

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| v. | : | No. 11AP-794 (C.P.C. No. 07CR-2358) |
| Michael Slager, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on August 9, 2012

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

Michael Slager, pro se.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendant-appellant, Michael Slager ("appellant"), appeals pro se from a September 8, 2011 judgment of the Franklin County Court of Common Pleas denying his post-conviction motion for jail-time credit. We find that appellant's claims are in the nature of a challenge to Ohio prison officials' interpretation of the trial court's original sentencing entry, which included an award of jail-time credit earned prior to the time of sentencing. Appellant did not, however, assert his claims in an original action naming as respondent the Ohio Department of Rehabilitation and Correction ("ODRC"), the Ohio Adult Parole Authority ("OAPA"), or any other Ohio prison officials. Nor did appellant establish the necessary criteria for the award of an extraordinary writ. Instead, appellant improperly sought relief by filing a post-conviction motion in the underlying

criminal action asking the court to order ODRC to correct its records regarding jail-time credit. As such, the trial court did not err in refusing to issue that order.

{¶ 2} On April 22, 2008, appellant entered guilty pleas in case Nos. 07CR-2358 and 07CR-2407, for failure to comply with an order or signal of a police officer, in violation of R.C. 2921.331, and failure to provide notice of change of address, in violation of R.C. 2950.05. *See State v. Slager*, 10th Dist. No. 08AP-581, 2009-Ohio-1804, ¶ 2, 4 ("*Slager I*"). Approximately one month later in a pending Delaware County case, appellant entered a no-contest plea to one count of theft, and a guilty plea to three counts of receiving stolen property and one count of theft, for which the Delaware County court sentenced him to 51 months' imprisonment. *Id.* at ¶ 5.

{¶ 3} On June 10, 2008, the Franklin County Court of Common Pleas sentenced appellant to five years' imprisonment in case No. 07CR-2358 and two years' imprisonment in case No. 07CR-2407, to be served consecutively, for a total of seven years. *Id.* at ¶ 6. Further, in its sentencing entry, the trial court awarded appellant 273 days of jail-time credit in each case. On July 9, 2008, appellant filed a pro se appeal from the trial court's sentencing entries. On July 10, 2008, appellant filed in the trial court pro se motions to correct his jail-time credit, alleging he was entitled to 328 days of jail-time credit. *Id.* at ¶ 7. On July 21, 2008, the trial court denied appellant's motions for jail-time credit. *Id.* Then, on August 18, 2008, appellant filed a second notice of appeal from the July 21, 2008 entry denying appellant's post-judgment motion for 328 days of jail-time credit. *Id.* Subsequently, we granted appellant's request to consolidate the appeals. *Id.*

{¶ 4} In *Slager I*, appellant raised two assignments of error: (1) the trial court erred by imposing a sentence that contravened the sentence previously agreed upon by the court and the parties, more specifically that the trial court's imposition of consecutive sentences breached its agreement to impose concurrent sentences, *id.* at ¶ 9; and (2) the trial court erred in its calculation of jail-time credit because it did not credit him for days he spent in a hospital recovering from injuries he sustained while attempting to flee from police and for days he was credited on two municipal court cases. *Id.* at ¶ 19, 24. We affirmed the trial court's

judgment because appellant failed to demonstrate that the trial court agreed to impose concurrent sentences, instead of consecutive sentences, or that the trial court miscalculated appellant's jail-time credit. *Id.* at ¶ 13, 26.

{¶ 5} On July 17, 2009, pursuant to App.R. 26(B), appellant filed an application to re-open *Slager I* on the basis of ineffective assistance of appellate counsel, along with a motion for appointment of new counsel. On November 24, 2009, we rendered a decision granting appellant's application and motion.

{¶ 6} In the re-opened appeal, *State v. Slager*, 10th Dist. No. 08AP-581, 2010-Ohio-4264, ¶ 1 ("*Slager II*"), appellant raised two assignments of error: (1) ineffective assistance of appellate counsel, and (2) imposition of a sentence that contravened the sentence previously agreed upon by the trial court and the parties. Appellant specifically alleged that the trial court judge promised to limit the length of the term of incarceration in Franklin County to no more than the length of the term of incarceration in Delaware County. *Id.* at ¶ 6. We found appellant's first assignment of error to be moot and overruled appellant's second assignment of error, stating:

Under the circumstance, we cannot find that the sentences given were in contravention of an agreement of the court and the parties. To the extent there was an enforceable agreement, the agreement was for the Franklin County sentences to run concurrently with the Delaware County sentences. The trial court honored that agreement.

