

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	MEMORANDUM OPINION
Plaintiff-Appellee,	:	
-vs-	:	CASE NO. 2015-T-0076
GEORGE GUITERRES, n.k.a.	:	
“G”,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas.
Case No. 2013 CR 00417.

Judgment: Appeal dismissed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

George Guitterres, pro se, PID: A653-284, Marion Correctional Institution, P.O. Box 57, 940 Marion-Williamsport Road, Marion, OH 43302 (Defendant-Appellant).

TIMOTHY P. CANNON, P.J.,

{¶1} On July 13, 2015, appellant, George Guitterres, filed his notice of appeal, pro se, from a June 9, 2015 judgment entry issued by the Trumbull County Court of Common Pleas. In the appealed entry, the trial court denied appellant’s motion for jail time credit.

{¶2} On July 17, 2015, appellee, the state of Ohio, filed a motion to dismiss the appeal on the basis that the entry denying appellant’s motion for jail time credit is not a final appealable order. Appellee also contends that, alternatively, the appeal is barred

under the doctrine of res judicata. We find that the entry in this matter is a final appealable order, and appellee's motion to dismiss on that basis is overruled. See *State v. Kleiner*, 11th Dist. Geauga No. 2012-G-3077, 2012-Ohio-5933; *State v. Caldwell*, 11th Dist. Lake No. 2004-L-173, 2005-Ohio-6149.

{¶3} App.R. 4(A) states in part:

{¶4} “[A] party who wishes to appeal from an order that is final upon its entry shall file the notice of appeal required by App.R. 3 within 30 days of that entry.”

{¶5} In this case, appellant's notice of appeal was due by July 9, 2015, which was not a holiday or a weekend. Since appellant's notice of appeal was not filed until July 13, 2015, the appeal is untimely by four days.

{¶6} App.R. 5(A) states, in relevant part:

{¶7} “(1) After the expiration of the thirty day period provided by App.R. 4(A) for the filing of a notice of appeal as of right, an appeal may be taken by a defendant with leave of the court to which the appeal is taken in the following classes of cases:

{¶8} “(a) Criminal proceedings;

{¶9} “(b) Delinquency proceedings; and

{¶10} “(c) Serious youthful offender proceedings.

{¶11} “(2) A motion for leave to appeal shall be filed with the court of appeals and shall set forth the reasons for the failure of the appellant to perfect an appeal as of right. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App.R. 3 and shall file a copy of the notice of the appeal in the court of appeals. * * *”

{¶12} In the present case, appellant has neither complied with the thirty-day rule set forth in App.R. 4(A) nor sought leave to appeal. Thus, this court is without

jurisdiction to consider the appeal. Appellant has a remedy under App.R. 5(A) to file an untimely appeal from a criminal judgment.

{¶13} Based upon the foregoing analysis, the appeal is hereby sua sponte dismissed as being untimely.

{¶14} Appeal dismissed.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDALL, J., concurs in judgment only with a Concurring Opinion.

DIANE V. GRENDALL, J., concurs in judgment only with a Concurring Opinion.

{¶15} Although I concur in the judgment that the present appeal should be dismissed, the State has correctly argued that the appeal is not just untimely, but barred by res judicata.

{¶16} Guterres was sentenced on February 25, 2014, and the Entry on Sentence included an order “that the Defendant herein has been granted credit for time incarcerated pursuant to this charge from February 19, 2014 to date.” Guterres did not appeal the February 25, 2014 Entry.

{¶17} On March 18, 2015, Guterres filed a Motion for Jail-Time Credit. This Motion was denied on April 20, 2015, and was not appealed.

{¶18} On May 7, 2015, Guterres filed a Motion for Additional Jail-Time Credit. This was denied on June 9, 2015, and (untimely) appealed on July 13, 2015.

{¶19} This court has often and “specifically” held that, “where a defendant could have, but failed to, raise an issue regarding the calculation of jail-time credit in a prior proceeding, the matter is barred by res judicata.” *State v. Ott*, 11th Dist. Portage No.

2012-P-0010, 2012-Ohio-4471, ¶ 16 (cases cited). Also *State v. Bender*, 4th Dist. Gallia Nos. 14CA6 and 14CA7, 2015-Ohio-1927, ¶ 6-7. Guiterres' failure to appeal his original Entry on Sentence bars his subsequent efforts to appeal the trial court's determination of his jail-time credit.

{¶20} This conclusion is consistent with and compelled by the authority cited by the majority:

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 [*State v.*] *Caldwell*, [11th Dist. Lake No. 2004-L-173, 2005-Ohio-6149], 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.

State v. Kleiner, 11th Dist. Geauga No. 2012-G-3077, 2012-Ohio-5933, ¶ 14.

{¶21} For the foregoing reasons, the present appeal should be dismissed as barred by res judicata, and not merely as untimely.