

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NOS. 2012-P-0011 and 2012-P-0012
ROBERT A. WILLIAMSON,	:	
Defendant-Appellant.	:	

Criminal Appeals from the Portage County Court of Common Pleas, Case No. 2010 CR 0079.

Judgment: Reversed and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Timothy Young, Ohio Public Defender, and *Stephen A. Goldmeier*, Assistant Ohio Public Defender, 250 W. Broad Street, Suite 1400, Columbus, OH 43215 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Robert A. Williamson, appeals his sentence in the Portage County Court of Common Pleas following his guilty plea to nonsupport of dependents. At issue is whether appellant was given credit for jail-time served. For the reasons that follow, we reverse and remand.

{¶2} On February 9, 2010, appellant was indicted for two counts of nonsupport of his five-year-old daughter, each being a felony of the fifth degree, in violation of R.C.

2919.21(A)(2) or (B). On August 12, 2010, appellant pled guilty to count one of nonsupport of dependents as charged in the indictment and count two was nolle.

{¶3} Following a pre-sentence investigation, on November 3, 2010, appellant was sentenced to six months of intensive supervision under the control of the probation department and 54 months of general supervision. Appellant was ordered to maintain full-time employment and to comply with a payment plan established by the probation department and the Child Support Enforcement Agency to satisfy all arrearages. The court ordered that if appellant violated the terms of community control, he “will serve a specific prison term of one year.”

{¶4} Six months later, on May 13, 2011, the probation department filed a motion to modify/revoke appellant’s probation because: (1) he was found guilty of possession of drug paraphernalia in December 2010 in the Cuyahoga Falls Municipal Court; (2) he pled guilty to carrying a prohibited weapon in March 2011 in that court; (3) he failed to pay child support; (4) he failed to report to the probation department; and (5) he failed to refrain from using marijuana in February and March 2011.

{¶5} Following a hearing, by judgment entry, dated July 20, 2011, the trial court found that appellant violated the terms of his probation and imposed more restrictive sanctions. The court ordered appellant to serve 60 days in jail, successfully complete the Northeast Ohio Community Alternative Program (“NEOCAP”), intensive supervision for 12 months, and an additional 36 months of general supervision.

{¶6} Three months later, on October 31, 2011, the probation department again moved to modify/revoke appellant’s probation because he “was unsuccessfully terminated from NEOCAP.” At the hearing on the motion, held on November 14, 2011,

appellant admitted that NEOCAP had terminated him. NEOCAP reported that appellant had threatened and sexually harassed staff members and other residents. NEOCAP therefore recommended that appellant be incarcerated. Appellant's counsel stated that, between jail and NEOCAP placement, appellant had served 146 days, which left "slightly more than six months remaining" on his one-year sentence. The prosecutor did not dispute this representation. Defense counsel asked that the court terminate appellant's probation and place him in jail. The court found that appellant violated the conditions of his probation; terminated his probation; and "g[a]ve him six months in the Ohio Department of Correction, no credit for time."

{¶7} By the court's November 14, 2011 judgment entry, the court noted it had previously sentenced appellant, and then sentenced him to a "definite period" of six months in prison to be served for the offense of nonsupport of dependents, with no credit for time served.

{¶8} Appellant did not timely appeal the court's November 14, 2011 judgment entry. Instead, on December 30, 2011, he filed a pro se motion for jail-time credit. He listed the days he had served in jail and NEOCAP, which, he alleged, totaled 149 days. He requested a judgment entry directing the Department of Corrections to give him 149 days of jail-time credit.

{¶9} On January 4, 2012, the court entered an order denying appellant's motion, stating that on November 14, 2011, the court ordered appellant would not receive credit for time served.

{¶10} On February 3, 2012, appellant appealed the court's January 4, 2012 order denying his motion for jail-time credit in Case No. 2012-P-0011.

{¶11} On the same date, appellant filed a motion for leave to file a delayed appeal of the court's November 14, 2011 judgment entry and a notice of appeal of that entry in Case No. 2012-P-0012. This court subsequently granted appellant's motion for leave to file a delayed appeal in Case No. 2012-P-0012 regarding the November 14, 2011 judgment entry, and, sua sponte, consolidated both appeals for briefing, argument, and disposition.

{¶12} Appellant asserts the following for his sole assignment of error:

{¶13} "Because Ohio law unambiguously places the burden of correctly calculating jail-time credit on the sentencing court, the trial court erred in denying Mr. Williamson credit for pre-trial confinement, denying him equal protection of the law. Fourteenth Amendment to the U.S Constitution; Section 2, Article I of the Ohio Constitution."

{¶14} As a preliminary matter, we do not agree with the state's contention that appellant's appeal is barred because he was required to appeal the trial court's failure to calculate jail-time credit in a direct appeal from the court's November 3, 2010 sentencing entry. First, we note that the trial court did not calculate or even mention jail-time credit in that entry. Further, the court did not order appellant to be imprisoned at that time. Moreover, according to appellant's motion for jail-time credit, which the state does not dispute, he did not serve any jail time until February 22, 2011, three months *after* the court sentenced appellant on November 3, 2010. In addition, the first entry in which the trial court mentioned jail-time credit was the court's November 14, 2011 judgment entry. In that entry, the trial court sentenced appellant to a definite term of six months and stated he would not receive credit for time served. The state has not

referenced any pertinent authority for the proposition that, in these circumstances, appellant was required to appeal the court's failure to calculate jail-time credit in its original sentencing entry to preserve the issue.

{¶15} The state's reliance on *State ex rel. Jones v. O'Connor*, 84 Ohio St.3d 426 (1999), is misplaced. In *Jones*, the Supreme Court of Ohio held that the relator was not entitled to a writ of mandamus because he could have appealed any error by the trial court in calculating his jail-time credit. *Id.* In contrast, here, the court below did not calculate or even address jail-time credit in its November 3, 2010 sentencing entry. As noted above, the trial court did not address jail-time credit until November 14, 2011. Thus, appellant is not barred from raising the issue at this time.

