[Cite as *State v. Nicholson*, 2010-Ohio-6196.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95327

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTOINE NICHOLSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-455398

BEFORE: Celebrezze, J., Kilbane, P.J., and Jones, J.

RELEASED AND JOURNALIZED: December 16, 2010

FOR APPELLANT

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} On reconsideration, the original announcement of *State v. Nicholson*, Cuyahoga App. No. 95327, 2010-Ohio-5851, released on December 2, 2010, is hereby vacated. We find it necessary to vacate that opinion because of our misstatement regarding the hearing necessary pursuant to *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958.

{¶ 2} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records and briefs of counsel. Defendant-appellant, Antoine Nicholson, filed this appeal

claiming that the trial court erred in failing to correct his void sentence. Based on the record before us and the relevant case law, we affirm appellant's conviction, but remand to the trial court for a de novo sentencing hearing.

{¶ 3} In 2004, appellant was indicted in a six-count indictment for three counts of felonious assault, one count of attempted murder, and two counts of domestic violence. With the exception of the domestic violence charges, all counts contained one- and three-year firearm specifications. As a result of a plea deal, appellant pled guilty to one count of felonious assault,[1] one count of attempted murder,[2] and one count of attempted felonious assault.[3] Pursuant to this plea agreement, these charges were to contain only three-year firearm specifications. The remaining counts were nolled.

{¶ 4} The trial court sentenced appellant to three years for the firearm specifications, which merged for sentencing. This term was to run prior and consecutively to seven years for felonious assault, seven years for attempted murder, and three years for attempted felonious assault. These terms were to run consecutively to one another, for an aggregate sentence of 20 years.

{¶ 5} Appellant appealed in *State v. Nicholson*, Cuyahoga App. No. 85635, 2005-Ohio-5687 ("*Nicholson I*"). In *Nicholson I*, this court held that

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[1]R.C. 2903.11; a second-degree felony.

[2]R.C. 2923.02 and R.C. 2903.02; a first-degree felony.

[3]R.C. 2923.02 and R.C. 2911.11; a third-degree felony.

the trial court erred when it failed to make the necessary findings that were required to depart from the minimum sentence and impose consecutive sentences. Id. at ¶17-30. As a result of this error, this court affirmed appellant's convictions, but remanded the case for resentencing. Id. at ¶32. On March 24, 2006, the trial court resentenced appellant to three years for the firearm specifications, to run prior and consecutively to seven years for felonious assault, five years for attempted murder, and three years for attempted felonious assault. All terms were to run consecutively to one another, for an aggregate sentence of 18 years in prison.

{¶ 6} Appellant then filed a "Motion to Vacate Void Judgment and Order New Sentencing Hearing." In this motion, appellant claimed the trial court failed to properly advise him of the repercussions that could follow a postrelease control violation. He claimed this error made his sentence void, and he was entitled to a new sentencing hearing. In its brief in opposition, the state argued that appellant presented no evidence to support his argument, and the motion should be denied. Appellant then supplemented the record with a copy of the court's resentencing entry. The trial court denied appellant's motion finding that he failed to provide evidence of why the resentencing entry should be vacated. This appeal followed.

{¶ 7} Appellant presents one assignment of error for our review wherein he argues that the trial court erred by denying his motion to vacate a void judgment and order a new sentencing hearing.

Law and Analysis

{¶ 8} If a court imposes a prison sentence that includes a term of postrelease control, the court must notify the offender, both at the sentencing hearing and in its journal entry, that the parole board could impose a prison term if the offender violates the terms and conditions of postrelease control. R.C. 2929.191(B)(1).

{¶ 9} Pursuant to R.C. 2967.28(B)(1), appellant's attempted murder conviction, a first-degree felony, carried a mandatory five-year period of postrelease control. Although the sentencing entry in this case provided that appellant's sentence carried a five-year period of postrelease control, the trial court failed to include in the entry what repercussions would follow a postrelease control violation.

{¶ 10} "Effective July 11, 2006, R.C. 2929.191 establishes a procedure to remedy a sentence that fails to properly impose a term of postrelease control. It applies to offenders who have not yet been released from prison and who fall into at least one of three categories: those who did not receive notice at the sentencing hearing that they would be subject to postrelease control, those who did not receive notice that the parole board could impose a prison

term for a violation of postrelease control, or *those who did not have both of these statutorily mandated notices incorporated into their sentencing entries*. R.C. 2929.191(A) and (B). For those offenders, R.C. 2929.191 provides that trial courts may, after conducting a hearing with notice to the offender, the prosecuting attorney, and the Department of Rehabilitation and Correction, correct an original judgment of conviction by placing on the journal of the court a nunc pro tunc entry that includes a statement that the offender will be supervised under R.C. 2967.28 after the offender leaves prison and that the parole board may impose a prison term of up to one-half of the stated prison term originally imposed if the offender violates postrelease control." (Emphasis added). *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶23.

{¶ 11} Although appellant has failed to provide this court with a copy of the sentencing transcript, the journal entry in this case makes no mention of what repercussions could follow a postrelease control violation. As such, appellant is entitled to a de novo resentencing hearing and a correction of the trial court's journal entry, which shall notify him that a violation of postrelease control could result in a prison term of up to one-half of the prison term originally imposed upon him. *Singleton* at paragraph one of the syllabus ("For criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall

conduct a de novo sentencing hearing in accordance with decisions of the Supreme Court of Ohio.").

Conclusion

{¶ 12} The sentencing entry fails to advise appellant that he could be sentenced to an additional prison term should he violate postrelease control. Because appellant was sentenced prior to July 11, 2006, he is entitled to a de novo sentencing hearing to correct this error, both on the record and in the trial court's sentencing entry.

{¶ 13} Appellant's conviction is affirmed, but we reverse the sentence and remand to the trial court for a de novo sentencing hearing.

It is ordered that appellant and appellee share the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, P.J., and
LARRY A. JONES, J., CONCUR