

IN THE SUPREME COURT OF OHIO

State of Ohio,

Appellee,

v.

Rusty Jordan,

Appellant.

:
: Case No. 08-2172

:
: On Certified Conflict from the Marion
: County Court of Appeals, Third
: Appellate District, Case No. 9-08-11

APPELLANT RUSTY JORDAN'S NOTICE OF CERTIFIED CONFLICT

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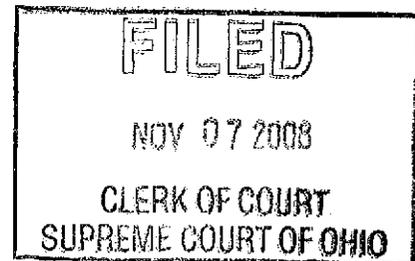
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Appellant Rusty Jordan's Notice of Certified Conflict

Appellant Rusty Jordan hereby gives notice to the Supreme Court of Ohio that on November 5, 2008, the Marion County Court of Appeals, Third Appellate District, certified a conflict between its September 15, 2008 judgment entered in this case, Marion App. No. 9-08-11, and the decision of the Summit County Court of Appeals, Ninth Appellate District, in State v. North, Lorain App. No. 06CA009063, 2007-Ohio-5383. The opinions are attached as Exhibits 2 and 3.

Mr. Jordan asked the court of appeals to certify the following question:

May a criminal defendant be convicted of 'escape' from postrelease control when the Adult Parole Authority lacked authority to impose the sanction pursuant to Hernandez v. Kelly, 108 Ohio St.3d 395, 2006-Ohio-126?

The Court of Appeals certified the following question:

If a defendant is under *actual* detention, can the defendant be convicted of escape under R.C. 2921.34(A)(1) when the record demonstrates that the defendant knew he was under detention or was reckless in that regard, irrespective of whether the defendant was *properly* under said detention?

Entry certifying a conflict, Exhibit 1.

This case raises a substantial constitutional question, involves a felony, and is of public or great general interest.

Respectfully submitted,

Office of the Ohio Public Defender



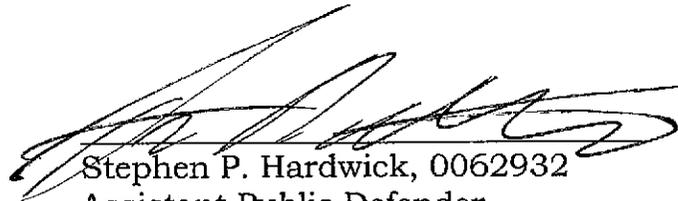
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Certificate of Service

I certify that the foregoing was sent by regular U.S. Mail, postage prepaid to Renee Potts, Assistant Marion County Prosecutor, 134 E. Center Street, Marion, Ohio 43302 on November 7, 2008.



Stephen P. Hardwick, 0062932
Assistant Public Defender

Counsel For Defendant-Appellant

#289330

NOV 5 2008

MARION COUNTY OHIO
JULIE M. KAGEL, CLERK

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

MARION COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 9-08-11

v.

RUSTY JORDAN,

JUDGMENT
ENTRY

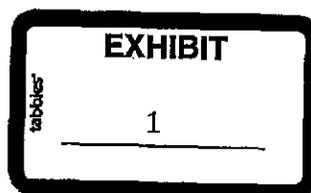
DEFENDANT-APPELLANT.

This cause comes on for determination of appellant's motion to certify a conflict as provided in App.R. 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution.

Upon consideration the court finds that the judgment in the instant case is in conflict with the judgment rendered in *State v. North*, 9th Dist. No. 06CA009063, 2007-Ohio-5383.

Accordingly, the motion to certify is well taken and the following issue should be certified pursuant to App.R. 25:

If a defendant is under *actual* detention, can the defendant be convicted of escape under R.C. 2921.34(A)(1) when the record demonstrates that the defendant knew he was under detention or was reckless in that regard, irrespective of whether the defendant was *properly* under said detention?



It is therefore **ORDERED** that appellant's motion to certify a conflict be, and hereby is, granted on the certified issue set forth hereinabove.

Vernon Z. Burton

John P. Hillamowski

JUDGES

DATED: November 5, 2008

/jlr

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO
MARION COUNTY

STATE OF OHIO, FILED
COURT OF APPEALS
 PLAINTIFF-APPELLEE, SEP 15 2008
 v. MARION COUNTY OHIO
JULIE M. KAGEL, CLERK CASE NO. 9-08-11
 RUSTY JORDAN, JOURNAL
 DEFENDANT-APPELLANT. ENTRY

For the reasons stated in the opinion of this Court rendered herein, the assignments of error are overruled, and it is the judgment and order of this Court that the judgment of the trial court is affirmed at the costs of the appellant for which judgment is rendered and that the cause be remanded to that court for execution.

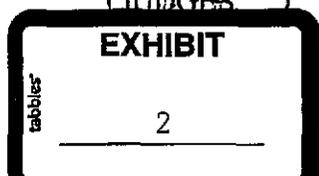
It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.

