

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JAMES K. BISHOP,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 JE 0006

Criminal Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 17 CR 143

BEFORE:

Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:

Reversed and Remanded.

Atty. Jane M. Hanlin, Prosecuting Attorney, Jefferson County Justice Center, 16001 State Route 7, Steubenville, Ohio 43952, for Plaintiff-Appellee, *No Brief filed* and

James K. Bishop, pro se, #704-375, 1001 Olivesburg, Road, P.O. Box 8107, Mansfield, Ohio 44901 for Defendant-Appellant.

Dated: June 24, 2021

Robb, J.

{¶1} Defendant-Appellant James K. Bishop appeals the decision of the Jefferson County Common Pleas Court denying his motion for jail time credit. He claims he was entitled to 4 additional days of jail time credit for the time spent in a West Virginia jail after he was arrested on a fugitive from justice warrant issued as a result of this case. He concludes the trial court erred in ruling a defendant cannot receive credit for time served out-of-state awaiting extradition until after he signed the waiver of extradition. This argument has merit as the event starting the jail time credit clock would be the incarceration arising out of this Ohio case, not the waiver of extradition. For the following reasons, the case is reversed and remanded for further proceedings as to jail time credit, after providing the state time to respond to Appellant's evidence.

STATEMENT OF THE CASE

{¶2} On November 23, 2016, a complaint was filed in the Jefferson County Court, Area District Two, charging Appellant with burglary, theft, safecracking, and receiving stolen property, all felonies. At the same time, the court issued a warrant for his arrest. The return on the warrant shows he was arrested on the county court's warrant on September 29, 2017. Appellant was bound over to the grand jury.

{¶3} On November 8, 2017, the grand jury indicted Appellant for the aforementioned offenses. The case was thereafter tried to a jury in the Jefferson County Common Pleas Court. Appellant was convicted of the four offenses (with the degree of the felony reduced for the theft based on the jury's valuation of the stolen items).

{¶4} At the January 17, 2018 sentencing hearing, the court imposed a maximum sentence of 8 years for burglary consecutive to 18 months for safecracking. One-year sentences for theft and receiving stolen property were imposed concurrent to each other and to the other offenses. The aggregate sentence was thus 9.5 years in prison.

{¶5} Jail time credit was not discussed at the sentencing hearing. The January 18, 2018 sentencing entry provided Appellant with credit for 110 days served in jail as of January 17, 2018, the date of the sentencing hearing. The use of this number means the

court started the credit from the September 29, 2017 date on the county court’s warrant return.

{¶6} In Appellant’s direct appeal from his conviction, he addressed the trial court’s application of the sentencing factors and the imposition of consecutive sentences. This court overruled his arguments and affirmed the trial court’s judgment. *State v. Bishop*, 7th Dist. Jefferson No. 18 JE 0005, 2019-Ohio-2720. Appellant filed an application for reopening, which this court denied. *State v. Bishop*, 7th Dist. Jefferson No. 18 JE 0005, 2019-Ohio-4963.¹

{¶7} On January 14, 2020, Appellant filed a pro se motion for jail time credit, pointing to the sentencing court’s continuing jurisdiction under R.C. 2929.19(B)(2)(g)(iii) to correct any jail time credit error not raised at sentencing. He argued that in addition to the 110 days of jail time credit afforded to him from September 29, 2017 until his sentencing, he was entitled to 4 days of credit for time served in jail in Preston County, West Virginia, where he was held on this case beginning on September 25, 2017.

{¶8} Attached to the motion was a letter Appellant received from a public defender explaining the law entitling him to credit while awaiting extradition where the confinement arose from the offense at issue. The attorney included the following documents obtained from West Virginia on Appellant’s behalf showing he was held in a West Virginia jail from September 25 to 29, 2017 on the Ohio offense: a September 25, 2017 West Virginia fugitive from justice warrant based on the Ohio warrant; an initial appearance entry signed by a Preston County magistrate on September 25, 2017, wherein Appellant indicated “I wish to proceed to circuit court where I may waive my right to an extradition hearing”; and a jail commitment history showing his incarceration from September 25 to 29, 2017 on the fugitive from justice case.

