

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

State of Ohio

Court of Appeals No. WD-10-010

Appellee

Trial Court No. 2009CR0532

v.

Kinley Kelm

DECISION AND JUDGMENT

Appellant

Decided: June 30, 2011

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Melissa A. Schiffel and David E. Romaker, Jr., Assistant Prosecuting Attorneys, for appellee.

William F. Hayes, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas following a jury verdict finding defendant-appellant Kinley Kelm guilty of escape in violation of R.C. 2921.34(A)(1), a felony of the third degree. For the reasons that follow, we affirm.

{¶ 2} On August 14, 2009, appellant pleaded guilty to a felony of the fourth degree. At the time of the plea hearing, appellant was already in custody, and he remained in custody for the relevant time following the hearing. Shortly before the sentencing hearing, appellant filed a motion for a furlough so that he could move some personal belongings from his residence into storage. On August 18, the trial court granted appellant's motion, and ordered a furlough from 10:00 a.m. to 8:00 p.m. on August 19. The trial court judge handwrote on the order that "[f]ailure to promptly return to jail will constitute a charge of escape."

{¶ 3} Appellant failed to return to the jail on August 19. On August 20, appellant's counsel filed a motion to extend the furlough on the grounds that appellant could not return to jail because he was undergoing treatment at St. Vincent's Hospital in Toledo for injuries that he claimed were received when muggers attacked him while he was moving his personal belongings. On August 21, the trial court granted the motion and ordered that the furlough was to last until the hospital discharged appellant.

{¶ 4} Appellant remained at the hospital for the next few days, during which time he occasionally spoke on the phone with Cpl. Chip Maurer, who was in charge of the booking area of the Wood County Sheriff's Department. Maurer testified that appellant indicated his desire to get another extension of his furlough for rehabilitation after he was discharged. The need for rehabilitation was never confirmed with the hospital. Maurer also testified that, during these conversations, he informed appellant that he was to return to jail immediately upon being released from the hospital.

{¶ 5} On August 25, believing that appellant had been discharged from the hospital, Maurer contacted the trial court and was told to expect appellant at the Wood County Justice Center by 6:00 p.m. When appellant did not return by that time, a sergeant at the jail initiated the procedures for charging appellant with escape and obtaining a warrant for his arrest. That warrant was issued around 8:00 p.m. on August 25.

{¶ 6} In addition to speaking with Maurer while in the hospital, appellant also had multiple phone conversations with Sgt. James Gross of the Perrysburg Township Police Department. Appellant had previously assisted Gross with an investigation, and wanted to talk to him regarding some information that appellant could provide. Gross testified that, on August 25, appellant called while Gross was unavailable, and left a phone number where Gross could reach him. When Gross called the number an hour later, he learned that it was the number to a bar or a carryout on the east side of Toledo, and that appellant was no longer at that location.

{¶ 7} Gross also testified that, later in the evening on August 25, appellant successfully contacted him, and during the conversation told Gross that he had been discharged from the hospital and was tracking down one of the individuals who could provide information concerning the prior investigation. Gross informed appellant that "[y]ou need to go back to the jail. You can't just go out and do your own investigation." After failing in his attempts to elicit where appellant was, Gross finally said to appellant, "Well, you know if you are going to do this you are going out and do it, I'm telling you

not to investigate it. What you need to do is you need to come in and see me at two o'clock the next day." Sometime after this conversation, on the night of August 25, appellant was arrested in the waiting room of St. Vincent's Hospital.

{¶ 8} On November 5, 2009, appellant was indicted on one count of escape. Appellant filed a demand for discovery on December 23, 2009, and on January 22, 2010, appellant's counsel acknowledged his receipt of the discovery. Nevertheless, on February 9, 2010, one day before trial was set to begin, the prosecutor's office for the first time provided appellant's trial counsel with a copy of an August 24, 2009 email from the trial court's criminal case manager to the prosecutor, the public defender's office, and appellant's former attorney that stated:

{¶ 9} "I just received a phone call from [Maurer] at the jail. His understanding is that [appellant] is going to be released to a rehab center after his hospital stay. The hospital is supposed to call [Maurer] when the [appellant] is released. Then [Maurer] will need another order for the furlough to extend to the rehab facility.