Vernon Z. Guston

John B. Hillman

 JUDGES

DATED: September 11, 2008
/jlr



IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
MARION COUNTY

FILED
COURT OF APPEALS

SEP 15 2008

MARION COUNTY OHIO
JULIE M. KAGEL, CLERK

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 9-08-11

v.

RUSTY JORDAN,

OPINION

DEFENDANT-APPELLANT.

CHARACTER OF PROCEEDINGS: An Appeal from Common Pleas Court

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: September 15, 2008

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Case No. 9-08-11

PRESTON, J.

{¶1} Defendant-appellant, Rusty Jordan (hereinafter "Jordan"), appeals the judgment of the Marion County Court of Common Pleas. For the reasons that follow, we affirm.

{¶2} On October 31, 2007, the Marion County Grand Jury indicted Jordan on one count of escape, in violation of R.C. 2921.34, a third degree felony. The charge stemmed from Jordan's violation of postrelease control. Jordan was placed on postrelease control following his release from prison. A jury trial was conducted on January 7-8, 2008. The jury found Jordan guilty of escape. Thereafter, the trial court sentenced Jordan to three years imprisonment.

{¶3} It is from this judgment that Jordan appeals and asserts five assignments of error for our review. For clarity of analysis, we have combined Jordan's first, second, and third assignments of error.

ASSIGNMENT OF ERROR NO. I

**THE JURY'S GUILTY VERDICT WAS AGAINST THE
MANIFEST WEIGHT OF THE EVIDENCE**

ASSIGNMENT OF ERROR NO. II

**THE CONVICTION OF ESCAPE WAS NOT SUPPORTED
BY SUFFICIENT EVDIENCE**

ASSIGNMENT OF ERROR NO. III

**THE TRIAL COURT DID NOT HAVE THE AUTHORITY
TO SENTENCE APPELLANT DUE TO THE FACT THERE**

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**WAS A LACK OF PROOF THAT APPELLANT WAS
UNDER DETENTION**

{¶4} In his first assignment of error, Jordan argues that the jury's verdict was against the manifest weight of the evidence. Jordan argues that: (1) the trial court has to inform the defendant about postrelease control at the sentencing hearing and in the sentencing entry; (2) the prosecution had the burden to prove that Jordan was properly placed on postrelease control; and (3) R.C. 2921.34, the escape statute, requires that the defendant be under detention and since Jordan was not properly under detention, the guilty verdict was erroneous. Further, Jordan argues that "since the Escape statute requires that appellee prove beyond a reasonable doubt that appellant had a specific intention to break or attempt to break detention, and appellant never even understood he was under detention, the jury did clearly lose its way in finding appellant guilty of Escape." (Appellant's Brief at 13).

{¶5} Jordan argues, in his second assignment of error, that since the prosecution presented no evidence that he had been notified about postrelease control at his sentencing hearing that his conviction was not supported by sufficient evidence.

{¶6} In Jordan's third assignment of error, he asserts that since the prosecution presented no evidence that the trial court his notified him of postrelease control at the sentencing hearing the original judgment entry imposing

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sentence was void. Thus, Jordan asserts, he was never lawfully sentenced to postrelease control, and the trial court had no authority to sentence him on the escape.

{¶7} When reviewing the sufficiency of the evidence, “[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Jenks* (1981), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶8} However, when determining whether a conviction is against the manifest weight of the evidence, a reviewing court must examine the entire record, “[weigh] the evidence and all reasonable inferences, consider the credibility of witnesses and [determine] whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, quoting *State v. Martin* (1983), 20 Ohio App. 3d 172, 175, 485 N.E.2d 717.

{¶9} Jordan was convicted of escape, under R.C. 2921.34, which provides:

(A)(1) No person, knowing the person is under detention or being reckless in that regard, shall purposely break or attempt to break the detention, or purposely fail to return to detention, either following temporary leave granted for a specific purpose

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or limited period, or at the time required when serving a sentence in intermittent confinement.

* * *

“Detention” is defined, in pertinent part, to include: “* * * supervision by an employee of the department of rehabilitation and correction of a person on any type of release from a state correctional institution * * *”. R.C. 2921.01(E). See also, *State v. Boggs*, 2nd Dist. No. 22081, 2008-Ohio-1583, ¶¶12-14 (a person on post release control is under detention for purposes of the escape statute).

{¶10} At the trial, Jeremy Hecker, an Adult Parole Authority employee and Jordan’s parole officer, testified that Jordan had been in prison at North Central Correctional Institution in Marion. (Tr. 1/7/08-1/8/08 at 91-92). Hecker testified that Jordan was on parole for Marion County Common Pleas Court Case Number 05 CR 438, and identified State’s Exhibit Number 5, the journal entry from that case. (Id. at 92). The aforementioned case involved: possession of cocaine, a fifth degree felony; vandalism, a fifth degree felony; two forgeries, both fifth degree felonies; and receiving stolen property, a fourth degree felony. (Id. at 83); (State’s Ex. 5). Hecker testified that Jordan was placed on postrelease control because he owed restitution. (Id. at 94).

