

[Cite as *State v. Gonzalez*, 2009-Ohio-5759.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 09CA009528

Appellee

v.

JOSE C. GONZALEZ

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 03 CR 064048

Appellant

DECISION AND JOURNAL ENTRY

Dated: November 2, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Jose Gonzalez, appeals from the decision of the Lorain County Court of Common Pleas. This Court vacates his sentence and remands for resentencing.

I.

{¶2} On October 29, 2003, Jose Gonzalez was indicted for aggravated trafficking in marijuana, a first-degree felony, in violation of R.C. 2925.03(A)(2); possession of criminal tools, a fifth-degree felony, in violation of R.C. 2923.24(A); permitting drug abuse in a motor vehicle, a fifth-degree felony, in violation of R.C. 2925.13(A); and possession of drug paraphernalia, a fourth-degree misdemeanor, in violation of R.C. 2925.14(C)(1). Gonzalez initially pled not guilty to the charges.

{¶3} On October 17, 2005, Gonzalez pled guilty to the charges. On October 28, 2005, Gonzalez was sentenced to a total of ten years of incarceration. On March 10, 2008, Gonzalez filed a pro se motion to withdraw his plea. On October 22, 2008, with the assistance of counsel,

Gonzalez filed a second motion to withdraw his guilty plea. The trial court held a hearing and denied his motions. Gonzalez appealed this decision and has raised one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED WHEN IT DENIED [GONZALEZ’S] MOTION TO WITHDRAW HIS GUILTY PLEA.”

{¶4} In his sole assignment of error, Gonzalez contends that the trial court erred when it denied his motion to withdraw his guilty plea. Although Gonzalez has not raised the issue on appeal, this Court concludes that his sentence must be vacated as a result of an error in the trial court’s sentencing entry with respect to its imposition of post-release control.

{¶5} In *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, the defendant moved to vacate his plea based on a sentence that failed to include 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. Therefore, we must first determine whether the trial court properly imposed post-release control, and thus, whether his sentence is void. This determination then dictates how to properly analyze Gonzalez’s request to withdraw his plea.

{¶6} This Court recently examined Ohio Supreme Court precedent regarding void and voidable sentences. See *State v. Holcomb*, 9th Dist. No. 24287, 2009-Ohio-3187. In *Boswell*, supra, the Ohio Supreme Court held that “[d]espite the lack of a motion for resentencing, we still must vacate the sentence and remand for a resentencing hearing in the trial court. Because the original sentence is actually considered a nullity, a court cannot ignore the sentence and instead must vacate it and order resentencing.” *Id.* at ¶12.

{¶7} R.C. 2967.28(B) requires that “[e]ach sentence to a prison term for a felony of the first degree, *** shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender’s release from imprisonment.” The term of post-release control for an offender convicted of a first-degree felony is a mandatory period of five years. R.C. 2967.28(B)(1).

{¶8} Gonzalez was convicted of, and sentenced to, one count of aggravated trafficking in marijuana, a felony of the first degree. Pursuant to R.C. 2967.28(B)(1), Gonzalez is subject to a mandatory five-year period of post-release control. However, a review of the trial court’s judgment entry reflects that the trial court mistakenly imposed a mandatory term of post-release control of “up to a maximum of 5 years[.]” The use of the term “up to” appears to allow the parole board discretion to impose less than five years of post-release control. This is incorrect as R.C. 2967.28(B)(1) establishes a *mandatory* term of five years.

{¶9} “‘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. 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” *Id.* at ¶9. Though a defendant does not have an absolute right to withdraw his plea, a presentence motion 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.*

{¶10} Because the trial court mistakenly imposed post-release control, Gonzalez’s sentence is void and must be vacated. *Boswell*, at ¶8. Therefore, pursuant to *Boswell*, the trial court is required to treat Gonzalez’s request to vacate his plea as a presentence motion. Accordingly, the matter is remanded to the trial court to “conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea.” *Id.*, at ¶10; *Xie*, 62 Ohio St.3d at 527. We further “vacate [Gonzalez’s] void sentence and order resentencing if his motion to withdraw his guilty plea is ultimately denied.” *Boswell*, at ¶13.

III.

{¶11} Because Gonzalez’s sentence is void, this Court cannot address his assignment of error. Gonzalez’s sentence is vacated, and the cause is remanded for proceedings consistent with this opinion.

Sentence 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 Lorain, 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.

CARLA MOORE
FOR THE COURT

DICKINSON, J.
BELFANCE, J.
CONCUR

APPEARANCES:

KENNETH N. ORTNER, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellee.