

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2012-P-0010
DANIEL C. OTT, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2007 CR 00044.

Judgment: Reversed and remanded.

Victor V. Viglucci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Daniel C. Ott, Jr., pro se, PID: A534675, Mansfield Correctional Institution, P.O. Box 788, Mansfield, OH 44901 (Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Daniel C. Ott, Jr., appeals the judgment of the Portage County Court of Common Pleas denying his pro se motion for jail-time credit. For the reasons that follow, the judgment is reversed and remanded for factual findings concerning the jail-time credit owed to appellant.

{¶2} On October 15, 2007, appellant received a three-year prison term for his conviction for retaliation, a third-degree felony in violation of R.C. 2967.28. Appellant

appealed his conviction on the basis of insufficient evidence. His conviction was affirmed by this court in *State v. Ott*, 11th Dist. No. 2007-P-0049, 2008-Ohio-4049.

{¶3} On October 24, 2008, appellant was granted judicial release and placed on probation. However, the trial court subsequently found that appellant violated the terms of his probation, on recommendation from the Adult Probation Department. Appellant was taken into custody on January 2, 2011, and held without bond awaiting a probation-revocation hearing. After multiple continuances, the hearing was held on March 14, 2011.

{¶4} In a March 17, 2011 entry, the trial court ordered appellant's probation to be revoked, stating that appellant was to serve the balance of his prison term. As to jail-time credit, the court stated: "Defendant shall receive credit for all the time served in the Portage County Jail and in prison in this matter. That time shall be calculated by the reception facility." The trial court did not include any dates of incarceration or the number of days to be credited in the sentencing entry.

{¶5} Shortly thereafter, the Department of Rehabilitation and Corrections ("DRC") noted that appellant's aggregate jail-time credit was now 386 days. It is clear that appellant believes this total was calculated in error and, in actuality, that he is entitled to more credit. On September 26, 2011, appellant filed a motion to compel the DRC to credit him the difference between the credit received and the credit allegedly owed. The trial court overruled the motion, explaining that "the Defendant shall receive credit for time served in the Portage County Jail and in Prison in this matter and that that time shall be calculated by the reception facility."

{¶6} On December 5, 2011, appellant filed a motion for jail-time credit, arguing he is entitled to additional credit. The state argued that the trial court explained in its prior order that appellant would receive credit for all time served in the matter, and thus there was no error. The trial court overruled the motion without explanation.

{¶7} Appellant, pro se, now appeals. We note appellant attached multiple exhibits to his merit brief which cannot be considered because they are not part of the record. See App.R. 9(A)(1) (explaining the record on appeal constitutes the original papers and exhibits filed in the trial court). See also, e.g., *State v. Johnston*, 7th Dist. No. 06 CO 64, 2007-Ohio-4620 (“exhibits attached to an appellate brief are not part of the record and cannot be considered on appeal”). Appellant asserts three assignments of error. Appellant’s first assignment of error states:

{¶8} “[The] trial court erred by failing to credit Mr. Ott with all days served incarcerated in the instant case in violation of the Fourteenth Amendment Right to Equal Protection of the law.”

{¶9} R.C. 2967.191 mandates a reduction of a prison term for related days of confinement:

{¶10} 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

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.

{¶11} The statute codifies the Equal Protection principle that defendants shall not be subjected to disparate treatment based on economic status; that is, for instance, defendants unable to make bail while awaiting trial must be credited for the time they are confined. See *State v. Mason*, 7th Dist. No. 10 CO 20, 2011-Ohio-3167, ¶14, citing *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856.

{¶12} In this case, appellant specifically states that additional time from 2007 should have been credited, but was not. The state asserts this argument is barred by res judicata. Appellant also argues that additional time from 2011 should have been credited, but was not. The state conversely states that appellant should have appealed from the March 17, 2011 entry of sentence and that the matter is not properly before this court. Though appellant also contends he is owed credit for "good days" while attending an educational institutional while incarcerated, this time or contention was never before the trial court for consideration and therefore cannot be considered.

{¶13} Thus, we will consider both appellant's claim that credit is owed for time served in 2007 and his claim that credit is owed for time served in 2011.

{¶14} Appellant first explains that he should have been credited one day for time served on February 2, 2007, and ten days for time served October 15, 2007, to October 25, 2007. In its entry dated October 18, 2007, the trial court noted that appellant was to receive one day credit for time served, and additional time awaiting conveyance to the reception facility would be calculated. That is, the trial court made a factual

determination of the number of days credit to which appellant was entitled by law. Appellant had the opportunity to appeal this sentencing entry, but failed to do so. The record further indicates that appellant was credited for ten days on November 16, 2007. Appellant did not file any motion contesting this time in the trial court, nor was it raised in his initial appeal; consequentially, this argument is barred by res judicata.