{¶11} Hecker checked the address that Jordan was going to be living with his mother at 311 Olney Avenue in Marion and approved the address. (Id. at 94-96, 101). Jordan’s mother called Hecker and informed him that she had moved to

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an apartment at 243 West Pleasant Street, and Hecker approved the apartment over the phone. (Id. at 104). Hecker testified that on December 13th Jordan signed a paper with his monitored time conditions listed. (Id. at 108); (State's Ex. 2B). Hecker testified that he explained various things to his parolees including: "if they abscond supervision [they] can and probably will be charged with the offense of Escape." (Id. at 109).

{¶12} On December 18, 2006, Hecker received a telephone call from the Marion Police Department. (Id. at 112). Later, Jordan was arrested and Hecker placed him on an APA hold. (Id.). Hecker then issued Jordan a written sanction, which indicated that Jordan's postrelease control was bumped up from monitored time to basic supervision. (Id. at 113). On December 26th, Hecker reviewed the basic conditions of supervision with Jordan, and Jordan signed the document. (Id. at 120); (State's Ex. 6). The third condition of supervision provided: "I understand if I'm a releasee and abscond supervision I may be prosecuted for a crime of Escape under Section 2921.34 of the Revised Code." (Tr. 1/7/08-1/8/08 at 117); (State's Ex. 6). The conditions also included that Jordan was to report to Hecker the first Wednesday of every month. (Id. at 119); (Id.).

{¶13} Jordan reported on January 3rd, February 7th, March 7th, and April 4th at the old warden's house in front of the North Central Correctional

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Institution. (Tr. 1/7/08-1/8/08 at 122-125).¹ Hecker testified that on April 18th, Patrolman Zacharias "advised he was at the offender's residence and nobody would answer the door. He thought the offender might be in there. He advised the landlord was there and the door was unlocked." (Id. at 126). Hecker went to Jordan's residence with Patrolman Zacharias and searched the residence for Jordan. (Id.). Thereafter, Hecker "faxed an Order to Arrest to the Police Department and the Sheriff's Department." (Id. at 127).

{¶14} On May 2nd, Jordan reported for his visit and was arrested. (Id. at 127). Hecker testified "I actually applauded him for reporting when he probably knew he was gonna be arrested, and I explained to him at that time that he did the right thing because if he runs from me it is Escape." (Id. at 127). Jordan was released on June 4, 2007. (Id. at 128).

{¶15} Hecker testified that Jordan reported for his scheduled visit on June 6th. (Id. at 128). According to Hecker, Jordan was instructed to report on July 3, 2007 at the Multi-County Jail because the white house, which was used for reporting, was being used for training. (Id. at 129). Hecker testified that a note was placed on the door instructing people to report to the jail. (Id. at 129). Jordan did not report as directed. (Id. at 129). Hecker went to Jordan's residence but did not make any contact with Jordan. (Id. at 129). Hecker left his business card at

¹ The old warden's house is also referred to as the "white house" in this opinion.

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the residence. (Id. at 129-30). According to Hecker, Jordan called him and said that he forgot to report, so Hecker told Jordan to report on July 18th at the jail. (Id. at 130).

{¶16} On July 18th, Patrolman Zacharias called and informed Hecker that they were looking for Jordan due to another incident. (Id. at 131). Jordan did not report on July 18th. (Id. at 131). That same day, Hecker faxed an order to arrest to both the police department and the sheriff's department. (Id. at 131-32).

{¶17} On August 5th, Hecker and the Police Department went to Jordan's residence at 243 West Pleasant Street and made contact with Jordan's mother. (Id. at 132). According to Hecker, Jordan's mom stated that "he wasn't there and hadn't been staying there," and she advised that he may be at a different residence. (Id.). However, they did not locate Jordan at that address either. (Id.). Hecker was advised that Jordan was hanging out with Ryan Nelson, and they contacted Nelson who said that he was not there. (Id. at 133).

{¶18} On August 9th, Hecker received a voice mail from Jordan stating that he had gone to the sheriff's department, and they did not have a warrant for him. (Id.) Jordan left a telephone number and Hecker called that number but got an answering machine, and so, he left a message telling Jordan to turn himself in at the Marion Police Department because there was a local order to arrest. (Id.).

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Hecker testified that Jordan did not turn himself in and did not report in August. (Id. at 134).

{¶19} On August 17th, Hecker and Patrolman Cox went to Jordan's APA approved residence at 243 West Pleasant Street and made contact with a neighbor who said that Jordan and his family moved out. (Id. at 134). Hecker and Patrolman Cox went up to the apartment, and it was completely empty. (Id.) Hecker testified that Jordan had not notified him that he had changed his residence. (Id.)

{¶20} On August 20th, Jordan was officially declared "whereabouts unknown," and Hecker sent an e-mail requesting a statewide warrant. (Id. at 135). On October 12th, Hecker received an e-mail advising him that Jordan was residing at 554 Wilson Street, and he forwarded the e-mail to the police department. (Id. at 136). Later, Hecker was informed that Jordan was arrested at 554 Wilson Street. (Id. at 136-7).

