

STATE OF OHIO                    )  
  )ss:  
COUNTY OF SUMMIT            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.       24677

Appellee

v.

MARRION P. SMITH

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     CR 08 03 1065

Appellant

DECISION AND JOURNAL ENTRY

Dated: September 16, 2009

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DICKINSON, Judge.

INTRODUCTION

{¶1} A jury convicted Marrion P. Smith of aggravated robbery with a gun specification, having weapons while under disability, and four counts of retaliation. The trial court subsequently found that Mr. Smith is a repeat violent offender. Mr. Smith has appealed, arguing, among other things, that the trial court incorrectly denied his motion to sever the first two counts of the indictment, violated his speedy trial rights, and incorrectly denied his motion for acquittal on certain counts. Because the trial court made a mistake regarding post-release control in its sentencing entry, the sentencing 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} Mr. Smith's aggravated robbery conviction is a felony of the first degree. His other convictions are lesser offenses. For the aggravated robbery conviction, the trial court

sentenced him to ten years in the custody of the Ohio Department of Rehabilitation and Correction. In its sentencing entry, the trial court ordered Mr. Smith to serve three years of post-release control.

{¶3} Under Section 2967.28(B) of the Ohio Revised Code “[e]ach sentence to a prison term for a felony of the first 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 first degree, the period is five years. R.C. 2967.28(B)(1). Under Section 2929.14(F)(1), “[i]f a court imposes a prison term for a felony of the first 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 first degree . . . .”

{¶4} At his sentencing hearing, the trial court correctly advised Mr. Smith that he would be required to serve five years of post-release control. In its journal entry, however, it wrote that, “[a]fter release from prison, the Defendant is ordered to serve Three (3) years of post-release control.”

{¶5} 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.

{¶6} 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. Smith’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

{¶7} 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

MOORE, P. J.  
WHITMORE, J.  
CONCUR

APPEARANCES:

DAVID M. WATSON, attorney at law, for appellant.

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