Id. at ¶ 18.

{¶ 7} Subsequent to *Slager II*, appellant filed numerous additional motions in the trial court, including yet another motion for jail-time credit on August 12, 2011. In his motion for jail-time credit, appellant requested that the trial court issue an order directing the ODRC to credit him with 273 days of jail-time credit in case No. 07CR-2358. Appellant asserted that, thus far, he had received zero days of credit in that case, despite having been granted 273 days of credit in that case by the court. He stated that it did "not appear that [his] right to jail time credit is in dispute." Instead, he asserted that the issue was whether ODRC had failed to properly reflect that credit on its records. Appellant asked the trial court

to "direct ODRC to modify defendant's sentence in case No. 07CR-2358 to reflect 278¹ days of jail-time credit." (See Motion for Jail-Time Credit, at 3.) Appellant attached to his motion a letter from the ODRC Bureau of Sentence Computation, advising appellant that its records showed "a total of 278 days jail time credit for Case #07CR042407 and zero days for Case #07CR032358."

{¶ 8} On September 8, 2011, the trial court journalized a decision and entry denying appellant's motion for jail-time credit. In its decision, the trial court stated that appellant's "claim for jail-time credit is barred by *res judicata* as any claimed errors in jail-time credit computation can and should be raised at the time of sentencing or on direct appeal." (See Sept. 8, 2011 Decision and Entry, at 1.) Further, referring to *State v. Thorpe*, 10th Dist. No. 99AP-1180 (June 30, 2000), the trial court stated that this court had previously "recognized the repeal of the mandatory language of Crim.R. 32.2(D), which removed the earlier obligation of trial courts to determine jail time credit. [*Thorpe*]. Even though trial courts are still encouraged to make a recommendation to the Department of Rehabilitation and Correction (DRC) as to how much time was served *prior to* sentencing, the obligation to determine jail time credit rests with the DRC."² (Emphasis added.) (See Decision and Entry at 1-2.)

{¶ 9} On September 16, 2011, appellant filed a timely notice of appeal and sets forth a single assignment of error for our consideration:

The trial court failed to send a certified judgment entry
with the correct amount of days of jail time credit

¹ The trial court awarded 273 days of jail-time credit for jail time earned prior to the time of sentencing. Thereafter, ODRC added five days of jail-time credit for jail time earned post-sentencing but prior to transportation to the prison. *Slager I* at ¶ 18.

² We note that the excerpt from *Thorpe* to which the trial court refers was a summary of the Second District decisions in *State v. Herd*, 2d Dist. No. 17385 (Mar. 31, 1999), and *State v. Reichelderfer*, 2d Dist. No. 17445 (Apr. 30, 1999). Our decision in *Thorpe* however was specific to jail time credit served *post* sentencing. "With regard to any credit for time served between the sentencing and transportation to prison, the trial court found that it did not have jurisdiction to give jail time credit because jurisdiction to give jail credit *after the initial sentencing date* rests with the Ohio Department of Rehabilitation and Correction or with the Adult Parole Authority. We agree. '[T]he duty to grant credit for time served in jail "while awaiting transportation to the place where he is to serve his sentence" R.C. 2967.191, rests solely with the adult parole authority.' *State ex rel. Edwards v. Honorable M. David Reid, Court of Common Pleas, Greene County, Ohio* (July 8, 1987), Greene App. No. 87 CA 55, unreported, citing *State ex rel. Harrell v. Court of Common Pleas* (1979), 58 Ohio St.2d 193, 389 N.E.2d 506. Thus, in the present case, the trial court was under no duty to calculate this credit because such duty rests with the adult parole authority." (Emphasis added.) (*Thorpe* at 1-2).

[pursuant to R.C.] 2967.191, that has already been [granted] by the Franklin County court, and [affirmed] by this court. Defendant has already been [granted] 273 days of jail time credit in case 07CR-2358.