{¶21} On cross-examination, Hecker testified that he had previously come into contact with Jordan when he was at Owens Street Apartments looking for someone else, and Jordan had cussed at him and other people and called them "pigs." (Id. at 141). Hecker testified that if someone in Marion wanted to call him that it would be a long distance telephone call. (Id. at 141-42). Hecker testified that to his knowledge Jordan had not been out of the county. (Id. at 151).

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{¶22} On redirect examination, Hecker testified that the other 80 or 90 people that he supervised were able to find him after the reporting location changed to the Multi-County Jail. (Id. at 154-56).

{¶23} Patrolman Keith Cox, employed by the Marion City Police Department, testified that he assisted Hecker in looking for Jordan at 243 West Pleasant Street on August 17, 2007. (Id. at 160). Patrolman Cox testified that he was "advised by a neighbor that the people in the apartment had moved out." (Id. at 160). According to Patrolman Cox, the apartment was empty. (Id. at 161).

{¶24} Donnie Lutz, the maintenance manager at West Pleasant street, testified that Cindy Jordan, Ryan Johnson, and Marty Madison were listed on the lease, and they moved out approximately the second week of August. (Id. at 163). On cross-examination, Lutz testified that the roof of the apartment had been leaking in the apartment occupied by the Jordans. (Id. at 165).

{¶25} Jon Shaffer, a lieutenant at the Marion Police Department, testified that he received information that Hecker was looking for Jordan, and he along with three other police officers attempted to locate Jordan at an address given to them. (Id. at 84-85). When he arrived at the residence, he noticed a couple of children playing out back, and he walked to the front of the house where other officers were knocking on the door. (Id. at 86). No one answered the door. (Id.). Shaffer walked around to the back of the house to say something to the children

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when someone waived the children inside the residence. (Id.) The police knocked on the front door several times, rang the doorbell, and knocked on the back door. (Id.) Shaffer then yelled at the window that they were looking for Jordan and he needed to come to the door. (Id.) Shaffer testified that Jordan came to the door and was arrested. According to Shaffer, the police found Jordan at 554 Wilson Street in Marion. (Id. at 87).

{¶26} On cross-examination, Shaffer testified that Hecker wanted Jordan arrested on a parole violation but he was not aware of a warrant. (Id. at 87). Shaffer testified that he did not believe that Jordan gave anyone any trouble when he was picked up by the police. (Id. at 88). According to Shaffer, there was no indication how long Jordan had resided at that residence. (Id.).

{¶27} The defense presented the testimony of Jason Dutton, Randy Spencer, Cindy Murray Jordan, and Jordan. Jason Dutton and Randy Spencer both work at the Marion County Sheriff's Department and testified that they did not recall Jordan coming into the sheriff's department. (Id. at 179, 181).

{¶28} Cindy Murray Jordan, Jordan's mother, testified that Hecker came to the apartment and said that he had a warrant for Jordan's arrest. (Id. at 184-86). Cindy testified that she took Jordan to the sheriff's department on August 8, they checked the computers and the search took 15 to 20 minutes, however, there was not a warrant. (Id.). Further, Cindy testified that if Jordan "wasn't in jail then he

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was living with me on West Pleasant. And then August 11th we moved over on Wilson." (Id. at 188). Cindy testified that they moved because the roof leaked and there were health problems there. (Id.).

{¶29} Jordan testified that on December 12, 2006, he was released from the penitentiary. (Id. at 205). Jordan testified that he found out that he was going to be on postrelease control approximately two weeks before his release date. (Id. at 205). Jordan testified that he called Hecker upon his release and met him at the Multi-County Jail. (Id.). During the meeting, Hecker said that he remembered him from a past "run in." (Id. at 206). Jordan signed papers and "got out of there." (Id.).

{¶30} Jordan testified that he missed his reporting on July 3rd and called Hecker to tell him that he missed because there was no one there. (Id. at 207). Jordan testified that Hecker did not verbally tell him that they were going to be meeting at the Multi-County Jail. (Id.). Further, Jordan testified that he did not "have the knowledge that they could put a new felony Escape on [him]." (Id. at 208).

{¶31} On cross-examination, Jordan testified that he did not report to the Multi-County Jail nor the white house on July 18th. (Id. at 219). Jordan further testified that he did not report in August. (Id. at 220). Jordan testified that he went to the sheriff's department on August 8th. (Id. at 220). Jordan testified that

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he called Hecker and left a message with a phone number, and that he had no recollection of receiving a message from Hecker. (Id. at 222). Additionally, Jordan testified that he did not report in September or October and that he did not report for forty eight days. (Id. at 222-23). Jordan also testified that he moved but did not tell Hecker where he was living. (Id. at 224). Jordan stated:

*** * * I'm saying that I never left Marion County. I never jumped no walls. I never ran from the police when they come to arrest me. I come out the door with my hands up. I done nothing in an Escape formality. I absolutely did not. I did not report and I changed my address and I've been held accountable for that at the Multi-County Jail.**

(Id. at 226).

