

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24488

Appellee

v.

RAFFAEL DION WHEELER

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 2003 08 2421

Appellant

DECISION AND JOURNAL ENTRY

Dated: July 22, 2009

BELFANCE, Judge.

{¶1} Appellant, Raffael Wheeler, appeals from the judgment of the Summit County Court of Common Pleas. We reverse the trial court’s ruling on Wheeler’s motion for resentencing, vacate the trial court’s sentencing entry, and remand the matter for further proceedings.

I.

{¶2} In 2003, Raffael Wheeler was indicted on several criminal charges. He entered a plea of not guilty to each charge. However, before the matter was tried, he pled guilty to three charges of the indictment: two counts of aggravated robbery and one count of possession of cocaine, each felonies of the first-degree. The remaining charges in the indictment were dismissed pursuant to negotiations. He was sentenced to serve a total of eight years in prison. Wheeler did not appeal his conviction.

{¶3} On April 30, 2008, Wheeler filed a *pro se* motion for resentencing, citing an error in the trial court's judgment entry with respect to post-release control.

{¶4} On July 3, 2008, counsel on behalf of Wheeler filed a motion to withdraw Wheeler's plea. In support of the motion, counsel argued that Wheeler was not properly informed of the consequences of his plea in light of the trial court's inaccurate notification concerning post-release control.

{¶5} On October 14, 2008, the trial court denied Wheeler's motion for resentencing. The trial court construed Wheeler's motion as an untimely and successive petition for postconviction relief and reasoned that he did not meet the requirements of R.C. 2953.23 that would allow the court to grant the motion. The court's entry did not address the motion to withdraw the plea filed by counsel.

{¶6} Wheeler appeals the trial court's denial of his motion for resentencing and his motion to withdraw his plea. For the reasons that follow, we reverse the trial court's denial of Wheeler's motion, vacate his sentence, and remand the matter to the trial court for resentencing.

II.

{¶7} Wheeler's brief assigns error with respect to the trial court's denial of his motion for resentencing and his motion to withdraw his plea, however, the judgment entry from which Wheeler appeals addresses only the motion for resentencing. We note that both motions raised the issue of the inadequate notification as to post-release control, but confine our review to the motion for resentencing addressed by the trial court in its judgment entry of October 14, 2008.

{¶8} In denying Wheeler's motion for resentencing, the trial court cited this Court's decision in *State v. Price*, 9th Dist. No. 07CA0025, 2008-Ohio-1774. In *Price*, we followed the Supreme Court of Ohio's holding as set forth in *State v. Reynolds* (1997), 79 Ohio St.3d 158, that

motions for resentencing filed subsequent to a direct appeal alleging that the offender's sentence is void should be construed and analyzed as petitions for postconviction relief. *Id.* at 160.

{¶9} Since *Price*, the Supreme Court of Ohio decided *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, which this Court recognized in *State v. Holcomb*, 9th Dist. No. 24287, 2009-Ohio-3187. In *Holcomb*, we examined the precedent of the Supreme Court of Ohio relative to void and voidable sentences. We recognized that in *Boswell*, the Supreme Court of Ohio held that even in the absence of a motion for resentencing, a court must recognize as void a sentencing entry that fails to properly notify an offender of post-release control, and thus, the entry must be vacated. *Holcomb* at ¶18. In *Holcomb* we also noted that the Court in *Boswell* held that an offender may raise the claim that his or her sentence is void for failure to include post-release control by filing a motion for resentencing, and that the trial court may not re-characterize the motion as a petition for postconviction relief. *Id.* at ¶19. Instead, “* * * a trial court, confronted with an untimely or successive petition for postconviction relief that challenges a void sentence must ignore the procedural irregularities of the petition and * * * vacate the void sentence and resentence the defendant.” *Id.*

{¶10} Thus, assuming Wheeler's sentence is void, the trial court erred by characterizing Wheeler's motion for resentencing as an untimely and successive petition for postconviction relief and ultimately denying the motion on that basis. Accordingly, we shall now examine whether Wheeler's sentence is indeed void as alleged in his motion for resentencing due to improper notification as to post-release control.

{¶11} R.C. 2967.28(B) requires that “[e]ach sentence to a prison term for a felony of the first degree, * * * shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment.”

The term of post-release control for an offender convicted of a first-degree felony is a mandatory period of five years. R.C. 2967.28(B)(1).

{¶12} In the instant matter, Wheeler was convicted of felonies of the first-degree. Pursuant to R.C. 2967.28(B)(1), Wheeler is subject to a five-year, mandatory period of post-release control. With respect to post-release control, the trial court’s judgment entry states: “After release from prison, [Wheeler] *is ordered subject up to three (3) years* post-release control[.]” (Emphasis added.) The judgment sentencing entry does not clearly state that Wheeler’s term of post-release control is mandatory, and incorrectly identifies the period of control as *up to three years*, rather than the statutorily required term of five years. Because Wheeler’s sentence does not impose a mandatory term of five years of post-release control, we must vacate his sentence and remand this matter to the trial court for resentencing. *Boswell* at ¶12; *Holcomb* at ¶20.

III.

{¶13} We conclude that the trial court erred by denying Wheeler’s motion for resentencing and further recognize the error with respect to the notification of post-release control in the sentencing entry. Thus, the judgment of the Summit County Court of Common Pleas is reversed, Wheeler’s sentence is vacated, and this matter is remanded for proceedings consistent with this opinion.

Judgment reversed,
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 the Appellee.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

JANA DELOACH, Attorney at Law, for Appellant.

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