{¶ 10} In support of his single assignment of error, appellant argues that, although the trial court awarded him 273 days of jail-time credit in case No. 07CR-2407, and 273 days of jail-time credit in case No. 07CR-2358, ODRC only gave him credit for 273 days of jail-time credit in case No. 07CR-2407. (See appellant's brief, at 1.) As such, appellant believes he is entitled to an additional 273 days of jail-time credit in case No. 07CR-2358. (See appellant's brief, 4.) In response, the state argues that: (1) appellant's challenge to the allocation of credit by ODRC is barred by the doctrine of res judicata because appellant failed to raise this issue in his direct appeal, and (2) appellant's argument fails on the merits because the trial court ordered his sentences [in case Nos. 07CR-2407 and 07CR-2358] to be served consecutively, therefore, pursuant to R.C. 2967.191 and *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, jail-time credit applied to one prison term gives full credit that is due. (See appellee's brief, at 2-3.)

{¶ 11} Pursuant to the doctrine of res judicata, a final judgment of conviction precludes a defendant from raising and litigating in any proceeding, except a direct appeal from that judgment, any defense or claimed lack of due process that the defendant raised or could have raised on direct appeal from his conviction. *State v. Szefcyk*, 77 Ohio St.3d 93 (1996), syllabus. Thus, a defendant may generally "only contest a trial court's calculation of jail-time credit in an appeal from the judgment entry containing the allegedly incorrect calculation." *State v. Lomack*, 10th Dist. No. 04AP-648, 2005-Ohio-2716, ¶ 11.

{¶ 12} In the case at bar, however, appellant is not contesting the trial court's calculation of jail-time credit earned prior to the time of sentencing. Rather, he has raised a different issue—whether ODRC is correctly crediting jail-time credit in conformity with the court's judgment. We reject, therefore, the trial court's logic and the state's first argument to the extent it posits that res judicata would always bar defendant from raising the issue he raises now. As noted above, appellant asked the trial court to address a different issue than the issues raised in *Slager I*

and *Slager II*. Appellant's complaint now is with ODRC, not the trial court. Furthermore, it is possible that appellant was not aware of the issue now raised until after the time for direct appeal had passed.³

{¶ 13} The issue raised by appellant is the proper allocation of jail-time credit earned prior to sentencing by ODRC as that credit was already ordered by the trial court. Appellant requested the trial court, and now asks us, to order ODRC to give him the 273 days' credit in case No. 07CR-2358, consistent with the trial court's award.

{¶ 14} Indeed, in *Slager I*, we noted that the "trial court gave appellant 273 days of jail-time credit in *both* of the Franklin County cases [07CR-2358 and 07CR-2407]." (Emphasis added.) *Id.* at ¶ 6. Further, in *Slager II*, we stated:

The judge then gave appellant a 5 year sentence of incarceration on the failure to comply with the order of a police officer case [07-CR-2358], with 273 days of jail-time credit to run concurrently with his sentence of incarceration in Delaware County. The judge then gave appellant a sentence of 2 years on the failure to provide notice case [07CR 2407], and also gave 273 days of jail-time credit on that case. The second case was also to run concurrent with the Delaware County case, but consecutively to the sentence on the other Franklin County charge. Stated more concisely, appellant received a sentence of 7 years of incarceration on the Franklin County cases with 546 days of jail-time credit, or a total sentence of 5 1/2 years of custody to run concurrently with the 4.25 years of incarceration given in Delaware County.

³ In his brief, appellant asserts that he became aware that ODRC had not credited him 273 days in case No. 07CR-2358 only after we decided *Slager II*. He then wrote the Bureau of Sentence Computation at ODRC, and they informed him by letter dated July 27, 2011. (Appellant's brief, Exhibit 4.) We note that there is in the record a notice of commitment and calculation of sentence dated June 17, 2008 and filed June 23, 2008. This notice, however, is addressed to the Franklin County Clerk of Court, not to appellant, and there is no indication that appellant was served a copy of the same. However, in his motion for correction of jail-time credit filed July 10, 2008, with respect to his first appeal, appellant stated with regard to case No. 07CR-2358 that "[t]his Court granted defendant 273 days jail-time credit (JTC) at the sentencing hearing * * * and received 0 days JTC by the Ohio Department of Rehabilitation and Correction."

{¶ 15} The judgment entries and the disposition sheets for case Nos. 07CR-2358 and 07CR-2407, both signed by the trial judge and filed with the clerk on June 11, 2008, clearly indicate 273 days' jail-time credit for each case.

{¶ 16} We find *res judicata* does not always bar a defendant from requesting a trial court to order ODRC or other prison officials to comply with the trial court's previously ordered allocation of jail-time credit earned prior to sentencing, even when the same issue was not raised on direct appeal. The proper method⁴ to make such a request, however, is not the filing of a post-conviction motion in the underlying criminal action—litigation to which the ODRC is not a party. Rather, the proper method would be the filing of an original action. *See State v. Berger*, 170 Ohio App.3d 8, 11 (1984) ("mandamus, rather than a motion in the trial court for credit for time served, is the proper remedy for enforcing a * * * right to have [a] sentence reduced by crediting time served prior to conviction.")⁵ We note that this court has previously considered and resolved mandamus actions in which prisoners have sought extraordinary writs of mandamus compelling state prison officials to recognize jail-time credit consistent with a court's entry. *State ex rel. Green v. Money*, 10th Dist. No. 03AP-7, 2003-Ohio-4572.

{¶ 17} In order to obtain a writ of mandamus, appellant would be required to demonstrate that: (1) he has a clear legal right to the relief prayed for; (2) that the respondent is under a clear legal duty to perform the act requested; and (3) that the relator has no plain and adequate remedy in the ordinary course of law. *State ex rel. Thompson v. Ohio Adult Parole Auth.*, 10th Dist. No. 10AP-24, 2011-Ohio-429, ¶ 23, *citing State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 29 (1983). In this instance, appellant filed a motion for jail-time credit. In so doing, he has not demonstrated any of the criteria necessary for a court to consider

⁴ On September 16, 2011, ODRC Bureau of Sentencing Computation suggested to appellant that he could proceed with an even less formal method by writing the sentencing judge and asking "that any credit for time served be forwarded to our office in a certified judgment entry." (Exhibit attached to Motion for Jail-Time Credit, Appellant's brief, Exhibit C.)

⁵ Appellant in the instant case has not alleged that he is entitled to immediate release. We note this because in *Scanlon v. Brunsman*, 112 Ohio St. 3d 151, 152 (2006), the Supreme Court of Ohio found that a prisoner's habeas corpus claim was not viable because although he claimed that he was not entitled to an earlier release date, the prisoner did not claim he was entitled to immediate release from prison. The Supreme Court held "[i]n general, habeas corpus is proper in the criminal context only if a petitioner is entitled to immediate release from prison or some other physical confinement."

whether appellant's request is warranted, nor has he named ODRC as a party. With this in mind, we cannot say the trial court erred in denying the motion, but the reasons for this conclusion differ from the reasons articulated by the trial court and argued by the state.

{¶ 18} We refrain from opining regarding the trial court's application of *Thorpe* and the state's second argument that R.C. 2967.191 and *Fugate* apply to prevent the trial court from granting appellant's request, as to do so would amount to an advisory opinion regarding whether appellant has a clear legal right to the relief prayed for and whether ODRC has a clear legal duty to perform the act requested. These issues would be considered if and when an original action is filed.⁶

{¶ 19} Appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BROWN, P.J., and BRYANT, J., concur.

⁶ In essence, the issue to be decided then would be whether ODRC can disregard a trial court's calculation of jail-time credit earned prior to the time of sentencing where the trial court's calculation of jail-time credit may be contrary to how R.C. 2967.291 and *Fugate* direct ODRC to calculate jail-time credit. See *Thorpe*; compare *State v. McKenzie*, 10th Dist. No. 00AP-1182 (June 5, 2001) ("[I]n *Thorpe*, this court stated that jurisdiction to give jail-time credit *after* the initial sentencing date for credit for time served between sentencing and transportation to prison rested with [ODRC]. This court did not reach the issue of *pretrial* detention." (Emphasis added.)); *State ex rel. Rankin v. Ohio Adult Parole Auth.*, 98 Ohio St.3d 476, 2003-Ohio-2061, ¶ 8 ("[T]he APA may credit only the amount of jail-time that the trial court determines the inmate is entitled to by law. The APA cannot ignore the trial court's determination of jail-time credit and substitute its own judgment in complying with the mandates of R.C. 2967.191."); *State v. Mills*, 10th Dist. No. 09AP-198, 2009-Ohio-6273 ("While R.C. 2967.191 requires that the ODRC credit an inmate with jail-time already served, 'it is the trial court that makes the factual determination as to the number of days of confinement that a defendant is entitled to have credited toward his sentence.' This information is required to be included with the sentence and entry.").