{¶32} The Ohio Supreme Court has held:

[w]hen a trial court fails to notify an offender that he may be subject to postrelease control at a sentencing hearing, as required by former R.C. 2929.19(B)(3), the sentence is void; the sentence must be vacated and the matter remanded to the trial court for resentencing. The trial court must resentence the offender as if there had been no original sentence. When a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense.

State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶16.

However, in order to convict Jordan of escape, the prosecution did not need to prove beyond a reasonable doubt that Jordan was *properly* under detention, but rather, that Jordan knew he was under detention or that he was being reckless in

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that regard. R.C. 2921.34; *State v. Howard* (1969), 20 Ohio App.2d 347, 254 N.E.2d 390 (escape conviction is not affected by the validity of the sentence which the defendant was serving at the time of the defendant's escape).

{¶33} Both Hecker and Jordan's testimonies show that Jordan knew that he was on postrelease control. Jordan testified that he was informed that he was going to be on postrelease control prior to being released from the penitentiary, and he contacted Hecker after being released. (Tr. 1/7/08-1/8/08 at 205). Hecker testified that Jordan initially reported as required, and he signed paperwork regarding postrelease control. (Id. at 120, 122-125); (State's Ex. 6). Further, Jordan purposely broke or attempted to break the detention when he violated his postrelease control by not reporting to his parole officer in July or August.²

{¶34} After viewing the record, in a light most favorable to the prosecution, we find that a rational trier of fact could find all of the elements of escape beyond a reasonable doubt. Additionally, we cannot find that the jury lost its way or created a manifest miscarriage of justice when it found Jordan guilty of escape. Finally, based on our previous finding that the prosecution did not need to prove that Jordan was *properly* under detention, we find that the trial court was authorized to sentence Jordan for escape.

² The Bill of Particulars alleges that Jordan failed "to report to his parole officer on July 3, 2007 and/or July 18, 2007 and/or August 8, 2007."

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{¶35} Jordan's first, second, and third assignments of error are, therefore, overruled.

ASSIGNMENT OF ERROR NO. IV

THE TRIAL COURT ERRED BY GIVING A CONFUSING JURY INSTRUCTION ON ESCAPE.

{¶36} In his fourth assignment of error, Jordan maintains that the trial court erred by providing a confusing jury instruction on escape.

{¶37} Crim.R. 30(A) provides, in pertinent part: "[o]n appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." The failure to object to jury instructions constitutes a waiver of that issue absent plain error. *State v. Bridge*, 3d Dist. No. 1-06-30, 2007-Ohio-1764, ¶19, citing *State v. Underwood* (1983), 3 Ohio St.3d 12, 13, 444 N.E.2d 1332. "Under the plain error standard, the appellant must demonstrate that, but for the error, the outcome of his trial would clearly have been different." *Id.* at ¶20, citations omitted.

{¶38} In the present case, the prosecution objected to the jury instruction before the jury retired to reach a verdict; however, the defense did not object to the jury instruction. In fact, defense counsel indicated that he did not see it as damaging to the defense. (Tr. 1/7/08-1/8/08 at 268). Since the defense did not

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object to the jury instruction, the defense waived the issue absent plain error. *Bridge*, 2007-Ohio-1764, at ¶19, citing *Underwood*, 3 Ohio St.3d at 13.

{¶39} Jordan has not demonstrated that the outcome of his trial would have been different if the trial court's jury instructions had been different. As previously noted, Jordan testified that he failed to report in July and August. (*Id.* at 119-20). Accordingly, Jordan has failed to meet the plain error standard of review.

{¶40} Jordan's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR NO. V

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

{¶41} Jordan argues that he was denied effective assistance of trial counsel. Specifically, Jordan argues that his trial counsel was ineffective because trial counsel: (1) failed to join the prosecutor in requesting a modification of the jury instruction; (2) failed to move for dismissal of the case because there was no proof that Jordan was informed at the original sentencing hearing about postrelease control; (3) failed to object to hearsay evidence; and (4) failed to object to evidence that was irrelevant and prejudicial.

{¶42} "It is well-settled that in order to establish a claim of ineffective assistance of counsel, appellant must show two components: (1) counsel's performance was deficient or unreasonable under the circumstances; and (2) the

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deficient performance prejudiced the defense.” *State v. Price*, 3d Dist. No. 13-05-03, 2006-Ohio-4192, ¶6, citing *State v. Kole* (2001), 92 Ohio St.3d 303, 306, 750 N.E.2d 148, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. “To warrant reversal, the appellant must show that there is a reasonable probability that, but for counsel’s performance, the result of the proceeding would have been different.” *Id.*, citing *State v. Strickland*, 466 U.S. at 687.

