

[Cite as *State v. Miller*, 2009-Ohio-6281.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No.     24692

Appellee

v.

JENNIFER R. MILLER

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     CR 08 08 2577

Appellant

DECISION AND JOURNAL ENTRY

Dated: December 2, 2009

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DICKINSON, Judge.

INTRODUCTION

{¶1} A jury convicted Jennifer R. Miller of unlawful sexual conduct with a minor. She has appealed, arguing that the trial court incorrectly denied her motion for acquittal under Rule 29 of the Ohio Rules of Criminal Procedure. Because the trial court made a mistake regarding post-release control in Ms. Miller’s sentencing entry, the sentencing entry is void. This Court, therefore, exercises its inherent authority to vacate the void judgment and remands for a new sentencing hearing.

POST-RELEASE CONTROL

{¶2} Ms. Miller’s conviction is a felony of the third degree. The trial court sentenced her to two years of incarceration and suspended the sentence on the condition that Ms. Miller complete three years of community control. The trial court warned Ms. Miller that violation of

her community control requirements would lead to “[t]wo (2) years in prison and in addition post release control of up to Three (3) years.”

{¶3} Under Section 2967.28(B) of the Ohio Revised Code “[e]ach sentence to a prison term for a . . . felony sex offense . . . 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.” For a felony sex offense, the period is five years. R.C. 2967.28(B)(1). Under Section 2929.14(F)(1), “[i]f a court imposes a prison term . . . for a felony sex offense, . . . it shall include in the sentence a requirement that the offender be subject to a period of post-release control after [her] release from imprisonment . . . .” In addition, Section 2929.19(B)(3)(c) provides that, “if the sentencing court determines . . . that a prison term is necessary or required, [it] shall . . . [n]otify the offender that [she] will be supervised under section 2967.28 of the Revised Code after [she] leaves prison if [she] is being sentenced . . . for a felony sex offense . . . .”

{¶4} In its journal entry, the trial court warned Ms. Miller that violation of her community control requirements would lead to “[t]wo (2) years in prison and in addition post release control of up to Three (3) years.” That would have been correct if Ms. Miller’s third-degree felony had not been a felony sex offense. Section 2967.28(A)(3) defines a “[f]elony sex offense” as “a violation of a section contained in Chapter 2907 of the Revised Code that is a felony.” A jury convicted Ms. Miller of violating Section 2907.04, a felony of the third degree. Due to her conviction for a felony sex offense, she was subject to a mandatory five years of post-release control, rather than up to three years for a third-degree felony.

{¶5} In *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197, the Ohio Supreme Court held that, “[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense

for which postrelease control is required but not properly included in the sentence, the sentence is void . . . .” *Id.* at syllabus. The Supreme Court reasoned that “no court has the authority to substitute a different sentence for that which is required by law.” *Id.* at ¶20. It concluded that “a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void [and] must be vacated.” *Id.* at ¶22.

{¶6} In *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972, at ¶11, this Court held that, if “[a] journal entry is void because it included a mistake regarding post-release control . . . there is no final, appealable order.” Accordingly, this Court does not have jurisdiction to consider the merits of Ms. Miller’s appeal. *Id.* at ¶14. It does have limited inherent authority, however, to recognize that the journal entry is a nullity and vacate the void judgment. *Id.* at ¶12 (quoting *Van DeRyt v. Van DeRyt*, 6 Ohio St. 2d 31, 36 (1966)).

#### CONCLUSION

{¶7} The trial court’s journal entry included a mistake regarding post-release control. It, therefore, is void. This Court exercises its inherent authority to vacate the journal entry and remands this matter to the trial court for a new sentencing hearing.

Judgment vacated,  
and cause remanded.

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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.

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CLAIR E. DICKINSON  
FOR THE COURT

MOORE, P. J.  
BELFANCE, J.  
CONCUR

APPEARANCES:

RHONDA L. KOTNIK, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.