

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106904

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KATAWN TAPP

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-616564-A

BEFORE: E.A. Gallagher, A.J., Kilbane, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: October 11, 2018

[Cite as *State v. Tapp*, 2018-Ohio-4120.]

APPELLANT

Katawn Tapp, pro se
Inmate No. A700700
Lake Erie Correctional Institution
501 Thompson Road
Conneaut, Ohio 44030

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
BY: Anthony T. Miranda
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

[Cite as *State v. Tapp*, 2018-Ohio-4120.]
EILEEN A. GALLAGHER, A.J.:

{¶1} Defendant-appellant Katawn Tapp, pro se, appeals the trial court’s denial of his motion for jail-time credit. He contends that the trial court erred by failing to give him credit for 69 days that he spent in the Cuyahoga County jail while awaiting trial. For the reasons that follow, we affirm the trial court’s ruling.

Factual and Procedural Background

{¶2} In April 2017, Tapp was indicted by a Cuyahoga County Grand Jury on one count of receiving stolen property, one count of identity fraud and one count of aggravated theft. At the time, Tapp was also facing criminal charges in Lake County C.P. No. 17CR000119 (the “Lake County case”).

{¶3} On June 21, 2017, Tapp was sentenced to 18 months in prison in the Lake County case and began serving his sentence at the Lorain Correctional Institution. A *capias* was issued by the Cuyahoga County Court of Common Pleas based on the charges in this case and, on August 22, 2017, Tapp was transported from the Lorain Correctional Institution to the Cuyahoga County jail. He was arraigned two days later. Tapp remained in the Cuyahoga County jail until October 31, 2017.

{¶4} In October 2017, Tapp pled guilty to identity fraud and aggravated theft charges and the remaining count was nolle. The trial court sentenced Tapp to six months on the identity fraud charge and 180 days on the aggravated theft charge, to be served concurrently to each other but consecutively to the 18-month sentence in the Lake County case. The trial court awarded Tapp no jail-time credit, indicating in its October

27, 2017 sentencing journal entry that he was “currently serving time under Lake County case.” On October 31, 2017, Tapp was returned to the Lorain Correctional Institution.

{¶5} On November 9, 2017, Tapp filed a motion for jail-time credit, requesting that he be awarded a total of 220 days of jail-time credit for (1) 156 days he spent in the Lake County jail from January 24, 2017 to June 30, 2017 and (2) 64 days he spent in the Cuyahoga County jail from August 22, 2017 to October 26, 2017. On November 17, 2017, the trial court denied the motion, indicating that “defendant received 0 days credit” because “defendant was serving time under Lake County case.” Tapp did not appeal the trial court’s ruling.

{¶6} On February 14, 2018, Tapp filed a second motion for jail-time credit, requesting 69 days of jail-time credit for the time he spent in the Cuyahoga County jail from August 23, 2017¹ until he was returned to the Lorain Correctional Institution on October 31, 2017. Once again, the trial court denied the motion, indicating that “defendant received 0 days credit” because “defendant was serving time under Lake County case.”

{¶7} Tapp appealed, raising the following assignment of error for review:

The trial court erred when it failed to appropriately calculate appellant’s credit for jail time served in violation of the Equal Protection Clauses of the United States and Ohio Constitutions.

¹In his second motion for jail-time credit, Tapp indicates that he arrived at the Cuyahoga County jail on August 23, 2017. The record reflects that this occurred on August 22, 2017.

Law and Analysis

{¶8} Tapp argues that he is entitled to 69 days of jail-time credit for the time he spent in the Cuyahoga County jail before he was sentenced and returned to the Lorain Correctional Institution. He contends that the trial court's failure to appropriately credit him for the time he spent in jail violates R.C. 2967.191, Ohio Adm.Code 5120-2-04(F), *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, and the Equal Protection Clauses of the Ohio and United States Constitutions.

{¶9} “The practice of awarding jail-time credit * * * has its roots in the Equal Protection Clauses of the Ohio and United States Constitutions.” *Fugate* at ¶ 7. The Equal Protection Clause “does not tolerate disparate treatment of defendants based solely on their economic status” and “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 deleted.) *Id.*, quoting *Workman v. Cardwell*, 338 F.Supp. 893, 901 (N.D. Ohio 1972), *vacated in part on other grounds*, 471 F.2d 909 (6th Cir.1972).