{¶ 10} "This court will need a motion *with documentation attached* for the Judge to consider granting an extension to the rehab facility." (Emphasis sic.)

{¶ 11} Within three hours of receiving this information, appellant's trial counsel filed both a motion in limine to exclude the email, and a motion to continue the trial so that counsel could do further investigation into the email to determine whether it was exculpatory, and if so, to subpoena the necessary witnesses to testify.

{¶ 12} The next morning, before the trial began, the trial court excluded the email from evidence, and then addressed the motion for continuance. Trial counsel argued that he needed further time to investigate the facts contained in the email, and to check with hospital staff, physicians, and personnel because the comment that appellant was to go to physical therapy immediately upon discharge may provide "an absolute defense for the charge of escape." The court replied, "I'm not seeing it, [counsel], in fact your motion to exclude it argues against your motion for continuance. So I'm going to deny your motion to continue the case on the eve of trial. Ready for jury?"

{¶ 13} The jury was then selected and sworn in. After the prosecution's case in chief, appellant moved for a judgment of acquittal pursuant to Crim.R. 29, which the trial court denied. The defense then rested without calling any witnesses. Appellant again moved for a judgment of acquittal, which the trial court again denied. Following deliberations, the jury returned a verdict finding appellant guilty as charged. Appellant was sentenced immediately after trial, and was ordered to serve the maximum sentence of five years, consecutive to his term on the underlying felony.

{¶ 14} Appellant timely filed his notice of appeal, and now asserts the following five assignments of error:

{¶ 15} 1. "The trial court erred to the prejudice of Kelm and denied his right to due process and a fair trial by not granting the Rule 29 motion for judgment of acquittal as to the single count of the indictment."

{¶ 16} 2. "The trial court erred in denying the appellant's motion to continue the trial, when the State of Ohio provided potentially exculpatory evidence the day before trial, and a motion for a continuance was timely filed."

{¶ 17} 3. "The trial court erred in failing to conduct a constitutional analysis before denying the appellant's request for a continuance."

{¶ 18} 4. "The trial court erred in following *State v. Foster* after the U.S. Supreme Court issued its ruling in *Oregon v. Ice* when the trial court imposed a maximum sentence, consecutive to another previously imposed maximum sentence upon the appellant without making the required findings of fact."

{¶ 19} 5. "The trial court's 5 year prison sentence for escape, wherein no individual was physically harmed, violated appellant's right against cruel and unusual punishment as guaranteed by the 8th and 14th Amendments to the U.S. Constitution and Article I, Section 9 of the Ohio Constitution."

Crim.R. 29 Motions

{¶ 20} Under his first assignment of error, appellant alleges the trial court erred in denying his Crim.R. 29 motions for judgment of acquittal. Pursuant to Crim.R. 29(A), "[t]he court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶ 21} When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court's function is "to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph two of the syllabus, superseded by state constitutional amendment on other grounds as stated in *State v. Smith* (1997), 80 Ohio St.3d 89, 684 N.E.2d 668.

{¶ 22} Here, the element of escape at issue is whether appellant purposely failed to return to detention following temporary leave for a specific purpose or limited period. R.C. 2921.34(A)(1). Appellant argues that the prosecution presented no direct evidence showing that he was released from the hospital, and consequently failed to show that he purposely violated the court's order to return upon his release. Specifically, appellant relies on the fact that testimony from Maurer stating that hospital personnel told him that appellant had been discharged was excluded from being used to prove that appellant had indeed been discharged. In light of that exclusion, appellant contends that the only evidence showing that he had been released from the hospital was representations and hearsay statements made by the appellant himself that he thought he was released. Appellant does not argue that any of the evidence produced at trial was improperly

admitted; rather, he argues that, after excluding the statements from hospital personnel to Maurer, the remaining evidence is insufficient to support the trial court's denial of his Crim.R. 29 motions. We disagree.

{¶ 23} First, Gross testified on direct, cross, and re-direct examination that appellant said he had been discharged from the hospital and was investigating potential information on the east side of Toledo. No evidence was presented indicating that Gross's testimony was untrue, or that appellant was still admitted at the hospital.

