[Cite as *State v. Wilson*, 2010-Ohio-305.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 23602

v. : T.C. NO. 2009 CR 1581

JAMES R. WILSON : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 29th day of January, 2010.

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FROELICH, J.

{¶ 1} James R. Wilson pled no contest to escape, a second degree felony, in the Montgomery County Court of Common Pleas. The trial court found him guilty and sentenced him to two years, the minimum mandatory sentence. Wilson appeals from his conviction, claiming that his plea was not knowingly and voluntarily given, that his

conviction for escape violates the Double Jeopardy Clause, and that his sentence constitutes cruel and unusual punishment. For the following reasons, Wilson's conviction will be affirmed.

I

{¶ 2} According to the Bill of Particulars, Wilson was on post-release control for prior convictions for kidnapping, a first degree felony, and felonious assault, a second degree felony. On March 26, 2009, Wilson failed to turn himself in to his parole officer on a warrant after the parole officer instructed him to do so. Wilson states that the parole board required him to serve 30 days in prison for violating his post-release control.

{¶ 3} On June 19, 2009, Wilson was indicted for escape, in violation of R.C. 2921.34(A)(1), a second degree felony. On July 13, 2009, Wilson moved to dismiss the charge, arguing that he did not purposefully fail to report to his parole officer and that punishment under the statute would constitute cruel and unusual punishment. Wilson subsequently moved to suppress any statements that he may have made while in police custody on April 9, 2009.

{¶ 4} On August 4, 2009, the trial court held a hearing on the motion to dismiss. At that hearing, Wilson informed the court that the parole board had already imposed an additional 30 days in prison for the post-release control violation in the underlying case. After hearing counsel's arguments, the court asked counsel to approach and stated: "How about the [sic] overrule motion, plead no contest, sentence to two years. You move for an appeal bond and I grant it. I don't know what you've got to appeal." The court indicated that it would grant a recess to allow defense counsel to discuss the matter with Wilson. At

the end of the sidebar discussion, the court stated in open court:

{¶ 5} "The Court has reviewed Defendant's motion and the State's response and the Court is familiar from prior cases with everything that the Defendant urges here. And though not unsympathetic to the arguments made, the Court finds that the Defendant's motion to dismiss by reason of other case law is dismissed or is overruled. The motion to dismiss is overruled and that the Court will proceed after a recess to a scheduling conference for Defendant's motion to suppress. Court will be in recess."

{¶ 6} Upon resuming, the court scheduled a hearing on the motion to suppress for August 12, 2009. On August 6, 2009, the court filed a written entry overruling the motion to dismiss.

{¶ 7} On August 12, 2009, instead of proceeding with a hearing on Wilson's motion to suppress, Wilson entered a plea of no contest to the escape charge. The court found him guilty and sentenced him to two years, the minimum mandatory term of imprisonment. The court stayed Wilson's sentence pending appeal.

{¶ 8} Wilson appeals, raising three assignments of error.

II

{¶ 9} Wilson's first assignment of error states:

{¶ 10} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ENTERING A FINDING OF GUILTY TO A NO-CONTEST PLEA NOT KNOWINGLY AND FREELY GIVEN."

{¶ 11} In his first assignment of error, Wilson argues that his plea was not knowingly and voluntarily made, because he did not understand the nature of the charge to

which he pled. He asserts that the trial court did not adequately explain to him why he had been charged with escape.

{¶ 12} In order for a plea to be knowing and voluntary, the trial court must comply with Crim.R. 11(C). *State v. Greene*, Greene App. No. 2005 CA 26, 2006-Ohio-480, ¶8. "Crim.R. 11(C)(2) requires the court to (a) determine that the defendant is making the plea voluntarily, with an understanding of the nature of the charges and the maximum penalty, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions; (b) inform the defendant of and determine that the defendant understands the effect of the plea of guilty and that the court, upon acceptance of the plea, may proceed with judgment and sentencing; and (c) inform the defendant and determine that he understands that, by entering the plea, the defendant is waiving the rights to a jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself." *State v. Brown*, Montgomery App. No. 21896, 2007-Ohio-6675, ¶3. See, also, *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶27.

{¶ 13} The Supreme Court of Ohio has urged trial courts to literally comply with Crim.R. 11. *Clark* at ¶29. However, because Crim.R.11(C)(2)(a) and (b) involve non-constitutional rights, the trial court need only substantially comply with those requirements. E.g., *State v. Nero* (1990), 56 Ohio St.3d 106, 108; *Greene* at ¶9. The trial court must strictly comply with Crim.R. 11(C)(2)(c), as it pertains to the waiver of federal constitutional rights. *Clark* at ¶31.