{¶16} We now turn to the merits of appellant's appeal. In his initial brief, appellant makes no mention of the trial court's original November 3, 2010 sentence of one year in prison upon violation of the terms of his community control. Instead, he refers only to the November 14, 2011 judgment in which the court sentenced him to "a definite period" of six months. He argues the court should have given him jail-time credit for 147 days, and deducted these days from his six-month sentence, which would have reduced his sentence to 35 days.¹

{¶17} In response, the state notes that the trial court initially sentenced appellant to one year, or 365 days, in prison in the event of a probation violation. The state further notes that when the court sent him to prison after his second probation violation hearing, rather than impose the one-year prison term with jail-time credit, the trial court

1. We note that, below and on appeal, appellant has not been consistent with respect to the number of days to which he claims entitlement. At the November 14, 2011 hearing on the probation department's motion to modify/revoke probation, appellant claimed entitlement to credit for 146 days. In his motion for jail-time credit, filed December 30, 2011, he claimed entitlement to 149 days. On appeal, he claims entitlement to 147 days.

imposed a term certain of six months with no jail-time credit. The state argues that appellant benefited from the court's sentence. At the hearing on the probation department's motion to modify/revoke probation, appellant argued he was entitled to credit for 146 days, with 219 days remaining on his original sentence. However, the trial court only sentenced him to six months, or 182 days, which was 37 days less than the number of days that remained on his original sentence. Thus, the state argues the trial court did not err in not giving appellant jail-time credit.

{¶18} Thereafter, in his reply brief, appellant acknowledges his original one-year sentence. However, he argues that even if the court intended its reduced, six-month sentence to reflect his jail-time credit, the court should have expressly stated in its latter judgment entry that this was the reason for the reduced sentence. Appellant argues that because the court did not do so, this court must reverse the trial court's denial of his motion for jail-time credit and order the court to grant him the 147 days credit to which he is entitled.

{¶19} When the trial court imposes its sentence, the court must give the defendant credit for all time served, pursuant to R.C. 2967.191. That section provides: "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 * * *."

{¶20} It is the duty of the trial judge to determine the amount of credit to which a prisoner is entitled. *State ex rel. Rankin v. Ohio Adult Parole Auth.*, 98 Ohio St.3d 476, 2003-Ohio-2061, ¶7. This information must be included in appellant's sentencing entry. See R.C. 2949.12; Ohio Adm.Code 5120-2-04(B). Further, since the provisions of R.C.

2967.191 are mandatory, the trial court's failure to properly calculate jail-time credit and to include it in the body of the sentencing order is plain error. *State v. Miller*, 8th Dist. Nos. 84540 and 84916, 2005-Ohio-1300, ¶10.

{¶21} By sending appellant to prison for six months, the court may have intended to have the 146 days of jail-time credit reflected in the six-month sentence imposed at the re-sentencing hearing. However, at no time during the re-sentencing hearing or in the court's November 14, 2011 entry did the court state that this was the court's intent. Consequently, the record does not clearly account for the 146 days served by appellant.

{¶22} While the parties have failed to bring to this court's attention any cases in which any Ohio Appellate District has considered similar circumstances, our independent research discloses that the Tenth Appellate District has addressed virtually the same facts in *State v. Mills*, 10th Dist. No. 09AP-198, 2009-Ohio-6273. In *Mills*, following the defendant's guilty plea, he was given two years of community control. He was also notified the court would impose an 11-month prison sentence if he violated community control. After the defendant was arrested for another crime, a re-sentencing hearing was held. The court revoked community control and imposed a six-month sentence. The defendant requested 105 days of jail-time credit for the time he was in jail prior to his re-sentencing. The trial court denied the request. The appellate court held it was plain error for the trial court to fail to properly calculate jail-time credit pursuant to R.C. 2967.191. *Id.* at ¶13. The appellate court stated that the trial court might have intended to recognize defendant's jail-time credit because the trial court

stated at the re-sentencing hearing and in its re-sentencing entry that it reduced Mills' original 11-month sentence to six months. *Id.* at ¶15. The Tenth District stated:

{¶23} Although it may have been the court's intention to have the 105 days of jail-time credit reflected in the shorter sentence imposed, the entry fails to specifically state this intention, and the record otherwise fails to adequately account for the 105 days. Thus, we are remanding the matter for the trial court to clarify the application of jail-time credit in order to ensure that appellant receives the full amount of jail-time credit to which he is entitled. *Id.*

{¶24} We find the Tenth District's holding in *Mills* to be persuasive. We note that *Mills* applies with greater force here because in *Mills*, the transcript indicated the trial court might have intended to recognize the defendant's jail-time credit by reducing his sentence from 11 to six months. There is no such indication in the record before us. The transcript of the re-sentencing hearing, the re-sentencing entry itself, and the court's entry denying appellant's motion for jail-time credit are silent as to the court's intent in reducing appellant's sentence from one year to six months. We note that, while the trial court may have intended to recognize appellant's jail-time credit in re-sentencing him, this cannot be gleaned from the record due to the complete lack of any indication therein to this effect.

{¶25} We therefore hold that by failing to calculate appellant's jail-time credit, the court erred in not complying with the mandatory provisions of R.C. 2967.191. Further, we remand this matter for the trial court to re-sentence appellant to an amount of time

within the court's discretion; to calculate the correct amount of jail-time credit to which appellant is entitled; and to include this credit in a corrected sentencing entry.

{¶26} For the reasons stated in this opinion, it is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is reversed, and this matter is remanded to the trial court for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.