{¶43} “In order to show that an attorney’s conduct was deficient or unreasonable, the appellant must overcome the presumption that the attorney provided competent representation by showing that the attorney’s actions were not trial strategies prompted by ‘reasonable professional judgment.’” *Id.* at ¶7, citing *Strickland*, 466 U.S. at 687. “ ‘Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance.’” *Id.*, quoting *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 693 N.E.2d 267, citing *State v. Thompson* (1987), 33 Ohio St.3d 1, 514 N.E.2d 407.

{¶44} First, Jordan maintains that his trial counsel was ineffective for not joining the prosecution’s request to modify the jury instruction. However, Jordan’s trial counsel’s decision not to join in the prosecution’s objection to the jury instruction was a matter of trial strategy, and thus, does not constitute

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ineffective assistance of counsel. *Price*, 2006-Ohio-4192, at ¶7, citing *Strickland*, 466 U.S. at 687.

{¶45} Second, Jordan maintains that trial counsel was ineffective for failing to file a motion to dismiss because the prosecution presented no proof that he was informed about postrelease control at his original sentencing hearing. However, in Jordan's second assignment of error, we determined that there was sufficient evidence for Jordan to be convicted of escape. As a result, there is not a reasonable probability that the outcome of the trial would be different but for trial counsel's failure to file a motion to dismiss.

{¶46} Third, Jordan claims that trial counsel was ineffective for failing to object to hearsay evidence including Patrolman Zacharias' testimony that: Cindy stated that Jordan had not been staying at her residence; about an e-mail he received regarding an anonymous call about where Jordan had been residing; and that Cindy told him that Jordan needed help. In addition, Jordan claims that Patrolman Cox testified regarding a neighbor's statements and trial counsel was ineffective for not objecting. Finally, Jordan claims that trial counsel was ineffective for failing to object when the maintenance manager testified that a neighbor said Jordan and his family moved, and that he had never seen Jordan at the residence.

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{¶47} Hearsay evidence is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Evid.R. 801(C). However, the aforementioned evidence does not constitute hearsay evidence as the evidence was not admitted to prove the truth of the matter asserted, but rather, to show why Hecker and the police officers took the steps that they did.

{¶48} In addition, Jordan has failed to establish that the outcome of his trial would have been different but for the aforementioned testimony.

{¶49} Fourth, Jordan maintains that his trial counsel was ineffective for failing to object to irrelevant and prejudicial evidence. Jordan maintains that the bill of particulars provided that the most serious offense that he was convicted of was a fifth degree felony, but the jury instructions and the written verdict form stated that the most serious offense was a fourth degree felony. Jordan also maintains that the bill of particulars did not include anything about him failing to inform Hecker about a new address, and trial counsel was ineffective for failing to object. In addition, Jordan maintains that trial counsel failed to object when the prosecution asked whether any of Hecker's other parolees had any difficulty reporting at the new location. Finally, Jordan maintains that trial counsel was ineffective for failing to object to Cindy's testimony, on cross-examination, that she told Hecker that she thought that Jordan was using drugs again.

Case No. 9-08-11

{¶50} Under the escape statute, the level of offense depends upon the level of the offense with which the defendant was under confinement when he escaped. See R.C. 2921.34. Regardless of whether Jordan was under detention because of a fourth degree offense or a fifth degree offense, the crime of escape would constitute a third degree felony. R.C. 2921.34(C)(2)(b). Thus, Jordan has not shown that there is a reasonable probability that, but for his trial counsel's performance, that the result of his proceeding would have been different.

{¶51} Further, the fact that trial counsel failed to object on the basis that the bill of particulars does not contain anything about Jordan failing to inform his parole officer about changing his residence does not establish ineffective assistance of counsel in this case. Jordan testified that he failed to report, as required, on July 18th and in August, and this conduct is sufficient for an escape conviction. Thus, Jordan has failed to show that the outcome of his trial would have been different, but for, his trial counsel's conduct.

{¶52} Finally, Jordan has failed to demonstrate that but for his trial counsel's failure to object regarding Cindy's testimony the result of his trial would have been different. Thus, Jordan has failed to establish that he was provided ineffective assistance of trial counsel.

{¶53} Jordan's fifth assignment of error is overruled.

Case No. 9-08-11

{¶54} Having found no error prejudicial to appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed.

WILLAMOWSKI and ROGERS, J.J., concur.

/jlr

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 06CA009063

Appellee

v.

JOHN ROBERT NORTH

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 05 CR 068099

Appellant

DECISION AND JOURNAL ENTRY

Dated: October 9, 2007

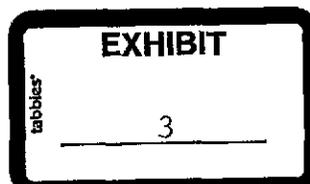
This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Presiding Judge.

{¶1} Defendant-Appellant John Robert North has appealed from the judgment of the Lorain County Court of Common Pleas which denied his motion to withdraw his guilty plea. We reverse.

I

{¶2} On March 31, 1997, Appellant pled guilty to aggravated robbery and aggravated burglary. The trial court sentenced Appellant to five years in prison. The trial court's journal entry appears to have struck any reference to post-release control. However, Appellant was placed on post-release control following his sentence. Appellant did not comply with the provisions of post-release control.



