[Cite as *State v. Whitehouse*, 2009-Ohio-6504.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. SEAN E. WHITEHOUSE Appellant	C. A. No. 09CA009581 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 08CR076198

DECISION AND JOURNAL ENTRY

Dated: December 14, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} The trial court convicted Sean Whitehouse of one count of domestic violence. He has attempted to appeal in order to challenge the sufficiency and manifest weight of the evidence and to argue that the trial court incorrectly allowed the State to impeach its own witness. Because the trial court made a mistake regarding post-release control in its sentencing entry, the sentencing entry is void. This Court, therefore, exercises its inherent power to vacate the void judgment and remands for a new sentencing hearing.

POST-RELEASE CONTROL

{¶2} At the bench trial in this case, Brittany Kramer testified that she is the mother of Mr. Whitehouse's daughter and that, in June 2008, she and their daughter were living with him. She further acknowledged that she called the police to report an argument between her and Mr. Whitehouse. She allowed the officer who came to the house to take pictures inside, showing

furniture askew as well as a broken ceiling fan blade. She also allowed the officer to take pictures of her body, showing bruising on her leg and red marks on her neck. At trial, she agreed that she had written a police witness statement that blamed Mr. Whitehouse for the furniture being thrown about and for the bruises on her leg. In the statement, she also accused Mr. Whitehouse of refusing to allow her to leave the house and of choking her and throwing her onto the bed. But, she testified that she had lied to the police officer because she had been angry with Mr. Whitehouse. She testified that he had not physically attacked her. Despite Ms. Kramer's recantation of her allegations, the trial court found Mr. Whitehouse guilty of violating Section 2919.25(A) of the Ohio Revised Code. Under that Section, "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." R.C. 2919.25(A).

{¶3} Due to two prior domestic violence convictions, Mr. Whitehouse's domestic violence conviction in this case is a felony of the third degree. Using a preprinted form, the trial court sentenced him to one year of prison. Regarding post-release control, the form provided alternative terms in parentheses, allowing the court to choose between the words "mandatory" and "optional" and between the numbers "3" and "5." In Mr. Whitehouse's case, the trial court circled the word "mandatory" and scratched out the word "optional." It also circled the number "3" and scratched out the number "5" : "post release control is (mandatory/~~optional~~) in this case up to a maximum of (3/~~5~~) years . . . ."

{¶4} Under Section 2967.28(B) of the Ohio Revised Code, "[e]ach sentence to a prison term . . . for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person 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." Under Section 2929.14(F)(1), "[i]f a

court imposes a prison term . . . for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after [his] release from imprisonment . . . ." The period of post-release control for a third-degree felony that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person is three years. R.C. 2967.28(B)(3).

{¶5} The trial court used both mandatory and discretionary language in its entry. Although it wrote that Mr. Whitehouse was subject to a "mandatory" term of post-release control, it incorrectly described the term as lasting "up to a maximum of" three years. Section 2967.28(B) governs mandatory post-release control. Each of the subsections of Section 2967.28(B) dictates a definite term of either three or five years, depending on the offense. Mr. Whitehouse's conviction required the trial court to sentence him to a definite term of three years of post-release control under Section 2967.28(B)(3). The sentencing entry incorrectly implies that his term of post-release control could be less than three years.

{¶6} The Parole Board does not have discretion over the length of a term of post-release control imposed under Section 2967.28(B). The Parole Board has discretion only over the length of a term of post-release control imposed under Section 2967.28(C). The use of the trial court's form sentencing entry in mandatory post-release control cases results in the mixing of mandatory and discretionary language because it does not allow the court to choose the term "for" rather than "up to a maximum of" three or five years when the term "mandatory" is chosen.

{¶7} 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.

{¶8} 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 Mr. Whitehouse'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

{¶9} The trial court's journal entry included a mistake regarding post-release control. It, therefore, is void. 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.

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.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶10} I respectfully dissent for the reasons I articulated in *State v. King*, 9th Dist. No. 24675, 2009-Ohio-5158 (Carr, J., dissenting).

APPEARANCES:

PAUL A. GRIFFIN, attorney at law, for appelant.

DENNIS P. WILL, prosecuting attorney, and LAURA ANN E. SWANSINGER, assistant prosecuting attorney, for appellee.