{¶15} “[A]ny issues that were raised or could have been raised by a defendant at the trial court level or on direct appeal are res judicata and not subject to review in subsequent proceedings.” *State v. Lintz*, 11th Dist. No. 2010-L-067, 2011-Ohio-6511, ¶36, citing *State v. Perry*, 10 Ohio St.2d 175 (1967). The doctrine “bars not only subsequent actions involving the same legal theory of recovery as the previous action, but also claims which could have been litigated in the previous action[.]” (Emphasis deleted.) *State v. Robinson*, 8th Dist. No. 85266, 2005-Ohio-4154, ¶8, citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381 (1995).

{¶16} This court has specifically held that, where a defendant could have, but failed to, raise an issue regarding the calculation of jail-time credit in a prior proceeding, the matter is barred by res judicata. *State v. Caldwell*, 11th Dist. No. 2004-L-173, 2005-Ohio-6149; *State v. Smith*, 11th Dist. No. 2010-L-010, 2011-Ohio-1014; *State v. Salvano*, 11th Dist. Nos. 2006-L-243, 2006-L-244, 2007-Ohio-3208; *State v. Custer*, 11th Dist. No. 2011-T-0070, 2012-Ohio-2357.

{¶17} For instance, in *Caldwell*, 2005-Ohio-6149, the defendant failed to file a direct appeal on the entry of sentence, even though the entry clearly provided that he was credited with eight days of jail time; thus, an argument concerning additional jail-time credit was barred by res judicata. *Id.* at ¶10. In *Smith*, 2011-Ohio-1014, the

defendant was aware of the jail-time credit issued by the time of his initial sentencing, and additionally, the trial court's sentencing entries stated the defendant was credited with three days of jail time; thus, the argument was barred by res judicata because the defendant could have previously asserted the alleged error, but failed to make such an argument. *Id.* at ¶26. In *Salvano*, 2007-Ohio-3208, the trial court's sentencing entries credited the defendant with 59 days and 29 days; the argument that more time should have been credited was barred by res judicata because the defendant could have, and should have, appealed from those prior entries. *Id.* at ¶6 & ¶9. More recently, in *Custer*, 2012-Ohio-2357, the trial court's sentencing entry explained the defendant was granted jail-time credit from a specific date; even though he was aware of the issue when he filed his notice of appeal, he failed to assert it for review on appeal and therefore was barred from doing so subsequently. *Id.* at ¶13.

{¶18} Thus, appellant's jail-time-credit attack on the original October 2007 sentencing entry is barred by res judicata.

{¶19} Next, appellant argues he should have been credited more time *after* his direct appeal, i.e. from January 2, 2011, when he was again taken into custody for violating the terms of his judicial release, to March 24, 2011, when he was admitted to the DRC reception center to serve the balance of his sentence. In its March 17, 2011 entry, the trial court revoked appellant's probation and sentenced him to the remainder of his original sentence.

{¶20} The state argues that the March 17, 2011 sentencing entry revoking appellant's probation and sentencing him to the duration of his previous term was not a final, appealable order, and as such, this appeal is not properly before this court. The

state contends that appellant's pro se motion for jail-time credit was a motion seeking reconsideration of the final sentencing entry the court entered in March 2011 and was therefore a legal nullity. In support, the state cites *State v. Harbert*, 9th Dist. No. 20955, 2002-Ohio-6114. In *Harbert*, the Ninth District concluded the defendant's motion seeking additional jail-time credit was tantamount to a motion for reconsideration of the trial court's final sentence, and as such, the motion was a nullity; therefore, an appeal from the denial of the motion could not be perfected. As the defendant in *Harbert* never filed a direct appeal from the original sentencing entry, the appellate court essentially found that any subsequent motion on the entry was, in effect, a request to reconsider the final sentence. *Id.* at ¶12.

{¶21} However, in *Harbert*, unlike the case sub judice, that court's sentencing entry specified the amount of credit the defendant was to receive—288 days. The Ninth District explained, “[o]nce the trial court entered its final order granting [a]ppellant two hundred eighty-eight days of credit for time served, the burden was upon [a]ppellant to seek judicial redress of this determination if he believed it to be in error.” (Emphasis added.) *Id.* at ¶11. Here, appellant did not fail to meet any such burden because the court never entered an order specifying the amount of credit he was to receive; instead, it merely acknowledged that appellant was to receive credit for the time he was incarcerated.

