[Cite as *State v. Fuller*, 2020-Ohio-6735.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 108915
v.	:	
TYSEAN FULLER,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: December 11, 2020

Cuyahoga County Court of Common Pleas
Case No. CR-18-628447-B
Application for Reopening
Motion No. 541559

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Brandon A. Piteo, Assistant Prosecuting Attorney, *for appellee*.

Tysean Fuller, *pro se*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} Applicant, Tysean Fuller, timely seeks to reopen his appeal, *State v. Fuller*, 8th Dist. Cuyahoga No. 108915, 2020-Ohio-3804. In support, he claims that

appellate counsel was ineffective for not arguing the following proposed assignments of error:

> I. The trial court violated the Double Jeopardy Clause to the U.S. Constitution by re-prosecuting, re-convicting, and resentencing appellant for the same incident appellant pled no contest to in Euclid Municipal Court.
>
> II. The trial court committed plain error and violated the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution by convicting and sentencing appellant on Counts 1, 5, 7, and 9, which also violate R.C. 2941.25.
>
> III. Appellant was deprived [of] effective assistance of trial counsel in violation of the Sixth Amendment to the U.S. Constitution when counsel failed to request credit for time served under the Double Jeopardy Clause on Counts 2, 3, and 6.
>
> IV. The trial court committed plain error by failing to calculate and include jail-time credit in the sentencing entry.

{¶ 2} The application is denied for the following reasons.

Background

{¶ 3} Fuller was convicted of numerous crimes related to the armed theft of an automobile from Osman Baslamisli in Cuyahoga C.P. No. CR-18-628447-B. Baslamisli was attempting to sell his car when Fuller and another, Alexander Sewell, schemed to take the vehicle from him at gunpoint. Sewell met Baslamisli in a parking lot with a feigned desire to purchase the car. Sewell told Baslamisli that he wanted to take the car to a mechanic to look it over. Sewell and Baslamisli left in the car. While the two were driving, Sewell was texting with Fuller. The texts showed that Sewell and Fuller were arranging to lead Baslamisli to a more secluded location where Fuller could ambush Baslamisli and steal the vehicle.

{¶ 4} After the theft was accomplished, police attempted to stop the vehicle, which resulted in a highspeed chase through Cleveland and a few of its eastern suburbs. Sewell was apprehended at the conclusion of the chase, but Fuller escaped. He was later apprehended still carrying Baslamisli's cell phone, which was taken at the time of the robbery. Crimes related to the police chase were charged separately in Cuyahoga C.P. No. CR-18-627966-A.

{¶ 5} Fuller appealed his convictions in CR-18-628447-B, assigning a single error for review:

> The judgment entry of conviction and sentence against defendant-appellant, Tysean Fuller for the separate offenses of aggravated robbery, robbery, kidnapping, abduction, grand theft-motor vehicle, receiving stolen property-motor vehicle, telecommunication fraud, carrying a concealed weapon and improper handling of a firearm in a motor vehicle were all contrary to manifest weight of the evidence.

{¶ 6} On July 23, 2020, this court overruled this assigned error and affirmed Fuller's convictions. *Fuller*, 8th Dist. Cuyahoga No. 108915, 2020-Ohio-3804, ¶ 28.

{¶ 7} On October 2, 2020, Fuller timely filed the instant application, seeking to reopen his appeal based on the proposed assignments of error listed above.

Standard for Reopening

{¶ 8} An application for reopening provides a limited means of asserting a claim of ineffective assistance of appellate counsel. App.R. 26(B). The application shall be granted if "there is a genuine issue as to whether the applicant was deprived

of the effective assistance of counsel on appeal." App.R. 26(B)(5). The Supreme Court of Ohio has held that the two-pronged analysis found in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is the appropriate standard in assessing whether an applicant has raised a "genuine issue" as to the effectiveness of appellate counsel in a request to reopen an appeal. *State v. Myers*, 102 Ohio St.3d 318, 2004-Ohio-3075, 810 N.E.2d 436, ¶ 8.