{¶ 14} On appeal, Wilson claims that he did not "understand the nature of the

charge" at the time of his plea. "The nature of the charge refers to the particular basis for the criminal liability that may result." *Greene* at ¶20.

{¶ 15} At the beginning of the August 12, 2009, plea hearing, defense counsel informed the court that Wilson would be pleading no contest to escape and that, pursuant to discussions held in chambers, "the Court has advised us and the State has agreed that they would stipulate to the minimum mandatory sentence, which is two years, and that the Court would grant Mr. Wilson an OR appellate bond so that he could appeal the issue ***." The Court asked Wilson if that was his understanding as well; Wilson responded affirmatively.

{¶ 16} Wilson informed the court that he was 38 years old, had an eighth-grade education, was not under the influence of drugs or alcohol, and was entering his plea voluntarily. He denied being forced to plea or having promises made to him. Wilson acknowledged that he was on parole in another case and that he understood that the court had no influence over what action the parole board might take as a result of his plea. The prosecutor read the escape charge as set forth in the indictment, and Wilson indicated that he understood the charge. The court informed Wilson of the maximum potential penalties for a second-degree felony and that Wilson would be required to serve a mandatory three-year period of post-release control following his release from prison.

{¶ 17} During the court's explanation of post-release control, Wilson asked the court about the basis for the escape charge, with the following exchange:

{¶ 18} "THE COURT: If the violation of post-release control sanctions were to be a new felony, then in addition to being prosecuted and sentenced for the new felony, you might also receive from the Court yet another prison sentence for violation of post-release

control sanctions itself, do you understand that?

{¶ 19} "[WILSON]: Yeah. Your Honor, can you explain to me where and how I escaped from because I've yet to figure it out. Nobody will tell me.

{¶ 20} "THE COURT: It's a failure to report to your parole officer is – is that –

{¶ 21} "[PROSECUTOR]: That's correct.

{¶ 22} "[WILSON]: I already went to CRC and got punished for that. I went to CRC and got sentenced from the parole board for that.

{¶ 23} "THE COURT: And I think that these are appellate issues that your attorney is going to pursue. These are issues which have been dealt with by this Court before and the Court of Appeals and the Supreme Court apparently thinks that that constitutes escape, so. And that's why we're granting you an OR bond for appeal and –

{¶ 24} "[WILSON]: All right."

{¶ 25} After reviewing the ramifications of post-release control and the constitutional rights that Wilson would be waiving by his plea, the trial court asked Wilson if he had any further questions. Wilson stated that he did not. Wilson then entered a plea of no contest to escape, a second degree felony.

{¶ 26} The trial court informed Wilson that he would enter a finding of guilty and provided Wilson "all the time you need" to review the plea form with his attorney, who was experienced counsel. The plea form states that Wilson was pleading no contest to "ESCAPE in violation of O.R.C. 2921.34(A)(1) – a felony of the 2nd degree." Immediately following the statement of the escape charge appear the words: "I understand the nature of the(se) charge(s)." Wilson's counsel reiterated to Wilson that the court was required to

impose at least two years in prison and that he was not eligible for community control. Counsel expressed that he did not think the court would fine Wilson. Wilson and his attorney then signed the plea form. Afterward, the trial court found that Wilson "has entered this plea knowingly, intelligently, and voluntarily, that he understands the nature of the charges, the maximum penalties for it, the terms of his stipulated sentence, [and] that he was not eligible for community control sentencing. He understands the effects of his plea." The court accepted the no contest plea and found Wilson guilty.

{¶ 27} The record clearly reflects that the trial court determined, before accepting Wilson's plea, that Wilson understood the nature of the charge to which he was pleading no contest. The record supports the trial court's determination. During Wilson's conversation with the judge at the plea hearing, Wilson was told that the escape charge was based on his failure to report to his parole officer while under post-release control. Wilson indicated that he understood that charge and, at the conclusion of the hearing, signed a plea form that stated "I understand the nature of the(se) charge(s)." Although Wilson questioned why his conduct constituted escape when he had already received punishment from the parole board, the trial court informed him that the Supreme Court has held that a failure to report constitutes escape under the statute. In short, Wilson understood the nature of the escape charge, even though he disagreed that his parole violation should constitute escape; the trial court complied with its duty to determine that Wilson understood the nature of the charge. Crim.R. 11(C)(2)(a).

{¶ 28} Wilson's first assignment of error is overruled.

