

In Case No. 427392
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KENNETH A. ROCCO, J.:

{¶ 1} In these appeals that have been consolidated for briefing, argument and disposition, appellant the State of Ohio challenges the trial courts' dismissal of the indictments against appellees Glenn Dameron and Abel Currie; each appellee was charged with one count of escape in violation of R.C. 2921.34(A)(1) for failing to comply with post-release control requirements.

{¶ 2} The state presents the same arguments in each case. It contends that appellees waived the issue of the Ohio Adult Parole Authority's ("APA's") power to impose post-release control requirements upon them, that appellees received notice of post-release control requirements, and further, that the trial courts should not have granted appellees' motions without holding "evidentiary" hearings.

{¶ 3} Upon a review of the record in each case, this court determines that although the fact patterns differ in some details, the disposition of the appeals must be the same. The

trial courts' decisions to dismiss the indictments against appellee Dameron and appellee Currie are affirmed.

{¶ 4} In appellee Dameron's case, the record reflects he was convicted of aggravated assault, a felony of the fourth-degree. At the subsequent sentencing hearing, the trial court imposed upon him the minimum term of incarceration for the offense.

{¶ 5} The sentencing entry indicated only that Dameron's sentence "include[d] any extensions provided by law."

{¶ 6} Dameron duly completed his prison term, whereupon he was placed under the APA's supervision. His parole officer informed him of the conditions of his post-release control. Thereafter, in September 2002, Dameron was indicted on one count of escape, R.C. 2921.34(A)(1), for breaking the terms of his post-release control.

{¶ 7} The record reflects appellee Currie's case has a similar background. Currie entered a guilty plea to one count of burglary, a fourth-degree felony. The trial court's docket indicates Currie was sentenced to six months in prison, and that his "sentence include[d] any extensions provided by law." No transcript of Currie's sentencing hearing in that case appears in the appellate record. In August, 2002 Currie was indicted on one count of escape, R.C. 2921.34(A)(1), for breaking the terms of his post-release control.

{¶ 8} Each appellee filed a motion to dismiss the indictment in his case, citing as authority for his position this court's opinion in *State v. Mickey* (Apr.5, 2001), Cuyahoga App. No. 77889.¹ In each case, the state countered by filing a brief in opposition to the motion. The state, however, in each case neither provided evidentiary exhibits to support its position nor

¹In appellee Dameron's case, he additionally challenged the indictment on constitutional grounds. Those arguments neither were addressed by the trial court nor are they raised by the parties in App. No. 82702.

requested an oral hearing on the matter. Nevertheless, before making their decisions, both trial courts held a hearing at which they considered the parties' oral arguments.

{¶ 9} In Dameron's case, at the state's request, the trial court made the transcript of the original sentencing hearing a part of the record.² It then considered the transcript in conjunction with the original order of sentence before granting Dameron's motion to dismiss the escape indictment.

{¶ 10} In Currie's case, the state filed no request to include in the record the transcript of Currie's original sentencing hearing. The trial court considered, therefore, only the original docket entries. The court concluded that the judgment entry of sentence in itself was inadequate to impose post-release control upon the defendant; thus, the escape indictment against Currie was dismissed.³

{¶ 11} The state has timely appealed each of the foregoing orders. This court subsequently permitted the cases to be consolidated for briefing, argument and disposition.

{¶ 12} In both cases, the state presents the same three assignments of error as follows:

²Prior to oral argument, this court issued an order in appellee Dameron's case that directed the parties to supplement the record pursuant to App.R. 9(E) with copies of the documents considered by the trial court at the hearing on Dameron's motion to dismiss, viz., the sentencing transcript and order of sentence in CR-401475. No compliance with that order was made. Therefore, this court cannot determine that the state's references to these items in its appellate brief are accurate. See footnote 3.

³Since they are not included in the record on appeal, neither the attachment to the state's appellate brief in appellee Dameron's case, nor the citations to the transcript of sentencing in appellee Currie's underlying criminal case, which now are presented by the state, can be considered by this court. App.R. 12(A)(1)(b).

{¶ 13} “I. The trial court erred in granting appellee’s motion to dismiss as appellee waived error in the underlying journal entry []⁴ by failing to timely appeal such error.

{¶ 14} “II. The trial court erred in granting appellee’s motion to dismiss, as appellee was properly notified of post-release control and the penalties for violating post-release control at the time of his plea and sentencing.

{¶ 15} “III. The trial court erred in granting appellee’s motion to dismiss without holding an evidentiary hearing.”

{¶ 16} The state argues the trial courts improperly dismissed the indictments that charged each appellee with the offense of escape and sets forth three alternative contentions to support its argument. On the records of these cases, however, none of the contentions has merit. Consequently, the state’s argument must be rejected.