¹ Among the nine proposed assignments of error in Appellant’s application for reopening, he alleged a speedy trial violation even though the issue was not raised in the trial court. In rejecting the argument, this court used September 29, 2017 as the date of arrest, which was the date reflected in the record, and concluded he was timely tried on day 90. *Id.* at ¶¶ 26, 29 (reduced from 270 days due to triple time with an instance of tolling on the request for discovery and a bill of particulars). Notably (as to the earlier date presented in the jail time credit motion), speedy trial time is tolled by “Any period during which the accused is unavailable for hearing or trial, * * * by reason of his confinement in another state, or by reason of the pendency of extradition proceedings, provided that the prosecution exercises reasonable diligence to secure his availability * * *.” R.C. 2945.72(A). *See also State v. Helms*, 7th Dist. Mahoning No. 14 MA 96, 2015-Ohio-1708, ¶¶ 24-25 (arrival in Ohio after extradition proceedings was the arrest date for purposes of speedy trial time). Speedy trial is distinct from jail time credit.

{¶9} On January 16, 2020, the trial court summarily overruled the motion. The court issued this ruling two days after the motion was filed, without waiting for or ordering a response from the state. Appellant did not appeal.

{¶10} On February 10, 2020, Appellant filed another pro se motion for jail time credit, seeking an oral hearing. He again asked for the four additional days, urging his credit for time served should start on the date his incarceration began on September 25, 2017. He said this was a mathematical or clerical error and reiterated the trial court's continuing jurisdiction to correct any jail time credit error not raised at sentencing. Appellant resubmitted the letter from the public defender along with its attachments. He also submitted an affidavit stating he was committed to state custody on September 25, 2017, the jail time credit issue was incorrect and not raised at sentencing, and he did not have a copy of the sentencing transcript as he was indigent. (We note the sentencing transcript is part of the record due to the direct appeal from the conviction.)

{¶11} On February 11, 2020, the trial court overruled the motion. The court disclosed its belief that Appellant was seeking credit for the four days from September 21 to 25, 2017. The court recognized Appellant's documentation showed he agreed to have his case transferred to the circuit court for the purpose of waiving extradition. The court quoted from the entry Appellant signed on September 25, 2017. The court then opined: "This document, however, is not a waiver in and of itself. * * * The Defendant does not attach any documentation about what happened in Circuit Court. Presumably, he signed a waiver but there is no documentation showing the waiver or the date of the actual waiver."

{¶12} On March 2, 2020, Appellant filed another motion for jail time credit, asking the court to "reconsider" the February 11, 2020 order and leave to file the waiver of extradition mentioned in the court's last entry. Appellant attached his September 27, 2017 waiver of extradition signed before a judge and filed in the Preston County Circuit Court. He also attached: the judge's September 27, 2017 extradition order memorializing the waiver; the September 27, 2017 commitment order stating Appellant was a fugitive from justice in Ohio and the jail was to hold him until he was picked up by Ohio; and documents showing he was in custody without bond on September 25, 2017 as a result of being a fugitive from justice in Ohio.

{¶13} The trial court overruled Appellant’s motion on March 2, 2020, the day it was filed. The court noted Appellant’s February 10, 2020 motion was overruled because he failed to submit a copy of his waiver of extradition and opined, “It is the waiver that starts the clock.” The court then concluded the waiver of extradition was signed and filed on September 27, 2020, which led the court to believe Appellant received two days more than he was entitled as the court was under the impression Appellant sought credit for the four days between September 21 and 25, 2017 (without realizing he sought credit for the four days between September 25 and 29, 2017).

{¶14} Appellant filed a notice of appeal on March 17, 2020. Due to the pandemic tolling order, this notice of appeal was timely as to the February 11, 2020 order, as well as the March 2, 2020 order. See Ohio Supreme Court, 3/27/2020 Administrative Actions, 2020-Ohio-1166 (tolling effective Mar. 9. 2020 through July 30, 2020).

ASSIGNMENT OF ERROR

{¶15} Appellant sets forth one assignment:

“The Trial Court, in contravention to the Ohio Revised Code and case law, erred when they miscalculated the jail time credit.”

{¶16} Asking for a remand to the trial court, Appellant concludes he is entitled to credit for the time he spent in the West Virginia jail on this Ohio case from September 25 to 29, 2017. He notes the September 25, 2017 date and the reason for his incarceration was reflected in various documents he submitted to the trial court: the West Virginia fugitive from justice warrant showing he was arrested on the Ohio warrant; an entry showing a court appearance in Preston County at which he asked to proceed to the circuit court to waive extradition; a jail commitment history showing his incarceration for those four days; and his waiver of extradition.

