

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION**

**RICHARD COX,
Appellant,**

v.

**UCN: 512018AP000009APAXWS
Appeal No.: 18-AP-9
Lower No.: 17-MM-5208**

**STATE OF FLORIDA,
Appellee.**

On appeal from Pasco County Court,
Honorable Debra Roberts

Jessica Rae Stephens, Esq.,
for Appellant,

David M. Caples, Esq.,
Assistant State Attorney,
for Appellee.

ORDER AND OPINION

Appellant contends that the trial court erred in denying his Motion to Dismiss. For the reasons discussed below, the Court affirms the trial court's order.

STATEMENT OF THE CASE AND FACTS

On October 30, 2017, Appellant was charged by Information with a Violation of Pretrial Release, a first-degree misdemeanor, in violation of section 741.29(6), Florida Statutes (2017). On November 16, 2017, Appellant filed a Motion to Dismiss the Information. The motion alleged the following facts: (1) That on August 27, 2017, Appellant had been arrested for aggravated battery pursuant to section 784.045(1)(a)2. according to the State's Complaint Affidavit and therefore had not been arrested for an act of domestic violence; (2) that a no contact order was entered against Appellant for the victim; (3) On October 30, 2017, the State filed an Information alleging a violation of pretrial release contrary to section 741.29(6); and (4) that Appellant had been in custody since August 27, 2017. Appellant argued that he could not be convicted of Violation of

Pretrial Release under section 741.29(6) because Appellant was in custody and had not been arrested for an act of domestic violence as defined in section 741.28.

On December 18, 2017, the State filed a Traverse stating that Appellant was the husband and he had struck the victim, his wife, thus making this aggravated battery an act of domestic violence. The State further argued that Appellant had been granted conditions of pretrial release but had not yet bonded out and that Appellant violated a condition of pretrial release by contacting the victim from jail.

A hearing on the Motion to Dismiss was held on January 5, 2018. During that motion, the trial court held that because the State's Traverse had specifically denied Paragraph 1 of Appellant's Motion to Dismiss, the motion was denied. On February 7, 2018, Appellant pled no contest to Violation of Pretrial Release but expressly reserved his right to appeal the trial court's denial of his Motion to Dismiss. Appellant was adjudicated guilty and sentenced to time served.

STANDARD OF REVIEW

"The purpose of a motion to dismiss is to allow a pretrial determination of the law of the case when the facts are not in dispute," and when "considering the motion, the State is entitled to the most favorable construction of the evidence, and all inferences should be resolved against the defendant." *Bell v. State*, 835 So. 2d 392, 393-94 (Fla. 2d DCA 2003). This court reviews the trial court's order on a motion to dismiss pursuant to a *de novo* standard. *Id.* Questions of law are also reviewed pursuant to a *de novo* standard. *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000).

LAW AND ANALYSIS

Appellant's contentions of error may be restated as follows: Appellant contends that despite the State's Traverse denying Paragraph 1, the trial court erred in denying the Motion to Dismiss because the facts in Paragraph 4 not refuted by the Traverse established that Appellant had not been released from custody. Therefore, because he had not been released from custody, he could not have been found guilty of Violation of Pretrial Release. The State responds that the trial court did not err in denying the Motion to Dismiss because while Paragraph 4 was undisputed, it was not a material fact because it is possible to violate a condition of pretrial release where conditions of release have been set but the defendant has not yet bonded out of jail.

The State is correct. See §§ 741.29(6) (A person who willfully violates a condition of pretrial release provided in s. 903.047, when the original arrest was for an act of domestic violence . . . commits a misdemeanor of the first degree"); 903.047(1)(b) (As a condition of pretrial release . . . the defendant must, if the court issues an order of no contact, refrain from any contact of any type with the victim, except through pretrial discovery pursuant to the Florida Rules of Criminal Procedure"); *Santiago v. Ryan*, 109 So. 3d 848 (Fla. 3d DCA 2013) (holding that the defendant had violated pretrial release under section 903.047 by contacting the victim by phone from jail after conditions of pretrial release had been set but before he had bonded out).

CONCLUSION

Because conditions of pretrial release had been set, Defendant could have been found guilty of violating those conditions regardless of the undisputed fact that he was still in custody. Therefore, the trial court did not err in denying his Motion to Dismiss. The trial court's order and Appellant's conviction are affirmed.

It is therefore ORDERED and ADJUDGED that the order of the trial court is hereby AFFIRMED.

DONE AND ORDERED in Chambers at New Port Richey Pasco County, Florida this ____ day of _____, 2018.

Original Order entered on July 20, 2018, by Circuit Judges Susan Barthle, Shawn Crane, and Daniel D. Diskey.

Copies furnished to:
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