{¶ 17} The state initially asserts the indictments were legitimate because neither appellee challenged the journal entry of sentence in the underlying criminal case; that is, the state claims the words in the sentencing entries that each appellees’ sentence “includes other extensions provided by law,” if they were ambiguous as to whether they specifically included post-release control, should have been the subject of a direct appeal by Dameron and Currie.⁵ This assertion is unacceptable for two reasons.

{¶ 18} First, the records reflect each appellee received a minimum sentence for the underlying offense; he would hardly be required to appeal a sentence if he deemed it opportune

⁴The first assignment of error in each case cites, respectively, CR 401475 for appellee Dameron and CR 401059 for appellee Currie.

⁵Each appellee was convicted in the underlying case of a fourth-degree felony. Pursuant to R.C. 2967.28(C), in such cases the APA retains discretion concerning whether to impose post-release control upon the defendant.

under the circumstances. *State v. Thompson*, Cuyahoga App. No. 82937, 2003-Ohio-7070. The state's reliance upon *State v. Leaks* (Oct. 18, 2001), Cuyahoga App. No. 78801 for its position to the contrary is misplaced. In that case, Leaks had appealed only his conviction for escape; therefore, without a delayed and consolidated appeal of his sentence in the underlying offense, this court lacked jurisdiction to consider his argument that related to it. Cf., *State v. Newman*, Cuyahoga App. No. 80034, 2002-Ohio-328.

{¶ 19} Second, a defendant cannot be presumed to see the journal entry of his sentence. *State v. Brown*, Hamilton App. Nos. C-020162-164, 2002-Ohio-5983 at P.*27.

{¶ 20} The state next asserts each appellee was “notified” of post-release control at his sentencing. The records, however, fail to support this assertion.

{¶ 21} In Currie's case, although it filed a brief in opposition to appellee's motion to dismiss the escape indictment, the state did not provide the transcript of the underlying sentencing hearing to the trial court. Thus, the trial court had no way of determining if Currie were informed pursuant to R.C. 2967.28 of the potential imposition upon him of a discretionary term of post-release control. *State v. Heard* (Nov. 1, 2001), Cuyahoga App. No. 78189; cf., *State v. Wilbon*, Cuyahoga App. No. 82934, 2004-Ohio-1784, at P.*67, *State v. Mickey* (Apr. 5, 2001), Cuyahoga App. No. 77889.

{¶ 22} In Dameron's case, although the record reflects the trial court considered evidence provided by the state at the hearing on his motion to dismiss the escape indictment, the appellate file does not contain those items with which the trial court was provided. Under these circumstances, this court presumes the trial court's decision was correct, and will affirm it. See, e.g., *Columbus v. Hodge* (1987), 37 Ohio App.3d 68.

{¶ 23} Based upon the records before them, therefore, the trial courts did not err in granting each appellee's motion to dismiss the escape indictment. *State v. Thompson*, supra.

{¶ 24} The state finally asserts the trial courts acted improperly when they dismissed the indictments without an evidentiary hearing. This assertion also is rejected.

{¶ 25} In both cases, the state neither requested the trial court to hold an evidentiary hearing nor protested when the trial court held only oral arguments on the motions for dismissal. Under these circumstances, the state waived this issue for purposes of appeal. *State v. Williams* (1977), 51 Ohio St.2d 112.

{¶ 26} For the foregoing reasons, the state's assignments of error are overruled.

{¶ 27} The trial court's order in each case is affirmed.

It is ordered that appellee recover of appellants 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

i. KENNETH A. ROCCO
ii. JUDGE

ANN DYKE, J. CONCURS
IN JUDGMENT ONLY (CONCURRING OPINION)

ATTACHED)

MICHAEL J. CORRIGAN, A.J. CONCURS
IN JUDGMENT ONLY WITH MAJORITY OPINION
AND CONCURS IN JUDGMENT ONLY WITH
JUDGE ANN DYKE'S SEPARATE CONCURRING
OPINION

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

ii. COUNTY OF CUYAHOGA

iii. NO. 82702/82771

STATE OF OHIO	:	
	1. :	
Plaintiff-Appellant	:	
	2. :	CONCURRING
b. -vs-	:	OPINION
	1. :	
GLENN DAMERON	:	
AND	:	
ABEL CURRIE	:	
	2. :	
Defendants-Appellees:		

DATE OF ANNOUNCEMENT
OF DECISION:

OCTOBER 14, 2004

ANN DYKE, J., CONCURRING IN JUDGMENT ONLY:

{¶ 29} I respectfully concur in the judgment only with the majority opinion. As the majority correctly notes, the state failed in both cases, following a specific directive from this court, to file a proper record on appeal. I would therefore presume the regularity of the proceedings below, affirm both dismissals, and consider irrelevant in this matter any case law or arguments presented by the parties.