

[Cite as *State v. Bennett*, 2017-Ohio-5589.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105585

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TIMOTHY BENNETT

DEFENDANT-APPELLANT

**JUDGMENT:
VACATED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-599094-A

BEFORE: Celebrezze, J., E.T. Gallagher, P.J., and Jones, J.

RELEASED AND JOURNALIZED: June 29, 2017

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, Timothy Bennett, appeals his escape conviction that resulted when, on community control, he removed a court-ordered alcohol monitoring device from his person. He argues that an element of the offense is lacking and the trial court erred in finding him guilty following his no contest plea. The state concedes the error. Therefore, appellant's first assignment of error is sustained and his escape conviction and sentence are vacated.

I. Factual and Procedural History

{¶2} Appellant was placed on community control in 2014. He violated the terms of community control twice and was ordered to wear a transdermal alcohol monitor as a condition of continued community control. Appellant's supervising officer was alerted that the transdermal monitor had been tampered with. Appellant also missed his scheduled report date with the officer. A capias warrant was issued for appellant's arrest. Appellant was arrested soon after. At all relevant times, appellant was not under supervised release detention as set forth in R.C. 2921.31(D), but was subject to community control supervision.

{¶3} Appellant was indicted and charged with one count of escape, a violation of R.C. 2921.34(A)(3), and one count of criminal damaging, a violation of R.C. 2909.06(A)(1). On February 6, 2017, the trial court conducted a change of plea hearing where appellant entered a no contest plea to one count of escape, and a guilty plea to one count of criminal damaging. Appellant's attorney presented arguments as to why the

trial court should not find him guilty of escape and the state presented contrary arguments. Appellant admitted to cutting off the monitoring device, but argued that he was not on supervised release as required by the statute. The trial court found appellant guilty of escape and criminal damaging, and set a date for sentencing. On February 28, 2017, appellant was sentenced to a five-year period of community control.

{¶4} Appellant then filed the instant appeal assigning the following errors for review:

I. The trial court erred or in the alternative abused its discretion by finding the appellant guilty of escape in violation of [R.C.] 2921.34(A)(3).

II. The appellant received ineffective assistance of counsel, thereby violating his right to be represented by counsel.

II. Law and Analysis

{¶5} Appellant pled no contest to the charge of escape and argued to the trial court that as a matter of law, the court should not find him guilty. Appellant admitted to the facts underlying the charge, but claimed that those facts did not meet all the essential elements of the crime of escape as charged.

{¶6} “When the trial court asks for the recitation of the facts underlying a no contest plea to a felony charge and those facts negate the existence of an essential element of the offense charged, the trial court errs in making a finding of guilt.” *State v. Williams*, 8th Dist. Cuyahoga No. 103762, 2016-Ohio-7777, ¶ 11.

{¶7} The crime of escape with which appellant was charged provides,

[n]o person, knowing the person is under supervised release detention or being reckless in that regard, shall purposely break or attempt to break the

supervised release detention or purposely fail to return to the supervised release 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.

R.C. 2921.34(A)(3). R.C. 2921.34(D) defines “supervised release detention” as

detention that is supervision of a person by an employee of the department of rehabilitation and correction while the person is on any type of release from a state correctional institution, other than transitional control under section 2967.26 of the Revised Code or placement in a community-based correctional facility by the parole board under section 2967.28 of the Revised Code.

{¶8} In *State v. Williams*, 7th Dist. Mahoning No. 11 MA 156, 2012-Ohio-4262, the Seventh District determined that, as a matter of law, one on house arrest was not under detention as defined in R.C. 2921.34. This case demonstrates that not all types of supervision qualify as “supervised release detention.”

{¶9} The state concedes that appellant’s community control sanctions do not qualify as “supervised release detention” under R.C. 2921.34(D). There is no dispute that appellant was subject to community control sanctions, not release from a state correctional institution or community-based correctional facility. As the state’s recitation of the facts precludes a finding that appellant was on “supervised release detention,” an essential element of the crime of escape as charged in R.C. 2921.34(A)(3) is missing. Under this court’s decision in *Williams*, the trial court erred in finding appellant guilty of escape. Appellant’s escape conviction must be vacated, leaving only appellant’s criminal

damaging conviction. This holding renders appellant's ineffective assistance of counsel claim moot.

III. Conclusion

{¶10} Appellant was not on "supervised release detention" at the time he was alleged to have committed the crime of escape. Therefore, the trial court erred in finding appellant guilty of escape following appellant's no contest plea.

{¶11} Appellant's escape conviction is vacated.

It is ordered that appellant recover of said appellee 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.

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

FRANK D. CELEBREZZE, JR., JUDGE

EILEEN T. GALLAGHER, P.J., and
LARRY A. JONES, SR., J., CONCUR