

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24534

Appellee

v.

THOMAS W. MARTIN, JR.

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 08 09 3204

DECISION AND JOURNAL ENTRY

Dated: August 26, 2009

BELFANCE, Judge.

{¶1} Appellant Thomas Martin, Jr. appeals his sentence and conviction from the Summit County Court of Common Pleas. In light of the following, we vacate Martin's sentence and remand to the trial court for resentencing.

I.

{¶2} On September 22, 2008, officers from the Summit County Sheriff's Office responded to a domestic violence call. When they arrived at the home, Martin was sitting on the couch and the home was in disarray. Martin stated that he and his live-in girlfriend had gotten into an argument. When his girlfriend subsequently entered the room, she was visibly upset, crying, and her shirt was torn. The girlfriend told the officers that she and Martin had a physical altercation. The officers observed red marks on her face and a cut in her mouth. Martin was ultimately arrested. Following a bench trial, Martin was found guilty of domestic violence and sentenced to two years in prison.

II.

{¶3} Although Martin has not raised the issue on appeal, this Court concludes that Martin’s sentence must be vacated due to an error in the trial court’s sentencing entry with respect to post-release control. We are required to vacate and remand for resentencing in light of the recent decision of the Supreme Court of Ohio, *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, ¶12 (a court cannot ignore a sentence that is void for failure to properly include term of post-release control, the court must vacate and order resentencing); see, also, *State v. Holcomb*, 9th Dist. No. 24287, 2009-Ohio-3187, at ¶20.

{¶4} R.C. 2967.28(B) requires that “[e]ach sentence to a prison term * * * for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person 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 third-degree felony that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person is a mandatory period of three years. R.C. 2967.28(B)(3).

{¶5} In the instant matter, Martin was convicted of one count of domestic violence, a violation of R. C. 2919.25(A) and a felony of the third degree, which states: “No person shall knowingly cause or attempt to cause physical harm to a family or household member.” Thus, pursuant to R.C. 2967.28(B)(3), Martin is subject to a three-year, mandatory period of post-release control. With respect to post-release control, the trial court’s judgment entry states: “the Court advised [Martin] that after serving his prison term, he *may be placed* on post-release control for a period of three years * * *.” (Emphasis added.) The trial court’s entry does not

clearly indicate that Martin will be subject to a mandatory term of post-release control of three years. Rather, the use of the word “may” indicates that the imposition of post-release control is discretionary.

{¶6} The Supreme Court of Ohio stated in *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶22: “Because a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void, it must be vacated.” Thus, the error in the trial court’s sentencing entry renders it void, as it does not conform to the statutory mandates with respect to post-release control, and we must vacate and remand for resentencing. See *Simpkins* at ¶22; *Boswell* at ¶12.

{¶7} In light of our ruling that Martin’s sentence is void, we do not address the merits of his assignments of error. *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972, at ¶14.

III.

{¶8} The judgment of the Summit County Court of Common Pleas is vacated and remanded for proceedings consistent with this opinion.

Judgment 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.

EVE V. BELFANCE
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

WESLEY A. JOHNSTON, Attorney at Law, for Appellant.

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