[Cite as *State v. Johnson*, 2009-Ohio-3188.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. BERNARD JOHNSON Appellant	C.A. No. 24536 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2001 03 0714

DECISION AND JOURNAL ENTRY

Dated: June 30, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, Bernard Johnson, appeals from the denial of his motion for re-sentencing in the Summit County Court of Common Pleas. This Court reverses the judgment of the trial court and vacates his sentences.

I

{¶2} On July 11, 2001, Johnson pleaded guilty to three counts of rape in violation of R.C. 2907.02(A)(1)(b), all first-degree felonies. At the same time, the State dismissed a fourth count of rape and amended the indictment on the remaining three counts to delete the specification that the felonies were committed "by force or threat of force." Johnson appealed his sentence, challenging the trial court's imposition of a ten-year maximum on one count and a four-year consecutive sentence on the two counts remaining. This Court affirmed. *State v. Johnson*, 9th Dist. No. 20708, 2002-Ohio-1108. While his direct appeal was pending, Johnson

also filed a petition for post-conviction relief. The trial court denied the petition without a hearing. *State v. Johnson* (Jan. 11, 2002), Comm. Pleas No. 01-03-0714.

{¶3} At the request of the Ohio Department of Rehabilitation and Correction, on January 21, 2003, the court issued a nunc pro tunc order inserting the word "mandatory" before the phrase imposing Johnson's consecutive four-year sentence. On August 13, 2008, Johnson filed a motion for re-sentencing alleging that the trial court failed to inform him he was subject to a mandatory term of post-release control. Johnson argued that his sentence was void because of this omission and further alleged that his earlier sentencing entries did not include a mandatory four-year sentence on two of the counts. Additionally, he requested to vacate his underlying guilty plea based on the trial court's sentencing error. The trial court denied his motion. Johnson now appeals from that denial, asserting three assignments of error for our review, which we have rearranged for ease of analysis.

II

Assignment of Error Number One

> "WHETHER THE COMPLETE FAILURE TO IMPOSE A (5) FIVE YEAR MANDATORY PERIOD OF POST-RELEASE CONTROL RENDERS A SENTENCE A MERE NULLITY AND VOID AS PRESCRIBED IN: STATE V. BEZAK, 114 OHIO ST. 3D 94, REQUIRING VACATION OF THE 'VOID SENTENCE' AND A 'NEW SENTENCING HEARING[.]'"

Assignment of Error Number Three

> "WHETHER, AND WHERE A TRIAL COURT DURING A PLEA COLLOQUY FAILS TO NOTIFY AN OFFENDER OF MANDATORY POST-RELEASE CONTROL IMPLICATES AN ANALYSIS FOR PREJUDICE AND RENDERS SUCH PLEA CONSTITUTIONALLY UNENFORCEABLE." (Sic.)

{¶4} In his first assignment of error, Johnson argues that his sentence is void because the trial court failed to properly inform him that he was subject to a five-year mandatory term of post-release control. He further asserts in his third assignment of error that, had he been properly

advised by the trial court of such, he would not have pleaded guilty to the three counts of rape. Consequently, he now seeks to withdraw his guilty plea.

{¶5} Recently, the Supreme Court addressed very similar circumstances in *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577. There, the defendant moved to vacate his plea based on a sentence that failed to properly inform him of mandatory post-release control. In that case, the Supreme Court concluded that "[a] motion to withdraw a plea of guilty *** made by a defendant who has been given a void sentence must be considered as a presentence motion under Crim.R. 32.1." *Boswell* at syllabus. Based on this directive, we must first determine whether the trial court properly informed Johnson that he was subject to five years mandatory post-release control and thus, whether his sentence is void. This determination then dictates how to properly analyze Johnson's request to withdraw his plea.

{¶6} The transcript from Johnson's plea colloquy reveals that the trial court informed Johnson he was "subject to five years of post release control" and further explained that:

> "After you have served whatever sentence the court hands out in this case, the parole authority will monitor your behavior once you are released and they could do so for up to five years on each of these counts should they choose to. I don't have any control over that. That's a decision of the parole authority."

During his sentence hearing, the court failed to include any reference to the term or nature of post-release control that would be a part of Johnson's sentence based on his guilty plea. The trial court did, however, include in its journal entry of Johnson's sentence that he "is ordered subject up to five (5) years post-release control, to the extent the parole board may determine as provided by law." Having pleaded guilty to first-degree felonies, however, Johnson was subject to a mandatory, not discretionary, term of five years post-release control. R.C. 2967.28(B)(1) (requiring that "a period of post-release control required by this division for *** a felony of the first degree or for a felony sex offense [is] five years").

{¶7} When considering the ramifications of omitting any reference to a statutorily mandated term of post-release control, the Supreme Court has expressly indicated that such sentences are void. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, syllabus; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, syllabus. Furthermore, "[b]ecause 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 *Simpkins* at ¶22. Accordingly, 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. Though a defendant does not have an absolute right to withdraw his plea, a presentence motion is to vacate a plea must be "freely and liberally granted." *State v. Xie* (1992), 62 Ohio St.3d 521, 527. Additionally, "the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for withdrawal of the plea." Id.

{¶8} It is undisputed that Johnson's sentence failed to include the statutorily mandated five-year term of post-release control. Thus, his sentence is void and must be vacated. *Boswell* at ¶8. Pursuant to *Boswell*, the trial court needed to treat Johnson's request to vacate his plea as a presentence motion. Upon review of the trial court's order, it is evident that the trial court did not do so, and instead treated Johnson's motion as a post-sentence motion. Specifically, the court noted that Johnson "ha[d] not established the existence of a manifest injustice as required under Crim.R. 32.1[.]" See Crim.R. 32.1 (requiring that "to correct a manifest injustice the court *after sentence* may set aside the judgment of conviction and permit the defendant to withdraw his or her plea"). (Emphasis added.) Based on the trial court's application of the incorrect standard of review, *Boswell* requires we remand Johnson's case to the trial court to hold a hearing and

consider if a reasonable and legitimate basis exists for him to withdraw his plea. *Boswell* at ¶13; *Xie*, 62 Ohio St.3d at 527.

{¶9} Based on the foregoing, Johnson's first and third assignments of error are sustained and his sentences are vacated.

Assignment of Error Number Two

> "WHETHER THE OFFICE OF NUNC PRO TUNC WILL LIE TO SUPPLY OMITTED ACTION OR TO INDICATED WHAT A TRIAL COURT COULD HAVE OR SHOULD HAVE DECIDED." (Sic.)

{¶10} Given our disposition of Johnson's other assignments of error, his second assignment of error is moot. App.R. 12(A)(1)(c).

III

{¶11} Johnson's first and third assignments of error are sustained and his second assignment of error is moot. The judgment of the Summit County Court of Common Pleas is reversed, Johnson's sentences are vacated, and his cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment reversed,
sentences 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

CARR, P. J.
CONCURS

SLABY, J.
CONCUR IN JUDGMENT ONLY

(Slaby, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(C), Article IV, Constitution.)

APPEARANCES:

BERNARD JOHNSON, pro se, Appellant.

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