III

{¶ 29} Wilson's second assignment of error states:

{¶ 30} "IMPOSITION OF THE SENTENCE HEREIN SERVES AS DOUBLE JEOPARDY IN VIOLATION OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION."

{¶ 31} In his second assignment of error, Wilson claims that the Double Jeopardy Clause prohibits the State from prosecuting him for escape when, based on the same conduct, he had already been imprisoned for violating the conditions of his post-release control. In making this argument, Wilson acknowledges that *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, "seems to indicate that punishing a Defendant for violation of conditions of his post-release control with a term imprisonment and then charging him with a new offense of 'escape,' is not a violation of Defendant's right contra double jeopardy." Wilson asks us to "discard the above fiction that his additional 30-day incarceration imposed by the parole board was part of his original sentence" and to adopt the reasoning of the dissent in *Martello*.

{¶ 32} Wilson is correct that *Martello* is controlling. In that case, the Ohio Parole Board ruled that the defendant's failure to report to his parole officer on several occasions was a violation of his post-release control and ordered that he be incarcerated for 91 days for the violation. After Martello served the 91-day term, he moved to dismiss the escape charge (also arising out of his failure to report to his parole officer), arguing that double jeopardy prohibited his prosecution for escape. The Supreme Court of Ohio disagreed, concluding that "jeopardy does not attach when a defendant receives a term of incarceration for the violation of conditions of postrelease control. Such a term of incarceration is

attributable to the original sentence and is not a 'criminal punishment' for Double Jeopardy Clause purposes that precludes criminal prosecution for the actions that constituted a violation of the postrelease control conditions." *Martello* at ¶26. Thus, double jeopardy did not preclude the criminal prosecution of Martello for escape. Id. at ¶41.

{¶ 33} We find no meaningful distinctions between Wilson's prosecution for escape following a 30-day incarceration for violating the terms of his post-release control and the facts in *Martello*. Accordingly, under *Martello*, jeopardy did not attach when he was incarcerated by the parole board, and his prosecution for escape was not barred by the Double Jeopardy Clause.

{¶ 34} Wilson asks that we disregard *Martello* and follow the reasoning of the dissent in that case. As a court inferior to the Supreme Court of Ohio, we lack authority to review whether the Supreme Court has properly determined that a defendant may be prosecuted and additionally sentenced for escape after serving a term of imprisonment imposed by the parole board for that same conduct. See *State v. Aitken*, Clark App. No.2008 CA 75, 2009-Ohio-3757, ¶8. Rather, we are obligated to follow and apply the rules of law that the Supreme Court announces in its decisions. *In re Estate of Werts*, Montgomery App. No. 22824, 2009-Ohio-3120, at ¶23. "We may not vary from them, much less overrule them ***." Id.

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

IV

{¶ 36} Wilson's third assignment of error states:

{¶ 37} "IMPOSITION OF THE INSTANT SENTENCE EXPOSED APPELLANT

TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION."

{¶ 38} In his third assignment of error, Wilson claims that the 30-day sentence imposed by the parole board for violating his post-release control followed by a two-year sentence for escape, both based on his failure to report to his parole officer for a few days, constitutes cruel and unusual punishment. We addressed and rejected such an argument in *State v. Myers*, Montgomery App. No. 21612, 2007-Ohio-2602.

{¶ 39} In *Myers*, the defendant failed to report to his parole officer for approximately ten weeks while he was on parole for robbery, a second degree felony. Myers was convicted of escape and sentenced to a mandatory term of two years in prison. On appeal, Myers claimed that R.C. 2921.34 violates the Eighth Amendment to the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." We overruled Myers's assignment of error with the following analysis:

{¶ 40} "The United States Supreme Court has set forth a tripartite framework to review sentences under the Eighth Amendment:

{¶ 41} "'First, we look to the gravity of the offense and the harshness of the penalty. *** Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. *** Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.' *Solem v. Helm* (1983), 463 U.S. 277, 290-91, 103 S.Ct. 3001,

77 L.Ed.2d 637.

{¶ 42} "The court need not consider the second and third prongs of the *Solem* test if 'a comparison of "the gravity of the offense and the harshness of the penalty" under the first element of *Solem* does not give rise to an inference of gross disproportionality.' *State v. Barnes* (2000), 136 Ohio App.3d 430, 435, 736 N.E.2d 958.

{¶ 43} "In reviewing this issue, we note that statutes are afforded a strong presumption of constitutionality, and the challenger must establish that the statute is unconstitutional beyond a reasonable doubt. *State v. Weitbrecht*, 86 Ohio St.3d at 370, 715 N.E.2d 167; *State v. Love*, Montgomery App. No. 21568, 2007-Ohio-135, ¶5.

