

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 25125

Appellee

v.

ANDRE YEAGER

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 01 12 3475(B)

DECISION AND JOURNAL ENTRY

Dated: August 18, 2010

BELFANCE, Judge.

{¶1} Defendant-Appellant, Andre Yeager, appeals from the decision of the Summit County Court of Common Pleas that denied various post-conviction motions he filed.

I.

{¶2} In 2002, Yeager and several co-defendants were indicted on various charges stemming from a crime spree during which various businesses were broken into and robbed. After a jury trial in April 2002, Yeager was convicted of four counts of breaking and entering and one count of receiving stolen property. The jury found Yeager not guilty of three counts of breaking and entering and was unable to reach a verdict on the charges of engaging in a pattern of corrupt activity and intimidation of a witness. On April 24, 2002, the trial court entered an order in which it sentenced Yeager to a total of five and one-half years of prison for his convictions. The entry included a term of post-release control. Yeager appealed his convictions

and this Court affirmed. *State v. Yeager*, 9th Dist. Nos. 21091, 21112, 21120, 2003-Ohio-1808, at ¶1.

{¶3} In 2003, a second jury trial was held on the charges of engaging in a pattern of corrupt activity and intimidation of a witness. The jury found Yeager guilty of one count of engaging in a pattern of corrupt activity and two counts of intimidation of a witness. On March 14, 2003, the trial court ordered that Yeager serve six years concurrent with his sentence in his 2002 conviction, and four years consecutive with the six-year sentence. In sum, Yeager would serve a total of ten years in prison for his 2002 and 2003 convictions. The sentencing entry did not contain a term of post-release control, thus, the trial court issued a second entry also on March 14, 2003 detailing post-release control. Yeager appealed the March 14, 2003 judgment. We held that there was sufficient evidence to sustain the convictions; however, Yeager did not knowingly waive his right to counsel. *State v. Yeager*, 9th Dist. No. 21510, 2004-Ohio-2368, at ¶¶24-25. Thus, we reversed and remanded for a new trial. *Id.* at ¶25. We did not reach Yeager's other assignments of error. *Id.* However, the Supreme Court of Ohio reversed our decision and remanded to this Court for further consideration. *State v. Yeager*, 103 Ohio St.3d 476, 2004-Ohio-5707, at ¶1. On remand, we considered each of Yeager's assignments of error and affirmed the judgment of the trial court in its entirety. *State v. Yeager*, 9th Dist. No. 21510, 2005-Ohio-4932, at ¶51.

{¶4} Since resolution of his appeals, Yeager has filed numerous motions in the trial court related to his convictions. The instant appeal concerns the trial court's judgment entry of November 13, 2009, which denied Yeager's five most recent motions. In his motions, Yeager contended that the 2002 and 2003 judgment entries were void in light of various deficiencies and errors. Yeager sought resentencing. He also maintained that he could not be convicted of

felonies because the verdict forms did not contain either the degree of the offense nor the factors that elevated the offense to a felony. The trial court found that his sentences were not void, he was not entitled to be resentenced, and that Yeager's motions were moot, untimely, or barred by res judicata. All the motions were denied.

{¶5} Yeager has appealed the trial court's ruling and has assigned nine errors for our review. With respect to the judgment entry of April 24, 2002, Yeager asserts that: (1) he should not have been convicted of felonies because the verdict forms do not contain the legally required language; (2) the trial court failed to advise him of the penalties for violating post-release control; (3) the trial court did not advise him at sentencing that restitution would be ordered, but included restitution in its judgment entry; (4) the trial court did not inform him at sentencing that he would be ordered to pay costs and did not determine his ability to pay the costs, and; (5) the trial court failed to inform him that he could be sentenced to community service if he did not pay the monetary judgment. With respect to the March 14, 2003 entry, Yeager contends that: (1) the entire sentence is void because the sentencing entry did not contain the required term of post-release control; (2) he should not have been convicted of felonies because the verdict forms do not contain the legally required language; (3) he is entitled to a de novo sentencing hearing during which he is notified of post-release control, and; (4) the trial court did not inform him at sentencing that he would be ordered to pay costs and did not determine his ability to pay the costs.

{¶6} The State argues that Yeager's assignments of error related to the April 24, 2002 entry are moot because he has already served the sentence imposed by that order. Despite this argument, the State briefly addresses the merits of each of Yeager's claims with respect to the 2002 entry. However, the State concedes that the trial court's March 14, 2003 judgment entry is

void because the trial court failed to inform Yeager of post-release control at his sentencing hearing. Further, when the trial court realized its error, it failed to conduct a de novo sentencing hearing, instead, the trial court held a second hearing during which it notified Yeager solely of his post-release control sanction.

II.

April 24, 2002 Sentencing Entry

{¶7} Yeager raises several issues with respect to the trial court’s entry of April 24, 2002. The April 24, 2002 entry sentenced Yeager to five and one-half years in prison for his convictions. He has completed that sentence and is serving the sentence ordered in the March 14, 2003 entry. He argues, inter alia, that the entry does not contain the proper period of post-release control.

