

STATE OF OHIO                    )  
  )ss:  
COUNTY OF WAYNE            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.       10CA0007

Appellee

v.

ANTHONY MARTIN

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF WAYNE, OHIO  
CASE No.     06-CR-0119

Appellant

DECISION AND JOURNAL ENTRY

Dated: November 8, 2010

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WHITMORE, Judge.

{¶1} Defendant-Appellant, Anthony Martin, appeals from the judgment of the Wayne County Court of Common Pleas. This Court vacates.

I

{¶2} On March 16, 2006, a grand jury indicted Martin based on two felony counts of possessing cocaine, in violation of R.C. 2925.11, and one count of possessing marijuana, in violation of R.C. 2925.11. After multiple continuances and two mistrials, a jury found Martin guilty of the two felony possession counts. On October 5, 2006, the trial court issued Martin's sentencing entry. Martin appealed from the court's entry. During the pendency of Martin's appeal, however, Martin filed a motion, asking the trial court to issue a nunc pro tunc entry because the entry from which he appealed did not comply with Crim.R. 32(C). Specifically, the entry did not set forth Martin's initial plea or the manner of his conviction pursuant to *State v.*

*Miller*, 9th Dist. No. 06CA0046-M, 2007-Ohio-1353.<sup>1</sup> On April 30, 2007, the trial court issued a nunc pro tunc entry that included the manner of Martin's conviction, but not his initial plea. On June 1, 2007, the court issued another nunc pro tunc entry that included his initial plea.

{¶3} On October 29, 2007, this Court dismissed Martin's appeal because the trial court's sentencing entry did not dispose of the third count in Martin's indictment. *State v. Martin* ("Martin I"), 9th Dist. No. 06CA0069, 2007-Ohio-5764. After the dismissal, the trial court issued a new sentencing entry in November 2007. The new entry complied with Crim.R. 32(C), and Martin appealed from it. This Court affirmed Martin's convictions. *State v. Martin* ("Martin II"), 9th Dist. No. 07CA0089, 2008-Ohio-5526.

{¶4} On November 16, 2009, Martin filed a motion for sentencing in the court below because he was never properly advised of post-release control. The trial court held a hearing, advised Martin of post-release control, and issued a sentencing entry on January 20, 2010. Much like Martin's sentencing entry from his first appeal, the court's January 20, 2010 sentencing entry did not dispose of the third count in Martin's indictment. On February 10, 2010, the court issued a nunc pro tunc sentencing entry, which disposed of the third count.

{¶5} Martin now appeals from the court's January 20, 2010 and February 10, 2010 sentencing entries. This Court consolidates his assignments of error.

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<sup>1</sup> The Ohio Supreme Court later rejected *Miller's* interpretation of Crim.R. 32(C), which was that sentencing entries were non-appealable if they failed to include a defendant's initial plea. See *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330.

## II

Assignment of Error Number One

“WHERE DEFENDANT-APPELLANT’S ORIGINAL AND SUBSEQUENT SENTENCE JUDGMENT ENTRIES WERE VOID DUE TO INCORRECT ADVISEMENT CONCERNING POST-RELEASE CONTROL AND RE-SENTENCING WAS REQUIRED ONCE AGAIN IN 2010, DEFENDANT-APPELLANT’S PREVIOUS APPEALS WERE INVALID AND THE INSTANT APPEAL MUST BE TREATED AS HIS FIRST DIRECT APPEAL OF RIGHT IN WHICH ISSUES OTHER THAN THOSE RELATING TO HIS MOST RECENT RE-SENTENCING MAY BE RAISED.”

Assignment of Error Number Two

“THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY’S VERDICT OF GUILTY AS TO FIRST-DEGREE FELONY COUNT OF POSSESSION OF CRACK COCAINE SET FORTH IN THE INDICTMENT, AND APPELLANT’S CONVICTION OF THAT FIRST-DEGREE (sic) FELONY COUNT OF POSSESSION OF CRACK COCAINE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

Assignment of Error Number Three

“THE TRIAL COURT INCORRECTLY CITED THE UNCONSTITUTIONAL AND REPEALED ‘BAD TIME’ STATUTE, R.C. 2967.11, IN THE SENTENCING JUDGMENT ENTRY; ERRONEOUSLY ADVISED DEFENDANT THAT HE WOULD BE SUBJECT TO ‘BAD TIME’ IMPOSED BY THE PAROLE BOARD FOR VIOLATIONS OF POST-RELEASE CONTROL; AND ERRONEOUSLY INDICATED THAT DEFENDANT’S MANDATORY PERIOD OF POST-RELEASE CONTROL WAS DISCRETIONARY AS DETERMINED BY THE PAROLE BOARD.”

{¶6} In his assignments of error, Martin asks this Court to review his underlying convictions and his sentence on the basis that his prior appeal amounts to a nullity, which stemmed from a void sentencing entry. We do not agree that Martin’s sentence is void or that his prior appeal amounts to a nullity. It is clear, however, that the record in this case is replete with error, and the trial court exceeded its jurisdiction when it issued Martin’s 2010 sentencing entries. As such, this Court must vacate the trial court’s 2010 sentencing entries.

{¶7} To constitute a valid judgment, a sentencing entry must contain: “(1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court.” *Baker* at syllabus. Martin’s November 2007 sentencing entry contained all of the foregoing requirements and was, therefore, a valid judgment.<sup>2</sup> Martin appealed from that final judgment, and this Court affirmed his convictions. *Martin II*, supra. In November 2009, Martin challenged his November 2007 sentencing entry because it did not contain an effective post-release control notification. Martin argued that his sentence was void and sought re-sentencing due to the post-release control defect.

