

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals Nos. E-08-034

E-08-035

Appellee

E-08-036

v.

Trial Court Nos. 2007-CR-346

2007-CR-695

Daniel C. Hughes

2007-CR-476

Appellant

DECISION AND JUDGMENT

Decided: July 17, 2009

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Jeffrey Whitacre, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Daniel C. Hughes, appeals the judgment of the Erie County Court of Common Pleas resentencing him pursuant to R.C. 2949.06. For the reasons that follow, we reverse.

{¶ 2} On December 10, 2007, appellant entered guilty pleas to one count of burglary, one count of theft, one count of obstructing official business, one count of drug

trafficking and two counts of drug possession. He was sentenced to three years in prison and he was ordered to report to the Erie County Jail on January 7, 2008, at 9:00 a.m. to commence his sentence. The judgment entry of sentence specifically provided:

{¶ 3} "[I]n the event that defendant fails to report to the Erie County Jail on January 7, 2008 for commencement of sentence, a warrant will be issued for his arrest and the defendant shall be held in the Erie County Jail until he is brought before this court pursuant to R.C. 2949.06 * * *"

{¶ 4} Appellant failed to report to the jail at the designated time. He was apprehended on February 15, 2008, and he appeared before the trial judge for resentencing on March 6, 2008. The trial judge stated:

{¶ 5} "This court stayed execution of sentence and allowed him to report on January 7, 2008 at 9:00 o'clock. And the court advised him at the time of his plea and the sentence under 2949.06 [sic] that should he fail to report at that date and time that the sentence would be vacated and he would be resentenced according to law."

{¶ 6} Pursuant to R.C. 2949.06, the trial judge resentenced appellant to 6 years and four months in prison. Appellant now appeals setting forth the following assignment of error:

{¶ 7} "I. The trial court abused its discretion and violated the mandates of Ohio law in re-sentencing appellant, and more than doubling the original sentence, because appellant failed to report to jail on the date given by the court."

{¶ 8} R.C. 2949.06 provides:

{¶ 9} "If a person escapes after sentence and before confinement in a state correctional institution or jail, the clerk of the trial court, upon application of the prosecuting attorney or by order of the court, shall issue a warrant stating the conviction and sentence and commanding the sheriff to pursue the person into any county of this state. The sheriff shall take into custody the person so escaping and shall make return of the warrant to the court if it is in session, and if it is not in session he shall commit the accused to the jail of the county and bring him before the court at the next session of the court. The court shall set aside the former sentence and again pronounce judgment upon the verdict."

{¶ 10} The plain language of the term, escape, is defined in R.C. 2921.34 as follows:

{¶ 11} "(A)(1) No person, knowing the person is under detention or being reckless in that regard, shall purposely break or attempt to break the detention, or purposely fail to return to detention, either following temporary leave granted for a specific purpose or limited period, or at the time required when serving a sentence in intermittent confinement * * *.

{¶ 12} "(B) 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. In the case of any other detention, irregularity or lack of jurisdiction is an affirmative defense only if either of the following occurs:

{¶ 13} "(1) The escape involved no substantial risk of harm to the person or property of another.

{¶ 14} "(2) The detaining authority knew or should have known there was no legal basis or authority for the detention.

{¶ 15} "(C) Whoever violates this section is guilty of escape."

{¶ 16} Thus, in order to "escape", one must first be under "detention." "Detention" is defined by R.C. 2921.01(E), which provides:

{¶ 17} "'Detention' means arrest; confinement in any vehicle subsequent to an arrest; confinement in any public or private facility for custody of persons charged with or convicted of crime in this state or another state or under the laws of the United States or alleged or found to be a delinquent child or unruly child in this state or another state or under the laws of the United States; hospitalization, institutionalization, or confinement in any public or private facility that is ordered pursuant to or under the authority of section 2945.37, 2945.371, 2945.38, 2945.39, 2945.40, 2945.401, or 2945.402 of the Revised Code; confinement in any vehicle for transportation to or from any facility of any of those natures; detention for extradition or deportation; except as provided in this division, supervision by any employee of any facility of any of those natures that is incidental to hospitalization, institutionalization, or confinement in the facility but that occurs outside the facility; supervision by an employee of the department of rehabilitation and correction of a person on any type of release from a state correctional institution; or confinement in any vehicle, airplane, or place while being returned from outside of this

state into this state by a private person or entity pursuant to a contract entered into under division (E) of section 311.29 of the Revised Code or division (B) of section 5149.03 of the Revised Code. For a person confined in a county jail who participates in a county jail industry program pursuant to section 5147.30 of the Revised Code, 'detention' includes time spent at an assigned work site and going to and from the work site."

{¶ 18} At the point in time when appellant failed to report to the county jail, it was after his sentencing but before his confinement. None of the situations in which a person can be under detention apply to appellant. When he was apprehended by authorities, he was not in "confinement" in a vehicle or facility; he was not under confinement for the purposes of transportation to or from a facility; he was not under detention for extradition or deportation; he was not under the supervision of "any employee of any facility of any of those natures that is incidental" to confinement in a facility; he was not yet under the supervision of an employee of the Department of Rehabilitation and Correction while on release; he was not being returned from outside or inside of Ohio; and he was not participating in a county jail industry program.

{¶ 19} Because appellant was not under "detention" as intended by R.C. 2921.01, the trial court could not have found that appellant "escaped" when he was apprehended. Therefore, given the plain language of R.C. 2949.06, the trial judge was without authority to "set aside" appellant's first sentence and proceed to sentence appellant for a violation of R.C. 2949.06 . See *State v. Harvey*, 6th Dist. No. E-08-009, 2009 -Ohio- 1534. Appellant's sole assignment of error is found not well-taken.

{¶ 20} On consideration whereof, the judgment of the Erie County Court of Common Pleas is reversed. This matter is remanded to the trial court with instructions to reinstate the judgment entry of sentencing dated December 18, 2007 and to delete the condition and references to R.C. 2949.06. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Richard W. Knepper, J.
CONCUR.

JUDGE

Judge Richard W. Knepper, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.