[Cite as *State v. Preston*, 2009-Ohio-4332.]

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

STATE OF OHIO Appellee v. REGGIE L. PRESTON Appellant	C. A. No. 24595 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 07 12 4181

DECISION AND JOURNAL ENTRY

Dated: August 26, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, Reggie Preston, appeals from his conviction in the Summit County Court of Common Pleas. This Court vacates.

I

{¶2} On December 27, 2007, a grand jury indicted Preston on one count of possession of cocaine, a fifth-degree felony in violation of R.C. 2925.11(A)(C)(4). Preston filed a motion to suppress on January 23, 2008. The trial court held a hearing on the motion and later denied the motion on April 17, 2008. Thereafter, Preston's trial was continued several times. On December 17, 2008, Preston filed a motion to dismiss based on his speedy trial rights. The record is devoid of any written order denying Preston's motion to dismiss, but the judge who presided over Preston's December 18, 2008 trial engaged in the following discussion with the prosecutor before the start of trial:

> "THE COURT: *** For the record, there has been a speedy trial request to dismiss. And [the prosecutor] indicated to me that [the previous judge] *** ruled on that; is that correct?
>
> "[PROSECUTOR]: Yes, [y]our Honor. She denied the motion yesterday on the record.
>
> "THE COURT: All right. Then that's taken care of."

Preston objected to the denial of his motion to dismiss after this discussion. Apart from the aforementioned discussion, however, no evidence exists that any type of recorded motion hearing took place on Preston's motion to dismiss.

{¶3} The jury found Preston guilty of possession of cocaine, and the trial court sentenced him to six months of incarceration, suspended on the condition that he successfully complete eighteen months of community control. Preston now appeals from his conviction and raises two assignments of error for our review.

II

Assignment of Error Number One

> "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING THE MOTION TO SUPPRESS."

Assignment of Error Number Two

> "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING THE MOTION TO DISMISS."

{¶4} In his first assignment of error, Preston argues that the trial court erred in denying his motion to suppress. In his second assignment of error, Preston argues that the trial court erred in denying his motion to dismiss. We cannot reach the merits of Preston's arguments, however, because the record reflects that his sentence is void.

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

> "[N]o 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} R.C. 2967.28(C) provides, in relevant part, that:

> "Any sentence to a prison term for a felony of the *** fifth degree *** shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender."

For fifth-degree felony offenders, the parole board must decide "whether a post-release control sanction is necessary and, if so, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances." R.C. 2967.28(D)(1). Accordingly, fifth-degree felony offenders must be notified that they are subject to the discretionary imposition of up to three years of post-release control. R.C. 2967.28(C). "[I]n the absence of a proper sentencing entry imposing post[-]release control, the parole board's imposition of post-release control cannot be enforced." *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, at ¶71.

{¶7} Although we are without a transcript from Preston's sentencing hearing, the trial court's sentencing entry provides, in relevant part, as follows:

> "As part of the sentence in this case, [Preston] may be supervised by the Adult Parole Authority after [he] leaves prison, which is referred to as post-release control, *for up to One (1) year* as determined by the Adult Parole Authority." (Emphasis added.)

Accordingly, the trial court's entry indicates that Preston is subject to the discretionary imposition of up to one year of post-release control, not three years as set forth in R.C. 2967.28(C).

{¶8} "[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 post[-]release 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. This holds true regardless of whether the post-release control term at issue is mandatory or discretionary. Id. at ¶20. If a trial court fails to properly notify an offender about post-release control, that offender's sentence is void and must be vacated pursuant to that determination. *State v. Jones*, 9th Dist. No. 24520, 2009-Ohio-3360, at ¶7. Because the trial court improperly journalized that Preston is subject to up to one year of post-release control instead of up to three years of post-release control his sentence is void. As Preston's sentence is void, this Court lacks jurisdiction to consider his assignments of error. *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972, at ¶14.

III

{¶9} Because Preston's sentence is void, this Court cannot address Preston's assignments of error. Preston's 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.
BELFANCE, J.
CONCUR

APPEARANCES:

HOLLY L. BEDNARSKI, Attorney at Law, for Appellant.

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