

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009CA00077
MARK TURNBOW	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of
Common Pleas Case No. 2004-CR-1382

JUDGMENT: DISMISSED

DATE OF JUDGMENT ENTRY: September 28, 2009

APPEARANCES:

For Plaintiff-Appellee:

JOHN D. FERRERO 0018590
Stark County Prosecutor
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KATHLEEN O. TATARSKY 0017115
Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

MARK TURNBOW, pro se
Inmate No. 480-385
Grafton Correctional Camp
1800 S. Avon-Beldon Road
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Delaney, J.

{¶1} Defendant-Appellant, Mark Turnbow, appeals from the judgment of the Stark County Court of Common Pleas, denying his “Motion for Relief From Final Judgment pursuant to Civil Rule 60(B).” In that motion, Appellant argued that the trial court was required to hold a new sentencing hearing to properly notify him of mandatory post release control. The State of Ohio is Plaintiff-Appellee.

STATEMENT OF THE CASE AND FACTS

{¶2} On September 7, 2004, Appellant was indicted on three counts of felonious assault, in violation of R.C. 2903.11, felonies of the first degree, and one count of failure to comply with an order or signal of a police officer, in violation of R.C. 2921.331, a felony of the third degree.

{¶3} Appellant entered a plea of not guilty to the charges at his arraignment on September 10, 2004. His case proceeded to a bench trial, where the trial court found him not guilty of one count of felonious assault but found him guilty of the lesser included offense of negligent assault. The trial court also found Appellant guilty of the remaining two counts of felonious assault as well as the one count of failure to comply. The trial court ordered a pre-sentence investigation and scheduled a sentencing hearing for December 22, 2004.

{¶4} On December 30, 2004, the trial court sentenced Appellant to five years on each of the counts of felonious assault and ordered the terms to run concurrently. The trial court also sentenced Appellant to a prison term of one year on the failure to comply count, and ordered that such sentence was to run consecutively to the sentences on the felonious assaults. At the sentencing, the trial court did not advise

Appellant of the five-year period of post release control mandated by R.C. 2967.28. Appellant did not object to this omission.

{¶5} Post release control is mentioned in the judgment entry; however, the trial court incorrectly imposed three years of post release control instead of the mandatory five years.

{¶6} Appellant filed a direct appeal as a result of his convictions. His convictions were affirmed by this Court in *State v. Turnbow*, 5th Dist. No. 2005CA00026, 2005-Ohio-6702. He filed a delayed appeal to the Ohio Supreme Court, which was rejected. *State v. Turnbow*, 109 Ohio St.3d 1421, 2006-Ohio-1967, 846 N.E.2d 532.

{¶7} On October 5, 2005, Appellant filed a Petition to Vacate or Set Aside Sentence pursuant to R.C. 2953.21. Appellant, in his petition, alleged that trial counsel was ineffective in failing to “subpoena, ascertain affidavits of or request depositions of any and all witnesses provided to trial counsel for the defense of petitioner.”

{¶8} Pursuant to a Judgment Entry filed on November 7, 2005, the trial court overruled Appellant's Petition for Post-Conviction Relief. Appellant then appealed the denial of his post-conviction petition to this Court. This Court affirmed the decision of the trial court in *State v. Turnbow*, 5th Dist. No. 2006CA00159, 2007-Ohio-2817.

{¶9} On February 10, 2009, Appellant then filed a “Motion for Relief from Final Judgment pursuant to Civil Rule 60(B)” in the trial court, arguing that his sentence was void because he was not notified at the sentencing hearing of post release control. He requested that the trial court hold a new sentencing hearing to properly include mandated post release control and reevaluate his “lengthy accomplishments while

incarcerated.” The trial court denied the motion, however, a resentencing was scheduled for, and held, on July 8, 2009. In the trial court’s judgment entry from the July 8, 2009, resentencing, the trial court advised Appellant as follows with respect to post release control:

{¶10} “The Court had further notified the defendant that post release control is mandatory in this case up to a maximum of five (5) years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code section 2967.28. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control.”

{¶11} Appellant raises one Assignment of Error:

{¶12} “I. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CORRECT THE VOID SENTENCE IN THIS MATTER, PURSUANT TO THE DOCTRINE OF STARE DECISIS.”

I.

{¶13} Appellant argues, in his sole assignment of error, that the trial court erred in failing to notify him at sentencing that he was subject to a five year period of post release control based on his convictions.

{¶14} The State of Ohio conceded in its brief that Appellant was entitled to a resentencing on this matter based on the failure of the trial court to properly inform Appellant as to post release control.

{¶15} The resentencing was held on July 8, 2009, during the pendency of this appeal. Appellant was resentenced and the State of Ohio supplemented the record with

the judgment entry from that resentencing on August 25, 2009. It is clear from that entry that the trial court did properly inform Appellant of the mandatory post release control as required by R.C. 2968.28. As such, the issue that Appellant raises in his brief is moot and this appeal is dismissed.

By: Delaney, J.

Gwin, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE

[Cite as *State v. Turnbow*, 2009-Ohio-5289.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MARK TURNBOW	:	
	:	
Defendant-Appellant	:	Case No. 2009CA00077
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is dismissed. Costs assessed equally to the parties.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE