

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24520

Appellee

v.

DARRELL H. JONES

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 06 07 2670(A)

Appellant

DECISION AND JOURNAL ENTRY

Dated: July 8, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, Darrell Jones, appeals from the judgment of the Summit County Court of Common Pleas. This Court vacates.

I

{¶2} On August 3, 2006, a grand jury indicted Jones on the following counts: (1) possession of cocaine, in violation of R.C. 2925.11(A); (2) two counts of possession of heroin, one a first-degree felony and the other a second-degree felony, in violation of R.C. 2925.11(A); (3) trafficking in heroin, in violation of R.C. 2925.03(A)(2); (4) illegal manufacturing of drugs, in violation of R.C. 2925.04(A); (5) two counts of having weapons while under disability, in violation of R.C. 2923.12(A)(1)/(2)/(3); and (6) possession of criminal tools, in violation of R.C. 2923.24. The matter proceeded to a jury trial on August 6, 2007. The trial court granted Jones' Crim.R. 29 motion as to the illegal manufacturing of drugs count, but the jury found Jones guilty on all the remaining counts. On appeal, this Court affirmed Jones' convictions, but remanded his

case to the trial court for resentencing because the trial court failed to properly notify him of post-release control. *State v. Jones*, 9th Dist. No. 23875, 2008-Ohio-5443.

{¶3} Upon remand, the trial court sentenced Jones to a total of nine and one-half years in prison. Jones received consecutive sentences on the following convictions: possession of cocaine, having a weapon while under disability, possession of criminal tools, and second-degree felony possession of heroin. The trial court also sentenced Jones on his remaining convictions for trafficking in heroin and first-degree felony possession of heroin, but ordered that the sentences run concurrently with his consecutive sentences. Jones now appeals from his resentencing and raises three assignments of error for our review.

II

Assignment of Error Number One

“THE TRIAL COURT ERRED IN SENTENCING APPELLANT BASED UPON CONVICTIONS WHICH WERE BARRED BY THE ALLIED OFFENSE STATUTE[.]”

Assignment of Error Number Two

“THE TRIAL COURT ERRED IN FAILING TO VACATE ONE OF APPELLANT’S CONVICTIONS FOR HAVING A WEAPON UNDER DISABILITY.”

Assignment of Error Number Three

“THE TRIAL COURT’S SENTENCE WAS CONTRARY TO LAW.”

{¶4} In each of his assignments of error, Jones asserts various challenges to his sentence, arguing that the trial court erroneously sentenced him to allied offenses and neglected to sentence him to a term reflective of his status as a first-time offender. We do not reach the merits of Jones’ arguments, however, because the record reflects that his sentence is void.

{¶5} Recently, the Supreme Court reiterated that:

“[S]entences that fail to impose a mandatory term of postrelease control are void. This stems from the fundamental understanding that no court has the authority to substitute a different sentence for that which is required by law. A sentence that does not comport with statutory requirements is contrary to law, and the trial judge is acting without authority in imposing it.” (Internal quotations and citations omitted.) *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at ¶8.

The Court held that even though “neither party here is actually challenging the imposed sentence

*** we still must vacate the sentence and remand for a resentencing hearing in the trial court.”

Id. at ¶12. “[A] court cannot ignore a void sentence and instead must vacate it and order resentencing.” Id.

{¶6} Jones was convicted of two first-degree felonies and various other felonies. A first-degree felony is subject to a five year mandatory period of post-release control. R.C. 2967.28(B)(1). A trial court must notify a first-degree felony offender that he is subject to mandatory post-release control and that a violation of the conditions of that post-release control could result in the imposition of an additional prison term of up to one-half of his stated prison term. R.C. 2929.19(B)(3)(c), (B)(3)(e). At Jones’ resentencing hearing, the trial court informed him of the following with regard to post-release control:

“I am hereby informing you when you are released from this incarceration, this penal institution, there will be a period of five years of post-release control. Under that control, if you violate the law or their rules and regulations, you may be returned to that institution and they may add up to 50 percent to the sentence I just gave you.”

Jones’ sentencing entry, however, provided the following:

“As part of the sentence in this case, [Jones] *may* be supervised by the Adult Parole Authority after [he] leaves prison, which is referred to as post-release control, for Five (5) years as determined by the Adult Parole Authority. If [Jones] violates the post-release control supervision or any of its conditions, the Adult Parole Authority [m]ay impose a prison term, as part of the sentence, of up to Nine (9) months, with a maximum for repeated violations of Fifty percent (50%) of the stated prison term.” (Emphasis added.)

The entry described Jones' term of post-release control as being discretionary rather than mandatory. As such, the sentencing entry did not properly set forth the terms of his post-release control.

{¶7} “[W]hen sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about postrelease control and is further required to incorporate that notice into its journal entry imposing sentence.” *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶17. Specifically, “a court imposing mandatory postrelease control [must] include in the sentencing entry a statement that an offender convicted of a first- or second-degree felony offense *will* be subject to postrelease control after leaving prison.” *State v. Bloomer*, Slip Opinion No. 2009-Ohio-2462, at ¶68. Because the trial court failed to do so, Jones' sentence is void and must be vacated pursuant to that determination. *State v. Kidd*, 9th Dist. No. 24315, 2009-Ohio-3189, at ¶5.

III

{¶8} Because Jones' sentence is void, this Court cannot address Jones' assignments of error. Jones' sentence is vacated, and the cause is remanded for the trial court to resentence him according to law.

Sentence vacated,
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.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

DEREK CEK, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.