

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
GALLIA COUNTY

STATE OF OHIO,	:	Case Nos. 14CA6
	:	14CA7
Plaintiff-Appellee,	:	
	:	
vs.	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
JESSE BENDER,	:	
	:	
Defendant-Appellant.	:	<b>Released: 05/13/15</b>

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APPEARANCES:

Jesse Bender, Marion, Ohio, Pro Se Appellant.

Jeff Adkins, Gallia County Prosecuting Attorney, Gallipolis, Ohio, for Appellee.

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McFarland, A.J.

{¶1} This is a consolidated appeal from two Gallia County Court of Common Pleas journal entries denying motions for jail-time credit in two different underlying common pleas cases (Gallia Case Nos. 12CR124 and 13CR86). In his consolidated appeal, Appellant contends that the trial court erred in overruling his post-sentence motions for jail-time credit. Because we conclude that the argument should have been raised on direct appeal from Appellant's conviction and sentence, but was not, the argument is

barred by res judicata. Accordingly Appellant's sole assignment of error is overruled and the judgment of the trial court is affirmed.

### FACTS

{¶2} Appellant pled guilty to one count of illegal assembly for the manufacture of methamphetamine, a third-degree felony, on January 11, 2013 and was placed on twenty-four months of community control (Gallia Case No. 12CR124). At his sentencing hearing, Appellant was advised that a specific prison sentence of thirty months would be imposed if he violated any of the terms of his community control. On June 25, 2013, while Appellant was still on community control, the State filed an amended complaint charging Appellant with illegal manufacture of methamphetamine, a second-degree felony (Gallia Case No. 13CR86). Appellant subsequently pled guilty to a lesser charge of attempted illegal manufacture of methamphetamine, a third-degree felony, in the 13CR86 case, and admitted to a community control violation in the 12CR124 case.

{¶3} On July 17, 2013, a sentencing hearing was held regarding both cases. Appellant was sentenced to a thirty-month prison term on the 12CR124 case, and was given one hundred twenty-one days of jail-time credit. He was also sentenced to a thirty-month prison term on the 13CR86 case, and was given twenty-four days of jail-time credit. The prison

sentences were ordered to be served concurrently. Appellant did not appeal from that decision.

{¶4} Thereafter, on August 22, 2013, Appellant filed motions for jail-time credit in each case. Appellant cited R.C. 2929.19 and R.C. 2967.191 in support of his motions. The trial court denied the motions filed in both cases on October 4, 2013. Appellant did not appeal the denial of either motion, but rather, filed a second motion for jail-time credit in each case on September 14, 2015. Appellant cited the same Revised Code sections in support of his motions, and argued that he was entitled to one hundred twenty-one days of jail time credit on his Gallia Case No. 13CR86 sentence, rather than twenty-four days, because the sentences were ordered to be served concurrently. He cited *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, in support of his motions. The trial court again denied the motions, stating that “[t]he Court finds that Defendant is not entitled to any additional jail time credit.” Appellant filed separate appeals from the denial of both motions. This Court, by order dated October 28, 2014, sua sponte consolidated Appellant’s appeals. Appellant raises a single assignment of error in his consolidated appeal, as follows.

#### ASSIGNMENT OF ERROR

“I. THE TRIAL COURT ERRORED [SIC] IN OVERRULING APPELLANT’S POST SENTENCE MOTION FOR JAIL TIME

CREDIT. A TRIAL COURT IS MANDATED TO AND RESPONSIBLE FOR GRANTING JAIL TIME CREDIT WHERE A DEFENDANT IS SENTENCED [SIC] TO CONCURRENT SENTENCES."

### LEGAL ANALYSIS

{¶5} In his sole assignment of error, Appellant contends that the trial court erred in overruling his post-sentence motion for jail-time credit. In support of his contention, Appellant argues that it is the trial court's responsibility to determine all jail-time credit and to properly submit journal entries reflecting concurrent sentences, allowing the Bureau of Sentencing Computation to correctly apply jail-time credit. Appellant essentially argues that because concurrent sentences merge into one sentence, all jail-time credit should be applied. The State responds by arguing that Appellant's argument is barred by res judicata because Appellant failed to file a direct appeal of his convictions and sentences. For the following reasons, we agree with the State.

{¶6} We have recognized that " '[i]f a party fails to timely appeal a final order, matters that could have been reviewed on appeal become res judicata and cannot be reviewed in related or subsequent proceedings or appeals.' " *State v. Marcum*, 4<sup>th</sup> Dist. Hocking No. 14CA13, 2014-Ohio-5373, ¶ 21; quoting *State v. Swayne*, 4<sup>th</sup> Dist. Adams Nos. 12CA952, 12CA953, and 12CA954, 2013-Ohio-3747, ¶ 24. The applicability of res

judicata is a question of law, which we determine independently. *State v. Marcum* at ¶ 21; citing *State v. Tolliver*, 4<sup>th</sup> Dist. Athens No. 12CA36, 2013-Ohio-3861, ¶ 12.

{¶7} Here, res judicata barred Appellant from raising his claims for additional jail-time credit than had been specified by the trial court in its sentencing entries because he could have raised his claims in direct appeals from these prior judgments, but he did not. *State v. Marcum* at ¶ 22; citing *State v. Bradshaw*, 4<sup>th</sup> Dist. Lawrence No. 14CA8, 2014-Ohio-3148, ¶ 10; *State v. Quinnie*, 8<sup>th</sup> Dist. Cuyahoga No. 100317, 2014-Ohio-1435, ¶ 16 (res judicata barred appellant from raising jail-time credit claim in postconviction motion because he could have but did not raise the issue in his direct appeal); *State v. Spillan*, 10<sup>th</sup> Dist. Franklin Nos. 06AP-50, 06AP-51, 06AP-52, and 06AP-750, 2006-Ohio-4788, ¶ 12 (“res judicata bars appellant from raising the jail-time credit issue through the jail-time credit motions and subsequent appeal of such motions, given that appellant, represented by counsel, could have raised the issue on direct appeal”); *State v. Williams*, 3<sup>rd</sup> Dist. Allen No. 1-03-02, 2003-Ohio-2576, ¶ 10 (res judicata barred appellant from raising claim for additional jail-time credit in postconviction motion when he could have raised it in an appeal from his original sentence).

{¶8} Appellant’s motions for jail-time credit cited R.C. 2929.19 in support. R.C. 2929.19 governs sentencing hearings and was amended in September of 2012 to include section (B)(2)(g)(iii), which purports to confer sentencing courts with “continuing jurisdiction to correct any error not previously raised at sentencing” in making jail-time credit determinations in the trial court. *Marcum*, supra, at ¶ 20. In *State v. Carpenter*, 4<sup>th</sup> Dist. Lawrence No. 14CA13, 2014-Ohio-5698, ¶ 15-16, this Court rejected an argument that R.C. 2929.19(B)(2)(g)(iii) precludes courts from applying res judicata to bar post-sentence motions for jail-time credit even when the claims could have been raised by timely appeal from the sentencing judgment. In reaching that conclusion, we based our decision on the recent reasoning of the Sixth District set forth in *State v. Verdi*, 6<sup>th</sup> Dist. Erie No. E-13-025, 2013-Ohio-5630, and noted that the Supreme Court of Ohio did not accept jurisdiction for a review of the appellate court’s decision in *Verdi*. *Carpenter* at ¶ 16-17.

{¶9} In *State v. Carpenter* at ¶ 16, we quoted the *Verdi* Court verbatim as follows:

“Referencing R.C. 2929.19(B)(2)(g)(iii), appellant contends that the General Assembly intended to create a ‘statutory exception to the doctrine of res judicata as applied to custody

credit determinations.’ However, appellant’s argument overlooks several cases decided by appellate courts in this state since the effective date of the amendment, all of which maintain that ‘[a] post-sentencing motion for jail-time credit may only be used to address a purported mathematical mistake by the trial court, rather than \* \* \* an erroneous legal determination.’ *State v. Doyle*, 10<sup>th</sup> Dist. Franklin Nos. 12AP-567, 12AP-794, 12AP-568, 12AP-793, 2013-Ohio-3262, ¶ 10, citing *State v. Roberts*, 10<sup>th</sup> Dist. Franklin No. 10AP-729, 2011-Ohio-1760, ¶ 6; see also *State v. Summerall*, 10<sup>th</sup> Dist. Franklin No. 12AP-445, 2012-Ohio-6234, ¶ 11 (applying res judicata to bar appellant’s motion where appellant ‘failed to challenge the trial court’s award of jail-time credit at sentencing or on a direct appeal from his conviction’ and ‘did not allege that the trial court committed any mathematical error in the calculation of jail-time credit so as to avoid the res judicata bar’); *State v. McKinney*, 7<sup>th</sup> Dist. Mahoning No. 12 MA 163, 2013-Ohio-4357 (stating that appellant’s failure to raise his ‘purely legal argument’ concerning jail-time credit on a direct appeal precluded him from raising it in a subsequent appeal under the doctrine of res

judicata); *State v. Perry*, 7<sup>th</sup> Dist. Mahoning No. 12 MA 177, 2013-Ohio-4370, ¶ 12 (finding that appellant's substantive claim for jail-time credit was barred by res judicata where he failed to raise it on a direct appeal, noting that '[t]his is the view across the state'); *State v. Britton*, 3<sup>rd</sup> Dist. Defiance Nos. 4-12-13, 4-12-14, 4-12-15, 2013-Ohio-1008, ¶ 14 (limiting the use of a motion for correction of jail-time credit to situations where the trial court made a mathematical mistake)."<sup>1</sup>

Here, Appellant does not seek the correction of a mere mathematical mistake or clerical error, which would not be barred by res judicata. Rather, he seeks a legal determination that he is entitled to additional jail-time credit to be applied to his concurrent sentences, based upon the application of the jail-time credit provision of R.C. 2929.19, as well as the recent reasoning of the Supreme Court of Ohio set forth in *State v. Fugate*, supra. We conclude that this is a substantive claim that requires a legal determination rather than simply a correction of a mathematical error. As such, his claim is barred by res judicata. *State v. Marcum* at ¶ 26.

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<sup>1</sup> But see, *State v. Quarterman*, 8<sup>th</sup> Dist. Cuyahoga No. 101064, 2014-Ohio-5796, ¶ 8 ("R.C. 2929.19(B)(2)(g)(iii) now allows the court to correct 'any error,' regardless of whether the error involved a mathematical miscalculation or an erroneous legal determination, i.e. whether the defendant was entitled to jail-time credit for time served in an inpatient rehabilitation facility.").



{¶10} As in *Marcum*, the trial court below did not rely on res judicata to deny Appellant's motions for additional jail time credit. In *Marcum*, we held that "reversal is not warranted even assuming that the court applied an erroneous rationale." *Marcum* at ¶ 27; citing *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, ¶ 51 ("a reviewing court should not reverse a correct judgment merely because it is based on erroneous reasons."). Based upon the foregoing, Appellant's sole assignment of error is overruled. Accordingly, the decision of the trial court is affirmed.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallia County Common Pleas Court to carry this judgment into execution.

**IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT**, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: \_\_\_\_\_  
Matthew W. McFarland,  
Administrative Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**