

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 22CA7
	:	
vs.	:	
	:	
Cole Midlam,	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	

APPEARANCES:

Cole Midlam, London, Ohio, Appellant, pro se.

Anneka P. Collins, Highland County Prosecutor, and Adam J. King, Assistant Highland County Prosecutor, Hillsboro, Ohio, for Appellee.

Smith, P.J.

Appellant, Cole Midlam, appeals the judgment of the Highland County Court of Common Pleas denying his motion for judicial release. On appeal, he contends that 1) the trial court abused its discretion when it failed to consider the principles and purposes of sentencing set forth in R.C. 2929.11 through R.C. 2929.19; 2) the trial court erred in relying only on the “seriousness factor” in denying his motion; and 3) the trial court violated his due process rights and abused its discretion in relying on an arbitrary or fixed anticipatory judgment to deny his motion. However, because a trial court’s denial of a motion for judicial

release is not a final appealable order, we must dismiss this appeal for lack of jurisdiction.

PROCEDURAL HISTORY

Cole Midlam was convicted of aggravated robbery, a first degree felony, in the Highland County Court of Common Pleas and was sentenced to a five-year prison term on February 27, 2012. The sentence was ordered to be served consecutively to sentences imposed in Dearborn County, Indiana, and Montgomery and Greene Counties in Ohio. Relevant to the current appeal, Midlam filed a motion for judicial release in the Highland County Court of Common Pleas on August 10, 2022. The trial court denied Midlam's motion with prejudice on August 11, 2022. In denying the motion, the trial court noted that Midlam had completed all of his other sentences and that although Midlam had "used his time in prison to obtain an associates degree and has done many things to improve himself * * * To grant him judicial release would mean that he has not been required to serve the sentence for the offense that he committed in this county." Thus, the trial court denied Midlam's motion with prejudice, stating that "[a]ny future motions filed shall be deemed denied upon filing." It is from the trial court's August 11, 2022, judgment that Midlam now brings his appeal, setting forth three assignments of error for our review.

ASSIGNMENTS OF ERROR

- I. TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER THE PURPOSES AND PRINCIPLES OF SENTENCING SET FORTH IN R.C. 2929.11-19.
- II. TRIAL COURT ERRED IN RELYING ONLY ON SERIOUSNESS FACTOR TO DENY MOTION.
- III. TRIAL COURT VIOLATED DEFENDANT’S DUE PROCESS RIGHTS AND ABUSED ITS DISCRETION IN RELYING ON AN ARBITRARY OR FIXED ANTICIPATORY JUDGMENT TO DENY DEFENDANT’S MOTION.

LEGAL ANALYSIS

Before we review the merits of this appeal, we must initially determine whether we have jurisdiction to do so. “Appellate courts ‘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 * * *.’ ” *State v. Stevens*, 4th Dist. Lawrence Nos. 21CA15, 21CA16, 2022-Ohio-2518, ¶ 8, quoting Ohio Constitution, Article IV, Section 3(B)(2). “ ‘If a court’s order is not final and appealable, we have no jurisdiction to review the matter and must dismiss the appeal.’ ” *Stevens* at ¶ 8, quoting *Clifton v. Johnson*, 4th Dist. Pickaway No. 14CA22, 2015-Ohio-4246, ¶ 8. As this Court noted in *Stevens*, “ ‘[i]n the event that the parties do not raise the jurisdictional issue, we must raise it sua sponte.’ ” *Id.* Here, however, the State argues that the order being appealed

from, the trial court's judgment denying Midlam's motion for judicial release, does not constitute a final appealable order and that this Court lacks jurisdiction to proceed. For the following reasons, we agree.