{¶8} In December 2009, the Ohio Supreme Court released *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, and held that “[f]or criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose post[-]release control, trial courts shall apply the procedures set forth in R.C. 2929.191.” *Singleton* at paragraph two of the syllabus. *Singleton* clarified that when post-release control errors occur in sentences imposed on or after July 11, 2006, those errors do not result in void sentences. *Id.* at ¶23-34. Rather, R.C. 2929.191 provides a means of correction for those sentences. *Id.*

{¶9} The trial court imposed Martin’s criminal sentence after July 11, 2006, which means that any error in Martin’s post-release control notification did not result in a void judgment. *Id.* To the extent that Martin claims his sentence is void and his prior appeal is a nullity, Martin is incorrect. Martin received his appeal as of right, see *Martin II*, supra, and that

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<sup>2</sup> While not detrimental to the validity of his judgment under Crim.R. 32(C), Martin’s November 2007 entry erroneously ordered that Martin serve his sentence for possession, in violation of R.C. 2911.11. In fact, Martin’s possession convictions were for violations of R.C. 2925.11. It is evident that the court’s error was clerical in nature, as the jury convicted Martin of possession,

appeal stemmed from a valid judgment. Martin cannot re-litigate the merits of his case. See *State v. Taylor*, 9th Dist. No. 09CA009663, 2010-Ohio-814, at ¶4-7. Compare *State v. Harmon*, 9th Dist. No. 24495, 2009-Ohio-4512, at ¶7-18. By that same token, the trial court had no authority to modify Martin’s judgment.

{¶10} The trial court held a hearing on Martin’s motion for re-sentencing on January 20, 2010, one month after *Singleton’s* issuance. Martin appeared pro se at the hearing and specifically asked the court whether his sentence was void. The court replied:

“The sentence is void to the extent that, you know, I didn’t apprise you of the post[-]release control provision. That’s why we brought you back so I could do that. But the sentence of seven years which the Court imposed after your trial is your sentence.”

The court also told Martin that it was “affirm[ing]” his seven-year sentence for the possession of cocaine. “Hearings and entries conducted pursuant to R.C. 2929.191 ‘pertain only to the flawed imposition of post[-]release control,’ not a defendant’s underlying sentence.” *State v. Haskins*, 9th Dist. No. 25152, 2010-Ohio-4332, at ¶6, quoting *Singleton* at ¶24. Because Martin was initially convicted and sentenced after July 11, 2006, his sentence was voidable, not void, and the court erred when it told Martin that his sentence was void to a certain extent. *Singleton* at ¶23-34. It further erred by indicating that it was “affirm[ing]” Martin’s sentence, as that statement incorrectly suggested that the court had the ability to change the term of Martin’s sentence. See *State v. Plant*, 9th Dist. No. 24118, 2008-Ohio-4424, at ¶10 (noting that a court has no authority to modify a sentence by increasing the severity of the sentence once execution of the sentence has begun). Martin’s sentence was a valid one that the court had no authority to modify. See *State v. Stovall*, 9th Dist. No. 07CA0027-M, 2008-Ohio-272, at ¶5.

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the sentencing entry described Martin’s offenses as possession offenses, and the trial court later sought to correct the citation numbers in its 2009 judgment entries.

{¶11} Apart from the erroneous statements the trial court made to Martin, the court's January 20, 2010 and February 10, 2010 journal entries also amount to more than corrections entered in accordance with R.C. 2929.191. A jury convicted Martin, and the court's November 2007 sentencing entry accurately reflects the jury's verdict in setting forth Martin's manner of conviction. The court's January and February 2010 entries, however, make no mention of the jury's verdict and indicate that "[t]he Court hereby enters a finding of guilty to those offenses." The court changed Martin's manner of conviction and, thereby, erroneously modified Martin's sentence. See *Haskins* at ¶6; *Stovall* at ¶5.

{¶12} The trial court here was limited to two actions with regard to Martin's judgment entry: (1) the correction of any clerical errors, such as the court's citation to R.C. 2911.11 instead of R.C. 2925.11; and (2) the correction of Martin's post-release control notification in accordance with R.C. 2929.191. See *Stovall* at ¶5. It is worth noting that, to the extent the court attempted to correctly notify Martin of post-release control, the notification remains incorrect. The larger problem, however, is that the court exceeded its jurisdiction by modifying Martin's sentence rather than simply correcting it. The court lacked jurisdiction to modify any portion of Martin's judgment. As such, the court's 2010 sentencing entries are void and vacated pursuant to that determination. See *State v. Horne*, 9th Dist. No. 24691, 2009-Ohio-6283, at ¶7-9 (noting an appellate court's inherent authority to recognize and vacate void judgments).

### III

{¶13} Because Martin has appealed from void judgment entries, this Court cannot address his assignments of error. Martin's January 20, 2010 and February 10, 2010 sentencing entries are vacated. The trial court's November 2007 sentencing entry remains valid.

Judgments vacated.

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 Wayne, 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 Appellant.

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BETH WHIMTORE  
FOR THE COURT

MOORE, J.  
BELFANCE, P. J.  
CONCUR

APPEARANCES:

JOSEPH F. SALZGEBER, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.