

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JOHN CHARLES KENNEDY

Defendant-Appellant

: JUDGES:

:
: Hon. Patricia A. Delaney, P.J.
: Hon. W. Scott Gwin, J.
: Hon. William B. Hoffman, J.

: Case No. 16CA59

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Richland County Court
of Common Pleas, Case No. 2010-CR-
0278 D

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY

April 12, 2017

APPEARANCES:

For Plaintiff-Appellee:

GARY D. BISHOP
RICHLAND COUNTY PROSECUTOR

DANIEL M. ROGERS
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For Defendant-Appellant:

JAMES L. BLUNT, II
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Delaney, P.J.

{¶1} Defendant-Appellant John Charles Kennedy appeals the August 19, 2016 judgment entry of the Richland County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

{¶2} On July 29, 2010, Defendant-Appellant, John Charles Kennedy, pled guilty to two counts of passing bad checks in violation of R.C. 2913.11, nine counts of theft in violation of R.C. 2913.02, five counts of forgery in violation of R.C. 2913.31, one count of attempted burglary and one count of burglary in violation of R.C. 2911.12, and one count of possession of criminal tools in violation of R.C. 2923.24. By entry filed August 17, 2010, the trial court sentenced Kennedy to an aggregate term of four years in prison.

{¶3} On February 23, 2011, the trial court granted Kennedy judicial release and suspended the remainder of his prison term on the condition he complete four years of community control.

{¶4} In 2012, Kennedy was charged with a number of probation violations. Kennedy admitted to the violations and was ordered to complete the Reformers Unanimous program (hereinafter "RU").

{¶5} In 2014, Kennedy was again charged with probation violations. Kennedy admitted to four of the five alleged violations and the trial court sentenced him to an aggregate term of four years in prison.

{¶6} On April 9, 2014, Kennedy filed three motions asking for jail time credit for the three programs he participated in while on community control, including RU. By order filed April 25, 2014, the trial court denied Kennedy's request with respect to Community

Alternative Center and RU, but granted Kennedy's motion for jail time credit with respect to Crosswaeh Community Based Correctional Facility and credited him with 173 days.

{¶7} On October 16, 2014, Kennedy filed a motion to reconsider and amend the jail time credit. By order filed October 23, 2014, the trial court denied the motion. Kennedy filed an appeal. This court vacated the trial court's decision and remanded the matter, stating the following: "We vacate the trial court's judgment as to RU and remand the matter to the court with instructions to determine 1) whether a hearing is necessary, and, should the relief requested be denied, 2) to place on the record an explanation of why Kennedy's participation in Reformers Unanimous was not 'confinement' so that this court may conduct a meaningful review." *State v. Kennedy*, 5th Dist. Richland No. 15CA32, 2015-Ohio-5401, ¶ 24.

{¶8} On January 4, 2016, Kennedy filed a motion for an evidentiary hearing on the issue of confinement and time spent at RU. By order filed February 16, 2016, the trial court denied Kennedy's request for an evidentiary hearing and again denied Kennedy's motion for jail time credit for time spent at RU. The trial court's decision cited to the attached affidavit of Daniel Gates, program director for RU, who averred Kennedy's time at RU did not constitute "confinement" for purposes of jail time credit.

{¶9} Kennedy appealed. In *State v. Kennedy*, 5th Dist. Richland No. 16CA16, 2016-Ohio-4788, we vacated the February 16, 2016 judgment entry and remanded the matter for an evidentiary hearing on the issue of "confinement" vis-à-vis the RU program. *Id.* at ¶ 17. We found Gates was unqualified to give the opinion that Kennedy's time with RU was not "confinement" within the meaning of Ohio's jail time credit statute. *Id.* at ¶ 15.

{¶10} The trial court held an evidentiary hearing on August 3, 2016. The State presented the testimony of Daniel Gates, a program director for RU. Kennedy testified on his own behalf.

{¶11} On August 19, 2016, the trial court issued its judgment entry determining Kennedy's time at RU did not constitute "confinement" for purposes of the jail time credit statute.

{¶12} It is from this judgment Kennedy now appeals.

ASSIGNMENT OF ERROR

{¶13} Kennedy raises one Assignment of Error:

{¶14} "WHETHER THE PERIOD OF TIME DEFENDANT WAS IN THE REFORMERS UNANIMOUS TREATMENT FACILITY WAS CONFINEMENT."

ANALYSIS

Definition of "Confinement"

{¶15} In his sole Assignment of Error, Kennedy argues he should receive jail time credit for his time spent at RU. R.C. 2967.191 governs reduction in prison term for prior confinement and states in pertinent part:

The department of rehabilitation and correction shall reduce the stated prison term of a prisoner * * * by the total number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced, including confinement in lieu of bail while awaiting trial, confinement for examination to determine the prisoner's competence to stand trial or sanity, and confinement while awaiting

transportation to the place where the prisoner is to serve the prisoner's prison term.

