

[Cite as *State v. Moton*, 2009-Ohio-4169.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24262

Appellee

v.

MICHAEL MOTON

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 07 11 3915

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 19, 2009

BELFANCE, Judge.

{¶1} Michael Moton was convicted by a jury of two counts of aggravated robbery, each with a firearm specification and a repeat violent offender specification, and two counts of having weapons under disability. He seeks to reverse his convictions, arguing that: (1) the proceedings were permeated with structural error because the State did not charge the *mens rea* element for the aggravated robbery charges; (2) his conviction for aggravated robbery of a Kentucky Fried Chicken restaurant was against the manifest weight of the evidence; (3) his conviction for aggravated robbery of Fat Billy’s pizza shop was based on insufficient evidence and/or against the manifest weight of the evidence; and (4) his convictions for having weapons under disability and the firearm specifications were based on insufficient evidence and/or against the manifest weight of the evidence because the State failed to prove the operability of the firearm involved. For the reasons set forth below, we vacate and remand for resentencing.

FACTS

{¶2} On the evening of September 7, 2007, Ashley Williams and Francisco McDay were working at the Kentucky Fried Chicken restaurant on South Arlington Street in Akron. As Williams approached the front register where McDay was working, a man entered the restaurant, pointed a shotgun at McDay and demanded the money from the cash register. McDay complied and the man fled with the removable drawer from the register in a backpack. During the police investigation of the robbery, Williams was able to identify Moton as the robber.

{¶3} In the afternoon of September 22, 2007, Nicholas Glaude was working at Fat Billy's pizza shop on Grant Street in Akron. Two men entered the shop and asked for change for the pay phone. The men later returned and one placed a food order. While Glaude prepared the food, one of the men leapt onto the counter. Glaude turned toward the counter, and the man was pointing a gun in his face. Glaude immediately fled the shop to seek assistance from a passerby. Upon his return to the pizza shop with the police, he noticed the portion of the cash register that held the money was missing. Glaude later identified Moton as the man who pointed a gun at him at Fat Billy's.

SENTENCING ERROR

{¶4} Although Moton has not raised the issue on appeal, this Court concludes that Moton's sentence must be vacated due to an error in the trial court's sentencing entry with respect to post-release control. Recently, in *State v. Holcomb*, 9th Dist. No. 24287, 2009-Ohio-3187, we examined the precedent of the Supreme Court of Ohio relative to void and voidable sentences. In *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, the Supreme Court of Ohio held that "[d]espite the lack of 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.” (Emphasis added.) *Id.* at ¶12. In the instant matter, Moton’s conviction included two counts of aggravated robbery, a felony of the first-degree, for which he was sentenced to a total term of imprisonment of 17 years. R.C. 2967.28(B) requires that “[e]ach sentence to a prison term for a felony of the first degree, * * * 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.” The term of post-release control for an offender convicted of a first-degree felony is a mandatory period of five years. R.C. 2967.28(B)(1).

{¶5} Pursuant to R.C. 2967.28(B)(1), Moton is subject to a five-year, mandatory period of post-release control. With respect to post-release control, the trial court’s judgment entry states: “the Defendant shall be supervised by the Adult Parole Authority after the Defendant leaves prison, which is referred to as post-release control, for *up to* Five (5) years * * *.” (Emphasis added.) The trial court’s entry mistakenly states that Moton could be subject to less than, but no more than, five years of post-release control instead of indicating that he in fact will be subject to the full term of five years. Because Moton’s sentence does not impose a mandatory term of five years of post-release control, we must vacate Moton’s sentence and remand this matter to the trial court for resentencing. *Boswell* at ¶12; *Holcomb* at ¶20.

CONCLUSION

{¶6} In light of our determination that Moton’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. Instead, we vacate and remand this matter to the trial court for a new sentencing hearing. The

judgment of the Summit County Court of Common Pleas is vacated and remanded for proceedings consistent with this opinion.

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 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.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
CONCURS

CARR, J.
CONCURS, SAYING:

{¶7} I concur in the majority’s opinion, although I reiterate the concerns I enunciated in *State v. Baker*, 9th Dist. No. 23840, 2008-Ohio-1909, at ¶35 (Carr, J., concurring, in part, and dissenting, in part, noting the “substantial stake” which criminal defendants retain in judgments

of conviction), and raised in the concurring opinion in *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972 (Whitmore, J., concurring).

APPEARANCES:

NICHOLAS SWYRYDENKO, Attorney at Law, for Appellant.

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