

[Cite as *State v. Gaines*, 2010-Ohio-905.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92930

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEMETRIUS D. GAINES

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513974

BEFORE: Dyke, J., Stewart, P.J., and Boyle, J.
RELEASED: March 11, 2010

**JOURNALIZED:
ATTORNEY FOR APPELLANT**

Jonathan N. Garver, Esq.
4403 St. Clair Avenue
The Brownhoist Building
Cleveland, Ohio 44103-1125

ATTORNEYS FOR APPELLEE

William D. Mason, Esq.
Cuyahoga County Prosecutor
By: Katherine Mullin, Esq.
Assistant County Prosecutor
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

ANN DYKE, J.:

{¶ 1} Defendant Demetrius Gaines appeals from his conviction for escape.

For the reasons set forth below, we affirm.

{¶ 2} On March 5, 2008, defendant was indicted for one count of escape, in violation of R.C. 2921.34(A)(1). The state charged that defendant “did purposely break or attempt to break * * * detention,” and alternatively charged that defendant “did purposely fail to return to detention * * *.” Defendant pled not guilty and the matter proceeded to a jury trial on January 29, 2009.

{¶ 3} Rochelle Jopek testified that she is employed by the Ohio Adult Parole Authority and that one of the offenders whom she supervises is defendant.

According to Jopek, defendant was under her supervision in connection with his previous convictions for burglary and failure to verify his residence.¹ Over objection from the defense, the parole officer testified that she investigated where defendant was living because he is a registered sex offender and may not live within 1000 feet of a school.

{¶ 4} Jopek further testified that parole supervision is a form of detention under the law. Defendant was released from prison on January 14, 2008 and was instructed to report to Jopek the following day. At this time, Jopek presented defendant with a document entitled Conditions of Supervision. Jopek outlined the conditions as set forth in this document. In relevant part, defendant was instructed that he must register his address with the sheriff every 90 days, he

¹ The reporting requirement appears to be related to defendant’s previous conviction for sexual battery in Case No. CR-253994.

must notify the department of his address and cannot move without prior permission of his supervising officer. The instructions further explained that the defendant is to “follow all orders verbal or written given to me by my supervising officer,” and that if the defendant absconds from supervision, he may be prosecuted for the offense of escape. Defendant signed the Conditions of Supervision and was instructed to return to the office on January 23, 2008.

{¶ 5} Jopek further established that defendant reported to the Adult Parole Authority on January 23, 2008, and again on February 6, 2008. Defendant was to report to the office again on March 5, 2008 but he failed to do so. By March 27, 2008, Jopek still had not heard from defendant so she went to his residence and left a card with instructions that he report to the office on April 2, 2008. The following day, defendant left a message for Jopek to inform her that he had moved, but he did not leave a telephone number and did not report on April 2, 2008, or any time thereafter.

{¶ 6} Defendant elected to present evidence. He testified that he reported as instructed on January 15, 2008. Jopek informed him that she did not have all of his file and verbally instructed him to return on January 23, 2008. On that date, she verbally instructed him to return on February 6, 2008. Jopek was not in the office on that date. Another parole officer gave defendant a card instructing him to call the office for a follow-up appointment.

{¶ 7} Defendant further testified that he moved on February 8, 2008 and called to apprise Jopek of his new address. He admitted that he did not report to

Jopek on March 5, 2008, but he stated that he was never informed that he had to do so.

{¶ 8} Jeanette Wagner, defendant's mother, testified that defendant lived with his sister immediately following his release from prison, then moved to the area of East 79th Street and Superior Road.

{¶ 9} Defendant was subsequently convicted of escape for "purposely failing to return to detention." The trial court sentenced defendant to four years of imprisonment and three years of postrelease control sanctions. Defendant now appeals and assigns three errors for our review.

{¶ 10} For his first assignment of error, defendant asserts that the trial court erred in permitting Jopek to testify that defendant is a registered sex offender who must register his address with the sheriff every 90 days and may not live within 1,000 feet of a school.

{¶ 11} The offense of escape is set forth in R.C. 2921.34(A), which provides, in pertinent part, "[n]o person, knowing the person is under detention or being reckless in that regard, shall purposely fail to return to detention * * *." Pursuant to R.C. 2921.01(E), "detention" includes supervision by an employee of the department of rehabilitation and correction of a person on any type of release from a state correctional institution. A defendant on postrelease control is "under detention" for purposes of the offense of escape. *State v. Boggs*, Montgomery App. No. 22081, 2008-Ohio-1583.

{¶ 12} Because the state was required to establish that defendant knew the

conditions of his supervision and restrictions upon his residency, and knowingly violated these requirements, the testimony regarding the residency restrictions could be admitted. See *State v. Green*, Cuyahoga App. No. 92475, 2009-Ohio-5374; *State v. Smith*, Cuyahoga App. No. 88002, 2007-Ohio-717.

{¶ 13} For his second assignment of error, defendant complains that the trial court erred in instructing the jury that it had to find beyond a reasonable doubt that he committed the offense “on or about” the date alleged in the indictment.

{¶ 14} “In a criminal charge the exact date and time are immaterial unless in the nature of the offense exactness of time is essential[; it] is sufficient to prove the alleged offense at or about the time charged.” *Tesca v. State* (1923), 108 Ohio St. 287, 140 N.E.2d 629, at paragraph one of the syllabus. The question in such cases is whether imprecision with regard to the date prejudices the accused’s ability to fairly defend himself. *State v. Barnecut* (1988), 44 Ohio App.3d 149, 542 N.E.2d 353.

{¶ 15} In this instance, defendant maintains that he was prejudiced since the “on or about” language created a greater window of time within which the jury could convict him of escape. We do not agree because March 5, 2008 was the central date at issue.

{¶ 16} The second assignment of error is overruled.

{¶ 17} In his third assignment of error, defendant contends that his conviction is against the manifest weight of the evidence.

{¶ 18} The weight of the evidence concerns “the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other.” *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541. In determining whether a conviction is against the manifest weight of the evidence, the appellate court reviews the entire record, “weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

{¶ 19} In this matter, the evidence demonstrated that defendant was instructed that he must notify the department of his address, could not move without prior permission of his supervising officer, was to “follow all orders verbal or written given to me by my supervising officer,” and could be prosecuted for the offense of escape if he did not report as required. Defendant met all reporting requirements through February 6, 2008. The record indicates, however, that defendant was instructed to call on February 13, 2008 and to report in person on March 5, 2008. Defendant called on February 13, 2008 but did not report to the office on March 5, 2008. He was instructed to report on April 2, 2008 and did not do so on that date or thereafter.

{¶ 20} Defendant testified that he complied through February 6, 2008. Two days later, he informed Jopek that he moved. He admitted that he did not report to Jopek on March 5, 2008, but he stated that he was never informed that he had to do so. The evidence indicated, however, that defendant was instructed to call in on February 13, 2008 and to report on March 5, 2008. Accordingly, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice in convicting defendant of the offense.

{¶ 21} The third assignment of error is overruled.

Affirmed.

It is ordered that appellee recover from 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. 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.

ANN DYKE, JUDGE

**MELODY J. STEWART, P.J., and
MARY J. BOYLE, J., CONCUR**