[Cite as *State v. Doyle*, 2013-Ohio-3262.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	No. 12AP-567 (C.P.C. No. 10CR-3392)
Plaintiff-Appellee,	:	No. 12AP-568 (C.P.C. No. 10CR-1774)
v.	:	No. 12AP-793 (C.P.C. No. 10CR-1774)
Troy A. Doyle,	:	No. 12AP-794 (C.P.C. No. 10CR-3392)
Defendant-Appellant.	:	(REGULAR CALENDAR)
	:	

D E C I S I O N

Rendered on July 25, 2013

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Howard Legal LLC, and *Felice Howard*, for appellant.

APPEALS from the Franklin County Court of Common Pleas

VUKOVICH, J.

{¶ 1} In these four consolidated appeals, defendant-appellant, Troy A. Doyle, appeals from judgments of conviction and sentence entered by the Franklin County Court of Common Pleas pursuant to his plea of guilty to one count of theft and one count of receiving stolen property. He also appeals from the trial court's subsequent denial of his post-sentencing motions for additional jail-time credit.

{¶ 2} The charges against appellant arose out of separate incidents and proceeded in the trial court under separate case numbers. Appellant appeared in court, represented by counsel, on April 28, 2011 and pled guilty to reduced charges of one count of theft in Franklin C.P. No. 10CR-1774 and one count of receiving stolen property in Franklin C.P. No. 10CR-3392. The trial court engaged in a thorough and detailed colloquy with

appellant before concluding that his plea was made knowingly, intelligently, and voluntarily. Counsel for appellant then asked the court to continue sentencing in both cases for two weeks in order to allow appellant to re-establish his program with a mental health provider and obtain a prescription for medication before going to prison. The court inquired about appellant's past mental health issues, and appellant stated that he had previously been prescribed Lithium and Depacote. The court granted a continuance and set sentencing for May 18, 2011.

{¶ 3} Appellant did not appear for sentencing on May 18, and on May 24, 2011, the trial court issued a capias for appellant in each of the two cases. Appellant thereafter committed new crimes and was arrested for older offenses in other Ohio jurisdictions. He was eventually returned to Franklin County for sentencing in the two pending cases. On May 30, 2012, the trial court held a sentencing hearing. At the hearing, appellant stated that he was currently incarcerated in Washington County, Ohio, where he had pled guilty to one count of breaking and entering. Appellant stated that he pled guilty in Washington County in the belief that the approximately one-year sentence to be imposed there would be run concurrently with any sentence imposed in Franklin County.

{¶ 4} Appellant then made an oral motion to withdraw his prior plea of guilty to the Franklin County charges. He stated that the charges did not fit the nature of his actual conduct, that at the time he entered the plea he had been addicted to pain pills, and that in the interim he had been able to undergo detox and take appropriate psychiatric medication. He stated that he now had a more rational understanding of his legal situation and wished to withdraw his plea. Appellant further stated that he had a poor relationship with his attorney and wished to receive better counsel.

{¶ 5} The court then undertook inquiry into the type of medication available to appellant and his communication problems with his attorney. The court inquired of counsel regarding his interaction with appellant and conversations regarding the effect of the previous guilty plea. After this discussion, the court declined to allow appellant to withdraw his guilty plea and imposed concurrent terms of 12 months for the two Franklin County charges. The court did not specify whether these two concurrent terms would be served concurrently or consecutively with the Washington County sentence, or any other penalty previously imposed by another jurisdiction. The court allowed three days of jail-

time credit based on appellant's initial arrest in case No. 10CR-1774 and no jail-time credit in case No. 10CR-3392, based on the prosecution's representation that appellant had never been arrested in that case.

{¶ 6} Appellant filed pro se notices of appeal from both convictions. After initial representation by the public defender, this court has now appointed counsel in these direct appeals.

{¶ 7} In the interim, appellant filed pro se motions before the trial court to recalculate his jail-time credit. He seeks credit against his Franklin County sentence for the days he was incarcerated in Washington County prior to his sentencing in Franklin County. The trial court denied those motions, and appellant has again appealed, represented by the same court-appointed counsel.

{¶ 8} We have consolidated these four appeals. In appeal Nos. 12AP-567 and 12AP-568, appellant brings the following assignments of error addressing his conviction and sentence:

> FIRST SUPPLEMENTAL ASSIGNMENT OF ERROR
>
> Troy Doyle was denied the effective assistance of trial counsel as guaranteed by the United States and Ohio Constitutions.
>
> SECOND SUPPLEMENTAL ASSIGNMENT OF ERROR
>
> The trial court abused its discretion by overruling Mr. Doyle's motion to withdraw his guilty pleas.

{¶ 9} In addition, the public defender filed an initial brief under all four appellate case numbers but addressing primarily appeal Nos. 12AP-793 and 12AP-794 from the trial court's denial of his post-sentencing motions to recalculate his jail-time credit. In this brief, appellant argues the following sole assignment of error:

> The trial court erred in failing to give Appellant jail time credit against each of the concurrent terms in violation [of] R.C. 2967.191. The court's action deprived Appellant of equal protection under the Fourteenth Amendment to the United States Constitution.

{¶ 10} We will first address appellant's arguments concerning the court's denial of his motions to recalculate jail-time credit. The trial court's denial of appellant's post-sentencing motion for jail-time credit would ordinarily be affirmed summarily on grounds of res judicata, because, under most circumstances, a defendant must challenge a trial court's calculation of jail-time credit directly in an appeal from the judgment of conviction and sentence that contains the alleged error in credit. *State v. Roberts*, 10th Dist. No. 10AP-729, 2011-Ohio-1760, ¶ 6. As a result, this court has uniformly held that the doctrine of res judicata bars a jail-time credit motion that alleges that the trial court made an erroneous legal determination. *See, e.g., State v. Summerall*, 10th Dist. No. 12AP-445, 2012-Ohio-6234; *State v. Lomack*, 10th Dist. No. 04AP-648, 2005-Ohio-2716; *State v. Smiley*, 10th Dist. No. 11AP-266, 2012-Ohio-4126. A post-sentencing motion for jail-time credit may only be used to address a purported mathematical mistake by the trial court, rather than in an erroneous legal determination. *Roberts* at ¶ 6.

{¶ 11} In the present case, appellant raises legal, rather than computational, error on the part of the trial court. That claim is barred by res judicata if raised by a post-sentencing motion. However, the issue of jail-time credit determination is not only raised in connection with the trial court's denial of the post-sentencing motions, but forms an integral part of appellant's argument that he did not receive the effective assistance of trial counsel either at the time of his plea or at the time of sentencing. We, accordingly, affirm in appeal Nos. 12AP-793 and 12AP-794 the trial court's denial of his post-sentencing motions, but consider some of the arguments briefed in connection therewith when we turn to his direct appeals from his convictions.

{¶ 12} Appellant's first supplemental assignment of error in appeal Nos. 12AP-567 and 12AP-568 asserts that he was denied the effective assistance of trial counsel in contravention of his rights under the U.S. and Ohio Constitutions. His second supplemental assignment of error asserts that the trial court abused its discretion by denying his motion to withdraw his guilty pleas at the time of sentencing. We address these in inverse order.

{¶ 13} Appellant asserts that the trial court erred at the May 30, 2012 sentencing hearing when it refused to grant his oral motion to withdraw his prior guilty plea made at the April 28, 2011 hearing. A defendant may move pursuant to Crim.R. 32.1 to withdraw

his guilty plea before sentence is imposed. "[A] presentence motion to withdraw a guilty plea should be freely and liberally granted." *State v. Xie*, 62 Ohio St.3d 521, 527 (1992). "Nevertheless, it must be recognized that a defendant does not have an absolute right to withdraw a [guilty] plea prior to sentencing." *Id*. The trial court, therefore, must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea. *Id*., paragraph one of the syllabus. The trial court's decision to grant or deny a pre-sentence motion to withdraw a guilty plea will be made at the sound discretion of the trial court. *Id*., paragraph two of the syllabus. We, accordingly, review the trial court's decision in this matter under an abuse-of-discretion standard.

{¶ 14} The Supreme Court in *Xie* did not mandate in detail the type of hearing required for a presentence motion to withdraw a guilty plea. In reviewing a trial court's decision on a pre-sentence motion to withdraw guilty plea, we must weigh several nonexhaustive factors. These include: (1) whether the prosecution would be prejudiced if the plea were withdrawn; (2) whether the defendant was represented by competent counsel; (3) whether the defendant received a full Crim.R. 11 hearing prior to entering the plea; (4) whether there was a full hearing on the motion to withdraw; (5) whether the trial court gave full and fair consideration to the motion to withdraw; (6) whether the motion was filed within a reasonable time period; (7) whether the motion put forth specific reasons for the withdrawal; (8) whether the defendant understood the nature of the charges and the possible penalties; and (9) whether the defendant had a complete defense to the crime or perhaps was not guilty. *State v. Jones*, 10th Dist. No. 09AP-700, 2010-Ohio-903, ¶ 10, *citing State v. Fish*, 104 Ohio App.3d 236, 240 (1st Dist.1995); *State v. Zimmerman*, 10th Dist. No. 09AP-866, 2010-Ohio-4087, ¶ 13; and *State v. Harris*, 10th Dist. No. 09AP-1111, 2010-Ohio-4127, ¶ 25. "Consideration of the factors is a balancing test, and no one factor is conclusive." *Zimmerman* at ¶ 13, citing *Fish* at 240.

{¶ 15} In the present case, the trial court did inquire into appellant's basis for the motion. Satisfied that appellant could articulate nothing more persuasive than his personal belief that he had done no great chargeable wrong, the trial court advised appellant that it found no basis to allow him to withdraw the plea. Our own review of the circumstances surrounding the plea establishes that the court did conduct a thorough Crim.R. 11 sentencing hearing before accepting the original plea, and appellant's

responses during this colloquy demonstrated his complete understanding of the nature of the charges and the possible penalty. We note that it was appellant who failed to timely appear for the original sentencing date, postponed sentencing by over one year when he jumped bail and absconded, and that prejudice to the state caused by the delay cannot be negligible. Finally, appellant made no tenable claim of actual innocence or pretense of denying his underlying conduct behind the offenses, choosing instead to minimize its criminal nature.

{¶ 16} In summary, we find that the trial court did not abuse its discretion in refusing to allow appellant to withdraw his guilty plea, and appellant's second supplemental assignment of error in appeal Nos. 12AP-567 and 12AP-568 is overruled.

{¶ 17} Appellant's first supplemental assignment of error asserts that he was denied the effective assistance of trial counsel in violation of his rights under the Sixth and Fourteenth Amendments to the U.S. Constitution. In order to establish a claim of ineffective assistance of counsel, a defendant must first demonstrate that his trial counsel's performance was so deficient that it was unreasonable under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The defendant must then establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

{¶ 18} "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689, citing *Michel v. Louisiana,* 350 U.S. 91, 101 (1955). A verdict adverse to a criminal defendant is not of itself indicative that he received ineffective assistance of trial counsel. *State v. Hester*, 45 Ohio St.2d 71, 75 (1976).

{¶ 19} Appellant's assertion that he did not receive effective assistance of counsel is based entirely on counsel's alleged errors in failing to secure appropriate jail-time credit at sentencing.

{¶ 20} R.C. 2967.191 requires jail-time credit for "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." (Emphasis added.) The statute therefore "requires a connection between the jail-time confinement and the offense upon which the defendant is convicted." *State v. Thomas*, 10th Dist. No. 12AP-144, 2012-Ohio-4511, ¶ 6. As a result, "[t]here is no jail-time credit for time served on unrelated offenses, even if that time served runs concurrently during the pre-detention phase of another matter." *State v. Hunter*, 10th Dist. No. 08AP-183, 2008-Ohio-6962, ¶ 20. Although R.C. 2967.191 mandates that prison authorities credit an inmate with jail time already served, it is the responsibility of the trial court to make the factual determination as to the number of days of confinement that a defendant may receive. *State ex rel. Rankin v. Ohio Adult Parole Auth.*, 98 Ohio St.3d 476, 2003-Ohio-2061, ¶ 7.

{¶ 21} Appellant's statements at sentencing and his subsequent filings recite that he was arrested on or about August 18, 2011 in Ross County on a misdemeanor charge unrelated to the Franklin County cases. Washington County then claimed and transported him on yet another outstanding warrant. While in Washington County custody on August 30, 2011, officials noted a detainer based upon his Franklin County charges. Subsequently, appellant pled guilty to one count of breaking and entering in his Washington County case and began to serve an 11-month sentence. A summary prepared by the Ohio Department of Rehabilitation and Correction gives a start date for the Washington County term of December 7, 2011, but the record does not reliably establish the precise dates of appellant's plea in that jurisdiction. Moreover, during his detention in Washington County, appellant was also subject to a detainer requested by Clinton County, and his filings before the trial court state that he is currently subject to an 11-month sentence for Clinton County offenses, start date unspecified.

{¶ 22} In summary, appellant was, at various poorly-defined times between August 18, 2011 and May 30, 2012, held for a misdemeanor arrest in Ross County, subjected to detainers from Franklin, Washington, and Clinton Counties, held awaiting

trial in Washington County, serving a sentence imposed by Washington County, and (possibly) serving a concurrent sentence imposed in Clinton County. In the face of this fog of facts, defense counsel at sentencing elected to first state that he had not had "an opportunity to assess the jail-time credit," then to remain silent when the court ultimately credited appellant with only three days for time attributable to his original arrest in Franklin County. (May 30, 2012 Tr. 4.) The court also briefly inquired of appellant regarding jail-time credit, to which he gave only the cryptic response "392," apparently referring to one of his case numbers since this figure does not correlate to even the most optimistic estimate of possible credit. (May 30, 2012 Tr. 8.)

{¶ 23} Appellant now asserts that he was entitled to 270 additional days of jail-time credit based upon all time served in Washington County after the effective date of his Franklin County detainer and prior to his sentencing in Franklin County. Appellant principally relies upon *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, ¶ 22, in which the Supreme Court of Ohio held that "when a defendant is sentenced to concurrent terms, credit must be applied against all terms, because the sentences are served simultaneously."

{¶ 24} We first specify that to the extent that appellant seeks jail-time credit here for time served *after* his plea and conviction in Washington County but before sentencing here, this is not a *Fugate* case. Appellant is not entitled to jail-time credit against his Franklin County sentence for time served in Washington County pursuant to his sentence there. "[A] defendant is not entitled to jail-time credit for time incarcerated in another county for unrelated offenses." *State v. Daughenbaugh*, 3d Dist. No. 16-09-05, 2009-Ohio-3823, ¶ 19; *see also Hunter*. In other words, while *Fugate* controls the application of *valid* jail-time credit across multiple concurrent sentences, any time served after appellant's conviction in Washington County is not such valid, creditable time applicable to his Franklin County sentences, concurrent or not.

{¶ 25} On the other hand, *pretrial* detention time on one charge, even when the defendant is simultaneously detained awaiting trial on other, unrelated charges, is creditable in most circumstances. *Fugate* at ¶ 19-21. If we assume that all appellant's sentences across all jurisdictions are imposed concurrently, then his pretrial time in

Washington County, even if already credited to his Washington County sentence, might also apply to his Franklin County sentences under the primary holding in *Fugate*.

{¶ 26} Appellant, however, has demonstrated no more than that if a series of colorable but not concretely supported assumptions are made, *Fugate* might have required the trial court to grant him additional jail-time credit. Appellant now urges us to incorporate these assumptions into the record in order to find deficient performance by his trial counsel. Reversal on this ground requires more than speculative prejudice. We must find both that counsel's refusal to venture a guess regarding jail time constitutes unprofessional error, and that, but for this error, appellant could have reasonably expected more jail-time credit.

{¶ 27} It is the duty of the appellant upon appeal to point to the record and demonstrate error in the trial court's jail-time credit calculation. *Hunter* at ¶ 17, citing *State v. Evans,* 2d Dist. No. 21751, 2007-Ohio-4892, ¶ 13. If the appellant has failed to demonstrate error and no miscalculation in the jail-time credit is apparent from the record, any claimed error must be overruled. *Id.* App.R. 9(A)(1) provides that the record on appeal, in all cases, constitutes "[t]he original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court." Appellate review is limited to the record as it existed at the time the trial court rendered its judgment. *Franks v. Rankin*, 10th Dist. No. 11AP-934, 2012-Ohio-1920, ¶ 73, citing *Wiltz v. Clark Schaefer Hackett & Co.*, 10th Dist. No. 11AP-64, 2011-Ohio-5616, ¶ 13. "Since a reviewing court can only reverse the judgment of a trial court if it finds error in the proceedings of such court, it follows that a reviewing court should be limited to what transpired in the trial court as reflected by the record made of the proceedings." *State v. Ishmail*, 54 Ohio St.2d 402, 405-06 (1978).

{¶ 28} There is obviously little available in the record of this case that definitively supports any additional jail-time credit for appellant. Even if we give appellant the benefit of considering the unauthenticated materials attached to his post-sentencing motions, which materials where obviously not before the trial court or trial counsel at the time of sentencing, appellant has not born his burden of demonstrating error. Even taken on its face, appellant's asserted version of his detention history outside Franklin County does

not establish in sufficient detail the pertinent circumstances surrounding his detention in Washington County. Without an accurate assurance regarding the portion of this time that was served prior to his plea in that jurisdiction, neither counsel nor the trial court could be sure that it was creditable. "[A]ppellant has not established the required connection between the jail-time confinement and the offense upon which [he] was convicted." *Thomas*, ¶ 13, citing *Hunter* at ¶ 17, and *State v. Slager*, 10th Dist. No. 08AP-581, 2009-Ohio-1804, ¶ 25.

{¶ 29} On this record, we find that counsel's handling of the jail-time credit issue neither fell below prevailing professional norms nor dictated a different outcome from that which different representation might have secured. Appellant's first supplemental assignment of error in appeal Nos. 12AP-567 and 12AP-568 is overruled.

{¶ 30} In summary, appellant's three assignments of error are overruled. The judgments of conviction and sentence entered by the Franklin County Court of Common Pleas are affirmed.

Judgments affirmed.

KLATT, P.J., and SADLER, J., concur.

VUOKVICH, J., of the Seventh Appellate District, sitting by assignment in the Tenth Appellate District.