

[Cite as *State v. Bien*, 2009-Ohio-2422.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 22773
vs. : T.C. CASE NO. 06CR3518
SCOTT BIEN : (Criminal Appeal from
Defendant-Appellant : Common Pleas Court)

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O P I N I O N

Rendered on the 22nd day of May, 2009.

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GRADY, J.:

{¶1} Defendant, Scott Bien, was convicted in 1994 of burglary and sentenced to a prison term of from three to fifteen years. On his release from prison, Defendant was placed on parole under the supervision of the Adult Parole Authority ("APA").

{¶2} Defendant failed to report to his parole officer and/or return to detention. He was charged by indictment with the offense of escape. R.C. 2929.34(A)(1). In addition, the APA revoked Defendant's parole, ordered him returned to prison to serve the remainder of the sentence the court had imposed in 1994, and extended Defendant's parole eligibility and "maxout" dates by several years.

{¶3} Defendant filed a Crim.R. 12(C)(1) motion to dismiss the indictment charging the escape offense, arguing that any punishment for that offense would necessarily be in addition to punishments the APA had imposed for the same conduct, and therefore proceedings on the escape charge would violate his right against double jeopardy guaranteed by the United States and Ohio Constitutions.

{¶4} The trial court conducted a hearing on Defendant's motion to dismiss on May 22, 2008. When Defendant was unable to produce evidence demonstrating the actions that the APA allegedly took, the court offered Defendant a continuance to allow him to obtain that evidence. Defendant declined the offer, indicating that he wished to enter a no contest plea, and would challenge any resulting conviction and sentence on appeal on grounds of double jeopardy.

{¶5} The trial court indicated that if Defendant entered

a no contest plea to the escape charge it would find him guilty and sentence him to a two-year prison term, which by law must be served consecutive to the remaining sentence for the burglary offense Defendant serves as a result of the revocation of his parole. Defendant responded: "That's fine. That's fine."

{¶6} Following a plea hearing, in which the trial court fully complied with Crim.R. 11(C)(2), the court accepted Defendant's no contest plea to the escape charge, found him guilty, and sentenced him to a two-year prison term, to be served consecutive to the sentence Defendant was returned to prison by the APA to serve following revocation of his parole.

{¶7} Defendant timely appealed to this court, challenging only the trial court's failure to grant his motion to dismiss the escape charge on double jeopardy grounds.

SECOND ASSIGNMENT OF ERROR

{¶8} "THE TRIAL COURT ERRED WHEN IT FAILED TO RULE ON A TIMELY AND PROPERLY FILED AND DULY-ARGUED MOTION TO DISMISS THE SECOND CHARGE ON THE SAME CONVICTION."

{¶9} Defendant's motion to dismiss alleged a constitutional defect in his prosecution and was therefore made pursuant to Crim.R. 12(C)(1). Per Crim.R. 12(F), the court was required to rule on the motion before trial. No

trial was held because Defendant entered a plea of no contest.

Crim.R. 12(I) provides: "The plea of no contest does not preclude a defendant from asserting on appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence."

{¶10} Defendant's no contest plea admitted the truth of the facts alleged in his indictment, Crim.R. 11(B)(2), and the plea colloquy establishes that Defendant waived his right to trial by entering the no contest plea. Crim.R. 11(C)(2)(b). Upon accepting Defendant's plea, the court was required to proceed to impose a sentence for Defendant's escape offense. Crim.R. 11(B)(3).

{¶11} Defendant's no contest plea and the court's acceptance of it relieved the court of the duty imposed on the court by Crim.R. 12(F) to rule on Defendant's motion to dismiss. The trial court did not err in then failing to rule on the motion, and Defendant suffered no prejudice as a result.

{¶12} The second assignment of error is overruled.

FIRST ASSIGNMENT OF ERROR

{¶13} "THE TRIAL COURT ERRED WHEN IT VIOLATED THE LEGAL CONCEPT OF DOUBLE JEOPARDY BY ADDING TIME TO THE DEFENDANT-APPELLANT'S SENTENCE WITHOUT CHARGING HIM FOR A

SEPARATE CRIMINAL OFFENSE."

{¶14} The double jeopardy provisions in the Fifth Amendment to the Constitution of the United States and Section 10, Article I of the Ohio Constitution bar multiple punishments for the same offense. *State v. Gustafson*, 76 Ohio St.3d 425, 1996-Ohio-299. Defendant argues that the sentence the court imposed for his escape offense violates his double jeopardy rights because it arises from the same conduct for which the APA had revoked his parole, ordered him returned to prison, and extended Defendant's parole eligibility and "maxout" dates.

{¶15} We previously considered and rejected these same arguments in *State v. Buckney* (Dec. 15, 2000), Champaign App. No. 2000CA9, and *State v. Wellbaum* (Sept. 1, 2000), Champaign App. No. 2000CA5. As we pointed out in *Wellbaum*: "If an individual is sent back to jail as a result of a parole revocation, it is not a punishment for the new crime, but a remedial measure reinstating his original sentence for the first crime committed. Any jail time served is a 'continuing consequence of the original conviction.'" *Id.*, quoting *Flowers v. Dept. of Health* (1978), 81 Wis. 2d 376, 260 N.W. 2d 727, 732 (internal citations omitted).

{¶16} The same would apply to the APA order returning

Defendant to prison to serve the remainder of his 1994 sentence for burglary, as well as related extensions of Defendant's parole eligibility and "maxout" dates in relation to that original sentence. All are independent of the punishment the court in the present case imposed for Defendant's offense of escape.

{¶17} The first assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. And FAIN, J., concur.

Copies mailed to:

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Hon. Connie S. Price