{¶ 9} Pursuant to *Strickland*, Fuller bears the burden of showing "that his counsel [was] deficient for failing to raise the issues he now presents, as well as showing that had he presented those claims on appeal, there was a 'reasonable probability' that he would have been successful." *State v. Spivey*, 84 Ohio St.3d 24, 24, 701 N.E.2d 696 (1998).

Double Jeopardy

{¶ 10} Fuller first claims that appellate counsel was ineffective for not arguing that a plea agreement entered in an unspecified municipal court case precluded charges in the common pleas court case that was the subject of his appeal.

{¶ 11} The record does not disclose a plea agreement in a municipal court case. "It is well-settled that '[m]atters outside the record do not provide a basis for reopening.'" *State v. Carmon*, 8th Dist. Cuyahoga No. 75377, 2005-Ohio-5463, ¶ 29, quoting *State v. Hicks*, 8th Dist. Cuyahoga No. 83981, 2005-Ohio-1842, ¶ 7.

{¶ 12} Fuller claims that he filed a motion to dismiss in his common pleas court case premised on double jeopardy grounds, which would presumably offer some evidence to support this proposed assignment of error. Fuller does not cite to

the record when making this claim. A review of the docket in CR-18-628447-B does not indicate that Fuller filed a motion to dismiss based on double jeopardy. There was a pro se motion to dismiss based on speedy trial filed on May 13, 2019. But Fuller was represented by counsel at the time this motion was filed, and this constituted the kind of hybrid representation prohibited in Ohio. *State v. Pierce*, 8th Dist. Cuyahoga No. 107752, 2019-Ohio-3762, ¶ 11. *See also State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, paragraph one of the syllabus.

{¶ 13} There is no evidence in the record before this court of a plea agreement in a municipal court case that would preclude the state from prosecuting Fuller for the charges in CR-18-628447-B. A claim of ineffective assistance of appellate counsel must be based on matters in the record that appellate counsel could detect and argue because, generally, counsel does not have the ability to add new material to the appellate record. *State v. Moon*, 8th Dist. Cuyahoga No. 93673, 2014-Ohio-108, ¶ 14. *See also State v. Cooperrider*, 4 Ohio St.3d 226, 228, 448 N.E.2d 452 (1983). Therefore, Fuller has not presented a colorable claim of ineffective assistance of appellate counsel based on this proposed assignment of error.

Allied Offenses

{¶ 14} Fuller next claims the trial court committed plain error when the court imposed sentences on Counts 1, 5, 7, and 9,[1] and appellate counsel was

[1] This court notes that this proposed assignment of error takes issue with the court's failure to merge Count 7 with another count. However, the trial court did merge

ineffective for not advancing this issue. Fuller claims these are allied offenses of similar import with other convictions that should have merged prior to sentencing.

{¶ 15} R.C. 2941.25 codifies the double jeopardy rights afforded by the United States and Ohio Constitutions into statutory law.

> Under R.C. 2941.25(B), a defendant whose conduct supports multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus.

State v. Ruff, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, paragraph three of syllabus. An affirmative answer to any of the questions will permit separate convictions. *Id*. at ¶ 31.

{¶ 16} Prior to sentencing the state put the following on the record:

> Your Honor, I know we have gone through, and I did send the Court and defense counsel a list of the charges that I believe that the defendant should be sentenced on, and I would just like to take a moment — I think we acknowledged that the defendant needs to be sentenced on both the kidnapping and the aggravated robbery charge, and that the minimum sentence would be nine years because those — the gun specifications, the three-year specs on each of those charges need to be run prior to and consecutive to each other and the underlying offense.
>
> I don't think there is any dispute about that.

(Tr. 928-929.)

{¶ 17} The court then sentenced Fuller as follows:

> So in Case Number 628447, on Count 1, aggravated robbery, I will sentence you to four years, and you have the three-year gun

---

Count 7, grand theft of an automobile, with Count 1, aggravated robbery. Therefore, the court will limit the discussion of this proposed assignment of error to Counts 1, 5, and 9.