{¶16} Although it is the department's duty to reduce the term of incarceration by the number of days served prior to sentencing, it is the responsibility of the sentencing court to properly calculate the amount of days for which such credit may be extended. *State v. Kennedy*, 5th Dist. Richland No. 15CA32, 2015-Ohio-5401, ¶ 18 citing *State ex rel. Corder v. Wilson*, 68 Ohio App.3d 567, 589 N.E.2d 113 (10th Dist.1991). A trial court may issue credit for time spent in a rehabilitation facility. *State v. Osborn*, 3rd Dist. Marion No. 9-05-35, 2006-Ohio-1890, ¶ 19. The issue is whether the program constitutes “confinement.” Time spent in a rehabilitation facility where one's ability to leave whenever he or she wishes is restricted may be confinement for the purposes of R.C. 2967.191. See *State v. Napier*, 93 Ohio St.3d 646, 2001–Ohio–1890 758 N.E.2d 1127. In *State v. Napier, supra*, the Ohio Supreme Court found “confinement” includes facilities where a failure to return constitutes escape. *State v. Holda*, 5th Dist. Richland No. 2006CA0039, 2006-Ohio-4452, ¶ 12. “Confinement” also includes facilities that have day privileges only with permission, and only to specific places at designated times. *Id.*

{¶17} As noted by this Court in *State v. Jones*, 122 Ohio App.3d 430, 432, 702 N.E.2d 1061 (5th Dist.1997), the “court must review the nature of the program to determine whether the restrictions on the participants are so stringent as to constitute ‘confinement’ as contemplated by the legislature.” *Id.*; see also, *State v. Osborne*, 5th Dist. Richland No. 2009 CA 0119, 2010–Ohio–4100, ¶ 14. “The nature of the review may depend upon the trial court's familiarity with the facility and the defendant's participation in a particular program.” *State v. Crittle*, 11th Dist. Lake No.2000–L–042, unreported,

2001 WL 687435, *3 (June 15, 2001). “The trial court may hold an evidentiary hearing to determine the exact nature and circumstances of the program. The trial court may choose to take judicial notice or accept evidence by way of affidavits or a stipulation from the parties regarding the [community-based correctional facility]. The evidence would have to be detailed enough to permit this court to effectively review the trial court’s determination that the facility does or does not qualify as a [community-based correctional facility] based upon the criteria set forth above.” *Id.*; see also, *State v. Ventra*, 11th Dist. Geauga No. 2010–G–2968, 2011–Ohio–156.

Evidence Presented Does Not Show Confinement

{¶18} The State argues there is sufficient, competent, and credible evidence to support the trial court’s determination that Kennedy’s time spent in the RU program was not “confinement.” The trial court held an evidentiary hearing on August 3, 2016.

{¶19} Daniel Gates, a program director with RU testified on behalf of the State. Gates testified that RU is a faith-based program catering to people with addictions. (T. 5). The inpatient treatment facility is located in Hammond, Indiana and Kennedy was sent to this facility. (T. 5, 6). The exterior doors of the Hammond, Indiana facility are not locked and it does not have a fence around the perimeter. (T. 6). The residents are not kept in handcuffs or shackles. (T. 8). The residents are permitted to leave the premises for various reasons: (1) special purposes, such as Sunday morning worship, or (2) daily basis, such as work detail. (T. 8). While on work detail, a resident is not monitored and may walk away. (T. 9). A resident is eligible to file for a special pass to leave the facility. (T. 8). He or she may look for work or attend other approved errands. (T. 11).

{¶20} During a resident's probationary period at the facility, the resident has less freedom of movement than he does after the probation period. (T. 13). During the probationary period, however, the resident may leave the facility with special permission, to attend church, or to attend a group activity, such as a baseball game. (T. 13). After the probation period, the resident may work outside the facility and go home to visit family. (T. 15).

{¶21} Kennedy testified on his own behalf. Kennedy testified that during the first four months, he was restricted to the facility. (T. 21). He was only permitted to attend church and work at the facility while supervised. (T. 22). Kennedy did not have visitors the first four months. (T. 22). After four months, Kennedy was permitted to look for outside work. (T. 22).

{¶22} During cross-examination, Kennedy testified the windows of the facility were not locked. (T. 24). Kennedy conceded the level of confinement at the Hammond, Indiana facility was different from the level of confinement he experienced in prison. (T. 27-28).

{¶23} The testimony shows that even during the probationary period, a resident of the RU program is permitted to leave the facility to work, worship, or attend a group outing. The resident can apply for a special pass to leave the facility. Based on the evidence in the record, we find there was sufficient, competent, and credible evidence supporting the trial court's conclusion that Kennedy's time spent in the RU program was not confinement within the meaning of R.C. 2967.191. Accordingly, we find the trial court did not err when it denied Kennedy a reduction against his prison sentence for time spent in the RU program.

{¶24} Kennedy's sole Assignment of Error is overruled.

CONCLUSION

{¶25} The judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Gwin, J. and

Hoffman, J., concur.