

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 08CA009458

Appellee

v.

FRANK J. HONAKER

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 07CR075036

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 31, 2009

Per Curiam.

{¶1} Appellant, Frank Honaker, appeals his conviction out of the Lorain County Court of Common Pleas. This Court vacates and remands.

I.

{¶2} On December 20, 2007, Honaker was indicted on one count each of aggravated murder in violation of R.C. 2903.01(A), murder in violation of R.C. 2903.02(A), and murder in violation of R.C. 2903.02(B), all unclassified felonies; felonious assault in violation of R.C. 2903.11(A)(1), and felonious assault in violation of R.C. 2903.11(A)(2), both felonies of the second degree. All five counts contained a firearm specification. Honaker pled not guilty and the matter was scheduled for trial.

{¶3} At the conclusion of trial, the jury found Honaker not guilty of aggravated murder and one count of murder. The jury found Honaker guilty of murder in violation of R.C. 2903.02(B), both counts of felonious assault, and three firearm specifications. On August 4,

2008, the trial court issued a judgment entry of conviction and sentence. On October 9, 2008, the trial court issued a corrected judgment entry of conviction and sentence. Honaker appeals, raising one assignment of error for review.

II.

ASSIGNMENT OF ERROR

“APPELLANT’S CONVICTION FOR MURDER MUST BE REVERSED BECAUSE THE INDICTMENT FAILED TO CHARGE THE CRIME OF FELONY MURDER UNDER R.C. 2903.02(B) IN VIOLATION OF APPELLANT’S STATE CONSTITUTIONAL RIGHT TO A GRAND JURY INDICTMENT AND HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS.”

{¶4} Honaker argues that his conviction must be reversed because the indictment did not properly charge him with murder. This Court does not reach the merits of his argument, however, because the record indicates that his sentence is void.

{¶5} The Ohio Supreme Court recently held:

“[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. 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.” (Internal quotations and citations omitted.) *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at ¶8.

The *Boswell* court held that although “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. The high court reasoned that “[b]ecause the original sentence is actually considered a nullity, a court cannot ignore a void sentence and instead must vacate it and order resentencing.” *Id.*

{¶6} Honaker was convicted of two felonies of the second degree, as well as the unclassified offense of murder. R.C. 2967.28(B)(2) requires that an offender be subject to a three-year mandatory period of postrelease control for a felony of the second degree. Honaker’s judgment entry of sentence, however, provided: “The court further notifies the defendant that post-release control is mandatory on Counts IV & V of this case *up to a maximum of three (3) years[.]*” (Emphasis added.) The trial court’s judgment, therefore, erroneously states that Honaker could be subject to less than, but not more than, three years of postrelease control instead of notifying him that he will in fact be subject to the full term of three years. Accordingly, the sentence is void for lack of conformity to the statutory mandates and must be vacated. *Boswell* at ¶8; see, also, *State v. Jones*, 9th Dist. No. 24520, 2009-Ohio-3360, at ¶7.

III.

{¶7} Because Honaker’s sentence is void, this Court cannot address his assignment of error. Honaker’s sentence is vacated, and the cause remanded to the trial court for resentencing 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 Lorain, 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.

CARLA MOORE
FOR THE COURT

MOORE, P. J.
WHITMORE, J.
CONCUR

CARR, J.
CONCURS, SAYING:

{¶8} I respectfully concur in judgment only on the basis of stare decisis and in the interest of consistency for the reasons I enunciated in *State v. Holcomb*, 9th Dist. No. 24287, 2009-Ohio-3187 (Carr, J., concurring).

APPEARANCES:

JACK W. BRADLEY, and BRIAN J. DARLING, Attorneys at Law, for Appellant.

DENNIS WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellee.