

[Cite as *State v. Fife*, 2007-Ohio-6588.]

IN THE COURT OF APPEALS OF CHAMPAIGN COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 2006-CA-33
vs. : T.C. CASE NOS. 06-CR-135
06-CR-128
DONALD E. FIFE, SR. :
Defendant-Appellant : (Criminal Appeal from
Common Pleas Court)

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O P I N I O N

Rendered on the 7th day of December, 2007.

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GRADY, J.:

{¶ 1} Defendant, Donald E. Fife, appeals from his
convictions for complicity to aggravated robbery, forgery, and
unauthorized use of a motor vehicle, and the sentences imposed
for those offenses pursuant to law. Fife presents two
assignments of error on appeal. Both concern his sentence.

{¶ 2} In his first assignment of error, Fife argues that the trial court erred when it imposed sentences for his convictions on the basis of factual findings the court made, because that procedure is prohibited by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-865.

{¶ 3} *Foster* was decided on February 27, 2006. Defendant's sentence was imposed on October 19, 2006. Because *Foster* had then been decided, it was Defendant's burden to make a *Foster* objection when his sentence was imposed, if it was imposed in violation of *Foster*. Defendant failed to do that, and because of that failure, Defendant forfeited his right to argue the *Foster* error he assigns on appeal. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642. The first assignment of error is overruled.

{¶ 4} For his second assignment of error, Fife argues that the trial court erred when it failed to award him jail-time credit for the pretrial incarceration to which Defendant was subjected after his arrest on the offenses for which he was convicted and sentenced.

{¶ 5} In *State v. Nagy*, Greene App.No. 2003CA21, 2003-Ohio-6903, we wrote:

{¶ 6} "¶ 3. 'Where, for whatever reason, a defendant remains in jail prior to his trial[,] he must be given credit

on the statutorily fixed sentence ultimately imposed for all periods of actual confinement.' *White v. Gilligan* (1972), 351 F.Supp. 1012, 1014. The requirement enforces the Fourteenth Amendment right to equal protection of the law. *Workman v. Cardwell* (1972), 31 Ohio Misc. 99, 338 F.Supp. 893.

{¶ 7} "¶ 4. R.C. 2967.191 codifies the holding in *White*. It credits a convicted defendant with 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.' However, where the incarceration also arose out of a set of facts separate and apart from the conviction or convictions on which sentence is imposed, the statutory credit is inapplicable. *State ex rel. Jordan v. Haskins* (1998), 131 Ohio App.3d 791, 723 N.E.2d 1116.

{¶ 8} "¶ 5. R.C. 2967.191 further provides that it is the Department of Rehabilitation and Correction which must reduce a prisoner's stated prison term by the number of days of the jail time credit to which he is entitled. Even so, '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 Adult Parole Authority*, 98 Ohio St.3d 476, 478, 2003-Ohio-2061. Therefore, 'alleged errors regarding jail-time

credit ... may be raised by way of the defendant's direct appeal of his criminal case.' *Id.*, at p. 479, 786 N.E.2d 1286, citing *State ex rel. Jones v. O'Connor* (1999), 84 Ohio St.3d 426, 704 N.E.2d 1223."

{¶ 9} In its judgment of conviction and sentence, the trial court denied defendant any jail-time credit on a finding that the credit had been awarded in relation to sentences previously imposed on Defendant for offenses in Clark County.

The State argues that those Clark County offenses were unrelated to Fife's offenses in the present case, and that Defendant was incarcerated prior to trial on both sets of charges simultaneously.

{¶ 10} Fife contends that he is entitled to jail-time credit, notwithstanding any simultaneous incarceration on unrelated charges, citing our holding in *State v. Ruby*, 149 Ohio App.3d 541, 2002-Ohio-5381. That holding conflicted with our prior holding in *State v. Zuder* (February 7, 1997), Champaign App. NO. 96-CA-11, which held that the jail-time credit does not apply in that circumstance. We addressed the potential conflict between the two decisions in *State v. Nagy*, ¶ 22, stating:

{¶ 11} "As a final matter, the State asks us to revisit our holding in *State v. Ruby*, 149 Ohio App.3d 541, 2002 Ohio 5381,

773 N.E.2d 101, to the extent that it conflicts with our holding in *State v. Zuder* (Feb. 7, 1997), Champaign App. No. 96-CA-11, 1997 Ohio App. LEXIS 376. The conflict involves whether incarceration on other charges avoids the jail-time credit for the days concerned. *Ruby* stated that it did not; *Zuder* held that it did. *Zuder* is correct, and, though our statement in *Ruby* was dicta, the suggestion it makes is rejected as inconsistent with the requirements of R.C. 2967.191."

{¶ 12} Fife further contends that the trial court erred when it denied him jail-time credit because its finding that he was also incarcerated on unrelated criminal charges was based merely on an unsworn representation of the prosecuting attorney. We have held that the State must offer admissible evidence when it is required to make that showing. *State v. Nagy*, ¶ 18. However the State's burden is triggered by a defendant's request for the credit, *Id.*, ¶ 21, and Fife made no such request. That failure forfeited his right to argue on appeal that the trial court erred when it denied a credit. Neither is plain error demonstrated, because Fife does not contend that he is actually entitled to the credit the court denied him, preventing the finding of prejudice that plain error requires. *State v. Long* (1978), 53 Ohio St.2d 91.

{¶ 13} The second assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. and DONOVAN, J., concur.

Copies mailed to:

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Hon. Roger B. Wilson