[Cite as *State v. Gondeau-Guttu*, 2010-Ohio-3321.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94027

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DIANA GONDEAU-GUTTU

DEFENDANT-APPELLANT

JUDGMENT:
DISMISSED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-501732

BEFORE: Cooney, J., Dyke, P.J., and Jones, J.

RELEASED: July 15, 2010

JOURNALIZED:
ATTORNEYS FOR APPELLANT

John J. Sheehan
Suite 1648 Hanna Building
Cleveland, Ohio 44115-2001

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Patrick J. Lavelle
Assistant County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Diana Gondeau-Guttu ("Guttu"), appeals from the trial court's decision granting her judicial release. For the following reasons, we dismiss for lack of a final appealable order.

{¶ 2} In October 2007, Guttu and codefendant, Steven Guttu, were charged in a 13-count indictment.[1] She was charged with theft, tampering with evidence, and forgery. Pursuant to a plea agreement, she pled guilty to several charges and was sentenced to an aggregate of four years and six months in prison and ordered to pay $64,706.67 in restitution.

{¶ 3} In March 2009, Guttu appealed to this court in *State v. Gondeau-Guttu*, Cuyahoga App. No. 92926 ("*Guttu I*"), claiming in her notice of appeal that the trial court's restitution calculation was erroneous. While this appeal was pending, she filed a motion for judicial release in the trial court in June 2009, which the State opposed.[2] Guttu then moved to dismiss her appeal, which this court granted in September 2009.

{¶ 4} The trial court held a judicial release hearing, at which the court placed Guttu on five years of judicial release. The court noted that Guttu

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[1]Steven is not a party to this appeal.

[2]Guttu also sought a stay of execution of the "restitution sentence," which this

was placed on judicial release in order to pay the restitution, and her failure to comply would result in the remainder of her prison term being imposed.

{¶ 5} It is from this order that Guttu now appeals, raising one assignment of error, in which she argues that the trial court committed plain error when it ordered her to pay restitution to third parties.

{¶ 6} As an initial matter, we must address whether the judgment from which Guttu appeals is a final appealable order.

{¶ 7} "Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district * * *." Section 3(B)(2), Article IV, Ohio Constitution. A final order is an "order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it * * * affects a substantial right made in a special proceeding * * *." R.C. 2505.02(B)(2).

{¶ 8} R.C. 2929.20 governs motions for judicial release and gives a trial court substantial discretion in deciding whether to grant a motion for judicial release. The statute, however, makes no provision for appellate review.

{¶ 9} In *State v. Coffman*, 91 Ohio St.3d 125, 129, 2001-Ohio-296, 742 N.E.2d 644, the Ohio Supreme Court held that a denial of a motion for shock

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court granted in August 2009.

probation under former R.C. 2947.061 is not a final appealable order.[3] As the *Coffman* court noted, R.C. 2947.061, which governs shock probation, was repealed effective July 1, 1996, and therefore inmates who are incarcerated after that date must now seek judicial release under R.C. 2929.20. Id. at 126. See, also, *State v. Woods* (2001), 141 Ohio App.3d 549, 752 N.E.2d 309, (the Ninth District Court of Appeals, relying on *Coffman,* found that the denial of a motion for judicial release is not a final appealable order). The *Coffman* court further held that a "the determination of a shock probation motion is a 'special proceeding' inasmuch as shock probation was a purely statutory creation and was unavailable at common law." Id. at 127.

{¶ 10} "This observation is equally true with respect to the determination of a judicial release motion. Judicial release is a purely statutory creation." *State v. Burgess,* Greene App. No. 01-CA-87, 2002-Ohio-2594. Thus, the determination of a judicial release motion constitutes a "special proceeding." See *State v. Cunningham,* Cuyahoga App. No. 85342, 2005-Ohio-3840, ¶9, affirmed, 113 Ohio St.3d 108,

[3]The Ohio Supreme Court has also found that the State can appeal the trial court's granting of a motion for judicial release for first and second degree felonies, but "R.C. 2953.08(B)(2) does not authorize a prosecuting attorney to appeal the modification of a sentence granting judicial release for a felony of the third, fourth, or fifth degree." *State v. Cunningham*, 113 Ohio St.3d 108, 2007-Ohio-1245, 863 N.E.2d 120, paragraph one of the syllabus.

2007-Ohio-1245, 863 N.E.2d 120 (affirming this court's dismissal of the appeal that challenged the granting of judicial release).

{¶ 11} Having determined that granting judicial release is a special proceeding, we now analyze whether it affects a substantial right. In *Coffman*, the court reasoned that the denial of a shock probation motion does not affect a "substantial right," which is defined as "'a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.'" Id. at 127, quoting R.C. 2505.02(A)(1). In reaching its conclusion, the court stressed that the shock probation statute gave judges considerable discretion in ruling on a motion filed thereunder. Id. Given that the shock probation statute "conferred substantial discretion while simultaneously making no provision for appellate review," the court concluded that an order denying shock probation was not a final, appealable order. Id. at 128.

{¶ 12} Taking this into consideration, we conclude that the trial court's grant of an inmate's motion for judicial release is also not a final appealable order. This is because, under R.C. 2929.20, the granting of judicial release is within the discretion of the trial judge, and the statute makes no provision for appellate review. Thus, we are without jurisdiction to hear this appeal.[4]

[4]We further note that Guttu essentially seeks to attack her sentence, arguing that

{¶ 13} Accordingly, this appeal is dismissed.

It is ordered that appellee recover of appellant costs herein taxed.

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

COLLEEN CONWAY COONEY, JUDGE

ANN DYKE, P.J., and
LARRY A. JONES, J., CONCUR

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the trial court erroneously ordered her to pay restitution to third parties and that the restitution imposed exceeded the economic loss sustained by the victims. However, the doctrine of res judicata may be applied to bar the further litigation of issues that were previously raised or could have been raised through a direct appeal. See *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104. Here, Guttu had the opportunity to appeal her sentence and the order of restitution in *Guttu I* but voluntarily dismissed her appeal. Thus, her claim would be barred under the doctrine of res judicata.