{¶ 24} Second, both Gross and Maurer testified that they directly informed appellant that he was to return to jail immediately upon being released from the hospital. Further, a couple of witnesses provided testimony that the standard procedures for furlough included giving the inmate a copy of the judicial order granting the furlough. In this case, the copy appellant would have received included the handwritten notation "[f]ailure to promptly return to jail will constitute a charge of escape." Although appellant's trial counsel successfully elicited on cross-examination that none of the testifying officers could specifically remember handing appellant the order, when viewed in the light most favorable to the prosecution, a reasonable fact finder could have found that the standard procedures had been followed and appellant received a copy of the order.

{¶ 25} Finally, the prosecution entered into evidence a letter that appellant wrote to Gross approximately a week after appellant was arrested in the hospital waiting room.

In the letter, appellant stated "So I tell my friend not to worry about being there after work to pick me up from the hospital because I'll just stay there until the morning and figure out another ride tomorrow to get to your work so as to work with you guys because I was told by the Sgt. to be there at 2 p.m. to meet with him."

{¶ 26} To summarize, the prosecution presented evidence that appellant admitted he was discharged from the hospital, that appellant knew he was to return to jail upon being discharged from the hospital, that after his discharge he was driving around east Toledo, and that appellant cancelled a ride to return to jail so that he could stay in Toledo and meet with Gross the next day. After viewing this evidence in a light most favorable to the prosecution, we hold that a rational trier of fact could have found the essential element—that appellant was discharged from the hospital and purposely failed to return to the jail—proven beyond a reasonable doubt. Therefore, the trial court did not err in denying appellant's Crim.R. 29 motions for judgment of acquittal. Accordingly, appellant's first assignment of error is not well-taken.

Motion for a Continuance

{¶ 27} In appellant's second assignment of error, he alleges that the trial court erred when it failed to grant his motion for a continuance, which was filed in response to the discovery of the August 24, 2009 email the day before trial.

{¶ 28} "The grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial

of a continuance unless there has been an abuse of discretion." *State v. Unger* (1981), 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (citing *Ungar v. Sarafite* (1964), 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. In reviewing the trial court's exercise of discretion, we must weigh concerns such as a court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice against any potential prejudice to the defendant. *State v. Unger* at 67. "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.*, quoting *Ungar v. Sarafite* at 589.

{¶ 29} In light of the revelation of the email, appellant's trial counsel argued to the court that a continuance was necessary so that he could "investigate and check with hospital staff in regards to the medical issues involving my client." Counsel believed that the information upon which the email was based could provide an absolute defense to the charge of the escape, specifically any facts underlying the comment that "[Maurer's] understanding is that [appellant] is going to be released to a rehab center after his hospital stay." After hearing and considering counsel's argument, the trial court failed to see how the email was potentially exculpatory and why a continuance was needed, particularly

when counsel had simultaneously filed a motion to exclude the email, which the court granted.

{¶ 30} Appellant rightfully points out on appeal that this is not a case where there had already been multiple continuances or delays in the trial court proceedings, nor were there any lay witnesses for whom a continuance would have caused significant inconvenience because all of the state's witnesses were either professionals or state or state agency employees. Moreover, appellant also correctly identifies that it was the state's failure to disclose the email, not any action on appellant's part, which caused appellant's trial counsel to file the motion for continuance. Nevertheless, given the limited manner in which the facts underlying the email could have been exculpatory, and the appellant's knowledge of those facts, we cannot conclude that the trial court's denial of the continuance constituted an abuse of discretion.

{¶ 31} Appellant is charged with escape in violation of R.C. 2921.34(A)(1), which provides in relevant part, "No person, knowing the person is under detention or being reckless in that regard, shall * * * purposely fail to return to detention * * * following temporary leave granted for a specific purpose or limited period." Based on the elements of escape, the statements contained in the email are not exculpatory. For example, any statements concerning Maurer's understanding of appellant's rehab situation are not material to the issue of whether appellant actually was discharged from the hospital, and whether he purposely failed to return to jail upon being discharged. Similarly, the

statement "[t]his court will need a motion *with documentation attached* for the Judge to consider granting an extension to the rehab facility," is not exculpatory, and is in fact inculpatory, because the statement necessarily implies that the purpose for which appellant's furlough was extended did not include rehab. Thus, even if appellant could show that he was released to a rehab facility, he would still be in violation of the furlough that was extended for the limited purpose of his hospitalization.

