

STATE OF OHIO                    )  
  )ss:  
COUNTY OF SUMMIT            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.       24531

Appellee

v.

ANTHONY J. MORTON

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     2008-04-1308

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 19, 2009

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DICKINSON, Judge.

INTRODUCTION

{¶1} A jury convicted Anthony Morton of aggravated possession of drugs, a felony of the second degree. He has appealed his conviction, arguing that the trial court incorrectly denied his motion to suppress. Because the trial court made a mistake regarding post-release control at the sentencing hearing and in its journal entry, the journal entry is void. This Court, therefore, exercises its inherent power to vacate the void judgment and remands for a new sentencing hearing.

POST-RELEASE CONTROL

{¶2} Section 2967.28(B) of the Ohio Revised Code provides that “[e]ach sentence to a prison term for a felony of the . . . second 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.” For a felony of the second degree that is not a felony sex offense,

the period is three years. R.C. 2967.28(B)(2). Under Section 2929.14(F)(1), “[i]f a court imposes a prison term . . . for a felony of the second degree . . . it shall include in the sentence a requirement that the offender be subject to a period of post-release control after [his] release from imprisonment . . . .” In addition, Section 2929.19(B)(3)(c) provides that, “if the sentencing court determines . . . that a prison term is necessary or required, [it] shall . . . [n]otify the offender that [he] will be supervised under section 2967.28 of the Revised Code after [he] leaves prison if [he] is being sentenced for a felony of the . . . second degree . . . .”

{¶3} At the sentencing hearing, the trial court told Mr. Morton that it was sentencing him “to a mandatory sentence of two years in prison with up to three years of post-release control as the Ohio Parole Authority may determine.” In its journal entry, it wrote that, “[a]fter release from prison, [Mr. Morton] is ordered subject to 3 years post-release control to the extent the parole board may determine as provided by law.” The court, therefore, made a couple of mistakes. At the sentencing hearing, it incorrectly told Mr. Morton that post-release control would be for up to three years even though Section 2967.28 requires a full three years. At the sentencing hearing and in its journal entry, the court incorrectly suggested that the imposition of post-release control was at the discretion of the parole board, instead of mandatory under Section 2967.28(B).

{¶4} In *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197, the Ohio Supreme Court held that, “[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void . . . .” *Id.* at syllabus. The Supreme Court reasoned that “no court has the authority to substitute a different sentence for that which is required by law.” *Id.* at ¶20. It concluded that “a

sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void [and] must be vacated.” *Id.* at ¶22.

{¶5} In *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972, at ¶11, this Court held that, if “[a] journal entry is void because it included a mistake regarding post-release control . . . there is no final, appealable order.” Accordingly, this Court does not have jurisdiction to consider the merits of Mr. Morton’s appeal. *Id.* at ¶14. It does have limited inherent authority, however, to recognize that the journal entry is a nullity and vacate the void judgment. *Id.* at ¶12 (quoting *Van DeRyt v. Van DeRyt*, 6 Ohio St. 2d 31, 36 (1966)).

### CONCLUSION

{¶6} The trial court’s journal entry included a mistake regarding post release control. It, therefore, is void. This Court exercises its inherent power to vacate the journal entry and remands this matter to the trial court for a new sentencing hearing.

Judgment vacated,  
and cause remanded.

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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.

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CLAIR E. DICKINSON  
FOR THE COURT

WHITMORE, J.  
CONCURS

MOORE, P. J.  
CONCURS IN JUDGMENT ONLY

APPEARANCES:

MATILDA O. CARRENA, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN DIMARTINO, assistant prosecuting attorney, for appellee.