

[Cite as *State v. Jenkins*, 2010-Ohio-2853.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-1029
 : (C.P.C. No. 08CR-12-8808)
 Richard D. Jenkins, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 22, 2010

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for
appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Richard D. Jenkins, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court sentenced him for possession of cocaine with firearm specification, a violation of R.C. 2925.11 and a second-degree felony.

{¶2} Although this case involves the appeal of only one judgment in a single case, case No. 09CR-8808 ("case 8808"), the arguments on appeal also concern charges in two other cases. In case 8808, on December 19, 2008, appellant was indicted on one

count of having a weapon while under disability and two counts of possession of cocaine with firearm specifications. Appellant was issued a summons, but failed to appear for the January 2, 2009 arraignment resulting in a *capias* being issued January 16, 2009. On January 22, 2009, appellant was arrested on the *capias* and, on February 3, 2009, appellant posted bond and was released.

{¶3} On May 1, 2009, appellant was indicted on two counts of kidnapping with specification, aggravated robbery with specification, robbery, and theft, in case No. 09CR-2621 ("case 2621"). On May 13, 2009, the trial for case 8808 was continued because appellant had been arraigned in case 2621 and was incarcerated. It appears he was then released on bond because, on May 27, 2009, a *capias* was issued and bond was surrendered in case 8808 based upon appellant's failure to comply with the release agreement. On May 27, 2009, appellant was arrested on the *capias* in case 8808. On May 29, 2009, the trial court set a \$1,000,000 cash or surety bond in case 8808. On June 1, 2009, the trial date in case 8808 was continued to consolidate it with case 2621.

{¶4} On August 5, 2009, appellant was indicted for possession of cocaine, in case No. 09CR-4654 ("case 4654").

{¶5} On October 5, 2009, appellant appeared before the trial court and the parties discussed the three indictments. The court eventually indicated it would not address case 2621 at that hearing. In case 8808, appellant entered a plea of guilty to one count of possession of cocaine with firearm specification, with the two remaining counts dismissed. In case 8808, the court imposed a sentence of four years for the possession charge plus one year for the firearm specification, as well as a fine. In case 4654, appellant entered a plea of guilty. In case 4654, the court imposed a sentence of four

years, to be served consecutive to the sentence in case 8808, as well as a fine. The aggregate sentence was nine years.

{¶6} The court indicated that, in imposing the sentence in case 8808, it was giving appellant ten days of jail-time credit, and zero jail-time credit for case 4654. The court indicated that, although appellant was entitled to 180 days of jail-time credit for time served since April 25, 2009, those days would be applied in case 2621, which was to be heard at a later date, as that case had a "heavy bond" for the robbery.

{¶7} Appellant appeals the judgment of the trial court related to case 8808, asserting the following assignments of error:

[I.] The trial court erred in imposing consecutive terms of incarceration for felony convictions without making findings required by R.C. 2929.14(E)(4) to overcome the statutory presumption favoring concurrent sentences.

[II.] The trial court erred in failing to give Appellant jail time credit against his sentence in violation of R.C. 2967.191 and the Equal Protection Clauses of the state and federal Constitutions.

{¶8} Appellant argues in his first assignment of error that the trial court erred when it imposed consecutive sentences without first making the factual findings required under R.C. 2929.14(E)(4) to overcome the statutory presumption in favor of concurrent sentences. Specifically, appellant contends the United States Supreme Court's decision in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, was contrary to the Supreme Court of Ohio's prior decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and demonstrated that Ohio's consecutive sentencing statutes were not unconstitutional and should not have been severed.

{¶9} In *Ice*, the United States Supreme Court found state statutory sentencing schemes that presume concurrent sentences, but allow consecutive sentences, to be ordered based upon the judicial finding of facts to justify such were constitutional. In *Foster*, the Supreme Court of Ohio found that Ohio's sentencing scheme, which provided that sentences be served concurrently unless judicial fact-finding permitted consecutive sentencing, was unconstitutional and severed those requirements from the rest of the sentencing statute. Therefore, appellant argues, because *Ice* rendered *Foster's* severance void ab initio and resurrected the Ohio sentencing statutes previously severed by *Foster*, the trial court should have been required to make judicial findings of fact, as required before *Foster*.

{¶10} This court has consistently declined to depart from *Foster*. See, e.g., *State v. Anderson*, 10th Dist. No. 09AP-631, 2010-Ohio-626; *State v. Potter*, 10th Dist. No. 09AP-580, 2010-Ohio-372; *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664; *State v. Russell*, 10th Dist. No. 09AP-428, 2009-Ohio-6420; *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554; *State v. Anderson*, 10th Dist. No. 08AP-1071, 2009-Ohio-6566; *State v. Crosky*, 10th Dist. No. 09AP-57, 2009-Ohio-4216. Therefore, unless the Supreme Court of Ohio directs otherwise in the future, we will continue to decline to depart from *Foster*. Appellant's first assignment of error is overruled.

{¶11} Appellant argues in his second assignment of error that the trial court erred in ordering his jail-time credit. Specifically, appellant contends that the trial court should have applied his 180 days of jail-time credit to case 8808 instead of case 2621, which was still awaiting trial. Appellant contends that, if the charges in case 2621 were to be dismissed or if the court chose to impose a concurrent term, the jail credit would be lost.

Appellant asserts that the trial court's actions violated R.C. 2967.191 and the holding in *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856.

{¶12} We need not address the applicability of *Fugate* to address appellant's argument. R.C. 2967.191 provides:

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.

{¶13} A trial court has the clear legal duty to specify in the record of conviction and sentence the number of days a defendant was confined prior to conviction. Ohio Adm.Code 5120-2-04(B); *State ex rel. Rankin v. Ohio Adult Parole Auth.*, 98 Ohio St.3d 476, 2003-Ohio-2061. Although it is the parole authority who credits the jail time served, it is the sentencing court that makes the factual determination as to the amount of time served by the prisoner before being sentenced in a facility under the supervision of the parole authority. *State ex rel. Corder v. Wilson* (1991), 68 Ohio App.3d 567. However, R.C. 2967.191 requires that jail credit be given only for the time the prisoner was confined for any reason arising out of the offense for which he was convicted and sentenced. It does not entitle a defendant to jail-time credit for any period of incarceration that arose from facts that are separate and apart from those on which his current sentence is based. *State v. Dawn* (1975), 45 Ohio App.2d 43.

{¶14} In the present case, the following discussion took place before the trial court with regard to jail credit:

THE COURT: What's his jail-time credit on 8808 * * *? Do you have the number?

[APPELLANT'S COUNSEL]: Yes, sir, if we set aside the nine months, I've got six months. He's been in since April 25th, Judge.

THE COURT: Of this year?

[APPELLANT'S COUNSEL]: Of this year, yes, sir.

* * *

[APPELLANT'S COUNSEL]: He's been in since April 25th of this year.

[PROSECUTOR]: He's got a day or two, doesn't he, for getting picked up on January 3?

* * *

[APPELLANT'S COUNSEL]: He does. So on the January case – see, he's not entitled to as much jail-time credit on that because he didn't get indicted on that till August. So, Judge, this is kind of rounding. I would say 180 days on the 8808 without the nine months that I had requested, and then I'd say two months on 4654. He was indicted on that on the 7th of August.

THE COURT: Does that duplicate with the 180?

[APPELLANT'S COUNSEL]: Yes, it would if the court imposed consecutive sentences. If it was concurrent, no.

[PROSECUTOR]: The time from April 25th goes with his robbery case. I don't think we need to worry about giving it to him now. If he takes it on this case, we'll have to deal with it later on the robbery case. I just don't know how we want to deal with it.

THE COURT: I guess my preference would be to leave it on the robbery case so it would be cleaner.

[APPELLANT'S COUNSEL]: Assuming he gets found guilty on that.

[PROSECUTOR]: Assuming.

THE COURT: That's right. Otherwise, it's gone. But that's where the heavy bond was, was the robbery, I think. So that's 180 days on the robbery, and so does that leave anything on 8808? Is there 10 days in muny [sic] court or something?

[APPELLANT'S COUNSEL]: Probably 10 days on that.

THE COURT: Ten days jail-time credit.

(Tr. 38-39.)

{¶15} We first note that, with regard to the actual number of days to which appellant is entitled to jail credit, the record before this court is not sufficient to address what appellant's proper jail credit should be. As indicated above, appellant's trial counsel represented to the court that appellant had been in jail since April 25, 2009, for a total of 180 days. The record in this case is unclear as to what occurred on April 25, 2009, but it may have been the date of arrest for the offenses in 2621, as appellant was indicted in case 2621 on May 1, 2009. The prosecutor for the state of Ohio, plaintiff-appellee, represented at the hearing that the time spent in jail from April 25, 2009 until the hearing was attributable to case 2621, and the trial court agreed. However, the record does not appear to support the claim that appellant was in jail continuously from April 25, 2009, until the hearing date in this case. The record does reveal that appellant was still in jail as of May 13, 2009, as the continuance form filed in the present case on that date indicated that the trial for case 8808 was continued because appellant had been arraigned in case

2621 and was "in jail." However, appellant was apparently released from jail on bond sometime thereafter because the record reveals that, on May 27, 2009, a *capias* was issued in the present case, case 8808, based upon appellant's failure to comply with the release agreement, and he was arrested on the *capias* the same day. Thus, it appears that appellant was not imprisoned for the entire time. The state alludes to this point in its appellate brief. Therefore, we find the matter must be remanded for the trial court to recalculate the total number of days to which appellant is entitled for jail-time credit.

{¶16} With regard to appellant's main argument that his jail-time credit for the time he spent incarcerated since April 25, 2009, should be applied to the present case and not case 2621, the only record before this court is from case 8808. The record reveals that (1) appellant was arrested and jailed on the *capias* in case 8808 on May 27, 2009, based upon his failure to comply with the release terms in case 8808, and (2) on May 29, 2009, the trial court set a \$1,000,000 cash or surety bond in case 8808, the effect of which was appellant remained jailed. This evidence would suggest that appellant was jailed on May 27, 2009, and remained in jail until the hearing on October 5, 2009, based upon actions taken with respect to the crimes in the present case. However, because this court is without the record from case 2621, we are unable to determine whether any of the time spent in jail from May 27, 2009, was related to case 2621. Despite the above evidence in the present record pointing to the fact that appellant remained in jail since May 27, 2009, based upon actions related to the present case, the trial court seemed to suggest at the hearing that, in reality, appellant remained in jail during this period due to the "heavy bond" that was set based upon the crimes in case 2621. Because the record is not fully clear in this respect, we believe the better course is to remand the matter to the trial court

to either correct its decision to apply any jail-time credit accrued after May 27, 2009, to the current case or make further findings to support its decision to apply the jail-time credit to case 2621. The court may also take into consideration any events that have subsequently occurred in case 2621, if they impact its determination in the present case.

{¶17} Additionally, it appears that any time spent in jail between April 25, 2009 and May 27, 2009, was due to appellant's arrest in case 2621. As explained above, it appears appellant was released from jail sometime after May 13, 2009, but the record does not disclose the exact date; therefore, we are unable to determine the precise number of days that should be added to appellant's jail-time credit for this period. Given our remand of the other issues related to appellant's jail-time credit, the trial court may also revisit the issue to which case the jail-time credit for this period should apply while addressing the other jail-time credit issues. For these reasons, we sustain appellant's second assignment of error.

{¶18} Accordingly, appellant's first assignment of error is overruled, his second assignment of error is sustained, the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this matter is remanded to that court for proceedings consistent with this decision.

*Judgment affirmed in part and reversed in part;
cause remanded.*

KLATT and CONNOR, JJ., concur.