Consequently, he was indicted on one count of escape in violation of R.C. 2921.34. Appellant pled guilty to the charge of escape on September 28, 2004. Upon his release, Appellant was informed that his prior period of post-release control from his 1997 convictions was still in effect. Appellant again violated the terms of his release and was indicted for escape a second time on June 22, 2005. In the instant matter, Appellant violated the terms of his release by leaving the state without permission. Consequently, both of Appellant's escape charges resulted not from an "escape" in the traditional meaning of the word but through Appellant's failure to comply with the specific terms of post-release control.

{¶3} On August 29, 2005, Appellant pled guilty to escape. Appellant was sentenced to one year in prison by the trial court. In its entry, the trial court neglected to inform Appellant of post-release control. Accordingly, on October 20, 2006, the trial court conducted a new sentencing hearing in order to properly inform Appellant of post-release control. During that hearing, Appellant moved to withdraw his guilty plea. The trial court heard Appellant's arguments and then orally denied the motion. The trial court then sentenced Appellant to one year in prison and informed him of post-release control. Appellant has timely appealed from the trial court's judgment, raising two assignments of error for review.

II

Assignment of Error Number One

“THE TRIAL COURT ERRED BY DENYING MR. NORTH’S
PRESENTENCE MOTION TO WITHDRAW HIS GUILTY PLEA.
***”

{¶4} In his first assignment of error, Appellant has argued that the trial court erred in denying his presentence motion to withdraw his guilty plea. We agree.

{¶5} This Court reviews a motion to withdraw a guilty plea under the abuse of discretion standard. *State v. Xie* (1992), 62 Ohio St.3d 521, 526. Crim.R. 32.1 permits a defendant to file a presentence motion to withdraw his plea. Although a presentence motion to withdraw a guilty plea is generally “to be freely allowed and treated with liberality” by the trial court, the decision to grant or deny such a motion is nevertheless within the sound discretion of the trial court. *Xie*, 62 Ohio St.3d at 526, quoting *Barker v. United States* (C.A.10, 1978), 579 F.2d 1219, 1223. Moreover, “[a defendant] who enters a guilty plea has no right to withdraw it.” *Id.* To prevail on a motion to withdraw a guilty plea a defendant must provide a reasonable and legitimate reason for withdrawing his guilty plea. *State v. Dewille* (Nov. 4, 1992), 9th Dist. No. 2101, at *1, citing *Xie*, 62 Ohio St.3d at 527; *State v. Van Dyke*, 9th Dist. No. 02CA008204, 2003-Ohio-4788, at ¶10.

{¶6} During his hearing, Appellant introduced evidence that he was released from prison on March 18, 2005 for his initial escape conviction. Appellant’s evidence indicated that he was not placed on the optional post-release

control that can accompany that offense. Appellant also introduced the judgment entry from his 1997 convictions for aggravated burglary and aggravated robbery. In that entry, the trial court did not impose post-release control on Appellant. Specifically, the trial court drew a line through the provision in its sentencing entry which discussed the imposition of post-release control.

{¶7} Based upon that evidence, Appellant argued to the trial court that he was actually innocent of the charge of escape because he was not legally under detention at the time the escape offense was committed. Specifically, Appellant asserted that *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, mandated a finding that the imposition of post-release control on him by the Adult Parole Authority was void. In *Hernandez*, the Court noted that “nothing in R.C. 2967.28 authorizes the Adult Parole Authority to exercise its postrelease-control authority if postrelease control is not imposed by the trial court in its sentence.” (Emphasis omitted.) Id. at ¶18. On appeal, the State has conceded that *Hernandez* dictates a conclusion that the APA could not impose post-release control on Appellant from his 1997 convictions due to the trial court’s failure to inform him of that sanction. The State, however, has urged that Appellant had notice of his post-release control and admitted to knowing those restrictions. This notice, however, does not cure the fact that Appellant’s post-release control was void under *Hernandez* and that the APA lacked the authority to supervise Appellant as a result.

{¶8} Additionally, R.C. 2921.34(B), the statute defining escape, provides as follows:

“Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority, is not a defense to a charge under this section if the detention is pursuant to judicial order or in a detention facility. In the case of any other detention, irregularity or lack of jurisdiction is an affirmative defense[.]”

Accordingly, the statute under which Appellant was indicted specified the defense he sought to raise in the trial court. Specifically, Appellant asserted that the APA lacked jurisdiction to impose post-release control on him because it was not contained in his 1997 sentencing entry. Based on *Hernandez*, Appellant’s argument is legally correct. Moreover, without a valid form of detention, Appellant cannot be convicted of escape. As the trial court did not recognize the import of *Hernandez*, it abused its discretion. See *State v. Ross*, 9th Dist. No. 20980, 2002-Ohio-7317, at ¶27 (noting that “a mistake of law is equivalent to an abuse of discretion.”).

{¶9} Appellant’s first assignment of error, therefore, has merit.

Assignment of Error Number Two

“MR. NORTH WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.”