{¶17} Appellant argues jail time credit should begin after he was arrested on September 25, 2017 rather than after he was transported to Ohio on September 29, 2017. As the 110 days of jail time credit provided in the sentencing entry began with his Ohio incarceration, he seeks an additional four days. He urges it is well-settled the time awaiting extradition counts toward jail time credit where the defendant was not being held on other charges, citing various cases (which were cited in the public defender’s letter

attached to his motion for jail time credit), including this district's *Neville* case discussed infra.

{¶18} Because jail time credit is to begin accumulating upon such arrest, he argues the trial court erred in holding credit does not begin accumulating until the day a waiver of extradition is entered. He points to extradition statutes supporting his observation that the arrest and resulting custody by any state as a result of a fugitive warrant sought by another state should be considered custody on behalf of Ohio. See R.C. 2963.20 to .21 and 2963.28 to .29. See also R.C. 2963.27 (“Sections 2963.01 to 2963.26, inclusive, of the Revised Code shall be so interpreted and construed as to make the law of this state uniform with the law of those states which enact similar legislation.”).

JAIL TIME CREDIT: Time in Jail Awaiting Extradition

{¶19} Upon sentencing Appellant to prison, the court was required “to include in the sentencing entry the number of days that the offender has been confined for any reason arising out of the offense for which the offender is being sentenced and by which the Department of Rehabilitation and Correction (DRC) must reduce the stated prison term under section 2967.191 of the Revised Code.” Former R.C. 2929.19(B)(2)(g)(i) (the language when Appellant was sentenced). The cited statute directs DRC to reduce the stated prison term:

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, confinement while awaiting transportation to the place where the prisoner is to serve the prisoner's prison term, as determined by the sentencing court under division (B)(2)(g)(i) of section 2929.19 of the Revised Code * * *.

R.C. 2967.191(A).

{¶20} Appellant did not appeal the jail time credit in his direct appeal of the sentence. However, the sentencing statute further provides:

The sentencing court retains continuing jurisdiction to correct any error not previously raised at sentencing in making a determination under division

(B)(2)(g)(i) of this section. The offender may, at any time after sentencing, file a motion in the sentencing court to correct any error made in making a determination under division (B)(2)(g)(i) of this section, and the court may in its discretion grant or deny that motion. * * *

R.C. 2929.19(B)(2)(g)(iii).

{¶21} As Appellant points out, this district has ruled on the topic of a defendant's incarceration in an out-of-state jail during extradition proceedings in *Neville*. First, we rejected an argument that R.C. 2967.191 would have listed time spent awaiting extradition if such time validly counted as jail time credit. *State v. Neville*, 7th Dist. Belmont No. 03 BE 68, 2004-Ohio-6840, ¶ 20. We noted the statute contained a non-exhaustive list of some situations where credit for time served is applicable and did not limit the available credit to situations listed. *Id.* "Thus, even though credit for time served while awaiting extradition is not listed in the statute it does not preclude a defendant from receiving credit for that time served as long as the reason for the confinement arose out of the offense for which the prisoner was convicted and sentenced." *Id.*² See also *State v. Painter*, 11th Dist. Ashtabula No. 2009-A-0016, 2009-Ohio-4929, ¶ 28; *State v. Nunez*, 2d Dist. Montgomery No. 21495, 2007-Ohio-1054, ¶ 19.

{¶22} We concluded the defendant's motion showed he was entitled to 114 days of credit for his time in a Pennsylvania jail awaiting extradition because his incarceration was based only on the *capias* issued for his failure to appear for sentencing on the Ohio case and thus his confinement arose out of the Ohio case. *Neville*, 7th Dist. No. 03 BE 68 at ¶ 22-23, 26-27, distinguishing *State ex rel. Gillen v. Ohio Adult Parole Auth.*, 72 Ohio St.3d 381, 650 N.E.2d 454 (1995) (where an Ohio parole violator was held in New York on the Ohio parole violation *and* for violation of New York law).

