

[Cite as *State v. Norris*, 2014-Ohio-5833.]

STATE OF OHIO, MONROE COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 14 MO 7
PLAINTIFF-APPELLEE,)	
)	
VS.)	OPINION
)	
DOWELL NORRIS,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 2005-297.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: December 29, 2014

[Cite as *State v. Norris*, 2014-Ohio-5833.]
VUKOVICH, J.

{¶1} Defendant-appellant Dowell Norris appeals the decision of the Monroe County Common Pleas Court denying his motion for additional jail time credit wherein he argued that he was incarcerated in West Virginia due to a warrant issued by Monroe County and that he should have been credited with the 89 days that he said he spent in West Virginia prior to being transferred to Ohio. Contrary to appellant's argument, the trial court cannot use a nunc pro tunc entry to add days that were not initially considered by the court as such situation is not a clerical error or a mechanical oversight. And regardless of the fact that the record belies appellant's claim that he was held in West Virginia solely on the Ohio warrant, the issue is res judicata as appellant filed a prior motion seeking credit for these same days that was denied but not appealed. In accordance, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

{¶2} Appellant was indicted in October of 2005 with two counts of illegal assembly or possession of chemicals for the manufacture of drugs. (A new indictment was filed in April of 2006, the cases were consolidated, and the new indictment replaced the first, which is the reason that various filings have two trial court case numbers.) Appellant was convicted of the two third-degree felony counts after a jury trial. (One of the counts originally carried a school specification, but the jury failed to circle a choice on that specification.)

{¶3} In a June 26, 2006 entry, the court sentenced appellant to a maximum sentence of five years on each count to run consecutively. He was provided 126 days of jail time credit, representing the time between his local incarceration until the sentencing hearing. His conviction and sentence were upheld by this court on appeal. *State v. Norris*, 7th Dist. No. 06MO5, 2007-Ohio-6915. Jail time credit was not discussed. The denial of an untimely post-conviction petition raising a merger argument was upheld on appeal as well. *State v. Norris*, 7th Dist. No. 11MO4, 2013-Ohio-866.

{¶4} Nearly eight years after sentencing, appellant filed a motion for additional jail time credit in the amount of 89 days, without asking for a hearing. In

this March 31, 2014 motion, he stated that he was arrested in West Virginia on November 16, 2005 due to the Ohio warrant from this case and was then incarcerated there for 89 days, while he awaited extradition to Ohio on February 13, 2006. The motion pointed out that time spent awaiting extradition entitles a defendant to jail time credit as long as the reason for the confinement arose out of the offense for which the prisoner was sentenced. He attached a November 21, 2005 waiver of extradition signed by him and a judge in Kanawha County, West Virginia.

{¶15} On April 7, 2014, the trial court entered an order denying the motion for jail time credit, stating that the sentence imposed was appropriate. Appellant did not appeal this order.

{¶16} Thereafter, he filed a May 19, 2014 motion for a nunc pro tunc entry, asking the court to correct a clerical mistake in the sentencing order concerning jail time credit. He repeated his request for jail time credit for the 89 days spent in West Virginia after his arrest. He again attached the November 21 waiver of extradition. He noted that this court's precedent in *Neville* holds that a defendant is entitled to jail time credit for time awaiting extradition where he is only being held in the other state due to the Ohio warrant in the case under consideration. See *State v. Neville*, 7th Dist. No. 03BE68, 2004-Ohio-6840.

{¶17} Appellant posited that the matter did not involve a legal judgment and thus could be corrected nunc pro tunc as a clerical error or error arising from oversight or omission under Crim.R. 36. He also stated that the court had continuing jurisdiction to correct any error not previously raised at sentencing regarding jail time credit, citing R.C. 2929.19(B)(2)(g)(iii). In seeking 89 additional days, he asked for a total of 365 days of jail time credit, stating in two places that the court originally granted 276 days of jail time credit at sentencing (when in fact the court originally granted only 126 days so that an additional 89 days would mean a total of 215 days).

{¶18} On May 27, 2014, the trial court denied appellant's motion. Appellant filed a notice of appeal on June 6, 2014 from the May 27, 2014 order.

ASSIGNMENT OF ERROR

{¶9} Appellant's sole assignment of error provides:

{¶10} "JAIL TIME CREDIT MUST BE GIVEN TO A CRIMINAL DEFENDANT WHO IS EXTRADITED FROM WEST VIRGINIA FOR THE TIME PERIOD THE DEFENDANT SPENT IN WEST VIRGINIA CUSTODY."

{¶11} Appellant points to this court's decision in *Neville* that days awaiting extradition must be credited where the arrest arose from the case on which he was sentenced. In that case, we stated that if a fleeing felon is held in another state solely on the pending Ohio charge, then the felon is entitled to credit for the time served. *Neville*, 7th Dist. No. 03BE68 at ¶ 25-26 (finding that the sole reason for Neville's stay in Pennsylvania was for failing to appear at his Ohio sentencing and suggesting that the result may be different if a defendant is arrested in another state for violating their law and is held for that offense and an Ohio warrant).

{¶12} Appellant attaches an exhibit to his brief that is his West Virginia signed statement acknowledging the accusation that he was a fugitive from justice from Monroe County, Ohio and that the possible penalty was extradition to the State of Ohio. He uses this to confirm his statement that he was incarcerated in West Virginia on November 16, 2005; as his later waiver of extradition, which he provided to the trial court, was dated November 21, 2005. And, he may believe that the November 16 document shows that he was solely arrested due to the Ohio case as he claims that he was arrested in West Virginia on a warrant issued by Monroe County in this case.

{¶13} Notably, this document was not provided to the trial court to support his jail time credit argument. Additionally, it does not establish that he was solely arrested due to the Ohio case. And, he did not specifically explain to the trial court his current allegation that he was held in West Virginia only after he waived extradition and made himself available to the State of Ohio.¹

¹We note that appellant filed a speedy trial motion on April 4, 2006 based upon this West Virginia time. The state responded that appellant was not arrested solely on the Monroe warrant as his bond had been revoked and his arrest ordered in Putnam County, West Virginia pursuant to an October 20, 2005 entry. The state also explained that Monroe County was advised that an entry was about to be filed dismissing the West Virginia indictment due to a defect. Monroe County thus made

{¶14} Appellant concludes that on February 13, 2006, which is 89 days after his arrest, he arrived in Ohio to face the current charges and insists that the court should not have commenced the jail time credit count from the date he arrived in Ohio but from the date of his arrest on the Ohio warrant. He calculates that the 126 days credited in the entry plus the 89 days entitles him to a total of 215 days of jail time credit, apparently realizing the mistakes he made in the motion submitted to the trial court (wherein he stated that he was given 276 days of credit and that adding 89 more days, he was entitled to 365 days of total credit).

{¶15} Appellant posits that by mistake or oversight the trial court failed to credit him with the 89 days he spent in West Virginia awaiting transportation to Ohio and states that the issue should have been corrected as a clerical error under Crim.R. 36.

CLERICAL MISTAKE

{¶16} Appellant entitled the motion which resulted in this appeal as a motion for a nunc pro tunc entry to correct a clerical mistake. Crim.R. 36 provides: “Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time.” A clerical error or mistake is “a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment.” *State v. Miller*, 127 Ohio St.3d 407, 2010–Ohio–5705, 940 N.E.2d 924, ¶ 15, quoting *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19.

{¶17} Although a court has “inherent authority to correct clerical errors in judgment entries so the record speaks the truth,” a nunc pro tunc entry is “limited in proper use to reflecting what the court actually decided, not what the court might or

arrangements to transport appellant on February 13, 2006 and did transport him that day, after which the West Virginia dismissal entry was signed.

The state had also filed various discovery documents showing that Kanawha County officers stopped appellant while he was driving a stolen vehicle on November 14, 2005, but he escaped on foot. The notes of an agent from the Drug Enforcement Agency confirmed that at that time, appellant was wanted on West Virginia warrants. Officers thereafter spotted appellant on November 16, now driving a vehicle with a stolen license plate. Appellant stopped the car and again fled on foot, but he was captured in the woods. Thus, there is evidence in the file disputing his claim that he was arrested because of the Ohio warrant.

should have decided.” *Id.* “The function of an entry nunc pro tunc is the correction of judicial records insofar as they fail to record, or improperly record, a judgment rendered by the court, as distinguished from the correction of an error in the judgment itself, or in the failure to render the judgment.” *Caprita v. Caprita*, 145 Ohio St. 5, 60 N.E.2d 483 (1945), ¶ 2 of syllabus.

{¶18} Here, the court granted 126 days of jail time credit at sentencing and then issued an entry accordingly. The court did not actually decide that appellant would receive jail time credit for time incarcerated in West Virginia and then by oversight fail to include that time in the sentencing entry. The issue was thus not mechanical in nature, nor was it an issue of mathematics. Thus, any mistakes were not clerical, and a nunc pro tunc entry was not available.

{¶19} In the past, some courts regularly held that clerical or mathematical jail time credit issues could be remedied by the trial court after sentencing but legal determinations could not as they were res judicata where they could have been raised at sentencing and in the direct appeal therefrom. Effective on September 28, 2012, a statutory amendment provides for a sentencing court’s continuing jurisdiction on the matter of jail time credit errors. See R.C. 2929.19(B)(2)(g)(ii). Appellant’s motion did additionally point to the sentencing court’s continuing jurisdiction under this statutory provision.

CONTINUING JURISDICTION

{¶20} R.C. 2967.191 directs the Adult Parole Authority to reduce the sentence by the total number of days the prisoner was confined for any reason arising out of the offense for which he was convicted and sentenced. This information on credit for time served prior to the date of sentencing is obtained from the sentencing court. Pursuant to R.C. 2929.19(B)(2)(g)(i), a sentencing court imposing a prison term shall “[d]etermine, notify the offender of, and 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 [prison] must reduce the stated prison term under [R.C.] 2967.191 * * *.” R.C. 2929.19(B)(2)(g)(i). In making

this determination, the court shall consider the parties' arguments and conduct a hearing if one is requested. R.C. 2929.19(B)(2)(g)(ii). Thereafter,

[T]he 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. 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.

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

{¶21} The limitations on filing a motion for a new trial under R.C. 2931.15 or a petition for post-conviction relief under R.C. 2953.21 do not apply to this jail time credit motion. *Id.* Lastly, the statute provides that an inaccurate determination of jail time credit at sentencing is not grounds for setting aside the conviction or sentence and does not otherwise render the sentence void or voidable. R.C. 2929.19(B)(2)(g)(iv).

{¶22} The statute requires the matter to be one not previously raised at sentencing. In speaking of time served in jail pending sentencing, appellant's counsel mentioned at sentencing that he was arrested in November of 2005. (Sent.Tr. 6). However, the court used the date of Ohio incarceration. (Sent.Tr. 12-13). As aforementioned, appellant appealed from the sentencing entry, but he did not raise this issue. *State v. Norris*, 7th Dist. No. 06MO5, 2007-Ohio-6915. In any event, appellant does not maintain his argument regarding this statute on appeal, and there is an additional res judicata issue preventing our review of the merits of the trial court's refusal to grant jail time credit here.

RES JUDICATA

{¶23} In general, the res judicata doctrine provides that “a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.” *State v. Davies*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221, ¶ 6. In a criminal case, res judicata means that matters that have been or could have been raised on direct appeal are not subject to further review in subsequent proceedings. *Id.* For instance, res judicata bars a defendant from pursuing a second post-sentence motion to withdraw a guilty plea where the matter was or could have been raised in his first motion, the denial of which was not appealed. See, e.g., *State v. McFarland*, 7th Dist. No. 08JE25, 2009-Ohio-4391, ¶ 18-19.

{¶24} Appellant already asked for jail time credit in a prior motion filed on March 31, 2014. Notably, that motion was filed well after the September 28, 2012 effective date of the statutory provision permitting the trial court to exercise continuing jurisdiction to address such a motion on matters not previously raised at sentencing. And, the trial court then denied him jail time credit on April 7, 2014. Appellant failed to appeal that judgment entry. Instead, he again asked the trial court for jail time credit.

{¶25} However, the trial court has already ruled that its sentencing order was appropriate. That decision is now res judicata and constitutes the law of the case on the topic of whether appellant was entitled to an additional 89 days for a West Virginia incarceration alleged² to have arisen out of the offenses in this case. A defendant cannot keep filing motions seeking the same additional jail time credit sought in a prior motion and then only appeal the last of such motions.

{¶26} In conclusion, a nunc pro tunc decision was unavailable here as the trial court was alleged to have made a legal rather than a clerical error. This issue could have been raised in the appeal taken from the original sentence, and there was mention at sentencing of appellant’s jail time prior to his local incarceration. And

²See prior footnote, *supra*. But, res judicata prevents our review of the merits of the allegation.

finally, the trial court had already issued an unappealed decision that appellant was not entitled to a legal determination that he was owed more jail time credit. For these reasons, the trial court's second denial of jail time credit was not erroneous. The judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.

DeGenaro, P.J., concurs.