

[Cite as *State v. McDonald*, 2015-Ohio-1911.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-140303
		C-140304
Plaintiff-Appellee,	:	C-140305
		C-140306
vs.	:	TRIAL NOS. B-1401180
		B-1301298
DERON MCDONALD ¹ ,	:	B-080724
		B-0609239
Defendant-Appellant.	:	

OPINION.

Criminal Appeals From: Hamilton County Court of Common Pleas

Judgments Appealed From Are: Affirmed in Part, Sentence Reversed in Part, and Cause Remanded in C-140305; Reversed and Cause Remanded in C-140306; Appeals Dismissed in C-140303 and C-140304

Date of Judgment Entry on Appeal:

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Rachel Lipman Curran*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Jeffrey L. Adams, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

¹ We note that in the case numbered B-0609239, the defendant's name is spelled Derron McDonald.

FISCHER, Judge.

{¶1} Defendant-appellant Deron McDonald appeals the trial court's judgments, convicting him of possession of heroin in the case numbered B-1301298 and possession of cocaine in the case numbered B-1401180. McDonald also appeals the trial court's judgments, revoking his community control and imposing concurrent ten-month prison sentences in the cases numbered B-0609239 and B-080724.

{¶2} McDonald has not raised any assignments of error challenging his convictions in the cases numbered B-1301298 and B-1401198, so we treat his appeals in those cases, numbered C-140303 and C-140304 respectively, as having been abandoned and we dismiss them. *See State v. Thomas*, 1st Dist. Hamilton Nos. C-100411 and C-100412, 2011-Ohio-1331, ¶ 4, citing *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693, ¶ 8 (1st Dist.).

{¶3} In the case numbered B-080724, McDonald argues that his sentence is contrary to law because the trial court failed to award him any jail-time credit. In the case numbered B-0609239, McDonald argues that the trial court erred in sentencing him for cocaine possession as a fourth-degree felony, because he is entitled to the reduced penalty of a fifth-degree felony. We find both arguments meritorious.

{¶4} Under the Ohio Supreme Court's opinion in *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, because the trial court had credited McDonald with 158 days of jail-time credit in the case numbered B-0609239, he was entitled to the same number of days of jail-time credit in the case numbered B-080724, since the trial court had ordered the sentences in the two cases to be served concurrently. Further, because McDonald's prison sentence for his community-control violation was not imposed until after the effective date of Am.Sub.H.B. 86, he was

entitled to be convicted of a fifth-degree-felony offense under Am.Sub.H.B. 86 and the amended version of R.C. 2925.11 and to be sentenced for a fifth-degree felony.

Factual and Procedural Posture

{¶5} On April 16, 2008, McDonald was convicted in the case numbered B-0609239 of possession of cocaine, a fourth-degree felony. The trial court sentenced him to community control for three years, which included a condition of 75 days' confinement in the Hamilton County Justice Center, credited him with 75 days, and imposed a one-year driver's license suspension. That same day, McDonald was convicted in the case numbered B-080724 of possession of cocaine, a fourth-degree felony. The trial court sentenced him to community control for three years, which included a condition of 75 days' confinement in the Hamilton County Justice Center, credited him with 75 days, and imposed a one-year driver's license suspension.

{¶6} On March 11, 2013, while McDonald was still on community control in the cases numbered B-0609239 and B-080724, he was indicted in the case numbered B-1301298 for possession of heroin and possession of cocaine, both fifth-degree felonies. McDonald was released on bond.

{¶7} McDonald's indictment in the case numbered B-1301298 caused the probation department to file a complaint on March 21, 2013, charging him with violating the conditions of his community control in the cases numbered B-0609239 and B-080724. That same day, the trial court issued warrants for his arrest.

{¶8} The following day, when McDonald failed to appear for arraignment in the case numbered B-1301298, the trial court ordered his bond forfeited and issued a capias for his arrest. McDonald was arrested on March 8, 2014, and confined in the Hamilton County Justice Center on all three cases.

{¶9} On March 13, 2014, McDonald was charged in the case numbered B-1401180, with trafficking in cocaine and possession of cocaine, both fifth-degree felonies. The trial court set all four cases for hearing on April 18, 2014.

