

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24462

Appellee

v.

AARON J. CUTRIGHT

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 08 03 1023(A)

Appellant

DECISION AND JOURNAL ENTRY

Dated: September 16, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Aaron Cutright, appeals from his convictions in the Summit County Court of Common Pleas. This Court vacates the trial court’s sentencing entry and remands the matter for further proceedings.

I.

{¶2} On September 24, 2008, Appellant, Aaron Cutright, was convicted of several counts including (1) illegal manufacture of drugs, a second-degree felony, (2) illegal assembly or possession of chemicals for the manufacture of drugs, a third-degree felony, (3) aggravated possession of drugs, a fifth-degree felony, and (4) illegal use or possession of drug paraphernalia, a misdemeanor of the fourth degree. The trial court sentenced Cutright to a total of six years of incarceration. Cutright’s sentencing entry also stated that “[a]fter release from prison, [Cutright] is ordered to serve Five (5) years of post-release control.” Cutright timely appealed the trial

court's order. He has raised four assignments of error for our review. We have combined Cutright's assignments of error to facilitate our review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED [] CUTRIGHT'S MOTION FOR JUDGMENT OF ACQUITTAL UNDER CRIM.R. 29."

ASSIGNMENT OF ERROR II

"[CUTRIGHT'S] CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED CUTRIGHT HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT CONFRONTATION CLAUSE BY ADMITTING HEARSAY STATEMENTS."

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING EVIDENCE OVER THE DEFENSE OBJECTION THAT THE STATE FAILED TO SHOW A PROPER CHAIN OF CUSTODY."

{¶3} Although Cutright has not raised the issue on appeal, this Court concludes that his sentence must be vacated as a result of an error in the trial court's sentencing entry with respect to its imposition of post-release control. This Court recently examined Ohio Supreme Court precedent regarding void and voidable sentences. See *State v. Holcomb*, 9th Dist. No. 24287, 2009-Ohio-3187. In *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, the Ohio Supreme Court held that "[d]espite the lack of a *motion for resentencing*, we still must vacate the sentence and remand for a resentencing hearing in the trial court. Because the original sentence is actually considered a nullity, a court cannot ignore the sentence and instead must vacate it and order resentencing." (Emphasis added.) *Id.* at ¶12.

{¶4} R.C. 2967.28(B) requires 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.” The term of post-release control for an offender convicted of a second-degree felony is a mandatory period of three years. R.C. 2967.28(B)(2).

{¶5} Cutright was convicted of, and sentenced to, one count of illegal manufacture of drugs, a felony of the second degree. Pursuant to R.C. 2967.28(B)(2), Cutright is subject to a three-year, mandatory period of post-release control. However, a review of the trial court’s judgment entry reflects that the trial court mistakenly imposed five years of post-release control instead of three years.

{¶6} In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶22, the Ohio Supreme Court held that “[b]ecause a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void, it must be vacated.” Consequently, 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 determination that Cutright’s sentence is void, we may not address the merits of his appeal. See *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972, at ¶14. Instead, we must vacate the trial court’s judgment entering Cutright’s sentence and remand this matter to the trial court for a new sentencing hearing.

III.

{¶8} Cutright's assignments of error are not addressed. 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.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

DONALD R. HICKS, Attorney at Law, for Appellant.

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