

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

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2012-G-3077
PETER G. KLEINER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Geauga County Court of Common Pleas, Case No. 07C000048.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *Nicholas A. Burling*, Assistant Prosecuting Attorney, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

Peter G. Kleiner, pro se, PID: A560312, Mansfield Correctional Institution, P.O. Box 788, Mansfield, OH 44901 (Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This accelerated-calendar appeal is from a final judgment of the Geauga County Court of Common Pleas. Appellant, Peter G. Kleiner, seeks reversal of the trial court's decision overruling his post-judgment motion for correction of the calculation of his jail-time credit. As part of his argument before this court, appellant contends that he is not barred under the doctrine of res judicata from raising the credit question in his motion for correction.

{¶2} In May 2007, the county grand jury returned a six-count indictment against appellant, including two felony charges of operating a motor vehicle under the influence of alcohol. When the Geauga County Sheriff tried to serve appellant with summons on the indictment, he could not be found in the county. However, nearly four months later, he was arrested and charged with separate crimes in Summit County, Ohio. After the Summit County proceedings were concluded, he was returned to Geauga County to be arraigned on the six counts in January 2008.

{¶3} Ultimately, appellant chose to enter a guilty plea to one count of operating a motor vehicle under the influence of alcohol, a third-degree felony offense under R.C. 4511.19(A)(1)(a). The remaining five counts were then dismissed. In November 2008, the trial court sentenced him to a mandatory prison term of 4 years and 60 days. In its final sentencing judgment, the court further ordered that appellant was entitled to 94 days of jail-time credit.

{¶4} Appellant did not pursue a direct appeal of the sentencing judgment. After serving approximately 26 months of his sentence, he moved the trial court for an award of additional jail-time credit. In this motion, he argued that he was entitled to 128 days of additional credit for the time period he was detained in the Summit County jail. In January 2011, only four days following the submission of the motion, the trial court rendered an abbreviated judgment denying the motion for additional credit. Again, no appeal was taken from the trial court's decision.

{¶5} Fifteen months later, in April 2012, appellant filed a motion for "correction" of his jail-time credit. Even though this post-judgment motion was captioned differently than his prior motion, he essentially sought the same relief; i.e., he requested an

additional credit for the days he was incarcerated in Summit County. Without waiting for the prosecution to respond, the trial court issued a new judgment overruling the motion for correction.

{¶6} In appealing this latest judgment, appellant has asserted one assignment of error for review:

{¶7} “The trial court erred by failing to credit [appellant] with all days served incarcerated in the instant case in violation of the Fourteenth Amendment right to equal protection of the law.”

{¶8} In addition to re-stating the general substance of his motion for correction of his jail-time credit, appellant submits under his sole assignment that his challenge to the trial court’s original calculation of his credit is not barred pursuant to the doctrine of res judicata. Specifically, he maintains that, regardless of the prior proceedings at the trial level, his contention as to his period of incarceration in Summit County is properly before this court because it has never been subject to appellate review.

{¶9} As a basic proposition, this court has already indicated that the doctrine of res judicata can bar subsequent consideration of the “jail-time credit” issue under some circumstances. In *State v. Caldwell*, 11th Dist. No. 2004-L-173, 2005-Ohio-6149, ¶2, the trial court’s sentencing judgment contained the ruling that the defendant was entitled to eight days of credit. Although the defendant filed a direct appeal from the sentencing judgment, he did not assert an assignment regarding the “credit” issue. Subsequently, the *Caldwell* defendant submitted successive motions for additional credit. While he did not appeal the denial of the first motion, he did try to argue the substance of his “credit” argument in an appeal from the denial of his second motion.

{¶10} In holding that the merits of the defendant’s “credit” argument could not be addressed in that particular appeal, the *Caldwell* court began its analysis by quoting the general law governing the application of res judicata in a criminal case:

{¶11} “Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or an appeal from that judgment.” *Id.* at ¶9, quoting *State v. Szefcyk*, 77 Ohio St.3d 93, syllabus (1996).

{¶12} In applying the foregoing standard to the facts of that case, this court held that the *Caldwell* defendant was barred from raising the “credit” question in that appeal because the point could have been litigated as part of his direct appeal from the final sentencing judgment. *Id.* at ¶10. The *Caldwell* court emphasized that the trial court’s decision as to the amount of the credit became final once the defendant failed to raise it in his original direct appeal. *Id.*

{¶13} In the present case, appellant attempts to distinguish his situation from the *Caldwell* scenario by noting that the instant matter is the first appeal he has ever taken in the underlying criminal action. However, in following our *Caldwell* precedent, the Fifth Appellate District has concluded that the doctrine of res judicata is applicable even if the defendant does not take an appeal from the sentencing judgment. See *State v. Walker*, 5th Dist. No. CT2007-0062, 2007-Ohio-6624, ¶25. This conclusion is based upon the fact that the doctrine applies to any issue which either was *or could have been asserted* in a direct appeal from the final sentencing judgment. *Id.* at ¶26.

{¶14} A review of the trial record before this court readily indicates that the trial court's November 2008 sentencing judgment was a final appealable order, in that it set forth the basis of appellant's conviction and imposed his sentence. Thus, appellant had an opportunity to pursue a direct appeal and challenge the trial court's calculation of his jail-time credit. Furthermore, even if it is assumed, for the sake of argument only, that appellant had to bring a post-judgment motion to properly raise the issue of the effect of his Summit County incarceration, he still could have fully litigated the issue in an appeal from the denial of his original post-judgment motion. See *Caldwell*, 2007-Ohio-6624, at ¶10. Since appellant chose not to appeal the "credit" issue until after the denial of his second post-judgment motion on the subject, the trial court's original "credit" decision is considered final and binding for all purposes.

{¶15} Based upon the foregoing appellant's sole assignment of error is without merit. It is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.