{¶10} The calculation of jail-time credit is governed by R.C. 2967.191. That provision states, in relevant part:

The department of rehabilitation and correction shall reduce the stated prison term of a prisoner or, if the prisoner is serving a term for which there is parole eligibility, the minimum and maximum term or the parole eligibility date of the 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 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, and confinement in a juvenile facility. * * *

{¶11} “[I]f the sentencing court determines at the sentencing hearing that a prison term is necessary or required,” it has the duty to “[d]etermine, notify the offender of, and include in the sentencing entry” the number of days of jail-time credit by which the department of rehabilitation and correction must reduce the stated prison term under R.C. 2967.191. R.C. 2929.19(B)(2)(g)(I).

{¶12} R.C. 2929.19(B)(2)(g)(iii) further provides:

The sentencing court retains continuing jurisdiction to correct any error not previously raised at sentencing in making a determination under [R.C. 2929.19(B)(2)(g)(I)]. 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 [R.C. 2929.19(B)(2)(g)(I)] and the court may in its discretion grant or deny that motion. If the court changes the number of days in its determination or redetermination, the court shall cause the entry granting that change to be delivered to the department of rehabilitation and correction without delay. * * *

{¶13} As an initial matter, we note that Tapp's request for 69 days of jail-time credit is barred by res judicata. “Res judicata prevents repeated attacks on a final judgment and applies to all issues that were or might have been litigated.” *State v. Moore*, 8th Dist. Cuyahoga Nos. 100483 and 100484, 2014-Ohio-5682, ¶ 28, quoting *State v. Sneed*, 8th Dist. Cuyahoga No. 84964, 2005-Ohio-1865, ¶ 16. Although, under R.C. 2929.19(B)(2)(g)(iii), a defendant is not required to contest a trial court's calculation of his jail-time credit in a direct appeal of his conviction and may file a motion to correct

an error in calculating jail-time credit that was not previously raised at sentencing even if no appeal is pursued or the time for a direct appeal of his sentence has expired, this does not mean that res judicata has no application to motions to correct jail-time credit. As this court has explained, “[s]imply because res judicata does not operate to bar an initial, post-sentence motion for jail-time credit does not imply the doctrine is inapplicable to successive motions.” (Emphasis sic.) *State v. Wilson*, 8th Dist. Cuyahoga No. 105535, 2017-Ohio-8068, ¶ 13, quoting *State v. Smith*, 11th Dist. Lake No. 2016-L-107, 2017-Ohio-4124, ¶ 12; see also *State v. Cretella*, 11th Dist. Trumbull No. 2018-T-0014, 2018-Ohio-3245, ¶ 8-10 (“res judicata applies to successive motions for jail-time credit”).

{¶14} In this case, Tapp filed his first motion for jail-time credit in November 2017, requesting that the trial court grant him 220 days of jail-time credit. Tapp did not appeal the trial court’s denial of that motion. Instead, in February 2018, he filed a second motion, requesting 69 days of jail-time credit. “Res judicata bars [a defendant’s] attempted use of a second motion to correct jail-time credit as a substitute for a timely appeal.” *Wilson* at ¶ 14.

{¶15} Even if Tapp’s second motion for jail-time credit was not barred by res judicata, his argument that he is entitled to 69 days of jail-time credit for the time he was confined in the Cuyahoga County jail in this case is meritless.

{¶16} A defendant is entitled to jail-time credit only for confinement “arising out of the offense for which the prisoner was convicted and sentenced.” R.C. 2967.191. “When a defendant is sentenced to concurrent prison terms for multiple charges, jail-time

credit * * * must be applied toward each concurrent prison term.” *Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, at syllabus; *see also* Ohio Adm.Code 5120-2-04(F). However, when a defendant is serving consecutive terms, jail-time credit is to be applied only once. *Id.* at ¶ 10, citing Ohio Adm.Code 5120-2-04(G). Further, “there is no jail-time credit for time served on unrelated offenses, even if that time runs concurrently during the pre-detention phase of another matter.” (Emphasis deleted.) *Wilson* at ¶ 20, quoting *State v. Holley*, 2017-Ohio-1559, 88 N.E.3d 1290, ¶ 15 (8th Dist.). _

{¶17} In support of his argument that he is entitled to 69 days of jail-time credit, Tapp relies primarily on *Fugate* and the Ohio Supreme Court’s statement in that case that “[s]o long as an offender is held on a charge while awaiting trial or sentencing, the offender is entitled to jail-time credit for that sentence; a court cannot choose one of several concurrent terms against which to apply the credit.” *Fugate* at ¶ 12. *Fugate* is distinguishable from this case.

