[Cite as *State v. Baranski*, 2005-Ohio-4956.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	Case No. 04CA2971
vs.	:	
KEITH B. BARANSKI,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellee.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Mark E. Kuhn, Scioto County Prosecuting Attorney, and Chadwick K. Sayre, Assistant Prosecutor, 602 Seventh Street, Portsmouth, Ohio 45662

COUNSEL FOR APPELLEE: Richard A. Cline, Richard Cline & Co., L.L.C., 580 South High Street, Ste. 200, Columbus, Ohio 43215

_CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-16-05

ABELE, P.J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment that dismissed an indictment charging Keith B. Baranski, defendant below and appellee herein, with theft from an elderly person, in violation of R.C. 2913.02(A)(1)/(B)(3). The State of Ohio, plaintiff below and appellant herein, assigns the following error for our review:

"THE TRIAL COURT ERRED IN DISMISSING THE INDICTMENT AGAINST APPELLEE."

{¶ 2} The Scioto County Grand Jury returned an indictment charging appellant with theft from an elderly person in violation of R.C. 2913.02(A)(1)/(B)(3). At the time of the incident, appellant was incarcerated at the United States Penitentiary in Lewisburg, Pennsylvania. The Scioto County Prosecutor made a "Request for Temporary Custody" pursuant to Article IV(a) of the Interstate Agreement on Detainers ("IAD"), codified at R.C. 2963.30. Eventually, appellant was transferred to Scioto County.

{¶ 3} On October 29, 2004, appellee filed a motion to dismiss the indictment. Appellee argued that he had not been brought to trial within the one hundred twenty (120) days specified in the IAD. The prosecution responded and conceded that the deadline had passed under the IAD, but argued that appellee waived that provision by agreeing to a trial date beyond the one hundred twenty day time frame. The trial court was unswayed and, on November 5, 2004, granted the motion and dismissed the indictment. This appeal followed.

{¶ 4} Appellant argues that the trial court erroneously dismissed the indictment. We disagree. Article IV(c) of the IAD expressly states that "[i]n respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state." (Emphasis added.) R.C. 2963.30.[1] There is no

[1] The provisions of Article IV(c) also provide for extension of the one hundred twenty day time limit for continuances but there was no continuance requested below and that is not at issue in this case.

question that the one hundred twenty day time limit expired in this case. The record reveals that appellee came into the custody of Scioto County on June 30, 2004. Thus, Article IV(c) of the IAD required that trial commence no later than October 28, 2004. Appellee filed his motion to dismiss on October 29th, the day after the deadline expired. Thus, the trial court correctly granted the motion.

{¶ 5} The prosecution asserts, however, that appellee waived the one hundred twenty day time limit of Article IV(c) and cites New York v. Hill (2000), 528 U.S. 110, 114-118, 145 L.Ed.2d 560, 120 S.Ct. 659, for the proposition that the IAD deadline can be waived by counsel if counsel agrees to a trial date outside the one hundred twenty day time frame. Although we do not necessarily dispute the prosecution's argument as an abstract proposition of law, we find no waiver under the particular facts and circumstances of this case.

{¶ 6} In Hill, the United States Supreme Court cited a transcript that explicitly showed that defense counsel agreed to a trial date outside the IAD deadline. Id. at 112-113. This was sufficient for the Court to find that defense counsel waived the defendant's right to be brought to trial within one hundred twenty days. Id. at 114-115. By contrast, in the case sub judice we find no transcript or filing to establish that appellee's counsel agreed to a trial date outside the time limit. Nothing appears in the original papers of this case that reflects appellee's trial counsel's signature on an entry setting a trial

date beyond the one hundred twenty day time limit. For these reasons, this case is distinguishable from Hill.

{¶ 7} The prosecution contends that because no transcript of the pre-trial hearing has been presented to this court, we may simply rely on the "recitation of facts" in its memorandum contra to establish that defense counsel affirmatively agreed to a trial date outside the deadline. We disagree. The prosecution's argument is, in essence, an invitation to simply accept its version of the facts as true. Unfortunately for the prosecution, we, as an appellate court, may not simply accept as true, absent a stipulation by both parties, one party's unsupported claims concerning the disputed, underlying factual nature of a case. It is well-settled that in the absence of a transcript, appellate courts must presume the correctness of trial court proceedings. State v. Littlefield, Ross App. No. 03CA2747, 2004-Ohio-5996, at¶10; State v. Lewis, Adams App. No. 02CA734, 2003-Ohio-1006, at ¶12; State v. Robinson (Oct. 23, 2000), Scioto App. No. 00CA2698. Moreover, any error on the part of the trial court must affirmatively appear of record in order to warrant the reversal of a judgment. State v. Puckett (2001), 143 Ohio App.3d 132, 135, 757 N.E.2d 802; State v. Lane (1997), 118 Ohio App.3d 485, 488, 693 N.E.2d 327; State v. Whaley (Mar. 25, 1997), Jackson App. No. 96CA779.

{¶ 8} Without evidence in the record in the instant case to establish that appellee's counsel affirmatively agreed to a trial date beyond the deadline set by Article IV(c) of the IAD, the

prosecution cannot show a waiver pursuant to Hill. Thus, the prosecution cannot show that the trial court erred by dismissing the indictment.

{¶ 9} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's assignment of error and hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

McFarland, J., concurring:

{¶ 10} I agree with the majority opinion and write separately to emphasize the underlying judgment entry dismissing this case below. The record reveals the State of Ohio approved, by signature, the judgment entry dismissing the case with prejudice.

{¶ 11} As such, the only waiver in the record below was by the State with its express approval of the judgment entry of dismissal. With that in mind, it is questionable whether the State can subsequently appeal a decision after consenting to the with prejudice dismissal of the entire case. [2]

{¶ 12} Based on the foregoing, and fundamental principles of

{¶ 13} fairness, it seems axiomatic that once the State approved the judgment entry dismissing the case, it expressly

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[2] See, generally, *Mansker v. Dealers Transport Co.*(1953),160 Ohio St. 255, 116 N.E.2d 3(discussing estoppel by judgment);I*n re Sideris*, Athens App. No. 04CA37, 2005-Ohio-1055 & S*antobello v. New York* (1971), 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 2d 427 (discussing duties of the prosecution); and *Paletta v. Paletta* (1990), 68 Ohio App.3d 507, 589 N.E.2d 76,(holding counsel waived errors for appeal by expressly approving judgment entry with signature.).

waived any objections and is arguably estopped from appealing the same entry.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J.: Concurs in Judgment & Opinion
McFarland, J.: Concurs with Concurring Opinion

For the Court

BY:
Peter B. Abele
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.