[Cite as *State v. Robertson*, 2009-Ohio-5052.]

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

STATE OF OHIO	C.A. No. 07CA0120-M
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
LEONARD E. ROBERTSON	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellant	CASE No. 05-CR-0539

DECISION AND JOURNAL ENTRY

Dated: September 28, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} As part of a plea agreement, Leonard E. Robertson pleaded guilty to 54 counts of sexual battery, one count of gross sexual imposition, and two counts of attempted gross sexual imposition. Mr. Robertson was convicted of those charges and has appealed, arguing that his guilty pleas were not knowingly, intelligently, and voluntarily made because the trial court failed to advise him, at his change of plea hearing, that he would be subject to a mandatory term of five years of post-release control. Mr. Robertson, however, has not moved the trial court to withdraw his plea. 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. Robertson's sexual battery convictions are felony sex offenses of the third degree. His other three convictions are felony sex offenses of lesser degrees. The trial court sentenced him to a total of fifteen years in the custody of the Ohio Department of Rehabilitation and Correction and ordered him to serve "up to" five 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 sex offense . . . 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 sex offense, 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 sex offense, . . . 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 . . . ."

{¶4} In its sentencing entry of March 31, 2008, the trial court wrote that "post release control is mandatory in this case up to a maximum of 5 years." Although the trial court correctly wrote that Mr. Robertson was subject to "mandatory" post-release control, it incorrectly described that post-release control as lasting "up to a maximum of 5 years," thereby implying that it could last for less than 5 years. Under Section 2967.28, any sentence to a prison term for a felony, except uncategorized special felonies, "shall include a requirement that the offender be subject to a period of post-release control" following release. R.C. 2967.28(B), (C). Thus, if the trial court imposes a prison term for such an offense, it must include that requirement in the sentence. To that extent, the requirement that the offender be "subject" to post-release control under Section 2967.28 is always "mandatory" because the trial court has no discretion over whether to include it in the sentence.

{¶5} The trial court also has no discretion over whether post-release control is actually imposed or, when it is, the length of that post-release control. To the extent anyone has discretion regarding post-release control, it is the parole board, not the trial court. Depending upon the offense, Section 2967.28 dictates either a definite period of three or five years under part B, or a possible period of up to three years under part C, "if the parole board . . . determines that a period of post-release control is necessary for that offender." R.C. 2967.28(C).

{¶6} Mr. Robertson was convicted of third-degree felony sex offenses within the coverage of Section 2967.28(B)(1). The trial court, therefore, should have included in his sentence that he would be subject to post-release control for a definite period of five years. The language in the sentencing entry about a term of "up to" five years incorrectly implies that Mr. Robertson could serve less than five years.

{¶7} 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.

{¶8} 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. Robertson'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

{¶9} 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.

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 Medina, 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.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

JOSEPH F. SALZGEBER, attorney at law, for appellant.

DEAN HOLMAN, prosecuting attorney, and RUSSEL A. HOPKINS, assistant prosecuting attorney, for appellee.