{¶10} On April 18, 2014, McDonald's counsel informed the trial court that McDonald and the state had reached plea agreements in the cases numbered B-1301298 and B-1401180. In the case numbered B-1301298, McDonald agreed to plead guilty to one count of possession of heroin, a fifth-degree felony, in exchange for the state's dismissal of the cocaine-possession charge. In the case numbered B-1401180, McDonald agreed to plead guilty to one count of possession of cocaine, a fifth-degree felony, in exchange for the state's dismissal of the trafficking charge. Following a thorough Crim.R. 11 colloquy, the trial court accepted McDonald's guilty pleas.

{¶11} The trial court then addressed the community-control violations in the cases numbered B-0609239 and B-080724. McDonald waived a probable-cause hearing in both cases, and pleaded no contest to violating the terms and conditions of his community control. The trial court found him guilty. It ordered a presentence-investigation report, and deferred sentencing to a later date.

{¶12} On May 14, 2014, the trial court held a sentencing hearing on all four cases. The trial court terminated McDonald's community control and imposed sentences of ten months in prison in the cases numbered B-0609239 and B-080724, to be served concurrently. The trial court imposed sentences of 12 months in prison in the cases numbered B-1301298 and B-1401198, to be served consecutively. The trial court ordered the concurrent ten-month prison sentences in the cases numbered B-0609239 and B-080724 to be served consecutively to the 12-month prison sentences imposed in the cases numbered B-1301298 and B-1401180, for an aggregate sentence of 34 months'

incarceration. The trial court awarded McDonald jail-time credit of 158 days in the case numbered B-0609239 and no days of jail-time credit in the case numbered B-080724.

Jail-Time Credit

{¶13} In his first assignment of error, McDonald argues that his sentence in the case numbered B-080724, appeal numbered C-140305, is contrary to law because the trial court awarded him no jail-time credit. McDonald, however, did not object to the trial court's jail-time-credit award at the time of his sentencing hearing. As a result, he has waived all but plain error for purposes of appeal. *See State v. Hargrove*, 1st Dist. Hamilton No. C-120321, 2013-Ohio-1860, ¶ 9.

{¶14} R.C. 2967.191 requires the Ohio Department of Rehabilitation and Correction to “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 for which the prisoner was convicted and sentenced, including confinement in lieu of bail while awaiting trial * * *.” While the Ohio Department of Rehabilitation and Correction must credit a prisoner with his pretrial confinement, it is the trial court's responsibility to calculate the number of days the defendant served prior to being sentenced. *State ex rel. Rankin v. Ohio Adult Parole Auth.*, 98 Ohio St.3d 476, 2003-Ohio-2061, 786 N.E.2d 1286, ¶ 7.

{¶15} The trial court is required to include the amount of pretrial-confinement credit, commonly referred to as jail-time credit, in the sentencing entry. *See State v. Morgan*, 1st Dist. Hamilton No. C-140146, 2014-Ohio-5325, ¶ 5-6, citing R.C. 2929.19(B)(1)(g)(i); *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, fn. 1. Any error in the trial court's calculation “may be raised by way of a direct appeal* * *.” *State ex rel. Rankin* at ¶ 10; *Hargrove* at ¶ 8.

{¶16} McDonald argues that because the trial court awarded him 158 days of jail-time credit in the case numbered B-0609239, the trial court was required, under the Ohio Supreme Court's holding in *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, to credit him with the same number of days in the case numbered B-080724, since it ordered the ten-month prison sentences in these cases to be served concurrently. The state concedes the error.

{¶17} In *Fugate*, the defendant was charged with burglary and theft while he was on community control for a prior conviction for receiving stolen property. *Id.* at ¶ 2. As a result of his indictment, the probation department filed a motion to revoke his community control. Following a jury trial, Fugate was found guilty of theft and a lesser charge of burglary.

{¶18} Prior to sentencing Fugate on the new charges, the trial court held a hearing on the state's motion to revoke his community control. *Id.* at ¶ 3. At the hearing, Fugate admitted that his new convictions for theft and burglary had violated the conditions of his community control. *Id.* The trial court imposed a 12-month prison term for the community-control violation, and granted Fugate 213 days of jail-time credit against this term. *Id.* at ¶ 4. The trial court imposed a two-year sentence for the burglary conviction and a six-month sentence for the theft conviction. *Id.* at ¶ 5. The trial court awarded Fugate 50 days of jail-time credit toward his theft sentence, but awarded no credit against the burglary sentence. The trial court ordered all three sentences to be served concurrently. *Id.* at ¶ 5.

{¶19} On appeal, Fugate argued that the trial court had violated his equal-protection rights and committed plain error by failing to apply the 213 days of jail-time credit to each of his concurrent prison sentences. *Id.* at ¶ 6. The Ohio Supreme Court agreed. It noted that "[t]he practice of awarding jail time credit has its roots in the Equal

Protection Clauses of the Ohio and United States Constitutions,” and that “the Equal Protection Clause requires that all time spent in any jail prior to trial and committed by [a prisoner who is] unable to make bail because of indigency must be credited to his sentence.” *Id.* at ¶ 7, quoting *Workman v. Cardwell*, 338 F.Supp. 893, 901 (N.D.Ohio 1972), *vacated in part on other grounds* 471 F.2d 909 (6th Cir.1972).

{¶20} The Supreme Court then looked to R.C. 2967.191, which governs jail-time credit, and the Ohio Administrative Code, which provides guidance on how jail-time credit should be applied when multiple prison terms are imposed. *Id.* at ¶ 9-11. The Supreme Court stated that when multiple prison terms are to be served consecutively, the administrative “code instructs that jail-credit be applied only once, to the total term.” *Id.* at ¶ 10, citing Ohio Adm.Code 5120-2-04(G). However, “when a defendant is sentenced to concurrent prison terms for multiple charges, jail-time credit pursuant to R.C. 2967.191 must be applied toward each concurrent prison term.” *Id.* at ¶ 9, quoting Ohio Adm.Code 5120-2-04(F), and ¶ 22.

{¶21} The Supreme Court held that when a defendant is sentenced to concurrent terms, applying credit to one term only would, in effect, negate the credit for time that the offender has been held, and would constitute a violation of the Equal Protection Clause. *Id.* at ¶ 22. The Supreme Court concluded that because the record showed that Fugate had been held in custody simultaneously on each of the charges while awaiting sentencing, he was entitled to have the 213 days of jail-time credit applied to each concurrent prison term. *Id.* at ¶ 12 and 18.

{¶22} Here, the record reflects that McDonald was held in custody for 158 days in the case numbered B-0609239 and, as the state concedes, for 158 days in the case numbered B-080724, pending sentencing. Because McDonald’s ten-month prison sentence in the case numbered B-080724 was to be served concurrently with the ten-

month sentence in the case numbered B-0609239, the jail-time credit applies to each term of incarceration. Thus, the trial court committed plain error when, having imposed concurrent sentences in cases B-0609239 and B-080724, it failed to credit McDonald with 158 days of jail-time credit against the sentence imposed in the case numbered B-080724. We, therefore, sustain his first assignment of error.

Am.Sub.H.B. 86 Reduction in Penalty

{¶23} In his second assignment of error, McDonald argues that the trial court erred to his prejudice “by entering a judgment in the case numbered B-0609239 that is contrary to law.” McDonald argues that because his community control was revoked and he was sentenced to prison after the effective date of Am.Sub.H.B. 86, the trial court should have reduced the degree of his cocaine-possession offense to a fifth-degree felony in accordance with R.C. 2925.11, as amended by Am.Sub.H.B. 86. Because McDonald did not raise this argument before the trial court, we review it under a plain-error analysis. *See* Crim.R. 52(B).

{¶24} In April 2008, McDonald was convicted for possessing more than one but less than five grams of crack cocaine. At the time, possession of this quantity of crack cocaine was punishable as a fourth-degree felony. *See* former R.C. 2925.11(C), effective May 17, 2006. McDonald was sentenced to three years of community control, which included a condition of 75 days’ confinement in the Hamilton County Justice Center. The trial court credited him with 75 days, and imposed a one-year driver’s license suspension.

{¶25} On September 30, 2011, the legislature amended Ohio’s sentencing scheme. Am.Sub.H.B. 86 addressed the disparity between crack cocaine and powder cocaine by eliminating the different penalties for crack and powder cocaine, and including both under the definition of cocaine in R.C. Chapter 2925. *See State v.*

Limoli, 140 Ohio St.3d 188, 2014-Ohio-3072, 16 N.E.3d 641, ¶ 3. R.C. 2925.11(C)(2)(a), as amended by Am.Sub.H.B. 86, provides that possession of less than five grams of cocaine, whether in the form of powder or crack, is a fifth-degree felony, punishable by up to 12 months' imprisonment under R.C. 2929.14(A)(5).

{¶26} Section 3 of Am.Sub.H.B. 86 provides that the amendments to R.C. 2925.11 “that are made in this act apply to a person who commits an offense involving marihuana, cocaine, or hashish, on or after the effective date of this act and to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.” R.C. 1.58(B) states that “[i]f the penalty, forfeiture, or punishment, for any offense is reduced by a reenactment, or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.”

{¶27} In *State v. Limoli*, 140 Ohio St.3d 188, 2014-Ohio-3072, 16 N.E.3d 641, ¶ 1, the Ohio Supreme Court examined the effect of Am.Sub.H.B. 86 on a defendant who was convicted of possession of crack cocaine, an offense specified in Section 3 of Am.Sub.H.B. 86, prior to its effective date, but who was not sentenced until after its effective date. The Supreme Court concluded that because Section 3 of Am.Sub.H.B. 86 specifically identified the code section for that particular offense and stated that R.C. 1.58(B) makes the amendments to that code section applicable, courts must sentence individuals who committed that offense prior to, but were sentenced after Am.Sub.H.B. 86's effective date under Am.Sub.H.B. 86's sentencing provisions. *Id.* at ¶ 12 and 13. Thus, the court held that a defendant sentenced after the effective date of Am.Sub.H.B. 86 is entitled not only to the benefit of the reduction in sentence that can be imposed as a result of the statute, but also to a reduction in the degree of the offense. *Id.* at ¶ 14.

{¶28} The Supreme Court explained that the goal of the General Assembly in enacting Am.Sub.H.B. 86 was “to reduce the state’s prison population and to save the associated costs of incarceration by diverting certain offenders from prison and by shortening the terms of other offenders sentenced to prison.” *Id.* at ¶ 10, quoting *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612, ¶ 17, citing Ohio Legislative Service Commission, Fiscal Note & Local Impact Statement to Am.Sub.H.B. 86 at 3 (Sept. 30, 2011).

{¶29} In *Limoli*, the Ohio Supreme Court did not expressly address whether Am.Sub.H.B. 86 applies when a defendant is sentenced to prison following a community-control violation. But we believe the plain language of R.C. 1.58(B), when read together with Supreme Court precedent on sentences imposed after a community-control violation, makes clear that a defendant sentenced for a community-control violation is entitled to the benefit of that section.

{¶30} The key phrase in R.C. 1.58 for our purposes is “if not already imposed.” If the sentence or punishment has not already been imposed, then the defendant is entitled to the rule of lenity provided for in R.C. 1.58. Thus, the question for our case is whether the sentence for the community-control violation was “already imposed” at the time of the original sentencing or if it was imposed at the time of the sentencing on the community-control violation.

{¶31} The Ohio Supreme Court has answered this question for us. In *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, ¶ 17, the Supreme Court made clear that “following a community control violation, the trial court conducts a second sentencing hearing. At this second hearing, the court sentences the offender anew and must comply with the relevant sentencing statutes.” Thus, because the court sentences the offender anew at the hearing on the community-control violation, the

sentence has not been “already imposed” and the defendant is entitled to the protections of R.C. 1.58.

{¶32} This logic has been followed by the Second, Fourth, Fifth, Sixth, and Tenth Appellate Districts. *See State v. West*, 2d Dist. Montgomery No. 24998, 2012-Ohio-4615; *State v. Tolliver*, 4th Dist. Athens No. 12CA36, 2013-Ohio-3681; *State v. Fischer*, 5th Dist. Stark No. 2012CA00031, 2013-Ohio-2081; *State v. Marshall*, 6th Dist. Erie No. E-12-022, 2013-Ohio-1481; *State v. Nistelbeck*, 10th Dist. Franklin No. 11AP-874, 2012-Ohio-1765.

{¶33} Here, McDonald’s original sentencing entry provided that McDonald had been convicted of possession of cocaine as a fourth-degree felony, and had been sentenced to three years of community control for the cocaine possession offense as a fourth-degree felony. The sentencing entry warned McDonald that, should he violate the conditions of his community control, the court could impose a ten-month prison term for the offense. Thereafter, McDonald violated his community control four times, and his community control was restored each time.

{¶34} In each of the entries restoring his community control, the trial court stated that McDonald could be sentenced to ten months in prison if he violated the conditions of his community control. *See Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, at ¶ 19. McDonald was charged with violating his community control a fifth time in March 2013. Because the trial court revoked McDonald’s community control and sentenced him to prison in May 2014 following the amendment by Am.Sub.H.B. 86 to R.C. 2925.11(C)(4)(a), which lowered the penalty for possession of less than five grams of cocaine, whether in the form of powder or crack, from a fourth-degree felony to a fifth-degree felony, R.C. 1.58 applies and McDonald is

entitled to be sentenced for a fifth-degree felony. We, therefore, agree that his sentence is contrary to law and sustain his second assignment of error.

Conclusion

{¶35} In sum, we dismiss as abandoned the appeals numbered C-140303 and C-140304. In the appeal numbered C-140305, we reverse McDonald's sentence in part in the case numbered B-080724, and we remand the cause to the trial court with instructions to enter a judgment crediting McDonald with 158 days of jail-time credit and to cause the entry to be delivered to the Ohio Department of Rehabilitation and Correction without delay. We further reverse the trial court's judgment in the appeal numbered C-140306, and we remand the cause in the case numbered B-0609239 with instructions for the trial court to vacate McDonald's fourth-degree felony conviction, to enter a conviction for a fifth-degree felony, and to sentence McDonald for a fifth-degree-felony offense. We affirm the trial court's judgments in all other respects.

Judgment accordingly.

DEWINE, J., concurs.

CUNNINGHAM, P.J., concurs in part and dissents in part.

CUNNINGHAM, P.J., dissenting in part.

{¶36} I dissent from the majority's resolution of the second assignment of error. I agree that McDonald was sentenced anew in May 2014 in the case numbered B-0609239. *See Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, at ¶ 17. At that time, the trial court terminated the community control that had been imposed for the possession-of-cocaine offense, and imposed a ten-month prison term for the violation of community control. But I disagree that McDonald was

entitled to be sentenced to a prison term under the range available for a fifth-degree felony based on the application of the lenity provisions of Am.Sub.H.B. 86 and R.C. 1.58.

{¶37} When sentencing McDonald for his community-control violation, the trial court was required to follow R.C. 2929.15(B)(2), which provides “[t]he prison term, if any, imposed upon a violator pursuant to this division shall be within the range of prison terms available for the offense for which the sanction that was violated was imposed and shall not exceed the prison term specified in the notice provided to the offender at the sentencing hearing pursuant to division (B)(2) of section 2929.19 of the revised code.”

{¶38} Thus, to determine the applicable range of prison terms, the trial court was required to look to the range available for the offense for which the community-control sanction was imposed. That offense, as indicated in all of McDonald’s sentencing entries, was “possession of cocaine, a fourth-degree felony.” The range of prison terms available for that offense at the time that community control was imposed was six to 18 months. The fifth-degree-felony range that would now apply for similar criminal conduct was not available.

{¶39} Importantly, R.C. 2929.15(B)(2) has never directed the court to look to the range available for the offense at the time of the sentencing for the community-control violation, and the legislature could have, but did not, provide for such an amendment in Am.Sub.H.B. 86. Therefore, I would hold that the trial court properly sentenced McDonald to 10 months in prison for his community-control violation in the case numbered B-0609239.

Please note:

The court has recorded its own entry this date.