{¶18} In *Fugate*, the defendant committed burglary and theft offenses while on community control for a prior, unrelated conviction. *Fugate* at ¶ 2-3. While the defendant was awaiting disposition of the community control violation and the new burglary and theft charges, he was held in jail. After a jury found the defendant guilty of burglary and theft, the trial court imposed a 12-month sentence for the community control violation, a six-month sentence on the theft charge and a two-year sentence on the

burglary charge — all of which were to run concurrently. *Id.* at ¶ 2-5. The defendant was credited with 213 days of jail-time credit toward his 12-month sentence for the community control violation only; he received no jail-time credit toward his sentence on the burglary conviction. *Id.* at ¶ 3-4. The defendant appealed, arguing that he should have received jail-time credit of 213 days toward each of his concurrent prison sentences. *Id.* at ¶ 6. The Ohio Supreme Court reversed and remanded for the defendant to be awarded jail-time credit for each sentence. *Id.* at ¶ 22-23.

{¶19} The court explained:

[W]hen concurrent prison terms are imposed, courts do not have the discretion to select only one term from those that are run concurrently against which to apply jail-time credit. R.C. 2967.191 requires that jail-time credit be applied to all prison terms imposed for charges on which the offender has been held. If courts were permitted to apply jail-time credit to only one of the concurrent terms, the practical result would be, as in this case, to deny credit for time that an offender was confined while being held on pending charges. So long as an offender is held on a charge while awaiting trial or sentencing, the offender is entitled to jail-time credit for that sentence; a court cannot choose one of several concurrent terms against which to apply the credit.

* * *

When a defendant is sentenced to consecutive terms, the terms of imprisonment are served one after another. Jail-time credit applied to one prison term gives full credit that is due, because the credit reduces the entire length of the prison sentence. However, when a defendant is sentenced to concurrent terms, credit must be applied against all terms, because the sentences are served simultaneously. If an offender is sentenced to concurrent terms, applying credit to one term only would, in effect, negate the credit for time that the offender has been held. To deny such credit would constitute a violation of the Equal Protection Clause. Therefore we hold that when a defendant is sentenced to concurrent prison terms for

multiple charges, jail-time credit pursuant to R.C. 2967.191 must be applied toward each concurrent prison term.

Id. at ¶ 12, 22.

{¶20} Tapp is not entitled to jail-time credit for the time he allegedly spent in the Cuyahoga County jail facing the charges in this case because while he was confined in the Cuyahoga County jail, he was under sentence in the Lake County case. He was not in the Cuyahoga County jail because he could not post bail; even if he had sufficient resources to post bail, he would not have been released because he was serving his 18-month sentence in the Lake County case. *See State v. Lane*, 11th Dist. Lake No. 2017-L-046, 2017-Ohio-9335, ¶ 13-18 (defendant was not entitled to jail-time credit for the time he was confined in the Lake County jail while he was already serving his prison term for unrelated Cuyahoga County offenses and the sentences on defendant's Lake County offenses were ordered to be served consecutive to his preexisting Cuyahoga County sentence); *see also State v. Spears*, 2d Dist. Montgomery No. 25645, 2014-Ohio-146, ¶ 10 ("We have consistently held that jail time credit is not appropriate where the defendant was serving time for a separate offense. * * * [A] defendant cannot receive jail time credit when he serves time for unrelated offenses while in jail awaiting trial on separate charges."), quoting *State v. Dewey*, 2d Dist. Montgomery No. 25515, 2013-Ohio-2118. The Lake County case is unrelated to this case and the sentences in this case were ordered to be served consecutively to the sentence in the Lake County case — not concurrently as in *Fugate*. The time Tapp spent in the Cuyahoga County jail was

appropriately credited against the sentence he was then serving in the Lake County case and not against his sentence in this case.

{¶21} Accordingly, the trial court did not err in denying Tapp's motion for jail-time credit. Tapp's assignment of error is overruled.

{¶22} Judgment affirmed.

It is ordered that appellant recover from appellee the costs herein taxed.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas 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.

EILEEN A. GALLAGHER, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
ANITA LASTER MAYS, J., CONCUR