{¶23} In an Eleventh District case, the trial court ruled it could not credit a defendant with 13 days spent awaiting extradition from Nevada, calling it "dead time." The appellate court concluded the trial court erred in holding it lacked authority to provide

² Our *Neville* case was decided before former R.C. 2967.191 was amended to add "as determined by the sentencing court under [R.C. 2929.19]" and before the latter statute was amended to specifically provide for a post-sentence jail time credit motion. Such amendments would not alter the holding that the time awaiting extradition can be counted in the calculation of "days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced" under R.C. 2967.191(A) and R.C. 2929.19(B)(2)(g)(iii).

credit for this out-of-state time. *State v. Brandon*, 11th Dist. Portage No. 2012-P-0016, 2013-Ohio-1740, ¶ 11. Where a defendant challenged extradition from Montana to Ohio, the Second District found he was entitled to credit for the time spent in jail during those proceedings. *State v. Walker*, 2d Dist. Montgomery Dist. No. 16599 (May 1, 1998). The court noted the statute contains no exception if a defendant is incarcerated while he exercises legal rights. *Id.* (remanding for determination of the number of days the defendant was confined in Montana pursuant to an Ohio detainer).

{¶24} These districts observed that when a defendant invokes the jail time credit statute and raises the time spent awaiting extradition, “the court and the state are placed on notice of a defendant's claim for jail time credit. And, at that point, the state has the burden to establish a defendant is not entitled to credit.” *Brandon*, 11th Dist. No. 2012-P-0016 at ¶ 10, citing *Painter*, 11th Dist. No. 2009-A-0016 at ¶ 30, citing *Nunez*, 2d Dist. No. 21495 at ¶ 21. We note the Tenth District regularly indicates the defendant has the burden to show error in the computation of jail time credit. *Myers*, 10th Dist. Franklin No. 19AP-178 at ¶ 16. These holdings can be reconciled by recognizing a shifting burden after the defendant provides evidence in support of his claim. See *State v. Bryant*, 2020-Ohio-363, 151 N.E.3d 1096, ¶ 31 (10th Dist.) (where the defendant presented evidence to support his claim to additional jail time credit and the state failed to rebut the evidence).

{¶25} Here, the state did not dispute Appellant’s arguments (as the trial court ruled immediately rather than ordering a response). The trial court did not find Appellant was held in West Virginia on other offenses, and the evidence Appellant submitted suggested he was held there only on this Ohio case. The trial court did not find the error was previously raised at sentencing, and the transcript showed there was no mention of jail time credit at sentencing (or on appeal of the sentence). The trial court based its decision on a factual misstatement on dates and an erroneous legal ruling that the pertinent date for jail time credit was the date of the extradition waiver rather than the date his incarceration on the Ohio case began.

{¶26} Contrary to the trial court’s recitation of the argued dates, Appellant was not seeking jail time credit for September 21 to 25, 2017. He was seeking credit from September 25, 2017 (the date of his arrest and incarceration in West Virginia on the Ohio case) until September 29, 2017 (the date he was transported to Ohio and the date used

in calculating the credit set forth in the sentencing entry). Even applying the trial court’s own legal holding (that the September 27, 2017 date of the extradition waiver governs), Appellant would be entitled to two additional days of jail time credit (as the sentencing court used September 29, 2017 as the beginning date for jail time credit).

{¶27} Nevertheless, contrary to the trial court’s legal holding, it is not the date of the extradition waiver that starts the accumulation of jail time credit. As set forth above, it is the date of the initial incarceration that starts the accumulation of jail time credit “as long as the reason for the confinement arose out of the offense for which the prisoner was convicted and sentenced.” *Neville*, 7th Dist. No. 03 BE 68 at ¶ 20.³ Using the start date of Appellant’s West Virginia incarceration on the fugitive from justice warrant, which was issued as a result of the Ohio case and warrant, would entitle Appellant to 4 additional days of jail time credit.

{¶28} In accordance, in reviewing the precise rulings made by the trial court, Appellant’s assignment of error is sustained. The trial court’s judgment is reversed, and the case is remanded for further proceedings with instructions to apply the law set forth above, after the trial court issues an order providing the state time to respond on remand (in case the state wishes to verify the period of and the basis for the West Virginia incarceration).

Res Judicata Considerations

{¶29} We note we have decided to refrain from sua sponte applying res judicata to reject Appellant’s motion. Although the two motions on appeal were successive to Appellant’s first jail time credit motion on the same issue, the trial court did not apply res judicata principles. The standard res judicata principle in a criminal case provides: “a convicted defendant is precluded under the doctrine of res judicata from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on appeal from that judgment.” *State v. Szefcyk*, 77 Ohio St.3d 93, 96, 671 N.E.2d 233 (1996).

³ The aforementioned speedy trial statutory tolling provision does not govern jail time credit (and deals with transport to Ohio, not the date of the extradition waiver, unless there was a lack of reasonable diligence in securing the defendant). See fn. 1.