{¶22} As explained by the Second Appellate District in *State v. Coyle*, 2d Dist. No. 23450, 2010-Ohio-2130, upon which appellant relies, the jail-time credit issue is “a *matter collateral* to the judgment of conviction and sentence the court journalized” only where, just as here, the “court therein did not pass upon whether Defendant had spent

any time at all in confinement.” (Emphasis added.) *Id.* at ¶10. In *Coyle*, the sentencing entry noted the defendant was to receive “_____ days” for time served. *Id.* at ¶1. Even though the defendant in *Coyle* did not file a direct appeal from his sentence, the Second Appellate District considered the underlying merits. *Id.* at ¶10 & ¶15.

{¶23} Further, appellant’s argument is not barred by res judicata because appellant did not have notice of the credited time and, hence, no opportunity to realize any prospective error in the calculation of time. Unlike in *Caldwell*, *Smith*, *Salvano*, and *Custer*, the trial court never made an express determination of the aggregate jail-time credit, either by noting a window of dates or a computation of the total days. Rather, the trial court, in its sentencing entry and in its two denials of appellant’s pro se jail-time-credit motions, noted that the time would be calculated by the DRC. That is, the trial court did not make a factual determination of the number of days appellant was credited, nor did it include a window of dates where the number of days could readily be calculated. However, the trial court properly ruled appellant should be given credit for all the time spent in jail and prison. Given that ruling, there would be no reason for appellant to appeal, since the trial court ordered precisely what appellant was seeking.

{¶24} Thus, as this court has jurisdiction to consider the issue, and as appellant’s jail-time-credit attack on the later March 2011 sentencing entry revoking his probation is *not* barred by res judicata, we may proceed to the substance of appellant’s contentions.

{¶25} Turning to the underlying merits of the appeal, appellant’s contentions cannot be addressed on this record because the trial court failed to include the amount of jail-time credit in the sentencing entry. The trial court’s entry merely acknowledges

time is owed, but does not detail the amount of credit owed in specific terms, either by noting the number of days or a window of dates. As such, it is not clear based on the record that the trial court has properly determined the amount owed, or that the DRC has properly calculated the time appellant is entitled to receive.

{¶26} Without any guidance from the trial court, the DRC is essentially making an independent calculation concerning the amount of credit. However, this court has previously noted that the DRC “has not been afforded any discretion to decide what amount of credit must be given; instead, its role is limited to enforcing the credit as determined by the trial court.” *Davis v. Bobby*, 11th Dist. No. 2007-T-0063, 2007-Ohio-5610, ¶6, citing *State ex rel. Petty v. Portage Cty. Court of Common Pleas*, 11th Dist. No. 97-P-0041, 1997 Ohio App. LEXIS 4684 (Oct. 17, 1997). The DRC has established rules, set forth primarily in Ohio Adm. Code 5120-2-04, to be utilized when jail-time credit is an issue in a case. These rules include a mandate that the trial court make a factual determination of the number of days credit and include it within the journal entry imposing the sentence.¹ This court has also noted that “the duty to complete the calculation lies solely with the trial court which imposes the actual sentence.” *Id.* at ¶7, citing *State ex rel. Rankin v. Adult Parole Auth.*, 98 Ohio St.3d 476, 2003-Ohio-2061, ¶7. “In relation to the trial court’s performance of that duty, we have stated that the final determination of the amount of the credit should be contained in the final sentencing judgment.” *Id.*, citing *State ex rel. Miller v. Court of Common Pleas*, 11th Dist. No. 96-P-0006, 1997 Ohio App. LEXIS 1820 (May 2, 1997). This court is not alone in advising that the amount of credit should be contained in the sentencing entry. In fact, both the

1. This opinion does not suggest Ohio Adm. Code 5120-2-04 is binding. In fact, the code section, in imposing strict rules on the trial court, appears to exceed the scope of its enabling statute, R.C. 5120.01.

Eighth and Tenth Appellate Districts have held that a “trial court’s failure to properly calculate a felony offender’s jail-time credit, pursuant to R.C. 2967.191, and *to include the amount of jail-time credit in the body of the offender’s sentencing judgment* is plain error.” (Emphasis added.) *State v. Mills*, 10th Dist. No. 09AP-198, 2009-Ohio-6273, ¶13, citing *State v. Collier*, 184 Ohio App.3d 247, 2009-Ohio-4652, ¶18 (10th Dist.), and *State v. Miller*, 8th Dist. No. 84540, 2005-Ohio-1300, ¶10.