> specification that needs to be served prior to and consecutive to that underlying sentence.
>
> Count 2, Count 3 and Count 4 merge for the purpose of sentencing. Count 5, kidnapping, you have the three-year gun specification that needs to be served prior to and consecutive to the underlying as well as the other three-year gun specification.
>
> For the underlying crime of kidnapping, I will sentence you to four years to be served concurrent to the others. Count 6, abduction; Count 7, grand theft; and Count 8 all merge for the purpose of sentencing. To be clear, Count 6 merges with Count 5. Counts 7 and 8 merge with Count 1.
>
> For Count 9, receiving stolen property, I will sentence you to nine months to be served concurrent to the other counts. Count 26, telecommunication fraud, will be nine months to be served concurrent. Count 27, nine months to be served concurrent, and Count 28, nine months to be served concurrent.

(Tr. 940-941.)

{¶ 18} In this case, the state indicated that the issue of allied offenses was discussed and the parties arrived at an understanding about which charges would merge prior to sentencing. The state put on the record a summary of those discussions and provided opposing counsel and the judge with a list of the elections the state made. Defense counsel did not contradict the state's recitation or raise an objection. The issue of allied offenses was considered, and the trial court found that Counts 1, 5, 9, 26, 27, and 28 survived based on the facts of the case and the state's elections. Therefore, Fuller must rely on plain error to demonstrate any probability of success in his application. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 5. Plain error may be recognized in a criminal case at the discretion of a court pursuant to Crim.R. 52(B).

> However, the accused bears the burden of proof to demonstrate plain error on the record, [*State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900,] at ¶ 16, and must show "an error, i.e., a deviation from a legal rule" that constitutes "an 'obvious' defect in the trial proceedings," *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240 (2002). However, even if the error is obvious, it must have affected substantial rights, and "[w]e have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." *Id*. The accused is therefore required to demonstrate a reasonable probability that the error resulted in prejudice — the same deferential standard for reviewing ineffective assistance of counsel claims. *United States v. Dominguez Benitez*, 542 U.S. 74, 81-83, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004) (construing Fed.R.Crim.P. 52(b), the federal analog to Crim.R. 52(B), and also noting that the burden of proving entitlement to relief for plain error "should not be too easy").

Rogers at ¶ 22.

{¶ 19} Fuller claims that Count 5, kidnapping, should have merged with Count 1, aggravated robbery.

{¶ 20} The Supreme Court of Ohio has developed a test to determine whether kidnapping and another offense are allied offenses of similar import. *State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979). This is necessary because inherent in several offenses is the restraint of a person's liberty of movement by force, threat, or deception; the general elements of kidnapping under R.C. 2905.01. *See State v. Echols*, 8th Dist. Cuyahoga No. 102504, 2015-Ohio-5138, ¶ 35 (rape); *State v. Cook*, 8th Dist. Cuyahoga No. 95987, 2011-Ohio-5156, ¶ 29 (aggravated robbery). The *Logan* court developed the test to distinguish actions that constitute

kidnapping separate and apart from those that are inherent in some other offense, such as aggravated robbery defined in R.C. 2911.01.[2] The court stated:

> (a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;
>
> (b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

Id. at the syllabus.

{¶ 21} Even though the allied offense analysis applied by Ohio courts has undergone significant change since *Logan* was decided, these factors are still routinely applied by courts addressing this question. *See State v. Meeks*, 3d Dist. Defiance No. 4-20-02, 2020-Ohio-5050, ¶ 17 (collecting cases); *State v. Watts*, 8th Dist. Cuyahoga No. 108707, 2020-Ohio-3282, ¶ 64; *State v. Tolliver*, 8th Dist. Cuyahoga No. 108955, 2020-Ohio-3121, ¶ 57.

