

[Cite as *State v. Wright*, 2009-Ohio-6081.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24610

Appellee

v.

COURTLAND J. WRIGHT

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 08 07 2228

Appellant

DECISION AND JOURNAL ENTRY

Dated: November 18, 2009

BELFANCE, Judge.

INTRODUCTION

{¶1} On October 24, 2008, a jury in the Summit County Court of Common Pleas convicted Courtland J. Wright of murder, having a weapon under disability, and tampering with evidence. Wright now appeals his conviction, arguing (1) he was denied a fair trial due to prejudicial comments made during the prosecutor’s closing statement; (2) the trial court erred in failing to consider a juror’s affidavit offered in support of Wright’s motion for a new trial, and; (3) his convictions for murder and tampering with evidence were against the manifest weight of the evidence as presented at trial. Due to a defect in the trial court’s sentencing entry, we do not reach the merits of Wright’s arguments. Instead, we vacate Wright’s sentence and remand the matter to the trial court for resentencing.

FACTS

{¶2} On July 4, 2008, Robert Smith was shot and killed in the parking lot of the Circle K gas station at 440 West Market Street in Akron. On July 7, 2008, Defendant-Appellant, Courtland J. Wright, turned himself into the police as the shooter. He did not deny that he shot Smith, but claimed that he did so in self-defense.

{¶3} Wright's jury trial began on October 20, 2008. The jury returned a verdict of not guilty as to aggravated murder but, guilty as to murder with a gun specification, having a weapon under disability, and tampering with evidence. Following the verdict, Wright moved for a new trial alleging that he was denied a fair trial in the first instance due to prosecutorial misconduct. The trial court denied the motion. The trial court subsequently sentenced Wright to a total of twenty-one years to life in prison. The instant appeal followed.

POST-RELEASE CONTROL

{¶4} Although Wright has not raised the issue on appeal, this Court concludes that Wright's sentence must be vacated due to an error in the trial court's sentencing entry with respect to post-release control. Recently, in *State v. Holcomb*, 9th Dist. No. 24287, 2009-Ohio-3187, we examined the precedent of the Supreme Court of Ohio relative to void and voidable sentences. In *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, the Supreme Court of Ohio 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} Pursuant to R.C. 2967.28, “any sentence to a prison term for a felony, except uncategorized special felonies, ‘shall include a requirement that the offender be subject to a

period of post-release control' following release.” *State v. Robertson*, 9th Dist. No. 07CA0120-M, 2009-Ohio-5052, at ¶4, quoting R.C. 2967.28(B), (C). After an offender who was convicted of a classified felony is released from prison, the offender must complete a period of supervision known as post-release control. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, at ¶35; R.C. 2967.01(N). By its terms, R.C. 2967.28 applies only to felonies classified by degrees. R.C. 2967.28

{¶6} In the instant matter, Wright was convicted of murder with a firearm specification, having weapons under disability, and tampering with evidence. Murder is not a classified felony, it is a special felony; thus, the post-release control statute does not apply to a murder conviction. *State v. Baker*, 1st Dist. No. C-050791, 2006-Ohio-4902, at ¶6. See, also, *Clark* at ¶36. Instead of post-release control, an offender convicted of a special felony is either ineligible for parole or, eligible for parole after serving the stated term of his or her sentence for the conviction. *Clark* at ¶36; R.C. 2967.13(A)(1). However, Wright’s convictions for having weapons under disability and tampering with evidence are both classified felonies of the third degree. R.C. 2923.13(B); R.C. 2921.12(B). Thus, the post-release control statute applies to those convictions and the trial court’s judgment entry must include the appropriate period of post-release control. R.C. 2967.28. See, also, *Robertson* at ¶4.

{¶7} The trial court’s judgment entry of sentencing provides the following concerning post-release control: “After release from prison, [Wright] is ordered to serve *Five (5) years* of post-release control.” (Emphasis added.) Pursuant to R.C. 2967.28(B)(1), the only offenders subject to five years of post-release control are those convicted of first-degree felonies or felony sex offenses. Wright was not convicted of either. The Supreme Court of Ohio has held, “[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.” *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶22. Accordingly, we may not address the merits of Wright’s appeal. See *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972, at ¶14. Instead, we must vacate Wright’s sentence and remand this matter to the trial court for resentencing so that it may order the correct term of post-release control. *Boswell* at ¶12; *Holcomb* at ¶20.

CONCLUSION

{¶8} In light of our determination that Wright’s sentence is void due to an error in sentencing with respect to post-release control, we do not reach the merits of his appeal. The judgment of the Summit County Court of Common Pleas is vacated and the matter is remanded for proceedings consistent with this opinion.

Judgment 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.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶9} I respectfully dissent for the reasons I set forth in *State v. King*, 9th Dist. No. 24675, 2009-Ohio-5158 (Carr, J., dissenting), as well as *State v. Harville*, 9th Dist. No. 08CA009501, 2009-Ohio-5420 (Carr, J., dissenting).

APPEARANCES:

NICHOLAS SWYRYDENKO, Attorney at Law, for Appellant.

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