{¶30} The enactment of the statutory jail time credit motion in R.C. 2929.19(B)(2)(g)(iii) eliminated the application of res judicata to this type of post-sentence motion where the error was not raised at sentencing. See *State v. Thompson*, 147 Ohio St.3d 29, 2016-Ohio-2769, 59 N.E.3d 1264, ¶ 11 (and a jail time credit ruling is a final, appealable order); *State v. Phillips*, 7th Dist. Mahoning No. 16 MA 0003, 2016-Ohio-5194, ¶ 10-14. The review of a successive motion is not wholly akin to reviewing an issue that should have been raised in a direct appeal after a conviction.

{¶31} However, the statute does not grant a perpetual right to keep filing jail time credit motions. See *State v. Norris*, 7th Dist. Monroe No. 14 MO 7, 2014-Ohio-5833, ¶ 23-25 (but finding the topic was raised at sentencing and suggesting the defendant was held on out-of-state charges as well as an Ohio warrant); *State v. Simmons*, 7th Dist. Jefferson No. 13 JE 2, 2013-Ohio-5282, ¶ 27-30 (alternatively rejecting the motion on the merits); *State v. Smith*, 11th Dist. Lake No. 2016-L-107, 2017-Ohio-4124, ¶ 12 (also finding “No injustice will result if res judicata is applied to bar appellant's second motion” and the jail time credit argument lacked merit); *State v. Cretella*, 11th Dist. Trumbull No. 2018-T-0014, 2018-Ohio-3245, ¶ 8-10 (considering whether “injustice will result if res judicata is applied to bar appellant's second motion” and emphasizing the appellate court ruled on the first motion).

{¶32} The Supreme has observed the doctrine of res judicata should only be “applied as fairness and justice require” and not “so rigidly as to defeat the ends of justice.” *Davis v. Wal-Mart Stores Inc.*, 93 Ohio St.3d 488, 491, 756 N.E.2d 657 (2001). See also *Goodson v. McDonough Power Equip. Inc.*, 2 Ohio St.3d 193, 202, 443 N.E.2d 978 (1983) (“the public policy underlying the principle of res judicata must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which to present his case”).

{¶33} The Eighth District reversed a denial of a defendant’s successive jail time credit motion without applying res judicata where the trial court granted the motion in part (finding the defendant was entitled to an additional two days) and the trial court did not apply res judicata. *State v. Henderson*, 8th Dist. Cuyahoga No. 106308, 2018-Ohio-5155, ¶ 23, *rev’d on other grounds*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, ¶ 7-14, 44 (reciting the jail time credit history and noting the state did not challenge the jail

time credit issue, while finding *res judicata* barred the state from filing a motion to resentence to a different prison term). See also *State v. Bryant*, 2020-Ohio-363, 151 N.E.3d 1096, ¶¶ 22-23 (10th Dist.) (writing judge opined *res judicata* should not be applied to a successive jail time credit motion under certain circumstances such as a summary dismissal based on an incorrect statement of lacking evidence and the state's failure to respond with evidence in opposition).

{¶34} Here: the trial court's ruling on Appellant's first jail time credit motion was a summary denial, leaving the reason for the first denial unknown; there was no prior appellate review of the issue; Appellant presented evidence supporting the claim that he was held in West Virginia on only the Ohio case for four days before arriving in Ohio on the date used by the sentencing court in calculating jail time credit in the sentencing entry; the state submitted no evidence disputing Appellant's evidence or argument disputing Appellant's position (as the court ruled immediately); the state did not submit an appellate brief in this case and thus did not argue *res judicata* at any point; *the trial court did not overrule the motions on appeal herein based on res judicata; and the trial court specifically announced a merit decision.* Furthermore, the trial court's decision included: an erroneous factual statement as to the requested dates for credit in Appellant's motion; a holding which would have entitled Appellant to at least two days of credit if not for the court's factual misstatement; and an erroneous legal declaration on extradition. *Under the limited facts and circumstances of this particular case, we abstain from applying res judicata to bar Appellant's argument.*

{¶35} For the foregoing reasons, the case is reversed and remanded for further proceedings as to jail time credit, with instructions for the trial court to provide the state an opportunity to respond to the motion (in case the state wishes to verify the period of qualifying West Virginia incarceration).

Donofrio, P J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Jefferson County, Ohio, is reversed. We hereby remand this matter to the trial court for further proceedings as to jail time credit, after providing the state time to respond to Appellant's evidence according to law and consistent with this Court's Opinion. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.