

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 09CA009532

Appellee

v.

PHILLIP V. THOMAS, III

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 08CR076875

Appellant

DECISION AND JOURNAL ENTRY

Dated: November 16, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Phillip Thomas, appeals from the decision of the Lorain County Court of Common Pleas. This Court vacates and remands for a resentencing hearing.

I.

{¶2} On November 29, 2008, Thomas was indicted on one count of aggravated burglary, in violation of R.C. 2911.11(A), one count of abduction, in violation of R.C. 2905.02(A), and one count of assault, in violation of R.C. 2903.13(A). The indictment stemmed from an attack on Thomas's ex-girlfriend, Kimberly Montgomery. He pled not guilty to the charges and on December 11, 2008, the matter proceeded to a jury trial. On December 12, 2008, the jury found Thomas guilty of the charges in the indictment and on December 19, 2008, he was sentenced to a total of eight years of incarceration. On January 12, 2009, the trial court held a resentencing hearing, due to the fact that Thomas had not previously been informed of the mandatory period of post-release control. Accordingly, the trial court's journal entry states that

Thomas was subject to a mandatory period of post-release control of “up to a maximum” of five years. Thomas timely appealed his convictions and sentence, and has raised one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

“THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED EVIDENCE OF PRIOR BAD ACTS THAT PREJUDICED MR. THOMAS’[S] CASE.”

{¶3} In his sole assignment of error, Thomas contends that the trial court abused its discretion when it admitted evidence of prior bad acts. Although Thomas 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. *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at ¶12.

{¶4} R.C. 2967.28(B) requires that “[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.” The term of post-release control for an offender convicted of a first-degree felony is a mandatory period of five years. R.C. 2967.28(B)(1).

{¶5} Thomas was convicted of, and sentenced on, one count of aggravated burglary, a felony of the first degree. Pursuant to R.C. 2967.28(B)(1), Thomas is subject to a five-year, mandatory period of post-release control. However, a review of the trial court’s judgment entry reflects that the trial court mistakenly imposed a mandatory term of *up to* a maximum of five years. The use of the term *up to* implies that Thomas could be subject to a term of less than five years. This is incorrect. Accordingly, Thomas’s sentence is a nullity and must be vacated and

remanded for resentencing. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶22; *Boswell* at ¶12.

{¶6} In light of our determination that Thomas'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.

III.

{¶7} Because Thomas's sentence is void, this Court cannot address his assignment of error. Thomas's sentence is vacated, and the cause is remanded for proceedings consistent with this opinion.

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

DICKINSON, J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶8} I respectfully dissent.

{¶9} In a recent line of cases, the Supreme Court of Ohio has consistently held that sentences which fail to impose mandatory post-release control are void. See *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at ¶8; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, syllabus; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, syllabus. In *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, at ¶24, the high court noted that the General Assembly’s goal of achieving “truth in sentencing” resulted in a felony-sentencing law in 1996 that was intended to ensure that all persons with an interest in a sentencing decision would know exactly the sentence a defendant is to receive upon conviction for committing a felony. The *Cruzado* court went on to note that “[c]onfidence in and respect for the criminal-justice system flow from a belief that courts and officers of the courts perform their duties pursuant to established law.” *Id.*

{¶10} The debate regarding whether sentences which fail to comply with statutory requirements are void or voidable is complex and well-documented. See, e.g., *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197; *State v. Holcomb*, 9th Dist. No. 24287, 2009-Ohio-3187. Although I am uncomfortable with the existing approach adopted by this Court, I will continue to support the framework outlined in the majority opinion on the basis of stare decisis and in the

interest of consistency for the reasons I enunciated in *Holcomb*, supra, (Carr, J., concurring). However, I am unwilling to extend that analysis to defendants who are sentenced after July 11, 2006.

{¶11} On appeal, Thomas contends that the trial court abused its discretion when it admitted evidence of prior bad acts. While Thomas does not specifically challenge whether the trial court properly put him on notice of post-release control during the sentencing phase, the majority holds that his sentence is void on the basis that it does not satisfy statutory requirements. This case presents an example of how a sentence may be considered void even though the trial court's actions did not run afoul of the statutory framework. As the majority noted, the current version of R.C. 2967.28(B) states that each sentence to a prison term for a felony of the first degree shall include a requirement that the offender be subject to a mandatory period of post-release control imposed by the parole board after the offender is released from prison. However, the statute also states:

“If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a sentencing court to notify the offender pursuant to division (B)(3)(c) of section 2929.19 of the Revised Code of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under this division.” *Id.*

The current version of R.C. 2929.19(B)(3)(c) contains parallel language to R.C. 2967.28(B) regarding the imposition of post-release control in situations where an offender was not given notice at the sentencing hearing or in the journal entry. In this case, Thomas was convicted of multiple offenses including aggravated burglary under R.C. 2911.11(A)(1) which is categorized as a felony of the first degree. He was sentenced by entry dated December 19, 2008.

{¶12} In *Woods v. Telb* (2000), 89 Ohio St.3d 504, 512, the Supreme Court held that the former version of Ohio's post-release control statute did not violate the separation of powers doctrine but went on to emphasize that "post-release control is part of the original judicially imposed sentence." In *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, at ¶18, the Supreme Court held that under the former version of Ohio's post-release control statute, the APA was not authorized to impose post-release control on a defendant when the trial court did not inform the defendant about the mandatory term of post-release control at the sentencing hearing and had failed to incorporate post-release control in its sentencing entry. See, also, *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶9. Unlike the version of the statute which was at issue in *Woods* and *Hernandez*, the amended post-release control statute at issue in this case empowers the APA to impose mandatory post-release control regardless of whether the trial court gave the defendant notice of the mandatory term of post-release control. R.C. 2967.28(B).

{¶13} The recent line of cases which have consistently held that sentences which fail to impose a mandatory term of post-release control are void have been premised on the fundamental understanding that trial courts do not have the authority to impose sentences which do not comply with the law. *Boswell* at ¶8; *Simpkins* at ¶20. Under the current language of R.C. 2967.28(B), post-release control may be imposed when the trial court does not put the offender on notice at the sentencing hearing or by journal entry. Because confidence in and respect for the criminal justice system flow from a belief that courts and officers of the courts perform their duties pursuant to established law, the current disconnect between the approach adopted by Ohio appellate courts and the language in R.C. 2967.28(B) must be reconciled. In this case, I would address Thomas' assignment of error on the merits.

APPEARANCES:

KENNETH N. ORTNER, Attorney at Law, for Appellant.

PHILLIP V. THOMAS, III, pro se, Appellant.

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