

[Cite as *State v. Dubose*, 2015-Ohio-621.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26105
	:	
v.	:	T.C. NO. 13CR3134
	:	
FRANK K. DUBOSE	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 20th day of February, 2015.

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FROELICH, P.J.

{¶ 1} Frank K. Dubose pled guilty in the Montgomery County Court of Common Pleas to one count of operating a vehicle under the influence of drugs or alcohol (OVI), in violation of R.C. 4511.19(A)(1)(a), a third-degree felony. The trial court sentenced him to a mandatory period of 60 consecutive days in prison, followed by up to five years of

community control.¹ Dubose's driver's license was suspended for three years. The trial court indicated that Dubose would not receive credit for any days spent in confinement prior to sentencing.

{¶ 2} Dubose appeals from his conviction, claiming that the trial court erred in failing to award him jail time credit for the 52 days he spent in confinement prior to sentencing. In its appellate brief, the State concedes that the trial court erred in failing to provide jail time credit to Dubose, recognizing that jail time credit is required by the Equal Protection Clause. We agree with the State's assessment.

{¶ 3} Dubose allegedly drove under the influence of drugs or alcohol on October 1, 2013. The record does not reflect if he was arrested that night (October 1) and later released on bond, but the parties appear to agree that he spent some time in jail prior to his indictment.

{¶ 4} On November 19, 2013, Dubose was indicted on two counts of OVI, one in violation of R.C. 4511.19(A)(1)(a), and the other in violation of R.C. 4511.19(A)(2). The indictment was served on Dubose by certified mail, and he was summoned to appear on December 3, 2013. Dubose appeared as ordered. The same day, the court released Dubose on his own recognizance and placed him in the electronic home detention program (EHDP). On January 2, 2014, Dubose pled guilty to OVI, in violation of R.C. 4511.19(A)(1)(a); the other OVI charge was dismissed.

{¶ 5} On January 14, 2014, prior to sentencing, the trial court ordered Dubose to be arrested for violating his EHDP release and set bond at \$25,000. Dubose was arrested on January 22, 2014. He did not post bond and remained incarcerated until

¹ We stayed Dubose's prison sentence pending appeal.

sentencing.

{¶ 6} On February 6, 2014, the trial court sentenced Dubose to a mandatory 60 consecutive days in prison, followed by five years of community control sanctions. At some point that day, the prosecutor raised the question of whether Dubose was entitled to jail time credit.² The court, prosecutor, defense counsel (by telephone), and an employee of the criminal justice services division of the common pleas court discussed the matter in chambers.

{¶ 7} During the in-chambers discussion, the prosecutor argued that the OVI statute required 60 “consecutive” days in prison, and therefore the court should count against those 60 days only the period of presentence confinement following Dubose’s arrest for violating EHDP (i.e., after January 22). The prosecutor stated that if Dubose later violated community control, he could then receive credit for his original (presumably preindictment) period of confinement; the prosecutor argued that these days in jail should not apply toward the 60-day prison sentence, because they were not served consecutively with the period following his re-arrest on January 22, 2014.

{¶ 8} Defense counsel countered that Dubose should receive jail time credit for his entire period of presentence confinement, because to do otherwise would violate equal protection. He indicated that a person with no pre-commitment confinement would serve only 60 days in prison, whereas a person who could not make bail and had pre-commitment confinement would be incarcerated for more than 60 days in total.

{¶ 9} The common pleas court employee who calculates jail time credit stated that “we’ve never applied jail time credit to any of those mandatory DUI sentences”

² The record does not contain a transcript of the sentencing hearing. Consequently, it is unclear whether the issue of jail time credit was first raised at sentencing or later that day.

because of R.C. 2929.13(G)(2). In relevant part, R.C. 2929.13(G)(2) sets forth the mandatory prison terms for a third-degree OVI offense and states that, subject to R.C. 2967.19(C)-(I), “the court shall not reduce the [mandatory OVI prison] term pursuant to section 2929.20 [judicial release], 2967.19 [80% release procedure], 2967.193 [credit for participation in certain prison programs], or any other provision of the Revised Code.”

{¶ 10} Defense counsel argued that the phrase “or any other provision of the Revised Code” should not include R.C. 2967.191, which addresses jail time credit. Counsel argued that R.C. 2929.13(G)(2) was concerned with preventing a reduced sentence after commitment to an institution, not jail time credit.

{¶ 11} The trial court ruled that it was “going to follow what the Court believes is the plain language of R.C. 2929.13(G)(2) * * * that would not permit the application of jail time credit to this mandatory consecutive 60 days.” The court stated that it was “not persuaded” by defense counsel’s equal protection argument. The trial court subsequently issued a judgment entry imposing sentence without jail time credit.

{¶ 12} Dubose appeals from the trial court’s judgment, claiming that the trial court’s refusal to include jail time credit is a “violation of equal protection” and a “misinterpretation of the Ohio Revised Code.” The State agrees with Dubose’s equal protection argument.

{¶ 13} The Supreme Court of Ohio has stated:

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. Recognizing that the Equal Protection Clause does not tolerate disparate treatment of defendants based solely on their

economic status, the United States Supreme Court has repeatedly struck down rules and practices that discriminate against defendants based solely on their inability to pay fines and fees. See *Griffin v. Illinois* (1956), 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (a state cannot deny appellate review to defendants unable to afford a transcript); *Williams v. Illinois* (1970), 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (a state may not imprison a defendant beyond the statutory maximum based solely on his inability to pay a fine); *Tate v. Short* (1971), 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (a state may not impose a fine as a sentence and then automatically convert it to jail time based upon the defendant's inability to immediately pay the fine). Relying on the principle set forth in such cases, courts have held that defendants who are unable to afford bail must be credited for the time they are confined while awaiting trial. "The Equal Protection Clause requires that all time spent in any jail prior to trial and commitment by [a prisoner who is] unable to make bail because of indigency *must* be credited to his sentence." (Emphasis sic.) *Workman v. Cardwell* (N.D. Ohio 1972), 338 F.Supp. 893, 901, vacated in part on other grounds (C.A.6, 1972), 471 F.2d 909. See also *White v. Gilligan* (S.D. Ohio 1972), 351 F.Supp. 1012.

State v. Fugate, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, ¶ 7.

{¶ 14} Citing *Fugate*, the State recognizes that, "even though R.C. 4511.19(G)(1)(e)(i) imposes a requirement of a mandatory 60 consecutive days in prison, and even though R.C. 2929.13(G)(2) says that the term cannot be reduced by any provision of the Revised Code, using either provision to refuse to award jail-time credit

violates equal protection.” We agree. And, we appreciate the professionalism of the State’s counsel in filing a separate notice of conceded error, as required by Loc.R. 2.24 of the Court of Appeals of Ohio, Second Appellate District.

{¶ 15} Dubose’s assignments of error are sustained.

{¶ 16} The trial court’s judgment will be reversed to the extent that it fails to provide jail time credit, and the matter will be remanded to the trial court for calculation of the jail time credit to which Dubose is entitled. In all other respects, the trial court’s judgment will be affirmed.

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FAIN, J. and DONOVAN, J., concur.

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