{¶10} In his second assignment of error, Appellant has argued that he received ineffective assistance of trial counsel. Based upon this Court’s resolution

of Appellant's first assignment of error, his second assignment of error is moot and we decline to address it. See App.R. 12(A)(1)(c).

III

{¶11} Appellant's first assignment of error is sustained. Appellant's second assignment of error is moot and we decline to address it. The judgment of the Lorain County Court of Common Pleas is reversed and the cause is remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

The Court finds that 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.

BETH WHITMORE
FOR THE COURT

CARR, J.
CONCURS

MOORE, J.
DISSENTS, SAYING:

{¶12} The majority assumes that a line drawn through the post-release control provision of a form sentencing entry evidences the trial court's intentional deletion of that provision. As it is not clear from the record that this was the court's intention, I respectfully dissent.

{¶13} At the outset, I would note the difficulty reviewing courts encounter based on some form journal entries. Clearly the volume of cases makes it impossible for trial judges to individually draft each sentencing entry. However, lines drawn through certain provisions, and circling or underlining of other provisions, without the initials or signature of the court, present challenges for the reviewing court to determine what the trial court actually ordered. A line on a page drawn through a provision certainly can mean that the document's drafter intended to strike the provision. Here, it is not clear whether the trial court struck the provision or whether the line was drawn before or after the trial court's signature. More troubling, the journal entry at issue has numerous subheadings. The paragraph containing the notice of post-release control does not have a

subheading. Rather, it is contained within the subheading, “Repeat Violent Offender or Major Drug Offender.” Immediately following the post-release control paragraph is the subheading, “Drug Offenses.”

{¶14} On appeal, we have not been presented with a transcript of the sentencing hearing which led to the issuance of this journal entry. The transcript of that hearing might well have shed light on the trial court’s intent regarding Appellant’s original sentence. To illustrate this fact, we need only examine our recent decision in *State v. Battle*, 9th Dist. No. 23404, 2007-Ohio-2475. In *Battle*, we held that it was appropriate for the trial court to nunc pro tunc its sentencing entry to include the proper term of post-release control. We based our decision upon the fact that the transcript of the trial court’s sentencing hearing revealed the trial court’s intent with respect to post-release control. See *id.* at ¶6. *Battle* is also persuasive as this Court noted therein as follows: “It is clear from the transcript excerpt supplied to this Court by the State that Appellant was informed of and understood that he was sentenced to two years of community control.” *Id.* In the instant matter, Appellant also conceded that he knew of his existing post-release control obligation. Appellant must have acquired knowledge of this term of post-release control in some manner. Without further evidence in the record, the trial court was left to speculate about the origin of Appellant’s knowledge of his post-release control.

{¶15} Moreover, as Appellant's offenses were wholly unrelated to the two subheadings which surrounded the paragraph giving notice of post-release control, it is possible that any striking through of that paragraph was entirely inadvertent. Consequently, it is troubling that we do not have a sentencing hearing transcript that would demonstrate the trial court's intent regarding post-release control. More troubling is that we are left with an insufficient record despite the fact that Appellant waited more than fourteen months to withdraw his plea. As it was Appellant's burden to demonstrate the validity of his request to withdraw his plea, I would find that the scant evidence he presented after such a substantial delay was not sufficient to justify granting his motion.

{¶16} The following facts compel a critical review of the relief sought by Appellant. Appellant filed no formal motion to withdraw his plea. Rather, after waiting fourteen months after pleading guilty, he orally moved to withdraw his plea at the inception of his sentencing hearing. See *State v. Van Dyke*, 9th Dist. No. 02CA008204, 2003-Ohio-4788, at ¶18 (finding that the length of delay is a relevant consideration when determining whether to permit withdrawal of a plea). This lengthy delay existed despite the fact that the statute under which Appellant was indicted specifically mentions the defense Appellant raised in his motion. See R.C. 2921.34. Additionally, as noted above, rather than providing the complete record from the offense resulting in his post-release control, Appellant provided only his initial journal entry, leaving the trial court to speculate about the intent of

that journal entry and leaving open the possibility that post-release control was properly imposed at a later date.

{¶17} The unique facts of this case raise some suspicion over Appellant's tactical decision to supply only the initial journal entry. Appellant conceded that he had previously pled guilty to escape charges based on the same post-release control he now claims has always been void and in fact served time in prison for that conviction. While I agree with the majority that motions to withdraw guilty pleas should be generally treated with liberality, I question whether this case merits such liberal treatment. Appellant waited more than a year to seek the withdrawal of his plea and even then sought only orally to do so. In support, he submitted an inconclusive journal entry. I cannot agree that the trial court was unreasonable or arbitrary in determining that evidence was insufficient to support Appellant's motion. Accordingly, I respectfully dissent and would find that the trial court did not abuse its discretion in overruling Appellant's motion to withdraw his plea.

APPEARANCES:

DAVID H. BODIKER, State Public Defender, and STEPHEN P. HARDWICK, Assistant Public Defender, for Appellant.

DENNIS WILL, Prosecuting Attorney and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellee.