

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-08-032

Appellee

Trial Court No. 2007-CR-250

v.

Earl B. White, III

DECISION AND JUDGMENT

Appellant

Decided: August 7, 2009

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Christopher M. Carroll, Erie County Public Defender, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Earl White, appeals a February 27, 2008 judgment of the Erie County Court of Common Pleas, journalized on April 17, 2008, resentencing him, pursuant to R.C. 2949.06, and imposing an additional one year term of imprisonment. For the reasons that follow, we reverse.

{¶ 2} On January 18, 2008, appellant entered guilty pleas to one count of complicity to commit possession of heroin,¹ one count of possession of heroin,² and an amended count of attempted preparation of heroin for sale with enhancement of preparing within 1,000 feet of the boundaries of school premise.³ He was sentenced to serve a term of imprisonment of 4 years and 11 months and ordered to report to the Erie County Jail on February 19, 2008, at 8:00 a.m. to begin serving his sentence. The trial court orally notified appellant at the sentencing hearing that he would be subject to resentencing if he failed to appear as ordered to serve his sentence:

{¶ 3} "[U]nder Ohio Revised Code 2949.06, if you fail to report for execution of sentence after sentence has been imposed, and sentence has now been imposed on you, once you're taken into custody you'll be brought back before this Court for resentencing * * *."⁴

{¶ 4} Appellant failed to report to the jail at 8:00 a.m. on February 19, 2008, as ordered. He arrived at the jail voluntarily at approximately 11:00 a.m. on that same day. Two days later, appellant appeared before the trial judge for resentencing. The trial judge stated:

¹a violation of R.C. 2925.11(A) and (C)(6)(c) and R.C. 2923.03(A)(2) and a third degree felony.

²a violation of R.C. 2925.11(A) and (C)(6)(b) and a fourth degree felony.

³a violation of R.C. 2925.03(A)(2) and (C)(6)(c) and a third degree felony.

⁴The judgment entry imposing sentence also provided for resentencing under R.C. 2949.06 upon a failure to appear as ordered.

{¶ 5} "[T]his Court * * * gave the defendant a reporting date for execution of sentence * * * The date was February 19th, 2008 by 8:00 a.m. He was instructed to go to the Erie County Jail for execution of sentence at that time, and then he was advised, pursuant to R.C. 2949.06, that should he not report at that date and time, he will be held in custody once he was caught and be brought back before this Court for re-sentencing."

{¶ 6} Pursuant to R.C. 2949.06, the trial judge imposed an additional year of incarceration to appellant's sentence for a total of 5 years and 11 months in prison. Appellant now appeals setting forth the following assignment of error:

{¶ 7} "The trial court abused its discretion and violated the mandates of Ohio law in re-sentencing appellant, and ordering appellant to serve one full additional year in prison, simply because appellant reported late to the jail to begin serving his original sentence."

{¶ 8} This Court recently faced this precise issue in the case of *State v. Harvey*, 6th Dist. No. E-08-009, 2009-Ohio-1534. R.C. 2949.06 governs the offense of escape. In *State v. Harvey*, we held that a criminal defendant was not under "detention" when he voluntarily appeared late to jail to begin serving his sentence. *State v. Harvey* at ¶ 21. Accordingly, under R.C. 2949.06, the trial court could not find that the defendant had "escaped" when he reported late. *Id.* at ¶ 22. We held that under such circumstances the trial court was without authority under R.C. 2949.06 to set aside the defendant's first sentence and to conduct a second sentencing hearing. *Id.* We followed *State v. Harvey*

and reaffirmed this analysis in *State v. Hughes*, 6th Dist. Nos. E-08-034, E-08-035 and E-08-036, 2009-Ohio-3499, ¶ 19.

{¶ 9} For the reasons stated in *State v. Harvey* and *State v. Hughes*, the February 27, 2008 judgment of the Erie County Court of Common Pleas, journalized on April 17, 2008, is reversed. This matter is remanded to the trial court with instructions to reinstate the judgment entry of sentencing dated January 18, 2008, also journalized on April 17, 2008, and to delete the condition and references to R.C. 2949.06. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
