

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-10-1292

Appellee

Trial Court No. CR0200601137

v.

Matthew Wyburn

DECISION AND JUDGMENT

Appellant

Decided: October 14, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Kathryn J. T. Sandretto, Assistant Prosecuting Attorney,
for appellee.

Scott J. Hoffman, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} Defendant-appellant, Matthew Wyburn, appeals from the denial of his pro se motion for jail-time credit entered by the Lucas County Court of Common Pleas on September 13, 2010. We affirm.

{¶ 2} The pertinent facts are not in dispute. In May 2005, Wyburn was indicted on one count of breaking and entering, a fifth degree felony in violation of R.C. 2911.13(A) (case No. CR0200502084). In August 2005, he pled no contest to that charge, was convicted and sentenced to three years of community control. The sentencing court directed that Wyburn would serve the first four months at the Correctional Treatment Facility and, following his release there, the next two months in the Lucas County work-release program. The court informed Wyburn that any violation of the terms of his community control would lead to more restrictive sanctions, including a 12-month prison term.

{¶ 3} On January 10, 2006, Wyburn was arrested for escape, a third degree felony, in connection with his failure to return from work-release. He was indicted ten days later (case No. CR0200601137). On March 7, 2006, he pled no contest to this charge, was convicted and then sentenced to four years of community control, the first thirty days to be served at the Corrections Center of Northwest Ohio. The sentencing court's entry specified that the community control imposed in the escape case "shall be served concurrently with the community control imposed and continued at [sic] CR200502084," the earlier breaking and entering case. The court again notified Wyburn that violating his community control would entail harsher sanctions, "including a prison term of four (4) years."

{¶ 4} On May 16, 2007, at a community control violation hearing, Wyburn admitted to a new violation in the escape case. The trial court then revoked his

community control in that case and in the earlier breaking and entering case. On the escape conviction the court imposed the four-year prison term, "to be served concurrent to sentence imposed in CR-05-2084 [the breaking and entering conviction] for a total incarceration period of 4 (four) years." It granted 73 days of jail-time credit on the escape conviction. On the same date, in the sentencing entry on the breaking and entering conviction, the court imposed an 11-month prison term "to be served concurrent to sentence imposed in CR-06-1137." The court's entry credited Wyburn with the 277 days he was held in jail on that offense. Both entries also stipulated that he receive credit for any "future custody days while [awaiting] transportation" to prison.

{¶ 5} On June 8, 2010, Wyburn filed a motion in the trial court "pursuant to Ohio Criminal Rule 36 to correct the clerical error in the record," claiming entitlement to an alleged credit of "204" custody days on the escape conviction. The court later denied this motion. In this appeal Wyburn assigns the following error:

{¶ 6} "The trial court committed prejudicial error by failing to give him [sic] appropriate credit for time served in relation to two concurrent sentences."

{¶ 7} Wyburn now argues that the sentencing court erred in failing to credit him with "273" days on *both* of the underlying convictions.¹ In support of this argument, he

¹We construe this discrepancy as an apparent typographical error in counsel's appellate brief, because all other references therein, as well as in the sentencing entry in case No. CR0200502084, are to 277 days of jail-time credit—73 days more than Wyburn requested. Further, although Wyburn's motion insisted the trial court committed a "clerical" or mathematical error in applying jail-time credits between the two offenses, his arguments appeared to be substantive, not merely clerical. As we have previously

relies on the Ohio Supreme Court's holding in *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856. In *Fugate*, the parties agreed that the defendant had been held simultaneously on the three charges involved, two of which were new offenses committed while he was on community control. Following Fugate's conviction on the new offenses, he was sentenced to prison terms that were concurrent with the time imposed for the community control violation, but the trial court applied a jail-time credit only to the latter violation. *Id.* at ¶ 2-5. Citing R.C. 2967.191, the Supreme Court ruled that "defendants who are sentenced to concurrent prison terms are entitled to have jail-time credit applied toward all prison terms for charges on which they were held." *Id.* at ¶ 1.

{¶ 8} R.C. 2967.191 states, in relevant part:

{¶ 9} "The department of rehabilitation and correction shall reduce the stated prison term of a prisoner or, if the prisoner is serving a term for which there is parole eligibility, the minimum and maximum term or the parole eligibility date of the 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 while awaiting trial, * * *." (Emphasis added.)

held, "claims that a person was denied jail-time credit *because days were not properly classified as arising under the instant offense* are 'substantive' claims, which must be brought to the trial court's attention before sentencing or raised on direct appeal. [Where the] claims are substantive, appeals from the denial of such motions are barred by res judicata.* * *" *State v. McLain*, 6 Dist. No. L-07-1164, 2008-Ohio-481, ¶ 12. (Citations omitted; emphasis added.) Even if not barred by res judicata, however, Wyburn's present claim still fails for the reasons stated herein.

{¶ 10} This statute "requires that jail-time credit be applied to all prison terms imposed for charges *on which the offender has been held*. If courts were permitted to apply jail-time credit to only one of the concurrent terms, the practical result would be * * * to deny credit *for time that an offender was confined while being held on pending charges*. So long as an offender *is held on a charge while awaiting trial or sentencing, the offender is entitled to jail-time credit for that sentence*; a court cannot choose one of several concurrent terms against which to apply the credit." *Fugate* at ¶ 12. (Emphasis added.) In other words, a defendant is entitled to jail-time credit only for confinement that is related to the offense for which he is being sentenced. *State v. Dailey*, 3d Dist. No. 8-10-01, 2010-Ohio-4816, ¶ 25; *State v. Mitchell*, 6th Dist. L-05-1122, 2005-Ohio-6138, ¶ 8.

{¶ 11} The *Fugate* Court also identified Ohio Adm.Code 5120-2-04(F) as bearing on a prisoner's entitlement to jail-time credit. That section states:

{¶ 12} "If an offender is serving two or more sentences, stated prison terms or combination thereof concurrently, the department shall *independently reduce each sentence or stated prison term for the number of days confined for that offense*. Release of the offender shall be based upon the longest definite, minimum and/or maximum sentence or stated prison term after reduction for jail time credit." (Emphasis added.)

{¶ 13} The state argues that *Fugate's* holding is inapposite to the facts here. We agree. It applies only to a defendant entitled to jail-time credit under R.C.

2967.191—i.e., on each charge for which he is actually being held. Here, regarding his 2006 escape conviction, Wyburn contends that he should be credited with the 277 days he was in jail on his 2005 breaking and entering conviction, even though he could not have been "held on" the escape charge before his arrest on January 10, 2006 (case No. CR0200601137). As the state notes, Wyburn is, in effect, arguing for a forward application of the 2005 jail-time credit *before* his arrest in 2006, when he obviously could not have been held simultaneously on both charges.

{¶ 14} In *State v. Izquierdo*, 6th Dist. No. L-10-1221, 2011-Ohio-286, we rejected a similar argument. The defendant there sought to have a jail-time credit of 231 days received in a 2005 conviction applied to a 2006 felonious assault conviction. In the 2006 case, the sentencing court ordered the defendant's prison term to be served concurrently with his 2005 conviction. As well, the court credited him with "100 in-custody days" for the time he was held between indictment and sentencing on the assault charge. *Id.* at ¶ 2-4. Citing R.C. 2967.191 and Ohio Adm.Code 5120-2-04(F), we found that "the defendant [is] entitled to have his sentences *reduced by the number of days served on each case*," with the defendant being "required to serve the longer sentence." *Id.* at ¶ 9. (Emphasis added; citation omitted.) We further stated:

{¶ 15} "Upon review of the judgment entries attached to appellant's brief, in this [2006] case appellant was given 100 days of jail time credit. In [the 2005] Lucas County case * * * appellant was given 231 days of jail time credit. *Reviewing them independently*, although appellant has served his sentence in the 2005 case, his sentence

on the 2006 case has not expired. Appellant is properly being held on the 'longest definite' prison term. Ohio Adm. Code 5120-2-04(F)." Id at ¶ 10. (Emphasis added.)²

{¶ 16} Similarly, Wyburn seeks to benefit here from a prospective application of the larger jail-time credit from the earlier breaking and entering conviction to the later escape conviction, merely because the sentences were made concurrent—despite the fact that he was not "held on" the escape charge in 2005. *Fugate*, supra, at ¶ 1. Thus, Wyburn's argument is without merit.

{¶ 17} Accordingly, the sole assignment of error is not well-taken.

{¶ 18} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

²See, also, *State v. Bainter*, 6th Dist. No. OT-08-002, 2009-Ohio-510, ¶ 10 ("R.C. 2967.191 requires that jail[-time] credit be given only for the time the prisoner was confined for any reason arising out of the offense for which he was convicted and sentenced. It does not entitle a defendant to jail-time credit for any period of incarceration which arose from facts which are separate and apart from those on which his current sentence is based." Id., quoting *State v. Goehring*, 6th Dist. No. OT-03-035, 2004-Ohio-5240, ¶ 9.)

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
