

[Cite as *State v. Harris*, 2009-Ohio-6078.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24611

Appellee

v.

ROBERT E. HARRIS

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 08 08 2708(B)

Appellant

DECISION AND JOURNAL ENTRY

Dated: November 18, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Robert Harris, appeals from the decision of the Summit County Court of Common Pleas. This Court vacates and remands for proceedings consistent with this opinion.

I.

{¶2} On August 26, 2008, Robert Harris was indicted on one count of receiving stolen property, a fifth-degree felony, in violation of R.C. 2913.52(A), and one count of misuse of credit cards, a first-degree misdemeanor, in violation of R.C. 2913.21(B)(2). The indictment stemmed from the theft of Megan Eskar’s car and purse. On September 5, 2008, Harris pled not guilty. On December 30, 2008, the case proceeded to a jury trial. The jury found him guilty of receiving stolen property and he was sentenced to one year of incarceration. Harris timely appealed from this decision and has raised one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

“[HARRIS’S] CONVICTION FOR RECEIVING STOLEN PROPERTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶3} In his sole assignment of error, Harris contends that his conviction for receiving stolen property was against the manifest weight of the evidence. Although Harris 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.

{¶4} 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 *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 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.

{¶5} R.C. 2967.28(C) requires that “[a]ny sentence to a prison term for a felony of the *** fifth degree *** shall include a requirement that the offender be subject to a period of post-release control of *up to* three years after the offender’s release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender.” (Emphasis added.)

{¶6} The statute thus vests the parole board with the discretion to determine whether any period of post-release control is suitable for the offender, and that discretion may be exercised within a range of zero to three years.

{¶7} Harris was convicted of one count of receiving stolen property, in violation of R.C. 2913.51(A), a fifth-degree felony. Pursuant to R.C. 2967.28(C), the trial court was required to inform Harris that the parole board is vested with the discretion to impose a term of post-release control of *up to* three years. However, the trial court’s judgment states that “the Defendant is ordered to serve Three (3) years of post-release control.” Thus, the trial court mistakenly advised Harris of a *mandatory* three-year term of post-release control. This is incorrect as R.C. 2967.28(C) clearly establishes that the term should be discretionary, i.e., *up to* three years if the parole board determines that a period of post-release control is necessary.

{¶8} “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. In light of our determination that Harris’s sentence is void, we may not address the merits of his appeal. See *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972, at ¶14. Instead, we must vacate the trial court’s judgment entering Harris’s sentence and remand this matter to the trial court for a new sentencing hearing.

III.

{¶9} Because Harris’s sentence is void, this Court cannot address his assignment of error. Harris’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 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.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶10} I respectfully dissent as I am unwilling to extend this Court's reasoning to defendants who are given sentences which allow for the imposition of post-release control under R.C. 2967.28(C).

APPEARANCES:

NICHOLAS SWYRYDENKO, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.