

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24990

Appellee

v.

MARVIN LAMONT WILLIAMS

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 05 09 3164

DECISION AND JOURNAL ENTRY

Dated: October 20, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Marvin Williams, appeals from the judgment of the Summit County Court of Common Pleas. This Court vacates.

I

{¶2} On September 9, 2005, a grand jury indicted Williams on the following counts: (1) receiving stolen property, in violation of R.C. 2913.51(A); (2) failure to comply with the order or signal of a police officer, in violation of R.C. 2921.331(B); (3) operating a motor vehicle without a license, in violation of R.C. 4507.02; (4) failing to obey a stop sign, in violation of R.C. 4511.12; and (5) failing to obey a red light, in violation of R.C. 4511.13. Subsequently, the grand jury issued a supplemental indictment, which added the following counts: (1) failure to comply with the order or signal of a police officer, in violation of R.C. 2921.331(B); (2) possession of cocaine, in violation of R.C. 2925.11(A); (3) illegal use or possession of drug paraphernalia, in violation of R.C. 2925.14(C)(1); (4) possession of marijuana, in violation of

R.C. 2925.11(A); (5) driving under suspension, in violation of R.C. 4510.11; (6) resisting arrest, in violation of R.C. 2921.33(A); (7) obstructing official business, in violation of R.C. 2921.31(A); and (8) reckless operation, in violation of R.C. 4511.20. A jury trial took place on all of the counts that were not minor misdemeanors. The court ultimately granted Williams' Crim.R. 29 motion with regard to his charges for receiving stolen property and driving under suspension. The jury found Williams guilty on the remaining charges. After the jury returned its verdict, the trial court found Williams guilty on all of the minor misdemeanor charges.

{¶3} On March 23, 2006, the court issued Williams' sentencing entry. The entry did not include sentences for two of Williams' minor misdemeanors. This Court dismissed Williams' first appeal, in part, for lack of a final, appealable order with respect to the two misdemeanors, but affirmed the remainder of his convictions. *State v. Williams*, 9th Dist. No. 23176, 2007-Ohio-622. This Court did not address the fact that the March 23, 2006 sentencing entry did not contain a proper post-release control notification.

{¶4} After this Court's partial dismissal, the trial court sentenced Williams solely with regard to his minor misdemeanors. On June 24, 2009, the court issued another sentencing entry, nunc pro tunc. The entry reiterated the entirety of Williams' sentence and included a notification that Williams would be subject to post-release control. Yet, the entry did not inform Williams of the penalty for violating post-release control. On August 21, 2009, the court issued a second nunc pro tunc sentencing entry. The August 21, 2009 sentencing entry included Williams' post-release control term and the penalty for violating any post-release control conditions.

{¶5} Williams now appeals from the court's August 21, 2009 nunc pro tunc sentencing entry and raises five assignments of error for our review. We consolidate the assignments of error.

II

Assignment of Error Number One

“APPELLANT’S CONVICTION WAS BASED UPON INSUFFICIENT EVIDENCE AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]”

Assignment of Error Number Two

“THE TRIAL COURT ERRED BY DENYING THE APPELLANT’S CRIM.R. 29 MOTION. THE TRIAL COURT ERRED BY REFUSING TO RULE ON THE APPELLANT’S SUPPLEMENTAL MOTION FOR ACQUITTAL, CRIM.R. 29 AT THE CLOSE OF THE CASE IN THE TRIAL COURT[.]”

Assignment of Error Number Three

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY NOT PERMITTING THE JURY TO VIEW EVIDENCE IN A TIMELY MANNER AND IN THAT POISONED THE MINDS OF THE JURY CREATING A MISCARRIAGE OF JUSTICE[.]”

Assignment of Error Number Four

“WHEN COUNSEL’S PERFORMANCE IS DEFICIENT IN THE CONDUCT OF TRIAL COUPLED WITH PREJUDICE INURING TO THE DETRIMENT OF THE APPELLANT, HIS RIGHT TO A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL ARE VIOLATED CONTRA THE OHIO AND FEDERAL CONSTITUTION[.]”

Assignment of Error Number Five

“THE TRIAL COURT ERRED BY PROVIDING APPELLANT WITH THE JOURNAL ENTRY IN LIGHT OF THIS APPEAL. THE TRIAL COURT IS DENYING APPELLANT DUE PROCESS OF LAW IN THAT THE JOURNAL ENTRY HAS FALSE STATEMENT’S (sic) AND THE APPEARANCE THAT APPELLANT WAS PREAENT (sic) AT A SENTENCING HEARING FEBRUARY 15, 2007, AND WAS AFFORDED ALL RIGHT’S (sic) PURSUANT TO CRIM.R. 32[.]”

{¶6} All of Williams’ assignments of error attack various aspects of his convictions on the merits. Because Williams has appealed from a void sentence, this Court cannot address his assignments of error.

{¶7} Williams’ original criminal sentencing entry, dated March 23, 2006, did not contain a valid post-release control notification. Therefore, it was void. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at syllabus.

“For criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose post[-]release control, trial courts shall conduct a de novo sentencing hearing in accordance with decisions of the Supreme Court of Ohio.” *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, at paragraph one of the syllabus.

A trial court may not correct a pre-July 11, 2006 criminal sentence by way of a nunc pro tunc entry because the sentence itself is void and therefore “there is no existing judgment for a sentencing court to correct.” *Singleton* at ¶26. See, also, *State v. Yeager*, 9th Dist. No. 25125, 2010-Ohio-3848, at ¶13. Thus, for pre-July 11, 2006 criminal sentences, the trial court must follow the de novo sentencing procedures as prescribed by Ohio Supreme Court precedent. *Id.*

{¶8} Williams never received a de novo sentencing hearing. The court instead attempted to correct Williams’ sentence on more than one occasion by way of a nunc pro tunc entry. The nunc pro tunc entries the court issued did not change the status of Williams’ void sentence. *Singleton* at ¶26. As such, Williams still has not received a valid criminal sentence from which he may appeal, and this Court may not address his assignments of error on the merits. Williams’ prior sentencing entries, including those designated “nunc pro tunc” are vacated, and this matter is remanded to the trial court for a de novo sentencing hearing.

III

{¶9} Because Williams’ sentence is void, this Court cannot address his assignments of error. Williams’ sentence is vacated, and the cause is remanded for the trial court to conduct a de novo sentencing hearing in accordance with the foregoing 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 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.

BETH WHITMORE
FOR THE COURT

BELFANCE, P. J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶10} I respectfully dissent from the majority's decision vacating Williams' sentence and remanding to the trial court. I would dismiss Williams' appeal as untimely.

{¶11} The trial court first attempted to sentence Williams on March 21, 2006. Williams was present at that hearing. The trial court, however, failed to properly impose post-release

control. The judgment entry issued on March 23, 2006, was, therefore, void and Williams was entitled to a de novo sentencing hearing. See *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph one of the syllabus. On February 15, 2007, the trial court conducted a sentencing hearing with the defendant present. The trial court issued a judgment from that hearing on February 22, 2007, only sentencing Williams on four minor misdemeanors, and failing to sentence him on any felonies. Accordingly, as of that time, the trial court had not conducted the required de novo sentencing hearing.

{¶12} On June 19, 2009, the trial court revisited the issue of Williams' sentence and issued what it described as a nunc pro tunc entry designed to correct the February 22, 2007 sentencing entry. However, the trial court's June 24, 2009 journal entry sentenced Williams on all charges for which he was originally found guilty in February 2006. Notwithstanding the trial court's assertion that it was merely correcting the February 22, 2007 journal entry nunc pro tunc, it in fact substantively changed that entry by sentencing Williams for the first time on the felonies and higher level misdemeanors. The trial court sentenced Williams by way of the June 24, 2009 entry which contained all the elements of a final judgment of conviction. See *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, at ¶18. Moreover, this Court has held that a judgment entry of conviction which incorrectly imposes postrelease control is voidable and triggers the right to timely appeal. *State v. Jones*, 9th Dist. No. 25254, 2010-Ohio-3850, at ¶8. The trial court's mislabeling of the judgment as an entry nunc pro tunc does not negate its finality. *State v. Hopkins*, 3d Dist. No. 17-08-01, 2008-Ohio-2611, at ¶14. Accordingly, the trial court's June 19, 2009 contemplation of the matter constituted a de novo sentencing hearing at which Williams had the right to be present. See *Singleton*, at paragraph one of the syllabus.

{¶13} Williams could have appealed the June 24, 2009 judgment to allege error due to his absence at the sentencing hearing. Moreover, he could have raised at that time any issues relevant to the trial court's imposition of postrelease control arising out of that judgment. Assuming, without deciding, that the trial court improperly addressed postrelease control in the June 24, 2009 judgment, that would have constituted error which the Ohio Supreme Court has recognized that the trial court may correct pursuant to the provisions of R.C. 2929.191. This Court has acknowledged that a criminal defendant's remedy remains with the trial court under those circumstances.

{¶14} R.C. 2929.191 allows the trial court to issue a *correction* to the judgment of conviction by way of an entry nunc pro tunc. The corrected sentencing entry relates back to the date of the inaccurate judgment of conviction. R.C. 2929.191(A)(2). "A corrective [i.e., nunc pro tunc] judgment does not act to extend the time in which an appellant can file a notice of appeal from the actual final judgment of sentence." *Hopkins* at ¶13. App.R. 4(A) provides that a party must file a notice of appeal within thirty days of the date of judgment. None of the exceptions set forth in App.R. 4(B) are applicable to this situation. Because Williams did not file his notice of appeal until September 22, 2009, his appeal from the final judgment issued on June 24, 2009, is untimely and this Court lacks the jurisdiction to address it.

{¶15} I would further acknowledge the significance of the status of the June 24, 2009 entry as a voidable judgment, rather than a void one. A void judgment is one that has no effect from its inception. A voidable judgment, on the other hand, remains effective and requires some action by the trial court to terminate the efficacy of the order. The trial court's August 21, 2009 journal entry, which purported to fully address the issue of postrelease control, did not vacate the June 24, 2009 judgment. Had it done so, I would be inclined to conclude that the trial court held

a resentencing hearing on August 19, 2009, pursuant to R.C. 2929.191, and issued a final, appealable judgment on August 21, 2009. Because it did not vacate its prior voidable order, however, that June 24, 2009 judgment remained as the final order from which Williams could appeal.

APPEARANCES:

MARVIN L. WILLIAMS, pro se, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.