{¶ 22} We now apply the facts of this case to the above test. Baslamisli testified that he was attempting to sell his car and arranged to meet Fuller's co-conspirator, Sewell. Through deception, Fuller and Sewell schemed to remove Baslamisli from a parking lot to a more secluded location where Fuller could ambush

---

[2] This statute provides in pertinent part: "No person, in attempting or committing a theft offense * * * shall * * * [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it * * *."

Baslamisli, and steal his car. This movement concluded after Fuller ordered Baslamisli out of the car at gunpoint. Text messages exchanged by Fuller and Sewell during the movement bore that out. The movement of Baslamisli from one location to another distant location by car does not constitute slight or incidental movement. This conduct is not the type that would constitute a kidnapping that would be inherent in the aggravated robbery that took place after Baslamisli was removed from the car. The movement was not merely incidental to a separate crime; it was sustained and calculated to achieve its own purpose separate from the robbery. It was done to remove the victim from an open, well-trafficked location to a secluded one.

{¶ 23} Fuller argues this is a single course of conduct with a single animus. But the facts of this case demonstrate otherwise. The movement of the victim from the location of a parking lot of a business owned by his brother-in-law, to a residential area where he was ordered out of the car at gunpoint was done to secure seclusion of the victim. This may have been done in aid of the robbery plan, but it constitutes separate conduct under *Logan*. Therefore, no plain error exists under the facts of this case when the trial court sentenced Fuller for both aggravated robbery and kidnapping.

{¶ 24} Fuller also argues that he cannot be convicted of both receiving stolen property as found in Count 9, and Count 1, aggravated robbery. The receiving stolen properly conviction was for the possession of stolen state of Missouri license plates taken from Raul's Auto Sales that was affixed to Baslamisli's vehicle after it was

stolen. This constitutes the receipt of separate stolen properly from a separate victim at a separate time. This conviction was not for the same conduct as that charged in the aggravated robbery conviction — the theft of Baslamisli's car at gunpoint.

{¶ 25} Fuller has not presented any allegations that could lead this court to the conclusion that had appellate counsel raised these merger issues, there is reasonable probability of success on appeal. The trial court addressed merger at the sentencing hearing, merged several offenses, and sentenced Fuller only for those offenses that survived merger. Fuller has not set forth a colorable claim of ineffective assistance of appellate counsel here.

Jail-time Credit for Merged Offenses

{¶ 26} In his third proposed assignment of error, Fuller claims that appellate counsel was ineffective for not arguing that trial counsel was ineffective for not requesting an award of jail-time credit for Counts 2, 3, and 6. These are offenses that were merged with other offenses, on which no sentence was imposed. He claims that trial counsel had a duty to request credit for the merged offenses.

{¶ 27} Ineffective assistance of trial counsel is judged by the *Strickland* standard articulated above.

> In order to prevail on an ineffective-assistance-of-counsel claim, a defendant must prove that counsel's performance was deficient and that the defendant was prejudiced by counsel's deficient performance. [*State v.*] *Bradley*, 42 Ohio St.3d [136,] 141-142, 538 N.E.2d 373 [(1989)]; *Strickland*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Thus, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that there exists a

> reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *See Bradley* at paragraphs two and three of the syllabus. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* at 142, quoting *Strickland* * * * at 694.

State v. Davis, 159 Ohio St.3d 31, 2020-Ohio-309, 146 N.E.3d 560, ¶ 10.

{¶ 28} R.C. 2967.191, Ohio's jail-time credit statute, requires the award of credit for confinement awaiting trial for each offense for which the defendant was "*convicted and sentenced*." (Emphasis added.) R.C. 2967.191(A). R.C. 2929.19(B)(2)(h)(i) also instructs the trial court to do the following at a felony sentencing hearing:

> Determine, 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 department of rehabilitation and correction must reduce the definite prison term imposed on the offender as the offender's stated prison term * * *.

(Emphasis added.) A finding of guilt alone is not sufficient to qualify for an award of jail-time credit under either statute. A plain reading of the statutes show that merged offenses are not subject to jail-time credit.

{¶ 29} This conclusion does not offend principles of double jeopardy as Fuller seems to argue with his citations to two cases in his application. Fuller cites to *Jones v. Thomas*, 491 U.S. 376, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989), and *Williams v. Singletary*, 78 F.3d 1510 (11th Cir.1996). However, Fuller does not explain how these cases aid his claim. Neither case addresses jail-time credit for offenses that were merged prior to sentencing.

{¶ 30} *Thomas* dealt with double jeopardy concerns after a defendant was convicted of a felony that underpinned a conviction for felony murder. When it was later determined that the state legislature had not intended that punishment be imposed for both felony murder and the felony that underpinned the felony murder charge, the felony conviction was vacated, Thomas was resentenced on the felony murder charge and given time served for the now vacated underlying felony. *Id*. at the syllabus. Thomas argued that resentencing on the felony murder charge was impermissible because he had completed the sentence for the underlying felony. *Id*. The *Thomas* court held that the longer sentence for felony murder could be maintained even if the shorter sentence for the predicate felony was completed. *Id*. at 387. Resentencing for felony murder was appropriate where the defendant was also credited with time served for the predicate felony. *Id*.

{¶ 31} In *Williams*, the court stated, "[t]he sole issue presented in this appeal is whether Williams' conviction and sentences for assault under Count II of the information and for burglary with assault under Count IV of the information violate double jeopardy principles." *Williams* at 1512. Applying the test developed by the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the *Williams* court determined that an assault conviction, which was used to elevate the sentence imposed for a burglary with assault conviction to a life sentence, constituted the same criminal act. *Williams* at 1516. The court determined that principles of double jeopardy prevented punishment on each offense. *Id*. The violation was remedied by vacating the conviction for assault

and applying the time that had been served on that offense to an extant offense. *Id*. at 1517.

{¶ 32} Neither case addresses offenses for which no punishment was ever imposed. Further, jail-time credit finds its roots in the Equal Protection Clause of the United States Constitution, not the Double Jeopardy Clause. *See State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, ¶ 7. The act of merging offenses prior to sentencing sufficiently addresses double jeopardy concerns. Nothing in the present case supports Fuller's position that he is entitled to jail-time credit for offenses that merged prior to sentencing. Therefore, trial counsel was not ineffective for seeking jail-time credit on merged offenses.

{¶ 33} Appellant also asserts that he is entitled to an aggregated cumulative credit for time served of at least 365 days for each charged offense — a sum of at least 2,190 days according to Fuller's calculation. It is unclear how he would be entitled to over five years of credit when Fuller's own calculation indicates that he was held for approximately 365 days prior to sentencing.

{¶ 34} Fuller has failed to sufficiently establish a claim of ineffective assistance of appellate counsel to warrant reopening for the failure of trial counsel to request jail-time credit for offenses for which Fuller was not sentenced.

Jail-Time Credit

{¶ 35} Finally, Fuller argues the trial court committed plain error when an award of jail-time credit was not made at the sentencing hearing and included in the sentencing entry.

{¶ 36} R.C. 2929.19 specifies the duties that a judge must perform when sentencing a defendant for a felony. Included in the court's responsibilities is the duty to calculate jail-time credit. R.C. 2929.19(B)(2)(h)(i). Once the judge calculates the number days, the Ohio Department of Rehabilitation and Correction must reduce an inmate's prison term accordingly. R.C. 2967.191.

{¶ 37} The transcript in this case does not indicate that the trial court calculated jail-time credit when sentencing Fuller in CR-18-628447-B, and the sentencing entry does not include an award of jail-time credit in this case. While a trial judge retains jurisdiction to address the issue of jail-time credit pursuant to R.C. 2929.19(B)(2)(h)(iii), the failure to award jail-time credit still constitutes an error that may be addressed on appeal. *State v. Thompson*, 8th Dist. Cuyahoga No. 102326, 2015-Ohio-3882, ¶ 23, citing *State v. Ponyard*, 8th Dist. Cuyahoga No. 101266, 2015-Ohio-311, ¶ 10-12; *State v. Collins*, 8th Dist. Cuyahoga No. 99111, 2013-Ohio-3726, ¶ 22-25. Generally, the failure to address jail-time credit at sentencing constitutes error. *State v. Williams*, 8th Dist. Cuyahoga No. 105903, 2018-Ohio-1297, ¶ 14-15. Whether such an error satisfied the requirements for reopening is another matter. This court must further determine if an error is prejudicial.

{¶ 38} Here, after an indictment was returned, a capias warrant was issued on May 29, 2018. Fuller was taken into custody on June 18, 2018. Bond was set on June 20, 2018, but there is no indication on the record that Fuller was released on bond. The jury returned its verdict on June 14, 2019, and Fuller was sentenced on

July 24, 2019. Contrary to Fuller's calculation in this application, Fuller spent approximately 401 days in custody — from June 18, 2018, to July 24, 2019. He is potentially entitled to jail-time credit for this time.

{¶ 39} In a similar circumstance, this court granted an application to reopen an appeal when the applicant argued essentially the same proposed assignment of error Fuller advances here. *State v. George*, 8th Dist. Cuyahoga No. 100113, 2015-Ohio-514. George argued that appellate counsel was ineffective for not arguing that the trial court erred by not specifying the number of days of jail-time credit according to R.C. 2949.12. *Id*. at ¶ 6. This statute, dealing with the transfer of a person to a state correctional facility after conviction, specifies that the correctional institution shall be notified of the number of days of credit the inmate received pursuant to R.C. 2967.191. This court held that plain error existed when the court stated on the record that George would receive credit for time served, but failed to include any credit in the journal entry. *Id*. at ¶ 6. In doing so, the court rejected the argument the state raised in opposition to Fuller's application.

{¶ 40} As in the present case, the state argued that because R.C. 2929.19(B)(2)(h)(iii) gives the trial court continuing jurisdiction to address jail-time credit, the error is not prejudicial. In a terse manner, the *George* Court rejected this notion: "The state notes that George could achieve his objective by moving the trial court for any jail-time credit to which he might be entitled. This court rules that the trial court did err by not specifying the number of jail-time credit days in the sentencing entry, and that George's argument is well-taken." *Id*. at ¶ 6.

{¶ 41} This holding is consistent with the Supreme Court of Ohio's rejection of a similar argument in the context of the waiver of court costs. *Davis*, 159 Ohio St.3d 31, 2020-Ohio-309, 146 N.E.3d 560, at ¶ 14. There, the court held that even though a trial court retains jurisdiction to modify or waive court costs, the availability of another avenue for relief does not impact the analysis that courts must engage in when deciding a claim of ineffective assistance of counsel.

> Whether the defendant may move for a waiver of court costs at a later time has little or no bearing on whether the trial court would have granted a motion to waive court costs at the time of sentencing. The enactment of R.C. 2947.23(C) did not change how courts of appeals should evaluate the prejudice prong of the ineffective-assistance-of-counsel analysis. The analysis remains the same: a court must review the facts and circumstances of each case objectively and determine whether the defendant demonstrated a reasonable probability that had his counsel moved to waive court costs, the trial court would have granted that motion.

Id.

{¶ 42} Turning to the analysis as outlined in *Davis*, Fuller must demonstrate that had counsel raised this proposed assignment of error, there is be a reasonable probability of success — that Fuller would have received jail-time credit in this case.[3]

{¶ 43} The record in this case indicates that on July 25, 2017, a capias warrant was issued in a separate case, Cuyahoga C.P. No. CR-15-595619-A, because Fuller violated terms of his community control. The presentence investigation report ("PSI") includes information on this case and that Fuller was taken into

---

[3] As the *Rogers* court recognized, the plain error standard under Crim.R. 52(B) is the same deferential standard that applies to the prejudice prong of claims of ineffective assistance of counsel. *Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, at ¶ 22.

custody as a result of this and other warrants on June 18, 2018. The violation of community control predated the indictment in the present case, which was filed on May 14, 2018.

{¶ 44} If Fuller was in custody for a community control or probation violation as the PSI indicates, his confinement did not arise solely from the charges in this case. "A defendant is not entitled to jail-time credit while held on bond if, at the same time, the defendant is serving a sentence on an unrelated case." *State v. Cupp*, 156 Ohio St.3d 207, 2018-Ohio-5211, 124 N.E.3d 811, syllabus. This includes time spent in jail on an unrelated case awaiting resolution of a community control or probation violation. *State v. Claggett*, 8th Dist. Cuyahoga No. 108742, 2020-Ohio-4133, ¶ 31, citing *Cupp* at ¶ 23.

{¶ 45} In *Claggett*, this court held that barring evidence to support an assignment of error that the trial court erred in calculating jail-time credit, the record tended to show that a defendant was not entitled to additional credit where he was being held on a federal parole violation at the same time he was being held awaiting trial. *Id*. at ¶ 34.

{¶ 46} This directly impacts the availability and calculation of jail-time credit in the present case. Fuller does not address how his community control violation and detention in this unrelated case affects the availability of jail-time credit.

{¶ 47} The PSI and sentencing transcript also contain information about the failure-to-comply case, CR-18-627966-A. The PSI indicates that a capias warrant was issued and Fuller was taken into custody on June 18, 2018, the same day he was

taken into custody for the capias warrant that was issued in the present case. The sentencing transcript in the record in the present case contains the sentencing hearing for both cases. It demonstrates that Fuller was sentenced to an aggregate 15-month prison term in the failure-to-comply case. The court ordered the sentence in that case to be served prior to and consecutive with the sentence imposed in the aggravated robbery case that is the subject of the present application.

{¶ 48} Depending on the circumstances, when consecutive sentences between cases are imposed jail-time credit may only apply to one case. The Supreme Court of Ohio discussed the effects consecutive sentences have on the computation of jail-time credit in *Fugate*. There, the court discussed the different methods of computing jail-time credit when sentences are imposed either concurrently or consecutively.

> The Ohio Administrative Code provides additional details regarding when a prisoner is entitled to jail-time credit and how to calculate a prison term, taking the credit into account. Most relevant to the question before us is Ohio Adm.Code 5120-2-04(F), which states that "[i]f an offender is serving two or more sentences, stated prison terms or combination thereof concurrently, the adult parole authority shall independently reduce each sentence or stated prison term for the number of days confined for that offense. Release of the offender shall be based upon the longest definite, minimum and/or maximum sentence or stated prison term after reduction for jail-time credit."
>
> The Administrative Code provides a different rule for calculating jail-time credit for offenders serving consecutive terms. In such cases, the code instructs that jail-time credit be applied only once, to the total term. *See* Ohio Adm.Code 5120-2-04(G).

(Emphasis deleted.) *Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, at ¶ 9-10.

{¶ 49} If Fuller is entitled to any jail-time credit, it would be applied to the total aggregate sentence imposed in the failure-to-comply case and the aggravated robbery case. Ohio Adm.Code 5120-2-04(G). Practically, this means that credit would first be applied to the sentence imposed in the failure-to-comply case, and should any additional credit remain, then to the prison terms imposed in the aggravated robbery case. As the calculation of Fuller's potential jail-time credit set forth above demonstrates, at most, Fuller could be entitled to approximately 401 days of credit. This is shorter than the 15-month prison term imposed in the failure-to-comply case. As a result, no credit would be applied to the aggravated robbery case. Any potential jail-time credit should be sought in the failure-to-comply case by filing a motion for jail-time credit with the trial court.

{¶ 50} Unlike *George*, the record in this case indicates that the amount of jail-time credit to which fuller is entitled in the aggravated robbery case is zero. Fuller has not established prejudice — a reasonable probability that he would be awarded jail-time credit. As such, Fuller has failed to show that he was prejudiced by counsel's failure to raise and argue this issue on appeal. Accordingly, Fuller's application for reopening is denied.

{¶ 51} Application denied.

MICHELLE J. SHEEHAN, JUDGE

SEAN C. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR