[Cite as *State v. Barclay*, 2009-Ohio-3186.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 24497
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DELMAR H. BARCLAY	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 2005 05 1934

DECISION AND JOURNAL ENTRY

Dated: June 30, 2009

CARR, Judge.

{¶1} Appellant, Delmar Barclay, appeals the judgment of the Summit County Court of Common Pleas, which denied his motion for resentencing and alternative motion to withdraw his guilty plea. This Court reverses the judgment of the trial court and vacates his sentence.

I.

{¶2} Barclay was indicted on thirteen charges on June 9, 2005. He originally pled not guilty to the charges. Barclay filed a motion to suppress, which the trial court denied after hearing. On September 25, 2005, Barclay appeared before the trial court for a change of plea hearing and sentencing. He pled guilty to five counts, including two felonies of the first degree, while the remaining eight counts were dismissed upon the State's recommendation. The trial court sentenced Barclay to an aggregate of six years on the five counts. The trial court further sentenced him to serve three years of postrelease control, without noting whether that term was mandatory or discretionary.

{¶3} On May 12, 2008, Barclay filed a motion for resentencing, or in the alternative, for leave to withdraw his guilty plea. In support, he argued that his plea was invalid because the trial court had failed to advise him at his change of plea hearing of the potential maximum term of postrelease control. The State filed an opposition to the motion, and Barclay replied. On October 29, 2008, the trial court denied Barclay's motion on the authority of *State v. Price*, 9th Dist. No. 07CA0025, 2008-Ohio-1774, upon finding that the motion constituted an untimely petition for "post-release control subject to the time requirements of R.C. 2953.21[.]" Barclay filed a timely appeal, in which he raises two assignments of error. This Court consolidates the assignments of error, as they are interrelated.

II.

ASSIGNMENT OF ERROR I

"WHETHER, AND WHERE A TRIAL COURT FAILS TO ADVISE A CRIMINAL DEFENDANT OF MANDATORY POSTRELEASE CONTROL AND THE MAXIMUM PENALTIES INVOLVED WITH A VIOLATION OF POSTRELEASE CONTROL DURING A PREPLEA COLLOQUY, IT FAILS TO COMPLY WITH THE STRICT COMPLIANCE REQUIREMENTS OF CRIM.R. 11(C)(2) THEREBY REDUCING THE RESULTING SENTENCE TO A MERE NULLITY AND VOID."

ASSIGNMENT OF ERROR II

"WHETHER TRIAL COURT'S FAILURE TO ADVISE DEFENDANT OF CORRECT MAXIMUM PENALTIES INVOLVED WITH A VIOLATION OF POSTRELEASE CONTROL SANCTION AND THAT HE FACED 'MANDATORY POSTRELEASE CONTROL' UPON COMPLETION OF THE STATED PRISON TERM RENDERED HIS GUILTY PLEA INVALID THUS NECESSITATING REMAND FOR FURTHER PROCEEDINGS."

{¶4} Barclay argues that his sentence is void because the trial court failed to properly inform him that he was subject to a five-year mandatory term of post release control. He further asserts that, had he been properly advised by the trial court of such, he would not have pled guilty to the charges. Consequently, he now seeks to withdraw his guilty plea.

{¶5} Recently, the Supreme Court addressed very similar circumstances in *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577. There, the defendant moved to vacate his plea based on a sentence that failed to include mandatory postrelease control. In that case, the Supreme Court concluded that "[a] motion to withdraw a plea of guilty *** made by a defendant who has been given a void sentence must be considered as a presentence motion under Crim.R. 32.1." *Boswell* at syllabus. Based on this directive, we must first determine whether the trial court properly informed Barclay that he was subject to five years mandatory postrelease control and thus, whether his sentence is void. This determination then dictates how to properly analyze Barclay's request to withdraw his plea.

{¶6} Because Barclay was pleading guilty to two felonies of the first degree, he would have been subject to a mandatory five-year term of postrelease control pursuant to the version of R.C. 2967.28(B)(1) then in effect. At the plea hearing, and prior to accepting Barclay's plea, however, the trial court only vaguely referenced postrelease control, stating:

> "You know if I do sentence you to the penitentiary, which obviously I'm going to, you should keep in mind that you'd be subject to post-release control. That's like parole. So I'm sure you're familiar with that. Once you've served your time and you're released, then you can be subject to supervision by the prison authorities, and if you violate some rules or regulation they can - - at that time they can send you back to serve additional prison time; fair enough?"

{¶7} Immediately after accepting Barclay's guilty plea, the trial court proceeded to sentencing. During his sentence hearing, the court failed to include any reference to the term or nature of postrelease control that would be a part of Barclay's sentence based on his guilty plea. The trial court did, however, include in its sentencing journal entry that "[a]fter release from prison, the Defendant is to serve Three (3) years of post-release control." Having pled guilty to first-degree felonies, however, Barclay was subject to a mandatory term of five years postrelease

control. R.C. 2967.28(B)(1) (requiring that "a period of post-release control required *** by this division for *** a felony of the first degree or for a felony sex offense [is] five years").

{¶8} When considering the ramifications of omitting any reference to a statutorily mandated term of postrelease control, the Supreme Court has expressly indicated that such sentences are void. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, syllabus; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, syllabus. Furthermore, "[b]ecause a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void, it must be vacated[,] plac[ing] the parties in the same position they would have been in had there been no sentence." *Boswell* at ¶8, quoting *Simpkins* at ¶22. Accordingly, when "a motion to withdraw a plea of guilty *** [is] made by a defendant who has been given a void sentence [it] must *** be considered as a presentence motion under Crim.R. 32.1" Id. at ¶9. Though a defendant does not have an absolute right to withdraw his plea, a presentence motion to vacate a plea must be "freely and liberally granted." *State v. Xie* (1992), 62 Ohio St.3d 521, 527. Additionally, "the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for withdrawal of the plea." Id.

{¶9} It is undisputed that Barclay's sentence failed to include the statutorily mandated five-year term of postrelease control. Thus, his sentence is void and must be vacated. *Boswell* at ¶8. Pursuant to *Boswell*, the trial court is further required to treat Barclay's request to vacate his plea as a presentence motion. Accordingly, the matter is remanded to the trial court to "conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." Id. at ¶10; *Xie*, 62 Ohio St.3d at 527. We further vacate Barclay's sentence and order resentencing if the trial court ultimately denies his motion to withdraw his guilty plea.

{¶10} Based on the foregoing, Barclay's assignments of error are sustained and his sentence is vacated.

III.

{¶11} The assignments of error are sustained. Barclay's sentence is vacated and the judgment of the Summit County Court of Common Pleas is reversed, and the cause remanded for further proceedings consistent with this decision.

Sentence vacated,
judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

DELMAR H. BARCLAY, pro se, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.