{¶ 44} "Myers was convicted of escape, in violation of R.C. 2921.34(A)(1). That statute provides: 'No person, knowing the person is under detention or being reckless in that regard, shall purposely break or attempt to break the detention, or purposefully fail to return to detention, either following temporary leave granted for a specific purpose or limited period, or at the time required when serving a sentence in intermittent confinement.' 'Detention' includes '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).

{¶ 45} "The degree of offense under the escape statute is dependent upon the nature of the underlying crime for which the offender was under detention. R.C. 2921.34(C). In the instant case, Myers was charged with escape, a second degree felony, because his underlying offense of robbery was a felony of the second degree. Accordingly, Myers was subject to a possible sentence of two to eight years of imprisonment. Myers received a

sentence of two years in prison, the minimum available sentence for the sentencing range.

{¶ 46} "Myers argues that his two-year sentence was grossly disproportionate to the offense, which was based on his failure to report to his parole officer for a ten-week period. The Eighth Appellate District rejected a similar argument in *Barnes*, in which a parolee raised an Eighth Amendment challenge to his conviction for escape based on his failure to report to his parole officer on four occasions in a two-week period. Barnes received a one-year sentence, the minimum sentence available. On review, the appellate court found that the first *Solem* prong was not satisfied, reasoning:

{¶ 47} "'*** We note with great deference that Ohio's General Assembly has seen fit, through its passage of R.C. 2921.34, to stiffen the punishment available to detainees, which includes parolees, who choose to break their detention or fail to return to detention. We also recognize that there exists a strong presumption of constitutionality with regard to legislative determinations. This legislative action, on its own, clothes the offense with a presumption that the General Assembly considered the gravity of the offense to be of such seriousness to the state that heightened penalties were justified in order to provide a deterrent. The General Assembly clearly wished to deter those detainees from violating their detention status and running the risk of criminal recidivism or interrupting their orderly rehabilitation and return to the law-abiding population. In addition, this determination by the General Assembly to treat the crime of escape as a grave offense is corroborated by R.C. 2901.01(A)(9), which defines escape as an "offense of violence." Being an offense of violence, it does not shock the conscience of the community that, in appellant's case, the range of punishment for a conviction of escape is one to five years imprisonment.

{¶ 48} "'As to the harshness of the penalty incurred by appellant for having failed to report to his parole officer on four occasions over a two-week period, we note that the trial court imposed the minimum sentence available. Obviously, the trial court took into consideration the facts of the offense and proportionately tailored the penalty to the degree of the crime.' *Barnes*, 136 Ohio App.3d at 435-36, 736 N.E.2d 958.

{¶ 49} "Although Myers's escape offense had a potential penalty of two to eight years, we find *Barnes* persuasive, and we likewise conclude that Myers's two-year sentence was not grossly disproportionate to his offense. See, also, *State v. Adams* (Oct. 4, 2000), Lorain App. No. 99 CA 7478. We note that, effective October 4, 1996, R.C. 2921.01(E) was amended to remove the exclusion of parolees from the definition of detention and, on March 17, 1998, R.C. 2967.15(C)(2) was amended to remove the exception for parolees. See *State v. Thompson*, 102 Ohio St.3d 287, 2004-Ohio-2946, 809 N.E.2d 1134, ¶7-8. Accordingly, as expressed in *Barnes*, the Ohio legislature's actions demonstrate its intent to include parolees who fail to abide by the terms of their parole in the potentially harsh sentencing scheme for escape. Myers's Eighth Amendment challenge lacks merit." *Myers* at ¶5-14.

{¶ 50} Although Wilson states that he failed to report for a matter of days, as opposed to weeks in *Myers*, we conclude that his two-year sentence does not constitute cruel and unusual punishment. As noted in *Myers* and *Barnes*, the General Assembly has chosen to make Wilson's conduct punishable under the escape statute and to treat those under detention for more serious felonies more harshly if they break detention. Wilson was on post-release control for kidnapping, a first degree felony, and felonious assault, a second

degree felony, and was charged with escape, a second degree felony. Like the defendant in *Myers*, Wilson faced a possible sentence of two to eight years for escape. The trial court imposed the minimum mandatory sentence of two years, thus apparently taking into account the severity – or lack thereof – of Wilson's actions. We cannot conclude that Wilson's two-year sentence was grossly disproportionate to his offense.

{¶ 51} The third assignment of error is overruled.

V

{¶ 52} The judgment of the trial court will be affirmed.

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DONOVAN, P.J. and BROGAN, J., concur.

Copies mailed to:

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