

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 17CA6
	:	
v.	:	
	:	<u>DECISION AND</u>
MICHAEL D. LINEK,	:	<u>JUDGMENT ENTRY</u>
AKA: MICHAEL D. LINEK II,	:	
	:	
Defendant-Appellant.	:	RELEASED 02/05/2018

APPEARANCES:

Timothy Young, Ohio Public Defender, and Timothy B. Hackett, Assistant Ohio Public Defender, Columbus, Ohio, for defendant-appellant.

Judy C. Wolford, Pickaway County Prosecuting Attorney, and Robert A. Chamberlain, Pickaway County Assistant Prosecuting Attorney, Circleville, Ohio, for plaintiff-appellee.

Hoover, P.J.

{¶ 1} Defendant-appellant, Michael D. Linek, aka Michael D. Linek II (“Linek”), appeals from the sentence he received in the Pickaway County Common Pleas Court after he pleaded guilty to one count of robbery. Because the prison term imposed by the trial court is outside of the permissible statutory range and therefore contrary to law, we reverse the judgment of the trial court, vacate Linek’s sentence, and remand this matter to the trial court for a resentencing hearing. We further find that the trial court erred in calculating Linek’s jail-time credit, having failed to award him credit for time served in the juvenile detention facility while awaiting transfer from the juvenile court to the common pleas court. Thus, on remand, the trial court should award Linek the proper jail-time credit.

I. Facts and Procedural Posture

{¶ 2} On October 7, 2016, Linek, then 17 years old, was arrested and detained in the Multi-County Juvenile Detention Center (“Multi-County JDC”). Four days later, on October 11, 2016, a formal complaint was filed in Pickaway County Juvenile Court (Case Number 2016JO563) alleging that Linek was delinquent for committing robbery, in violation of R.C. 2911.02(A)(3), a felony of the third degree if committed by an adult. That same day, October 11, 2016, the State filed a motion to transfer the case to the Pickaway County Common Pleas Court, General Division, for criminal prosecution. On November 30, 2016, Linek was transferred from the Multi-County JDC to the Pickaway County Jail pending adult prosecution.

{¶ 3} On December 8, 2016, the juvenile court formally transferred jurisdiction to the Pickaway County Common Pleas Court. Approximately a month later, on January 6, 2017, Linek was indicted on one count of robbery, in violation of R.C. 2911.02(A)(3), a felony of the third degree. On January 25, 2017, Linek pleaded guilty to the offense as charged in the indictment. The trial court accepted Linek’s plea, found him guilty, and continued the matter for sentencing.

{¶ 4} Linek was ultimately sentenced on March 15, 2017, to 42 months in prison, plus court costs and restitution. By subsequent journal entry, Linek was given 114 days of jail-time credit “for the time he [was] incarcerated in the Pickaway County Jail only[.]” Linek filed a timely notice of appeal.

II. Assignments of Error

{¶ 5} On appeal, Linek assigns the following errors for our review:

Assignment of Error I:

The trial court committed plain error when it sentenced Michael Linek to a prison term outside the sentencing range authorized by statute, in violation of his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution. (3/15/2017 T.p. 11; 3/17/17 Entry).

Assignment of Error II:

The trial court committed plain error when it granted Michael Linek only 114 days of jail time credit, in violation of his right to equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution. (3/15/2017 T.p. 11; 3/17/17 Entry).

Assignment of Error III:

Michael Linek was denied the effective assistance of counsel when trial counsel failed to object to the imposition of a statutorily unauthorized sentence and to the trial court's inaccurate calculation of jail-time credit. Sixth and Fourteenth Amendments to the U.S. Constitution; Ohio Constitution, Article I, Section 10. (3/15/2017 T.p. 11; 3/17/17 Entry).

III. Law and Analysis

A. Assignment of Error I

{¶ 6} In his first assignment of error, Linek contends that the trial court erred when it sentenced him to a prison term outside the sentencing range authorized by statute. The State concedes that the trial court's imposition of a 42-month prison term for third degree robbery was outside the permissible statutory range. For the following reasons, we find that Linek's first assignment of error is well taken.

{¶ 7} As noted in *State v. Bever*, 4th Dist. Washington No. 13CA21, 2014-Ohio-600, the standard of review set forth in R.C. 2953.08(G)(2) shall govern all felony sentences. *Id.* at ¶ 13; *State v. Childers*, 4th Dist. Lawrence No. 17CA5, 2018-Ohio-26, ¶ 22. Under R.C. 2953.08(G)(2), when hearing an appeal of a trial court's sentencing decision, "[t]he appellate

court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing.”

{¶ 8} An appellate court may take any action authorized under R.C. 2953.08(G)(2) only if the court “clearly and convincingly finds” either: (1) “the record does not support the sentencing court’s findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;” or (2) “[t]hat the sentence is otherwise contrary to law.” R.C. 2953.08(G)(2)(a)-(b); *see also State v. Perry*, 4th Dist. Pike No. 16CA863, 2017-Ohio-69, ¶ 13. “[A] sentence is generally not contrary to law if the trial court considered the R.C. 2929.11 purposes and principles of sentencing as well as the R.C. 2929.12 seriousness and recidivism factors, properly applied post [-]release control, and imposed a sentence within the statutory range.” *State v. Brewer*, 2014–Ohio–1903, 11 N.E.3d 317, ¶ 38 (4th Dist.). “The sentence must also comply with any specific statutory requirements that apply, e.g. a mandatory term for a firearm specification, certain driver’s license suspensions, etc.” *Id.*

{¶ 9} Linek failed to object to the imposition of the sentence at the sentencing hearing and forfeited this issue, absent plain error. Crim.R. 52(B). For a reviewing court to find plain error: (1) there must be an error, i.e., “a deviation from a legal rule”; (2) the error must be plain, i.e., “an ‘obvious’ defect in the trial proceedings”; and (3) the error must have affected “substantial rights,” i.e., it must have affected the outcome of the proceedings. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). “[T]he burden of demonstrating plain error is on the party asserting it.” *State v. Davis*, 116 Ohio St.3d 404, 2008–Ohio–2, 880 N.E.2d 21, ¶ 378. “We take notice of plain error with the utmost of caution, under exceptional

circumstances, and only to prevent a manifest miscarriage of justice.” *State v. Merryman*, 4th Dist. Athens No. 12CA28, 2013–Ohio–4810, ¶ 49.

{¶ 10} In the case sub judice, the trial court imposed a prison term of 42-months. When a defendant pleads guilty to robbery in violation of R.C. 2911.02(A)(3), a felony of the third degree, and the defendant “previously has been convicted of or pleaded guilty in two or more separate proceedings to two or more violations of section 2911.01 [aggravated robbery], 2911.02 [robbery], 2911.11 [aggravated burglary], or 2911.12 [burglary] of the Revised Code, the prison term shall be twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months.” R.C. 2929.14(A)(3)(a); *see also State v. Whittington*, 6th Dist. Lucas No. L–16–1073, 2017–Ohio–613 (54–month sentence for robbery in violation of R.C. 2911.02(A)(3) was within the permissible range and not contrary to law because defendant pleaded guilty to robbery after pleading guilty to two past robberies); *State v. Hampton*, 8th Dist. Cuyahoga No. 104629, 2017-Ohio-7067 (60-month sentence for robbery in violation of R.C. 2911.02(A)(3) was within the permissible range and not contrary to law because defendant pleaded guilty to robbery after being convicted of two prior robberies).

{¶ 11} However, where the defendant has not previously been convicted of the listed offenses, a third degree felony robbery offense is punishable by a prison term of 9, 12, 18, 24, 30, or 36 months. *See* R.C. 2929.14(A)(3)(b); *State v. Taylor*, 2d Dist. Greene No. 2011-CA-67, 2013-Ohio-1074, ¶ 24. A review of the record does not indicate that Linek has been previously convicted of or pleaded guilty to the offenses that would make division (A)(3)(a) apply. Therefore, the trial court’s imposition of a 42-month sentence for a robbery of the third degree was outside the permissible statutory range and thus contrary to law. Additionally, we find that

Linek's sentence clearly deviates from a legal rule; and the error is obvious from reviewing the record.

{¶ 12} As far as whether the error affected Linek's substantial rights, "[t]he Supreme Court of Ohio has declared, '[j]udges have no inherent power to create sentences * * * [and lack] the authority to impose a sentence that is contrary to law.' " *State v. Clay*, 4th Dist. Lawrence No. 11CA23, 2013–Ohio–4649, ¶ 76, quoting *State v. Fischer*, 128 Ohio St.3d 92, 2010–Ohio–6238, 942 N.E.2d 332, ¶¶ 22–23. "[J]udges are duty-bound to apply sentencing laws as they are written." *Fischer* at ¶ 22. We find that since the trial court imposed a sentence that is contrary to law and not authorized by law, the sentencing error did affect Linek's substantial rights. *Accord State v. Wharton*, 2015–Ohio–5026, 53 N.E.3d 758, ¶ 34 (4th Dist.).

{¶ 13} Based on the foregoing, we find that the trial court committed plain error by sentencing Linek to a prison term outside the sentencing range authorized by statute. Accordingly, we sustain Linek's first assignment of error.

B. Assignment of Error II

{¶ 14} In his second assignment of error, Linek contends that the trial court failed to give him credit for time served in the Multi-County JDC in addition to the county jail pending resolution of the charges against him. He contends that he is entitled to 167 days of jail-time credit.

{¶ 15} "The practice of awarding jail-time credit, although now covered by state statute, has its roots in the Equal Protection Clauses of the Ohio and United States Constitutions." *State v. Fugate*, 117 Ohio St.3d 261, 2008–Ohio–856, 883 N.E.2d 440, ¶ 7. The Equal Protection Clause requires that defendants who are unable to afford bail must be credited for the time they

are confined while awaiting trial. *Id.* “ ‘The rationale for [giving jail-time credit] is quite simple. A person with money will make bail while a person without money will not. If both persons are given identical sentences, the reality is that unless the person who did not make bail is given credit for his pretrial time, the poorer person will have served more time than the other. Unequal treatment based on personal wealth is anathema to the Constitution as a denial of equal protection.’ ” *Id.* at ¶ 25 (Lundberg Stratton, J., concurring), quoting *State v. Thorpe*, 10th Dist. Franklin Nos. 99AP–1180 through 99AP–1187, 2000 WL 966702, *3 (June 30, 2000) (Grey, J. dissenting). *Accord State v. Primack*, 4th Dist. Washington No. 13CA23, 2014-Ohio-1771, ¶ 6.

{¶ 16} This principle is codified in R.C. 2967.191, which states that a prison term shall be reduced “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 * * * and confinement in a juvenile facility.” “Time spent in confinement includes time spent in detention awaiting transfer from the juvenile court to the adult court as well as time spent in the county jail awaiting trial and sentencing.” *State v. Golson*, 8th Dist. Cuyahoga No. 104776, 2017-Ohio-4438, ¶ 35, citing R.C. 2967.191 and *State v. Curtis*, 3d Dist. Allen No. 1-15-55, 2016-Ohio-6978, ¶ 84. “An offender may challenge the amount of jail-time credit on direct appeal.” *Curtis* at ¶ 84. “A trial court commits plain error when it fails to include the appropriate amount of jail-time credit in the sentencing entry.” *Id.*

{¶ 17} Here, Linek was held in the Multi-County JDC, on juvenile case number 2016JO0563, from October 7, 2016 through November 30, 2016, for a total of 54 days. Linek was then transported, in anticipation of his imminent bind-over, to the Pickaway County Jail and was held there from November 30, 2016 until his transport to prison on March 23, 2017, for an

additional 113 days. Thus, Linek spent 167 total days in confinement on the robbery charge¹ awaiting final disposition and transport to prison. Accordingly, the trial court did not properly award Linek with the entirety of his jail-time credit. The State concedes the error.

{¶ 18} Given the trial court's error in calculating Linek's jail-time credit, we sustain Linek's second assignment of error.

C. Assignment of Error III

{¶ 19} In his third assignment of error, Linek contends that his trial counsel was ineffective for not recognizing and objecting to the sentencing error and the jail-time credit error. However, given our disposition of his first and second assignments of error, we find Linek's third assignment of error moot. *See* App.R. 12(A)(1)(c).

IV. Conclusion

{¶ 20} Having sustained Linek's first and second assignments of error, we reverse the judgment of the trial court and vacate Linek's sentence. We remand this matter to the trial court to resentence Linek and to award him the proper jail-time credit consistent with this decision.

JUDGMENT REVERSED AND CAUSE REMANDED.

¹ Our review of the record reveals that Linek may not have been held in the Multi-County JDC solely on the robbery charge at issue. Clearly, Linek was arrested and sent to the Multi-County JDC on the date the robbery occurred – October 7, 2016. However, at a subsequent hearing, the juvenile court judge indicated that Linek's "original apprehension was the result of a warrant that was issued for absconding from the jurisdiction of the Department of Youth Services". [OP 40, pages 4-5.] Nonetheless, the State does not raise this issue, but rather concedes that Linek's "fifty-four days confined at a juvenile facility arose out of the offense [for] which [he] was convicted and sentenced." [Appellee's Brief at p. 5.]

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED AND THIS CAUSE IS REMANDED for further proceedings consistent with this opinion. Appellee shall pay the costs.

The Court finds that reasonable grounds existed for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County 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.

Abele, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

By: _____
Marie Hoover, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.