

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
HOCKING COUNTY

STATE OF OHIO	:	
Plaintiff-Appellee,	:	Case No. 18CA1
v.	:	
NICOLE L. NUTTER,	:	<u>DECISION AND</u>
Defendant-Appellant.	:	<u>JUDGMENT ENTRY</u>
	:	RELEASED: 12/19/2018

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APPEARANCES:

Ryan Shepler, Kernen & Shepler, LLC, Logan, Ohio, for appellant.

Benjamin E. Fickel, Hocking County Prosecutor, and Colleen S. Williams, Assistant Hocking County Prosecutor, Logan, Ohio, for appellee.

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Hoover, P.J.

{¶1} Defendant-appellant, Nicole L. Nutter (“Nutter”), appeals the judgment of the Hocking County Court of Common Pleas, which sentenced Nutter to 180 days of incarceration for violating a condition of her probation. The trial court had originally ordered that Nutter be placed on community control for a period of five years after being convicted of Failure to Appear, a fourth degree felony, in violation of R.C. 2937.99(A). On appeal, Nutter contends that the trial court erred by sentencing her to 180 days in prison without credit for time previously served. Instead, Nutter believes that all jail time served in relation to this case should be included in the calculation of her jail time credit. The State argues that the trial court did not err in ordering Nutter to serve 180 days in prison. The State does agree that the trial court miscalculated the jail time credit but argues that Nutter is only entitled to additional credit from

November 15, 2017, the date of her arrest on the second community control violation, to February 27, 2018, the date of her release from prison on a recognizance bond.

{¶2} For the reasons that follow, we find that the trial court did err in sentencing Nutter without granting her credit for time previously served. In other words, the trial court erred in calculating Nutter's jail time credit. Accordingly, although we affirm the sentence of 180 days in prison, we reverse the trial court's decision granting Nutter only 16 days jail time credit. We remand this cause for the trial court to grant Nutter jail time credit consistent with this decision and to discharge her immediately.

### **I. Facts and Procedural History**

{¶3} On July 22, 2016, the Hocking County Grand Jury issued a one-count indictment charging Nutter with Count 1: Failure to Appear, in violation of R.C. 2937.99(A), a felony of the fourth degree. Nutter was arraigned on the charge on September 1, 2016, where she was appointed counsel and entered a plea of not guilty.

{¶4} The trial court held a sentencing hearing on November 29, 2016; and at that time, Nutter pleaded guilty to Failure to Appear. The trial court ordered that she be placed on community control for a period of five years, with eleven days of jail time credit. The court informed Nutter that she could be sentenced to up to eighteen months imprisonment for violating community control.

{¶5} On or about January 20, 2017, Nutter violated her probation by failing to report to her supervising officer and by failing to notify her supervising officer of a change of address. The State filed a probation violation motion on January 23, 2017. In its motion, the State requested that Nutter be arrested and that her community control be tolled as of January 20, 2017. Nutter was arrested on February 22, 2017. The trial court imposed a cash bond. Nutter did

not post the cash bond. The arraignment was held February 27, 2017; and Nutter was again appointed counsel.

{¶6} On March 9, 2017, Nutter’s trial counsel filed a motion for an evaluation to determine if she was competent to stand trial. The trial court granted the motion and, after reviewing the subsequent evaluation, issued an order on May 17, 2017, finding Nutter incompetent to stand trial. According to the trial court’s order, Nutter was transferred to the Appalachian Behavioral Healthcare in Athens, Ohio for restoration. The trial court held a competency hearing on September 25, 2017. At that time, the court found that Nutter had been restored to competency.

{¶7} On October 3, 2017, Nutter admitted to the court that she had violated the conditions of her probation. On October 10, 2017, the trial court ordered that Nutter’s community control be continued. Specifically, the court ordered that Nutter be “placed on Community Control for a period of five (5) years, less credit[.]” (OP 53). Additionally, the trial court ordered Nutter to complete the STAR Program at the STAR Community Justice Center in Franklin Furnace, Ohio.

{¶8} Nutter was transferred from the Southeastern Regional Jail to the STAR Program on November 2, 2017. After Nutter left the STAR Program, the State filed another probation violation motion on November 9, 2017. (OP 59). In its motion, the State requested that Nutter’s community control supervision be revoked and that the court impose the sentence previously suspended on the charge of Failure to Appear. Nutter was arrested on November 15, 2017. Again, the trial court set a cash bond, which Nutter did not post. At the arraignment, held November 28, 2017, Nutter was appointed counsel.

{¶9} At the hearing on the State’s motion, Nutter admitted to violating the conditions of her probation. On December 15, 2017, the trial court sentenced Nutter to serve 180 days in prison on the charge of Failure to Appear, in violation of R.C. 2937.99(A), a fourth degree felony. The court granted credit for “sixteen (16) days as of December 14, 2017[.]” (OP 68).

{¶10} Nutter appealed the trial court decision on January 9, 2018. On February 8, 2018, Nutter filed a motion to stay execution of sentence pending appeal, which the trial court granted on February 14, 2017. Nutter was released from prison on February 27, 2018 with a recognizance bond while this appeal is pending.

## **II. Assignment of Error**

{¶11} On appeal, Nutter assigns a sole error for our review:

Assignment of Error I:

The trial court erred by sentencing Ms. Nutter to 180 days in prison without credit for all time previously served in this case.

## **III. Law and Analysis**

### **A. Standard of Review**

{¶12} Nutter contends that the standard of review is de novo where the sentence is contrary to law. However, as both parties agree that the actual sentence of 180 days is proper, (Appellant’s brief p. 6) we narrow the standard of review to determine whether the computation of Nutter’s jail time credit was proper. “A trial court must make a factual determination of the number of days credit to which a prisoner is entitled by law. *See* Ohio Adm.Code 5120-2-04(B). Therefore, we must uphold the trial court[’]s findings of fact if the record contains competent, credible evidence to support them.” *State v. Primack*, 4th Dist. Washington No. 13CA23, 2014-Ohio-1771, ¶ 5, quoting *State v. Elkins*, 4th Dist. Hocking No. 07CA1, 2008-Ohio-674, ¶ 20.

### B. Calculating Jail Time Credit

{¶13} “The practice of awarding jail time credit, although now covered by state statute, has its roots in the Equal Protection Clauses of the Ohio and United States Constitutions.” *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, ¶ 7. The Equal Protection Clause requires that defendants who are unable to afford bail must be credited for the time they are confined while awaiting trial. *Id.* “ ‘The rationale for [giving jail time credit] is quite simple. A person with money will make bail while a person without money will not. If both persons are given identical sentences, the reality is that unless the person who did not make bail is given credit for his pretrial time, the poorer person will have served more time than the other. Unequal treatment based on personal wealth is anathema to the Constitution as a denial of equal protection.’ ” *Id.* at ¶ 25 (Lundberg Stratton, J., concurring), quoting *State v. Thorpe*, 10th Dist. Franklin Nos. 99AP-1180 through 99AP-1187, 2000 WL 966702, \*3 (June 30, 2000) (Grey, J. dissenting).

{¶14} This principle is codified in R.C. 2967.191, which states that:

The department of rehabilitation and correction shall reduce the stated prison term of a prisoner \* \* \* by the total number of days that the prisoner was confined *for any reason arising out of the offense*<sup>1</sup> *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, as determined by the sentencing court \* \* \*.

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<sup>1</sup> *Black’s Law Dictionary* 1108 (7th Ed.1999) defines an “offense” as “[a] violation of the law; a crime, often a minor one.”

(Emphasis added.) “Thus, R.C. 2967.191 is inapplicable when the offender is imprisoned as a result of another unrelated offense.” *State v. Maddox*, 8th Dist. Cuyahoga No. 99120, 2013-Ohio-3140, ¶ 41.

**C. Nutter Was Entitled to More Than Sixteen Days of Jail Time Credit**

{¶15} In her sole assignment of error, Nutter states that “the trial court erred by sentencing Ms. Nutter to 180 days in prison without credit for all time previously served in this case.” Although Nutter addresses this issue within her assignment of error, we refuse to make a ruling on whether Nutter’s community control violation constituted a technical violation. We need not address the issue at this time because Nutter was actually sentenced within the 180 days as provided for in R.C. 2919.15(B)(1)(c)(ii). The trial court did not sentence Nutter to more than 180 days.

{¶16} Furthermore, trial court did not commit plain error. *See* App.R. 12(A); Crim.R. 52(B); *State v. Lamb*, 4th Dist. Scioto No. 17CA3796, 2018-Ohio-1405, ¶ 29 (“To constitute plain error, a reviewing court must find (1) an error in the proceedings, (2) the error must be a plain, obvious or clear defect in the trial proceedings, and (3) the error must have affected ‘substantial rights’ (i.e., the trial court’s error must have affected the trial’s outcome).”). The 180-day prison term the trial court imposed was permissible under either R.C. 2929.15(B)(1)(c)(ii), for a technical violation of community control, or under R.C. 2929.14(A)(4), for a non-technical violation of community control. We have consistently refused to reverse a correct judgment merely because of an erroneous rationale. *State ex. rel. Gilmore v. Mitchell*, 86 Ohio St.3d 302, 303, 714 N.E.2d 925 (1999). In short, any ruling we would issue on this matter would amount to an advisory opinion, which we refuse to render. *See State v. Moore*, 4th Dist. Adams No. 13CA987, 2015-Ohio-2090, ¶ 7.

{¶17} We will address the issue of Nutter's jail time credit to which she is entitled. Both Nutter and the State agree that the trial court improperly credited Nutter with only 16 days of jail time. Nutter argues that she should have received credit for time spent incarcerated after her first community control violation. Further, Nutter believes that she is entitled to discharge upon remand since she was incarcerated continuously for over 180 days from February 22, 2017, the date of her arrest on the first community control violation, to September 25, 2017, the date on which she was restored to competency. The State argues that Nutter should not get credit for time served for her previous community control violation. Instead, the State argues that Nutter is entitled jail time credit from November 15, 2017, the date of her arrest on the second community control violation, to February 27, 2018, the date of her release from prison on a recognizance bond.

{¶18} According to the record, Nutter was arrested on February 22, 2017 after violating the terms of her probation the first time. She was incarcerated through May 17, 2017, at which time the trial court found her incompetent to stand trial. Then, from May 17, 2017 through September 25, 2017, Nutter was housed in Appalachian Behavioral Healthcare due to her incompetency to stand trial. After a hearing on September 25, 2017, the trial court determined that Nutter was restored to competency and released Nutter on a recognizance bond. Therefore, Nutter had been incarcerated or had been confined for examination to determine her competency to stand trial from February 22, 2017 through September 25, 2017.

{¶19} After a determination that Nutter was competent to stand trial, she admitted to the probation violation on October 10, 2017. Nutter's community control was continued with the added condition that she complete the STAR program. Nutter reported to STAR, only to leave after several days. As a result, Nutter was arrested on November 15, 2017 for violating the terms

of her probation for a second time. She was continuously incarcerated until February 27, 2018, when she was released on a recognizance bond. The sum of these two stretches of confinement alone total more than 180 days.

{¶20} We find that the trial court erred by failing to properly calculate Nutter’s jail-time credit pursuant to R.C. 2967.191. The plain language of the statute instructs the court to reduce a 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[.]” R.C. 2967.191. This includes “confinement in lieu of bail while awaiting trial” and “confinement for examination to determine the prisoner’s competence to stand trial or sanity[.]”

{¶21} Here, Nutter is entitled to jail time credit for days confined for any reason arising out of her conviction and sentence on Count 1: Failure to Appear, a fourth degree felony, in violation of R.C. 2937.99(A). Since both of her community control violations arise out of this offense and sentence, Nutter is entitled to jail time credit for confinement related to both violations. Therefore, we find that the trial court erred in granting only 16 days of jail time credit, as of December 14, 2017. Nutter should be granted jail time credit for all time for which she was incarcerated and held in the Appalachian Behavioral Healthcare that arose out of her original Failure to Appear conviction.

{¶22} Consequently, we sustain Nutter’s assignment of error with respect to her jail time credit.

#### **IV. Conclusion**

{¶23} Accordingly, although we affirm the sentence of 180 days in prison, we reverse the trial court’s decision granting Nutter only 16 days jail time credit. We remand this cause for



the trial court to grant Nutter the proper amount of jail time credit consistent with this decision and to discharge her immediately.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED. Appellant and Appellee shall equally divide the costs.

The Court finds that reasonable grounds existed for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellee to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellee to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. and Abele, J.: Concur in Judgment and Opinion

For the Court,

By: \_\_\_\_\_  
Marie Hoover  
Presiding Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**