{¶27} The record illustrates that appellant was incarcerated (either in jail or prison) from his sentencing hearing on October 15, 2007, to his judicial release on October 24, 2008 (375 days). The record also indicates that appellant was taken into custody via warrant on this case due to a violation of his probation on January 2, 2011. He apparently remained incarcerated without bond until his probation was revoked at a hearing on March 14, 2011, which was journalized on March 17, 2011. He was subsequently conveyed to the DRC reception facility on March 24, 2011. The total for this period is 81 days. As noted above, he was credited by the DRC with a total of 386 days pursuant to the trial court’s March 17, 2011 entry. It is not clear whether the DRC’s computation of time is consistent with the trial court’s order. As the court did not make a factual determination concerning the specific credit owed, a determination concerning the jail-time credit cannot be reviewed by this court. The specific period that does not appear to have been credited is the time between appellant’s January 2, 2011 arrest and the March 14, 2011 hearing when his probation was revoked. It appears clear from the record that appellant was in jail during this period “in this case,” even though there may have been proceedings pending against him in another county.

{¶28} Appellant is entitled to credit for time served in jail and in prison in this case. The trial court properly ordered that this be done. It should be clear from the record that the DRC is recognizing the amount of credit ordered by the trial court; however, the record is not clear. Therefore, the trial court's intentions regarding its order must be made clear: it must make a factual finding and journalize the amount of time owed to appellant. A remand to the trial court is the appropriate procedural mechanism for this determination. See *State v. Navedo*, 2008-Ohio-2324, 11th Dist. No. 2007-L-094, ¶24 (“As the record fails to disclose any basis for the trial court’s denial of six days jail time credit to Mr. Navedo, we must reverse and remand for a calculation, and factual findings”); *State v. Painter*, 11th Dist. No. 2009-A-0016, 2009-Ohio-4929, ¶40 (“The judgment of the Ashtabula County Court of Common Pleas is reversed and remanded for a determination of the time Mr. Painter served in jail awaiting extradition from Kentucky to Ohio for the present case and if he is entitled to 90 days of jail time credit”).

{¶29} Upon remand, the trial court should examine the jail-time credit as determined by the DRC and clarify that this credit either complies or does not comply with the direction in its prior order concerning the credit. This shall be done by journalizing its intentions regarding the period of dates or number of days for which appellant is to receive credit. As it stands, the time between appellant’s January 2, 2011 arrest and the March 14, 2011 hearing does not appear to be credited.

{¶30} Appellant’s first assignment of error has merit.

{¶31} Appellant’s second assignment of error states:

{¶32} “Appellant was subjected to ineffective assistance of appellate counsel and counsel, in case no. 2007-P-0093 in the 11th District Court of Appeals and 2007 CR 00044.”

{¶33} Appellant advances two separate arguments in his second assignment of error. First, appellant argues that his appellate counsel was ineffective for failing to set forth the issue of jail-time credit as an assignment of error in his prior direct appeal (11th Dist. No. 2007-P-0093). However, an application for reopening is the proper procedural mechanism by which to raise a claim of ineffective assistance of appellate counsel, pursuant to App.R. 26(B). We take notice that appellant filed an application for reopening regarding case number 2007-P-0093 on January 10, 2012. However, because the application was filed three and one-half years after the journalization of the appellate judgment—well beyond the 90-day requirement—the application was denied.

{¶34} Next, appellant argues that, during the probation-revocation hearing, his retained trial counsel failed to note the specific times appellant had spent in the Portage County Jail to ensure jail-time credit would be properly applied. This claim cannot be addressed on this record because there is no transcript of the probation-revocation hearing. It is therefore impossible to assess trial counsel’s performance in this matter.

{¶35} Appellant’s second assignment of error is without merit.

{¶36} Appellant’s third assignment of error states:

{¶37} “The trial court committed prejudicial error by not providing defendant a copy of the state’s objection and judgment entry, thereby abusing discretion materially comprising defendant’s ability to properly [sic] defend himself and due process of law.”

{¶38} It is not the trial court's duty to provide appellant with a copy of a pleading filed by the state. However, as this case is being remanded so that the trial court may make a determination of the time appellant served and is to be credited, the third assignment of error is moot.

{¶39} The judgment of the Portage County Court of Common Pleas is reversed, and this case is remanded for proceedings consistent with this opinion.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.