{¶8} In the 2002 entry, the trial court sentenced Yeager to prison for his convictions for receiving stolen property, a fourth-degree felony, and breaking and entering, a fifth degree felony. The entry further provides that Yeager is “subject to post-release control for three (3) years[.]” Pursuant to R.C. 2967.28(C), Yeager’s fourth- and fifth-degree felony convictions subject him to post-release control for “up to” three years. The trial court’s entry mistakenly implies that Yeager is subject to a mandatory three-year period, however, he is actually subject to a discretionary period of *up to* three years. *Id.* This error renders the April 24, 2002 sentencing entry void. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶22; *State v. Harris*, 9th Dist. No. 24611, 2009-Ohio-6078, at ¶¶7-8. ““The effect of determining that a judgment is void is well-established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment.”” (Internal citations omitted.) *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-

3972, at ¶10, quoting *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268. Because the trial court's entry of April 24, 2002 is void, we lack jurisdiction to consider the merits of Yeager's appeal with respect to the 2002 entry. *Bedford* at ¶14. On remand, Yeager shall not be subject to resentencing with respect to the 2002 entry as he has completed his sentence for the offenses that are the subject of that entry. See *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at ¶18.

{¶9} We do not address Yeager's remaining assignments of error that relate to the void, April 24, 2002 sentencing entry.

March 14, 2003 Sentencing Entry

{¶10} Yeager has argued, and the State concedes, that the March 14, 2003 sentencing entry is void because it does not include any reference to post-release control. Furthermore, the trial court's attempt to remedy this deficiency was not effective because the trial court did not hold a de novo sentencing hearing. We agree.

{¶11} On March 14, 2003, Yeager was sentenced to prison for engaging in a pattern of corrupt activity, a second-degree felony, and intimidation of a witness, a third-degree felony. R.C. 2967.28(B) requires that:

“[e]ach sentence to a prison term * * * for a felony of the second degree * * * or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control[.]”

The period of post-release control for each of Yeager's convictions is a mandatory three years. R.C. 2967.28(B)(2), (3).

{¶12} The Supreme Court of Ohio has held that if a trial court fails to properly include post-release control in its sentencing entry, that entry is a nullity and is void. *Simpkins* at ¶22. The sentence must be vacated. *Id.* Recently, in *State v. Singleton*, 124 Ohio St.3d 173, 2009-

Ohio-6434, the Supreme Court re-evaluated *Simpkins* and its other post-release control precedent in light of R.C. 2929.191, which provides a remedy for defendants with a sentencing entry that does not conform to the statutory mandates of R.C. 2967.28(B). The Supreme Court concluded that, for sentences imposed prior to July 11, 2006, the effective date of R.C. 2929.191, that do not properly impose post-release control, the remedy is to conduct a de novo sentencing hearing. *Singleton* at paragraph one of the syllabus.

{¶13} In the case at bar, the trial court did not properly include Yeager’s term of post-release control in the March 14, 2003 entry. Further, upon realizing the error, the trial court failed to provide Yeager with a de novo sentencing hearing and instead, merely informed him of post-release control and issued a second entry to that effect. Thus, the March 14, 2003 sentencing entry is void, must be vacated, and the matter is remanded to the trial court to conduct a de novo sentencing hearing. See *Simpkins* at ¶22; *Singleton* at paragraph one of the syllabus. Because the 2003 entry is void, we do not address the merits of Yeager’s remaining assignments of error as they relate to that entry. See *Bedford* at ¶14.

III.

{¶14} The judgment of the Summit County Court of Common Pleas that denied Yeager’s motions concerning the 2002 and 2003 sentencing entries is reversed because those sentencing entries are void. The matter is remanded to the trial court for de novo resentencing as outlined in this opinion.

Judgment reversed,
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.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
CONCURS, SAYING:

{¶15} This case is a further excursion through the looking glass. I write separately to note that, as a result of the confusion the Ohio Supreme Court has caused regarding the difference between “void” and “voidable,” Mr. Yeager’s 2002 sentence is “void.” Because he has completed serving the prison term imposed by that sentence, however, he cannot be resentenced. *State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250, at ¶18. The result of vacating his “void” sentence, therefore, would be that, at least for some purposes, his 2002 conviction would not exist. See *State v. Whitfield*, 124 Ohio St. 3d 319, 2010-Ohio-2, at ¶24. Accordingly, we are not vacating his 2002 sentence, and that “void” sentence is, as it should be, valid for all purposes.

CARR, J.

CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶16} I concur with this Court's analysis and resolution of Yeager's 2003 sentence. With respect to Yeager's 2002 sentence, I respectfully dissent on the same basis I articulated in *State v. Harville*, 9th Dist. No. 08CA009501, 2009-Ohio-5420, and *State v. Barrett*, 9th Dist. No. 24707, 2009-Ohio-6429. In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶6, the Supreme Court held that "in 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, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence." In that case, the trial court's sentencing entry did not indicate that Simpkins was subject to a period of post-release control. *Id.* at ¶1. I remain unwilling to extend the Supreme Court's holding beyond the facts of that case. Here, unlike in *Simpkins*, the trial court put Yeager on notice that he could face three years of post-release control and merely omitted the words "up to" from the sentencing entry. Accordingly, I dissent.

APPEARANCES:

ANDRE YEAGER, pro se, Appellant.

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