

[Cite as *State v. Cash*, 2011-Ohio-938.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95158

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

RODNEY CASH

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-524503

BEFORE: Cooney, J., Boyle, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: March 3, 2011

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor

By: Thorin O. Freeman
Assistant County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

Charles M. Morgan, Jr.
11510 Buckeye Road
Cleveland, Ohio 44104

COLLEEN CONWAY COONEY, J.:

{¶ 1} Plaintiff-appellant, the state of Ohio (the “State”), appeals the trial court’s dismissal of an indictment charging defendant-appellee, Rodney Cash (“Cash”), with escape. We find no merit to the appeal and affirm.

{¶ 2} In May 2010, Cash was charged with escape pursuant to R.C. 2921.34(A)(1). This charge arose from his previous convictions in Lucas County for which he was sentenced to five years and 11 months in prison. The Lucas County Common Pleas Court issued three sentencing entries. Neither of the first two entries mentioned postrelease control. The third

entry indicates that Cash was given notice of postrelease control but does not specify any terms of postrelease control. Cash asserts, and the State concedes, that none of these entries “would be deemed sufficient” for the imposition of postrelease control.

{¶ 3} Nevertheless, following his release from prison in January 2009, the Ohio Department of Rehabilitation and Corrections placed Cash on five years postrelease control. In March 2009, Cash was charged with escape for allegedly failing to comply with the terms of his postrelease control. He initially pled guilty to an amended charge of attempted escape and was sentenced. The court later permitted Cash to withdraw his guilty plea, vacated his sentence, and dismissed the indictment. In the dismissal entry, the court stated: “Defendant’s indictment on an escape charge is premised on an invalid PRC that does not comply with the statutory mandates per the imposition of postrelease control.” The State now appeals this ruling.

{¶ 4} In the sole assignment of error, the State argues that the trial court erred in dismissing the indictment. We review a trial court’s decision to dismiss an indictment de novo. *State v. Johnson*, Cuyahoga App. No. 82527, 2003-Ohio-4569, ¶17, citing *United States v. Jobson*, (C.A.6, 1996), 102 F.3d 214 and *United States v. Wright* (C.A.6, 2001), 260 F.3d 568, 570. A de novo standard of review affords no deference to the trial court’s decision, and we independently review the record. *Gilchrist v. Gonsor*, Cuyahoga App. No. 88609, 2007-Ohio-3903, ¶16.

{¶ 5} The State contends that R.C. 2921.34(B) prohibits a defendant from challenging an escape charge on the basis that he was never properly under detention if that detention is a result of a judicial order. R.C. 2921.34(B) provides: “Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority, is not a defense to a charge under this section if the detention is pursuant to judicial order or in a detention facility.” However, the section goes on to state that irregularity or lack of jurisdiction is an affirmative defense “if [t]he detaining authority knew or should have known there was no legal basis or authority for the detention.” R.C. 2921.34(B).

{¶ 6} In his motion to withdraw his guilty plea and to dismiss the indictment, Cash argued that he was innocent of the escape charge because he was not legally under detention at the time the escape offense was committed. In other words, Cash argued that “there was no legal basis for the detention.” R.C. 2921.34(B). Thus, contrary to the State’s argument, Cash raised a valid defense under R.C. 2921.34(B).

{¶ 7} The State concedes that postrelease control was never properly imposed on Cash. The failure to properly notify a defendant of postrelease control and to incorporate that notice into the court’s sentencing entry renders the sentence void. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph one of the syllabus. In *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, the Ohio Supreme Court explained:

“‘The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment.’ (Citations omitted.)”

{¶ 8} *Bezak* at ¶12, quoting *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268, 227 N.E.2d 223; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶19. Thus, the failure to properly advise Cash of postrelease control is not simply an “irregularity” in his sentence. It renders his sentence void, i.e., as if it never occurred.

{¶ 9} In *Hernandez v. Kelley*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, the Ohio Supreme Court noted that “nothing in R.C. 2967.28 authorizes the Adult Parole Authority to exercise its postrelease control authority if postrelease control is not imposed by the trial court in its sentence.” (Emphasis omitted.) *Id.* at ¶18. Thus, the Adult Parole Authority lacked jurisdiction to impose postrelease control on Cash because it was not included in a valid sentence, nor was there a judicial order imposing postrelease control. Without a valid form of detention, Cash cannot be convicted of escape. See *State v. North*, Lorain App. No. 06CA009063, 2007-Ohio-5383, ¶18. The trial court properly dismissed the indictment charging Cash with escape.

{¶ 10} Accordingly, the sole assignment of error is overruled.

Judgment is affirmed.

It is ordered 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 common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

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

COLLEEN CONWAY COONEY, JUDGE

MARY J. BOYLE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR