[Cite as *State v. Copas*, 2015-Ohio-5362.]

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

STATE OF OHIO, :

Plaintiff-Appellee, : Case No. 14CA996

vs. :

JARED COPAS[1], : DECISION AND JUDGMENT ENTRY

Defendant-Appellant. :

APPEARANCES:

Timothy Young, Ohio Public Defender, and Stephen A. Goldmeier, Ohio Assistant Public Defender, Columbus, Ohio, for appellant.

David Kelley, Adams County Prosecuting Attorney, and Kris D. Blanton, Adams County Assistant Prosecuting Attorney, West Union, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:10-23-15

[1]Appellant's first name is spelled in the record both as "Jared" and "Jarod." Because Jared is used in the judgment appealed, we use that spelling.

ABELE, J.

{¶ 1} This is an appeal from an Adams County Common Pleas Court judgment that denied a motion for "jail time credit" filed by Jared Copas, defendant below and appellant herein. Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE COURT ERRED WHEN IT DENIED JARED COPAS'S MOTION FOR 227 DAYS OF JAIL TIME CREDIT, IN VIOLATION OF HIS RIGHT TO EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE COURT ACTED CONTRARY TO LAW WHEN IT DENIED JARED COPAS CREDIT FOR THE 466 DAYS HE WAS HELD IN THIS CASE, IN VIOLATION OF HIS RIGHT TO EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

{¶ 2} On January 13, 2010, the Adams County Grand Jury returned an indictment (Case No. 20100025CRI) that charged appellant with the failure to register as a sex offender in violation of R.C. 2950.05(E)(1). Appellant initially pled not guilty, but later agreed to plead guilty in exchange for the State's recommendation that he be sentenced to community control. At the June 28, 2010 hearing, after the trial court endeavored to make sure that appellant understood his various rights, the court accepted appellant's plea, found him guilty[2] and

[2]Although the original papers in this case show that the guilty plea was entered in Case No. 20100025, the transcript

sentenced him to serve, inter alia, three years of community control.[3]

{¶ 3} On March 31, 2011, the State filed a motion to revoke community control on grounds that appellant violated the requirement to not use or possess illegal drugs. At the May 27, 2011 hearing, defense counsel spoke as follows on appellant's behalf:

> "[DEFENSE COUNSEL]: I would ask the court to give him this chance. This is one of those extreme cases. He's facing a maximum of 10 years in prison. Or, if the court would give him this one final opportunity he's facing the possibility of rehabilitating himself without having to go to prison.
>
> * * *
>
> [THE COURT]: I don't know, Mr. Copas, I...I begged for this relapse program. They put it in several years ago and I'm considering it certainly for you. But, your attitude is horrible. You seem to have no sense of motivation. You seem to have no sense of appreciation. You seem to have no sense of responsibility. Am I wrong?
>
> [APPELLANT]: I am trying.
>
> * * *
>
> [THE COURT]: Mr. Copas, this is your final chance. Do you understand that?
>
> [APPELLANT]: Yes, sir"

{¶ 4} Despite its apparent misgivings, the trial court sentenced appellant to serve three

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of the June 28, 2010 change of plea hearing also bears the Case number of 20100026. A review of that transcript also reveals that the court and counsel all reviewed matters outside the record of this particular proceeding. Nothing in the record shows that Cases 20100025 and 20100026 were formally combined, and none of the original papers from Case No. 20100026 are included in the record in this case.

[3]Although the hearing transcript referenced both case numbers, the sentencing entry refers to only Case No. 20100025.

more years of community control.[4]

{¶ 5} Sadly, appellant again violated the terms of community control. On January 12, 2012, a notice was filed to indicate that appellant tested positive for illegal drugs. Prosecution testimony on January 17th and 18th 2012 further revealed that appellant tested positive for, and admitted to using, heroine on several occasions.

{¶ 6} After two unsuccessful attempts at community sanctions, the trial court sentenced appellant to serve a five year prison term. As part of that judgment, the trial court granted him "zero days" credit for previous incarceration and noted that "[a]ll credit for time served (466 days) was credited in Case No. 20100026." It does not appear from the record in this case that an appeal was taken from that judgment.

{¶ 7} On June 11, 2014, appellant commenced the case sub judice with a "Motion for Jail-Time Credit" in Case No. 20100025. Appellant argued that the March 19, 2012 entry failed to credit him for "227 days" that should have been applied against his sentence. The trial court denied his motion on July 25,2014. The court reasoned that the sentences in Case No. 20100025 and Case No. 20100026 were ordered to be served consecutively and the requested "227 days" that appellant wanted to apply to his Case No. 20100025 sentence was already included as part of a "466 days credited" to him under Case No. 20100026. This appeal followed.

I.

{¶ 8} We first consider, out of order, appellant's second assignment of error wherein he argues that the trial court erred by denying him "466 days" of jail credit in Case No. 20100026.

[4]Although the transcript styled the hearing as both Case Nos. 20100025 & 20100026, the judgment entry included only Case No. 20100025.

The Notice of Appeal filed in this Court in the case sub judice states that it is from the trial court's judgment in Case No. 20100025. Furthermore, the entry referred to in appellant's Notice of Appeal is the July 25, 2014 entry and references only Case No. 20102025. Thus, the only case before us at this time is Case No. 20100025. Because appellant's second assignment of error appears to reference only Case No. 20100026, that case is not properly before us at this time. Thus, we hereby overrule appellant's second assignment of error.

II.

{¶ 9} We now turn to appellant's first assignment of error wherein he asserts that the trial court erred by overruling his motion for additional jail time credit in Case No. 20100025. The basis for his argument involves the trial court's July 25, 2014 judgment wherein the court held that appellant is not entitled to such credit because (1) the court ordered the sentences in both Case Nos. 20100025 and 20100026 to be served concurrently with one another; and (2) the jail credit requested in Case No. 20100025 was applied to, and included with, his sentence in Case No. 20100026.

A. Procedural Questions

{¶ 10} Before we review this argument on its merits, we first address a procedural issue. As appellant correctly points out in his Reply Brief that this Court recently cast doubt on whether the merits of this sort of appeal may be addressed, or whether they are barred from consideration by application of the doctrine of res judicata.

{¶ 11} R.C. 2929.(B)(2)(g)(iii) provides, inter alia, a "sentencing court retains continuing jurisdiction to correct any error not previously raised at sentencing in making a determination [of the appropriate jail-time credit]...The offender may, at any time after sentencing, file a motion in

the sentencing court to correct any error made in making a determination[.]" (Emphasis added.) In several recent cases, we held that this statute applies only to correct "mathematical errors," rather than to correct alleged legal errors. See e.g. *State v. Bender*, 4th Dist. Gallia Nos. 14CA6, 14CA7, 2015-Ohio-1927, at ¶¶8-9; also see *State v. Carpenter*, 4th Dist. Lawrence No. 14CA13, 2014-Ohio-5698, ¶¶15-16. In reaching that conclusion, we cited a Sixth District decision 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, 10th Dist. Franklin Nos. 12AP-567, 12AP-794, 12AP-568, 12AP-793, 2013-Ohio-3262, ¶ 10, citing *State v. Roberts*, 10th Dist. Franklin No. 10AP-729, 2011-Ohio-1760, ¶ 6; see also *State v. Summerall*, 10th 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*, 7th 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*, 7th 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*, 3rd 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)."

State v. Verdi, 6th Dist. Erie No. E-13-025, 2013-Ohio-5630, ¶14-15. To the best of our knowledge, we are the only Court to rely on *Verdi*. Other districts have, however, reached the opposite conclusion insofar as R.C. 2929.19(B)(2)(g)(iii) is concerned. In *State v. Quarterman*,

8th Dist. Cuyahoga No. 101064, 2014-Ohio-5796, at ¶8, the Eighth District held:

> "Amended R.C. 2929.19(B)(2)(g)(iii) marks a significant change in the law regarding jail-time credit. Previously, inmates could only challenge errors in jail-time credit on direct appeal unless the error consisted of a mathematical mistake in calculation rather than an erroneous legal determination. See, e.g., *State v. Robinson*, 4th Dist. Scioto No. 00 CA 2698, 2000 Ohio App. LEXIS 5001, 2000 WL 1617952 (Oct. 23, 2000). 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..."

The Franklin Court of Appeals reasoned in *State v. Inboden*, 10th Dist. Franklin Nos. 14AP-312 & 14AP-317, 2014-Ohio-5762, at ¶¶7-8:

> "Prior to the enactment of R.C. 2929.19(B)(2)(g)(iii), this court held that motions for jail-time credit were subject to the doctrine of res judicata except for where the alleged calculation error was clerical or mathematical. This court has consistently held that "the doctrine of res judicata applies to a jail-time credit motion that alleges an erroneous legal determination on jail-time credit." *State v. Roberts*, 10th Dist. No. 10AP-729, 2011-Ohio-1760, ¶6. *State v. Lomack*, 10th Dist. No. 04AP-648, 2005-Ohio-2716, ¶12; *State v. Smiley*, 10th Dist. No. 11AP-266, 2012-Ohio-4126, ¶12. '"[A] defendant may only contest a trial court's calculation of jail-time credit in an appeal from the judgment entry containing the allegedly incorrect calculation.' "*Roberts* at ¶6, quoting *Lomack* at ¶11. However, '"if the trial court makes a mathematical mistake, rather than an erroneous legal determination, in calculating the jail-time credit, then a defendant may seek judicial review via a motion for correction before the trial court.' "*State v. Spillan*, 10th Dist. No. 06AP-50, 2006-Ohio-4788, ¶9, quoting *Lomack* at ¶11. *State v. Eble*, 10th Dist. No. 04AP-334, 2004-Ohio-6721, ¶10.
>
> R.C. 2929.19(B)(2)(g)(iii), however, states that the court has continuing jurisdiction to correct any jail-time credit error "not previously raised at sentencing," thereby abating the application of doctrine of res judicata as it relates to issues that could have been raised at sentencing but were not."[5]

[5]This is not actually the "holding" of the *Inboden* case, as appellant argues in his brief, but rather obiter dicta. The Tenth District observed "[n]evertheless, we determine that R.C. 2929.19(B)(2)(g)(iii) does not apply in this case because the issue raised by appellant in his motion for jail-time credit was previously raised and addressed at sentencing." 2014-Ohio-5762, at ¶9. But in *State v. Lynch*, 10th Dist. Franklin Nos. 15AP-123, 15AP-124, 15Ap-125, & 15AP-126, 2015-Ohio-3366, at ¶¶9-11, the Tenth District did, in fact, adopt the *Inboden* reasoning as its holding.

{¶ 12} We point out that Subpart (iii) is of relatively recent vintage, and added to R.C. 2929.19(B)(2)(g) by Am. Sub. S.B. 3, see 2012 Ohio Laws File 131, effective on September 28, 2012. The only case authority we found that discusses subpart (iii) within the context of res judicata are the cases mentioned supra.[6] We readily agree with the view that an appellate court's doctrinal position should not be based on simply a tally of the number of cases on each side of an issue, but, as we noted we are the only district to rely on *Verdi*. More important, as the Eighth and Tenth Districts have pointed out, the dichotomy between "mathematical" and "legal" errors pre-existed the enactment of R.C. 2929.19(B)(2)(g)(iii). We also doubt that the legislature would have enacted this part of Am. Sub. S.B. 3 and intend to keep the law the same. Finally, Subpart (iii) of the statute permits a defendant to file a motion to correct "any error" in his jail-time credit determination. This Court has held that the word "any" means "all." *Calses v. Armstrong World Industries, Inc.*, 4th Dist. Scioto No. 02CA2851, 2003-Ohio-1776, at ¶17, fn. 8. Thus, if a trial court has continuing jurisdiction to consider "any" and "all" errors, it must have continuing jurisdiction to consider both mathematical and legal errors.

{¶ 13} For these reasons, and after enactment of Am. Sub. S.B. 3, we conclude that *Bender* and *Carpenter* were erroneously decided with respect to the issue of whether res judicata continues to apply to motions to re-determine jail time credit. Therefore, we overrule those cases and now turn to the merits of appellant's first assignment of error.

B. The Merits of the First Assignment of Error

{¶ 14} Our analysis begins with a recitation of the appropriate standard of review. An appellate court may modify or vacate a sentence and remand for re-sentencing if it clearly and

[6]We also note that the State did not argue that res judicata should bar appellant's arguments.

convincingly finds (1) the record does not support the trial court's findings, or (2) the sentence is contrary to law. R.C. 2953.08(G)(2); also see *State v. Farnese*, 4th Dist. Washington No. 15CA11, 2015-Ohio-3533, at ¶6; *State v. Robinson*, 4th Dist. No. 13CA18, 2015-Ohio-2635, at ¶36; *State v. Edwards*, 4th Dist. Ross Nos. 14CA3424 & 14CA3425, 2015-Ohio-2140, at ¶18.

{¶ 15} The gist of appellant's argument is that his sentences are contrary to law because the trial court did not comply with *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440. In particular, appellant asserts that the trial court erroneously lumped together all of his jail-time credit in Case No. 20100025 and Case No. 20100026, and then applied it only to Case No. 20100026 rather than applying the credit equally to both cases.

{¶ 16} In *Fugate*, the Ohio Supreme Court held at the syllabus that if "a defendant is sentenced to concurrent prison terms for multiple charges, jail-time credit pursuant to R.C. 2967.191 must be applied toward each concurrent prison term." On its face, this holding appears to support appellant's argument. The trial court sentenced appellant to serve concurrent prison terms and, according to the court's July 25, 2014 judgment, all jail-time credit was to be applied to one case rather than to both. However, it is also well-settled that the Court's syllabus must be construed in light of the particular facts of the case, see *State v. Clark*, 11th Dist. Portage Nos. 96-P-0257, 96-P-0258, 1998 WL 386186 (May 22, 1998), and should not be interpreted broader than the facts of the case permit. See *State v. Pitts*, 4th Dist. Scioto No. 99CA2675, 2000 WL 1678020 (Nov. 6, 2000).

{¶ 17} In *Fugate*, a review of the facts reveals that the defendant was serving community control for a prior case (receiving stolen property) when he was charged in a new case that involved burglary and theft. The defendant was found guilty of the new offenses.

2008-Ohio-856, at ¶¶2-3. Prior to the defendant's sentence on the new charges, the trial court held a revocation hearing and appellant admitted that his new convictions violated his community control. The court then sentenced appellant to serve concurrent prison terms on the new charges, as well as violation of community control. The court, however, applied jail-time credit only to the sentence for the community control violation and not the time spent in jail on the new charges. Id. at ¶¶3-5.

{¶ 18} The facts in *Fugate* differ from those at issue here. In the case sub judice, appellant was not sentenced for any new crimes. Instead, what occurred was a revocation of community control because of the illegal drugs in his system. We find no indication that appellant was criminally charged in any way in addition to the community control violation for that occurrence. While the original papers of Case No. 20100026 are not before us, it does not appear that any new conviction arose in that case. Again, every indication is that nothing more occurred than a straightforward revocation of community control.