{¶ 32} Instead, based upon appellant's trial counsel's insistence that he needs time to investigate appellant's medical issues, we infer that he believes it is the facts underlying the email that are exculpatory, not the email itself. Although trial counsel never delineated the arguments, we discern only two ways in which the facts underlying the email could be exculpatory. First, the email could reveal that, because appellant was to be released to a rehab facility for physical therapy, he was never actually "discharged" by the hospital, and thus his temporary leave for a specific purpose or limited period had not ended. Alternatively, the email could reveal that, because appellant believed he was being released to a rehab facility, he did not think that he was "discharged," and thus could not have purposely failed to return to detention.

{¶ 33} In either case, appellant would have already known the information he claims is exculpatory long before the prosecutor disclosed the email to appellant's trial counsel. As the patient, appellant would have known his status with the hospital and whether or not he was discharged. Further, even if he were confused as to his status,

appellant would have known if he thought he was not discharged, thereby allowing him to demonstrate that he did not "purposely" fail to return to jail. Thus, although the email was not disclosed to appellant's trial counsel until the day before trial, appellant was not prejudiced because the defenses that the email may have supported were based on knowledge that appellant already possessed. Accordingly, the trial court did not abuse its discretion when it denied the motion for continuance, and appellant's second assignment of error is not well-taken.

{¶ 34} Appellant's third assignment of error concerns the same issue, but in a slightly different framework—that the denial of his motion for a continuance denied appellant of his right to the effective assistance of counsel. Appellant relies on the principle articulated in *United States v. Burton* (C.A.D.C. 1978), 584 F.2d 485, 489, that not providing defense counsel a reasonable time to prepare for trial is "tantamount to denying altogether the assistance of counsel for the defense." However, as discussed above, appellant's trial counsel had ample time to prepare because the email only concerned information that was at all times known by appellant. Therefore, appellant's third assignment of error is not well-taken.

State v. Foster

{¶ 35} In his fourth assignment of error, appellant argues that the trial court erred when it did not sentence him under statutes that required the trial court to make particular findings of fact in order to impose maximum or consecutive sentences, R.C. 2929.14(C)

and R.C. 2929.14(E)(4), respectively. Notably, those statutes were excised by the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-0856, 845 N.E.2d 470. Subsequent to *State v. Foster*, the United States Supreme Court issued *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, which undermined the rationale that the Ohio Supreme Court relied on to hold the statutes relating to consecutive sentences unconstitutional. Based on *Oregon v. Ice*, appellant contends that the excised statutes should be revived and applied to appellant in this case, and because the trial court failed to make the requisite findings of fact when it sentenced appellant, it committed error.

{¶ 36} However, the Ohio Supreme Court has already addressed this issue and come to the opposite conclusion in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768. Specifically as to R.C. 2929.14(E)(4), which governs consecutive sentences, the Ohio Supreme Court held that "[t]he United States Supreme Court's decision in *Oregon v. Ice* does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*." (Citations omitted.) *State v. Hodge* at paragraph two of the syllabus. "Trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made." *Id.* at paragraph three of the syllabus. Further, the statute relating to maximum sentences, R.C. 2929.14(C), was not implicated by *Oregon v. Ice*, and thus

State v. Foster's excising of that statute was never called into doubt. *State v. Hodge* at ¶ 27. Therefore, pursuant to *State v. Hodge*, the trial court did not err when it sentenced appellant without applying the excised statutes. Accordingly, appellant's fourth assignment of error is not well-taken

Cruel and Unusual Punishment

{¶ 37} As his fifth and final assignment of error, appellant maintains that the trial court's imposition of a five-year sentence for escape constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Section 9, Article I of the Ohio Constitution. We are not persuaded. Here, the sentence falls within the statutory allowance for felonies of the third degree. *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 373, 715 N.E.2d 167. Further, given appellant's lengthy criminal history, we hold that imposing the maximum sentence of five years is not so greatly disproportionate as to "shock the sense of justice of the community." *Id.* at 371. Accordingly, appellant's fifth assignment of error is not well-taken.

{¶ 38} For the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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>.