

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-09-048

Appellee

Trial Court No. 2006-CR-112

v.

Desmond B. Scott

DECISION AND JUDGMENT

Appellant

Decided: January 29, 2010

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Desmond B. Scott, pro se.

* * * * *

SINGER, J.

{¶ 1} Appellant, Desmond B. Scott, appeals from a decision of the Erie County Court of Common Pleas wherein his "motion for sentencing" was denied. For the reasons that follow, we reverse.

{¶ 2} Appellant asserts one assignment of error:

{¶ 3} "Whether the trial court committed reversible error thereupon abusing its discretion by construing defendant's properly pled and substantively supported motion for 'sentencing' under: *State v. Bezak*, 114 Ohio St.3d 94, as an untimely post-conviction relief petition. See: *State v. Holcomb*, 2009 WL 1864759 (Ohio App. 9 Dist.), 2009-Ohio-3187; *State v. Barclay*, (Ohio App. 9 Dist.) (citation omitted): and, *State v. Boswell*, 121 Ohio St.3d 575."

{¶ 4} On October 19, 2006, appellant was convicted in the trial court of burglary, disrupting public service and theft. He received a five year prison sentence for burglary, a 15 month sentence for disrupting public service and a 12 month sentence for theft. The sentences for burglary and disrupting public service were ordered to run concurrently to each other but consecutively to the sentence for theft, for a total of six years incarceration. This court affirmed his convictions on April 18, 2008. See *State v. Scott*, 6th Dist. No. E-06-075, 2008-Ohio-1862.

{¶ 5} On June 18, 2009, appellant filed a "motion for sentencing" arguing that his sentences were void because the trial court had failed to adequately notify him at sentencing concerning post-release control. On July 14, 2009, the state responded to appellant's motion. In particular, the state recharacterized appellant's motion as a motion for post-conviction relief pursuant to R.C. 2953.21. Applying the guidelines of R.C. 2953.21, the state argued that appellant's motion should be dismissed for being untimely. In a July 17, 2009 judgment entry, the trial court also construed appellant's motion as a

motion for post-conviction relief pursuant to R.C. 2953.21 and denied it for being untimely.

{¶ 6} Appellant's motion for sentencing is based on the holding of *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, wherein the court stated that "[w]hen a defendant is convicted of or pleads guilty to one or more offenses and post release control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense." *Id.* at syllabus. See, also, *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, syllabus. In *Bezak*, the defendant was convicted of offenses requiring post-release control, which was properly included in the judgment entry of sentence; however, the defendant was not orally advised of such at the sentencing hearing.

{¶ 7} In *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, the Ohio Supreme Court discussed the difference between a void and voidable sentence.

{¶ 8} "A void sentence is one that a court imposes despite lacking subject-matter jurisdiction or the authority to act. *State v. Wilson* (1995), 73 Ohio St.3d 40, 44. Conversely, a voidable sentence is one that a court has jurisdiction to impose, but was imposed irregularly or erroneously. *State v. Filiaggi* (1999), 86 Ohio St.3d 230, 240." *Payne*, supra at 507.

{¶ 9} The following year, in *State v. Simpkins*, supra, the Ohio Supreme Court again addressed the distinction between void and voidable sentences. The court held that "* * * in cases in which a defendant is convicted of, or pleads guilty to, an offense for

which post-release control is required but not properly included in the sentence, the sentence is void[.]" *Id.* at 421. The Court clarified by recognizing that, "[I]n general, a void judgment is one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act. Unlike a void judgment, a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but the court's judgment is invalid, irregular, or erroneous." *Id.* at 422-433 (citation omitted). The court recognized that, although it normally holds "that sentencing errors are not jurisdictional and do not necessarily render a judgment void, * * * there are exceptions to that general rule. The circumstances in this case—a court's failure to impose a sentence as required by law—present one such exception." *Id.* at 423 (citations omitted). *State v. Holcomb*, 9th Dist. No. 24287, 2009-Ohio-3187.

{¶ 10} In this case, our review of the record shows that appellant was not properly advised of the post-release control sanctions he faced. The court correctly informed appellant that he was subject to a mandatory three year term of post-release control for the burglary offense. However, the court failed to advise appellant that he may be subjected to additional discretionary terms of up to three years for the disrupting public service conviction and the theft conviction. Thus, his sentences for those two offenses are void.

{¶ 11} Appellee contends that the court is not required to notify a defendant that he may be subject to post-release control on each and every charge. Appellant cites to R.C. 2967.28(F)(4)(c) which states:

{¶ 12} "If an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board. Periods of post-release control shall be served concurrently and shall not be imposed consecutively to each other."

{¶ 13} Appellee seems to be arguing that because appellant was properly notified of the three year mandatory term, it was not necessary to notify him that he may be subject to two additional three year discretionary terms since they would be served concurrently with mandatory term pursuant to R.C. 2967.28(F)(4)(c). Put simply, whether or not appellant was notified of the discretionary terms is irrelevant as there was never any chance that he would be subjected to more than three years. While we cannot deny that appellee's argument makes some sense, the fact remains that the law states that "[F]ailure to provide a notification of *possible or required* post release control will support a reversal for re-sentencing. Griffin & Katz, Ohio Felony Sentencing Law (2008), 715, Section 2:256. R.C. 2929.19(B)(3)(d) states in pertinent part:

{¶ 14} "* * * if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

{¶ 15} "* * *

{¶ 16} "[N]otify the offender that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth, or fifth degree * * *."

{¶ 17} By indicating that the sentencing court "shall do all of the following," the legislature clearly placed a mandatory duty upon the trial court rather than granting it discretion. *State v. Jenkins*, (Mar 14, 2000), 7th Dist. No. 98-502 CA.

{¶ 18} "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." *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267.

{¶ 19} Here, the trial court disposed of appellant's motion by re-characterizing it a "motion for post conviction relief." This was error. A defendant may raise a claim that his or her sentence is void by filing a motion for resentencing and the motion should not be reclassified as a petition for post-conviction relief. *State v. Holcomb*, supra, citing *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577. If a sentence is void for failure to include post-release control notification, the trial court-or the reviewing court-has an obligation to recognize the void sentence, vacate it, and order resentencing. *Boswell* at 579. "Presumably, this means that a trial court, confronted with an untimely or successive petition for post-conviction relief that challenges a void sentence must ignore the procedural irregularities of the petition and, instead, vacate the void sentence and resentence the defendant." *Holcomb*, supra at ¶ 19. Appellant's assignment of error is found well-taken.

{¶ 20} Based on the foregoing, the judgment of the Erie County Court of Common Pleas is reversed as to appellant's convictions for disrupting public service and theft.

Appellant's sentences for disrupting public service and theft are vacated, and this cause is remanded for the trial court to resentence him according to law. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED, IN PART,
AND VACATED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.