{¶ 19} This is no trivial distinction. The Ohio Supreme Court has explained the underlying principle behind *Fugate* as follows:

> The practice of awarding jail-time credit, although now covered by state statute, has its roots in the Equal Protection Clauses of the Ohio and United States Constitutions. Recognizing that the Equal Protection Clause does not tolerate disparate treatment of defendants based solely on their economic status, the United States Supreme Court has repeatedly struck down defendants based solely on their inability to pay fines and fees. See *Griffin v. Illinois* (1956), 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (a state cannot deny appellate review to defendants unable to afford a transcript); *Williams v. Illinois* (1970), 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (a state may not imprison a defendant beyond the statutory maximum based solely on his inability to pay a fine); *Tate v. Short* (1971), 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (a state may not impose a fine as a sentence dand [sic] then automatically convert it to jail time based upon the defendant's inability to immediately pay the fine). Relying on the principle set

> forth in such cases, courts have held that defendants who are unable to afford bail must be credited for the time they are confined and awaiting trial. 'The Equal Protection Clause requires that all time spent in any jail prior to trial and commitment by [a prisoner who is] unable to make bail because of indigency must be credited to his sentence.' *Workman v. Cardwell* (N.D.Ohio 1972), 338 F.Supp. 893, 901, vacated in part on other grounds (C.A.6, 1972), 471 F.2d 909. See also *White v. Gilligan* (S.D.Ohio 1972), 351 F.Supp. 1012." 2008-Ohio-856, at ¶7."

The Ohio Supreme Court further stated that this "principle is codified in Ohio at R.C. 2967.191, which states that "[t]he 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, including confinement in lieu of bail which awaiting trial[.]" (Emphasis added.) 2008-Ohio-856, at ¶8. This is important for two reasons. First, *Fugate* is grounded in Equal Protection concerns and the distinction between someone who could make bail on criminal charges and someone who could not, and thus had to languish in jail until trial. As Justice Lundberg Stratton noted in her concurrence: "'[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.' * * * '"The rationale for [giving jail-time credit] is quite simple. A person with money will make bail while a person without money will not. If both persons are given identical sentences, the reality is that unless the person who did not make bail is given credit for his pretrial time, the poorer person will have served more time than the other. Unequal treatment based on personal wealth is anathema to the Constitution as a denial of equal protection.'" (Citations Omitted) Lundberg Stratton, J., Concurring at ¶25. In the case sub judice, we emphasize that appellant was not held in jail on new charges for which he was unable to make bond. Thus, we find no Equal Protection violation here and we decline to extend *Fugate* beyond the pertinent facts in that case.

{¶ 20} Second, the Supreme Court observed that its *Fugate* holding is consistent with R.C. 2967.191, which states that jail-time credit shall be calculated by computing "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, including confinement in lieu of bail which awaiting trial[.]" (Emphasis added.) 2008-Ohio-856, at ¶8. We point out the phrase "the offense" is worded in the singular. As this Court and others have stated, *Fugate* does not negate the proposition that R.C. 2967.191 does not entitle a defendant to jail credit for incarceration on unrelated offenses. See *State v. Primack*, 4th Dist. Washington No. 13CA23, 2014-Ohio-1771, at ¶¶1&11; *State v. Lowe*, 8th Dist. Cuyahoga No. 99176, 2013-Ohio-3913, at ¶29; *State v. Bainter*, 6th Dist. Ottawa No. OT-08-002, 2009-Ohio-510, at ¶¶9-10.

{¶ 21} Whatever else can be said about Case No. 20100026 (or not said, as again we point out that the original papers from that case are not before us), it appears unrelated to Case No. 20100025 which involves the charge of failure to give notice of change of address pursuant to R.C. 2950.05(E)(1). We therefore reject the argument that the trial court was required to give full jail-time credit on both cases. Thus, appellant did not persuade us that the trial court's entry is clearly and convincingly contrary to law so as to allow us to vacate the sentence and remand for re-sentencing pursuant to R.C. 2953.08(G)(2).

{¶ 22} Accordingly, we hereby overrule appellant's first assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

ADAMS, 14CA996

JUDGMENT ENTRY

It is ordered the judgment be affirmed and appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams 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, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Hoover, P.J. & McFarland, A.J.: Concur in Judgment & Opinion

For the Court

BY: _____

Peter B. Abele, 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.