

[Cite as *State v. Peters*, 2009-Ohio-5836.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92791**

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**STATE OF OHIO**

PLAINTIFF-APPELLANT

vs.

**GARLAND PETERS**

DEFENDANT-APPELLEE

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**JUDGMENT:  
REVERSED AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-508436

**BEFORE:** Dyke, J., Rocco, P.J., and Boyle, J.

**RELEASED:** November 5, 2009

**JOURNALIZED:**

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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), 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

{¶ 1} The State of Ohio appeals from the order of the court of common pleas that dismissed the indictment issued against defendant Garland Peters. For the reasons set forth below, we reverse and remand for further proceedings consistent with this opinion.

{¶ 2} On March 31, 2008, defendant was indicted for one count of escape in violation of R.C. 2921.34(A)(1). Defendant subsequently filed a motion to dismiss the indictment. He argued that he did not break detention because he was subject to electronic home monitoring. He further argued that the indictment subjected him to double jeopardy because it set forth allegations for which defendant was previously determined to have violated probation. In support of the motion, defendant presented docket entries in Case No. CR-07-500622-A which indicated that on February 26, 2008, the trial court determined that defendant violated the terms of his probation and sentenced him to three years of imprisonment.

{¶ 3} The trial court granted the motion to dismiss the indictment. The state now appeals and assigns three errors for our review.

{¶ 4} For its first assignment of error, the state maintains that the trial court violated the terms of Crim.R. 12(C) by conducting pretrial proceedings which constituted a “trial on the general issue” and, in essence, impermissibly granted defendant “summary judgment” prior to trial.

{¶ 5} Pursuant to Crim.R. 12(C):

{¶ 6} “Prior to trial, any party may raise by motion any defense, objection,

evidentiary issue, or request that is capable of determination without the trial of the general issue. \* \* \*.”

{¶ 7} Accord *State v. Serban*, Stark App. No.2006 CA 00198, 2007-Ohio-3634 (“A Crim.R. 12 pre-trial motion to dismiss cannot reach the merits or substance of the allegations as there is no equivalent of the civil rules summary judgment procedure in the criminal arena”); *Elyria v. Elbert* (Oct. 4, 1995), Lorain App. Nos. 95CA006082, 95CA006083 (In deciding whether to dismiss an indictment, the court should look only at its face; there is no “summary judgment” on a criminal indictment in Ohio).

{¶ 8} A trial court may not summarily dismiss an indictment based on the sufficiency of the evidence. See *State v. Varner* (1991), 81 Ohio App.3d 85, 610 N.E.2d 476; *State v. Lee*, Cuyahoga App. No. 89087, 2008-Ohio-143. Rather, under Crim.R. 12(C), the proper determination is whether the language within the indictment alleges the offense. See *State v. Heebsh* (1992), 85 Ohio App.3d 551, 620 N.E.2d 859. A claim which goes beyond the face of the indictment is improperly presented under Crim.R. 12 and should be presented at the close of the state’s case as a Crim.R. 29 motion for acquittal. *Varner*, supra.

{¶ 9} In this matter, the trial court did not simply determine whether the indictment alleges an offense. The trial court looked beyond the face of the indictment and considered the sufficiency of the state’s allegations, then dismissed the indictment. In so doing, the trial court engaged in a pretrial determination of the general issue of the case and violated Crim.R. 12( C).

{¶ 10} The first assignment of error is well-taken.

{¶ 11} For its second assignment of error, the state asserts that the trial court erred insofar as it determined that the instant prosecution was barred by double jeopardy.

{¶ 12} In accordance with Crim.R. 48(B), the court has the inherent power to dismiss with prejudice only where it is apparent that the defendant has been denied a constitutional or statutory right, the violation of which would, in itself, bar prosecution. *Fairview Park v. Fleming* (Dec. 7, 2000), Cuyahoga App. Nos. 77323, 77324, citing *State v. Dixon* (1984), 14 Ohio App.3d 396, 471 N.E.2d 864.

{¶ 13} As to whether prosecution of the instant matter violates the constitutional prohibition against double jeopardy, the court in *State v. Seeman* (Mar. 19, 1999), Lucas App. No. 98-1176, determined that the defendant had not been twice placed in jeopardy where he was prosecuted for the crime of escape after it was previously determined that defendant had violated the terms of community control sanctions. The court stated:

{¶ 14} “[A] finding that a defendant violated the terms and conditions of community control is not the equivalent of a criminal prosecution in that it does not result in a conviction, nor does it constitute punishment. *United States v. Miller* (C.A. 6, 1986), 797 F.2d 336, 340.

{¶ 15} “As a condition of community control, appellant was required to follow the laws of the state of Ohio. R.C. 2951.02(C)(1)(b). Thus, by committing the independent crime of escape, a violation of the laws of the state of Ohio,

appellant breached the terms of his community control.

{¶ 16} “After reviewing the proceedings below, we find that appellant has not been subjected to double jeopardy. At the time of his escape conviction, appellant had already been convicted and sentenced for his prior crime of aggravated assault. After being found in violation of the terms and conditions of community control, pursuant to his sentence for aggravated assault, appellant was continued on community control. The sentence imposed by the trial court for appellant’s escape conviction is based upon an event completely unrelated to the events which culminated in his prior conviction.”

{¶ 17} Accord *State v. Estis* (June 11, 1999), Lucas App. No. L-98-1373; *State v. Hollis* (May 15, 1997), Cuyahoga App. No.70781; *State v. Boone* (March 10, 1994), Cuyahoga App. No. 64924.

{¶ 18} In accordance with the foregoing, the earlier proceedings for violation of community control sanctions do not bar the instant prosecution under the double jeopardy prohibition.

{¶ 19} The second assignment of error is well taken.

{¶ 20} For its third assignment of error, the state of Ohio asserts that the trial court erred insofar as it ruled that electronic home monitoring does not constitute detention under R.C. 2921.34, and therefore cannot serve as a basis for the offense of escape.

{¶ 21} Although the definition of “detention” set forth in R.C. 2921.34(E) has previously excluded supervision and restraint incidental to probation and parole, it

no longer contains this exclusionary language. Accordingly, the trial court erred inso far as it determined that the state of Ohio failed to state an offense in this matter. *State v. Holmes*, Lucas App. No. L-08-112, 2008-Ohio-6804; *In re Gould*, Licking App. No. 07-CA-0099, 2008-Ohio-900.

{¶ 22} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said 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.

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., and  
MARY J. BOYLE, J., CONCUR