

[Cite as *State v. Roper*, 2009-Ohio-3185.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24321

Appellant

v.

DERRICK E. ROPER

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 03 02 0342

Appellee

DECISION AND JOURNAL ENTRY

Dated: June 30, 2009

WHITMORE, Judge.

{¶1} Appellant, the State of Ohio, appeals from the judgment of the Summit County Court of Common Pleas, granting Defendant-Appellee, Derrick Roper’s, motion to withdraw his plea. This Court affirms.

I

{¶2} In 2003, Roper pled guilty to two counts of trafficking in cocaine, one count of possession of cocaine with a major drug offender specification, and one count of having a weapon while under disability. Upon consideration of his delayed appeal, this Court reversed Roper’s sentence and remanded his case to the trial court for resentencing. *State v. Roper* (“*Roper I*”), 9th Dist. No. 22102, 2005-Ohio-13, at ¶7-11 (concluding that the trial court failed to make required findings pursuant to *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165).

{¶3} Before the trial court resentenced Roper, he filed a motion to withdraw his guilty plea on July 19, 2005. Roper argued that his plea was not knowingly, voluntarily, and

intelligently made because the trial court had failed to properly inform him of the maximum penalties that could be imposed upon him. Although the trial court initially permitted Roper to withdraw his plea, upon further consideration, the trial court denied Roper's motion. Subsequently, the trial court resentenced Roper, and Roper appealed. This Court held that the trial court erred in considering Roper's motion to withdraw his guilty plea because it lacked jurisdiction to do so. *State v. Roper* ("Roper II"), 9th Dist. No. 22988, 2006-Ohio-3661, at ¶10-12. Specifically, we held that *Roper I* remanded Roper's case to the trial court solely for the purpose of resentencing and that, by considering Roper's motion, the trial court exceeded this Court's mandate and the scope of its jurisdiction. *Id.* Because the trial court eventually resentenced Roper, however, we further held that the trial court's consideration of Roper's motion was harmless and disregarded Roper's arguments with respect to the denial of his motion. *Id.* at ¶11-12. Even so, a review of Roper's sentence revealed that the trial court failed to notify Roper of post-release control at his resentencing and resulted in this Court once again vacating Roper's sentence and remanding his case for resentencing. *Id.* at ¶13-15.

{¶4} Before the trial court resentenced Roper, he filed another motion to withdraw his guilty plea on June 27, 2008. Roper argued that his plea was not knowingly, intelligently, and voluntarily made because the trial court failed to advise him of post-release control at the time of his plea hearing. On July 16, 2008, the trial court granted Roper's motion. The State now appeals from the trial court's judgment and raises a single assignment of error for our review.

II

Assignment of Error

“THE TRIAL COURT ERRED TO THE PREJUDICE OF THE STATE BY ALLOWING THE DEFENDANT TO WITHDRAW HIS FORMER PLEAS OF GUILTY[.]”

{¶5} In its sole assignment of error, the State argues that the trial court erred in granting Roper’s motion to withdraw his plea because the trial court lacked jurisdiction to consider that motion. Specifically, the State argues that this Court remanded Roper’s case for resentencing and that, by considering Roper’s motion, the trial court exceeded this Court’s mandate. The Supreme Court’s recent post-release control decisions require us to conclude that the trial court did not err.

{¶6} Earlier this year, the Ohio Supreme Court held a “motion to withdraw a plea of guilty or no contest made by a defendant who has been given a void sentence must be considered as a presentence motion under Crim.R. 32.1.” *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, syllabus. As we held in Roper’s last appeal, his sentence was void because the trial court failed to notify him of post-release control at his resentencing. *Roper II* at ¶15. This Court vacated his sentence and remanded the matter to the trial court for Roper to be resentenced. *Id.*

{¶7} “Because a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void, it must be vacated[,] plac[ing] the parties in the same position they would have been in had there been no sentence.” *Boswell* at ¶8, quoting *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶22. Notwithstanding this Court’s mandate to the trial court to resentence Roper, *Boswell* requires a different result. Roper, like *Boswell*, moved to withdraw his plea and when “a motion to withdraw a plea of guilty ***

[is] made by a defendant who has been given a void sentence [it] must *** be considered as a presentence motion under Crim.R. 32.1” *Boswell* at ¶9.

{¶8} *Boswell* supports the trial court’s consideration of Roper’s motion to withdraw his guilty plea. The State has argued that the trial court failed to consider whether Roper suffered prejudice, as required by *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, at ¶20. *Boswell* rejected this approach under these circumstances. *Id.* at ¶5 (“We do not reach the state’s argument concerning the prejudice requirement for insufficient plea colloquies, because our multitiered analysis for evaluating compliance with Crim.R. 11 does not apply under the present circumstances.”). Because Roper’s sentence was void, the trial court properly considered Roper’s motion, and Roper was not required to prove prejudice. *Id.* at ¶9.

III

{¶9} The State’s sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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 Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

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

JANA L. DELOACH, Attorney at Law, for Appellee.