence that does not comport with statutory requirements is contrary to law, and the trial judge is acting without authority in imposing it. Id. at ¶21. 'Because a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void, it must be vacated. The effect of vacating the sentence places the parties in the same position they would have been in had there been no sentence.' Id. at ¶22, citing *Bezak*, 114 Ohio St.3d 94, 2007-Ohio- 3250, at ¶13."

{¶ 19} Thus, if the defendant has not yet been released, and the sentence is void, he or she is subject to resentencing. *State v. Jordan*, 104 Ohio St.3d 21, 2004- Ohio-6085, ¶22-23.

{¶ 20} In this case, the record contains no transcript of Siwik's original sentencing hearing. However, the original journal entry of sentence fails specifically to state the required period of postrelease control for his convictions.[3]

{¶ 21} Since any ambiguity in the journal entry in this regard must be reviewed on direct appeal, and since the original journal entry of sentence in this case did not properly incorporate postrelease control, Siwik's assignment of error is sustained. *State v. Jones*, Mahoning App. No. 06 MA 17, 2009-Ohio-794, ¶12-

[3]Five years is the mandatory term of postrelease control for first degree felonies. R.C. 2967.28(B)(2).

14, citing *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, ¶51 and *State v. Osborne*, 116 Ohio St.3d 1228, 2008-Ohio-261, ¶2.

{¶ 22} The trial court's order is reversed, Siwik's sentence is vacated, and this case is remanded to the trial court for resentencing pursuant to R.C. 2929.191 and *State v. Simpkins*, supra.

It is ordered that appellant recover from 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.

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

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KENNETH A. ROCCO, PRESIDING JUDGE

ANN DYKE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR