[Cite as *State v. Ventra*, 2011-Ohio-156.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-G-2968**
- vs -	:	
CHARLES W. VENTRA,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Geauga County Court of Common Pleas, Case No. 08 C 000114.

Judgment: Reversed and remanded.

David P. Joyce, Geauga County Prosecutor, and *Matthew J. Greenway,* Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

Charles W. Ventra, pro se, PID# 581-541, North Coast Correctional Treatment Facility, 2000 South Avon Belden Road, Grafton, OH 44044 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Charles W. Ventra, appeals the Judgment Entry of the Geauga County Court of Common Pleas, overruling his Motion for Jail Time Credit. For the following reasons, we reverse the decision of the court below.

{¶2} On September 29, 2008, Ventra was indicted by the Geauga County Grand Jury for two counts of Theft, felonies of the fifth degree in violation of R.C.

2913.02(A)(1), and two counts of Breaking and Entering, felonies of the fifth degree in violation of R.C. 2911.13(B).

{¶3} On December 15, 2008, Ventra entered a Plea Agreement, whereby he entered a plea of guilty to Theft and Petty Theft, being a lesser included offense of Theft and a misdemeanor of the first degree in violation of R.C. 2913.02(A)(1).

{¶4} On February 5, 2009, the trial court entered a Judgment of Conviction. On the State's motion, the court dismissed the remaining counts of the Indictment pursuant to Crim.R. 48(A). For Petty Theft, the court imposed a suspended six-month jail term in the Geauga County Safety Center. For Theft, the court imposed a five-year period of community control sanctions. One of the conditions of the community control sanctions was that Ventra "shall participate in and successfully complete the Teen Challenge Program."

{¶5} On February 10, 2009, the Ohio Adult Parole Authority filed a Petition for Violation of Community Control and Request for Capias. The Petition alleged that Ventra had violated the terms of his community control, "in that, the defendant left the Teen Challenge Program on 2-9-09 and did not successfully complete the program."

{¶6} On March 8, 2010, the trial court entered an Order, finding that Ventra "admitted to violating the conditions of community control as contained in the petition for violation." The court ordered Ventra to serve an eleven-month sentence in a state penal institution for the violation, to be served consecutively with the nine-month sentence imposed in Lake County Court of Common Pleas Case No. 08CR000675. The court credited Ventra with twenty-five days of jail time credit.

{¶7} On March 29, 2010, Ventra filed a Motion for Jail Time Credit, arguing that he was entitled to an additional 107 days of jail time credit for time spent in the Teen Challenge Program.[1]

{¶8} On April 6, 2010, the trial court entered a Judgment Entry, overruling Ventra's Motion without a hearing. The court stated:

> **{¶9}** Defendant seeks credit for the time he spent at Teen Challenge, apparently contending that the program constituted time spent in confinement. Teen Challenge is not a Court program, nor is it a state-operated entity. Defendant's attendance at Teen Challenge was a choice he knowingly and voluntarily made; his participation was not ordered by the Court.

{¶10} On May 12, 2010, Ventra filed a Notice of Appeal.

{¶11} On June 21, 2010, this court dismissed Ventra's appeal as untimely filed. *State v. Ventra*, 11th Dist. No. 2010-G-2968, 2010-Ohio-2814; App.R. 4(A).

{¶12} On August 26, 2010, this court granted Ventra leave to file a delayed appeal and vacated our June 21, 2010 Memorandum Opinion and Judgment Entry.

{¶13} On appeal, Ventra raises the following assignment of error: "The trial court committed harmful error in failing to give the defendant/appellant jail time credit against the imposed prison sentence for time confined in a residential treatment facility."

{¶14} "The department of rehabilitation and correction shall 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 ***." R.C. 2967.191. "Although the APA has a mandatory duty pursuant to R.C. 2967.191 to 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." *State ex rel. Rankin v. Ohio*

1. Ventra's Motion seeks credit for the period of time from November 3, 2008, until February 18, 2009.

Adult Parole Auth., 98 Ohio St.3d 476, 2003-Ohio-2061, at ¶7. In other words, "the APA may credit only the amount of jail time that the trial court determines the inmate is entitled to by law." Id. at ¶8. This court has held that R.C. 2967.191 applies to reduce the term of imprisonment imposed upon an offender for violating community control sanctions. *State v. Murray* (2000), 140 Ohio App.3d 217, 222.

{¶15} "All time served in a community-based correctional facility constitutes confinement for purposes of R.C. 2967.191." *State v. Napier*, 93 Ohio St.3d 646, 2001-Ohio-1890, at syllabus. "In order to qualify as a [community-based correctional facility], certain minimum requirements must be met. Those requirements include the designation that (1) the physical facility be used for the confinement of people sentenced to the facility by a court and (2) that the facility be secure, containing lock-ups and other measures sufficient to ensure the safety of the surrounding community." *State v. Crittle*, 11th Dist. No. 2000-L-042, 2001 Ohio App. LEXIS 2713, at *6-*7, citing R.C. 2301.52; *Napier*, 93 Ohio St.3d at 647. "Third, the [community-based correctional facility] must provide twenty-four hour living accommodations and provide treatment programming." *Crittle*, 2001 Ohio App. LEXIS 2713, at *7, citing Ohio Adm.Code 5120:1-14-01.

{¶16} "Whether a defendant receives credit pursuant to R.C. 2967.191 for time served turns upon the type of confinement involved." Id. (citation omitted). When confronted with the issue of whether an offender is entitled to jail time credit for confinement in a correctional facility, the trial court "must review the nature of the program to determine whether the restrictions on the participants are so stringent as to constitute 'confinement' as contemplated by the legislature." *State v. Jones* (1997), 122 Ohio App.3d 430, 432. "The nature of the review may depend upon the trial court's

familiarity with the facility and the defendant's participation in a particular program." *Crittle*, 2001 Ohio App. LEXIS 2713, at *7. "The trial court may hold an evidentiary hearing to determine the exact nature and circumstances of the program. The trial court may choose to take judicial notice or accept evidence by way of affidavits or a stipulation from the parties regarding the [community-based correctional facility]. The evidence would have to be detailed enough to permit this court to effectively review the trial court's determination that the facility does or does not qualify as a [community-based correctional facility] based upon the criteria set forth above." Id. at *8.

{¶17} Ventra asserts that the trial court erred by "failing to hear any evidence whatsoever concerning the nature of the Teen Challenge program to determine whether the restrictions on [him] were so stringent as to constitute 'confinement' as contemplated by the legislature." Accordingly, Ventra requests that this case be remanded to the court for an evidentiary hearing. The State, in its appellate brief, has conceded that Ventra's argument has merit in that the court erred by ruling on Ventra's Motion without holding a hearing to determine whether the restrictions imposed by the Teen Challenge Program were sufficient to constitute confinement.

{¶18} The trial court in the present case received no evidence regarding the nature of the Teen Challenge Program in which Ventra participated as a condition of his community control sanctions. Rather, the court overruled Ventra's Motion based on the program not being a "Court program" or "state-operated entity" and on his voluntary participation in the program. These criteria, however, are not determinative of the issue of whether Ventra's participation in the program constituted "confinement" under the authorities cited above. Moreover, the lower court's docket does not give any indication of the circumstances in which, or even the date on which Ventra entered the Teen

Challenge Program. Although Ventra's participation in Teen Challenge may have originally been voluntary, the court made completion of the program a condition of his community control sanctions.

{¶19} In *Jones*, the court of appeals vacated a trial court's denial of a motion for jail time credit, where the record contained "no information from which this court may conduct a meaningful review of the nature of program." 122 Ohio App.3d at 432. The court of appeals remanded the case "with instructions to conduct a hearing on the nature of appellant's participation in the Crossroad program and a determination of whether he was 'confined' for purposes of the statute." Id.

{¶20} Since the *Jones* decision, appellate courts have routinely reversed jail time credit decisions where the evidentiary record has not been developed so as to permit a meaningful review of the correctional program to determine whether it qualifies as a community-based correctional facility. See, e.g., *Murray*, 140 Ohio App.3d at 222; *State v. Carter*, 8th Dist. No. 92053, 2009-Ohio-497, at ¶20; *State v. Hull*, 3rd Dist. No. 9-02-51, 2003-Ohio-396, at ¶11; *State v. Crumpton*, 8th Dist. No. 82502, 2003-Ohio-7063, at ¶10; *State v. Barkus*, 5th Dist. No. 2002 CA 0052, 2003-Ohio-1757, at ¶14 ("we vacate the trial court's judgment and remand the case sub judice to the trial court with instructions to conduct a hearing on the nature of the Teen Challenge Program to determine whether the restrictions on the participants in such program 'are so stringent as to constitute "confinement" as contemplated by the legislature'") (citation omitted).

{¶21} Ventra's sole assignment of error has merit.

{¶22} Ventra has requested that this court order the trial court to appoint counsel to represent him at the hearing that may be held on his Motion for Jail Time Credit. An offender is not automatically entitled to representation in postconviction proceedings.

State v. Crowder (1991), 60 Ohio St.3d 151, at paragraph one of the syllabus. The procedure for determining whether Ventra is entitled to representation is set forth in R.C. 120.16(A)(1) and (D), as explained in the *Crowder* decision.

{¶23} When a person is convicted of a criminal offense and claims that his or her constitutional rights were violated, the person, pursuant to R.C. 2953.21, may petition the court which imposed the sentence and request that the court vacate or set aside the judgment or sentence. Next, the clerk of the court must forward a copy of the petition to the prosecuting attorney of that county. Thereafter, unless the petition, supporting affidavits, and files and records pertaining to the proceedings show that "substantive grounds for relief" exist, the court need not afford the petitioner a hearing. If the court finds, however, that a petitioner is entitled to a hearing, then it is entirely possible that the public defender may not become aware that a hearing has been set, or that the actual hearing itself has taken place in a case where the petitioner seeks to appeal the trial court's denial of the postconviction petition. Hence, without notification, the public defender is in no position, with respect to postconviction proceedings, to exercise those discretionary powers explicitly conferred on the public defender by the General Assembly pursuant to the Public Defender's Act. Accordingly, the public defender must be provided with notice that a postconviction evidentiary hearing has been set.

{¶24} Id. at 153 ("although an indigent petitioner does not have a state or a federal constitutional right to representation by an attorney in a postconviction proceeding, the petitioner, pursuant to R.C. 120.16(A)(1) and (D), is entitled to representation by a public defender at such a proceeding if the public defender concludes that the issues raised by the petitioner have arguable merit"). Ventra's request is denied.

{¶25} For the foregoing reasons, the judgment of the Geauga County Court of Common Pleas, overruling Ventra's Motion for Jail Time Credit, is reversed, and this case is remanded for further proceedings consistent with this opinion. Costs to be taxed against appellee.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.