

STATE OF OHIO                     )  
  )ss:  
COUNTY OF SUMMIT            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No.       24691

Appellee

v.

MARSHAWN LYNDELL LORE HORNE

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     CR 08 08 2603

Appellant

DECISION AND JOURNAL ENTRY

Dated: December 2, 2009

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Per Curiam.

{¶1} Appellant, Marshawn Lyndell Lore Horne, appeals the judgment of the Summit County Court of Common Pleas. This Court exercises its inherent power to vacate a void judgment and remands this case for a new sentencing hearing.

I.

{¶2} On September 11, 2008, Marshawn Horne was indicted on one count of aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree; one count of having weapons while under disability in violation of R.C. 2923.13, a felony of the third degree; and one count of grand theft in violation of R.C. 2913.02(A)(1)/(4), a felony of the fourth degree. Count one of the indictment contained a firearm specification. After a jury trial, Horne was found guilty of aggravated robbery with a firearm specification, having weapons while under disability, and grand theft. The sentencing entry accurately states the terms of post-release

control. However, at the sentencing hearing, the trial court did not notify Horne that he would be subject to post-release control upon his release from prison.

{¶3} Horne appeals his convictions to this Court, raising seven assignments of error.

## II.

### **ASSIGNMENT OF ERROR I**

“TRIAL COURT ERRED AND COMMITTED PLAIN ERROR BY ALLOWING THE PROSECUTOR TO INTRODUCE EVIDENCE ABOUT PRIOR, SEPARATE CRIMINAL CONDUCT IN VIOLATION OF OHIO STATUTORY LAW AND OHIO RULES OF EVIDENCE 403 AND 404.”

### **ASSIGNMENT OF ERROR II**

“TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR, BY ACCEPTING JOURNAL ENTRIES OF DEFENDANT’S PRIOR CONVICTIONS AS EVIDENCE.”

### **ASSIGNMENT OF ERROR III**

“THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTION FOR MISTRIAL.”

### **ASSIGNMENT OF ERROR IV**

“TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR WHEN IT PERMITTED INTO EVIDENCE TESTIMONY REGARDING RESULTS OF POLYGRAPH EXAM.” (sic)

### **ASSIGNMENT OF ERROR V**

“TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR WHEN IT REVERSED ITS PRIOR RULING AND PERMITTED THE PROSECUTOR TO REFER TO DEFENDANT AS ‘KILLER[.]’”

### **ASSIGNMENT OF ERROR VI**

“TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR WHEN IT FAILED TO PROPERLY INSTRUCT THE JURY ABOUT THE ESSENTIAL ELEMENTS OF THE OFFENCE OF AGGRAVATE ROBBERY[.]” (sic)

**ASSIGNMENT OF ERROR VII**

“DEFENDANT’S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]”

{¶4} Horne has raised seven assignments of error on appeal. This Court declines to address Horne’s arguments on the merits as the record indicates his sentence is void.

{¶5} Horne’s conviction for aggravated robbery is a felony of the first degree. Pursuant to R.C. 2967.28(B), “[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 R.C. 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 the offender’s release from imprisonment[.]” In addition, R.C. 2929.19(B)(3)(c) provides that, “if the sentencing court determines at the sentencing hearing 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[.]”

{¶6} Pursuant to R.C. 2967.28(B), an offender convicted of a felony of the first degree is subject to a mandatory term of five years post-release control. In this case, the trial court’s sentencing entry stated that Horne “is ordered subject to post-release control of 5 years, as provided by law.” However, the trial court did not notify Horne about mandatory post-release control at the sentencing hearing.

{¶7} The Supreme Court of Ohio has held that a trial court’s failure to properly impose a mandatory term of post-release control renders a sentence void. *State v. Simpkins*, 117 Ohio

St.3d 420, 2008-Ohio-1197, at syllabus. The Supreme Court’s reasoning emanates from “the fundamental understanding that no court has the authority to substitute a different sentence for that which is required by law.” *Id.* at ¶20, citing *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438. “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.” *Simpkins* at ¶22. The Supreme Court has recognized that if an offender’s sentence is void, a reviewing court must vacate the sentence even if neither party has moved for resentencing. *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at ¶12; *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972, at ¶12. “[T]he effect of vacating the trial court’s original sentence is to place the parties in the same place as if there had been no sentence.” *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at ¶13.

{¶8} In this case, the trial court did not properly inform Horne about the imposition of post-release control at the sentencing hearing. It follows that the judgment entry is void and must be vacated.

### III.

{¶9} Because Horne’s sentence is void, this Court cannot address his assignments of error. 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

DICKINSON, P. J.  
BELFANCE, J.  
CONCUR

CARR, J.  
DISSENTS, SAYING:

{¶10} I respectfully dissent for the reasons I articulated in *State v. King*, 9th Dist. No. 24675, 2009-Ohio-5158 (Carr, J., dissenting).

APPEARANCES:

SHUBHRA N. AGARWAL, Attorney at Law, for Appellant.

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