

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 25152

Appellee

v.

DAWON S. HASKINS

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 03 12 3833

Appellant

DECISION AND JOURNAL ENTRY

Dated: September 15, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Dawon Haskins, appeals from the nunc pro tunc journal entry of the Summit County Court of Common Pleas. This Court vacates.

I

{¶2} On December 16, 2003, a grand jury indicted Haskins on the following counts: (1) attempted murder, in violation of R.C. 2903.02(A)/2923.02; and (2) aggravated robbery, in violation of R.C. 2911.01(A)(1). Both counts contained firearm specifications. Haskins ultimately agreed to plead guilty to the aggravated robbery count in exchange for the dismissal of the aggravated murder count. The trial court issued Haskins' original sentencing entry on February 27, 2004. It is undisputed that the entry contained a defective post-release control notification.

{¶3} On November 24, 2009, the trial court sua sponte issued an order, scheduling a hearing "to correct the judgment of conviction." The court issued a journal entry the following

day. Both the prosecutor and Haskins' counsel were present for the hearing while Haskins appeared by way of a videoconference link. The November 25, 2009 nunc pro tunc journal entry specified that the foregoing individuals appeared "pursuant to O.R.C. 2929.191(C), for a hearing to correct the judgment of conviction" and ordered "a correction to the judgment of conviction be filed NUNC PRO TUNC." It also independently set forth the terms of Haskins' original sentence (limited to his charge, plea, and sentence length) and contained a proper post-release control notification. Shortly after the journalization of the new entry, Haskins completed his six-year prison term.

{¶4} Haskins now appeals from the court's November 25, 2009 nunc pro tunc journal entry and raises one assignment of error for our review.

II

Assignment of Error

"A TRIAL JUDGE CANNOT USE A NUNC PRO TUNC ORDER TO CORRECT AN ERROR IN A PREVIOUS ENTRY WHEN IT CHANGES THE RIGHTS OF THE DEFENDANT. A NUNC PRO TUNC ORDER IS ONLY ADMISSIBLE TO CORRECT A CLERICAL ERROR."

{¶5} In his sole assignment of error, Haskins argues that the trial court improperly used a nunc pro tunc entry to correct his pre-July 11, 2006 sentence, which was void due to an improper post-release control notification. Haskins requests that this Court vacate the trial court's November 25, 2009 nunc pro tunc journal entry. Additionally, Haskins argues that he can no longer be ordered to comply with post-release control because the trial court failed to properly notify him of post-release control at a de novo sentencing hearing before his release from prison.

{¶6} Approximately one month after the trial court issued its November 25, 2009 nunc pro tunc journal entry, the Ohio Supreme Court released *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434. In *Singleton*, the Supreme Court held that:

“For criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose post[-]release control, trial courts shall conduct a de novo sentencing hearing in accordance with decisions of the Supreme Court of Ohio.” *Singleton* at paragraph one of the syllabus.

Post-July 11, 2006, R.C. 2929.191 provides trial courts with a mechanism for correcting deficient post-release control notifications by way of a nunc pro tunc entry. *Id.* at ¶23.

“R.C. 2929.191 provides that trial courts may, after conducting a hearing with notice to the offender, the prosecuting attorney, and the Department of Rehabilitation and Correction, correct an original judgment of conviction by placing on the journal of the court a nunc pro tunc entry that includes a statement that the offender will be supervised under R.C. 2967.28 after the offender leaves prison and that the parole board may impose a prison term of up to one-half of the stated prison term originally imposed if the offender violates post[-]release control.” *Id.*

Hearings and entries conducted pursuant to R.C. 2929.191 “pertain only to the flawed imposition of post[-]release control,” not a defendant’s underlying sentence. *Id.* at ¶24. The statute permits a court to have a defendant appear solely by way of videoconference and allows both the defendant and prosecutor to “make a statement as to whether the court should issue a correction to the judgment of conviction.” R.C. 2929.191(C).

{¶7} The trial court’s nunc pro tunc journal entry indicates that the court scheduled a hearing “pursuant to O.R.C. 2929.191(C).” Because Haskins’ criminal sentence was imposed before July 11, 2006, however, R.C. 2929.191 does not apply to him. *Singleton* at paragraph one of the syllabus. The court could not correct Haskins’ sentencing entry nunc pro tunc. To include a proper post-release control notification, the court had to “conduct a de novo sentencing hearing in accordance with decisions of the Supreme Court of Ohio.” *Id.* See, also, *State v. Yeager*, 9th

Dist. No. 25125, 2010-Ohio-3848, at ¶13 (vacating a sentencing entry and remanding for a de novo hearing where trial court attempted to correct a pre-July 11, 2006 sentencing entry by merely informing the defendant of post-release control and issuing an entry to that effect).

{¶8} The State contends that Haskins may have actually received a de novo sentencing hearing despite the court’s repeated references to R.C. 2929.191. The State urges that, because Haskins failed to include a transcript of the sentencing hearing, this Court should presume that a de novo sentencing hearing occurred and affirm. Upon review of the November 25, 2009 nunc pro tunc journal entry, this Court cannot accept the State’s position.

{¶9} It is well established that “a trial court only speaks through [its] journal entry[.]” *State v. Overstreet*, 9th Dist. No. 21367, 2003-Ohio-4530, at ¶8. Here, the court’s November 25, 2009 nunc pro tunc journal entry: (1) specifically cites R.C. 2929.191; (2) indicates that the court held a hearing, pursuant to that statute, “to correct the judgment of conviction”; (3) orders that the correction “be filed NUNC PRO TUNC,” the specific mechanism for correction under R.C. 2929.191(C); and (4) indicates that Haskins appeared by way of videoconference link, the specific method for appearance mentioned in R.C. 2929.191(C). Moreover, the nunc pro tunc journal entry lacks several critical items that only appeared in Haskins’ original sentencing entry. These items include a statement that Haskins was afforded his Crim.R. 11 rights, a statement that the court considered the principles and purposes of sentencing and factors set forth in R.C. 2929.11 and 2929.12 when fashioning Haskins’ sentence, and a dismissal of Haskins’ attempted murder charge.¹ The plain language of the November 25, 2009 nunc pro tunc journal entry simply does not support the State’s assertion that Haskins received a de novo hearing.

¹ The court’s November 25, 2009 nunc pro tunc journal entry only provides that Haskins’ attempted murder charge “was previously dismissed.”

{¶10} This Court is not without sympathy for the State's position, as the trial court applied R.C. 2929.191 without the benefit of *Singleton*. The plain language of R.C. 2929.191 permitted the retroactive application of the statute, and the trial court simply applied the statute as written. Only upon *Singleton's* issuance did it become clear that, despite its plain language to the contrary, R.C. 2929.191 only applies prospectively. See *Singleton* at ¶26. Because R.C. 2929.191 did not apply to Haskins and the court did not afford him a de novo sentencing hearing, this Court has no choice but to conclude that his nunc pro tunc journal entry is void. See *Singleton* at paragraph one of the syllabus; *Yeager* at ¶13. Further, because Haskins has already completed his prison term, this Court cannot remand this matter for a de novo resentencing. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at ¶18. Haskins is correct in his assertion that this Court must vacate his nunc pro tunc journal entry and that he cannot be ordered to comply with post-release control.

III

{¶11} Haskins' nunc pro tunc journal entry is void and is vacated pursuant to that determination.

Nunc pro tunc journal entry vacated.

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.

BETH WHITMORE
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

JANA DELOACH, Attorney at Law, for Appellant.

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