“This court and other Ohio appellate courts have held that the denial of a motion for judicial release is not a final, appealable order.” *State v. Garland*, 4th Dist. Scioto No. 20CA3923, 2021-Ohio-1805, ¶ 7, citing *Bradley v. Hooks*, 4th Dist. Ross No. 16CA3576, 2017-Ohio-4105, ¶ 3. *See also State v. Cruz*, 8th Dist. Cuyahoga No. 109770, 2021-Ohio-947, ¶ 6 (citing cases from the 1st, 2nd, 9th, 10th and 11th appellate districts); *State v. Watkins*, 162 N.E.3d 141, 2020-Ohio-5203, ¶ 25 (10th Dist.) (“A denial of a motion for judicial release is not a final, appealable order”); *but see State v. Francis*, 4th Dist. Meigs No. 10CA2, 2011-Ohio-4497, ¶ 14 (appellate review available if state breached an agreement concerning judicial release, citing *State ex rel. Rowe v. McCown*, 108 Ohio St.3d 183, 2006-Ohio-548, ¶ 5); *contra State v. Williams*, 10th Dist. Franklin No. 07AP-1035, 2008-Ohio-1906, ¶ 10 (“appellant may not avoid this jurisdictional barrier by arguing that the trial court ‘broke its agreement’ to grant a motion for judicial release * * *”).

As we recently observed in *Garland*:

“In *State v. Coffman*, 91 Ohio St.3d 125, 742 N.E.2d 644 (2001), syllabus, the Supreme Court of Ohio held that ‘[a] trial court's order denying shock probation pursuant to former R.C. 2947.061(B) is not a final appealable order.’ The court premised

its holding on the fact that although the decision arises in a special proceeding, no substantial right of the defendant is impacted even if there is a constitutional or statutory violation. *Id.* at 127-129. Judicial release replaced shock probation effective July 1996, and consistent with *Coffman*, courts have generally held that a trial court's order denying judicial release pursuant to R.C. 2929.20 is not a final appealable order. *See generally State v. Hague*, 11th Dist. Ashtabula No.2015-A-0030, 2015-Ohio-3645, ¶ 3, and cases cited therein.”

Garland at ¶ 7, quoting *State v. Dowler*, 4th Dist. Athens No. 15CA7, 2015-Ohio-5027, ¶ 15.

Just as in *Garland*, Midlam does not allege that the State breached an agreement concerning judicial release and thus, that exception does not apply. *See Garland* at ¶ 7 and *Dowler* at ¶ 17.

In his brief, Midlam concedes that “[u]nder most circumstances the Appellate Courts have held that the denial of a motion for judicial release is not a final appealable order.” Nonetheless, Midlam argues that because his motion for judicial release was denied with prejudice, it is appealable. He cites two civil cases in support of his argument that a dismissal with prejudice constitutes a final appealable order. Importantly, the analysis in both of those cases was limited to the civil rules and made no mention of the criminal rules. For example, in *Sunkin v. Collision Pro, Inc.*, 174 Ohio App.3d 56, 2007-Ohio-6046, 880 N.E.2d 947, ¶ 10 (9th Dist.), one of the cases relied upon by Midlam, the court stated that “[a] dismissal with prejudice in a *civil* case affects the substantial right of the plaintiff

to seek redress for injury in the courts, as provided by Section 16, Article I of the Ohio Constitution.” (Emphasis added). However, as set forth above, the *Coffman* case expressly stated that the denial of shock probation, or judicial release, does not affect a substantial right. Thus, we find the cases relied upon by Midlam in support of his argument are inapplicable in the criminal context.

Further, R.C. 2929.20, which governs judicial release, provides in section (D) that trial courts may deny motions for judicial release with or without prejudice. As noted in *State v Greene*, 2nd Dist. Greene No. 02-CA-17, 2002-Ohio-2595, * 2, the judicial release statute makes “no provision for appellate review when the court denies an inmate’s motion.” Midlam has cited this Court to no relevant authority providing for the appealability of denials of motions for judicial release that are denied with prejudice. In the absence of any such authority and light of the prior reasoning of the Supreme Court of Ohio in *Coffman*, as well as the recent holding of this Court in *Garland, supra*, we find that we lack jurisdiction to address the merits of Midlam’s appeal and must dismiss it.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE _____ and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

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

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

For the Court,

Jason P. Smith
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.