

[Cite as *State v. Barrett*, 2009-Ohio-6429.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No.     24707

Appellee

v.

STEVEN E. BARRETT

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     CR 06 08 2940(B)

Appellant

DECISION AND JOURNAL ENTRY

Dated: December 9, 2009

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Per Curiam.

{¶1} Appellant, Steven E. Barrett, appeals the judgment of the Summit County Court of Common Pleas. This Court exercises its inherent power to vacate a void judgment and remands this case for a new sentencing hearing.

I.

{¶2} On September 8, 2006, Steven Barrett was indicted on charges of illegal manufacture of drugs in the vicinity of a juvenile in violation of R.C. 2925.04(A), a felony of the first degree, and illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041, a felony of the third degree. After a jury trial, Barrett was found guilty of illegal assembly or possession of chemicals for the manufacture of drugs. Barrett was acquitted of the charge of illegal manufacture of drugs in the vicinity of a juvenile. Barrett was sentenced to a prison term of two years. The sentencing entry also states that Barrett “may be placed on post release control for a period of three years.”

{¶3} Barrett appeals his conviction to this Court, raising four assignments of error on appeal.

## II.

### **ASSIGNMENT OF ERROR I**

“THE COURT ERRED IN NOT COMPELLING THE PROSECUTOR TO PRODUCE TO DEFENSE COUNSEL A COPY OF ANY AUDIO RECORDING BETWEEN THE CONFIDENTIAL INFORMANT AND STEVEN BARRETT RELATING TO THE CHARGED OFFENSE AND ERRED IN NOT ORDERING DISCLOSURE OF THE INFORMANT.”

### **ASSIGNMENT OF ERROR II**

“APPELLANT’S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND BASED ON INSUFFICIENT EVIDENCE AND THE COURT ERRED IN OVERRULING THE DEFENDANT’S RULE 29.”

### **ASSIGNMENT OF ERROR III**

“THE COURT ERRED IN DENYING MR. BARRETT’S MOTION TO SUPPRESS EVIDENCE WHICH WAS DESTROYED AND HIS MOTION TO DISMISS FOR VAGUENESS[.]”

### **ASSIGNMENT OF ERROR IV**

“THE COURT ERRED IN GIVING INSTRUCTION ON AIDING AND ABETTING[.]”

{¶4} Barrett has raised four assignments of error. However, we are unable to reach the merits of Barrett’s arguments because the record demonstrates that his sentence is void.

{¶5} The Supreme Court of Ohio has held that a sentence which fails to comport with statutory mandates with regard to the imposition of post-release control is a nullity and void. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶22; see, also, *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at ¶8. The Supreme Court has said that even without 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.” (citation omitted) *Boswell* at ¶12.

{¶6} R.C. 2967.28(C) provides:

“[a]ny sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section 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[.]” (Emphasis added.)

{¶7} In this instant case, Barrett was convicted of, and sentenced on, one count of illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041, a felony of the third degree. The sentencing entry states that Barrett “may be placed on post release control for a period of three years.” If the Adult Parole Authority (“APA”) should decide to impose post-release control, it will not necessarily be a definite term of three years. As noted above, R.C. 2967.28(C) gives the APA discretion to impose on offenders convicted of third degree felonies terms of post-release control which are less than three years. This Court recently held that over-notifying a defendant about post-release control does not constitute compliance with R.C. 2967.28(C). See *State v. Harville*, 9th Dist. No. 08CA009501, 2009-Ohio-5420. Therefore, because the trial court imposed a sentence which fails to conform with statutory mandates, it is null and void. See *Simpkins* at ¶22; *Boswell* at ¶12.

{¶8} In light of our determination that Barrett’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. It follows that the judgment entry must be vacated.

### III.

{¶9} Because Barrett’s sentence is void, this Court cannot address his assignments of error. This Court exercises its inherent power 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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CARLA MOORE  
FOR THE COURT

MOORE, P. J.  
WHITMORE, J.  
CONCUR

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:

RICHARD P. KUTUCHIEF, Attorney at Law, for Appellant.

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