

[Cite as *State v. Harville*, 2009-Ohio-5420.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 08CA009501

Appellee

v.

KEITH ALLEN HARVILLE

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 08CR075757

Appellant

DECISION AND JOURNAL ENTRY

Dated: October 13, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Keith Harville, appeals from the judgment of the Lorain County Court of Common Pleas. We vacate the trial court’s sentencing entry and remand the matter for further proceedings.

I.

{¶2} On April 24, 2008, the Lorain County Grand Jury indicted Harville on one count of failure to register as a sexually oriented offender, in violation of R.C. 2950.04(E), a felony of the third degree. On July 31, 2008, Harville pleaded guilty to the charge in the indictment. The court sentenced Harville to a four-year prison term. The judgment entry further provided that he is subject to five years of mandatory post-release control. Harville has appealed and has raised one assignment of error for our review.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING A SENTENCE WHICH DID NOT ADEQUATELY CONSIDER THE SERIOUSNESS AND RECIDIVISM FACTORS LISTED IN THE OHIO REVISED CODE, AND WHICH WAS INCONSISTENT WITH THE PRINCIPLES AND PURPOSES OF SENTENCING.”

{¶3} In his single assignment of error, Harville contends that the trial court abused its discretion when it inadequately or incorrectly considered and applied the factors related to the purposes of felony sentencing, as well as seriousness and recidivism. However, we are unable to reach the merits of Harville’s argument because the record demonstrates that his sentence is void.

{¶4} Recently, in *State v. Holcomb*, 9th Dist. No. 24287, 2009-Ohio-3187, this Court followed *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577. In *Boswell*, the Supreme Court of Ohio addressed the validity of trial court sentencing entries with regard to errors in post-release control. *Boswell*, supra, at ¶8. The *Boswell* court held 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) *Id.* at ¶12. This follows from the Supreme Court’s earlier determination that a sentence that fails to conform to 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, ¶22. ““The effect of vacating a plea places the parties in the same position they would have been in had there been no sentence.”” *Boswell* at ¶8, quoting *Simpkins* at ¶22.

{¶5} R.C. 2967.28(C) requires that

“[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[.]”

{¶6} R.C. 2967.28(B)(1) provides for a mandatory five-year period of post-release control for third, fourth, or fifth degree felony sex offenses. R.C. 2967.28(B)(3) provides for a mandatory three-year 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 physical harm to a person[.]” Importantly, R.C. 2967.28 defines “felony sex offense” as “a violation of a section contained in R.C. Chapter 2907. of the Revised Code that is a felony.”

{¶7} In the instant case, Harville was convicted of, and sentenced on, one count of failure to register as a sexually oriented offender, in violation of R.C. 2950.04(E), a felony of the third degree. The judgment entry from the trial court orders that “[d]efendant is subject to 5 YEARS MANDATORY POST-RELEASE CONTROL.” (Emphasis sic.) It appears that the trial court found that the failure to register as a sexually oriented offender constituted a sex offense subject to a mandatory five-year period of post-release control under 2967.28(B)(1). As noted above, only those offenses found in R.C. Chapter 2907 are felony sex offenses for the purposes of R.C. 2967.28 and its post-release control provisions. Accordingly, the trial court’s entry mistakenly provides for five years of post-release control instead of up to three years of post-release control.

{¶8} Under *Simpkins* and *Boswell*, Harville’s sentence fails to conform to statutory mandates, rendering it null and void. *Simpkins* at ¶22; *Boswell* at ¶12.

{¶9} In light of our determination that Harville'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 the sentence and remand this matter to the trial court for a new sentencing hearing.

III.

{¶10} The judgment of the Lorain 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 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.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶11} 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:

PAUL A. GRIFFIN, Attorney at Law, for Appellant.

DENNIS WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellee.