

[Cite as *State v. McKeever*, 2017-Ohio-9387.]

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

STATE OF OHIO	)	
	)	
PLAINTIFF-APPELLEE	)	
	)	CASE NO. 17 MA 0038
VS.	)	
	)	OPINION
PAUL McKEEVER	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas, of Mahoning County, Ohio Case No. 15 CR 388
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JUDGMENT:	Dismissed.
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APPEARANCES:	
For Plaintiff-Appellee	Attorney Paul Gains Mahoning County Prosecutor Attorney Ralph Rivera Assistant Prosecutor 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503-1426

For Defendant-Appellant	Attorney Jennifer Simon 4410 Market Street Youngstown, Ohio 44512
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JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 29, 2017

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DeGENARO, J.

{¶1} Defendant–Appellant, Paul McKeever, appeals the trial court's judgment overruling his pro-se motion to correct the calculation of jail-time credit. Appointed appellate counsel for McKeever has filed a no-merit brief and a request to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967), and *State v. Toney*, 23 Ohio App.2d 203, 262 N.E.2d 419 (1970). There are no appealable issues. McKeever has served his prison sentence, thus the entire appeal is moot. Accordingly, this appeal is dismissed as moot and counsel is permitted to withdraw.

{¶2} McKeever pled guilty to three counts of having weapons while under disability, third-degree felonies. In the Criminal Rule 11 plea agreement, the State agreed to recommend a four-year prison term in exchange for McKeever's guilty pleas. The trial court accepted the plea and ordered a presentence investigation. On August 31, 2015, following a hearing, the trial court sentenced McKeever to 24 months in prison on all three counts to run concurrently. McKeever was ordered conveyed to the custody of the Department of Rehabilitation and Corrections and given jail time credit of 116 days. The credit included "all time of incarceration served in jail on these charges up to and including" the date of the sentencing hearing. McKeever failed to file a direct appeal from his conviction and sentence.

{¶3} On December 8, 2016, McKeever filed with the trial court a pro-se "Motion to Correct the Mathematical Calculation of Already Granted Jail-Time Credit Pursuant to R.C. 2929.19," requesting an additional 28 days credit for time spent in the Mahoning County jail between sentencing and transportation to the Department of Rehabilitation and Corrections, raising the amount from 116 days to 144. McKeever further argued that the 144 days should be applied to each of the three counts within the concurrent prison term for an aggregate 432 days of jail-time credit.

{¶4} The State agreed that McKeever was entitled to a total of 144 days jail time credit, but contended he had subsequently been credited with those additional days. However, the State contested that the imposition of concurrent sentences entitles him to 144 days jail time credit on *each* count or 432 days in the aggregate.

{¶15} The trial court overruled McKeever's motion on February 13, 2017, and from that entry McKeever, acting pro-se, timely appealed. McKeever filed a pro-se Appellant's brief but later requested, and was granted, the assistance of appointed appellate counsel. Counsel filed a no-merit brief and requested to withdraw. We granted McKeever 30 days to file a pro-se brief but he did not file an additional brief.

{¶16} An attorney appointed to represent an indigent criminal defendant may seek permission to withdraw if the attorney can show that there is no merit to the appeal. See *generally Anders*, 386 U.S. 738. To support such a request, appellate counsel is required to undertake a conscientious examination of the case and accompany the request for withdrawal with a brief referring to anything in the record that might arguably support an appeal. *Toney*, 23 Ohio App.2d at 207. Counsel's motion must then be transmitted to the defendant in order to assert any error pro se. *Id.* at syllabus. The reviewing court must then decide, after a full examination of the proceedings whether the case is wholly frivolous. *Id.* If so, counsel's motion is granted, new counsel denied, and the trial court's judgment affirmed. *Id.*

{¶17} The procedural posture of this case is slightly backwards: the pro-se brief was filed before counsel was requested, appointed, and filed a no-merit brief. Both the no-merit brief and the pro-se brief raise similar issues, and the scope of this appeal is quite narrow; the ruling on the motion for jail-time credit.

{¶18} Courts have generally held that once the defendant has been released from prison, the merits of arguments relating to the trial court's calculation of his jail-time credit become moot. See *State ex rel. Gordon v. Murphy*, 112 Ohio St.3d 329, 859 N.E.2d 928, 2006-Ohio-6572, ¶ 6; see also *Sper v. Gansheimer*, 11th Dist. No. 2003-A-0124, 2004-Ohio-2443, ¶ 4.

{¶19} Mootness upon release from confinement is a general rule with exceptions, such as where the claim is "capable of repetition, yet evading review." Thus, where there is a reasonable expectation that same complaining party will be subject to the same action again, or the action presents debatable constitutional question, or there is a question of great public or general interest, a court can still

address the claim after the inmate's release from prison under this exception. See *Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶ 14, fn. 1, citing *State v. Tuomala*, 104 Ohio St.3d 93, 2004-Ohio-6239, 818 N.E.2d 272, ¶ 7, and *State ex rel. Calvary v. Upper Arlington* (2000), 89 Ohio St.3d 229, 231, 729 N.E.2d 1182 (2000).

{¶10} We take judicial notice of the Ohio Department of Corrections website which demonstrates McKeever was released from prison on April 30, 2017, after serving his full sentence. *State ex rel. Brown v. Ohio Dept. of Rehab. & Corr.*, 139 Ohio St.3d 433, 2014-Ohio-2348, 12 N.E.3d 1187, ¶ 2. Since this appeal involves solely the calculation of jail-time credit, and there is no reasonable expectation that McKeever will be subject to this same action again, the entire appeal is moot. See *id.* "The proper response to a moot appeal is the dismissal of the appeal." *Freedom Mtge Corp. v. Boston*, 7th Dist. No. 14 CO 0036, 2016-Ohio-7016, ¶ 9, citing *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004-Ohio-5466, 816 N.E.2d 238, ¶ 28.

{¶11} In sum, any arguments relating to the calculation of jail-time credit are moot because McKeever was released from prison in April 2017. Accordingly, this appeal is dismissed as moot and counsel is permitted to withdraw.

Donofrio, J., concurs.

Waite, J., concurs.